

Identifying the Legitimacy of the Taliban Government and the Resurrection of Peace in Afghanistan

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Abstract

A government's legality and its recognition need to be tested through the lenses of international law where the government changes through unconstitutional measures. The Taliban's coming to power in Afghanistan is through unconstitutional and undemocratic means. Its control over Afghanistan raises questions about the fundamental nature of international law, politics, the State's internal governance, and issues crucial for international peace. These matters although of primary concern, however, compromised to a secondary position as their accomplishment is contingent on peace being restored and guaranteed by the class of people in the ruling hierarchy. Since the Taliban government is not recognised by many States, it puts to test, the international law criteria for recognizing the government of the State. The reluctance shown by the comity of nations in recognizing the government, further raises the related issue of international law, that how the comity of nations can create an inroad for human rights and peace in Afghanistan. The objective to establish peace in Afghanistan, by identifying the legitimacy of the Taliban regime, touches the core aspect of *de jure* government as recognized by international law and is also a key concern for setting the trust of Afghan people in international law and international institutions. This article sets the premise to know the position of international law, for recognising a government in a State where the change of government is not established by legal measures and therefore not recognised by other nations. Besides, the author attempts to explore the possibilities of setting the foundation and establishing human rights and related objectives for sustainable peace in Afghanistan. The author sets the dialectical discourse, for setting a roadmap to achieve peace in Afghanistan by applying international law provisions through international institutions.

I. Taliban and interface with democratic principles: a new equation for the comity of nations

The comity of nations for establishing a relationship with a new State or with a newly elected government relies both on the principles of international law and the internal legal system of the said State. There are certain positive norms of international law for whose effectiveness democracy is considered a better political option. However, this strand can

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be subject to critical analysis as many point to the hollowness of the democratic system of several States and still maintaining trust among the comity of nations.¹ The present Taliban government after attaining power and its interface with democratic principles and international law obligations, is setting a new equation for its recognition before the comity of nations. Law in practice of a State is often defined by the people at the helm of affairs and in Afghanistan, presently it is the Taliban that is controlling the political system. The present Taliban regime took over the power not by democratic means but by waging armed aggression against the elected government.² This regime has re-established the Islamic Emirate of Afghanistan (IEA)³ and has further brought changes in the style of governance by making substantive modifications to the theoretical and structural basis of the political, administrative, and judicial setup. However, there is a big contrast between the democratic setup and the Emirate as established by the Taliban.⁴

As is popularly known, in a democratic setup, citizens have the right to elect their representatives and sovereignty lies with them based on the concept of popular sovereignty. On the contrary, the present Taliban regime has shown their willingness to establish an Islamic system of government and the State to be referred as an Islamic Emirate. The conception of the Emirate according to the Taliban is State governed based on Islamic text. Citizens in a democratic setup choose their representatives through universal suffrage. In the Emirate, there is no command except that of Allah, and the State is ruled by an *Emir*, (a commander of the faithful) chosen by *Shura-Ahl al-hallwal-aqd* (a limited group of Islamic leaders).⁵ In an established democracy 'at least in theory', no one is above the law and the law is passed by elected representatives in such a system. On the other hand however, the *Emir* has near absolute executive, legislative and judicial authority. However, there are no strict provisions for the accountability of Emir. Individual rights and freedoms are also to the limits of *Sharia* (body of religious law that forms part of Islamic traditions) and as determined by *Emir* and selected *Ulema* (a body of Muslim scholars).

A question that thus arises is what kind of government can restore peace in Afghanistan and can also achieve the goal of an inclusive State along with respect for Islam. Establishing peace in Afghanistan is not simply to set a roadmap for democratic changes in the internal system but to forge a state-to-state relationship among the comity of nations as recognised by international law, which demands a certain predictable social, political, legal order based on certain standards of values.⁶ Accomplishing the objectives of peace requires social reconstruction in Afghanistan. Such social reconstruction can be engineered through social and cultural bridges formed between various Afghan tribes. Demographically, Afghanistan consists of several tribes, and the origin of people inhabiting this country remains diverse. However, historically there are instances of intermingling of various ethnic groups over a period of time but the majority of Afghan tribes

¹ Jan Klabbers and others, 'International Law and Democracy Revisited: Introduction to the Symposium' (2021) 32(1) *European Journal of International Law* 9-15.

² Gilles Dorransoro, 'The Taliban's Winning Strategy In Afghanistan' (*Carnegie Endowment for International Peace*, 29 June 2009) <https://carnegieendowment.org/files/taliban_winning_strategy.pdf> accessed 28 January 2023.

³ Alex Thier, 'The Nature of the Afghan State: Republic vs. Emirate' (*United States Institute of Peace*, November 2020) <<https://www.usip.org/sites/default/files/Afghanistan-Peace-Process-The-Nature-of-the-Afghan-State-Republic-vs-Emirate.pdf>> accessed 20 January 2023.

⁴ *ibid.*

⁵ Golam Mohiuddin, 'Decision-Making Style in Islam: A Study of Superiority of Shura (Participative Management) and Examples from Early Era of Islam' (2016) 8(4) *European Journal of Business and Management* 79, 80.

⁶ Court of Appeals of the State of New York, *Russian Republic v Cibrario* [1923] 235 NY 255.

have tried to maintain distinct ethnic, physical, and linguistic differences.⁷ Often, rigidities related to tribal and cultural identities have led to bloody conflicts among the tribes. The new Taliban regime and its mentors require considerable determination to govern Afghanistan and establish peace in the society that remains fragmented from historical times because of ethnic and tribal conflicts. Setting the objective to attain a balance between the conflicting interests of various tribes and groups, Afghanistan needs a political, judicial, and administrative system based on a federal democratic structure, that facilitates reconciliation among the various tribes.

