

**FEDERALISM, SUBNATIONAL GOVERNMENT AND RIGHTS PROTECTION**

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Subnational states or provinces that are quasi-autonomous provide the ‘self-rule’ component of Elazar’s (1987, 12) definitional summing up of federalism as a system of ‘*self-rule plus shared rule*’. Whether federalism protects rather than jeopardizes rights is a longstanding debate within federal studies,<sup>1</sup> but there has been less attention to the role and significance of subnational states and constitutions in protecting rights. This has been due in part to the relative neglect of subnational compared to national constitutions, as Tarr, Williams and Marko (2004, 4-5) point out: ‘The study of constitutional federalism is most often approached from the vantage point of the national constitution’, while ‘subnational constitutions have been, and generally remain, low-visibility constitutions’. While there is a well established tradition of subnational constitutionalism in the United States where states have their own written constitutions and bills of rights,<sup>2</sup> in many other systems there has been relative neglect. For instance, Saunders (1999-2000, 1000-1001) pointed out in the Australian case that ‘the significance of state constitutions is largely unrecognized’ and ‘they are in a state of disrepair’. That is changing in Australia with a recent major study (Carney 2006) of state constitutions and attention (Evans and Evans 2006, 264-281; Evans 2004, 291-309) to rights protection at the subnational level with Victoria and the Australian Capital Territory recently adopting statutory bills of rights. There is considerable potential for extending rights protection through enhanced measures at the subnational level. While this will likely increase variability of peaks and troughs, as Kincaid (1995, 944-47) points out, peak jurisdictions might function as ‘rights leaders for a leveling-up process’.

The comparative study of rights protection has to engage with the complex and variable spectrum of countries that are usually classified as federal or quasi-federal (Elazar 1987, 43-44); Watts 1999, 8-10), plus other unitary countries that have adopted or modified hybrid federal elements, as is more typical in Asian countries (He, Galligan and Inoguchi 2007). Since World War II there has been extensive focus on rights protection both in the national and international spheres of governance, but less attention to rights protection at the subnational level. Since subnational states constitute one of the essential spheres of federal government, however, how well rights are protected will depend on a combination of both federal and subnational protections. Or putting this another way, subnational states have both a shared role as part of the overall federal system and a self-role in rights protection.

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<sup>1</sup> A more recent example is Ellis Katz and G. Alan Tarr, eds, *Federalism and Rights* (Lanham, Maryland: Rowman & Littlefield Publishers, 1996).

<sup>2</sup> For example, *State Constitutions for the Twenty-First Century* (Albany: State University of New York Press, 2006): Volume 1 *The Politics of State Constitutional Reform*, ed. G. Alan Tarr and Robert F. Williams; Volume 2 *Drafting State Constitutions, Revisions and Amendments*, ed. Frank P. Grad and Robert F. Williams; *The Agenda of State Constitutional Reform*, ed. G. Alan Tarr and Robert F. Williams. See also Dorothy Toth Beasley, “Federalism and the Protection of Individual Rights: The American State Constitutional Perspective,” in *Federalism and Rights*, ed. Ellis Katz and G. Alan Tarr (Lanham, Maryland: Rowman & Littlefield Publishers, 1996); and G. Alan Tarr, “American State Constitutions and Minority Rights,” in *Federalism, Subnational Constitutions, and Minority Rights*, ed. G. Alan Tarr, Robert F. Williams, and Josef Marko (Westport, Connecticut: Praeger, 2004).

Nor can we restrict our attention to written constitutions alone in examining rights protection at the subnational level. Among the older federations the United States and Switzerland have robust subnational polities with written constitutions, as do the reconstituted federal systems of Germany and Austria. Canada is more anomalous among older federations in not having provincial written constitutions at all, except in the case of British Columbia, yet Canada's Provinces are relatively strong, both politically and jurisdictionally despite the centralist features of its national constitution. (Morton 2004). Most post-World War II federal constitutions are more like Canada than the United States in relying primarily upon national instruments for specifying federal arrangements including the institutions of subnational government. This reflects the primacy of national power that can restrict or even exclude subnational constitutions. The Indian Constitution permits only Kashmir to have its own constitution, whereas the South African Constitution provides an extensive list of constitutional principles to be followed in drafting subnational constitutions and requires review by its Constitutional Court.

