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Executive Authoritarianism in Lawmaking in the Afghan Republic

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The political system and government structure in Afghanistan have long been contentious issues, reflecting the diverse nature of Afghan society along ethnic, tribal, linguistic, religious, social, and political lines. Even today, with the Taliban in power, there is ongoing debate among the international community, Afghans, and other stakeholders on how to establish a political system and governmental structure that truly represents and reflects the diversity of Afghan society. The overthrow of the Taliban by the U.S. and its allies in 2001 marked a significant turning point in the contemporary history of Afghanistan, as the country adopted a new constitution in 2004.

By examining the legislative process, politics, and decree authority in the Republic government (pre-2021) formed under the 2004 Constitution, this Article argues that the Afghan Republic presented an extreme case of usurpation of legislative powers by the executive. Such executive usurpation was witnessed in the concentration of legislative powers in the executive, including the executive's introduction of bills, a presidential veto with high override threshold, and decree authority and its overuse. Moreover, over half of the legislative decrees issued by the executive were unconstitutional in their process. Lastly, the Republic was plagued by the lack of an independent judiciary with clear judicial review power. Based on an empirical review of the legislative acts promulgated during President Ghani's administration, this Article demonstrates that the executive overwhelmingly dominated the legislative process, revealing itself as an authoritarian force.

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Presenting the unique experience of Afghanistan with legislative decree authority, this article builds on John M. Carey and Matthew S. Shugart's extensive comparative study of executive decree authority in presidential systems in Latin America and elsewhere. This article asserts that the Afghan experience is characterized more by usurpation of legislative powers, rather than the legislative's tolerance or preference for executive authority indicated in Carey's and Shugart's work. The article also details the performance of Afghanistan's 2004 Constitution and presidential system, the fall of this (nominal) democracy, and the politics and dynamics of lawmaking in Afghanistan over the two decades of the Republic government. After analyzing the consequential impacts of Afghanistan's executive authoritarianism on democracy, governance, the rule of law, society, and the resultant demise of the Republic, this article concludes with recommendations for future reforms concerning the executive's legislative powers in Afghanistan, with an aim to contribute to the current national and international debates over adopting an appropriate political system for the country.

I.	INTRODUCTION	3
II.	GOVERNMENT STRUCTURE: POWER IMBALANCE AND THE EXECUTIVE INSTITUTIONAL DOMINANCE	8
	A. <i>The Legislative Branch and the Constitutional Process for Lawmaking</i>	9
	B. <i>The Executive and Its Overreaching Role in Making Laws</i>	10
	C. <i>The Judiciary and Its Role in Making and Unmaking Laws</i>	11
III.	RESEARCH FINDINGS: AN EXAMINATION OF THE LAWS ENACTED UNDER PRESIDENT GHANI'S ADMINISTRATION (2014-2021)	12
	A. <i>An Overview of the Legislation</i>	12
	B. <i>Legislative Decree Authority and the Executive's Usurpation of Legislative Powers</i>	17
IV.	THE UNCHECKED EXECUTIVE: CASE STUDIES.....	21
	A. <i>Population Census</i>	21
	B. <i>Caretaker Ministers</i>	24
	C. <i>Election</i>	27
V.	THE NATIONAL ASSEMBLY'S UNSUCCESSFUL ATTEMPT TO ASSERT ITS POWER: LAW ON LEGISLATIVE DECREES	30
VI.	THE IMPLICATIONS OF THE EXECUTIVE'S AUTHORITARIANISM	33
	A. <i>Unconstitutionality and Fostering a Culture and Practice of Disrespect to the Constitution</i>	33
	B. <i>Usurpation of Legislative Powers and Undermining the National Assembly</i>	35
	C. <i>Anarchy in Lawmaking: Overproduction of Low-Quality Laws</i>	36
	D. <i>Weak Implementation of Laws</i>	37
	E. <i>Exacerbating Political and Social Friction</i>	38

2025] EXECUTIVE AUTHORITARIANISM 3

F. Undermining the Rule of Law and Good Governance	38
G. Undermining Democracy and the Will of People	38
VII. CONCLUDING REMARKS.....	39

I. INTRODUCTION

Legal scholars, political scientists, comparativists, and institutional theorists examining executive-legislative relations, including in both old and new democracies,¹ have primarily focused their scholarship on the U.S.² and Latin America.³ The executive's legislative powers (e.g., veto power, decree power, introducing legislation power) in presidential systems particularly have attracted considerable scholarly attention. More specifically, executive decree authority⁴ has been at the center of many comparative studies.⁵ Scholars have expounded on how executive decree authority has been problematic and contentious, straining the relationship between the executive and the legislative, and leading to constitutional

1. See e.g. MATTHEW S. SHUGART & JOHN M. CAREY, *PRESIDENTS AND ASSEMBLIES: CONSTITUTIONAL DESIGN AND ELECTORAL DYNAMICS* (1992); John M. Carey & Matthew S. Shugart, *Calling out the Tanks or Filling Out the Forms*, in *EXECUTIVE DECREE AUTHORITY* (John M. Carey & Matthew S. Shugart, 1998); AREND LIJPHART, *DEMOCRACIES: PATTERNS OF MAJORITARIAN AND CONSENSUS GOVERNMENT IN TWENTY-ONE COUNTRIES* 67-89 (1984); John M. Carey, *Presidential Versus Parliamentary Government*, in *HANDBOOK OF NEW INSTITUTIONAL ECONOMICS* (Claude Ménard & Mary M. Shirley, 2008); Vincent D. Sala, *Government by Decree: The Craxi Government and the Use of Decree Legislation in the Italian Parliament*, 2 *ITALIAN POLITICS* 8, 8-24 (1988).

2. See e.g. ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* (2010); PHILLIP J. COOPER, *BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION* (2d ed. 2014); WILLIAM G. HOWELL, *POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION* (2003); FREDERICK A. O. SCHWARZ JR. & AZIZ Z. HUQ, *UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR* (2008); Joel L. Fleishman & Arthur H. Aufses, *Law and Orders: The Problem of Presidential Legislation*, 4 *LAW & CONTEMP. PROBS.* 141, 141-169 (1976); Tara L. Branum, *President or King? The Use and Abuse of Executive Orders in Modern Day America*, 28 *J. LEGIS.* 1, 1-86 (2002); Kenneth Lowande & Jon C. Rogowski, *Presidential Unilateral Power*, 24 *ANN. REV. POL. SCI.* 21, 21-43 (2021).

3. See e.g. Carey & Shugart, *supra* note 1; Mark P. Jones, *Legislator Behavior and Executive-Legislative Relations in Latin America*, 37 *LATIN AM. RES. REV.* 176, 176-188 (2002); Jose A. Cheibub et al. *Latin American Presidentialism in Comparative and Historical Perspective*, 89 *TEX. L. REV.* 1707, 1707-1739 (2011); Carlos Pereira et al. *Under What Conditions Do Presidents Resort to Decree Power? Theory and Evidence from the Brazilian Case*, 67 *J. POLITICS* 178, 178-200 (2005).

4. This Article follows Carey's and Shugart's definition of decree "as the authority of the executive to establish law in lieu of action by the assembly." (CAREY & SHUGART, *supra* note 1 at 9.) As will be noted later, the term "legislative decree" is commonly used in the context of Afghanistan.

5. See e.g. CAREY & SHUGART, *supra* note 1.

crises in many countries. Notably, John M. Carey observed that “[t]he use of decree authority has been central to conflicts between legislatures and executives that generated constitutional crises in a number of countries” including Argentina, Russia, and Peru.⁶ Similarly, over three decades ago, in the context of proposing economic reforms in Latin America, Adam Przeworski made the following observation regarding the executive decree:

When governments announce vital policies by decree or ram them through legislatures without debate, they teach parties, unions, and other representative organizations that they have no role to play in policy making. When they revert to bargaining only to orchestrate support for policies already chosen, they breed distrust and bitterness. Democracy is thus weakened. The political process is reduced to elections, executive decrees, and sporadic outbursts of protest. The government rules by decree, in an authoritarian fashion but often without much repression. All the Power in the state is concentrated in the executive, which is nevertheless ineffectual . . .⁷

Referring to the Przeworski’s above quote⁸ and the extant political science literature, Matthew S. Shugart and John M. Carey acknowledge and agree with the “conventional wisdom” that executive decree “represents both the concentration of power in the executive and the marginalization of legislatures,” and in recent instances, the “usurpation of legislative powers.”⁹ However, they caution against generalizing this understanding to every context and accepting it as a universal truth.¹⁰ They assert that “more frequently than is commonly acknowledged, executive decree is tolerated—or even preferred—by legislative majorities.”¹¹

In light of extensive comparative literature and the comprehensive study of executive decree authority by Shugart and Carey, this article examines the case of Afghanistan, demonstrating how the use of executive decree in Afghanistan represents an (extreme) usurpation of legislative powers, more aligned with Przeworski’s observations. While Afghanistan’s experience with executive decree may resemble the case of

6. See e.g. Carey, *supra* note 1 at 104; CAREY & SHUGART, *supra* note 1 at 21.

7. Adam Przeworski, DEMOCRACY AND THE MARKET: POLITICAL AND ECONOMIC REFORMS IN EASTERN EUROPE AND LATIN AMERICA 186-187 (1991).

8. CAREY & SHUGART, *supra* note 1 at 3.

9. *Id.*

10. *Id.* at 2.

11. *Id.*

Argentina (1989-1993),¹² it does not align with the concept of legislative tolerance or preference for executive decree, as observed by Shugart and Carey in a few other countries.¹³ However, it is important to note that this article does not dispute Shugart's and Carey's findings and arguments regarding the circumstances under which legislative bodies might favor executive decrees in the studied cases.¹⁴ Notably, Shugart and Carey acknowledge that in situations where the executive holds veto power, or there is no independent judiciary, or both conditions exist, legislators would not tolerate or prefer executive decree authority.¹⁵ Unfortunately, both conditions existed in Afghanistan. Therefore, the Afghan situation can be attributed more to the legislative branch's institutional and actual weakness rather than legislators' tolerance or preference for executive decree.

After the overthrow of the Taliban 1.0 in 2001, a new constitution was adopted in Afghanistan in 2004.¹⁶ The Constitution shaped political and social life in the country for nearly two decades until the Taliban returned to power in August 2021. After the adoption of the Constitution, Afghanistan's citizens were able to experience a democratic system and cast their votes in four presidential elections and three parliamentary elections.¹⁷ Although these elections were rife with controversies and accusations of fraud and corruption,¹⁸ Afghans remained hopeful for reforms, transparent elections, an accountable and responsive political system, and a better constitutional democracy in the long run. The Constitution had an undeniably significant role in state-building, the peaceful transfer of power, enshrining fundamental rights and liberties for citizens, establishing the foundations for public administration and good governance, and shaping the overall political and legal landscape of the country during its lifetime.

Although the Constitution established a democratic system and granted extensive rights and liberties to citizens, it was subject to

12. See Delia F. Rubio & Matteo Goretti, *When the President Governs Alone: The Decretazo in Argentina*, in EXECUTIVE DECREE AUTHORITY 33-59 (John M. Carey & Matthew S. Shugart, 1998).

13. CAREY & SHUGART, *supra* note 1 at 3.

14. CAREY & SHUGART, *supra* note 1 at 2.

15. See CAREY & SHUGART, *supra* note 1 at 18-19.

16. *Qanooni Asasi Afghanistan* [The Constitution of Afghanistan], Official Gazette, art. 60, Extraordinary Issue, January 2004, No. 818 (Afg.) [hereinafter THE CONSTITUTION].