II. The rule of law as a western model vis-à-vis tribal system of governance

The rule of law is a key to constitutional values and rights, and through the judicial system it also enables a State to meet international obligations. The constitutional system of Afghanistan is at a very nascent stage of development. The present Afghanistan constitution is not very much based on western ideas of liberal democracy.⁸ Western political thinking idealises the democratisation of societies, which promotes the idea of ending the set of inherited rights and privileges and aims to assure equal rights, to all its citizens without any discrimination.⁹ The tribal power hierarchies, not based on elected governments and undermining the basic rights of citizens fail the test of political modernity. The political methodology adopted by the Taliban is outside the purview of legality and fails the test of modern methods to define the rights of people and apply the law for the attainment of justice.¹⁰

While aiming for gradually achieving modernity in the Afghan legal system, a comparative perspective between the Afghan tribal system and the political system that follows Dicey's rule of law¹¹ can set the premise for the gradual reconstruction of social order. In a social setup based on the rule of law, political leaders are chosen through elections and cannot have a power structure like a tribal system based on a strict hierarchy without checks and balances.¹² These leaders are made accountable through institutional procedures. In the tribal form of governance, the tribal leaders characterise themselves as superior to the common people and work through the set of their followers. Regarding the centre of power and stability, when the control of tribal leaders gets weaker, the tribal society can be in a state of chaos. Once a tribal leader declines, there starts shift in power. With the shift in power, the people often shift their support to a new tribal leader or to a new tribe.¹³

⁷ Martin Ewans, *Afghanistan: A Short History of Its People and Politics* (Harper Perennial 2002) 4-5.

⁸ Amin Tarzi, 'Islam and Constitutionalism in Afghanistan' 2012 (5) *Journal of Persianate Studies* 205-243.

⁹ J S McClelland, *A History of Western Political Thought* (Routledge 2005) 266-267.

¹⁰ '8834th meeting: Secretary-General Urges Council to "Stand as One", Ensure Human Rights Respected in Afghanistan, as Delegates Call for Protection of Civilians' (16 August 2021) UN Doc UN SC/14603.

¹¹ Albert Venn Dicey, *Introduction to the Study of Law of Constitution* (Macmillan 1915) xxxvi.

¹² Adelphi Alexander Carius, Adelphi Lukas Rüttinger and Adelph Achim Maas, 'Developing National Sustainable Development Strategies in Post-Conflict Countries' (*United Nations Department of Economic and Social Affairs Division for Sustainable Development*, June 2011) <<https://sustainabledevelopment.un.org/content/documents/1039guidancenotes2.pdf>> accessed 10 December 2022.

¹³ Antonio Giustozzi and Noor Ullah, 'Tribes and Warlords in Southern Afghanistan, 1980-2005' (*Crisis State Research Centre LSE*, September 2006) <<https://www.lse.ac.uk/international-development/Assets/Documents/PDFs/csdc-working-papers-phase-two/wp7.2-tribes-and-warlords-in-southern-afghanistan.pdf>> accessed 15 December 2022.

Talibs believe that they are fighting to set up an order run by Ulama.¹⁴ Adding further to this, they aim to create a *sharia*-based setup for implementing *Din*, the religion of God. The head of the State under the Taliban's regime is essentially with unlimited and unaccountable power. The Emir is the head of the State and obedience to him is deemed crucial. Afghanistan to date, is primarily a rural country with a negligible industrial base and high illiteracy. The uneducated rural population or those confined to the traditional system are the core basis of support for the Taliban. In the present Afghan power structure, tribal leaders and militia commanders form the key components.¹⁵ The rules as applied by the Taliban are in contrast to the fundamentals of a democratic system, however, formation of the Taliban government has unified tribal leaders and militia commanders of various ethnic groups to an extent. This unification, however, is not based on the rule of law, rather on the rule of decree¹⁶ as the Taliban has set its objectives for the entire Afghan nation to be governed with moral principles based on theocracy and not based on universally acknowledged democratic values. The kind of laws the Taliban applies mainly is derivative from Islamic religious texts. The reason for such practices as advocated by the Taliban is its proclamation of moral principles and for applying such codes.¹⁷

Linking Afghanistan and Afghan society with the international community requires the identification of values that are common nationally and internationally and a road map drawn through international law tools. Taliban rejects liberal democracy and its features. It is expected that Afghanistan when ruled by the Taliban will adhere to basic human values acceptable to the community of nations such as, good governance, respecting human rights, creating pluralistic societies and a policy of international appeasement. Working in furtherance of such goals seems a remote possibility, that can be reasonably explained owing to the lack of democratic ideas in their setup. In the absence of democratic values in the power system, the political will that sets the goals for human rights in general and individual rights cannot be translated into reality.

III. International law and legal position of the Taliban government

Referring to the conventional practices followed by the States, for recognition of a State and government, a State under international law can give recognition either to a *de facto* government, political entity, or a group controlling the state of affairs of a nation or having control over part of the territory of a State in question.¹⁸ The question of legality of a government and its recognition by international law arises when the government in a State in question, is changed through unconstitutional or unconventional measures. These background conditions set the proposition for international law to explore and characterise the preconditions, for a State to recognise the government of another State subject to fulfilling objective conditions. International law sets pre-conditions for the recognition of

¹⁴ Haroun Rahim and Ali Shirvani, 'Is Taliban Story Going to be the Iranian Story? The Islamic Emirate v. the Guardianship of the Jurist (Wilayat Faqih)' (2021) 17(1) *Manchester Journal of Transnational Islamic Law & Practice* 23, 28.

¹⁵ William Byrd, 'Lessons from Afghanistan's History for the Current Transition and Beyond' (*United States Institute of Peace*, September 2012) <<https://www.usip.org/sites/default/files/SR314.pdf>> accessed 8 March 2023.

¹⁶ Ananya Jain, 'Rule of Law and its Application in the Indian Polity' (2018) 1(3) *International Journal of Law Management & Humanities* 2-4.

¹⁷ 'Afghanistan: COI Repository 1 Sept 2021 - 31 Dec 2022' (*Asylos/Clifford Chance*, December 2022) <<https://www.asylos.eu/Handlers/Download.ashx?IDMF=e3400d01-e5c8-474b-9473-5ea1ae009109>> accessed 08 March 2023.

¹⁸ Malcolm Shaw, *International Law* (Cambridge University Press 2019) 337.

the State but the same is not the practice for recognising the government. The customary practices followed by the nations for recognition of a newly formed government are relatively different from the recognition of a newly formed State.