Where subnational constitutions do not exist, and even where they do, rights protection depends significantly on political and parliamentary means. If the predominant concern is with legal protection of civil and political rights, with lawyers and courts focusing on declarations and bills or charters of rights, much will be missed especially at the subnational level. The US legal model has been the touchstone for political scientists like Epp (1998) who, in comparative work, look for explanations of the 'rights revolution' in the activities of lawyers, legal activists and supreme courts and in support structures for legal mobilization. To get a fuller picture of rights protection, we need to broaden the scope of investigation beyond the realm of legal protection and include parliamentary and political means of rights protection (Galligan and Morton 2006). This is imperative for subnational constitutions that often lack written form. Having subnational self-governing political communities with functioning institutions provides a substantial base for rights fulfillment and protection, regardless of whether there is a formal subnational constitution. For ethnocultural group rights that are at the core of multinational federalism, a focus on political as well as legal dimensions of rights protection at the subnational level is essential.

In order to explore some of the main ways in which rights are protected by subnational governments within federal and quasi-federal systems, the focus is upon three models of federalism with different structures of subnational government: traditional *constitutional federalism*; recently articulated *multinational federalism*; and *asymmetric federalism*. These three are models or types that emphasise different roles for subnational governments in their own right and as integral parts of larger systems of government. Each will be outlined and how they assist or hinder rights protection will be explored. Selective illustrative examples will be used but, because of the diversity across countries and the extent of current developments, there is no attempt to be comprehensive or to systematically examine the rich and varied world of practice. Rather, the purpose is to provide a framework for comparative analysis of how federalism and subnational governments protect rights that might assist in-depth country studies that are required for a more comprehensive knowledge of the topic.

Asian federalism and examples of asymmetrical federal arrangements are included. Asia has established federations like India that has been extraordinarily successful; others like Malaysia and Pakistan that have been less successful; and China that has economic and administrative decentralization that some have called 'de facto' federalism (Zheng 2007, 213-41) despite its highly authoritarian national government, as well as special autonomous arrangements for Hong Kong. Most Asian countries are experiencing substantial economic and political change, and adapting and combining indigenous and Western traditions and institutions of governance. Although fully fledged federalism has been relatively weak or non-existent in Asian countries that lack decentralist traditions, or where liberal democracy and market capitalism are weak, there is extensive use of hybrid and asymmetric forms of federalism that combine self-rule and shared rule in novel ways. Multiculturalism and rights protection are areas of concern in Asia that greater attention to federalism and subnational government might help address. Including Asian countries both broadens the framework of analysis and brings to comparative attention the innovations of Asian countries in forging new variants of federal and subnational arrangements.

The three models discussed are variants of federalism. Constitutional federalism is the paradigm case pioneered by the American founders in drafting the United States Constitution in 1787, and adapted by various countries since then. The institutional features that characterise Anglo-European federalism are well known and much studied. It is important to keep in mind, however, that American federalism was itself an adaptation of earlier federalism that was understood as a league or association of smaller states, or an association of associations (Carney 1965) — strictly a confederation with weak central government and sovereign member states. The American innovation was to buttress the national association by giving it distinctive powers and making it directly linked to the sovereign people while also retaining subnational polities and their governments as member states.

Multinational federalism adapts the traditional federal model for multinational purposes with a primary focus on the subnational state representing distinctive subnational peoples. Such representation of ethno-distinctive peoples can be in one, as with Quebec in Canada, or a number, as in Switzerland and India, of sub-national provinces or states. Multinational federalism is not exclusive but often combined with constitutional federalism, as in Canada and India. Indeed their main form is constitutional federalism with multinational features added on for particular provinces and states. In various ways, multinational federalism has now been applied to Canada, Switzerland, Belgium, Spain, Russia, India and Malaysia (Burgess and Pinder 2007).

Asymmetric federalism has the basic features of shared rule and self rule but only for one or small number of subnational states. This is not an exclusive category as there are aspects of asymmetry in most federations that combine subnational units of diverse population and geographic size and influence. The Punjab's dominant place in Pakistan or Quebec's special status in Canada are asymmetric. More striking examples are Hong Kong's special status within China, or Aceh's within Indonesia where both relatively centralised and authoritarian states have granted extensive autonomy to subnational states

with distinctive political, in the case of Hong Kong, or ethnic, in the case of Aceh, character. Also there is some confusion in how the concept asymmetric is used: some use it interchangeably with multinational federalism to refer to the special status given to states with distinctive subnational majorities (Tillin 2006).<sup>3</sup> It seems preferable to reserve multinational federalism for this purpose, and use asymmetric more generically for the special treatment of a particular state whether for historical and political reasons, for example Hong Kong, or multinational ones.