17. *Id.*

18. See e.g. Rahim Faiez & Kathy Gannon, *Fraud, Misconduct Threaten Afghan Presidential Election*, AP (Sept. 28, 2019), <https://apnews.com/article/ap-top-news-elections-international-news-afghanistan-election-2020-2e5b77dbe5ac41198e9c33c86184d9f3>.

significant criticism. In particular, the Constitution was faulted for designing an extremely centralized political and administrative system for the very diverse and fractionalized society of Afghanistan.¹⁹ Most perilously, at the top of this highly centralized system, the Constitution granted the president extensive and unrivaled power.²⁰ Such concentration of power around one person, the president, ultimately transformed what was meant to be a democracy into an authoritarian-like regime.

Scholars and authors have extensively critiqued the political system established by the Constitution, noting its injudicious centralization and the problematic power dynamics between the central and local governments.²¹ Several commentators concluded that the centralization of power in the capital of Kabul represented a significant and problematic transfer of power from the peripheries to central institutions, crippling the ability of local governments in the provinces to function effectively and develop policies and programs that would help meet the specific and unique needs of their local constituents.²² Additionally, the centralization of power not only failed to unite Afghanistan's diverse and divided society, but also exacerbated divisions among ethnicities, religious groups, tribes, and local communities. Local communities, for example, accustomed to autonomous governance for centuries, felt abandoned and excluded from the centralized system.²³ Consequently, they viewed the government as dysfunctional, intrusive on their autonomy, power-hungry, and indifferent to their local needs and suffering.²⁴

Against this backdrop, this article focuses on another form of centralization within the central government, which was the concentration

19. See e.g. Bashir Mobasher, CONSTITUTIONAL LAW AND THE POLITICS OF ETHNIC ACCOMMODATION: INSTITUTIONAL DESIGN IN AFGHANISTAN 108-09 (2024).

20. *Id.*

21. See e.g. Mobasher, *supra* note 19, at 109-118 (2024); Mohammad Bashir Mobasher & Mohammad Qadam Shah, *Deproblematizing the Federal-Unitary Dichotomy: Insights from a Public Opinion Survey About Approaches to Designing a Political System in Afghanistan*, 52 J. OF FEDERALISM 225, 225-253 (2022); Alex Thier, *The Nature of the Afghan State: Centralization vs. Decentralization*, U.S. INST. OF PEACE (2020), https://www.usip.org/sites/default/files/Afghanistan-Peace-Process_Nature-of-the-Afghan-State_Centralization-vs-Decentralization.pdf; Jennifer Brick Murtazashvili, *The Collapse of Afghanistan*, 33 J. DEMOCRACY (2022), <https://www.journalofdemocracy.org/articles/the-collapse-of-afghanistan/>.

22. See generally, Mohammad Qadam Sha, *The Conundrum of Policy Stability: The Case of Afghanistan's Centralized Planning and Budgeting Policies*, 10 ASIAN J. OF PEACEBUILDING 159, 159-183 (2022).

23. Murtazashvili, *supra* note 21.

24. See generally, Thier *supra* note 21.

of power in the executive,²⁵ emanating from an extremely uneven distribution of power among the three branches of government: the executive, the legislative, and the judicial. This constitutionally created concentration of power in the executive resulted in the marginalization of the other two branches and gave birth to an authoritarian and unaccountable executive. Such executive authoritarianism was particularly pronounced and controversial in lawmaking.²⁶

This Article delineates the concentration of legislative power in the executive, revealing the ways it severely undermined the authority and autonomy of the other two branches of the government; exposes the executive's numerous unconstitutional legislative actions; and analyzes the broader implications of such executive authoritarianism for democracy, the rule of law, and the collapse of the Republic. Focusing on the politics and practice of the lawmaking process, this article demonstrates that the executive exerted authoritarian dominance over the government's lawmaking function, essentially operating unchecked.

It should be noted that the duration of this study is limited to President Ghani's administration, such that it only examines the laws enacted between 2014 to 2021. The reasoning behind this selection is that by the time of Ghani's presidency, the relevant institutions, including the executive and the National Assembly, had gained substantial experience, understood their constitutional powers and duties, and had reached a certain level of maturity ten years after the adoption of the Constitution in 2004. Studying the politics and laws produced during this period provides a glimpse into the implementation of the Constitution, the performance of the presidential system, and the power dynamics between the three branches of government, deepening our understanding of the political system and its failure in Afghanistan.

This Article proceeds as follows. Part II critically analyzes the provisions of the Constitution concerning the legislating power and the lawmaking process. Part III presents empirical findings that expose the executive authoritarianism in Afghanistan, uncovers the extent of legislative decree use, and assesses the constitutionality of the laws enacted under President Ghani's administration. Part IV examines select laws as instructive case studies to demonstrate the power struggle and dynamics between the three branches of government in lawmaking and

25. See e.g. Aruni Jayakody, *Separation of Powers in Afghanistan: Theory and Practice*, AREU 1 (2015), <https://areu.org.af/publication/1509/>; Farid Hamidi & Aruni Jayakody, *Separation of Powers Under the Afghan Constitution: A Case Study*, AREU 6-7 (2015), <https://areu.org.af/publication/1507/>.

26. Jayakody, *supra* note 28 at 1-2.

how the executive usurped legislative powers. Part V recounts how the National Assembly's attempt to assert its power and check the power of the executive failed. Part VI delves into the implications of executive authoritarianism for governance, democracy, and rule of law in the country. Finally, Part VII concludes by offering recommendations for future reform and consideration.

II. GOVERNMENT STRUCTURE: POWER IMBALANCE AND THE EXECUTIVE INSTITUTIONAL DOMINANCE

The 2004 Constitution adopted a separation of powers theory, dividing the government authorities and responsibilities into executive, legislative, and judicial branches.²⁷ However, the Constitution unevenly distributed the powers among the three branches of the government, substantially favoring the executive. The Constitution established a presidential system and a powerful executive, with the president at its apex.²⁸ Not only did the Constitution assign the president to be the chief of the executive branch,²⁹ but it also placed the president at the head of state with the ability to exert power over the legislative and judicial branches.³⁰ The Constitution delineated at least twenty-one instances of presidential power.³¹ Under the Constitution, one of the main authorities of the president was to endorse laws and legislative decrees.³² The Constitution further granted the veto power to the president, which enabled him to reject bills adopted by the National Assembly if he saw fit.³³ Most extraordinarily, if urgently needed, the Constitution conferred the executive with an exceptional power to issue legislative decrees during the National Assembly's recess.³⁴ This legislative decree power and its use by the executive is at the heart of this article's analysis and argument. The legislative power of all three branches of the government will be further examined below.

27. THE CONSTITUTION, *supra* note 16.

28. *Id.* at art. 60.

29. *Id.*

30. *Id.*

31. *Id.* at art. 64.

32. *Id.* at art. 64 (16).

33. *Id.* at art. 94 (2).

34. *Id.* at art. 79 (1).

A. *The Legislative Branch and the Constitutional Process for Lawmaking*

The Constitution designated the National Assembly (a.k.a. Parliament) as the legislative branch. According to the Constitution, “[t]he National Assembly of the Islamic Republic of Afghanistan, as the highest legislative organ, shall manifest the will of its people, as well as represent the entire nation.”³⁵ The Constitution established a bicameral National Assembly comprised of *Wolesi Jirga* (House of the People) and *Meshrano Jirga* (House of Elders).³⁶ The Constitution placed the lawmaking function at the top of the National Assembly’s authorities. According to the Constitution, one of the powers of the National Assembly was to approve, amend, or repeal laws or legislative decrees.³⁷

The Constitution defined “law” as a legislative draft or any bill that is approved by the two chambers of the National Assembly and endorsed by the president, unless the Constitution stipulated otherwise.³⁸ The Constitution granted the veto power to the president and stated that the president could return a bill approved by the National Assembly to the *Wolesi Jirga* explaining the reasons within fifteen days if the president did not agree with the bill.³⁹ However, the approved bill would automatically become law and enforceable if the fifteen days passed. Or in the case of a presidential veto, the *Wolesi Jirga* could readopt the bill by a two-thirds vote of its members.⁴⁰

Under the Constitution, all three branches of the government—namely the executive branch, members of the National Assembly, and the judiciary within its judicial ambit—could propose bills, except in budgetary and financial affairs where the executive branch had exclusive power to propose bills.⁴¹

If a bill was proposed by the executive, it had to go through the following process: The executive had to send the proposed bill to the *Wolesi Jirga* first.⁴² The *Wolesi Jirga* would have to reach a decision on

35. Afghanistan’s Constitution of 2004 [English Translation], CONSTITUTE, https://www.constituteproject.org/constitution/Afghanistan_2004.pdf?lang=en (last visited Aug. 26, 2022) [hereinafter THE CONSTITUTION ENGLISH TRANSLATION].

36. THE CONSTITUTION, *supra* note 16 art. 82.

37. *Id.* at art. 90 (1).

38. *Id.*

39. *Id.* at art. 94 (2).

40. *Id.* at art. 94 (3).

41. *See id.* at art. 95.

42. *See id.* at art. 97 (1).

the bill within a month.⁴³ If the *Wolesi Jirga* approved the bill, it would send it to the *Meshrano Jirga*.⁴⁴ Then, the *Meshrano Jirga* would have to decide upon the bill within fifteen days.⁴⁵ The Constitution required the National Assembly to prioritize those bills that the Executive identified as “urgent.”⁴⁶

The Constitution set out the following process for a bill initiated by the National Assembly. For a bill to be included in the legislative agenda of any house of the National Assembly, it needed to be proposed by at least ten members of any chamber of the National Assembly and approved by one-fifth of the members of the relevant chamber.⁴⁷ The bill would then go through the same procedure explained above, such as approval by the *Meshrano Jirga* and endorsement by the president.

According to the Constitution, if any chamber of the National Assembly refuted the other’s approved bill, a mixed committee with an equal number of members from each chamber would be established to resolve the issue.⁴⁸ If the mixed committee approved a bill then, after the president’s endorsement, it would become enforceable law.⁴⁹ However, if the mixed committee could not reach an agreement, the bill would be deemed refuted.⁵⁰ In the latter case, the *Wolesi Jirga* could approve the bill by a vote of two-thirds of its members in its next session.⁵¹ This approved bill would become law after the president’s endorsement without the need to be sent to the *Meshrano Jirga*.⁵²

B. *The Executive and Its Overreaching Role in Making Laws*

In addition to the president’s veto power, which empowered the president to reject any bill adopted by the National Assembly, and the ability of the executive to initiate a bill, the Constitution authorized the executive to issue legislative decrees in accordance with Article 79 of the Constitution.⁵³ Under Article 79, during the National Assembly’s recess, if urgently needed, the executive branch could enact legislative decrees in

43. *See id.* at art. 97 (3).

44. *See id.* at art. 97 (4).

45. *See id.* at art. 97 (5).

46. *See id.* at art. 97 (6).

47. *See id.* at art. 97 (7).

48. *Id.* at art. 100 (1).

49. *Id.* at art. 100 (2).

50. *Id.* at art. 100 (3).

51. *Id.*

52. *Id.*

53. *Id.*

all areas except in budgetary and financial affairs.⁵⁴ Such executive legislative decrees would become law after being endorsed by the president.⁵⁵ The Constitution required that legislative decrees be sent to the National Assembly for approval within thirty days of when the National Assembly reconvenes after its recess. According to the Constitution, legislative decrees would become void if the National Assembly rejected them.⁵⁶ Importantly, the Constitution conditioned the issuance of legislative decrees on four essential criteria. First, a legislative decree should be issued only when the National Assembly is in recess. Second, there must be an urgent need for such a legislative decree. Third, the subject of a legislative decree shall not be related to government budget and financial affairs. Finally, the executive shall send the decree to the National Assembly within thirty days of it returning from recess.⁵⁷

Arguably, this article turned out to be the most controversial and practically consequential provision of the Constitution in making laws in Afghanistan during the Republic era. As history unfolded, Article 79 was overwhelmingly and strategically used by the executive to circumvent the normal constitutional process for making laws.⁵⁸ Moreover, the executive often failed to observe the three conditions set out in the Constitution when issuing legislative decrees.

