

Federalism – Back to the Future?

Introduction

“A constitution ... has several important functions. It will be looked to as a clear symbol of the country’s direction, both by its citizens and the international community. It can also provide important safeguards against the government going off track, while laying the groundwork for increased democracy, rule of law, and good governance”¹.

The federalist revolution

There is an increasing worldwide interest in and shift towards federalism as means of political structuring as opposed to unitary, centralised government. Daniel Elazar, a pre-eminent scholar of federalism, has described its popularity as representing “a paradigm shift of major proportions from a world of states modeled after the ideal of the nation-state ... to a world of diminished state sovereignty and increased interstate linkages of a constitutionalized federal character”².

At the end of World War II, exclusive statism and the role of nationalism as an ideal *per se* was called into question.³ With the exception of China, all of the world’s geographically large countries are federations and even smaller countries like Germany and Belgium have adopted federal structures. What are the reasons for this renewal of interest in federalism as a model for constitutional organisation?

I would suggest that it is a recognition that identification with a local homogeneous group needs to be tempered by the economic and cultural advantages of belonging to a larger group which gains strength through its diversity. Elazar describes the growth of federal arrangements as occurring in the context of increased recognition of ethnic

¹ Abou El Fadl, K et al, Benard C & Hachigian N (eds) *Conference Proceedings: Democracy and Islam in the New Constitution of Afghanistan* (2003) RAND, California at 1.

² Elazar D, ‘Introduction’ in *Federal Systems of the World: A Handbook of Federal, Confederal and Autonomy Arrangements* (1994) Jerusalem Centre for Public Affairs available from <http://www.jcpa.org/dje/index-fs.htm> at 3.

³ Elazar D (1994) at 3; and Elazar D, *Three Federal-Type Solutions in Dealing with Multi-Ethnicity: Confederal Examples* (1999) Jerusalem Centre for Public Affairs available from <http://www.jcpa.org/dje/index-fs.htm> at 3.

identity, greater linkages of people across territorial boundaries, and the growing reality of the limitations of political sovereignty⁴.

Since the 17th Century, the principal form of political organisation was the nation-state, exercising exclusive territorial sovereignty over or in the name of the people of that territory⁵. However, the United States, Switzerland and Canada, with their constitutions of 1787, 1848 and 1867 respectively, demonstrate that alongside this system developed a second, based on federal arrangements. These constitutions showed that the benefits of statehood, liberty and autonomy (or self-determination and self-government), could in fact be achieved with federal arrangements⁶. Since then, other “species of federalism” have emerged in various forms such as confederation, decentralised union, federacy, regional arrangements, leagues, and cultural home-rule⁷. Many of the world’s politically sovereign states are either federations or include within them forms of self-determination and self-government representing extensions of the federal principle⁸. Intellectually, this emergent form of political organisation has been described as the “matrix model” of state-building “whereby authority and power are dispersed among a network of arenas within arenas”⁹.

What is Federalism?

Before we take the discussion further, it is perhaps best to examine what is meant by the term “federalism”.

The term “federal” is derived from the Latin *foedus* which means “covenant”. This embodies ideas of promise, commitment and undertaking so that the federal idea involves cooperation, reciprocity and mutuality¹⁰. “In essence, a federal arrangement is one of partnership, established and regulated by a covenant, whose internal relationships reflect the special kind of sharing which must prevail among the

⁴ Elazar D (1994) at 5-6.

⁵ Elazar D (1994) at 4.

⁶ Elazar D (1994) at 4.

⁷ Elazar D (1994) at 11-12.

⁸ Elazar D (1994) at 4.

⁹ Elazar D (1994) at 7.

¹⁰ Chen P, ‘Federalism and Rights: A Neglected Relationship’ in *South Texas Law Review* 40 (Summer 1999) 845 at 850.

partners, namely one that both recognizes the integrity of each partner and seeks to foster a special kind of unity among them.”¹¹ In this sense, the federal idea is concerned with the combination of self-rule and shared rule. It involves the connection of peoples in enduring but limited union in the pursuit of common ends in such a way that the integrity of all parties are maintained.¹²

“As a political principle, federalism has to do with the constitutional diffusion of power so that the constituting elements in a federal arrangement share in the processes of common policy-making and administration by right, while the activities of the common government are conducted in such a way as to maintain their respective integrities.”¹³

“Federalism” is used both to describe particular institutional arrangements and to convey a set of ideas underpinning such institutions¹⁴. Indeed, Elazar asserts that federalism is best understood not by reference to particular structures but by reference to particular relationships between participants in a political system. The federal principle, Elazar says, is not limited to systems representing the conventional federation model but embodies a wide variety of structures, each adapted to a particular polity¹⁵.

A Word About Democracy

Federalism can take many different institutional forms. They differ in their assignment of powers, degrees of representation, and mechanisms used to administer those relations¹⁶. It is generally agreed, however, that there is considerable correlation between federalism and democracy¹⁷. Some scholars, “democratic federalists”, go so far as to say that democracy and federalism are “inextricably intertwined” and that only federations in which democracy is practiced are true federations¹⁸. Elazar’s position is that federalism, by its nature, tends to bring governments closer to the adoption of democratic principles¹⁹.

¹¹ Elazar D (1994) at 8.

¹² Elazar D (1994) at 8.

¹³ Elazar D (1994) at 8.

¹⁴ Chen P (1999) at 851.

¹⁵ Elazar D (1994) at 8.

¹⁶ Chen P (1999) at 854.

¹⁷ Chen P (1999) at 855.

¹⁸ Smith G (1995) at 8.

¹⁹ Elazar D, *Constitutionalizing Globalisation* (1998) at 47-8, cited in Chen P (1999) at 855.

Celebration of Diversity through Unity

The federal principle holds that “the ideal organisation of human affairs is best reflected in the celebration of diversity through unity”²⁰. Federalism is, in the first instance, a response to pluralistic society²¹. It is suggested, in fact, that “since every basic aspect of humanity – one’s race, one’s religion, one’s language, one’s culture – necessitates the creation of subcommunities within larger communities”, the only means of protecting the autonomy of those groups within a larger whole is through federal ordering.²²

Elazar has described the modern growth of federal and federal-type arrangements as arising alongside globalisation, the fall of the nation-state and accompanying “ethnonationalism”²³ – the reclaiming and advancing of national identity by ethnic groups²⁴. This universal trend toward pluralism, or as Elazar describes it, the “postmodern legitimation of ethnic identity”²⁵ has naturally led to a renewal of interest in federal institutions. The federal principle has been used on the one hand to link established ‘states’ to achieve greater economic advantage and security, and on the other, “to integrate new polities while preserving legitimate internal diversities”²⁶. It is often said the main strength of federalism is its capacity to accommodate and reconcile competing diversities within a state²⁷.

