Legal Protection of Women’s Rights in Afghanistan During the Taliban Regime of 2021-2022 and the State Responsibility

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Abstract: This paper discusses women’s rights in Afghanistan during the Taliban regime from 2021 to 2022. Having seized power in Afghanistan by the Taliban in August 2021, a wide range of regulations seem to discriminate against women. The discriminatory restrictive regulations enforced by the Taliban have prevented women and girls in Afghanistan from receiving the same rights as men, such as access to education, employment, and access to public facilities. This is clearly inconsistent with The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Given that Afghanistan ratified CEDAW in 2003, it guarantees the protection of women’s rights, it means that Afghanistan has become a state party, then Afghanistan has the responsibility to comply with this convention. This research uses the type of normative legal research - searching for material in the form of library materials or secondary data as sources in writing research. The purpose of this study is to find out how the legal protection of women’s rights during the Taliban regime considering that Afghanistan has ratified CEDAW. Furthermore, to find out whether Afghanistan can be held responsible for the restrictions on women’s rights imposed by the Taliban. The approach used in this study is the conceptual approach and the statute approach. This research also uses a historical approach and a case approach. This study finds the legal protection that Afghanistan has provided for women’s rights based on the ratification of CEDAW, namely the Law on Elimination of Violence against Women (EVAW). The Islamic Republic of Afghanistan’s Constitution also protects women’s rights. However, the EVAW law has not been enforced at all since the Taliban took over. It indicates that Afghanistan can be held responsible.

Keywords: Legal Protection; Taliban; State Responsibility; Women’s Rights

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INTRODUCTION

Every individual regardless of nationality, sex, national or ethnic origin, color, religion, language, or any other status has the same rights that are inherent in each of us, namely inalienable human rights. Human rights confirm that all human beings are born free and equal in dignity and rights. Even though the Universal Declaration of Human Rights has been formed, it does not mean that human rights violations have stopped. There are numerous cases of human rights violations across the globe, especially against women. As a result, an international legal instrument - the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) was born.

This convention is motivated by women’s experiences of discrimination all over the world, and it represents a global commitment that women’s human rights are human rights. This convention establishes the principles of human rights, norms and standards of behaviour, and obligations to which the Contracting States agree to adhere. As defined in article 1, discrimination is understood as “any distinction, exclusion or restriction made on the basis of sex...in the political, economic, social, cultural, civil or any other field”. This convention establishes the principles of human rights, norms and standards of behavior, and obligations to which the contracting states agree to adhere. Based on article 3 of CEDAW, the convention gives positive affirmation to the principle of equality by requiring states parties to take “all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men”.

Since Taliban retaking power in 2021, they applied sharia laws which are Islamic rules based on the Quran. This statement allows for various interpretations as it reflects on the Taliban’s imposition of a stringent regime, which included restrictions on women’s mobility and denial of education to female. Critics judge that the restriction on women imposed by the Taliban under the guise of Islamic law actually went beyond the bounds of Shariah. Zabihullah Mujahid as a Taliban spokesman said that there would be no discrimination against women and wanted to guarantee the international community that no one would be harmed. However, the promises that have been made by the Taliban cannot be fully realized by the government. One form that the Taliban discriminates against women is that the Taliban insists that women in Afghanistan cannot be involved in government affairs. The policies applied to women in Afghanistan severely limit the space for them to fully exercise their rights. Education, employment, public spaces as well as other basic freedoms are now inaccessible.

for women and girls. The first week since the Taliban came to power, many women protested in public and the Taliban's response was quite brutal, such as beating protesters, disturbing the protests and torturing journalists covering the demonstrations. Over time, the protests continued and the response from the Taliban worsened and peaked on January 16 in Kabul, when Taliban members threatened, intimidated, and physically assaulted protesters, using pepper spray and electric shock devices.\(^8\)

In the end of 2022 this regime banned women from studying in universities and working for NGOs. Even though there were many protesters, this group quashed all the demands made by the people who were protesting as a result of the stricter rules on women that were upheld.\(^9\) Taliban armed squads at one point entered women's classrooms at universities and schools across Kabul and forced students to lift their long skirts and robes to reveal their clothes underneath. When students were caught wearing Western-style pants, the armed squad beat them with electrical cables.\(^10\) The restrictions enforced by the Taliban on women in Afghanistan are not in line with the 2004 Afghan constitution that regulates the prohibition of discrimination between citizens, which reads: “Any kind of discrimination and distinction between citizens of Afghanistan shall be forbidden. The citizens of Afghanistan, man and woman, have equal rights and duties before the law.”\(^{11}\) Furthermore, these restrictions are not in line with CEDAW, even though Afghanistan is a state party to CEDAW. The country, therefore, must work towards equality between the genders and against gender discrimination.

