

## Lebanese constitutionalism and the political-theological Middle East

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We are, let us not forget, in this East, always in fermentation and literally sick with intelligence and exegesis, a promised land of anxious minorities, a high place from which all prayers rise freely into the most transparent, starry sky.<sup>1</sup>

Michel Chiha wrote the Lebanese Constitution in 1926. He died in 1954. The survival of his constitution is not banal. In 1979, whatever remained from the Persian Constitution of 1905-1906 was brushed aside by the revolution in Iran. This makes the Lebanese Constitution the sole surviving sage in a regional sea of constitutional trouble. Why this survival and continuity, how it is rooted in the deepest Middle Eastern past, and how it developed in Lebanon and against the region after the passing of Chiha in 1954, are the subject of the present chapter.

### The depth of Middle Eastern constitutionalism

In the Middle East, where the written records extend back to the end of the third millennium BCE, religion has always been a staple of society. Writing on the earliest Mesopotamia, a Sumer/Akkad scholar explains why:

[I]n the spheres reflected in our documents *Mesopotamian religion is politics*. From the earliest times historical statements are couched in religious metaphors, and this alone is enough to show that their ideological statements were important on a purely secular level.<sup>2</sup>

The political-theological scene was always a tightly knit compact, and social segmentation along religious lines a fixture of the public scene ever since.<sup>3</sup> Instead of free-floating free citizens/denizens/ subjects as agents, we have citizens defined by their religious ‘communities’. In the absence of a regulating mechanism amongst communities when they are mixed, a ruler dominates the lot. Modern Middle Eastern constitutionalism faces a reality, deeply rooted in its past, which continues to weigh on the citizenry to date.

Not only does this trait strike root as a Middle Eastern calque since antiquity, but its continuity is attested at various moments of a long history. A scholar of the earliest Christian period confirms

<sup>1</sup> ‘Nous sommes, ne l’oublions pas, dans cet Orient toujours en fermentation et littéralement malade d’intelligence et d’exégèse, une terre promise des minorités inquiètes, un haut lieu d’où montent librement vers le ciel le plus transparent, le plus étoilé, toutes les prières.’ LA 46.

<sup>2</sup> Nicholas Postgate, *Early Mesopotamia*, London: Routledge 1992, 479. Emphasis added.

<sup>3</sup> In a Western context, the masterpiece of Lucien Febvre on *Le Problème de l’Incroyance au 16ème Siècle- La Religion de Rabelais*, Paris: Albin Michel 1937, demonstrates the inevitably religious daily life in society in early Renaissance Europe.

the irrelevance of secularism attested in the confrontation in the tragic triangle composed by Pilate as Roman prefect, Caiaphas as Judean Grand Priest, and Jesus, a Nazareth native. 'Sedition' is what Pilate cares about, Caiaphas wants to punish Jesus for 'blasphemy', and Jesus considers that his realm, and his law, belong to neither Roman law nor to Judean/Jewish law. But even Roman law at the time was religious:

On a purely lexical register, characterization of sedition as a 'secular Roman crime' is confused. Pre-Christian Roman law had no place for the term 'secular'; there are no 'secular' rights, or crimes, in pre-Christian Rome. The legal use of the term 'secular' (*saecularis*) emanates from Christian chanceries in late antiquity, and the word 'secularity' (*saecularitas*) was put into circulation by the late Medieval, Latin-rite Christians.

In a technical sense, Jesus could not have been condemned for a secular offence, since no offense in first-century Roman law is called 'secular'. But for that matter, no offence in first-century Judean law is called 'religious.'<sup>4</sup>

Confusion between religious and secular law continued through the ages. The ca 5<sup>th</sup> century Syro-Roman Code shows how, well before Islamic law came of age in the 8-9<sup>th</sup> century, law was inextricable from religion.<sup>5</sup> This segmentation persisted naturally with the advent of Islam.

In his alluring wide brush of Lebanese history, Michel Chiha ascribes to Islamic rule the transformation of a more secular governmental mode epitomized by the Byzantine Roman empire, in the West, and the Sassanid Persian Empire in the East, into a stricter religious-communal system. Regardless of whether the two large Empires defeated by the Islamic conquests of the seventh century were 'secular' in a modern understanding, there is little doubt that the religion-defined community, and within it, the communal/sectarian one, dominates Middle Eastern history since.

The political-theological segmentation was demonstrated in great detail in the case of Egypt in the tenth to thirteenth century through the prism of the Jewish communities of Cairo, and the wider Muslim world in which they operated, as a 'medieval religious democracy' in the masterpiece of Samuel Goitein.<sup>6</sup> It was conceptualized into the Ottoman Empire under the so-called *millet* system when the democratic revolutions of the late 18<sup>th</sup> century rocked Europe then the Middle East. The Ottoman system is therefore a calque of previous Middle Eastern systems: the Sultan rules, deputizes across the realm bureaucrats and judges, while recognized or tolerated religious communities govern their members in various forms that do not threaten or impinge on his deciding for the realm. Various councils of state, generally known as *diwan* (plural *dawawin*), as antechambers, advised the Sultan and carried out his orders. These 'privy councils' acted on the command of the ruler. Members of the diwan were generally appointed and

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<sup>4</sup> David Loyd Dusenbury, *I Judge No One: a Political Life of Jesus*, New York: Oxford UP 2023, 203 (fns omitted).

<sup>5</sup> On the religious dimension of the Syro-Roman law book, see IMEL, 22-32.

<sup>6</sup> Samuel Goitein, *A Mediterranean Society: the Jewish Communities of the Arab World as Portrayed in the Documents of the Cairo Geniza*, 5 vols, Berkeley: University of California Press 1967-88, vol. 2, *The Community*, 1971, 5.

dismissed by him at will.<sup>7</sup> No democracy in the modern state on this level then. There certainly were no elections.

