



An Overview of Citizens' Fundamental Rights: Challenges and Opportunities

Dr Rangin Dadfar Spanta

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Afghanistan Research and Evaluation Unit

Case Study

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Photos: All photos by Firooz Mashoof.

Cover photo: Afghan women in Herat protest violence against women.

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Dr Rangin Dadfar Spanta

Kabul, 23 September 2014

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Acronyms

AIHRC	Afghanistan Independent Human Rights Commission
AREU	Afghanistan Research and Evaluation Unit
IRoA	Islamic Republic of Afghanistan
PDPA	People's Democratic Party of Afghanistan
UDHR	Universal Declaration of Human Rights

Glossary

Jizya:	a special tax levied on non-Muslim subjects in an Islamic state
Khalq:	meaning “people,” one of the two major factions in the People’s Democratic Party of Afghanistan; also the name of its publication
Kuchis:	nomads, mostly Pashtun in ethnicity
Loya Jirga:	meaning “grand assembly,” the traditional Afghan assembly that decides matters of national importance such as the adoption of a new constitution
Nezamnama-ye Asasi:	meaning “Founding Document,” the constitution of King Amanullah, adopted in 1924
Meshrano Jirga:	meaning “the assembly of elders,” the upper house of the Afghan National Assembly or Parliament
Mulla:	a term referring to a Muslim man who is educated in Islam and Islamic religious matters and who has traditionally held a position of authority in Islamic countries such as Afghanistan
Osul-e Asasi:	meaning “Fundamental Principles,” the term used to name the constitutions made by King Nader Shah in 1931 and the People’s Democratic Party of Afghanistan-ruled Democratic Republic of Afghanistan in 1980
Parcham:	meaning “flag,” one of the two major factions in the People’s Democratic Party of Afghanistan; also the name of its publication
Qanun-e Asasi:	“Basic Law” or “Constitution” in Dari/Farsi
Re’aya:	meaning “servant folks,” a group of people who it was believed should be exploited and ruled by a king or another such ruler
Sadat:	a qawm or kinship group, consisting of both Sunnis and Shias, who say that they are descendants of Prophet Mohammad and who have also traditionally held a position of authority in Islamic countries such as Afghanistan
Sharia:	Islamic legal system
Umma:	meaning “community” or “nation,” a term referring to the collective community of all Muslims in the world
Wolesi Jirga:	meaning “the assembly of people,” the lower house of the Afghan National Assembly or Parliament

Preface

Mr Nader Nadery, Director of the Afghanistan Research and Evaluation Unit (AREU), urged me to write a guide on the fundamental rights of Afghan citizens under the country's current constitution. From my perspective, this request was raised at an appropriate time because I had been thinking that in two weeks' time I would be released from my official state responsibilities and thus be free to return to research. Also, I found the proposed topic of interest. Firstly, a part of my political life, even while in positions of state authority, has been devoted to defending the human rights and freedoms of my country's citizens. Over the last ten years I have never ceased upholding these values in writings published under my real or pen names as well as in my speeches, interviews, and dialogues. Secondly, making a comeback to research is, for me, a return to my real and fascinating profession. In addition, I had already conducted some studies on the draft version of the current constitution of the Islamic Republic of Afghanistan (IRoA).

Due to day-to-day politicisation, it is sometimes expected in our country that academic writings dealing with a legal text should also address the challenges of implementation; however, the main work here is a discussion of the fundamental rights of the country's citizens, taking into account the text and, to some extent, its interpretation. Furthermore, when dealing with the text, apart from many obvious errors of composition within it, tacit references are in a few cases made to contradictions. As such, existing contradictions between the text and its lived reality are not addressed in this publication. However, references are made to this point in the concluding section.

The parameters of the research topic had already been given, and the author did not disagree with this either. This writing is therefore not a critique of Afghanistan's constitutions and/or an analysis of the socio-political circumstances that constitute the material and epistemological contexts of legislation in the country. At the same time, the lack of implementation of laws and the distinction of the constitution in theory and in practice is not the purpose of this writing.

This writing briefly addresses the process of incorporating citizen rights in Afghanistan's constitutions, but it mainly focuses on the current constitution given its objectives. References are also sometimes made to the legal literatures of other countries when there is a necessity for doing so and a dearth of specific domestic resources.

Acknowledging that research on the fundamental rights of citizens in Afghanistan is difficult without an assessment of the forwards and backwards steps made in the process of social and political modernity and the campaigns that have been waged in this direction, I stress that the purpose here is to write a case study and nothing more than this.

This study hence takes a brief look at Afghanistan's first constitution of 1923, which contained a number of fundamental rights and freedoms of citizens. Afterward, it gives attention to the country's subsequent constitutions and the positive and negative steps taken with regard to the inclusion of fundamental rights in these basic laws. Finally, it addresses the fundamental rights and their scope in the current constitution.

Executive Summary

Despite a range of inconsistencies and linguistic inadequacies, the 2004 Constitution of the Islamic Republic of Afghanistan (IRoA) is a major step forward in establishing the fundamental rights and freedoms of citizens. This constitutional law codifies such fundamental rights of citizens through the principle of equality, protection of human dignity, prohibition of discrimination, right to freedom, freedom of expression, access to information, confidentiality and freedom of correspondence, the due process of the law, the right to housing, and education.

The fundamental rights of nationals were first enshrined in the country's constitution of 1923. Subsequently, these rights were incorporated, to varying degrees, in the constitutions of 1931, 1964, 1997, 1980, 1987, and 2004.

The fundamental rights of citizens have been enshrined in Afghanistan's constitutional law, but not guaranteed by its state. Law enforcement and judicial institutions have been unable to implement the law properly. Also, the lack of the rule of law and a faulty understanding of it are among the causes why the fundamental rights of citizens have been violated. Although the citizens, given the constitutional law, could have complained about violations of their rights to various bodies such as the complaints commissions of the *Wolesi Jirga* and/or of the *Meshrano Jirga* and the Afghanistan Independent Human Rights Commission (AIHRC), in practice, their complaints have not been properly addressed.

There is a contradiction between Articles 3 and 7 of the current constitution. The former requires the compatibility of the law with Islamic religious beliefs, while the latter focuses on the fulfilment of the Universal Declaration of Human Rights (UDHR). Some Afghan and other Muslim lawyers and scholars believe that the UDHR contains provisions that are in contravention with the beliefs and tenets of the sacred religion of Islam; therefore, they are of the opinion that Article 3 has supremacy over Article 7. However, others, including most Afghan human rights activists, women's rights activists, and some parliamentarians, do not see any conflicts between the UDHR and Islamic values. Many scholars consider that what has been recognised as the International Bill of Rights is today's representation of what had already been recognised by the *sharia*; therefore, there are no contradictions between the two.

Some laws such as the Law on the Prohibition of Violence against Women, which includes women's fundamental rights, have not paid attention to their compatibility with people's customary practices, other laws, and the *sharia*. This is another reason why the fundamental rights of citizens are not properly protected. There is a lack of co-operation among state institutions, particularly the Supreme Court, civil society organisations, academia, and religious centres, in the drafting of laws, thus making it possible to ratify such laws so that they negatively affect the fundamental rights of citizens.

Children and women constitute the two largest segments of the population whose rights have not been properly fulfilled. Girls are married off at an early age and the patriarchal society has generally restricted women's access to their fundamental rights. The reactions of the patriarchal society have been violent in many cases, including poisoning potable water in girls' schools, throwing acid on women's heads and faces, honour killings, and amputations.

Textual inadequacies and structural contradictions are not the only basic problem in implementing the law in Afghanistan; the fundamental problems are the lack of awareness and lawfulness in the country. Individuality and individual awareness based on a social contract continue to be weakly reflected. The rulers of Afghanistan, including the early reformists and modernists, lacked the necessary awareness about the philosophical underpinnings of the fundamental rights of citizens. Additionally, social institutions that can act as the enforcers and protectors of these values are non-existent. As a result, contradictions in both the letter and the spirit of the law and its lack of implementation by the state are reasons why the fundamental rights of citizens are not properly guaranteed and provided.

1. Methodology

The methods used in this research were desk review, primary data collection through key informant interviews, and participant observations.

The AREU provided me with a research assistant who turned out to be an assiduous young Afghan. It was planned to do this work in two parts: (1) a theoretical approach to discuss fundamental rights in Afghanistan's current constitution, and (2) an empirical study through conducting interviews with those responsible and knowledgeable in this area. Problems arose, however, in respect to both parts. Within the theoretical approach, I faced an unbelievable dearth of research resources in the Afghan discourse on the fundamental rights of citizens. My constraints related to visiting libraries in person and searching for the existing resources might have further exacerbated this problem. My main research language, due to the availability of numerous resources and my linguistic familiarity and proficiency as a result of my university experiences, is German. I also encountered serious constraints in this respect, apart from accessing a limited number of works in my personal library.

Within the empirical component, the AREU research assistant, Mr Ali Shah Hasanzada, conducted the interviews so as to encourage the interviewees, particularly those working for the government, to freely express their opinions. I herewith thank him for his efforts. Although Mr Hasanzada tried to prompt the interviewees to express their opinions on specific topics, in some cases, the responses could not be used in this study. The other problem encountered was that I, as the author of this case study, am not an empiricist, so the categorisation and analysis of the expressed opinions were not without issues. Nevertheless, I have tried my best to use the material to write the study, as requested. The first draft had to be made ready within a short timeframe, from mid-August to the end of September 2014. Given the academic culture and experience with which I am familiar, it would have been difficult to present a quality and up-to-date study given the scarcity of research resources and the lack of access to specific studies that might have previously been conducted on this subject. Therefore, as I see, the present case study should be considered as a starting point for a more in-depth study that can be used as a reference for students of law and politics and other interested persons in the future.

2. Fundamental Rights of Citizens

Coupled with the right to national sovereignty, the state of law and democracy and fundamental rights are the key constituents of lawful and democratic states in the contemporary world. The right to national sovereignty and the fundamental rights of citizens are strongly connected because they share their source and origin in the human citizen, who is the sovereign or the holder of political power.¹

In fact, fundamental rights define and guarantee the legal status of individuals in a political community. As they defend and guarantee the liberty and security of individuals before the state, these rights protect individuals from state oppression. The fundamental social rights of citizens are given less attention in the legal discourses of most countries. However, ensuring political rights without guaranteeing the social and economic rights of citizens severely limits the material conditions for the realisation of fundamental rights and freedoms. Economic and social rights provide the legal context in which citizens are empowered to participate in society and take part in processes of economic production and in the formation of social and cultural values. As such, they also provide the genuine context for political participation.

The inclusion of citizens' fundamental rights in constitutions expresses the change in the relational paradigm between the state and the individual. The state's people, before attaining the position of citizenry, are only subjects of the exercise of power by the ruler, king, or caliph. They are passive human beings whom the ruler, as per his/her wishes; makes to pay taxes, dispatches to wars, or exploits in various ways.

The growth and strengthening of the community of citizens and the relations that arise from it retransformed this relation from a legal standpoint and citizens were promoted as the only legitimating source of political authority, which they exercise directly or through representation.

The addressee of what has been enshrined in the Declaration of the Rights of Man and of the Citizen in the French Revolution is the human person. This text indeed addresses all human persons. The incorporation of the fundamental rights of citizens in a constitution seeks to institutionalise the relationship between a national state and its legitimating source, that is to say, the people. Citizens are thus the holders of rights and they are, in some cases, still not stripped of these rights even if they are outside the territory of a national state.

2.1 Binding fundamental rights and ideal fundamental rights

Positive fundamental rights are those such as the right to privacy of correspondence and the security of tenure that have been enshrined in "constitutional provisions" and that are binding on the state. If these rights are violated without legal justification, the alleged victim can sue the state for violation of their rights. However, there are some rights that comprise the ideals of the constitution, and due to their programmatic and idealistic characteristics, they leave no material context for an individual to take the state to court, claiming that the state does not fulfil these rights. For instance, Article 43 of the current constitution falls into this category. Likewise, the phrase "all acts of the state are subject to the law" is mostly considered as a programme, an ideal, a value and an instrument of pressure on the legislator and the enforcer of the law; as such, if a citizen has not been directly victimised as a result of a violation in a specific case, he/she cannot sue the state institution in question. In such cases, according to the current experience in Afghanistan, citizens have the right to complain to the National Assembly as the body overseeing the performance of the government. From the perspective of legal implications, the right to complain to the legislator differs from the right to file a lawsuit in a competent court. With respect to the right to complain to the Complaints Commission of the *Wolesi Jirga* or *Meshrano Jirga* or to the Afghanistan Independent Human Rights Commission, for example, the citizen expresses their protest to the action or inaction that he/she alleges has caused a violation of their human rights as a citizen. It is not, however, binding on the state institution in question to carry out the opinions of these complaints bodies, because such bodies do not have

¹ Thomas Meyer, *Was ist Demokratie* (Wiesbaden: VS Verlag, 2009), 40.

the authority to issue binding judicial decisions. Nevertheless, decisions made by these bodies in countries with the principle of the supremacy of laws and rights are often implemented by the state institutions because of the moral effects that they exert on the media and public opinions.

2.2 The origin and development of the fundamental rights of citizens

The fundamental rights of citizens have their roots in the Enlightenment and the modernity associated with this era. In other words, these rights became binding when democratic states appeared with constitutions that incorporated these rights. The inclusion of these rights into the constitutional laws of countries with democratic systems is the result of the continued and sometimes bloody campaigns of citizens against the rule of the monarchy and church in these countries.

The concept of the citizen has been an ever-changing one in history. In various countries, the term “citizen,” as a legal principle, still does not include all residents as holders of fundamental rights. This is clearly seen in countries with migrant workers.

In the modern period, the US Declaration of Independence of 1776 is the first declaration to defend the fundamental rights of citizens. In other words, the fundamental and inalienable rights of citizens were first codified in this declaration.

The English Magna Carta of 1215² contains only elements of the rights of the landed gentry before the monarchy, not the natural and inherent rights of all human beings and citizens as reflected in the US Declaration of Independence.³ However, the present writing addresses fundamental rights that have been enshrined in constitutional laws as the fundamental and undeniable rights of all citizens, irrespective of any distinctions made on grounds of race, religion, and gender. These rights have grown and been strengthened with the advent of states founded on democratic constitutional laws in the modern era.

2.3 The first declarations of the fundamental rights of citizens

The first declaration that extensively codified the fundamental rights of citizens was the 1776 Virginia Declaration of Rights, significant parts of which were later included in the US Declaration of Independence in the same year. This also became a source of inspiration for the French Declaration of the Rights of Man and of the Citizen in 1789. The fundamentals of the US Declaration of Independence were subsequently appended to the US Constitution in 1791.

Europeans had launched major campaigns to achieve the freedoms contained in the US Declaration of Independence several centuries before the ideals of the Declaration were enshrined in the US Constitution. In fact, campaigns launched by Europeans to achieve religious freedom and the freedom to conduct scientific research, particularly during the Enlightenment, took several centuries to become fulfilled. This history is replete with the struggles and sacrifices of scientists and intellectuals versus the rule of the church in the Middle Ages, particularly as seen in the Inquisition. The further freedoms spread, the louder demands were raised for the realisation of other freedoms such as the protection of human dignity and the security of persons against illegal acts and oppression. It was in such a way that supporters of democracy continually developed the context for the implementation of written freedoms.

Natural human rights constitute the basis of the fundamental rights and freedoms of human beings. On this premise, all human persons possess such rights, which are not separable from their existence once they are born. Having said this, fundamental rights are those rights that nature has given to humans and that are inherent in human nature; the state neither confers these rights on the human beings nor can it deprive them of these rights. It is thus the responsibility of the state to uphold these rights. In the words of Thomas Meyer, fundamental rights are born with

2 British Library, “English Translation of 1215 Edition of Magna Carta,” http://www.bl.uk/treasures/magnacarta/translation/mc_trans.html (accessed 9 September 2014).

3 University of Groningen, “The Final Text of the Declaration of Independence July 4 1776,” <http://www.let.rug.nl/usa/documents/1776-1785/the-final-text-of-the-declaration-of-independence-july-4-1776.php> (accessed September 2014).

human beings and are the direct, indivisible, and inalienable rights that belong to the human person without any religious or other justifications;⁴ thus, he writes:

Thinking based on the social contract. . . reflected the return from the medievalist notion of the religious legitimation of political authority to a perspective according to which only the individual and their fundamental rights were given attention as the legitimating source, because any types of metaphysical authority over the human person (as a result of the belief in the philosophy of the social contract) had lost their binding power.⁵

According to Meyer, the inclusion of fundamental rights in constitutional law is important from two standpoints. On the one hand, human fundamental rights and freedoms are guaranteed by the law; on the other, the human person, as the active subject in the codification of the social contract, becomes the holder of the right to exercise fundamental rights and freedoms, and is able to control state performance through the exercise of these rights.⁶

The Virginia Declaration of Rights is one of the most important historical documents in which the rights of citizens have been codified. This Declaration significantly influenced the US Declaration of Independence. The Declaration emphasises the supremacy of fundamental rights over other rights, which means that no council or state can nullify these rights as they are born with and inseparable from human beings.

Although the French Declaration of the Rights of Man and of the Citizen was influenced by the US Declaration of Independence, the former has left a wider and deeper impact on the politico-legal ideals and thoughts of peoples in our region. Most Eastern Enlightenment and freedom movements have been directly affected by the French Declaration of the Rights of Man and of the Citizen. These include the Turkish, Iranian, and Afghan constitutionalist movements, which were all inspired by the Enlightenment epoch in Europe. The constitutional laws of these countries, excluding the Republic of Turkey, are a combination of Islamic and Roman-Germanic legal values. Research on most constitutionalist currents in this region shows that the right to national sovereignty, a law-based state, civic values, and human fundamental rights are among the main demands of constitutionalists and reformists in our region. This is not just a characteristic of the movements in our region; individuals had launched social revolutions in Europe—considered to be the cradle of these norms—in order to institutionalise these values. Jörn Ipsen believes that:

Fundamental rights, according to the history of constitutions around the world, are in fact the expression of legal measures to protect individual freedoms from state interferences, and these rights have mainly been achieved through revolutions. . . These rights constitute the highest legal standards in the legal hierarchy.⁷

The French Declaration of the Rights of Man and of the Citizen of 1789 is one of the first legal documents that played a valuable role as the source of inspiration for the French Constitution and other constitutions of continental Europe. Articles 1-3 of the Declaration read as follows:

1. *Men are born free and remain free and equal in rights. Social distinctions may be founded only upon the general good.*
2. *The aim of all political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression.*
3. *The principle of all sovereignty resides essentially in the nation. No body nor individual may exercise any authority which does not proceed directly from the nation.⁸*

4 Meyer, *Was ist Demokratie*, 40.

5 Meyer, *Was ist Demokratie*, 24.

6 Meyer, *Was ist Demokratie*, 42.

7 Jörn Ipsen, *Staatsrecht II* (Munich: Vahlen, 2014), 17.

8 Yale Law School, “Declaration of the Rights of Man,” http://avalon.law.yale.edu/18th_century/rightsof.asp (accessed September 2014), Articles 1, 2, and 3.