It is the very nature of federalism that it seeks to achieve diversity through unity. What distinguishes federal systems from the unitary state is constitutionally

²⁰ Smith G, ‘Mapping the Federal Condition: Ideology, Political Practice and Social Justice’, in Smith G (ed) *Federalism: The Multiethnic Challenge* (1995) Longman, London at 4.

²¹ Chen P (1999) at 853.

²² In the United States, for example, the country was formed upon the migration of people from many different ethnic, religious and racial groups so that federalism “helps diffuse the pressures of ethnicity and race, and vice versa”: Elazar D, *Three Federal-Type Solutions in Dealing with Multi-ethnicity: Confederal Examples* (1999) Jerusalem Centre for Public Affairs available from <http://www.jcpa.org/dje/index-fs.htm> at 2.

²³ Elazar uses this term as encompassing racial, linguistic, ethnocultural, tribal and religious communities whether minorities within a state or not.

²⁴ Elazar D (1997) at 3; see also Elazar (1994) at 10.

²⁵ Elazar D, ‘Chapter 1’ of *Constitutionalizing Globalization: The Postmodern Revival of Confederal Arrangements* (1997) Jerusalem Centre for Public Affairs available from <http://www.jcpa.org/dje/index-fs.htm> at 3.

²⁶ Elazar D (1994) at 9.

²⁷ Chen P (1999) at 853.

guaranteed regional autonomy (and representation)²⁸. This is reflective in the various definitions given of federalism. Chen, for example, states that:

“Federalism can be defined as the mode of political organization that unites smaller polities within an overarching political system by distributing power among general and constituent governments in a manner designed to protect the existence and authority of both national and subnational political systems, enabling all to share in the overall system’s decision-making and executing process.”²⁹

In the broader terms which he prefers, Elazar states:

“As a political principle, federalism has to do with the constitutional diffusion of power so that the constituting elements in a federal arrangement share in the processes of common policy-making and administration by right, while the activities of the common government are conducted in such a way as to maintain their respective integrities.”³⁰

Indeed, as a framer of the Australian Constitution, Sir Samuel Griffith adopted a definition of federalism which specifically enshrined state sovereignty, so that a federation is:

“a political union of several States, which, for certain purposes, and within certain limits, is complete, so that the several States form one larger State with a common Government acting directly upon the individual citizens as to all matters within its jurisdiction, while, beyond those limits, and for all other purposes, the separate States retain complete autonomy”³¹.

Federalism is to be distinguished from decentralised (national) government which merely delegates authority to the states, which can be taken away. Federalism, by contrast, is about the division of *power*.³² As power is dispersed, the less likely it is that it can be despotically abused. However, the pull from the centre can reach a critical point where the federation can fragment or be subverted by individuals or groups seeking greater than their constitutional power.

²⁸ Smith G (1995) at 7.

²⁹ Chen P (1999) at 857, citing Williams R, ‘Comparative Subnational Constitutional Law: South Africa’s Provincial Constitutional Experiments’ in *South Texas Law Review* 40 (1999) 625 at 629-30.

³⁰ Elazar D (1994) at 8.

³¹ Griffith S, *Notes on Australian Federation: Its Nature and Probable Effects* (1896) Edmund Gregory, Government Printer, Brisbane at 5, quoted in Aroney N, ‘Chapter 12: Griffith’s Vision of Australian Federalism’ in White M & Rahemtula A (eds) *Sir Samuel Griffith – The Law and the Constitution* (2002) The Lawbook Co., Sydney at 200.

³² Mazzone J, ‘The Social Capital Argument for Federalism’ in *Deakin Law Review* 6 (2001) 2, 200 at 233.

How Federalism Achieves Diversity Through Unity

The benefits of a federal constitution are all related to recognising, advancing and protecting the rights and interests of individuals, however divergent they may be, within a unified nation. The primary concern of federalism is to achieve diversity through unity. The three key mechanisms through which federalism achieves diversity through unity are first, the guarantee of regional autonomy; second, the ability for increased participation in and access to the political system; and third, the checks on abuse of government power.

1. Regional Autonomy

It is the very entrenchment in a written constitution of regional autonomy which distinguishes federalism from other forms of political structuring³³. Even when it is called something else, Elazar says, the use of arrangements which constitutionally combine self-rule and shared rule is federalism³⁴. In this way, a federal structure in which smaller regions within the whole retain some measure of autonomy provides an outlet for minority views and in so doing strengthens national unity. Federalism allows “diverse local groups to control aspects of their lives ... without having to persuade a majority of citizens nationwide”³⁵. As such it encourages innovation in legislative solutions.

The guarantee of regional self-government acts as an incentive for remaining part of or joining a union. Indeed, guaranteed regional autonomy is seen by some as “the basic minimum condition for federalism”³⁶.

2. Increased Participation

With more levels of government there are more opportunities to access the political system. “Federalism creates opportunities for more local and regional voices to be

³³ Smith G (1995) at 7.

³⁴ Elazar D (1998) at 2.

³⁵ Kelso R, ‘A Post-Conference Reflection on Federalism, Toleration, and Human Rights’ in *South Texas Law Review* 40 (1999) 811 at 813.

³⁶ Chen P (1999) at 856, quoting Dikshit R, *Political Geography of Federalism* (1975) at 23.

heard and more issues to be raised in the process of government decision-making.”³⁷ Mazzone describes this in terms of federalism’s capacity to increase social capital.³⁸

When political power is divided, it is more difficult for any single interest group to dominate the discourse³⁹. In a free society there will always be conflict. Minorities therefore tend to prefer federalism⁴⁰ since it tends to alleviate the excesses of brute majoritarianism.

Individual states are closer than a national government to the workplace and are in a better position to assess the impacts of policy on their citizens. Competition between the states acts as an incentive to address individuals’ needs. As Kelso puts it, federal structuring permits a higher level of responsiveness to particular local needs⁴¹.

3. Checks on Abuse of Government Power

As Elazar reasons, this constitutional distribution of power is specifically designed to maintain the respective integrities of the parties⁴². Kelso describes this as a classic strength of federalism. “The checks and balances associated with any federal system tend to prevent the aggrandizement of power in any one political entity, party or person.”⁴³ This dispersion and division of power is precisely what federal structuring accomplishes so that, at least potentially, federalism is more likely to prevent abuses of government power⁴⁴.

Many of these benefits derive from the government competition promoted by this vertical division of power. Essentially, competition between governments serves as a check on government excesses and abuses of power.

³⁷ Chen P (1999) at 865.

³⁸ Mazzone P (2001) at 231.

³⁹ Mazzone P (2001) at 215.

⁴⁰ Chen P (1999) at 866.

⁴¹ Kelso R (1999) at 813.

⁴² Elazar D (1994) at 8.

⁴³ Kelso R (1999) at 812, citing Faber D et al, *Constitutional Law: Themes for the Constitution’s Third Century*, 2nd Ed (1998) at 764.

⁴⁴ Chen P (1999) at 864.