This makes communities as intermediaries, agents, between the individual and the state, as a lasting feature which survives most clearly in the associated minorities of Chiha's constitutional theory. The Lebanese Constitution stands as a stubborn template of historically deep social structures across the Middle East which consider the person always as individual-in-a fixed-religious group. Democracy as equality between individuals is bound to fail in a communal system.

Goitein was excessive in his enthusiasm about the 10-13<sup>th</sup> centuries Middle East as a 'medieval democracy'. And whereas the classical Middle East allowed members of minorities to express themselves through a complicated system of castes and dynasties, insofar as democracy necessarily entails elections, the qualification of Middle Eastern societies as democratic also fails on this score. But it fails slightly less. Consultation was a daily feature within minorities, and a common one from the leaders of these minorities to the Caliph, Shah or Sultan at the top. But there were no elections. There is no democracy without elections.

### **Disruptive elections**

The obvious way to promote representation, all the way to full representation of the people, is through fair, regularly held elections to ensure democratic change of the rulers. Although there may be several persons contesting a coveted official position, the concept of a competitive election with participants casting a vote with a (relative or absolute) majority in favor of one candidate winning, is so far unattested in the life of classical Middle Eastern/Muslim history. In an investigation carried out on government manuals of the classical Islamic age, an unexpected concept transpired about the choice by a community of its leader, one which conjures up an ancestor to modern elections. This is the forgotten process of *istiham*, share-apportioning in the choices cast for a leader amongst others. The concept was therefore within the constitutional imagination of leading scholars, but it did not take root in public life.<sup>8</sup> This exception confirms the rule of the absence of any electoral practice in the pre-modern Middle East.

This should not come as a surprise, for this was also true in the West until the Enlightenment. It took hundreds of years for 'social choice' to morph into 'election'. For our purposes, an election can be defined as an arithmetical operation carried out in a relative short time to compute votes cast with the objective of choosing one or more winners among competing candidates in a pre-agreed ballot under majoritarian system, with the acceptance of the winner(s) by all candidates as a matter of course. Like the elephant in the room, this complicated definition claiming accuracy and comprehensiveness will not add much to the practical or intuitive understanding of what an election is for the simple voter. It underlines nonetheless the immense advance constituted by elections in the slow progress of humankind to the people's representation in the State. Elections are one, late form of social choice, intimately associated with the concept of democracy as a

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<sup>7</sup> On Diwan al-mazalim, see my 'A Middle Eastern tradition', in Peter Cane et al. eds, *Oxford handbook of comparative administrative law*, Oxford: OUP 2021, 97-116.s

<sup>8</sup> On the concept of *istihama*, see 'Introduction: Three circles and a few promises (with Elham Fakhro)', in *Promises of constitutionalism in the Gulf States*, *al-Abhath*, Special issue 70, 2022, 5-27, at 25-7.

critical pool of equal voters inexorably growing to become ‘universal suffrage’. Disenfranchisement steps on the road to minimal democratic representation as accepted in the 21<sup>st</sup> century under universal suffrage were slow, hesitant, often marred with reversals. Elections are ever more perfectible on the road to fairness.

### *‘Un monstre ingouvernable’*

In light of the wide brush of this glacial move of humankind towards democracy, how did Lebanese constitutionalism fare since 1926?

A century after Chiha and his colleagues drafted the social contract, Lebanese constitutionalism remains the prisoner of a profound paradox.

At one end of the paradox, all factions, all political leaders swear by the Constitution and the need to apply it. Even the most radical groups sitting on the extremes have rallied to the mantra of holding on to the Constitution. This, regardless of the fact that ‘extremes’ in Lebanon are counterintuitive, for they are not merely right and left extremes, itself a dying but persistent dichotomy the world over. Extremism between groups operating dominantly within a communal setting spanning the 18 or so legally recognized sects in the country. The political leader of one community is extreme when he sets his community up against any other. There are many such political/communal leaders: extreme Maronites, extreme Sunnis, extreme Shi‘is. Yet the problem of communalism in government is that it does not require its leaders to be extreme for the system to freeze into ungovernability. The association of minorities coalesces sometimes, not always, in a Muslim-Christian binary. This has been a formal reality in Lebanon since 1943, when the president started becoming a Maronite by constitutional custom, and the prime minister a Sunni.

This binary figure moved steadily since the 1990 Ta‘ef constitutional amendments into a deadlocked triangle formed by Maronites, Sunnis and Shi‘is as the three largest religious communities. This triangle is described in the country as ‘troika’. For the Lebanese citizen, the troika is represented constitutionally by the president of the Republic, the president of the Council of Ministers, and the president of the Chamber of Deputies. One can see how the layers superpose unevenly under the constitution: at the bottom, varying association of minorities in bi- or tri-nary mode; at the top strict *numerus clausus* principle in government; both superposed onto a Montesquieu separation of powers between three branches defined by their function.

In short, one pole of the paradox rests in a Constitution vaunted by all in a text of increasing sacredness which all Lebanese factions have rallied around in the pretense to, need for, or intimate belief in upholding it.

The other pole is that it does not work. The communal State of representative government, undergirded by a Lebanese Constitution forged in 1926, freed from stern mandatory shackles in 1943, and revisited in 1989-90 with significant amendments, has become ‘*un monstre ingouvernable*.’<sup>9</sup> The ungovernability of a system based on an association of minorities is daunting. Whether it is encapsulated in two communities, Christian and Muslim, or three, Maronite, Sunni and Shi‘i, or even in more granular arrangements down to the fractiously

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<sup>9</sup> Editorial, ‘Liban : l’Etat, monstre ingouvernable’, *Le Monde*, 30 November 2020.

detailed representation in the cabinet, parliament, the judiciary and the administration of all or nearly all communities, the system blocks or risks getting blocked at each and every turn.