### **Constitutional Federalism**

Constitutional federalism is the institutional system that structures government into two partly independent, partly interdependent spheres of government. The central feature is the division of powers between national and subnational governments so that each has some independent jurisdiction and neither is sovereign over the other. Federalism is a spatial or territorial arrangement with the component states being discreet, contiguous regions, although there can be major variability in the size and significance of member states. Federal thinking has often used a cartwheel or pyramid metaphor with the national government at the centre or apex and the states at the periphery or base. Elazar (1987, 36-38) proposed an alternative matrix model of power distribution among multiple centers of government that gave less prominence to national government. The strength of modern federations, compared to earlier confederations, is due to the fact that both spheres of government act directly upon the citizens, who in effect have dual loyalties to both state and national polities.

Federalism provides no prescriptions on nationalism or the good life for its citizens, but rather disperses government power concentrations. Its purpose in dispersing power, and thereby restricting that of any particular government, is the basic liberal one of providing space for individuals to determine and pursue their own wellbeing. A certain pluralism in governance is achieved through allowing subnational states to be different if they so choose but within national limits. Federalism works best in countries with established traditions of rules based politics, moderate political ideologies and tolerance for individual and group differences.

Federalism is typically embodied in a suite of institutions that are considered characteristic if not essential, although each of these institutions can also be found in non-federal constitutions. Lijphart (1999, 4, 187) lists three: a bicameral legislature with a strong federal chamber to represent the constituent regions, a written constitution that sets up the two spheres of government and divides powers between them that is difficult to amend, and a supreme court to decide jurisdictional disputes. An essential fourth feature that Watts (1999, 7) details is a system of intergovernmental institutions and processes to facilitate collaboration in areas of shared or overlapping jurisdiction. This form of federalism is typified by the established Anglo-European federations, the United States, Canada, Australia, Switzerland, Germany and Austria and dominates discussions of

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<sup>3</sup> Tillin uses asymmetry in this way; more specifically for de jure multicultural federalism where constitutional status is given to the dominant cultural group in the state.

institutional (Galligan 2006) arrangements and policy processes of comparative federalism (Obinger, Leibfriedand and Castles 2005).

A significant purpose of constitutional federalism was to stabilise representative and republican democracy and protect individual rights against excessive government power. The American founding was grounded in liberal and republican principles and traditions (Beer 1993). The object was to filter and refine popular sentiment, and to break up and prevent majority factions and populist movements that had plagued participatory democracy and made it highly unstable. For its American founders, federalism protected individuals and individual rights by checking government through dividing the institutions of national government into more or less separate compartments for the legislature, executive and judiciary, and the powers of government between separate national and state spheres. So much so, that the authors of the justifying *Federalist Papers* did not consider a bill of rights was necessary in the original constitutional design, and was only added during the ratification debates to satisfy those anti-federalists who still thought that democracy was only possible in smaller states and centralisation of power in a large national government would inevitably lead to tyranny. Rights protection has remained a key feature of American style federal systems, and been significant in the Australian case (Galligan, Knopf and Uhr 1990, 53-67) and the experience of other Western democracies.

An important element in the resurgence of interest in federalism has been concern for maintaining or achieving subsidiarity and decentralised government within and among nations. The European Union is a major site for evolving a type of transnational federalism while maintaining strong national government (Ortino, Zagar and Mastny 2005), but also for deepening regional variants of federalism as in Britain's devolution to Scotland, Wales and Northern Ireland, or Spain's recognition of Basque and Catalan autonomous communities. Decentralisation brings government closer to the people, thereby enhancing democratic participation; it also facilitates effective policy development and delivery, especially in large counties and those with significant regional differences such as India, China, Nigeria and Brazil. As Stepan (2000, 145-69) has pointed out in Brazil's case, federalism assists both democratisation and decentralisation by bringing government closer to citizens. Even without regional diversity, effective policy delivery for education, health care and environmental protection all have major local as well as national dimensions that are best served by systems with 'some degree of decentralization coupled with some centralized coordination of policy' (Ahmad, Hewitt and Ruggiero 1994, 25-48).