The term recognising a government can be further explained, as constituting acceptance of a particular political situation by the recognising State, both in terms of the relevant factual situation and legal consequences that follows the recognition.¹⁹ Having set this as a legal basis, further, conditions can be set for recognition of the Taliban government in Afghanistan by the comity of nations. The Taliban took over the capital city of Kabul on 15 August 2001 after a prolonged armed assault against the elected government of President Ghani. They declared the formation of their own government after President Ghani fled Afghanistan.²⁰ This change in the regime of Afghanistan through non-constitutional measures raises questions about the Taliban government's recognition under the established rules of international law. The majority of the nations, showing their concern for the 'rule of law', for day-to-day internal administration, have set pre-conditions to the recognition of the Taliban as the new government. The prominent pre-conditions are respect for human rights, political stability, assurances at the political level and in the context of international law obligations, that Afghanistan will not be used as a ground for training terrorists,²¹ and that the Taliban ensures basic rights for women.

Such agenda setting as a precursor to recognition of the government, leads to the debate, of how conditional recognition of government by the other States can establish the efforts for long-lasting peace being restored in this country. The second relevant question is, if the government is not given recognition by other nations, then what is the position of international law on the recognition of that particular State? Referring here the present-day practices, States no longer consider the recognition of governments as a matter of international law obligation on their part, as this has become a matter of personal choice by the States. However, international law draws a distinction between recognising a State and recognising the government of a State.²² Recognition of a State constitutes a unilateral act, entirely at the discretion of the State recognising that other one. The recognition of a State creates a presumption that it possesses the key characteristics of a State²³ within the meaning of international law. The State is accorded *de jure* recognition, which means, legally the essential conditions are fulfilled.²⁴ On the contrary *de facto* recognition has relatively less legal effect as all the required conditions are not fulfilled or it may be that the characteristics for acquiring Statehood are not stable.²⁵ The issue of recognition of the government of the State, whether *de jure* or *de facto*, emphasises further examination by international law, whether a political group attains political power constitutionally or not by constitutionally recognized means. International law has little to guide when the discussion is at this crossroads, and practically seems that recognition of a government is

¹⁹ Anne Schuit, 'Recognition of Governments in International Law and the Recent Conflict in Libya' (2012) 14(4) *International Community Law Review* 381, 400.

²⁰ 'Taliban announces new government in Afghanistan' (*AlJazeera*, 8 September 2021) <<https://www.aljazeera.com/news/2021/9/7/taliban-announce-acting-ministers-of-new-government>> accessed 10 October 2022.

²¹ John F Sopko, 'What We Need To Learn: Lessons From Twenty Years of Afghanistan Reconstruction' (*Special Inspector General for Afghanistan Reconstruction*, August 2021) <<https://www.sigar.mil/pdf/lessonslearned/SIGAR-21-46-LL.pdf>> accessed 11 August 2022.

²² Hersch Lauterpacht, 'Recognition of States in International Law' (1944) 53(3) *Yale Law Journal* 385, 386.

²³ A State consist of territory, population, and independent and effective government.

²⁴ Dencho Georgiev, 'Politics or Rule of Law: Deconstruction and Legitimacy in International Law' (1993) 4(1) *European Journal of International Law* 1, 5.

²⁵ M J Peterson, *Recognition of Governments: Legal Doctrine and State Practice, 1815-1995* (Macmillan Press 1997) 17.

more of a political act for creating legal consequences. Recognition of a State or a government, through international law and further regulating relations among the States, where one seeking recognition and another recognising it, may practically get influenced by concerned facts, and significantly by the vital interest of the States and not merely by the premises as framed under international law. The unconventional methods adopted by the States on the question of recognition, metamorphise into new forms of methodologies and justifications for recognising the said government in question.²⁶ Recognition given to the Taliban by few of the States gets intriguing, and this requires further finding of the reasons for such recognition. The reasons can be deduced by drawing several perspectives, as recognition being given to the Taliban government by States due to interpretation of principles of international law, common factor of Islamic traditions, or bargaining based on mutual interests.

The examples can be referred, such as the relationship between the Chinese government and the Taliban. China's relationship with Afghanistan seems to be driven primarily by economic interests, for the use of natural resources, and for other strategic reasons. The BRI (Belt Road Initiative) connects China with regions in all directions. Further, the strategic expansion of China here is to put a check on the United States (US) influence in the region, while simultaneously enabling the development of the Afghan-China trade and energy corridor.²⁷ Secondly, China also faces tensions in its Xinjiang province, of Sunni Uyghur militant groups based near the Pakistan-Afghanistan border.²⁸ However, it seems some level of understanding has been attained between the two sides, as the Taliban regime has also shown interest in establishing a relationship with China, having shown their openness to Chinese investments.

Concerning Russia, it also began re-engaging with the Taliban following the establishment of the Taliban's regime in Afghanistan. The present Russian government, hopes that a relationship with the Taliban may safeguard their political interests in Central Asia. However, Russia because of its bitter experiences during Soviet Union's control over Afghanistan, from 1979 to 1989 cautiously depended upon the cooperation of other neighbours in resolving the central Asian situation. After the withdrawal of US troops, the prospect of China and Russia's co-operation in the central Asian region had evolved.²⁹

For Saudi Arabian policymakers, Afghanistan is closer to their kingdom. Saudi Arabia sees Afghanistan the kingdom's neighbour and for both, strategic and cultural reasons, has developed keen interest in Afghanistan's social and political affairs. Strategic and cultural reasons cover threat from Shia population. Saudi Arabia's foreign policy is also influenced by its complex relationship with the Shia minority. Saudi Arabia by maintaining a relationship with the Taliban and recognising the legitimacy of their government tackles two points of political convergence. Firstly, keeping a check on the growing Iranian influence which is a Shia-dominated nation, and secondly, influencing

²⁶ O H Thormodsgard and Roger D Moore, 'Recognition in International Law' (1927) 12(2) *Washington University Law Review* 108-117.

²⁷ Deon Canyon and Srin Sitaraman, 'China's Global Security Aspirations with Afghanistan and the Taliban' (*Daniel K. Inouye Asia-Pacific Center for Security Studies*, 1 August 2020) <<https://www.jstor.org/stable/resrep25711>> accessed 14 August 2023.

