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LAW ENFORCEMENT PROCESS: COMPARISON BETWEEN IRA AND IEA



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)



LAW ENFORCEMENT PROCESS: COMPARISON BETWEEN IRA AND IEA

INTRODUCTION

Human is a social creature and needs to live with other human beings. But human beings are naturally selfish, they are normally in contradiction and in contrast with each other while achieving the high interests and masalih and stopping the bad actions. Therefore, any party who endeavors to enforce his/her idea on the opposing party and tries that his/her ideas to be well considered and respected, that itself result in destruction of the relations and subsequently destroy the humanity. Due to the above-mentioned reasons, human beings have enforced laws in various areas to stop such problems, and as a result of its implementation they endeavor to reach into peace and prosperity in their lives. Religiously the divine Sharias (Laws) are divided into two parts:

Stable or definitive rules and Ijtihadi or changeable rules.

Definitive rules are the rules that have clear reasons and injunctions in the Holy Quran and the Sunna (Hadith) of Prophet Mohammad (PBUH) and Muslim Scholars agreed upon those. That has chosen justice and prosperous way for the humanity and saved human beings from going on wrong ways and destruction.

Ijtihadi rules: these rules are generally changeable rules that provide solutions for the existing problems of each time. It means that Islam allows changeable rules to be created in each and every time, but it should not be against the definitive rules.

Based on the legislative hierarchy or chain, laws are divided into Constitution and Laws in Afghanistan. Legally there is the concept of organic laws also in the country, but such laws are not enforced in Afghanistan. For processing laws in Afghanistan, during Islamic Republic of Afghanistan (IRA) there was a law by the name of Law on process of legislative documents that was basically guiding the process of making the legal documents in the country, which contained nine chapters and (61) articles. In the light of the mentioned law, any new draft of the legislative documents were being processed in accordance to the provisions of that law. While Islamic Emirate of Afghanistan (IEA) came to power in Afghanistan, there is a special decree for legislative documents making process, it means that the Law on process of legislative documents



of IRA is nullified. So, in this analytical article we are comparing to discuss the similarities and differences between both the law-making process documents.

LEGISLATIVE DOCUMENTS ENFORCEMENT PROCESS STEPS DURING IRA:

In the Law on process of legislative documents of IRA the legislative documents have been defined in article 3 as follow: “legislative decree, regulation, statute and amendments, additions, deletion, cancellation and suspension and its attachments and drafts of the government that has legal aspects are called legal documents. It means that all the documents in the article during IRA were known as legal documents, and IEA changed legal documents to fundamental documents. So, we can say that the fundamental documents could be used for all the documents mentioned in the above article.

During IRA the steps for processing the legislative documents were as below:

1- Drafting (Tasweed in Dari and Pashto): The root of Tasweed is Soud that means blackening a white paper and writing. While a concept it written and it is revised, it is called draft (Musaweda) and its writer is called Musawed (Drafter).

In the paragraph 15 of the article 3 of the Law on processing the Legislative Documents, draft is defined as this; (Drafting is writing the concept of legislative document.)

Based on the article 14 of the mentioned law, the relevant agency is responsible for drafting the legislative document. It means that if an agency needs a legal document, it should provide the draft and send it for next steps to the relevant agencies.

2- Scrutiny (Tadqiq): Tadqeeq is derived from the root of Deqat which means concentration. In the paragraph 16 of article three of the Law on processing the Legislative Documents scrutiny is defined as this; (Scrutiny (Tadqiq) is assessing the structure and context of the draft of legislative documents’ terminologies, wording, phrases, sentences and orders and also preventing its controversy with Islamic Sharia Laws, and it should be insured that it is accepted by the Constitution, enforceable laws, international agreements and conventions and positive culture of the community.)

Based on the article 22 of the mentioned law, legislative documents should be sent to the Ministry of Justice for scrutiny and next steps. It means that the scrutiny of legislative documents is the responsibility of the Ministry of Justice.

3- Confirmation (Taeed): Confirmation is defined in the paragraph 17 of the article three of the Law on process of Legislative Documents; (It is the decision regarding the next steps of the



legislative documents processing in flow with the information that is taken by the Legal Committee or the government.)

Before approval, there is confirmation step. For this step there is the legal committee at the Administrative Office of the President and this step of legislative document belongs to this committee. Based on the article 44 of the Law on process of Legislative Documents, once a legislative document is scrutinized and signed by the minister of justice, it is sent to the Administrative Office of the President to send it to the aforementioned committee. Once the document is confirmed by the committee, this is called the confirmation step of processing a legislative document.

