

The Constitution of Afghanistan: Structure of Government and Center-Periphery Relation

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1. Introduction

If a constitution as “the soul of a nation,” as a South African scholar puts it, I am tempted to add that the constitution-making experience of a nation—the constitutional moment—is an occasion for a nation’s self-interrogation on its past, present and future. It is a rendezvous with destiny.

Successful constitutions are characterized by a capacity to strike a balance between the need to enshrine fundamental principles, on the one hand, and provisions for adaptation to changing circumstances, on the other. The latter includes the needs of achieving security and the developmental imperatives of a nation. One of the crucial questions that the drafters of a constitution face concerns the relationship between the central government and the regions and localities comprising the country. What degree of decentralization is granted to the regions is a matter to be determined in each case by the history and politics of each country. In Afghanistan, the state building enterprise began by Amir Khan which culminated in the 1964 constitution, seems to have created a sense of nationhood among the various groups making up the country. Despite the recent history of war and feud between different parties, there seems to be consensus on preserving a united Afghanistan nation. This is a basic feature of the constitution.

2. Government Structure/Center-Periphery Relation

At the risk of stating the obvious, I offer the following insights on issues surrounding center-periphery relation.

There are two powerful motives that animate people, particularly at the regional and local levels. First is the desire for recognition as worthy members of their communities. Second is the desire to be part of a larger, more efficient modern state, which is a principal reason why, once united, people stay together in a nation-state. The first motive involves a search for identity, and a demand that the identity be publicly acknowledged as having import. The extreme form of fulfilling this is ethnic federalism. The second motive is actuated by a desire to have better life, which can best be realized in a larger unity transcending regional boundaries of power relationship or economic interaction. These two motives are linked in the concept of citizenship, which in the modern state has become an important currency of personal significance connecting the person and his or her place of origin with the center of power. The two motives are held in tension, which can be constructive as well as obstructive to national peace and progress; they respond differently to different pressures. A successful arrangement of the center-periphery relation must thus take account of this inherent tension.

Federal versus Unitary System

The advantages of federalism are that it provides for the maximum possible concession made to regions or ethnic groups. The boundary of division and the degree of autonomy granted to the component states, vis-à-vis the Federal center is historically defined and differs from case to case. In the United States, the states were accorded maximum legislative power within their jurisdiction, from the beginning. By contrast, the states of the Federal Republic of Germany, the *landers*, developed over a longer period, do not enjoy maximum legislative power, which is retained by the federal legislature. The desire for economic integration was the principal driving force behind German federalism, facilitated by customs union, and legislation designed to protect industry against parochial pressures. It was achieved under Prussian domination.

In Ethiopia, the federal structure was designed along ethnic lines. The opposition parties (mainly comprising the historically dominant Amhara) contend that an ethnic-based federation will lead to disintegration, that it will destroy the center built by their own kings (in the manner of Amir Khan). The response of the governing party is that unless the various ethnic groups are granted maximum autonomy within a federally united country, they will not feel a sense of belonging. If you impose centralized rule on them, they will revolt and break up the state. Under the 1994 constitution of the Federal Democratic Republic of Ethiopia, there are nine member states delineated along ethnic lines, with equal powers and rights. Moreover, according to Article 47 of the constitution, the “nations, nationalities, and peoples within the states have the right to establish, at any time, their own states.” This provision applies particularly to the State of southern nations, nationalities and peoples, which embraces a number of smaller ethnic groups.