C. *The Judiciary and Its Role in Making and Unmaking Laws*

The Constitution granted two legislative powers to the Afghan judiciary. The first was the Supreme Court's ability to initiate a bill related to judicial affairs.⁵⁹ A judicial bill would have to go to the National Assembly for approval and then to the president's desk for endorsement. The second authority was the Supreme Court's undefined and obscure judicial review role.⁶⁰ According to Article 121 of the Constitution, "at the request of the Government, or courts, the Supreme Court shall review the laws, legislative decrees, international treaties as well as international

54. *Id.* at art. 79 (1).

55. *Id.* at art. 79 (2). Normally, executive decrees would be initiated and approved by the government cabinet chaired by the president.

56. *Id.*

57. *See id.*

58. *Id.* at art. 79.

59. *Id.* at art. 95.

60. *See e.g.* Shamshad Pasarlay, *Restraining Judicial Power: The Fragmented System of Judicial Review and Constitutional Interpretation in Afghanistan*, 26 MICH. ST. INT'L L. 245, 280 (2018); Scott Worden, *Constitutional Interpretation and the Continuing Crisis in Afghanistan*, U.S. INST. OF PEACE (2011), <https://www.usip.org/publications/2011/11/constitutional-interpretation-and-continuing-crisis-afghanistan>.

covenants for their compliance with the Constitution and their interpretation in accordance with the law.”⁶¹ This broad and vague provision turned the judiciary into an arm of the executive in making and unmaking laws, particularly in situations where the executive was not able to stop the National Assembly from adopting a law that was not in full conformity with the executive’s proposals. In practice, if the president vetoed a bill approved by the National Assembly yet subsequently the National Assembly reapproved the bill by two-thirds’ vote in accordance with its constitutional authority, the executive would send the bill to the Supreme Court for judicial review and assessment of compliance with the Constitution. In all cases referred to the Supreme Court by the executive, the judiciary sided with the executive and declared the National Assembly’s acts as unconstitutional.⁶² This judicial review and the Supreme Court’s role in the process was never clearly defined with its requirements, limits, and procedures⁶³ by any laws, and it remained so until the collapse of the Republic in 2021. The judiciary’s weak institutional independence not only incapacitated the institution, preventing it from providing a check on the executive’s unparalleled authorities,⁶⁴ but also turned the judiciary into a tool at the hand of the executive to further promote the latter’s authoritarianism.

III. RESEARCH FINDINGS: AN EXAMINATION OF THE LAWS ENACTED UNDER PRESIDENT GHANI’S ADMINISTRATION (2014-2021)

A. *An Overview of the Legislation*

Overall, according to available information on the Ministry of Justice’s Official Gazette website,⁶⁵ approximately 233 pieces of legislation were enacted during President Ghani’s administration between December 2014 and June 2021. These laws addressed a wide variety of

61. THE CONSTITUTION ENGLISH TRANSLATION, *supra* note 35 at art. 121.

62. See Ghizaal Haress, *Judicial Review in Afghanistan: A Flawed Practice*, AREU 1 (2017), <https://areu.org.af/publication/1723/>.

63. *See id.*

64. See Mehdi J. Hakimi, *The Judiciary and the Rule of Law in Afghanistan*, 105 JUDICATURE INT’L (2021-22), <https://judicature.duke.edu/articles/the-judiciary-and-the-rule-of-law-in-afghanistan/>.

65. All the information and related laws retrieved from the Ministry of Justice Official Gazette’s website right after the Taliban takeover in August 2021. That said, apparently, the *de facto* authorities have not made any changes to the Ministry of Justice’s website yet. However, caution is still necessary when referring to the available data now.

2025]

EXECUTIVE AUTHORITARIANISM

13

issues related to public administration,⁶⁶ public health,⁶⁷ rights and liberties,⁶⁸ access to information,⁶⁹ agriculture and livestock,⁷⁰ taxation,⁷¹ election,⁷² public procurement,⁷³ population census and nationality,⁷⁴ civil service,⁷⁵ military sector,⁷⁶ education and science,⁷⁷ criminal justice,⁷⁸ international law and affairs,⁷⁹ national security,⁸⁰ business and trade,⁸¹

66. See e.g. *Qanoone Ejraate Edari* [Administrative Procedure Law], Official Gazette, April 2018, No. 1298 (Afg.).

67. See e.g. *Tadeele Made Dowome Qanoone Sehate Aama* [Amendment to Article 2 of Public Health Law], Official Gazette, January 2016, No. 1201 (Afg.).

68. See e.g. *Qanoone Hemayat Huqooqe Tefl* [Law on Protection of Child Rights], Official Gazette, March 2019, No. 1334 (Afg.).

69. See e.g. *Qanoone Dastrasi Ba Etlaat* [Access to Information Law], Official Gazette, March 2018, No. 1297 (Afg.).

70. See e.g. *Qanoone Aftat Koshhai Zoraati* [Law on Agricultural Pesticides], Official Gazette, October 2015, No. 1190.

71. See e.g. *Qanoone Mahsole Khadamate Mokhaberati* [Law on Taxation of Telecommunications], Official Gazette, September 2015, No. 1181 (Afg.).

72. See e.g. *Qanoone Entekhabat* [Election Law], Official Gazette, September 2016, No. 1226 (Afg.).

73. See e.g. *Qanoone Tadarukat* [Procurement Law], Official Gazette, October 2015, No. 1186 (Afg.).

74. See e.g. *Tadeele Barkhai Mawade Qanoone Sabte Ahwale Nofos* [Amendment of Some Articles of the Law on Population Statistics Registration], Official Gazette, May 2017, No. 1259 (Afg.).

75. See e.g. *Tadeel Dar Barkhai Az Mawade Qanoone Karkunane Khadamate Molki* [Amendment to Some Articles of the Civil Servants Law], Official Gazette, September 2015, No. 1180 (Afg.).

76. See e.g. *Qanoone Amor Zati Sarbazan* [Law on Personnel Affairs of Soldiers], Official Gazette, May 2019, No. 1346 (Afg.).

77. See e.g. *Qanoone Tahseelate Aali Molki* [Law on Civil Higher Education], Official Gazette, October 2015, No. 1195 (Afg.).

78. See e.g. *Ezad Dar Madahe 350 Qanoone Ejraate Jazae* [Addition to Article 350 of the Criminal Procedure Code], Official Gazette, October 2018, No. 1318 (Afg.).

79. See e.g. *Qanoone Maahadat Wa Mesaghahi Bainalmellali* [Law on International Treaties and Conventions], Official Gazette, November 2016, No. 1236 (Afg.).

80. See e.g. *Tadeel Wa Ezad Dar Barkhai Az Mawade Qanoone Jelawgiri Az Tamweele Terrorism* [Amendment and Addition to Some Articles of The Law on Prevention of Financing Terrorism], Official Gazette, September 2015, No. 1181 (Afg.).

81. See e.g. *Qanoone Tojarate Khareji Kalaha* [Law on Foreign Trade of Merchandise], Official Gazette, October 2016, No. 1233 (Afg.).

aviation,⁸² transportation,⁸³ energy,⁸⁴ land and water management,⁸⁵ telecommunication,⁸⁶ local administration,⁸⁷ drug control,⁸⁸ national symbols and medals,⁸⁹ banking and the financial system,⁹⁰ and many other matters.⁹¹ As shown in Figure 1, according to the findings of this research, of 233 pieces of legislation, 192 (82.4%) were deemed valid before the Taliban takeover in August 2021, and 41 (17.6%) were superseded by subsequent legislation during the Republic era. The validity of an overwhelming percentage of these items of legislation is significant, as they relate to the executive's excessive use of its legislative decree power. After the Taliban takeover, the regime has not taken an official or consistent position regarding the legislation enacted during the Republic government. Some reports indicate that the supreme leader of the Taliban invalidated all Republic-era laws, considering them man-made and against Sharia.⁹² However, the website of the Ministry of Justice (now controlled by the Taliban) has not been updated to reflect any changes in the legal status of these items of legislation including the validity or invalidity of the laws in the regime's eyes.

82. See e.g. *Tadeele Madae 11 Wa Juzae (15) Madae 12 Qanoone Hawanawardi Molki* [Amendment to Article 11 and Paragraph (15) of Article 12 of the Civil Aviation Law], Official Gazette, October 2016, No. 1231 (Afg.).

83. See e.g. *Qanoone Tanzeeme Transporte Jada* [Road Transport Management Law], Official Gazette, May 2018, No. 1300 (Afg.).

84. See e.g. *Qanoone Energy Hastawi* [Law on Nuclear Energy], Official Gazette, September 2015, No. 1182 (Afg.).

85. See e.g. *Qanoone Tanzeem Amor Aab* [Water Affairs Management Law], Official Gazette, February 2020, No. 1367 (Afg.).

86. See e.g. *Qanoone Mahsole Khadamate Mokhaberati* [Law on Telecommunication Services Fee], Official Gazette, March 2016, No. 1206 (Afg.).

87. See e.g. *Qanoone Tanzeeme Amor Shurahi Mahalli* [Law on Managing the Affairs of Local Councils], Official Gazette, April 2019, No. 1342 (Afg.).

88. See e.g. *Qanoone Controle Tobacco Wa Dokhaneyat* [Law on Control of Tobacco], Official Gazette, February 2015, No. 1162 (Afg.).

89. See e.g. *Qanoone Tarze Estefada Baira, Neshan Melli Wa Sorodi Melli* [Law on the Use of Flag, National Emblem and National Anthem], Official Gazette, October 2016, No. 1231 (Afg.).

90. See e.g. *Qanoone Bankdari Afghanistan* [Banking Law of Afghanistan], Official Gazette, November 2015, No. 1197 (Afg.).

91. See e.g. *Qanoone Passport* [Passport Law], Official Gazette, October 2015, No. 1193 (Afg.).

92. *Rahbare Taliban: Qawaneene Sakhta Shoda Bashara Kenar Begzaraid Wa Shariat Ra Tatbeeq Konaid* [The Taliban Leader: Put Aside the Man-Made Laws and Implement Sharia Law], BBC PERSIAN (July 28, 2022), <https://www.bbc.com/persian/articles/cjm1248xklxo>.

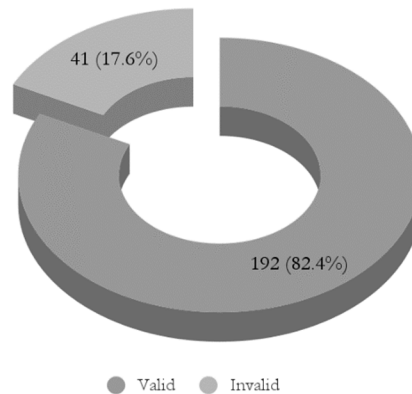
2025]

EXECUTIVE AUTHORITARIANISM

15

In addition, the items of legislation can be divided into two categories: original laws⁹³ and amendments.⁹⁴ Considering the dichotomy between original law and amendment, of the 233 pieces of legislation,

Figure 1: Legal Status of Legislation enacted Between 2014 and 2021



N= 233 observations. Source: Afghanistan's Ministry of Justice, Official Gazette.

nearly half (49.4%) constituted original law and slightly over a half (50.6%) were amendments to existing original laws (see Figure 2). This finding provides an overall picture of lawmaking during Ghani's presidency and the extent to which a significant number of new original laws were enacted within a short period, albeit mostly through the executive.