Mazzone argues that it is not just competition between the state governments which is significant, but competition between the national government and the states as to the appropriate division of power. These struggles present constant opportunities for citizen groups, including smaller groups, to seek to influence policy decisions.⁴⁵

Federalism as Compromise

Ultimately, federalism is a continuing balancing act which by its nature strives to reconcile authority and liberty⁴⁶. Federalism is about compromise, “conveyed by the image of checks and balances between unity and diversity, autonomy and sovereignty, the national and the regional”⁴⁷. It is flexible enough to allow for periodic adjustments in response to social, political, regional and ethnic pressures. Indeed this flexibility is considered by many to be the hallmark of successful federal states and such a constant balancing act is said to lead naturally to tolerance and respect⁴⁸. “[T]he essence of a federal society is one in which the people in the society possess and exhibit divided loyalties. This, in turn, compels them to recognize that others in the society also possess divided loyalties. The result ... is the flowering of such values as humility, sharing, tolerance, trust, respect – in a word, balance.”⁴⁹

The Federal Principle in Practice

1. The United States

The modern idea of federal government was determined by the United States of America.⁵⁰ This is despite the absence of the word ‘federal’ from the Constitution of 1787. The United States, however, is considered the most important and successful example of a federal government anywhere in the world and federalism is considered the central feature of the United States Constitution⁵¹.

⁴⁵ Mazzone P (2001) at 215-16.

⁴⁶ Kelso R (1999) at 815.

⁴⁷ Smith G (1995) at 5.

⁴⁸ Chen P (1999) at 859.

⁴⁹ Chen P (1999) at 859.

⁵⁰ Wheare K, *Federal Government* 4th Ed (1963) Greenwood Press, Connecticut at 1.

⁵¹ Berger R, *Federalism: The Founders’ Design* (1987) University of Oklahoma Press at 3.

“The principle of organization upon which the American association is based is that of the division of powers between distinct and co-ordinate governments.”⁵² It is this division of powers which informs the federal principle as it is generally known. Indeed, the United States provided a federal model which significantly influenced later constitutional designs and gave other states something to imitate, with the adoption of the federal principle in the Australian, Swiss and Canadian Constitutions, for example.

It is clear that the framers of the 1787 Constitution delegated substantial economic and regulatory powers to the Federal government, more so than in previous drafts⁵³. In fact, many theorists argue that the Constitution was rather more directed at achieving centralised government than it was about securing state power⁵⁴. For example, the Constitution granted the Federal government broad power to legislate “commerce between the several states” under the Commerce Clause⁵⁵. “Indeed, the poor condition of American commerce and the proliferating trade rivalries among the states were the immediate provocations for the calling of the Constitutional Convention.”⁵⁶ The scope and limits of the commerce power, however, have fluctuated throughout its history.

During the 19th Century, as new economic and social pressures emerged with advances in industrialisation, transportation and communication, Congress began to look at the commerce power as an attractive basis for the assertion of national regulatory authority to address a growing range of problems⁵⁷. This gave rise to such legislation as the *Interstate Commerce Act* of 1887 and the *Sherman Anti-Trust Act* of 1890. While the Supreme Court frequently struck down federal laws for exceeding the proper scope of the power in the early 1900’s, almost 6 decades passed from 1937

⁵² Wheare K (1963) at 2.

⁵³ Adams W, *The First American Constitutions* (1980) University of North Carolina Press, at 290.

⁵⁴ See for example Berger R (1987) *Federalism – The Founders’ Design*, University of Oklahoma Press at 48.

⁵⁵ Art I §8 cl3.

⁵⁶ Sullivan K & Gunther G, ‘Chapter 3 – The Commerce Power’ in *Constitutional Law*, 14th Ed (2001) Foundation Press, New York at 119.

⁵⁷ Sullivan K & Gunther G (2001) at 119.

where federal laws addressing problems not only of the national economy but of morality and criminality, anchored to the commerce clause, were routinely upheld⁵⁸.

During the presidency of Roosevelt, who came to the job in the midst of the great depression and grave economic crisis⁵⁹, Congress produced an “unprecedented flow of far-reaching measures”, many based on the commerce power. After a brief period of uncertainty⁶⁰, the New Deal measures were largely upheld⁶¹. In upholding the *National Labor Relations Act* of 1935 in the watershed case *NLRB v Jones & Laughlin Steel Corp*, Chief Justice Hughes noted, importantly, that:

“Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. The question is necessarily one of degree.”

The commerce power was relied upon to regulate industry, to curb racial discrimination⁶² and to control crime⁶³. This continued, until the decision of *Lopez*⁶⁴ in 1995 and *Morrison*⁶⁵ in 2000 in which the Supreme Court ushered in its new conservative, restrictive federalism jurisprudence⁶⁶. The Supreme Court seemed to be following the path of “dramatically curtailing the power of the federal government ... under the banner of states’ rights”⁶⁷. In both decisions, the Court struck down federal public welfare laws, in *Lopez*, a federal gun control law, and in *Morrison*, a statute addressing violence against women. This trend continued and saw the invalidation of social welfare and environmental protection laws and attacks on age and disability discrimination statutes which purported to abrogate States’ immunity

⁵⁸ Sullivan K & Gunther G (2001) at 119.

⁵⁹ Sullivan K & Gunther G (2001) at 130.

⁶⁰ See for example, *Railroad Retirement Board v Alton Railroad Co* 295 US 330 (1935).

⁶¹ See for example, *NLRB v Jones & Laughlin Steel Corp* 301 U.S. 1 57 S.Ct. 615, 81 L.Ed. 893 (1937); and *United States v Darby* 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609 (1941).

⁶² See *Heart of Atlanta Motel v United States* 379 U.S. 241 (1964) upholding Title II of *Civil Rights Act* 1964.

⁶³ See *Perez v United States* 402 U.S. 146 (1971).

⁶⁴ *United States v Lopez* 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995).

⁶⁵ *United States v Morrison* 529 U.S. 598, 120 S.Ct. 1740 (2000).

⁶⁶ Boudreaux P, ‘Federalism and the Contrivances of Public Law’ in *Saint John’s Law Review* 77 (2003) 523 at 523.

⁶⁷ Knowland D, ‘US Supreme Court Steps up Attack on Federal Regulatory Powers’ (17 June 2002) *World Socialist Web Site*.

from suit under the 14th Amendment.⁶⁸ This interventionist jurisprudence attracted much attention among constitutional scholars and prompted renewed debate about the federal division of powers and the legitimate role of federal regulation.

