

# **From Sectopolitics to a Politics of Diversity: Issues and Options for Deconfessionalising Lebanon**

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## SYNTHETIC OVERVIEW

On January 21, 2010, Lebanon's Speaker of Parliament, Nabih Berri, called for the establishment of a committee to explore the notion of abolishing Lebanon's system of political confessionalism. The reaction to the call was swift and fiercely divided. Although constitutionally mandated, the issue of deconfessionalization is explosively emotive and controversial in Lebanon. This report responds to the Speaker's call.

However, it should not be read as a definitive prescription on how to go about deconfessionalizing the Lebanese system; rather, it aims to make a contribution to the debate currently taking place by proposing ideas and options for consideration as the country contemplates deconfessionalization. Ultimately, the solution arrived at should be one decided by the Lebanese people, through their representatives or otherwise, and tailored to the particular challenges and opportunities faced by the people of Lebanon.

### The Controversy

The mandate for the deconfessionalization of the Lebanese system is not a recent one. Indeed, the January 2010 call is only the most recent of many such appeals over the last two decades. In fact, at its origin the National Pact, the gentleman's agreement of 1943, which instituted the formal division of powers between sects, was conceived as temporary in nature, serving as a transition to a secular form of governance. More recently, Article 95(1) of the Lebanese Constitution, amended following the 1989 Ta'if Accord, calls for "appropriate measures to realize the abolition of political confessionalism according to a transitional plan." The Constitution provides for the formation of a National Committee, comprised of the primary stakeholders and leading political, intellectual and social figures of Lebanon, "to study and propose the means to ensure the abolition of confessionalism."<sup>1</sup> Although there was no deadline imposed, the current confessional system was clearly intended to be a temporary transitional post-war system. Now, more than two decades after the end of the Lebanese civil war and the signing of the Ta'if Agreement, the time to begin thinking about deconfessionalization is long overdue.

In spite of this constitutional mandate, the abolition of the political confessional system in Lebanon is a deeply divisive issue with a long history of failure. This was clear from the immediate and divided reaction to Berri's January appeal. Some argue that the current confessional system serves as a gate-keeper: the only thing keeping sectarian tensions from boiling over into outright violence. Supporters of deconfessionalization respond that keeping Lebanon in unconstitutional political limbo will be more of a threat to stability. In reality, many Lebanese agree that the political confessional system is not a viable long-term solution, but few can agree how to go about dismantling the current system or what a stable permanent solution for Lebanon would look like.

This is why establishing a National Committee to explore the question is of the utmost importance. Once established, it will have the mandate to consider all relevant issues, to discuss and debate them in a relatively open forum, and to allow for a broad range of voices to be heard. As Eleonora Dimitrova highlights in Chapter 2 of this report, the Committee will need to strive for popular legitimacy through accountability and transparency, while at the same time

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<sup>1</sup> *Lebanese Constitution as amended in 1990* [Lebanon], 21 September 1990, *Presidency of the Republic of Lebanon*, <http://www.presidency.gov.lb/English/TheNatureoftheLebanesesystem/Pages/The%20Lebanese%20Constitution.aspx>, (accessed 4 April 2010), art. 95(1).

minimizing the potential impact of spoilers. Bringing together political elites, system stakeholders, communal leaders, experts and academics should ensure a representative and inclusive way to deliberate options for constitutional reform. The Committee should also provide an outlet for the settlement of inter-communal grievances and consensus-building. In order to reinforce the national ownership element of the new constitutional framework, the process should also engage the national media, civil society and the general public.

### Framing the Discussion

One of the most oft-stated arguments against abolishing the confessional political system is that “confessionalism must be eliminated from Lebanese hearts before it can be eliminated from Lebanese laws.” Confessionalism is viewed as more than just a system of political representation; many argue that it is an elemental feature of Lebanese society that is delicately holding sectarian tensions in check. The memory of the Lebanese civil war remains a looming reminder of the hardship wrought by violent sectarianism.

Yet it is important to recall that the Lebanese political system was arranged along confessional lines long before the outbreak of the civil war. That confessional system was unable to hold sectarian tensions in check and many argue that it was precisely this divided political system that led to the outbreak of civil war in 1975.<sup>2</sup> The removal of the confessional political structures that reinforce sectarian divisions may in fact be a necessary precondition to building a stable, peaceful, and truly democratic Lebanon.

Among the reasons for which deconfessionalization has remained such a divisive issue is that the term itself is a misnomer. For many, “deconfessionalization” implies a rejection of the different identities that make up Lebanese society, a lack of protection for confessional groups, and secularization to the detriment of confessional identities. The true mischief of the confessional political structure, however, is not the existence of a plurality of distinct confessional identities in Lebanon, but that the current political system acts as a straitjacket for political competition along purely sectarian lines.

This phenomenon of “sectopolitics”<sup>3</sup> prevents the creation of truly national political objectives while incentivizing undesirable political practices such as clientelism, patronage and vote-buying. As it exists today, the confessional political system simply does not work. Political deadlock is the norm and the few compromises arrived at are most often concerned with details rather than with the most important issues facing Lebanon. Compromise on the important issues often comes too late or at too high a cost.<sup>4</sup> Political alliances are fleeting and overwhelming focus on communal interests prevents consideration of the issues that require a national perspective.

It is critically important, however, to distinguish between these negative manifestations of confessionalism in the form of “sectopolitics” and the recognition and protection of confessional groups themselves. The aim of political reform should not be to camouflage the remarkable diversity of Lebanon, but to embrace it and protect it, while also providing for the

<sup>2</sup> See, for example, Kamal Salibi, *A House of Many Mansions: A History of Lebanon Reconsidered*, (California: University of California Press, 1988); Nazih Richani, *Dilemmas of Democracy and Political Parties in Sectarian Societies*, (New York: St. Martin's Press, 1998).

<sup>3</sup> Term borrowed from: Richani, *Dilemmas of Democracy*, 15. "**Sectopolitics** is the mobilization of sects on a political basis. It is an ideology that incorporates communal feelings, values, symbols, and the perceptions of an outside threat. It is the political articulation of status interests (sect/religions), and thus seeks to organize political competition between groups along strictly sectarian lines ... Sectopolitics does not operate in a vacuum; it has agents, such as the state, church, parochial schools, media organizations, research centers, universities, and of course political parties, that participate in making it the dominant ideology in Lebanese society."

<sup>4</sup> Ahmad Beydoun, “Confessionalism: Outline of an Announced Reform,” In Nawaf Salam, ed., *Options for Lebanon*, (London: I.B. Taurus, 2004): 88-89.

long-term stability, peace and prosperity of Lebanon and protecting the rights of its citizens. This report contemplates various ways in which the harmful aspects of confessionalism described above may be minimized while still providing sufficient protection for the unique interests and needs of Lebanon's communal groups. This may be achieved through the deconfessionalization of certain aspects of the Lebanese political and legal system while preserving relatively strong protections for collective rights in others.

While this report attempts to address what we believe to be the most systemic problem facing Lebanon, it does not profess to cure all of Lebanon's ills. In fact, we have identified three other major challenges that will need to be addressed in order for Lebanese society to develop in a stable and democratic manner but that remain outside the scope of this paper: the influence of foreign powers, the question of the status of Palestinians in Lebanon, and the arms of Hezbollah. However, we do feel that a restructuring of the confessional nature of the state may still serve to further the achievement of these goals, albeit to a limited extent. While many of Lebanon's ills have often been attributed to its strategic position within the Middle East and the role of external actors within its domestic politics, it will be difficult to remove the incentives that these external actors have to seek influence in Lebanon. Rather, the focus must be placed on changing the domestic demand structures that enable and often invite these interventions. With confessional groups no longer competing with each other for power, the desire to look for external patrons will no longer be as necessary for acceding to political power within the state.

Moreover, the naturalization of Palestinian refugees, arguably one of the most protracted issues Lebanon has faced, is consistently opposed through the use of the 'sectarian argument' which states that the delicate confessional balance of Lebanon could not sustain the influx of an estimated 400,000 Palestinians, most of whom are Sunni Muslims.<sup>5</sup> Evidently, this argument becomes less tenable when major political institutions are deconfessionalized.

Finally, the armed presence of Hezbollah, an issue that has garnered much attention in the last few years, is intimately related to the sectarian nature of the state. While Hezbollah's arsenal has almost exclusively been directed at non-Lebanese enemies, it also serves "the function of internal power equaliser, compensating for the Shi'ite communities limited share of parliamentary seats."<sup>6</sup> Therefore, the disarmament of Hezbollah arguably becomes more feasible when the major institutions of the state do not seem to marginalize the Shi'ite community, which can be achieved through a partial deconfessionalization of the system.

Deconfessionalization in the political realm should not be viewed as a cure-all remedy to all of the major challenges facing Lebanon. It is only a beginning, albeit a very important one. The challenge does not lie simply in the need to agree upon the best way of dismantling the current confessional political system—despite the important obstacle that this presents. Rather, the true challenge will be to determine how to best lay the building blocks of a viable, democratic, and inclusive Lebanese nation.

### **The Role of Constitutional Design and Political Institutions**

There are important formal legal and structural issues that will need to be addressed along the way. As Choudhry notes, constitutions do more than simply regulate and set out the rules of the game. Constitutions can play an important constitutive role in forging a common political identity through the creation of institutional spaces for shared decision-making within a rule of

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<sup>5</sup> Simon Haddad, *The Palestinian Impasse in Lebanon: The Politics of Refugee Integration*, (Portland: Sussex Academic Press, 2003).

<sup>6</sup> Rudy Jafaar, "Democratic System Reform in Lebanon: An Electoral Approach," in Youssef M. Choueiri, ed., *Breaking the Cycle: Civil Wars in Lebanon*, (London: Stacey International, 2007), 293

law framework.<sup>7</sup> In Lebanon, the constitution has held a central role in the political narrative. Ziadeh observes that, “the Constitution has been both a text which was formed by, and a text which has formed, the political history of Lebanon,” and concludes that, “the Constitution has its own presence as an actor in the Lebanese quest for national consensus.”<sup>8</sup> Thus, addressing the constitutional framework will be crucial.

An appropriate balance of power-sharing will need to be reached. Lebanon is not and should not strive to be a “secular” state in the sense of ignoring the need for protection of communal identities and interests. As Andrew Hiatt notes in Chapter 3, simply imposing a majoritarian system would be highly undesirable for Lebanon. Political institutions that aim to encourage a national focus at the legislative and executive levels must be accompanied by adequate protections for Lebanon’s communal groups. The Constitution provides that, upon the election of the lower house on a national, non-sectarian basis, a senate will be established to represent all of the religious communities, with review powers limited to “major national issues.”<sup>9</sup> However, this order provides only a starting point for the structure of the redesigned government. The powers of parliament, the selection of the executive, the relationship between the upper and lower houses, and the composition of the military and civil services must all be reexamined in a post-confessional context. The most effective arrangement will allow national parties to conduct normal politics under the oversight of the confessional communities.

As Lama Mourad emphasises in Chapter 4 of this report, new parliamentary election laws will be essential to transcending the hold that sectarian competition and interests have on the political sphere. In an attempt to address this phenomenon, as well as the preponderance of clientelist practices, it is recommended that elections to the lower house be conducted on a non-confessional proportional basis, with medium-size districting at the *muhafaza* level and open party lists. Moreover, in order to properly represent the interests of the different confessions within the senate, but bearing in mind the limits imposed by the lack of a census, a two-staged approach will be necessary for the senate elections. For the first two rounds of elections, before the new census is conducted, a single transferable vote model will be applied on a single national district. However, following the holding of the census, a shift towards regional districts would be recommended as to give the voters a more meaningful and less overwhelming array of choices.

### **Beyond the Political Institutions**

Though undoubtedly important, the analysis cannot begin and end with reform of Lebanon’s confessional political institutions. The reality is that sectarian division exists and is perpetuated throughout the many other formal and informal institutions that shape the everyday lives of ordinary Lebanese citizens, including civil society organizations, education, religion and personal status law, among others. Meaningful change will only emerge through a larger project of building a political culture based on trust, shared objectives and values, respect for constitutionalism, rights and the rule of law. These features will be essential to the achievement of a stable, democratic Lebanese nation, and will be more difficult to address than questions of formal constitutional design and changing political institutions.

As Kathryn Beck observes in Chapter 5, the Lebanese personal status legal framework is one such pervasive institution that remains strictly divided according to confessional group. The

<sup>7</sup> Sujit Choudhry, “Bridging Comparative Politics and Constitutional Law,” in Sujit Choudhry, ed., *Constitutional Design for Divided Societies*, (Oxford: Oxford University Press, 2008): 6.

