

## 7. Classical and post-conflict federalism: Implications for Asia

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### I. INTRODUCTION

Federalism has long been a topic of study for comparative constitutional law. However, the scholarly literature on federalism is in a process of transition. For most of the twentieth century, the study of federalism was oriented around a standard set of cases in the developed world: Australia, Canada, Switzerland and the United States of America. These cases provided the raw material for certain fundamental questions: What is federalism? Why should federations be adopted? What role is there for courts? For the most part, these questions appear to have been answered, often with the aid of comparative analysis. To be sure, important debates persist. For example, scholars disagree over the relative priority to be given to the different goals served by federalism and how those goals should shape the allocation of jurisdiction. In the area of environmental policy, for example, new opportunities for democratic self-government and policy experimentation argue for greater regional authority but also generate inter-jurisdictional externalities, which argue against it. This debate relies on an implicit understanding of its terms and range, and participants in such discussions of federalism often draw on the same standard set of jurisdictions as illustrations of models to be followed and dangers to be avoided.

Recent developments in the practice of constitutional design have challenged this consensus. Many states in the developing world, such as

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Ethiopia, Iraq and Nigeria, have adopted federal solutions to manage ethnic conflict, often as part of a broader package of post-conflict constitutional reforms. In these federations, internal boundaries are drawn to ensure that territorially concentrated national minorities constitute regional majorities. The difference between the standard and emerging cases is not just geographic. Rather, the very mission of federalism is different. Its principal goals are not to combat majority tyranny or to provide incentives for states to adopt policies that match their citizens' preferences, but rather to avoid civil war or secession. Federalism promotes not public accountability or state efficiency but rather peace and territorial integrity. Post-conflict federalism pursues different goals than classical federalism and thus provides an opportunity to revisit the basic assumptions underlying the field.

Advocacy of federalism as a tool for managing ethnic conflict continues to grow, with respect to a diverse set of cases that spans the globe from South and East Asia to Eastern Europe. However, its purported benefits have been challenged by those who argue that federalism exacerbates, instead of mitigates, ethnic conflict. This academic debate about the merits of post-conflict federalism has reached an impasse, largely as a consequence of methodology. Proponents and opponents of drawing boundaries to empower national minorities point to different cases of federal success and failure. But recent scholarship in comparative politics that combines large-sample quantitative analysis with small-sample qualitative case studies promises a way forward. It shows how we might test these competing claims about the ability of federalism to control ethnic conflict across a variety of cases and begin to identify the factors that explain when post-conflict federalism succeeds and when it does not.

These global debates are highly relevant to Asia. This chapter brings those debates to bear on Asia, and draws on an earlier contribution that explored these issues on a global canvas (Choudhry and Hume 2011). It first reviews the literature on classical federalism (Section II), and turns to a discussion of post-conflict federalism (Section III). Finally, it explores the purchase of post-conflict federalism in three Asian cases: India, Sri Lanka, and the Philippines (Section IV).

## II. CLASSICAL FEDERALISM

Three questions dominate the classical literature on comparative federalism: What is federalism? Why should we adopt it? What role is there for courts? These questions and the standard answers to them are drawn from

the experiences of a few canonical federal states and the dominant academic accounts of those experiences. The model I call “classical federalism” emerges from these analyses.

### A. What is Federalism?

What is federalism? In his seminal *Federal Government*, K.C. Wheare provided this influential definition of the “federal principle”: for a state to be federal, “the general and regional governments must be coordinate and independent in their respective spheres” (Wheare 1964: 4–5). The constitutional implications of this federal principle included a written constitution expressly conferring powers on the central and regional governments, a system of direct elections for both levels of government, the power of each level of government to act (or not act) independently of the other, and the existence of an independent high court to serve as the “umpire” of federalism. This definition has informed many investigations into the political, social and institutional conditions required for different orders of government to preserve their independence while coordinating their actions (Elazar 1987). It also has inspired scholars to propose other definitions. For example, William Riker criticized Wheare for fostering a legalistic approach to federalism and offered an alternative formula: federalism is “a political organization in which the activities of government are divided between regional governments and a central government in such a way that each kind of government has some activities on which it makes final decisions” (Riker 1975: 101). While Riker’s definition does not emphasize the use of constitutions to create and entrench federal arrangements, it is identical in substance (Riker 1964: 11). Ronald Watts, by contrast, elaborated Wheare’s constitutional model. He added the formal distribution of legislative and executive authority, the allocation of sufficient revenues to ensure the autonomy of each order of government, the representation of regional views in the central legislature (e.g. through an upper chamber), a constitutional amendment procedure requiring a substantial degree of regional consent, and an enforcement mechanism that included courts, referendums or a special role for the upper chamber (Watts 1966).

Wheare developed his definition from a set of standard cases that embodied the federal principle to varying degrees: Australia, Canada, Switzerland and the United States. To be sure, Watts extended the field to the new federations then emerging from the British Empire (i.e., India, Pakistan, Malaysia, Nigeria, Rhodesia, and the West Indies) and firmly demonstrated that federalism was not confined to Wheare’s four original cases. But those classical federal constitutions set the intellectual agenda

for the study of federalism, and they continue to serve as the focus, or at least the point of departure, for orthodox engagements in comparative federalism. As the initial and most prominent modern example of federalism, the United States is often considered first among equals. Although Daniel Elazar attributed a biblical pedigree to his preferred definition (“shared rule plus self rule”), he identified American federalism as the prototype for modern federalism and used it to orient his explorations in the field (Elazar 1987: 12, 144–146). Riker also used his model of American federalism to make sense of federal experiments elsewhere (Riker 1964; Stepan 2001). With its rich history and widespread influence, American federalism remains a valuable foil for contemporary developments elsewhere, including the European Union (see, for example, Nicolaidis and Howse 2001). This narrow focus has facilitated comparative investigation, but it also has limited the relevance of the literature. The four central cases are relatively stable, prosperous and democratic. They have rarely faced domestic threats to their very existence. The theories and models that have resulted from elaborating their conditions may illuminate aspects of their experience but, at the same time, obscure distinctive developments elsewhere. Many legal scholars interested in comparative federalism have followed the lead of these political scientists by examining the same classical cases and seeking to elaborate or complement their arguments (see, for example, Aroney 2006).

The question of what is federalism has raised two derivative questions. First, what is *not* federalism? Historically, scholars were preoccupied with distinguishing federations from confederations on the basis of the mechanism for choosing political office-holders in central institutions. In federations, citizens elect central governments directly, whereas in confederations, delegates of regional governments run central institutions (Watts 1998). More recently, scholars have emphasized the distinction between devolution and decentralization, on the one hand, and federalism, on the other (Cross 2002; Feeley and Rubin 2008). Devolution and decentralization have the same political dynamic and legal form. They both involve the redistribution of authority and capacity from the central government to smaller, subordinate units of government. Consistent with this dynamic, attempts to devolve and decentralize power typically take the form of laws or regulations adopted unilaterally by the central government, in contrast to federal constitutions, which are often understood as compacts among the constituent regions. Although similar in many ways, devolution is thought to entail larger and more powerful

sub-units than decentralization: comparable to provinces and municipalities, respectively (Grindle 2009). In contemporary discussions, devolution is regularly identified with the United Kingdom, while decentralization is observed in a large number of jurisdictions. However, the lack of standard definitions for devolution and decentralization make generalizations of this sort unhelpful. Following Wheare's definition, the key difference between federalism and these other forms of government is that the autonomy of the regions that comprise a federation is guaranteed by a constitution that the central government may not alter unilaterally, whereas the institutions that exercise delegated powers in a decentralized or devolved political system may have their powers modified or revoked by the central government, often through the ordinary legislative process.