However, the Supreme Court seems now to have reviewed its former uncompromising position. In its most recent federalism decision handed down earlier this year, the Court rejected Nevada's claim to immunity from suit under the federal *Family and Medical Leave Act*⁶⁹. The *Act*, aimed at protecting the right to be free from gender-based discrimination in the workplace, invoked Congress's power to enforce the equal protection guaranteed by the 14th Amendment⁷⁰. The Court decided that unlike statutes dealing with age discrimination, for example, because gender discrimination will almost always be unconstitutional, the *Act* validly abrogated state immunity. The decision signals a brake on the Court's march toward states' rights and the undoing of important civil rights legislation⁷¹. Civil rights groups and constitutional scholars are now watching closely as the Supreme Court prepares to hear a case about state immunity from suit under the *Americans with Disabilities Act*⁷².

I suggest all of this demonstrates that the federal principle is very much alive, and healthy, in the United States today. American Constitutional law is inescapably bound up in the division of power and the balancing of regional and general authority. The federal principle is a dynamic and fluid concept capable of responding to social and economic pressures and which by its very nature incorporates a fail-safe design; where one government fails, another can step in. It demonstrates that federalism is a constant balancing act which allows individual rights to be protected and abuses of

⁶⁸ See for example, *Solid Waste Agency of Northern Cook County v United States Army Corps of Engineers* 531 U.S. 159 (2001); and *Federal maritime Commission v South Carolina State Ports Authority*; and *Board of Trustees of the University of Alabama v Garrett* 531 U.S. 356 (2001). See Biskupic J, 'Justices Affirm Family Leave Act' (27 May 2003) *USA Today*.

⁶⁹ *Nevada Department of Human Resources v Hibbs* 123 S.Ct. 1972 (2003).

⁷⁰ Greenhouse L, 'Supreme Court Ruling Increases Federal Power' (28 May 2003) in *The New York Times*.

⁷¹ Greenhouse L (28 May 2003).

⁷² *Tennessee v Lane* No. 02-1667. See 'The Supreme Court Returns' (6 October 2003) in *The New York Times*; Greenhouse L, 'Supreme Court's Docket Includes 48 New Cases' (6 October 2003) in *The New York Times*; and Frieden L, *Tennessee v Lane: The Legal Issues and the Implications for People with Disabilities – Policy Briefing Paper* (4 September 2003) National Council on Disability from <http://www.ncd.gov/newsroom/publications/legalissues.html>.

government power to be curtailed. As Mazzone argues, “[w]hen the national government and the states struggle over the appropriate division of governing authority and when the courts draw and redraw the constitutional divisions, new opportunities for citizens continually emerge”⁷³. Uncertainty as to which government will make the decisions on particular matters encourages larger, more powerful interest groups to spread their resources between the national and state governments and opens up more opportunities for smaller groups to pursue their agendas⁷⁴. Mazzone describes this struggle, then, as a healthy feature of federalism⁷⁵.

2. The Middle East: Nation Rebuilding

If federalism can work so well in America, can it, as has been proposed, work in Iraq?

Elazar argues that because of the very nature of the federal principle, in its underlying aim of combining shared rule and self-rule, it has a demonstrated utility in peacemaking⁷⁶. This is in part because the popularity of federalism has been accompanied by developments in constitutional techniques used to implement federal principles⁷⁷. It is not necessary, he argues, to confine the federal idea to the conventional federation. *(Instead, Elazar argues, there is particular merit in utilizing confederal arrangements particularly in the context of peacemaking⁷⁸.)*

The Public International Law and Policy Group recently published a constitutional primer for the rebuilding of Iraq⁷⁹. It works from the premise that constitutional design in Iraq will be aimed at democratisation and it explores the appropriateness and viability of various state structures which could be used to achieve this.

The report canvasses numerous constitutional structures, including, federation, as possible options for Iraq. While it does not go so far as to conclude that a federal

⁷³ Mazzone P (2001) at 233.

⁷⁴ Mazzone P (2001) at 232.

⁷⁵ Mazzone P (2001) at 215.

⁷⁶ Elazar D (1998) at 1.

⁷⁷ Elazar D (1999) at 14.

⁷⁸ Elazar D (1997) at 5.

⁷⁹ Public International Law and Policy Group and The Century Foundation, *Establishing a Stable Democratic Constitutional Structure in Iraq: Some Basic Considerations* (May 2003) at www.pilpg.org.

model is the best available option, it does explore the various considerations to be made if a federal model were chosen. On the whole, the report provides assurance that a well-constructed federation is a viable means of political restructuring for a region seeking to undergo the radical transformation from an authoritarian and oppressive regime to a representative democracy.

Significantly, this transformation is sought in a country lacking a democratic history and in a region lacking useful democratic models. It is sought in a country which for several decades was subjected to the totalitarian regime of Saddam Hussein. While there is no doubt that affecting such a major transformation is a confronting task, there seems to be general agreement among Iraqis for democracy, the protection of rights, and equality⁸⁰ and broad support for the adoption, to some extent at least, of federal principles. There are, though, significant substantive differences between proposed structures which will require intensive efforts to bridge.

Choosing a State Structure in Iraq:

In choosing a state structure, regard must be had to Iraq's unique internal and regional context.

Internal Context:

Iraq is described as having an "eclectic ethnic and religious make-up"⁸¹. Ethnicity and religion will significantly influence Iraq's choice of a state structure. The Kurdish population, based largely in the North, were subjected to "gross and massive" human rights violations under Saddam Hussein's regime⁸². With the protection of a no-fly zone by the British and United States, the Kurds have established a near-independent level of autonomy and quasi-democratic state institutions which they are unlikely to want to relinquish⁸³. The Kurdish proposal is for a confederacy made up

⁸⁰ Brooks D, 'Iraq's Founding Moments' (7 October 2003) in *The New York Times*.

⁸¹ Public International Law and Policy Group and The Century Foundation (May 2003) at 5.

⁸² Public International Law and Policy Group and The Century Foundation (May 2003) at 9.

⁸³ Public International Law and Policy Group and The Century Foundation (May 2003) at 9.

of Kurdish and Arab provinces with near equal powers and responsibility at a federal level and with most important powers devolved to them⁸⁴.

The majority Iraqi population, the Shi'a Arabs, were precluded from political participation under Saddam's regime⁸⁵. Having been freed from exile, the Shi'a Arabs have proposed a secular democracy and federal state structuring⁸⁶. Their proposal has attracted wide support from outside Iraq. The Iraqi National Congress, made up mostly of formerly exiled Iraqis, is keen to ensure the protection of minority and human rights⁸⁷.

The minority Sunni Arab population, however, having controlled the Iraqi government for decades under Saddam is likely to fear retribution from other groups and will be sceptical of any attempts to reduce their exercise of power⁸⁸.

Other minorities, including ethnic Turkomans and Assyrians which make up a substantial portion of Iraq's population, fear a lack of recognition of their identities where the focus is on resolving tension between the Kurds and the Arabs⁸⁹. These groups are keen to ensure the representation and protection of their interests⁹⁰.

Given that religious expression was suppressed during Saddam's regime, it is likely that Islam will feature in the political bargaining process as will the special interests of Iraqis in known political flashpoints such as Kirkuk, Basra and Baghdad⁹¹.

