

WEEKLY ANALYSIS

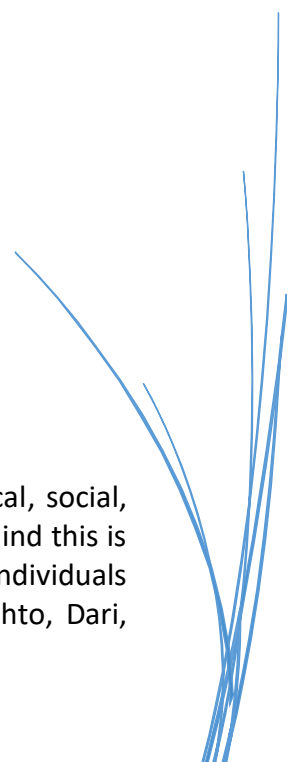
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A LEGAL ANALYSIS OF THE LAW ON ENJOINING GOOD AND FORBIDDING EVIL (AMR BIL MA'RUF WA NAHY AN AL-MUNKAR)



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)



A LEGAL ANALYSIS OF THE LAW ON ENJOINING GOOD AND FORBIDDING EVIL (AMR BIL MA'RUF WA NAHY AN AL-MUNKAR)

Introduction

Human beings are social by nature and need to live in community with others. However, people are naturally inclined toward self-interest, and in the pursuit of their benefits and the avoidance of harm, they often find themselves in conflict. To resolve these conflicts and regulate social behavior, human societies create various laws, often established by the people themselves. In Islamic countries, however, in addition to laws that govern social conduct, there are laws designed to regulate individual behavior as well. One of the central duties of Islamic Sharia is Enjoining Good and Forbidding Evil (Amr bil Ma'ruf wa Nahy an al-Munkar), which plays a vital role in shaping personal behavior and moral development. An Islamic government can formalize this responsibility within the framework of the law, as seen in the Islamic Emirate's Drafting of the Law on Enjoining Good and Forbidding Evil. Additionally, from a religious perspective, the principles of divine law are divided into two categories:

Fixed and Definitive Rules vs. Ijtihad-based and Variable Rules

Definitive Rules: These refer to principles that are explicitly supported by clear evidence in the Holy Quran and the Sunnah of the Prophet (peace be upon him), and they have been unanimously agreed upon by the jurists of the Islamic community. These rules provide the definitive path to achieving justice and prosperity for humanity and protect individuals from deviation and destruction.

Ijtihad-based Rules: These rules are generally subject to change, adapting to different circumstances and evolving over time. They offer legal solutions to contemporary issues, reflecting the flexibility inherent in Islamic jurisprudence. In other words, Islamic law allows the formulation of new legal rules in matters subject to ijtihad, provided that such rules do not conflict with the core principles established by the definitive rules.

In Afghanistan's legal hierarchy, laws are classified into constitutional laws and ordinary laws. While the term "organic laws" is occasionally used in legal terminology, such laws are not applicable within the Afghan legal system. During the previous republic, a specific law known as the Law on the Legislative Process was enacted, consisting of nine chapters and sixty-one articles. This law outlined the procedures for the drafting and enactment of legal documents. However, with the advent of the Islamic Emirate, the legislative process underwent significant changes, resulting in the nullification of the previous republican law through a new decree. According to the new procedure under the Islamic Emirate, the relevant government body must first prepare a draft law, which is then reviewed by the Ministry of Justice. Following this, the draft is submitted to a specialized commission for jurisprudential review, to ensure that it aligns with the principles of Hanafi jurisprudence. Once this review is complete, the draft is forwarded to Kandahar for final approval by the Amir al-Mu'minin.



The Law on Enjoining Good and Forbidding Evil, which followed this process, was officially enacted on 10th Asad 1403 (Solar Hijri Calendar) and published in the Official Gazette of the Ministry of Justice, issue No. 1442. The law consists of a preamble, four chapters, and 35 articles, and is now enforceable.

This analysis seeks to provide a critical evaluation of the legal framework of this law, assessing whether it has been appropriately structured from a legal perspective, or if there are any shortcomings within its formulation.

