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Legislative Analysis

Date: 14 February 2024

I. Title of the Document: [Drug Penal Procedure](#)

II. Introduction

This analysis examines the "Drug Penal Procedure" issued by the De Facto Authorities (DFA). The document outlines a legal framework for addressing drug-related offenses, including cultivation, importation, sale, and consumption. It contains 11 topics, 32 articles, a procedural note, and an annexed list of controlled substances.

The DFA issued the procedure on August 29, 2023, following a meeting of the DFA Leader with judicial and narcotics officials. This document reflects the DFA's strategy for addressing drug-related issues within their area of control.

III. Key Provisions and Analysis

1. Basis:

The "Drug Penal Procedure" is grounded in the Islamic legal tradition, specifically invoking Hadith and Hanafi jurisprudence. This religious and legal foundation grants the Supreme Leader of the DFA the authority to establish discretionary punishments (Taziri penalties) for drug-related offenses. This reflects a versatile approach to justice that aims to adapt Islamic principles to contemporary challenges, allowing for the imposition of penalties that are not explicitly outlined in the Quran or Hadith but are deemed necessary to maintain social order and morality.

2. The Drafting Committee:

The committee responsible for drafting this procedure comprises 12 individuals, led by the DFA Supreme leader and including:

- Five high officials from the judiciary, including the Chief Justice
- Deputy minister for combating drugs from the Ministry of Interior
- Five provincial governors (Nangarhar, Badakhshan, Kandahar, Helmand, and Farah provinces)

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The drafting committee's composition underscores a strategic approach to addressing drug-related offenses, with a focus on legal and regional insights from judiciary members and provincial governors in areas most affected by drugs. The absence of Ministry of Justice (MOJ) representation could be seen as a missed opportunity, hinting at potential areas for enhancing the committee's breadth of legal expertise and ensuring alignment with the comprehensive principles of procedural justice.

- 3. Reference to Hanafi Jurisprudence:** The introduction references Hanafi jurisprudence, establishing that the ruler (the DFA Supreme Leader, in this case) holds the power to determine Taziri penalties for crimes. This signals potential flexibility within DFA laws, suggesting they could change lashings to imprisonment or explore non-carceral alternatives.
- 4. Definitions:** The procedure introduces key terms without defining them. The following open-source definitions will aid in the understanding of this analysis:
 - **Had** refers to fixed penalties prescribed by the Quran or Hadith for certain offenses, exemplifying the divine basis for justice in Islamic law.
 - **Tazir** represents discretionary punishments that Islamic judges (Qazis) can impose for offenses not specifically mentioned in religious texts, highlighting the flexibility within Islamic jurisprudence to address new or unenumerated crimes.
 - **Hanafi Jurisprudence:** One of the major schools of Islamic law, known for its emphasis on reason and discretion, provides the methodological basis for the procedure, reflecting a balance between strict adherence to scriptural sources and the practical needs of contemporary society.
 - **Ephedra:** A plant species known for containing ephedrine, a compound used in the illegal manufacture of methamphetamine, a powerful stimulant drug.
 - **Methamphetamine (Ice):** A highly addictive synthetic drug that stimulates the central nervous system, known for its crystalline form resembling ice.

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- **Tablet K:** Refers to various synthetic drug tablets sold illegally in Afghanistan, often containing methamphetamine, opioids, or other substances.
- **Decree No. 9:** A decree issued by the DFA outlining the process for drafting, reviewing, and enacting legal documents. This decree is available on the ARLO website.
- **Jerib:** A traditional unit of land area measurement in Afghanistan and other countries, generally around 2,000 square meters.
- **Acid (in drug production):** Chemical substances used in the synthesis of drugs, often referring to precursors or substances that facilitate drug manufacturing.
- **Poppy:** The source plant for opium and several narcotics, including morphine and heroin, often regulated or illegal due to its potential for abuse.
- **Hashish:** A drug made by compressing and processing trichomes of the cannabis plant, known for its psychoactive and medicinal properties.
- **Importing without a permit:** The act of bringing goods, including controlled substances, into a jurisdiction without official authorization, typically illegal.
- **Criminal responsibility of legal persons:** A legal principle that allows for organizations, as well as individuals, to be held accountable for engaging in criminal activities.
- **Controlled Substances:** Substances regulated by law due to their potential for abuse or addiction. This includes drugs and chemicals whose manufacture, possession, and use are governed by legal standards to prevent and control substance misuse.
- **Alcoholic Beverages:** Drinks containing ethanol, also known as alcohol. In the context of Afghanistan and under Islamic law, the production, sale, and consumption of alcoholic beverages are prohibited, as they are considered intoxicating substances that can impair judgment and behavior.

