Nangarhar University Social Science Journal

NUSSJ

e-ISSN: 3079-2398 (Online) p-ISSN: 3079-238X (Print)
Vol:1(01), Nov: 2024
Journal Homepage: https://nussj.nu.edu.af

Review Article

The Law-Making Process in the Legal System of Afghanistan

Ihsanullah Nasih[1] and Khalilullah Nasih[1]

[1]*Department of Islamic Studies, Faculty of Sharia, Nangarhar University, Jalalabad, Afghanistan.*

ABSTRACT

The legislative process in Afghanistan, which is a thorough and multi-phase process with roots in both historical and modern frameworks, is examined in this paper. To guarantee efficient governance and social fairness, the Afghan legal system integrates ideas from Islamic jurisprudence and constitutional law. Drafting, review, approval, endorsement, publication, deadline, and enforcement are all steps in the process that are intended to create laws that meet both domestic and global requirements. From Amir Shir Ali Khan's rule to the organized processes of the current National Assembly, Afghanistan's legislative process has undergone substantial changes over the years. Every step of the legislative process ensures compliance with the Constitution and Islamic Sharia by addressing particular-legal, social, and administrative issues. The paper identifies the legislative system's shortcomings and accomplishments and offers recommendations for enhancing the law-making process to promote good governance and the rule of law.

ARTICLE INFO

Keywords
Musharaka,, Mudaraba, Diminishing Musharaka,, Ijara and Sukuk.

Article History
Received: 18-09-2024
Accepted: 15-11-2024
Published: 17-11-2024

Cite this Article
Nasih, I., & Nasih, K. (2024). The Law-Making Process in the Legal System of Afghanistan. *Nangarhar University Social Science Journal*, *1*(01), 23–27. https://doi.org/10.70436/nussj.v1i01.7

Introduction

As soon as humanity came into existence, at the same time, a set of provisions were issued by the Almighty Allah to consolidate and organize the humanity. If the humankind does not comply the divine provisions and deviate from them, they should face the severe punishment. As Almighty Allah says in the Holy Qur'an (وماكنا معذبين حتى نبعث رسولا). (And never would We punish until We sent a messenger) (Sura Al Isra 15, QS 17: 15). From this blessed verse, it is clear that Almighty Allah has revealed the provisions and guidelines to guide the humanity towards success and victory. But over time, the humankind had to develop in various aspects of the life and required to make a series of laws and regulations. By enacting laws and regulations, from one hand, the society will get rid of aggression, oppression, dictatorship, and anarchism. From the other hand, the humanity will progress in various aspects of the life, and justice will be maintained, respectively.

Since Afghan society is also a part of the world, it is inevitable to impose a series of rules and regulations for the welfare of the people. Those laws and regulations which bring order and remove injustice and grievances from the society is called legislation.

The history to law-making process in Afghanistan can be divided into two eras: First, the era before the country's independence. Secondly, the era after the country got independence.

Attai, (2012) and Haneef (2011) have respectively noted as follow:

***Corresponding Author**:
Email: Ih.nasih3@gmail.com
https://doi.org/10.70436/nussj.v1i0.7
© 2024 The Authors. Published by Nangarhar University, this is an open access article published under the CC-BY license
https://creativecommons.org/licenses/by/4.0

1. The Era of Pre-Independence

It is an honor to reveal that legislation in Afghanistan has a relatively long history. In this era, Afghanistan is one of the leading countries in the region; because Afghanistan has undergone comprehensive political, social, and governmental reforms based on the rule of law.

a. Legislation during the reign of *Amir Shir Ali Khan* (1863-1878):

Amir Shir Ali Khan has established the first cabinet of six people, who were responsible for decision-making in all aspects of the governmental issues including legislative responsibility. During this period, a series of laws were passed such as the code of military, budget Law, and the laws to regulate land tax, etc.

b. Legislation during the reign of *Amir Abdul Rahman Khan* (from 1880 to 1901): The following laws and regulations were prepared and enacted in the ruling time of Amir Abdul Rahman Khan:

1. The rules of the rulers: Based in this law, the high officials should do their affairs regarding the rules and regulations carried out by the particular law.
2. The basis of judges: Based on this law, the court judges must obey the provisions of this law and should act and make the decisions according to this particular-law.
3. Preaching treatise: The purpose of this treatise was to inform people about the religious and other issues such as the acquisition of knowledge (Elam), zakat, protection of the borders of the Islamic State, and the obedience of the king

c. Legislation during the ruling of *Amir Habibullah Khan* (1901-1919): Amir Habibullah khan established a council where scholars and academics were getting together to prepare various types of laws and regulations such as the regulation on wedding and mourning, the law of the high officials of the government, regulation on purchasing goods from foreign countries, regelation on population registration, regulation on tax revenue, and many more. A number of these laws and regulations were published in the government official newspaper called Siraj al-Akhbar.