2.4 Human social fundamental rights

Human social and political rights have been codified in the Universal Declaration of Human Rights (UDHR) as well as in the constitutional laws of some countries across the world. However, liberal constitutional laws and thinkers of the liberal school systematically avoid giving attention to human social and economic rights. For this reason, liberal human rights campaigns have placed the main emphasis on human political rights. Although the UDHR has stressed human social rights, this has largely been forgotten in human rights discourses. Article 22 of the UDHR thus states:

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.⁹

The inclusion of human social rights in the constitutional laws of northern and central European countries shows that justice-oriented struggles by peoples in these countries have made considerable achievements. From a historical perspective, fundamental political rights, as we know them today, have their roots in the massive social upheavals and civic movements of the 18th century, while human social rights have mostly been the result of the social movements of the 19th century and class conflicts arising from the industrial society. Various social movements and revolutions aimed at achieving equal rights and freedoms in society, irrespective of an individual's property, wealth, gender, and class status, finally made remarkable achievements in the late 19th and early 20th centuries.

The purpose of human social rights is to ensure a dignified life for the human being; that is, access to adequate food, adequate housing, appropriate employment, humane working hours, leave and holiday conditions, health insurance, guarantees for a dignified life in times of retirement, and so on. Legal discussions in a number of developed countries such as the US consider that paying attention to fundamental social rights is a socialistic approach given the country's economic system and liberal politics, thereby equating a state commitment to fulfilling these rights with the negation of individual freedoms. For instance, the Obama healthcare programme was resisted and defeated for this very reason.

For those believing in human social rights, not paying attention to these rights is equivalent to accepting the continuity of the structural contradiction of democracy. This means that democracy acknowledges and stresses equality in participation in democratic processes as one of its foundations as well as a fundamental right of the citizen. However, if citizens are deprived of education, health, and dignified standards of living due to the lack of opportunities and practical and material facilities, how can they exercise and enjoy equality in political participation? Therefore, contrary to the beliefs upheld by liberal democracy, social democracy does not believe that only the right to political participation is sufficient to achieve democracy. Within a social democratic approach, equality in political participation is the prerequisite for achieving civic democracy. Meyer believes that guaranteeing fundamental rights should be coupled with guaranteeing the tools and contexts for the realisation of these rights, otherwise democracy will, in practical terms, be reduced to a hollow process.¹⁰

In developing countries, human social rights are given less attention because of the underdevelopment and inability of the state to provide social services. For the most part, countries with a social market economy and a social approach to democracy consider it to be a prerequisite of democracy to guarantee the social rights of citizens in parallel with providing their political rights. Thomas H. Marshall, a British social scientist, calls the acceptance of the principle of human social rights in constitutional laws, "social citizenry."¹¹ From his view, providing human social rights causes the citizen to go beyond a procedural acceptance of human rights toward creating the practical context to achieve these rights. For example, the right to the freedom of expression, while the citizen is deprived of education and lacks access

⁹ United Nations, "The Universal Declaration of Human Rights: Article 22, 1948," <http://www.un.org/en/documents/udhr/index.shtml#a22> (accessed January 2015).

¹⁰ Meyer, *Was ist Demokratie*, 44.

¹¹ Thomas H. Marshall, *Bürgerrechte und Soziale Klassen* (Frankfurt am Main: Campus, 1992), 44.

to information, will only, and with much difficulty, be effective in processes to shape political thoughts and social programmes.¹²

The 1966 UN International Bill of Rights consists of a whole range of human political, social, and cultural rights. This Bill of Rights considers human rights not as elements that can be separated from one another, but rather as parts of an inseparable and indivisible entirety. In addition to fundamental political rights, the social rights as contained in this Bill of Rights are summarised in the following:

- Legal equality of men and women;
- The right to work;
- The right to social security;
- The right to adequate standards of living;
- The right to the highest attainable standard of health, including the right to have access to appropriate medical treatment;
- The right to education aimed at developing human personality and respecting fundamental human rights and freedoms;
- The right to participation in cultural life.¹³

2.5 Fundamental rights and the democratic system

In contemporary democracies, fundamental rights coupled with the principles constituting the state comprise an interconnected set of political and social values, at the centre of which lies the inalienable and indivisible principle of human dignity. In abstract terms, the state obligation to uphold the fundamental freedoms of the human person and its commitment to respect the freedoms of the citizen arise from the belief in the principle of human dignity and its inalienable and indivisible nature. All emphasis placed on avoiding violations of fundamental rights, political freedoms, social freedoms, the security of property, the freedom of association, the freedom of expression, the right to political participation and suchlike, derives from the inalienable principle of human dignity. Hence, if one of these values as enshrined in constitutional laws is infringed upon, such a violation represents a violation of the constitution as a value in itself.



Image 1: Afghan journalists protest the increasing violence against journalists by putting black tape over their mouths.

¹² Marshall, *Bürgerrechte und Soziale Klassen*, 58.

¹³ "Internationaler Pakt über wirtschaftliche, soziale und kulturelle Rechte vom 19. Dezember 1966 [International Covenant on Economic, Cultural, and Social Rights of 19. December 1966]," <http://www2.fzs.de/uploads/unsozialpakt.pdf> (accessed September 2014).

No doubt, there is simultaneity in the codification of fundamental rights and the advent of democratisation for the first time. As democratic values expanded, fundamental rights also developed in terms of the attention given to them as well as their observance, both theoretically and practically. The right to elect and be elected made people decide their own political fate. Through elections, people were empowered to freely choose their political authority and thereby influence the development of fundamental rights through their representatives. For this reason, the French Declaration of the Rights of Man and of the Citizen says, “The aim of all political association is the preservation of the natural and imprescriptible rights of man.” Despite its early homogeneity and simultaneity, the growth of democracy has not always been equal to the development of the fundamental rights of human beings and citizens. For instance, the rise of the Jacobin Club in the beginnings of the French Revolution led to violations of the fundamental rights of citizens and instituted a system of terror and fear, grossly disrespecting the human rights and freedoms as enshrined in the French Declaration of the Rights of Man and of the Citizen.

The beginnings of European civic revolutions faced numerous problems in the practical observance of the rights of citizens. There are even limitations in constitutional laws in terms of the attention that they give to the fundamental rights and freedoms of citizens. This is particularly so in the early phases of democratisation when these rights were limited to a few categories of citizens in democratic societies. Early on in France, only men who paid taxes and owned a specific amount of property were qualified to hold certain fundamental rights; for example, only men who owned private property and paid taxes had the right to vote. The right of universal suffrage was enshrined in some European constitutional laws as a result of massive campaigns launched by workers in the second half of the 19th century. Nevertheless, women as the other half of society were deprived of the right to vote until the early 20th century.

A misconstrued understanding of democracy as the rule of the majority meant that for a long time those belonging to parliamentary minorities were divested of some of their rights. This is yet another case in which a discrepancy occurs between democracy and the actualisation of fundamental rights. Sometimes democracies were nearly abolished for a majoritarian dependency, as in fascist Germany. This is the reason why contemporary democracies have promoted respect for human dignity and the freedoms arising from it as the right of both the majority and minority and as the undeniable foundation of a democratic state. Article 1 of the Basic Law of the Federal Republic of Germany states, “Human dignity shall be inviolable”; this is among the unchangeable articles of the country’s constitution to such an extent that no parliamentary majority can modify it. Learning a lesson from the experience of the anti-democratic majority in the fascist era of the early 1930s when the majority voted to annul democracy, the Germans have turned their constitutional provisions on fundamental rights into unchangeable articles of their Basic Law.

2.6 Human rights and citizen rights

Often human rights and citizen rights are used as interchangeable legal categories in human rights discourses. Despite some homogeneity and shared identity between human rights and citizen rights, they differ in the scope of their implementation: the former includes all human beings without any distinction, while the latter includes a limited number of human beings. As referred to above, protracted campaigns and struggles were needed to promote the fundamental rights of citizens as guaranteed rights in constitutional laws. Several centuries elapsed from the Magna Carta and the French Declaration of the Rights of Man and of the Citizen to the UDHR on 10 December 1948. The UDHR is yet to become binding upon many countries across the world, as some do not recognise the UDHR on cultural or ideological grounds. In the practical sphere, many countries supporting human rights make an instrumental use of the UDHR. Some countries have committed to upholding human rights in their national laws, but there are still gaps, to varying degrees, between the lived reality and the theoretical claim.

Human rights norms are universal. As indicated above, some of these norms have been enshrined in constitutional laws of some democratic countries. The concept that “[h]uman dignity shall be inviolable [and to] respect and protect it shall be the duty of all state authority” is in fact a universal legal value, emanating from human dignity. This right is born with the human person and is, hence, inalienable.

On the one hand, human rights are positive legal norms; yet on the other, they are the rights of a human being as a person. As such, human rights norms are much more expansive than citizen rights. From the perspective of the ideals of humanism and the Enlightenment, human rights are natural rights that human beings are born with. Therefore, the human person has an obligation to respect their own rights as well as those of others. In the first instance, human rights protect the human person from state interferences, irrespective of an individual's religious, racial, gender, or other origins and orientations. Hence, the human person, regardless of their national origin, holds those rights and freedoms, and these must be respected. The difference between human rights and the fundamental rights of citizens, from the standpoint of legal inclusion, is that it is the duty of the state to respect human rights whether or not they enshrine them in their laws and whether or not they recognise these rights for human beings, because these rights are inherent in and inseparable from human beings and their existence. Contrary to the fundamental rights of citizens, human rights are not a product of the system of coexistence or of the requirements of the social-political contract among citizens in a national context. These rights are inherent in and inseparable from human nature and existence.

For their part, the fundamental rights of citizens emanate from the social contract between the state and its citizens, ensuring the coexistence of citizens and their status before the state as its masters and the source of its power. Hence, the inclusion of human freedoms in constitutional laws are not what the states create or define anew by writing them down, but instead what have existed in abstract terms are embodied and incorporated in constitutional laws. In other words, universal legal norms have been nationally embodied and as such, their exercise has also been made subject to national laws, while they have a universal scope of jurisdiction and enforcement. The human has equal human rights in any national territory simply because he/she is a human being. For instance, the right to freedom of association is a human right and therefore a universal right, but when this right is codified as a fundamental right of citizens in a national constitution, a dichotomy emerges in terms of its observance from a practical point of view. This means that the citizens of the country in question, as this right is inseparable from their citizen rights, have greater possibilities and more legal guarantees to exercise this right.

For this reason, articles referring to human rights or citizen rights are stipulated in different ways. For example, articles in the Afghan Constitution containing terms such as "human beings" or "human being" mean that the freedoms and rights enshrined therein include all human beings, regardless of their citizenship. Article 24 of the Afghan Constitution is one such example: "Life is the gift of God as well as the natural right of human beings."¹⁴ This article comprises all human beings, including those who are not citizens of Afghanistan. However, there are cases wherein the citizens of Afghanistan are explicitly mentioned, and as a result, these articles have limited the scope in terms of the implementation of the relevant rights and freedoms. For example, Article 24 of the Afghan Constitution specifies that "The citizens of Afghanistan shall have the right to elect and be elected."¹⁵ This means that human persons who are not citizens of Afghanistan do not have the right to elect and be elected in this country. Through this article, the principle to elect, which is a human right, is incompatible with citizen rights in the geography of its implementation. This is seen, with varying differences, in the constitutional laws of almost all countries across the world. One difference is that in some European countries, foreigners who are residents can participate in local elections, while citizens of the European Union can participate in EU elections or local (i.e., municipal) elections in the countries of their residence even if they are not citizens of those countries.

One of the objectives of the global human rights movement has been to remove this dichotomy and ensure the harmonisation of universal human rights with citizen rights as codified by the states. The realisation of this human rights norm, notably by removing the dichotomy between universality and locality in international and domestic contexts, has been a principal vision of the human rights movement as a whole.

¹⁴ *Constitution of Afghanistan*, Article 24, 2004 (SY 1382). All English citations of the 2004 constitution have been taken from the Ministry of Justice website: <http://moj.gov.af/en/page/1684>.

¹⁵ *Constitution of Afghanistan*, Article 33, 2004 (SY 1382).

The other dimension of the human rights discourse that was raised in the 1990s was human rights protection in the case of a conflict between the right of national sovereignty of a state and the protection of the human rights of the people living in the territory of that state. Considering the crimes against humanity in the Balkans, the human rights discourse entered a new phase that threw the international legal system into question. In accordance with the Treaty of Westphalia (Westfälischer Frieden, 1648), the principle of non-interference in domestic affairs of a state constitutes one of the key foundations of modern international law. However, events in the Balkans raised the question that if a state commits war crimes or systematic violations of the human rights of its own citizens, can the principle of non-interference as a state's right to national sovereignty be respected as an international legal principle? The question in this discourse is thus: which legal category precedes which legal category in such a case? Some scholars believe that human rights precede the principle of non-interference in the internal affairs of a state and that the responsibility to protect the human rights of citizens and prevent war crimes is, in such cases, superior to the right of a state to national sovereignty. For this opinion, scholars have in mind the Nazi atrocities committed during the Second World War and the experiences of the Nuremberg trials (Nurnberg-Prozesse) as well as the racial cleansings in Rwanda (1994) and the former Yugoslavia. These interventions are known as "humanitarian interventions" in legal discussions. Nevertheless, the critics of this view and some UN member states do not agree with such a theory. From their perspective, such an acceptance allows the world's powerful states to interfere in other countries under the pretext of preventing systematic human rights violations.

3. The Process of Legalising the Fundamental Rights of Citizens in Afghanistan

As indicated above, citizen rights, as they are the subject of our discussion, are the product of civic movements in Northern America and Western Europe during the 18th century. The transition from a human being as the subject of the ruler and dependent on or subordinate to a higher power, to one of holding political power is intellectually an extension of the Enlightenment and the end of the unlimited rule of royal and ecclesiastical authorities over the social and individual life of the human person. These ideas, as part of the influence of the European Enlightenment, entered developing countries in two ways: (1) through colonialism and dominance, and (2) through criticism by Third World anti-colonialist thinkers. In other words, Third World anti-colonial intellectuals appropriated certain notions from the Enlightenment such as individualism, freedom from oppression, democracy, and the humanistic basis of authority, and sought to create political associations and civil societies that had already been implemented in the West. While appropriating certain European concepts, post-colonial reformists in fact renounced the Enlightenment in the 20th century. Questions about the outcomes of such an approach and the achievements and problems arising out of its social, structural and intellectual dichotomies in post-colonial countries are outside the scope of the present paper; as a result, they are not discussed here.

Adopting an approach to the state instead of the *umma* in Islamic countries, establishing national states within fixed boundaries, and creating modern state institutions are all consequences of these two currents of thought. In India, the British colonial power broke apart the country's traditional structures to some extent and replaced them, as the colonial rulers wished, with European-type civil services and modern legislations. In Turkey, Kemalist revolutionaries dismantled the remnants of the ailing Ottoman Empire, which had considered itself as the centre of the Islamic *umma* and caliphate, replacing it with the idea of the Turkish state. Islamic reformists, particularly in Ottoman Turkey, Pahlavi Persia, and Afghanistan, opened a new chapter in social and political approaches in the early 20th century.

Afghan notions of constitutionalism were mostly influenced by the Turkish constitutionalist movement. In Turkey, from the early 20th century to the establishment of the Republic of Turkey (1923), 21 governments changed hands within 13 years. This was indicative of the broader decline of the absolutist Ottoman Empire. The Turkish liberation movement began in 1919 and resulted in the establishment of the Republic of Turkey in 1923. The collapse of the Ottoman Empire and the declaration of the six principles of the Kemalist revolution caused independence-oriented demands to mingle with reformist demands in Afghanistan's reformist approaches, which had achieved victory through an armed independence struggle at the same time as Turkey. This also spread to the Indian subcontinent. There was no doubt that the Republic of Turkey was heading down a very radical path in accordance with the six principles of Kemal Atatürk: namely republicanism, populism, laicism, reformism, nationalism, and statism. The Afghan reformists, who were informed by constitutionalist, republican, and reformist movements in the newly created Republic of Turkey, went on to raise their demands more courageously. No doubt, Mahmud Tarzi was one of the first to spread reformist thoughts in Afghanistan. However, later on he acted more cautiously due to resistance from the popular masses, conservative circles, and destructive colonial influences to reforms and independence.

In their campaign for post-independence modernity and reform, King Amanullah and some of those surrounding him approached modernity and reforms more fundamentally than Tarzi had previously done. Abdul Rahman Ludin and Mohammad Wali Khan Darwazi were prime representatives of radical reforms.

Nevertheless, the fact is that social classes supporting civic values did not exist in Afghanistan as they had in Europe.

Those backing the reforms were the monarch, the nobility surrounding him, and a handful of reformist intellectuals close to the monarchy while the majority of the people opposed the reforms along with their promotion from being the subjects of the king to citizens holding political authority. In an interview with a German journalist on the deck of a Multan ship carrying him to his exile in Italy in the aftermath of a rebellion by Habibullah Kalakani in 1929, King Amanullah expressed the truth about the people's resistance to reforms and their unpreparedness to accept them. Queen Soraya, King Amanullah's wife, is also present in the interview, expressing her problems in Afghanistan with unbelievable resentment. She thus stated:

If I do not increase my husband's pain, I welcome this overthrow [of King Amanullah's government]. This overthrow returned my freedom to me. No one can imagine what I have been through in Afghanistan. My father was the leader of an Afghan border tribe. My mother was from Syria, and I grew up in Damascus. When I came to Kabul from the intellectual atmosphere of Damascus, I could not adapt to the conditions in Afghanistan. Afghanistan is a tough country devoid of friendship, and the spirit of its citizens is fraught with violence. Only my love for my husband and our pleasant and unforgettable youth memories helped me endure the blows of destiny.