Regional Context:

In determining the most appropriate state structure to adopt, regard will also be had to regional interests. Both Iran and Syria have complex relationships with Iraq and with

⁸⁴ Public International Law and Policy Group and The Century Foundation (May 2003) at 8.

⁸⁵ Public International Law and Policy Group and The Century Foundation (May 2003) at 9.

⁸⁶ Public International Law and Policy Group and The Century Foundation (May 2003) at 8.

⁸⁷ Public International Law and Policy Group and The Century Foundation (May 2003) at 10.

⁸⁸ Public International Law and Policy Group and The Century Foundation (May 2003) at 9.

⁸⁹ Public International Law and Policy Group and The Century Foundation (May 2003) at 10.

⁹⁰ Public International Law and Policy Group and The Century Foundation (May 2003) at 9; see also Kamber E, 'A Post-Saddam Iraq Conference Series – Constitutional Issues and Federalism: Ethnicity and Justice in Post-Saddam Iraq' *Speech at the American Enterprise Institute* (3 March 2003) at <http://www.atour.com/government/docs/20030314a.html>.

⁹¹ Public International Law and Policy Group and The Century Foundation (May 2003) at 10.

the United States and may wish to protect themselves from a western-aligned democratic Iraq⁹². Turkey will wish to see a stable Iraq so as to avoid claims being sparked in its own territory for Kurdish autonomy⁹³.

Why Choose Con/Federation over Unitary State?

Despite the complexity of influences and demands among the Iraqis, there is a significant and important common commitment to unification and, though the degree of centralisation differs between proposals, a commitment to federalism⁹⁴. It is this commitment which is really the determinative factor in choosing a state structure. For a federal or federal-type structure to work, the people must desire it:

“[I]t would seem that federal government is appropriate for a group of states or communities if, at one and the same time, they desire to be united under a single independent general government for some purposes and to be organised under independent regional governments for others. Or, to put it shortly, they must desire to be united, but not to be unitary.”⁹⁵

From an examination of modern federations, it is possible to at least discern what common factors seem to lead to a desire for union on the one hand and separation on the other. Wheare suggests such an examination reveals half a dozen factors which seem always to be present in varying degrees as leading to a desire for union:

1. A sense of military insecurity and the concomitant need for common defence;
2. A desire to be independent of foreign powers;
3. A hope of economic advantage;
4. Prior political association between them;
5. Geographic proximity to each other; and
6. Some similarity of political institutions.⁹⁶

Of those factors, Smith is of the view that the drive for peace, security and economic stability are perhaps the most significant⁹⁷. Interestingly, Wheare notes that factors such as commonality of language, race, religion and nationality are absent from this list. Indeed, he notes that “it has proved possible ... to produce a desire for union

⁹² Public International Law and Policy Group and The Century Foundation (May 2003) at 10.

⁹³ Public International Law and Policy Group and The Century Foundation (May 2003) at 10.

⁹⁴ Public International Law and Policy Group and The Century Foundation (May 2003) at 15.

⁹⁵ Wheare K (1963) at 36.

⁹⁶ Wheare K (1963) at 37.

⁹⁷ Smith G (1995) at 6.

among people who differ in all these important particulars” and in fact that in some federations, such as Canada and Switzerland, it is the divergence of those particulars which drives the desire for federal unity⁹⁸.

Wheare also finds that there are three common factors which lead to a desire for separation within a unified state:

1. Previous existence as distinct colonies or states, or in the case of previously unitary states, the existence of provinces or administrative divisions;
2. Divergent economic interests between those distinct groups; and
3. A regional consciousness and geographic distance or isolation between those distinct groups.⁹⁹

Significantly, Wheare also notes that divergence of nationality, race, language and religion are also strong forces for separation¹⁰⁰.

There are at least three reasons why a unitary state might be preferred in Iraq¹⁰¹. The first is that it would substantially further a sense of nationalism and thus foster internal stability. The second is that this in turn would provide the best assurances to Iraq’s neighbours of its territorial integrity. Finally, a centralised government would, at least initially, be more efficient to administer.

However, there are several reasons why a unitary state would not be favoured among the Iraqis, not least of which is that fact that Iraq operated as a unitary state under Saddam¹⁰². In a unitary Iraqi state there would always be a risk that a single ethnic or religious group could exercise excessive influence over the interests of other groups¹⁰³. It would also be significantly more difficult to moderate radical interests at a local level without regional mechanisms. Perhaps of most import is the fact both the Kurdish population and those previously exiled have specifically rejected the unitary state option¹⁰⁴.

⁹⁸ Wheare K (1963) at 39 and 40.

⁹⁹ Wheare K (1963) at 40-41.

¹⁰⁰ Wheare K (1963) at 41.

¹⁰¹ Public International Law and Policy Group and The Century Foundation (May 2003) at 19.

¹⁰² Public International Law and Policy Group and The Century Foundation (May 2003) at 19.

¹⁰³ Public International Law and Policy Group and The Century Foundation (May 2003) at 19.

¹⁰⁴ Public International Law and Policy Group and The Century Foundation (May 2003) at 19.

Federation, or an arrangement incorporating federal principles, is a much more appealing option. “The primary advantage of a federal system is that it is designed for states in precisely the same set of circumstances that face Iraq – a diverse and pluralistic population with a desire to maintain national unity.”¹⁰⁵ A federal structure, if constructed properly, is more likely to safeguard individual rights and to secure effective representation in plural societies¹⁰⁶. It is more likely to reward compromise than zero-sum political competition¹⁰⁷. It is more likely to provide effective checks on majority power¹⁰⁸.

If a federal structure is chosen, a number of other decisions will need to be made¹⁰⁹. These include questions about the allocation of power, the number of constituent units, the type and extent of regional autonomy, and parliamentary and executive design. For the purposes of this paper, perhaps the most important consideration will be deciding which criteria to use in determining the boundaries of the constituent units. This question seems to me to be inextricably linked to notions of whether a federal arrangement can successfully be implemented.

Some commentators have cautioned that which makes federalism attractive may also render it unrealistic. A federation in which the constituent groups were divided along ethnic lines could, it is said, promote separatist tendencies and lead to the destabilisation of Iraq¹¹⁰.

The Kurdish population has proposed a structure drawn of two states, one Arab and one Kurdish. The idea of using subjective factors alone, such as ethnicity, religion or language, however, has been widely cautioned against¹¹¹. One commentator has set out four reasons in particular why such a structure should not be pursued. First,

¹⁰⁵ Public International Law and Policy Group and The Century Foundation (May 2003) at 20.

¹⁰⁶ Public International Law and Policy Group and The Century Foundation (May 2003) at 20.

¹⁰⁷ Phillips J, ‘Democracy, Federalism, and Realism in Postwar Iraq’, *Executive Memorandum No. 873* (2 May 2003) The Heritage Foundation from <http://www.heritage.org>.

