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Human Rights Conflicts in Afghan 2004 Constitution: Shariah vs. International Standards

Muhibullah Faizan^{1*}, Noor Shuhadawati Mohamad Amin² & Mohammad Tahir Sabit Haji Mohammad³

¹Ahmad Ibrahim Kulliyah of Laws, International Islamic University Malaysia, 53100 Gombak, Selangor, Malaysia

²Civil Law Department, Ahmad Ibrahim Kulliyah of Laws, International Islamic University Malaysia, 53100 Gombak, Selangor, Malaysia

³Islamic Law Department, Shariah Faculty, Afghan International Islamic University, 1001 Darul Aman, Kabul, Afghanistan

*Corresponding Author: nfaizanmohibullah@gmail.com / faizanmohibullah@yahoo.com

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Abstract: In the discourse of human rights, tension emerged from the full involvement of the Western countries led by the United States of America “USA” in the 2004 constitution of Afghanistan “The 2004 Constitution”. It focuses on human rights under Shariah and international standards without unifying conflicting ideas after the Bonn Agreement of 2001. Hence, human rights are considered a subject of controversy among Afghan legal experts, law enforcement authorities and international community. It led to the lack of the rule of law due to constitutional duality. To fulfil the legal gap, this research seeks to discover the real position of human rights by evaluating the tension between legal provisions on Shariah and international human rights standards in the 2004 constitution. The research employs the doctrinal method of textual analysis and coordinated constitutional interpretation to discover the opposing areas of human rights under the Shariah and international standards. The researcher examined the legal status of human rights under constitutional provisions on Shariah and international human rights instruments which are introduced as conflicting sources of law for fundamental human rights, particularly about religious freedom and gender equality. Additionally, the 2004 constitution weakens the position of Shariah by restricting the meaning of law which does not contain the constitution itself, and by considering the provisions of international human rights instruments to be equated to the constitutional provision in ranking. However, the 2004 constitution prefers international human rights instruments to Shariah in the case of conflict either in legislation or in the judiciary.

Keywords: Afghanistan; constitutional duality; Shariah; Human Rights; controversy

Introduction

The “Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions,” also referred to as the Bonn Agreement, reached in 2001, following the USA invasion of Afghanistan, was a constructive step in Afghanistan’s transition toward international human rights standards (Their, 2003). One of the most important requirements of the Bonn Agreement which introduced a national justice system per the Islamic principles, international standards, Afghan legal traditions, and the rule of law was to make a new constitution which was therefore considered a crucial step toward making a legislative framework for Shariah and human rights (Bonn Agreement, 2024). Based on this, the process for

drafting and ratifying a new constitution was created, guiding its development under five pillars that are still called the principles of Islam, democracy, human rights, rule of law, and unitary state as contained in 2004 Constitution (Rose Leda Ehler et al., 2013). Under this constitutional framework, in addition to the numerous provisions particularly Article 7 in Chapter One of the Constitution 2004 which adopted the international human rights standards, Chapter Two is also a full Chapter titled “The Fundamental Rights and Duties of Citizens”, has been allocated to human rights in its own right with different meanings. This dual list of fundamental human rights conceptually serves both Shariah and international human rights standards under which several constitutional provisions are established but the convergence between them offers a complex and contentious legal framework (Rubin, 2004).

Among these constitutional provisions, Articles 3 and 7 of the Constitution 2004 are the focal point of Shariah and international human rights standards (Tadjini, 2012). Article 3 of the Constitution 2004 states that “no law shall contravene the beliefs and principles of Islam”. This provision firmly introduced Shariah as a source of law while it is subjected to the provisions of international human rights instrument based on the first clause of Article 7 of the Constitution 2004 which states that “The state shall observe the United Nations Charter, inter-state agreements, as well as international treaties to which Afghanistan has joined, and the Universal Declaration of Human Rights”. Actually, the incorporation of international human rights standards in the Constitution 2004 indicates propound challenges in legislation in line with the Afghan legal context, especially when the subject of religious freedom and gender equality come to the stage, as Shariah has been serving as a vital legal reference in the history of the country (Ahmed & Ginsburg, 2014).

