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FEDERALISM IN THE MIDDLE EAST AND EUROPE^{*}

Chibli Mallat[†]

By addressing the topic of federalism in the Middle East, we could be breaking new ground in an area where clearly old models failed, or are failing before our eyes.

This is typically work in progress. Some of it is well established – and is much better known than any observer can express it from without. Some of it is in the making, in a way which is momentous in history. And some of it is still farfetched, but may provide an inevitable horizon for societies that are looking for conviviality by way of law.

Federalism is well known in its first, well-established dimension thanks to the extraordinary tradition this country has known. It is less known and is currently a big battle in progress in Europe. It is completely unknown and is, I think, the intellectual battle to come in the Middle East. So, these will be my three perspectives. Again, this is work in progress because it forges itself out *in media res*, and requires some generosity towards its fluid approximation sometimes, banal statements at other times, and simply erroneous conclusions by way of evasive comparisons through a single concept like federalism.

But first, it may be useful to offer a preliminary note of caution by taking stock of the fact that federalism operates as a concept within a larger non-legal and non-constitutional framework of societies, national and international.

^{*} Lecture given at Case Western Reserve University School of Law in February 7, 2002. Despite the profound changes in the field since (new fundamental basic laws and constitutions in the European Union 2003, Afghanistan 2003 and Iraq 2004), I have kept to the original text of the lecture, introducing only minor changes. An updating would have required a complete overhaul of the original lecture, which may be better appreciated in its original, prospective form. I am grateful to the editors of the CWRU Journal of International Law for ascertaining quotes and references, and to Professor Hiram Chodosh who invited me to address this difficult topic.

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I

The model in which federalism can be inscribed is ambitious, but is particularly helpful as a common ground for all three societies. This model is emerging for the analysis of society and states in the late 20th century through the tripartite separation between the cultural (also called ideological), the political (also dubbed juridical or legal), and the economic. On that tripartite basis is projected either a unionist model or a separatist one. When union is sought or defended, the lines examined follow the tripartite analysis. When secession is envisaged or analyzed, the grid is similarly divided into these three dominant prisms of the same object of analysis – society within a state, and society within a transnational and international system.

A detour helps ascertain the tripartite theory and its effectiveness, which Fernand Braudel, the great French historian, offers in his *Grammaire des civilisations*.¹ Its clearest theoretician in the late 20th century is another Frenchman, Robert Fossaert, who is not well known, unfortunately, even in his native France. This is partly because he secluded himself from the whirlwinds of academic life to devote himself to research, which is as ambitious as it is formidable. His *summa* in six volumes, called *La Société* and published between 1977 and 1983, offers a clear and engaging journey carried out in a spirit of unity, nuance, rigor and comprehensiveness.² Fossaert's approach offers a framework for each of the three sub-analytical categories in the shape of a three-faced prism in which the study of society is engaged. Society in the theory is singular, but it should and can be observed analytically under each of those three facets. Each facet, in turn, offers a full view of society as a whole with additional factors obtaining from the interrelationship between the three facets within the given society or state or in an international context. Some such factors could for instance be the role of gender, or leadership. Another factor, which has been bearing increasingly heavily on the nation state and society, is the so-called globalization of the late 20th century. Ours presently is federalism.

Now, the models and the other factors in Fossaert's theory are also dynamic. Any factor operates horizontally, and looks at society under three facets. It is, also, both domestic and international. In addition, approaching the same factor in its effect on the social, forces a looking at the subject matter, society, along a historical continuum – that is, society as it goes rather than as a simple snapshot arrested in time.

¹ FERNAND BRAUDEL, A HISTORY OF CIVILIZATIONS (Richard Mayne trans., 1994) (1987).

² ROBERT FOSSAERT, LA SOCIÉTÉ (Paris: Editions du Seuil) (6 vols., 1977-1983). Two further, separate books complete the study. ROBERT FOSSAERT, LE MONDE AU 21ÈME SIÈCLE (Paris: Fayard 1991), ROBERT FOSSAERT, L'AVENIR DU SOCIALISME (Paris: Stock 1996). For more recent material, see <http://www.macrosociologie.com>.

