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THE NATURE OF LEGAL PERSONALITIES AND THEIR PLACE IN THE LEGAL SYSTEM OF AFGHANISTAN

The present research, entitled “The Nature of Legal Personalities and Their Place in the legal System of Afghanistan”, aims to identify and explain the essence of legal personality within the theoretical frameworks of legal scholars and effective laws of Afghanistan. This research is compatible with the spirit of qualitative research. In terms of purpose, it is fundamental research, and in terms of nature and method, it is descriptive-analytical research. The method of data collection is library-based; the researchers have collected data using books, articles, and legal dictionaries and analyzed them using qualitative content analysis. The main question of this research is the essence and nature of the formation of legal personality and identifying the perspective of the Afghan legal system regarding the nature of legal personality. The findings of this research suggest that there are four theories regarding the nature of legal personality: the theory of denial, the theory of fiction, the theory of reality, and the theory of the construction of legal personality. Moreover, through the collected and analyzed materials, it is explained that the Afghan legal system has accepted the constructivist theory of legal personality under the Civil Law and the Law of Social Organizations.

Key words: *Afghanistan, legal personality, legal system, nature.*

Introduction

Law, as a set of rules and regulations, provides normative guidance for regulating social interactions and relationships between persons in a prescriptive manner [1, p. 22]. This definition indicates that the primary focus of law involves addressing individuals and their legal statuses. Therefore, the purpose of legal rules is to regulate relations between persons, and legal personality is one of the fundamental topics in law. Legal rules determine the scope of authority, competence, rights, and obligations of persons. We well-know that one of the necessities of social life is the existence of legal personality; be-

cause proper administration of society and flow of affairs is not possible without the existence of government, state, governmental institutions, and foundations. Necessarily, assigning some affairs to non-governmental institutions separate from the government apparatus and establishing commercial companies, institutions, and endowments, whether profitable or non-profitable, are considered vital necessities of society. That is why various types of legal persons have been considered in different areas of public and private law.

From a legal point of view, a legal person comes into being when a group of individuals who have common interests and activities or some properties that are devoted to specific purposes are placed together. The law recognizes them as the holder of rights and obligations and gives them an independent personality; such as the State, Municipality, University, Commercial Companies, Associations, Institutions, and endowments [5, p.151].

Just as natural persons have been given the attention of lawyers to protect their rights, special attention has been paid to legal personality to protect their rights. Therefore, in this study, we intend to study the nature of legal personality. The main concern of this research is the essence and nature of the formation of legal personality and identifying the perspective of the Afghan legal system regarding the nature of legal personality.

By reviewing the research literature, it became clear that comprehensive research has been done regarding legal personality and its position in national and international documents. In the Afghan legal system, civil law, media law, the law on non-governmental organizations and the articles of association of Afghanistan have discussed the position and how legal personality is formed within the framework of the law. In addition to scholarly articles by domestic researchers, scientific works and books have also been written by young researchers, including Mr. Nazamuddin Abdullah, a well-known researcher in Afghanistan who has pointed out important points about legal personality, its types, rights, and obligations. However, independent and systematic research that comprehensively covers all aspects of legal personality and explains its nature was not done yet.

This research is compatible with qualitative research; in terms of purpose, it is fundamental research “a type of study in which the researcher seeks to discover realities and scientifically understand phenomena” [2, p. 40] and in terms of nature and method, it is descriptive and analytical research; The explanation is that firstly the topics under discussion were collected by referring to the books and scientific works of domestic and foreign authors and internet sources, and then interpreted, analyzed and generalized through qualitative content analysis. As stated in the research methodology, in this paper we will make every effort to pursue the concern of this research accurately with the help of the legal documents of the Afghan legal system and the legal works of domestic and foreign authors, to gain a proper understanding of the nature and essence of legal personality. Understanding the nature of legal personality has important implications in Afghanistan as the legal system continues to develop statutory frameworks for various public and private entities. Clarifying the theoretical underpinnings will help inform establishment of legal persons that balance individual rights and collective social needs.

Conceptual Foundations of Legal Personality

Personality is one of the states and attributes of a person by which they can be the subject of rights and obligations. Personality is a kind of description and qualification for having rights and obligations. If this description and ability are inherent and intrinsic to the person, it refers to natural personality. If the legislator has considered this description and ability for an entity that does not have intrinsic ability, it is considered a legal personality. For further explanation, in this section of the article, we explain the conceptual framework of issues related to legal personality.