Through extending democratisation and providing decentralisation in government, federalism and subnational governments provide the political infrastructure that enables subnational communities to govern themselves while at the same time being part of a larger national association. Such regional communities need not be ethnically distinct, but have distinctive histories and geographical identities as do the Maritime provinces in Canada, or states like Queensland and Tasmania in Australia, or Rhode Island and Texas in the United States. Nevertheless representing regionally distinct communities is most dramatically evident in instances of multinational federalism considered below.

Regardless of the sorts of differences among subnational states, having self-government is itself one of the most fundamental manifestations of rights recognition and protection — in this instance of the right to self-government in subnational as well as national political associations.

Of course, subnational governments can discriminate against minorities and join with other states in blocking national reform initiatives. This led critics like Riker (1964, 245) to deny that federalism has been a positive factor for rights protection: ‘the abstract assertion that federalism is a guarantee of freedom is undoubtedly false’, he claimed, because it impeded the freedom of the majority and either had nothing to do with, or more likely, impeded that of the minority. Katz and Tarr (1996, xvii) note that ‘proponents of federalism seldom expressly champion it as promoting civil liberties,’ even though ‘a concern for rights pervades the arguments for federalism.’ The pessimistic view of federalism and rights protection typically draws upon American experience of slavery and continuing institutionalised racial discrimination in Southern states, or the more recent break up of federal countries like Yugoslavia and Czechoslovakia. Despite such dark episodes, modern scholarship is generally optimistic, and even Riker (1993, 515) came full circle in his own federalism odyssey, concluding positively that: ‘Taking together all federations in the world at all times, I believe that federalism has been a significant force for limited government and hence for personal freedom.’ We do need to keep in mind the reflexive quality of institutions that are operated by people who can make them work differently and for different purposes (Goodin 1996). Institutions are also contextually imbedded in historical time and place and can work differently depending on the politics of the time and what is already in place — for example in impeding or protecting the welfare state (Obinger, Leibfried and Castles 2005). Human agency introduces an element of contingency to the ways in which institutional systems operate.

### **Multinational federalism**

When federalism serves subnational groups that are culturally distinctive and form a regional majority, as in the case of Francophone Quebec in Canada, it has been called ‘multinational’ (Resnick 1997; Tarr, Williams and Marko 2004, pt iv). In recent times, there has been much clearer recognition of distinctive minority nations within the larger nation state, and acknowledgment of their normative claims for distinctive democratic representation (Taylor 1992; Keating 1996; Gagnon and Tully 2001). Not surprisingly, given its combination of self rule and shared rule, federalism has been embraced as an appropriate institutional framework for both recognising and structuring multinational democracy (Linz 1993, 355-369; Simeon and Conway 2001; Burges and Pinder 2007; Stepan 2004). The term is now applied to a wide variety of countries and used in different ways (Burgess and Pinder 2007).

In making sense of such broad usage, a useful distinction is that between *de facto* political dominance of ethnically distinct peoples in a particular member state or states, and more technical *de jure* or constitutional recognition that entrenches their special

status or group rights. Examples are Quebec or the smaller ‘peripheral’ or territorial states of north-east India. De facto multinational federalism treats all member states the same, but allows them to adopt distinctive state policies. A notable example is India’s linguistic reorganisation in the 1950s that gave all states the same constitutional rights with respect to language: Article 345 of the Constitution allowed every state to adopt as its official language either Hindi or the language in use in the state. However, Article 348 also required that court proceedings, orders, laws and regulations must be in English (Tillin 2006, 59).

What precisely is meant by multinational federalism and what it entails varies among authors. For example, Requejo develops the notion of ‘multinational federalism’ as ‘plural federalism’. According to Requejo (2005, 63, 73, 77) who applies it to Spain, multinational federalism derives from adding confederal and asymmetric elements to the more traditional ‘uninational’ notion of federalism, and enables diverse unit members to be treated differently in ways that mirror, collectively, Isaiah Berlin’s notion of value pluralism. Will Kymlicka (2005, 23-4) prefers the term ‘multi-nation federalism’ which he defines as ‘creating a federal or quasi-federal subunit in which the minority group forms a local majority, and so can exercise meaningful forms of self-government’, and where ‘the group’s language is typically recognized as an official state language, at least within their federal subunit, and perhaps throughout the country as a whole’. Despite their different approaches, both these authors ground multinational federalism in versions of liberal theory and recognition of the right to be different.

