



Legal Capacity of Afghanistan after the Succession of Government by the Taliban

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Abstract: The purpose of this study is to examine how the legal capacity of Afghanistan after the succession of government by the Taliban. This research uses a normative legal research type with a statutory approach (statute approach) and also a historical approach (historical approach). The research results show that the phenomenon that occurs in Afghanistan is the succession of government, so basically the principle used is the principle of continuity, so that even though there are changes internally from the Afghan state in the government system, the country is still bound by rights and obligations according to international law. This is as stated in article 11 of the 1978 Vienna Convention which explains that a change in the government of a country does not affect the boundaries set in the agreement and also the rights and obligations set by an agreement.

Keywords: Legal Capacity; government succession; 1978 Vienna Convention.

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1. Introduction

In 2021, on August 15, to be exact, the Taliban rose for several reasons, including, having taken over control of the Afghan government by controlling most of the territory in Afghanistan including Kabul as the center of government. The takeover of government control took place quite briefly, which only took about 2 weeks. This condition is accompanied by the withdrawal of troops by the United States and the North Atlantic Treaty Organization (NATO) which has controlled the country for 20 years. The United States and NATO from the Afghanistan region stated that their anti-terrorism mission had been completed. The success of the Taliban in 2021 in retaking the Afghan government was not fully supported by the Afghan population. The public is of the view that, The Taliban will apply the concept of government that was previously implemented before the military invasion occurred. The concept of fundamental Islamic governance in 1996 implemented by the Taliban regime prior to the invasion, severely discriminated against the rights of women and minorities.¹

In implementing the rules, some of them are considered to be contrary to human rights in the international community, namely restrictions education carried out by the Taliban government. Human Rights are natural rights. Rights that belong to everyone and cannot be taken away.² Whereas in article 26 of the 1948 Universal Declaration of Human Rights (UDHR) it is stated that: first, everyone has the right to receive education, teaching must be free, at least at the basic level. Primary school teaching should be mandatory. Second, teaching must be directed towards the widest possible personal development and to strengthen the sense of respect for human rights and fundamental freedoms. Teaching must enhance mutual understanding, mutual acceptance and a sense of friendship among nations, national groups or religious groups and must promote the activities of the United Nations in maintaining peace.³

The state is the largest institutionalized political community (polity) and has authoritative power.⁴ Afghanistan as a country has the capacity as a subject of international law, one of which is entering into agreements with other countries or being a participant in international agreements. In other words, these policies can

¹ Miko Aditiya Suharto and Maria Novita Apriyani, "Kapasitas Pemerintahan Afghanistan Rezim Taliban Baru Sebagai Peserta Dalam Perjanjian Internasional," *Risalah Hukum* 18, No. 1 (2022): 34-43, <https://doi.org/10.30872/risalah.v18i1.818>

² Melissa Towadi, "The Application of Sharia Maqashid on the Protection of the Rights of Minority of Muslim Rohingya in Regional ASEAN (Indonesia-Malaysia)," *Journal of Indonesian Legal Studies* 2, no. 1 (2017): 43-54, <https://doi.org/10.15294/jils.v2i01.16637>.

³ Johan Jasin, "Perlindungan Hukum Atas Hak Asasi Anak Memperoleh Pendidikan," *Legalitas*. 2, No.3 (2009).

⁴ Fence M. Wantu and Ahmad, "Mekanisme Koordinasi Dan Singkronisasi Lembaga Kementerian Negara: Suatu Praksis Menuju Kabinet Yang Efektif," *Al-Ahkam* 15, no. 2 (2019): 69-80.

affect political input in a country.⁵Afghanistan as a state party to international agreements has rights and obligations according to international law, including: the right to independence, the right to exercise jurisdiction over its territory, the right to obtain equal legal status and the right to carry out self-defense as well as collectively. While the obligations that apply to the country include: not to intervene in problems in other countries, not to stir up civil unrest in other countries. With these basic rights and obligations, the countries in the world have the rights and obligations to create a climate for peaceful coexistence. These rights and obligations of Afghanistan were obtained when the Afghan state had an independent government.⁶

In the midst of the process of forming a new government carried out by the Taliban and increasing international political turmoil with other countries, one of the issues that is interesting for us to raise is how the legal capacity of Afghanistan is after the succession of government by the Taliban, which we will then describe in the discussion.

