

Diversity, human rights and federalism: The case of Afghanistan

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1. Introduction

Human rights maintenance in a diverse society has always been a challenging and disputed issue. Governmental systems, both unitary and non-unitary, are similarly faced with the challenge. Afghanistan is a deeply diverse country and there have been massive violations of human rights. This paper explores the questions of whether it is a) possible to strengthen human rights maintenance through legal-political structures inside a culturally and ethnically diversified state such as Afghanistan, and b) justifiable to do this by recognising ethnic diversity at a political-legal level to prevent human rights violations in Afghanistan. By addressing these two questions, the paper considers whether a Federal system is more helpful than unitary systems in an ethno-politically diverse society such as Afghanistan.

This article first provides an introduction to the ethnic diversity in Afghanistan which, this author contends, is the basis of the political diversity and everlasting conflicts in the country. Afghanistan is a country of minorities, where none of the ethnically diversified groups has the absolute majority, but four major ethnic groups play a political role in all conflicts. Next, the article examines the failure of the unitary system to put an end to the conflicts and the endless significant violations of human rights. A unitary system has been in place for 130 years and remains the sole power

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mechanism in that time. The main characteristics are the powerful central government, the lack of legislative, judicial, financial or administrative power for regional authorities, and the violent suppression of any resistance. Unitary governments have played a fundamental role in the conflicts and violations of human rights in Afghanistan. This article examines federalism as a political-legal structure which can legally recognise diversity and the right to self-determination as a fundamental human right. Then it tries to show how federalism can help to ensure human rights protection in a general sense and the right to self-determination.

2. Afghanistan: Diversity and political structure

Geographically, Afghanistan is a country located in the border areas of several international geopolitical regions. It is debated whether it is part of the Middle East, Central Asia, South Asia or Southwest Asia. The country is landlocked, and has borders with Pakistan to the south and southeast, Iran to the west, Tajikistan, Uzbekistan and Turkmenistan to the north, and a very narrow mountainous border with China in the northeast. The geographical location of Afghanistan may also reflect its cultural and ethnic diversity. The country's current borders are organised in such a way that they divide ethnic groups: the Tajikistan border divides the Tajiks, the Uzbekistan border the Uzbeks, the Pakistan border the Pashtuns, and the Iranian border the Persian-speaking and Baluch peoples. The only ethnic group that does not see such a division is the Hazaras, who live mainly in the central regions of the country.

2.1. Diversity in Afghanistan: *Qawms* (ethnicities)

Afghanistan is famous for its social diversity, which has resulted in everlasting conflicts and violations of human rights. There are many diverse factors in social categorisation in Afghanistan, such as linguistic, cultural, ethnic and religious distinctions. Apart from two different sects of Islam, there are also Sikh and Hindu followers in Afghanistan; there was also a very small population of Jews, though the last one has now left (Guardian 2021). Linguistically, besides the two major languages of Farsi and Dari (which more than 80 percent of the people can speak), Pashto is widely spoken and more than forty other languages are in use (World Atlas 2017). All these different diversifying factors are usually reduced to ethnicity, which is called "*qawm*" in Afghanistan. There are dozens of *qawms* in Afghanistan, none of which has an absolute majority, and among which four larger ethnic groups have played a significant political role: Hazaras, Tajiks, Turktatars (Uzbeks and Turkmen), and finally Pashtuns (Afghans)¹.

1 Although referring to all people of Afghanistan as "Afghans" is internationally recognised and constitutionally guaranteed, non-Pashtuns traditionally only use "Afghan" or "awghan" to name Pashtuns.

Ethnicity is not a natural phenomenon, but a social and historical construct. Objective and subjective factors of self-categorisation are involved (Huddy 2001). External-physical factors include language, religion, physical characteristics, and skin colour; subjective factors include the extent to which a person perceives themselves as belonging to an ethnic group. Collective or racial memory is another subjective factor in the development of a person's perception of their identity (Assmann and Czaplicka 1995).

Geographically, the Turktabars live in northern Afghanistan. They constitute up to 6 percent of the population.² Hazaras mainly live in the mountainous areas of central and northern Afghanistan. Areas in north-eastern Afghanistan, the Badghis region and in north-western Afghanistan are also home to Sunni Hazaras. Shi'ite Hazaras are thought to constitute up to 19 percent of the population. Tajiks mainly live in northern Afghanistan and the northern part of Kabul. They also live in the west of Afghanistan. They constitute up to 25 percent of the population. Pashtuns live mainly in the south and south-east of Afghanistan. Some groups of Pashtuns have been relocated to northern parts of Afghanistan.³ They constitute up to 38 percent of the population. (US Department of State 2021). Drawing a clear-cut line between ethnic identities is almost impossible. There are Sunni Hazaras in Badakhshan and Baghlan, there are Shi'ite Tajiks in Balkhab and Daikundi, there are Pashtuns who do not speak Pashto,⁴ especially in Herat and Kabul, Hazara and Tajik Farsi speakers use many Turkish words, and so on.