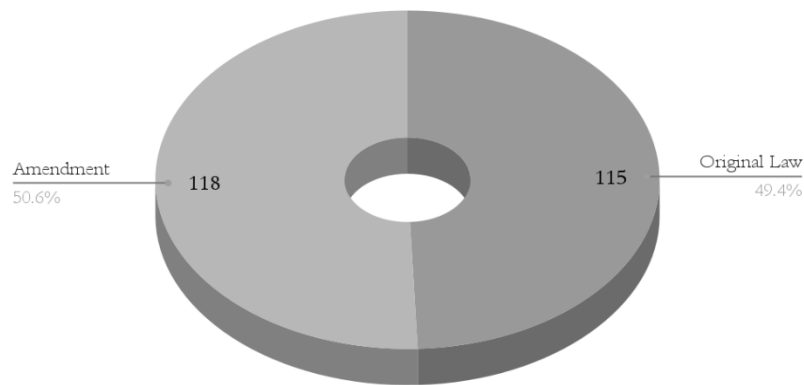
However, the most important and relevant aspect of the items of legislation is whether they underwent the standard legislative process, such as approval by the National Assembly, or if they were enacted in the form of legislative decrees under Article 79 of the Constitution. As noted earlier, the executive had been accused of authoritarianism and undermining the National Assembly's legislative power by misusing Article 79 to issue legislative decrees. The findings of this study demonstrate that the executive did in fact use Article 79 excessively and

93. In this Article, "original law" refers to a complete act of legislation enacted to comprehensively regulate specific areas such as water management, criminal law, or criminal procedure. For instance, the Penal Code is considered an original law.

94. In this Article, an "amendment" is defined as a subsequent legislative piece, typically brief, intended to modify provisions of an existing original law. For example, an amendment to the Penal Code would only alter specific provisions within the Penal Code. In terms of the hierarchy of laws, original laws and amendments are considered to be on the same level.

violated the limits and requirements set forth in the Article. As can be seen in Figure 3, nearly sixty percent of the legislation was enacted via the executive's legislative decree power and only about forty percent of the legislation underwent the normal constitutional legislative process including receiving parliamentary approval as envisaged in the Constitution. That said, out of the ninety-five legislative pieces approved by the National Assembly, nineteen were initially enacted by executive decree and later approved by the National Assembly.

Figure 2: Percentage of Original Laws and Amendments



N=233 observations. Source: Afghanistan's Ministry of Justice, Official Gazette.

Furthermore, as depicted in Figure 4, the executive's decree power was deployed more than the legislature's lawmaking power in both enacting new original laws and amending existing laws. Executive legislative decrees also amended many recent laws that had been enacted through the normal constitutional legislative process.⁹⁵

95. See e.g. Qanoone Tai Marahele Asnade Taqnini [Law on the Processing of Legislative Documents], Official Gazette, October 2018, No. 1313 (Afg.).

2025]

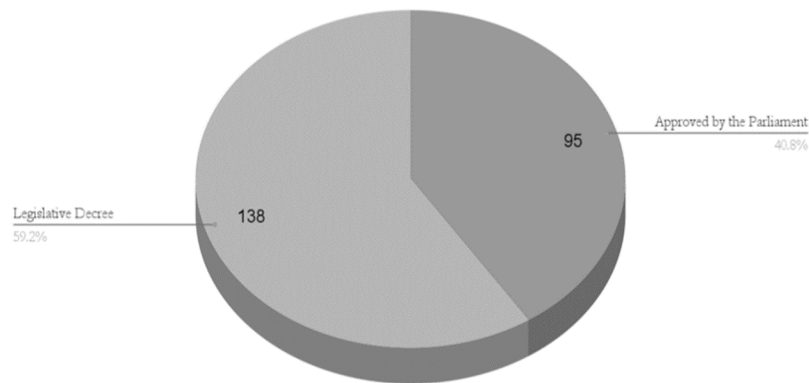
EXECUTIVE AUTHORITARIANISM

17

B. Legislative Decree Authority and the Executive's Usurpation of Legislative Powers

To fully understand the depth and breadth of the executive's usurpation of legislative powers, it is helpful to closely analyze the executive's legislative decrees. As previously explained, nearly sixty percent (138) of the legislation was enacted under Article 79 of the Constitution as legislative decrees by the executive (the government cabinet and president). This is a significant number and represents a huge power shift from the legislature to the executive, with the president at the helm of lawmaking. There are a few key observations noted below regarding this power grab, including that most of the executive's legislative decrees were problematic and undertaken in an unconstitutional manner.

Figure 3: Percentage of Legislative Decrees and the Laws Approved by the National Assembly



N=233 observations. Source: Afghanistan's Ministry of Justice, Official Gazette.

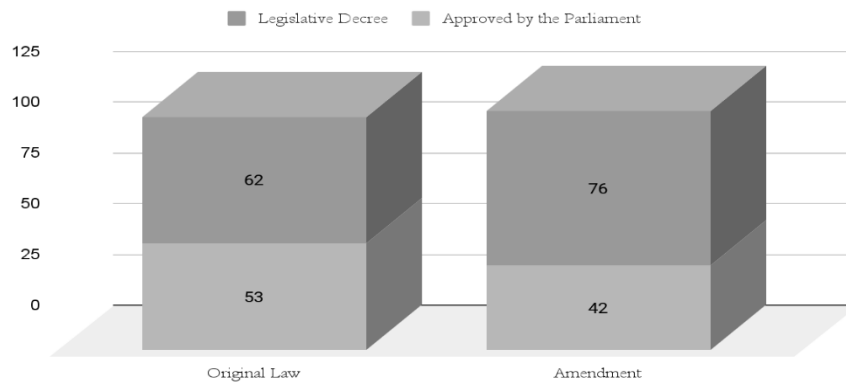
First and most importantly, as Figure 5 indicates, of 138 legislative decrees, over fifty percent (seventy) of them were issued when the National Assembly was in session. This is a blatant violation of the terms laid out in Article 79 which mandated, among other things, that legislative decrees be issued by the executive *only when the National Assembly was in recess*.⁹⁶ Consequently, a large number of these legislative decrees (seventy) were enacted by the executive unconstitutionally. According to the Constitution, the National Assembly would hold two regular sessions per year totaling nine months in duration.⁹⁷ Normally, the National

96. See THE CONSTITUTION, *supra* note 16 at art. 79 (1).

97. See *id.* at art. 107.

Assembly would go on recess twice a year, known as the summer and winter recesses. Considering the Afghan solar calendar, the summer recess would start on 15 Jowza [June 5] and end on 1 Asad [July 23] every year. The National Assembly's winter recess would start on 1 Dalw [January 21] and end on 15 Hoot [March 5] every year.⁹⁸ Looking at the issuance date of the executive's legislative decrees, as noted above, over fifty percent (seventy) were adopted by the cabinet and endorsed by the president when the National Assembly was in session. Therefore, these legislative decrees were issued in clear violation of the requirements in Article 79 of the Constitution.

Figure 4: Number of Pieces of Legislation as Enacted by Legislative Decree or Through Parliamentary Approval



N=233 observations. Source: Afghanistan's Ministry of Justice, Official Gazette.

Second, as Figure 5 portrays, less than fifty percent (sixty-eight) of the legislative decrees were issued during a National Assembly recess, which raises crucial constitutional questions. For instance, even though the executive enacted these sixty-eight legislative decrees at times when the National Assembly was in recess, there remains the question of whether the matters were sufficiently "urgent" that they needed to be initiated by legislative decree. Unfortunately, the Constitution did not define the term "urgency" nor name the conditions that could justify issuance of legislative decrees by the executive under an urgency requirement. However, if the logical intention of the Constitution's

98. Note that the converted dates from the Afghan Solar Calendar to the Gregorian Calendar above are approximate, as there might be a one-day discrepancy at the beginning or end of the National Assembly's recesses in the Gregorian Calendar. For example, the end of the National Assembly's winter recess could vary between March 5 and March 6 when the dates are converted from the Solar Calendar.

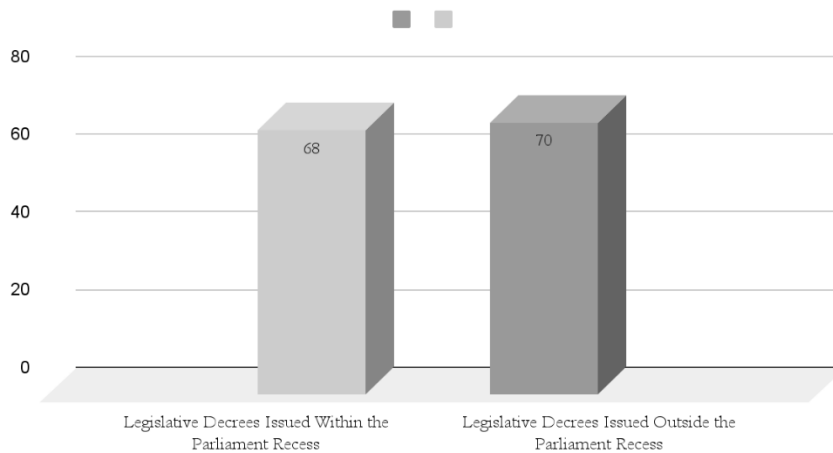
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EXECUTIVE AUTHORITARIANISM

19

framers was a narrow definition, such as extraordinary situations where the executive could not perform a particular duty of the government without legislation, most of these legislative decrees issued during the National Assembly's recess would not meet such an urgency requirement. On the other hand, if the objective of the framers was a broader definition, such as allowing the executive to issue legislative decrees as it pleased and on virtually any matter (as the executive in fact practiced), it would call into question the existence of the National Assembly as a separate and independent legislative branch of the government. It is most likely that the framers intended the narrower interpretation, allowing the executive to take temporary legislative actions only if a lack of immediate legislation in an area would significantly limit the ability of the government to carry out its functions lawfully and effectively.

Figure 5: Number of Legislative Decrees That Were Issued Within or Outside the Purview of the National Assembly Recess



N= 138 observations. Source: Afghanistan's Ministry of Justice, Official Gazette.

Third, it is vital to bring to light the timing of the issuance of the legislative decrees, specifically, how the executive issued many legislative decrees in one day on many occasions, and how the decrees were often issued just a few days before the return of the National Assembly to session. Some of the dates when the executive issued many legislative decrees are as follow:

- a. 1397/6/14 [September 5, 2018]: twenty-one legislative decrees (the National Assembly in session)
- b. 1397/12/14 [March 5, 2019]: fifteen legislative decrees (the National Assembly in recess)

c. 1395/12/14 [March 4, 2017]: fourteen legislative decrees (the National Assembly in recess)

d. 1396/6/14 [September 5, 2017]: thirteen legislative decrees (the National Assembly in session)

Two points are worth emphasizing here. First, on two occasions mentioned above, the legislative decrees were enacted in violation of the terms of the Constitution, as the National Assembly was in session. Second, on the remaining two occasions, the legislative decrees were issued *only one or two days prior* to the return of the National Assembly from its recess. In these cases, while the legislative decrees might not blatantly violate the Constitution, their urgency is questionable. One can imagine the executive rushing to issue the decrees one or two days prior to the return of the National Assembly from recess just to avoid being criticized for issuing unconstitutional legislative decrees.⁹⁹

Moreover, the Constitution required the executive to present its legislative decrees to the National Assembly for approval within thirty days of the National Assembly returning from its recess.¹⁰⁰ However, in practice, the executive often failed to comply with this requirement. Even though the text of the president's orders frequently provided that each legislative decree shall be sent to the National Assembly within a month, that seldom occurred, as the executive used back-channel communications to determine when they might send a legislative decree to the National Assembly. Indeed, some of these legislative decrees remained the law of the land for years without even being sent to the National Assembly for approval. In some cases where the executive was determined to get a legislative decree quickly approved, it would immediately send the said decree to the National Assembly.¹⁰¹ However, even if the National Assembly failed to adopt a decree due to internal disagreement and infighting or discord with the executive's policy preferences, the legislative decree would continue to be implemented as valid law. Furthermore, if the National Assembly explicitly rejected a legislative decree, the executive seldom respected or adhered to the legislature's decision and continued to implement the rejected decree,

99. Despite being notorious for issuing excessive (and often unconstitutional) decrees, the executive, to the extent possible, did not want to be perceived as such.

100. See THE CONSTITUTION, *supra* note 16.

101. See e.g. *Qanoone Masuneyat Mawade Ghezaee* [Law on Food Security], Official Gazette, September 2016, No. 1222 (Afg.).