In addition to this, Article 130 of the Constitution 2004 has introduced a typical structure of constitutional norms by declaring that “In cases under consideration, the courts shall apply provisions of this Constitution as well as other laws. If there is no provision in the Constitution or other laws about a case, the courts shall, in pursuance of Hanafi jurisprudence, and, within the limits set by this Constitution, rule in a way that attains justice in the best manner.” The text represents the constitution as the supreme source of law and Shariah in terms of Hanafi Fiqh as a subsidiary source of law by removing the supremacy of Shariah as a source of law in the judiciary while Afghanistan has also ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) without putting reservation in 2003 which is perceived to be incompatible with Shariah in some areas (Haneef et al., 2016). Otherwise, the international community focuses on respecting human rights as per international human rights instruments to which Afghanistan has joined but Afghan judges have supremely applied Shariah as they have taken oaths based on their faith for respecting Shariah, constitution, and law in that order (Salimi, 2007). However, it led to ambiguity in the position of human rights within the constitutional provisions. Because it is essential to ascertain the real position of human rights in the Constitution 2004, this study seeks to point out the connection between constitutional provisions on human rights with more emphasis on the conflict between Shariah and international human rights standards. Additionally, it aims to introduce a way to harmonise human rights and Shariah wherever it is possible to contribute to the development of the legal system of Afghanistan.

Methodology

This research is document-based, which relies on qualitative data including that obtained through empirical research. Accordingly, it utilised comparative analytical approaches focusing on the conceptual and applied features of the legal provisions concerning the application of Shariah and international human rights standards in the Constitution 2004. The researcher has referred to primary sources of Shariah i.e., the Quran and Sunnah and the provisions of the Constitution 2004, domestic ordinary laws, international treaties, and case law particularly the judicial review of the constitutional provisions. This primary legal data was analysed under the strict rule of harmonious interpretation of legal texts, to highlight the conflicts between Shariah and international human rights standards in the Constitution 2004. To identify the supreme reference to human rights, legal provisions were focused in comparison with Shariah based on the hierarchy of constitutional norm.

As the understanding of the constitutional provisions is of high value among Afghans, case law was explored to determine the interpretation of legal provisions according to Afghan law enforcement authorities

and international community. References to secondary legal data were also made in the criteria where a true understanding of constitutional application was needed in Afghan society. This data included published and unpublished materials such as books, articles, conference papers, speeches, and newspaper articles. They were used to examine a variety of perspectives on human rights in the Constitution 2004. An analytical systematic thematic literature review was conducted (Thomas & Harden, 2008), where ideas related to the problem question were thematically identified, examined, and used to fill the gaps. Most of the literature is focused on foreign involvement in the constitution-making and implementation process (Thier, 2006). Likewise, most of the literature only discusses the development of human rights in the Constitution 2004 (Sadat, 2004). It is difficult to find literature to associate them with Shariah in the Constitution 2004. Politicians in Afghanistan, have deliberated on this subject in line with their interests and given recognition to the international elements. Experts are of different opinions, depending on their official positions. Hence, in this study, the available literature related to the issue has been reviewed to establish a link between Shariah and international human rights instruments in the 2004 constitution which is currently scarce.

Findings

In reviewing past studies on Shariah's relation with international human rights standards in the Afghan legal context, the researchers classify the findings of their studies into three main themes, namely, the position of human rights in the Constitution, ordinary legislation, and case law.

1. The Position of Human Rights in the Constitution 2004

Even though the principle of human rights is theoretically focused on by the Constitution 2004, its status is still a matter of ongoing dispute among Afghan law enforcement authorities and the international community due to the duality of constitutional provisions on human rights under Shariah and international human rights instruments (Shahram & MacQueen). The Constitution 2004 declares that Afghanistan is an Islamic Republic, recognising the sacred religion of Islam as its official religion and emphasising Shariah as a source of law in Articles 1,2, and 3 while simultaneously adopting a variety of provisions especially Article 7 to proclaim international human rights standards as binding principles (Rofi, 2020). Although some legal experts argued that the above provisions were consistent with the Islamic principle in the Constitution 2004, the International Human Rights Declaration "UDHR" and other international human rights conventions, to which Afghanistan had joined, nevertheless, in the Afghan legal context, contravened the provisions of Afghan domestic laws and Shariah, particularly concerning religious freedom and gender equality. ("Constitutional Law and Human Rights International, Comparative and National Perspective," 2020). Such conflict between the constitutional provisions on subjects related to human rights can be seen in both legislation and judiciary (Roder, 2017).

