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Constitutions for the 21st Century

Emerging Patterns–the EU, Iraq, Afghanistan...*

Chibli Mallat**

I. INTRODUCTION: CONSTITUTIONALISM'S INTERNATIONAL DRIVE

Amongst the furthest encompassing contemporary reflections on law stand the works of Paul Kahn. In a contribution to a Latin American/New England seminar on law and violence in 2003, he had this to say about the EU:

> The political project of the EU, for example, is about displacing a sacrificial politics with a set of bureaucratic arrangements for the administration of markets and social-welfare. If the romantic element in Western politics has been in its attachment to sacrifice of the body, the EU project is just the opposite: it is politics as management of the well-being of the body. The bureaucrat in Brussels is the very opposite of the romantic politician. The longing to join the EU among the countries of Eastern Europe is not just about economics, but also about depoliticalization, i.e., about an emerging perception of sacrificial politics as a form of pathology. Indeed, the entire effort of the international human rights movement is rooted in this vision of well-being. No one, on this view, should die or suffer for politics.[1]

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** Presidential Professor of Law, University of Utah, Jean Monnet Chair in Law, EU Centre of Excellence, University Saint Joseph. Principal, Mallat law offices, Beirut. This is a lightly footnoted version of the Third Herbert L. Bernstein Annual Memorial Lecture in International and Comparative Law read at Duke Law School on September 28, 2004. I have updated the text slightly considering the important changes in both the EU and Iraqi constitutional scenes; the central argument has not changed.

1. Paul W. Kahn, "Sacred Violence," SELA 2003, 13. SELA, acronym of Seminario en Latinoamérica de Teoría Constitucional y Democracia, brings together a group of leading academics mostly from Latin American and North American law schools, who meet usually

There are several strands in the Kahnian view which will appear elusive for those who have not followed his fertile search for the triangle love-law-religion, and the meanings relevant to the triangle for such issues as war and international relations, the body, or human rights. In a vision which tends to be overall bleak, the silver lining is a peculiar form of legal optimism, which is of significance to anyone interested in reform despite the less humane aspects of human beings.[2]

Here we need to bifurcate:

One bifurcation regards the EU and constitution-making, the other is Kantian, and regards constitutions and war.

Strong moments in constitution-making often result from traumas—sacrificial politics, amongst which the archetype stands as Abraham's offer to sacrifice his son for God in order to save his people, religion and nation. The case of the EU, which is universally considered a triumph of Europe over its 20th Century most tragic traumas, two World Wars for the Europe of 6, the Cold War for Europe of the 25 to 30, is a living, acknowledged example, Afghanistan and Iraq another. Nothing defines trauma for Afghanis and Iraqis more than war, internal and international, for over a quarter of a century, and their most lasting response, if war is to be transcended, will be a working constitution. Here stands the contribution of Kahn at its best: 21st century constitution-making conceived as a response to the failures of the 20th century, and a new prism—the love, religion, law triangle—to go beyond comparing the trite and the insignificant, or the incomparable, or the hard to compare.

This chapter follows a similar quest. Rather than looking at these three perforce unique constitutions simply through black-letter law, I shall try to look beyond the arrangements of the respective constitutional texts for the emerging patterns of constitution-making.

Before that, a brief word off the Kantian bifurcation in its leg which is not totally unrelated to the argument of this chapter—that there is a core common thematic constitutional horizon across the planet. That leg is the subject of a separate "work in progress." As Kahn also says, "after Einstein, we are all Kantians,"[3] and no person has

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once a year under the auspices of the Yale Law School. SELA is animated by Professor Owen Fiss. I read here Depoliticization instead of Depoliticalization.

2. We find Kahn bleak on the intersection of psychology and law (*Law and Love: The Trials of King Lear*, New Haven, 2000) and international law ("Universal Jurisdiction and the Rule of Law," in John Borneman ed., *The Case of Ariel Sharon Case and the Fate of Universal Jurisdiction,* Princeton 2004, 131–145); more positive on domestic law, *The Reign of Law: Marbury v. Madison and the Construction of America*, New Haven 1997; *Legitimacy and History: Self-Government in American Constitutional Theory*, New Haven 1992.

3. Kahn, "Sacred Violence," 3.

written a more meaningful treatise on war, constitutional treatises and international law than Immanuel Kant. On the occasion the bicentenary of Kant's death, the Goethe-Institut has been particularly inspired in its depiction of the 2004 *Zeitgeist* through the poster which puts, on the one side, the 300+ wars that have befallen mankind since 1804, on the other the text of his *Treatise for a Perpetual Peace*.[4] That dimension belongs to a separate work, in progress, on Kant's *TPP*, but it cannot be totally shorn from our present reflection, so much steeped in war those societies working out these constitutional texts, and so menacing to both domestic and international peace if they fail their promise. Should Iraq, Afghanistan and the EU roll their constitutions back, and the political trend seems to indicate that they have, much of the promise of peace will fall by the wayside.

In Europe, the new constitutional order was designed by Jean Monnet to prevent a repeat of World Wars I and II, both classic wars. A collapse of the Afghani and Iraqi theatres of violence in the so-called "war on terrorism," a *sui generis* development increasingly dubbed as the third or fourth world war, will have incalculable consequences first for the peoples of Iraq and Afghanistan, but also for the rest of the planet.[5]

So while that part of the Kantian bifurcation would appear at first glance to stand outside the pale of the present study, constitution as antidote to war suffuses it throughout: already the inside-outside image of constitutions is breaking at the seams. Traditionally, constitutions are eminently sovereign texts, made by people to rule themselves by themselves. This is no longer the case. The fiction of a self-organized Iraqi constitution, or of a self-organized Afghani constitution, might be naturally peddled by the Iraqi and Afghani governments, few believe their constitutional input and output isn't international. As for the European Union, even a fiction encompassing the 15 Member-States, or indeed the additional ten delegations from the enlarged continent who attended the Constitutional Convention, makes the effort by nature a particularly non-national one. More importantly, the international drive

4. All the major wars are listed on a poster published on the anniversary of Kant's double centenary's death in 2004 by the Goethe-Institut. Kant's famous treatise, *Zum Ewigen Frieden*. appeared first in 1795.