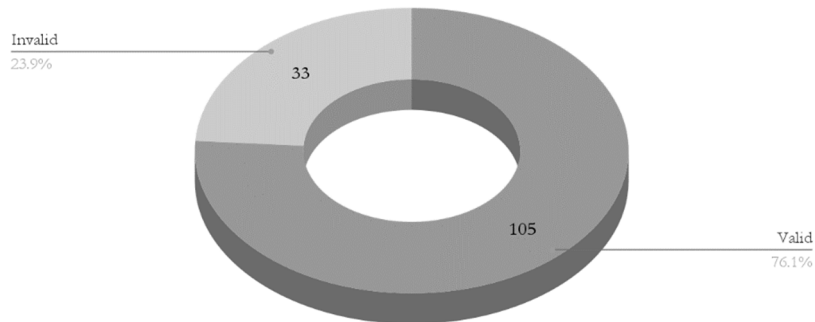
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EXECUTIVE AUTHORITARIANISM

21

although at times it would halt implementation.¹⁰² Consequently, contrary to the requirements of the Constitution, according to which the fate of the issued legislative decrees should have been decided quickly by the National Assembly, a huge percentage (76.1%) of these legislative decrees continued to be enforced as laws of the land without approval by the National Assembly (see Figure 6).

Figure 6: The Legal Status of Legislative Decrees Before the Taliban Takeover



N=138 observations. Source: Afghanistan's Ministry of Justice, Official Gazette.

IV. THE UNCHECKED EXECUTIVE: CASE STUDIES

To gain a deeper understanding of the politics and process surrounding the executive's extensive use of Article 79, the power dynamics between the executive and the legislature, and the executive's authoritarianism in lawmaking, it is worth closely examining a few controversial and nationally scrutinized examples of legislative decrees.

A. *Population Census*

In 2014, President Ashraf Ghani struck a power-sharing deal with his presidential rival, Abdullah Abdullah, and was sworn in as president after a contested general election.¹⁰³ One of the first legislative actions Ghani took was to endorse a bill by the National Assembly, the Law on Population Census.¹⁰⁴ The law was highly controversial, vigorously

102. See generally *Farmanhai Taqini Rad Shoda Az Soi Majles Hanooz Ham Nafez Ast* [Legislative Decrees Rejected by The National Assembly Are Still Enforced], JAMHORNNEWS (Dec. 31, 2015), <https://www.jomhornnews.com/fa/news/74795/>.

103. *Id.*

104. *Qanoone Sabte Ahwali Nofos* [Population Census Law], Official Gazette, November 2014, No. 1154 (Afg.).

debated among members of the National Assembly, and only narrowly adopted by the National Assembly approximately one year before Ghani became president.¹⁰⁵ The most divisive article of the law was Article 6, concerning the content of the national identity card.¹⁰⁶ The article did not require nationality (Afghan), ethnicity, and religion to be listed in the identity card.¹⁰⁷ The word “Afghan” as nationality was particularly contested as members of the National Assembly from ethnicities such as Tajiks, Hazaras, and Uzbeks did not consider the term inclusive, arguing that it only refers to Pashtuns and thus cannot be assigned to everyone in Afghanistan. The proponents of including of this information did not prevail, and thus, the final version of the bill excluded the above details from the content of the national identity card.¹⁰⁸ After President Ghani approved the law and it was published in the Official Gazette and became effective,¹⁰⁹ opponents of the law pressured the president to hold off on implementing the law until the desired changes were made. The president submitted to their demands and took no action to implement the law for nearly two years, despite the urgent need for implementation.¹¹⁰ The government needed to begin issuing electronic national identity cards for Afghans as mandated by the law. The new national identity cards were intended to reduce fraud and deception in the upcoming elections and other daily business activities, as well as to help accurately survey the country’s population. During the two years of delay, the opponents of the law aggressively advocated and pressured President Ghani to amend the law and include the three lines of information about nationality, ethnicity and religion in the national identity card.¹¹¹

After two years of inaction, the president and the executive finally acted. First, they proposed to amend the law in accordance with the losing group’s demands.¹¹² The executive issued a legislative decree during the

105. *Id.*

106. *Id.* at art. 6.

107. *Id.*

108. *Id.*

109. As a matter of fact, during Karzai’s presidency, the Law on Population Census was readopted by the *Wolesi Jirga* by two-thirds’ majority after it was initially vetoed by President Karzai. According to Article 94 of the Constitution, the law should have automatically gone into effect. But President Karzai unconstitutionally withheld the law and prevented it from being published in the Official Gazette and thus prevented its implementation.

110. *Qanoone Sabte Ahwali Nofos* [Population Census Law], Official Gazette, November 2014, No. 1154 (Afg.).

111. *Id.*

112. See *Tarhe Tadeele Qanoone Sabte Ahwale Nofooz Afghanistan Taheya Shoda Ast* [A Proposal to Amend the Afghan Census Law Has Been Prepared], BBCPersian (Apr. 4, 2016), https://www.bbc.com/persian/afghanistan/2016/04/160404_k05_afghanistan_new_id_will_issue.

last days of the National Assembly winter recess that year: 1395/12/12 [March 2, 2017].¹¹³ This executive action triggered an outcry from the National Assembly, who harshly condemned the legislative decree as unconstitutional and infringing upon the legislative authority of the National Assembly.¹¹⁴ The members of the National Assembly who were most adamant against the legislative decree argued that the president could not issue a legislative decree in the presence of an enforceable law which was already adopted by the National Assembly and endorsed by the president.¹¹⁵ However, after much controversy and nearly nine months, on 1396/9/27 [December 18, 2017], the executive legislative decree was approved by the National Assembly.¹¹⁶ The president signed the bill into law on 1396/10/2 [December 23, 2017].¹¹⁷ It is not clear why the legislative decree took such a long time to be approved by the National Assembly. The reason could be the divisive nature of the amendment, or the executive might have belatedly sent the bill to the National Assembly. Either way, the timing of the legislative decree shows how the executive strategically misused Article 79 to impose its wishes on the National Assembly. In a similar fashion, the executive issued two more legislative decrees to amend the National Census Law, one on 1397/6/14 [September 5, 2018] and another on 1399/6/13 [September 3, 2020].¹¹⁸ According to the available information, these two legislative decrees were deemed enforceable despite not receiving the National Assembly's approval before the Taliban takeover.¹¹⁹ The timing of the latter legislative decrees indicates that they were issued outside the purview of the National Assembly's summer and winter recesses, and hence in clear violation of the Constitution's requirements enshrined in Article 79.

113. See *Tadeele Barkhe Mawade Qanoone Sabte Ahwale Nofooz* [Amendment of Some Articles of Population Census Law], Official Gazette, May 2017, No. 1259 (Afg.).

114. See “*Junbeshe Defa Az Qanoon*” *Ba Tadeele Wa Tawsheh Qanoone Sabte Ahwale Nofooz Etraz Kard* [“Defending the Law Movement” Protests Amending the Population Census Law], JAMHOR NEWS (Mar. 4, 2017), <https://www.jomhornews.com/fa/news/91896/>.

115. *Id.*

116. *Id.*

117. *Id.*

118. See *Tadeele Madae 18 Qanoone Sabte Ahwale Nofooze* [Amendment to Article (18) of the Population Census Law], Official Gazette, October 2018, No. 1317 (Afg.); *Tadeele Wa Ezad Dar Barkhe Az Mawade Qanoone Sabte Ahwale Nofooz* [Amendment and Addition to Some Articles of the Population Census Law], Official Gazette, October 2020, No. 1386 (Afg.).

119. See the Ministry of Justice's website, http://old.moj.gov.af/Content/files/Pages/OfficialGazetteIndex_D-header.htm (last visited Dec. 9, 2024). It appears that the status of the laws has not yet been updated on the website, and they remain in their pre-Taliban takeover condition, still shown as enforceable.

B. Caretaker Ministers

During the last decade of the Republic, the most controversial issue between the executive and legislative concerned the extent to which a ministry could be run by an acting or caretaker minister instead of a minister properly confirmed by the *Wolesi Jirga*. The most contentious matter was the length of time during which an acting minister could oversee a ministry without being confirmed by the *Wolesi Jirga*. According to the Constitution, the president and *Wolesi Jirga* shared the power of appointing ministers with certain other top executive officials including the attorney general and head of the central bank.¹²⁰ Accordingly, any such appointments should be nominated by the president, and confirmed by the *Wolesi Jirga*. Considering this constitutional provision, a law on ministry caretakers¹²¹ was enacted during the last term of President Hamid Karzai in 2011. The law went through all the proper constitutional legislative processes including being passed by the National Assembly and signed by the president. One of the major provisions of the law was to limit the tenure of an acting minister to two months, meaning that no acting minister could oversee a ministry beyond this period.¹²² Another provision of the law prohibited the president from appointing a person as an acting minister of a ministry if their initial nomination was rejected by the *Wolesi Jirga*, or if they were an incumbent minister impeached while in office who received a vote of no confidence from the *Wolesi Jirga*.¹²³ These provisions restricted the executive's power to appoint caretakers, and imposed reasonable limits. However, contrary to the provisions of the Constitution and the law, both President Karzai and Ghani commonly appointed acting ministers beyond the limited two-month period specified by the law.¹²⁴ The practice was

120. See THE CONSTITUTION, *supra* note 16 at art. 64 (11) & 91 (3).

121. See *Qanoone Sarparasti Wezarat* [The Law on Ministry Caretaker], Official Gazette, June 2011, No. 1051 (Afg.).

122. *Id.* at art. 1.

123. *Id.* at art. 2.

124. See e.g. Enteqad Az Taeen Waziran Qabli Ba Hais Sarparast [Criticism of Appointing Former Ministers as Acting Ministers], DW (Aug. 5, 2012), <https://www.dw.com/fa-af/%D9%B E%D8%A7%D8%B1%D9%84%D9%85%D8%A7%D9%86-%D8%A7%D9%81%D8%BA%D8%A7%D9%86%D8%B3%D8%AA%D8%A7%D9%86-%DA%A9%D8%B1%D8%B2%DB%8C-%D8%A8%D8%A7%DB%8C%D8%AF-%D9%86%D8%A7%D9%85%D8%B2%D8AF-%D9%88%D8%B2%DB%8C%D8%B1%D8%A7%D9%86-%D8%B1%D8%A7-%D9%85%D8%B9%D8%B1%D9%81%DB%8C-%DA%A9%D9%86%D8%AF/a-16147200>.

frequently the subject of strident criticism by the *Wolesi Jirga*, yet had little impact on the behavior of the Executive.¹²⁵

Soon after Ghani became president, the executive enacted a new law on regulating affairs related to caretakers for ministries and other government directorates through a legislative decree¹²⁶ that superseded the previous law approved by the National Assembly. Notably, the decree provided greater detail and expanded the scope and length of the caretaking concept. The decree allowed the term of caretaking to automatically be extended an additional two months and recurrently for a virtually unlimited time if a candidate for a ministry was not confirmed by the *Wolesi Jirga*.¹²⁷ The new decree had three important implications. First, it put pressure on the *Wolesi Jirga* to confirm the president's nominees. Second, it gave the president extensive power in appointing acting ministers for a longer period without the *Wolesi Jirga*'s confirmation. Finally, acting ministers, even if they oversaw the relevant ministries for a long time, would be barely responsive to the National Assembly or fear any repercussions. This pronouncedly weakened the National Assembly's oversight over acting ministers.¹²⁸

Additionally, the decree retained the provision from the previous law that the president could not appoint as caretaker a rejected nominee or an impeached minister at the same ministry.¹²⁹ However, in practice, there were plenty of instances where rejected nominees continued to caretake

125. See e.g. Timeline Be Entehai "Sarparsti" Dar Hukumate Wahdate Meli [The Endless Timeline of "Caretaker" in the National Unity Government], Etılaatroz (Nov. 7, 2017), <https://www.etilaatroz.com/53307/%D8%AA%D8%A7%DB%8C%D9%85%D9%84%D8%A7%DB%8C%D9%86-%D8%A8%DB%8C%E2%80%8C%D8%A7%D9%86%D8%AA%D9%87%D8%A7%DB%8C-%D8%B3%D8%B1%D9%BE%D8%B1%D8%B3%D8%AA%DB%8C-%D8%AF%D8%B1-%D8%AD%DA%A9%D9%88%D9%85/>.