Second, which constitutions that appear to be federal truly deserve that label? Even if the central and regional governments derive their powers from a constitution, on closer inspection that constitution may fall short of federal status. Wheare himself originally described India and even Canada as "quasi-federal" due to their centralizing tendencies. In Canada, he was concerned with the power of the federal government to prevent provincial laws from coming into force (disallowance) or to set aside provincial legislation (reservation); in India, he was bothered by the power of Parliament to unilaterally create new states and change state boundaries, as well as the power of the central government to assume the direct rule of states in an emergency (President's rule) (Wheare 1964). The difficulties raised by the standard definition prompted Elazar to pursue a more ambitious project, in which he sought to catalogue the many institutional manifestations ("species" or "expressions") of the federal principle, from confederations and federacies to leagues and condominiums (Elazar 1987: 38–59). Such conceptual and categorical refinements may help to resolve certain descriptive or theoretical controversies. From the standpoint of public policy, their value is more ambiguous. On the one hand, they serve to catalogue the variety of constitutional forms through which states can respect the federal principle. In short, they indicate the broad scope for constitutional choice. On the other hand, they may draw political actors into debates over categorization (e.g. whether a proposed constitutional design is federal or confederal) that divert attention from the concrete political problems to which federalism is a response. Such debates might lead political actors to conclude that the constitutional forms discussed exhaust the institutional possibilities of federalism, when they are better understood as variations on a theme that remains open to a great deal of adaptation and experimentation.

Some scholars working within the traditional paradigm have responded to these concerns by performing empirical surveys of existing federal systems (see, for example, Griffiths 2005; Halberstam and Reimann forthcoming; Kincaid and Tarr 2005; Majeed et al. 2006; Watts 2008). These surveys extend far beyond the four core cases of Australia, Canada, Switzerland and the United States. However, the current literature suffers from shortcomings. Although these studies amass a large amount of material on federalism and its many forms, they are rarely analytical and generally do not seek to explain the commonalities and diversity that exist in the design and operation of federal systems. Moreover, there has been little attempt to evaluate the success of the design choices made by different federations. The flight from prescription is fuelled by the methodology of these studies, which employ a minimal or ecumenical definition of federalism and aim to identify its various manifestations. This line of research should therefore be understood as an important first step that provides the raw material for more analytical and prescriptive work.

## **B. Why Federalism?**

Classical federalism presupposes a shared account of how federations come into being. Federations form from pre-existing political units that are politically independent from each other. They may be sovereign states or colonies in an imperial order that lack full statehood but enjoy extensive rights of self-government. These political units are the actors that decide to form a new political community, which entails the pooling and surrendering of some of their sovereignty to a central government while retaining an important degree of autonomy. The central government's authority is derived from this political agreement. The federal constitution is a pact, compact or bargain among the regions; this agreement constitutes the central government, creates its institutions and allocates powers to them. Riker built his theory of federalism on this account, which Al Stepan aptly terms "coming-together federalism" (Stepan 2001: 320).

Set against this backdrop, "why federalism?" becomes a two-part question. First, "why should existing political units combine in any form?" Scholars of classical federalism tend to invoke either collective security or economic prosperity (Riker 1964; Wheare 1964). A federation can be understood as a mutual defence alliance against external military threats. Whether the threat comes from a former colonial ruler or another state seeking to expand its territory, the members of a federation can provide a more effective deterrent together than alone. A federation also

can be understood as a common market that is larger and more efficient than one in which international borders impede the flow of goods, services and capital.

Since political units that desire such military and economic benefits could choose to pursue them by pooling their sovereignty in a new unitary state, the second part of “why federalism?” is “why federalism and not unitary rule?” As a preliminary matter, federalism may reduce the burden of coming together and thus make union more likely and more durable than if previously independent units sought to form a single unitary state. Federalism allows groups that have a history of self-government or a distinct culture or economy to preserve some measure of autonomy (Watts 1966; Wheare 1964). By definition, it offers the benefits of unity without the costs of imposing uniformity on a diverse population.

Once formed, a classical federal system is believed to offer numerous advantages over a unitary state. For example, it is thought to bolster democracy by guaranteeing the existence of a tier of regional governments. It ensures another set of offices to elect and contest and thus promotes political competition, by ensuring that political parties which lose power at the federal level may wield power at the sub-national level, thereby providing them with the benefits of incumbency to contest for power at the national level. It increases the number of opportunities for political participation, and also improves the quality of political participation by empowering relatively small political communities, in which citizens are more likely to have more in common, individual votes and voices are likely to have more influence, and representatives are likely to be more responsive to their concerns (see, for example, Friedman 1997; Merritt 1988). Classical federalism also is said to enhance efficiency in various ways. The existence of two tiers of government allows a diverse society to allocate responsibilities and assign liabilities in a manner that improves the quantity and quality of public goods by engineering a closer fit between those who benefit from them and those who bear the cost. Those goods, like military defence, that the regions might fail to produce adequately can be assigned to the central government, while those that depend on local knowledge and preferences, like education and perhaps some aspects of environmental regulation, can be left to the regions (Esty 1996; Revesz 1996). In addition, federalism makes it easier for citizens to move from one region to another, which means they can sort themselves into like-minded communities and, through the enduring threat of exit, impel their governments to satisfy their diverse policy preferences as well as or better than another regional government might (Tiebout 1956). Finally, federalism is believed to protect liberty by reinforcing limited

government. By dividing power between the two levels of government, it gives politicians at each level the incentives and the means to prevent their counterparts from abusing their constitutional authority (Amar 1991; Hamilton 1788: No. 51; Merritt 1988). By engineering a competition among regional governments for mobile people, resources and money, it also ensures that those governments face economic and political pressure to refrain from infringing upon property rights and markets: a result that just so happens to enhance economic efficiency across the federal system (Weingast 1995).

These arguments prompt an array of critical responses. Some concern the manner in which federalism has been implemented: actual regions are too big, centralized and heterogeneous to deliver the democratic dividends associated with small political units (Briffault 1994; Cross 2002); they are too few and too similar (and the practical constraints on the mobility of individuals and ideas remain too severe) to sustain meaningful inter-jurisdictional competition and thus do not enhance efficiency or promote innovation as promised (Daniels 1991; Feeley and Rubin 2008); they have not, in practice, served as reliable bulwarks against encroachments on individual and group liberties, whether by central governments or other regions (Shapiro 1995); their boundaries are too rigid and arbitrary to capture the myriad externalities their policies produce (e.g. positive and negative, economic and environmental), and agreements to redistribute those burdens and benefits efficiently are too difficult to negotiate and enforce, so they are not likely to supply an optimal bundle of public goods, regulatory or otherwise (Levy 2007). Other criticisms concern inherent characteristics of federalism. Most importantly, federalism has democratic costs that must be weighed against its contested democratic benefits. While it empowers discrete provincial majorities to make certain decisions, it compromises the ability of the national majority to set policies for the entire country. Indeed, by setting constitutional limits on the concentration and exercise of government authority, federalism may frustrate attempts to address our most pressing moral and practical problems (Riker 1964; Stepan 2001).

The arguments for and against federalism are well known. Many of them are drawn from American experience, and together they constitute the intellectual framework for contemporary analytical work on federalism within the classical mould. Although debates about federalism remain vigorous, the classical framework within which they occur is fairly stable. These criteria do not themselves require comparative analysis, and there is a vast body of country-specific work that relies on them without reference to foreign federal examples. Although the bulk of this work is done in economics and political science, legal scholars



contribute to and draw upon this literature. In the American legal academy, for example, there has been an extensive debate on environmental policy and federalism. Participants dispute not only the optimal allocation of responsibility for environmental regulation among the federal and state governments but also the proper basis on which to make such decisions (see, for example, Stewart 1977; Revesz 2001).

In addition, there have been a smaller number of comparative studies that draw upon this intellectual framework in specific substantive areas. The work is both analytical and prescriptive. Comparative models offer both negative and positive guidance. Barry Weingast has collaborated with other scholars to elaborate and apply his conception of market-preserving federalism in countries from England and the United States to India and Russia (Figueiredo et al. 2007; Parikh and Weingast 1997). Similar projects have considered topics that range from environmental regulation (Farber 1997; Kimber 1995) and the evolution of corporate law (Deakin 2006; McCahery and Vermeulen 2005; Stith 1991) to the fight against cybercrime (Mendez 2005). The arguments may be familiar but, perhaps for that very reason, “why federalism?” remains a rich and relevant question.