King Amanullah states in the interview:

I am not a daydreamer, without circumspection. I wanted to approach them (the mullas) through tolerance, but they did not want to hear anything related to modernity. They did not even want improvements in the simplest technical equipment. For instance, they rejected the telephone as an invention of Satan. They discarded my reasons about the existence of telephone lines in Mecca and Medina, arguing that Islam had been perverted there. I could not build hospitals, because the mullas believed that diseases should only be treated through a talisman (by placing it under the pillow) and ab-e keshidani (a kind of talisman according to which the mullas write verses from the Holy Qur'an on a piece of paper and ask the sick person to immerse it in water and drink the water as a cure). They refused to pay regular taxes, regarding it to be against divine orders and saying that this is what has not been decreed by God. They severely struggled against the rules on the distribution of national identity cards, because this required men to take photos, as is common all over the world. The mullas said that if a person lets his photo be taken, he will die within a year, within a month, or even within a day. People were coming to police stations, preferring to be flogged 50 times than have their photos taken. We had to campaign under such circumstances. First of all, I had to have a powerful and trustworthy army. This required costs and how could I have covered these costs in a country as poor as Afghanistan?¹⁶

3.1 **Nezamnama-ye Asasi (Founding Document) of the State of Afghanistan, 1924**

King Amanullah led an array of reforms unprecedented in the history of Afghanistan. From a legal perspective, the king oversaw the codification of Afghanistan's first constitution. Without public support, the king and those around him attempted to implement socio-political reforms and modernisation, efforts that, from the perspective of politics and political sociology, are among the most astonishing of social oddities. The reformist king was, after all, delegating his authority to the nation by including the nation in decision-making processes, subjecting his and his government's acts to the law, and conferring certain rights and freedoms on his people, but his people revolted against him and rescinded his reforms.

Afghanistan's first constitution of 1924, ratified by the *loya jirga* in Paghman, contained some fundamental rights of the citizens for the first time. The difference between this process as written citizen rights and the French process in 1789 was that in France, the National Assembly codified human and citizen rights despite resistance from the aristocracy and clergy and against the will of the ruling monarchy and nobility. The French revolutionaries focused power in the National Assembly, due to the anger unleashed by the revolution and the trial of the king, queen, and others at the head of the royal regime. In Afghanistan, however, the king and some of his sympathisers sold these rights to the *loya jirga*, despite serious resistance from the participants. This first effort by the king was in fact a test of public opinion and an introduction for the development of people's democratic rights and freedoms—something that was unprecedented

16 Ber A. Ramleh, *Akt Afghanistan* (Bonn: 1929).

in that historical context. The uprising of the Afghan people, backed by colonialism, delayed all programmes for reforms and citizen rights.

The constitution of King Amanullah was titled *Nezamnama-ye Asasi-ye Daulat-e 'Elay-e Afghanistan* (Founding Document of the State of Afghanistan). Containing 73 articles, this constitutional law was first raised in a *loya jirga* held in eastern Afghanistan in 1922, in which 872 elders, aristocrats, and clerics had participated, and then ratified after long and heated debates in a *loya jirga* held in Paghman in 1924, in which 1,052 representatives from the mentioned social classes had taken part.¹⁷ As can be seen in the Paghman *loya jirga* records, the king is time and again required to tell the participants, through both argument and compulsion, that Afghanistan needs law and lawfulness.

Although this constitutional law is regarded as a major revolution in the history of the codification of the rights and duties of Afghan “citizens,” it includes serious ambiguities in the text due to the lack of legal awareness and legal codification approaches as well as resistance from the aristocratic and conservative social classes, particularly the *mullas*. For example, articles have not been placed where they should have been, and there are articles in the text of the constitution that employ terms contradictory to the monarch’s personal beliefs due to a concern over how people would react to it later on.

Article 2 of this constitutional law reads, “The religion of Afghanistan is the sacred religion of Islam, and its official religious school is the sublime Hanafi religious school. Followers of other religions such as Hindus and Jews must pay the *jizya* tax and wear distinctive clothing, provided that they do not disturb the public peace.”¹⁸ The inclusion of such constraints for adherents of other religions in this law clearly indicates the monarch’s fear and concern about society’s conservative elements such as the *mullas*: otherwise how can one justify that Ranji Das, an Afghan Hindu, King Amanullah’s Minister of Finance and part of the Afghan delegation to the Rawalpindi conference (1920), be required to pay the *jizya* tax while the same person together with Nand Lal Bhasin, another Afghan Hindu, were part of the Afghan delegation that signed the treaty of independence in 1921. This would mean that the king was forced to conceal his ideals due to his fears about the reactions of the *mullas* and Afghanistan’s traditionalist society.

Articles 8 to 35 of this constitutional law codified the rights and freedoms of citizens. Article 9 recognised the freedom of subjects in the performance of their religious rituals, that is, “freedom and individual rights.”¹⁹ Article 10 more explicitly stressed this: “Personal freedom is immune from all forms of violation or encroachment. No person may be arrested or punished other than pursuant to an order issued by a *sharia* court or in accordance with the provision of appropriate laws. In Afghanistan, the principle of slavery is completely abolished. No man or woman can employ others as slaves.”²⁰ The abolition of slavery and the acceptance of the principle of freedom of the individual and the protection of their rights in the law were results of the influence of the European Enlightenment on Amanullah-era reformists in Afghanistan. Article 11 of this constitutional law enshrined the freedom of the media and of thought. The subsequent articles contain the right to freedom of profession, the right to education, the right to entrance into public service based on merit (previously considered a prerogative of the royal family, nobility, *sadat*, and *ulama*), the right to freedom of property, the security of housing, the prohibition of forced labour, and the prohibition of torture.

The law, from the perspective of its juridification and the duties and ideals envisaged for citizens, represented a massive and unprecedented revolution in our country’s political history and independence struggle, both then and now. There are still many people in Afghanistan who pursue the reforms initiated by King Amanullah. The king and his queen came onto the stage in Paghman and they both played a role in the independence struggle. The massive revolution launched by the king set many things in motion in the country. The enmity of the society’s

17 *Collection of Afghanistan Laws* (Kabul: Islamic Republic of Afghanistan, Ministry of Justice Publications, 2007).

18 *Founding Document of the State of Afghanistan*, Article 2, 1924 (SY 1303).

19 *Founding Document of the State of Afghanistan*, Article 9, 1924 (SY 1303).

20 *Founding Document of the State of Afghanistan*, Article 10, 1924 (SY 1303).

conservative elements with what the king initiated in the 1920s still persists. The continuity of enmity with women's emancipation is still something that shakes the country's patriarchal system and pours many onto the streets in protest.

3.2 Fundamental rights in *Osul-e Asasi* (Fundamental Principles) of the State of Afghanistan, 1931

With the support of British colonialists, the conservatives and reform opponents ousted the Amanullah government.²¹ In the time of Nader Shah, Afghanistan's second constitution entitled *Osul-e Asasi-ye Daulat-e 'Elay-e Afghanistan* (Fundamental Principles of the State of Afghanistan) was ratified with 110 articles by a *loya jirga*, in which tribal elders, aristocrats, and the *ulama* had participated. What favoured the inclusion of a number of citizen rights and freedoms in this law were the foundations laid during the Amanullah period on the one hand and the public reaction to the rule of Amir Habibullah Kalakani on the other hand. Despite all of this, the law was endorsed with warnings from the *loya jirga* to the then king so as not to repeat the Amanullah experience.

In Afghanistan's history, one period characterised by a profound gap between the theory of the constitution and its lived reality was during the rule of Nader Shah and the subsequent period until the adoption of the 1964 constitution. The present writing does not intend to conduct an academic social and political analysis, but only to discuss the text of the law as a whole.

The legal literature improved in the 1931 constitution compared to the previous constitutions, and there was even progress in the area of religious freedom. For example, Article 1 of this law stipulates:

*The religion of Afghanistan is the sacred religion of Islam, and the official religious school and that of the population in general is the Hanafi religious school. The King of Afghanistan should be a follower of this religious school. Followers of other religions, such as Hindus and Jews, who live in Afghanistan, provided that they do not infringe the ordinary rules of conduct and propriety, also enjoy protection.*²²

It can be seen here that the followers of other religions, due to their religious belonging, have been exempted from paying the *jizya* tax. From the perspective of legislative theory, this is a step forward.

At the time of Nader Shah, 15 articles were allocated to the fundamental rights of citizens under the title, "General Rights of the Nationals of Afghanistan." These legal provisions relate to the religious freedom of Afghan people, personal freedoms, security from illegal imprisonment, the abolition of slavery and forced labour, the freedom of profession and the equality of citizens before the Islamic *sharia* and statutory laws. Also, the security of tenure, the prohibition of illegal confiscation of property, the prohibition of torture, the right to primary education, and the freedom of the press were enshrined in the law as they do not run contrary to religion.

Nevertheless, the realities of the period show that the state systematically violated the rights and freedoms of its citizens, censored the press, and killed people.²³ The law was in force in the years after Nader Shah's rule and, according to Ghobar,²⁴ the widespread and systematic violations of the rights of Afghan people, particularly those of the intellectuals and constitutionalists, continued well into the prime ministership of Mohammad Hashem Khan until the relative openness of the 1950s.

21 Mir Gholam Mohammad Ghobar, *Afghanistan dar masir-e-tarikh [Afghanistan in the Course of History]*, vol. 2 (Herndon, VA: Hishmat Khalil Gobar, 1999); Mir Mohammed Siddiq Farhang, *Afghanistan dar panj qarn-e akhir [Afghanistan in the Last Five Centuries]* (Peshawar, Pakistan: 1373/1994); Dadfar Rangin Spanta, *Afghanistan: entstehung der Unterentwicklung, Krieg und Widerstand [Afghanistan: Genesis of Underdevelopment, War and Resistance]* (Frankfurt am Main: Lang 1993).

22 *Fundamental Principles of the State of Afghanistan*, Article 1, 1931 (SY 1310). *Collection of Afghanistan Laws* (Kabul: Islamic Republic of Afghanistan, Ministry of Justice Publications), 2007 (SY 1386), 53.

23 Ghobar, *Afghanistan dar masir-e-tarikh*, 952.

24 Ghobar, *Afghanistan dar masir-e-tarikh*, 1052-96.

3.3 The Constitution of Afghanistan, 1964

This constitution was ratified with 128 articles in a *loya jirga* held during the rule of Mohammad Zaher Shah in 1964 in Kabul. The draft constitution had been prepared by Afghanistan's then most qualified lawyers, educated personalities, and intellectuals. The constitutional law reflected some of the demands raised by two generations of Afghan constitutionalists and reformists. The text of the constitution was, from the perspective of legal literature and terminology as well as in terms of the uniformity and consistency of its content, a considerable legal document. From this standpoint, this constitution is paramount to those preceding and succeeding it, including Afghanistan's current constitution. The study of this constitution is important for students of law and politics in terms of their familiarity with legal language and terminology. However, the primacy of this constitution is limited to its theoretical or normative field. Contradictions between the theory and the lived reality, the fledgling status of the social structures, the lack of general education in the society, and the lack of commitment and leadership within the state caused not only a constitutional crisis, but also a crisis of the monarchical system as a whole.

The preamble to this constitution reads, "To achieve justice and equality. . . To establish political, economic, and social democracy. . . to form, ultimately, a prosperous and progressive society based on social co-operation and preservation of human dignity. . . We, the People of Afghanistan. . . framed this constitution for ourselves and for the generations to come."²⁵ These are ideals beyond a liberal constitution. In other words, the purposes enshrined in this constitution are the combination of liberal democratic and social democratic values. The inclusion of "economic democracy" and "justice and equality" in the constitution was influenced by second-generation Afghan constitutionalists who were members of the constitutional drafting commission. In addition, given the international atmosphere of the time, it was easier to commit oneself to upholding these values than in today's world.

Afghanistan was one of the pioneering countries of the Non-Aligned Movement. Most Non-Aligned Movement member countries had just won independence from colonialism, and justice was the mobilising slogan in the anti-colonial campaigns and movements—something reflected in the movement's declaration. Justice-oriented approaches were thus a motivating force behind many progressivist currents in Third World countries.

This constitution first codified the principle of national sovereignty as arising from the determination of the people, as a result of which the right of the king as "God's caliph" and the legitimating source and holder of authority theoretically shifted to the people. Paragraph 2 of Article 1 of this constitution stipulates, "National sovereignty in Afghanistan belongs to the nation."²⁶ The constitution thus makes the people the source of political power and gives them the right of sovereignty—meaning that the people as the sovereign replace any power beyond the law and beyond the social reality. Chapter 3 of this constitution allocates 16 articles to the "fundamental rights and duties of the people."

Article 25 recognises the equality of Afghan people, without any discrimination, in terms of their rights and duties before the law.²⁷ Article 26 regards freedom as the human person's "natural right" and stresses that "human freedom and dignity is inviolable"²⁸ and that the state has the obligation to respect and protect these values. The same article also enshrines the principle of the legality of all state performances and the responsibility of the state before the law. The prohibition of torture, the freedom of movement,²⁹ the freedom and security of tenure of housing,³⁰ the security of property,³¹ the freedom of thought and expression, the freedom of publication,³²

25 *Constitution of Afghanistan*, Preamble, 1964 (SY 1343).

26 *Constitution of Afghanistan*, Article 1, Section 2, 1964 (SY 1343).

27 *Constitution of Afghanistan*, Article 25, 1964 (SY 1343).

28 *Constitution of Afghanistan*, Article 26, 1964 (SY 1343).

29 *Constitution of Afghanistan*, Article 26, 1964 (SY 1343).

30 *Constitution of Afghanistan*, Article 28, 1964 (SY 1343).

31 *Constitution of Afghanistan*, Article 29, 1964 (SY 1343).

32 *Constitution of Afghanistan*, Article 31, 1964 (SY 1343).

the freedom of association and demonstration, and so on were also incorporated and regulated. The law also recognises the rights of citizens to political education and participation in the processes of the production and dissemination of political thoughts. Since political education and the processes to shape and disseminate political thoughts cannot be developed by citizens on their own in a democracy, the Constitution also recognises the right to freedom of association and demonstration. Association and demonstration in fact relate to the utilisation of possibilities to communicate to the wider public.

Association and demonstration in order to protest or inform others *en masse* differ from the gatherings of people in banquets and festivities and/or on *eid* occasions. It is necessary to provide security for such associations. Nevertheless, going to banquets or festivities is not considered among the fundamental rights of citizens that the state has a duty to fulfil. At the same time, participation in a political association for acts of destruction and sabotage is not provided for as a citizen right.

The 1964 constitution recognised the right to create political associations in order to shape public opinions and achieve common social, political, cultural, and economic objectives. Article 35 of this constitution stipulates that “Afghan citizens have the right to establish, in accordance with the provisions of the law, associations for the realisation of material or spiritual purposes.”

“Afghan citizens have the right to establish, in accordance with the provisions of the law, political parties.”³³ The right to establish political parties and associations is one that citizens exercise in collective terms. Individuals who have shared opinions and interests due to political and/or economic purposes can establish associations and parties in order to pursue their interests. Although this right has been recognised for groups of individuals, the people enter into or withdraw from such organisations based on their own free individual will. However, it is the duty of the state to protect the legal existence and free operation of these institutions, pursuant to the law.

The freedom of association and union does not mean the freedom to create associations and unions that seek to abolish the constitution. “Afghan citizens have the right,” as the law says, “to establish, in accordance with the provisions of the law, associations for the realisation of material or spiritual purposes.”³⁴ Here, the law refers to the establishment of labour unions, associations of businesspeople and other professions, employer unions, and suchlike. The inclusion in this constitution of the right to sue the administration for its illegal acts³⁵ and the universal right to education³⁶ is a major step forward in the codification of the fundamental rights of Afghan citizens. However, there were formidable problems in terms of its implementation. Ultimately, the Constitution was annulled by Daud Khan’s coup in 1973, who replaced it with the 1977 Constitution of the Republic of Afghanistan.

3.4 The Constitution of the Republic of Afghanistan, 1977

The 1977 constitution was, legally speaking, a disjuncture and a step backward in terms of the development of the fundamental rights of citizens. This constitution epitomised the launch of a statist approach to evade the development of the fundamental rights of citizens. The constitution showed a Third World, statist, and absolutist political orientation. On the one hand, some norms and values were accepted—for example, regarding people as the source of power—yet on the other hand, the central principle of democracy in its consideration of people as the unconditional sovereign was rescinded under the pretext of people’s “political immaturity.” Also, the concepts of the people and the nation were tacitly limited under an absolutist approach influenced by Soviet Union-oriented socialism.

33 *Constitution of Afghanistan*, Article 35, 1964 (SY 1343).

34 *Constitution of Afghanistan*, Article 35, 1964 (SY 1343).

35 *Constitution of Afghanistan*, Article 33, 1964 (SY 1343).

36 *Constitution of Afghanistan*, Article 34, 1964 (SY 1343).

If the concept of “people” was limited in ancient Greece to the free and property-owning men of Athens, the concept in European and American democracies during the 18th century included only men with property. As referred to above, it took over a century for this concept to encompass all mature men as a result of social, revolutionary, and reformist campaigns by men and women who mostly belonged to the lower classes. Ultimately, the concept also comprised women as citizens with full fundamental rights in the early 20th century.

The reduction of citizens from all men and women to individuals with a specific class status (workers, farmers, and others) was characteristic of totalitarian socialist states. However, this theory entered politics and legislation in its softer form in the absolutist Third World states, particularly in the Middle East, Africa, and in Daud Khan-era Afghanistan. In socialist systems, the principle of elections as the right of all citizens to participate in was interpreted differently according to which certain social classes, such as (in the words of communists themselves) the bourgeoisie, the nobility and those representing the former ruling regime, were deprived of their rights, including the right to elect and be elected. In Afghanistan, too, the principle of universal suffrage was thrown into question and the concept of the citizen also tacitly limited, even in legal theory.