1-1. Person. A person has different meanings and conveys different concepts in each branch of science. In Persian dictionaries, person means individual, human, and human being [3, p. 897]. From a legal point of view, a person is a phenomenon that becomes the subject of rights and obligations [4, p.154].

This concept in legal writings is termed legal personality. In other words, a person is someone or something that becomes the subject of a right, such as a human, commercial companies, associations, and the State. Also, legally, any entity that has a legal or natural personality is called a person [5, p. 7–8].

1-2. Personality. Literally, it means the innate temperament of each person, especially the set of internal and psychological factors that include the feelings, emotions, and thoughts of an individual [6, p. 614]. This term is taken from European law. Its Greek term is *persona*. *Persona* was a mask that Roman actors covered their faces with. Since each actor had a specific role and each mask represented that role. Therefore, the audience could identify the actor and their role from the mask. Hence the term *persona* also took on the meaning of role and share.

Legally, personality refers to the state of being distinguished of a person from the fact that they are the subject of rights and obligations. In other words, personality is the attribute and competence of a person to become a party and holder of rights and obligations [7, 1125]. Given the above, every human has a personality and can have rights and obligations.

The definitions of person and personality show there are two types of persons: natural and legal. The term natural person, also called physical person, is used when the subject of rights and obligations is a human. A person is an individual independently with free will and activity becomes the source of a series of affairs that can impose legal-civil effects on those activities [8, p. 507]. Therefore, natural person refers to human individuals who have rights and obligations. Legal person in law means having rights and obligations and having the competence to exercise them. More clearly, a community for whom lawmakers collectively recognize uniform rights and obligations, not for each individual. That is, the will and activity of each of the individuals forming the community is separate from their collective will and activity.

According to the legislators of all countries, such a community must have a separate name, independent residence, and separate property. So that, when necessary, they can independently file or participate in a lawsuit. These types of legal personalities are divided into two branches, a group of legal entities that fall within public law; such as ministries, government, universities, municipalities, etc. The second group of legal persons is related to the private law of countries; such as independent institutions, companies, banks, and cooperative [8, p. 506–507], which will be discussed further in the types of legal personality.

1-3. History of Legal Persons. The early concept of legal personality emerged in primitive societies, though it was not formally termed as such. The rationale for this idea gained logical justification in a basic form at that time. For instance, hypothetically, in primitive societies, the family was considered the basis of society and the continuity of the family was the main purpose of each of its members. In these societies, property, and land mostly belonged to the family rather than individuals. Also, in primitive societies, in addition to the family, other issues conveyed the concept of legal personality to some extent. Including temples, places of worship, and religious places that people have thought about establishing since ancient times. People of that time devoted property and assets to protect and continue these places. Thereby, the said places were known as owners of rights and property ownership. This represents the rudimentary concept of legal personality. In European law, legal personality emerged during the Middle Ages. Similar concepts were incorporated into Islamic law under titles such as *Bayt al-Mal* (state treasury), mosques, and endowments. These Islamic legal entities relate significantly in their function and nature to the European concept of legal personality [5, p.152–153].

In Afghanistan, the title of legal personality was first raised in the effective Civil Law of 1355. In this law, the concept of legal personality with types of legal persons, conditions of formation and dissolution, effects and consequences of establishing legal personality and its dissolution are each discussed independently and clear rules exist in this regard. In addition to that law, the Commercial Law of Afghanistan and several other laws have also been enacted to regulate subsidiary provisions and related criteria. Including the Law on Political Parties, the Mass Media Law, the Law on Non-Governmental Organizations, and the Law on Social Organizations.

1-4. Types of Legal Personality. Jurists divide legal persons into two categories: public law legal persons and private law legal persons. The Civil Law of Afghanistan has also accepted this categorization.

Public legal persons are the state, subsidiary departments, or branches related to it and public facilities. Special legal persons arising from the private will, in the form of associations, institutions, civil or commercial companies, and the like [4, p. 154].