### **C. What Role for Courts?**

Comparative legal analyses of the judicial role in federations present a puzzle. Scholars and statesmen alike have long recognized that courts are an important, if not an integral, component of federal government because of the need for a mechanism to resolve jurisdictional disputes (Madison, Hamilton and Jay: *Federalist No. 78*; Watts 1966; Wheare 1964). Not surprisingly, constitutional judicial review first developed in three of the classical federations: the United States, Canada and Australia. As federalism spread to Latin America in the nineteenth century, judicial review came along with it. Indeed, the rise and spread of judicial federalism occurred more than a century before the global diffusion of judicial power associated with the “Rights Revolution” and the third wave of democratization. However, whereas this more recent phenomenon has inspired an explosion of comparative literature, judicial federalism has attracted less comparative attention.

In part, this may be a function of the different roles played by courts of final appeal in maintaining different federal systems. In India, debates over state boundaries and the imposition of President’s Rule eclipse questions about the role of courts in the federal system. Likewise Ethiopia, where disputes between the ethnic groups that comprise the federation are resolved not by judges but by the upper house of

Parliament (Baylis 2004). By contrast, the United States Supreme Court has been actively engaged in the adjudication of federalism disputes during various periods of American history. This discrepancy, coupled with the passionate American debate over judicial review, may explain why the bulk of the comparative work on judicial federalism is American in origin. But even in the United States, it has been suggested that the primary determinants of the federal balance lie in the political process, and that courts play the role of enforcing constitutional baselines, such as subsidiarity, the right to free movement, the institutional integrity of the federal and state governments, the prohibition on state discrimination against persons, goods and services originating in other states, and the various burdens of justification for government action (Halberstam 2008).

The literature on courts and comparative federalism emphasizes both substance and method. The former involves the constitutional concepts, rules and doctrines appropriate or even necessary for a court operating within a federal system. These include democratic ideals, conflict-of-laws rules, tests for territorial jurisdiction and, more controversially, an anti-commandeering principle (see, for example, Halberstam 2001). Such tools enable courts to maintain and even tinker with the federal structures of their constitutions as circumstances and endeavours evolve. For example, the Supreme Court of Canada has selectively invoked American constitutional text and doctrine to support the introduction of unwritten constitutional principles of order, fairness and efficiency that reconcile elements of Canadian private international law and thus the Canadian federal system to what it perceives as contemporary economic imperatives (Hume 2006).

The latter concerns the risks, benefits and legitimacy of judicial references to foreign law when dealing with federal aspects of the constitution. Some theorists encourage such references because knowledge about foreign arrangements can illuminate new domestic possibilities and clarify existing practices. For example, Halberstam suggests that German constitutional practice could serve as a model for American courts to shift the political morality underlying American federalism jurisprudence from one that emphasizes the entitlements of different orders of government to decide whether to act in a cooperative or competitive manner to a fidelity approach that imposes duties to cooperate and act responsibly in the interest of the entire system (Halberstam 2004). Others are more equivocal about the relevance of foreign federal experiments for domestic judges, since federal constitutions are package deals defined by contextual compromises. More a product of pragmatism than of principle, their lessons often require intimate knowledge of their history and operation, which judges from other countries

rarely possess. Nonetheless, Vicki Jackson concedes that judges might profit from studying foreign experience when deciding issues of federal structure and constitutional principle on which the relevant text is silent (Jackson 2004).

These debates are important, but their importance is limited to those countries in which courts play a major part in the federal system. Such issues are unlikely to resonate in federal states where the constitution is viewed predominantly as a contested, contingent political compromise rather than as a settled legal framework for the resolution of political controversies. More generally, arguments that deduce the nature and implications of federalism from a small and increasingly unrepresentative sample of states risk error and irrelevance when applied beyond that narrow realm.

### III. POST-CONFLICT FEDERALISM

#### A. Setting the Stage

Scholars who contribute to the literature of classical federalism disagree on many important issues: the goals served by federalism, their relative priority, the weight of any countervailing considerations and the manner in which the design of a federal system should reflect these calculations. However, this literature also tends to rely on a shared yet generally tacit set of basic assumptions. These assumptions include the following: once pre-existing political units have come together in a federal state, they shall remain members of a single political community bound in a common constitutional order; this new political community is a nation that inhabits the entire territory of the state and possesses the right to self-government; and debates over the design of the federal system are debates about how this nation should organize itself internally and thus do not raise the prior question of whether the nation should continue to exist.

That existential question is precisely what lies at the heart of constitutional politics in what Choudhry has termed a divided society (Choudhry 2008). As a category of political and constitutional analysis, a divided society is not merely a society that is ethnically, linguistically, religiously or culturally diverse. The age of the ethnoculturally homogeneous state, if there ever was one, is long over. What marks a divided society is that these differences are politically salient. That is, they are persistent markers of political identity and bases for political mobilization. In a

divided society, ethnocultural diversity translates into political fragmentation: political claims are refracted through the lens of ethnic identity, and political conflict is synonymous with conflict among ethnocultural groups.

Scholars of ethnic politics have long drawn distinctions among different types of ethnic groups. There are many dimensions on which to do so: the relationship they assert between ethnicity and territory, the manner in which they have been incorporated into their respective states, their relative economic and political status, the terms in which they frame their constitutional arguments and the substance of their constitutional claims. One such type is what Will Kymlicka has termed a national minority (Kymlicka 1995). National minorities are regionally concentrated ethnic groups who once enjoyed political autonomy and have become part of states in which they constitute an ethnic minority through conquest, colonization or voluntary incorporation. Other terms for this type of ethnic group include “ethnonationalists” (Gurr 1993: 18–20). They mobilize politically around assertions of national identity and self-determination. The goal of such mobilization is to recover the extensive self-government they claim to have enjoyed historically. The degree of self-government they seek ranges from autonomy to independent statehood, which would entail secession. National minorities accept the premise that states are the means by which nations exercise their right to self-determination over their territory, but they use this premise to challenge particular combinations of state, nation and territory. National minorities argue that the state in which they live contains more than one nation, that each of those nations possesses an inherent and identical right to self-determination, and that they are therefore entitled to their own separate state.

Why do national minorities mobilize, and why do they anchor their specific policy goals around the right to self-determination? The “grievance” or “relative deprivation” school of civil war studies, which focuses on the question of how ethnic conflict becomes violent, offers a leading answer to these questions. On this account, ethnic difference per se is not the spark for the rise of ethnic politics. Rather, ethnic groups mobilize politically in response to their experience of economic and political disadvantage. Political disadvantage entails the systematic limitation of access to political office or basic political rights; economic disadvantage involves the systematic denial of economic goods and opportunities. The different dimensions of disadvantage are often mutually reinforcing: political disadvantage insulates politics from attempts to address economic disadvantage, and economic disadvantage undermines an ethnic group’s ability to exercise political influence. Ethnic groups vary in their

response to disadvantage. Some groups may demand the reform of those state institutions in which they are consistently outvoted. National minorities entertain secession because they desire the additional protection that comes from forming a political majority in an independent state. Most ethnic groups demand voice; national minorities emphasize exit.

Some states resist political mobilization by national minorities because the very existence of such groups threatens the equation of nation, state and territory on which those states base their claims to political legitimacy. A state that perceives its territory as indivisible and integral to its identity may be more likely to react in that manner (Toft 2003). In such cases, there is a clash between competing nationalisms with parallel logics: a minority nationalism that is confined to one region and seeks to realign nations, states and territories; and a statewide nationalism that asserts the exclusive existence of a single nation throughout the territory of the state and thus denies the need for realignment. Gurr argues that the conflict between competing nationalisms typically escalates in stages: from non-violent protest to violent protest and finally to rebellion. This escalation occurs through a pattern of demands and responses: non-violent protest is met with a lack of political responsiveness, which in turn leads to violent protest, which is met with a violent reaction, and which then leads to rebellion and an armed conflict (i.e. civil war). Indeed, the evidence suggests that self-determination disputes are the most common variety of civil war and are more resistant to settlement than other kinds of disputes, especially when states face more than one potential separatist claim (Walter 2009).

## **B. Theoretical Debate**

This diagnosis suggests that minority nationalism may lead to civil war and secession. The question is whether federalism, either on its own or as part of a larger package of constitutional reforms, is an effective response that diminishes these risks and serves peace and territorial integrity. This question has sparked a vigorous academic debate (Hale 2008). Scholars fall into one of two diametrically opposed camps. One school holds that federalism can dampen secessionist sentiment; the other holds that federalism will in fact fuel it. In other words, federalism is either a solution or a catalyst for ethnic violence. Thus framed, these two positions are mutually exclusive.