¹⁰⁸ Walen A, ‘Federalism for Postwar Iraq: How Federalism May Make Democracy Work’ (10 April 2003) *FindLaw’s Legal Commentary* at http://writ.findlaw.com/commentary/20030410_walen.html.

¹⁰⁹ These are all canvassed in the Public International Law & Policy Group Report.

¹¹⁰ Public International Law and Policy Group and The Century Foundation (May 2003) at 20; Gelb LH, ‘The Three-State Solution’ (25 November 2003) in *The New York Times*

¹¹¹ Public International Law and Policy Group and The Century Foundation (May 2003) at 24.

division along ethnic lines alone would be difficult to construct in Iraq given that the ethnic groups, even the major ones, are not well concentrated in discrete territories. Second, many people have been moved from one region to another so that it would be difficult to determine which group would have the better claim to a particular territory. Third, such a division would be unfair to the minority ethnic groups like the Assyrians and Turkomans who would not “get a state of their own”. Fourth, such a division would simply reinforce the ethnic divisions which threaten to fragment Iraq in the first place.¹¹²

Elazar acknowledges that the use of federalism in the context of ethnic conflict can be particularly troublesome¹¹³. “[E]thnic demands are among the most exclusivist in the world and the same ethnic consciousness that makes federalism in some form necessary, makes it all the more difficult and less likely to succeed.”¹¹⁴ In federations, like Canada and Switzerland, where boundaries are drawn on along clear ethnic, language or religious lines, the risk of secession is more likely to arise. As Elazar summarises it;

“Where more than one ethnic group occupies a territory, that itself becomes problematic. Where one or only one does or where it is overwhelming, it may be tempted to secede rather than maintain a federal relationship with those whom it sees as its enemies. Under such conditions, only the sense of interdependence that goes beyond desires for separate ethnic identity can make federal relationships work.”¹¹⁵

There are factors in Iraq which lessen the risk of fragmentation. It has been noted that while there is significant divergence of ethnicity in Iraq, the population has mixed over time so that it is a sense of Iraqi rather than ethnic allegiance which has developed¹¹⁶.

“Federalism can strike a reasonable balance [that] ... would ensure that the provinces have sufficient autonomy to feel confident that they will not be oppressed by the national government [and] ... that the national government has sufficient strength that it will not collapse.”¹¹⁷

¹¹² Walen A (10 April 2003).

¹¹³ Elazar D (1997) at 4.

¹¹⁴ Elazar D (1997) at 4.

¹¹⁵ Elazar (1997) at 4.

¹¹⁶ Public International Law and Policy Group and The Century Foundation (May 2003) at 20.

¹¹⁷ Walen A (10 April 2003).

In Iraq, then, perhaps the single most important factor is the people's apparent desire for some form of federal unity. Whether this will ultimately be sought and achieved, is uncertain. What we do know, however, is that in another relatively nearby country which is facing the task of constitutional rebuilding, a much more centralised structure has been chosen.

Afghanistan's Draft Constitution

In early November this year, a new draft Constitution for Afghanistan was unveiled and formally presented to Mohammad Zahir Shah, the former king by the 35-member Constitutional Commission¹¹⁸. The draft is set for a vote in the grand assembly in December.

The draft, which names the country the Islamic Republic of Afghanistan, represents a significant step towards the rebuilding of Afghanistan after the fall of the Taliban. The draft "was designed with the intention of making it a model for international standards of democracy and human rights, while reaffirming Afghanistan's cultural and religious traditions"¹¹⁹.

Again, an examination of the context in which Afghanistan's constitutional rebuilding will take place is necessary to understand the extent to which federal principles would be appropriate.

Internal Factors:

For more than 2 decades, Afghanistan has suffered near continuous warfare and periodic drought and famine with a huge cost to the lives of Afghan people. There are significantly high rates of illiteracy and infant mortality. Infrastructure is virtually non-existent. There has been no effective central government for more than thirty years.¹²⁰

¹¹⁸ Gall C, 'King Receives Draft of Constitution' (4 November 2003) in *The New York Times*.

¹¹⁹ Gall C (4 November 2003).

¹²⁰ Public International Law and Policy Group Peace-Building Program, *Report of the Committee of Experts on National Rebuilding in Afghanistan* (10 December 2001) at 3.

Afghanistan is also the world's largest producer of poppies which bring a huge profit compared with other crops. Associated with this export trade is significant organised crime.¹²¹

Afghanistan has also come to be divided along ethnic political lines. “[M]ost governance in Afghanistan occurs at the local level, where ethnic and tribal political structures dominate the political bargaining process”¹²². In some areas, central authorities have exercised almost no control at all. Importantly, the Afghan people have expressed little interest in continuing this form of decentralised government¹²³.

The Public International Law and Policy Group has cautioned that a highly decentralised Afghanistan would be particularly problematic¹²⁴. The absence of the ruling Taliban has paved the way for warlords to reassert control over towns and cities. Most local leaders cannot be relied upon to guarantee peace or fairly enforce the rule of law. The numerous groups making up the anti-Taliban alliance now have no common enemy and so are likely to “pursue their own myopic interests and those of external sponsors”¹²⁵.

External Factors:

Afghanistan has also been subject to a long history of economic and political interference from its neighbours which will influence Afghanistan's rebuilding efforts¹²⁶. Traditionally, these neighbouring states have sought to promote their own strategic interests through their proxies in Afghanistan. The influence of the United States is also a significant consideration¹²⁷.

Why Choose Centralised Government?

¹²¹ Public International Law and Policy Group Peace-Building Program (10 December 2001) at 4.

¹²² Public International Law and Policy Group Peace-Building Program (10 December 2001) at 4.

¹²³ Public International Law and Policy Group Peace-Building Program (10 December 2001) at 4.

¹²⁴ Public International Law and Policy Group Peace-Building Program (10 December 2001) at 7.

¹²⁵ Public International Law and Policy Group Peace-Building Program (10 December 2001) at 7-8.

¹²⁶ Public International Law and Policy Group Peace-Building Program (10 December 2001) at 4.

¹²⁷ Public International Law and Policy Group Peace-Building Program (10 December 2001) at 5-6.

The overriding and long-term goals for Afghanistan are security, peace and stability. The destruction of Taliban rule has meant there are numerous important objectives to be achieved by a new government: economic development, agricultural reform, rule of law, democracy and human rights¹²⁸. Underscoring this is the common conviction to incorporate the country's deep-rooted Islamic traditions¹²⁹.

To this end, the draft establishes a strong central government with concentration of power in a democratically elected president rather than a provincial federation¹³⁰. The aim seems to be to shift the balance of power from Afghan provinces, regional allegiances and ethnic groups "where warlords rule like feudal princes", to a strong central government in an effort "to cast aside a quarter-century of conflict"¹³¹. In a country historically divided along ethnic lines, a provincial federation which legitimised local power would serve only to continue the destructive influence of local warlords. Here it is the need and desire for a sense of national identity among a war-weary people which is of primary concern¹³².