²⁸ Dirk van der Kley, 'China's Foreign Policy in Afghanistan' (*Lowy Institute For International Policy*, October 2014) <https://www.lowyinstitute.org/sites/default/files/chinas-foreign-policy-in-afghanistan_0.pdf> accessed 17 August 2023.

²⁹ Brian G Carlson, 'The Taliban Takeover and China-Russia Relations' (*Center for Securities Studies Analyses in Security Policy*, November 2021) <<https://css.ethz.ch/content/dam/ethz/special-interest/gess/cis/center-for-securities-studies/pdfs/CSSAnalyse294-EN.pdf>> accessed 17 August 2023.

Afghanistan's educational sector, to ensure that the interpretation of Islam to be based on the conservative Sunni culture.³⁰

Taliban's relation with Pakistan can be understood with Pakistan being one of its closest neighbours. Pakistan's historical connection with Afghanistan, begins in the colonial era, however both are highly cognizant of the violations of their respective territorial boundaries, as Kabul refuses to recognise the Durand line drawn by the British as a border between the two nations. Later from the period of 1950 onwards, and Cold War alignments of the nations, based on the two power blocks added different chapters on the relationship between Pakistan and Afghanistan. It was Pakistan's support for the creation of the Mujahideen along with Saudi Arabia and the US that brought the two nations politically closer to each other.³¹ Recently, with the presence of Indian Aid agencies working in Afghanistan, Pakistan has shown its contention with Taliban on this issue, finally settled with reduction of India's role.

As per the practices, recognising a government also contributes to giving legitimacy both to the government and acts done by the government. Furthermore, recognition of the government and of the State can be a unilateral act of any nation but is often influenced by foreign policy concerns and are also of a political nature.³² Once the government is recognised, the scope of its decision-making power and credibility in the international domain gets acknowledged. The recognised government's actions and its decisions are binding on the States, so far as the obligations under international laws are concerned.³³ Such governments can appoint its diplomat, can establish consular offices, and can conclude international agreements.

In the events when governments of the State acquire power through the constitutional process or there is a change in authority by constitutional measures, such authorities are *ipso facto* recognised as per international law.³⁴ However, recognition of government, if contingent on compliance with UN Charter and observance of the rule of law or any other conditions which at times are termed as western values of democracy, would create the scope for political bargain between the States. As such, politics and diplomacy plays crucial role in recognising the government established through unconstitutional means.³⁵ The act of recognising a government however needs to be tested even further by the principles of international law, for distinguishing between recognition by an external State, either as an interference in the internal affairs of the State or is it in true sense a case of recognizing a government for bringing it into mainstream of the comity of nations.

³⁰ Guido Steinberg and Nils Woermer, 'Exploring Iran & Saudi Arabia's Interests in Afghanistan & Pakistan: Stakeholders Or Spoilers' (*CIDOB Policy Research Project*, April 2013) <https://www.swp-berlin.org/publications/products/fachpublikationen/Steinberg_Woermer_SaudiArabia_Interest_April2013.pdf> accessed 5 January 2024.

³¹ Elizabeth Threlkeld and Grace Easterly, 'Afghanistan-Pakistan Ties and Future Stability in Afghanistan' (*United States Institute of Peace*, 2021) <<https://www.usip.org/publications/2021/08/afghanistan-pakistan-ties-and-future-stability-afghanistan>> accessed 5 January 2024.

³² Anne Schuit, 'Recognition of Governments in International Law and the Recent Conflict in Libya' (2012) 14(4) *International Community Law Review* 381.

³³ Miyazaki Takashi, *Chinese (Taiwan) Yearbook of International Law and Affairs, Volume 28* (Brill Nijhoff 2010) 68.

³⁴ Shaw (n 18) 344.

³⁵ Stefan Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile* (Clarendon Press 1998) 10. 'On the basis of both principle and State practice it is thus argued that recognition of governments, either as a concept of international law or indeed as a term appearing in official statements, has not been abolished'.

The recognition of a State is mentioned in Article 1 of the Montevideo Convention, whereas, there is no similar legal instrument for the recognition of government,³⁶ making the criteria for recognising government subjective. From this level of subjectivity, the issue to be analysed is whether the Taliban Government can be recognised under international law. Since, human rights principles and related objectives are essential components of international law, the State's practice of recognition of a government can be made contingent on the fulfilment of these conditions. Applying these accepted parameters of International law, there is no straight answer to the recognition of government but circumstances bringing the States closer and the level of conditional interaction by States, with the Taliban government, provide reason for the recognition of the Taliban government or denying such recognition. Ironically, President Ghani who was elected by constitutional procedure has left the country and has put no claims for its legitimate control of affairs.³⁷ The extent of influence, the Taliban had over the Afghan people, itself answers this question and, the rapid fall of the Ghani government shows the weak base of the *de jure* government. In the context of this entire event and diplomatic relations already being established by some nations as mentioned above, a proposition can be set; can the Taliban government be given *de facto* status initially?³⁸ *De jure* recognition means that the State giving recognition considers the recognised entity to be the government, ie the government in legal terms is representing the State.³⁹ An implication drawn from *de facto* recognition is that the system in question fulfils the constituent features, but seems more a matter of individual choice of a State to recognise.⁴⁰ The conditions for giving the Taliban a *de facto* recognition as a prelude to *de jure* after complying with international law requisites, can have some justifiable consequences for the Taliban government and in legal terms, some responsibility based on international law can be bestowed on them.

IV. The extent of State responsibility for the acts of Taliban

International law establishes the responsibility of the State for the conduct of government. This can further be clarified by elaborating on the relationship between the action of the government on one hand and the State being held responsible for such an action. When an action is taken by the respective government, it is considered an action of the State and the State can be held accountable for it under international law.⁴¹ While determining the extent of State responsibility for international obligations, it is not always necessary that the concerned State is at fault rather, it could be the government has breached the agreement.