5. James Woolsey, CIA director during the first Clinton Administration, is to my knowledge at the origins of the description of the post-September 11 era as "fourth world war." For a robust legal debate on the contours of the new "war," see Bruce Ackerman, "The Emergency Constitution," 113 Yale. L.J. 1029 (2004) and the forum devoted to the responses of David Cole, "The priority of morality: The Emergency Constitution's Blind Spot," 113 Yale L.J. 1753 (2004), and of Laurence Tribe and Patrick Gudridge, "The Anti-Emergency Constitution," 113 Yale L.J. 1801 (2004), together with the rejoinder of Ackerman, "This is Not a War," 113 Yale L.J. 1871 (2004).

of E.U. constitutionalism is now formally enshrined in the European Union's "proximity policy."

Proximity is not only about Turkey, the immediate next-door giant of the EU. The most intriguing, perhaps the most interesting article in the European Constitution in terms of emerging patterns—read here challenges—of the 21st century appears in Part I, Title VIII of the text,

> Title VIII, The Union and its Neighbours
>
> Article I-57:
>
> The Union and its Neighbours
>
> 1. The Union shall develop a special relationship with neighbouring States, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation.[6]

Much has been built on this seemingly innocuous article, on different levels. On the political plane, a full and daring proximity policy was announced and followed through, from a European perspective, by the former head of the Commission, Professor Romano Prodi. This policy suggests including any willing neighbouring state in the EU system, except for the institutions. Short of voting and being represented in Brussels, "everything else" could be common, European.[7] On the academic plane, I have tried to develop this concept as a solution to the Arab-Israeli problem by way of a Hegelian-style *Aufhebung* resting on the freedom of circulation and establishment through the new immense territory constituted by the EU + its Mediterranean neighbourhood.[8] The EU as solution to the hundred-year conflict over Palestine is one striking illustration, following which the right to return for Palestinians would find its application in their freedom of movement over the new "EU" territory that includes Israel. For Israel, the fear of a destabilizing influx would be tempered by its opening up to a European space where part of its security would be naturally one shared with the EU.

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6. EU Constitution, final draft as agreed in Dublin, June 2004 (Text widely available on the internet, hereinafter EU Constitution).

7. Romano Prodi, "L'Europe et la Méditerranée: venons en aux faits," Louvain-la-neuve, 26 Novembre 2002 ; Romano Prodi, "L'Europa più grande: una politica di vicinato come chiave di stabilità," ECSA conference, Bruxelles, 5-6 Décembre 2002, COM (203) 104, Bruxelles 11 Mars 2003. Mallat, "Des relations privilégiées entre l'Union et les pays voisins," ECSA 2002, 5 December 2002, forthcoming as EU Commission publication.

8. See Mallat, "George Weidenfeld's bright idea," *The Daily Star*, 16 July 2003; "L'UE entre déficit démocratique et Méditerranée en feu," *L'Orient-Le Jour*, 21 June 2004.

This is a long shot, a generation at least away. Still, if emerging patterns for the 21st century are to be sought, one can see how the EU has now internalized, in the revolutionary text of Art.I-57, that pattern of constitutional internationalization. While it sounds excessive to think of it in such grandiloquent terms as the chance of a peaceful Mediterranean, more specifically a solution to the Arab-Israeli conflict much in the manner that Europe has "solved" the Northern Ireland problem, one is staring in Art.57 the promise of a century, not just of a few years. And if the Good Friday Agreement marks a real turning point in Irish history conceived in its four-centuries long pattern of violence, it is undoubtedly the result of European integration. For it can hardly be conceived outside the framework of the concept of regionalization—and the hankering for a realization of subsidiarity across Europe and within its regions, the well-established as well as the contentious ones.[9]

II. SIMPLIFIERS: PERSISTENT MONTESQUIEUIAN ISSUES

So much for constitutionalism's international drive. Let us take a step back, and indulge in a few simplifiers. By simplifiers I mean those trusted mileposts which are the basics of constitutional making, and which any drafter needs to contemplate in accordance with a received vision which is essentially an eighteenth century legacy of political science/constitutionalism, more specifically a Montesquieuian one. This is the concept of separation of powers, or the checks and balances in American lore, coupled with the concept of federalism to accommodate regional disparities. Such vertical and horizontal division of powers is the stuff of any constitution-making, arguably since Plato and Aristotle,[10] and goes along a number of classical questions from both sides of society. Seen from the top, how solid and impermeable are the boundaries between powers in the state? This, reduced to its simplest expression, raises the need to make a choice between a presidential and legislative constitution, and a choice between a federal system and a centralized one. What are the powers of federated states, and if there are no federated states, how is power devolved and exercised by regional entities? Seen from the bottom, what voting power does the citizen have, as individual and as member of a collectivity? What recourse does the individual have in case of infringement on his or her rights as enshrined in the text?

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9. For some of the extensive treatments in this vein of Northern Ireland and Palestine, see e.g. the works of Gideon Gotlieb and Donald Horowitz.

10. Central reference to Plato's *Republic* ix, Aristotle's *Politics*, chapter 1, Cicero's *De Republica*, chapters 1 and 2.

Now even simplifiers can make life complicated when comparisons are exercised in dual terms, let alone when three nascent constitutions are being compared. National systems of law, the first year law student learns quickly, are self-sufficient. In a fiction which is essential to understanding its realm, law operates outside history as well as outside geography. Legal history might explain much, but it works in a way irrelevant to the substance, or content, provided by a given law. Comparative law is an additional luxury: use of comparative law may be edifying, enlightening or enriching, even persuasive; it is never decisive. Yes, there are increasing exceptions in global law.[11] But legal history, as well as comparative law, remain luxuries. The law stands for what it disposes *hic et nunc*, not for how it came about, or what country it compares with beyond the realm of the jurisdiction in which it holds sway.

It therefore makes sense, from the vantage point of simplifiers, at the overall architectonics of our three constitutions, with each as a self-contained arrangement.

