Constitutionalism in Lebanon: continuities and discrepancies

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In recent years, scholarship has developed significantly on constitutionalism in Lebanon at various stages of the modern period starting in the early nineteenth century. At the same time, constitutional theory has grown under the effect of what can be described (or decried) as the Lebanonisation of the world, in reaction to the collapse of nation-states under local and regional pressures in various post-cold war hot spots. This happened or is happening in the Balkans, Africa, and Indonesia, to name the most dramatic such instances, very much on the lines of the collapse of Lebanon between 1975 and 1990. The spectre of Lebanonisation is also true of the Middle East, Iraq, Sudan, Palestine-Israel, and offers a root model for an infinity of variations which seem connected by one common thread: the collapse of the state along lines of primary affiliation of the groups within it, be they sectarian, linguistic, racial or national, that is communities fixed largely by birth and therefore unable to change that affiliation. In various intensities and at various rhythms, Lebanonisation has become a synonym of the collapse of societies and states in a *Pandemonium* pattern which Daniel Moynihan and others predicted forecefully at the beginning of the previous decade.[2]

The paper presented here builds on a reflection which has long been concerned with the constitutional dimension of these crises, and its Lebanese root model or mirror. By stressing "constitution" one gives a positive twist to a phenomenon which is essentially tragic, a blocked system and its descent into civil war along fixed community lines. The present analysis should be seen as a further investigation into facets of constitutionalism in Lebanon and in the region. It departs, on the strength of research conducted in and around Lebanese society, from the results reached over the years.

To start with the results of our own comparative constitutional research, conclusions reached can be summarized as follows:

1- The first conclusion is the vindication of sectarian constitutionalism against the secularism of the regional dictatorships. The perception of Lebanese society, in its most immediate regional environment, chiefly Arab, should allow a revisitation of the sectarian dimension (or communitarian, or confessional as generally translated of the *ta 'ifi* Arabic) with its positive appreciation as a separation of powers that prevents the

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[2] Daniel Moynihan, *Pandemonium*, New York 1994; Robert Fossaert, *Le Monde au 21ème Siècle*, Paris 1991.

emergence of dictatorship. In comparison with Iraq, to take the extreme counter-model of a country which appears to be "secular", the Lebanese constitutional system offers significant progress, in legal-civilisational terms, thanks in large part to the sectarian separation of powers operative in the Lebanese constitution, as opposed to the blanket secularism of the Iraqi constitution, which allows no institutional check on the ruler in power. This is easily understood, though an apparent paradox: by preventing the emergence of one single leader in the country without any countervailing power under the guise of "secularism", the Lebanese system prevents the rise of one sole leader, however popular or powerful. More dramatically, this sectarian rejection of an exclusive leadership represents the constitutional safety valve preventing the emergence of consistent authoritarianism/dictatorship in the country. In clearer words, what has prevented dictatorship in Lebanon on Iraqi lines is the acknowledged constitutional dimension of sectarianism.

Glosses are naturally possible, and a number of caveats and refinements are needed to clarify the picture, not least the fact that the Lebanese leader or leaders are constitutionally representative of the whole country, and indeed get elected by a larger constituency than their strict own, throughout the electoral ladder. As noted in a thoughtful compendium on the Lebanese system, "le critère de responsabilité de l'exécutif devant la Chambre des deputés doit être analysé à la lumière d'une donnée essentielle, le communautarisme institutionnalisé ou encore l'institutionnalisation du communitarisme. Sans doute les effets de ce dernier auraient pu être amoindris par le scrutin de liste (le collège électoral étant unique à l'intérieur de chaque circonscription) et par le fait que chaque député est élu par des électeurs étrangers à sa propre communauté."[3] The fact that the president, directly, and the Prime Minister, indirectly, as well as most deputies, need to pander also to an electorate which is not exclusively under the same confessional denomination as they are, represents the non-communitarian facet of a communitarian system. This, from the point of view of democratic representation, ensures in our view a large measure of social cohesion to the country. At the top, the national representation of officials thus secured, is reinforced by constitutional checks and balances which imposes leaders from other communities to share in the constitutional control of the state apparatus, also at all levels. This factor allows the country a minimum of social cohesion, while reproducing the structural weakness and fissiparousness inherent to sectarianism when protected and entrenched in the constitution. Hence the usefulness of the word consociationalism, which by rhyming with consensualism suggests forms of constitutional veto by a section of society over decision-making in the state so that, unless that section is represented effectively in the constitutional decision of laws and decrees, any legislative or administrative decision of the state gets blocked. The formal as well as practical manifestation of this constitutional reality can be observed at work in the dual signature of the president and the Prime Minister for all decrees, following the imprimatur of Parliament and its Speaker when laws are also concerned.

In short, sectarianism becomes the key vector for the constitutional protection of the democratic process in multiple nation-states, multiple being either multi-confessional, as in Lebanon or Syria, or multi-racial/ethnic, as in the Sudan, Algeria or Turkey. Models

[3] Flory et al., *Les Régimes Politiques Arabes*, Paris 1990, 314-5, chapter on Lebanon by Bahgat Korany.

can be refined ad infinitum, and the arrangements rendered ever more complicated, such as the tripartite Sunni-Shi'i Arab-Kurdish triangle in Iraq, where markers of community difference are at the same time sectarian, linguistic, and national.