³⁶ Rüdiger Wolfrum and Christiane E Philipp, *Max Planck Yearbook of United Nations Law, Volume 6* (Max Planck Institute for Comparative Public Law and International Law 2002) 559, 570. There are exceptions to this general practice as well. President Obama gave recognition to National Coalition of Syrian Revolutionary and Opposition Forces in December 2012.

³⁷ Ayesha Malik, 'The Islamic Emirate of Afghanistan and Recognition of the Government under International Law' (*Research Society of International Law*, 2021) <https://rsilpak.org/wp-content/uploads/2021/10/afghanistan-taliban-recognition_rsil.pdf> accessed 10 January 2023.

³⁸ J Whitla Stinson, 'Recognition of De Facto Governments and the Responsibility of States' (1924) 9(1) *Minnesota Law Review* 1,2.

³⁹ State Department, Agreement for Bringing Peace to Afghanistan Between the Islamic Emirate of Afghanistan, which is not recognised by the United States as a State and is known as a Taliban-run State.

⁴⁰ Lauterpacht (n 22) 386.

⁴¹ International Law Commission, 'Report of the International Law Commission on the Work of its Fifty-Third Session' (23 April – 1 June and 2 July – 10 August 2001) UN Doc A/56/10 art 4. Article 4 (conduct of organs of a State) states that '1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the Central Government or of a territorial unit of the State. 2. An organ includes any person or entity which has that status in accordance with the internal law of the State'.

However, holding the State accountable if the political entity has attained power as a result of an insurrectional movement requires, widening the scope of international law and setting the objective criteria for the recognition of government. In this concern, Article 10(1) of the Draft Articles on Responsibility of States for Internationally Wrongful Acts states that 'an act of the government, that is formed as a conduct of an insurrectional movement, shall be considered as an act of that State, under international law'. While applying legal parameters for holding the State responsible, we need to outline the extent of responsibility that can be attributed to a State, for any such acts of the government formed by an insurrectional movement. The responsibility can be further specified by dividing, the conduct of the members of such an insurrectional movement into two categories. One, their acts purely as the conduct of private individuals, and the second, the working of the movement as a political group. The State cannot be held liable or made responsible for the conduct of private individuals. Article 10,⁴² has thrown some light on establishing the responsibilities of those, who have attained power after an insurrection and making the State responsible for such acts. This is inclusive of the act of non-State groups, groups or entities involved in replacing the existing government. Such non-State actors after forming the government are responsible for the acts committed while it was part of an insurrectional movement.⁴³ Analysing here the control of the Taliban over Afghanistan from the perspective of international law, the issue is, since the government formed by the Taliban, is not recognised by majority of States, then how can their action be considered actions of the State and the State can be held responsible for acts violating human rights. The valid answer to this argument is that, the State is held accountable for the actions of its government, since State is in a position to have effective control over the activities of its people or the political entity. Further, international law recognises the need for stronger protection of common legal interests and values of the international community, and this can be done by setting common obligations for the States. Common legal interests are set under peremptory norms of general international law.⁴⁴ It can be inferred from the general interpretation of international law, that the Taliban government although not recognized by many States, has a responsibility for maintaining basic human rights. These responsibilities can be further identified as conditions, for recognising the government. International humanitarian law being part of International customary law, cannot be contravened simply on the pretext of non-recognition of the government. Safeguarding peremptory norms are part of international law obligations and the Taliban cannot escape from it, on the ground that its government is not being recognised by the international community. During peace efforts, Taliban leaders have clarified their wish that sanctions imposed upon them should be lifted and have agreed to ensure the basic human rights of the people living in Afghanistan.⁴⁵ Therefore, it becomes relevant to

⁴² *ibid* art 10.

⁴³ *ibid*. Article 10 (conduct of an insurrectional or other movement) states that '1. The conduct of an insurrectional movement which becomes the new Government of a State shall be considered an act of that State under international law. 2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law. 3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9'.

⁴⁴ James Crawford, 'Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect' (2002) 96(4) *The American Journal of International Law* 874, 880.

⁴⁵ Barnett R Rubin, 'Leveraging the Taliban's Quest for International Recognition' (*United States Institute of Peace*, March 2021) <https://www.usip.org/sites/default/files/Afghanistan-Peace-Process_Talibans-Quest-for-International-Recognition.pdf> accessed 10 February 2023.

analyse the recognition of the Taliban government and the legal consequences that ensue. Ironically, the Taliban counters the allegations against them for violating human rights by creating propaganda against the Western world.

V. An insight into the effectiveness of the role of international institutions

International world order is increasingly becoming interdependent and inter-connected, which has greatly influenced international law. Prior to the Second World War, international law was applied for bilateral relations among the autonomous States and the main concern was, establishing diplomatic relations, treaties, and negotiations among nations for concerned reasons. Post Second World War, international law seems to have expanded its role through treaties and institutions in the areas that are of common concern for the majority of States. These institutions also promote coordination and expect uniform behaviour in the vast areas for the acknowledgement of multilateralism. The role of international institutions in expanding environmental law can be referred to here as an example. Institutions through treaties have tried to curb many local practices that can have effects beyond boundaries of the State. This in a way highlights the significance of norms created to control the activities endangering other nations and people. This can be compared to a situation where the State is supporting those groups of people who violate human rights and do not follow the rule of law and can ideologically be threat to peace and the peaceful existence of other cultures. Member States of the UN have acknowledged that the UN as an international institution can take initiative for establishing basic human rights standards that are binding on all the States regardless of their political structure.⁴⁶ This may come in conflict with the customary practices of the nations. Further, this initiates a debate on the reasons for the origin of any particular custom. Afghanistan when interfaced with values and standards set by international institutions finds itself in similar binaries. In the present times, we see offensive measures adopted by the Taliban against the policies of international institutions, that can be reasoned as a reactionary and rebellious attitude of the people embedded, because of the several attempts by external forces to control Afghanistan. Certainly, one cannot discount the fact, that many of the present policies in Afghanistan are forwarded by international institutions; their genesis is based on the Cold War struggle and thoughts based on neo-colonial concepts.⁴⁷ Neo-colonial concepts attempted to subdue the cultural ethos in Afghanistan, the culture based on the Subcontinent's traditions and customary practices, the instability, and the power struggle are used as favourable political conditions for big players. Despite the influence of great powers, these international institutions nevertheless do have positive objectives. Ironically, peace and stability as a part of an external effort by the international bodies and other stakeholders⁴⁸ also become a subject of political bargaining for the Taliban. The external efforts for peace and stability, because of cultural and political impediments are pushed to a secondary level, rather than forming part of the mainstream normative setup. Further, the gap between political convictions and strategic reasons for establishing peace gets widened as international institutions are not making decisions based on consensus but often apply principles that are based on majority decisions. The propaganda generated

⁴⁶ Jonathan I Charney, 'Universal International Law' (1993) 87(4) *The American Journal of International Law* 529-532.