Based on the explanation of the problems above, the problem formulation appears, namely:

1. how is the legal protection of women’s rights in Afghanistan during the Taliban regime of 2021-2022 considering Afghanistan has ratified CEDAW?
2. Can Afghanistan be held responsible under CEDAW for the restriction on women’s rights imposed by the Taliban?

This research aims to analyze the legal protection of women’s rights in Afghanistan based on the ratification of CEDAW during the Taliban regime and also analyze the responsibility of the Afghan state as a result of the enforcement of restrictions on women’s rights carried out by the Taliban.

The problems currently being faced by Afghanistan regarding the implementation of the protection of women’s rights can be used as a lesson for Indonesia. The problems that occur in Afghanistan can be a reflection for Indonesia. It is hoped that Indonesia can review and improve existing laws and regulations so that in the end the laws and regulations in Indonesia can internalize the principles of CEDAW.

METHOD

This research uses the type of Normative legal research by researching secondary data. Normative legal research is a research process that examines law as norms, rules, legal principles, legal principles, legal doctrine, le-


\(^{9}\) Taliban Restrictions on Women’s Rights Deepen Afghanistan’s Crisis, 2023.


\(^{11}\) Article 22 of the Constitution of the Islamic Republic of Afghanistan, 2004
The approach used in this study is the conceptual approach and the statute approach. This research also uses a historical approach and case approach.

**ANYLISIS AND DISCUSSION**

The legal protection of women’s rights in Afghanistan during the Taliban regime of 2021-2022 based on the ratification of CEDAW

The principle of legal protection for the people against government actions rests on and stems from the concept of recognition and protection of human rights because historically in the West, the development of the concepts of recognizing and protecting human rights aimed to restrict and impose responsibilities on both society and the government. In line with this, A.J Milne said: “A regime which protects human rights is good, one which fails to protect them or worse still does not acknowledge their existence is bad.” Setiono provides an explanatory concept that legal protection is an action or effort to protect the public from arbitrary actions that are not in line with the rule of law carried out by the government or authorities. Therefore, order and tranquility can be achieved, enabling human beings to enjoy their dignity.

Legal protection is all efforts made


put in place laws, policies, and measures, including through affirmative action, to improve the status of women. State parties to CEDAW have a responsibility to ensure the practical realization of rights, and are thus obliged to show results. Therefore, the state parties to adopt temporary special measures to accelerate the achievement of equality of opportunity for both men and women with a view to achieving women’s de jure and de facto equality with men in the enjoyment of their human rights and fundamental freedoms. These can be in the form of temporary special measures that address the special needs of women.\(^{17}\)

2. Non-discrimination Principle

The definition of discrimination against women can be seen in Article 1 of this Convention. CEDAW also explains the factors that are very influential in the emergence of discrimination, namely due to prejudices and habits based on stereotypical roles of men and women contained in Article 5 of the CEDAW. This factor prevents women from achieving the same rights as men.

In accordance with article 22 of the constitution of Afghanistan, in particular the international convention on the Elimination of All Forms of Racial Discrimination, the Government of the Islamic Republic of Afghanistan has reaffirmed to eliminate all forms of discrimination as drafted under Anti-Discrimination Law with several objectives\(^{18}\), namely: To combat discrimination against the rule of law and create a society free of discrimination; To preserve human dignity and equal opportunity for all; To protect the fundamental rights and freedoms of all citizens; To identify cases of discrimination and then formulate a strategy to combat and avoid future discrimination.