Kymlicka (2007, 33-56) offers a general explanation as to why Western countries have embraced multinational federalism and Asian nations, by and large, have not. In a nutshell, Western acceptance of multinational federalism is due to three factors: one, the absence of security threats from an adjacent nation with the same ethnic composition as the bordering subnational group; two, a deep consensus across ethno-national lines on basic liberal democratic values and human rights; and three, an acceptance all round that the distinct ethnic groups will endure. In contrast, Asian countries that eschew federalism have opposite beliefs on all three points: one, there are apparent security threats from minority ethnic groups; two, it is doubtful that such groups will respect democratic values and human rights; and three, there is the belief that such groups can be made to integrate and blend into the larger nation. National security, deep consensus on liberal democratic values, and the relative strength and concentration of ethnically distinct minorities are major factors in explaining why certain multinational countries embrace federalism and others eschew it.

Although proponents of multicultural federalism do not claim the lineage, the current multinational take on federalism has some similarity with an earlier sociological view that federalism was a consequence of ethnically diverse societies. The most notable proponent of this view was Livingston (1956, 4) who claimed ‘Federalism was a function not of constitutions but of societies.’ In this functionalist view, institutional form was derived from, and needed to be grounded in distinctive societal character and perform a related function. Federalism seems tailor-made for a country of ethnically diverse societies, or multiple nations. It provides an institutional basis for their political

organisation and representation, while at the same time allowing unity and a national government at the aggregate level.

The primary purpose of multinational federalism is to recognise group rights of ethno-culturally distinct peoples who have an identifiable territorial homeland that forms a subnational state within the federal nation. Such groups have a primary right to practice and preserve their distinctive culture, proponents of group rights contend, and the best way to do this is through having their own institutions of government, albeit within an overarching national system. As Kymlicka (2005, 29, 35) also emphasizes, multiculturalism and its institutional embodiment in multinational federalism relies upon 'a further elaboration and evolution of liberal-democratic values' and 'a deep consensus across ethnological lines on basic values of liberal-democracy and human rights'. The institutionalisation of minority rights is dominated by the 'idea, or ideology, of liberal multiculturalism' (Kymlicka 2005, 54). So the language of group rights and their embodiment in multinational federalism are an extension of liberal-democratic discourse and practice that underpin traditional federalism. The main difference is in having subnational governments serve the nationalism of groups with distinctive ethno-cultural identities.

If this is what makes the multinational version of federalism attractive, it is also the source of its weakness. Using federalism to provide an institutional basis for ethnoculturally distinct peoples can 'either exacerbate or mitigate ethnic conflict', as Horowitz (1985, 603) has pointed out. Where there are deep divisions that divide regions, such as slavery in the United States, federalism can provide institutional assistance for secession 'by creating opportunities for conflict and providing the region' with the opportunity and the institutions needed to mobilize support for secession (Anderson 2004, 96). Canada's long-standing national crisis over Quebec separatism shows how vulnerable multinational federalism can be, even in a long standing liberal democracy. Studies of failed federations and attempts to deal with regions of ethnic conflict provide ample evidence of this dangerous aspect of federalism (Dorff 1994, 99-114). Federalism is in trouble where there is too little national sense among the people, and too sharp differences among regionally based ethnic, religious and linguistic groups. Examples abound in post-colonial federations hastily drawn up by retreating European powers (Franck 1968), or in the recent failure of Yugoslavia where there was insufficient cohesion in the multiethnic Yugoslav community (Zagar 2005, 107-33).

As Kymlicka points out, multinational federalism works best where there are no security risks and deep consensus on liberal democratic values and respect for human rights, including the recognition of and tolerance for ethnic differences. This explains why Europe has become the main theatre for multinational federalism: the European Union ensures joint security and reduces the sovereign independence of nation states, and there is deep consensus on liberal democratic values. In such a congenial environment, multinational member states like Belgium and Spain can adopt multinational federalism. Countries without an overarching transnational association to ensure national security and without a deep consensus on liberal democratic values, such as many of the Asian countries, will not be drawn to federalism in the same way.

In any case, having regional state boundaries coincide with ethnic fault lines and state institutions represent distinctive ethnic communities is fraught with secessionist tendencies. Federalism would likely work better if multiculturalism is implemented at the regional state level. Ethnically distinct regions that form subnational states are invariably not mono-cultural but usually have other sub-minorities or minority groups interspersed. There needs to be intrastate political and civil interactions between diverse ethnic groups, and moderation, toleration and inclusiveness at the subnational as well as the national level. In other words, as well as subnational expression of the dominant ethno-cultural group, the *intrastate* protection of minority rights is also necessary. This is often secured through national instruments or interventions, with national institutions such as the executive or supreme court having responsibility for oversight and protection for local minorities.