2. Method

The type of research used by researchers to compile this research is normative research. In this study the authors used several approaches including: statute approach and historical approach.⁷

3. Legal Capacity Afghanistan after the Succession of Government by the Taliban

Currently the subject of international law is not limited to countries, but includes non-state entities, and one of them is an international organization. In general, legal subjects are interpreted as supporting rights and obligations, so that the understanding of international legal subjects is supporting rights and obligations in international law. International organizations will become active subjects of international law in addition to the state as the main subject if they are equipped with a Legal Personality. As for organizations that have a Legal Personality, those international organizations automatically have Legal Capacity.⁸

One of the Legal Capacity possessed by international organizations is the capacity to be able to make international agreements with member countries, other non-member countries, international organizations and other international legal subjects. The

⁵ Mohamad Hidayat Muhtar, Zamroni Abdussamad, and Zainal Abdul Aziz Hadju, "Studi Perbandingan Penanganan Pengungsi Luar Negeri Di Inonesia, Australia Dan Thailand," *Ius Quia Istum* 30, no. 1 (2023): 26–48, <https://doi.org/10.20885/iustum.vol30.iss1.art2>.

⁶Suharto & Apriyani *op. cit.*, Hal. 37

⁷ Suhaimi, "Problem Hukum Dan Pendekatan Dalam Penelitian Hukum Normatif," *Yustitia* 19, No. 2 (2018): 208.

⁸ Arbi Nurcahyanto, "Legal Capacity ASEAN Dalam Penyelesaian Sengketa Laut China Selatan," *Elektronik Hukum Bisnis* 4, No. 2 (2020): 475.

capacity to make agreements with international organizations has been codified by the 1986 Vienna Convention on the law of agreements between states and international organizations or between other international organizations. Article 6 of the 1986 Vienna Convention states that the capacity of an international organization to make international agreements is governed by the provisions of the organization itself.⁹

Before further discussion, we need to know in advance whether the Taliban organization group belongs to an international organization. When an insurgent group has succeeded in being at a stage where they are able to control most of the territory of their country effectively, then this requires more attention from the international community to immediately be able to determine attitudes and also various kinds of considerations in order to recognize the rebellion as an entity that is separate from the country which represents the aspirations of some people due to dissatisfaction with the government regime that is in power in the country concerned.¹⁰

In this case, the Taliban group is categorized as Belligerency which is at a stage two levels higher than Rebellion. Adapun Rebellion is a term used for a group of people who are sovereign in a certain area and wish to separate themselves from the government due to feelings of depression resulting from the seizure of human rights. Then for the level above there is the term Insurgent. Insurgent is a term for a group of people who carry out an insurgency and then lead to an organized group that aims to fight against the government that is in charge of a country by means of rebellion or rioting on a small scale so that the matter can still be handled by the government.¹¹

A Belligerency resulting from the development of a Rebellion into an Insurgent evolves to a higher stage and becomes increasingly massive. An insurgent group that has taken effective control of the country concerned by leading to a state of civil war against the country's armed forces. According to the law of war, giving recognition to belligerence means also giving their rights as subjects of international law. The belligerence has the right and power to choose and determine the economic system, resources, culture and their own destiny. In addition, rebels who can be categorized as belligerence must fulfill 4 conditions that have become international custom, as stated in Article 1 of the 1907 Hague Convention (The Hague Convention On Land Warfare Of 1907), among others¹²:

- a) Organized under clear leadership
- b) Using clear identification such as a uniform with the aim of showing identity
- c) Open use of weapons

⁹ *Ibid.*, Hal. 476

¹⁰ Elisabeth Septin Harmin, Dicky Firmanzyah & Puspoayu, "Penegakkan Hukum Terhadap Penanggulangan," 2021.

¹¹ *Ibid.*,

¹² Pasal 1 Konvensi Den Haag 1907

d) Obey and respect all laws and customs of war.

However, in categorizing a rebel group as Belligerency influenced by more dominating political factors. Like at least controlling 1/3 of the territory effectively so that the area is really under his control and also gets the support of the people in the area concerned.