⁴⁷ The States interested in restoration of peace for establishing trade routes and cultural linkages.

⁴⁸ The main stakeholders for restoring peace in Afghanistan are India, Pakistan, China, Russia, Arab States, Iran and several of the Central Asian countries.

by the Taliban against these institutions leads to a backlash against international institutions, by the local Afghans.

The backlash against globalisation further takes the form of economic and cultural dissension. The reasons for economic counter-reaction are obvious. The poor and unemployed in Afghanistan feel outside the system run by law and democratic setup based on a western concept. Consequently, many of the Afghan people and leaders began to question the relevant position of Afghanistan in a globalised system which they consider non-Islamic. The reasons for their questioning do have logical justifications as one cannot deny that the globalised system is also believed to have created inequalities: while some States seem to become more prosperous, others are in a debt trap. The usual perception that is created about globalization⁴⁹ through international institutions is to reduce economic inequality, provide political and social freedom, and find social security in which each family can expect to earn more and live better than the previous generation.

Another facet of this reactionary movement can be traced to cultural reasons. The cosmopolitan culture, instead of creating an inclusive environment, creates rather a hostile atmosphere in Afghanistan as local Afghan people rely on customs and traditional practices. This state of confusion has made the Afghan people dispel liberal political ideas such as multiculturalism, and secularism in the name of establishing pluralism. Populist leaders and warlords have often attempted to encash this state of ambiguity. These leaders try to persuade the masses convincing them, that they are the real defenders of this land, its people, and its culture. The misunderstanding is further translated into the belief that, the reason for western interference is to culturally influence Afghanistan and gradually to establish western hegemony in the region and over Islam. Further to add here, Afghan people are tutored by Madrasas to believe that recourse to Islamic practices can save them from such influences.⁵⁰ Such beliefs put a curtain on the construction of a pluralistic legal order and democratic setup. Therefore, establishing the rule of law as a core principle for running the State by protecting the rights of all, simply remains in theory.

The evolution for long-term peace in Afghanistan further depends upon a key parameter, the foundation of a pluralistic society. The roadmap for realising the objective of a pluralistic society requires the facilitation of reconciliation through a legal process, enabled by a stable justice system.

VI. The legal system to safeguard pluralistic social order for peace in Afghanistan

Afghanistan consists of main tribes such as Pashtoon, Tajiks, Uzbeks, Hazaras, and several others. Many of these tribes follow their own system of laws based on distinct customs and practices. Afghanistan as a nation, does not seem to have a uniform set of rules to be considered, primarily for a common judicial functioning. The tribal laws that often exist in the form of unwritten practices may not be entirely in harmony with written laws and in certain circumstances may stand in contradiction to each other.⁵¹ The reason for this contradiction can be, the way methodologies are applied to scripting the customary laws and practices into a codified system. The influence of a western approach or

⁴⁹ Betül Yalcin, 'Comparative Social Policy Programme' (MSc essay at the University of Oxford, 2009) <https://www.researchgate.net/publication/324331543_What_is_globalisation> accessed 10 February 2023.

⁵⁰ Martin Lau, *Afghanistan's Legal System and its Compatibility with International Human Rights Standards: Final Report* (International Commission of Jurists 2003) 16, 19.

⁵¹ Christine Zuni Cruz, 'Tribal Law as Indigenous Social Reality and Separate Consciousness [Re]Incorporating Customs and Traditions into Tribal Law' (2001) 1(1) *Tribal Law Journal* 1-5.

methodological tools may not fit into the existing customary practices. Some of the common traits among these tribes are preserved and practiced as tribal pride, and this also gets complemented by rigid following of the Islamic faith.⁵²

With such a social setup, it can be stated that, the people of Afghanistan are at a crossroads in bringing social transformation, to achieve a stable Afghanistan. The stability in the State, whether it evolves through the choice of the people from within, or by measures of international institutions, in either of the cases requires social transformation and relieving the people from ideologically established prisonhood by securing for them fundamental freedoms.

Sustainable peace can be accomplished based on the criteria as set by international institutions, and by the law-making bodies of the concerned nation establishing a constituent body, for drawing a constitutional plan, that features a pluralistic setup. Such a constitutional setup is required for defining the specific roles of legislator, executive, and judiciary. The present regime of Afghanistan needs to follow a constructive approach more inclined towards deductive reasoning rather than adopting the rigid method of interpretation. The International community expects from them, the resurrection of peace and stability and setting the normative basis for basic human rights.⁵³ The Taliban regime although following odd patterns of governing the Afghan society has finally taken the society to insularity. However, the Taliban owes a moral obligation to the international community. The recognition the Taliban government has sought from the international community is contingent on complying with certain legal obligations.

This new regime faces severe challenges in establishing the framework for the rule of law, applicable to all the tribes. Primarily, the present regime should establish a pluralistic model of Afghan society. The pluralistic social order, for having its long-term effective support base of the people up to the normative level, rests on two key features. Firstly, the ruling class acknowledges the will of various communities of the State being governed by their respective social and legal order within a common overarching legal framework as it is in the case of federal structure.