India has been relatively successful in accommodating multi-ethnic diversity through combining constitutional federalism of a centralist kind with elements of multinational federalism. As referred to earlier, India restructured its federal system by redrawing state boundaries and increasing the number of states to recognise cultural communities. While Hindi has the status of national language and English is retained for superior courts and national laws and regulations, states choose their own language, either Hindi or the dominant language used in the state (Tillin 2006, 59). This ‘three-language formula’ has allowed a patchwork of state and territory languages in a workable compromise (Mitra 2001, 51-60). But as well India allowed special *de jure* provisions for the highly strategic state of Jammu and Kashmir, that was the subject of dispute and armed conflict with Pakistan, and also for the eight small states in the north-east tribal territories located to the east of Bangladesh and joined to India by a land corridor. Mahajan (2007, 82-100) reports that the overall effect has been successful combination of culturally distinct units coexisting ‘with reasonable ease within a united and integrated India’. Dual identity and allegiance to the local state and to India are surprisingly high in states like Punjab and Mizoram that previously supported militant succession (Mahajan 2007, 90-91).<sup>4</sup> Nevertheless, the challenge for India where there are more languages and cultures than states, and linguistic and cultural minorities within states, is recognition and protection of minority group rights.

### **Asymmetric federalism**

An asymmetric arrangement is one that treats one or a number of subnational units significantly differently from the others. It is usually put in place to accommodate differences, either of subnational states or geographically concentrated peoples with distinctive ethno-cultural differences. Departures from the federal rule of symmetry, however, have usually been treated with some disdain by federal scholars. In a pioneering study of the topic, Tarlton (1965, 861-74) defined symmetry as ‘the level of conformity and commonality in the relations of each separate political unit of the system to both the

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<sup>4</sup> Relying on Juan Linz, Stepan, A. and Yadav, Y. 2007. “‘Nation State’ or ‘State Nation’? India in Comparative Perspective’. In *Democracies and Diversity: India and the American Experience*, ed. S. Pajpai. Delhi: Oxford University Press.

system as a whole and to the other component units'. At its core, Tarlton speculated, a symmetric system would have 'a harmonious pattern of states partaking of the general features of the federal nation', and 'no significant social, economic or political peculiarities would exist which might demand special forms of representation or protection'. Asymmetric federalism was a system 'composed of political units corresponding to differences of interest, character and makeup that exist within the whole society'. In other words, in both cases of symmetric and asymmetric federalism, Tarlton envisaged the component states mirroring the characteristics of the federal whole. For him asymmetry as such was not the cause of conflict and instability, but rather where it characterized only a few of the subnational states. This was something to be avoided as it caused the breakup of federal counties; indeed, he thought greater centralism was necessary to counter such diversity.

Tarlton's notion of asymmetry where the differences in the subnational units correspond to those of the federal nation overall is an unlikely theoretical construct — perhaps a pluralist and multicultural society where different ethnocultural groups are well integrated and spread throughout the country might be an example. In any case, asymmetry of one or a few subnational units is the usual situation. Tarlton (1965, 872) recognized this and concluded that the higher level of symmetry, the more suited and stable a federal system of government would be. In other words, he effectively rejected asymmetric federalism.

The more normal understanding of asymmetry is the form Tarlton rejected: recognizing ethnic heterogeneity or established political differences in one or a few subnational states. For Aganoff (1999, 11), 'Federal asymmetry refers to the differentiation of status and rights sanctioned between component units within the undiminished system'. Such differential status and rights are common in many federations, including Canada, India, Belgium, Spain, Malaysia and South Africa. Instances of asymmetry that recognise the ethno-cultural distinctiveness of subnational states in Anglo-European federations are encapsulated in Kymlicka's notion of multinational federalism. He refers to Quebec in Canada, Catalonia and the Basque region in Spain, South Tyrol in Italy. These have become distinctive subnational units where regionally concentrated groups of ethnically distinct people — the Quebecois, Catalonians, Basques and Germans — who consider themselves a separate nation have achieved special recognition that is reflected in supporting constitutional arrangements and subnational institutions of government which provide a supporting political structure.