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5. Structure of the Procedure: This procedure is organized into four main sections:

- **Introduction**, outlining the basis and the drafting committee;
- **Main Body**, encompassing 11 topics through 32 articles detailing crimes and punishments;
- **Procedural Note**, addressing the destruction of seized drugs and penalties for DFA employees involved in drug crimes; and
- An **Annex** is intended to list drugs.

6. Main Body of the Procedure:

- **Penalty Structure:** The procedure outlines penalties for various drug offenses, reflecting an effort to address the complexity of drug crimes with a nuanced legal approach. The inclusion of modern synthetic drugs alongside traditional narcotics signals an acknowledgment of the evolving nature of drug abuse and trafficking.
- **Procedural Depth and Judicial Discretion:** While the procedure specifies penalties for a broad spectrum of drug-related activities, it lacks detailed guidelines for the investigative and trial processes. This omission limits the scope of judicial discretion and may hinder the procedural fairness of legal proceedings. The procedure would benefit from more explicit guidelines on evidence gathering, trial conduct, and the rights of the accused to ensure a fair and transparent legal process.

7. Note Section:

- The procedural note within the "Drug Penal Procedure" outlines three critical aspects: the mandated destruction of seized drugs, a directive to reference an annexed list of drugs for judicial decision-making on punishments, and specific measures against DFA employees involved in drug crimes. These measures include the application of penalties, confiscation of weapons and public equipment, and, in cases of repeated offenses, expulsion from the DFA ranks.
- **Accountability and Legal Boundaries:** The introduction of an accountability mechanism for DFA officials involved in drug crimes signifies a zero-tolerance policy towards misuse of office. However, the broad

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discretion afforded to judges, especially concerning unlisted substances, underscores the need for clearer legal standards to prevent arbitrary sentencing and ensure the principle of legality is upheld.

8. Annexed List of Drugs

The procedure includes an annex listing drugs imported in small quantities. This list is critical yet unavailable for review during this analysis. While the procedure lacks explicit penalty guidelines for these substances, it grants judges discretion in determining appropriate punishments. This flexible approach offers potential adaptability but also highlights the challenge of maintaining the principle of legality without clear punishment ranges. It emphasizes the need for judges to exercise balanced and well-reasoned discretion.

IV. Impacts

- The Procedure reflects an attempt to systematically address drug offenses through a structured legal framework. However, gaps in procedural detail, the fixed nature of penalties, and the need for clearer definitions and guidelines are evident.
- This is the first time that DFA has codified crimes and punishments in a regulation. Previously, judges were authorized to issue decisions based on their own interpretations from religious sources.
- Out of 32 articles, only one article prescribed lashing as punishment, which seems to be a positive move towards minimizing lashing punishment.
- The procedure introduces an accountability framework for DFA officials implicated in narcotics activities, promoting a stance of zero tolerance towards corruption and misuse of office. This step, if effectively implemented, could mark a significant stride towards ensuring officials are held to stringent legal and ethical standards.

V. Gaps and Areas of Concern:

Upon careful examination of the procedure, several areas have been identified that could benefit from further refinement to enhance clarity, effectiveness, and legal coherence. Below are some observations that underscore the need for adjustments to ensure the procedure's comprehensive application and alignment with legal standards:

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- **Lack of Definitions:** The procedure's absence of definitions for key terms leads to potential ambiguities, making it challenging for implementers to uniformly understand and apply its provisions. For example, without a clear definition of "drug-related crimes," interpretations can vary, affecting the consistency of enforcement.
- **Missing Procedural Rules:** This gap pertains to the lack of specified methods for detecting, investigating, and prosecuting drug crimes. A detailed procedural guideline, such as steps for conducting surveillance or destroying confiscated drugs, is essential for effective law enforcement. The omission of such guidelines leaves law enforcers without a clear roadmap, potentially hindering the procedure's application.
- **Unclear Roles and Responsibilities:** The procedure fails to delineate the responsibilities of various entities like police, courts, and informants in the drug law enforcement process. Clarity in roles is crucial for coordinated efforts; for instance, specifying the police's role in surveillance could streamline operations and improve efficacy.
- **Fixed Penalties:** The procedure's reliance on fixed penalties (e.g., "6 months, one year") severely restricts judicial discretion. Outside of drug consumption (Article 12), judges lack the flexibility to consider the circumstances surrounding an offense. This inflexibility can lead to disproportionate outcomes. For instance, under Article 10, a small-scale vendor and a major drug trafficker could receive the same sentence. This undermines the principle of proportionality, where punishment should fit the severity and context of the crime.
- **Asset Confiscation:** The procedure lacks provisions for confiscating assets directly linked to drug crimes. This omission is especially concerning in the absence of a robust anti-money laundering framework. Without asset seizure capabilities (such as those common in organized crime statutes), drug traffickers may retain profits from their illegal activities. To fully deter these offenses, consider the confiscation of vehicles used in drug transportation (see vehicle seizure in Article 14) as a potential model; this should extend to properties, cash, or other valuables derived from drug-related activities.