Article 2 of this constitution on who constitutes the source of power in Afghanistan reminds the reader of the country’s social classes and makes a legal preference. As such, the universal principle is amended in this way, “Political sovereignty belongs unconditionally to the nation.” This article points out that “[p]ower is exercised by the people whose majority includes farmers, workers, intellectuals, and youths.”³⁷ The emphasis on the “majority” in this article is a concealed ideological expression of a political programme, which was endorsed as a national revolution by its defending classes in a 1960 conference of communist and workers’ parties. Later on, the programme was disseminated in the publication *Khalq* by the People’s Democratic Party of Afghanistan (PDPA) followed by the publication *Parcham*, the other faction of the PDPA, as the discourse of the Soviet Union-oriented leftists in Afghanistan. PDPA activists, particularly from the *Parcham* faction, played a role in drafting the Daud Khan-era constitution.

Despite all of this, this constitution recognises a number of citizen rights and freedoms in more limited terms compared to the 1964 constitution. These rights were codified in 16 articles in Chapter 4 of the constitution. Article 27 recognised the equality, without discrimination, of men and women before the law.³⁸ Article 28 states that “Liberty is the natural right of human beings, unless it harms or damages the liberty and dignity of others, or the public benefit and security and the national interests. This right shall be regulated by law.”³⁹ In contrast, the concept of freedom as a natural human right and the duty of the state to protect were enshrined in Article 26 of the 1964 constitution in the following manner:

*Liberty is the natural right of the human being. This right has no limitations except the liberty of others and of public interest as defined by the law. The liberty and dignity of the human being are inviolable and inalienable. The state has the duty to respect and protect the liberty and dignity of the human being.*⁴⁰

The principle that the human being has inherent dignity simply because he or she is a human being, without any political and/or social distinctions, forms the foundation of all approaches to human and citizen rights. This guiding principle makes one believe in the equality of all human beings and in the rights that are inherent in their nature as a human being. All human beings, regardless of any distinction in racial, gender, religious, ideological, or social class-specific terms, are equal before the law and so have equal rights. The fact that the duty to protect human dignity has been left out in this constitution is an expression of an ideological programme according to which human beings are classified due to their class origins, ultimately limiting the rights of some of them theoretically and all of them practically. The reference to “the liberty and dignity of others, or the public benefit and security and the national interests” instead of to “the liberty

37 Constitution of the Republic of Afghanistan, Article 2, 1977 (SY 1355).

38 Constitution of the Republic of Afghanistan, Article 27, 1977 (SY 1355).

39 Constitution of the Republic of Afghanistan, Article 28, 1977 (SY 1355).

40 Constitution of the Republic of Afghanistan, Article 26, 1964 (SY 1343).

of others and public interest” shows that the legislator was seeking certain preconditions in order to employ them to restrict human rights and freedoms. Setting prerequisites to exploit freedom and fundamental freedoms on a practical level gives space to the state to constrain them. This article is an attempt to legalise an absolutist state as rooted in the totalitarian ideas and ideologies of the Third World in the 1960s and 1970s. Article 40 of the 1977 constitution refers to people’s political immaturity, thereby legalising a one-party system, which is in contravention of a pluralist political process to politically organise people and ensure their free participation in oppositional political processes. This article stipulates that “For the reflection of social demands and for the political education of the people of Afghanistan, until such time as this aspiration is realised and attains its natural maturity, the one-party system led by the revolutionary party, which is the founder and vanguard of the popular and progressive revolution of 26 Saratan 1352 [17 July 1973] of the people of Afghanistan, will prevail in the country.”⁴¹ The abolition of human autonomy and, thereby, the reduction and limitation of human citizen rights are straightforward in Article 46 of this constitution; according to which, citizens are required to maintain “loyalty to the objectives of the revolution of 26 Saratan 1352 and. . . respect for the president.”⁴² In effect, these relate to the prohibition of any opposition, the rejection of contrarian opinions in social and political life, the legalisation of a personality cult, and the securing of the President from any political criticism on the part of the citizens. Due to its reduction and limitation of the rights and freedoms of the citizens of the country, this constitution is considered to be a major step backward compared to the 1964 constitution.

3.5 Fundamental Principles of the Democratic Republic of Afghanistan, 1980

As indicated above, the 1977 constitution represented a major step backward in the process of institutionalising the fundamental rights of citizens. It was mainly an attempt to legalise a totalitarian state and a one-party system, influenced by post-colonial Third World nationalism in the 1960s and 1970s. As also referred to above, the concept of people in this constitution was a tacit allusion to specific segments of the population in majoritarian terms, namely the subordinate classes, by reducing all people into these categories. This belief was more extensively and explicitly expressed in the ideological legislation of the Democratic Republic of Afghanistan.

The understanding of those who prepared the 1980 constitution—calling it *Osul-e Asasi* (Fundamental Principles) instead of *Qanun-e Asasi* (Constitution)—is affected by various strategic approaches of communist and workers’ parties as elaborated in the 1960 Bucharest conference. According to the decisions taken at that conference, statist movements by those who were educated in the Soviet Union or by military officers supporting it were named revolutions “with a socialist approach” in most Third World countries. These systems included military dictatorships from Algeria to Egypt, Syria, Iraq, and other countries. These states and their coups were regarded as revolutionary states on the path of transition toward socialism. Such states were, in theory, led by national or popular fronts with a national democratic character.⁴³

Article 1 of the Fundamental Principles of the Democratic Republic of Afghanistan defined people in the following manner: “The Democratic Republic of Afghanistan is the independent and democratic state of all hardworking and Muslim people of Afghanistan, including workers, farmers, businesspeople, *kuchis*, intellectuals, and other hardworking people and all democratic and patriotic forces of all of the country’s nationalities and ethnicities.”⁴⁴ Contrary to pluralist democracies in which power unconditionally resides in the people and which include all men and women citizens without any discrimination on such grounds as property and wealth,

41 *Constitution of the Republic of Afghanistan*, Article 40, 1977 (SY 1355).

42 *Constitution of the Republic of Afghanistan*, Article 46, 1977 (SY 1355).

43 Since communists could, in the course of their campaigns, come to power in very underdeveloped countries such as China, Vietnam and the like—countries in which there were no signs of the proletariat and the bourgeoisie—they started creating new theories such as the “national democratic revolution” (at the conference of communist and workers’ parties in Bucharest in 1960) and the “new democratic revolution” (Mao Zedong). In Afghanistan, Mr Taraki regarded Afghan *khalqi* officers as the agents who set this revolution in motion. See Rangin Dadfar Spanta, “Modern Political Parties,” *Asmae Magazine* 26 (2003).

44 *Fundamental Principles of the Democratic Republic of Afghanistan*, Article 1, 1980 (SY 1359).

ideologically communist states reduce people to certain classes in whose name the “vanguard party” rules over the people. In practice, people and the source of power are reduced to the central committee and mostly to the political bureau of the party. Paragraph 2, Article 2 of the Fundamental Principles of the Democratic Republic of Afghanistan reads, “In the Democratic Republic of Afghanistan, state power belongs to hardworking people in cities and villages; this power is exercised by democratically established state and local organs in cities and villages.”⁴⁵ The idea of the “national democratic state” as an influence of the ideological principle of the “national united front” is revealed in Article 3 of the declaration of principles of the aforementioned Bucharest conference:

*The power of hardworking people in the Democratic Republic of Afghanistan relies on the broad-based National Fatherland Front, which unites all workers, farmers, businesspeople, nomads, intellectuals, women, youth, representatives of all nationalities and ethnicities, all progressive, democratic, and patriotic forces, and the country’s social and political institutions under the leadership of the People’s Democratic Party of Afghanistan within a general programme aimed at creating a new, free, and democratic society.*⁴⁶

Given the purposes of the present research, I do not give attention to the PDPA’s renunciation and denial of the fundamental rights of citizens, but rather to the values of the fundamental rights that were ideologised and therefore reduced in order to be made applicable to specific segments of the population. For this reason, other groups of people who owned property or had different political orientations were stripped of their fundamental rights, as in immature democracies in the 18th century. It is natural that such a legal system allows the state to systematically violate the fundamental rights of the people as its ideological approach demands. According to the understanding of the PDPA leaders, the National Fatherland Front was the same national front led by the vanguard proletarian party, while the PDPA was the Leninist vanguard proletarian party that should lead society toward socialism under the dictatorship of a united front, which, from the perspective of Marxist-Leninist ideologues, is the popular democracy. This process required curtailing the “political rights of the bourgeoisie.” Article 4 of the Fundamental Principles of the Democratic Republic states:

*The People’s Democratic Party of Afghanistan is the party of the working class and all hardworking people of the country, the leading and directing force of the society and state, the expression of the will and interests of workers, farmers, intellectuals, all working people, and national democratic forces, as well as the steadfast defender of the genuine interests of all people resident in the unified homeland of Afghanistan.*⁴⁷

The totalitarian countenance and character of the Fundamental Principles is conspicuously clear in their idealistic principles and programmatic components. As such, subsequent articles are all references to the fundamental rights of citizens, but all limited to or rescinded by the ideological requirements. For instance, when discussing the freedom of association, this freedom is subject to the propagation of the objectives of the “Saur revolution”⁴⁸ and the defence of the goals of the Democratic Republic. Paragraph 7 of Article 29 reads, “The right to freedom of thought, the right to peaceful association and demonstration, and the right to patriotic union. . . are regulated within the framework of the law.”⁴⁹ However, all of these values were subjected to ideological approaches and interpretations by using non-legal political affixes. For example, the epithet “patriotic” is too flexible a term. These are known as *elastic terms* in law because they can be interpreted to mean something different from the original intention behind using them in the first instance. The difference is that in non-ideological legal usage, interpretations cannot run contrary to the letter and spirit of the law and so violate the impartiality and universality of legal norms, but law is not impartial in ideological interpretations, siding with specific social groups due to their class status, ideological beliefs, gender, or race.

45 *Fundamental Principles of the Democratic Republic of Afghanistan*, Article 2, 1980 (SY1359).

46 *Fundamental Principles of the Democratic Republic of Afghanistan*, Article 3, 1980 (SY1359).

47 *Fundamental Principles of the Democratic Republic of Afghanistan*, Article 4, 1980 (SY1359).

48 *Fundamental Principles of the Democratic Republic of Afghanistan*, Article 6, 1980 (SY1359).

49 *Fundamental Principles of the Democratic Republic of Afghanistan*, Article 29, 1980 (SY1359).

No doubt, the Fundamental Principles of the Democratic Republic of Afghanistan do not seek to hide a statist, one-party, and ideological approach. They go to such a length that in Article 22, even “scientific, technical, cultural, and artistic activities” should fall within the scope of the “purposes of the Saur revolution,” so they can be protected by the law. This constitution, in both its letter and spirit, reflects a totalitarian Third World state—a destructive step backwards from the perspective of the fundamental rights and freedoms of citizens. In legal theory, this constitution is considered to be the legalisation of an ideological brutish force, coupled with the nullification of political pluralism.

3.6 The Constitution of 1987

This constitution was a response to the ideological programmes of the PDPA government. It was an amendment of the 1980 constitution which, in its lived reality, caused unprecedented lawlessness in the history of Afghanistan instead of providing a legal order. The public rebellion made party-oriented legislators take a legal step backward in the benefit of the people.

The government led by Dr Najibullah, following the “policy of national reconciliation,” decided to amend the constitution in such a way that it would also be acceptable for the opposition. As a result, fundamental changes were made to some concepts and terms in the previous constitution. The first article stopped reducing the definition of people to “hardworking classes.” This article in the new constitution thus stated that “National sovereignty belongs to the people in the Republic of Afghanistan.”⁵⁰ Here, the concept of people was broader than the concept of “hardworking people” who included workers, farmers, nomads, and other hardworking people, and hence it was compatible with a democratic understanding. Article 5 of this constitution recognised the freedom of political parties and, thus, political pluralism.⁵¹ Chapter 3 of this constitution, including Articles 33-64, enshrined citizenship and the fundamental rights and freedoms of citizens. These articles ensured the equality of all citizens before the law as well as non-discrimination.⁵² The subsequent articles contained the right to life, the freedom to perform religious rituals, the right to liberty, and the protection of human dignity from state violations.⁵³ Furthermore, other individual rights and freedoms were recognised, including the right to freedom of expression, the right to legal demonstration and protest, the security of tenure for housing, the privacy of correspondence, and the right to elect and be elected.⁵⁴

The 1987 constitution was amended in 1990, but no considerable changes were made with regard to the fundamental rights and freedoms of citizens. These rights continued to be stipulated in Chapter 3 from Article 33 to Article 64.

3.7 The Constitution of the Islamic Republic of Afghanistan, 2004

This constitution was prepared pursuant to the Bonn Agreement in November and December 2001. The draft constitution was debated and ratified by a constitutional *loya jirga* held from 13 December 2003 to 4 January 2004 in Kabul. It was endorsed by the president on 26 January 2004.

Both the draft and final versions of this constitution aroused heated debate and discussion. Before discussing the chapter on the fundamental rights of citizens in this constitution, it is noteworthy that the author was also one of those who referred to a number of inadequacies and problems in this constitution after the draft was circulated in 2003. The critique that I published focused on technical problems, structural contradictions, literary weaknesses, and inadequacies of legal concepts. I presented my article at a conference in the Netherlands where I had to shorten my text, but it was initially a longer treatment on this subject.

50 *Constitution of Afghanistan*, Article 1, 1987 (SY 1366).

51 *Constitution of Afghanistan*, Article 5, 1987 (SY 1366).

52 *Constitution of Afghanistan*, Article 38, 1987 (SY 1366).

53 *Constitution of Afghanistan*, Articles 39-41, 1987 (SY 1366).

54 *Constitution of Afghanistan*, Articles 42-64, 1987 (SY 1366).

My article entitled “Observations on the Draft Constitution of Afghanistan” was later published in 2003 and made available to some of the members of the Constitutional *Loya Jirga*. The article was later reprinted in the book *Difficult Years*, which contains an anthology of this author’s articles.⁵⁵ Although some contradictions were addressed in the final draft of the constitution, considerable problems remain and thus call for a review of this constitution.

A main problem in this constitution, legally speaking, is its weakened or reduced legal literature and terminology. Like many branches of the humanities, the language of the law is specific with its own specific terminology. If legislators are not proficient in this language, the law is reduced to an eclectic one and is influenced by generalisations, making the implementation of the law a tense and difficult process later on. As the aim of this present study is not to discuss legal contradictions and inadequacies, it will suffice to refer briefly to what I had written at the time; I will afterward address any issues related to the fundamental rights of citizens in this constitution.

I wrote in “Observations on the Draft Constitution of Afghanistan” in 2004 that “The present draft is mostly a position paper on the regulation of power relations in today’s Afghanistan. This text sets the preconditions for the creation of power-seeking individuals at the head of the future government of Afghanistan.”⁵⁶ Today’s discourses on decentralisation and systemic reform emanate precisely from the then foreseeable concerns. Anyone who finds his way to the centre of such a centralised power will but bring all affairs under his control. As such, the value of a government founded on democracy and law is undermined. Another problem then was the existence of contradictions between the letter and the spirit of the law. For instance, Afghanistan’s commitment to the UDHR and the interpretations later made based on a partial acceptance of the UDHR, despite the fact that Afghanistan is a UDHR signatory, is in practice a contradiction in the spirit of the law. In the above mentioned article, I wrote:

What will cause troubles in the process to implement this constitution is exactly this acceptance of contradictory values, which requires the state to enforce them. Making it an obligation for the state to abide by the principles of the Universal Declaration of Human Rights is worthwhile, as it is an attempt to promote the Afghan citizen to one having equal rights in the human community. Despite all of this, accepting such an egregious contradiction in the spirit of the constitution will cause many difficulties. In the future, the Supreme Court will make its desired interpretations—ones that are contradictory to the constitution. It is a fundamental legislative principle that possibilities for contrarian and contradictory interpretations of the spirit of the law must be restricted. A constitution that is open to all types of contradictory interpretations will, in the end, turn out to be a weak one.⁵⁷

It might have been an interesting coincidence that a constitutional crisis, as I had observed and warned about in my 2004 critique based on the many existent contradictions and ambiguities in the Constitution, happened to me in my then capacity as the Afghan Minister of Foreign Affairs. Paragraph 3 of Article 92 of the Constitution of Afghanistan reads as follows: “The no-confidence vote on a Minister shall be explicit, direct, as well as based on convincing reasons.” In my 2004 critique of this same article, I had questioned which authority would have the power to distinguish between “convincing reasons” and “unconvincing reasons.”⁵⁸ This article, as written in the law without identifying an authority to distinguish between convincing and unconvincing reasons, does not hold any legal worth.

Four years after the entry of this constitution into force, the *Wolesi Jirga* impeached me because Iran expelled Afghan refugees from its territory. As the supporters of a no-confidence motion did not obtain the necessary majority in the first round, a second round of voting was, contrary to the parliamentary rules of procedure, conducted on the same motion; as a result, I received a no-confidence vote. The Supreme Court of Afghanistan then rescinded the *Wolesi Jirga* decision, declaring it unconstitutional. The point here is that if the law had been explicit, there would have been no need to refer the matter to the Supreme Court. Either the decision of the *Wolesi*

55 Rangin Dadfar Spanta, “Observations on the Draft Constitution of Afghanistan,” in *Difficult Years* (Kabul: Parnian, 2004), 43-64.

56 Spanta, “Observations on the Draft Constitution of Afghanistan,” 45.

57 Spanta, “Observations on the Draft Constitution of Afghanistan,” 49.

58 Spanta, “Observations on the Draft Constitution of Afghanistan,” 59.

Jirga would have been implemented or such an ambiguous power would not have been granted to the *Wolesi Jirga* in the first place. This is a problem related to the letter of the law. My discussion is, however, not about the ridiculous utilisation of the institution of the no-confidence vote, as it has been repeatedly used in the last years. My point concerns the philosophy of the law or the constitution in question; that is, about the constitutional spirit or ideal. As we see, the institution of the no-confidence vote has become a source of continued abuse in Afghanistan. The law must be fully strong and explicit, or it will become a plaything in the hands of persons and groups in positions of power. Mrs Juli Zeh, an advisor to the UN mission in Kosovo, in her field research about the legal inadequacies in that country, described violations of the law by governments as the “dictatorship of the democrats.”⁵⁹

Nonetheless, the Constitution of Afghanistan is a major democratic achievement. It is a constitution that, after years of unrest, lawlessness, and the denial of people as the holders of power and citizens as legal subjects, recognises not only the rule of the people but also the fundamental rights of the citizens. If we accept Heller’s idea that a constitution is, “an informed process to plan and organise social and political life,”⁶⁰ our current constitution is then an instrument subject to a process that should be continually adapted to the country’s social, economic, and cultural conditions. This is, of course, not to mean that the holders of power should be left free to amend the constitution as they wish and to turn constitutional change into a day-to-day practice. The constitution as a whole, particularly the articles that codify the fundamental rights of citizens and the principal values of a democratic system, should be the most difficult provisions to amend. It is thus positive that the amendment of the fundamental rights and freedoms of citizens is not possible in the current Afghan constitution. Therefore, the constitution should be made adaptable so that its idealistic articles can, in the longer term, respond to the changing social organisation and democratic needs of the people. A constitution is not a regulation of traffic offences, whose articles can be changed because of an increase in monetary inflation or a rise in traffic offences. With this reminder, I turn to my main discussion.