From the first definition, it is inferred that within the framework of the state (including all three branches), any administration established is a public legal person. Additionally, any other administration formed by the state for advancing affairs related to the state and public interests is a public legal person. Such as independent administrations separate from the government apparatus and the Afghan Red Crescent Society. According to Article 338, paragraph 2 of the Civil Law, special legal persons are persons created based on the will of private individuals. Such as associations, endowments, institutions, civil or commercial companies, and the like, unless the law designates such persons as public. This article implies that special legal person's stem from private will and comprise three types:

1. Profitable, such as commercial and civil companies
2. Non-profit, including unions, associations, institutions, and foundations
3. Endowments [5, p.162].

Each of the above persons, according to the Civil Law of Afghanistan, has specific conditions of formation, dissolution, and legal effects in the case of establishment and abolition. It is noteworthy that although special legal persons are formed based on the will of private individuals, according to the law, the conditions and manner of their formation must be completed in order to gain permission to operate.

2. Theoretical Foundations of Legal Personality

In this section, we discuss the scientific basis of legal personality and its nature. The disagreement of jurists about the essence and nature of the formation of legal personality has led to the emergence of several theories. The most important of these theories are the theory of denial of legal personality, the theory of fiction of legal personality, the theory of reality of legal personality, and the theory of construction of legal personality.

2-1. Theory of Denial of Legal Personality. Some jurists deny legal personality. The famous jurist Gaston Geze has a satirical remark about legal personality. He used to say that it has never happened to me to sit at the dining table and have a meal with a legal person.

Similarly, German Irang and famous French jurists including Planiol and Barthelemy believe that there is no need to think of legal personality. Instead, one can propose the simpler idea of "joint ownership". Meaning that the property belonging to a community is the joint ownership of the whole group. So that they are all one person and individuals do not have the right to dispose of the joint property, except with the consent of all members. Therefore, the idea of joint ownership provides everything we want from legal personality. In this case, we become needless of the idea of legal personality.

The theory of joint ownership instead of legal personality faces some criticisms. First, the idea of joint ownership can only justify the existence of private law legal entities such as companies, banks, and private institutions. But it cannot explain the ownership of property of legal entities other than companies, such as public law legal persons. Second, the theory of joint ownership cannot explain all the consequences that result from legal personality, because this view only explains the financial aspect of legal personality. While the state and public legal personality, not all of its goals are limited to financial matters. Sometimes more important goals than financial matters are raised for the state [10, p. 101–102].

2-2. Theory of Fiction of Legal Personality. It is one of the oldest theories related to legal personality. This theory stems from individualist ideas. According to this theory, groups and communities are not separate from their members and do not constitute independent persons. Therefore, legal personality is a fiction and construct of the legislator and does not arise without state intervention. The renowned German jurist Savigny argued that legal personality is fictional, created and destroyed at the

will of the state [5, p. 155]. This theory states that only natural persons have rights and obligations, and legal entities have rights and obligations in a fictional and artificial manner. They consider this fictional aspect of legal personalities necessary for simplifying affairs.

This theory is not consistent with reality; because according to this theory, the legal personality of the state is not justified. Since the state cannot grant itself legal personality as long as it does not exist and only exists if it has legal personality. The artificiality of this theory has led some jurists like Duguit to oppose it. He believes that since the term legal personality is metaphorical and artificial, therefore it is better to completely remove it from legal language. Others have said that stating a certain group or community has a legal personality is incorrect, and it is better to say that certain property is devoted to a specific purpose and the property itself implies rights and obligations and has all the effects of legal personality. Duguit says: If we accept the theory of legal personality, it is unprovable and inconsistent with reality, there is no reason for us to try to maintain it. This theory is by no means necessary to justify judicial protection of social resources. Whenever we are faced in a situation whose subject and purpose are legitimate, society need only protect it [11, p. 256–257].

2-3. Theory of Reality of Legal Personality. This theory in some works of Afghan writers is referred to as the theory of originality of legal or juridical personality. According to this theory, a legal person is an original and independent entity and has a nature separate from those who constitute it. Such that, the interests of the legal person may conflict with the private interests of its members.