Asymmetry is contrary to the assumption usually made about federal systems, that there should be rough equality of subnational units rather than proportionality according to population, geographic size or economic strength. Indeed, providing equal treatment to smaller states is usually part of the attraction for their becoming part of a federation, as was the case in the United States and Australia. Even in such cases, symmetry is only one of the guiding factors, evident for example in equal Senate representation by subnational state. Asymmetry that recognises greater size and significance of states is present in most federations, including these two, for example in representation in the House of Representatives on a constituency or population basis. Canada groups Provinces on a

population basis for some constitutional purposes, as for example in its elaborate amending formula that requires support from Provinces with two-thirds of the population for certain changes. According to von Beyme, real symmetry has long been undermined in classic federations even where symmetric formal arrangements remain in place. This is due to changing economic, social and political dynamics, and greater acceptance of variability and complexity. Von Beyme (2005, 432-47) concludes that in post modernity, 'Federalism and centralism are no longer treated as fixed ontological entities, but are poles on a scale of varying degree of decentralization'. Elements of symmetry are present in most federations, either *de jure* when embedded in the constitutional arrangements or *de facto* to reflect major differences in the population or political power of particular subnational states (Watts 1999, 24-31).

More dramatic instances of asymmetric arrangements are found in Asia: Hong Kong's special status within China, and Aceh's autonomous status within Indonesia. In these cases asymmetric arrangements have been used to accommodate quite special subnational units. Because it had been under separate British rule for a century, <sup>1</sup> Hong Kong had well established governance arrangements and a strong market economy. Its special status in China is recognised in the policy of 'One Country, Two Systems' and Hong Kong's autonomy in monetary policy and external affairs, although the Chinese central government has final constitutional power and appoints its senior executive (Cheung 2007, 242-65). While China is moving towards a kind of *de facto* federalism with real power dispersed between the centre and economically powerful provinces (Zheng 2007, 213-41), the special status granted to Hong Kong is uniquely different. Aceh's special status is a bold experiment on the part of Indonesia in recognising the claims of a subnational state with a more autonomous colonial heritage and an assertive Muslim people prepared to fight for an autonomous Muslim state. In the Philippine's case, May (2007, 165-87) argues that special autonomy is a better way of dealing with Mindanao, a Muslim enclave within the predominantly Catholic Philippines, than changing the whole system to a fully blown federal one.

From the perspective of rights protection, asymmetric arrangements are about recognition of the right of peoples with distinctive characteristics in subnational states to self-rule, and also extending them corresponding special rights and privileges within the larger nation. Few would argue that the people of Hong Kong and of Aceh, or Quebec and Catalonia, are not better served by having special constitutional guarantees and subnational governance arrangements. The difficulty is in restricting these solely to those groups and not extending them to others. Nevertheless, such asymmetric arrangements are positive pragmatic responses to problem areas of national integration, and if successful might provide models for extending such favored treatment to other groups and regions.

### **Rights Protection and Subnational Government**

Subnational government is important for rights protection for the interrelated reasons of shared rule and self-rule identified at the beginning. Subnational government is an integral component of federalism that provides one of the two spheres of government

between which powers are divided and to which they are allocated. This disperses, and thereby checks and limits, power and restrains government so that individuals are given space and freedom. Subnational self-rule is thus one of the necessary anchors of federal government, without which there could be no federal system with its inherent limits on government. We might call this the anti-Leviathan or negative propensity of federalism that restrains government, especially national government and as a consequence leaves individuals and groups with greater freedom. It is this aspect of federalism that countries with illiberal centralist rule, like China, or with nationalist ideologies, like Indonesia and many developing countries, find hard to accept.

The second way in which subnational governments further rights protection is in providing self-rule to a regional or ethnic — if it is regionally based — community. The high value put on self-rule and the conviction that this occurs best in smaller polities has been affirmed by political writers down through the ages. Until relatively modern times democracy was understood in a participatory sense and so was considered suitable only for small polities. Rousseau ([1792] 1968, 113) expressed the older view that democracy required ‘a very small state, where the people may be readily assembled and where each citizen may easily know all the others,’ as well as simplicity of lifestyle and substantive equality without which equality of rights would not endure. The principle of subsidiarity that is strong in Europe is another manifestation of the recognition that government activities should be carried on as close to the people who are affected, as citizens and subjects, as possible. Modern communitarians emphasise the shared relationships and strong bonding that smaller communities provide for human development and identity that is beneficial for group members, even if it poses some threat for the rights of others who are not members. The point being made here is that subnational governments enable self-rule in smaller polities that is a positive good: self government is fundamental to rights recognition of such polities.