In August 2009 a new law (EVAW-Law – Elimination of Violence against Women) entered into force by presidential decree that defined and penalized various types of violence against women. EVAW Law which defined and penalised 22 types of violence against women, including rape, battery, forced marriage, preventing women from acquiring property.\(^{19}\) According to EVAW Law, issues such as violence against women, discrimination against women as well as prohibition from the rights of access to education, employment, and health services have been criminalized which is contained in article 35 that states:\(^{20}\) “If a person prohibits a woman from the right of education, work, access to health services or exercising other rights provided by law, considering the circumstances the offender shall be sentenced to short term imprisonment not exceeding 6 months.” However, in EVAW Law there is no article that regulates women's rights in political and public life. As in CEDAW article 7 which explains that:\(^{21}\) “shall ensure to women, on

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\(^{17}\) PLD, *CEDAW South Asia: Core Concept*, terdapat dalam [http://cedawsouthasia.org/about-cedaw/core-concepts/#:~:text=There%20are%20three%20fundamental%20principles%20implementation%20of%20CEDAW%20rests](http://cedawsouthasia.org/about-cedaw/core-concepts/#:~:text=There%20are%20three%20fundamental%20principles%20implementation%20of%20CEDAW%20rests)

\(^{18}\) Convention on the Elimination of All Forms of Discrimination against Women, *Replies of Afghanistan*


\(^{21}\) Article 7, Convention on the Elimination of All Forms of Discrimination against Women
equal terms with men, the right: (a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies.” although in EVAW Law there are no regulations regarding non-discrimination against women in the fields of political and public life, Article 83(6) of Constitution of Afghanistan specified that at least two female delegates must be elected to the House of Representatives in each province. In parallel, Article 84 provided that 50% of the people appointed by the President to the Senate had to be female to promote female participation in government.22

3. State Obligation

State obligation forms a crucial component of the framework that defines both non-discrimination and equality. Within the context of CEDAW, this obligation includes four essential elements: respecting, protecting, promoting, and fulfilling human rights. The binding nature of the treaty and the scope of state obligation are outlined in the Preamble and Articles 2–4 of the Convention.

The concept of State Obligation is evident in multiple articles of the Convention. The CEDAW Convention states several obligations that must be upheld by the state to ensure that women’s rights are protected in all legal, political, social, economic and cultural domains. These obligations are explicitly highlighted in Articles 2, 3, 4, 5, and 6, emphasizing the state’s responsibility to ensure gender equality in various spheres.23

State obligation consists of two interconnected aspects: (1) incorporating and implementing CEDAW standards and norms within their domestic jurisdiction, and (2) reporting their progress and challenges related to CEDAW’s realization at the domestic level to the UN treaty body. Consequently, each state party is required to provide both initial and periodic reports to the treaty body, detailing their fulfillment of the CEDAW commitments.

The Government of the Islamic Republic of Afghanistan is dedicated to advancing and expanding women’s rights in all areas, in line with its national and international commitments. “Protection of women’s rights within an Islamic framework” refers to upholding and following fundamental rights outlined in Chapter Two of the country’s Constitution, as specified by international treaties to which Afghanistan is a party. The government is obligated to actualize and adhere to these rights. Therefore, the protection of women’s rights is embedded in the strategy of the Afghan High Peace Council as an indicator of the support provided for women’s rights in negotiations under the constitution of Afghanistan.24

In Afghanistan the legal protection of human rights is a protection that has been regulated in the constitution of Afghanistan in 2004 article 6 which states25:

“The state shall be obligated to create a prosperous and progressive society based on social justice, preservation of human dignity, protection of human rights, realization of democracy, attainment of national unity as well as equality between all peoples and tribes and balanced development of all areas of the

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22 Gabija Leclerc, Rosamund Shreeves, Loc. Cit.
23 I Gede Pasek, Pengaturan Tentang Penghormatan Dan Perlindungan Terhadap Hak Asasi Perempuan dalam CEDAW, BAHAN AJAR HUKUM INTERNASIONAL, 2016.
24 Convention on the Elimination of All Forms of Discrimination against Women, Replies of Afghanistan to the list of issues and questions in relation to its third periodic report, C No. 13
country.” Furthermore, article 7 also states:
“The state shall observe the United Nations Charter, inter-state agreements, as well as international treaties to which Afghanistan has joined, and the Universal Declaration of Human Rights...” in article 24 also states:
“Liberty is the natural right of human beings. This right has no limits unless affecting others freedoms as well as the public interest, which shall be regulated by law. Liberty and human dignity are inviolable. The state shall respect and protect liberty as well as human dignity.”

With the Elimination of Violence against Women law or EVAW Law, for the first time, rape was then a statutory offence in Afghanistan and domestic violence was also recognized as a crime. In this law there are 7 protected rights for the victims of violence as stated in Article 6 of EVAW Law. There is also a protection mechanism to prevent violence which is the obligation of the ministry of women affairs in article 8 paragraphs 3, and 4. Along with the EVAW law, some measures were taken by the former government to protect women. These efforts encompassed the appointment of special prosecutors and the establishment of courts to combat violence, setting up the Ministry of Women’s Affairs, and providing for divorce through the creation of family courts, and enacting the Personal Status Law.