Approval (Tasweeb): Tasweeb means approve and acceptance. Based on paragraph (18) of Article three of the Law on process of Legislative Documents Tasweeb is defined as this; (It is the decision of an authorized source that is taken regarding acceptance or rejection of a legislative document's concept.)

Acceptance of a legislative document was the duty of both houses of the parliament that the legislative document was first sent to the lower house and then to the upper house. Once the document was approved by the both houses, then it was sent to H.E. the President of the country for endorsement.

5- Endorsement (Tawshih): Based on the paragraph (19) of article three of the Law on process of Legislative Documents, Tawshih is defined as this; (Decrees signed by H.E. the President based on which law, legislative decree and their amendments, addition, deletion, cancellation, suspension and attachments are approved.) Based on the article 48 of the law, in the legislative documents the Approval of final signing of the documents is the duty of H.E. the President.

6- Publication: Based on the article 48 of the Law on process of Legislative Documents, publication of legislative document is the duty of the Ministry of Justice and they should publish it in its official gazette.

7- Enforcement (Enfaaz): Enforcement means applying and implementing. Based on the article 50 of the Legislative Documents Processing Law, legislative documents are enforceable and applicable after its publication in official gazette.

Above are the processing steps of legislative documents processing steps that are discussed here. These steps have more technical and legal aspects, but we don't have enough patience to discuss all of them in this article.



LEGISLATIVE DOCUMENTS ENFORCEMENT PROCESS STEPS DURING IEA:

On 3/8/1401 Amirulmuminin of IEA has signed and published a decree in which the law enforcement steps or law-making process is declared. This decree totally contains 5 articles. Compared to IRA, in this decree instead of legislative documents the expression of fundamental documents is used. So, it seems that IEA has returned back to the expressions of Amanullah Khan and Nadir Shah's eras.

Based on the aforementioned decree, legislative documents processing steps are as below:

1- Drafting: The first article of the decree about drafting fundamental documents contains below points:

- (1) Drafts of the fundamental documents should be drafted by the relevant agency.
- (2) The relevant agency is supposed to make and appoint a committee of scholars, experts and relevant experience holders and technical persons for drafting the first draft of fundamental document.
- (3) If the fundamental document is related to more than one agency, the committee of scholars, experts and relevant experience holders and technical persons should be made based on the collective decision of all the relevant agencies.
- (4) The agency that has more responsibility regarding the enforcement of the fundamental document should lead the committee mentioned in section (3) of this article.
- (5) The committees mentioned in paragraph (2) and (3) of this article is responsible to find out Hanafi (Sunni Sects) reference books to the articles that contains Sharia aspects.

The above article shows that any agency that needs a fundamental or legal document, should appoint a committee that contains scholars for drafting of legislative document. All agencies of IEA currently implement legislative documents of IRA and they mainly use those documents with just revising such documents. But the main point for the review is that it should not be contrary to the Islamic Sharia and Hanafi Sects reference books, and for the articles that contains Islamic Sharia aspects, the Hanafi Sects reference books should be found and attached. The remaining steps of the documents would be taken with the attached documents.

2-Scrutiny: The second step of fundamental documents processing in IEA is scrutiny and same as IEA, this duty is given to the Ministry of Justice. In article two of the decree regarding fundamental documents processing, about scrutiny it is stated as below:

- (1) Ministries and IEA relevant agencies are responsible to send their drafts of fundamental documents to the Ministry of Justice for its Islamic Sharia Research, scrutiny and revision.



(2) Ministry of Justice is obliged to scrutinize the fundamental documents mentioned in paragraph (1) of this article by the scholars and fundamental documents academic – legal research technical members.

(3) The scholars of fundamental documents making and academic – legal research are obliged to do research and scrutiny regarding the articles of the inducements that contains Islamic Sharia aspects.

(4) Ministry of Justice is obliged to prevent conflict among the fundamental documents.

In the light of the above article, the Ministry of Justice should scrutinize a fundamental document in below fields:

(a) The drafts of fundamental documents should be scrutinized based on Islamic Sharia that it should not be in contradiction with Islamic Sharia.

(b) The fundamental documents should be scrutinized that it should not be legally against legal documents.

(c) The contacts among the fundamental documents should be prevented. It means that if a draft of fundamental document is prepared, it should not be in contradiction with any other fundamental document.

3- Final Revision (Tasweeb): Final revision of the fundamental documents' draft is the third step of fundamental documents processing. Based on the article three of the aforementioned decree, the final review contains below points:

(1) An independent commission will be established for final review of the drafts of fundamental documents.