2- The second conclusion is perhaps more dramatic: here the comparison obtains from the contrast between the Lebanese and Israeli constitutional arrangements. The question is as follows: considering a convergence between the level of democratic indicators in both societies as appear in a significant degree of freedom of expression and the recurrence of meaningful elections resulting in periodic change at the top, which of the Lebanese or the Israeli constitutional models is preferable for societies divided on religious/communitarian lines ? Is the operation of the Lebanese sectarian democracy (when it works) not preferable to a majoritarian democracy which, like Israel, systematically discriminates, at all levels, against its non-Jewish citizens ? More specifically, here is the dilemma: "Granted that discrepancies in the Israeli system have been rendering it immune or oblivious to the demands formulated by its non-Jewish natives over the half century of its existence, is the Lebanese model of sectarian constitutionalism not more alluring than its Israeli counterpart in the absolute, that is to the extent of the Palestinian tragedy in the past, and as a more inclusive model for the future ?"

None of these issues is particularly novel, nor is there any striking originality in the quandaries broached above. Michel Chiha's thought itself, because of its mere sophistication, encompasses in one way or the other all the poles of reference: "Nous sommes de ceux-là qui soutiennent avec une extrême vigueur que le Liban étant fait de minorités confessionnelles, il faut entre elles, pour que le Liban vive, un permanent équilibre."[4] But at the same time, "Cet équilibre c'est dans la représentation nationale, c'et dans la Chambre qi'il le faut chercher. Pour le reste, ne faut-il pas laisser tomber lentement le préjugé et donner plus de souplesse aux rouages de la machine ?"[5] And earlier, "Tout ce que l'idée confessionnelle gagne, *c'est la Nation qui le perd.*"[6]

What attempt to some novelty can carry us further is archival and semantic, and the next stage of the current work tries to follow these two threads: archival, that is, on the strength of newly explored documents, how deep is the specific constitutional tradition in Lebanon, from the nineteenth century all the way to the post-Taef Second Republic ?

Semantically, granted the depth of the tradition, is there any value added to this depth from the point of view of positive law ? In other words, can one depart from the above sketched conclusions on a new semantic direction of the constitutional debate ? This issue will be discussed in the second part of the paper.

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[4] Michel Chiha. *Politique Intérieure*. Beirut 1964, 81 (26 January 1945).
[5] Id.
[6] *Politique Intérieure*, 20. (2 July 1936, emphasis in original)

I. Continuities: From the archival legacy

Archival work is direct and indirect for our purposes. Indirectly, this means taking into account and incorporating historical work on the 19th and 20th century Lebanon achieved in the past decades. Comes to mind a number of authors at various periods, who enrich an already remarkable legacy represented in the works of Dominique Chevallier or A. Smilanskaia, to name foreign scholars on the history of 19th century Lebanon, Edmond Rabbath and Antoine Kheir for legal and institutional history. A later batch of distinguished archival work was achieved by Leila Fawaz, Engin Akarli, and Usama Makdisi, and for the period of the Mandate, Masoud Daher, Antoine Hokayyem, Fares Sasine, Fawwaz Trabulsi and Meir Zamir; and for the more recent period, such works as Farid al-Khazen, Elisabeth Picard, Samir Khalaf, Samir Kassir, Ahmad Beydoun, Melhem Chaoul, to name only some of the prominent participants in the present conference. There are naturally areas which remain understudied, notably legal developments in the 19th and 20th centuries at the level of the courts, and our own discovery of the *sijills* of judge Tamer Mallat at the turn of the 19th century, with over 100 full decisions in each *sijill*, suggest that the intersection between legal institutions and social history will yield, if enough talents are devoted to court records, a seachange in our understanding of the equilibrium and breakpoints in the daily life of the people of Lebanon as well as in the central institions presenting the liveliest interface between the individual and the state, namely the courts.

It would be preposterous to try encapsulating all this remarkable archival work in the current study, but it is important to note that continuities and discrepancies will not be assessed properly unless this scholarship is properly digested. While we have followed some of these works over the years, the subject of constitutional discrepancy and continuity can be further enlightened with a focus on two sets of documents, untapped yet to our knowledge, the first going back to the 1830s, the second contemporaneous with the formation of the 1926 Constitution and revealed remarkably on the occasion of the current celebration of Michel Chiha. Both enquiries respond to the main characteristic which is acknowledged as the distinguishing feature of Lebanese constitutionalism: its sectarian institutional arrangements.

When does sectarian constitutionalism first appear in the documented history of Lebanon? While antecedents on notables from all confessions and groups coming together to give the prince a faithful and comprehensive mirror of the society he is requested to rule, most famous among which the Great Fakhreddin II (r.1590-1633), when did the state, or some organ of the state, incorporate the sectarian structure of the country in a formal way, that is under a written document of some binding nature ?