Image 2: One of the victims of domestic violence in Afghanistan. It was reported that this woman’s husband cut off her lips and nose.

It is important to refer to some legal principles on the character and structure of the state and its ideal goals before discussing the fundamental rights of citizens. To prevent any misunderstandings, I once again remind that my discussion here focuses on the text of the law as a legal instrument and hence it will only refer to the separation between the legal claim and its lived reality where this is directly relevant to the discussion, since a discussion of the implementation policy and breaches of the law is mostly political.

59 Juli Zeh, *Die Diktatur der Demokraten* (Hamburg: Körber-Stiftung, 2012).

60 Cited in Spanta, “Observations on the Draft Constitution of Afghanistan,” 45.

As indicated, there is a permanent principle in law which says that there is always a disconnection between the constitutional claim and its reality; in German, this principle is known as *Diskrepanz zwischen Verfassungsanspruch und Verfassungswirklichkeit*. As such, progressivists and reformists generally aim to bridge this gap.

The 2004 constitution is indeed a return to democratic values and fundamental human rights after the constitutional laws in the 1950s. It is also a break from the lawless past toward establishing the authority of the people within the legal context.

The principle of the sovereignty of the people

Article 4 of the 2004 constitution explicitly recognises the principle of the sovereignty of the people. Therefore, from a legal standpoint, the most founding principle of democracy is re-established in this constitution. This article states that “National sovereignty in Afghanistan shall belong to the nation, manifested directly and through its elected representatives.”⁶¹ This article hence recognises both direct and representational forms of democracy. The fundamental difference about this principle in this constitution compared with previous ones is that this constitution also refers to the direct exercise of power by the people. This means that people become the source and origin of political authority instead of the king or ruler; authority is thus reified, and this natural right of people, which they exercise in association with one another and which forms the basis of their determination, enters into a recognised social contract. The phrase that “the nation exercises...” sovereignty “directly or through its representatives” means that the Afghan Constitution includes a blend of elements from both direct and representational democracy. As a result, as in Athens where citizens (that is, free, property-owning men, members of the metropolitan, and members of the city-state) could directly participate in their city-state’s executive and judicial affairs, specific spheres have also been identified in Afghanistan where people can directly take part in decision-making processes. Therefore, from the viewpoint of legal theory, the exercise of determination and participation does not only occur through elected representatives; people can also directly participate in decision-making processes.

Although the constitution is not explicit about direct processes of the exercise of power and how people can directly make decisions, it is clear that this makes reference to the creation of village councils, the participation in referendums, and the like.⁶² Within a normative theory of democracy, the issue with this article is that the constitution defines the Afghan nation as composed of ethnicities while the nation is constituted by the set of a nation’s citizens, even in democracies that regard nations as arising from ethnicities, and that the citizens can belong to various ethnic and tribal groups. The definition of the Afghan nation as composed of ethnicities is fraught with a serious problem, according to political sociology and democratisation theory. Even if such a definition is liked by many, it is practically in conflict with the democratic understanding of the nation as a social contract, comprising free citizens. Within the practical sphere, this is also in contravention of the constitutional provisions on individuals as the fundamental elements of the nation, who are entitled to citizen rights. The rights and freedoms of citizens in Afghanistan have been codified along with their duties in a separate chapter. On the other hand, defining rights in a collective (i.e., ethnic) sense creates a serious ambiguity in the definition of the rights of citizens as individuals holding human and citizen rights. The recognition of Afghanistan’s ethnic diversity, due to the country’s multi-ethnic reality, should have been differently treated by the law, instead of legally interpreting the individual identity of citizens in an ethnic sense. For instance, it would have been better to rewrite this constitutional provision as follows: “Afghanistan is a multi-ethnic country where various ethnicities such as Pashtuns, Tajiks, Hazaras, Uzbeks, Baluchis, Pasha’is, and others live. The Afghan nation comprises all individuals who have the citizenship of Afghanistan.” Such an expression is congruent with the spirit of democracy, because a democratic state is based on the law and is free from ideological tribalism.

⁶¹ *Constitution of Afghanistan*, Article 4, 2004 (SY 1382)

⁶² Hans Vorländer, “Grundzüge der Demokratie” (Bonn: Bundeszentrale für politische Bildung, 2013). Athens had a direct form of democracy from 508 to 322 BCE. Decision-making processes were direct and unmediated. All citizens of Athens, excluding women, slaves, and foreign residents, could gather in the town square or in the courts and decide political matters. Everything relating to the Polis was considered “political”; therefore, the citizen as the holder of authority of the Polis had a right to decide its fate.

This is exactly the problem of Saudi Arabia, where the country is named after a specific tribe (as in the name of Saudi Arabia); as such a naming process constitutes a political identity. It means that the Arabian Peninsula belongs to the House of Saud and as such, sovereignty is theirs. Such an understanding and interpretation of a democratic state is in fact the continuation of pre-democratic and pre-Enlightenment perceptions within a social context that intends to find a way into participatory democracy. A democratic state has no ideological tribe or ethnicity. Such a state is impartial in terms of its tribal or ethnic belonging. The state derives its legitimacy from the people, and the people are composed of all citizens without any discrimination on such grounds as ethnicity, gender, religion, language, and so on.

The principle of social justice and the protection of human dignity

Article 6 of the constitution states that “The state shall be obliged to create a prosperous and progressive society based on social justice, preservation of human dignity, protection of human rights, realization of democracy, attainment of national unity as well as equality between all peoples and tribes and balance[d] development of all areas of the country.”⁶³ This article, legislatively speaking, is one of the constitution’s programmatic articles: on the one hand, it expresses the political and social structure of the state; on the other hand, it requires the state to fulfil what have been presented as the constitutional ideals. The obligation of the state, “to create a prosperous and progressive society based on social justice, the protection of human dignity, the protection of human rights, and the realisation of democracy,” demonstrates the ideals of the constitution. The state’s aim for “the protection of human dignity” refers to the human dignity of the individual. This dignity, as previously mentioned, is not subject to ethnicity, race, religion, or any other belonging. The state’s commitment to respect this principle—the principle that a human being has rights—derives from the rights that are inherent in the human nature.

The state’s commitment to establish “a prosperous and progressive society based on social justice” is the embodiment of the principle of a social state, which differs, in its nature and purposes, from a purely liberal state or a liberal democracy that principally reduces democracy to a series of political approaches and preferences. The democracy intended by the Afghan Constitution presents goals and ideals that create social commitments for the state—among them, a commitment to create a state of public welfare. This requires the state to intervene in economic issues in order to establish social justice. The social state is an idealistic element and an instrument to realise a constitutional norm. The phrase, “a prosperous and progressive society based on social justice,” entrusts a responsibility to the state. This responsibility of the state is further clarified in Paragraph 2, Article 14 of the constitution: “The state shall adopt the necessary measures for provision of housing and distribution of public estates to deserving citizens in accordance with the provisions of law and within financial possibilities.”⁶⁴ As further clarifications do not exist in the idealistic parts of the constitution, one cannot but refer to legal literature and theories on the social state, or the state of public welfare, in order to better understand this subject.

The establishment of “a prosperous and progressive society based on social justice” requires the state to organise a social order—an order in which social justice is respected.⁶⁵ In many such cases, the laws mostly prescribe what the state cannot do, but in this case the law, due to the importance of social justice, requires the state to take measures to establish social justice. In other words, the law recognises the state as the mediator among different social classes in order to realise social justice and authorises the state to intervene in economic affairs within the framework of the law and of national interests. The difference between this type of state and totalitarian and liberal states is that a totalitarian state confiscates people’s property in the name of social equality and equity but for the benefit of specific classes of people, while a liberal state does not intervene in economic affairs and believes, with Adam Smith, that an invisible hand on micro-economic foundations equilibrates the economy. By contrast a state of social welfare, as

63 *Constitution of Afghanistan*, Article 6, 2004 (SY 1382).

64 *Constitution of Afghanistan*, Article 14, 2004 (SY 1382).

65 Otto Bachof, *Begriff und Wesen des sozialen Rechtsstaates* (Berlin: Walter de Gruyter & Co., 1954), 39, 43.

based on the above mentioned legal principles, is a mediating state. As a mediator, this state provides the material, political, and cultural contexts for a humane life and the prerequisites of equality for a society's individuals.

However, due to difficulties in the definition of social justice and the lack of explicitness in this article, it should also be regarded as an idealistic one. Put differently, this article expresses a constitutional goal or claim. In such cases, a citizen cannot sue the state in a court of law because social justice has not been established. The lived reality of the law is such in many of the world's states, and abstract goals fall within the sphere of constitutional normative values.

The state has an obligation to provide destitute and poor human beings and those with disabilities with a social life that does not harm their human dignity. This specified goal requires the state to create such systems of social safety that empower citizens to have equal chances to participate in social life and that deprive no citizen of his or her participation in political, social, and cultural processes due to his or her poverty or inability. This obligation would mean that a law-based democratic state has to provide justice and social security to its citizens. To realise these goals, the state has a duty to make laws and take appropriate measures. Laws on social aid, insurance, the right to free education, retirement, determination of minimum income standards for a humane life, and suchlike are included in a state's social obligations. Therefore, the legal emphasis on social justice, coupled with other norms such as a law-based state, human rights, citizen rights, and human dignity, constitutes one of the structural and idealistic elements of the constitution.

Respect for human rights and human dignity

Human dignity and human rights are also mentioned in this article, showing that they are also among the purposes and ideals of the Afghan state. Article 7 of the constitution reads, "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."⁶⁶ Afghanistan indeed faces many problems in implementing this article. Firstly, Afghanistan's accession to international treaties and conventions requires the country to respect its obligations thereunder. It is an indisputable legal principle that a country should implement the binding norms of international laws once it is a party to them. Afghanistan acceded to a number of international treaties, including the UDHR, during previous governments as well as with the government of the IRoA. To accede international conventions means, legally speaking, that a state party to these conventions has a duty to harmonise its laws with the provisions of the conventions. In other words, it is an accepted legal principle that when a state adheres to binding international treaties, the implementation of international law acquires supremacy over that of national law, and that the state is required to reform its domestic laws to ensure compatibility with the international treaties to which it is a party.

However, there have been cases in Afghanistan where the state has, in practice, faced problems fulfilling this commitment. For instance, Afghanistan encountered political difficulties and confrontations in drafting and ratifying the Law on the Prohibition of Violence against Women—problems that persist to this day.

I myself have been witness to discourses that negate the obligation of the government of the IRoA to make its laws compatible with international treaties to which Afghanistan is a party. The argument of some of these individuals who have the power to monitor the implementation of the Afghan Constitution is that the duty to respect international treaties in their binding form is in contravention with the principle of national sovereignty, while it is a structural principle of the constitution to regulate international relations and legal interactions with the world. As a result of this faulty understanding, an official of the Constitutional Oversight Commission, in the case of amnesty for prisoners swapped and transferred by Tajikistan to Afghanistan, was of the opinion that it is the unilateral power of the Afghan president to pardon these prisoners, if the president deems it necessary. He was invoking Paragraph 18, Article 64 of the constitution in this respect.⁶⁷

⁶⁶ *Constitution of Afghanistan*, Article 7, 2004 (SY 1382).

⁶⁷ *Constitution of Afghanistan*, Article 64, 2004 (SY 1382).

However, the prisoner exchange contract between the two countries stipulated that each party could only pardon the prisoners agreed upon by the other party. A bilateral agreement between two national sovereign states due to their mutual obligations emanates from the supremacy of international law over domestic law. This matter is not unconstitutional.

However, if a contract is in conflict with the constitution, then firstly, the government should not sign it; secondly, if the government has signed a contract that contravenes the constitution, the National Assembly should not ratify it; thirdly, if the National Assembly has also ratified it, the competent authorities can request the Supreme Court to do a constitutionality review, pursuant to Article 121 of the constitution.⁶⁸ If the Supreme Court considers such a contract to be unconstitutional, the government has a duty to withdraw from or to reform, in agreement with the other party to the contract, such sections of the contract that are in conflict with the constitution. Similarly, the National Assembly can decide the withdrawal of Afghanistan from such bilateral or multilateral treaties. If these do not happen, the Afghan state has an obligation to fulfil the contracts.

Although Article 6 of the constitution describes the “protection of human rights” as a purpose for the Afghan state and Article 7 requires the state to “observe” these rights, there are serious differences in how to interpret and construe these articles. It is natural for there to be legal differences between “observing” and “protecting” human rights. Although the UDHR is not a binding international treaty or convention, it becomes binding on a state that, of its own volition, “assigns” itself to “respect” it. If a state should accept or protect the UDHR, the legal binding nature of such an act differs in international law in terms of respecting or not respecting its obligation. Since Afghanistan is a UDHR signatory and Article 6 of the constitution “requires” the state to protect human rights without limitation in the law on respecting the instrument in a partial or complete manner, the Afghan state has the obligation to respect the UDHR as a whole.

Nevertheless, there are substantial differences of opinion among human rights scholars and practitioners when it comes to implementing these rights in Afghanistan. These differences emanate from Article 3 of the constitution and an understanding of human rights as enshrined in the UDHR. Article 3 states that “No law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan.”⁶⁹ Some lawyers and scholars in Afghanistan and elsewhere in the Islamic world believe that the UDHR contains certain provisions that run contrary to the beliefs and precepts of the holy religion of Islam. As a corollary, a binding commitment to the UDHR causes the Afghan state to commit itself to accepting what contravenes Article 3 of the constitution. From a point of view of legal hierarchy, if a contradiction exists between Islamic teachings and the principles contained in the UDHR, there is no doubt, from the perspective of constitutional oversight authorities, that Article 3 should be take precedence over Article 7. (Prof. Nematullah Shahrani, Head of the Constitutional Drafting and Review Commission, told this author that in discussions about the draft constitution, it was clear to the commission that Article 3 has supremacy over Article 7. The same was repeated by Prof. Abdul Salam Azimi, the former Chief Justice and member of the Constitutional Drafting and Review Commission.)

The difference among Muslim scholars relates to whether or not the UDHR content is in conflict with the basic principles of Islam. Some scholars believe that as stated in the UDHR, the equality of human beings, who are adherents to various religions, is against the spirit of Islam. This continues to be the ruling perception in many Islamic countries. Therefore, leaders and some scholars in Islamic countries promulgated the Cairo Declaration on Human Rights in Islam as an alternative to the UDHR. I have been witness to the fact that some individuals, who have themselves been involved in drafting and reviewing the current Afghan constitution, believe that Afghanistan is only committed to those UDHR articles that are not in conflict with the spirit of Islam and, naturally, Article 3 of the constitution. This author has also been witness to discourses where leaders of the Afghan *ulama* council have also insisted on the same point. Besides, the discussions in the Afghan National Assembly reveal that parliamentarians have, in some cases, fundamental differences of opinion in this regard. Therefore, some think that “respecting and

⁶⁸ *Constitution of Afghanistan*, Article 121, 2004 (SY 1382).

⁶⁹ *Constitution of Afghanistan*, Article 3, 2004 (SY 1382).

fulfilling the UDHR” does not mean that all UDHR articles should be fulfilled by the Afghan state. As a result of such an understanding, the punishment for apostasy in Afghanistan is death, while the UDHR recognises religious freedom as a human right.

A well-known case is that of Abdul Rahman, who converted to Christianity and was later convicted by the Afghan judiciary to the death penalty for apostasy. He finally received permission to leave Afghanistan for asylum in Italy because of a massive intervention by foreign countries and foreign human rights organisations. Another noisy case was that of the young journalist Parwiz Kambakhsh, who was accused of having disseminated atheistic papers and materials and was, as a result, sentenced to death. When national and international campaigns were launched to secure his release, I was one of those who demanded his freedom for a variety of reasons, including that there was no acceptable proof for Kambakhsh’s conviction. A high-ranking Afghan government official told me in the presence of the Afghan president that if this apostate is freed, he would personally kill him. Enormous efforts were needed to convince the president to pardon him. Despite serious threats, we managed to hide him in the residence of the then UN Secretary-General’s Special Representative for Afghanistan, Kai Eide. After a while, with Kai Eide’s and my help, he managed to leave Afghanistan on board the personal airplane of the Swedish Minister of Foreign Affairs, Carl Bildt. Kai Eide has described this incident in his book, *Power Struggle over Afghanistan*.⁷⁰

Muslim *ulama* and scholars as well as Islamic countries have differing views and experiences about whether the UDHR is in contravention with the fundamental principles of Islam. Most Afghan human rights activists, women’s rights activists, and some members of the National Assembly do not see any contradictions between the UDHR and Islamic values. They also have a different understanding of Articles 6 and 7 of the Constitution of Afghanistan. This means that they do not see a contradiction between the provisions of these two articles and those of Article 3. Some Muslim thinkers such as Abdolkarim Soroush, Mohsen Kadivar,⁷¹ Mohammed Arkoun, and others do not see any contradictions between Islam and human rights, either. This is also the experience of the Republic of Turkey. In Turkey, all human rights principles and values are binding on the state to such an extent that if these rights are violated by the state, the citizens of this country can sue the state in the judiciary and, ultimately, in the European Court of Human Rights. It is binding on the Turkish state to enforce decisions made by the judiciary as well as by the European Court of Human Rights.

In interviews conducted by myself and by Mr Ali Shah Hasanzada, an AREU colleague, with a number of civil society activists and experts on citizen rights and freedoms in Afghanistan, one can find the same dichotomy of perspectives about fundamental rights and freedoms. For instance, Mohammad Moheq, a well-known Afghan religious intellectual, said the following in response to a question about Islamic perspectives on human rights and women’s rights:

In the view of many experts, what are today recognised as international human rights conventions are today’s manifestation of what had already been considered by the sharia to be so; as such, there is no contradiction between them (Sheikh Mohammed Ghazali, Human Rights between Islamic Teachings and the Universal Declaration of Human Rights).