(2) Ministry of Justice is responsible to send the final draft of the fundamental document to the commission mentioned in paragraph (1) of this article for final review.

(3) The commission mentioned in the paragraph (1) of this article is obliged to revise the final drafts of fundamental documents received from the Ministry of Justice accurately, bring all the corrections in the document and send it to the leadership of IEA.

(4) The Commission of Revision of Final Drafts of Fundamental Documents is the final source of revision and correction of fundamental documents, after that the draft is ready for final Endorsement and it is sent to Amir ul Mo'meneen for final approval/Endorsement.

(5) A special secretariat and administrative structure should be appointed for the Commission of Final Review of Fundamental Documents.



Based on the above article of the decree, it seems that there will be a special commission for final review of the fundamental documents, yet the commission is not established and based on paragraph (5) of the article, special secretariat and structure is approved for it, yet the organization structure of the commission is not specified. Anytime this commission is established, it will be the final source of revision of fundamental documents and after that the documents will be sent to Amir ul Mu'meneen for his final approval and signature.

4- Final Endorsement (Tawshih): Once the commission finalized fundamental document, then based on the paragraph (3) of Article three of the decree it is sent to Amir ul Mu'meneen for final Endorsement and it is signed by him.

5- Publishing: Once fundamental document is signed and final approved by Amir ul Mu'meneen, then it comes to the Ministry of Justice for publishing purpose and the Ministry of Justice publish it in its official gazette. In article three of the decree it is mentioned about it;

Fundamental documents should be sent to the Ministry of Justice after the final approval for its publication.

6- Enforcement (Enfaaz): Once the fundamental document is published in official gazette, then it is applicable.

RESULT AND COMPARISON

After seeing the steps of legislative documents processing of IRA and IEA, we will have a comparison of both here:

DIFFERENCES:

1- Legislative documents processing had 7 steps during IRA and it has on 6 steps in the current government (during IEA).

2- During IRA the drafting agency was not obliged to send the legislative documents along with the attachment regarding Hanafi Sects to clarify its conformity with Hanafi Jurisprudence and send it to the Ministry of Justice, the agency was obliged to send only the draft of the document. However, during IEA the relevant agency is obliged to find Hanafi Sects reference books related to each articles of the fundamental document that has Islamic Sharia aspects and send it in written form as an attachments to the Ministry of Justice.



3- During IRA the approval (Tasweeb) of legislative document was the duty of the parliament, while during IEA this job is given to a special commission.

4- During IRA, once the document was scrutinized by the Ministry of Justice, it was sent to the Legislative Committee of Administrative Office of the President, but in IEA legislative documents processing this step is eliminated.

5- During IRA the final approval/Endorsement of the document was done by President and during IEA it is the duty of Amir ul Mu'meneen.

SIMILARITIES:

1- Both IRA and IEA have given the responsibility of drafting legal document to the relevant agencies.

2- Both IRA and IEA have given the responsibility of scrutiny of legislative document to the Ministry of Justice.

3- Both IRA and IEA have given the duty of publication of legislative documents to the Ministry of Justice to publish it in the official gazette.

4- Both IRA and IEA have accepted legislative documents enforcement process, it means that both the systems agreed that agencies cannot process its affairs without legislative documents and community without legislative documents is not complete.

RECOMMENDATIONS

1- All legislative/fundamental documents are primarily processed based on Constitution, so it is needed that IEA enforce a constitution as soon as possible.

2- IEA has published a decree for processing of fundamental documents, so it would be better to convert it to a detailed fundamental document or regulation.

3- In drafting a document IEA has obliged to provide Hanafi Sects Fiqha regarding articles that are relevant to religious aspects, but in some cases, it seems that Hanafi Sects Fiqha cannot have enough references regarding the issue or references of other sects Fiqha are stronger than Hanafi Sects Fiqha. So, it is suggested to IEA to accept Hanafi Fiqha as the first and primary source and do not close doors on other sects Fiqhas and while needed that reasoning of other sects or jurisprudence could also be accepted.



4- Yet the Final Review Commission is not defined, first this commission's structure needs to be declared and then, in addition to scholars, there should be legal experts and people with enough knowledge regarding relevant fundamental documents.

5- All the agencies of IEA should not cancel all the existing legislative documents, because the previous legislative documents are drafted and enforced in an Islamic Community and in any document the Islamic Sharia Law is taken into consideration. If there are new fundamental documents processed, their bases should be taken previous laws and if there are such cases that needs amendments, those documents should be amended.

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