2. Conflicts in Legislation and Judiciary

According to the Afghan legal norms, the intersection between Shariah and international human rights instruments in the constitution has garnered significant legal debate. Afghan interpretation of Shariah is limited, recognizing it as the main source of law, but such interpretation faced challenges after the approval of the Shia Personal Status Law in 2009 (Oates, 2009). This law has drawn considerable criticism from Western countries and their supporters who were fully involved in making the Constitution 2004. They considered the Shia Personal Status Law of 2009 to be incompatible with international standards on the basis that certain provisions discriminated against women's rights (Frogh, 2009.) For example, Article 133 of the Shia Status Law of 2009 declared that:

"The household's supervision is the right of the husband; A wife cannot leave the house without her husband's permission unless she has an urgent cause, or is in extreme difficulty"

The Afghan legislators held such a position on refusing to approve the Law on Elimination of Violence Against Women due to its inconsistency and consistency with Shariah and international human rights standards respectively (Hakimi, 2020). EVAW law was enacted by presidential decree when legislators were

in recess in 2009 (Qazi Zada, 2020). Article 79 of the Constitution 2004 stated that “Legislative decrees shall be presented to the National Assembly within thirty days of convening its first session, and if rejected by the National Assembly, they become void.” Therefore, it seems that without the approval of the parliament, the EVAW law has been implemented unconstitutionally. This is because the position of the Afghan government was steadily reliant on Western interpretation of Afghan constitutional provisions due to their role as either financial supporters or occupiers (Gross, 2009).

Afghan parliament could support this idea by withdrawing from its position on the Law on Protection of Child Rights, which was then approved based on Article 7 of the 2004 constitution after eight years of discussion on the age of the child in 2019. The age of a child was regarded as one of the most controversial issues (Azizi & Latif, 2023). Article 3 of the Law on Protection of Child Rights defines a child as “a person who has not completed the age of 18.” The Afghan legislators who were in favour of Shariah argued that the child shall be defined as a person who has not yet reached the age of puberty, which is seen differently in girls and boys because of their biological differences. While such difference is recognised in the entire legal system of Afghanistan, Western countries’ interpretation of the constitutional provisions was different. They concentrated on unrestricted gender equality by prioritising either international human rights standards over the local sources of law or harmony between their home country's legal system and that of Afghanistan, without taking into consideration the historical and legal position of Shariah in Afghan legal context (RAND, 2003). Actually, Western interpretation of Afghan constitutional provisions regarding gender equality refers to the principles of democratic governance which are not limited (Okpe et al., 2021). From an Islamic perspective, equality between men and women comes from the concept of treating human fairly in line with their requirements (Saiful et al., 2020). They are equal in terms of human dignity, but are allocated differing roles according to their biological functions (Cairo Declaration on Human Rights in Islam, 1990). This view is backed by numerous evidence from Quranic verses. The following verse can be an example:

(The Holy Quran, يَا أَيُّهَا النَّاسُ إِنَّا خَلَقْنَاكُمْ مِنْ ذَكَرٍ وَأُنْثَىٰ وَجَعَلْنَاكُمْ شُعُوبًا وَقَبَائِلَ لِتَعَارَفُوا ۚ إِنَّ أَكْرَمَكُمْ عِنْدَ اللَّهِ أَتْقَاكُمْ ۚ إِنَّ اللَّهَ عَلِيمٌ خَبِيرٌ. (49: 13)

Translation: “O men! Behold, We have created you all out of a male and a female, Verily, the noblest of you in the sight of God is the one who is most deeply conscious of Him. Behold, God is all-knowing, all-aware”

The above verse does not differentiate men from women in origin but are placed at higher for being God fearing. This indicates that such a position is based on their fulfilment of legal obligations according to Shariah, in which they have different positions and social responsibilities. Such difference is, for example, in the following verse of the Holy Quran:

الرِّجَالُ قَوَّامُونَ عَلَى النِّسَاءِ بِمَا فَضَّلَ اللَّهُ بَعْضَهُمْ عَلَىٰ بَعْضٍ وَبِمَا أَنْفَقُوا مِنْ أَمْوَالِهِمْ ۚ فَالصَّالِحَاتُ قَانِتَاتٌ حَافِظَاتٌ لِمَا حَفِظَ اللَّهُ ۗ وَاللَّاتِي تَخَافُونَ نُشُوزَهُنَّ فَعِظُوهُنَّ وَاهْجُرُوهُنَّ فِي الْمَضَاجِعِ وَاضْرِبُوهُنَّ ۚ فَإِنْ أَطَعْنَكُمْ فَلَا تَبْغُوا عَلَيْهِنَّ سَبِيلًا ۗ إِنَّ اللَّهَ كَانَ عَلِيمًا كَبِيرًا. (The Holy Quran, 4:34)

Translation: “Men are the protectors and maintainers of women because Allah has given the one more (strength) than the other, and because they support them from their means. Therefore, the righteous women are devoutly obedient, and guard in (the husband's) absence what Allah would have them guard. As to those women on whose part ye fear disloyalty and ill-conduct, admonish them (first), (Next), refuse to share their beds, (And last) beat them (lightly); but if they return to obedience, seek not against them Means (of annoyance): For Allah is Most High, great (above you all)”

Muslim commentators think that the word qawwama, which is referred to men only, does not recognise the dictatorship of a husband who shall financially support his wife due to men’s physiological nature. It seems that family relationship under Shariah is regulated in line with the physiological nature of men and women where their roles are considered imperative and supportive respectively (Muhannad Fouad -, 2024). This principle has still been applied in Afghan cases as Article 17 of Civil Law of Afghanistan, 1976 explicitly states that:

“husband shall have to pay alimony, even if wife dwells in her relatives’ residence”.

The above text explicitly shows the imperative responsibility of the husband to provide his wife with alimony “nafaqa” which shall depend on the ability of the husband (Max Planck Manual on Family Law in Afghanistan, 2012). According to the above elaboration, the international human rights standards and Shariah are perceived to be conflicting principles of the Constitution 2004 upon which the legislation shall be established by Afghan legislators (Mahmoudi, 2004). The decisions of Afghan legislators seemed to be hinged on the Western interpretation of the Afghan legal system which mostly led to either controversy among the legislators of Afghanistan to endorse laws pertaining to human rights or the enforcement of law unconstitutionally. Hence, passing the law under these constitutional principles weakened not only the legislative process but also the implementation of the law (UNAMA, 2018).

In addition to the contradictive aspect of human rights with existing legislation, the Constitution 2004 specifies a different hierarchy of norms for the judiciary in Article 130 according to which the constitution and law shall be the main references to courts respectively and Hanafi Fiqh shall be as subsidiary or gap filling source of law (Hashimi, 2017). Regarding this, there is a discourse on the international human rights instrument as to whether or not they are applicable to the judiciary as legal reference. If its provisions shall be applied then which position would they be in? In contrast to Articles 3 and 7 of the Constitution 2004 which present both international human rights instruments and Shariah as the main source of law, Article 130 shapes a differing vision of a legal source for the judiciary. It shows Shariah as a weak source, in terms of Hanafi Fiqh, portrayed as a subsidiary source of law on the one hand, and on the other hand, by removing international human rights instrument from the text thereby creating confusion about whether or not such instrument could be considered as a legal reference to judiciary (Azimi, 2020). However, the enforcement of constitutional provisions revealed the problems of their enforceability. It can be clearly seen in the criminal case of Abdul Rahman, an Afghan citizen who garnered significant international attention in 2006 due to his arrest for conversion to Christianity (Tāhā Jābir Fayyād Alwānī & Roberts, 2012).