Haravi (2014) and Hasimi (2011) explained the process of legislative system after the independent as follow:

2. The Era of Post-Independence

Afghanistan got independence from the Great Britain in 1919. In this era, many positive changes have come in the political, economic, cultural, and social fields. Besides, the legislation has also developed and many Nizamnamas and laws have been enacted.

A. Legislation during the reign of king Amanullah Khan (1919-1929): King Amanullah Khan formed the State Council. This council was the supreme authority for decision-making in the government affairs, the recognition of the supreme interests of the country, and the seeker of better ways for the progress of the homeland. During this period, with the help of a number of Turkish specialists roughly 77 Nizamnamas or laws such as the Nizamnamas of tax, Nizamnamas of the basic organizations of the Afghan state, and many more were prepared and published in various fields. It is worth mentioning that the first constitution, which contained 73 articles was enacted in the time of Amir Amanullah Khan (Danish, 2010).

B. Law-making in the reign of King Mohammad Nadir Shah (1929-1933): In the time of King Mohammad Nadir Shah, for the first time the National Assembly was opened in 1930. By the opening of the National Assembly, the legislative process in Afghanistan changed. At this stage, the Nizamnamas, statutes, regulations, and other legislative documents were processed. During the reign of Mohammad Nader Shah, for the first time, an official body was established to carry out the drafting of laws and other legislative documents. Currently, there is the General Directorate of legislation in the Ministry of Justice. The mentioned directorate is gradually promoting in terms of the legislation of the legal documents.

Materials and Methods

On the basis of earlier literature, a comparable investigation the content was developed. The summary of the main conclusions, techniques, and findings from all sources were the data extraction process. The use of methods was constrictive and analytical.

Results and Discussion

Haneef (2011) and Wasiq (2009) stated steps to be taken in drafting law are as follow:

1. The Legislation Process (Steps to Enact a Law)

Apparently, in the legislative system of Afghanistan, a bill becomes a law when it passes the following seven stages:

2.The Stage of Drafting (تسوید)

Drafting is the first stage of the law-making process in Afghanistan. Drafting (تسوید) is linguistically derived from Arabic language which means to blacken, written a paper or writing sentences and phrases of legislative documents. Although, each of the three powers or branches of the state can initiate a legislative process by proposing a bill, the formalities of the bill and its steps are not the same for all three powers.

The most common method for drafting, scrutinizing, and passing or approving a law is to start with government agencies and be approved by the National Assembly, then signed and endorsed by the president, and finally published in the official gazette. Moreover, The Supreme Court can also propose its legal proposal to the National Council in

the field of judicial regulation through the government. Furthermore, Members of the house of people and upper house can also propose a bill, but there are a number of conditions under Articles 95 and 97 of the Constitution: 1. The proposed bill should not be in financial or budget matters; 2. The number of the proposed members should not be less than ten; 3. The approval of one fifth of the house (representative or upper) where it was initiated. Additionally, whenever the government feels the need to enact a law in a particular area, which includes several bodies or ministries, the representatives of all the relevant departments are invited to make a draft.

3.The Stage of Scrutiny (تدقیق)

The scrutiny is the second step in the legislation process in Afghanistan. Scrutiny (تدقیق) is linguistically derived from Arabic language which means subtilizing or paying close attention. According to the Law on the Procedure for Publication and Enforcement of Legislative Documents scrutiny is the Comprehensive and accurate revision of the form and contents of the draft of the legislative document that is done by the competent authority before the approval and ratification stage in order to be effective, efficient and compatible with the rules of the holy religion of Islam, the constitution, and applicable laws.

Once the draft of the law has been drafted, it will be sent to the Department of Legislative Affairs or the Institute for Legislative Affairs and Scientific and Legal Research for almost two main tasks:

1. To review and observe the usage and formation of the words, sentences, and phrases of the draft carefully in order to resolve the possible ambiguity, gapes, or mistakes.

2. The second task of this organization is to comply the draft of the law with the Islamic Sharia, the Constitution, the applicable laws, regulations and, in some cases, the international agreements to which Afghanistan has acceded.

4.The Stage of Ratification or Approval (تصویب)

The approval is the third stage in the legislative process in Afghanistan. Ratification (تصویب) is linguistically derived from Arabic language which means knowing the truth, judging correctly, or Voting for the approval of the bill by the National Assembly or the Council of Ministers. According to the Law on the Procedure for Publication and Enforcement of Legislative Documents, approval is defined as: Deciding on the approval or rejection of a bill from a competent authority.

