

An Options Paper for the Afghan Constitutional Commission

Unitary or Federal: A False Choice?

Decentralisation of state powers in Afghanistan

Yash Ghai

The issue

1. A key issue for resolution by the people of Afghanistan is whether the state should be unitary or federal. The central point of the debate so far on the issue has been the effect of either system on the unity and integrity of the country. The proponents of the unitary state argue that Afghanistan is fragmented, state institutions are weak, parts of the country are run by warlords and their militias or are under attack by rebel groups, and therefore needs a strong, centralised government. The proponents of federalism argue that the country consists of different ethnic groups which desire autonomy and that there are powerful groups in charge of regions and provinces who will not easily give up their control over these places. Attempts to impose a unitary regime, they argue, will threaten national unity.

2. Constitutions in Afghanistan have been instruments for centralisation of power and the extension of state power into the hinterland, even though they have recognised provincial councils. However, the reality on the ground has not been fully reflective of constitutional provisions. Especially since 1978, the authority of the state has been fragmentary; its writ has not run in many parts; dissidents etc have been in control over different parts; there have been armed conflict over occupation of territory etc. etc. But even before then, the ability of the centre to deliver services, etc. was limited, due to difficulties of transport and communications. At the moment there are many features which go counter to centralisation—taxation, revenue raising, dispersal of armed force, dissident activity, extensive control over regions by warlords who substitute for central authority (see the excellent paper by Helena Malikyar and Barnett Rubin on the current situation as it pertains to decentralisation, ‘Center-periphery Relations in the Afghan State: Current Practices, Future Prospects’, Dec. 2002).

3. The framework of the debate on unitary/federalism needs to be broadened by the inclusion of two other factors. The first is alternative rationale for or against the geographical distribution of power, such as effects on efficiency, responsiveness and accountability. The second is the consideration of different legal forms of geographical distribution (of which federalism is only one) to enable a proper evaluation of the consequences. For example some of the disadvantages which may be advanced against federalism may be specific to the type of geographical distribution rather than to the principle of distribution. In this paper the term ‘devolution’ is used to refer to the principle, rather than the form.

The rationale for devolution

4. There are many reasons for the popularity of devolution. The earlier examples represent separate sovereign states coming together to form a federation, for the purposes of strengthening their defence capacity, or to create economies of scale (that is to say, create larger markets and pool resources), or to manage sovereignty over large distances. When devolution takes the form of the distribution of power from a unitary centre, the reasons are usually different. In India, Nigeria and Ethiopia, for example, devolution was a response to the demands of ethnic groups, usually minorities, who wanted a bigger share in the affairs of the state which they considered they could not achieve in a unitary state. Modern instances of devolution are almost always examples of accommodating ethnic, regional, linguistic or religious diversity, as in Bosnia-Herzegovina, the Russian Federation, Puerto Rico/USA, Spain, the Philippines, and the recent recognition of aboriginal autonomous areas in Canada. Devolution is thus seen as the response to the multi-ethnic or multi-national character of the population of states, in an attempt to retain intact the sovereignty and unity of the state.

5. Apart from these broad considerations, devolution has been justified on other grounds—as for example

- being a more democratic system than a unitary one, as it disperses power and thus helps in checks and balances;
- as allowing for more experimentation in policy or institutions, since this can be conducted at first in one part of the country only;
- as ensuring greater responsiveness and accountability of government to the people; and
- facilitating higher participation of people in public affairs.

6. On the other hand, it has been argued that devolution

- creates complicated and expensive systems of government, for political and technical skills to manage them are usually missing;
- causes conflicts between central and regional authorities and may in time lead to secession by militant minorities; and
- in some countries, devolution has been associated negatively with the supremacy of ethnic groups in the devolved areas and the oppression of other groups.