<sup>8</sup> Hanna Ziadeh, *Sectarianism and Intercommunal Nation-Building in Lebanon*, (London: Hurst & Company, 2006), 19.

<sup>9</sup> Lebanese Constitution, see note 1 *supra*, art. 22.

current system, which enables the autonomous governance by each religious sect of issues such as marriage, divorce, and child custody and guardianship, is fundamentally guided by a notion of collective rights protection. Although the constitution provides for freedom of conscience and the equality of all citizens before the law, in reality these basic individual rights are strictly limited with the religious personal status realm. There is no civil personal status law option and those who are not, or do not wish to be, subject to the personal status laws of a recognized religious sect. Moreover, the religious personal law of most sects contain provisions that discriminate, to a greater or lesser degree, against the rights of women and children. It may be counter to Lebanon's value for plurality and diversity to eliminate religious personal laws entirely; however, it will be critical to find a more appropriate balance between collective and individual rights within the personal status legal framework. Offering a meaningful civil law option while enhancing the enforcement of individual constitutional rights in the religious personal status realm may be two ways to seek this appropriate balance.

Furthermore, legal principles and constitutional provisions are meaningless unless there is some way to enforce them. Adam Tanel notes in Chapter 6 that Lebanon has been in a protracted constitutional crisis since 1996. The way forward must involve a reform to constitutional enforcement, otherwise reforms to the constitutional text risk futility. An enforceable constitution also provides meaningful protection of citizens' rights and a legal check on government power. Modern conceptions of the rule of law necessarily involve the doctrine of the separation of powers. The separation of powers requires judicial review by a politically independent court. Lebanon has lacked this cornerstone of democratic legitimacy for far too long, and as will be shown in Chapter 6, this has contributed to the country's instability. In the new constitutional era being contemplated herein, it will be critical to demonstrate real commitment to the rule of law, judicial review and constitutional supremacy. One of the most potent ways to go about this is by empowering the Constitutional Council to provide independent review.

Finally, as Nicole Betel argues in Chapter 7, the success of the reforms proposed in this report will depend, in part, on effective transitional justice initiatives. Likewise, deconfessionalism can also work to support different proposed reconciliatory initiatives throughout the country. In that transitional justice works towards reconciling divided societies, so that their difference can be appreciated and respected, rather than become a line of division, it will be necessary to initiate transitional justice programs in the country. In order break the cycle of violence, which is destabilizing efforts to reform the country, Lebanon will need to find the fine balance between facing that past and creating justice for the events that transpired during the civil war years. This report recommends holding individuals accountable for acts of sectarian violence after 1991 in the national courts, as well as exploring the many different options that restorative justice has to offer. Among them are the establishment of a National Narrative Commission, civil war workshops and inter-sectarian cooperative exercises.

## **Conclusion**

The recommendations and options contained in this report are not exhaustive, nor are the particular issues considered in this report the extent of what will need to be considered if a commission on deconfessionalization is established. Notably, this report does not consider educational reform or judicial capacity building, both of which will be critical questions to consider and address.



What this report does offer is, with respect to certain key issues, an evaluation of various options for reform and recommendations based on these evaluations. We urge the readers of this report, however, to remember that there is no one right path or perfect solution to the unique challenges that Lebanon faces. All reforms have benefits and limitations, though some may be preferable to others. Ultimately, it will be through dialogue and debate that ideas, options and reforms will be tested, challenged, and eventually agreed to, but for now beginning an inclusive national dialogue on these issues will be a crucial first step.

## **Summary of Recommendations**

### ***Ensuring the Legitimacy of the Constitutional Reform Process***

1. Establish a National Committee, on the initiative of the President of the Republic, to deliberate and propose options for constitutional reform. Appoint a technical commission responsible for the drafting of the text once consensus is reached. (see Chapter 2)
2. Open up the process to public participation, through various media outlets and direct consultation at the community level. (see Chapter 2)
3. Send the final constitutional draft to the Chamber of Deputies for ratification. (see Chapter 2)
4. Limit the role of international actors to agenda-setting and process-safeguarding. As much as possible, avoid the involvement of foreign parties who have a vested interest in the outcome of the process, by providing incentives. Instead, employ the expertise of non-governmental organizations. (see Chapter 2)

### ***Limiting “Sectopolitics” and Sectarian Division through Institutional Reform***

5. Convert the fixed confessional power sharing arrangement to a traditional parliamentary system with a figurehead head of state. (see Chapter 3)
6. Create a confessional Senate with the power to confirm appointees and veto legislation. (see Chapter 3)
7. Deconfessionalize military and civil service selection and give power of appointment to the prime minister. (see Chapter 3)
8. Implement an open-list proportional representation electoral system based on medium-sized muhafaza districts. (see Chapter 4)
9. Implement a two-stage approach for senate elections where, for the first two rounds of elections, a single transferable vote model will be applied on a single national district. Afterward, a single-transferable vote model with regional lists would be recommended. (see Chapter 4)
10. Implement a meaningful civil personal status law option for those who do not identify with the recognized religious personal status laws. (see Chapter 5)
11. Make woman’s rights issues a political priority and encourage dialogue on these issues through the creation of a national task force or commission. (see Chapter 5)
12. Enhance protection of constitutionally-protected equality rights in the realm of family law by allowing judicial review of constitutional issues that arise in religious courts, either by civil courts or by the Constitutional Council. (see Chapter 5; see also Chapter 6)
13. Empower civil society groups in the legal system through relatively broad standing requirements for constitutional challenges. (see Chapter 6; see also Chapter 5)

14. Increase the independence of the Constitutional Court by reforming appointment process and term limits. (see Chapter 6)
15. Empower the Constitutional Court and create a link between it and the citizenry by allowing concrete *ex post* review. (see Chapter 6)
16. Remove confessional quotas for Constitutional Court Justices. (See Chapter 6)

### ***Transitional Justice for Long-Term Peace***

17. Hold perpetrators of sectarian violence accountable in national courts (see Chapter 7)
18. Promote reconciliation and a common historical experience through one or a combination of the following: (see Chapter 7)
  1. Establishment of the National Narrative Commission mandated with collecting and recording the private civil war memory of the Lebanese public in order to bridge the gap between private and public memory in the country and create an inclusive national narrative, which can later be implemented into the history curriculum in Lebanese schools.
  2. “Civil war workshops,” which will teach a unit on the civil war experience in history classrooms throughout Lebanese schools. The workshop will include teachers from the major sects and ultimately, through a dialogue illustrate to the next generation of Lebanese both a common suffering and common responsibility for the events that transpired during the civil war, as well as a common power to change the future.
  3. Intergroup exercises to promote inter-sectarian understanding and tolerance.
19. Research to explore alternative or traditional mechanisms of restorative justice. (see Chapter 7)

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# 1. CONSTITUTIONAL REFORM PROCESS - ELEONORA DIMITROVA

## Introduction

Constitutional reform is long overdue in Lebanon. Throughout the country's fragile history, talks to deconfessionalize the system have been persistent. Yet to this day no such change has taken place. Part of the problem has been the absence of a clear vision as to what a deconfessionalized Lebanon would look like and a process that would prove effective in this fragmented society. Politicizing and institutionalizing social divisions has created a disincentive for many social and political elites to engage in the necessary dialogue and take the appropriate steps towards reform. In the absence of strong political institutions, the patriarchal network that characterizes the Lebanese governing system induces sectarian leaders to negotiate among themselves for access to resources and opportunities. With so much vested in the status quo, any successful attempt at constitutional reform would need to entice, engage and ultimately convince confessional elites that the peaceful, prosperous and united future of Lebanon depends on ongoing efforts to reorganize the system.

Following the withdrawal of Syrian troops from Lebanon in 2005, a renewed sense of hope and strive for self-determination emerged. The Lebanese government however, has not yet managed to capitalize on this turn of events. Instead, the National Dialogue process, which has circumvented institutional political practices, has reaffirmed the current sectarian arrangement, as opposed to moving away from it. The Ta'if Accord of 1989 explicitly calls for the abolition of confessionalism and sets out the mechanism for undertaking this change. The problem however, has been that Lebanon is not yet ready for complete deconfessionalization. Instead, a moderate strategy is required in order to secure the successful transition of the state, avoiding complete order breakdown. The means through which the reforms proposed in this report would crystallize, should very much mirror the amendment procedures set out in the Lebanese constitution, in order to preserve the legitimacy and constitutionality of the process. Working with political elites, system stakeholders, communal leaders, experts and academics should ensure a representative and inclusive way to tackle the deficiencies of the present arrangement. In addition, a framework of public input and participation is required in order to secure popular support and national ownership of the new constitution.

## Background

The Lebanese Constitution dates back to 1926, when Lebanon was still under French colonial rule. This was also the origin of the confessional nature of the Lebanese system. Though every successive wave of reforms attempted to extract this sectarian formula from the equation, the overall result has always been reversion to the default. The National Pact of 1943 – the unwritten agreement signed between leading Christian and Muslim leaders – announced the end of French rule and reformulated the power-sharing arrangement. Although it was intended as a political compromise between the various Lebanese sects in the wake of Lebanese liberation, it actually reaffirmed the consociational model that had developed in Lebanon.<sup>10</sup> Instead of producing an overall vision for national unity and a common future, it reflected the

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<sup>10</sup> Michael Kerr, *Imposing Power-Sharing: Conflict and Coexistence in Northern Ireland and Lebanon*, (Portland: Irish Academic Press, 2006), 112.

communitarian interests of the various confessions.<sup>11</sup> The National Pact was not meant to be a long-term solution to Lebanese institutional problems, yet in the absence of political will to reform the system, every successive effort has been unfruitful. As a result, the National Pact concretized the political foundations of the country for years to come.

The next constitutional wave took place in 1975 when calls for secularization were once again heard. The Constitutional Document of 1976 however, reflected a Syrian strategy to impose a political settlement on Lebanon. As secularisation tendencies were slightly silenced following the Iranian revolution, the dialogue concerning deconfessionalization did not re-emerge until the end of the Lebanese civil war at the peace talks in Ta'if, Saudi Arabia. The objective of the Ta'if Accord was not only to end the violent civil conflict, but also to define Lebanon's national identity and provide for a meaningful political settlement, which would ensure future peace and stability.

The Ta'if Accord specifically called for the deconfessionalization of the Lebanese political system. Article 95 of the constitution instructed “the first Chamber of Deputies which is elected on the basis of equality between Muslims and Christians” to take “the appropriate measures to realize the abolition of political confessionalism according to a transitional plan.” It further outlined the process through which this can be achieved. A “National Committee is to be formed, headed by the President of the Republic, including, in addition to the President of the Chamber of Deputies and the Prime Minister, leading political, intellectual and social figures.” The goal of the Committee would be to “study and propose the means to ensure the abolition of confessionalism, propose them to the Chamber of Deputies and the Ministers, and supervise the execution of the transitional plan.” Ta'if also stipulated the cancellation of appointments to high-level posts based on sectarian criteria, including public service jobs, the judiciary, the military, security institutions and other public and mixed agencies.<sup>12</sup>

The document did not provide for a deadline by which this transitional plan would be implemented. However it does establish a beginning of the process following the election of “the first Chamber of Deputies.” Thus, in effect, the Lebanese political system is operating in an unconstitutional limb. In practice, the effects of Ta'if have been very similar to those of the National Pact. The constitutional negotiation had taken place alongside the ongoing peace talks, resulting in an agreement dominated by the need for short-term compromise, in exchange for a long-term vision. Ta'if once again (although temporarily) reaffirmed the sectarian nature of the system and in fact formalized its previously unwritten principles.<sup>13</sup> It slightly readjusted the power-sharing ratio, without any drastic reforms or immediate detrimental changes. The calls for the abolition of confessionalism have not yet been implemented. As such, Ta'if has been criticized as a failure of the parties to execute an agreement they themselves negotiated.<sup>14</sup>

### Constitutional Amendment

With Lebanon's Speaker of Parliament Nabih Berri's call to establish a commission to explore options for the abolition of confessionalism, mirroring the objective of Article 95, the

<sup>11</sup> Mohammad F. Mattar, “Is Lebanese Confessionalism to Blame?” in Youssef M. Choueiri, ed., *Breaking the Cycle: Civil Wars in Lebanon*, (London: Stacey International, 2007), 52.

