

The Modern Legal System of Afghanistan

THE HISTORICAL BACKGROUND OF MODERNIZATION IN THE LEGAL SYSTEM**

by

A. S. Sirat*

Forty years ago, the legal system of Afghanistan was based mostly on religious tradition and regional customs. The Afghan religious scholars and religious men who pursued Islamic studies did so in Afghanistan, India (including present Pakistan), Bukhara, Tashkand, and Samarkand (some of the present Russian republics). With this background they then held the positions of kadi (judge) and mufti (assistant-judge) in the Afghan government. Some of these men also taught Islamic studies informally and acted as religious leaders. The formal structure for legal decisions was the court consisting of the Kadis and mufties. In addition to this formal system, the leaders of the tribes and sages were informally the source of decision for many cases. In these cases the people respected their decisions and opinions which were based on regional traditions.

The modernization of the legal system of Afghanistan began after the Constitution of 1930 was adopted. Although this Constitution was based on religious tradition, it was modern in that it recommended that specific laws should be written within the framework provided. During the years that followed, new laws were written dealing with the administration of the government as well as with criminal, commercial, and civil cases. Even though the principles of law were taken from religious and national tradition, the Western influence can be seen in the new theories of administrative, commercial, and procedural law utilized in making the new laws. Afghanistan benefited most from studies of the laws of Turkey, Germany, Switzerland, and France. Thus we view this period in Afghanistan as the one when new laws were framed, while retaining the religious and national traditional values.

There was an interesting movement of modernization forty years ago when Afghan scholars who had no formal training in Islamic studies re-organized the Islamic Law in modern form by grouping the old materials in new chapters and articles which would facilitate the finding of specific rules and provide internal consistency. Different doctrines and interpretations made it difficult before this time to ascertain the controlling provisions for many cases. Another difficulty was the fact that the old sources were written in classical Arabic, which made the Islamic law texts difficult

*Abdul Satar Sirat is Dean, Faculty of Islamic Law, Kabul, Afghanistan.

**16 *American Journal of Comparative Law* 563 (1968). Reproduced with the permission of the Publishers.

for Afghans to understand. First of all, the reorganizers divided the provisions of Islamic law into two categories—criminal and civil. Based on the teaching of Hanafi, the Afghan scholars selected, organized, and translated materials from the Islamic law into Afghan Persian to form a law book called *Tamasok al Qudat* which is an instruction book for judges. This type of reform had been first begun in Egypt about 1920. The Egyptian reform reorganized "Law No. 25" which is the "Family Law" consisting after the reorganization of 13 articles. Before that, in 1876, the movement toward reorganization of Islamic law had been carried forward under a decree of the Osmani Caliph in Turkey by turning the teaching of the Hanafi school into the compilation which was called *Mujalla al ah Kam* (Magazine of Provisions) with 1,851 articles.¹

THE NEW CONSTITUTION OF AFGHANISTAN—1964

The Constitution of Afghanistan of October 1, 1964 was adopted in to reorganize the national life of the country according to the requirements of the time and on the basis of the national history and culture, to achieve justice and equality, and to establish political, economic, and social democracy. This Constitution is considered to be modern and progressive leading to a great deal of change in the Afghan legal system. The Constitution confirmed the fact that Afghanistan is a constitutional monarch, an independent, unitary, indivisible state, and insisted that sovereignty belongs to the Afghan nation.²

The new Constitution also affirmed that the official religion in Afghanistan is Islam, and requires that religious rites performed by the State shall be according to the provisions of the Hanafi teaching. Although the official religion is Islam, the law provides that non-Muslims are free to follow their religious beliefs.³

The King in Afghanistan is considered as the centre of National Unity and he is respected by all as the popular leader. The qualifications for the King are that he must be an Afghan national, a Muslim and a follower of the Hanafi teaching. According to the new Constitution of 1964 the King has the following rights and duties :

1. Holds Supreme Command of the armed forces of Afghanistan.
2. Declares war and armistice.
3. Summons and inaugurates the Loya Jirgah (Great Council which consists of all members of Parliament and the Chairmen of the Provincial Councils).
4. Inaugurates the ordinary session of Shura (Parliament).
5. Summons and inaugurates the extraordinary sessions of the Shura.
6. Dissolves the Shura and decrees new elections, which must be held within three months from the date of the dissolution of the Shura.
7. Signs laws and proclaims their enforcement.
8. Issues ordinances.

1. Sirat, Abdul Satar, *Islamic Law in Modern Legislation* (Kabul: Afghan Government Press, 1964).

2. *Constitution of Afghanistan*, Article 1 (Kabul: Government Printing, 1964).