3. Case Law Examples (e.g., Abdul Rahman’s Case)

Abdul Rahman, Afghan citizen, was accused of converting out of Islam to Christianity in 2006. After his arrest, Abdul Rahman’s case exposed the perilous interrelation between Shariah and international human rights standards. It led to different interpretations of legal provisions under the 2004 Constitution when he was faced with the possibility of the death penalty by Afghan courts (Knust & Afsbar, 2006). In the Afghan legal context, conversions out of Islam or renouncing Islam after professing it is commonly known as apostasy which is firmly considered to be part of the hudud crimes. Article 130 of the Constitution 2004, the criminal law of 1976, and the Penal Code of 2017 all refer the matter to Hanafi Fiqh in case of hudud crimes (Editing at Afghanistan, 2019).

According to the above provisions, apostasy shall be punished with the death penalty based on clear rulings of the Hanafi Fiqh. Afghan judges are, therefore, bound to apply Hanafi Fiqh in cases involving apostasy. This is why the court in Kabul pronounced the judicial execution of Abdul Raman for apostasy after his case came before it (Qani Zadah, 2006). It must be taken into consideration that religious scholars and legal experts almost unanimously recognised the legal killing of Abdul Rahman. The judicial execution of the accused was ordered by the members of the Supreme Court of Afghanistan including its president, Fazl Hadi Shinwari (Welle, 2006).

Meanwhile, Abdul Raouf, who was one of the famous members of religious scholars, warned “We will not allow Allah to be humiliated, we will call on Afghan people to pull Abdul Rahman into pieces”. Similarly, Maulavi Habibullah, another prominent Afghan religious scholar called students and hundreds of clerics in Kabul demanding that universal standards should not be implemented in the case by stating that “the Prophet (PBUH) says, when somebody converts his religion, he must be punished with the death penalty”(Wafa, 2006). By contrast, several human rights organizations and Western countries’ officials argued that the relevant cases of human rights shall be decided based on Article 7 of the Constitution 2004 which required the Afghan government to observe international human rights standards, and therefore apostasy shall not be

regarded as a crime (Munadi, 2006). For example, the deputy foreign minister of the US, Robert Nicholas Burns, in a face-to-face meeting with foreign minister of Afghanistan, Abdulullah Abdullah, in Washington, insisted the Afghan government should respect UDHR in Abdul Raham's case (NPR, 2006).

Following this, the president of the USA, George W Bush focused on stopping the proceedings of the case for the Afghan government, he thought, had committed to international human rights standards while Muslims were treated differently in the western countries (Raihanah et al., 2015). He added that "We have got influence in Afghanistan, and we are going to use it to remind them that there are universal values. It is deeply troubling that a country we helped liberate would hold a person to account because they chose a particular religion over another" (ABC News, 2006). The impression of Western countries persuades Afghan president Hamid Karzai to recommend Afghan law enforcement authority to end the case peacefully. (*BBCPersian.com*, 202).

It resulted in ending the case by releasing Abdel Rahman. Ansarullah Mawlawizadah, the Head of The Public Security Court and presiding judge then stressed that "it is clearly interference by Western countries in the court affairs of Afghanistan to release Abdul Raham", even though the constitution of Afghanistan explicitly guarantees the independence of the Judiciary (Khabar Kozari Jamhori Islami, 2006). In addition to this, a similar conflict between Shariah and international human rights instruments has mostly been observed in running a way case of women to which the Afghan court applied the provisions of Hanafi Fiqh as neither the Afghan penal code nor EAW law has criminalized running away (Commission on Crime Prevention and Criminal Justice, 2008).

Discussion

Given the findings, the potential theoretical development of human rights under international human rights standards has emerged from the Bonn agreement due to the full involvement of Western countries while the Afghan legal system has still followed the strict interpretation of Shariah in terms of Hanafi Fiqh (Rasekh, 2017). To fulfil the requirement of the Bonn agreement, the Afghan government took a vital step toward international human rights standards by signing the CEDAW without recording any reservations for its compliance with the existent domestic laws, Shariah (Farhoumand-Sims, 2009) and local customs and traditions. This position of the Afghan government was kept in the Constitution 2004 which increasingly focused on international human rights standards while at the same time recognising Shariah as a source of law (Alekseyeva et al, 2017). At that time, Loya Jirga approved the provision to recognise laws that did not run against Constitution 2004, under Article 162 though emphasising on Shariah compliance as evidenced in Article three of the Constitution. This was done while the existing legal provisions pertaining to human rights were derived from Islamic sources (Family Structures and Family Law in Afghanistan a Report of the Fact-Finding Mission To, 2005).