The three models of federalism outlined above all recognise and implement the principle of self-rule for subnational communities, but in different ways. Constitutional federalism gives each geographically defined subnational state equal self-governing status and its citizens equal rights. Multinational federalism recognises territorially based ethno-cultural minority groups, or subnational nations, and gives them special governing arrangements and recognition of distinctive group rights, usually privileging language, culture or religion that is different from that of the majority of other states and people. Asymmetric federalism is similar to multinational federalism but more selective in restricting recognition to one or a few special cases. It has the advantage of being able to deal with the special case, for example Mindinao in the Philippines, Aceh in Indonesia or Hong Kong in China, without having to change the whole system and extend similar privileges to all parts. Nor does asymmetric federalism presuppose the same deep consensus on liberal values that constitutional and multinational federalism require: it can be a solution for otherwise illiberal national regimes, even though making such an arrangement does require substantial restraint and respect from both sides.

Institutions need to be highly interactive with their supporting political culture if they are to work effectively, with the one interactively supporting the other. That is the case with

federalism overall and its subnational self-rule component: both require and promote restraint and toleration. Restraint is necessary for moderating commitment to one or other nationalism and sphere of government, and toleration is necessary for allowing diversity and respecting differences. The need is greater in multinational federal systems, even if that is more unlikely among its formative components whose purpose is to serve their distinctive subnational nationalism. Having subnational units defined by ethno-cultural fault lines makes national unity more precarious, as critics referred to earlier have pointed out. It probably also makes rights protection of minorities within ethnically defined states more difficult.

The protection of minority rights within the subnational state is best ensured by blending multinational federalism as defined by Kymlicka with constitutional federalism in its more traditional sense. In other words, the dominant ethnic majority need to respect the rights of minorities within the state where they form a majority, just as their rights need protection against the national majority. India provides a successful example of such blending of multinational and constitutional federalism evident in two notable ways. One is the high national identification among distinctive ethno-cultural people such as the Mizos who formed Mizoram, the 23<sup>rd</sup> state of India, in 1986 after decades of separatist strife and now identify strongly as both Mizos and Indians. The second is the increased plurality of political elites at the national level due to emergence of leaders from state and subnational politics. (Mahajan 2007, 82-100).

## **Conclusion**

Although often neglected in the study of rights protection that tends to focus on national and international instruments and charters, subnational government is important in its own right and as an integral part of any federal system. Along with national government, subnational government provides one of the essential anchors of federalism that divides powers and provides checks of one sphere of government upon another. If national government and national bills of rights and interventions are of primary significance and tend to dominate, subnational government is also crucially important in its own right. Subnational government provides self-rule in smaller regional political communities that is a good in itself and a primary right of such communities. Subnational government can ground other more tailored measures for rights recognition, of distinctive language, culture and religion, or rights protection through subnational bills of rights or protective legislation. At the same time, it is important to keep in mind that federalism and subnational governments provide frameworks and institutions that can be used in different ways, and not necessarily for better rights protection. Other contextual and intervening variables such as political culture, civil society, strategic stability and a level of economic development are also required, as well as political leadership and citizen participation.

Multinational federalism extends the protective rights purpose of federalism from individual to group rights and from regionally based subnational polities to distinctive ethno-cultural ones. In so doing it privileges the distinctive group and provides it with

supporting institutions of government. This can threaten national unity and/or the rights of subnational minorities unless it is moderate and tolerant, acknowledging both national allegiance and the rights of local minorities. To work well, multinational federalism requires countervailing conditions of a deep consensus on liberal values and tolerance for differences, and the absence of external threats that might take advantage of internal divisions.

Asymmetric arrangements, that might loosely be called federal, are more pragmatic ways of accommodating distinctive subnational polities. They are available to a greater range of liberal and illiberal regimes and can recognize distinctive historical and political development as well as ethnic differences. At the same time, asymmetric arrangements require respect for differences on both sides and commitment to binding agreements that are the hallmarks of federalism. Given the political and ethnic diversity of nations and the strength of demands for subnational government, asymmetry is likely to be a prominent structure for modern government and asymmetric developments an expanding field of study.

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