126. *Qanoone Tanzeeme Sarparsti Wezaratha Wa Edarate Dawlati* [Law on Regulating Affairs Related to Acting Ministers and Directors of Government Departments], Official Gazette, March 2015, No. 1168 (Afg.).

127. See *id.* at art. 4 (4).

128. See *Majlese Nemayendagan Khastare Payane Kare Sarparstha Dar Edarat Shod* [The National Assembly Is Demanding an End to the Caretaking of Government Departments], AREZO NEWS (Jan. 18, 2021), <https://arezo.news/%D8%A7%D9%81%D9%81%D8%A7%D9%86%D8%B3%D8%AA%D8%A7%D9%86/%D9%85%D8%AC%D9%84%D8%B3-%D9%86%D9%85%D8%A7%DB%8C%D9%86%D8%AF%D9%87%E2%80%8C%DA%AF%D8%A7%D9%86-%D8%AE%D9%88%D8%A7%D8%B3%D8%AA%D8%A7%D8%B1-%D9%BE%D8%A7%DB%8C%D8%A7%D9%86-%DA%A9%D8%A7%D8%B1-%D8%B3%D8%B1/>.

129. *Qanoone Tanzeeme Sarparsti Wezaratha Wa Edarate Dawlati* [Law on Regulating Affairs Related to Acting Ministers and Directors of Government Departments], Official Gazette, at art. 5, March 2015, No. 1168 (Afg.).

the same ministry for years.¹³⁰ Examples include the acting minister of education, Rangina Hamidi, and the acting governor of the central bank, Ajmal Ahmadi, whose nominations were rejected by the *Wolesi Jirga* in December 2020,¹³¹ but they were kept as acting officers at their respective ministries by the president until the Taliban takeover in August 2021. The expansion by legislative decree of the president's authority in appointing caretakers and circumventing the constitutional process was a significant power grab by the executive. Almost a year later, the executive issued another legislative decree to amend the previous legislative decree and allow the president to appoint as caretaker a rejected nominee or impeached minister who had received a vote of no confidence to the same office in three ministries: the Ministry of Defense, the Ministry of Interior, and the National Security Directorate.¹³² This was yet another expansion of the president's power through legislative decree. The National Assembly rejected the decree, and based on the Constitution¹³³ it should have automatically been deemed invalid after the National Assembly's rejection. However, the president asserted that the decree would be valid until a new law replaced it.¹³⁴ According to available information, the two legislative decrees were considered enforceable despite lacking the National Assembly's approval until the government collapsed in August 2021.¹³⁵

130. See Esmatullah Soroush, *Hukumat Sarparstha: Kabina Hukumat Dar Panj Sale Gozashta Chera Takmil* Nashod [The Caretaker Government: Why the Government Cabinet Was Not Completed in Five Years], ETILAATROZ (Aug. 25, 2019), <https://www.etilaatroz.com/82609/government-of-governors-why-cabinet-of-ministers-wasnt-completed-in-last-5-years/>.

131. See *Taeed Se Wazir Wa Rade Do Nazmzad Wazir Wa Namzade Reyasate Banke Markazi Az Soy Majlese Nemayendagan* [Confirmation of Three Ministers and Rejection of Two Minister Nominees and the Nominee for the Central Bank by Wolesi Jirga], DIDPRESS (Dec. 2, 2020), <https://didpress.com/%D8%AA%D8%A7%DB%8C%DB%8C%D8%AF-%D8%B3%D9%87-%D9%88%D8%B2%DB%8C%D8%B1-%D9%88-%D8%B1%D8%AF-%D8%AF%D9%88-%D9%86%D8%A7%D9%85%D8%B2%D8%AF-%D9%88%D8%B2%DB%8C%D8%B1-%D9%88-%D9%86%D8%A7%D9%85%D8%B2%D8%AF/>.

132. See *Ezade 2 Fagare Dar Madah Panjume Qanoone Sarparsti Wezaratha Wa Edarate Dawlati* [Addition to Paragraph 2 of Article 5 of the Law on Regulation of Affairs Related to Acting Officials of Ministries and Government Departments] Official Gazette, September 2015, No. 1181 (Afg.).

133. See *Farmanhai Taqnini Rad Shoda As Soe Majles Hanoz Nafez Ast* [The Rejected Legislative Decrees by the National Assembly Are Still Enforceable], JOMHOR NEWS (Dec. 31, 2015), <https://www.jomhornews.com/fa/news/74795/>.

134. See *id.*

135. See Ministry of Justice's website: http://old.moj.gov.af/Content/files/Pages/OfficialGazetteIndex_D-header.htm.

C. Election

From the beginning of the Afghan Republic in 2004, elections were hotly debated and disputed by the Executive and Legislative branches and among Afghan politicians and citizens. Contested topics included the impartiality, independence, and duties of the institutions in charge of running the election, including the Independent Election Commission and the Independent Complaints Commission; electoral districts; electoral systems; and the use of technology in elections.¹³⁶ In 2013, toward the end of President Karzai's second term, two critical laws related to elections were enacted: the Law on the Organization, Duties and Authorities of the Independent Election Commission and Independent Election Complaints Commission, and the Election Law.¹³⁷ Both laws underwent the normal legislative process as set out in the constitution, such as being passed by the National Assembly and signed by the President. These two laws superseded all prior election-related laws that had been enacted by legislative decree.¹³⁸ However, when Ghani became President, the Executive issued new legislative decrees that superseded the duly enacted election laws.¹³⁹ In fact, during Ghani's presidency, the Executive changed election laws four times by legislative decree over the span of less than four years.¹⁴⁰

First, the Executive issued two legislative decrees, one a new Law on the Organization, Duties, and Authorities of the Independent Election Commission and Electoral Complaints Commission,¹⁴¹ which replaced its predecessor law entirely, and another legislative decree amending and

136. See e.g. *Tarhe Tadeele Qanoone Entekhabat Taeed Shood, Che Mawarede Dar En Tarh Janjali Bood* [The Draft Amendment to Election Law Was Confirmed, What Issues Were Controversial in the Amendment], (Feb. 11, 2019, 8 AM), <https://8am.media/election-adjustment-bill-approved-2/>.

137. See e.g. *Qanoone Tashkeel, Wazayef, Wa Salaheyathai Comeseyoune Mustaqele Entekhabat Wa Comeseyoune Mustaqele Shekayate Entekhabati* [Law on the Organization, Duties and Authorities of the Independent Election Commission and the Independent Election Complaints Commission], Official Gazette, August 2013, No. 1112 (Afg.); *Qanoone Entekhabat* [Election Law], Official Gazette, August 2013, No. 1112 (Afg.).

138. See e.g. *Qanoone Entekhabat* [Election Law], Official Gazette, at art. 80, August 2013, No. 1112 (Afg.); See also *Qanoone Entekhabat* [Election Law], Official Gazette, March 2010, No. 1012 (Afg.).

139. *Id.*

140. *Id.*

141. See *Qanoone Tashkeel, Wazayef, Wa Salaheyathai Comeseyoune Mustaqele Entekhabat Wa Comeseyoune Shekayate Entekhabati* [Law on the Organization, Duties, and Authorities of the Independent Election Commission and the Electoral Complaints Commission], Official Gazette, September 2015, No. 1184 (Afg.).

adding provisions to the Election Law.¹⁴² Both of these legislative decrees were issued by the executive when the National Assembly was in session.¹⁴³ Thus, the legislative decrees were in blatant violation of the Constitution's terms. These legislative decrees were rejected by the National Assembly for various reasons, including their violation of Article 79 of the Constitution.¹⁴⁴ Additionally, as many National Assembly members argued, there was no need for legislative decrees when there were recent duly enacted laws in place.¹⁴⁵ Apparently, despite this rejection by the National Assembly and the constitutional requirement that the laws should automatically be invalidated after such rejection, the executive considered them applicable because the executive's subsequent legislative decrees were intended to supersede these two decrees rather than the earlier duly enacted laws.¹⁴⁶

Second, over six months after issuing the above legislative decrees, the executive issued two additional legislative decrees, one to supersede the prior duly enacted election law entirely along with a later amendment and addition,¹⁴⁷ and another to supersede the preceding legislative decree concerning the Organization, Duties, and Authorities of the Independent

142. See *Tadeel Wa Ezad Dar Barkhi Az Mawade Qanoone Entekhabat Muntashera Jareeda Rasmi Shomara (1112) Sale 1392* [Amendment and Addition to Some Articles of the Election Law Published in the Official Gazette No: (1112) Year 1392 (2013)], Official Gazette, September 2015, No. 1184 (Afg.).

143. *Id.*

144. See e.g. *Majlese Afghanistan Farmane Taqnine Tadeele Qanoone Entekhabat Ra Rad Kard* [Afghanistan's National Assembly Refuted the Legislative Decree Amending the Election Law], BBC PERSIAN (Dec. 26, 2015), https://www.bbc.com/persian/afghanistan/2015/12/151226_k05_parliament_reject_ghani_decree; *Meshrano Jirga Farmane Taqnine Ashraf Ghani Dar Mawrede Qanoone Entekhabat Ra Rad Kard* [Meshrano Jirga Rejected Ashraf Ghani's Legislative Decrees Regarding the Election Law], AZADI RADIO (Dec. 27, 2015), <https://da.azadiradio.com/a/27468255.html>.

145. See *Majlese Afghanistan Farmane Taqnine Tadeele Qanoone Entekhabat Ra Rad Kard* [Afghanistan's National Assembly Refuted the Legislative Decree Amending the Election Law], BBC PERSIAN (Dec. 26, 2015), https://www.bbc.com/persian/afghanistan/2015/12/151226_k05_parliament_reject_ghani_decree.

146. Under mounting pressure from the National Assembly, political parties, civil society, and oppositions, six months later, the executive issued another two legislative decrees to supersede the prior two decrees. At the end of the new legislative decrees, abrogation of the previous decrees was mentioned, indicating that the previous decrees were valid. See *Qanoone Entekhabat* [Election Law], Official Gazette, at art. 80, March 2016, No. 1207 (Afg.); *Qanoone Tashkeel, Wazayef Wa Salaheyathai Comeseyoune Mustaqele Entekhabat Wa Comeseyoune Shekayate Entekhabati* [Law on the Organization, Duties, and Authorities of the Independent Election Commission and the Electoral Complaints Commission], Official Gazette, at art. 29, March 2016, No. 1207 (Afg.).

147. See *Qanoone Entekhabat* [Election Law], Official Gazette, at art. 80, March 2016, No. 1207 (Afg.).

Election Commission and the Electoral Complaints Commission.¹⁴⁸ These legislative decrees were issued by the executive when the National Assembly was on its winter recess.¹⁴⁹ After returning from its recess, the National Assembly rejected both legislative decrees, arguing, among other things, that there was not an urgent need for the legislative decrees and thus they were issued in violation of Article 79 of the Constitution.¹⁵⁰ Despite this rejection by the National Assembly, these legislative decrees remained in force until the next legislative decree was issued.

Third, another six months later the executive issued a new legislative decree regarding election laws, nullifying the previous legislative decrees.¹⁵¹ This new legislative decree was issued at a time when the National Assembly was in session and thus violated the terms of Article 79 of the Constitution.¹⁵² This time, the executive combined all the election-related laws into one, incorporating the affairs related to the election commissions into the election law.¹⁵³ Additionally, in an unprecedented move, the executive ignored the National Assembly within the text of the legislative decree, nowhere indicating that it would send the legislative decree to the National Assembly for approval within thirty days, as mandated by Article 79 of the Constitution.¹⁵⁴ Indeed, the executive never sent the legislative decree to the National Assembly for approval in the subsequent years, and two elections (the parliamentary election of 2018 and presidential election of 2019) were held based on this unconstitutionally enacted law. The executive deemed the legislative decree valid and in effect until the Republic collapsed in 2021.