Lebanese history since 1926 is a chain of grips in the system. What makes the country even more ungovernable is the fact that intra-communitarian disputes are often the reason why the system blocks. During the Mandate, the system was undermined by the difficulty of the CD voting on a successor to the first president from amongst Christian leaders. Debbas was reelected in 1929, as allowed by the Constitution at the time, for another term of three years to avoid a brutal contest between Christians. In 1932, the dispute between the two leading Maronite contenders, El-Khuri and Eddé, led to the 'risk' of Tripolitan Muslim leader Jisr taking over the Republic's helm. Prodded by the Maronite Patriarch, 'Christian' France reacted by suspending the Constitution, and HC Ponsot extended Debbas's mandate, with the fig leaf of his appointment as President of the Council of ministers whilst retaining his title as President. After Debbas died in 1935, the rivalry between El-Khuri and Eddé dominated the CD microcosm for the next 15 years. Eddé prevailed between 1936 and 1941, then Khuri between 1943 and 1952.

As in *Hamlet*, the foreigner is called in when the locals are at daggers drawn. French military-backed 'arbitration' under the Mandate would recur again and again, prodded more often than not by intra-Maronite rivalry over the presidency. This was repeated in 1958 by the American brief 'arbitration' when the Marines landed and secured the presidency of the head of the army, General Fouad Chehab.<sup>10</sup> The constitutional system was undermined again by the rise of the Palestinian armed movement in Lebanon after 1967, and the split in the country between the 'Muslim left' and the 'Christian right', but the battle remained most acute over the holder of the presidency. Syrian military 'arbitration' then came in to secure its preferred Maronite presidents between 1976 and 1992, with a significant interlude of a 'counter-arbitration' by Israel invading Lebanon and occupying Beirut in 1982, thereby securing two successive presidents, the first one assassinated before taking over. In the later stage of the blocked system of governance, the presidency was the battleground between Maronite contenders backed by Iraq (1989-90), then Syria again (1990-2005). The Lebanese Cedar Revolution weakened Syrian control briefly in 2005, but the subsequent presidents have remained an expression of outside domination, Iranian rather than Syrian, until another major upheaval started in October 2019.

This is one speedy, bullet-like reading centered over the Maronite presidency battles that wrecked the country over a century of constitutionalism. One recalls that the denomination of a Maronite president was never inscribed formally into the text. The received notion, also unwritten, is the so-called National Pact (*al-mithaq al-watani*) struck by El-Khuri and the President of the Council/PM Riad al-Solh in 1943, whereby the president would be forever Maronite, and the PM forever Sunni. When the historically marginal status of Shi'is inherited from the Ottoman Empire was terminated by the recognition of the community by the French in 1926 as the Constitution was getting drafted, the seeds of the modern troika were sown.<sup>11</sup>

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<sup>10</sup> On the presidency of Fouad Chehab, see in the bibliography the books of Bassem al-Jisr and Nicolas Nassif in Arabic, and of Stephane Malsagne in French, and the site FouadChehab.org

<sup>11</sup> On Shi'i positioning during the French Mandate for and against the Grand Liban, Tamara Chalabi, *The Shi'is of Jabal 'Amil and the New Lebanon*, New York: Palgrave-McMillan 2006, esp. chapter 5, 'Out of the margins: Political and religious integration', 115-138, and the granting by de Jouvenel of official recognition Shi'is, for the first time in its history, as one of the religious communities in the country, by a decree of the HC issued on 27 January 1926. Id. 130.

Chiha saw the downside of a communal constitution, as did most of his contemporaries. One of his persistent responses was time. Time will hopefully assuage the Nation against the communities, many hoped. But the passage of time can also have the opposite effect, and Chiha knew it. One early tragic example is the quasi-total disappearance of Jewish citizens in the country, starting in the aftermath of the Arab defeat by Israel in 1967, and accelerating with the onset of the war in 1975. A community which dwindles to a few residents cannot claim representation in government. The principle holds also true for the larger communities. The last official census was carried out in 1932, six years after the Constitution was put in place. Following on the previous census of 1922, upon which the first electoral law of the CR was based, it was clear that Christians were losing numerical ground to Muslims. This was the last census officially conducted in the country.

When it comes to the game of numbers, change is always troubling in a democracy. A republic, aka democracy, aka a representative system, aka majority rule, can be undermined by changes in numbers and their perception by the usually dominant groups who see themselves assailed by rising 'minorities' or a large immigration. This is a basic, universal rule, always function of time and its effects on demographics. Its manifestation in Lebanon, at its most basic, is the illegitimacy of Christian dominance when Maronites are no longer a relative majority and Christians no longer an absolute majority. But the reality is more complex because of the triangle of three large communities, as opposed to the binary system that prevailed before 1975. It does not solve the Christian or Maronite conundrum, but it makes it sometimes secondary to the rivalry between Sunnis and Shi'is.

Chiha was a firm believer in Lebanon as the be-all and end-all of its residents. Even the corrections of his drafts are eloquent on the subject. They show an author keen on perfecting and refining his expressions in what was clearly a task he had at heart. Some of his formulas ring as true and needed today as they were when written, for instance the one which he inserted at the beginning of Article 2: 'No part of the Lebanese territory can be alienated or ceded.'<sup>12</sup> This is an example of continued portent, while arguably superfluous in the context of state which isn't, like Lebanon, the object of prying neighbors. This insistence explains also the qualification which has puzzled scholars over the very first article in Chiha's earliest manuscript: 'Great Lebanon is a unitary independent republic.'<sup>13</sup> The word 'unitaire', which remains to date in the text, reflects the troubled context of the country in 1925-6, in between the calls for the unity with Syria and the separation of parts of the country, especially Tripoli at the time, from the Lebanese map arrested in 1920.<sup>14</sup>

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<sup>12</sup> 'Aucune partie du territoire libanais ne peut être aliénée ou cédée.' DOC 1, insertion at Art.2= Constitution of 1926, Art.2.