With the Taliban coming to power in 2021, the EVAW-Law was not officially revoked but it is not being enforced at all because the current regime does not have a comparable legal framework or judicial system in place. Instead of ensuring protection for women, the state is not subject to regulations related to the protection of women which are already listed in the constitution and laws of the country. And what is very unfortunate is that the ministry of women's affairs no longer exists and was replaced by the Ministry for the Propagation of Virtue and the Prevention of Vice by the time the Taliban took over Afghanistan.

One of the most illustrative examples of the systematic discrimination and failure to protect basic rights against women and girls in Afghanistan today is the relentless issuance of edicts, decrees, declarations and directives restricting their rights, including their freedom of movement, attire and behavior, and their access to education, work, health and justice. Between September 2021 and May 2023, more than 50 edicts were issued, including restriction on education for girls beyond grade six; women prohibited from entering parks in Kabul; a written announcement later published in Faryab banned access of women to public baths, gyms, sports clubs and amusement parks; right of women to attend university “suspended” and; all forms of education beyond grade 6 banned for girls.

In this case, The Taliban are obliged under international law to fully respect women’s rights. Afghanistan has ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 2003. Afghanistan has tried to fulfilled its obligation to fulfilled the enforcement of legal protection of women's rights as

29 “9 Facts on Women’s Rights in Afghanistan” (n.d.).
stipulated in CEDAW, such as implementing a new draft of the Afghan Constitution at the end of 2003 which contains article 22 which states that men and women are equal before the law. Thus in 2009 the Elimination of Violence against Women (EVAW) law came into force. Afghanistan itself also had an institution that aimed to protect women's rights and promote women's empowerment under the Ministry of Women's Affairs. At the international level, when a country ratifies a human rights treaty, it takes on specific responsibilities, including the obligation to report on its progress. Therefore, to fulfill the obligation in December 2011 submitted its first combined initial and second periodic report to the CEDAW Committee. Following in 2016 The Government of Islamic Republic of Afghanistan prepared a written report on the implementation of Recommendations No. 11 and No. 23 and submitted it to the CEDAW Committee due to responding to The CEDAW Committee in August 2013. Then at the end of 2018 Afghanistan submitted a state party's report. Basically, protecting and upholding human rights is the duty of the state, therefore the state or government that has the power to bear this responsibility. But it is seen that the Taliban violates the rights guaranteed by CEDAW by depriving women of their rights. Legal protection for women's rights in Afghanistan is still unclear or it could be said that the government has failed to provide protection moreover Afghanistan is currently undergoing a transition of government power.

### Afghanistan Responsibility under CEDAW for the Restriction on Women’s Rights Imposed by the Taliban

Articles 2 and 3 of CEDAW establish a comprehensive obligation to eliminate discrimination in all its forms in addition to the specific obligations under articles 5-16. The chapeau of article 2 reads: “States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women...” The first obligation of States parties referred to in the chapeau of article 2 is the obligation to “condemn discrimination against women in all its forms”. States parties have an immediate and continuous obligation to condemn discrimination. They are obliged to proclaim their total opposition to all forms of discrimination against women to all levels and branches of Government, to their population and to the international community, and their determination to bring about the elimination of discrimination against women. The term “discrimination in all its forms” clearly obligates the State party to be vigilant in condemning all forms of discrimination, including forms that are not explicitly mentioned in the Convention or that may be emerging.

The meaning of Immediate and Continuous

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32 Committee on the Elimination of Discrimination against Women, third periodic report submitted by Afghanistan under article 18 of the Convention, due in 2017, CEDAW/C/AFG/3


34 Division for the Advancement of Women, CEDAW General Recommendation No. 19: Violence against Women, No. 10.

35 Committee on the Elimination of Discrimination against Women, General Recommendation No. 28 on the Core Obligations of States Parties under Article
Obligation to Condemn Discrimination is that States parties have an obligation to condemn all forms of discrimination against women without delay. That whenever discrimination occurs or there are reports of discrimination, the state must take prompt action to condemn and express its disapproval. In doing so, States reaffirm their commitment to protecting women's rights and promoting gender equality. Vice president of Afghanistan, Mr. Amrullah Saleh in his opposition to the Taliban. He has said that any deal with the Taliban should absorb them into the existing democratic system, rejecting anything that resembles a return to their time in power, when they ruled with an iron fist and banned women from public life. This shows that Afghanistan takes prompt action to condemn all forms of discrimination against women and express its disapproval.