Afghanistan. Starting with the simplest, the Constitution of "the Islamic Republic of Afghanistan," as defined in Article 1. Simplest because it has now been adopted (24 January 2004); the other two remain transient, either getting superseded by repeated amendments as in Iraq, or frozen, as for the EU after the rejection of the agreed text by a majority of the French and Dutch citizens. Simplest because it is an essentially presidential constitution, with a person—Hamid Karzai—in mind drawing the constitution and implementing it. Simplest because there is no federalism in the text. Simplest because, despite the international convulsions in the modern history of Afghanistan, the non-Afghani input, unlike for Iraq and the EU, is limited. Simplest, finally, because there does not seem to have been too much work behind it.[12] By contrast, the emergence of the Iranian Constitution in 1979 has left constitutional scholars a formidable trail of constituents' minutes.[13]

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11. Progress in comparative law within the US Supreme Court can be read in *Stanford v. Parker*, 266 F.3d 442 (6th Cir. 2001) cert. denied 71 USLW 3236 (S.Ct. 2002), decided on October 7, 2002 (execution of juvenile offenders) and in *Atkins v. Virginia*, No. 00-8452, decided on 20 June 2002. (execution of mentally retarded defenders). The trend is adumbrated and developed in Harold Koh, "Paying 'Decent Respect' to World Opinion on the Death Penalty," 35 UC David L R 1085–1131, at 1104. Judith Resnik, "Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry," 115 Yale L.J. 1564 (2006).

12. The little available can be found in a report by the Secretariat of the Constitutional Commission of Afghanistan, 'The Constitution-making Process,' 10 March 2003. Henceforth reference to "Afghani Constitution," text available as pdf in English, Pashtu and Dari on the internet, e.g. on http://www.loc.gov/law/guide/afghanistan.html.

13. They can be found in two series of official documents, of three and four volumes respectively, entitled *Surat-e mashruh-e muzakarat-e shura-ye majles-e barrasi-ye niha'i-ye*

Composed of a preamble and one hundred and sixty articles, and divided into twelve neat chapters, the Afghani Constitution was written in Pashtu and Dari, two of the several languages recognized by Article 16.[14] Following a familiar and didactic terrain, the Constitution presents the main attributes of the State of Afghanistan in the Preamble and first chapter—flag, languages, religion, economic traits and state responsibility for citizens' welfare, education, place in the international order—followed by the citizens' fundamental rights (chapter 2). The organs of the state cover chapters 3 to 8: presidency, government, national assembly, Loya Jirga, judiciary, administrative divisions. "Special dispositions" are enshrined in the last four chapters, including the state of emergency and the amendment process. Most significant in terms of separation of powers is the establishment of Afghanistan as a centralized presidential republic, where the head of the executive is elected directly by popular suffrage if he or she gets over 50 percent of the vote. The two candidates with the highest vote in the first turn, as in France, fight it out in a second turn.[15] "No one can be elected as president for more than two terms."[16]

The president is extremely powerful under the Constitution, as he heads the Cabinet—there is no Prime Minister. The list of presidential prerogatives is long and wide-ranging, to which should be added the prerogatives of a cabinet which cannot be brought down by Parliament by a vote of confidence, with the exception of individual ministers. The president is even entitled to name some of the members of the Upper House (the Elders' House). Parliament under the Constitution is composed of two houses, to which should be added the Loya Jirga, originally a congregation of tribal leaders in which the Constitution vests some historical mantle of sovereignty.[17] In reality, the Loya Jirga consists of all the parliamentarians, to which are added provincial and district council heads, and the members of government. The Loya Jirga is supposed to deal with the supreme interests of the country, but it is again the president who is entitled to convene it. Presumably, it can in some cases meet of its own

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qanun-e asasi-ye jumhuri-ye islami-ye iran (Tehran 1985-89) and *Surat-e mashruh-e muzakarat-e shura-ye baznegari-ye qanun-e asasi-ye jumhuri-ye islami-ye iran* (Tehran 1990).

14. Afghani Constitution, Art.16: "Pashtu and Dari (which is a variation of Persian) are the official languages of the state."

15. Afghani Constitution, Art.61.

16. Afghani Constitution, Art. 62.

17. Afghani Constitution, Art.110, Loya Jirga as historical "manifestation of the people of Afghanistan," see the classic work of the late Louis Dupree (d. 1989), *Afghanistan*, Princeton 1980.

accord, since it is also entitled to pass judgment on the president in case he dramatically fails his duties, such as committing crimes against humanity.[18]

Loya Jirga and "crimes against humanity," a phrase which appears in several articles of the Afghan constitution, provides the comparative lawyer with the most original concepts in the text. The bottom line is about centralized presidential power, where the battle will be fought for the foreseeable future, for Afghanistan as well as for Iraq, and, to an extent which we need to dwell also upon, in the European Union. The place of the president as chief executive rallying the country is the more important locus of constitutional attention since the Afghani and Iraqi experience, despite sharing common "international" inputs, underline the difficult of agreeing on the place of the head of the executive branch under a Montesquieuian scheme of things. In Afghanistan, as the text stands, the president trumps the rest of the Constitutional arrangements, be they central or federal. This may be unwise, especially since the incumbent owes his position to "being the smallest common denominator" picked by the UN.19 The battle for executive power will continue to define constitution-making in the 21st century, as it has from time immemorial. This is a certainty. Whether it is wise is a different matter.

Iraq. In Iraq, the battle for the presidency has taken another shape, despite a similar international input, including the same UN envoy. It played itself out differently, and the idiosyncrasies of history got the upper hand on planning.[20]

Unfortunate Iraqis, trying to find some peace after thirty five years of solid dictatorship, including the longest Middle East war in 20th century history, and two or three invasions, that is their invasion of others, and others invading them, plus a twelve year sanctions regime followed by occupation: in the midst of which mayhem they put together a "wonderful new Constitution."[21] It is true that the Iraqis, who forge

18. Afghani Constitution, Arts. 110 to 115.

19. As explained by the UN mediator Lakhdar Brahimi, who supported Hamid Karzai's nomination on the basis that his name appeared on all the lists requested from the various leaders and lawlords of Afghanistan.

20. For some of these highly unusual circumstances, Mallat, "Malgré tout, une leçon de démocratie à Bagdad," *L'Orient-le Jour*, 2 June 2004.