From this viewpoint, sharia, as part of the religion, is a legal mechanism toward the achievement of the general purposes of the religion. The general purposes of the religion aim for the realisation of moral values and within the Islamic ethnical system, the three values of freedom, justice, and equality rank among the most foundational values. The concept of tawhid [oneness], according to many Muslim experts, exists in order to eliminate all forms of discrimination among human beings, and equalise and liberate them from all manifestations of servitude and slavery.⁷²

70 Kai Eide, *Power Struggle over Afghanistan* (New York: Skyhorse, 2012).

71 Mohsen Kadivar, *Haqqal-nās: Islām vahuqūq-ibashar*, 3rd ed. (Tehran: Intishārāt-iKavīr, 2004), 85-163.

72 Mohammad Moheq, pers. comm., 27 September 2014.

Dr Abdul Rauf Herawi, an Al-Azhar University graduate, states the following:

The fundamental rights of citizens, as enshrined in the Afghan Constitution, have not been guaranteed by the state. Judicial and law enforcement institutions have not been able to implement the law properly. Also, the lack of the rule of law and a faulty understanding of the law are among the reasons why the fundamental rights of citizens have been violated. For example, when a person speaks of apostasy or discusses religion in such a manner, he is convicted of apostasy, and the constitution has granted such a right. Sanctities are made by us as human beings and have no genuine aspects in religion. This is justified as being anti-religion, but this is a tradition made by human beings, which should be separated from religion. For instance, when Abdul Rahman translates the Qur'an, why should he be tried? On what crime should he be tried? There is no provision on apostasy in the Noble Qur'an; this has only been mentioned in the Hadith. The Qur'an is not the religion of compulsion, as in the Qur'anic verse stating that there is no compulsion in religion.⁷³

However, Sayyed Rateb Mozaffari, who holds a PhD in International Relations and is a Professor of Law and Political Science at Kabul University, gave the following view in an interview with Hasanzada:

Articles 3 and 7 of the Afghan Constitution are contradictory. The form of our governmental system is an Islamic Republic, and this is in conflict with international charters, treaties, and conventions. An example is in the area of women's rights. The solution is to amend Articles 3 and 7 of the constitution. The text of the constitution should be amended or a mixed system should be set up, as in Turkey. Nevertheless, a proper constitutional texture does not exist even there, and it has not been assimilated in the social context.⁷⁴

Mohammad Es'haqzada, Professor of Law and Political Science at the American University of Afghanistan, also says that Articles 3 and 7 of the Afghan Constitution are contradictory.⁷⁵ As referred to above, the issue of the (in)compatibility of human rights and Islam has led to substantial differences of opinion among Muslim scholars, both theoretically and practically.

Mr Abdul Rahman Sa'id takes a contrarian position, stating that "I do not see any contradiction between Articles 3 and 7 of the constitution." He believes that "the term 'observe' in Article 7 does not mean an obligation to do so."⁷⁶

Equality of rights for Afghan citizens

The rights and duties of citizens have been codified in 37 articles, starting with Article 22, in Chapter 2 of the Constitution of Afghanistan. Article 22 reads, "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."⁷⁷

The equality of rights for citizens is a foundational principle of the Afghan Constitution and a law-based state. The legal equality of citizens without any discrimination and distinction means on the one hand that the law applies equally to all individuals, and on the other hand that all individuals have equal rights. Practically, equality before the law means that the law applies to all, regardless of their social or other positions. It also means that no government institution can abuse the implementation of the law to someone's benefit or detriment. From a content perspective, the legal equality of citizens means that legal principles, because they are prescriptive in the provisions that this or that matter is not permitted and because they address both the state and citizens, apply to all Afghan citizens as well as, where relevant, to the state on an equal footing and without discrimination and distinction. In other words, social standing,

⁷³ Dr Abdul Rauf Herawi (Head of Law, Department of Justice Ministry), interview with Ali Shah Hasanzada, 7 September 2014.

⁷⁴ Sayyed Ahmad Rateb Mozaffari (Professor in the Faculty of Law and Political Science, Kabul University), interview with Hasanzada, 13 September 2014.

⁷⁵ Mohammad Es'haqzada (Professor in the Department of Law and Political Science, American University of Afghanistan), interview with Hasanzada, 20 September 2014.

⁷⁶ Lotf al-Rahman Sa'id, interview with Hasanzada, 23 September 2014.

⁷⁷ *Constitution of Afghanistan*, Article 22, 2004 (SY 1382).

authority, or power should not be a reason for distinction and discrimination among citizens when the law is implemented. At the same time, equality before the law, from a legal content viewpoint, means that what is equal cannot be transacted in unequal forms and manifestations. This can be seen in cases where a wealthy and more educated citizen exercises the right to vote, but another citizen, who is poor and uneducated, is divested of such a right; or where a citizen who is rich and powerful commits a crime and is subsequently exempted from the application of law, but another citizen with an inferior social position is interrogated and prosecuted by the law.

The principle of equality before the law causes the citizens of a country to have equal rights and duties in areas defined by the law. In other words, equality before the law is the origin of and/or justification for other equalities.

The right to elect and be elected

Article 33 of the Afghan Constitution stipulates that “The citizens of Afghanistan shall have the right to elect and be elected.”⁷⁸ This article is interrelated with the article on the equality of citizens before the law. The equality of all citizens in their right to vote emanates from the philosophy of their equality before the law. This principle is also structurally interwoven with the principle of social justice, as indicated above. One of the most basic interpretations of social justice is that citizens should be provided with equal opportunities to participate in social, political, and cultural life.

Equality before the law also has protective outcomes in political decision-making processes for citizens when they are subjected to the application of the law.

The right to create political parties

Paragraph 2, Article 35 of the constitution states that “The people of Afghanistan shall have the right, in accordance with provisions of the law, to form political parties.”⁷⁹ Legally speaking, a political party is a voluntary association of citizens created for long-term political activity; its members also have shared political objectives.⁸⁰ The inclusion of this right in the constitution means the promotion of the political party as a constitutional institution. Such a constitutional promotion requires these institutions to respect the norms of the Afghan constitution in their activity and operation. The right to form a political party as a political association of citizens means that such a right is legally the right of all citizens but considering the principle of equality, if a party achieves the majority of votes in an election, it is not permitted, due to its majority, to violate the rights of those in the minority. The protection of the rights of the minority from the hegemony of the majority is one of the meanings behind the principle of legal equality. Political parties thus have specific responsibilities and duties in a democracy.

Political parties exist to shape and represent the thoughts and ideas of citizens, to provide political education and awareness to them, and to influence public opinions. As political associations of citizens, political parties, whether they work within the National Assembly or not, take part in political power to actively influence processes in political life. Political parties defend the interests of people in a political system and participate in legal political institutions to fulfil these interests. In other words, political parties provide the context for citizen participation in the political processes and system as a whole, but they also inform and systematise their participation through political awareness, thereby ensuring organised political mobilisation. No doubt, every political party seeks power in order to implement its programmes and goals. In a representational democracy, political parties that come to power mostly exercise political power on behalf of the people.

⁷⁸ *Constitution of Afghanistan*, Article 33, 2004 (SY 1382).

⁷⁹ *Constitution of Afghanistan*, Article 35, 2004 (SY 1382).

⁸⁰ Ipson, *Staatsrecht II*, 166.

The social domain of law and the prohibition of discrimination

Constitutional articles also demarcate the boundaries of rights and freedoms. For example, when articles mention such terms as “citizen” or “Afghan,” they mean that the rights and freedoms contained therein are only applicable to Afghan citizens or nationals. This would mean that other human beings are not entitled to the rights and freedoms contained in the relevant articles. From a constitutional and democratic standpoint, the domain of the term “nationals” includes all citizens of the IRoA without any racial, linguistic, gender, or other discrimination. Hence, limiting the domain of rights and freedoms on religious or gender grounds unavoidably undermines the foundational principle of a law-based state, notably the legal equality of citizens.

Article 22 of the constitution begins by stating that “Any kind of discrimination and distinction between citizens of Afghanistan shall be forbidden.” Normatively, this article includes the domain of the national society, i.e., the reality of a citizen-based society. According to this article, the prohibition of discrimination is a desire to realise an ideal as an obligation of the state, so the principle of legal equality of citizens is implemented from a content perspective. The law here looks at a bitter social fact. The law identifies inequality or a type of discrimination on the grounds of gender or religious belonging and requires the state to eliminate such discrimination, so the legal equality of citizens is established. The prohibition of discrimination means the lack of distinction or difference between two agents, legally speaking. If it is meant to prohibit “any kind of discrimination and distinction between the citizens of Afghanistan,” this indicates that Afghan citizens are equal and that they are protected, according to the provisions of this article, from any damage arising from the state’s unequal treatment.

In this same area and regarding the equality of citizens and the need to eschew discrimination, Article 22 of the constitution stipulates 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.”⁸¹ Although the equality of women, as with men, before the law had been enshrined in previous Afghan constitutions, this was particularly important in the current constitution. This constitution was made after the Taliban regime had taken away all of women’s human rights and in an atmosphere where the forces opposing the legal equality of women and men were in a process of social and political withdrawal and felt morally down due to the oppression that had been justified against women. In practical terms, this article was also significant for the return of women to the country’s social and political life. In some cases, this return has even gone beyond expectation. The solidarity of international political and civilian community with Afghan women, the growth in education for women, and the effects of mass media and domestic human rights institutions made it possible to extensively raise women’s equality with men in an unprecedented manner. It should not be forgotten that women’s migratory experience and their own increased awareness have at least influenced opinions in the urban part of the society.

No doubt, the egalitarian demands of women and the affirmative action for them such as the requirement for at least 25 percent representation of women in the National Assembly have caused the emergence of a women’s lobby in the country. This lobby emerged in the society in such a way that all officials were, one way or another, obliged to accept equality.

However, after a while, women’s equality with men provoked the reaction of the society’s conservative circles. This reaction was expressed in terms of recourses to ultraconservative interpretations of religion and the reduction of religion to tradition or at least in terms of eclectic justifications. Such a reaction increased in parallel to women’s presence in the media and cultural institutions and to their efforts aimed at cultural reforms. As a result, the reaction of the patriarchal society was, in many cases, very violent. The violent reactions ranged from poisoning the drinking water in girls’ schools to throwing acid on women’s heads and faces, honour killings, and amputations. These reactions aimed to oppose women’s emancipation and the provisions of Article 22 of the constitution. Afghan patriarchal society demonstrated the worst type of male violence and reprisal against women. Despite all of this, the major progress and achievements made by Afghanistan during the last years are highly remarkable.

⁸¹ *Constitution of Afghanistan*, Article 22, 2004 (SY 1382).

I have personally been witness to many discourses in this area where some Afghan government officials and *ulama* council members were severely doubtful about the equality between women and men. When the Law on the Elimination of Violence against Women was endorsed by the president in an executive decree, all were concerned about the reaction of specific social circles. When, in accordance with constitutional requirements, the law had to be sent to the National Assembly for its ratification, I was witness to the many efforts made by women's movements and human rights activists so as to prevent its rejection in the National Assembly. Despite many efforts, when it proved probable that the law would be rejected by majority in the National Assembly, it was, in a controversial legal manoeuvre, removed from the National Assembly agenda.

Dr Herawi, a Muslim intellectual, said in an interview with Hasanzada:

The draft Law on the Prohibition of Violence against Women was prepared by the Ministry of Women's Affairs, but was considered by the Ministry of Justice to be compatible with the Islamic sharia. But I think that this law has its own inadequacies and should be reviewed. We should pay attention to these points when we want to draft a law. Firstly, the law should conform to the traditions of the Afghan people; yet this draft law is not compatible with the traditions of the people. Secondly, it should not only prevent the unrest and dissolution of families, but it should also solve the problems of the community; this law does not propose this. For example, if a man causes his wife to suffer, he should be sentenced to three months in prison, but this causes unrest in the family. Also, the law should not be in conflict with the Civil Code; yet this law says that any man who marries a second wife should be imprisoned, and this runs contrary to the Afghan Civil Code. Besides, no law should be against the Islamic sharia, while some of the articles in this law are anti-sharia. I think that there has been a foreign influence on drafting this law. There can be violence against everyone, including men and children. I recommend that the Ministry of Women's Affairs should prepare a new draft in co-operation with civic institutions, the Supreme Court, academia, and religious institutions, so that the law is made compatible with the country's traditions and laws and so that its inadequacies are addressed. The law, as it currently stands, should not be further processed.⁸²

In an interview with Mr Hasanzada, Mrs Najla Rahel refers more explicitly to the contradictions between Islam and the Law on the Elimination of Violence against Women. She thus states:

Whether the Law on the Prohibition of Violence against Women is congruent to Islamic values or not, this law is not without issues, but not as it was debated in Parliament. . . It was discussed to the extremes that according to the Law on the Prohibition of Violence against Women, anyone who beats his wife must be jailed, while Islam says that if a husband beats his wife so that there is no scar from the beating, this is not punishable. The two, however, are contradictory. Another example is that of polygamy, which is allowed by the Qur'an for a man, but this law says that if a man marries a second wife while the first wife is still alive and disregards Articles 86 and 89 of the Civil Code, that man should be punished, which is contentious. In this case, the first wife can demand a separation due to damage.⁸³

The right to freedom and its boundaries

Article 24 of the constitution stipulates:

Liberty is the natural right of human beings. This right has no limits unless affecting others' freedoms as well as the public interest, which shall be regulated by law.

Liberty and human dignity are inviolable.

The state shall respect and protect liberty as well as human dignity.⁸⁴

There are several noteworthy points in this article. First is the acceptance of the universal principle that "freedom is the natural right of human beings." According to the letter of the constitution, freedom is not only limited to Afghans and/or Muslims. Freedom is the natural right of all human beings; therefore, this article recognises freedom as a universal natural human right. The previous article talked about Afghan citizens. This means that

82 Herawi, interview with Hasanzada, 2014.

83 Najla Rahel, interview with Hasanzada, 10 September 2014.

84 *Constitution of Afghanistan*, Article 24, 2004 (SY 1382).

in accordance with the provisions of the previous article, there are certain rights that are specific to Afghan citizens and other cases in which the treatment of Afghan citizens differs from that of the citizens of other countries. Yet freedom is the natural right of all human beings, including non-Afghan residents. Moreover, the limits of freedom have extended to the freedom of others and public interests. The state cannot restrict the right to freedom as per its whims and fancies. This is exactly (being outside the sphere of state interference) what makes these rights universal and applicable in all territories and within all cultural contexts. The difference between this right and the fundamental rights of citizens is that the latter has been reserved for citizens alone. However, the state can only restrict the fundamental freedoms of citizens when such a restriction provides the prosperity of the society and guarantees freedom for all the members of the society.

Whenever freedom is discussed, it is natural for there to be different perceptions of it. However, freedom, as meant here,

consists in the freedom to do everything which injures no one else; hence the exercise of the natural rights of each man has no limits except those which assure to the other members of the society the enjoyment of the same rights. These limits can only be determined by law.⁸⁵

Some fundamental rights are an instrument to achieve an objective. For instance, the right to work is ensured in the law so that citizens can have a life free of worry, which is humane. However, although freedom helps to shape and develop a human being's personality, promotes knowledge, and makes it possible for a person to achieve a better social standing, freedom is not an instrument but rather a goal and an ideal *per se*. Hence, a person exercising his or her right to freedom does not need to justify why he or she does so. The human being exercises their freedom, because this is an inseparable part of their existence as a human being. As an objective, the principle of freedom is a human being's protective right from interferences by the state or other powerful actors. On the one hand, the right to freedom ensures a human being's freedom to do what he or she wants to do; on the other, it is closely interconnected with the "inviolability of human dignity"; therefore, it provides protection to a human being from state interferences.

A number of other rights and freedoms emanate from the right to freedom and the protection of human dignity. These include, for instance, the protection of a person's privacy; the right of autonomy and the use or exchange of information in speech, writing, and correspondence; and the right of a person to enjoy privacy in personal and discursive spheres and the like. In some cases, the Afghan discourse does not recognise an organic connection between the right to freedom and a person's privacy. Some consider that freedom is divisible. For instance, when a person becomes a public personality due to their political responsibilities, their personal privacy should be open due to his or her public position. On the contrary, if a person assumes political responsibilities due to his or her participation in a country's political life, it does not mean that their human origin has changed, thus giving the public or the media the right to violate their personal privacy. This public personality, when he or she goes to his or her bedroom, is again the same person. Similarly, he or she, like all human beings, has the right to have their privacy safeguarded when talking to his or her spouse or going to the doctor's for a medical check-up. How can a public personality allow the public (the state) to interfere in the personal affairs of his or her spouse or children? Apart from this feudalistic thought, a public personality's spouse or grown-up children have their own personal lives with their own secrets that their close family might not be aware of or even not be allowed to be aware of, in societies where human beings have attained a position of citizenry free from family-based clans.

The right to freedom of expression

The right to freedom of expression is derived from the universal principle of freedom as a natural human right. Categories of fundamental human freedoms are organically interwoven and should hence not be treated as separate entities; otherwise the entire legal system that guarantees fundamental human freedoms is undermined. Article 34 of the constitution reads:

85 "The Declaration of the Rights of Man and of the Citizen."

Freedom of expression shall be inviolable.

Every Afghan shall have the right to express thoughts through speech, writing, illustrations as well as other means in accordance with provisions of this constitution.