It is against this complex, but extremely effective model that the reflection on federalism should be engaged both in terms of the Middle East and in terms of Europe. In its construct, federalism is an alien concept operating as a transversal construct affecting a number of states. The construct sometimes simply does not exist as agreed legal-constitutional set-up, but its programmatic projections are increasingly present whether manifestly as the battleground of ideas and political positioning, as in Europe, or *sotto voce* as a potential ground which is still looking for its voices, as in the Middle East.

Federalism is the quintessential American invention. I have had occasion to dwell on it recently in a work which was published in English as a long series of newspaper articles which accompanied the 2000 presidential campaign in America, and appeared in book shape in Arabic in August 2001.³ It dwells on what makes America successful, its achievements, but also its limitations, and concludes that the excellence of law is one of the two distinctive features of pride for the American model – the other being science. While this rooting in law is not particularly new to an American audience, what one may not perceive as strongly from within the US is how much the world has been Americanized in terms of law.

Laurence Tribe, in *Constitutional Choices*,⁴ summarized what he calls the underlying political ideas of the American system into a list of six categories: representative republicanism, federalism, separation of powers, equality before the law, individual autonomy and procedural fairness. America has shared many of these traits with other democracies for a long time, but two constitutional features stand out on a world level as typically American – federalism and the Supreme Court. The American people deserve credit for both inventions which brought new dimensions to democracy and the rule of law for the rest of the planet. Perhaps America does not know it, but the world has been a consistently better place wherever her two home-grown intellectual products have found anchor. In contrast, and as further illustration to this point, federalism and the protection of law by an independent supreme court appear as the two missing ingredients for a peaceful and creative future in the many countries and regions that do not know them.

Save for the Civil War, which unleashed exceptional violence over the contours of power, the United States has indeed experimented peacefully with federalism since 1787. Its basic staples include freedom of movement for people and capital, and full faith and credit clauses for criminal and civil cases. Its more difficult terrains are much more intertwined and much more complex than the recognition of state jurisdiction and state decisions, or the

³ CHIBLI MALLAT, *DEMOCRACY IN AMERICA* (2001). The chapters developed into the book appeared serially in English in *The Daily Star*, and in Arabic in *an-Nahar*. The original English series can be found at <http://www.mallat.com>.

⁴ LAURENCE H. TRIBE, *CONSTITUTIONAL CHOICES* 25 (1985).

inherent treatment of movement or investment in labor. More difficult and complex terrain continues to be arbitrated by the federal courts two centuries hence. For example, in *Travis v. Reno*,⁵ the Seventh Circuit decided that Congress could prevent South Carolina from releasing data gleaned from driver's license applications to third parties who might use them to further their commercial interests. A few weeks later, the Supreme Court ruled that the state of Massachusetts could not bar local companies from doing business with a foreign country, in this case Myanmar, if Congress had taken up the issue.⁶ These are simple, serendipitous examples. In important and less important matters, federalism keeps getting reinvented by the robust competition between individual states and by the arbitration of a respected judiciary. Federalism is safe and secure in the everyday practice of democracy in America.

The oft-repeated 1932 quote by Justice Brandeis is another alluring characteristic of American federalism. The citation in his dissenting opinion is well known: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."⁷ Replace "country" with "planet," and the global answer follows. This takes us abroad, where the model is now being tested.

In its European dimension, federalism has been on the march since the Treaty of Rome.⁸ In its "Third world" dimension, federalism is inevitably the shape of things to come within and between countries in the Middle East, Southeast Asia, South America, and the luckier parts of Africa and the former Soviet Union. Examples of federalism abound, of course, from Malaysia to Nigeria. Where it is absent, as in the Middle East, it carries much promise. In the same way a decent future for Iraq or Turkey can only be federal within each country's borders, the emerging shape of Arab-Israeli peace must consider, for long-term success, federalism's hard-to-adopt central features of freedom of movement for business and labor. For Europe, another essential feature of federalism is still wanting, hence, the talk of the democratic deficit in the European Commission which stands in the way of Europeans, in their ever-closer union decreed in the opening passage of the founding Treaty of Rome in 1957.⁹ The details are daunting, but that is the proper dimension of the federal common ground. That is, even though the general patterns may well be established, there is always need for the growing of barriers and qualifications between states and between people living in different states. It is the ambiguity of federalism

⁵ *Travis v. Reno*, 163 F.3d 1000 (7th Cir. 1998), *cert. denied*, 528 U.S. 1114 (2000).