<sup>13</sup> 'Le Grand-Liban est un Etat unitaire indépendant.' (DOC 1, Art. 1) = 'Le Liban est un État indépendant, unitaire et souverain.' Constitution of 1926, Art. 1.

<sup>14</sup> In comparative lore, only when countries are threatened in the integrity of their territory, is this insistence on the integrity and unity of a country expected. The most famous antecedent appears in the successive French constitutions. The Constitution of 1791, which was enacted when France was a monarchy, mentions that "the Royaume est un et indivisible." (text adopted by the Assemblée Constituante on 4 September 1791) A year later the Convention declared that France was no longer a monarchy (21 September 1792), and on 25 September 1792 declared the country "a Republic". The name was included in the Constitution of 1793 (which never came into

This is not to say that the trouble with Lebanon's neighbors is ever over.<sup>15</sup> As ruled by the first president of the Lebanese Constitutional Council, it is an unfortunate fact that 'Lebanon's neighbors are not Sweden and Norway.'<sup>16</sup> The dominance of Syria over Lebanon after Ta'ef has meant that democracy was shorn of its most basic elements until the withdrawal of Syrian troops in 2005 following the so-called Cedar Revolution. In the South until 2000 meanwhile, Lebanese territory under Israeli occupation was governed militarily from Tel Aviv. North of that line, Syria ruled with an iron fist. The three main positions at the top of the country, and several positions across government and the administration, were filled at the behest of the Syrian rulers.

One important option, which is mentioned only perfunctorily in the present book, revolved over territory and boundaries. Lebanon was carved out, as were other parts turned countries, from the Ottoman Empire. United Syria, pan-Arab unity, pan-Islamic unity, all including Lebanon, drove part of an important debate on where the country lay exactly: alone, within Syria, within the larger Levant, within the Arab world, within the Mediterranean, within Asia, within the Islamic world? There were also active Christian groups who advocated a return to a smaller Lebanon where the Christians would remain a numerical majority. This option was dubbed derogatorily Marunistan (state of the Maronites). It remains alive and takes other forms, such as calls for federalism understood as a loose confederation pre-1787 US style with a hapless central government and harsh borders between the federated regions.<sup>17</sup> In addition, the relationship with the immediate neighbors, Syria in particular, has remained fraught since the Mandate. Michel Chiha penned several columns on this relationship. And whilst he was supportive throughout of a sharp territorial and political independence of Lebanon, he left room for close economic, even monetary, relations with Syria.<sup>18</sup> For all intents and purposes, this aspect of the public debate in the country is not discussed in this book.

While the rise of Lebanon the nation-state continues to be troubled by its close and less close neighbors, its continuity in its 1926 boundaries is no longer in doubt, or, in more cautious terms, no longer the subject of a serious debate. The crux of the ongoing existential controversy is how to govern the territory within these boundaries.

A serious discussion of reform could not take place when the heavy shadow of foreign countries was obscuring the local scenery, nor can it take place seriously so long as the monopoly of violence is not fully exercised by the State. Nonetheless, Lebanese constitutionalism calls for some speculative anticipation, the more so since the country continues to be an ungovernable monster.

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force) and on all republican constitutions since, including the third republic (Constitution of 1875), which is relevant for the Lebanese constitution, and the still current fifth republic (Constitution of 1958).

<sup>15</sup> See my short article, 'Trouble with the neighbours', *Index on Censorship*, 5, 2000, 158-60; and the telling formulation in the title of Ghassan Tueni, *Liban, Une Guerre pour les Autres*, Paris: Lattes 1985.

<sup>16</sup> Wajdi Mallat (d.2010), in private conversations.

<sup>17</sup> On the spirit of the 'Marunistan' break-up allure in the late 1970s, Jonathan Randal, *Going All the Way : Christian Warlords, Israeli Adventurers, and the War in Lebanon*, New York: Viking 1983. On the often misunderstood concept of federalism in the Middle East, see my '[Federalist Dreams for the Middle East](#)', *Lawfare*, 16 August 2018 (online)

<sup>18</sup> Economic ties with Syria are discussed in several op-eds by Chiha, see e.g. Chiha, ch \_ above.

There was no dearth of reform programs, especially constitutional ones, over the last century. Before and during the recorded constitutional debates, and in Chiha's papers, the central discussion was about the equality of citizens in the public space, primarily as voters and voted in. They could not escape the apportionment of positions at the top and in the administration through the dominant prism of communities.

The debate has not moved an inch since 1926. In support of full equality, with regard to merit over community appurtenance, stands a deep secular appeal. One can find it adumbrated in HC Maurice Sarrail's anti-clerical, Third Republic-style beliefs, which he sought to implement in a community-free electoral law. On the face of it, this citizen-based egalitarian secular system was and remains the rule in Western democracies. The penchant for secularism is also an expression of nationalism in its basic traits. As Chiha described it, what the communities lose, the Nation gains. This belief forms part of a liberal philosophy which marks the European Enlightenment's detachment from religion. It has deepened over two centuries astride the dominant cleavage between left and right, but the cleavage was always tempered by more refined segmentations. Being on the right did not necessarily entail a defense of a religion-less, and therefore religious communities-less government. In France, 'Republicans' since the French Liberation are by-and-large on the right side of the political spectrum, yet sometimes more markedly secularist than some adherents of the 'socialist' aspects of caritative Christianity. In Lebanon, the left developed over the better part of the 20<sup>th</sup> century and dominated the public debate over constitutional reforms from Independence to 1976. It advocated full-fledged secularism in the three branches of government and in the administration. Despite being carried by serious popular support peaking in the first few weeks of 1976, the call for secularism led nowhere. Since then, secular and egalitarian advocacy of secularism has faded as an impossible utopia against the rise of political Islam, Christian retrenchment, and extreme Judaism in the region, until it was kindled again in the large street protests in October 2019 in Lebanon, and in Israel four years later.