21. The description of the Constitution as "wonderful" is owed to the editors of the *New York Times* who propped up the comment I submitted into excessive enthusiasm, "East Meets West, at Least on Paper," *New York Times*, 11 March 2004. Here I discuss what became know in English as the Transitional Administrative Law, TAL (*Qanun idarat al-dawlat*, literally the law for the governance of the country, agreed on March 1, 2004 by the Iraqi Governing Council, and published by the Coalition Provisional Authority on 8 March as "Law of Administration for the State of Iraq for the transitional period.") The TAL, which preceded the "final" Constitution of 2005, exhibits similar trends. The "final" Constitution of 2005 mentions that it needs to be completed, and so its finality is relative even on its own accord.

ahead with a Constitution against the odds, deserve a burst of enthusiastic kudos. But one should perhaps remain reserved on such elusive matters for fear of ridicule—getting "mugged by reality" is a fashionable term.

In the midst of so much violence, how did they do it in Iraq? They, here, are a hapless though talented duo: Iraqi-"international" (chiefly American). One must realize what constitution-writing means in Iraq 2004, and it means a lot of English, not only because a U.N. Security Resolution had consecrated a governor of Iraq who is solely American-English speaking, and so wields the ultimate signature upon any text Iraqis may want to turn into law, but more fundamentally because the legal and judicial body politic of Iraq is simply inexistent. It is, unfortunately, as tragic as it sounds: so destructive of any judicial independence has the rule of the former Iraqi dictator been that Iraqi jurists who remained in Iraq simply lost confidence in their job and themselves. Not that there are no talents, dedication or competence: chapters of judicial and legal resistance in the Iraqi dictatorship are yet to be written. Polyglottism (especially Western. . .) was a mark of treason for dark, fascist Arabism in the heyday of the long Baathist night.[22] The systematic destruction of Iraqi legal culture, its lawyers, judges and law schools, meant that constitution drafting was left to those coming from the outside. There simply aren't so many people capable of writing up a constitution in English words which are also Arabic, and occasionally, Kurdish.

So hail to the two drafters, and their advisors. Friendship being involved here on both the drafting side and the advising side, all shall remain nameless. The result is what matters for the purpose of the present chapter, and that result is a longish text, with a didactic effort (62 articles in nine parts). The Transitional Administrative Law self-erased when the elections planned for January 2005 resulted in a Parliament which was tasked with writing the ultimate text and putting it to the vote. Meanwhile, some constitutional landmarks have been posted for Iraq. While buffeted by barbaric violence on a scale which knows few such precedents on the planet, the process moved decisively forward in textual terms.

Three matters draw the TAL reader's attention: the first is the place reserved for women, who were to constitute a quarter of Parliament. The second is the open reference to federalism. The third is the care given to

22. Conversation with the late Hani Fukaiki, May 2002, in Kurdish Iraq, who, as a former active member of the Baath leadership, explained to me how knowledge of a Western language was suspicious and frowned upon as a sure mark of "treason."

the protection of the individual's right. All three remained in the 2005 Constitution.

If Iraq wished to remain at the forefront of Middle East (ME) democracy—a position which it will continue to pretend to, despite it being rocked by violence, both in terms of the freedoms it carries, and the fact that those in power owe it neither to dynasty, nor to the ME-dominant self-extension of presidential mandate—then Iraqi society needs to protect those two achievements, women representation and federalism. This will not be easy. As for the judicial protection of the person's basic rights, it will come only after Iraqi society overcomes the violence that plagues it, and finds a way to stand on its two feet without foreign armies dictating the terms of social peace.

Much of this commentary is arguably hypothetical, but the morass of Iraqi politics should not mask the forest for the trees. In Iraq, constitutionalism has forged ahead in the most delicate of all arrangements, that is the attempt for a constitution to be inclusive of two dominant and competing national identities—Kurdish and Arab—and two dominant and competing religious sects, Shi'i and Sunni Islam. Even under the most elaborate constitutional schemes, which Donald Horowitz has dissected in many different approaches over three decades of scholarly attention to "discrete and insular minorities" across the world,[23] one would find it difficult to draw a model near enough accommodating the Iraqi socio-historical set-up. Nor have the Iraqi constituents succeeded yet in convincing their people, and the world at large, that they are out of the woods of overwhelming sectarianism in the individual politician's political expression.

The European Union. The Constitution finally agreed upon by the European Council (of heads of states) meeting in Dublin in June 2004 stands outside any recognizable model in the field: This for obvious reasons owing to the history of European integration. But it also stands out for technical reasons obtaining from its fissiparous genesis: the Constitution makes no sense for the reader outside the accumulation of texts since the six European communities came together on the so-called common market in Rome in 1957. This accumulation of treaties, and of legislative, judicial and administrative acts, is known as "acquis communautaire."

In any appreciation of constitution-making, it would not be appropriate to mark solely progress. There also are setbacks. One certain failure in the EU text concerns its style. However hard the constituents tried to make the text of the Constitution palatable to the

23. See e.g. Horowitz, *The Deadly Ethnic Riot*, Berkeley 2001.

educated but non-specialist reader, this effort was a failure. Even Valéry Giscard d'Estaing, the head of the Convention which drafted the text, discourages the reader from dealing with Part III of the text, which is the longest and most detailed.[24] The *Economist* rightly ran a cover page when the European constitutional project was disclosed suggesting to "bin it."[25] Could it have been otherwise?

It is true that one distinguished former Minister of Justice in France did write in 2002 a model constitution which had the advantage of being short and more palatable, including actually most of the provisions which found their way to the text.[26] It *was* possible to do better. But there is no point in trying to rewrite history, and there are already a number of reader-friendly editions and short commentaries, of which the introductions of Giscard and a *Que Sais-Je* by Professor Christian Philip stand their ground in terms of clarity and comprehensiveness.[27] One problem is the type of "consolidator Treaty" which integrates previous texts as so many layers, and the mechanisms in the Convention which, for sake of including the largest number of proposals, fails to devote a stylistic effort which could have brought together the text in the US-concise manner of 1787. It is true also that the US constitution is a unique text in the excellence of its constitutional style, hardly matched elsewhere on the planet.