It should be noted that in the international world, the transfer of state responsibility from one country to another, which in practice in international relations is still in the region, is referred to as state succession. So that what is related to state succession in practice can be in the form of merging, dividing, or forming which creates a new country which has consequences for the sovereignty of that country. This understanding is appropriately adopted in article 2 (b) of the Vienna Convention on Succession of State in Respect of Treaties on 1978. In practice, there are two types of succession, namely state succession and government succession.¹³

State succession can be divided into two forms, namely partial state succession and universal state succession. State succession gave birth to two parties, namely the Predecessor State (predecessor state) and the Successor State (new state). Government succession is a regime change from the old regime's legitimate government to a new government regime. Government succession can occur either constitutionally or unconstitutionally.¹⁴

Based on the principle of state continuity/sustainability, it explains that if there are changes within a country, the existence of a country will continue. The change in question is the replacement of a new government which is a domestic problem but has implications for third parties. This makes a third party must determine the attitude towards a new government. In determining the attitude, there are subjective considerations to objective considerations carried out by third parties, for example: the extent to which the differences in the style and political direction of the old government and the new government, to what extent the new government can bear all the rights and obligations left by the old government, to what extent the new government can comply to the application of international law,¹⁵

State succession will basically bring about juridical problems, such as the problem of the continuity of international agreements that have been formed by the country being replaced (Predecessor State). The 1978 Vienna Convention regulates an important issue that arises as a result of succession of states, namely the issue of the continuity of international agreements that have been formed by successor states. Even though this convention does not completely regulate matters relating to the continuity of international agreements, it cannot be denied that this convention has an important meaning because it has succeeded in instilling the pillars of guidelines. The Vienna

¹³ Malcolm N Shaw, *Hukum Internasional* (Bandung: Penerbit Nusa Media, 2013).

¹⁴ J.G Strake, *Pengantar Hukum Internasional* (Jakarta: Sinar Grafika, 1992).

¹⁵ Dkk. Winahyu, Asih Puspaning, "Taliban Sebagai Faksi Di Afghanistan Dalam Perspektif Hukum Internasional," *Dinamika* 28, No. 5 (2022): 3830.

Convention limits its scope in article 1 which reads: "The present convention applies to the effects of a succession of states in respect of treaties between states".¹⁶

On the other hand, seeing the phenomenon of succession that occurred in Afghanistan itself after the withdrawal of the United States and NATO from a legal perspective is the succession of government. This is because there is no Predecessor State (predecessor state) and Successor State (new country) after this succession occurs. The change that occurred was only the changing of the Afghan government regime from the government led by Ashraf Ghani to being taken over by the Taliban through resistance from the Taliban group. In the succession of government is an internal matter only so that it only changes the sovereignty that is held in control by the new government. The next problem faced is to what extent the rights and obligations of the old government were erased, and to what extent the new government will be entitled to these rights and obligations.¹⁷

Since the phenomenon that occurred in Afghanistan is a phenomenon that is categorized as a succession of government, basically the principle used is the principle of continuity, so that even though there are changes internally from the Afghan state in the system of government, government organs, or in its constitutional structure, the country remains bound by rights and obligations under international law. So we can conclude that the country of Afghanistan as a Contracting State in an international agreement that enters into force is still the same. The agreement must be obeyed, respected, and implemented by the party that made it. This is in accordance with the principle of *pacta sunt servanda* and in practice the parties must also carry it out based on the principle of good faith.¹⁸

Besides that, the rights and obligations that remain attached to a country that experiences a succession of government have also been affirmed in the 1978 Vienna Convention on Succession of State In Respect of Treaties or what we know as the 1978 Vienna Convention. This is as stated in article 11 which explains that the change of government of a country does not affect the boundaries set in the agreement and also the rights and obligations set by a treaty.

In addition, based on the provisions stipulated in the 1969 Vienna Convention on the Law of Treaties which regulate international agreements between countries as the main subject of international law, it does not mention the cancellation of an international agreement caused by the succession of government from a country participating in an international agreement. So that the implications of the succession of government that occurred in Afghanistan on the enforceability of international agreements made by the Afghan state through the previous government regime remain valid and do not eliminate the rights and obligations of the Afghan state as a

¹⁶ F.A Whisnu Situni, "Perjanjian Internasional Dan Suksesi Negara," *Hukum Dan Pembangunan* 19, No. 5 (2017): 483.