Classical federalism cannot answer this question because it focuses on politics in which the existence of the nation is not the crux of constitutional politics. For example, although Wheare and Watts observe how

federal systems can accommodate racial, religious and linguistic differences, these concerns are peripheral to their work. By contrast, this is the central question for post-conflict federalism and it is the subject of vigorous and ongoing debate. The core design feature of post-conflict federalism is the drawing of internal borders to ensure that a national minority constitutes a majority in a region. The allocation of jurisdiction between different levels of government ensures that the national minority is not outvoted by the majority and has sufficient powers to protect itself from economic and political disadvantage. These arrangements are constitutionally entrenched and enforced by independent courts. This approach has been variously termed multinational federalism, pluri-national federalism, ethnic federalism or ethnofederalism. It even shares some features and sympathies with what Stefan Wolff has labelled “complex power sharing” (Wolff 2009). Here, I refer to “post-conflict federalism” because I want to focus on how federalism in particular can help to contain and perhaps quell ethnic conflict. Although some of the societies that have adopted the arrangements I discuss have not yet suffered secession, ethnic violence or civil war, the term “post-conflict” is still appropriate, since federalism is designed to prevent such conflict from occurring, and those societies are often deployed as positive constitutional models in post-conflict contexts.

The stakes in these debates are very high. Many states in the developing world, such as Ethiopia, Iraq, Nigeria and Sudan, have adopted federal solutions to control ethnic conflict, often as part of a package of post-conflict constitutional design. Moreover, the advocacy of federalism as a tool for managing ethnic conflict continues to gather momentum around the globe. Federalism has also been proposed as a remedy to the frozen conflicts of the former Soviet Union: Armenia, Azerbaijan, Georgia, Abkhazia, South Ossetia, and Nagorno Karabach. In the world of post-conflict constitutional design, it has been “marketed as a palliative to secessionist conflict” (Erk and Anderson 2009: 191). However, while Philip Roeder seems to suggest that post-conflict federalism has emerged as the presumptive policy prescription to manage ethnonationalist conflict, Will Kymlicka has the better view. He carefully charts how, in Eastern and Central Europe, international institutions have taken a much more ambivalent and complex stance on post-conflict federalism, firmly rejecting it as part of the emerging international legal framework regarding the rights of national minorities, while accepting it on a case-by-case basis in order to diffuse violent conflict (Kymlicka 2007; Roeder 2009). But even with that caveat, if federalism exacerbates rather than mitigates conflict, then the most recent wave of constitutional design proceeds from dangerously erroneous premises. It is vitally

important to determine how federalism actually performs in such difficult circumstances.

The centre of gravity in this academic debate is firmly anchored in political science. Ethnonationalism and secession have been studied by scholars working from a variety of sub-fields within that discipline: political sociology, comparative politics, international relations and political theory. Although their debates, questions, motivations, frameworks and methodologies may differ, these scholars share a reliance on qualitative research methods that focus on a relatively small number of cases to explain the complex relationship between constitutional design and political behaviour in states with politically mobilized national minorities.

On the one hand, there are those who argue that federalism dampens secessionist sentiment. Kymlicka, a political theorist, is representative of this position (Kymlicka 1998). He proceeds from the starting point that ethnic conflict in states with politically mobilized national minorities is, at root, a conflict between competing nationalisms. This is a zero-sum conflict in which one side will necessarily lose. If secession occurs, a statewide nationalism will lose territory that belongs to the nation as a whole. If secession does not occur, minority nationalists will argue that state and nation must still be brought into alignment. Kymlicka's case for multinational federalism responds by challenging the premise that there must be a one-to-one correspondence between nation and state. Post-conflict federalism acknowledges that the state contains more than one constituent nation and structures its institutions in such a way as to recognize and empower each of them. Post-conflict federalism halts the clamour for secession without dismembering the state because it satisfies the demand for self-determination with powers of self-government that fall short of independent statehood. Although they differ in some respects, many scholars have in essence taken this position: Nancy Bermeo, Rogers Brubaker, Ted Gurr, Yash Ghai, Arend Lijphart, Al Stepan, and John McGarry and Brendan O'Leary (Bermeo 2002; Brubaker 1996; Ghai 2000; Gurr 2000; Lijphart 1977; McGarry and O'Leary 2009; Stepan 1999).

At first blush, post-conflict federalism may superficially resemble Riker's "coming-together" federalism because each bases the legitimacy of federal arrangements on the consent of the constituent units, which create and empower a central entity as part of a constitutional bargain. But upon closer examination, both the process of creating a post-conflict federation and the premises on which it relies are quite different. In most cases, a post-conflict federation is created from a state that already exists, and the constitutional imperative is not to make a new state but to

reconstitute the existing one along federal lines in order to prevent it from coming apart. The process of reconstituting an existing state as a post-conflict federation is suitably described as “holding together” an existing political entity for which the alternative to reconstitution is secession or perhaps even dissolution (Stepan 1999). For Riker federalism is just one, often unsatisfactory, way for a nation to exercise its right to self-government. The existence of a single political community, which governs itself through the institutions and procedures created by the constitution, is not in question. For post-conflict federalism, this is the fundamental question. To transform a unitary, devolved or classical federal state into a post-conflict federation entails more than changes to its constitutional structure. It requires a new understanding of the state as the institutional compromise required to preserve a composite or layered political community in which the basic question of constitutional politics is what the terms of political association should be among the constituent nations (Simeon and Conway 2001).

This brief, abstract account of post-conflict federalism contains a number of ambiguities on precise questions of constitutional design that require further research. Consider the causal mechanism whereby federalism dampens the demand for secession. In the world of post-conflict federalism, secession is a defensive response to the policies of the central government. For federalism to be a substitute for secession, it must remedy the disadvantages these policies cause by providing a constitutional self-defence mechanism for the aggrieved minority nation. But scholars differ on the character of the disadvantages against which federalism is a defence. The design of an effective post-conflict federalism will accordingly vary depending on the nature of the harms to which it is a response. Kymlicka (2001) and Brubaker (1996) emphasize culture. They use the concept of nation-building to describe a set of policies that aim to create a shared national identity across a state by promoting a common language and shared historical narrative. For them, regional jurisdiction over education and the language of the public and private sectors will be of paramount importance. Scholars who highlight the failure by central governments to ensure that national minorities receive adequate benefits from the extraction of natural resources in their territories will prioritize regional or local ownership, management and revenue sharing. Gurr dwells on instances of political discrimination, such as the exclusion of national minorities from political power and public sector employment. On this account, any federal arrangements would multiply the opportunities to wield political power.

Set against those who promote post-conflict federalism as a tool to manage and prevent ethnonationalist conflict, there are scholars who



argue that it not only will fail to stem secession but will have precisely the opposite effect and intensify the conflict it purports to manage. Philip Roeder has offered the most recent and extended argument of this position. He claims that post-conflict federalism is inherently unstable and is characterized by a constant struggle between the two extremes of centralization and secession: “a recurring crisis of politics” that is oriented around “competing nation-state projects that pit homeland governments against the common-state government” (Roeder 2009: 209). This political pattern is the product of four purportedly unavoidable consequences of post-conflict federalism.

First, post-conflict federalism shapes the development of political identities, in particular, regional political identities. The creation of an ethnically defined region has the effect of institutionally privileging a conception of regional political identity in which the region is imagined as the property and homeland of an ethnic group. Post-conflict federalism also provides regions with the political and economic resources to develop these distinct identities through jurisdiction over education, the adoption of official language policies and cultural policy instruments such as public holidays and monuments. These regional identities will compete with statewide political identities as a source of citizen identification and belonging. They will become political resources for regional political elites to mobilize support during conflicts with central authorities. Second, the multiplication of national identities within post-conflict federations transforms the character of political conflict between the centre and the regions. Moments of high constitutional politics that raise constitutive questions regarding the status and the powers of the national minority and the relationship between the two nation-building projects crowd out ordinary policy disputes; the latter are reframed as raising fundamental questions regarding the right to self-determination. National identity becomes the principal political cleavage. As a consequence, political debate runs the constant risk of escalating from the demand for greater powers toward the existential constitutional question of secession, which would be the logical culmination of the nation-building project of the national minority. Third, post-conflict federalism endows regional governments with coercive policy instruments that national minorities can use as institutional weapons against central authorities, whether by engaging in competitive nation-building or by pushing for enhanced powers and greater autonomy. Such instruments may include the power to interfere with statewide electoral processes and revenue collection. Finally, the constitutional empowerment of the regions entails not just autonomy but also an institutionalized voice in common institutions, up to and including vetoes. These vetoes can weaken the decision-making

ability of central authorities and hobble their ability to exercise their authority and thwart minority nationalism. Roeder's views are shared by other scholars (Bunce 1999; Crawford 1998; Leff 1999).