⁶ *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000).

⁷ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

⁸ Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter Treaty of Rome].

⁹ *Id.* preamble.

and the extraordinary role the Supreme Court in the US, and the European Court of Justice in the EU, grant to this ambiguity in their jurisprudence that constitute the basic and fundamental condition of federalism across the Transatlantic board. While the testing of new areas of conflict continues more or less successfully in “an ever closer” Europe, the federal paradigm is well entrenched as the measure of both achievement and shortcomings of the European Union, as it has been for two centuries in the States of united America.

The Supreme Court is the other great democratic improvement made in America. But let us look at it here in its relationship with the concept of federalism, as the ultimate arbitrator of the problems that might arise in the application of the system. In short, alongside the common underlying political ideas of most democracies, the concept of federalism and the presence of the Supreme Court as the readily available recourse of the citizen seeking his or her rights under the Constitution stand as the two pillars of the matrix sought to forge ahead on the international scene.

The question, therefore, is how much of this federal experiment is being knowingly or unknowingly processed now, in two great continents generally described as the Middle East and Europe. I will start with Europe because this is where the debate has been the most conscious and developed over the past few years.

II

It is perhaps best to start with the end – with the Treaty of Nice, and the way federalism was being developed to compensate for the most daunting dimension of European unionists, which is Europe's democratic deficit.¹⁰ We face in Nice the reality of a shortcoming – the Treaty of Nice did not meet the expectations of European federalists who were hoping to establish it by the end of the intergovernmental conference in December 2000. Shortly after Nice, the European Commission tried to show good will and treat Nice as if it was a success. Indeed, it was not. So Romano Prodi, the president of the Commission, and Jean-Luc Dehaene, the Commissioner who was in charge of institutional reform in Europe, dwelt on what had been achieved in Nice as a rosy achievement: The Commission, they explained soon after the Nice meeting came to an end, would include twenty-seven to thirty areas in which a qualified majority, rather than a complete consensus, is sufficient to decide. In these areas a majority could prevail, and action would not be frustrated by the otherwise consensual rule that has prevailed in Europe until then in these fields. At the same time they argued that Nice was not an objective *per se* and that it

¹⁰ Treaty of Nice, Protocol on the Enlargement of the European Union, Feb. 26, 2001, O.J. (C 80) (2001).

was only the means to prepare the ultimate historical objective to the ever closer union in Europe.

On the more objectively successful achievement of Nice, they also portrayed Nice as a moment of a revolutionary enlargement, underlining the decision to open the Union up to another thirteen or fourteen member states within a reasonable time frame, about ten years, and emphasizing that the enlargement was taking place at the pace that would be acceptable for both the European Court and the many countries that were seeking to join the union. Still, everybody knows that in the bazaar-like bargaining that took place in Nice, the states were still operating very much as selfish entities that cared more about their immediate interests than they cared for the development of Europe.

A year after Nice, one had to recognize that the enthusiasm had lapsed in Europe. This lapse is a downturn not uncommon in the history of the European Union. There were periods notably between the mid 1960s and the late 1970s when the only tangible progress in the European Community as it was known was the European monetary system introduced by Helmut Kohl and Valéry Giscard d'Estaing in order to create a new dynamism, indeed a signal economic achievement which eventually led to the emergence of the Euro.

There are periods in the history of Europe where one feels that "one step forward, two steps back," is much more characteristic of the construction of the union than the opposite, as in the continued deadlock of "unanimity" introduced back in 1966 by the so-called Luxemburg Compromise when, in the face of the objection of De Gaulle's France, the EC states agreed that on a matter that anyone considers as of national interest, only unanimous decisions would be allowed to prevail.¹¹ But that should not prevent us from looking at Europe as something that has been a great success in terms of the union of hitherto totally independent and warring nation states; and a great success within our discussion should be considered in the terms that made Europe such a *sui generis* conglomeration of states with great potential, rather than in the shortcomings the atmosphere of the Treaty of Nice temporarily suggest.