148. See *Qanoone Tashkeel, Wazayef Wa Salaheyathai Cameseyoune Mustaqele Entekhabat Wa Cameseyoune Shekayate Entekhabati* [Law on the Organization, Duties, and Authorities of the Independent Election Commission and the Electoral Complaints Commission], Official Gazette, at art. 29, March 2016, No. 1207 (Afg.).

149. *Id.*

150. See *Majlese Afghanistan Yak Farmane Taqnini Entekhabati Rais Jamhori Ra Rad Kard* [Afghanistan's National Assembly Rejected a Presidential Legislative Decree], BBC PERSIAN (June 13, 2016), https://www.bbc.com/persian/afghanistan/2016/06/160613_k02-afghanistan-parliament-rejected-ghanis-decree.

151. See *Qanoone Entekhabat* [Election Law], Official Gazette, September 2016, No. 1226 (Afg.).

152. *See id.*

153. *See id.*

154. *See id.* It must be noted that as a matter of law and practice, the executive would normally state in its legislative decrees that the decrees would be sent to the National Assembly for approval within thirty days. However, in the case of the election law, the executive avoided this language and considered itself entitled to legislate without the approval of the National Assembly. This shows yet another bold example of the executive's usurpation of power.

Finally, the executive enacted an unusually lengthy amendment to the last election law by legislative decree, modifying at least thirty-two provisions of the election law and adding a few new provisions.¹⁵⁵ Similar to the prior legislative decree, the executive once again refrained from mentioning the requirement under Article 79 of the Constitution to send the legislative decree to the National Assembly for approval within thirty days.¹⁵⁶

V. THE NATIONAL ASSEMBLY'S UNSUCCESSFUL ATTEMPT TO ASSERT ITS POWER: LAW ON LEGISLATIVE DECREES

Given the executive's many violations of Article 79 of the Constitution and overuse of legislative decrees, the National Assembly attempted to assert its legislative power and keep the executive's legislative action in check. However, the National Assembly's efforts failed due to the executive's wielding of the tool of judicial review, referring the National Assembly's adopted bill to the Supreme Court for a constitutionality analysis and judicial interpretation.¹⁵⁷

On 1395/10/29 [December 19, 2016], the National Assembly adopted a short bill entitled the Law on the Issuance of Legislative Decrees.¹⁵⁸ Without mentioning the Constitution, the bill focused on defining and clarifying the provisions of Article 79 of the Constitution based on which the executive had issued a prodigious number of legislative decrees.¹⁵⁹ For instance, Article 3 of the bill provided definitions and clarifications for a few terms that were vague in Article 79.¹⁶⁰ Article 3 of the bill identified the term "recess" as the normal summer and winter recesses of the National Assembly.¹⁶¹ The bill defined "urgency" as lack of law in an area related to national interests, territorial integrity, security, and stability of the country.¹⁶²

155. See *Tadeel, Ezad Wa Hazf Dar Barkhe Az Mawade Qanoone Entekhabat* [Amendment, Addition and Deletion to Some Articles of the Election Law], Official Gazette, February 2019, No. 1329 (Afg.).

156. See *id.* It was an established practice for the executive to clearly state at the beginning of its decrees that they must be sent to the National Assembly for approval within thirty days, as required by Article 79 of the Constitution. However, this clause is missing from the decree.

157. See *Qanoone Sodore Farmane Taqneeni* [Law on the Issuance of Legislative Decrees], Official Gazette, February 2018, No. 1285 (Afg.) [hereinafter LAW ON THE ISSUANCE OF LEGISLATIVE DECREE]. The bill entailed only eight articles.

158. *Id.*

159. *Id.*

160. See *id.* at art. 3.

161. *Id.* at art. 3 (1).

162. *Id.* at art. 3 (2).

The bill identified only two conditions under which the executive could issue legislative decrees. Namely, the executive could only issue legislative decrees when the National Assembly was in recess, and when there was urgency for legislation.¹⁶³ Moreover, the bill outlined specific situations where the executive could not issue legislative decrees.¹⁶⁴ According to Article 5 of the bill, the executive could not enact legislative decrees when the National Assembly was in session, when financial and budgetary issues were the subject of legislative decrees, when there was already an enforceable law, and when there was no “urgency.”¹⁶⁵

Additionally, the bill identified two instances where legislative decrees could be deemed automatically invalid and thus unenforceable.¹⁶⁶ The first instance was if the executive failed to send a legislative decree to the National Assembly for approval within thirty days after the National Assembly returned from its recesses.¹⁶⁷ The second instance was if the executive issued a legislative decree addressing an area where a law already existed.¹⁶⁸ With these two provisions, the National Assembly intended to stop the executive from issuing excessive legislative decrees and reassert its power as the main body for legislating in the country.

However, when the bill reached the president’s desk for endorsement, unsurprisingly, the president vetoed the bill on the grounds that the National Assembly did not have constitutional authority to limit the legislative powers of the president.¹⁶⁹ Then, the *Wolesi Jirga* reapproved the bill by a two-thirds’ majority in accordance with Article 94(3) of the Constitution.¹⁷⁰ Principally, according to the Constitution, this bill of the *Wolesi Jirga* should have become law. However, the president refused to accept the *Wolesi Jirga*’s decision. Instead, he referred the bill to the Supreme Court of Afghanistan for judicial review, to assess the compatibility of the bill with the Constitution of Afghanistan.¹⁷¹ As indicated previously, the executive used the judiciary as a tool to legitimize its legislative actions that were unpopular with the National Assembly, as well as to promote its government policies and political agenda.¹⁷²

163. *Id.* at art. 4.

164. *Id.* at art. 5.

165. *Id.*

166. *See id.* at art. 6.

167. *Id.* at art. 6 (1).

168. *Id.* at art. 6 (2).

169. *Id.*

170. THE CONSTITUTION, *supra* note 16 at art. 94 (3).

171. LAW ON THE ISSUANCE OF LEGISLATIVE DECREE, *supra* note 157.

172. *See* Haress, *supra* note 47 at 1.

In the request for judicial review, the executive asked the Supreme Court one specific question and provided two lines of reasoning against provisions in the National Assembly's bill. The question was whether the National Assembly had the power to enact such a law limiting the power of the president under Article 79 of the Constitution.¹⁷³ The first line of the executive's argument against the bill was regarding the prohibition of legislative decrees in the presence of a previously enacted and enforceable law.¹⁷⁴ The executive's request cited the bill's provision that, if there was already an enforceable law on an issue, the executive could not issue legislative decrees at the same issue, and if the executive did issue legislative decrees regardless, such enacted decrees would automatically be deemed invalid.¹⁷⁵ Against this, in its request, the executive reasoned that there might be a law in an area, but the law might need to be amended or outdated and irresponsible to the needs of the time.¹⁷⁶ Further, the executive posited that the government had made commitments to the international community and might need to act urgently to meet its international obligations.¹⁷⁷ The second line of the executive's reasoning focused on the definition of "urgency" in the bill.¹⁷⁸ According to the executive's reasoning, it was the authority of the executive to determine what matter was urgent under Article 79 of the Constitution and thus required new legislation to be enacted via its legislative decree power.¹⁷⁹ In addition, the executive indicated that the executive was in the best position to make such a determination.¹⁸⁰ Hence, the executive rejected the definition of urgency given by the National Assembly in the bill.¹⁸¹ The executive concluded that the National Assembly had encroached upon the executive's authority and could not regulate and limit the procedure and power for the executive's issuance of legislative decrees.¹⁸²

Deciding on the executive's request, on 1396/11/14 [February 3, 2018], the Supreme Court ruled that the National Assembly's bill was unconstitutional and thus invalid.¹⁸³ The reasoning of the Supreme Court mirrored that of the executive explained above.

173. LAW ON THE ISSUANCE OF LEGISLATIVE DECREE, *supra* note 157.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

VI. THE IMPLICATIONS OF THE EXECUTIVE'S AUTHORITARIANISM

As Guillermo O'Donnell observed in his "delegative democracy"¹⁸⁴ theory, "decision-making frenzy" is a characteristic of delegative democracies:

[Where] hasty, unilateral executive orders are likely to offend important and politically mobilized interests, they are unlikely to be implemented. In the midst of a severe crisis and increasing popular impatience, the upshot is usually new flurries of decisions which, because of the experience many sectors have had in resisting the previous ones, are even less likely to be implemented. Furthermore, because of the way those decisions are made, most political, social, and economic agents can disclaim responsibility. Power was delegated to the president, and he did what he deemed best. As failures accumulate, the country finds itself stuck with a widely reviled president whose goal is just to hang on until the end of his term. The resulting period of passivity and disarray of public policy does nothing to help the situation of the country.¹⁸⁵

In alignment with O'Donnell's observation, such a pattern emerged in Afghanistan, where the unilateral executive's decisions and authoritarianism led to dire consequences, including contributing to the collapse of state and democracy in the country. The negative and interrelated implications of such executive authoritarianism are analyzed further below.

A. *Unconstitutionality and Fostering a Culture and Practice of Disrespect to the Constitution*

One of the most obvious outcomes of the excessive use and misuse of the legislative decree power by the executive was the unconstitutionality of many of such decrees. As this research has demonstrated, over fifty percent of these legislative decrees were issued by the executive in flagrant violation of the requirements of Article 79 of the Constitution.¹⁸⁶ This includes the excessive number of legislative

184. See Guillermo A. O'Donnell, *Delegative Democracy*, 5 J. OF DEMOCRACY 55, 55-69 (1994). According to Guillermo O'Donnell, "[d]elegative democracies rest on the premise that whoever wins election to the presidency is thereby entitled to govern as he or she sees fit, constrained only by the hard facts of existing power relations and by a constitutionally limited term of office." (See *id.* at 59.) One can argue that the Afghan Republic was not more than a delegative democracy.

185. *Id.* at 66-67.

186. See Part III of this Article.

decrees issued when the National Assembly was in session. In addition, while the remainder of the legislative decrees were issued during the National Assembly's recess, the urgency for issuance of the decrees was questionable. As discussed, the Constitution did not define urgency.¹⁸⁷ However, no matter how expansive an interpretation of the term the executive might adopt, most of those legislative decrees could not easily qualify as urgent. Furthermore, most of the legislative decrees were issued to replace an existing law in the same area.¹⁸⁸ Even if there was a degree of urgency, the Constitution anticipated a better way for urgent matters to be processed by the National Assembly. For example, the Constitution required the National Assembly to prioritize passing bills that the executive considered urgent.¹⁸⁹ The main goal of this provision was to ensure that, even in urgent cases, bills should still go through the National Assembly rather than being promulgated by the executive to the greatest extent possible.¹⁹⁰ This implies that urgency for issuing legislative decrees required a much higher threshold, such as situations where the lack of law might jeopardize national interests or the security of the country if the executive did not enact a law quickly when the National Assembly was in recess. Accordingly, the executive could ask the National Assembly to prioritize adopting its urgent bills through the standard legislative process. However, as the data has shown, the executive did not respect the normal constitutional process for making laws.¹⁹¹ The executive's issuance of numerous legislative decrees on dates nearing the end of the National Assembly's recesses indicates that the executive intentionally used legislative decrees as a tool to avoid the standard legislative process. The excessive issuance of unconstitutional legislative decrees promoted a culture of disrespect for the Constitution and established the worst possible precedent for the implementation of the Constitution. For instance, if the president, as the face of the executive representing the entire Afghan state who took an oath to uphold and implement the Constitution,¹⁹² violated the Constitution so flagrantly, how could one expect the same from the other branches of government, high- and low-ranking officials, and ordinary citizens? The executive's disregard for the Constitution negatively influenced how the Afghan people perceived it as

187. See subpart III.B of this Article.

188. See *e.g.* Part IV of this Article.

189. THE CONSTITUTION, *supra* note 16, at art. 97.

190. See *generally id.*

191. See Part III of this Article.

192. *Id.* at art. 63. Article 63 required the president to take the oath of office before assuming the presidency.