The EU Constitution consists of four parts, and a number of protocols of which two are important. Starting with the end, a brief Fourth Part deals with amendments and transitional measures. A Third Part consolidates all previous treaties and is therefore the longest and most verbose. A Second Part integrates the bill of rights known as "the European Union Charter for Fundamental Rights," which had been approved in Nice four years earlier. The First Part is the most novel one, on which I shall mostly dwell to discern meaningful trends in 21st Century constitution making.

Let me suggest, for the sake of argument, an extreme critical line that flows from the universally acknowledged "democratic deficit" in Europe. Managing the 27–nation-strong E.U. by 2009 does create in and

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24. Valéry Giscard d'Estaing, "Introduction à la lecture du projet de constitution pour l'Europe," *La Constitution pour l'Europe*, Paris 2003, 75: "Je ne pense pas qu'il y ait lieu pour vous, lecteur, d'entreprendre la lecture en continu de cette troisième partie." (Hereinafter, Giscard, 'Introduction'.)

25. *The Economist*, 19 June 2003.

26. Robert Badinter, *Une Constitution Européenne*, Paris 2002.

27. Giscard, "Introduction," Christian Philip, *La Constitution Européenne*, Paris 2004 (Hereinafter Philip, *La Constitution Européenne*) The literature on the draft treaty known as the European Constitution is extensive. Most interesting are the minutes of the debates during the Convention, especially specialists' reports, available on the EU convention site.

by itself problems which have been dealt with in the EU constitution as it could best: the creation of enhanced cooperation, which allows a group of EU countries to go forward with integration without being hampered by slow or reluctant member states. The Euro system is the most successful application of that principle, which does not include Britain and Sweden. Already the EU operates on a system of *géométrie variable*, and this is fine as long as it does not burst at the seams. Even bursting at the seams has already been envisaged, and happily dealt with, when Austria found itself in the throes of a government dominated by racist extremism. From that emerged a "freezing out" procedure, which has worked well to temper extremism within Austria, without the EU exploding altogether under the shock. Of course, should one country turn so undemocratic as to threaten not only being frozen out of the EU, but also engaging in military hostilities against it, the issue would become grave to say the least; but even a major country or two turning in this nasty way at the same time would not unravel the system, and that scenario might even be a privileged way to consolidate it. More immediate is the risk that new countries bring in their weak democratic system of deliberation, as is the case of Rumania or the Republics of former Yugoslavia. But the remarkable democratic strides of Turkey to bring its legal system, both in terms of its books and, more importantly, in the application of its laws, up to EU standards, are testimony to the immense leverage at the disposal of the EU for smaller countries. Indeed the annual reports that the Commission prepares on Turkish alignment with EU legal and economic standards may be one of the most innovative tools for the spread of democracy, human rights and the rule of law across the world since the collapse of the Soviet system.[28]

No, the problem of EU democratic deficit does not lie in its expansion, and one can argue the exact opposite, namely that the world EU-fashion, and more specifically the Middle East EU-fashion, is a unique opportunity allowed by the emergence of a unified Europe.[29] No, the problem of the EU democratic deficit has been building up since the Treaty of Rome, and that problem is constitutional, more specifically one of separation of powers. In eighteen months of deliberation, the E.U. Constitutional Convention simply failed to address it successfully.

This problem is eminently Montesquieuian, and results from the vesting of legislative and executive powers in a strange EU mixture of a triangle Council-Commission-Parliament, in which the two first institu-

28. Commission reports on Turkey since 1999, available on the EU Commission's site.

29. Original reflection in Robert Fossaert, chapter entitled "Le Monde façon Europe," in his *Le Monde au 21ème siècle: une Théorie des Systèmes Mondiaux*, Paris 1991.

tions are dominant. Those who are elected "Europeanly," that is the E.U. MPs, represent at best a fifth wheel in the carriage, as the French motto has it. You can take most of the EU Parliament away, the maximum lost is a faint forum for deliberation, and an even fainter one in terms of legislation. While the legislative process has been time and again redrawn at the margins in order to enhance its powers, any person familiar with the institutional working of the EU knows that Parliament is a place for occasional protest, possibly elaborate and meandering "comitology," not a power that anyone seriously takes into account.

Now the Council, being composed of governments who are representative of their people, is indispensable. It is indispensable because it does represent the people within the Member States, and brings into the federal European model the voice of the constituent peoples. The Council is also indispensable because even if it does not contribute a federal voice, one can hardly imagine how laws enacted by the Union could be binding within each country, in that ever wider field of European competence, if implementation were not carried by the Council's governments at home.

How about the Commission? The Commission has real power. *This is the problem*, since the Commission has no popular legitimacy, and its members are appointed by the Council to play a *European* role. To make matters worse, the Constitution has managed to establish a number of new high positions, including a would-be president for the Council who fights, over terms of preeminence, with the president of the Commission, much as the High Representative for the Common Foreign Policy and Security has already fought it out with the Commissioner in charge of foreign affairs; this is a sorry sight indeed. The result, inevitably, is more muddle, and with poor legitimacy at that for the new bicephalous institutions. None of these positions will be filled by direct popular vote.

No, the only serious step to bring democracy to Europe would have been to scrap the Commission and to give Parliament a real legislative role. One would still remain in the throes of the federal problem, but the democratic deficit would have been tackled head on, in a way that would have made it finally meaningful to vote for a European MP. It is now alas mostly a waste of time, and the electors are far savvier than the institutional cooks of Europe give them credit for. They simply do not bother to vote for Parliament, nor do they show the slightest interest in what it does.

To underline further the democratic deficit in the EU version of separation of powers, an "error" in the text is telling: no doubt attentive

to the subdued role of Parliament, the constituents entrusted EU MPs, as the text goes, with "electing" the president of the Commission.[30]

This is further detailed under Article I-27, on the President of the European Commission:

> 1. Taking into account the elections to the European Parliament, and after having held the appropriate consultations, the European Council, deciding by qualified majority, shall propose to the European Parliament a candidate for the President of the Commission. This candidate shall be *elected* by the European Parliament by a majority of its members. If he or she does not obtain the required majority, the European Council, acting by a qualified majority, shall within one month propose a new candidate who shall be *elected* by the European Parliament, following the same procedure.[31]

A strange concept for an election indeed, in which there is no contest. Behind the awkward wording stands a battle for legitimacy on the European level for the head of the executive, be s/he the president of the Council or the president of the Commission. "Which president?" is a good question. One can imagine the confusion about the presidency, much in the way the confusion over who is Mr. Foreign Policy today, the Commissioner in charge, or the Council's High Representative. Or indeed the president of the Commission. Maybe the ruse of the constituents was deliberate, and some comments suggest that an ideal situation, which was purposefully left open by the Convention, forced the bicephalous anomaly of two presidents, a president of the Council and a president of the Commission, so that they end up being one and the same by the inevitable process of their redundancy.[32] Nothing bars such a possibility in the text. The problem remains. Both positions result from a choice exercised by the Council, not by an election between competing candidates.