It is always useful to recall that Europe is a construction in terms of law, a legal construct which is characterized by a great complexity of legal texts as well as an accumulation of treaties, with each treaty correcting the former legal arrangement. This creates an extraordinary maze of legal texts that citizens of Europe find difficult to maneuver through. Still, there is one unifying dimension to Europe, which like the US Supreme Court founding decision,¹² appeared early in 1964 in the decision of the Court of Justice in

¹¹ The Luxembourg Accords of 28 and 29 January 1966, Bulletin of the EEC, March 1966 (3-1966), reprinted in JAMES D. DINNAGE AND JOHN F. MURPHY, THE CONSTITUTIONAL LAW OF THE EUROPEAN UNION 215-16 (1996).

¹² *Marbury v. Madison*, 1 Cranch 137 (1803).

Costa.¹³ That decision, like *Marbury*, offered a formidable precondition for the federalist rights of the states of the European Union by way of making communitarian law, as it used to be called, to prevail over any national law, whether that national law is subsequent to or antecedent to the treaty with which that law may be incompatible.

Costa said that unlike international treaties, the European treaty has established its own juridical order, which is integrated into the legal systems of the member states, and which imposes itself on their jurisdiction. We find application of this founding ruling of the European Court of Justice in a large number of decisions in an amazing array of fields, including competition, freedom of movement and establishment, and immigration. It has also reverberated into the very internal system of case law within each member nation state. For example, in the 1977 case known as *Simmental*, the court held that a national judge who is in charge of applying, within the framework of his competence, the dispositions of communitarian law, has the obligation to ensure the full effect of these rules by leaving, if necessary, unapplied on his own authority any country disposition of the national legislation.¹⁴ He does not even have to wait for the elimination of that national disposition by legislative fiat or by any other constitutional process.¹⁵

In other words, a situation developed within the nation-states of Europe where a law passed in France or in Germany will not stand before a law passed at the level of the European Union. This is true even if European Union law has taken the form of a directive, a lower level law-making tool in Europe. For example, the Cour de Cassation, France's highest court and the apex of the civil law system in France, cannot issue a judgment which is contrary to a simple directive passed by the European Union. Hence, the structure of the extraordinary federalism, which by way of the court, has established two conditions in the European system. The first is the presence of a supreme court, the European Court of Justice ("ECJ"), which operates by way of referral, – which limits its sway somehow, but still by way of a referral that becomes mandatory whenever a disposition of European law is at stake in the system. The second is the large array of decisions within each of the fifteen jurisdictions in Europe establishing the primary dimension of European law even over decisions of its own national courts.

In some cases, there is a problem with the standing of the constitution in these countries with regard to the decisions of the European Court of

¹³ Case 6/64, *Costa v. Ente Nazionale Energia Elettrica*, 1968 E.C.R. 585 (determining that the European Economic Community treaties established a constitution and treating its constituent nations within a European system rather than as sovereign entities).

¹⁴ Case 106/77, *Amministrazione delle Finanze Dello Stato v. Simmental SpA (II)*, 1978 E.C.R. 629.

¹⁵ *Id.*

Justice. But even there, there is no flat denial of the ECJ's writ. This is best exemplified in the *Solange* decisions of the German Constitutional Court,¹⁶ which in recent years has hesitated to deny a place for the German Constitution over and above European law in one of its most basic entrenchments – human rights. Despite the German hesitations, the supremacy of European law and its integration into the system will appear familiar in terms of federalism under supremacy of the United States Constitution as interpreted by its Supreme Court since the early days of the Republic.

With the integration on the judicial level, which can be portrayed as the most important legal contribution to the rise of federalism in Europe, one has to dwell also on the development in the legislative field by way of the concept of 'qualified majority', included openly in the Treaties of Amsterdam and Nice. Under qualified majority, the states have a number of voices whenever a decision has to be voted upon, which is a complicated apportionment of population and political importance in each state for matters that do not run under the consensual agreement. In other words, Europe has inched away from unanimity, with complex logistical arrangements that trump consensual, unanimous decisions by all the member states, and which operate alongside the slow build-up by the European Court of Justice of the body of case law that is considered *sui generis*, – *sui juris* indeed as the new constitutional order of Europe. Nor can one omit the extraordinary achievements by way of the common currency that is now in place in twelve European countries. All of this is on the side of the achievements of European federalism.