Every Afghan shall have the right, according to provisions of law, to print and publish on subjects without prior submission to state authorities.⁸⁶

Freedom of expression is a basic requirement of a democracy. It contributes to the health, survival, and sustainability of a democracy as well as the lively and responsible participation of citizens in it. The above mentioned article opens with the statement, “Freedom of expression shall be inviolable.” Here a universal human right has been accepted. From a principalist perspective, all human beings have the right to freedom of expression, including those who are not citizens of the IROA. In the remainder of this article, emphasis is placed on freedom of thought and its expression through speech or writing as a fundamental right of Afghan citizens. In terms of freedom of expression as a fundamental human right and as a fundamental citizen right in Article 34 of the constitution, two issues are noteworthy. Firstly, citizens can express their thoughts and opinions through various media, which means that they have the right to express themselves in writing or speech or through images, films, electronic media, and suchlike. Secondly, freedom of expression is not concerned with the significance of what is expressed. Otherwise, determining what is an important or unimportant thought and allowing citizens to express only important things would give a state the capacity to control the thoughts and opinions of its citizens. Citizens can freely express their thoughts within the framework of the law and where, as in the case of any other freedom, one person’s right ends where another person’s begins, a principle that should not be harmed. Individuals expressing their thoughts cannot resort to the principle of freedom of expression to disseminate lies and defamations. It is a goal of the freedom of expression to provide an explanation for the thoughts expressed. The informed expression of lies is thus a denunciation of freedom. This is the reason why Article 24 of the constitution, after mentioning freedom as a “natural human right,” adds that “This right has no limits unless affecting others’ freedoms as well as the public interest, which shall be regulated by law.” Setting this limitation that a citizen’s freedom can be restricted by the law within the boundaries of public freedom and the freedom and privacy of others contributes to guaranteeing and safeguarding freedom as a goal. Of course, this restriction does not mean that the legislator can, of their own volition, make and ratify such rules and regulations in order to limit citizen freedoms. In the law-making process, the legislator has a duty to follow the letter and spirit of the constitution and the values enshrined therein in addition to the international conventions to which Afghanistan is a party. As said, one of the areas involving the boundaries of the freedom of others is the personal privacy of individuals. A person’s individual privacy has a direct connection to the principle of human dignity; therefore, no one has the right to invade another person’s individual privacy under the pretext of the right to freedom.

The public sphere of human behaviour should receive attention because of its breadth. However, questions still remain: should the right to have access to information occur in the spheres where citizens require such information in order to fulfil their civic responsibilities or does the exercise of freedom go beyond the boundaries established by the law as privacy? How can one harmonise the exercise of this freedom with boundaries and requirements that are deemed necessary to safeguard human dignity or where do the boundaries of public interest as established by the law to delimit the freedom of expression begin?

For example, the draft version of the access to information law required security institutions to provide media representatives with all kinds of information, as demanded by them. However, there are types of information in all of the world’s democracies that are, in accordance with the law, kept out of public access due to national security concerns. There were also cases in this draft law where the applicant would have been able to intrude into a person’s privacy. The author was one of the people who opposed these provisions in the draft law, because national security requires in some cases that information be kept out of some people’s access without a decision from a competent court of law, while in other instances, certain information related to a person’s privacy and human dignity is none of the public’s business. This draft law was translated

⁸⁶ *Constitution of Afghanistan*, Article 34, 2004 (SY 1382).

from Anglo-Saxon sources and then prescribed by Anglo-Saxon writers for those in developing countries. For these reasons, the draft law was amended. This author was among those insisting on its amendment.

There are a series of fundamental human freedoms that are delimited, within the legal framework, by subsidiary laws or other necessary measures because of the boundaries set by the law, but this should not be done to such an extent so as to allow the state to harm a person's human dignity and, thereby, undermine the relevant freedom as a whole. For instance, although Article 34 guarantees freedom of expression, other related freedoms can be delimited under extraordinary circumstances as required by national interests or the boundaries established by the freedom of others. For example, the freedom to form associations and demonstrations (Article 36 of the constitution)⁸⁷ or the principle that every Afghan has the right to travel to each and every part of the country⁸⁸ can be demarcated where they harm a society's well-being and freedom.

A key point in the discourse on the freedom of expression is how to treat those who oppose the freedom of expression and democracy. The point here is whether or not those who systematically oppose freedom of expression and democracy have the right to exercise this right in order to nullify it. Depending on their historical and democratic experiences, different countries have dealt with this issue in different ways. In Germany, those systematically campaigning for fascism, those exercising freedom of expression to denounce historical facts about crimes against humanity, or those exercising freedom of expression to insult and inflict damage on the religious values of others and undermine their religious sentiments are not allowed to exercise this right. However, as per the law, there is no limitation in this regard in the US.

The right to access information

The survival of democracy depends on citizens being aware about what is happening in their country. Through monitoring state performance, citizens can make judgements about the realities and thus make informed decisions. Hence, the fundamental right of citizens to access information has been provided for in democratic laws. The "right to access information" is a prerequisite of a democratic society since it acts as an instrument for society to control state acts and shape opinions and thoughts. In this regard, Paragraph 2, Article 50 of the constitution states:

The citizens of Afghanistan shall have the right of access to information from state departments in accordance with the provisions of the law. This right shall have no limit except when harming rights of others as well as public security.⁸⁹

There are various ways in which citizens can access information. On the one hand, citizens have the right to access information on national and international developments through the radio, television, newspaper, Internet, and social media, and there are no limitations in this regard. On the other hand, citizens have the right to request necessary information from the administration. The first allows citizens to use their right to access information in order to increase their knowledge and political awareness and participate as responsible citizens in the political processes. Furthermore, the second establishes direct control by the people over the performance of the administration.

The protection of human dignity

The principle of human dignity is inviolable and, according to the provisions contained in Article 24 of the constitution, "The state shall respect and protect liberty as well as human dignity."⁹⁰ As indicated in similar cases above, this basic approach sets the human being at the centre of power vis-à-vis the monarch or the ruler, which is justified by the principle of liberty as a value inherent in the human nature. Stressing this principle is in fact indicative of the philosophical origin of democratic law-making and an approach based on human rights and the fundamental rights of citizens.

87 *Constitution of Afghanistan*, Article 36, 2004 (SY 1382).

88 *Constitution of Afghanistan*, Article 39, 2004 (SY 1382).

89 *Constitution of Afghanistan*, Article 50, 2004 (SY 1382).

90 *Constitution of Afghanistan*, Article 24, 2004 (SY 1382).

Human dignity is the source of all human liberties and securities. As a concrete being, a human person has dignity and it is the duty of the state to safeguard it. This is the spirit and ideal of all legal approaches that depart from humanistic foundations and become a source of inspiration to eliminate many forms of individual and social discrimination and injustice. This means that a human being, a free human being, and the freedom of human beings are ends in themselves, and not ends to achieve other ends. The objective is to create a free society, and the *sine qua non* for this free society is to have free citizens. The objective is not to create a state that acts as a master. Guided by this same principle, the state is not allowed to treat citizens in a demeaning manner or in a way that humiliates their human status. In this regard, Article 29 of the constitution says:

Persecution of human beings shall be forbidden.

No one shall be allowed to or order torture, even for discovering the truth from another individual who is under investigation, arrest, detention or has been convicted to be punished.

*Punishment contrary to human dignity shall be prohibited.*⁹¹

Human dignity has been enshrined in the country's constitution as a transcending value and a guaranteeing source of human freedom without any conditions that can allow the state to manipulate it.

Contrary to cases such as the right to freedom and other rights that can be derogated under extraordinary circumstances by the law, the protection of human dignity is an unconditional obligation of the state. Each and every human being—whether Muslim or non-Muslim, man or woman, disabled or able-bodied, black or white, and so on—has human dignity, and no one's human dignity is respected more than another's. In accordance with the law, the state can restrict or ban the right to stage demonstrations due to public security requirements, or it can search the houses of suspected persons or monitor some individual's correspondence, but it cannot, under any circumstances, persecute people or act in such a way that infringes upon a person's human dignity. No social interest or collective threat gives such a right to a state. In the world's developed democracies, not only can the state not harm a person's human dignity after their birth or otherwise interfere in their human origin, but in ethical discourses of human dignity it likewise cannot do so within the boundaries of the living human being prior to their birth. For instance, legal and moral discussions about research on human genetics have raised heated issues about human dignity in various countries.

In countries like Germany, considerable limitations have been set on genetic research for the purpose of safeguarding human dignity. Questions about the extent to which humanity is allowed to prevent the birth of defective children or to have recourse to science to create flawless and intelligent human beings are among the topics that have raised many controversies with regard to human dignity.

However, the lived reality concerning the non-persecution of human beings has been different in Afghanistan. Despite continued efforts by the former president and this author, people are still ill-treated and tortured in Afghanistan's penitentiary system, and violations of their human rights still persist. A considerable reduction in torture should not result in complacency and a lack of continued attention by the country's relevant authorities. As the country's former National Security Advisor, I have had documents and reports at my disposal about the torture and ill-treatment of citizens, and I have always done, in co-operation with national and international organisations, what was possible to tackle these problems.

The right to life

The right to life is a fundamental human right that has been included in the Afghan Constitution. Article 23 of the constitution reads, "Life is the gift of God as well as the natural right of human beings. No one shall be deprived of this right except by legal provision."⁹²

91 *Constitution of Afghanistan*, Article 29, 2004 (SY 1382).

92 *Constitution of Afghanistan*, Article 23, 2004 (SY 1382).

It is the duty of the state to safeguard the right to life. In many countries, the interpretation of this right has led to the abolition of the death penalty. No one can be deprived of this right, except under extraordinary conditions pursuant to the Afghan Constitution. No one is stripped of their right to life in Afghanistan, except in accordance with the *sharia* provisions and/or the applicable law. Depriving a human being of their right to life has rarely occurred in recent years. The right to life and the right of a human person to physical and mental integrity are fundamental human rights. The inclusion of this right in the constitution shows the law's commitment to prevent the humiliation of the human being and reduce them to being a subject of violent acts, acts of physical punishment, or acts that are harmful to their integrity. This right empowers the citizen to protect themselves from the state's violent acts. This article also states that a human being cannot be subjected to mental pressure and that acts causing the violation of human dignity and harm to their physical and mental integrity are impermissible.

The right to citizenship abroad and to protection from foreign states

Article 28 of the Afghan Constitution provides for the security and freedom of the country's citizens from requests and accusations made by foreign states. Generally speaking, the Afghan citizen resides in the legal territory of the Afghan national state. The residing of the citizen within the national legal context emanates from the right to national sovereignty and the fundamental principles of national law. There is a direct connection between this principle and the principle of protecting the freedom of the country's citizens. Therefore, no Afghan citizen can be deprived of their citizen rights by the state, and, as the state has a duty to protect the rights and freedoms of citizens, it also has a duty, in accordance with constitutional provisions, to protect its citizens from other states. This protection is not only limited to the national territory, but the state also has the obligation to provide consular and legal protection to its citizens outside its borders. Waiving these rights is possible under special conditions and on the basis of the principle of reciprocity. Article 28 of the constitution thus states:

No citizen of Afghanistan accused of a crime shall be extradited to a foreign state without reciprocal arrangements as well as international treaties to which Afghanistan has joined. No Afghan shall be deprived of citizenship or sentenced to domestic or foreign exile.⁹³

As members of the nation, citizens are party to the social contract and are the source of political power. The state acts on behalf of the people; therefore, it does not have the right to unilaterally deprive a democratic state's citizen of the sphere of application of the social contract, which constitutes the national territory.

Severing the citizenship of a citizen involves the forced expulsion of that person from the politico-legal relationship to which they are a party. This means uprooting politico-social ties and divesting a human being from their environment. In the history of our country, expelling citizens out of the country has been an instrument of punishment used by princes against people considered to be their *re'aya*, or servant folks. The same experience was also commonplace in Western dictatorships. The severing of citizenship ties has always been a political penalty. Although the Afghan Constitution contains no explicit provisions on the prohibition of political punishment, the spirit of this constitution and the entire legal system that it establishes denounce political crimes; furthermore, there are practically no political prisoners in today's Afghanistan.⁹⁴ Hence, no Afghan is deprived of their citizenship, unless of their own volition. The application of this legal provision is very important for Afghan women who marry foreign nationals. In the past, if an Afghan woman married a foreign man she lost her Afghan citizenship due to marriage, but this is against the spirit of the current constitution if such a provision continues to exist in the law on Afghan citizenship.

Limiting the extradition of Afghan citizens to other countries gives more legal security to the citizen; yet this practice is recognised in principle as it can only occur on the basis of previous agreements such as bilateral accords or international conventions to which both the requesting country and Afghanistan are both parties. Here the principle of mutual respect, the equality of national sovereignties, and the principle of legal equality between sovereign states are taken into account.

⁹³ *Constitution of Afghanistan*, Article 26, 2004 (SY 1382).

⁹⁴ Soraya Sobhrang, interview with Hasanzada, 16 September 2014.

The right to privacy and freedom of correspondence

Freedom and privacy of correspondence is another fundamental citizen right that has been enshrined in various Afghan constitutions. Article 37 of the Constitution of Afghanistan reads thus:

Freedom and confidentiality of correspondence, as well as communications of individuals, whether in the form of a letter or via telephone, telegraph, as well as other means, shall be secure from intrusion.

The state shall not have the right to inspect personal correspondence and communications, unless authorized by provisions of the law.⁹⁵

It is inevitable that contemporary human beings use modern communications gadgets. Modern forms of media have provided many more communication possibilities to human beings than traditional communications tools. New communication instruments have made the world increasingly accessible to human beings. However, it has long been possible for other people to access the content of correspondence. In pre-modern times when information was exchanged through emissaries and carrier pigeons, both the volume and quality of the information as well as foreigners' access to this information were limited. The intrusion of US and British intelligence agencies into people's personal information through modern communication technologies showed how individuals' private spheres and fundamental rights are being threatened by states in the contemporary world. Thus, not only can large states and their intelligence agencies potentially inflict harm on individuals' private spheres, but even one's own state can have the tendency to infiltrate in to the private sphere and violate the confidentiality of one's correspondence.

The above mentioned Afghan constitutional provision at least theoretically protects individuals from state interferences in the confidentiality of their correspondence. The principle of privacy of correspondence includes the spaces in between the sender and the recipient of the information—these spaces may be virtual as in modern media or real as in the points between two or more geographical locations. Citizens need to be assured that the content of their exchanges will be guarded against hackers and eavesdroppers. Confidentiality is not only limited to the content of the correspondence or conversation. It also means the confidentiality of those performing the communication or exchange. The state has no right to know who is talking to whom or exchanging information with whom; likewise, it has no right to know the content of the dialogue, correspondence, or discourse.

The confidentiality of correspondence can be derogated by the law under special conditions and for a limited period of time. The requirements for such derogation must be specified in the law. Only public security interests can allow the derogation of this right in accordance with applicable legal provisions.

Security of tenure for housing

Just as a person's correspondence should be legally immune from state interferences, the privacy of housing and the security of its tenure should be immune from transgressions and encroachments by the state. Article 38 of the Afghan Constitution states:

Personal residences shall be immune from trespassing.

No one, including the state, shall have the right to enter a personal residence or search it without the owner's permission or by order of an authoritative court, except in situations and methods delineated by law.

In case of an evident crime, the responsible official shall enter or search a personal residence without prior court order. The aforementioned official, shall, after entrance or completion of search, obtain a court order within the time limit set by law.⁹⁶

⁹⁵ Constitution of Afghanistan, Article 37, 2004 (SY 1382).

⁹⁶ Constitution of Afghanistan, Article 38, 2004 (SY 1382).

Every human being needs housing where they can feel completely safe from interferences by the state and by those who are in powerful positions or are inquisitive; this place is thus the citizen's private house. In principle, this is a place where the state and public and private informers have no right to infiltrate. This can be a place that is the private property of the citizen or one that has been rented by them. It is not the will or perception of the state that acts as a determining factor, but it is important that the place becomes a house for the resident based on their own will. This understanding means that it is not only private houses but also hotel accommodation and student hostels that are immune from the state's illegal interferences.

Housing that is free from state interference and enjoys legal security of tenure is interrelated with human dignity. For this reason, searching a person's private house is a serious interference of their privacy. Therefore, if it is necessary to search a person's private house under exceptional circumstances, this should be assessed by an impartial and independent authority and can, in a democracy, only be decided by an independent and impartial court. The judicial ruling on temporary derogation of security of tenure must be proportionate to the accusation made against the resident.



Image 3: A demonstration held in the western city of Herat against increasing insecurity and abductions.

The surveillance of a person's private house by law enforcement agencies, including through the use of modern equipment such as closed-circuit television and so on, even if set up outside the house, is a violation of that person's privacy, unless it is legally permitted. If legally permitted, security institutions should have sufficient evidence to do so as well as a prior verdict from a competent court. In a democracy, monitoring a person's house, even for the discovery of crimes, is not permissible if this causes a violation of the person's privacy. For instance, it is not permitted to infiltrate into a person's conjugal life in order to discover criminal acts, because this is a sphere of human dignity—a sphere that must not be infiltrated even with a verdict from a competent court.

Freedom of movement

Freedom of movement and residence has been enshrined as a fundamental right of Afghan citizens in Article 39 of the country's constitution:

Every Afghan shall have the right to travel and settle in any part of the country, except in areas forbidden by law.

Every Afghan shall have the right to travel outside Afghanistan and return, according to the provisions of the law.⁹⁷

⁹⁷ Constitution of Afghanistan, Article 39, 2004 (SY 1382).

This article relates to the general principle of freedom. Here the practical aspect of the law is that citizens have the right and freedom to travel to and reside in any part of the country without having to acquire a permit from the state. This citizens' right is also compatible with the right to freedom of movement. However, the compatibility between this article and the UDHR text does not mean that all human beings can enjoy this right in Afghanistan. The residence of foreign nationals and/or their settlement within Afghanistan's territory is subject to the law on foreigners' affairs.

The right to property

Article 40 of the constitution speaks of the right of the Afghan citizen to have private property:

Property shall be safe from violation.

No one shall be forbidden from owning property and acquiring it, unless limited by the provisions of law.

No one's property shall be confiscated without the order of the law and decision of an authoritative court.

Acquisition of private property shall be legally permitted only for the sake of public interests, and in exchange for prior and just compensation.

Search and disclosure of private property shall be carried out in accordance with provisions of the law.⁹⁸

This article is important for Afghan citizens from two points of view. Firstly, it is a fundamental human right for people to have legitimate property and to own what they have gained through their initiative, effort, and knowledge. Secondly, an individual's property should be protected by the law, given the lawlessness and oppression to which Afghan people have been exposed, particularly during the *coup d'état* on 27 April 1978 and its aftermath. Although the constitution does not specify property, there are explicit references to property including site-specific, non-site-specific, and intellectual property found in Afghanistan's customary law, the provisions of *sharia*, and pertinent laws. Dispossessing someone of their property can only happen as required by public interests, and this must be compensated by the state.