The sectarian dimension of the Mutasarrifiyya (1861-1914) is well-known, and the Regime established by the Powers in 1861, and refined in 1865, replaced the territorial separation of the two Caimacams (1841-1860) by one single entity which is defined by a Council representing a number of communities with a strict quota for each, and governed

by a gouverneur (*mutasarref*) appointed by the Ottoman Porte – though nominally with the agreement of the five (or six) other Powers. In other words, the 20-year secessionist model of two caimacams, one for Christians the other for Druzes failed. But it had already failed because various "mixed arrangements" of which the Règlement de Chekib Efendi of 1845 is the best institutional representation, delinerating the detail of the composition of the Caimacamat Councils which were forced on the system by the impossibility of a systematic ethnic cleansing which the various conflicts could not bring about.[7] Edmond Rabbath saw in that Reglement de Chekib Efendi (in Arabic *ta'limat* or *tartibat*) the "norm which has since regulated public life in the Mountain. It will be in the following century transposed en bloc into the Lebanese State."[8]

But does sectarian constitutionalism have antecedents beyond the Mutasarrifiyya, or even the ad hoc arrangement of Chekib Efendi ?

There is actually a previous text consecrating the sectarian model, unknown to my knowledge in Lebanese constitutional lore:[9] it appears in the anonymous Chronicle of the battles of Ibrahim Pasha (ruled Lebanon 1831-1840), attributed to monk Antun al-Halabi (d.1864) by historian Asad Rustum, who compared the handwriting in the manuscript to letters in the Patriarchate, Halabi being a close supporter of Emir Bashir II (reigned intermittently 1788-1840) The whole text yields a wealth of information on the patterns of flights, battles, surrender, social and institutional hierarchy of the time, amidst the approximate Arabic rendering of a chronicler with a bias towards Emir Bashir. Our text is buried in this Chronicle.[10] Here how it starts:

"On the 1st of Ramadan [1249, January 1834], an order from Ibrahim Bacha was issued from Tripoli to the governor (*mutasallem*) of Beirut requesting that the capitation (*farda*) average for each person, rich and poor, ninety piasters.
On the 11th of Ramadan, Ibrahim Basha arrived in Beirut with only ten people so Emir Amin [one of the sons of Emir Bashir] came to his meeting in Beirut, where Ibrahim Basha ordered the collection of the capitation and a loan of 300 bags (*kis*)"

First things first, securing the tax. Then follows the intriguing report:

"On 14 Ramadan Ibrahim Basha ordered the establishment of a Consultative Council (*diwan mashura*) in Beirut composed of twelve men from capable notables of Beirut (*akaber Beirut ashab fitna*), with no say to the governor henceforth except in accordance with the decisions of the Consultative Council [following] a letter from him to the members of the aforementioned Council, who are six Muslims (*sittat islam*) 'Abd al-

[7] "Two Muslims, two Druzes, two Maronites, two Greeks, two Greek Catholics, one metwalli" in each Caimacam's "mixed Council", Rabbath, *Formation Historique du Liban Politique et Institutionnel*, Beirut 1986, 216.
[8] Id., 217.
[9] I am grateful for the following to my cousin Hyam Mallat, who provided me with a copy of the rare book which is the basis of the following paragraph, and for pointing out so precisely the origins of constitutional sectarianism in Lebanon.
[10] *Hurub Ibrahim Basha al-Misri fi Suria wal-Anadul.* Asad Rustum ed., Heliopolis n.d. (1927 ?), 36-38. The text is clearly contemporaneous of the events.

Fattah Hamadeh Secretary of the Council (*nazer*), 'Umar Beyh[um] Ahmad al-'Aris, Hasan al-Barbir, Amin Ramadan, Ahmad Jallul and six Christians (*sittat nasara*), Jibrayel Humsi, Bishara Nasrallah, Elias Menassa, Nasif Matar, Yusuf 'Ayrut, Musa Bustros,

As for the business (*tartib*) of the aforementioned Council:

(1) A specific time is fixed every day for the meeting of the members of the Council, and upon their arrival, the registrar (*kateb*) writes down their name in a list based on effective presence (*hudur*) which does not look at their rank (*maqam*).
(2) The registrar edits every day the business before him and submits it to the members of the Council when they arrive so that they complete it and so that business does not linger on from day to day.
(3) If these issues cannot be completed that day, the meeting the following day takes place some time before the time agreed, enough to complete [unfinished work].
(4) Business which remains from the previous day is not listed in that day's order but on the day it is completed.
(5) When the registrar reads the claim (*da 'wa*) the answer is sought from the one among the Council members who is expert in that matter before the others, and the registrar therafter takes the opinion of the others so that no one remains who has not spoken. If he finds a member of the Council has spoken with another member about a matter unrelated to the claim, he gives him a first then a second warning. If this is to no avail, then it gets noted in the minutes of the meeting that so-and-so is busy with matters outside the [public] interest. The registrar must note whatever is decided by the Council and shouldn't leave anything out; everytime a decision is made it is written down [to accord] with the law (*wa kull ma yataqarrar yakun maktuban wa la yataharra illa alladhi muwafiq al-haqq).*
(6) After the end of the meeting and business (*masaleh*) disposed of, and when a decision has been settled with the agreement of all (*bistihsan al-jami'*) the registrar writes it in draft and then copies it and files it in its appropriate place and then it is noted in the register (*sijill*) of the Council, and the registrar takes these summaries every day to the Council after they are noted down, and he reads them at the top of his voice in the presence of all. If they agree on a more appropriate opinion than the one presented *(istahsanu rayan awfaq min alladhi taqaddam*), they change the dispositions (summary, *khulasa*), and the dispositions are then presented to the Secretary of the Council who seals them with the Council's seal. After this is registered, the decisions are taken to the governor (decision-maker, *saheb al-amr*) who is briefed and orders those concerned [to act upon] the decisions. If His Excellency the governor (*hakemdar*) is present, then the honourable *mutasallem* does the briefing. *(tasil ila saheb al-amr likay yushrah 'alayha ila ashabiha amiran bi-ijra' ma tadamman min al-hukm wa-idha kana sa'adat al-hakemdar mawjudan fa-yushrah min taraf mutasallem agha)*
(7) The registrar hold two registers, the first including a copy to the Council with the report, the second including the decisions after they are sealed. The registrar must also keep the daily drafts in a bag."

Apart from the delightful historical information which this Beirut Charter includes, for instance the names of the notable Beirutis of the time or the degrees of seniority in decision-making, *saheb al-amr, hakemdar, mutasallem* or the members of the Council, the role of the registrar and of the Secretary of the Council, the text is important for our purposes as the first such document establishing in law the sectarian equality of Muslims and Christians who are entrusted to reach the dispositions needed to run public business. This brings Muslim-Christian parity in Lebanese constitutional decision-making back to 1834... While the arrangement is wobbly, and would remain hypothetical unless the minutes of these meetings are miraculously recovered in Beirut or in other cities where the same system seems to have also been followed, the purport is unmistakably Lebanese in the sectarian constitutionalism that it establishes. Between the Beirut Council of 1834 and the Lebanese Parliament of 2001 there is little structural difference.

Let us now move a hundred years forward to some of the novelty allowed by the recent Chiha Exhibit and book as regards the emergence of the Lebanese Constitution of 1926, the only Constitution remaining in the region after the Islamic Republic jettisoned its 1905-1906 constitutional legacy wholesale.

The archives uncovered in the Chiha Exhibit answer first a question which had remained puzzling to the constitutionalists, even those with the long memory and scholarship of Edmond Rabbath: was our founding text, the "dean of Middle Eastern constitutions", composed in Arabic or in French ? "Mais la question de savoir qui a rédigé la Constitution originale de 1926 et où, et en quelle langue, elle a été rédigée, ne laisse pas toujours d'alimenter des controverses devenues chroniques."[11] The Exhibit offers now a categorical answer, and it can be safely concluded that the author of the Lebanese Constitution is Michel Chiha, who wrote out the 96 articles which composed it in its original French version. The longhand manuscript is in his own writing, so are the copious annotations of the three consecutive typed corrections of the manuscript. This discovery ends a speculation that has lasted over three-quarters of a century.

Structurally, Titles 5 and 6, the first concerning the relationship with France under the League of Nations' Mandate, and the second on "Final and transitional arrangements" do not appear in the first draft. Title 5 and most of Title 6 have presently a mere historical value, and were drastically amended and or abolished to expurgate the Constitution either from a redundant Senate (1927 Amendment) or from ties to the coloniser (1943 Amendment). What emerges is that Chiha consciously worked for a Constitution which "would be viable outside the Mandate".[12] That challenge was met successfully, hence the deepest and most enriching constitutional tradition in the Middle East. This is no mean feat.

Even the corrections themselves are eloquent, and show an author keen on perfecting and refining his expression. At times, some of the addenda sound prophetic, for instance the one which has been inserted at the beginning of Article 2: "Aucune partie du territoire libanais ne peut être aliénée ou cédée". This is an example of continued portent to date,

[11] Rabbath, *La Constitution Libanaise: Origines, textes et commentaires*, Beirut 1982, 13.
[12] Claude Doumet-Serhal and Michèle Hélou-Nahas, *Michel Chiha 1891-1954*, Beirut 2001, 164.

while arguably superfluous in the context of state which isn't, like Lebanon, the object of prying neighbours. Several less circumstantial considerations are equally important. For instance, the Constitution in its earlier model shows how decisively parliamentarian its import looked, but its presidential tilt was no less clear: Chiha was interested in clarifying the exact position of the president, a position for which he looked as model the doctrinal work of French public lawyers, the famous Léon Duguit, directly or by way of the "specialist of public law" detached to Lebanon for assisting in consitution-writing, Paul Souchier.[13] Witness the several articles devoted to the president in the Lebanese Constitution, underlining the decisively presidential which it took even during the Mandate, a feature that explains how much it departs from any of the parliamentary models of the time (France, Belgium, Britain).