Roeder presents these four features as flowing from the logic of post-conflict federalism and, by implication, as absent from mononational federations. But this is not entirely true. The political resources he identifies – the ability to interfere with the operation of central authorities through coercive means and regional vetoes in central institutions – are contingent features of constitutional design that do not inhere in the very nature of post-conflict federations. To be sure, these were features of the constitution of the Soviet Union, and Roeder generalizes from the failure of the Soviet Union to argue that multinational federalism will fail more generally. But it is legitimate to ask whether the same patterns will hold in post-conflict federations that lack these institutional elements. Roeder himself states that “[t]inkering with the institutional details of different forms of ethnofederalism or autonomy is unlikely to exorcise the demons, for the devil is to be found in ethnofederalism and autonomy arrangements themselves” (2009: 207), which suggests that post-conflict federalism will collapse regardless of their adoption. However, the logic of his account suggests they are necessary for post-conflict federalism to fail. Moreover, if the presence of these features is necessary for federal failure, it is not sufficient, because they are also present in some enduring mononational federations. So Roeder's critique really turns not on the presence of these political resources but on the impact of political agendas on their use. At the root of the political dynamics that he describes are the new political agendas nurtured by post-conflict federalism: in particular, the institutionalization of minority nationalism through the designation of a region as a national minority's homeland. Since this new political orientation is precisely the point of post-conflict federalism, his critique strikes at its very heart.

### **C. Evidence**

Both academic camps – those who advocate the use of post-conflict federalism to manage ethnonational conflict, and those who oppose doing so – support their arguments by reference to examples of federal success and federal failure. This debate was sparked by the collapse of the former communist dictatorships of Eastern and Central Europe (ECE) in the early 1990s (Choudhry 2007). Students of ECE were confronted with a jarring contrast. Three of the former ECE communist dictatorships – Yugoslavia, the Soviet Union and Czechoslovakia – had been post-conflict federations prior to the transition to democracy. All three began

to disintegrate within 18 months after embracing democracy. By contrast, unitary states, including several with large national minorities (e.g. Poland, Hungary) and some in which nationalism served as the axis of internal political conflict, did not fall apart. If the ambition of post-conflict federalism is to manage competing nation-building projects within a single state, federalism may in fact have failed to meet its basic objective. Yet the problem went deeper still. Since only the post-conflict federations broke up, and all of them did, the suspicion was that federalism had fuelled secession, whereas unitary state structures prevented it. So in ECE, post-conflict federalism had fuelled precisely those political forces it was designed to suppress. ECE has been central to the case against post-conflict federalism. Indeed, scholars who argue that post-conflict federalism inflames ethnonational conflict have tended to be specialists on ECE who have extended their arguments to indict post-conflict federalism more generally.

The best way to respond to the anti-models of Yugoslavia, Czechoslovakia and the Soviet Union was to identify models where post-conflict federalism had actually worked. In the literature, the leading counter-examples are Canada, India and Spain. The founding of the Canadian federation in 1867 and the creation of Quebec was a direct response to the failure of the United Province of Canada, a British colony that existed from 1840 to 1867 and that had two wings: one with a French-speaking majority and one with an English-speaking majority. Each wing elected equal numbers of representatives to a legislative assembly, although the largely French-speaking citizens of the former outnumbered the largely English-speaking citizens of the latter. The goal behind the merger and the departure from representation by population was linguistic assimilation. The English-speaking wing eventually became more populous and demanded greater representation in the joint legislature, a request that was resisted by the French-speaking wing, which feared it would be outvoted on matters important to its linguistic identity. The result was political paralysis. Federalism was the solution: a compromise that provided representation by population at the federal level, but also created a Quebec with jurisdiction over those matters crucial to the survival of a French-speaking society in that province. Had Quebec not been created, it is likely that the French-speaking parts of Canada would have eventually seceded.

This academic debate has reached an impasse, largely as a consequence of methodology. As Dawn Brancati has argued, the use of qualitative case studies are at best “useful for generating interesting ideas about decentralization” but “do not provide strong evidence of their claims” (Brancati 2006: 653). The reason is that scholars tend to select

cases on the basis of the dependent variable, with critics studying the failed communist-era federations of ECE, and advocates analyzing the more successful examples. But recent scholarship in comparative politics that employs large-sample quantitative studies holds the potential to advance our understanding of federalism's capacity to manage ethnic conflict. Such studies can test competing empirical claims across a broad variety of cases and identify the factors that explain when post-conflict federalism succeeds and when it does not.

Three studies warrant discussion.

First, Roeder recently constructed a global database around the notion of the "segmented state", which he defines as a state that "divides its territory and population into separate jurisdictions, and gives the population that purportedly is indigenous to each jurisdiction a distinct political status" (Roeder 2007: 12). In such states, there is a "common state" that possesses jurisdiction over the entire population and territory, as well as separate "segment-states" that have jurisdiction over a portion of that territory and people. A segment-state is not merely a territorial subdivision; it contains "peoples who purportedly have special claim to that jurisdiction as a homeland" (12–13). Roeder observes that, in the twentieth century, 86 per cent of new states had been segment-states prior to independence, from which he concludes that segmented states are far more likely to experience secession than are states that are not segmented. Although Roeder does not use the language of post-conflict federalism, it clearly overlaps with his definition of a segmented state. The interesting question Roeder poses is under what conditions secession from the segmented state (or post-conflict federation) is more likely. Roeder answers this question by reference to a global data set of segmented states created before 1990, with annual observations. The independent variables were (a) the constitutional relationship between the common-state and segment-state, on a spectrum ranging from fully exclusive common-state autocracy to fully inclusive common-state democracy, and (b) whether the segment-state was self-governing or not. His key finding is that, in anocracies and democracies that excluded the population of segment-states from central governance, self-government in a segment-state increased the likelihood of secession. Since self-governing regions are core elements of post-conflict federalism and are designed to prevent secession, Roeder concludes that the evidence does not support this policy prescription and in fact counsels against it.

But Roeder's conclusion does not follow from his results. One of his most striking findings is that the most stable form of post-conflict federalism is a fully inclusive democracy in which the regions enjoy extensive forms of self-government. Two comparisons drawn from his

data are important here: (1) inclusive democracies are much more stable than other regimes when their regions are not self-governing; and (2) unlike exclusionary democracies and anocracies, inclusive democracies do not suffer an increased risk of secession when their regions *are* self-governing. What this suggests is that the rise of secessionist politics might instead be a function of the structure of politics at the centre. Roeder's data do not offer an explanation as to why, but it is possible to speculate. The finding that exclusionary democracies are less stable than inclusive democracies is consistent with theories of minority nationalism that explain the rise of minority nationalism as a defensive response to the policies of the central state, whether characterized as nation-building or as economic, political or cultural discrimination. It may be that common states have a freer hand to pursue these policies when they exclude the populations of segment-states from central governance. At a prescriptive level, this suggests that proponents of post-conflict federalism should not neglect the design of central institutions. This points to the need for further research on the link between federalism and central power sharing, as discussed below.

Second, a more recent study by Lars-Erik Cederman and his colleagues supports the conclusion that federalism can reduce the likelihood of secession (Cederman et al. 2010). They work from the grievance school of civil war studies. Ethnic political mobilization can take a variety of forms. One hypothesis they test is that the probability of ethnonationalist conflict increases with the degree of exclusion from central executive power. To test the relationship between political exclusion and violent conflict, Cederman et al. constructed the Ethnic Power Relations data set (EPR), which identified all politically mobilized ethnic groups and measured their access to state power on an annual basis from 1946 to 2005. They draw an important set of distinctions between those groups that are excluded from central power: "regional autonomy" (elites wield local authority within the state, e.g. through federal arrangements), "separatist autonomy" (elites wield local authority coupled with declaration of independence), "powerless" (elites excluded from central and local authority without explicit discrimination) and "discrimination" (elites excluded from central and local authority as a consequence of deliberate discrimination). Violent conflict is linked to any ethnic group in whose name an armed group instigated conflict.