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- **Uniform Penalties:** Applying identical penalties to diverse categories of offenders overlooks the complexity of drug-related crimes. Distinguishing between levels of criminal involvement, such as between gangsters and ordinary criminals, could enhance the fairness and effectiveness of the legal system.
- **Non-Differentiated Punishments:** The lack of differentiated punishments for varied offenses (e.g., cultivation versus transportation of drugs) does not account for the severity or context of the crime, which is a fundamental aspect of just legal practices.
- **Absence of General Rules:** The procedure lacks clearly codified principles applicable to all drug offenses. This creates the potential for inconsistent enforcement and undermines legal predictability. This is evident in provisions on drug production facilities, where Articles 15 and 19 address similar actions (manufacturing) yet prescribe differing penalties and processes. Without broader governing principles, such discrepancies could leave law enforcement and even judges without consistent guidance.
- **Internal Contradictions:** Identified contradictions, such as discrepancies in the treatment of marijuana or poppy, signal a lack of thorough review and could lead to confusion in enforcement.
- **Principle of Legality Concerns:** Allowing judges too much discretion in sentencing without specifying minimum and maximum punishment ranges raises issues with the principle of legality, which requires laws to be clear and predictable.

VI. Recommendations

1. **Enhancing Clarity through Definitions:** The procedure introduces several key terms. While these terms are integral to understanding the scope and application of the procedure, providing explicit definitions within the document itself could further enhance clarity and ensure uniform interpretation across different legal and enforcement contexts. Incorporating definitions directly into the procedure would support a more accessible and consistent application of its provisions, benefiting all stakeholders involved in the judicial process. This approach aligns with best practices in legal drafting,

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where precision in language serves to strengthen the effectiveness and fairness of the legal framework.

- 2. Elaboration of Procedural Guidelines:** Augmenting the procedure with explicit, step-by-step guidelines for the detection, investigation, trial, and sentencing phases of drug-related crimes could substantially improve legal clarity and operational efficiency. Such guidelines should cover the full spectrum of enforcement activities, from surveillance to asset destruction.
- 3. Specification of Institutional Roles:** Clearly articulating the roles and responsibilities of all stakeholders involved in drug enforcement—including law enforcement agencies, judiciary, and community informants—could enhance collaboration and streamline processes. This clarity is vital for effective coordination and execution of the law.
- 4. Establishment of Flexible Sentencing Ranges:** Introducing a framework that specifies minimum and maximum sentencing ranges would grant judges the flexibility to consider the specifics of each case, thereby upholding the principle of proportionate justice. This approach encourages a more nuanced assessment of each offense.
- 5. Provisions for Asset Confiscation:** Drafting comprehensive guidelines for the confiscation of assets directly associated with drug crimes could strengthen the legal arsenal against drug trafficking and related financial crimes. This measure would serve as a potent deterrent, particularly in the absence of a dedicated anti-money laundering statute.
- 6. Updating the Annex List Regularly:** Implementing a mechanism to regularly review and update the annex list of drugs could offer substantial benefits. This approach allows for the legal framework to adapt to the evolving landscape of drug trends, ensuring that regulations remain both relevant and effective against new and emerging narcotics. Such a proactive stance could significantly enhance the procedure's capacity to address contemporary challenges in drug control and prevention.

VII. Conclusion

The "Drug Penal Procedure" represents a significant initial step towards establishing a legal framework to address drug offenses within Afghanistan.

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However, to achieve its full potential as an instrument of justice and effective deterrence, several key improvements are essential. Incorporating precise definitions, detailed procedural guidelines, and a flexible sentencing scheme would foster greater fairness, consistency, and adherence to legal principles.

VIII. Other Legislation on Drug and Narcotics

SC, Circular No. 37 (Supreme Court, December 19, 2022): This circular addresses jurisdictional matters for handling drug-related cases, clarifying that the Public Security Division of the Urban Court in provinces outside Kabul will oversee such cases, including those from both the center and districts of the provinces.

Verdict No. 2234 (OG 1432) (January 29, 2023): Issued by the DFA Supreme Leader, this decree mandates provincial governors to take necessary actions to prevent drug use and establish treatment centers for addicts.