Federalism implies “federal comity,” a doctrine under which the component states and the federal center recognize and respect one another’s interests. But as this involves power relationship, such recognition needs to be defined in a constitution, rather left to later judicial interpretation. Under the Nigerian Constitution of 1999, the exclusive jurisdiction of the federal legislature as well as its concurrent jurisdiction with State legislatures are clearly laid out. [See Second Schedule of the Constitution, Parts I and II attached as Annex 1]. Nonetheless, Nigeria’s Federal Legislature (The National Assembly) retains much of the legislative powers similar to that of Germany. For example, Schedule I, Part II (D) provides on the collection of taxes as follows:

- (7) In the exercise of its powers to impose any taxes or duty on—
 - (a) capital gains, incomes or profits of persons other than companies; and
 - (b) documents or transactions by way of stamp duties, the National Assembly may, subject to such conditions as it may prescribe, provide that the collection of any such tax or duty or the administration of the law imposing it shall be carried out by the Government of the State or other authority of a State.
- (8) Where an Act of the National Assembly provides for the collection of tax or duty on capital gains, incomes or profit or the administration of any law by an authority of a State in accordance with paragraph 7 hereof, it shall regulate the liability of a person to such tax or duty in such manner as to ensure that such tax or duty is not levied on the same person by more than one State.

The Constitution of Ethiopia provides that “All powers not given separately to the Federal Government, or powers not given expressly and concurrently to the States and the Federal State, are reserved to the States. [Article 52(1). Article 52 gives a list of the powers given to the States. (See Annex 2).]

In general, the larger the country and the more numerous the ethnic groups making up a state, the more likelihood for demands to be made for a federal structure. This is the case with both Ethiopia and Nigeria. In Eritrea, the reverse is the case, where the constitution makers decided in favor of a unitary government, which, in their judgment, is consistent with Eritrea’s goal of building a unified and strong nation. At the same time, they recognized a degree of decentralization as essential for people’s participation and initiative at the regional or local levels. The relevant article of the constitution simply provides, “Eritrea is a unitary State divided into units of local government. The powers and duties of these units shall be determined by law.” [Article 1(5)].

Being a concise document, the constitution of Eritrea leaves division of power between center and periphery to future legislation. Such concision, which is similar to that of the US constitution, is not typical in our times. Its obvious advantage is flexibility: it does not bind the hands of present government too much, leaving details to future legislation. But because it leaves decision on a basic question of division of power unresolved, it is open to question whether leaving decision on such basic question unresolved is wise. It is a matter of policy and politics to be decided by the power holders of today. If, for example, they decide on a unitary system, then leaving these issues to be negotiated in the future may be an option worth exploring on the understanding that the details of power divisions, including those of all levels of local government can be settled in the future. On the other hand, if the choice is federalism, the division of power must be provided for in detail under the constitution, as in Ethiopia and Nigeria. In South Africa and Uganda also the division of power is defined in detail, although the two are not federations. [See Article 176 of the Uganda constitution.]. Sub Article (1) of Article 176 provides

“The system of local government in Uganda shall be based on the district as a unit under which there shall be such lower local governments and administrative units as Parliament by law may provide.”

Article 176(2) then makes provision for the principles applicable to the local government system, which is reproduced as follows:

- a. the system must be such as to ensure that functions, powers and responsibilities are devolved and transferred from the Central Government to the local government units in a coordinated manner;
- b. decentralization must be a principle applying to all levels of local government and in particular, from higher to lower local government units to ensure people’s participation and democratic control in decision making;
- c. the system must be such as to ensure the full realization of democratic governance at all local government levels;
- d. there must be established for each local government unit a sound financial base with reliable sources of revenue;

- e. appropriate measures must be taken to enable local government units to plan, initiate and execute policies in respect of all matters affecting the people within their jurisdiction;
- f. persons in the service of local government must be employed by the local government; and
- g. the local government must oversee the performance of persons employed by the Central Government to provide services in their areas and to monitor the provision of Central Government services or implementation of projects in their areas.

Above all, the system of local government must be based on democratically elected councils on the basis of universal adult suffrage in accordance with the constitution. If Afghanistan were to adopt a unitary system with local government similar to the Ugandan model, the *shuras* would presumably have to be elected democratically. This would achieve two objectives: it would fulfill representative principle, and it would also provide legitimate and organic link between center and periphery. If elections are to be held on political party basis, each candidate will seek office in the *Shura* of his local government area on the ticket of his party of choice. Assuming that eventually political parties organize across ethnic boundaries, this could also provide an additional basis for national building.