### **The pluses of communal constitutionalism**

Whilst stating the deformity of an ungovernable monster, important caveats need to be taken into account, such as relatively free elections and the reality of free speech in Lebanon in contrast to the vast majority of Middle Eastern countries. Yet even free speech is contingent in Lebanon on the communal system. In a State averse to the one ruler, even with strong powers usually associated with the presidency, checks and balances operate on a communal basis. When an individual criticizes a ruler, she inevitably criticizes a community leader. In practice, this allows the member of another community to be shielded by 'her' own – also communal, leader. As a fiercer political debate sets in, all political leaders, and their supporters, become the subject of criticism from other political leaders, and their supporters. While sectarianism deepens, the cacophony of criticism blurs the debate by making it free.

Freedom is therefore powerfully served by the communal system. There are other positive qualifications of constitutional sectarianism, not least the fact that the Lebanese leader or leaders are formally representative of the whole country who get elected by a larger constituency than strictly their own. This is true throughout the electoral districts. As noted in a subtle analysis on the Lebanese political system, 'the criterion of accountability of the executive before the Chamber of Deputies must be analyzed in the light of an essential fact, which is institutionalized

communitarianism or even the institutionalization of communitarianism. No doubt the effects of the latter could have been reduced by the list system (the electoral college being unique within each constituency), *and by the fact that each deputy is elected by voters foreign to his own community.*<sup>19</sup> Most deputies elected in mixed popular constituencies need to pander to an electorate which is not exclusively of the same denomination as they are. This important electoral trait represents the less communitarian facet of a communitarian system.

This, from the point of view of democratic representation, ensures a measure of national cohesion to the country. At the top, representation by unmoored officials is reinforced by constitutional checks and balances. This factor allows the country minimal social cohesion, while reproducing the structural weakness and fissiparousness inherent to sectarianism. Whence the usefulness of the word consociationalism, which, conjuring up consensual agreement, allows constitutional vetoes by a section of society against the ‘tyranny of the majority’ over decision-making in the state. If not agreed by major communities, any legislative or administrative decisions of the state are blocked and their imposition stifled.<sup>20</sup> The formal as well as practical manifestation of this constitutional reality can be observed at work daily in Lebanon under the dual signature of the president (qua Christian Maronite) and the Prime Minister (qua Muslim Sunni) for all decrees, following the imprimatur of Parliament and its Speaker (qua Muslim Shi‘i) when laws are also concerned.

## Ta’ef

It is time to look at the constitutional amendments effected in 1990. Constitutional amendments are the truest revelators of the reformists’ success. They all failed to change the system since the end of French tutelage in 1943. The one exception came in the Ta’ef agreement agreed between the warring Lebanese factions meeting under Saudi aegis in 1989. It marks the (relative) end of the civil and foreign wars over Lebanon. The domestic part of the agreement was incorporated in formal constitutional amendments the following year.<sup>21</sup> Ta’ef’s main changes limited presidential power in the bicephalic system and established a constitutional council, both put into effect since. For our purposes, it mostly provided a hypostatized ‘secular’ reform which is still pie in the sky over thirty years later.

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<sup>19</sup> ‘...[l]e critère de responsabilité de l’exécutif devant la Chambre des députés 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.*’ Maurice Flory et al. eds., *Les Régimes Politiques Arabes*, Paris 1990, chapter on Lebanon by Bahgat Korany, 314-5. (emphasis added)

<sup>20</sup> There is no exact equivalent in Arabic to the concept of consociationalism. The nearest expression is *al-dimuqratiyya al-tawafuqiyya*, concordance (as in the Swiss ‘démocratie de concordance’) or consensual democracy.

<sup>21</sup> Technically, these are two different types of agreement. Ta’ef was signed by most of the warring lords of the day, together with other less embattled leaders, under the sponsorship of the Kingdom of Saudi Arabia. The initial text of Ta’ef is known as *Wathiqat al-wifaq al-watani*, the document of national consensual agreement. The amendments were introduced the following year in the Constitution by a vote of the deputies under Art. xxx. The Ta’ef agreement included a foreign dimension, which was essentially the withdrawal of Syrian troops to the Biqa’ valley by December 1992, a commitment which was not honored. It also included a number of domestic arrangements. These were by and large incorporated verbatim in the Constitution in 1990.

Lebanese constitutionalists, and the political leaders by-and-large, converge on a common understanding of Ta'ef. They tend to agree that the president of the Republic's powers were diminished, and that Christians in Lebanon were deprived of their previously superior power in the country. They also agree that the constitutional system was enriched by the introduction of a constitutional council, inspired by France, whose task under a special procedure is to reject laws which violate the Constitution. They also support the general mantra that the unfulfilled reforms required by Ta'ef should be implemented.

The crux of the constitutional debate, we saw in our analysis of the 1926 texts, vests in Art. 95 of the Lebanese Constitution. The crux of the Ta'ef road out of the constitutional deadlock vests in its replacement.

The reader will recall the original text of the article:

Article 95 - On a provisional basis and in accordance with Art. 1 of the Charter of the Mandate, and with an 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.<sup>22</sup>

Ta'ef replaced it by the following verbose amendment:

Article 95- Once elected on a half-half basis between Muslims and Christians, Parliament must take the necessary measures to abolish political sectarianism according to a staggered plan [*marhali*, 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 CD and the Council of Ministers, and to follow through the implementation of the staged plan.