On the side of problems that are still important in the system, we have witnessed in the past years a tempestuous debate over what is known in Europe as the "F word." The concept of federalism itself is hotly debated within larger discussions on "good governance" and "democratic deficits." These discussions on governance have their federalist supporters, most prominent among them is Germany's Foreign Minister. In a speech last year, he advocated strongly for a system that obviously resembles the German federal system, a system which takes its *titre de noblesse* from the American precedent. The idea is to establish two chambers – one would be the chamber of citizens voting across the Union and the other would be a chamber that would represent the member states. The election of the president would take place with universal suffrage. These recommendations are being advanced in an active and politically engaged manner by the Germans against which there are a large array of positions, and some, like Great Britain's leaders, oppose the very idea of federalism. Other players who are more engaged in terms of the construction of Europe,

¹⁶Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratstelle fuer Getreide and Futtermittel (*Solange I*) [1974] 2 CMLR 540 (F.R.G.); Case 69/85, Wuensche Handelsgesellschaft and Co v. Germany (*Solange II*), 1986 E.C.R. 947.

like the French, are talking of a more nuanced “federation of nation states” rather than of a federation along the lines of America as more openly advocated in Germany: in terms more familiar to comparative jurists and political scientists when it comes to details, it is easier to defend federalism along the lines that the American system has developed, if only because it has such a powerful history behind it, but some of the concepts are hybrid even in the discussions. For instance, the election of a president of the Commission by universal suffrage would seem acceptable to the French, but doing away with the present weighting of votes in favor of straight majority-rule is not something that would be supported in Paris at this stage. One can also see the difficulty, in a few years, in having a large union without an arithmetic mechanism that does away with the complicated system Nice established.

In addition to these conscious, open debates, over federal issues, one contribution is typically European. That contribution has developed over the past ten years under the concept of subsidiarity. Since the Nice Treaty, the European Community, “in areas which do not fall within its exclusive competence . . . shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.”¹⁷ This is a complex definition, which can be translated in more simple terms: if the European Community’s objective can be achieved at a lower level (for instance states, or regions), then there is no reason why the upper level should intervene and legislate on that subject. Subsidiarity is an old concept which curiously appears in Papal encyclicals in the 1930s, but the problem is that there is not a single decision of the European Court of Justice which adjudicates subsidiarity. As long as there is no illustration of real conflicts between the lower level which is advocating its competence over a given field, and the higher level - most probably the Commission - in that field, the concept of subsidiarity will remain abstract and withdrawn from the daily life of the citizen as she lives it in European context.

To conclude this section on the path of European federalism both in its achievements and in the problems that it conjures up as a society in progress, perhaps the great contribution of Europe will be to devise not so much a working definition of subsidiarity – the definition as it stands in the treaty is good enough – but to offer practical areas in which the concept of subsidiarity can be adjudicated in a real conflict. A real conflict would not so much operate between the regions at the lower level and the Commission in Brussels, an inter-institutional operation which is handled well enough so far, but in practical problems that would directly engage the citizens. It is only when we see a citizen or a group of citizens suing in the European

¹⁷ Treaty of Rome, as amended, *supra* note 8, part V, art. 3b.

Court of Justice in order to vindicate decision-making closer to home for them, rather than a directive or regulation descending on them from Brussels, then typically European federalism will have come of age.

III

Let us now examine the area where some creativity is expected on my part, which is the issue of federalism in the Middle East. We can start with the following daunting question: why is it that in a region that is obsessed by unity, (that has been obsessed by unity at least for the past hundred years, where the concept of the Arab world is one that has been on the lips of everyone as a necessary passage for reform and strength at the regional level), why is it that not a single experiment of unity in any shape has succeeded so far beyond the existing nation states in their arbitrary boundaries delineated at the turn of the century by the former colonial powers? This paradox can be put even more forcefully. Why is it if one looks at this region into the smaller prism of those nation-states that have been the subjects, or vectors of international relations and of the rule of their citizens for the past seventy or eighty years, they all appear on the way, either indirectly or directly, of collapse? Why is it that the open reality of secession is more prevalent than the structure that has been inherited from colonial powers?

Examples are plethora: why have there been so many problems between south and north Yemen? Why is there continuing civil war pitting the south of Sudan against the north of Sudan for the past thirty years? Why is it that the Kurdish area north of the 36th parallel is one where the writ of Baghdad does not hold any sway? Why has Lebanon experienced a twenty-year civil war between its various regions? Why is the Palestinian problem so intractable between the very entities that form the historical Israel-Palestine compound? These questions not only address why unions have not been found in the Middle East, but why even within the nation-states that have been recognized and defended over the past fifty years, the system is bursting at the seams. Well again, there would be a number of explanations for this. One of my preferred ones, bizarre as it might sound, is that federalism is an invention, a construct that comes by way of education, and that legal education has never carried it in the area.