Still, this was, and remains, a frustrated presidential power. Here, more work is needed, as in the recent book by Anthony Issa el-Khoury comparing presidential powers in Lebanon and in France, for instance how both countries ended up consecrating "l'exécutif dualiste" as model;[14] or the continuing reflection, as in the just published book by Mahmud 'Uthman, on the nomination of the Prime Minister by the President under Art.53.[15] This is a major problem because of the poor (or ambiguous) drafting in Ta'ef of the Amendment about the "obligatory consultations", and the Chiha archives force a different view of the matter: there is here a mystery which remains to be solved, namely the profound discrepancy between the third correction of Art.60, which, after renumbering, became Art.53 in its approved Arab version: "Le président de la République nomme et révoque les ministres, parmi lesquels il désigne un président du Conseil des Ministres, ra'is al-jumhuriyya yu'ayyin al-wuzara' wa yusammi minhum ra'isan, wa yuqiluhum". Let us compare this to Art.60, correction 3: "Le Président de la République nomme et révoque le Ministre d'Etat et les autres ministres." Now correction 2: "Le Président de la République nomme et révoque le Ministre [crossed Secrétaire] d'Etat et les autres ministres." Correction 1 (then Art.55): "Le Président de la République nomme et révoque le Ministre [crossed Secrétaire] d'Etat et les autres ministres." Most interestingly the two original version, under Art.55: "le président de la République nomme et révoque le Secrétaire d'Etat [crossed here: président du Conseil] et les autres [inserted] ministres [crossed here sur proposition du Secrétaire d'Etat]."[16]

In addition to the missing link between correction 3 and the text adopted by the deputies in the meeting of 21 May 1926,[17] what this indicates is the existence of a dualist

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[13] Id., 166. From all accounts, Souchier and Chiha worked closely together, and many participants of the Drafting Commission of 13 must have had their say, especially Chebl Dammous. While a question remains about the exact nature of Souchier's contribution, or indeed de Jouvenel's, the emergence of the original text in Chiha's hand is a major discovery. The rest will remain speculative until another important archival document is discovered.

[14] Anthony Issa el-Khoury, *Le Rôle du Président de la République en France et au Liban*, Beirut 2000, 19.

[15] 'Uthman, xxx

[16] At pp.144-45. A closer look at this formidable collection shows that there were sometime two manuscript versions, and not merely one. In a small sheet appearing at p.160 of the book, an insert appears under Art.52: "Le président de la République nomme et révoque le Président du Conseil des ministres."

[17] Untouched by the discussions on that score, Ahmad Zein, *Mahader munaqashat al-dustur al-lubnani wa ta'dilatuh*, Beirut 1990, 57.

executive temptation from the very beginning, diluted thereafter by a preponderance of the President until Taef watered it down. Or perhaps more accurately, it indicates the quandary in which Chiha and the other founding fathers found themselves mired, at a time where the bicephalous headship of the executive could not be contemplated under a nominally parliamentarian system. This surely deserves more work, and further arguments bearing on the present interpretation of Art.53, especially since the confessional Maronite Christian presidency/ Sunni Muslim prime ministership of today has come clearly in the wake of the National Pact.

Such brief indications suggest that the emergence of the Chiha archives forces an adjustment of our constitutional theory to a significant extent. While we should point out that work on the model as the constitutional archetype of our system, in more ways than one, will further enhance the quality of an ongoing national debate,[18] let us end on three further notes about the leadership of the executive, in a controversy which has rightly become a major focus of the Lebanese Second Republic separation of powers:

1- In the same way as the Chiha archives forces a renewed and refined reflection of the nature of our dual executive system, one can imagine the effect of the publication of the Ta'ef minutes, still held by Speaker Husain al-Husaini, on the Lebanese constitutional debate.

2- Outside the purview of the 1926 constituants stands the major problem which affects the legitimacy of the presidency, because of the democratically flawed two-degree election of the Chief executive in the country, while a country like France has rallied to the inevitability of direct universal suffrage. This deserves other developments of their own right.[19]

3- The sectarian arrangement for the executive is a daunting problem, which is an essential part of the problems which the country will continue to face for a long time, and which is apparent in those hesitations and crossings: one president who heads the executive, or two ? If an internal separation of powers, how can this be fixed, and why a Maronite and a Sunni exclusively ? Does this not call for the inevitable complications one faced in the Troika, when the Shi'is asked, by way of the Speaker, for a say in *appointments*, a prerogative of the executive if any ?

This difficult question brings us to the other fascinating dimension opened by the Chiha Archives, and the one which sets Lebanon as a unique constitutional model in the world: the famous (or infamous Art.95). In previous work,[20] we have examined in some detail the Article, both in its first version and in its post-Taef amendment, as the central

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[18] That is in both the historical dimension, third republic, but also more interestingly in the extraordinary length reached by modern-day Belgium of the consociational model, cf xxx.

[19] Some of it can be found in my *Défis Présidentiels*, Beirut 1998.