<sup>12</sup> *Lebanese Constitution as amended in 1990* [Lebanon], 21 September 1990, *Presidency of the Republic of Lebanon*, <http://www.presidency.gov.lb/English/TheNatureoftheLebanesesystem/Pages/The%20Lebanese%20Constitution.aspx>, (accessed 4 April 2010), s. 95.

<sup>13</sup> Kerr, see note 1 *supra*, 160.

<sup>14</sup> Dr. Kristi Samuels, “State-building and Constitutional Design after Conflict,” *International Peace Institute Report*, (June 2006), <http://www.ipinst.org/publication/policy-papers/detail/127-state-buildng-and-constitutional-design-after-conflict.html>, 3-8.

move for political reform has once again gained momentum. Yet the question remains as to what the appropriate means for achieving this objective are in the context of a highly divisive and fragmented society. It is of great importance that the new constitution be accepted and adopted by the Lebanese people as their own. For that reason, it is vital that the road of constitutional reform is legal, legitimate and reflective of national Lebanese interests. We recommend that the process abides by the steps and procedures set out in the Lebanese constitution.

Adhering to the already stipulated rules is not the only option. Change could also be achieved by going the revolutionary route and scrapping the existing guidelines altogether. This approach however, seems to be more appropriate to a society emerging from conflict where the previous order has completely broken down. The Lebanese civil war, on the other hand, has been over for twenty years and though tensions still prevail, the governing structure is intact.

Constitutional reform may also be initiated in Parliament “at the request of at least ten of its members.”<sup>15</sup> However, taking into account the realities of current power allocation within the Lebanese political system, a weak Parliament may not be sufficient to produce this type of reform. Since 2005, the Chamber of Deputies has been basically brought to a standstill. Instead, most important political discussion have been taking place in the National Dialogue, a series of ad hoc conferences consisting of the eighteen Lebanese communal representatives brought together to discuss national reform.<sup>16</sup> Though this forum has not been successful in achieving any significant national reform and has instead maintained the status quo, the political elites involved in its composition have a direct vested interest in the outcome of any constitutional amendment.<sup>17</sup> A process excluding these sectarian leaders is not only unrealistic, but would be deemed illegitimate in its failure to include “leading political...figures” as prescribed by Article 95. Maintaining fidelity to legality would be the first step to assuring legitimacy in the eyes of the Lebanese public.

Devra C. Moehler argues that a constitutional process bears importance for the political culture that the program develops, alongside, if not more so, than the substantive measures it implements.<sup>18</sup> As a result, ensuring a process that is democratic and abides by the previously set out norms is crucial. As mentioned above, Article 95 of the constitution calls for the establishment of a Committee, headed by the President, whose task it is to “study and propose” the means through which system reform can take shape. Similarly, Article 76 of the Lebanese Constitution provides that one of the ways through which constitutional amendment may transpire is “upon the proposal of the President of the Republic.”<sup>19</sup> It follows that the presidential procedural power and authority designate him as the appropriate initiator of the constitutional amendment process.

### The Committee

Article 95 calls for the formation of a National Committee which is to include the President, the Prime Minister and the Speaker of Parliament, as well as “leading political,

<sup>15</sup> *Lebanese Constitution*, see note 3 *supra*, art. 77.

<sup>16</sup> Imad Salamey and Rhys Payne, “Parliamentary Consociationalism in Lebanon: Equal Citizenry vs. Quotated Confessionalism,” *The Journal of Legislative Studies*, Vol. 14, No. 4, (December 2008): 470.

<sup>17</sup> Vanessa E. Shields, “Political Reform in Lebanon: Has the Cedar Revolution Failed?” *The Journal of Legislative Studies*, Vol. 14, No. 4, (December 2008): 486.

<sup>18</sup> Devra C. Moehler, *Distrusting Democrats: Outcomes of Participatory Constitution Making*, (Ann Arbor: University of Michigan Press, 2008), 28.

<sup>19</sup> *Lebanese Constitution*, see note 3 *supra*, art. 76.

intellectual and social figures.”<sup>20</sup> The object is to include key stakeholders that would ensure the recognition and approval of the new draft and its eventual acceptance by the elites as well as the wider public. Jamal Benomar argues that the success of the process depends on the inclusion of powerful players. The durability of the new constitution will depend on it reflecting the interests of those who have the most at stake, without compromising the overall vision. Hence, the drafters will pre-empt the possibility for any potential spoilers, whose intention would be to capitalize on already existing social cleavages to circumvent the new constitution.<sup>21</sup> Edward McWhinney likewise asserts that in a plural society, such as Lebanon, it may be “politically prudent to negotiate new political-social consensus between the political leaders of [the] different units before entering upon any fundamental changes.”<sup>22</sup> As a result, the logical starting point for the Committee would be the National Dialogue, which already includes the leaders of the Lebanese confessions. Though it is widely criticized for being exclusive, unaccountable and undemocratic, as it acts outside the set out institutional and representative mechanisms, the body is crucial for securing the support of influential members of society that will likely still be involved in the political system upon the completion of the constitutional reform process.<sup>23</sup>

An argument can also be made that the National Dialogue is fairly representative of the various Lebanese sects and their interests. In the absence of a national census since 1932 that would set out the demographics of the various confessional groups, one representative per group appears to be a reasonable way to engage a wide range of political sentiment.

The last census in Lebanon, which outlined the size of each sectarian group as an overall percentage of the population was taken in 1932. It found that the Christians formed 55 per cent of Lebanese society, with Maronite Christians in the majority. The Sunnis added up to 22 per cent and the Shi’ites to 20 per cent of the population.<sup>24</sup> There are two problems associated with these numbers. First, the findings of the 1932 census themselves are contested. Rania Maktabi argues that the census was held at the same time as the concept of citizenship was being defined in Lebanon. As a result, both processes were highly political, engaging the interests of influential religious and political leaders, who sought to uphold Christian hegemony. The census included Lebanese emigrant populations, but excluded many permanent residents who had lived in Lebanon for generations, enumerating them as foreigners. Maktabi contends that “the way the figures were obtained presented and analysed indicates that the census findings were heavily politicized and embodied contested issues regarding the identity of the Lebanese state with which the country is still grappling.”<sup>25</sup> Second, tremendous changes have taken place in Lebanese demographics since the 1932 census was performed. Although the present numbers are far from clear, estimates set the Muslim population of Lebanon, including Shia, Sunni and Druze, between 60 to 70 per cent, with only 30 per cent made up of Christian groups, composed of Maronite, Catholic, Protestant and Orthodox.<sup>26</sup> These numbers do not include the large Lebanese Diaspora, the size of which is unknown.

One option would be to hold the long overdue national census prior to the beginning of deliberations. There are, however, inherent problems associated with this sequencing. All Lebanese communal leaders have a vested interest in what the system will look like following

<sup>20</sup> *Ibid.*, art. 95.

<sup>21</sup> Jamal Benomar, “Constitution-making After Conflict: Lessons from Iraq,” *Journal of Democracy*, Vol. 15, No. 2, (April 2004): 84.

<sup>22</sup> Edward McWhinney, *Constitution-making: Principles, Process, Practice*, (Toronto: University of Toronto Press, 1981), 31.

<sup>23</sup> Karam Karam, “Post-Syria Lebanon: Internal and External Determinants of a Crisis,” *The International Spectator*, (February 2006): 55

<sup>24</sup> Shields, see note 8 *supra*, 484; Simon Haddad, “Lebanon: From Consociationalism to Conciliation,” *Nationalism and Ethnic Politics*, Vol. 18, No. 3, (2009): 402.

<sup>25</sup> Rania Maktabi, “The Lebanese Census of 1932 Revisited. Who are the Lebanese?” *British Journal of Middle Eastern Studies*, Vol. 26, No. 2, (November 1999): 220-238.

<sup>26</sup> Shields, see note 8 *supra*, 484.

political reform. Whereas some groups, mainly the Maronites, are more concerned with maintaining the status quo for fear that their power will subside following a political rearrangement, other groups are in favour of complete reorganization as they feel they are presently underrepresented. The Shia, for example, have expressed dissatisfaction with the present consociational set-up that, as they argue, is not a true reflection of the group's demographic size. Shi'ite leaders Nabih Berri (Amal) and Hassan Nassrallah (Hezbollah) have both supported a system of proportional representation that, they believe, would increase their parties' size in Parliament.<sup>27</sup>

Taking a census prior to the completion of the constitutional reform deliberations would be premature and may impede the overall process. As Rudy Jafaar contends, a census would open up a Pandora's Box and deplete the whole system of any legitimacy. He argues that for "this reason, and given Lebanon's turbulent history, the country has refused to undertake a new census."<sup>28</sup> It would also concretize who would fall where in the political structure following its future reorganization, and as a result would crystallize the present interests of the political leaders. Adrian Vermeule argues that in a constitutional decision-making process a veil of ignorance "suppresses self-interest behaviour on the part of decision-makers" as it subjugates them "to uncertainty about the distribution of benefits and burdens that will result from a decision." By acting in a state of uncertainty a decision-maker will "choose the option or rule that impartially promotes the good of all those affected in an ex ante sense."<sup>29</sup> Applying this theory to the Lebanese situation would indicate that the uncertainty about the present demographics of the country would actually create a better opportunity for political leaders to engage in a process of constitutional reform, without any assured inhibitions as to the consequences of the overall outcome. Upon its completion however, it is essential to reinstate a practice of conducting a regular census.

Even in the absence of factual certainty, it is possible that political elites that fear the erosion of their power could resist the adoption of the new model and may present themselves as potential spoilers. A possible way to offset this effect would be to grant these parties some concessions at the negotiating stage, in order to secure their approval. This was done during the constitutional deliberations in South Africa, where potential spoilers were given a stake in the national unity government.<sup>30</sup> A way to achieve a similar effect in Lebanon would be the inclusion of confessional interests in the political system through the proposed Senate (See Chapter 3). Another effective approach to counteract this problem would be to expand the National Committee beyond the members of the National Dialogue to other national stakeholders, including academics, constitutional experts, activists, policymakers and various elements of civil society.<sup>31</sup> An informed, inclusive forum composed of widely represented political attitudes is better suited to embark on an exercise of political reform in a deeply divided society.<sup>32</sup>

The role of the National Committee would be to engage in extensive deliberations and discuss all possible options for constitutional reform. It should be independent of specific political, social or economic interests per se, and act for the long-term benefit of the nation as a

<sup>27</sup> Zachary Elkins, Tom Ginsburg and Justin Blount. "The Citizen as Founder: Public Participation in Constitutional Approval," *Temple Law Review*, Vol. 81, No. 2, (Summer 2008): 361.

<sup>28</sup> Rudy Jafaar, "Democratic System Reform in Lebanon: An Electoral Approach," in Youssef M. Choueiri, ed., *Breaking the Cycle: Civil Wars in Lebanon*, (London: Stacey International, 2007), 293.

<sup>29</sup> Adrian Vermeule, "Veil of Ignorance Rules in Constitutional Law," *The Yale Law Journal*, Vol. 111, No. 2, (November 2001): 399-405.

<sup>30</sup> Benomar, see note 12 *supra*, 84.

<sup>31</sup> Jafaar, see note 18 *supra*, 302; John J. Donohue, "Changing the Lebanese Constitution: A Postmodern History," *Cardozo Law Review*, Vol.

30, No. 6, (2009): 2533.

<sup>32</sup> Benomar, see note 12 *supra*, 94.



whole, including the different communities within it.<sup>33</sup> The negotiations should be lengthy and meticulous, in order to allow time for the parties to explore the issues at hand, and commit to the eventual outcome, as well as mobilize the general public.<sup>34</sup> Benomar points to the extensive deliberations among the parties in South Africa that secured a successful transition to a fully-functioning democratic state. In contrast, in Bosnia and Herzegovina the new constitution was adopted under an extreme time constraint and as a result was not a manifestation of stakeholder consensus or a common vision for national unity.<sup>35</sup> The public nature of the Committee should ensure the engagement of the national media, civil society and the public. In addition, it should undermine any incentive for under the radar horse trading that may take place in an in-chamber style negotiation between the various actors.