The main element of the chapeau of article 2 is that states should make forward movement, from the evaluation of the situation to the formulation and initial adoption of a comprehensive range of measures to develop such measures on an ongoing basis, taking into account their effectiveness and any new or emerging issues, to achieve the objectives of the Convention. This means that Afghanistan now needs to evaluate its situation under Taliban control and develop a comprehensive action plan and policy mechanisms to monitor and implement it, which provides a framework for the practical realization of the principle of formal and substantive equality between women and men. Although Afghanistan has constitutional and legislative guarantees, there are many practices on the ground that contradict these guarantees of women's rights protection. In monitoring the enforcement of CEDAW there is the Committee on the Elimination of Discrimination against women. State parties have several obligations, one of which is allowing the CEDAW Committee to scrutinize their efforts to implement the treaty by reporting to the body at regular intervals. In accordance with the Optional Protocol to the Convention, The Committee is mandated to accept communications from individuals or groups who submitting claims of rights being breached according to the Convention. Additionally, it can begin investigations into instances of serious or organized breaches of women's rights. These steps are not mandatory and are applicable only if the involved State has agreed to them. Therefore, Afghanistan has the opportunity to report to the committee regarding women's rights issue by submitting claims of violations of rights that are protected by the convention which will encourage inquiries into situations of violations of women's rights carried out by the Taliban.

As referred to general principle in article 1 of ARSIWA, it is known that every internationally wrongful act of a State results in that State bearing international responsibility. The term “international responsibility. The term “international responsibility.”

38 United Nation, “Introduction to the Committee” diakses pada 27 Julis 2023, terdapat dalam: https://www.un.org/en/treaty-bodies/cedaw/introduction-committee#-text=The%20Committee%20on%20the%20Elimination%20of%20All%20Forms%20of%20Discrimination%20against%20Women%2C%20no%2024.
Responsibility of States for Internationally Wrongful Acts, said that state responsible to provide full reparation toward injury by the internationally wrongful. So, Afghanistan responsible to give reparation related to the discriminatory restrictive regulations that caused material and moral damaged by the internationally wrongful act of a State.41

Despite the dramatic changes taking place in Afghanistan, Taliban as the government of Afghanistan still have a legal obligation to defend women's human rights under international human rights law. This obligation remains intact despite changes in leadership, and it applies regardless of a nation's political, economic, or cultural systems. Afghanistan, having signed the CEDAW agreement in 2003, must eliminate gender discrimination in politics, public life, and all regulated sectors. The current governing authority, the Taliban, is also under obligation to protect and maintain human rights, as these commitments persist through transitions of power. A key aspect of these rights is ensuring women's access to education, as dictated by CEDAW. States are required to provide equal educational opportunities, encompassing access, training, curriculum, and educational resources (as defined in Article 10 of CEDAW). However, Afghan women and girls continue to encounter biases, particularly in the realm of education. It's noteworthy that Afghanistan's official religion is Islam, and according to Article 45 of the Afghan constitution, the state must develop a unified educational curriculum grounded in national culture, academic standards, and Islamic teachings. This also extends to creating curricula for religious subjects in schools, encompassing the diverse

40 Article 30, Responsibility of States for Internationally Wrongful Acts 2001
41 Ibid, Article 31
Islamic sects present in Afghanistan.\textsuperscript{42}

CONCLUSION

By imposing the discriminatory restrictive regulations, Taliban violated women’s human rights as stated in CEDAW such as discrimination in the form of prohibiting women and girls from going to school and university, imposing restrictions on women to work and limiting access for women and girls in public facilities. The conduct of Taliban has violated the provisions of several International Instruments. Afghanistan has tried to fulfil the enforcement of legal protection in accordance with CEDAW, however, with the seizure of power by the Taliban, which currently holds the power of the Afghan government, legal protection for women’s rights is no longer effectively enforced.

Based on the existing facts and circumstances, Taliban as the government of Afghanistan can be held responsible. Even though there is a governmental succession, CEDAW is still binding considering that CEDAW is a core international human rights treaty. As a result, the Taliban as the new government of Afghanistan must continue to respect the provisions of CEDAW and if they violate it, there is an obligation to be responsible.

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