[20] "A New Constitution for Lebanon: Examining the Ways to Institutional Normalization", Carter Center Consultation on Lebanon, Atlanta, 27-28 November 1990; "Rights of ethnic and national minorities in the Middle East mirror", Yale Law School Istanbul conference, 7-9 May 2000; "Lebanon, Syria and Iraq", Conference on 'Islam and constitutionalism', Harvard Law School, 7-9 April 2000.

constitutional peg of sectarianism in the system. The text is well-known in Lebanon, and we leave it at that.[21]

Now Article 95 does not appear in the four versions of the Chiha archive. The documents extant stop in the mansucript version at Art.86, which discusses taxes and the budget. A page or more are clearly missing. But this is not important, as the three corrections clearly show that Art.95 as we came to know it did NOT appear in the original text, and that it surfaced subsequently, sometime inbetween the third correction and 19 May, when it was presented for discussion to the Representative Council. More specifically, since we do not know when any of the versions of the Chiha Exhibit is dated, Art.95 emerged between 18 April 1925, when an Avant-projet was sent to Paris by de Jouvenel, and 19 May 1925, when it surfaced for discussion and adoption by the full Representative Council. So whose is Article 95, and hence the institutional sectarianism of the country ? A closer look at the available texts suggests a nuanced answer.

In the two first versions, that is the manuscript and the first correction, no trace of Art.95 language for the nomination of public officials. Suddenly, and on the margins of the second correction appears the following handwritten insert, heavily corrected and recorrected, before Art.13: "Toutefois étant donné la coutume au Liban et dans une intention de justice [crossed: équité] et de concorde, les communautés seront équitablement représentées dans les emplois publics, sans cependant que cela puisse nuire au bien de l'Etat." Here is the embryo of Art.95 language. The third correction has this typed in. However, it disappears in the text of the Constitution from Art.13.

On the other hand Art.95 language appears in the very first manuscript with regard to the Cabinet composition. Art.64 in fine of the Manuscript reads: "Dans la composition du Ministère, les communautés sont représentées dans la mesure où l'intérêt public ne s'y oppose pas. (Variante: répartir les sièges)." In the first correction, there is a slight change, "dans la mesure où l'intérêt public le permet." The third version is missing, but the last version takes up the *variante* suggested and develops it (Art.71): "Dans la composition du Ministère, les communautés sont représentées dans la mesure où l'intérêt public le

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[21] For convenience here are the texts:
Old Article 95: "On a provisional basis and in the intention of justice and concord, communities will be represented equitably in public employment and in the composition of the government, without prejudice to the interest of the state."
As amended in 1990: "Once elected on a half-half basis between Muslims and Christians, Parliament must take the necessary measures to abolish political sectarianism according to a staged plan [i.e. in stages], and establish a national committee led by the President of the Republic, which includes in addition to the presidents of Parliament and of the Council of Ministers, political, intellectual and social personalities.
The task of the committee is to study and propose ways apt to suppress sectarianism, to present them to the Assembly and the Council of Ministers, and to follow through the implementation of the staged plan.
In the transitional period:
a- The communities shall be represented in an equitable manner for the composition of the Cabinet.
b- The rule of sectarian representation is abolished, and merit and specialty will be adopted for public office, the judiciary, military and security institutions, and public and mixed institutions, in accordance with the requirements of national accord, with the exception of the first-class positions and their equivalent. These positions will be considered on a half-half basis between Christians and Muslims without dedicating any position to any particular community, and will respect both the merit and specialty principles."

permet. La répartition est normalement la suivante: un Maronite, un Sunnite, un Chiite, un Grec-Orthodoxe, un Druze, un Grec-Catholique, et un Représentant des Minorités." Fully-fledged sectarianism, which disappears from the Constitution formally "activated" by de Jouvenel on May 23, but sectarianism is retained for the composition of the Cabinet under Art.95.

So the patchwork functioned as follows: sectarianism was retained both for the Cabinet and for public appointment under Art.95, but the references were taken away from their original place. From Title I on "fundamental dispositions" for public appointment, and from Title II on "powers" for the Ministry, sectarianism became part of the "transitory" dispositions, where it remained everafter...

It would be wrong to stop at this stage, and Art.95 was not the result of some patchy constitutional game. As we know, the larger Lebanese input into the Constitution was not insignificant. The record shows actually how impressive the consultation before and after the 13-member Commission completed its work, especially with regard to the religious communities being solicited for their delegates and the Chebl Dammous questionnaire. Of this we now have three major traces: (a) the two responses of Béchara el-Khoury and Habib Abi Chahla, considerable figures if any, (b) the final report itself in early January 1926;[22] and the discussion of Art.95 by the Representative Council on 22 May 1926.[23]

The incisive response of Habib Abi Chahla to the questionnaire about the need of "sectarian representation for the protection of minorities"[24] sets the tone.

xxx

II. Semantic revolution

What was secured in this brief journey ?