The greatest resistance in Europe to the concept of federalism comes from Britain and France. Neither country, because of historical reasons relating to their legal systems, has had any experience with federalism. And because of the fifty-years – on average, France ruled Algeria from 1830 to 1961 – of colonial domination these two countries exclusively exercised over the Middle East, the word “federalism” was never uttered in law schools and judicial systems. Put differently, there is no reference in the Middle East to federalism because the way legal education has been conducted for the past hundred years has been entrenched in the British and

French models, and thus in Egypt, Lebanon, Iran, and Iraq. Since the federal horizon did not appear in their textbooks, it is difficult for students, attorneys, judges or legislators to make a jump into the unknown, a jump that even the Europeans have difficulty making.

Even in Europe, there are problems along national lines that obtain from the lack of federal constructs in legal education. The countries that have experimented with federalism domestically, like Spain since 1978 and Germany since 1949, find it much easier to utter the word than countries like France and Britain where the concept has remained alien from their own legal tradition. Now project this reluctance onto the Middle East where there is no federal construct, and you have a real intellectual problem dealing with the word federalism for which there is no affinity because none of those natural vectors – law students, the judges, the law professors – have had to grapple with it in law school, let alone in less specialized fora.

This might sound bizarre, but I think this is one of the major elements that explain why the Middle East federal experiment is lacking. There is no recognizable dimension in which the legal profession can identify with federalism in order to project it on their own selves. And how needed that is! Let us take the example of Iraq. As you know, Iraq is one of those typical countries where "national unity" is lacking. National unity is lacking because of the many dimensions of Iraqi disunity – sociologically and historically between Arabs and Kurds, and within Arabs, between Shi'is and Sunnis. About 20% of the population of Iraq lives in a geographical continuum north of the 36th parallel. That region is mainly inhabited by Kurds, who speak a different language and have a different "national tradition" than the Arabs who live in Baghdad and south of that line. But there is also a curious fracture within Iraqi society between Arab Sunnis and Arab Shi'is. Shi'ism and Sunnism are the two main sects in Islam, historically somewhat similar to Catholics and Protestants in Christianity. And the divide is sociologically very heavy in the history of Iraq. As a result of those fractures, there is no proper accounting of how the society is exactly divided in terms of population and percentages. But it is presumed that the Iraqi population is comprised of approximately 60% Arab Shi'is, 20% Arab Sunnis, and 20% Kurds, mostly Sunnis. One can see how the three elements are additionally intertwined in terms of geography, because the line between the north and the south which marks the so-called 36th parallel operates relatively well to demarcate Arab and Kurdish Iraqis (and even then, there are quite a few Kurds who live in Baghdad, and many Kurds are more conversant in educated Arabic than in Kurdish), the geographical line simply does not work as a demarcation between Sunnis and Shi'is.

In a situation like this, and however thorny its application in practice, it is clear that the only model that can offer some sort of respite, some sort of room for those communities to flourish, is a federalist model. It would

allow new spaces to be created, both in terms of autonomy and interaction. But we are fighting one major problem: over the past thousand years, Iraq has been “unified.” In more recent times, the mere thought of federalism has always appeared as a secessionist ploy either put forward by the Kurds or put forward by the Shi‘is. It is a problem you will still hear now in the Arab world, that any intervention by America in Iraq is bound to blow it up. This should not deter us from trying: since 1992, with colleagues in Europe and the Iraqi opposition, we have been instrumental in putting federalism forward as a leading concept for the constitutional alternative in Iraq. Leading figures of the Iraqi opposition, with whom I worked for a long time, have realized through a slow process of persuasion, that a federal Iraq must be thought through, and thought through in a creative way that takes into account the diversity and complexity of populations in Iraqi society.