The right to education

According to Article 45 of the constitution, it is the duty of the state to develop the educational curricula. The purpose of this article is clarified in terms of its relationship with the fundamental rights of citizens when it is considered part of the broader right to free education. Article 45 of the constitution states as follows:

The state shall devise and implement a unified educational curricula based on the tenets of the sacred religion of Islam, national culture as well as academic principles, and develop religious subjects curricula for schools on the basis of existing Islamic sects in Afghanistan.⁹⁹

This article makes it clear that the state has a monopoly over the development of school curricula. Although the constitution provides for the establishment of private educational institutions in accordance with the law, these institutions also have the obligation to follow the curricula developed by the state, pursuant to Article 45.

Although Article 43 is interrelated to Article 45, what is meant in Article 43 on the right to education represents a specific legal concept, which is connected with elements of a social state, as referred to previously. Article 43 of the constitution stipulates that education is "the right of all citizens of Afghanistan, which shall be offered up to the BA level in the state educational institutes free of charge by the state."¹⁰⁰

⁹⁸ Constitution of Afghanistan, Article 40, 2004 (SY 1382).

⁹⁹ Constitution of Afghanistan, Article 45, 2004 (SY 1382).

¹⁰⁰ Constitution of Afghanistan, Article 43, 2004 (SY 1382).

This article by which Afghan citizens have the right to study up to the BA level in state-run institutions is among the constitution's idealistic or programmatic articles. This article is not implemented in practice; otherwise all those who could not study up to the BA level in state educational institutions due to the unavailability of opportunities could sue the state.

The right to work

The inclusion of the right to work in the constitution is another element relating to the social welfare state or the social state. Article 48 of the constitution thus reads:

Work is the right of every Afghan.

Working hours, paid holidays, employment and employee rights and related matters shall be regulated by the law.

Choice of occupation and craft shall be free within the bounds of law.¹⁰¹

The recognition of the right to work as a constitutional ideal and a citizen right represents a significant constitutional acknowledgement of social human rights. Social and economic human rights are given less attention in the legal instruments of most liberal democracies, even though the human right to adequate standards of living and to work are fundamental human rights. The human right to choose a profession is an acceptance of human autonomy to create a humane life without dependence on others. The right to work and choose one's profession is an acceptance of a citizen right to create frameworks in which the human being can actualise their talents and abilities as a free person who is not dependent on others. The possibility for a human being to freely choose their education and profession is a prerequisite for a person's free participation in society.

The prohibition of forced labour and the elimination of a feudal lord-vassal tradition

Regarding Article 49¹⁰² on the prohibition of forced labour, this measure aims to prevent a return to the feudal lord-vassal tradition in which states forced citizens to work compulsorily for their governments.¹⁰³ Inflicting forced labour on a human being is in contravention of their autonomy and the rule of the people. This article therefore re-emphasises the transition from a society based on a feudal lord-vassal relationship to one of citizenry. However, under extraordinary circumstances and for purposes of public peace, the law voluntarily regards it as a duty of citizens to participate and help in situations of war, disasters, and other emergencies. Even from this perspective, solidarity among citizens is mostly a moral message—a reference to civic values rather than forcing people to work.

The right to due process of the law

The extra-legal, princely state gives itself the right to treat its citizens in the way it chooses. This has been seen extensively in the Islamic Orient. Caliphs and rulers confiscated people's properties, jailed them, and did all sorts of other things as per their whims and fancies—all of which would be criminalised under the country's current laws.

Some constitutions as well as the experiences of citizens who are informed about their rights show that there are various ways through which citizens can ask for the restoration of their rights and can prevent state violations of their rights. Some of these instruments, depending on who is addressed by the political act, are not used vis-à-vis the state. Examples include strikes and/or demonstrations by workers against private employers (in such cases, the alleged victims also have the right to take the case to the court). Our purpose here is the recourse by citizens to legal means in order to restore their violated rights. The first is the right to complain before a court of

¹⁰¹ *Constitution of Afghanistan*, Article 48, 2004 (SY 1382).

¹⁰² *Constitution of Afghanistan*, Article 49, 2004 (SY 1382).

¹⁰³ Ghobar, *Afghanistan in the Course of History*, 740.

law for an illegal act committed by the administration, by which the citizen alleges to have been harmed. The second is the right to petition before non-judicial bodies.

Article 51 of the constitution thus states:

Any individual suffering damage without due cause from the administration shall deserve compensation, and shall appeal to a court for acquisition.

Except in conditions stipulated by law, the state shall not, without the order of an authoritative court, claim its rights.¹⁰⁴

Two approaches are important here as far as the codification of this article is concerned. The first concerns the citizen rights of individuals, according to which the administration and state are not allowed to inflict harm on a citizen's property, privacy, and physical and mental health or to undermine their human dignity or remove them from their job in an illegal manner. The second is based on the principle of a law-based state and administration. The most important perception of the principle of a law-based state is that like the individual, the state is also responsible before the law. The state has a responsibility to account for its illegal acts that harm its citizens.

The citizen who is harmed by the action or inaction of a state institution can sue the state in a court of law. The citizen's right to complain includes all state institutions. No state institutions, including security institutions, are exempted in this respect. A competent administrative court is the decision-making authority on these issues.

The second legal means to have recourse to when dealing with illegal acts is the citizen's right to complain to the National Assembly. Article 88 of the constitution says, "Each of the two houses of the National Assembly shall form commissions to study issues under discussion in accordance with the Regulations of Internal Duties."¹⁰⁵ And in accordance with Article 89, "The House of People [*Wolesi Jirga*] shall have the authority to establish a special commission, on the proposal of one-third of its members, to review as well as investigate the actions of the Government."¹⁰⁶ Afghanistan's experience shows that both houses of the National Assembly have complaints commissions. As it is a duty of the National Assembly to control state acts, it is also naturally within the authority of the National Assembly to control administration acts. Therefore, citizens can lodge their petitions to the complaints commissions of the National Assembly. However, decisions by the National Assembly act more as a control over state performance than as a substitute for judicial verdicts. For instance, the National Assembly cannot require the administration to pay compensation to the alleged victim.

Besides the possibility of complaining before the judiciary and/or legislature, the current constitution has made an additional achievement by making it possible for citizens to approach the Afghanistan Independent Human Rights Commission (AIHRC). Citizens can thus complain to the AIHRC for violations of their human rights.

The constitution establishes the AIHRC in Article 58 and extends the right to complain from complaints lodged against the state's illegal acts to issues related to human rights. The mentioned article thus states:

To monitor respect for human rights in Afghanistan as well as to foster and protect it, the state shall establish the Independent Human Rights Commission of Afghanistan.

Every individual shall complain to this Commission about the violation of personal human rights.

The Commission shall refer human rights violations of individuals to legal authorities and assist them in defence of their rights.¹⁰⁷

¹⁰⁴ Constitution of Afghanistan, Article 51, 2004 (SY 1382).

¹⁰⁵ Constitution of Afghanistan, Article 88, 2004 (SY 1382).

¹⁰⁶ Constitution of Afghanistan, Article 89, 2004 (SY 1382).

¹⁰⁷ Constitution of Afghanistan, Article 58, 2004 (SY 1382).

From the perspective of the constitution, the phrase “every individual” here includes all human beings. This extends the AIHRC’s sphere of activity from Afghan citizens to all individuals, including foreigners, and allows citizens to approach the AIHRC and ask for assistance if their human rights—and by extension their citizen rights—are violated. The constitutionalisation of the AIHRC shows that the legislator has given extraordinary value to the protection of human rights.

The protection of family

Compatible with Islamic teachings, the Afghan nation’s tradition and experiences of many other countries, the Afghan Constitution recognises the family as the fundamental unit of society and, hence, protects it. Article 54 of the constitution says:

Family is the fundamental pillar of the society, and shall be protected by the state.

The state shall adopt necessary measures to attain the physical and spiritual health of the family, especially of the child and mother, upbringing of children, as well as the elimination of related traditions contrary to the principles of the sacred religion of Islam.¹⁰⁸

This article requires the state to protect the institution of the family formed on the basis of legal matrimony. This is because the law emphasises the family as the fundamental unit of society that is protected by the state. This article also requires the state to pay attention to the physical and mental health of the mother and the child. There is a fundamental contradiction at the heart of this article, because some conservative circles consider early marriages to be legally permitted. Given all scientific findings, child marriages inflict bodily and mental damage on children. It is a state obligation to prevent physical and mental harm, pursuant to this constitutional provision. The constitutional promotion of the right to form a family as a fundamental citizen right is also indicative of some protection for citizens, meaning that men and women have the right to choose their spouses of their own will and no one can force them to do so. The other interpretation of this provision is that the prohibition of marriage is only possible where one or both intending parties have not reached the marriageable age, as in child marriages.

However, the reality is that there are many early and forced marriages in our country. These have been made possible by customary practices and specific interpretations of Islamic jurisprudence. Such contentions came to the fore in the case of the Shia Personal Status Code.

The right to form a family as a fundamental citizen right means that the two parties have equal rights and responsibilities in their shared marital life. Given that two people make the marriage contract and that Article 22 of the constitution makes it clear that “The citizens of Afghanistan, man and woman, have equal rights and duties before the law,”¹⁰⁹ the wife and husband should also have equal rights in their conjugal life. Any other interpretation is in contravention to the spirit of the constitution. At the same time, the two parties to the contract, i.e., the spouses, can agree otherwise on issues such as property and work inside and outside the home, but this agreement should conform to the principle of their human dignity, individual autonomy, and society’s moral norms. In other words, the two parties cannot agree in such a way that this violates the human rights and fundamental rights of one or both of them. When the family has been promoted by the legislator as the “fundamental pillar of the society,” and has thus been constitutionalised, this means that the relevant authorities need to register it, so the state knows how to protect this institution. Subsidiary issues are regulated in and by family law.

¹⁰⁸ *Constitution of Afghanistan*, Article 54, 2004 (SY 1382).

¹⁰⁹ *Constitution of Afghanistan*, Article 22, 2004 (SY 1382).

4. Conclusion

Nearly a century has elapsed since the fundamental rights of citizens began to be codified in Afghan constitutions. This process has been marked by ups and downs. One problem has been the way in which these rights have been constitutionalised, while another has been the separation between the theory and the lived reality of constitutional laws. Although Afghan constitutionalist and reformist movements have launched many campaigns and made numerous sacrifices to legitimise and legalise political authority since the early 19th century, especially in the early 20th century, in all truth, these efforts have not been a reflection of the civic movements seen in Europe. This is the reason why Afghan progressivist movements were defeated in confrontations with the same people who would have ultimately benefitted from them. The social classes that needed to act for the creation of a state based on law along with their civic programmes were non-existent in early 19th-century Afghanistan. This structural inadequacy is still visible in Afghanistan, at least in the political arena. What I mean to say here is that social arrangements are based more on ethnic and collective identities rather than the common demands of classes with a shared political identity or socio-political groups with shared programmes. In other words, individuality and an individual awareness based on the social contract continue to be weakly and faintly reflected in the country.

Due to this same reason, the first approaches to the codification of the fundamental rights of citizens in Afghanistan's constitutions mostly emanated from rulers who had an orientation toward Western modernity, particularly technological modernisation. The Afghan rulers and even the first Afghan modernists did not have the necessary awareness about the philosophical underpinnings of the fundamental rights of citizens. Additionally, there were no social institutions that could have acted as protectors and enforcers of these values. Therefore, protracted oppression to varying degrees continued well into the early 21st century. In other words, the fundamental rights and freedoms of citizens were not practically strengthened in our legal literature, although the 1964 constitution is considered a major step forward in this direction.

As referred to in this study, despite its difficulties, textual contradictions, and ambiguities in expression of the connection between the country's civilisational values and those of the modernity, the current Constitution of Afghanistan is the most developed and progressive constitution to date. This constitution marks a turning point in the country's legal history in terms of its codification of the fundamental rights and freedoms of individuals and citizens. However, there are a number of basic inadequacies, which are worth noting.

Structural violence is another problem facing the full realisation of citizen rights in Afghanistan. This type of violence emanates from and is reproduced by our social institutions and the relationships governing them. There are a number of entrenched habitual patterns in our country that make it possible to accept violence and its socialisation. Family violence, violence at school, and violence by superiors against inferiors act as the heritage of a traditionalist society. In societies like Afghanistan's where a person's individuality is not accepted by all as an institution *per se*, it is not always acceptable for all to respect the rights of a person as an individual. A person's privacy can, with great difficulty, adopt one particular meaning in a society in which their personality is crystallised in collectivistic terms, and this meaning differs from that found in a society based on the individuality of such individuals.

Inadequate public awareness and knowledge and, more importantly, the inability of a civic culture to make people aware about their rights, help them defend these very rights and freedoms and promote civic resistance to rights violations, constitute another constraint in the implementation of people's fundamental rights and freedoms.

This dichotomy between the theory and the lived reality of the Afghan Constitution with regard to people's fundamental rights and freedoms reveals an imbalance in the reality of the country's constitutional and legal life. This imbalance cannot be addressed only through amending the constitution or removing its contradictions and constraints, although this indeed could be very necessary. It is inevitable to increase the education and awareness of human beings, coupled with strengthening their belief in a law-based state and developing the commitment of those

who are responsible to enforce the law. These inadequacies cannot be addressed only by taking administrative measures. Rather, a continued historical process is required to tackle these problems. This continued historical process cannot achieve its purposes if this is not supported by people's participation in defending their fundamental rights and freedoms. The realisation of the rights and freedoms of citizens without having citizens who want to realise them and make efforts to this end is like wanting to establish a democracy without having democrats: restricted, restrained, and damaged.

5. Recommendations

Amendment of the Constitution

- Because of contradictions between the text of the constitution and the possibility for contradicting and different interpretations, any ambiguity in the text of the constitution should be removed. For example, Article 92, Clause 3 of the constitution reads that “The no-confidence vote on a Minister should be explicit, direct, as well as based on convincing reasons.” Thus, it is not clear in the text who has the authority to determine if the no-confidence vote is based on convincing reasons or not.
- The letter of the constitution needs greater clarity in the articles that stipulate the commitments of the Afghan state vis-à-vis human rights. In such disputatious cases, the letter of the constitution should be given more explicitness in order to prevent ambiguities in the future. It is useful to learn from the perspectives of Muslim intellectuals who have a different interpretation of Islam than the traditional *ulama* and to learn from the positive experiences of Islamic countries such as Turkey, Tunisia, Indonesia, and elsewhere.
- The recognition of Afghanistan’s ethnic diversity, due to the country’s multi-ethnic reality, should have been differently treated by the law rather than legally interpreting the individual identity of citizens in an ethnic sense. For instance, it would have been better to rewrite this constitutional provision in this manner: “Afghanistan is a multi-ethnic country where various ethnicities such as Pashtuns, Tajiks, Hazaras, Uzbeks, Baluchis, Pasha’is, and others live. The Afghan nation comprises all individuals who have the citizenship of Afghanistan.” Such an expression is congruent with the spirit of democracy, because a democratic state is based on the law and is free of ideological tribalism.

For the government of Afghanistan

- The state has a duty to make laws and take appropriate measures. Laws on social aid, insurance, the right to free education, retirement, determination of minimum income for a humane life, and suchlike are included in a state’s social obligations. Therefore, the legal emphasis on social justice, coupled with other norms such as a law-based state, human rights, citizen rights, and human dignity, constitutes one of the structural and idealistic elements of the constitution.
- The state is obliged to adapt its laws to the provisions and obligations of the conventions that it has joined. In other words, it is an accepted legal principle that when a state accepts binding international treaties, the implementation of international law acquires supremacy over that of national law. The state is thus required to reform its domestic laws to ensure compatibility with the international treaties to which it is a party.
- However, if a treaty is in conflict with the constitution: firstly, the government should not sign it; secondly, if the government has signed a contract that contravenes the constitution, the National Assembly should not ratify it; thirdly, if the National Assembly has also ratified it, competent authorities can request the Supreme Court to undertake a constitutionality review, pursuant to Article 121 of the constitution. If the Supreme Court considers such a contract to be unconstitutional, the government has a duty, in agreement with the other party to the contract, to withdraw from or reform such sections of the contract that are in conflict with the constitution. Similarly, the National Assembly can decide the withdrawal of Afghanistan from such bilateral or multilateral treaties. If these do not take place, the Afghan state has an obligation to fulfil the contracts.
- The state shall observe the principle of equality. The equality of rights for citizens is a foundational principle of the Afghan Constitution and a law-based state. The legal equality of citizens without any discrimination and distinction means that the law applies equally to all individuals and that all individuals have equal rights. In practical terms, equality before the law means that the law applies to all, regardless of their social or other positions. It also means that no government institution can abuse the implementation of the law to someone’s benefit or detriment.

- The spread of a culture of violence and war over the last three decades and the presence of state and para-state forces that seek exemption from the law have contributed to the growth of a violent culture, which makes it easily possible for individuals and institutions who want to violate the fundamental of citizens to do so.
- The persistence of a culture of impunity for the violators of people's rights due to the unpreparedness of law enforcement agencies is another basic issue restricting the realisation of people's fundamental rights.

For citizens, commissions, and social societies

- Afghanistan's civic and human rights movement needs to be promoted to a genuine civic movement—one that can reply to strong popular initiatives and campaigns in order to stand for and defend the fundamental rights and freedoms of citizens. No doubt, the protection of human and citizen rights requires strong institutions. To have such institutions, it is important to provide technical and material means so that these institutions can turn into active campaigns rather than becoming mechanisms to write proposals aimed at attracting aid.
- Political parties that exist to shape and represent the thoughts and ideas of citizens, to provide political education and awareness for them, and to influence public opinions, shall be supported. Political parties provide the context for citizen participation in the political processes and system as a whole; they also inform and systematise their participation through political awareness, thereby ensuring organised political mobilisation. No doubt, every political party seeks power to implement its own programmes and goals. In a representational democracy, political parties that come to power mostly exercise political power on behalf of the people.
- One of the main issues relating to the fundamental rights of citizens enacted in the constitution as well as their implementation is to have the mechanisms for people to access and take a lawsuit to court when those rights have been violated. Unfortunately, citizens have not yet experienced such a system to date. Thus, the violation of citizens' fundamental rights by the government has been left without judicial proceeding. Therefore, it is recommended that firstly, the AIHRC takes the lawsuits to court by representing the citizens in cases in which their rights have been violated. Secondly, the complaint commission of the Wolesi Jirga, or Meshrano Jirga, should help the citizens with their complaints.

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