On the other hand, some commentators have cautioned against the adoption of a strong, centralised government fearing monopolisation by a single family, clan or group at the expense of minority groups¹³³. These commentators argue instead that the existing self-governing local communities should be recognised and built upon so as to reflect Afghanistan's ethnic composition and ensure minority groups are not marginalised¹³⁴. If nothing else, perhaps what this argument demonstrates is that federalism principles, whether or not they are called by that name, still occupy the thoughts of those pondering new forms of government, particularly where diversity and pluralism are key features.

¹²⁸ Public International Law and Policy Group Peace-Building Program (10 December 2001) at 2.

¹²⁹ Gall C, 'New Afghan Constitution Juggles Koran and Democracy' (19 October 2003) in *The New York Times*.

¹³⁰ Gall C (19 October 2003).

¹³¹ Herman B, 'New Afghanistan Constitution Features Strong Presidency and Islamic Principles' (4 November 2003) *Associated Press*.

¹³² The Secretariat of the Constitutional Commission of Afghanistan, *The Constitution-Making Process in Afghanistan* (10 March 2003) at 2.

¹³³ Shahrani M N, 'Not 'Who?' but 'How?': Governing Afghanistan After the Conflict' (October 2001) in *Federations: Special Issue on Afghanistan*, Forum of Federations at <http://www.forumfed.org>.

¹³⁴ Shahrani M N (October 2001).

What is clear from the draft is that the essential precursor for a decentralised, federal government is missing: the people's desire for it¹³⁵. As Elazar has summarised it:

“[W]here there is a positive attitude toward federalism and a will to build a federal system, where the political society involved rests on sufficient trust, ... where political culture is either favourable or at least open to federal arrangements, where all of this leads to a wider understanding of liberty as federal liberty, then federalism has a good chance of succeeding when used for peace-making. It may have almost as good a chance if most of those elements are present and some chance even if one or two of them is. But it seems quite clear that without any, the chances of success are extremely limited.”¹³⁶

However, it is arguable that the draft has at least been influenced by the federal principle of shared rule in respect of its usefulness in recognising cultural diversity and social pluralism. The draft provides for local authorities to be involved in both the legislative and administrative arms of government. Two thirds of the members of the House of the People (the *Meshrano Jirga*) of the National Assembly are to be drawn from among the freely elected members of the Provincial and District councils¹³⁷. The draft states, in part, that:

“The government, while preserving the principle of centralism, shall delegate certain authorities to local administrative units for the purpose of expediting and promoting economic, social, and cultural affairs, and increasing participation of the people in the development of the nation.”¹³⁸

This combination of strong national (presidential) government with a substantial measure of local representation and some delegation of authority to provincial and municipal bodies perhaps represents something of a compromise between unitary and federal models of government. What is important to note for the purposes of this paper, is that what the draft does not necessarily represent is an outright rejection of federal principles. Perhaps the Afghanistan draft serves as a contemporary example of Elazar's claim that federal principles can be adapted to suit many different structures. In this case, the importance of recognising diversity has led to the constitutional guarantee of local participation and representation in government.

¹³⁵ Elazar says in fact that it ethno-nationalist statism is the most difficult to accommodate in a federal relationship: (1998) at 6.

¹³⁶ Elazar D (1998) at 4.

¹³⁷ Article Eighty-Four, *The Constitution of Afghanistan Year 1382 (2003)*, English translation, Constitutional Commission of Afghanistan at <http://www.constitution-afg.com/resrouces/Draft.Constitution.pdf>.

¹³⁸ Article One Hundred and thirty seven.

3. The European Union and Other Post-Modern Confederal Arrangements

While federal arrangements may not suit every situation, the federal principle has assumed a leading role in the post-modern world. Where federal principles have been used they have often been called something else¹³⁹. The tendency to limit federalism to the modern federation model, however, overlooks the fact that “the essence of federalism is not to be found in a particular kind of structure but a particular set of relationships” and can therefore be sustained by a wide variety of structures¹⁴⁰.

Elazar argues that one such structure is the post-modern confederation of which the European Union is the leading model¹⁴¹. A confederation can be defined as:

“Several pre-existing polities joined together to form a common government for strictly limited purposes, usually foreign affairs and defence, and more recently, economics, that remains dependent upon its constituent polities in critical ways and must work through them.”¹⁴²

Elazar claims that while federation was the best-known form of federalism in the modern era, confederation, as it has been adopted by the European Union, is re-emerging as the post-modern manifestation of federalism¹⁴³. The transfer of important decision-making authority to the supranational level is described as “the new confederalism”¹⁴⁴. This re-emergence is, Elazar says, part of the worldwide paradigm shift from statism to federalism.

The European Union

At the end of the Second World War, statism was revealed as a failed model¹⁴⁵. Exhausted by the two world wars, the states of Western Europe sought “new forms of unity in diversity” to avoid the recurrence of such devastating war¹⁴⁶. “Interdependence of states rather than independence became the key to post-war

¹³⁹ Elazar D (1998) at 1.

¹⁴⁰ Elazar D (1994) at 8.

¹⁴¹ Elazar D (1999).

¹⁴² Elazar D (1994) at 9.

¹⁴³ Elazar D (1994), [2] at 1.

¹⁴⁴ Golove D, ‘The New Confederalism: Treaty Delegations of Legislative, Executive, and Judicial Authority’ in *Stanford Law Review* 55 (2003) 1697 at 1699.

¹⁴⁵ Elazar D (1994), [5] at 1.

¹⁴⁶ Cairns W, *Introduction to European Union Law* (1997) Cavendish Publishing, London at 12.

international relations”¹⁴⁷. This began tentatively with a set of treaties establishing economic links through “communities” to improve their competition in the world market¹⁴⁸. The first such treaty and example of supranational planning was the European Coal and Steel Community Treaty, built on the premise that wars between traditional enemies, France and Germany, would become virtually impossible as long as both were prevented from developing a substantial war industry by the removal of raw materials of war from national control¹⁴⁹. A natural consequence of this would be the economic benefit to all states brought by the enlarged market for coal and steel¹⁵⁰.

The European Union was a federal vision from the very beginning. Original expectations were for a federation in the conventional sense, and such a union failed. From then on, the idea of functionalism dominated¹⁵¹ whereby a system of linked functions were developed, piece by piece, through treaties giving power to unifying authorities for specific and limited purposes¹⁵². This piece by piece approach at unity allowed the states to preserve their nationalist tendencies while providing them security from further conflicts and the economic strength that would flow from unity. “Thus, without giving up their nationalist ideals, they were ready for limited but very real functional linkages.”¹⁵³ While the label of federalism has been avoided, Elazar maintains that the Union is essentially a federal enterprise. Others have submitted that the European Union is a form of “supranational federalism”¹⁵⁴.