For example, all domestic laws especially the civil law of Afghanistan of 1976, the most important law, regulating family relationships under Shariah, is valid to date. Its provisions are contrary to international human rights standards in many cases, namely, family relationships, inheritance, and others (Razayi, 2022). In addition, the application of Hanafi Fiqh in criminal cases is inconsistent with the international human rights standards. Hence, enforcement of international human rights standards can be considered a challenging task for the Afghan government due to their inconsistency with Shariah in the Constitution 2004. The process of constitution-making and its results reflected in the Constitution 2004 in Afghanistan can be taken as an example of the difficulty when ideologically diverse groups try to make a constitution for a nation. In the 2004 Constitution Shariah was portrayed to be a Supreme source of law in practice, however, it is difficult to interpret as such. Mojaddadi and Muaaz (2022) confirmed this view by pointing out the internal weakness of the Constitution 2004 (Mojaddadi and Muaaz,2022). It even questions the supremacy of the Constitution under Article 3 itself, as the terms law and constitution have different meanings in the legal context of Afghanistan (Danish, 2010).

The haphazard placement of contents due to the demands of opposing groups has resulted in a product that one can argue to be always the cause of controversy. Article 94 of the Constitution 2004 defines the term law by stating that

“Law shall be what both houses of the National Assembly approve, and the President endorses it, unless this Constitution states otherwise”

This statement goes contrary to the soul of constitutionalism, that a constitution shall include law. Under the 2004 Constitution, however, it is not made by the law-making organ of the state rather it must be approved by Loya Jirga according to its preamble and Articles 162 and 111. Article 162 including the preamble of the Constitution 2004 states that “This Constitution shall be enforced from the date of approval by the Loya Jirga and endorsed and proclaimed by the President of the Islamic Transitional Government of Afghanistan. Upon the enforcement of this Constitution, laws and legislative decrees contrary to its provisions shall be invalid,” whereas Article 111 ensures the position of Loya Jirga on amending the constitution by stating that:

“The Loya Jirga shall convene in the following situations: 1. To decide on issues related to independence, national sovereignty, territorial integrity as well as supreme national interests; 2. Amend provisions of this Constitution; 3. Impeach the President in accordance with the provisions of Article Sixty Nine of the Constitution”.

It must be considered that the Constitution 2004 institutionalised Loya Jirga, although it is the Afghan tradition for a constitution to be approved by Loya Jirga, not the National Assembly or parliament (Danish, 2019). The above arrangement makes the Constitution something that is extra-legal and yet binding on the legislature. It appears therefore that the framers of the Constitution 2004 intended to take away the law-making authority from Loya Jirga which they were successful in, however, the result of their action proved to be a weaker constitution for Afghanistan. Be that as it may, the framers have also damaged the internal structure of the Constitution 2004 (Wang, 2014). The framers have accepted Shariah as a supreme source of law which does not include the constitution, for the Constitution 2004 declares so, i.e., “no law shall be contrary to the tenets of Islam”. The phrase “Islamic principle and tenets” which has a legal notion, refers to Shariah in terms of Hanafi Fiqh in general, though under the Constitution 2004 a law under the Shia School of Law for regulating Shia personal status is adopted (Mahdian & Talab, 2019).

Nevertheless, besides Shariah, it also stated that international human rights standards have binding force, as is stated above. This implies the supremacy of human rights principles concerning ordinary laws. This was argued in Abdul Rahman's case by Western countries. In line with this thinking, one assumes why the confusion under Articles 3 and 130 was created. The Constitution 2004 has offered Shariah as the main source of law for legislators in Article 3 and as a subsidiary source of law under Article 130 that outlines the jurisdiction of the judiciary (Rahimi, 2022). While the contents of Article 3 are clear in establishing supremacy of Shariah as a source of law, by using very general terms with different meanings in Afghan context, which is not so in the articles relating to human rights principle. Contrary to this, the language of Article 130 is restrictive, for it has subjected the application of Hanafi law to the provisions of the Constitution and other ordinary laws. With this, the framers may have attempted to weaken the application of Article 3, and also it seems, to be useful. First, the terms of Article 3 are then limited by other constitutional provisions such as Article 94, which do not allow Shariah to be a source of the constitution except for ordinary law, second, Article 130 applies in the instance when courts have to give their verdicts in cases not falling clearly under the provision of the Constitution and other ordinary laws (Saeed, 2022).