BENEFITS OF THE LAW:

The **Law on Enjoining Good and Forbidding Evil** provides several important benefits, which are outlined as follows:

1. **The Benefit of Having the Law Itself:** The most significant benefit is the existence of this law. In the previous era of the Islamic Emirate, the personnel responsible for enjoining good and forbidding evil operated without a legal framework, leading to actions that caused public dissatisfaction. With the re-establishment of the Islamic Emirate, the introduction of this law has provided a clear structure and set of rules for the Ministry of Enjoining Good and Forbidding Evil. This law prevents arbitrary actions by officials and allows the public to understand what is expected of them. Previously, the public was uncertain about which behaviors might lead to punishment, but now, with the law in place, people are better informed, and the authority of the officials is clearly defined. In essence, the creation of this law is beneficial in and of itself.
2. **Fiqh-based Legal Reasoning:** Another major benefit is the law's incorporation of **fiqh-based reasoning** from **Hanafi jurisprudence**. This is the first time a law has been explicitly linked to Islamic legal reasoning within its structure. This provides two key benefits:
 - First, it reassures the public that the law is based on Islamic principles, allowing them to reference the jurisprudential sources if they have any doubts.
 - Second, it emphasizes the religious nature of the law, reinforcing the idea that legislation is derived from divine authority. Whether the fiqh reasoning is strong or weak is a separate discussion, but the fact that it is rooted in Islamic jurisprudence is a beneficial aspect of the law.
3. **Preserving the Previous Legal Framework:** Another benefit of this law is that it does not abandon the structure of previous legal systems but builds upon them. This shows an acknowledgment of the effectiveness of the earlier legal frameworks. The law includes all necessary components, such as an introduction, legal foundations, objectives, definitions, scope, enforcement mechanisms, and more. It is then divided into chapters, articles, and clauses, indicating that the law is well-structured. This legal organization is a benefit within the context of the Islamic Emirate.



4. **Involving Both Men and Women as Muhtasibs:** One of the notable benefits of this law is its inclusion of both men and women in the role of **muhtasib** (moral officer). Article 9 specifies the qualifications for muhtasibs and clarifies that this role is not restricted to men. Women, too, can serve as muhtasibs under the Ministry of Enjoining Good and Forbidding Evil, which is a progressive aspect of the law.
5. **Clear Guidelines for Muhtasibs:** The law also benefit from setting clear rules for muhtasibs, preventing them from acting without oversight. Article 10 lists several principles for muhtasibs, including:
 - Respecting the dignity and honor of individuals and treating people with kindness.
 - Acting only when evil is directly observed or heard.
 - Refraining from investigating private sins or entering homes without Sharia-based permission.
 - Ensuring fairness and avoiding discrimination.
 - Offering advice and admonition gently.
 - Using physical intervention only when absolutely necessary and when it will not cause greater harm.
6. **Fostering a Religious Society and Fulfilling a Religious Duty:** A further benefit of this law is its potential to help cultivate a society that is more religiously observant. By following this law, people may avoid violating Islamic principles, practice modesty, and refrain from immoral actions in their dealings. Such behavior contributes to the stability of an Islamic system. Additionally, enjoining good and forbidding evil is a religious duty, and this law ensures that duty is fulfilled in a structured manner.

LEGAL DEFICIENCIES OF THE LAW

The **Law on Enjoining Good and Forbidding Evil** contains several legal and technical shortcomings, which are outlined below:

1. **Overly General Provisions:** The first issue is that many provisions of the law are too general and broad. Some of these provisions require exceptions, definitions, or specific restrictions, which the lawmakers have not included. For example, Article 23 of the law states that the "dhimmis" (non-Muslim citizens) and "musta'min" (temporary non-Muslim residents) are prohibited from engaging in public acts of immorality, but the term "immorality" is used in a very general sense. This implies that dhimmis and musta'min are forbidden from engaging in activities such as shaving their beards, neglecting prayers, not praying in congregation, and not fasting, among others. However, non-Muslims are generally free to practice their own religious



customs, and the law should specify that they are only prohibited from certain public immoralities. Without such clarification, their rights could be unjustly infringed.