In South Africa, the system is called Co-operative government. Chapter 3, Article 40, of the South African constitution, states the principle of the division of power as follows:

- (1) In the Republic, government is constituted as national, provincial and local spheres of government, which are distinctive, interdependent and interrelated.
 - (2) All spheres of government must observe and adhere to the principles in this Chapter and must conduct their activities within the parameters that the chapter provides.
- [Article 41 details the principles. (See Annex 3).]

3. Separation of Powers under Federal and Unitary Systems

The limits imposed by guidelines (3, 000 words) force me to deal with these topics together. I begin with the assumption that monarchy as an option has been abandoned, even in its limited constitutional form, which leaves us with a choice between parliamentary and presidential types under a republic.

Now a study of form outside the context of substance (of policy and purpose) makes no sense. The particular form, which a government assumes should reflect the reality of power relationships. It is sometimes said that a divided executive is desirable because it makes for varied institutional forms that accommodate diversity, providing better opportunities for different shades of political opinions or interests. This is debatable, particularly when it is advanced with a parliamentary form of government, as a better choice.

Parliamentary System—In this system, the members of the executive are members of the legislature thus diluting the idea of separation of powers. The parliamentary system is generally followed in Western Europe. On the face of it, this system seems to respond to

the challenges of the executive's accountability for its conduct of government business. Its weakness is that it can be messy and has been known to create instability, as France experienced before de Gaulle's constitution of 1958 introduced a strong executive presidency while retaining the parliamentary form. Three examples of parliamentary system under a federal structure are those of Germany, India and Ethiopia. In all three, executive power is vested in the prime minister and his cabinet of ministers. [In Germany the Chief Executive is known as Chancellor]. The president is a figurehead symbolizing national unity and continuity.

Presidential System—The principal difference between this and the parliamentary system is that the executive does not sit in the legislature under a presidential system. Secondly, the chief executive is elected directly by universal suffrage, whereas the chief executive in the parliamentary system is elected indirectly, by virtue of his leadership of the party enjoying a majority of seats in parliament. Some think that the presence of the executive in the legislature provides the opposition a more direct platform to challenge the governing party and hold ministers accountable. It should be remembered, however, that under the presidential system, there are congressional committees that can summon any member of the president's cabinet or their subordinate to answer questions on any issue of importance. And, just as under the parliamentary system, congressional hearings are conducted under the full view of the public.

Mixed System—Mention should be made in passing that there is a system combining the parliamentary and presidential systems exemplified by the French system. The President is elected separately by universal suffrage. The Prime Minister and his cabinet come out of the legislature to form a government, as under the parliamentary system, by virtue of a majority seats won at a parliamentary election. The problem arises when the Prime Minister belongs to a party different than that of the President. Such a situation is called *cohabitation* in France and is not recommended to countries adopting new constitutions.

4. Separation of Powers and Government Systems

What is the effect of the doctrine of separation of powers on these two systems? In theory, the principal function of the doctrine of separation of powers is to ensure accountability and to prevent or minimize the abuse of power by those who wield it. Its secondary function is efficiency. Is accountability better achieved under a system in which there is strict separation of the three branches of government? Put it another way, does the membership of the Executive in the Legislature in the parliamentary system reduce the chances of proper accountability and thus result in abuse of power? Again, it is debatable whether the executive's presence in the legislature reduces the chances of proper accountability. It depends mainly on the history and political culture of the country concerned.