2.2. The political aspect of *qawm*

The ethnic nationalities have become a serious political issue in Afghanistan and a factor in the long lasting political-military conflicts.⁵ It is famously said that "all behaviours in Afghanistan are ethnocentric",⁶ though some researchers do not recognise the ethnic side of political conflicts and rather reduce the conflicts to the economic, political or family interests of the political leaders (Schetter 2005, 5). Alternatively, it is claimed that ethnic radicalisation is the result of last forty years of war in Afghanistan.⁷ One origin of the ethnic problems is given as King Abdur Rahman, a Pashtun king from the Durrani tribe who consolidated his power in the late 1800s

2 There has never been a formal census in Afghanistan. All numbers are estimates and they differ extremely widely. For example, according to different estimates, Hazaras make up from 7% to 27% of the population.

3 See Barfield (1978). It is believed that relocations of Pashtuns from the south, and even from Pakistan, to northern parts of Afghanistan has been a political agenda of the Pashtun rulers of Afghanistan.

4 The most famous Pashtuns who could not speak Pashto were Mohammad Zahir Shah, the last king of Afghanistan, and his family.

5 In Afghanistan "nationalities", which has a political meaning, is interchangeably used with the word *qawm*.

6 This is usually attributed to Abdul Ali Mazari, a political leader in Kabul during the 1990s civil wars.

7 See Geller and Alam (2010, 10)

through massacre, slavery and land occupation; the political order he founded is still present in Afghanistan. As Thomas Barfield says, “The constitution of 2004 created a government barely distinguishable from the centralised monarchies and dictatorships that had characterised earlier regimes” (Barfield 2010, 7). King Abdur Rahman (who reigned from 1880–1901) changed the power mechanism in Afghanistan. He consolidated central governance through the suppression of other semi-independent regions. Since his power was centred on one family or one tribe, or at most one *qawm*, others were neglected and marginalised. Habibullah, son of Abdur Rahman and his successor, said after his coronation that he would build his government based on “two tribes of Pashtuns and Tajiks”, and when he was asked about Hazaras and others he rejected them as a part of Afghanistan’s political body. The strong central government controlled any efforts to oppose the forced uniformity, until it lost its suppressing power in the early 1980s. As a result, each ethnic group gained control of its own territory and established an independent power system. This feature of diversity-related violence should be taken seriously.

2.3. Afghanistan’s political structure

Although the word Afghanistan as a name for a country has a history of more than two hundred years (Mousavi 1998), the current borders of the territory were established by Amir Abdur Rahman about 130 years ago with the help of Great Britain, which wanted to control Afghanistan’s foreign affairs (Barfield 2010, 143). Prior to Abdur Rahman, Afghanistan experienced a form of feudalism, with autonomic tribal regions (Barfield 2010, 147). The central government did not have an absolute sovereignty over the whole territory. Abdur Rahman, the Iron Prince, overthrew the independence of the regions through massacres, enslavement, occupation, and the exiling of millions (Barfield 2010, 150).

Since that time, Afghanistan has passed ten constitutions: the first in 1921 and the most recent in 2004. Although there have been many fundamental changes in the drafting of each new constitution, such as the overthrow of a monarchy or the establishment of a republic, they all have one shared characteristic: authoritarian central government. This is in stark contrast to Afghanistan’s diversity: political parties, political coalitions and political figures in Afghanistan are ethnocentric (Rippenburg 2007, 6). Regardless, even though the last constitution was the most democratic, it was also autocratic. All legislative and administrative powers were consolidated in the capital. Local authorities had no legislative or fiscal power, and they were seen only as implementing the decisions made in the capital. The President was vested with vast administrative power similar to that of an absolute monarchy (see article 64 of the Constitution of 2004), and some powers to influence the legislative process (such as the nomination of one third of the upper house members (article 84(3)) and to issue directives (article 79), which was widely used instead of legislation.