As anticipated, excluded groups are more likely to instigate violent conflict than those that are not excluded. But if one disaggregates excluded groups, those that enjoy regional autonomy are much less likely to instigate violent conflict than those that experience other forms of political exclusion. Even more striking is that groups that are excluded

from central power but enjoy regional autonomy are *less* likely than those groups who are *included* in power – either as senior or junior partners – to instigate violent conflict. Although these observations are based on descriptive statistics and they change somewhat with regression analysis, with junior partners less likely to rebel than excluded groups that enjoy regional autonomy, the latter are still less likely to rebel than those that experience more severe forms of political exclusion, such as the powerless and the targets of discrimination. These results support the claims of those who argue that post-conflict federalism may operate as a conflict-management technique.

A third study takes the literature in a different direction. Federal arrangements may stem secession in some contexts but fuel it in others. The outcome may be a function of the central government's commitment to democratic inclusion but, as Brancati points out, federalism may fuel secession even in democratic states (Brancati 2009). The question is what additional factors explain the uneven effects of post-conflict federalism. The answer is to be found in the electoral strength of regional political parties. If they are strong, they can gain power and deploy the institutional resources provided by a federal constitutional structure to foster regional identity and mobilize a national minority around this identity to pursue secession; if they are weak, this is much less likely to happen. Regression analysis demonstrates that federalism reduces ethnic conflict and secession while controlling for the strength of regional parties, but that ethnic conflict increases with regional party electoral strength.

Critics of post-conflict federalism would counter that this constitutional arrangement itself fuels the rise of regional parties. But the evidence is more complex. While post-conflict federalism creates the opportunity for the rise of strong regional parties, they do not emerge in every post-conflict federation. The question is which other features of constitutional design, if any, determine whether that potential is realized. Brancati's principal findings are that regional parties are stronger (a) where there are more regional legislatures, because they provide more opportunities for regional parties to wield power; (b) where regional legislatures select the upper house of the central legislature, which increases the impact of regional parties in central institutions and creates additional incentives to form such parties; and (c) when national and regional elections occur at different times, which offsets the coat-tails effect pursuant to which elections to higher office influence the results in concurrent elections to lower offices.

Taken together, Brancati suggests that, in order to harness the benefits of federalism for managing ethnic conflict while mitigating its dangers, the focus should not be on federal design but on regional political parties.

This leads to two sets of policy proposals. One focuses on the rules governing political parties and electoral competition. For example, it suggests that parties that run in national elections should be required to field candidates in more than one region in order to win seats. Additional research is required to untangle the relationship between the electoral system and the rise of regional parties. But the other set of proposals shifts the focus to the centre, in particular the interaction of central institutions with regional political processes. Here, the prescriptions appear to point in opposite directions. Requiring direct elections for the upper chamber would appear to disentangle the central and regional governments, whereas coordinating the timing of central and regional elections would politically connect the two levels of government. However, if adopted as a package, the two measures should be understood as promoting the autonomy and priority of central political processes at the expense of the electoral strength of regional parties.

#### IV. POST-CONFLICT FEDERALISM: THREE ASIAN CASES

##### **A. Federalism in Asia**

Federalism is an increasingly prominent feature of constitutional design in Asia (Bertrand and Laliberté 2010; Bhattacharyya 2008; He, Galligan and Inoguchi 2009; Kymlicka and He 2005). The histories and trajectories of the Asian federations are diverse. Some federations are long-standing – federal constitutions have existed in India (discussed further below) and Malaysia for several decades, since independence from colonial rule, although they have undergone important reconfigurations since then. In the case of Pakistan, federalism existed in the post-independence period but was a casualty of military rule, and was recently restored after a hiatus of several decades as part of a return to civilian rule. Moreover, there are new federalisms on the horizon, under active discussion, or which are elements of broader political discourses on democratization and post-civil war settlement. Nepal has constitutionally committed itself to restructuring itself along federal lines, as part of its post-civil war transition to a democratic republican form of government. At the time of writing, it is engaged in a constitutional process to realize this commitment, in which the number and borders of sub-units has become a major point of contention. Over several decades, in Sri Lanka (as explored in further detail below), federalism was proffered as a

solution to ethnic conflict, by creating a Tamil-majority area in the north-east of the island. As part of broader discussions over political reform in China, the idea of federalism is part of a broad array of constitutional options to institutionalize liberal democracy (Qian and Weingast 1997).

In addition, forms of territorial devolution other than federalism are part of the broader constitutional agenda across Asia. These are often bundled with federalism in constitutional debates as techniques to decentralize power, notwithstanding important conceptual distinctions between federalism and these options. The most relevant are highly asymmetric quasi-federal arrangements in which a high degree of autonomy is given to one or a limited number of territories that account for a small proportion of the national territory and population, on an asymmetric basis, while preserving the unitary character of the rest of the state. The leading examples are in Indonesia, which has adopted this strategy for addressing longstanding demands for territorial autonomy in Aceh and Irian Jaya through the enactment of special autonomy laws. In the Philippines (see below), asymmetric self-governing arrangements have been discussed for decades for the Baguio region, the areas of the Mindanao claimed as the traditional homeland of the Moro. Asymmetric self-governing arrangements – sometimes referred to as *federacies* – are sometimes viewed as way stations to federalism, since their existence and success may serve as an experiment that may promote its diffusion across the state as a whole by reconstituting the remainder along federal lines. Myanmar is another example. Although the country was originally conceived of as federal, federalism was never adopted. Myanmar's ethnic minorities now demand federalism as part of a post-authoritarian constitutional settlement. The likely outcome is a quasi-federal arrangement.

The justifications for federalism proffered in these jurisdictions traverse the divide between classical and post-conflict federalism. The democratic virtue of increased policy responsiveness is often advanced as an argument for federalism in response to distant central administrations that are indifferent or opposed to the policy priorities of regional minorities who are outvoted in central institutions. Another democratic justification for federalism is the promotion of political competition, by creating the possibility for parties in opposition at the statewide level to control a sub-unit where it can harness the advantages of political incumbency to better contest political power at the centre. These justifications are offered side by side with those that anchor federalism as a mechanism to avoid or resolve longstanding conflict rooted in competing nation-building projects. In the three cases discussed below – India, Sri



Lanka and the Philippines – it is the conflict-prevention and resolution functions of federalism that have predominated.

## **B. India**

Federalism has been at the centre of Indian constitutional politics since independence (Choudhry 2009). British India consisted of provinces administered by the British Crown and hundreds of princely states which were nominally self-governing allies of the British Crown. Given India's vast size and population, federalism was an unavoidable necessity. However, the controversial issue was whether provincial boundaries would coincide with linguistic boundaries. The most widely spoken language in India was Hindi, but it is only spoken by about 40 per cent of the population. There are a dozen regional languages in India, each spoken by millions of individuals and accompanied by scripts and literary traditions. Very few speakers of these languages also speak Hindi, and indeed, the principal languages of South India are from entirely different linguistic families. In addition, these languages are spoken in fairly self-confined linguistic regions.

The trauma of the partition of British India into India and Pakistan led India's Constituent Assembly to oppose linguistic provinces out of a fear that they would fuel secessionist mobilization in India's border states and doom the country to disintegration. The decision to organize provinces on a non-linguistic basis was coupled with a constitutional policy to promote Hindi as the official language at the national level after a transitional period of 15 years. The goal of this integrated constitutional strategy was to create a unified nation state whose central institutions would soon operate in a single, indigenous language, and to prevent future threats to India's territorial integrity by deliberately choosing not to create federal sub-units that were linguistically homogeneous and could generate sub-national political identities which could undermine citizens' loyalty and shared sense of political identity. Hindi would knit together a single, unified country capable of mutual intercourse in politics, the economy and public administration. Linguistic homogenization would further the objectives of enabling democratic participation, improving the efficiency of public administration, and enhancing social and economic mobility.