¹⁷ Aditiya & Novita. *Op. Cit.*, Hal. 40

¹⁸ *Ibid.*, Hal. 41

participant in these international agreements and remain part of the international community.

4. Afghanistan Relationship with the Oic (Islamic Cooperation Organization)

OIC is an Islamic cooperation organization which was originally established as solidarity among Muslims in the world to protect Islamic holy places. This organization cooperates with the United Nations to protect the interests of Muslims around the world. Afghanistan is also a member country in this organization. Considering that Afghanistan is an Islamic country, the humanitarian crisis that occurred in Afghanistan after the takeover by the Taliban did not escape the eyes of this Islamic cooperation organization and immediately received special attention.¹⁹

We can see this in the implementation of the 17th Extraordinary Minister of Foreign Affairs Conference (KTM-LB) of the Organization of Islamic Cooperation (OIC) on the humanitarian situation in Afghanistan which took place in Islamabad, Pakistan. The event was attended by 30 member countries, 7 non-member countries (Germany, Britain, Italy, the United States, PRC, Japan and France), and a number of international organizations and representatives of the Taliban. The KTM-LB was held suddenly considering the humanitarian crisis that has overshadowed Afghanistan. The OIC as the motor of people's solidarity is obliged to direct the resources of its respective organization and member countries to save Afghanistan from a humanitarian disaster either through the OIC or bilateral mechanisms. Apart from that, the KTM-LB also demanded that the Taliban be obligated to realize commitments and develop a roadmap for political reconciliation.²⁰

This extraordinary meeting produced two outcome documents, namely the Resolution on the Humanitarian Situation in Afghanistan and the Islamabad Declaration on the Cause of Palestine and Al-Quds Al-Sharif. Foreign Minister Retno Marsudi said that the resolution on the humanitarian situation in Afghanistan which was a document resulting from the OIC meeting contained a number of steps to overcome the humanitarian crisis in Afghanistan. The steps taken include: 1) Encouraging relevant UN agencies to cooperate with the OIC in distributing humanitarian assistance to the people of Afghanistan, 2) calling on the international

¹⁹ Benny Dermawan, "Sejarah Berdirinya OKI, Organisasi Kerjasama Islam," CNN Indonesia, 2021, <https://www.cnnindonesia.com/internasional/20210623160237-125-658417/sejarah-berdirinya-oki-organisasi-kerjasama-islam/amp>.

²⁰ Putri Ayuningtyas, "Afghanistan, OKI Dan Taliban," Republika.id, 2022, <https://www.republika.id/post/23596/afghanistan-oki-dan-taliban>.

community to immediately send continuous humanitarian assistance to the people of Afghanistan,²¹

Thus it can be concluded that good relations have been established between the OIC and the Taliban Government by inviting representatives of the Taliban to be able to attend this extraordinary conference. Also at this meeting, representatives were open to receiving input from OIC member countries on how to deal with the humanitarian crisis that occurred in Afghanistan. The OIC also carries out their role to support peace and security for its member countries, in this case Afghanistan, by issuing humanitarian resolutions and steps they will take as a solution to the problem. The result of the extraordinary conference was also a joint agreement of the member countries that attended the meeting, one of which was a representative of the Taliban.

5. Afghanistan's Relationship with the UN

As we know that Afghanistan itself has long been a member of the United Nations. Meanwhile, the UN Security Council has issued one of the UN Security Council Resolutions No. 2513 of 2020 (Resolution 2513) regarding peace in Afghanistan, which involves a number of parties who play a role in the situation that occurred in Afghanistan, one of which is the Taliban group. In the resolution, paragraph 12 of the opening section stated that "Noting that the Islamic Emirate of Afghanistan is not recognized at the United Nations, and furthermore that the UN Security Council does not support the restoration of the Islamic Emirate of Afghanistan".²²Based on this statement, UN Security Council Resolution No. 2513 stipulates that the United Nations as an International Organization does not recognize the government of the Islamic Emirate of Afghanistan which was founded by the Taliban.

Furthermore, in that resolution, precisely in Operational Paragraph number 3, it was stated that "The Security Council, emphasizes the importance of the effective and meaningful participation of women, youth, and minorities, and affirms that any political settlement must protect the rights of all Afghans, including women, youth and minorities, and respect the strong desire of Afghans to achieve lasting peace and prosper." This resolution emphasizes the effective and significant participation of women, including in any political settlement that must protect the rights of women and every other group for the achievement of lasting peace and prosperity in Afghanistan.