7. If it were possible to agree clearly on the advantages and disadvantages of devolution, for example that it does increase people's participation or the accountability of officials, but that it is expensive and cumbersome, it may be possible to make a balance sheet and decide, on the basis of trade offs, whether it is worth while. However, we have a situation in which there is deep disagreement on the consequences of devolution, on whether devolution

- diffuses or promotes ethnicity
- strengthens or threatens national unity
- makes public authorities more responsive to people's aspirations or needs
- enhances or diminishes democracy and accountability or merely privileges local elites
- promotes or hinders economic development.

8. While powerful arguments can be made in defence of either position, the historical and empirical evidence is inconclusive. Indian and Spanish experiences of transferring power to regions demonstrate that devolution can end ethnic conflicts and strengthen national unity, while the former Yugoslavia and Czechoslovakia show the opposite. Experience in many countries shows that local mismanagement or corruption, often by bosses or ‘warlords’, are harder to control than national mismanagement or corruption.

Forms of devolution

9. The assessment of the general consequences of devolution is difficult also because there is no standard or typical model of devolution. Devolution comes in many forms. The essence of devolution, particularly federalism, is a combination of ‘self-rule’ (autonomy) and ‘shared rule’ (participation in the national government and institutions). One variation among different forms of devolution is the balance between self-rule and shared-rule. Some researchers believe that it is possible to maximise the benefits of devolution and minimise the negative consequences by the choice of the form of devolution and a careful design of constitutional and institutional arrangements. Devolution can and should be tailored to the aspirations, needs and constraints of the country. The way to open the debate in this manner is to examine different kinds of devolution and the different ways of structuring it. At one end, in *federalism*, the arrangements for the distribution of power are entrenched in the constitution; the powers of the centre and regions are specified; and governments established at the national and regional levels are co-ordinate and supreme within the spheres allocated to them; and the ultimate way to resolve disputes is through the courts. At the other end is *administrative decentralisation*, in which legislative and policy powers remain with the centre while implementation is delegated to either national civil servants stationed in the regions or to locally established councils. These latter arrangements are not usually contained in the constitution; they might be made either administratively or through legislation and can be easily revoked by the centre (although arts. 63-65 of the 1923 Constitution, arts. 102-3 of the 1931 Constitution and arts. 108-111 of the 1964 Constitution in their different ways, state principles for administration in provinces, although the functions of provincial institutions are at most advisory).

Variety of forms: why and how of devolution

10. An advantage of devolution is the flexibility in the ways that it can be designed and structured, which can facilitate the designing of devolution to the circumstances of the particular country. The following are the key factors which permit flexibility:

- the *purposes of devolution*—classical federations aimed to create pluralism of policy and administration in largely homogenous people, or to manage government over a large territory; most recent federations have been established to manage ethnic or linguistic diversity;
- the *unit to which power is devolved*—the size, number, homogeneity or heterogeneity of the population of the units; experience shows that when there are only two units representing two communities (East and West Pakistan, Czech and Slovakia, Tamils and Sinhala in Sri Lanka), federations are prone to extreme