2. **Applicability to Hindus, Sikhs, and Other Non-Muslims:** Another issue is that the law applies to all non-Muslims living in Afghanistan, including Hindus and Sikhs, as stated in Article 4: "This law applies to all institutions, public places, and persons residing within the territory of Afghanistan." This means that the law obligates Hindus and Sikhs to follow Islamic practices such as praying, fasting, growing beards to a fist-length, following Islamic grooming practices, not celebrating non-Islamic holidays, and avoiding ties, among others. If they do not comply, they are subject to punishment by the muhtasibs. However, under Islamic Sharia, dhimmis and musta'min are free to observe their religious practices, and in Hanafi jurisprudence, non-Muslims are not obligated to follow the specific rituals of Sharia. The solution would be to allow Dhimmis and Musta'min freedom in their religious practices and only prohibit them from engaging in public immoralities that cause public corruption.
3. **Confusion between Etiquette and Legal Principles:** Article 10 outlines the etiquette and principles for the conduct of Muhtasibs, but from a legal perspective, "etiquette" and "principles" are two distinct concepts. Violating etiquette results in being considered impolite, but it does not carry legal or criminal liability. In contrast, violating principles has legal and criminal consequences. Therefore, including the word "etiquette" in this law is legally inappropriate. This provision should be revised to only mention "principles and rules," as this is a legal document, not a guide on ethical behavior.
4. **Lack of Enforcement Mechanisms for Muhtasibs:** Another significant shortcoming is the absence of consequences if Muhtasibs fail to adhere to the eleven principles outlined in Article 11. The law remains silent on what should happen if these principles are violated. From a legal standpoint, whenever conditions or principles are established for a person or institution, there should be penalties or disciplinary actions if they are not followed. The article lists principles that must be observed by the Muhtasibs, but it does not mention any consequences for non-compliance. This creates a gap in the law and gives Muhtasibs excessive freedom without fear of repercussions for failing to follow the rules. The solution would be to amend this article or the disciplinary section of the law to state that if a Muhtasib fails to observe the principles and rules mentioned in the law, the following disciplinary actions will apply: a warning, a deduction of salary, reassignment, and if the violations continue, the matter will be referred to the Ministry for a final decision.
5. **Issues Regarding Women's Hijab (Article 13):** This article has several legal flaws. The second clause states that "due to fear of temptation, it is necessary for women to cover their faces," which implies that the legislator does not consider the face to be part of the 'awrah (the parts of the body that must be covered). Instead, it is only because of the potential for temptation that covering the face is mandated. However, if the reasoning behind covering the face is fear of temptation, then elderly women, such as those aged 70 or 90, would not need to cover their



faces, as there is no potential for temptation in such cases. The law should include an exception by specifying that women younger than 50 or 60 years old, who are more likely to cause temptation, must cover their faces, while elderly women are not obligated to do so.

6. **Overly Broad Prohibition in Article 11, Clause 7:** This clause broadly states, "It is forbidden for unrelated men to look at the body or face of unrelated women, and for unrelated women to look at unrelated men." This blanket ruling does not account for exceptions, such as when a man looks at a woman with the intention of marriage. Is this act considered sinful? Would the Muhtasib punish the individual? The clause should have included an exception for such situations. Similarly, if a doctor looks at a female patient for medical purposes, is this action prohibited? The solution is to amend the clause to include exceptions, such as when Sharia permits it, e.g., looking with the intention of marriage or for medical reasons.
7. **Issues with Clause 8 of Article 13:** This clause states, "If a woman leaves her home for a necessary purpose, she is required to cover her voice, face, and body." This provision overlooks practical realities. If a woman leaves her home out of necessity, she might be ill, buying food, or addressing other essential needs. In these situations, if her voice is considered part of the 'awrah, how can she communicate with a doctor to explain her illness? How can she ask a shopkeeper for what she needs? Furthermore, if she must hide her face, how can a shopkeeper verify her identity when she returns to exchange or return an item? The law does not address these practical issues, which creates legal challenges.
8. **Ambiguity in Article 14, Clauses 1 and 2:** The first clause of Article 14 states:
 1. "The 'awrah (parts of the body that must be covered) for a man is from below the navel to the knee, and the knee is also included in the 'awrah."
 2. "A man is obliged to comply with the provision of Clause (1) of this article and other rules regarding covering the body."

The second clause creates significant legal confusion. The phrase "other rules regarding covering" is vague. If the legislator intended for these additional rules to be derived from outside this law, those rules should have been incorporated into the law, and the specific areas of the body that men are required to cover should have been clarified. If the legislator was referring to other provisions within the law, those provisions primarily address women's covering, not men's. If one were to draw an analogy from these rules for women, it would imply that men's voices are also 'awrah, that they must cover their faces, and that they should not leave their homes without necessity. In summary, the second clause is ambiguous and has multiple interpretations, which contradicts legislative principles.

Proposed solution: The clause should be revised to state: "A man is obliged to comply with the provision of Clause (1) of this article and other rules specifically related to covering the body of men."