Proponents of this theory provide psychological and historical evidence to support their claims. Based on psychological evidence, non-material and spiritual factor such as values, beliefs, religion, nationality, and other common interests brings individuals together. This factor unites and integrates individuals and transforms the individual into individuals or from me to we (collective identity and independent personality). This collective identity and independent personality, by its formation, perform deeds that the individual could never perform alone under any circumstances. For example, when common religious beliefs in Iran lead to protests and demonstrations, this community can have a tremendous influence on the Iranian government and its domestic and foreign policies. In a way that the individual Iranian could never do this alone. Based on historical evidence, humans have always had social activity and lived in groups. Social or group life has led to joint decision-making and individual identity was defined and interpreted within the collective identity framework; because the life of early humans was structured in a way that the individual could not live alone. The individual always tried to be with a group. Whenever an individual was expelled from a tribe or group, their life was endangered. Even ownership at that time was also joint to some extent. All members of the early society defined and interpreted their identity based on tribe, ethnicity, clan, or even common great-father. Moreover, responsibility was collective in primitive societies. If an individual committed a crime, their entire tribe or ethnic group bore responsibility. There were many cases where the tribe or ethnicity paid the price of the crime and felony of their affiliated member.

According to the proponents of this theory, a concrete example of the reality of legal personality is the nation. National identity is distinct from the identity of the individuals of a nation. As the source of national sovereignty, a nation as a whole gains' collective will and legal personality, distinct from the individuals who constitute it [12, p. 63–64]. Gierke, a prominent German jurist and theorist of this theory, believes that the nation has legal personality and like natural and real persons, expresses its will through special members. In his view, the legislature is the means of expressing the will of the nation. The French scholar Raymond Saleilles, given the importance of legal personality in society, considers it an obvious fact. According to the theory of the mentioned scholar, legal entities are social phenomena whose role in social and political life is considered necessary [5, p.156].

Despite the evidence supporting this theory, it faces some criticisms. One criticism concerns the similarity it draws between legal personality and human beings. The second criticism is; This theory causes the personal responsibility of the representatives and delegates of legal entities to be ignored. If

all responsibility is attributed to a public or private legal entity, its managers may evade personal responsibility. This could enable abuse and authoritarian behavior.

2-4. Theory of Construction of Legal Personality. Proponents of this theory believe that “the fiction or reality of legal personality is a fabricated and artificial issue. Legal personality is an abstract concept and legal construct that stems from the innovations of today's civilization” [7, p.114]. Professor Waline believes that legal personality is only a constructive matter. He criticizes the theory of fiction and reality of legal personality and rejects the issue of the similarity of juridical personality with humans. Waline's reasoning is that person in law means competence to acquire rights, and legal personality is not inherent to the existence of humans. Secondly, the law protects interests that exist as a reality in society, and the legal person is the holder of these protected interests, and this definition applies equally to natural and legal persons [12, p.66–67].

From what is stated above, we conclude that the theory of fiction of legal personality means that the state has general and absolute authority to grant or deprive legal personality of life, while the practical consequence of the mentioned theory is that determining legal persons stems from the will of the legislator and the legislator is obliged to recognize their existence. While the construction theory resembles the fiction theory, it offers a more reasoned and lucid interpretation of legal and social facts.

2-5. The perspective of Afghanistan's Legal System regarding Legal Persons. Given that today in all countries' laws the existence of legal personality as an undeniable matter is accepted, Afghanistan's legal system is no exception. Article 339 of the Civil Law of Afghanistan states: “A group of persons who possess the necessary conditions and elements of legal personality can be recognized by law as a legal person”. Based on this perspective, legal personality is a construct conferred by law. The law creates the legal personality and determines the necessary conditions for its formation and activity, and no public legal person is established or abolished except based on law. This is also true for the establishment and activity of private legal persons.

Conclusion

This research was conducted to identify and explain the nature of legal personality within the theoretical frameworks of legal scholars and the effective laws of Afghanistan. The main concern of the research was the essence and nature of the formation of legal personality. On this issue, firstly the concept, types, and history of legal personality were discussed and analyzed in this text. In the next step, with the help of the collected, refined, and analyzed information, the theories of jurists and the perspective of the Civil Law of Afghanistan regarding legal personality were clarified. After critique and analysis of the presented theories, the findings of the research suggest that legal personalities have a contractual and constructive existential nature, and are undeniable necessities of social and political life. Among the mentioned theories, the theory of the construction of legal personality is well-reasoned and valid. This theory has been accepted in the legal system of Afghanistan. For instance: in addition to Article 339 of the Civil Law, Article Two of the Law on Social Organizations states: “Social organizations represent the voluntary association of natural persons established to achieve social, cultural, scientific, legal, artistic and professional objectives in accordance with this Law”. According to this law, based on the provisions of Article Four, the legal personality of a social organization is established when its statute is prepared, approved, registered, and published in accordance with the provisions of the Law on Social Organizations.