Secondly, in a State like Afghanistan where society is still based on a tribal system, the legitimate acceptance of an uncodified system of laws can be supportive of a pluralistic setup, such as in the case of the Indian system, where personal laws are exclusive of other laws.⁵⁴ This can be further explained as, laws based on customary practices of different tribes need a rightful place in the Afghan legal and judicial system, as people of specific tribes can conveniently adhere to such customary and traditional practices. This model can be affiliated with HLA Hart's conception of primary and secondary rules, and that can be further used for coordinating tribal rules and laws enacted based on the western notion of democracy. The customary practices of the tribes can be customised in the form of primary and secondary rules. Such an application of the law will act as a bridge between two different formats of rules and laws, customary practices and codified rules.⁵⁵

The concern for peace and stability in Afghanistan is not only confined to internal regulations and governance but rather in the broader context of South Asian Association for Regional Cooperation (SAARC) and the world at large, for sustainable peace, in

⁵² Martin Ewans, *Afghanistan: A Short History of Its People and Politics* (Harper Perennial 2002) 4.

⁵³ Shahzeb Shaid, 'Islamic Law of Armed Intervention for Peace and Humanitarian Purposes' (2021) 17(1) *Manchester Journal of Transnational Islamic Law & Practice* 59, 63.

⁵⁴ See Hindu Marriage Act [1955], Muslim Marriage Act [1939], Parsi Marriage Act [1936] in the Indian context.

⁵⁵ Matthew L M Fletcher, 'Rethinking Customary Law in Tribal Court Jurisprudence' (2006) 4 *Indigenous Law & Policy Center Occasional Paper Series Working Paper* <<https://www.law.msu.edu/indigenous/papers/2006-04.pdf>> accessed 5 January 2024.

Afghanistan.⁵⁶ While considering the restoration of peace as a primary objective, the international community would also like to see things from the spectrum of a binary set of legal values. This means distinguishing, on the one hand, the parameter of legality between the Taliban's takeover and the style of governance and, on the other hand, the expectations of the international community for establishing peace and stability in the society which at times seems contradictory.⁵⁷

Afghan society transforming from a theocratic system to a democratic one requires path-breaking measures that can transform their beliefs, faiths, and practices to modernity. Historically, there are instances of such transformation, such as the one in the European system, that choose the untrodden path to break established inequalities as a consequence of kinship ties and hereditary privileges, the consequence of monarchy, or a centralised system of authority.

Transformation of society from the old setup to the society following new norms, with the objective of establish equality, gender justice, and liberal values have become the hallmark of liberal democracy. The Taliban came to power through non-democratic, offensive methods that manifestly question the issue of their recognition as a legitimate form of government by the international community.⁵⁸ However, this debate gets diluted for practical purposes, as recognition of a State is altogether different than the recognition of the government by the international community. The recognition of a government can at times be considered an interference of a foreign nation in the internal matters of the State in question.⁵⁹ The methods adopted by the Taliban for setting their administrative set up and for establishing peace and stability in society will have long-term repercussions. The legal system to be formed on modern lines for Afghan people and society needs primarily to recognise Afghanistan as a diverse, independent country, its people belonging to different ethnicities, proud of their culture and traditions. Establishing a legal system that is inclusive to accommodate the features for a heterogenous society, faces challenges as various tribes and ethnicities cannot be bridged in a system that cannot guarantee peace.

VII. Running an extra mile with a human rights and women's rights approach

The role of human rights concepts and principles, as a developer of political and social systems can be based on the objectives as set in the constitution and objectives forwarded through rules and provisions of those international institutions, that promote multilateralism and international law. Regard must also be given, to the substantially inalienable character of human rights, its enforcement of collective values and its reach for the protection of individual freedom. Further, this construction has to be enabled for promoting and maintaining the ideals of a democratic society. The peace process, or the responsibility for establishing peace in Afghanistan is a monumental challenge. Introducing a human rights approach can be an attempt to evolve an alternative way of thinking and set the social structure with a democratic line of thinking. Human rights approaches from Afghanistan's perspective cannot be confined to asserting the natural rights of individuals as inalienable rights, but rather with a wider scope for further extension of rights, freedoms, and gender justice. Human rights can be adopted as safeguard measures against various forms of injustices and additionally as a legal

⁵⁶ Shaid (n 53).

⁵⁷ *ibid* 56.

⁵⁸ Malik (n 37).

⁵⁹ Montevideo Convention on the Rights and Duties of States (signed 26 December 1933, entered into force 26 December 1934) 165 LNTS 19, art 8.

instrument for putting an end to several forms of civil tension. This approach can be a tool for political modernization. Human Rights framework, undoubtedly can generate the ideas for establishing inclusiveness in society, where men and women both can be represented without gender discrimination. This is also in the light of UN Security Council Resolution 1325 on women, peace, and security. However, some issues, realising their impact on the core of the social setup, need to be addressed with much emphasis rather than expressing them in general terms.⁶⁰

Since Afghanistan is a State and society, hurt by ongoing tribal conflict and during armed conflicts and aggression, women are the worst sufferers. With the re-emergence of idea to formulate government of the local Afghan people, whether belonging to liberal groups or hardliners in Afghanistan, women are living a life of suppression even losing their representation in any such platform for placing their issues. Short-term peace can be established with the support of armed forces and the prescripts given by established international institutions but how can that be long-lasting? Knowing that negotiations are held for achieving these objectives, but harmony and progression cannot be established further in wider dimensions, denying women even their basic involvement in educational institutions, health care system, basic protection, access to livelihood opportunities, a strong and impartial judicial system that forms the basis of human rights values. Talking about stability and peace, it requires critical evaluation of the system if, for its restoration, the price is forgoing women's rights. Establishing peace at the cost of the human rights of women is denying the equitable approach to social justice. Concerning the US and its allies and their efforts to protect women's rights while they are engaged in nation-building, ironically, this methodology, is a reflection of neo-colonialism⁶¹ overlapping with the human rights objectives.