To conclude this section, any form of government that encourages and facilitates mechanisms for thrashing out problems should satisfy the functional test of good government. In the post-colonial experience of Africa, the case was made for what has been called neo-presidentialism which gives the president enormous power. It was

adopted on the argument that it was better suited to the needs of African countries whose nation-statehood was defined by artificially fixed boundaries enclosing different ethnic groups. Neo-presidentialism was accompanied by one party system, which eventually became part of the problem and opposition movements throughout Africa beginning in the late 1980's demanded democracy under a multi party system. Today, most Africans are opposed to one-partyism, and many of the constitutions make express provisions requiring multi-party.

5. Taxation and Revenue Allocation

I have already touched on taxation. As a matter of principle, the taxes people pay must be levied by their representatives. A typical provision on this is found in the Ugandan constitution. "No tax shall be imposed except under the authority of an Act of Parliament." [Article 152(1)]. The Uganda model of center-periphery relation is useful in the matter of taxation also. Article 191(1) provides, "Local governments shall have power to levy, charge, collect and appropriate fees and taxes in accordance with any law enacted by Parliament by virtue of article 152 of this constitution." The fees and taxes to be levied, charged, collected and appropriated under Article 191(1) consist of rents, rates, royalties, stamp duties, personal graduated tax, fees on registration and licensing and any other fees and taxes that Parliament may prescribe. [Article 191(2)]. All this neatly links local government power of finance, including taxation, to the authority of the National Legislature.

Taxation and revenue allocation become complicated in a federal structure. To take the Ethiopian case as an example, the federal and state governments share taxation and revenue in accordance with clear formulas of division. The federal government levies and collects taxes customs duties and other payments on imports and exports, as well as on a list of 8 other items. [Article 96.]. Article 97 gives the states power of taxation on a list of ten items. (See Annex 4)].

Concurrent Power of Taxation. Under Article 98, the federal government and the states jointly levy and collect taxes:

1. On the incomes and profits of enterprises they jointly establish, and on sales taxes.
2. On the profits of corporations and on dividends paid to shareholders.
3. On incomes derived from large-scale mining, petroleum and gas operations, and they shall determine and collect royalties.

Directives on Taxation. The exercise of tax powers by federal and state governments must be made in a manner that does not adversely affect their relationship. The tax rate must be fairly determined. And neither the federal nor the state governments must levy taxes on each other's property except on profit-making enterprises.

Revenue Sharing. Revenue sharing is implied in the examples cited above; I will not deal with it. As we saw in the Uganda model, it is less complicated in the unitary system of local government. Not so in the federal system. Under the Nigerian constitution, for example, allocation of revenue is made from a Federation Account in accordance with

certain principles, including factors of “population, equality, of States, internal revenue generation, land mass, terrain as well as a population density.” [Article 162(2).

In Nigeria another point concerns is what is called principle of derivation. The idea is to make extra allocation to states from which the country derives vital resources such as oil. In Nigeria it is derived from the Delta region of the South. The constitution prescribes not less than thirteen percent of the oil revenue to be reserved to the Delta states. The Delta states continually contest this, demanding for more. [See Proviso of Article 162(2).]

6. Justice and Security

Again, space constraint forces me to deal with these topics together, and in summary manner.

Justice. Under a federal system, the states have their own state judiciary, distinct from the federal judiciary. There is no concurrent jurisdiction in judicial matters.

Security. The security arrangement differs from case to case. Generally speaking, there is a national army irrespective of the whether the system is federal or unitary. With respect to internal security, however, generally speaking, the states have their own police under federal systems, while in unitary systems there is a national police under a national central command. This rule is proven by exceptions as in Nigeria where the police is under federal command. Many states keep demanding for the right to have state police, and in some areas such as Lagos, local militias have emerged by default with some unpleasant consequences. Lagos provides a cautionary tale on security as on other questions.

Finally, the issue of who finances the security and the judiciary of states is critical. States with poor resource endowment will depend on federal government assistance.

7. Conclusion

It would be presumptuous of me to recommend specifically as to which system is best suited for the country. But from the little I know about Afghanistan’s present condition and needs, a unitary system similar to that of Uganda seems to commend itself.

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