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# Taliban's Pursuit of Recognition and Legitimacy: Is a Monarchical Constitution the Solution?

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## **SYNOPSIS**

Following the seizure of power in August of 2021, in an effort to show the world that they are conforming to international standards of governance, the Taliban have reinstated the Constitution of 1964. Through this, the Taliban are trying to hide their tyrannical regime behind a constitutional façade. The Taliban's arbitrary exercise of authority undermines rule of law, alongside other constitutional values and principles. Despite the ongoing humanitarian crisis in Afghanistan, recognition and aid should be provided to a legitimate and effective government in good standing within the international community, a set of criteria which the Taliban do not adequately satisfy.

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## About the Authors



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Professor Ghizaal Haress is a constitutional lawyer, with 19 years of experience working in different legal aspects in Afghanistan. She has earned her LLM from School of Oriental and African Studies, University of London, and LLB from Kabul University. She is fluent in English, Dari, Hindi, Urdu, and Pashto.

She was the first Ombudsperson for Islamic Republic of Afghanistan (2019–2021). The Office of the Ombudsperson was mandated to inspect the allegations of corruption for high governmental officials. Prof. Haress was the first woman to ever lead an anti-corruption institution; and the first woman to ever lead a law enforcement institution in Afghanistan.

Prior to that, she was a Commissioner at the Afghanistan Independent Commission for Overseeing the Implementation of the Constitution, where she, as the only female Commissioner, led the institutions work on constitutional interpretation and developing legal opinions. Prof. Haress is also an Assistant Professor of Law at the American University of Afghanistan, where she has been teaching since 2012. She was the Chair of the Law Department at AUAF from 2016-2019.

## **Problem**

The Taliban seized control of the country after waging an unjustified war for years. With nominal to no support domestically, and no recognition internationally, the Taliban have resorted to desperate means to create some level of legitimacy for their regime. A part of this effort has been the reinstatement of the Constitution of 1964, while nullifying the Constitution of 2004, claiming it was a western imposed constitution on Afghans and did not comply with Islamic law.<sup>1</sup> Constitutions, legitimized by broad social credence and endorsement, serve as anchors for political regimes and legal systems, and provide the state with a basis for sovereign legitimacy. But, by reinstating the Constitution of 1964, the Taliban are attempting to hide their tyrannical regime behind a constitutional façade. The current political reality in Afghanistan is the antithesis of a constitutional regime. There is a wide gap between the text of the Constitution of 1964 and the Taliban's actions; be it the structural aspects of the Constitution or the guarantee of fundamental rights. The Taliban have disregarded most of the provisions established by that Constitution, and it is very unlikely, given their past records, that this will change in the future.

## **Essential Background**

After the fall of the Taliban in 2001, a new constitutional government was established in Afghanistan, which instituted a new Constitution in 2004;<sup>2</sup> however, soon after the country began to suffer from the Taliban's insurgency. Attempts to reach a peace deal between the Afghan government and the Taliban insurgency never reached fruition. Eventually, in February of 2020, the United States signed a direct agreement with the Taliban in Doha and pledged withdrawal from Afghanistan. Consequently, the Taliban expanded their territorial control with unprecedented scale and speed, until they seized power in Kabul in August of 2021.

Once in power, the Taliban were desperate for recognition and legitimacy both domestically and internationally. The Taliban had no popular support within the country, and there were immediate uprisings against their regime in major cities, particularly in the capital, Kabul. The Taliban subdued all voices domestically, particularly those challenging their legitimacy and demanding observance of women's rights. However, they have continued to seek international recognition.

The Taliban are pretending that they do believe in a legal and constitutional order, while their regime follows a constricted political, religious, and traditional ideology. They have narrow political participation, non-democratic institutions, absence of fundamental rights, suppression of media, and control of NGOs. They lack any mode of representative governance, or any system of checks and balances. The Constitution of 1964 is only used as a political tool, and thus should not be considered as a legitimization tool for the following reasons:

- Restrictions in the name of repugnancy: the Taliban have rehabilitated the Constitution of 1964, with the condition that the relevant provisions on King and Royal family and those contradictory to Islam shall not be valid. This gives the Taliban the flexibility to maneuver the implementation of the Constitution the way they wish. Taking into consideration their rigid and uncompromising interpretation of Islam, the Taliban will argue for various provisions of the Constitution to be un-Islamic if those articles fail to comply with their political agenda.