The demand for linguistic states arose as a defensive response to these policies. Advocates of what came to be known as "linguistic reorganization" argued that granting official language status to Hindi would have undemocratic consequences by redistributing economic and political power. Linguistic exclusiveness would consolidate political power in the hands of a Hindi-speaking elite and withdraw it from non-Hindi speakers

by restricting access to public office. In addition, official language policies distribute access to public sector employment. Indeed, underlying political competition regarding official language status was economic competition for white-collar public sector employment. Indeed, they argued that far from preserving national integrity, insisting on Hindi alone at the centre would have the perverse effect of undermining it.

The rejection of linguistic provinces began to unravel soon after independence, with the creation of Andhra State (now Andhra Pradesh) in 1953. Once that precedent was established, it sparked a chain reaction of movements for linguistic states across India. The central government struck the States Reorganization Commission with the mandate of recommending the principles for redrawing state boundaries and the specific boundaries of new states. The Commission recommended the redrawing of provincial boundaries on provincial lines. Based on the Commission's recommendations, Parliament created 13 new linguistic states in 1956. In 1960 and 1966, two of these states were further divided into four states. The Indian case is without a doubt the most significant restructuring of political space in modern times in response to competing linguistic nationalisms through a constitutional process. Although India continues to face enormous challenges, it has successfully managed linguistic nationalism through federalism.

There are three broader lessons to be learned from the Indian experience of managing competing nationalisms through a post-conflict federalism. First, language is different from other grounds of group identity that can serve as the basis of political mobilization. If race, ethnicity or religion serves as the grounds of political cleavage, one constitutional strategy for managing these tensions is neutrality. But while the state can be neutral on the basis of race, religion or ethnicity, it cannot be neutral on the question of language. The state must operate in one or more languages for official purposes, in order to communicate internally and externally with its citizens. Thus, it is not possible to take language off the constitutional agenda. Second, the official status of a language does not connote that it operates on a basis of equality with other official languages across the full range of the state's activities. Rather, the question of official language status must be disaggregated into a multiplicity of individual decisions that vary across institutional contexts, and which may be made differently. The scope for linguistic choice across institutional contexts varies. For example, the state can offer services in multiple official languages, but must operate in fewer languages in the judicial system and the legislature. Moreover, multiple official languages can exist within a unitary state structure. Third, linguistic pluralism does create pressure toward federalism in the context of the internal working

language of government. There is great pressure toward convergence on one or a very limited number of official languages for intra-governmental communication, for economic and practical reasons. Since the internal working language of government is also the language of government employment, economic competition for these opportunities requires multiple public sectors, each operating in its own language. Federalism is the only mechanism available to meet this political demand.

### **C. Sri Lanka**

Federalism has been on the constitutional agenda for Sri Lanka for several decades, as a tool to manage ethnic conflict on the island (Choudhry 2010). Sri Lanka contains a large, Sinhala-speaking majority as well as a large, Tamil-speaking minority who constitute a majority in the island. Both the Sinhalese majority and Tamil minority are engaged in competing projects of nation-building. The centrepiece of Sinhalese nation-building has consisted of the designation of Sinhala as the official language, especially the internal working language of government. It has also entailed the maintenance of a unitary state inherited from the British, and the refusal thus far to recast Sri Lanka along federal lines. The sources of Sinhalese linguistic nationalism are diverse, ranging from resentment toward the disproportionate professional success enjoyed by Tamils under colonial rule, to the use of official language policies to expand educational and employment opportunities for an increasingly literate and demanding Sinhalese population, to the pressure arising from the growth and consolidation of the state in the post-independence period to interact with the population in indigenous languages.

Tamil nationalism arose as a defensive response to Sinhalese nation-building and has consisted of a series of demands that has escalated from linguistic parity to federalism, and eventually to secession and independence in the northeast of the country. At first, Tamil nationalists advanced their claims through the political process and civil disobedience. The Sri Lankan state was resistant to these claims and responded to Tamil civil disobedience with increasing levels of violence. Frustrated by their lack of success, Tamil nationalists turned to violence. The result was a civil war that lasted from 1983 to 2009, which ended with the defeat of the Liberation Tigers of Tamil Eelam (LTTE), the leading Tamil militant group.

The descent into civil war in Sri Lanka arose from a breakdown in the Sri Lankan constitutional order. One dimension of this breakdown concerned a fundamental disagreement over the constitutional arrangements to frame the relationship between the Sinhalese majority and the

Tamil minority. But there was an equally fundamental disagreement over the precise character of constituent power – the rules governing constitutional amendment. The reason was that those rules were not perceived as being neutral among the competing substantive positions on the constitutional agenda. Tamil nationalists deplored that those rules were based on an understanding of Sri Lanka as a single nation in which the constituent actor was the Sri Lankan people as a whole, in which Tamils had no special standing. In opposition to this vision, Tamil nationalists conceived of Sri Lanka as a multinational or plurinational polity, where the ultimate power of constitutional change vests with its constituent nations, the Tamils and the Sinhalese.

This basic disagreement over the character of constituent power within Sri Lanka played itself out in a debate over whether the Sri Lankan conflict could be resolved from within the Sri Lankan constitutional order. Under Sri Lanka's constitution, amendments must pass by a 2/3 majority in Parliament. In addition, amendments that would alter Sri Lanka's unitary character require approval in a referendum. During over two decades of peace negotiations, a frequent stumbling block was whether a package of constitutional amendments that would meet Tamil demands would pass through these constitutional hurdles, because of opposition from Sinhalese hardliners. These constitutional obstacles produced radical proposals to step outside the constitution entirely. Before the military defeat of the LTTE in 2009, these issues were central to the debate over proposals that the Sri Lankan government legally recognize the LTTE's *de facto* sovereignty over the northeast of the island. The LTTE sought such recognition to legitimize it as a governmental entity. However, the Sri Lankan government claimed that it would be unconstitutional for it to do so without a constitutional amendment. The most relevant constitutional provision prohibited Parliament from setting up any authority with any legislative power – as the legal recognition of LTTE authority would have required. The LTTE responded by pointing to an international practice of establishing interim governing arrangements with legal force solely based on the agreement of the parties to the conflict.

Ultimately, this issue came before the Sri Lankan Supreme Court, in a case arising out of interim self-governing arrangements agreed to by the Sri Lankan government and the LTTE after the tsunami of 2004. The case was brought by Members of Parliament from the governing coalition (including cabinet ministers). The Court held that the self-governing arrangements circumvented constitutional provisions that gave Parliament the central role in supervising public expenditure, by allowing the self-governing authority to expend public monies from a regional fund

entirely outside the structures of the unitary state. After this judgment, many concluded that any ceasefire agreement between the Sri Lankan government and the LTTE would be unconstitutional, because it would amount to a de facto acquiescence of the authority to an armed force acting in breach of law over parts of the country, and would violate the government's constitutional obligation to assert authority over and protect the territorial integrity of Sri Lanka.

There are three broader lessons found in the Sri Lankan case for post-conflict federalism. First, constitutional transitions from unitary states to post-conflict federations must reckon with rules governing constitutional amendment. Those barriers may be insurmountable for political reasons, thereby creating a choice – to maintain fidelity to law and retain the unitary character of the state, or step outside the constitution to achieve the reconstitution of the state. Moreover, since these amending rules may encode a vision of constituent power that presupposes a unitary political community as opposed to a multinational or plurinational one, they may not command respect from parties who favour the reconstitution of the state in repudiation of its unitary character. In short, because they may impede constitutional change not perceived as ideologically neutral, constitutional amending rules may be unable to serve one of their basic functions – to enable the politics of constitutional change to occur. In this respect, Sri Lanka repeats a pattern of constitutional politics found in Canada. Second, unitary constitutions may create barriers to the negotiation of interim governing arrangements between warring parties in a civil war over the fundamental character of the state. Such arrangements are important and perhaps even indispensable stages in the process of moving from violent conflict to political negotiation. They allow the building of trust by setting down mutually agreed norms, procedures and even joint institutions that are necessary for more comprehensive constitutional negotiations. The difficulty is that interim governing arrangements are constitutions in microcosm, and may function as a preliminary form of federal constitutional structure if they grant a rebel party's jurisdiction over a portion of the national territory. This characteristic may render them unconstitutional under existing unitary arrangements. The result may be that the unitary constitution may trap parties who may agree in principle on the idea of post-conflict federalism in a civil war situation. This may be true even if the constitution has no substantive bars on amendments that would convert it from a unitary to federal order. Third, the lead institution for the enforcement of the existing order may be constitutional courts. If they are independent from the government, they may not adhere to even a broad political consensus in favour of post-conflict federalism. Moreover,

spoilers who advocate the retention of a unitary state structure – even if a small political minority – can harness the courts to block constitutional change. Judicial review amplifies their political power by providing them with an institutional base within the state to challenge the government.