⁶⁰ Relevant Security Council Resolutions are: UNSC Res 2626 (17 March 2022) UN Doc S/RES/ 2626. This resolution extended the mandate of the United Nations Assistance Mission in Afghanistan until 17 March 2023; UNSC Res 1615 (22 December 2021) UN Doc S/RES/2615. The resolution was on the 1988 Afghanistan sanctions regime and addressed the provision of humanitarian aid to Afghanistan; UNSC Res 2611 (17 December 2021) UN Doc S/RES/2611. This resolution renewed the mandate of monitoring team supporting the 1988 Afghanistan sanctions committee for a period of one year; Selected UNSC presidential statements are: 'Statement by the President of the Security Council' (23 July 2018) UN Doc S/PRST/2018/15. This was a presidential statement on the electoral process in Afghanistan, following the conclusion of the voters' registration process on 18 July for that year's parliamentary and district council elections and for 2019 presidential elections; 'Statement by the President of the Security Council' (19 January 2018) UN Doc S/PRST/2018/2. The presidential statement emphasised the importance of advancing regional, interregional and international co-operation to achieve the stability and sustainable development in Afghanistan and Central Asian Region; 'Statement by the President of the Security Council' (24 August 2017) UN Doc S/PRST2017/15. This was a statement in the review of the implementation of UNSC Res 2255; Selected General Assembly Documents are: UNGA Res 48/208 (21 December 1993) UN Doc A/RES/48/208. The General Assembly requested the Secretary-General to dispatch a new mission to the United Nations Assistance Mission in Afghanistan, to assist with the reproachment and reconstruction efforts in Afghanistan; UNGA Res 44/15 (1 November 1989) UN Doc A/RES/44/15. This resolution emphasised the importance of Geneva Accords and encouraged the Secretary-General to facilitate a political solution to the problems in Afghanistan and Northern Pakistan; Selected Human Rights Council Documents are: (16 January 2020) UN Doc A/HRC/43/74. This was the report of the High Commissioner for human rights on the situation in Afghanistan and on technical assistance achievements in the field of human rights; HRC, 'Situation of Human Rights in Afghanistan, and Technical Assistance Achievements in the Field of Human Rights' (21 February 2018) UN Doc A/HRC/37/45. This was the High Commissioner's report on Afghanistan presented at the 37th session of the Human Rights Council; HRC, 'Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons on His Mission to Afghanistan' (31 May 2017) UN Doc A/HRC/35/27/Add.3. This was a report of the Special Rapporteur on the Human Rights of the internally displaced persons in Afghanistan.

⁶¹ Kwame Nkrumah, *Neocolonialism, the Last Stage of Imperialism* (Thomas Nelson & Sons, Ltd 1966)

VIII. Conclusions and suggestions

The political and social conditions of Afghanistan are facing an unpredictable time phase, and in such an environment creating harmony and stability seems an enduring task for the international institutions and the supporting partners. International law applied by international institutions, is premised on both natural law thinkers and legal positivists. Legal positivists have argued to achieve the objectives by setting the law as a tool for social change. An amicable social environment can be instilled by setting primarily a constitutional base for recognizing basic human freedoms, even if the government is not established by democratic means.

In this concern, suggestions are made expecting that a positive outcome can be achieved. Establishing internal stability, which is a herculean task in Afghanistan, is the key to sustainable peace, so priority should be given to the attempts for establishing and maintaining internal stability. These responsibilities to co-operate for sustainable peace, shared by the nations should be considered by some vital parameters. Peace and stability in Afghanistan are also vital for neighbouring countries of South Asia and Central Asia. Therefore these countries should make positive efforts in reconstruction and development. Their efforts can get additional support, due to the cultural and traditional similarities of Afghanistan with the Indian Sub-continent and other central Asian countries. Further, the efforts for sustainable peace are also supported by international institutions, which cannot completely withdraw from positive roles and efforts, and the accountability should be shared at different levels between neighbouring nations, international institutions, and the Western world.

Setting the objectives for stability in Afghan society also necessitates recognising Afghanistan as a State with diverse cultures for lasting peace. The success of this objective will further depend upon the preparedness of various parties to engage in long and complex political and social negotiations representing Afghanistan's ethnic, social, and political groups, including women.

Recognition of the Taliban government by some of its neighbouring states as mentioned above, for their strategic interests, by deprioritising basic values, such as human rights and other forms of basic freedoms can weaken the commitments by the States for treaty-based obligations as set by international institutions.

The next step after the objective of attaining peace should be, to focus on social reconstruction and adopting effective measures for its acceptance. The changes essentially required through reconstruction are, basic rights for women, and this should be debated even at the local level of administration, that is in the jirga. The support of jirga is essential for attaining the objectives of social reconstruction. Negotiations with tribal leaders are required for achieving those targets that are part of a general multilateral level agenda and objective criteria under international law, such as i) respect for sovereignty, ii) territorial integrity iii) commitment to the principle of non-interference in the internal affairs of Afghanistan and its neighbouring countries and iv) not allowing the use of Afghanistan's territory for hostile activities. In this concern, the international community needs to remain flexible for the talks to be meaningful. Considering the present political scenario of Afghanistan, it is advisable that the international community attempt to facilitate them, not to be rigid in giving specific shape but to support in developing the structure. The outcome can remain sustainable through the coordination of internal determinants and external support measures. Acknowledging the fact that the long-term establishment of democratic values would take decades, such measures and attempts shall always be counted as a setting of foundation stone and shall be cherished as a great contribution. A

sustainable plan will require clarity and the ability to maintain support and coherence among various international players.

The relevance of setting democratic values in Afghanistan is not only confined to peace objectives in Afghanistan but also its broader perspectives in relation to the SAARC region. This proposition can be upheld with the support of determinants, one of the key ones being the human rights approach. While resolving several social crises, achieving the objectives of social reconstruction and acknowledging women's basic rights, human rights should be given due consideration. External efforts for the resurrection of peace become subject to the international law question of recognizing the Taliban government, which has taken international law hostage for either acknowledging or denying *de facto* support to the Taliban. However, Sustainable Goal No 16 can be referred to in support of legal measures taken for restoring peace but the extent of its effectiveness depends on the recognition given to the Taliban government. Given the extent of ambiguity, that exists at the multilateral level regarding recognition given to the Taliban government, it is difficult to conceive a formal peace process through a multilateral system, not giving weightage to regional partners. The regional actors that are historically connected, can play an effective role in bringing together leaders of various ethnic groups. However, the regional actors face one question, whether it is possible for them to overcome the mutual distrust for regional coordination, as a stable Afghanistan is in the interest of all the neighbouring countries and the world at large.