So back to basics of the democratic deficit: the Constituents were unable to see boldly enough into the strange system of separation of powers they were perpetuating since the Treaty of Rome. They tinkered with it, by establishing a president of the Council who would conceivably stay in his or her position five years, instead of the current rotation of six

30. EU Constitution, "Article I-20: The European Parliament: 1. The European Parliament … shall *elect* the President of the Commission." Emphasis added.

31. Emphasis added.

32. Philip, *La Constitution Européenne*, 92–93.

months which was made impossible by the enlargement. They also tinkered with the presidency of the Commission by suggesting that the person in charge would be elected by Parliament, whereas the candidate—only one—is nominated by the Council.

This leaves little democratic legitimacy in the choice of both executive and legislative powers in Europe, if indeed we mean by legitimacy the direct *election* of their EU leaders by the people of Europe. Both the presidents of the Council and of the Commission are nominated by the Council. In the case of the Council's president, the parliamentary representatives of European voters have no say. In the case of the Commission's president, parliamentary function is at best perfunctory, despite the constitutional language intimating his "election" by Parliament. And to top it all, Parliament does not legislate.

III. ACID TESTS AND EMERGING PATTERNS

In this search for emerging patterns in 21st century constitutionalism, I would like to introduce another concept which has been of assistance in writing on family and gender issues: acid test.[33] Acid is a metaphor which conjures up for different people and different cultures so many different images. One image, at least in my western-life generation, is that of a powerful mind distorter which clouds one's miserable life with a worldly vision induced by hallucinogenic drugs. For Iraqis emerging from 35 years of dictatorship, acid is a far more material reality as the most harrowing method of torture used by the former regime—said to be a specialty of the elder Hussein son—which consists in lowering the victim on a pulley into a basin of acid, first the toes, and drawing back the pulley up and down repeatedly. One shudders at the image, and we should leave it at that. What the small *Oxford English Dictionary* says about "acid tests" is that they are "severe and conclusive." In an Iraqi context, one has no doubt they are conclusive. In all cases, acid tests are certainly severe, the more severe as they include faith-based, and for all intents and purposes, "irrational" convictions imbued with religions that have competed with each other at least since God became word.

Let me pursue comparatively three such acid tests which I have found to be at the heart of 21st century constitutionalism, forming is a number of legal-constitutional fields which bring people literally up in arms: religion, federalism, two areas that did not constitute such a contentious arena of constitutionalism in the 20th century, and to which is added the perennial issue of who is to be master: the presidency.

33. Mallat, "The Search For Equality in Middle Eastern Family Law," *al-Abhath* (American University of Beirut), 48-49, 2000-2001, 7–63.

Religion. Maybe the most trying of all acid tests is the place of religion in the constitution.

The "law and religion complex" operates as acid test not merely in an Eastern, Muslim context. It was, and continues to be, a central point of disagreement in European constitution making. For those who have followed that particular aspect of the debate, suffice to see the discrepancy between the German and French texts in the translation of the Preamble to the Charter of Fundamental Rights in Nice in 2000, a discrepancy which is, in constitution-writing, unprecedented. While the French text acknowledges the "spiritual" tradition in Europe, the German version renders it "religious."

The European constituents eventually succeeded in preventing that acid test from blocking the whole process. Thanks to the Irish ironically, they finally produced a version which leaned towards the French disposition. Much to the dislike and vocal protests of the Vatican, they declared the *cultural* heritage of the peoples of Europe in common, skipping the mention of Christianity, religion and spirituality altogether.

Now how does one deal with such a difficult test, the religion of the land in a constitution? Of tons of ink spilled on matters constitutional, one would venture this is the issue of unique portent in the United States as well as in Europe and the Mideast, bringing religious affiliation in the domestic context from born-again Bible belts to international "clashes of civilisations" defined religiously. The concern is not about to abate.

To make some progress in the shape of religion in 21st century constitutionalism, a literary detour into the quasi-universal law of individual psychology, much in the vein of Sigmund Freud's Oedipus Complex, may help: it is acknowledged that adolescence generally, if not a later age, raises a form of religious libido in each and every individual on earth. Of that experience two literary expressions are particularly telling. The first is by Bertolt Brecht, whose alluring though not likeable character, Mr. K., was once asked about whether there was a God:

> Einer fragte Herrn K. ob es einen Gott gäbe. Herr K. sagte: "Ich rate dir, nachzudenken, ob dein Verhalten je nach der Antwort auf diese Frage sich ändern wuerde. Würde es sich nicht ändern, dann können wir die Frage fallenlassen. Würde es sich ändern, dann kann ich dir wenigstens nich soweit behilflich sein, dass ich dir sage, du hast dich schon entschieden: Du brauchst einen Gott.[34]

34. "Die Frage, ob einen Gott gibt (on the question whether there is a God)," in Bertolt Brecht, Kalendergeschichte, Geschichte vom Herrn Keuner, Brecht *Werke*, V, Suhrkamp

That adolescent part of the argument fits well with a rigid view of separation between church and state, and can be comforted with all kinds of citations, including from the most canonic sources, to wit the words of Christ to the effect of keeping to Caesar what is Caesar's, or the lapidary injunction in the Qur'an about "no compulsion in religion." As one makes his peace with God or religion on this basis, acknowledging in the process that there is more to it than Brechtian need or Qur'anic rejection of state force to deal with one's professed faith, another citation sticks in mind, that of the Levantine poet admonishing his children about the penumbra of dignity that religion brings to the believers, "*wa la tata'assabu abadan li-dinin, fa kullu ta'assubin yushqi wa yurdi/ likullin dinuhu wa likulli dinin masunu karamatin ta'ba al-ta'addi*."[35]