3. *Ibid.*, Article 2.

9. Grants credentials for conclusion of international treaties, in accordance with the provisions of the law.
10. Signs international treaties.
11. Appoints the Prime Minister and accepts his resignation. Appoints Ministers on the recommendation of the Prime Minister and accepts their resignations.
12. Appoints the non-elected members of the Meshrano Jirgah (Senate) and appoints its President from amongst its members.
13. Appoints the Chief Justice and Justices of the Supreme Court.
14. Appoints Judges and high-ranking civil and military officials and grants them retirement in accordance with the provisions of the law.
15. Appoints the Heads of Afghanistan's diplomatic missions to foreign States; appoints permanent Representatives of Afghanistan to international organizations and accepts the credentials of foreign diplomatic representatives.
16. Proclaims and ends a state of emergency.
17. Remits and pardons sentences.

"The succession to the Throne of Afghanistan is to continue in the family of H.M. Mohammed Nadir Shah,"⁴ the leader of Afghanistan's Independence and father of the present King, Mohammed Zahir Shah.

The Third Title of the Constitution deals with the very interesting and important area of the rights and duties of the people. This Title provides for the protection and respect of the liberty and dignity of the individual, and declares that freedom of speech, freedom of publishing, freedom of ownership, freedom of communication, freedom of peaceful assembly, and freedom to form political parties cannot be violated.

The most important and original aspect of this new constitution is the separation of executive, legislative, and judicial powers. These branches have been organized and are currently operating.

The Parliament of Afghanistan includes a House of Representatives and a House of Senators (*Wolesi Jirgah* and *Meshrano Jirgah*).⁵ The members of the House of Representatives are elected by the people of Afghanistan for a term of office of four years, which is one term of the legislature, in a free, universal, secret, and direct election. Two-thirds of the members of the Senate are elected in a similar manner with the following exceptions:

1. Each Provincial Council shall elect one of its members to the Senate for a period of three years.
2. The residents of each province shall elect one person for a period of four years.

The other one-third are appointed by the King for a term of five years. Persons appointed or elected for membership in the Afghan Parliament must meet the following requirements:

1. Having been an Afghan citizen for at least ten years (prior to the date of nomination or election).

4. *Ibid.*, Title Two.

5. *Ibid.*, Title Four.

2. Not having been punished by a court with deprivation of political rights since the adoption of the 1964 Constitution.
3. Being able to read and to write.
4. For members of the House of Representatives, being at least 25 years old at the time of the election and for the Senate being at least 30 at the time of their nomination or election.

The duties of the executive power, which includes the Prime Minister and his Cabinet, have been limited and controlled by the Parliament because of the establishment of a democratic society. Thus, the Prime Minister and the Ministers are collectively responsible to the House of Representatives for the general policy of the Government, and individually for their prescribed duties.⁶ The executive branch of the Government is formed by the person designated as Prime Minister by the King. The members and policy of the Government are presented by the Prime Minister to the House of Representatives, which after debate, approves by a vote of confidence in the Government or rejects the new Government if there is no vote of confidence. The Prime Minister (Head of the Executive Branch) must be an Afghan national by birth.⁷

The 1964 Constitution established that it is the duty of Parliament to organize the modern life of Afghanistan by making laws, but it stipulates that no laws may be passed against the basic principles of Islam.⁸ This requirement illuminates the concept of modernization in the legal system of Afghanistan and the relationship between modern laws and traditional laws. New laws must be made as provided by the Constitution so as to form a modern legal system. At the same time, only the basic principles of Islam—not the traditional and particular details of any certain teaching, are considered as a general frame for new laws. By this constitutional principle, the Afghan Legislature will adhere only to the basic principles of Islam, and will benefit from the advantages of all Islamic teachings (Hanafi, Shaffi, Malaki, Hanbali, etc.). The interesting point is that although the laws to be made are based on broad Islamic principles, if a case arises which is covered by no new law, the prevailing law in the court is only the Hanafi Doctrine.⁹ By choosing only the Hanafi Doctrine, the Constitution limits the courts' power and restricts conflicts of decisions.

In the last three years more than twenty new laws in the areas of judicial procedure, administration, and criminal and civil affairs have been made as prescribed in the new Constitution. While respecting historical and national values in its new legal system, Afghanistan benefited most from the legal theory of the United Arab Republic which is mostly based on the French system. Before adoption of the new Constitution, there was a small office for the drafting of legislation in the Ministry of Justice, but only in the last four years has this office become of major concern, and is now staffed by Afghan and foreign scholars, especially lawyers from the United Arab Republic.