The drafting of the constitution should be a two-stage process. At the first stage, the National Committee should act as a forum for debate and reconciliation, where inter-communal grievances are settled and consensus is reached.<sup>36</sup> The second stage should consist of the text drafting. For this venture, as in South Africa, an expert technical commission should be appointed. As McWhinney points out, drafting is an essentially technical field which requires a certain “degree of specialist constitutional expertise,” past what a regular politician or policy-maker would bring to the table.<sup>37</sup> The commission should be independent and unbiased. It should be appointed in a manner that offsets any political influence over its functions. Its mandate should be a narrow one and ultimately the constitutional draft should reflect the consensus reached during the deliberation process of the National Committee.<sup>38</sup> In order to reduce the effect of any personal, communal or institutional interests, the drafting should take place off-site. In this manner, the work of the commission will be shielded from potential spoilers as well as wider systemic pressures.<sup>39</sup>

### Public Participation

Following the completion of the first draft, it should be opened up to consultation, debate and criticism not just at the National Committee level, but before the general public. Constitution-making was historically considered to engage only elite members of society. This exclusive arrangement created a disconnect between the constitution-making process and the democratic values it promoted. In recent decades however, public participation has emerged as a requirement for the success and durability of the new constitution. Although the empirical evidence is limited, scholars argue that the constitutional process itself can act not only as a catalyst to the mechanisms of political transition, but also to inform, educate, and involve the general public.<sup>40</sup> Constitutional reform is perceived as one of the few opportunities a nation has to come together and produce a document that is a reflection of its national values.<sup>41</sup> Vivian Hart argues that the “constitution of new constitutionalism is [...] a conversation, conducted by all concerned, open to new entrants and issues, seeking a workable formula that will be

<sup>33</sup> *Ibid.*, 85.

<sup>34</sup> Tom Ginsburg, Zachary Elkins and Justin Blount, “Does the Process of Constitution-Making Matter?” *Annual Review of Law and Social Science*, Vol. 5, (2009): 209.

<sup>35</sup> Benomar, see note 12 *supra*, 87-88.

<sup>36</sup> Nicholas R. L. Haysom, “Constitution Making and Nation Building,” in Raoul Blindenbacher & Arnold Koller, eds., *Federalism in a Changing World: Learning from each other* (Montreal: McGill-Queen’s University Press, 2002), 230.

<sup>37</sup> McWhinney, see note 13 *supra*, 26.

<sup>38</sup> *Ibid.*, 27.

<sup>39</sup> Jon Elster, “Forces and Mechanisms in the Constitution-making Process,” *Duke Law Journal*, Vol. 45, (1995-1996): 377-380.

<sup>40</sup> Samuels, see note 5 *supra*, 6-7.

<sup>41</sup> Haysom, see note 27 *supra*, 232.

sustainable rather than assuredly stable.”<sup>42</sup> The prospect of excluding popular interests from the table thus renders the constitution vulnerable to contestation.<sup>43</sup>

Hart further argues that public participation is a moral practice, if not a legal requirement, in any constitution-making process. She claims that involving a broad range of national interests and providing the opportunity for popular authorship is the only way to ensure the respect and support that the new document will necessitate. Hart also makes the case for an emerging legal right of constitutional participation. She anchors it in the phrasing of “democratic participation” in the UN Declaration of Human Rights and Article 25 of the International Covenant on Civil and Political Rights, as well as an emerging international norm in that respect.<sup>44</sup>

As public involvement may be time-consuming and costly, McWhinney warns that if “what is wanted is considered to be incremental changes that build on existing constitutional values and constitutional institutions, without any perceived need for radical restructuring” the role of public participation may become “functionally unnecessary or irrelevant.”<sup>45</sup> The constitutional amendments proposed in this report, however, go to the very heart of the Lebanese political framework and thus should not be taken as the type that merely “build on” what is already there.

In polities, such as Lebanon, where the underlying legitimacy of the system is already at stake, public consultation is essential.<sup>46</sup> Youssef Choueiri notes that a “perennial problem of Lebanese society is the weakness of the state and its inability to acquire legitimacy from all or most of its citizens.”<sup>47</sup> Although, as mentioned above, the constitutional amendment process should tie down the interests of the elites by including them in the deliberations and providing them with a direct stake in the outcome, without the involvement of the general public it will be perceived as undemocratic and may lack legitimacy. Participation is seen as a valuable, if not a necessary way, to educate the population about the political evolution that is taking place and to develop trust and democracy within society. The process is deemed to empower members of the public who have previously felt excluded from the political mechanisms altogether and engage them in a constructive dialogue.<sup>48</sup> It should encourage the general population to become more engaged in the political realm, thus promoting democratic values, such as tolerance, equality, respect for the rule of law, and peaceful resolution to conflict.<sup>49</sup> In the short-run, the inclusion of the public domain could act as a catalyst as it will pressure those politicians that are averse to change to sanction the reform efforts.<sup>50</sup> In the long run, participation will foster citizen trust in the national political institutions, as it will build understanding and create expectations.<sup>51</sup> In this respect, the Lebanese people will be able to take ownership of a foundational document that will be able to better reflect a united national vision and include a broad consensus about their common future.<sup>52</sup>

There are different ways to incorporate public participation in the constitution-making process. In Uganda, popular involvement was one of the cornerstones of the political transition. The agenda included district and institutional seminars, parish meetings, distribution of draft

<sup>42</sup> Vivien Hart, “Democratic Constitution Making,” *United States Institute of Peace, Special Report*, No. 107, (July 2003), 3.

<sup>43</sup> Samuels, see note 5 *supra*, 8.

<sup>44</sup> Hart, see note 33 *supra*, 5.

<sup>45</sup> McWhinney, see note 13 *supra*, 31.

<sup>46</sup> Jennifer Widner, “Constitution Writing and Conflict Resolution,” *The Round Table*, Vol. 91, No. 381, (September 2005), 507.

<sup>47</sup> Youssef M. Choueiri, “Explaining Civil Wars in Lebanon,” in Youssef M. Choueiri, ed., *Breaking the Cycle: Civil Wars in Lebanon*, (London: Stacey International, 2007), 21.

<sup>48</sup> Moehler, see note 9 *supra*, 32.

<sup>49</sup> Elkins, Ginsburg and Blount, see note 18 *supra*, 369.

<sup>50</sup> Jafaar, see note 19 *supra*, 302.

<sup>51</sup> Moehler, see note 9 *supra*, 38.

<sup>52</sup> Benomar, see note 12 *supra*, 88.

constitutions in six languages, citizen lobbying and media coverage.<sup>53</sup> In South Africa, following the deliberations between the members of the elite, in an effort to construct the interim constitution, the debate was extended to the public. Citizens were encouraged to submit proposals and enter into public debates. Consultations were held at the village and neighbourhood level. As a result, the South African constitution is known for having a high level of legitimacy.<sup>54</sup>

The problem of public participation is that, if not focused enough, it has the potential to greatly expand the scope of the dialogue. Consensus building is already an intricate process, especially in the context of a fragmented society such as Lebanon. Furthermore, the general population may not fully comprehend the consequences of constitutional reform and may not be necessarily qualified to engage at the stages that require expertise and technical knowledge.<sup>55</sup> As a result, we propose that the actual drafting of the document remain in the hands of the technical commission. Only when the first draft is completed, should it be made public through television programs, radio shows and newspaper articles. Although Lebanese media largely reflects sectarian interests, it is still known to be relatively free in its publications.<sup>56</sup> Copies of the draft should also be made readily available electronically as well as in hard copy at various government institutions. The prepared text will focus the scope of the consultation to the proposed amendments at hand. In order to reach a wide sector of society and obtain as much input as possible, members of the Committee should travel through different communities and meet with various representatives, by holding local town hall meetings and seminars, similarly to the approaches taken in Uganda and South Africa.<sup>57</sup> Once the public participation is complete, the Committee should resume deliberation, incorporating popular sentiments and demands within the discussion. Based on these recommendations, a final draft should be produced by the commission.

### **Ratification**

Legitimacy at the ratification stage is also key to the acceptance and success of the constitution. There are a number of different ways to go about ratifying a proposed constitutional draft – through an elected constituent assembly, within the national parliament or through a popular referendum. There seems to be a general consensus that a constituent assembly elected directly on the mandate of constitutional reform, such as in South Africa, is the preferred approach for ratification. As it is directly elected on this specific issue, it is more likely to reflect and accurately represent the popular views and opinions, while offsetting any institutional interest. As a result, it has a much higher claim to legitimation than a regular legislature.<sup>58</sup> Approval by popular referendum is an additional way to secure the legitimacy of the constitution, by directly engaging the popular sentiment in the ratification process.<sup>59</sup>

The problem is that neither one of these approaches is best suited for a fragmented and highly divided society such as Lebanon. The election of a legitimate constituent assembly would either require a national census or would in itself be a de facto reflection of the demographics.

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<sup>53</sup> Moehler, see note 9 *supra*, 30.

<sup>54</sup> Benomar, see note 12 *supra*, 88.

<sup>55</sup> Yash Ghai and Guido Galli, "Constitution Building Processes and Democratization," in *Democracy, Conflict, and Human Security: Further Readings*, (September 2006), 15.

<sup>56</sup> Michael C. Hudson, "Lebanon After Ta'if: Another Reform Opportunity Lost?" *Arab Studies Quarterly*, (Winter 1999): 31.

<sup>57</sup> Moehler, see note 9 *supra*, 30.

<sup>58</sup> McWhinney, see note 13 *supra*, 33.

<sup>59</sup> Haysom, see note 27 *supra*, 230.

For the reasons already explained above, these findings are not advised and should in fact be avoided until the constitutional reform process is completed, in order to prevent the possibility of spoilers bringing the initiative to a halt. Without any mechanisms to offset the effects of an emerging majority, a constituent assembly at this stage may act in such a way as to alienate certain communities in the Lebanese context. For this reason, a popular referendum would not be recommended either.

As has also been outlined above, fidelity to legality is recommended to ensure a peaceful and legitimate transitional process. The section concerning amendment in the Lebanese Constitution provides for the submission of “a draft law to the Chamber of Deputies.” When this is done, the legislature “must confine itself to its discussion before any other work until a final vote is taken.” Furthermore, “it cannot discuss it or vote upon it except when a majority of two thirds of the members lawfully composing the Chamber are present. Voting is by the same majority.”<sup>60</sup> Although the parliamentary route is not as widely endorsed as the election of a constituent assembly, it appears to be a more appropriate model in the context of Lebanon. Ratification by Parliament is already required by the present constitution, which does not list an option for a separate assembly or a popular referendum. In addition, in their study Tom Ginsburg, Zachary Elkins and Justin Blount find “little support for the claims about institutional self-interest on the part of legislatures that control constitutional design.”<sup>61</sup>

The Lebanese Parliament is an elected institution, which operates with a modest degree of transparency. It has a website that summarises its activities and its general sessions are broadcast through various media outlets. It also encourages the engagement and inclusion of some civil society groups as well as some non-governmental organizations on various issues. Although its functions are presently somewhat undermined by the National Dialogue, which is exclusively working on issues of national concern, the Lebanese Parliament has had some success in researching, drafting, reviewing and amending laws.<sup>62</sup> Involving the Chamber of Deputies would not only be a legitimate and democratic way to engage present democratically elected political figures in the reform process, but would also give them a stake in the new constitution. Jon Elster notes that if a parliament takes on the additional role of a constituent legislature, its members can be held accountable at the next election. This approach would also prevent the inefficiency of two assemblies with different mandates operating concurrently and offset any conflict associated with this setup.<sup>63</sup>

### **The Role of the International Community**

What is the appropriate role of the international community during the constitutional reform process in Lebanon? The short answer is that, the involvement of any international actors should be kept as much as possible to the absolute minimum. The constitutional design agenda should be commissioned and advanced by the Lebanese people for the Lebanese nations. It should have a national character and, through the sentiment of popular authorship, it should allow the general population to take full ownership. Nonetheless, in recent decades the international community has often been involved in constitutional design and has had a role in the national transition processes. Participants have included international organizations, such as

<sup>60</sup> *Lebanese Constitution*, see note 3 *supra*, art. 76-79.

<sup>61</sup> Ginsburg et al, see note 25 *supra*, 219.

<sup>62</sup> Salamey and Payne, see note 7 *supra*, 466.