In the transitional period:

a- The communities (*tawa'ef*) shall be represented in an equitable manner for the composition of the Cabinet.

b- The rule of communal representation is abolished, and merit and expertise 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 parity basis between Christians and Muslims without dedicating any position to any particular community and will respect both the merit and expertise principles.

In addition to the Art. 95, the new relevant articles are Art. 22 and Art. 24. The first creates a Senate dependent on the mechanism established by the process detailed in Art. 95:

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<sup>22</sup> 'A titre transitoire et conformément aux dispositions de l'article 1er de la Charte du Mandat et dans une intention de justice et de concorde, les communautés seront équitablement représentées dans les emplois publics et dans la composition du ministère sans que cela puisse cependant nuire au bien de l'Etat.' Post-Independence amendments removed the clause referring to the French mandate.

Article 22 - With the election of the first Chamber of Deputies on a national non-sectarian basis, a new Senate shall be established in which all religious communities are represented. Their power shall be limited to high national causes.

New Art. 24, in turn, confirms parity in Parliament between the two large religions, with additional segmentation based on sects and geography.<sup>23</sup> From an electoral perspective, the iconic ratio of 6 to 5 for Christian to Muslim deputies in the CD could no longer hold, considering the turmoil over fifteen years, the perceived demographic decrease of Christians, and the political blunders of the Maronite leadership. It was replaced in Ta'ef by an equal number for both, in an eerie replica, two hundred years later, of the Beirut Council of 1834.

These articles remind us how relevant in the game of numbers is the electoral law. We have seen how electoral laws since 1922 have gone through a succession of traumatic and often arbitrary changes. It started with the CR at 30, then zigzagged between 25 and 99. The change in 1992 was equally arbitrary. In order for Ta'ef to create parity between Christians and Muslims in the CD, the number of deputies, which had remained stable at 99 (54 Christians to 45 Muslims in the 6 to 5 ratio), was increased to 108, twice the 54 number.<sup>24</sup>

Several changes adumbrated by Ta'ef add a signal complexity to an already crowded decision-making structure.

The first issue derives from the prospective establishment of the Senate and the relationship between the secular CD and the communal Senate over legislation. In several bi-cameral countries, the matter is resolved by a shuttling process, and in the case of the 1926 Constitution, the CD and Senate met on various occasions in Congress. This lasted one year and proved unworkable. A Senate could only add a layer of complication to an already byzantine and often deadlocked system. We saw how Chiha was opposed to the Senate. It is not clear that the Ta'ef constituents gave much consideration to the likely deadlock added on top of a constantly gripped system even in the absence of a second legislative chamber.<sup>25</sup>

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<sup>23</sup> Art. 24 is also long and slightly redundant with Art. 95: 'The Chamber of Deputies consists of elected representatives whose number and the manner of the election are determined by the electoral laws in effect. Until the Chamber of Deputies issues an electoral law shorn of the communal constraint [*al-qayd al-ta'ifi*, with *qayd* meaning both communal constraint and voters' registration], representative seats are distributed according to the following rules:

a. Equally between Christians and Muslims.

b. Proportionally between the communities of both sides [i.e. the various Christian denominations (the largest being the Greek-Orthodox and the Melkite Catholics, and, on the Muslim side, Sunnis, Shi'is, Druzes, and 'Alawis].

c. Proportionally among districts.

Exceptionally, and for only once, representative seats vacant at the date of publishing this Law, and all seats created by the electoral law are filled by appointment by a two-thirds majority of the National Unity Government, in implementation of the equality between Christians and Muslims, according to the National Accord Document [Ta'ef]. The electoral law shall provide details for the application of this Article.'

<sup>24</sup> Ta'ef determined the number of deputies at 108 (double the 54 Christians since 1960), but the 1992 electoral law increased it to 128. The increase was likely due to the Syrian government's wish to strengthen the small sect of Muslim 'Alawis in the North by increasing the number of CD deputies overall in order to justify the creation of two 'Alawi seats instead of one.

<sup>25</sup> The minutes of the Ta'ef meetings were never released by then Speaker Husain al-Husaini, who passed away in 2023.

A second difficulty passed over the head of all the Ta'ef constituents, namely secularism in the Executive. When equality and merit are supposed to prevail in the Republic, as stated in Art. 7 of the Constitution -- unchanged since Chiha wrote it in the early weeks of 1926 --, decision-making at the top, aka Executive power, must also be secular. Ta'ef prevaricated. Except for new Art. 95's mention of merit and expertise for 'first-class positions and their equivalent' in the top administrative posts, an amendment which remains mostly ignored with the entrenchment of communalism in Lebanese society and government, the three presidencies are not mentioned expressly. Were they to be considered for change, such proposal would hit a dead wall immediately. Parity, which is supposed to be the rule if and when Arts. 24 and 95 apply, confronts the basic triad of the presidencies with a helpless principle.

The third problem, also passed under silence by Ta'ef, is about the shape and mechanisms of an electoral law intended to result in a secular CD. When Paris told Sarrail off in 1925, there were good reasons to prevent him undermining the communal system with a secularized electoral law, and the Constitution confirmed the status quo. The schizophrenic attitude of the 1926 constituents remains true one hundred years later. Like them, (almost) everybody in Lebanon says his opposition to communalism, yet everybody frowns at any limitation of their community's power. Nor is this fear irrational, as we shall see in comparison with the rest of the region. The Lebanese communal template has worked better, despite its monstrosity, than *all* other countries.

Good luck to the constitutionalist who seeks to devise a secular electoral law accepted by the population at large. There have been various attempts to come up with a better electoral law, they have all failed.<sup>26</sup> Probably the greatest challenge is in devising a national electoral law which allays the fear of groups cohering in a religious community, especially amongst Lebanese Christians. Considering the demographic trends, this may be simply impossible to devise.