Meanwhile, in August 2021 the Taliban officially announced that Afghanistan was an Islamic Emirate, under the name The Islamic Emirate Of Afghanistan, which was announced by one of the Taliban spokesmen, Zahibahullah Mujahid through his

²¹ Yuni Arisandy Sinaga, "Pertemuan OKI Hasilkan Resolusi Tentang Situasi Kemanusiaan Di Afghanistan," *Antaraneews.com*, 2021, <https://antaranews.com/amp/berita/476813/pertemuan-oki-hasilkan-resolusi-tentang-situasi-kemanusiaan-di-afghanistan>.

²²Resolusi Dewan Keamanan PBB No. 2513 Tahun 2020

official Twitter account.²³In this way, we can conclude that the Afghan government has formed a government of a country which has explicitly stated that the government is not recognized by the UN and the restoration of the Islamic Emirate of Afghanistan is not supported by the UN Security Council through the resolutions it issues.

It is also undeniable that the formation of government in any form that has been known in international law is the sovereignty of a country. Therefore, the Taliban as the power holders of the Afghan government have the right or authority to determine the form or system of their own government.

Even so, determining the form of government is an exclusive right or sovereignty within a country, it cannot be denied that the Taliban government in Afghanistan still requires recognition from other countries and international entities, besides this can influence the determination of their system of government. As it is known, however, that recognition still brings important consequences in the field of law. For example, in the absence of recognition which at the same time results in the absence of diplomatic relations, this can affect unrecognized entities in claiming their rights or even other countries in carrying out their obligations under international law.²⁴

Based on Resolution 2513, the setting of the resolution has implications for UN member states to act in accordance with what has been stated in the resolution not to recognize the government of the Islamic Emirate of Afghanistan, and to support the enforcement of the participation of women, youth and minority groups in any settlement. politics that must be held in Afghanistan effectively and significantly.

Even though if a country after that continues to give recognition to the government of the Islamic Emirate of Afghanistan as such recognition is a unilateral action based on the interests of each country concerned, the UN itself cannot officially give recognition to the government formed by the Taliban based on what has been stated through the resolution. In assessing this issue, it can be referred to and analyzed from the theory of recognition of the government of a country put forward by Malcolm Shaw.²⁵

The demands in the resolution will continue to be the basis of reference for the United Nations and other member countries in considering the legitimacy of the Taliban government in Afghanistan. These conditions must be met first before getting support and becoming a recognized government for other countries.²⁶

Related to the implications of this resolution, the Taliban government cannot enter into official relations (diplomatic relations) with the United Nations and its member countries that are members of it because there is no recognition given to the Taliban government itself. Until early 2022, which is approximately 5 months after occupying

²³ Zahibahullah M. (Online), (<https://twitter.com/zabehullah-m33/status/142823604109880193?s=21>) diakses dari laman twitter juru bicara Taliban, Pada 11 Oktober.

²⁴Malcolm N. Shaw. *Op., cit.* Hal. 446

²⁵*Ibid.,*

²⁶United nation Security council. (Online), (<https://www.un.org/press/en/2021/sc14604.doc.htm>). Diakses pada 11 oktober 2022.

the Afghan government, not a single country or international organization has formally recognized the Taliban government. So this has resulted in the absence of representatives appointed by the Taliban government for Afghanistan who are accepted and recognized by the United Nations.²⁷

6. Conclusion

Based on the results of the analysis and discussion described above, it can be concluded that the phenomenon that occurs in Afghanistan is a phenomenon that is categorized into government succession, so basically the principle used is the principle of continuity, so that even though there are changes internally from the Afghan state in the government system, the country is still bound by rights and obligations according to law. International. The State of Afghanistan as a Contracting State in an international agreement that enters into force is still the same. The agreement must be obeyed, respected, and implemented by the party that made it. This is as stated in article 11 of the 1978 Vienna Convention which explains that a change in the government of a country does not affect the boundaries set in the agreement and also the rights and obligations set by an agreement. Besides that,

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²⁷Asih Puspaning Winahyu, dkk. *Loc., cit*

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