

# WEEKLY ANALYSIS

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## LEGITIMACY OF AFGHANISTAN'S CURRENT SYSTEM: THE NEED FOR A CONSTITUTION



Weekly Analysis is one of the CSRS publications analyzing significant weekly political, social, economic, and security events in Afghanistan and the region. The prime motive behind this is to provide strategic insights and policy solutions to decision-making institutions and individuals in order to help them design better policies. Weekly Analysis is published in Pashto, Dari, English and Arabic languages.

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Center for Strategic and Regional Studies (CSRS)



## LEGITIMACY OF AFGHANISTAN'S CURRENT SYSTEM: THE NEED FOR A CONSTITUTION

### INTRODUCTION

The constitution of a nation serves as a contract between the state and the people, outlining their respective rights and responsibilities. The nation recognizes its obligations to the government and exercises its rights within the boundaries of this agreement. The government also accepts the constitution's provision of their rights and applies its conditions and rules. If this agreement is broken, society will descend into chaos because there will be no framework for governing the nation's and the state's rights and obligations, and neither side will know what responsibilities they have to the other. And the result becomes anarchy.

Constitution is a set of rules that define the structure of the state and government, its main branches (legislature, judiciary, and executive), and the limits of their powers, as well as the rights and freedoms of a country's citizens.<sup>1</sup>

In Afghanistan, the constitution has governed the country for nearly a century despite having undergone several changes over the years. This is the first time Afghanistan has been without a constitution for a year. The previous constitution was declared null and void with the establishment of the caretaker government of the Islamic Emirate, and in its place, no formal work has officially started on drafting a new constitution, nor has any previous constitution been temporarily replaced by the country's constitution. The issue has negatively impacted IEA's national and international legitimacy.

The necessity of the constitution for the framework and system of government, the factors leading to the creation of a constitution, and other related topics, have been covered in this analytical article, along with a brief overview of the importance of the constitution from a historical perspective.



## HISTORICAL BACKGROUND

Throughout history, gradual social and political advancement empowered the people intellectually until rulers and kings gradually lost their ability to rule the people by force. For this reason, sane rulers came to the conclusion to grant citizens rights to preserve their position and political system. They then used decrees and dialogues to forge ahead with the creation of a constitution.

Even in the years before Christ, rulers saw the existence of law as essential to maintaining order because civilizations without it were historically disintegrating owing to their chaos. Examples include Babylonian Hammurabi law (2080-2123 BC), Manu laws in ancient India, Bokhoris laws in Egypt, Herodotus and Ahmes laws in Rome, and The Draconian code in Greece. Even Genghis's cruel system, which included the creation of the Genghis Mechanism, served as a sort of constitution for his government. Even in Genghis' cruel system, he created the Genghis Yasa to organize his affairs, which had the status of a constitution. As a result of political pressure, the monarch of England issued the Magna Carta in 1215, laying the foundation for the first written constitution for the organization of governance affairs.<sup>2</sup>

Similarly, we see in Islamic history that the Prophet of Allah, peace and blessings be upon him, established the Medina Charter, which was not only a constitution for the newly established Islamic State but it emphasized the importance of legality in Islam.

Afghanistan has had a constitution for nearly a century. Amanullah Khan drafted Afghanistan's first constitution. Nader Khan, Zahir Shah, Daud Khan, Babrak Karmal, Dr. Najib, and Mujahideen followed (the constitution was ratified during this period, but it was delayed due to disagreement on some issues). The constitution was drafted during the Hamid Karzai era, and regulations were incorporated based on the existing conditions and needs.<sup>3</sup>

The constitutional laws of Amanullah Khan, Nader Khan, and Zahir Shah were mostly based on the royal system and were adjusted for and were well suited to that historical context in terms of the basic rights and freedoms of the people, the judicial system, and the administrative structure.

Later, Dawad Khan's constitution organized and established the political structure within the framework of the republican and democratic systems for the first time in Afghanistan. Islam has been recognized as the state's official religion, and its principles have been incorporated into all of the fundamental legislation.

The constitution has been consistently upheld by Afghan society, especially over the past century, indicating a significant dependence on it. When the new constitution was not drafted in



2003, Hamid Karzai's interim and transitional government enacted Zahir Shah's constitution without including the chapter about Shah (king).<sup>4</sup>

## THE NEED FOR A CONSTITUTION

Since there is no scientific purpose in re-discussing topics that are entirely clear and understandable, such questions are not currently discussed in political debates and writings; however, it becomes a necessity when some people question that need for a constitution in a society. Thus, we briefly discuss the need for a constitution here:

**1. Legitimacy of the Political System:** The political system is mainly determined by the form and mechanism of running the government system, as well as the election of government officials, and this mechanism can only be defined by the constitution. The governance system and the mechanism of electing officials are given legitimacy by the constitution.

Of course, it is worth mentioning that sovereignty in Islamic systems in the form of legislation has only divine origin. The concept of Allah's sovereignty in Islamic systems is that any laws or orders by the Amir shall be in accordance with the Qur'an and Sunnah. People in Islam have the right to elect officials and to choose a political system. Moreover, new Ijtihad-based regulations are only implemented if Sharia-compliant and accepted by the people.<sup>5</sup>

Constitutions around the world are either approved through referendums or by parliaments. In Afghanistan, it is traditionally approved by a Loya Jirga.<sup>6</sup> In any of these approaches, the people are involved and they decide how to elect the president and the members of the parliament? They decide whether they want a prime minister or not? Should s\he be elected in Parliament or in another way?