This is more subtle than Brecht, because of the consideration of one's religion as shield, and not as sword, to borrow a distinction from English contract law.[36] The positive use of religion to shape the state is one thing, the defence of religion against aggression and other such humiliations is another. In our respective constitutions, this is generally the position adopted by the constituents: the state, or group of states in the EU, is not so much neutral about religion, which is the classical position of a rigid doctrine of separation between state and religion, as it acknowledges a heritage which in the case of Europe includes churches receiving constitutional recognition—and eventually tax relief and subsidies;[37] and in the case of Iraq and Afghanistan, a role for Islam which is not militant. Islam is to be perceived as shield, and not as sword.[38]

The formulation in both the Iraqi and Afghani constitutions is alluring. In the first case, "No amendment to this Law may be made to affect Islam."[39] Article 7 of the Iraqi TAL is equally protective:

1997, original written ca 1929–30, 218 ("One asked Mr. K. whether there was a God. Mr. K. answered: 'I advise you to reflect first on whether your behaviour would change depending on the answer to that question. If it doesn't change, then we can leave the question behind. If it does, then I can at least tell you that you have already decided: you need a God.'")

35. Chibli Mallat ("Poet of the Cedars," d.1961), *Diwan* (collected Poems), Beirut, 1952, vol. 2, 521: "Never follow a religion fanatically, all fanaticism brings misery and death/ to each his religion, and to each religion a penumbra of dignity that dislikes being attacked (and in a variation *ta'ba al-tahaddi*, that dislikes being challenged)."

36. Lord Denning, in *Central London Property Trust Ltd. v. High Trees House Ltd. [1947] K.B. 130*.

37. Article I-52 of the EU constitutional project: "Status of churches and non-confessional organizations. 1. The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States."

38. Expressed in Art. 17, Afghani Constitution as the duty of the state to "organise and improve mosques, madrasas and religious centres."

39. Afghani Constitution, Art.3.

> Islam is the official religion of the State and is to be considered a source of legislation. No law that contradicts the universally agreed tenets of Islam, the principles of democracy, or the rights cited in Chapter Two of this Law [i.e. the bill of rights] may be enacted during the transitional period. This Law respects the Islamic identity of the majority of the Iraqi people and guarantees the full religious rights of all individuals to freedom of religious belief and practice.

In Afghanistan, the more specific formulation of compatibility between Islam and law is similar: "No law can be contrary to the sacred religion of Islam and the values of this Constitution." In comparative Middle Eastern constitutionalism, where the acid test has generally taken the form of Islamic law being considered "the" in opposition to "a" source for the Constitution, this novel formulation upholds a conception of religion as *shield* in ways that shift the terrain of the debate onto areas which may relieve the test from some of its acid severity.

This is not the end of the matter, however, as the law and religion complex in modern constitutionalism must be perceived increasingly, in 21st century constitutionalism, on a far more elusive register: namely the absence of religion—as religious affiliation—in the constitution. The problem is no longer whether Islam is "state" religion or not, but how collectivities which identify themselves on the basis of religious affiliation can stand ignored by the constitutional set-up. I had several occasions over the past years to discuss this vexing issue in modern constitutionalism, so I will not pursue it further here, except to note that even the EU, secular as it may pretend to be, was unable to escape some form of recognition for established churches.[40]

Federalism. Directly related to the issue of collective identification to a given religious denomination is the problem of sectarianism, or communitarianism as Indian constitutionalists call it. This is an issue which conjures up an eminently *federal* mirror.

Federalism acts as an additional acid test in 21st century constitutionalism, albeit in a muffled way: of the three constitutions, only the Iraqi TAL mentions the word, and it may well be the most courageous. In Afghanistan, one will also not find the word federal in the Constitution, but there is mention of peoples, tribes and "men" in various

40. Above n. 38. See also my "Du fait religieux dans les institutions," in Mallat ed., *L'Union Européenne et le Moyen-Orient: Etat des Lieux,* Beirut 2004, 83-95.

articles.[41] Valéry Giscard d'Estaing explains in his Preface how the word "communitarian" came to replace the word "federal" in Article I.1 of the Constitution,[42] bringing an end to the heated debate between European federalists and European sovereignists among the constituents. A more "federalist" form of government than the European one it is hard to conceive, and the refusal for the constituents to get drawn by the word indicates areas of "irrationality" getting into the public discourse in ways typical of acid tests, as English and French national forms of *the Anti-Federalist* get pitted against mostly German and more recent Spanish adhesion to the concept as a perfectly acceptable one constitutionally.

Even a perfunctory approach of EU, Iraqi and Afghani constitution-making shows that all these issues are very much alive. Indeed the "F" word is as much of a hot potato in Europe as it is in Afghanistan or Iraq, and federalism could indeed represent a line of approach which brings together the inchoate world of 21st century constitutionalism: buckets of ink have also been spilled over European federalism,[43] and those of political inspiration are not the most interesting. It might have proved expedient for the constituents to have finally avoided the word in their would-be founding text, for they knew they were all practicing federalism like Molière's character speaking in prose without knowing it.

In Iraq, the battle for the inclusion of the word is far from over: I have often opined to Iraqi colleagues that constant resort to *sui generis* categories may not be useful (in this case the use of the concept of *wilayat* under Ottoman fashion to avoid using the Arabic *fidirali*). The advocacy has even found its way to Security Council Resolution 1546, which included the word in part upon my insistence with the Iraqi foreign minister. This has a story, and the jury is out on whether it is preferable to practice federalism à la Molière, or whether some more courage would not be amiss for the enrichment of the debate and its integrity.[44]

Presidency. Lest we lose our bearings, constitutions are about who is to be master. Put in less crude terms, 21st century constitutionalism

41. Afghani Constitution, Introduction paragraph 5, "*aqvam wa mardum*," Art. 6, "*aqvam va qaba'el*."

42. Giscard, Introduction, 34: "Aussi, dans le texte que j'ai préparé pour le Praesidium, ai-je substitué l'expression 'sur le mode fédéral' la formule 'sur le mode communautaire.'"