### **Lebanese and Middle Eastern constitutionalism**

In a broader frame, the route to the Lebanese Constitution started in the US Constitution of 1787 as the written consecration of the social contract in a republic. Written constitutions became the norm for the massive majority of Western states and were slowly adjusted and adopted in the rest of the world.

To recap:<sup>27</sup> in the Middle East, constitutional documents are extant since 1829 in Egypt and 1832-4 in the Levant, but received scholarship puts the earliest proto-constitutional text in the Tunisian 1861 basic law, following a bill of rights of 1857, itself a calque of the Ottoman Khatti-Hemayun of 1856. Both Ottoman 'rescripts', the one called Gulhane in 1839, the other Khatti-Hemayun in 1856, were shaped as bills of rights, but a full constitution was adopted formally only in 1876. It was suspended almost immediately by the Sultan and came back to life in 1909 when the Young Turks took over, with the election of a parliament across the Empire that lasted

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<sup>26</sup> All effective or attempted changes to the electoral law since 1926 were conceived under the communal canopy. Even the 'Boutros national commission for electoral reform' (named after its head, statesman Fouad Boutros, d. 2016), which was tasked with providing options to improve the electoral system, operated within the canopy.

<sup>27</sup> See section on 'constitution, *dustur*' in chapter one.

until the first world war. Meanwhile, a constitutional process in the other important empire, Persia, was under way from 1905 until 1911, when the Shah suspended a parliament elected on the basis of the constitutional text of 1906, and essentially froze the process until the 1979 Revolution swept the Persian Constitution away. Parallel developments took place in Egypt, from 1829 through the Constitution of 1923.

Whether in Tunis, Cairo, Beirut or Istanbul, all these texts were initially inspired by the European Enlightenment, including the checkered legacy of the French Revolution which came to Egypt, as the skewed invention of Republican France, in the suitcases of a brutal Napoleonic occupation which marked the birth of the modern Middle East in 1798.

Regardless of the 19<sup>th</sup> history of Middle Eastern constitutionalism, the Lebanese text of 1926 marks by its longevity a unique constitutional template in comparative constitutional law described by Michel Chiha as an ‘association of minorities’.

On a theoretical level, the expression is doubly imprecise. Lebanon may be an association of minorities sociologically or historically, but it was never exactly so constitutionally. ‘Association of minorities’ is imprecise because if all the ‘minorities’ were associated, then the term minority is wrong, for what is the majority in this case? It is not enough to say that the largest group numerically is the majority, or even a relative majority, because there is no majority in a country defined as association of minorities. Chiha, in his wisdom, knew that the Christians could not impose their will when he wrote the Constitution, even though they were the numerical majority at the time. He also knew that ‘association of minorities’ was an approximative concept.

The concept is also imprecise because ‘associated’ is an elastic term. Chiha’s constitution, any constitution, is forced to superpose the Montesquieu separation of powers under the LEJ(F)ARC template. When Chiha superposed it on ‘minorities’, he effectively introduced a layer of Montesquieuan order onto a fluid description of numerically uneven groups defined by religious denomination. Chiha might have used the word minorities to avoid bluntly saying ‘confession.’ The minority he meant is a social unit defined by its members’ cohesion in their belonging to a specific religious sub-unit, which is the sect, or the confession, or the community, or the *ta’ifa*, all words having the same denotation here. Whatever the terminology, the system as conceived in the Lebanese Constitution does not give, constitutionally, a superiority or dominance to one group over the other, even if the group is as small as Chiha’s own ‘Latin’ community. Born into a Chaldean family, Chiha was of the ‘Latin’ rite, the sole seat devoted to ‘minorities, *aqalliyāt*’, when he ran for the Beirut seat in 1925. While the size of community naturally matters, the constitutional system in Lebanon is an ‘uneven association of equal groups’, a ‘living togetherness’ of groups being defined by their members’ sectarian birth, *without any one group deemed superior to any other*.<sup>28</sup> This is fundamentally different from the Ottoman millet system, the heyday of the Caliphate, or the pre-Islamic Near and Middle East.

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<sup>28</sup> ‘Vivre-ensemble’, for the Arabic *ta’ayush*, has been a prominent trope of the 21<sup>st</sup> century, put forward in particular by secular activist leader Samir Frangieh (d.2017), see e.g. his *Voyage au bout de la Violence*, Beirut: L’Orient des Livres 2011, 137-50. The terms ‘vouloir vivre en commun’, similar to ‘vivre ensemble’ is an old topos which harks back at least to Renan’s definition of the nation in a seminal talk in 1882: ‘A nation is a soul, a spiritual principle. Two things, which are in truth one and the same, constitute this soul, this spiritual principle. One is in the past, the other in the present. One is the shared possession of a rich legacy of memories; The other is the current consent, *the wish to live together*, the will to continue to assert the legacy that one has received undivided. (Une

Constitutionalism advances at a glacial pace. Nuances are all in the breaks. In the Lebanese case, Ta'ef made a small adjustment in CD seat numbers and a modest diminution of the prerogatives of the Maronite presidency, whilst creating a constitutional council that proved generally incapable of providing solutions to the more serious deadlocks in the country. Yet the structure penned down by Chiha survived, rooted then in a hundred years of glacial moves and in millennia of religious entrenchment in Middle Eastern societies.

Empirically, one can easily note that the Lebanese survived better than all other constitutions in the region. Considering the turmoil, coups d'état and wars, this may be a coincidence, for Lebanon has also received its fair share of trouble, so the argument does not fully hold. Yet the country did not jettison its Constitution despite its long domestic and regional wars. Does this mean that the Lebanese constitutional regime, ungovernable as it may be, remains superior to other constitutional systems in the region?