<sup>63</sup> Jon Elster, “Legislatures as Constituent Assemblies,” in R.W. Bauman and T. Kahana, eds., *The Least Examined Branch: The Role of Legislatures in the Constitutional State*, (Cambridge: Cambridge University Press, 2006): 195.

the UN, national representatives, neighbouring states or international experts. However, unless involvement is kept to a minimum, it can be widely perceived as meddling within the sovereign constitution-making power of the state.<sup>64</sup>

Lebanon particularly has a history of external interference, occupation and colonisation. Greater Lebanon was ruled by the French between 1920 and 1943. It was later militarily and politically occupied by Syria from 1975 until 2005, when Syrian forces were effectively withdrawn. In addition, Lebanon has been described as a victim of its geographic location.<sup>65</sup> It has become implicated in the regional Arab-Israeli conflict, with the different factions fighting through proxy on Lebanese soil. It is also connected to the war in Iraq and Iran's nuclear ambitions. As a result it is a nation of interest not only to regional powers such as Israel, Syria and Iran, but also more generally speaking to the United States, the European Union, the Russian Federation and China.<sup>66</sup>

Historically, the perception has been that the involvement of an external actor as a third party is required in the settlement of any Lebanese domestic conflicts and instabilities. As a result, the Syrian government became involved during the turbulent times leading up to the Lebanese civil war. The Saudis took on the role of arbitrators during the Ta'if peace talks at the end of the war.<sup>67</sup> The Ta'if Accord also involved the efforts of Morocco and Algeria and the implicit support of Syria and the United States.<sup>68</sup> In 2008, it was the Qatari leadership that in turn mediated the talks in Doha. An argument can be made, however, that all of the above-listed international actors were less interested in a lasting peaceful settlement between the warring factions in Lebanon, as a result of their own regional status, role and influence. This may be part of the reason why none of the deliberations that have so far taken place have managed to produce a durable agreement that addresses the root causes of the conflict.<sup>69</sup> With all these international entanglements, it is difficult for Lebanon to remain isolated from the turbulences of the region. It has actually become a forum for foreign involvement, where the different sects are using regional actors as patrons to further their own domestic interests.<sup>70</sup> Taking these complex social, political and geographic realities into account, it may be naive to suggest exclusion of foreign interference in the process. Thus, one way to secure external cooperation is to provide incentives to regional and global actors to support the transition. Perhaps, the most convincing argument is that peace and stability in Lebanon are in the best interest of all concerned parties.

Nicholas Haysom notes that

international mediation, conciliation or facilitation is suggested where the legacy of inter-group conflict means that the groups cannot speak to each other, let alone compromise with one another; where the power balance between the parties is so great that one or both will not negotiate; or where the agreement must be buttressed and supported by international guarantees.<sup>71</sup>

None of these scenarios appear to presently apply to Lebanon. The parties have already engaged in a conversation through the National Dialogue process and are capable of negotiating among themselves. Therefore, the role of the international community within the constitutional reform process in Lebanon should be facilitative at best. Rather than becoming involved in the

<sup>64</sup> Samuels, see note *supra*, 7.

<sup>65</sup> Donohue, see note 22 *supra*, 2533.

<sup>66</sup> Choueiri, see note 38 *supra*, 33.

<sup>67</sup> Haddad, see note 15 *supra*, 412.

<sup>68</sup> Ahmad Beydoun, "Movements of the Past and Deadlocks of the Present: Did the violence of the nineteenth century generate a society prone to civil war?" in Youssef M. Choueiri, ed., *Breaking the Cycle: Civil Wars in Lebanon*, (London: Stacey International, 2007), 45.

<sup>69</sup> Haddad, see note 15, *supra* 412.

<sup>70</sup> Karim Knio. "Lebanon: Cedar Revolution or Neo-Sectarian Partition?" *Mediterranean Politics*, Vol. 10, No. 2, (July 2005): 230.

<sup>71</sup> Haysom, see note 27 *supra*, 234.

substantive negotiations of the agreement and taking on a position that should be reserved for domestic participants, the purpose of international actors should be to safeguard the process and provide logistical support.<sup>72</sup> To avoid any conflict of interest with the involvement of states that have a stake in the outcome of the process, a non-governmental organization such as the National Democratic Institute (NDI) may be best suited for the job.

### **Summary of Recommendations**

It is important to remember that the reform of the Lebanese constitution should be done by the Lebanese people for the Lebanese nation. The above stated recommendations provide options for the process of constitutional design, yet are not contended to be the only or absolute best ways to achieve long term peace and durability. Based on the context and present complexities on the ground, the outlined framework is deemed to be treated as a point of reference. That being said, we recommend that the process should follow the legal formulation that is encompassed within the present constitution. It should be initiated by the President of the Republic, in his appointment of a National Committee. The Committee should consist of the eighteen sectarian leaders as well as other stakeholders, including members of civil society, experts, and academics. Once a consensus is reached within the Committee, an independent technical commission should prepare a draft based on principles and proposals that have been agreed upon. The process should then be opened up to general public consultation and participation. Copies of the draft should be distributed through various media outlets in order to engage citizens in a constructive dialogue. Following the completion of this process, the Committee should review the constitutional draft, taking into account public views and opinions. Once the draft is finalized, it should be sent to the Chamber of Deputies for ratification. Throughout the process, the role of international actors should be kept to a minimum, limiting their role as agenda setting and process safeguarding. The final product should be a legitimate, democratic and durable document that is a source of pride and hope for the Lebanese people.

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<sup>72</sup> Ghai and Galli, see note 46 *supra*, 10.

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## 2. POWER SHARING OPTIONS – ANDREW HIATT

As was explained in the introductory chapter of this report, the goal of reform is not to remove the communities from Lebanese politics. Such an act would not only be disrespectful to Lebanon's unique diversity, but also functionally unworkable. Recognizing that the voices of the confessions are a critical part of Lebanese democracy, in this study we examine reforms targeted to purge the destructive inflexibility imposed by the fixed system of power-sharing.

One cannot discuss confessionalism or explore the prospect of deconfessionalization without being aware of their symbolic and political context in Lebanon. Arguments about the constitution are not simply about who receives the right to govern. For many Christians, particularly the Maronites, the constitution is a demonstration of a specific Lebanese particularism, of a country apart from the Arab character of the region. Thus, while in their view deconfessionalization represents a decrease in political influence relative to Muslims, particularly the Shi'a, it also signifies for some the dominance of an Arabic identity to the exclusion of others.<sup>73</sup> Similarly, Muslims, despite standing to gain more representation under a deconfessionalized system, would disapprove of a state that did not in some way recognize its Arab characteristics.<sup>74</sup> Furthermore, because of the reification of sectarian identity in government, the transnational conflict between Shi'a and Sunni Muslims has become tied to the fundamental structure of the Lebanese state.

In exploring options for the improvement of the power-sharing system, this section follows the philosophy offered by Rein Thaagepera in constructing electoral laws: keep the rules simple<sup>75</sup>. This directive entails both that rules should not be overly complex and that they should seek to do just enough to solve the most pressing problems. First, having fewer rules for establishing government is appealing because it allows citizens to better understand the consequences of their vote in evaluating potential governing coalitions.<sup>76</sup> Second, a system that leaves as much as possible to regular rather than constitutional politics is better able to adapt to the unforeseen situations without requiring the reorganization of the state.

Given these critical considerations, this chapter presents a system of power-sharing that allows confessional representation and protection without choking the government in destructive deadlock. It is not meant to be a definitive solution to Lebanon's problems or a suggestion that this type of reform could or should happen immediately, but rather illustrates that secular and sectarian interests are not mutually exclusive elements in Lebanon's political system. Any final deconfessionalized arrangement will rightly and undoubtedly be the product of the long deliberation of the Lebanese people. This report hopes only to add to this upcoming debate. First, it will outline the current power-sharing system. It will then identify what we perceive to be the critical failings of the power-sharing agreement. Third, it will analyze the advantages and disadvantages of various institutional models. Fourth, it will detail our preferred solution. Finally, it will discuss the incentives for sectarian leaders to engage in reform.

### Summary of Recommendations

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<sup>73</sup> Hanna Ziadeh. *Sectarianism and Intercommunal Nation-Building in Lebanon*. (London:Hurst & Company, 2006), 19.

<sup>74</sup> Ziadeh 2006, xvi.

<sup>75</sup> Thaagepera, Rein, "Designing Electoral Rules and Waiting for an Electoral System to Evolve," In Andrew Reynolds, ed., *The Architecture of Democracy: Constitutional Design, Conflict Management, and Democracy*, (Oxford: Oxford University Press, 2002), 257.

<sup>76</sup> Thaagepera 2002, 258.

- A deconfessionalized pure parliamentary system with a prime minister chosen by the winning coalition and held accountable by a constructive vote of no confidence.
- A figurehead president with limited to no power.
- The deconfessionalized selection of civil and military officials.
- A confessional senate created with the current sectarian balance empowered to confirm appointments and veto legislation.

### The Current Power-Sharing System

A brief, targeted description of the current power-sharing system in Lebanon will help identify the most problematic elements of fixed confessional government. Seats in the Chamber of Deputies (parliament) have, since the Ta'if agreement, been first split equally between Christians and Muslims and then further divided among the confessions. A chart demonstrating this allocation follows.

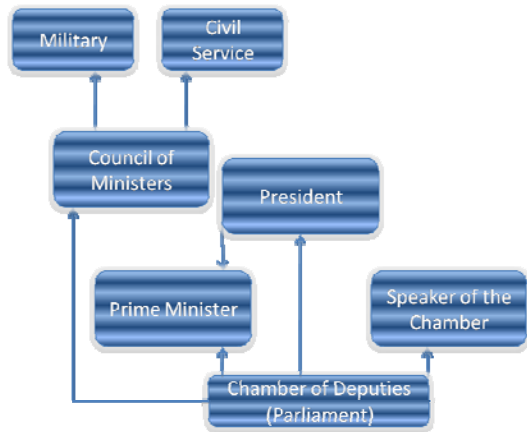
Figure 1 Distribution of Seats in the Chamber of Deputies by Confession

Confession	Seats
<b>Christians</b>	<b>64</b>
Maronite	34
Greek Orthodox	14
Greek Catholic	8
Grouped Remaining Minorities	8
<b>Muslims</b>	<b>64</b>
Sunni	27
Shia	27
Druze	8
Alawite	2
<b>Total</b>	<b>128</b>

The executive is a divided balanced semi-presidential system. The President, traditionally a Maronite Christian, is chosen directly by all of Parliament. The Prime Minister, a Sunni Muslim, is chosen by the President in binding consultation with Parliament. He or she is held accountable by Parliament by a vote of no confidence. The Speaker of the Chamber, always a Shi'a Muslim, is also elected by Parliament. Although in theory these three positions compose a balanced executive, the Ta'if agreement grants primacy to the Prime Minister. The Council of Ministers (cabinet) is divided among the confessions in rough, but not exact, proportion to their representation in Parliament. However, Cabinet has always tended to split the Cabinet equally between Christians and Muslims, even before the Ta'if agreement made this ratio the rule in

Parliament.<sup>77</sup> The current Council is a grand coalition giving Prime Minister Hariri and his allies fifteen cabinet seats and assigning ten and five seats to opposition and neutral coalitions respectively.<sup>78</sup> Civil and military appointments are fifty percent Muslim and fifty percent Christian. A diagram of the power-sharing arrangement follows.

**Figure 2: Current System of Power-Sharing**



### **Problems of Confessional Power-Sharing**

The act of constitutionally guaranteeing a set number of seats to confessional groups has several interrelated negative effects on the practice of normal politics. At the broadest level, Parliament can never truly represent shifting demographic and political realities. The division entrenched by the Ta'if agreement is widely understood to be out of line with estimates provided by today's voter registration records and unofficial censuses which show a firm Muslim majority.<sup>79</sup> The sense that Christians are unfairly overrepresented in government is a major source of Muslim resentment, which has served to fuel the unrest that has plagued Lebanon on and off since the 1940s.<sup>80</sup>

Besides the demographic issues inherent in the current power-sharing system, this kind of parliamentary representation creates dangerous political instability by only legitimizing “vertical” sectarian interests and cleavages. Effectively, this subverts the natural diversity within each sect and removes the ability for citizens to organize around shared political, economic, and social interests, or “horizontal” cleavages.<sup>81</sup> Even the most optimistic reading of the circumstances would recognize that sectarian leaders with politically heterogeneous constituents have a difficult time deciding on policy. A pessimistic (and more realistic) view of the situation sees an empowered confessional elite that need not be responsive to public opinion within their own groups because they have no real danger of losing power. They are thus primarily concerned with direct negotiation with other elites to divide the government's resources.<sup>82</sup>

<sup>77</sup> H. Hrair Dekmejian, *Patterns of Political Leadership: Egypt, Israel Lebanon*, New York: SUNY University Press (1975), 82-87.

<sup>78</sup> Natalia Antelava, “Lebanon Cabinet Deal Signals Syrian Return”, *BBC News*. Nov. 25, 2009, accessed Apr. 16, 2010, <<http://news.bbc.co.uk/2/hi/8378213.stm>>.