The Charter of the Beirut Council of 1834 can be considered the first document establishing egalitarian ground between communities, chiefly Christians and Muslims in modern history, and equality is clear between the members of the Council, who are registered in a list of names rather than according to their "position" – historians seem to agree that the major feature of Ibrahim Basha's rule is the acknowledgment of the equality between Christians and Muslims, against the backdrop of Ottoman Islamic unequal *millet* system.[25] From the Beirut Charter perspective, there was little new in the National Pact and its establishment of the dual executive, or the return to parity in the

[22] Antoine Hokayyem, *La Genèse de la Constitution Libanaise de 1926*, Beirut 1996, 234 n.1. The text is published in Annex 7, 342-53.
[23] Zein, *Mahader*, 74-77.
[24] Chiha, 89: "al-su'al al-sades, hal yakun al-tamthil al-niyabi ta'ifiyyan am la wa limadha ? al-jawab: ta'ifiyyan wa-dhalika hifzan li-huquq al-aqalliyyat".
[25] Rabbath, *La Formation Historique*, 216; Fattal, *Statut*, xxx.

Muslim-Christian representation in Parliament by way of Taef in Article 24 of the Constitution. 1834-1989, full circle bringing us back to square one.

The emergence of Art.95 confirms the tradition, and is particularly telling in view of the contrast between the various French avant-projets and the Lebanese adaptation of western constitutional models to local conditions. Antoine Hokayyem has revealed the extent to which the predecessor of the enlightened de Jouvenel, General Sarrail, had pushed the tempers to the brink, including in lighting up the 1925 revolt, by pushing laicisme as the only model to civilisation.[26] An aphorism of one of the foremost thinkers of modern France, himself a secular soul, puts the issue in an appropriately larger historical frame: "Les religions sont mortelles, leurs cadavres jonchent l'histoire, mais elles ne sont pas assassinables."[27] The lesson would have served Maurice Sarrail and the other narrow secularists of the Third Republic rather well, and should perhaps make the ardent defenders of secularism in modern Lebanon, including over such touchy subjects as civil marriage, think again, or differently.[28]

Institutional consociationalism, taken positively, is a mirror to the need for joint Christian-Muslim rule over Lebanon. Seen positively under what Chiha mentioned in one of his drafts as the "coutumes" or "usages du pays", it is also what the better poets repeated throughout the nineteenth and twentieth century, echoing the popular/political call to unite against the backdrop of all kinds of foreign intervention Machiavelli-style, which used and abused the diversity of Lebanese society to further their own interests in the country.[29]

This suggests two epistemological consequences: the first is the positive acknowledgment of sectarian constitutionalism as the strongest safety valve against authoritarianism. Once it is perceived positively, that is as a guarantee that none of the two major blocs – Christians and Muslims – can dominate, the whole challenge to sectarian constitutionalism becomes much more constructive: in one of the remarkable exchanges in the Representative Council in 1926, one of the deputies opined, in favour of keeping to the system, that "the confessional spirit is a psychological state with deep roots in us", to which his colleague retorted: "a state or an illness ?".[30] The depth of sectarian constitutionalism offers a *Gestalt* doubling up in a Rorschach test. As in the discussions over the Constitution in 1926, sectarianism is a state of (well) being as well as a sickness. How to make that *Gestalt* evolve is a difficulty which is weightier than a mere brushing off the Lebanese system with simple formulations or a nod of one's head, all too current with superficial observers or high-school enthusiasts who see the country as ungovernable and the citizens immature or uneducated to a "national" standard.

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[26] Hokayyem, 165-90.
[27] Fossaert, *L'Avenir du Socialisme*, Paris 1996, xxx.
[28] See Ahmad Beydoun, *Tis' 'ashrat firqat najiya*, Beirut 1999.
[29] E.g. in William Khazen, Al-shi'r wal-wataniyya fi Lubnan wal-bilad al-'arabiyya, Beirut 197, 79-82, 448-454.
[30] Zein, *Mahader*, 76: " 'Adra: inna al-ruh al-ta'ifiyya hiya hala nafsiyya laha judhur fina. Al-mundhir: hala am marad ?"

The second consequence is less rosy, which condemns the country to communitarianism forever. Failure of the call for change seems elicited everytime it gets uttered, either in a reformist context such as the defensive response of Béchara al-Khoury to question six of the Questionnaire[31] and the similar echoes over the discussions of the Constitutional final project on 22 May 1926; or indeed on revolutionary occasions, such as those spearheaded over the second half of the century by an "idealist" Kamal Joumblatt, as came in the very sectarian report of Balay to foreign minister Robert Schuman in 1952.[32]

So are we condemned to constitutional sectarianism, by sheer weight of history and the absence of a ready model which would offer a way out to the self-perpetuating "pre-ideological" system ?[33]

Let us look again at that sectarian formula, and consider generally whom it leaves out: the old problem of fixed communities playing the role of political parties remains; remain left out also the post-ideological types, that is those who do not care for a religious tie whatsoever. Remain also out the minorities of the majorities, the Chiha-Joumblatt type, with little or no possibility for the demographics or the majoritarian system to remedy their exclusion. Remains also the problematic trumping of Muslim-Christian parity by its replacement in the Executive by a Maronite-Sunni equation which adds a complicating layer to the system. Mostly, remains frustrated the principle of the access of all citizens to the top positions in the country on account of merit.

So how can one think ahead to solve the problem, without jettisoning the balance brought about by historical and comparative arguments ?