This is going to be the major problem of the future of Iraq. That is, in any situation where the central government is overthrown, then the great problem is going to be how these communities are going to interact. And this creates yet other problem, which is particularly interesting in the Middle East in the same way as the concept of subsidiarity may be a major European addendum to the federal template the American tradition has offered to the world for the past 200 years. I am referring to what I call, for lack of a better term, communitarian federalism. Communitarian federalism is not based on geography. As you know, federalism in all the states that have practiced it is essentially territorial, geographical. You identify an area of the country and give it some sort of a fictive boundary. Within that boundary, you establish the autonomy and the autonomous institutions that are needed for a federal system to project the voice of the people within that region in a way that keeps the country together, but gives much leeway to those nearer the communities within which they live and interact.

The problem with the Middle East is that while this can accommodate some countries where a geographical continuum corresponds to a sociological or historical entity like the Kurds in northern Iraq, the territorial continuum breaks down when you have divisions along “personal” matters, hence the weight of the communitarian system. This is where we find ourselves looking for a model which again, for lack of a better word, one can call communitarian federalism.

There are experiments in communitarian federalism in at least two Middle Eastern countries – Israel and Lebanon. In Lebanon it is the most developed because the whole structure of the state is built along communitarian lines. To give you a simple example: the president of the Republic in Lebanon can only be a Christian of the Maronite sect. No other Lebanese affiliation is entitled to that office. At the same time, the prime minister can only be a Sunni Muslim, and the speaker of parliament can only be a Shi‘i Muslim. By dividing up the three most potent positions of the center of the state – the speakership, the prime ministership and the

presidency – and secluding them in this communitarian federalism, the Lebanese system has achieved some sort of a balance.

Israel is different because it is a self-denominated Jewish state. The Jewish affiliation defines nationality in Israel in more ways than one. Israel also has a significant non-Jewish Arab minority, and one is not talking about the West Bank and Gaza. About 20% of the Israeli population is Arab. In order to accommodate this population, forms of communitarian federalism have been granted by the Israeli “constitution,” actually an unwritten constitution. This operates, for instance, in the field of family law. That is the most natural law for communitarian federalism to develop, whereby Muslims have their own courts and decisions of these courts are implemented by the state. Similarly, the Jews marry not alongside a civil contract that would be common to their country, but according to a system that essentially hails from their religious tradition. Similarly, the Christians have their courts, and the family law ambit is generally one that is diverse though protected by the state. This is one form of sub-communitarian recognition that the Israeli constitution has offered in order to accommodate those differences.

The problem is that the system is not working for things that matter usually more than marital or filial arrangements, like political decisions. Even though 20% of the population is Arab – that is, non-Jewish – very little representation of that 20% appears at the apex of decision-taking in Israel. Only recently was there an Arab minister in the government, but he had to resign because of some corruption scheme. In any case, anybody who knows Israeli society and the way it operates knows that the presence of this Arab minister was not significant in terms of power.

That brings us finally to the ongoing search for new horizons of federalism in the Middle East at large. It is important to think along new models in the area that have to incorporate those two dimensions. First of all, certainly, federalism, territorial federalism, because it seems to me that this is the only way to go forward and accommodate the search for autonomy and self-determination “of identifiable, discrete, and insular minorities,” to use the language of the U.S. Supreme Court.¹⁸ Similarly, however, there is an ambit of communitarian federalism which draws alternative means of integration in some countries. Such communitarian federalism offers a template that is very typically Middle Eastern, but also puts the concept of equality before the law in jeopardy. This means that we would have to find a unique accommodation of both geographical and communitarian federalism to solve this problem.

In the case of Palestine, such complex but rich arrangement is a much more interesting model to follow than the one debated within a two-state solution – not only at the level of the Israeli state within its 1948 boundaries, but also on the more general continuum between Palestine and

¹⁸ *Regents of University of California v. Bakke*, 438 U.S. 265, 288 (1978).

Israel. I do not believe it is practical to build two-nation states because the results would prove extremely harsh on whatever minority will remain in either nation state. What would be built up with walls and legislation – on the side of Palestine and on the side of Israel – would be harshly exclusive of anything that is not Jewish within Israel and not Arab in the West Bank and Gaza. Rather than having those two nation states built up along harsh demarcation lines, it is far more promising to look into forms of federalism, both territorial and communitarian, which would allow the conviviality of those communities in ways the law would regulate, so as to prevent the building up of walls, real or fictive. This would offer a much richer texture of societies that does not exclude any of their citizens, any of the people living on that federal, communitarian and geographical, continuum.