<sup>79</sup> Imad Salamey and Rhys Payne, “Parliamentary Confessionalism in Lebanon: Equal Citizenry vs. Quotated Confessionalism,” *The Journal of Legislative Studies* 14 (2008), 452.

<sup>80</sup> Salamey and Payne 2008, 452.

<sup>81</sup> Canadians for Justice and Peace in the Middle East, “Factsheet: Understanding Lebanese Confessionalism”, *Factsheet Series* 26 (2007), accessed April 15, 2010, <<http://www.cjpme.ca/documents/26-En-LebaneseConf.pdf>>.

<sup>82</sup> Salamey and Payne 2008, 453.

The socioeconomic cleavages that do roughly align with sectarian divisions serve to exacerbate pre-existing tensions. The Maronite Christians in particular are economically advantaged and over-represented. Therefore, the relatively rich are better represented in the legislative branch than the more numerous poor. These economic differences, especially when reinforced by the political power of the state, only serve to increase inter-communal feelings of unfairness, particularly if the disadvantaged groups perceive wealthier groups as benefitting from their political positions. Given the corruption and patronage common in the Lebanese government, this assumption is not totally unjustified.<sup>83</sup>

Because bureaucrats are chosen on a confessional, not merit, basis, the government is less effective. This reduced ability to deal with critical issues has lowered public opinion of the system in general and continues to ferment discontent.<sup>84</sup> Furthermore, because appointed administrators owe their positions solely to confessional elites, the assets of the state can be employed for sectarian purposes. This phenomenon is especially true and troublesome in the case of the security services, where this form of clientelism empowers confessional groups with the traditional resources of the state. As Choucair describes, “The head of the intelligence services is a Maronite, the director of general security is Shiite, the director of internal security is Sunni, and the director of state security is a Catholic[...] The interaction between ministers and directors of security depends on their personal relationship at any given point in time”.<sup>85</sup> Indeed, the agencies typically hide information from each other, keeping only their confessional patrons informed.<sup>86</sup> The lack of turnover in elected government only hardens these patron-client relationships in civil and military service as elites focus on dividing up the resources of the government rather than ensuring effective governance.

The power-sharing design that created these problems is naturally ill-suited to correct them. Under ideal democratic conditions, citizens or parties unhappy with electoral results must merely wait until the next election to have another chance to gain power. Under the Ta’if agreement, this opportunity is eliminated. They then resent the current balance of power. By doing so, they struggle not with the temporary disadvantage of a small bloc in parliament fixable by a better performance at the polls but the foundation of the state itself: the constitution. The choice is thus whether to accept the power-sharing status quo or contest the government itself outside of the bounds of normal politics, as has often happened in Lebanese history, with violence.

The search for more power outside of the state apparatus has led groups to seek help from foreign actors, most prominently Syria. International intervention in domestic politics serves only to further delegitimize the state. In addition to rightful suspicions of the undue influence of outside forces in Lebanon, the question of identity again threatens peace. Christians feel that close ties to Arab countries undermine their position as rightfully distinct members of a pluralistic society while Muslims fear the hand of the West in domestic affairs.<sup>87</sup> The Muslim community is further divided, as Sunni Lebanese resent the involvement of Shi’a states like Iran and vice versa.<sup>88</sup>

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<sup>83</sup> Samir Makdisi and Marcus Marktanner, “Trapped by Consociationalism: The Case of Lebanon,” *American University of Beirut Institute of Financial Economics: Lecture and Working Paper Series 1* (2008), 9.

<sup>84</sup> Salim, El-Hoss, “Horizons of Prospective Change in Lebanon,” *The Beirut Review* 3 Spring (1992). <<http://www.lcps-lebanon.org/pub/breview/br3/hoss3.html>>

<sup>85</sup> Julia Choucair, “Lebanon: Finding a Path from Deadlock to Democracy”, *Carnegie Papers* 4 Jan. (2006), 9.

<sup>86</sup> Choucair 2006, 10.

<sup>87</sup> Marie-Joelle Zahar, “Power Sharing in Lebanon: Foreign Protectors, Domestic Peace, and Democratic Failure”, in Philip G. Roeder and David S. Rothchild, ed., *Sustainable Peace: Power and Democracy after Civil Wars*, Ithaca: Cornell University Press, 2005.

<sup>88</sup> Mirjam E. Sorli, Nils Petter Gleditsch, and Havard Strand, “Why Is There So Much Conflict in the Middle East?”, *Journal of Conflict Resolution* 49 (2005).

The ideal power-sharing arrangement would avoid the issues listed above. It is clear that the culprit in the instability of the Lebanese state is its inflexible confessional system. For democracy to flourish and peace among the confessions to last, reforms must allow political disputes to be decided by normal political contestation, not violence. We will now examine alternative options.

### **Federalism**

Richard Simeon presents federalism as a tool for either integration or empowerment of minority groups, depending on constitutional design choices.<sup>89</sup> Federalism in Lebanon would have to follow an appeasement rationale to make sense; the communities have a long history within politics and identities are strong and politically mobilized. Empowerment constitutions typically feature: boundaries of federal units that correspond to group divisions, an amending formula that requires a high level of agreement, divided power and fiscal arrangements, equitable intergovernmental relations, and territorially representative second chambers.<sup>90</sup> Lebanon is not a good fit for this model for several reasons.

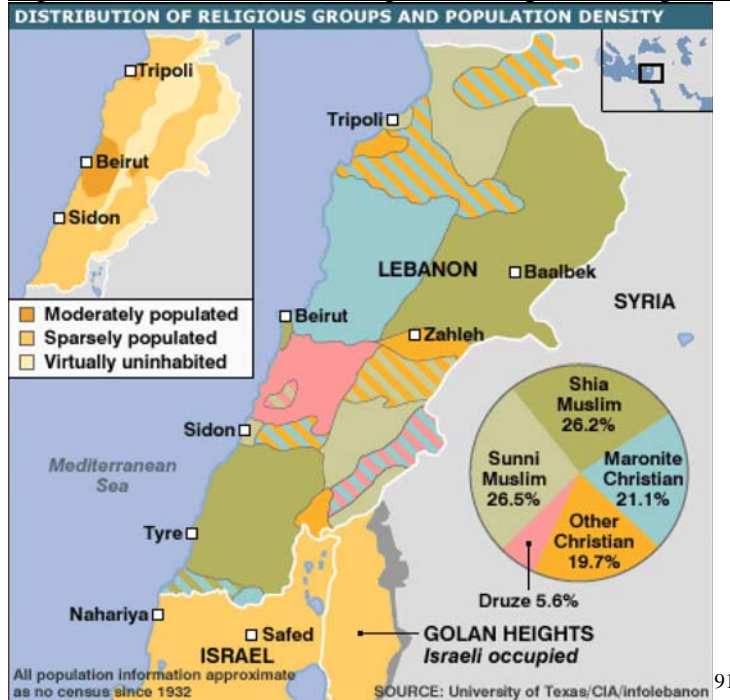
First, while the communities cannot be said to be completely intermingled, they do not populate distinct areas that would be conducive to the formation of sub-states. As the demographic map following this paragraph indicates, confessions often mix or occupy areas at the opposite borders of the country. The Shi'a are concentrated in the northeast and south while the Sunni live in pockets in the north and south. The Maronites largely live in Mount Lebanon in the centre of the country and in the south near the Israeli border. Federal units would then either have to combine territorially disparate areas of land or contain sizable minorities. Such an arrangement would defeat the purpose of the exercise. Furthermore, even if sensible boundaries could be drawn, the role of minorities within the federal states would still be problematic.

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<sup>89</sup> Richard Simeon, "Managing Conflicts of Diversity," Forum of Federations, 4th International Conference on Federalism, Conference Reader (Ottawa: Forum of Federations, 2007).

<sup>90</sup> Simeon 2007, 8-9.

Figure 3: Distribution of Religious Groups with Population Density



Second, the experience of the current confessional system, which could in some regards be compared to a federal system because of the way it subdivides power to sectarian groups, suggests that power balancing would continue to be a problem even in a federation. Traditionally, Lebanon has adopted a *laissez faire* philosophy in economic issues<sup>92</sup> and, of course, confessional autonomy has reduced the number of issues requiring state intervention. Nevertheless, disputes and legislative standstills still happen with disappointing frequency even in times of relative peace. Furthermore, given the country's diversity, allowing one community more autonomy, as the Maronite Christians in particular have argued for,<sup>93</sup> would require every group to attain the same rights. New issues like the distribution and transfer of state revenue would create even more contention, especially since wealth is currently unevenly distributed among confessional groups. In brief, this situation would be unworkable, and as unsustainable as the current system.

Finally, and perhaps most importantly, federalism could very easily encourage the foreign intervention that has been so detrimental to Lebanon's stability. Assigning groups distinct federal states would empower them further while still maintaining highly contentious national politics. Thus, the temptation to seek outside help mentioned at the beginning of the chapter would linger. The deadlock of the current system does have some distinct benefits in that communal groups can work to ensure undesired outside actors do not gain too much influence. This statement may seem hollow in light of Syria's continued influence in Lebanon, but at least opposition groups have institutional tools available to oppose unwanted reforms.

<sup>91</sup> Adapted from Salamey and Payne 2008, 454.

<sup>92</sup> SEE TOUFIC GASPARD, *A POLITICAL ECONOMY OF LEBANON, 1948-2002: THE LIMITS OF LAISSEZ FAIRE*, BOSTON: BRILL ACADEMIC PUBLISHERS, 2004.

<sup>93</sup> El-Hoss 1992.

Homogenous federal states would remove barriers and provide more points of access for international actors to interfere at the provincial level. This meddling could then easily complicate affairs at the national level.

### Presidential versus Parliamentary Regimes

One of the central debates in the constitutional design academic literature involves which of the two major democratic institutional arrangements, presidentialism and parliamentarism, better suits divided societies like Lebanon. Lebanon's mixed system has, since Ta'if, leaned toward parliamentarism, granting significantly more power to the Prime Minister and the Council of Ministers than the President. However, Salim El-Hoss, writing only a few years after the Ta'if Agreement, laments that "all tested power-sharing formulas within the executive authority[...] have thus far left a great deal to be desired".<sup>94</sup> Since the eighteen intervening years between his article and this report have not proved significantly more successful for the executive, a reappraisal is in order. Because "the study of democratic regimes cannot be separated from the study of electoral systems",<sup>95</sup> this section will delve briefly into the electoral underpinnings of the systems in question. The next chapter will explore these issues in much greater depth.

Donald Horowitz, the principal proponent for the presidential system in divided societies, feels that a president with a broad electoral base is the ideal institutional arrangement to moderate conflict. He furthermore suggests that electoral rules can manufacture moderation. In particular he favours arrangements which require certain percentage thresholds to be reached within a designated number of federal states, or in the case of Lebanon, confessional groups, to support the President. Presumably, only politicians in the centre of the spectrum could achieve this level of support. If a president can only be elected by a majority, then more than half of the population will have a stake in his or her success. Even though the executive is inevitably a compromise candidate for most involved, Horowitz counters that this outcome is more desirable than identity politics between unyielding extremist groups.<sup>96</sup>

Although El-Hoss ultimately concurs that a presidential regime with broad well-defined powers would be most effective in governing Lebanon,<sup>97</sup> we argue that such an arrangement would create several problematic situations. First, the President would inevitably be of a different confession than a majority of the legislative branch, even if elected by a majority after a runoff. This is particularly problematic for the Maronites who would be disinclined to cooperate in the short term because they could reasonably anticipate that a Maronite candidate probably would be elected to the presidency. Further complicating matters, a strictly presidential system would remove the Prime Minister, leaving no recourse for a balancing position. For any solution to be deemed acceptable to the Maronite community, it must be perceived to provide them a level of protection and security. A sunset clause that stipulated a later switch to a presidential system would similarly drive noncooperation as the Maronites attempted to grab as much power as they could before the transfer.

In all likelihood, other communities also probably take issue with a strong president as well because of the nature of majoritarian politics. Matthew Shugart and John Carey affirm that

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<sup>94</sup> El-Hoss 1992.

<sup>95</sup> Juan Linz, "The Virtues of Parliamentarism", In Larry Diamond and Mark F. Plattner, ed., *The Global Resurgence of Democracy*, (Baltimore: Johns Hopkins University Press, 1996), 155.