43. Most heated was the celebrated debate in 2001–2002 between German foreign minister Joschka Fischer (EU as federation), president Jacques Chirac and his foreign minister Dominique de Villepin (EU as assembly or confederation of nations), and former president of the EU Commission Jacques Delors (EU as people's federation *sui generis*).

44. On my intervention with Iraqi foreign minister Hoshyar Zibari for the inclusion of federalism in Security Council Resolution 1546 (8 June 2004), see the account in "2004, le Moyen-Orient en quête de non-violence: Un parcours personnel," published in Mallat, *Presidential papers*, Beirut 2005.

does not escape the battle about leadership and its democratic credentials since the dawn of history. Here appears the most muddled pattern in the present comparative exercise: in Afghanistan, the tailoring of the constitutional text to fit a particular person is simply wrong, and the sacrifice of real checks and balances to presidential power, one can alas confidently predict, is a recipe for trouble to come. In Iraq, matters are still in a situation of flux, owing to the duality of President-Prime Minister in the Transitional Administrative Law (and in the 2005 "final" Constitution), but also to the real test of federalism as it is wont to develop—or get smothered by authoritarianism and/or chaos, both equally capable of marking the death of constitutionalism in the country for another generation. In the EU, the gross emptying of the concept of election with regard to the choice of the president of the Commission is indicative of a major problem yet to be solved.

So what does this tell us about that long-standing acid test, the headship of executive power?

The president as leader voted in directly by the people underlies the central problem of constitutional theory, which is couched, perhaps even papered over since Montesquieu, as a natural result of a doctrine of separation of powers. The Montesquieuian scheme has arguably always been in crisis, and its difficult birth remains upon us, as troubling in the 21st century as it was in the second half of the 18th.[45] Separation of powers, in that description, is a way to say that society cannot vote in its parliament under universal suffrage, and vote in its president also in universal suffrage, without having to explain why there should be two bodies so elected. The solution was a functional one, based on the idea that the first legislates, and the second executes. Power becomes therefore segmented functionally, but such segmentation is a human construct which divides up power in a disturbing and incoherent manner: for what does it mean issuing a law, as opposed to executing it?

Federal arrangements are more convincing, because they point to a horizontal way in the division of powers which is based on a tangible division of territory and land. Horizontal devolution of power is more coherent than the functional division of powers between a parliament that enacts laws, a president/PM which applies them, and the judiciary which arbitrates conflicts arising from that application. Federalism as a

45. This is developed in Mallat, "Droit comparé au 18*ème* siècle: Influences françaises sur la common law," *Revue Historique de Droit Français et Etranger*, 3/1994, 383-400 (arguing that Montesquieu and Lord Mansfield understood separation of powers in a manner profoundly different from the way it became operational).

successful constitutional arrangement, a comparative reading of the three constitutions suggests, has far more credentials than the domestic functional division of powers extant in 21st century constitutionalism. While the Montesquieuian scheme lags behind, there is no decidedly convincing route out of the conundrum, which is illustrated in the three questions by the absence of a convincing mechanism that resolves it.

EPILOGUE

The federal order; Religion's proactive challenge to constitutionalism; the confusion in the tripartite separation of powers underlying the role of the presidency and its legitimacy; these are three problem areas which define the shape of things constitutional in the 21st century. Beyond the natural disparity in the respective traditions and conditions of emergence of the three constitutions, it may be helpful to end on the special form of internationalism which seems to mark 21st century constitutionalism.

One needs to reflect, in a planet that no longer recognizes the domain of internal affairs as a self-contained one, on the mechanisms which may ensure that domestic problems do not spill over regionally and internationally. Even more positively, the question of constitutions as model can no longer be avoided: the world after Europe, in the fashion adumbrated by the so-called proximity policy of Art.I-57 is a case in point, but there is little doubt that success in Afghanistan and/or in Iraq will make constitutional standards affect an immense area, reaching into India through Pakistan and Kashmir, and across the Middle East and North, including Palestine-Israel.

There is no harm putting the matter into the first leg of the Kantian bifurcation that the chapter opened onto, with the contrasting vantage points drawn from Kant's *Treatise on Perpetual Peace*: its failure on the ground since 1795, and its continuous success in the battle of ideas in ways that compel us to rediscover the Treatise again and again at key junctures in human history—the French-Atlantic Revolution, which saw its birth, the failed attempts in the Congress of Vienna to go beyond the Westphalian paradigm of sovereign nation-states, through the collapse of the Wilson vision in Versailles, and the shortcomings of the UN in the wake of World War II.

The constitutions just examined constitute, through their birth and potential projections beyond their borders, an attempt to include Kant's cosmopolitan law into their frame. This is halting and timid, but the pattern is there for the discerning, whether in terms of federalism for Iraq, a unique novelty in the Middle East (and Europe), crimes of

war as a constitutional category in Afghanistan, or transnational projections of the EU, both federal and international.

I would like to conclude on yet another horizon, which conjures up, in converging ways two millennia apart, Aristotle and Paul Kahn. At its simplest, the issue is one of "man"—less so woman, and this in itself is telling—"as a political animal": "The entire effort of the international human rights movement is rooted in this vision of well-being. No one, on this view, should die or suffer for politics." One could read this in the most exciting acknowledgement of the Preamble to the interim Iraqi constitution: the people of Iraq, it says, "reject violence and coercion in all their forms, and particularly when used as instruments of governance." One can also hear it plainly in a more relative, but potentially more "applicable" utterance interspersed, in a manner which seems novel in constitution-writing, in the repeated references throughout the Afghani text to the scourge of "crimes against humanity." In both Iraq and Afghanistan, societies which have been bled white through three decades of continuing horror, are showing the way to others, even to Europe, where the constituents remain behind in terms of the crucial task of preventing crimes against humanity from remaining unpunished.[46]

This points to the meta-conclusion of our emerging patterns, which is the next horizon of constitutionalism. How can human beings structure their domestic and international world to make politics redundant? Depoliticisation, I would like to conclude, is the ultimate horizon of comparative constitutionalism, that moment in history when it matters little what politics and politicians say, because they have become by-and-large irrelevant to the happiness of the citizen. But this is better left to constitution-making in the 22nd century.

46. Mallat, "Des relations privilégiées," supra n. 8, section discussing transnational justice.