9. **Issues with Article 17 Regarding Media and Information:** The third clause of Article 17 states: "(The publication of content without images of living beings)." Based on this provision,



television networks, newspapers, magazines, Facebook, X (formerly Twitter), Instagram, and other media outlets are prohibited from publishing images of humans or animals, as they are considered living beings. Failure to comply will result in punitive measures. The problem is that television itself is inherently image-based. If television stations are prohibited from broadcasting images of leaders such as the Amir al-Mu'minin or cabinet ministers, how are they to function? This clause effectively mandates the shutdown of television networks, social media platforms, and other forms of media.

10. **Article 20, Clause 5—Restrictions on Transporting Women without a Male Guardian:** Clause 5 of Article 20 stipulates that drivers are prohibited from transporting women without a sane, adult male guardian from one place to another. This provision is absolute and does not account for exceptions, which creates practical problems in society. For instance, a widow with five children may not have an adult male guardian among them or elsewhere in the country. How is she to provide food for her children or take them to school or the hospital? Additionally, consider a scenario where a husband is away, and his wife suffers a heart attack. She needs immediate transport to the hospital, but the driver refuses because she lacks a male guardian. If she dies, who is responsible? This provision, as written, is overly rigid and does not account for practical realities.

Proposed solution: The clause should be amended to state: "A driver should not transport a woman without a sane, adult male guardian from one province to another or without urgent necessity."

11. **Article 22, Clause 20—Prohibition on Friendship and Assistance to Non-Muslims:** Clause 20 of Article 22 prohibits friendship and assistance to non-Muslims, classifying such actions as prohibited. This provision is overly broad and absolute, meaning that even offering a glass of water, a piece of bread, or directions would be considered unlawful assistance to non-Muslims. Based on this clause, we would be prohibited from providing hospitality or security to visiting heads of state, such as a president coming to Kabul. The legislator has left this provision vague and has written it in an overly broad manner.
12. **Article 22—Omission of Contemporary Immoralities:** Article 22 lists 26 specific immoral acts, including minor transgressions such as "cockfighting," but fails to mention major issues such as sorcery, gambling, or the idolatrous practices found in certain Sufi gatherings. These are pressing issues in today's society, and their absence from the law constitutes a legal gap.
13. **Article 24—Ambiguity in Punishments:** Article 24 outlines a range of punishments, including recommendations, warnings of divine punishment, verbal reprimands, confiscation of property, and imprisonment from one hour to three days in public detention centers. However, Clause 7 of this article states: "(Any punishment deemed appropriate by the muhtasib that does not fall under the jurisdiction of the courts)." This clause is legally problematic, as the use of the word "appropriate" is vague. What may be deemed "appropriate" by one person may not be seen the same way by another, as there is no clear definition of the term? This grants excessive discretion to the muhtasibs, who could impose any punishment they deem fit, such



as public shaming or other arbitrary penalties. Allowing such broad discretion without any limits is legally unsound.

Proposed solution: The punishments should be clearly defined, and the muhtasib's discretion should be limited, with specific guidelines established for punishments that do not fall under judicial authority.

14. Failure to Adhere Strictly to Hanafi Jurisprudence: The law fails to fully adhere to the Islamic Emirate's stated policy of regulating all matters according to Hanafi jurisprudence. While some aspects of the law are based on Sharia principles, the sources referenced for certain provisions are drawn from comparative fiqh (jurisprudence), which includes rulings from other Islamic schools of thought. It would have been more appropriate for the entire law to be based exclusively on Hanafi fiqh, or for the law to draw from multiple schools of thought to ensure broader acceptance and prevent implementation challenges.

CONCLUSION

In general, the establishment of the **Law on Enjoining Good and Forbidding Evil** and the creation of a framework for the work of this ministry is, in itself, a commendable step. The law has many advantages; however, from a legal perspective, it contains several gaps, ambiguities, and terms with multiple interpretations, which may lead to complications. Additionally, there are some practical issues within the law that muhtasibs may face during its implementation.

RECOMMENDATIONS

1. The law should undergo a thorough legal review to address its gaps, resolve ambiguities, and clarify problematic terms, and a draft for its amendment should be prepared.
2. The law should be carefully examined in light of **Hanafi jurisprudence**, utilizing insights from authoritative Hanafi legal texts and scholars to resolve any practical challenges.



The Centre for Strategic and Regional Studies (CSRS) is an independent, non-profit, and non-governmental research organization established in July 2009 in Kabul. CSRS is committed to promoting policy-oriented research through conducting authentic and unbiased research concerning Afghanistan and the region.

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