In the literature, one comes sometimes across Lebanon as an example of federalist sectarianism, or sectarian federalism. We use this appellation ourselves, despite its shortcomings, because it allows a revolution in semantics without which it is hard to break new ground.

"Cette constitution, qu'à la première vue on est tenté de confondre avec les constitutions fédérales qui l'ont précédée, repose, en effet, sur une théorie entièrement nouvelle, et qui doit marquer comme une grande découverte dans la science politique de nos jours."[34] Tocqueville was right on: Federalism in the US style, no doubt, is a major development in political science in modern times. It would be hard to suggest Lebanese sectarianism is the cousin of federalism after the US model. Californians are not Maronites, New Yorkers Muslim Sunnis, or Floridans Druzes. It does not work like this, because the missing element in the terms of comparing Lebanese sectarianism and American federalism is obvious for a host of reasons, most centrally that federalism is territorial, whereas Lebanese sectarianism is primarily personal. In addition, in any federal system like the US, federalism works alongside and generally as accessory to the democratic

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[31] Chiha, 88

[32] Chiha, 239-240: "Le nouveau régime ... doit trouver aussi le moyen de freiner les emportements d'un idéaliste comme M. Kamal Djoumblatt - principal artisan de l'élection de M. Camille Chamoun."

[33] Michael Walzer, *On Tolerance*, New Haven 1997, 24.

[34] Alexis de Tocqueville, *Démocratie en Amérique*, (1835) Meyer edition, I, 223-24.

central principle, and tones it down or corrects it in favour of minorities or communities defined by territory. It does not negate the majoritarian principles as a matter of course.[35]. In Lebanon, there is no countervailing institutional arrangement, let alone any identifiable territorial entity which could be the repository of the federalist arrangement. And so on to a myriad of differences.

Much further exploration of the federal/communal comparison is needed. Ignoring that possibility would not be wise, however. Here is one example from Lebanese lore, which established a Senate in 1926 only to have it suppressed a year later as no one quite understood why another Chamber was needed. Whether in the Questionnaire, or in the comparable models in France or in Britain, the two Chambers appeared, and continue to appear rather redundant .But the Senate re-emerged at Ta'ef, and is even inscribed for the future in Art.22 and 24. This is a problem which Taef has just started grappling with, offering a bicameral country, with a dominant chamber based on majoritarian rule, and an upper chamber representing the communities on a parity basis, with a tilt towards the numerical minority to offer a real counterbalance. Or vice-versa. This is all approximative, for only if the model is federal does a bi-cameral system become rational in democratic terms.

But that is, one remembers, only one branch of government: what about the judiciary, which some of the TP of the Constitution tries to protect away from sectarianism ? How to compose it, who names the judges, should it also be federal/sectarian ? On those difficult answers, rests the reality of its independence, and its role in the arbitration of the other branches, and, perhaps more importantly, the constitutional rights of the individual. And what, more dramatically, is the arrangement for the Executive ?

Alexis de Tocqueville had seen it clearly two hundred years ago. After showing that all the "confederal models" of "modern Europe, not to speak about Antiquity" fall short of what he saw in America, he explained it by way of the strength of the federal government in the US: "Les Etats-Unis d'Amérique n'ont pas donné le premier et unique exemple d'une confédération. Sans parler de l'antiquité, l'Europe moderne en a fourni plusieurs. La Suisse, l'empire germanique, la république des Pays-Bas, ont été ou sont encore des confédérations... Cependant le gouvernment fédéral, chez ces différents peuples, est presque toujours resté débile et impuissant, tandis que celui de l'Union conduit les affaires avec vigueur et facilité."[36]

Despite these hard terms of the equation, we maintain that the semantic revolution is necessary, because the world is governed by either a classical unitary system, or a federalist one. There is no inbetween. Talk about confederations, as for Switzerland, is incorrect constitutionally. Switzerland offers a variety of a federal system, which is characterised by two chambers and an apportionment of powers which gives a large say to the Cantons, but which remains determinedly centralist for a large number of

[35] In extreme cases as happened in the 2000 elections, it might, as with candidate Gore receiving half a million votes more than his rival, and yet Bush becoming president in the 2000 elections.
[36] Tocqueville, *Démocratie en Amérique*, I, 223.

functions. And since the difficult Swiss model is mentioned, we might suggest that the Lebanese model might offer answers to the current constitutional quandaries of the EU.

At Ta'ef Article 95 was replaced by a forward-looking version announcing the death of constitutional sectarianism. Clearly the present conference, and other endeavours of a similar style, work as some sort of intellectual forum prefiguring the National Congress requested by new Article 95.[37]

To conclude: the passage to thinking along modes of federalism our sectarian constitutionalism can only operate on a dual basis: the positive acknowledgment of the checks and balances of a system that goes back to 1834 in a unique constitutional tradition, and the epistemological break which requires a semantic revolution. With much to do for that semantic revolution to begin, communitarian federalism deserves to be the next horizon of our Republic.

[37] On writing a Constitution, the Beauvais draft, plus bibliography: Hanf, Dawud Sayegh, Jisr, Salibi, Cicero.