3. Federalism

A federal system is where a state is constitutionally composed of a central government and local governments, without them being subordinate one to another (Wheare 1980, 2). Governments can ensure diversity and unity in diverse countries, particularly when diversity has risen to a political level, through federalism. Compared to a unitary system, in which powers are vested in a central government and authority is hierarchical, the political authority in federal systems is not hierarchical, and there is no single ultimate political authority. Central government is not superior to the local/regional governments and each regional government acts autonomously. Regional governments possess powers delegated to them by the people through a supreme constitution, the same as for the central government (Watts 2013, 22). The distribution of exclusive powers between central and regional Governments will vary from one federal system to another, so it is a disputed topic. (Wheare 1980, 11; Brouillet 2017, 136)

Federalism is a separation of power which can reflect social diversity. The separation of government in this way means that people living in different territories, based on historical, cultural, ethnic and linguistic differences, are separated and distinguished one from another. They are willing to remain different, distinct and independent, while at the same time wanting to live as a unity without uniformity. Federalism is a political effort to combine two apparently conflicting desires: distinctive independence, and unity. A federal system legally and politically recognises, at a constitutional level, the diversity of its people and provides the country with internal legal-political institutions. Federalism can help to guarantee the respect for human rights in a broad sense, and particularly it can be the objective embodiment of one of the most fundamental human rights: self-determination. The next section explores how federalism can contribute to human rights, while also making the protection of human rights more challenging

3.1. Horizontal separation of power and human rights maintenance

The existence of autonomous local governments, and two authorities at the local and national level that can check and balance each other, provides better support for the respect of human rights in the presence of proper constitutional provisions. Legislatively diversified jurisdictions make it possible to maintain human rights in some local regions, even if there is less respect for human rights in some others. Local governments, using their autonomous competence to regulate human rights issues, can take steps towards more respect for human rights. If the central government is incapable of enforcing human rights or the officials are unwilling to enforce constitutionally or internationally binding human rights, local governments can ensure that non-compliance with human rights at the federal level does not harm the country as a whole and that human rights can be upheld at regional level.

Human rights disputes can be within the competence of both central and regional governments. In fact, different federal countries have different approaches to the issue. The extent to which central or regional government has the competence on human rights issues varies from one federal system to another. In some federal systems such as the United States, the central government has less competence than in other federal systems such as Australia. There are some federal systems in which the federal judiciary has exclusive jurisdiction over some human rights disputes, while in others the protection of those rights is vested in the regional judiciary (Tran 2000, 205). The centralised government power in Afghanistan is mirrored in the judicial system, though it is not independent, and it is weak in protecting human rights. For example, corrupt ministers are regularly acquitted, and many are never brought before the courts (US Department of State 2021).

International protection of human rights in Federal governments through accession to conventions can be a double-edged sword. On one side, a unitary government's accession to a human rights convention is binding for the whole state, but central governments may face internal challenges which prevent accession. On the other side, if a federal government accedes to a human rights convention there may be some regional governments which choose not to be bound to the international obligations and that convention may not be binding for those regional governments, but there will be a better chance of accepting the international human rights obligations which will provide international protection for human rights in other regional governments. If a federal state accedes to, for example, the International Covenant on Civil and Political Rights (ICCPR), this accession, regardless of the internal accession mechanism, will also be binding for regional states.⁸ As a result, there will be an international obligation for both the central and regional government to respect human rights obligations.

If a regional government tries to hide behind its sovereignty and deny any interference from the federal judiciary, another way that international law can help to guarantee human rights is through the application of international customary interpretation. For example, Hazaras in Afghanistan claim that they are facing genocide and ethnic cleansing. They have consistently accused the previous government of acting negligently and not taking necessary safety measures. They have also accused the previous government of using attacks on Hazara as a means to persuade international forces to extend their military presence in Afghanistan and provide more financial support.⁹ The laws of genocide and human rights can bind both central government and regional states, and this can be used by the Hazaras.

8 For a detailed discussion on federal systems and international human rights conventions, see Sorensen (1952).

9 Attacks on the Hazaras have included the bombing of a girls' elementary school, and attacks on a maternity hospital in which many women and girls were shot. The previous government accused the Taliban, who condemned the attacks and tried to kill the commander who was blamed for the attacks.

An independent regional state may adopt the international definitions and interpretation regardless of the central government's actions.

3.2. Afghanistan as a federal government

Among all the diversifying factors such as language, religion, race and geography, *qawm* plays a significant political role and is a basis for long conflicts. The large *qawm* groups are almost always involved in the major political clashes and almost all political activities are based on this division system. Except for some larger cities, Afghanistan is geographically divided among *qawms*. Political parties and coalitions, and the behaviour of voters in presidential elections, proves how deeply ethnicity informs politics among the people of Afghanistan.

Neglecting this political feature of diversity in Afghanistan has resulted in endless cycles of political collapse and major human rights violations by governments and non-government actors. Much like the return of the repressed, the neglect of the politics of ethnicity means that conflict re-occurs. From a human rights perspective, a unitary government system has proven to be a failure in Afghanistan. To promote and maintain human rights in Afghanistan there should be a system which addresses the most fundamental conflict: diversity. Federalism is a widely accepted and exercised system in diversified countries. It not only recognises the fundamental right to self-determination for those groups that consider themselves politically different, but, through horizontal separation of power, it can promote and help to maintain human rights. For Afghanistan, federalism can be the way to address that fundamental cause of conflicts.

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