- tension and tend not to last, while India, Spain and Switzerland, with multiple ethnicities, are better able to achieve a viable balance;
- the *number of levels of devolution* (for example two or three levels, including local authorities); in many countries the regional level reproduces many of the problems of size that exist at the national level, and that a third tier (local government) may be necessary to ensure a wide degree of people's participation;
 - *uniformity or asymmetry* in the powers and institutions of devolved units; when all the units are similar in size or resources, devolution may work smoothly, but when they are dissimilar or asymmetrical, some with more powers or resources than others (the Northern State in the original Nigerian federation, Quebec in Canada, Kashmir in India or Zanzibar in Tanzania), tensions may arise, yet degrees of asymmetry may some times be better qualified to respond to the accidents and circumstances of ethnic or history;
 - the *extent of powers* of the national and devolved units; if significant powers are vested in the regions, denoting a small sphere of 'shared rule', the ability of the national government to regulate the economy, distribute resources, and even safeguard national security may be seriously affected, while if only a few matters are vested in regional governments, the centre will dominate local communities.
 - the *methods for the distribution of powers* has a major effect on the relationship between the centre and regions. When certain powers are vested exclusively in the centre and others exclusively in regions, there is a clear separation between the two levels of government, but where a significant number of powers are 'concurrent', that is, both the centre and regions may use these powers, the centre and regions have to regularly consult and co-operate;
 - another method to distribute powers is to *separate legislative from executive powers*, and instead of, as is usual, give both legislative and executive responsibility to one level of government in respect of specified matters, to give, for example, legislative responsibility over certain matters to one level of government, normally the centre, and the executive responsibility to another. In this way most policies are nationally determined and apply uniformly throughout the country, but their implementation takes account of local circumstances. Germany and South Africa follow this system, as to a lesser extent do India, Switzerland, Austria and Malaysia;
 - the *powers of the national government to intervene* in or direct, monitor or even suspend the governments of units depend on the priority given to the national government and the perception of its ultimate responsibility for the welfare of the people (as in India and Malaysia). In some federations the different levels of government are considered equal or co-ordinate, enjoying their legitimacy and authority from the people equally, and protected by the constitution (examples being the US, Switzerland and Australia).
 - The *financial arrangements* for national and regional governments, including the division of powers to raise and spend public revenue and the transfer of funds from one level of government to another (usually from the centre to the regions). Financial arrangements touch on some fundamental issues, such as whether the less developed regions receive special grants from the centre to ensure that their inhabitants enjoy the same level of amenities and social services as the well off

- regions, other equalisation measures, and co-ordination of economic policies through fiscal measures.
- diverse mechanisms for *inter-governmental relations*, for consultations between the national and regional governments, co-ordination of policies, adjustments in fiscal relations, and the implementation of laws. Federations with a significant degree of concurrent powers and interlocking fiscal policies use these mechanisms more than where powers are exclusive; these mechanisms compensate for divided authority inevitable in federal or devolved systems.
 - *mechanisms for the settlement of disputes* between governments, and the balance between consultative and mediation procedures and the judicial enforcement of constitutional provisions, the former being more valued where governments seek to co-ordinate and co-operate.
 - devices for the *protection of minorities* within regions, either through the supervening powers of the national government or mechanisms within the region, such as the protection of minority languages, equal rights of all citizens resident in that region, including the right to live, work and own property;
 - the degree and method of *entrenchment*, reflecting the priority given to devolution—usually the most entrenched form of devolution is federalism, where the consent of both the centre and regions is necessary to any change in their legal status or powers, while a lesser form some of protection is provided by the requirement of a special majority in the national legislature, and even less is when changes can be made by a simple majority—the last situation is indistinguishable from local governments.

Options for Afghanistan

11. Apart from national unity, what are the other goals for the constitution? The Bonn Agreement does not directly specify any goals or principles for the constitution. There is no reference even to the requirement of human rights, as in the agreements on Cambodia and East Timor. However, it is possible to draw some inferences from other sections of the Agreement, such as the determination to ‘end the tragic conflict in Afghanistan and promote national reconciliation, lasting peace, stability and respect for human rights in the country’ and the ‘establishment of a broad-based, gender-sensitive, multi-ethnic and fully representative government’. The quest for peace is an underlying objective, which finds echoes among the people. The popular support for a strong unitary government is itself a response to the wish for peace and security throughout the country.

12. However, a strong government is not merely the result of powers vested in the government. The strength of the government depends on a number of factors, including the legitimacy of state institutions, the spread of its support through the country, the structure of political parties, the participation of the people in the affairs of the state etc. This consideration also suggests that in deciding on devolution, Afghans need to weigh various priorities—peace, stability, social justice, national consensus, democratisation, accountability, public participation. Most of these objectives have a direct bearing on the issue of the geographical distribution of state power. For example, forms of local self-rule are critical to the overall democratisation of state and society. It also builds on traditional forms of local governance, for example with a central role for shuras. Moreover,

centralisation and decentralisation can go hand in hand; indeed decentralisation, involving the transfer of central authority, is only possible if the centre is in a position to transfer. The very mechanisms of the transfer and exercise of power bind the regions to the centre (and to other regions) through the modalities of transfer and the management of intergovernmental relations.