#### **D. The Philippines**

Modern Philippine nationalism has had a different character than in India and Sri Lanka. Whereas in those countries, language has been at the heart of nation-building in the post-colonial area, and has generated defensive linguistic nationalisms in response, in the Philippines, the major axis of nation-building and nationalist conflict has been religion (Bertrand 2010). The Philippines has a Roman Catholic majority, who adopted the faith in the wake of Spanish colonization. Roman Catholicism served to unite the inhabitants of the colony, who came from varied linguistic groups and indeed helped to transcend linguistic differences and prevented them from becoming axes of political cleavage. Islam came to what is now present-day Philippines in the thirteenth century, pre-dating Spanish colonization, and was centred in the southern island of Mindanao. During Spanish rule, Spain never fully established authority over Mindanao's Muslim inhabitants, whom it termed Moros. The Moros never accepted Spanish rule, and indeed, remained free from real Spanish control even after the Spanish defeat of the Moro in the eighteenth century.

The advent of American rule brought a number of fundamental changes that set the stage for contemporary conflict. In the Christian areas of the Philippines, American authorities created the basis for modern Filipino nationalism, through the expansion of education, construction of a national infrastructure, and the creation of a civil service staffed by indigenous officials, and political institutions in which Filipinos were represented by political parties. They also promoted the large-scale settlement of Christians to Mindanao, which profoundly altered its demographic character. While there were major cultural and religious differences between the Christian migrants and the Moro, the major point of conflict was land. American authorities did not legally recognize pre-existing patterns of landholding, and deemed lands long held by the Moro to be public property. They then granted legal titles to these lands to Christian settlers. The net result was a transfer of lands from the Moro to Christians, which also redistributed economic and political power within Mindanao. Alongside conflicts over land was a cultural conflict, whereby Christians saw the Muslim Moros as deviant. The Moro movement arose as a defensive response to Filipino nation-building.

The demand for post-conflict federalism within the Philippines arises from this conflict. The Moro turned to armed struggle in 1969, first under the Moro National Liberation Front (MNLF) and later under the Moro Islamic Liberation Front (MILF). Both the MNLF and the MILF veered between demanding independence and autonomy for traditionally Muslim areas of Mindanao, called the Bangsamoro. While federalism is part of a larger political discourse about democratization and responsiveness, in reality it is centred on Mindanao and is viewed as a means to resolve the conflict with the Moro. As discussed earlier, the proposals under consideration are for a highly asymmetric self-governing framework that leaves the rest of the Philippines structured on a unitary basis.

Since 1976, several agreements have been negotiated between these groups and the Philippines government to grant autonomy to Bangsamoro, with provisions on self-government and natural resource revenue sharing. The most controversial question has been the process for determining the borders of Bangsamoro. The large Christian population of Mindanao has strongly opposed these autonomy agreements, and has demanded plebiscites to determine the territory of Bangsamoro, as is mandated by the Philippines constitution. The high probability that many municipalities would vote against joining Bangsamoro led the MILF, for example, to argue that the parties should step outside the Philippines constitutional order to reach an agreement. Indeed, constitutional issues have been a central issue throughout the negotiations. In 2008, these issues came to a head when the Supreme Court of the Philippines struck down the Memorandum of Agreement on Ancestral Domain (MOA-AD) between the Philippines government and the MILF, which was the result of 11 years of negotiations. The Court found the agreement unconstitutional on substantive and procedural grounds. The MOA-AD referred to the relationship between the central government and Bangsamoro as “associative”, but did not define that term. Since this term exists under international law to describe a relationship between two independent states, the Court reasoned that the MOA-AD likewise aimed to confer statehood on the Bangsamoro. Terms of the MOA-AD that empowered Bangsamoro to enter into economic and trade relations with foreign states buttressed this conclusion. The Court held this to be unconstitutional, because the constitution contemplated only one state within the territory of the Philippines. In addition, the Court held that the President had abused her discretion in committing under the MOA-AD to secure the requisite constitutional amendments to implement it. Since the power of constitutional amendment rests with the Philippines Congress, the President had made a promise she could not keep. The judgment led to the collapse of the peace process. In 2012, the MILF and the Philippine

government signed a new “framework agreement” that tracked the content of the MOA-AD, to be implemented by a Basic Law, although the constitutional issues remain unresolved.

The Philippines offers three lessons for the study of post-conflict federalism. First, as in Sri Lanka, the rules for constitutional amendment pose a practical barrier to the transition to post-conflict federalism. However, in the Philippines, the challenge they pose is more fundamental. The MOA-AD assumed that amendments would be required to implement Bangsamoro’s associative relationship with the rest of the Philippines, but was nonetheless held to be unconstitutional on the basis that it was inconsistent with the existence of a single Philippines state. In effect, this is a basic structure doctrine that limits the substantive scope of possible amendments to the existing Philippine constitution (as opposed to a procedural hurdle that makes such amendments difficult to adopt). Second, the particular character of the separation of powers between the legislative and the executive can profoundly affect the bargaining dynamic of the transitions to post-conflict federalism. The Philippines has a Presidential system with a sharp separation of powers between the President and Congress. The President has led peace negotiations, but the power of constitutional amendment resides with Congress. This creates constitutional difficulties for the President to credibly commit at the bargaining table. These structural barriers might exist even when the same political party controls the Presidency and the Congress, because of the judicial enforcement of the structural constitution. Third, as in Sri Lanka, the courts and judicial review provide institutional resources to spoilers who desire to undermine a negotiated transition to post-conflict federalism. This injects considerable uncertainty into the constitutional process, although it may be countered by the use of standing and political questions doctrines that render peace negotiations non-justiciable (as some dissenting justices of the Supreme Court suggested).

## V. CONCLUSION

The familiar conception of classical federalism has fuelled important debates about essential elements of the most stable and successful federal systems. But lessons drawn from states like Australia and the United States often do not apply to more volatile conditions, such as those facing states seeking to recover from ethnic conflict. Post-conflict states must solve a very different set of constitutional problems, and in deciding whether and how to implement federalism, they must respond to a very



different set of challenges. By positing that the experiences of post-conflict federal states can support a coherent conception of federalism distinct from that fostered by the experiences of the first wave of federal states, post-conflict federalism offers a new perspective on basic questions like “what is federalism?” and even “what is a constitution?”

Finally, the three analytic narratives offered above (India, Sri Lanka, the Philippines) may inadvertently obscure the extent to which the classical and post-conflict justifications overlap. Indeed, the lesson from the Asian cases may be that the classical and post-conflict justifications for federalism not only overlap in particular cases but often interrelate at a conceptual level. For example, the unresponsiveness of remote centres to peripheries – a democratic concern addressed by classical justifications for federalism – often maps onto a national divide. Statewide nationalism may entail a central elite from one national community that is indifferent or hostile to the interests of a regional minority, whose economic and political exclusion fuel sub-state nationalism (e.g. Sri Lanka). Deploying federalism as a tool to defuse nationalist conflict by giving sub-state minorities access to power at the centre is not distinct from the classical democratic justification for federalism, although the character of the conflict that gives rise to these demands is different than in the classical federations. In parallel, one dimension of nationalist conflict within states may be the permanent exclusion of political parties representing sub-state minorities from power at the centre. Federalism may provide these parties with an institutional base from which to contest power at the centre, not as a majority party but as a member of a governing coalition (as has occurred in India, for example). This overlaps with the justification under classical federalism that federalism promotes political competition. Developing blended accounts of classical and post-conflict justifications for federalism, drawing on Asian materials, may be a fruitful academic agenda for the future.

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