<sup>96</sup> Donald Horowitz, "Comparing Democratic Systems", In Larry Diamond and Mark F. Plattner, ed., *The Global Resurgence of Democracy*, (Baltimore: Johns Hopkins University Press, 1996), 144-147.

<sup>97</sup> El-Hoss 1992.

“presidentialism distorts the proportional representation of voters’ choices in the executive, where  $M=1$ ”.<sup>98</sup> While Horowitz insists that moderate candidates will give citizens enough of a stake in government that they are satisfied, this assessment seems overly optimistic. Moderation in divided societies is not just difficult to achieve because electoral systems provide incentives to elect extremists, but also because conflict becomes so entrenched that abandoning even minor positions is a matter of identity and survival. At least in the short term, communities would prefer to be directly represented and probably would not agree to a constitution that forced otherwise.<sup>99</sup>

Juan Linz rightly draws attention to the tension between the president’s dual roles as head of state and head of government, positions that are currently divided between the president and the Prime Minister. This emphasis is especially important because of the symbolic role of power-sharing arrangements for groups concerned with the state’s fundamental identity. As such, every major community in Lebanon would find fault in a politicized head of state without a compensating arrangement (i.e. the current confessional divide) to indicate the country’s pluralist nature. The problem that immediately arises is that consociationalism is very incompatible with presidential systems. Presidential-legislative relations are contentious even in the best circumstances. A strong president facing several confessional factions with significant fixed independent power would lead to deadlock; there would simply be too many veto points to expect action. This is especially true when considered with Linz’s insight that “no democratic principle exists to resolve disputes between the executive and the legislature about which of the two actually represents the will of the people”.<sup>100</sup> Such a situation would quickly degenerate in a conflict prone society like Lebanon.

When discussing parliamentarism, it is necessary to distinguish between Westminster systems, which often but do not necessarily use plurality voting, and continental European models, which use proportional voting. Linz and Horowitz both agree that Westminster systems present many of the same dangers as majoritarian presidential regimes. While Linz makes the point that prime ministers are institutionally easier to remove than presidents<sup>101</sup>, the “winner-take-all” features of the Westminster regime are prevalent enough to dismiss it from our considerations about Lebanon for the same reasons given for presidential designs.

On the other hand, parliamentary systems with proportional electoral rules are much more inclusive because they permit multiple groups to share power. Lebanon’s confessional parliament is a modified, flawed example of this dynamic. Although the communities always receive a portion of parliamentary representation, the perceived winners (the Maronites and Druze) and losers (the Shi’a and Sunni) do not change. In that sense, Lebanon’s system fits more with majoritarian arrangements where the “broad and indefinite exclusion of power of any significant group”<sup>102</sup> is a probable outcome. Indeed, in Lebanon’s case, the privileging of certain groups attains de jure permanence rather than merely de facto consistence, further underscoring the hopelessness of sects who feel they are being wronged.

Parliamentary systems without predetermined representation allow for ongoing adjustments of power arrangements both through and between elections. Because the legislature is the only concentration of government power, issues of dual legitimacy do not arise. The

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<sup>98</sup> Matthew Shugart and John M. Carey, *Presidents and Assemblies: Constitutional Design and Electoral Dynamics*, (Cambridge: Cambridge University Press, 1992), 30.

<sup>99</sup> Lijphart, Arend, “Constitutional Design for Divided Societies”, *Journal of Democracy* 15 (2004), 98.

<sup>100</sup> Juan Linz, “The Perils of Presidentialism”, In Larry Diamond and Mark F. Plattner, ed., *The Global Resurgence of Democracy*, (Baltimore: Johns Hopkins University Press, 1996), 136.

<sup>101</sup> Linz “The Virtues of Parliamentarism” 1996, 156.

<sup>102</sup> Lijphart 2004, 100.



choice of a parliamentary system need not assume the fixed structure of the present confessional arrangement. It is for these reasons we focus on the possibility of a deconfessionalized parliament for Lebanon.

### **The Lower House**

As we consider the move from a mixed system with set confessional seats, we require a new method of selecting the Prime Minister and Cabinet. The most inclusive option in the spectrum of institutional choices is a pure consociational model that is a deviation from the current system. The entire parliament could choose the Prime Minister and then assign cabinet positions based on proportionality, as is currently done by South Africa.<sup>103</sup> Variations of this design are also possibilities, where the cabinet comes from the winning coalition but must contain a diverse selection of groups. Finally, the leader of a winning coalition might become the Prime Minister, but preside over a cabinet drawn proportionally from all of parliament. This system gives every party a piece of the executive but provides little direct accountability for voters. It is difficult to hold a government answerable for its actions when everyone legitimately has a hand. There is less incentive for moderation because participation in government is assured. Furthermore, if electoral fortunes are more or less stable as they have been with purely sectarian parties, then the government will not change substantially from election to election.

At the other end of the spectrum are systems where the Prime Minister and Cabinet only come from the winning coalition. This arrangement is a typical institutional feature of the West German model. This design provides highly accountable governments – voters know exactly which parties are driving policy and can vote retrospectively on performance. It also promotes the formation of relatively less diverse (in terms of political party but not necessarily in terms of religion) but more cohesive governments. Coalition theory shows that parties are not merely power maximizers, but instead seek to ally with like groups.<sup>104</sup> On the other hand, by more clearly defining winners and losers for each electoral cycle, it raises the stakes of elections, possibly upsetting delicate balances of power.

### **An Upper House**

This report has emphasized that Lebanon's communities must be respected and recognized in any constitutional reform. In line with this thinking, the changes this document explores focus on allowing both communal and secular interests to coexist, not banning the confessions from the public sphere. Indeed, sectarian voices in government contribute greatly to preventing any particular group from dominating and to providing critical oversight to the normal functions of government. To this end, we examine the creation of a second house.

The role of the upper house is usually described as either representation, to allow a different set of interests to have a say in government than are present in the lower house, or redundancy, to obtain a more measured, independent view of legislation, or both. Russell adds two other functions: an additional veto player and an administrative aid to legislative affairs.<sup>105</sup> So, in considering the construction of a Senate, we are presented with an array of options to be tailored to Lebanon's institutional needs.

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<sup>103</sup> Lijphart 2004, 103.

<sup>104</sup> Kaare Strom, Ian Budge, and Michael J. Laver. "Constraints on Cabinet Formation in Parliamentary Democracies". *American Journal of Political Science* 38 (May 2008).

<sup>105</sup> Meg Russell, "What are Second Chambers for?", *Parliamentary Affairs* 54 (2001), 443.

We declared from the outset that the upper house should represent confessional interests. One issue then is how it should be composed. A confessional Senate that allowed groups representation proportional to their share of overall population would provide for a different voice than the presumably more secular lower house while remaining demographically legitimate. However, this arrangement would require a census and might make smaller groups less likely to buy in to the system. Nonetheless, fixed representation protects minority confessional interests by injecting certainty into elections; no matter the outcome every group will retain some measure of power, an element of consociational power-sharing.

Another variable concerns the powers available to the Senate. Some upper houses like the U.S. and Australian Senates have near equivalent legislative capability to the lower house.<sup>106</sup> This design provides the optimal protection of communal interests but opens the door to deadlock and obstruction. Other second houses, like the Canadian Senate, have near symbolic powers that would probably be deemed illegitimate if used.<sup>107</sup> The upper house's power could also come in the form of the confirmation of appointments or the veto of laws. Here, it reacts to the actions of the lower house and executive, giving those decisions additional legitimacy based on different grounds. There are a wide variety of design features within these categories to accommodate the idiosyncrasies of any society's history of conflict.

### **The Military and Civil Service**

Article 12 of the Lebanese constitution directs that “every Lebanese has the right to hold a civil service job, with no preference being made except for on the basis of merit and competence”.<sup>108</sup> However, Article 95 of the constitution as amended by the Ta'if Agreement points out that “grade one posts and their equivalents should be exempted from this rule and should be equally distributed between Muslims and Christians without reserving any of them to any sectarian community”.<sup>109</sup> The patronage created by this provision clearly hurts day to day governance. The remaining issue is whether confessions should have any say in appointments.

In theory, keeping the communities completely out of civil and military service selection ensures that bureaucrats will be selected without bias. However, if done correctly allowing the sects a voice can actually benefit policy-making. Appointments made on a confessional basis by a deconfessionalized institution like the Cabinet might be acceptable if the executive could be trusted to do so impartially. Alternatively, a confessional check on appointments made by merit allows power to the communities without preventing the government from selecting the best people regardless of religious affiliation. Furthermore, it would work even if a strongly sectarian leader were elected to the executive because the Prime Minister could not pass objectionable candidates by the Senate.

### **The Head of State**

In the words of the Ta'if agreement, the president “is a symbol of the country's unity. He shall contribute to enhancing the constitution and to preserving Lebanon's independence, unity, and territorial integrity in accordance with the provisions of the constitution”.<sup>110</sup> We feel that

<sup>106</sup> Russell 2001, 446.

<sup>107</sup> Russell 2001, 456.

<sup>108</sup> Sami Ofeish, “Lebanon's Second Republic: Secular Talk, Sectarian Application,” *Arab Studies Quarterly* 21 (Winter 1999), 107.

<sup>109</sup> “Ta'if Agreement”. *NOW Lebanon*, accessed April 14, 2010,

<<http://www.nowlebanon.com/Library/Files/EnglishDocumentation/Official%20Documents/Taif.pdf>>.

<sup>110</sup> Ta'if Agreement.

maintaining this role is the best option. As such, it is critical that the president be an uncontroversial, respected figure who can remind the country of its spirit of diversity even when politics become nasty and contentious. The present method is effective in that regard, because it allows the confessions as a whole to select the head of state. Therefore, for the parliamentary system, only slight modifications should be necessary.

There are a few variants of parliamentary heads of state. The Prime Minister can be both head of state and head of government.<sup>111</sup> It is then unnecessary to create a position that does not have concrete power anyway. Another is the non-executive head of state. Here the head of state has extremely few real powers and exists only as a figurehead. Another option is the role played by the governor general in Canada. He or she does not participate in day to day governance, but constitutionally is granted several reserve powers: to dismiss the Prime Minister, to refuse or dissolve parliament, and to refuse or delay royal assent to legislation.<sup>112</sup>

The head of state typically acts as an impartial arbiter between opposing groups within parliament and branches of the legislature. There are many options for his or her selection. Second, the president can be elected by the general public by a variety of rules. These include a simple majority system, a runoff system where the top two candidates in an open election face election again, or an alternative vote where voters' ranked preferences are utilized.<sup>113</sup> Third, one or both of the legislative bodies could select the president as with the existing system.

### **Our Recommendations**

In response to the deadlock of the current confessional system, we recommend a system based on the German parliamentary model. Proportional representation, discussed more fully in the next chapter, and the country's natural political fragmentation would ensure that a large number of parties were elected to parliament. Government would then likely be composed of more rather than fewer political parties. The concentration of power provides incentives for cooperation among like-minded political groups, promoting secular parties rather than sectarian ones. Furthermore, as previously mentioned, the accountability provided by identifiable governing coalitions allows voters to choose on the basis of merit rather than identity.

The party with the highest electoral return should be asked to form a coalition with the leader becoming Prime Minister. Cabinet members should be selected from the other coalition members in rough proportion to their representation in parliament. After the cabinet's confirmation by the upper house (detailed later), the Prime Minister will appoint senior military and civil service officials in consultation with the cabinet.

As the primary chamber, the lower house should have the sole ability to initiate and pass legislation. It should also hold the government responsible with a constructive vote of no confidence, a rule that requires the opposition to propose an alternative leader on the motion. This wrinkle prevents unworkable coalitions from uniting in displeasure of the current government, only to later find that they are unable to govern credibly afterward. This is an especially important institutional element in a fragmented society like Lebanon, where one can imagine diverse opposition to any given government.

We suggest the creation of a confessional Senate that maintains the Chamber of Deputies' current balance between communal groups. This act is symbolic in that it recognizes

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<sup>111</sup> Lijphart 2004, 103.