The answer must be yes. Whilst the absence of a principle of majoritarian vote for the choice of a leader might have remained halting for centuries, let alone in its expression as universal suffrage, its nemesis exists since time immemorial: the tyrant, the despot, the dictator, the absolute or absolutist ruler, in short the autocrat. There is nothing particularly Middle Eastern in this. Institutionally, one-man rule is the dominant figure of history since political life was recorded, and the story of strongmen is far from over. This explains why Montesquieu's concept of separation of powers represents a fundamental break in the history of constitutionalism. Once you have three branches of government, none can dominate the other. There is no place for the autocrat in a constitution that respects the separation of powers. The Middle East is characterized by the dominance of autocrats, whom the traditional separation of powers is incapable of constraining.

In defense of Michel Chiha's constitutional conception of the social contract as one governing associated minorities, the Lebanese system appears superior, in its vindication of sectarian constitutionalism, to the official secularism of regional dictatorships. In comparison with the dominance of autocracies, rendered even more brutal and cynical with the failure of the Arab Spring, the Lebanese constitutional system offers significant advantages in legal-civilizational terms. In contradistinction with a sectarian separation of powers, the blanket secularism of constitutions based on the equality of all citizens allows little or no institutional check on the ruler in power. Despotism trumps secularism, and communalism trumps despotism. The paradox should now be easily understood. By preventing the emergence of one single leader in the country without any countervailing opponent under the guise of 'democratic secularism', the Lebanese system bars the advent or entrenchment of autocracy, which by definition is the rule of one. In Lebanon, there can be no one ruler in the presence of competing religious communities who respond to a different leader. The constitutional sect-inscribed rejection of a sole leader

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nation est une âme, un principe spirituel. Deux choses qui, à vrai dire, n'en font qu'une, constituent cette âme, ce principe spirituel. L'une est dans le passé, l'autre dans le présent. L'une est la possession en commun d'un riche legs de souvenirs ; l'autre est le consentement actuel, le *désir de vivre ensemble*, la volonté de continuer à faire valoir l'héritage qu'on a reçu indivis.)' Ernest Renan, 'Qu'est-ce qu'une Nation?', Paris: Calmann Lévy 1882, 27 (online version on Wikisource). The fact is that any social pact is meant to allow people to live together, so 'to wish living together' is redundant with constitution. No constitution is conceivable without the constituents wishing to live together.

represents a key safety valve preventing the emergence of dictatorship in the country as it has done elsewhere in the region. The acknowledged constitutional dimension of sectarianism in the foundational Lebanese text prevents the blossoming of authoritarianism against its prevalence in the Middle East.

Empirically, whilst undermined by foreign and domestic expressions of authoritarianism with varying intensities, freedom of speech prevails in Lebanon, and regular change at the top remains the principle. This, in large part, is because the other countries in the region do not have a constitution like the one adopted in Lebanon. Under the guise of secularism, their opposition is flattened. In a communitarian system, flattening differences is impossible. The result is that repression by one community, or one community's leader with the tools of state power, falls short of the other's community's equal power. A sole leader is incapable of shutting out most citizens in Lebanon because of the open, constitutionally expressed sectarian dimension of the country. The individual whom the ruler targets is shielded by his community. Even if this individual belongs to the repressing leader's community, he or she will find some solace and protection on the other side. On a parallel level, the distribution of powers on a community basis results in three presidents, none of which can push out the other or ignore him. An autocrat is constitutionally impossible in Chiha's system.

One could argue that it is easy to compare Lebanon favorably in a region where all other Arab countries, in addition to Iran, Afghanistan, and Turkey for most of the past century, have been mired in despotism. The superiority of the Lebanese constitutional system over these Middle Eastern states is empirically easy to defend. But can one push the envelope further, and defend the proposition that Lebanon's association of minorities is qualitatively superior constitutionally to Israel's vaunted Westminster-style democracy?

Considering the convergence between the level of democratic indicators in both Lebanese and Israeli societies as expressed 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 Lebanese sectarian 'democracy' not preferable to a majoritarian 'democracy' which, like Israel, systematically discriminates, at all levels and with different degrees of violence, against the non-Jewish sections of the populations whose life it controls ?

The question can be put differently. Granted that the Israeli system has been largely immune or oblivious to the demands formulated by its non-Jewish natives over the three-quarters century of its existence as an independent country, is the century-old Lebanese model of sectarian constitutionalism not a more inclusive model than its Israeli counterpart as?

Michel Chiha certainly thought so. That Lebanon was superior to Israel as a constitutional model was, in 1946 already, crystal-clear to him. We cite again, and expand on, his most expressive paragraph:

The formula [for Israel-Palestine] that we have been strongly advocating for so long is the very one proposed in London. It is reason itself: *a single government, a single assembly, personal status widely understood.*

All in all, with the distrust inherent to Palestine, it is the Lebanese solution. In a country of associated minorities, it is a common assembly that makes the will to live in common.<sup>29</sup>

An extensive exercise in comparative constitutionalism between the Israeli and Lebanese models needs to be taken up elsewhere. Too short an answer does not give credit to an existential problem on both sides of the Galilee with a ‘Jewish and democratic state’ on the south, and ‘an association of communities’ in the north.

Beyond the intra-Middle Eastern comparison, Lebanese constitutionalism requires a universal tribunal beyond the Middle East. This is the subject of the next chapter.

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<sup>29</sup> ‘La formule que nous préconisons depuis si longtemps avec force est celle-là même qui est proposée à Londres. Elle est la raison même : *un seul gouvernement, une seule assemblée, des statuts personnels très largement compris*. Tout compte fait, avec les méfiances propres à la Palestine, c’est la solution libanaise. Dans un pays de minorités associées, c’est une assemblée commune qui fait le vouloir-vivre en commun.’ ‘Les chances de la raison en Palestine’, 7 Octobre 1946, Pal. 30.