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1 [https://www.constituteproject.org/constitution/Afghanistan\\_1964.pdf?lang=en](https://www.constituteproject.org/constitution/Afghanistan_1964.pdf?lang=en)

2 [https://www.constituteproject.org/constitution/Afghanistan\\_2004.pdf?lang=en](https://www.constituteproject.org/constitution/Afghanistan_2004.pdf?lang=en)

- Cherry-picking provisions on structural aspects: The structure of the executive branch under the Constitution of 1964 is similar to the one of the Taliban. The Constitution introduces a head of state i.e., the King, with immense powers, and no accountability; a head of government i.e., the Prime Minister with limited political powers, responsible for running the day-to-day operations of the government, and the Cabinet. This is reflective of the Taliban's composition. They have a head of State i.e., Amir, who holds the highest power but has no accountability, a Chief Minister and then the Cabinet. However, rather ironically, the Constitution also calls for an elected parliament; Minister's accountability to the parliament, an independent and coequal judicial branch, and provincial councils, among other institutions, which are completely disregarded by the Taliban.

- Repudiating separation of powers: The Constitution of 1964 was Afghanistan's first Constitution introducing a meaningful separation of powers. The Constitution held the highest legal authority, elected representatives made the laws, government confirmed by the parliament enforced the law, and an independent judiciary adjudicated disputes and upheld fundamental rights. To the contrary, the Taliban hold full control of all state institutions, including the executive and judiciary branches with unconstrained authority, despite the precedent set under the 1964 Constitution stating otherwise. They have dissolved the parliament, and the institutions that facilitated elections.

- Defiance of fundamental rights: Afghanistan is one of the founding members of the United Nations, and among the countries that voted in favor of the Universal Declaration of Human Rights in 1948. Thus, the Constitution of 1964 introduced a comprehensive set of fundamental rights, and provisions on the rights of the criminal defendants. The Taliban have failed to exhibit any respect and observance for human rights. Since they have taken power, they have exerted power through coercion and have denied citizens their basic rights. They have not presented any clarity on the scope and extent of fundamental rights. This has resulted in constant violation of human rights. This creates the kind of paradox that is neither acceptable in the Islamic system of governance, nor in any constitutional regime.

Refusing women the right to education and work, limiting free speech and media, torturing detainees, refusing individuals the right to free trial before an impartial court, and denying citizens the right to assembly and demonstration, are a few examples of how the Taliban are systematically violating human rights, and how they disregard the rights enshrined in the Constitution of 1964.

## **Strategies and Solutions**

Legitimacy is the building blocks of state-citizen relations, and hence, the most important element of state-building. Citizens need to confirm the government's right to power. The Taliban are struggling to legitimate their power. While the international community is deliberating whether, and under what conditions, could the Taliban regime be recognized, they should not fall for the mere reinstatement of an old Constitution by the Taliban in knowing that the Constitution is not fully implemented, but rather, like in any other similar regime, remains a sham document with less authority than the power holders. The Taliban's arbitrary exercise of authority undermines rule of law and other constitutional values and principles.

## **Recommendations for Canada**

The Taliban are desperate for international recognition. There have been contacts between the Taliban and certain states since their takeover, to discuss bilateral relations, trade and humanitarian

women's rights as preconditions for recognition, and even provision of aid. Others have tried to reshape the Taliban's image to help integrate the group into the international system. However, human rights, particularly women's rights, an inclusive administration, enfranchisement and representative institutions, an independent judiciary, and free media, must be the redline for the international community before taking any steps towards recognition of the Taliban.

The Taliban are using a constitutional façade to legitimize their unrepresented regime and to exercise arbitrary governmental authority. The government of Canada should not consider the reinstatement of a Constitution, or overlook lack of domestic support to the regime, while contemplating recognition of the Taliban. International recognition of the Taliban will not legitimize their authority in the eyes of Afghans. Canada's stance on the Taliban's regime will influence its other partners at the international level as well.

Thus far, the Taliban's regulations regarding women and girls have been disproportionately discriminative, and it remains unclear what their policies will be in the future. While this may be a tactic to pressurize the international community to provide support and recognition to the Taliban, one must not forget that these are fundamental human rights and should not be subject to any kind of political dealing and debate.

While the need for humanitarian aid in Afghanistan remains critical, recognition and support should be provided to a legitimate government. Foreign recognition may not be a legal determinative for a state, but same as the Doha Agreement in 2020, the Taliban will gain further power and confidence as a regime. Recognition of the Taliban as a legitimate regime will also set an adverse precedent internationally, and will further encourage and empower hostile militant groups. Canada, like all other states, should act carefully. The Taliban's legal recognition could be interpreted as their empowerment and state legitimization.