Although the courts were independent in their decisions before adoption of the new Constitution, they were influenced administratively by the Ministry of Justice. Since the new Constitution the judiciary has become

6. *Ibid.*, Article 96.

7. *Ibid.*, Title 6.

8. *Ibid.*, Article 64.

9. *Ibid.*, Article 69.

completely independent. Preparation for this independence has been going on for the last three years and now for the first time, with the establishment of the Supreme Court on October 15, 1967, by H.M. Mohammed Zahir Shah, the King of Afghanistan, the judiciary is independent.

The new Constitution provides a specific Title covering the judicial branch and itemizing its duties and powers.¹⁰ One of the important conditions for being a member of the Supreme Court is to have substantial background and a high degree of knowledge of the science of law and the Afghan legal system. Requiring a greater educational background for the Justices helps to assure that the legal system will progress and modernize itself. The Judiciary consists of a Supreme Court and many lower, appellate, and other courts, the number and functions of which are determined by law.

The Supreme Court consists of nine Judges appointed by the King for a period of ten years. The Minimum age for these judges is thirtyfive. The King appoints one of the Judges of the Supreme Court, between the ages of forty and sixty, as the Chief Justice. Upon completion of their term the Judges may be reappointed for another term by the King. If a Chief Justice or Judge is not reappointed for another term he is given all of the financial privileges pertaining to the term of his office for the rest of his life. After the termination of their services, the Chief Justice and members of the Supreme Court cannot become Prime Minister or members of the Government, members of the Shura, or Government officials. The Chief Justice and members of the Supreme Court also are prohibited from participating in political parties during or after their tenure of office.

The Office of Attorney General was established for the first time by the new Constitution in the Ministry of Justice as a part of the executive power for the investigation of crimes, and to carry out other duties itemized in the Law of "Organization of the Attorney General's Office" and the law of "Criminal Procedure" which was adopted since the new Constitution.

LEGAL EDUCATION IN AFGHANISTAN

As has been stated, forty years ago Islamic law was studied only informally. However, in the last forty years the government has established several official Islamic schools under the guidance of the Ministry of Education for modern Islamic Studies in the capital (Kabul) and in the provincial regions. The students in these schools study modern sciences such as history, geography, mathematics, etc., as well as Islamic studies. After graduation many of them work for the government as part of the judiciary staff or as Islamic teachers.

The first schools to be established were on the high school level. In 1950 the government formed the Faculty of Islamic Law at Kabul University for advanced Modern Islamic and Legal Studies. The students from this program usually become part of the judicial staff of the government. The Islamic Law Faculty of Kabul and the University of Al Azhar, Cairo, United Arab Republic, have a close relationship. Students from Kabul attend Al Azhar for graduate studies and some professors from Al Azhar teach in the Faculty of Islamic Law at Kabul University.

10. *Ibid.*, Title Seven.

11. *Ibid.*, Article 103.

In 1938 Kabul University founded the first faculty of law, called the Faculty of Law and Political Science for Western and Afghan Modern Legal Studies. More than seven hundred graduates of this Faculty are now working in official positions, mostly in the office of the Interior or the Ministry of Foreign Affairs. This faculty is affiliated with the University of Paris, with students going to Paris for graduate work and professors from Paris teaching in Kabul. There is cooperation between the two faculties of law at Kabul University, with students of Western Law studying some Islamic law and Islamic law students studying some Western law. After graduation most students from both schools enter the judicial branch of the Afghan government.

Before the new Constitution there were very privately practicing lawyers. Now, under the provisions of the law, private practices have been established in Kabul and other large cities by graduates of the Faculty of Islamic Law and of the Faculty of Law and Political Science, and other persons with an equivalent background and knowledge.

CONCLUSION

The movement toward the modernization of the legal system in Afghanistan during the past forty years was effected while respecting the political, social, and historical conditions of the country. After the 1964 Constitution, increased modernization became a reality and a solution to the pressing problems of the times. Therefore, in the last four years the modernization has been very rapid and the changes have been felt by all. Although the law of Afghanistan will keep Islamic principles and Afghan national and historical values as its basic sources, new laws will be made governing modern life in Afghanistan, adopting theories and methods of legislation from the Western World. Because of this, the powers and duties of the legislative and judicial branches in present Afghanistan are becoming broader and completely different than ever before. Further, as progressive trends continue, the legal education will expand and improve.