All of these decisions are made by the people and are enshrined in the constitution. When a political system is founded in light of this constitution, we can say that the people have given this political system legitimacy.

Political systems get their legal legitimacy from the constitution, and a government without a constitution has neither public nor legal legitimacy. The drafting of a constitution for the Islamic Emirate in Afghanistan is crucial from the standpoint of introducing its political system and governing structure to the nation. The introduction of such a political system by the Islamic Emirate will also pave the path for its international recognition.

**2. Legitimacy of the Legal System:** The legal system of a country consists of ordinary laws such as criminal law, civil law, commercial law, laws governing the affairs of different ministries, etc. The constitution gives these laws their legitimacy because it authorizes their



creation and specifies the mechanism for doing so. In the absence of a constitution, all other laws are null and void because without a foundation, the structure cannot be built. If the Islamic Emirate wants the country's legal system to remain stable and gain legitimacy, then it is necessary to introduce a constitution.

**3. Avoiding Political Authoritarianism:** Constitutions protect citizens from political tyranny. Constitution determines the mechanisms of electing the leader, the powers of the head of state, the powers and duties of the three branches of government, and the principles of judicial independence and principles. However, when there is no constitution, and the ruler or Amir of the country considers himself absolute, his decisions and powers are not limited by any revised document, and the people's consent is unknown, it is dictatorship, and clashes with the Islamic principles.

**4. Recognition of Citizens' Basic Rights and Freedoms:** Without a constitution, citizens cannot determine what is legal under the ruling system and what is illegal, and thus faces problems and a gap between the nation and the state emerges. In the present and under the IEA, there are many ambiguities concerning free speech and demonstrations, the activities of political parties and groups, competition for public jobs, and other similar matters due to the lack of a constitution. Therefore, the constitution is needed to end the distrust between the nation and the state, to make the people aware of their rights and freedoms, and to bring the government system back to a normal state.

**5. Legitimacy of the Judicial System:** The judicial system has two aspects; its content and its formality. Islamic jurisprudence is the first source of the judiciary, and the judicial laws come next, which is used in Ijtihad-based topics. If there is no constitution, the judicial laws will also be nulled, and the judicial system loses its legitimacy. Without laws, the judicial system will be chaotic, arbitrary decisions will be made at the whim of each judge, and there will be widespread corruption. Therefore, in order to protect the judicial system from chaos and give it legitimacy, it is necessary to introduce a constitution.

## FACTORS FOR THE CREATION OF A NEW CONSTITUTION

Every country needs a constitution, but occasionally one is ousted or suspended, and a new constitution needs to be written in its place. We, therefore, explore situations where a new constitution is needed:

**1. The Emergence of New States:** New states emerge when they get independence from colonialism and are established as independent states, or a state is divided into several parts. In



both situations, the first and most important thing that governments do is the creation of a constitution because it determines the form of the political system, the powers of its branches, and sets forward the mechanism for electing the leader. The new constitution also serves as the declaration of independence. Countries like the United States, Yugoslavia, India, and Pakistan created their constitutional laws as soon as they gained their independence.<sup>7</sup>

**2. The Formation of New Governments:** The formation of new governments also can lead to the creation of a new constitution. The new governments sometimes have different policies that are not reflected in the constitution. If the Islamic Emirate is opposed to the political system and governance framework of the previous republic, it can introduce a new constitution and this is normal. However, the ambiguity and confusion regarding the type and foundation of the system is catastrophic for IEA and the nation.

**3. Incompatibility with the Context:** It often happens that the legislator cannot predict the future, and issues emerge that are not reflected in the constitution. In such a situation, the constitution is amended.

## CONCLUSION

Every country, without exception, needs a constitution, and its absence leads to chaos and the finally collapse of societies and governing systems. Governments lose their national and international legitimacy in the absence of a constitution, and governance activities are sacrificed to personal interests instead of legality.

Afghanistan lacks a constitution since last year and this has, directly and indirectly, imposed many problems and challenges in the country. There is complete ambiguity about the type and nature of the political system, and this has led to a lack of official recognition of the new government by the international community.

It is obvious that not introducing a constitution will intensify the situation, and it is now a must for the Islamic Emirate to take steps to amend the constitution based on Islamic values through an approved national process.

## RECOMMENDATIONS:

- Considering the critical need for a constitution, IEA should establish a committee to draft a constitution or amend the previous one and consider it as an urgent national priority.



- Given that some people currently believe Afghanistan does not require a constitution and that the government's actions are conducted in accordance with Islamic principles, serious debate about the constitution and its opponents should spark at the leadership level of the government for convincing its opponents.
- A temporary implementation of an old constitution (such as the constitution of 1964) with slight adjustments is necessary while the new one is being developed.
- The new constitution shall be drafted such that will be accepted to the entire nation, reflecting their values and their will. All cultural and Islamic values should be carefully taken into account.

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