As International human rights standards are incorporated into the fabric of the Constitution 2004, some legal experts have placed them under the constitution, law, and legislative decrees by interpreting constitutional provisions, focusing on Article 121 of the Constitution 2004 which states that:

“the Supreme Court shall review the laws, legislative decrees, international treaties as well as international covenants for their compliance with the Constitution”.

These scholars, therefore, argue that in the text before us priority is given to national laws over international standards by mentioning the law and legislative decree before the international covenants (Rasooli, 2017). Other writers countered this argument. They contended that this idea could be

unconstitutional, particularly in the discourse on the issues related to human rights, as human rights international standards are an important part of the constitutional provisions according to Article 7 (Worsi, 2020). This view was expressed early by Shah (2005), who observed that several constitutional provisions serve gender equality without restriction. Among them, Article 22 explicitly upholds gender equality in line with international principles by declaring that:

“Any kind of discrimination and distinction between citizens of Afghanistan shall be forbidden. The citizens of Afghanistan, man, and woman, have equal rights and duties before the law”

The above text explicitly provides unlimited equality between men and women contrary to Shariah and reveals a contradiction between constitutional provisions as to human rights status in addition to apostasy (Tarzi, 2006). One may argue that the generality of the language in Article 7 should override the above argument.

It is noteworthy that the current government of Afghanistan confirmed respect for international human rights standards as in Article 7 of the Constitution 2004 within the bounds of Shariah. Such harmonisation between Shariah and human rights international standards can be unconstitutional for Islamic principle is considered to be irrevocable in Article 149 which stipulates that:

“The principles of adherence to the tenets of the Holy religion of Islam as well as Islamic Republicanism shall not be amended. Amending fundamental rights of the people shall be permitted only to improve them”

This provision highlights the significance of keeping the Shariah in the current position which shall be transferred to the supreme by enacting a new constitution.

Conclusion

Due to the complete involvement of Western countries, international human rights standards derived from the Bonn Agreement were integrated into the Constitution 2004 without keeping the historical position of Shariah in mind. Hence, the conflict between Shariah and international human rights standards is seen in both legislation and judiciary in some areas. Although the Constitution 2004 specifically introduced Shariah as the main source of law in Article 3 and the hierarchy of norms to courts in Article 130, however, in practice, the international human rights standards were given precedence over other sources of law.

The reason for the subordinated position of Shariah as the source of law is that the term law does not contain the constitution which provides high-ranking provisions to guarantee human rights in line with international standards. In addition to this, the Constitution 2004 focuses more on weakening the position of Shariah in terms of Hanafi Fiqh as a gap-filling law or subsidiary reference to courts while at the same time, considering the international human rights standards to be in an equal position with constitutional provisions. Inferior interpretation of the position of international human rights standards is unconstitutional as the Constitution 2004 has explicitly adopted them in Article 7 and ensured their objectives by defining several fundamental rights in other constitutional provisions.

The discussion above showed that the Afghan Constitution 2004 was a document in the form and substance of a constitution that lacked the soul of a constitution that is the expression of the willingness of the people of Afghanistan. As such it could not be treated as a progressive document of social contract where the will and intention to follow its provisions. A social contract ought to be the outcome of give and take, among the different groups and a yardstick for social, legal and moral social harmony in order to legitimately attract national loyalty. Power and its use may result in an apparent sound-looking document of social contract; however, it only could result in legal disorder and legislative uncertainty, and an unrepresented form of governance. Because of the irrevocable position of the Islamic principle under the Constitution 2004, the only way for the new Afghan government to harmonise Shariah and international human rights standards is to enact a new constitution.

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