2025]

EXECUTIVE AUTHORITARIANISM

35

the supreme law of the land and its role in guiding and constraining power within the democratic process and governmental system it established.

B. Usurpation of Legislative Powers and Undermining the National Assembly

Executive authoritarianism overwhelmingly subverted the National Assembly's constitutional authority, autonomy, and functionality as the main governmental body for enacting laws in the country and turned it into a symbolic and ineffectual institution. While the National Assembly's proactiveness, ability, and experience to exercise its legislative power in relation to the executive can be questioned and assessed separately,¹⁹³ this study has demonstrated that the National Assembly had only limited opportunity and power to contain executive authoritarianism and prevent the continuous issuance of legislative decrees. As indicated in previous sections, the executive went so far as to use its legislative decree power to replace recent laws that were enacted through the standard constitutional process including approval by the National Assembly. Furthermore, in cases where the National Assembly adopted legislative decrees or bills proposed by the executive, the National Assembly was not in a position of power to bargain or compel the executive to concede or make compromises in cases where there was serious disagreement between the two branches of government. In situations where the National Assembly disregarded the executive's legislative proposals and policy preferences, the adopted bills faced the president's veto, or the executive refrained from publishing the laws in the Official Gazette and taking actions to implement them.¹⁹⁴ Similarly, in other rare cases where the *Wolesi Jirga* was able to readopt presidentially vetoed bills by a two-thirds' majority vote, the executive used judicial review as an effective tool to advance its authoritarianism, declaring such bills unconstitutional and further marginalizing the National Assembly.¹⁹⁵

With the inability of the National Assembly to restrain the executive and the absence of an impartial judiciary possessing independent judicial

193. See Shamshad Pasarlay & Zalmay Mallyar, *The Afghan Parliament: Constitutional Mandate Versus the Practice in the Post 2001 Context*, AREU (2019), <https://areu.org.af/publication/the-afghan-parliament-constitutional-mandate-versus-the-practice-in-the-post-2001-context/>.

194. See Omar Sadr, *The Republic and Its Enemies: The Status of the Republic in Afghanistan*, AFGHANISTAN INSTITUTE FOR STRATEGIC STUDIES 70 (2021), <https://aiss.af/assets/publication/The-Republic-and-Its-Enemies-English.pdf>.

195. See Part V of this Article.

review power, the executive maintained dominance over the legislative process, operating without meaningful checks or balances. This situation completely defeated the main premise of the separation of powers theory, which aims to grant each branch of government independent power and prevent any one branch from becoming too powerful.¹⁹⁶ Feeling powerless, members of the National Assembly could only express their frustration by raising their concerns and voice in the media and communicating the issues to their constituents.

C. *Anarchy in Lawmaking: Overproduction of Low-Quality Laws*

The executive's authoritarianism and monopoly in lawmaking led to an overproduction of inconsistent, repetitive, overlapping, conflicting, poorly drafted, and often unnecessary laws. This resulted in a cycle of constant redrafting, reproducing, and reenacting new laws due to the problems and poor quality of existing legislation that was mostly recent. For instance, some of the most important new laws, such as the Penal Code of 2017,¹⁹⁷ were enacted by the executive using the legislative decree power. While no one can deny the importance of a modern and unified penal code, the nature and significance of the code demanded further deliberation and thorough involvement of the National Assembly. The hurried action of the executive to consolidate criminal laws into a single code led to poorly drafted legislation. This forced the executive to issue at least six subsequent legislative decrees to add or amend many existing provisions of the code.¹⁹⁸ In another instance, the executive replaced a law regulating the processing and enforcement of legislative documents twice within the span of two years (the law had already been changed multiple times under President Karzai's administration).¹⁹⁹ This instability and constant change completely disrupted the legislative process and the work of the Ministry of Justice which was responsible for editing and scrutinizing legislative drafts. The issue of election laws, as discussed in subpart IV.C above, further highlights this instability.

196. *Separation of Powers*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/separation_of_powers_0 (last visited Feb. 6, 2024).

197. *See Kode Jaza* [Penal Code], Official Gazette, May 2017, No. 1260 (Afg.).

198. *See e.g. Eizad Dar Madae 916 Kode Jaza* [Addition to Article 916 of the Penal Code], Official Gazette, March 2018, No. 1286 (Afg.); *Zamima Shumara 1 Kode Jaza* [Annex (1) to the Penal Code], Official Gazette, October 2018, No. 1314 (Afg.), *Eizad Dar Madae 461 Kode Jaza* [Addition to Article (461) of the Penal Code], Official Gazette, October 2018, No. 1318 (Afg.); *Eizade Faqare (3) Dar Madae 407 Kode Jaza* [Addition of Clause (3) to Article 407 of the Penal Code], Official Gazette, March 2021, No. 1399 (Afg.).

199. *See e.g. Qanoone Tai Marahele Asnade Taqnini* [Law on the Processing of Legislative Documents], Official Gazette, October 2018, No. 1313 (Afg.).

Finally, the issuance of a prodigious number of legislative decrees (as many as twenty-one or thirteen, as previously noted) in one day underscores the inattention of the executive to the quality of legislation.²⁰⁰

D. *Weak Implementation of Laws*

As O'Donnell observed,²⁰¹ the overproduction of laws negatively impacts the implementation of the law. Regardless of how good or bad the laws may have been, there was little to no evidence that those laws were in fact implemented by the relevant authorities.²⁰² Sadly, the executive and its related institutions did not have the capacity or willingness to enforce the laws. Shockingly, in many cases the relevant authorities were barely aware of the new laws let alone had the understanding to implement the laws properly.²⁰³ In addition, the implementation of many of the newly enacted laws required a high level of competence and necessary resources which the government lacked. For instance, in the area of anti-corruption, the executive enacted several laws, including two laws in 2018.²⁰⁴ These laws put in place procedures for protecting whistleblowers²⁰⁵ and required the establishment of an anti-corruption agency,²⁰⁶ which was supposed to replace a few existing anti-corruption institutions. However, these laws were never fully implemented before the fall of the Republic. Furthermore, the constant change of laws in a single area did not provide sufficient time for the implementers and relevant authorities to keep up with the changes and learn the new laws and enforce them. The lack of implementation and enforcement created a situation where many new laws kept being enacted

200. See subpart III.B this Article.

201. In O'Donnell's view, "institutionalized democracies are slow at making decisions. But once those decisions are made, they are relatively more likely to be implemented." The opposite, however, is true in delegative democracies where the executive's hasty decisions are a hindrance to implementation (see O'Donnell, *supra* note 184 at 66-67.).

202. See e.g. Abdul Mahir Hazim, *The Mutual Legal Assistance Regime in Afghanistan: Assessing Compliance with International Law and Exposing Loopholes* (2001-2021), 32 WASH. INT'L L. J. 46-97 (2022).

203. See e.g. Abdul Mahir Hazim, *Transnational Crime, Mutual Legal Assistance, and Compliance with International Obligations in the Developing World: Reforming and Enforcing Legal Mechanisms to Effectively Combat Transnational Crime in Afghanistan* (2020) (Ph.D. dissertation, University of Washington).

204. See e.g. *Qanoone Mobareza Ba Fasade Edari* [Law on Combatting Administrative Corruption], Official Gazette, October 2018, No. 1314 (Afg.) [hereinafter LAW AGAINST CORRUPTION].

205. See *Qanooni Hemayat Az Etla Dehandagane Jarayeme Fasade Edari* [Law on the Protection of Whistleblowers], Official Gazette, October 2018, No. 1314 (Afg.).

206. See LAW AGAINST CORRUPTION, *supra* note 204 at art.6.

without any actual impact upon the behavior and process they were intended to regulate. As such, most of the laws remained simply words on paper.

E. Exacerbating Political and Social Friction

The Republic's executive authoritarianism and the ensuing heated tension between the executive and legislative generated excessive political friction and severely damaged the relationship between the two branches of government. This weakened the standard legislative process established in the Constitution. At the same time, debates around executive authoritarianism inundated the media and public discourse, increasingly eroding public trust in the government. Many members of the National Assembly, whether through media or gatherings with their constituents, exposed the executive's excessive use of its legislative decree power to restrain the National Assembly and transform it into merely a symbolic and ineffectual legislative institution. Towards the end of the Republic, there was a widespread understanding among the public that the president, as the head of the executive, was carrying on all the functions of the government, including making laws without valuing the National Assembly as a pillar of the government. Consequently, the people perceived the government as an autocratic regime.

F. Undermining the Rule of Law and Good Governance

The executive's unconstitutional legislative decrees undermined the rule of law and good governance in the country.²⁰⁷ This is not to suggest that Afghanistan would have had a robust rule of law without the executive's authoritarian approach to lawmaking. Nevertheless, it can be argued that the executive's authoritarianism dealt a severe blow to the establishment of the rule of law, impeding good governance in Afghanistan. Due to the executive's overreach, the hope that the laws and democratic processes should be respected by everyone and that no one should be above the law seemed increasingly remote.

G. Undermining Democracy and the Will of People

Ultimately, one of the major implications of executive authoritarianism was that it generally undermined democracy and the will of the people in Afghanistan. That the Constitution established a democratic system with a separation of powers (albeit flawed) and

207. See generally, Sadr, *supra* note 194 at 70.

provided Afghans with the right to directly elect their president and legislators who would display the will of the people,²⁰⁸ was a major political development in the history of Afghanistan. It was supposedly through this system and elections that Afghans could participate in lawmaking and have a say in their country's governance and determine their destiny. However, the executive disregarded this fundamental value enshrined in the Constitution, usurping legislative authority, and misusing its power to sidestep the people's house, the National Assembly. As such, when the country was in peril, few wished to stand up to fight for a government that they had completely lost faith in as a democratic system that would represent the people.

VII. CONCLUDING REMARKS

This Article demonstrated that the presidential system and the concentration of legislative powers in the executive seriously undermined the system of checks and balances that was supposedly established by the 2004 Constitution. As demonstrated, the executive made excessive use and misuse of its legislative decree authority, often legislating unconstitutionally and circumventing the standard legislative process and the National Assembly. Amid the absence of an independent judiciary and the National Assembly's inability to affect the process, the executive emerged as an unchecked and authoritarian force. Akin to observations of scholars in other contexts,²⁰⁹ such executive authoritarianism had destructive implications for the relationship between the executive and legislative, governance, the rule of law, the relationship between state and society, and the survival of the fragile (nominal) democracy in Afghanistan.

Given these findings, the study and understanding of power concentration in the executive and the usurpation of legislative powers are essential in discussing the complex factors contributing to the collapse of the state and the Republic of Afghanistan. The lessons learned from this failed experience are that any future democratic political system for Afghanistan should avoid concentrating power in the executive and must establish effective "horizontal accountability."²¹⁰ This may entail

208. See THE CONSTITUTION, *supra* note 16 at art. 81.

209. See Parts I and IV of this Article.

210. See Guillermo O'Donnell, *Horizontal Accountability in New Democracies*, 9 J. DEMOCRACY 112, 112-126 (1998). According to O'Donnell, in effective horizontal accountability, "there must exist state agencies that are authorized and willing to oversee control, redress, and if need be, sanction unlawful actions by other state agencies. The former agencies

removing the president's veto power or executive decree authority, or severely restricting both; for instance, by giving the legislative branch the ability to more easily override a veto or specifying limited conditions under which legislative decrees can be issued. Moreover, a strong and truly independent judiciary should be established.

must have not only legal authority but also sufficient de facto autonomy vis-a-vis the latter.” *Id.* at 119.