13. The above discussion demonstrates, I hope, that Afghans do not need to be locked into a choice between a unitary or federal state. A unitary state could become authoritarian and ultimately divisive, while a federal state is complicated, legalistic, can be rigid, and is hard to manage. Some point on the continuum between the two options may best serve Afghanistan's needs. In deciding on that point and the detailed arrangements for it, the sub-options listed in paragraph 10 should be taken into account. More specifically, the drafters of the Constitution should consider the following points.

14. Adversarial or co-operative devolution

Some devolved systems makes a sharp distinction between the powers of the centre and regions; others provide for a co-operative relationship. Examples of the latter are Germany and South Africa, where most of the legislation in the country is made at the central level (with the participation of national and regional authorities) but the implementation is largely the responsibility of regions. This system may be more suitable for Afghanistan where the capacity for law and policy making at regional and sub-regional levels is limited.

15. Minimum powers at the central level

There are some obvious powers that must remain with the central government—foreign powers, national defence and national army, currency, immigration, judiciary, bulk of revenue sources, and so on. If the co-operative model of devolution is accepted (see paragraph 14), then the centre will continue to have a major say in most critical areas of national policy.

16. What unit for devolution

Power can be devolved to more than one level, for example it could be to regions and districts, or to provinces alone, etc. If the units are too small, they will inevitably be subordinated to the central authorities. If they are too large, the benefits of devolution may be lost, as most people will still be distanced from the seat of governance. There is no reason why powers should not be devolved to more than one level. Municipalities will need their own scheme of powers and governance, including their relationship to the province.

It may also be necessary, as part of the devolution exercise, to review the boundaries of provinces and districts, to ensure conformity to agreed criteria of rationality and viability, including equity in size.

17. Fiscal arrangements

Financial arrangements are at the heart of a devolved system. Given regional/provincial capacities in Afghanistan, consideration could be given to vesting most revenue raising powers in the central government, but with clear criteria and mechanisms for re-

distribution of the revenue among the central and devolved authorities (perhaps through an independent fiscal commission). Special grants to less developed areas could be factored into the scheme.

18. *Security*

The centre must remain responsible for external security and have the monopoly of raising and deploying armed forces. No regional or provincial militias outside that monopoly should be allowed. On the other hand, regional/provincial authorities should have some powers, perhaps to be exercised in conjunction with central authorities, for internal security in their areas, including community policing.

19. *Dispute settlement*

It is best to avoid the participation of courts as far as possible. In a co-operative model of devolution, disputes should be settled politically, through forms of negotiations and conciliation.

20. *Bringing communities together rather than separating them*

Institutional ways must be found to emphasize the bonds that bind Afghans together. Arrangements for intergovernmental relations are critical for this. The debate on a possible second chamber of the legislature should also be informed by the need for regional/province presence and participation in national institutions.

21. *Rigid or flexible*

It is best to avoid rigid divisions of powers or even institutions. One way to do this is to avoid excessive detail in the constitution. Within a general and broad parameter of devolution, the details can be left to a special law. In order to ensure some security to devolved areas and authorities, such law should only be amended by an absolute majorities in the house(s) of the legislature.

22. *Method of implementation*

If the drafters decide to recommend devolution, there is not going to be enough time for the Constitution Commission or the Constitutional Loya Jirga to work out the details. The approach might be for these bodies to consider principles for devolution, establish the broad purposes and the parameters, leaving the details to be worked out by a task force, and to be given effect to in an organic law, etc. The task force might need one full year to work out the nuts and bolts of the scheme and to begin to lay the legislative and administrative foundations for it.

The transfer of powers will need to be phased over a period of time. A major problem in devolution is that powers are assigned to institutions at regional or local levels which do not have the capacity to exercise them. So the rules for the implementation of devolution might include the additional requirement that the transfer of powers to regions should take place only after it is demonstrated that the region has established an acceptable level of capacity. It would be the responsibility of the central authorities to assist with the development of capacity.