The Maastricht Treaty of 1994 affirmed the confederation beyond any doubt. The European Community had evolved from consultative agreements to joint functional authorities, to confederal arrangements to confederation¹⁵⁵. By the time the European Community was renamed the European Union in 1994, these communities had

¹⁴⁷ Lasok D, *Law and Institutions of the European Union*, 6th Ed (1994) Butterworths, London at 4.

¹⁴⁸ Elazar D (1999) at 3.

¹⁴⁹ Lasok D (1994) at 4.

¹⁵⁰ Lasok D (1994) at 4.

¹⁵¹ Lasok D (1994) at 4.

¹⁵² Elazar D (1999) at 4.

¹⁵³ Elazar D (1999) at 4.

¹⁵⁴ Bogdandy A, ‘The European Union as a Supranational Federation: A Conceptual Attempt in the Light of the Amsterdam Treaty’ in *Columbia Journal of European Law* 6 (2000) 27 at 28.

¹⁵⁵ Elazar D (1997) at 8.

developed into a new-style confederation as much a new political invention as the United States invention of federation in 1787¹⁵⁶.

In an even more innovative step, the European Union has most recently set its sights on drafting a single constitutional document. In 2002 the Convention on the Future of Europe was convened marking a new chapter in the Union's development. Almost a year later, a draft Constitution has been unveiled. This constitutionalising process has been described by one scholar as "the latest episode in the history of one of the most audacious experiments in governance ever launched since the Philadelphia Convention that passed the U.S. Constitution"¹⁵⁷. The draft has been formulated against the background of increasing sovereign powers being transferred to the Union's own institutions from the member states and increasing territorial application of the Union with a further 10 countries set to join the Union late in 2004¹⁵⁸.

What is particularly significant about the draft is the fact it is being pursued. Historically, the Union has adopted the approach of gradualism to evolve ever closer to union through "incremental, carefully scoped progressions"¹⁵⁹. The fact constitutionalisation is being pursued indicates an intention to achieve full political integration¹⁶⁰. The original skeletal draft proposed by Monsieur Giscard, President of the European Convention, envisioned Europe as a federal union of states equipped with legal personality¹⁶¹. While the word 'federal' does not now appear in the draft, Article 1 is still clearly influenced by the federal idea of combining shared rule and self-rule:

"Reflecting the will of the citizens and States of Europe to build a common future, this Constitution establishes the European Union, on which the Member States confer competences to attain objectives they have in common. The Union shall coordinate the policies by which the Member States aim to

¹⁵⁶ Elazar D (1999) at 3.

¹⁵⁷ Puder M, 'Constitutionalizing the European Union – More than a Sense of Direction from the Convention on the Future of Europe', in *Fordham International Law Journal* 26 (2003) 1562 at 1563.

¹⁵⁸ Puder M (2003) at 1565.

¹⁵⁹ Puder M (2003) at 1568.

¹⁶⁰ Puder M (2003) at 1570.

¹⁶¹ Puder M (2003) at 1583.

achieve these objectives, and shall exercise in the Community way the competences they confer on it.”¹⁶²

In this sense, one scholar has submitted that “the European Union is either rapidly approaching or has already crossed the elusive line which separates a purely confederal arrangement from a genuine federal government”¹⁶³.

The Caribbean Community

While Golove cites NAFTA, the WTO, the Chemical Weapons Convention, the Kyoto Protocol and the International Criminal Court as examples¹⁶⁴, Elazar claims the second most developed (new) confederal arrangement is the Caribbean Community embracing the Islands formerly of the British West Indies¹⁶⁵. The Islands made a failed attempt at federation in the 1960’s but since then retained and established an assembly of functional authorities for several different purposes including:

- Economic development through CARICOM (the Caribbean Common Market);
- Education with the common University of West Indies;
- Currency;
- Administration of Justice with a common Supreme Court;
- Defence; and
- Foreign relations.

The Caribbean Community was formally established by treaty in 1974. It is principally concerned with economic cooperation, foreign policy coordination and functional cooperation in areas such as health, education, culture, sport, science and technology and tax administration¹⁶⁶. Administered through various Conferences, councils, secretariats, standing committees and associate organisations, and with its own flag, it has slowly evolved into a confederation in all but name¹⁶⁷. The Community demonstrates the utility of federal-type principles in balancing state autonomy with necessary union for limited purposes. Confederation works in the Caribbean Community because despite the insularity of the islands, they could not

¹⁶² Article I-1: Establishment of the Union, *Draft Constitution, Volume I*, CONV 724/03, The European Convention, 26 May 2003, Brussels.

¹⁶³ Golove D (2003) at 1697.

¹⁶⁴ Golove D (2003) at 1697.

¹⁶⁵ Elazar D (1999) at 13.

¹⁶⁶ Elazar D (1999) at 14.

¹⁶⁷ Elazar D (1999) at 13.

support a full range of governmental institutions and nor could such institutions effectively serve such small territories by themselves¹⁶⁸.

Common Features of New-Style Confederations

The revival of confederation, Elazar argues, is made possible by the development of a new constitutional technique¹⁶⁹. Whereas a conventional federation rests on a single written, comprehensive constitutional document, these new-style confederations adopt limited constitutional agreements on specific topics. Such an approach allows the constituting states to agree only to those functions which they want to provide in common while reserving more powers than it is possible to maintain in a federation¹⁷⁰. These confederal arrangements adopt rather more collegial institutions than the conventional executive or parliamentary institutions common to federations. Elazar argues that the more developed the institutions become, the more integrated the confederal polity so that a parliamentary arm would be the last to develop being that it requires a much higher degree of integration.¹⁷¹ (The European Union's constitutionalisation process would suggest, therefore, that it is moving to a much higher degree of integration.) The very nature of the confederal solution, therefore, indicates the contemporary utility of federalism in its broad sense (as a principle concerned with the combination of self-rule and shared rule) of embracing diversity in unity.

This realisation has potentially enormous consequences in the current context of globalisation¹⁷². It shows that "... nations can live together and work together, that they can solve their differences amicably and, where need be, through appropriate legal and judicial process. It has demonstrated that the concept of a Community is not only viable but also capable of growth and development."¹⁷³

¹⁶⁸ Elazar D (1999) at 13.

¹⁶⁹ Elazar D (1999) at 14.

¹⁷⁰ Elazar D (1999) at 14.

¹⁷¹ Elazar D (1999) at 15.

¹⁷² Elazar D (1999) at 2.

¹⁷³ Lasok D (1994) at 5.

Conclusion

The advantages and disadvantages of federalism as a constitutional model is a dominant theme in contemporary political and legal discourse. The mechanics of federalism continue to be a dominant theme in contemporary judicial decisions. It will be interesting to see whether federalism fulfils its promise of being a transformative model to encourage unity, diversity and stability with due recognition of minority rights.