In Afghanistan, public legal entities are usually established or dissolved by decree or by explicit law. Such as the Independent Administrative Reform and Civil Service Commission, the Independent Election Commission, and the Anti-Corruption Commission. Similarly, the establishment of private legal entities is proposed by interested parties and approved by the government in light of the provisions of relevant laws. Their dissolution also takes place in two ways: compulsory (by the court) and voluntary (by agreement of the founders).

REFERENCES

1. Stanakzai, Nasrallah. Origins of rights. – Kabul: Saeed Publications, 2019.
2. Al Kajbaf, Hossein. Research method in law science. – Tehran: Jungle Publications, 2017.
3. Amid, Hassan. Amid's Persian culture. – 30th edition. – Tehran: Amir Kabir Publishing, 2014.
4. Stanakzai and others. Dictionary of legal terms. – Kabul: Afghanistan Judicial Project, 2008.
5. Abdullah, Nizamuddin. The rights of real and legal persons and prisoners. – Kabul: Saeed Publications, 2008.
6. Moein, Mohammad. One-volume Persian dictionary. – Tehran: Saraish, 2006.
7. Ansari, Massoud. Taheri, Mohammad Ali. Encyclopedia of Private Law. – 2005. – Volume 3. – Tehran: Mihrab Fekar Publications.
8. Farhikhta, Shamsuddin. Civilized culture. – Tehran: Zarin Publishing House, 1998.
9. Judge, Golrahman. Administrative rights. – 8th edition. – Kabul: Saeed Publications, 2017.
10. Danish, sarvar. Administrative law of Afghanistan. – Kabul: Amiri Publications, 2013.
11. Tabatabaye-Motmani, Manouchehr. Administrative rights. – Tehran: Samit Publications, 2006.
12. Hosseiny, Sayed Ali. Administrative law of Afghanistan. – Second edition. – Kabul: Amiri Publications, 2014.
13. Ansari, Wali Allah. General administrative law. – 7th edition. – Tehran: Mizan publication Laws, 2007.
14. Ministry of Justice. Law of social organizations // Official Journal. – 2002. – № 804.
15. Ministry of Justice. Civil law // Official Journal. – 1976. – № 353.
16. Ministry of Justice. Political parties law // Official Journal. – 2004. – № 812.
17. Ministry of Justice. The Law of Non-Governmental Organizations // Official Journal. – 2003. – № 857.
18. Ministry of Justice. Principles of trade // Official Gazette. – 1957.

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ПРИРОДА ЮРИДИЧЕСКИХ ЛИЦ И ИХ МЕСТО В ПРАВОВОЙ СИСТЕМЕ АФГАНИСТАНА

Настоящее исследование под названием «Природа юридических лиц и их место в правовой системе Афганистана» направлено на выявление и объяснение сущности правосубъектности в теоретических рамках ученых-юристов и действующих законов Афганистана. Это исследование совместимо с духом качественных исследований. По цели это фундаментальные исследования, а по характеру и методу — описательно-аналитические исследования. Метод сбора данных — библиотечный; исследователи собрали данные с помощью книг, статей и юридических словарей и проанализировали их с помощью качественного контент-анализа. Основным вопросом данного исследования является сущность и природа формирования правосубъектности и выявление взглядов правовой системы Афганистана на природу правосубъектности. Результаты данного исследования позволяют предположить, что существует четыре теории относительно природы правосубъектности: теория отрицания, теория фикции, теория реальности и теория построения правосубъектности. Более того, посредством собранных и проанализированных материалов поясняется, что правовая система Афганистана приняла конструктивистскую теорию правосубъектности по Гражданскому праву и Закону об общественных организациях.

Ключевые слова: Афганистан, правосубъектность, правовая система, природа.