Whenever a draft is prepared by the relevant organ, it will be sent to the relevant competent authority for the approval. Reference competent authority is authorized to approve or reject the prepared draft. In Afghanistan, there are usually two regulatory bodies that ratify or approve a bill:

1. The Loya Jirga (“A Loya Jirga, or "grand council", is a mass national gathering that brings together representatives from the various ethnic, religious, and tribal communities in Afghanistan. The Loya Jirga is a centuries-old institution that has been set up at times of national crisis or to settle national issues. Historically, it has been used to approve a new constitution, declare war, choose a new king, or to make extensive social or political reforms and the Parliament. The Loya Jirga usually adopts the constitution” (Bezhan, 2013).

2. The parliament or the National Assembly (the House of Representatives and the Upper House) approves ordinary laws and organic laws.

The Approval of the drafted bill in the National Assembly is a two-step process. First, the drafted bill is sent to the House of Representatives. The House of Representatives evaluates and reviews it. After the revision, the bill might be approved, rejected, or sent back for the correction to the reference authority from which it was sent to the House of Representatives. After the reference authority has made corrections to the bill, the corrected version of the bill will be sent to the House of Representatives for the second time. Secondly, when the drafted bill is approved by the House or Representatives, it will be handed over to the Upper House for the approval.

Regarding the ratification or Approval of a drafted bill, article 90 paragraph one of the Afghan Constitution states that ratification, modification or abrogation of Laws or legislative decrees is the duty of the parliament or the National Assembly.

5.The Stage of Endorsement (توشیح)

The endorsement is the fourth stage in the Law-making process in Afghanistan. Ratification (تصـــــویـــب) is linguistically derived from Arabic language which means decorating; or embellishing the text with a stamp and signature. According to the Law on the Procedure for Publication and Enforcement of Legislative Documents, endorsement is the signature of President to approve and enforce a Law.

When a drafted bill is passed by the Loya Jirga or parliament, later, it is sent to the president for a signature. According to Article 94 of the Afghan Constitution, drafted bill approved by parliament must then be submitted to the President for endorsement or rejection. Moreover, according to Articles 64, paragraph 16, the endorsement of

the legislative laws is one of the main authorities of the President.

A bill approved by the National Assembly must be submitted to the President. If the President does not accept the bill and does not want to sign it, should state the reasons for the non-acceptance and must return it to the House of Representatives within 15 days, otherwise, the approved bill will be considered as a Law and will be considered enforceable by publishing in the official gazette. When the president reverses the bill to the House of Representatives within 15 days and the House of Representatives approves it with two-thirds of the total votes of the members, regardless of the president's opinion, it is still considered a signed Law without the president's direct endorsement and considered enforceable by publishing it in the official Gazette.

6.The Stage of Publishing (نشر)

The Publication is the fifth stage in the Law-making process in Afghanistan. Publication (نشـر) is linguistically derived from Arabic language which means spreading or scattering news. According to the Law on the Procedure for Publication and Enforcement of Legislative Documents, publishing is Printing a legislative document in the official gazette for the purpose of public awareness of the provisions of the legislative document.

When the government bill is published in the official Gazette after the endorsement of the President or by 2/3 majority vote of the entire National Assembly, becomes an effective and enforceable law. Usually the last article of each law deals with this stage and determines its enforcement dates. Moreover, regarding the publication of legislative documents, article 1of the Law on the Procedure for Publication and Enforcement of Legislative Documents states " This law has been enacted in order to inform all the official and unofficial departments and citizens of the country about the laws, decrees, regulations, statutes, resolutions, as well as their regulation and publication method." Therefore, legislative documents must be published for the first time in a special government publication called the "Official Gazette".

The Ministry of Justice has an obligation to take necessary measures to introduce the newly enacted law through the mass media even before its publication in the official gazette. In a similar manner, the Ministry of Justice can distribute the enacted law throughout the country in libraries, bookstores, governmental centers and especially offices of law enforcement agencies. The publication of the law in the official gazette is like informing the people that such a legislative document has been enforced, and the people should show the commitment to it in the territory of the country. The legislative documents are published in both national languages; therefore, the draft law must be prepared in two official languages, Pashto in the right column and Dari in the left column of the official Gazette, otherwise the National Assembly will refrain from receiving it.

7.The Stage of Deadline (مهلة)

The deadline is the sixth stage in the Law-making process in Afghanistan. Deadline (مهلـة) is linguistically derived from Arabic language which means time-giving, slowing down or delaying, or tolerance. Usually, when the law is published in the official gazette, after the publication a certain period of time is given for the implementation of the law. So that all the citizens of the country can study the law and make themselves aware of the provisions of the law. For example, article 916 of the penal code (2017) states that this law can be applied after nine months of its publication. The reason why a certain period of time is given to laws for the implementation because there is a principle in law that (ignorance of the law is not considered an excuse), so the government is obliged to give a deadline for the good implementation of the law.

Additionally, in terms of deadline, the laws are categorized in two parts: First, laws which pose obligations and duties to the citizens such as penal code, civil law, and so on. The deadline is necessary for this type of laws. Because if the deadline is not given, the society may be suffered and affected. Second, laws that provide convenience, privileges, and rewards for a society such as tax exception law, pension law, and so on. For this sort of laws deadline is not needed (Wasiq, 2014).

8.The Stage of Enforcement (انفاذ)

The enforcement of the enacted law is the seventh stage in law-making process in Afghanistan. Enforcement (انفاذ) is linguistically derived from Arabic language which means executing or commanding. According to the Law on the Procedure for Publication and Enforcement of Legislative Documents, enforcement is the stage when the legislative documents become effective and applicable (The Constitution, 2003).

In fact, the stage of application or enforcement is the final stage of the legislative process. Whenever the law follows its previous steps, it later reaches the stage of enforcement. Sometimes, the law becomes enforceable or applicable from the date of approval, from the date of endorsement, or from the date of publication in the official Gazette.

Recommendations

considering the high goals of the legislative system and the need for its stability, two fundamental suggestions are:

First, the Afghan government has to identify the necessity of enacting the law and then suggest to the law-making authority to prepare the bill and ultimately pass the law. Secondly, the Afghan government should pay more attention to the implementation of a particular law. If the Afghan government considers these two recommendations, all the efforts and expenses of the legislative process will have desirable results.

Conclusion

The existence of good laws and their application is extremely vital in today's life. But the existence and good implication of laws require a precise and well-managed law-making process. Afghan legal system, after nearly a century of its own experiences and the use of the legislative experiences of other legal systems, has found gaps and hopes for good governance and the rule of law in the country. Moreover, the Afghan legislative system has become relatively well-established by drafting various types of statutes, regulations, bills, procedures, and other legislative documents. In order to fulfill the needs of the various aspects of life, the Afghan government has used and focused on these steps (drafting, scrutiny, approval or ratification, endorsement, publication, deadline, and enforcement) which are very critical in the law-making process.

References

Attai, A. (2012). The legislative process in Afghanistan(مراحل قانونگذاری در افغانستان). Legal and jurisprudential writings on the Islamic Republic of Afghanistan. http://sarahoqoq.blogfa.com/post/167.

Bezhan, F. (2013). Loya Jirga—an Afghan tradition explained. Radio Free Europe Radio Liberty. https://www.rferl.org/a/afghanistan-loya-jirga-explainer/25174483.html;

Danish, S. (2010). The Fundamental rights of Afghanistan(حقوق اساسی افغانستان). Publisher, Ibni Seen higher education institute, 64.

Haneef, A. (2011). Legislation (تسویید قوانین). Textbook. National Legal Training Center, Kabul University, 29.

Hiravi, A.R (2014). The process of legislation in Afghanistan (افغانستان چگونگی طی مراحل قانون در).The Justice Magazine. Ministry of justice of the Islamic Republic of Afghanistan,

Hisami, H.G. (2011). The process of the legislative system (سیستم قانونگذاری). The Justice Magazine. Ministry of justice of the Islamic Republic of Afghanistan,

Official Gazette (2007). Law on processing, Publishing and Enforcing Legislative Documents. published No: 924 dated

Official Gazette (2013). Law of the organization and authority of the court of Islamic Republic of Afghanistan.

Qayoumi, A. Q. (2026). The history of legislation in Afghanistan(تاریخچه قانونگذاری در افغانستان.). The Justice Magazine. Ministry of justice of the Islamic Republic of Afghanistan, Department of Publications, and public Relations، monthly specialized Legal and Cultural magazine - 8th Year / Serial Number 44, 33

Quran. (2009). surah Al Isra 15 (QS 17: 15) in Arabic and English translation. http://www.alquranenglish.com/quran-surah-al-isra-15-qs-17-15-in-arabic-and-english-translation

The Constitution of the Islamic Republic of Afghanistan (2003). Ministry of justice of the Islamic Republic of Afghanistan,

Wasiq, A. G. (2014). Principles of Law (مبادي حقوق). Nangarhar University, textbook, Mazigar publishing center,127.

Bio-data

Mr. Ihsanullah Nasih is an Assistant Professor in the department of Islamic Studies (Tafseer) and Vice Chancellor for academic affairs of Nangarhar University.

Mr. Khalilullah Nasih is an Assistant Professor and Deputy Dean of Faculty of Sharia at Nangarhar University.