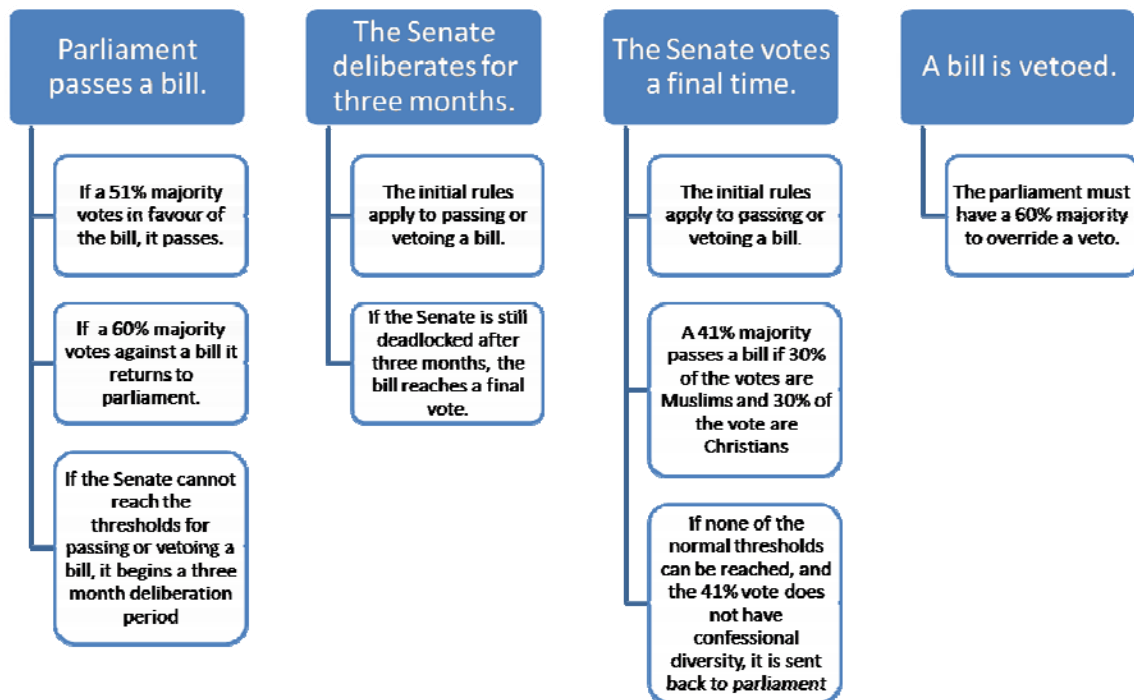
<sup>112</sup> Website of the Governor General of Canada. "Constitutional Responsibilities". accessed April 14, 2010. <<http://www.gg.ca/document.aspx?id=13264>>.

<sup>113</sup> Horowitz 1996.

the importance of the diversity within the country with concrete institutional design. Such a gesture frames the constitution as reform to improve the effectiveness and stability of government, not rob specific groups of power. It is also practical. It allows for much needed oversight into the democratic process, slowing down reform that might progress too quickly. Because of the relative geographic clustering of the confessions, territories would achieve an element of representation.

The Senate’s power of oversight should be institutionalized in two ways. First, after legislation is passed by the Chamber of Deputies, the Senate should be given the power to veto it. The ideal veto procedure protects sectarian concerns without allowing unnecessary obstructionism. Our suggestion utilizes varying vote thresholds and a deliberation period to achieve a balance. At any point in the process, a law can be passed with a 51% majority. However, it can only be rejected outright with a 60% share of the vote. If the initial vote falls between these two thresholds then a three month deliberation begins. If at the end of the allotted consideration period the Senate is still deadlocked, a bill is forced to a final vote. Here, 41% of the chamber may approve a bill if the coalition includes at least 30% Christians and 30% Muslims. This lower percentage is acceptable because the Senate is designed to protect confessional interests, not act as the primary legislative body. After a veto, the Chamber of Deputies can override the decision of the Senate with a 60% majority, giving parliament primacy in legislative matters.

Figure 4: Suggested Senate Veto Procedure



Second, the Senate should have the power to confirm major government appointments including the Cabinet, military leadership, and high level civil service positions. The confessions would then have input on the composition of the government but would not be able to appoint directly. We advise that the Cabinet be confirmed as a group while major military officials and

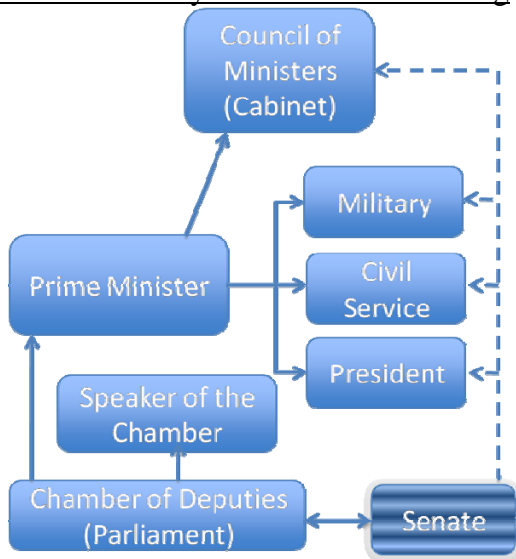
civil servants should be approved individually. This arrangement would give the confessions the ability to reject clearly unacceptable officials but not enough ability to stall government, fermenting dissent and conflict. This setup should immediately create a large turnover in military officials as secular parties appoint more moderate candidates and the Senate weeds out those that slip through. A 51% majority requirement should be sufficient to provide the needed oversight – Lebanon is fragmented enough that this threshold would indicate significant inter-confessional cooperation.

We suggest a head of state with a purely symbolic role. In a divided society like Lebanon we cannot trust that reserve powers intended to be purely ceremonial or used only in emergency situations will not be put into use. Such an occasion where the president clashed with Parliament would almost certainly cause a constitutional crisis that could easily escalate. Other provisions can instead provide rules to solve institutional conflict.

The president should still be selected by all of Parliament to reflect the range of political parties elected. This choice also ensures that the president will be a moderate political figure. Having passed the deconfessionalized parliament, the president must then be confirmed by the Senate to ensure that he or she is not objectionable on confessional grounds. With this arrangement, one can be reasonably sure that the president can act as a representative of the entire country.

We advise that the selection process for all civil and military positions be deconfessionalized. Confessional elites claim that these positions are necessary for the protection of the communities but ultimately only use them to maintain personal power and influence. Military appointments should be made solely by the Prime Minister and confirmed by the Senate. Then, all will be answerable to the Minister of Defence in times of peace and the Prime Minister in times of war. Civil service positions should also be appointed by the president and confirmed by the Senate.

**Figure 5: Reformed System of Power- Sharing**



## Incentives for Reform

The only way that our design is implementable is if confessional elites see it as beneficial. They hold the de facto and de jure leverage for any reform of the current system. This plan first appeals to the logic that no group benefits from a return to civil war. While the 1989 Ta'if and the 2008 Doha agreements brought temporary peace, they did not fix the perverse incentive structures that drive Lebanese political groups to seek power outside the system. We do not claim that this plan eliminates the chance of violence, but if power is fluid and obtainable within the political system then armed groups have much less reason to defect from normal politics. Furthermore, a parliament with proportional representation and the right to hold the executive accountable ensures that even the losers of a political election have a hand in government. Everyone will also benefit from more competent governance gained by a merit-based civil service. Finally, it is popularly supported. A recent poll by Information International indicated that a majority of Lebanese support deconfessionalization, even without the protections created by this system.<sup>114</sup>

Individual groups gain with our suggested reforms. The Maronites, afraid of being further marginalized by demographic pressures and a shifting state identity, are guaranteed a permanent voice in the Senate equivalent to their present share of power. The upper body deliberately over represents them to signal a commitment to their protection and significance. Furthermore, they gain the potential to attain more influence in parliament with either membership in the governing coalition or, with an inclusive platform, the office of the Prime Minister, something guaranteed to the Sunni community under the previous agreement.

The Sunni and the Shi'a also gain the ability to obtain representation in proportion to their demographic size while still maintaining institutionalized avenues for confessional input to be heard. If communal populations continue to grow, that fact will be reflected in the country's elected officials. This demographic legitimacy answers charges of the injustice of the fixed power-sharing system.

## Conclusion

The reforms we suggest would funnel the confessional elements of the system into one body, the Senate. This arrangement enables normal politics to occur with communal oversight, not sectarian obstruction. While we present this specific design, the institutions we explore are inherently variable in nature. In the case of the Parliament, different rules could be used for selecting the Prime Minister and Cabinet. In the Senate, vetoes could require higher or lower vetoes and the period of deliberation could be longer or shorter. More or less confessional representation could be required to reject a bill. In general, greater power could be assigned to the president. Thus, the institutions imagined in this report could be used in combination with many others with appropriate alterations.

The fact that the current confessional balance is the culprit in Lebanon's instability is alterable. It has transformed Lebanon's incredible and unique diversity from one of its greatest benefits to an instigator of violent conflict. Thus, we stress that while communal representation is important in Lebanon's government, it is better served as just one institutional feature, not the entirety of the system.

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<sup>114</sup> "Abolishing Confessionalism in Lebanon", *Information International*, 2010, accessed April 14, 2010. <<http://qifanabki.files.wordpress.com/2010/02/abolishing-confessionalism-poll.pdf>> (Arabic)

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### 3. ELECTORAL SYSTEMS AND POLITICAL PARTIES - LAMA MOURAD

#### Introduction

Following the previous chapter on power-sharing in the Lebanese political system, this chapter will attempt to address the question of electoral system design. Within most post-conflict societies, one of the most important issues faced by constitutional designers is determining how political representatives are to be selected. The case of Lebanon is no exception to that rule. Among the institutions that perpetuate the phenomenon of ‘sectopolitics’,<sup>115</sup> previously outlined, the electoral system is among the most influential. In fact, its reform has often been considered by academics and members of civil society as ‘the launching point’ for any further political reform.<sup>116</sup> Therefore, in order to truly address the mischief we have identified, we recommend that the National Committee embrace the prospect of a major overhaul of the electoral system.

This chapter will begin by giving a background on political parties and electoral systems in Lebanon, and move on to outline the current system, which is known for its complexity. It will then move on to consider the many problems that this arrangement creates, perpetuates, or exacerbates. These problems relate to the role of districts, the nature of alliances, and the sectarian and clientelist nature of politics within Lebanon. Next, this chapter will highlight potential options for reform and demonstrate why particular options are more likely to address the problems discussed. While a number of reforms are necessary, we will place emphasis on those that we deem particularly problematic and in need of further explanation, namely the ones relating to electoral constituencies and voting systems. A summary of the complete list of recommendations follows.

#### Summary of Recommendations

##### *Electoral Constituencies and Voting Systems*

1. Implement an open-list proportional representation electoral system based on medium-sized *muhafaza* districts.
2. Implement a sequenced approach for senate elections where, prior to the holding of a national census, a single transferable vote model will be applied on a single national district. Afterwards, a single-transferable vote model with regional lists would be recommended.

##### *Independence, Transparency and Legitimacy*

3. Establish an independent electoral commission
4. Regulate the media during elections

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<sup>115</sup> Nazih Richani. *Dilemmas of Democracy and Political Parties in Sectarian Societies*. (New York: St. Martin's Press, 1998), 15. Richani's definition of the term is as follows : “the mobilization of sects on a political basis. It is an ideology that incorporates communal feelings, values, symbols, and the perceptions of an outside threat. It is the political articulation of status interests (sect/religions), and thus seeks to organize political competition between groups along strictly sectarian lines ... Sectopolitics does not operate in a vacuum; it has agents, such as the state, church, parochial schools, media organizations, research centers, universities, and of course political parties, that participate in making it the dominant ideology in Lebanese society.”

<sup>116</sup> "Lebanon 2008-2009 National Human Development Report: Toward a Citizen's State." United Nations Development Programme, 2008-2009, available at <<http://hdr.undp.org/en/reports/nationalreports/arabstates/lebanon/name,3303,en.html>>, 113.

5. Regulate campaign spending
6. Establish a universal ballot system

#### *Inclusion*

7. Encourage women candidacy by introducing quotas on party lists

#### *Eligibility of Voters*

8. Lower the voting age from 21 to 18 years
9. Establish the capacity for out-of-country voting
10. Establish the option to vote in place of residency

#### *Amendment Process*

11. Establish a more meaningful process of electoral reform and amendment through the entrenchment of basic structuring principles within the Constitution

## **Background**

### *History of Parliamentary Elections and Political Parties*

Unlike the typical post-authoritarian context with very little – or no – history of competitive elections, which constitutional designers often find themselves facing, Lebanon has a long history of parliamentary elections and a fairly vast array of political parties. The first parliamentary elections were held in 1927 under the auspices of the French colonial power and held on a fairly regular four-year basis up until the outbreak of the civil war in 1975.<sup>117</sup> Political parties emerged around the same period. At that time, two types of parties emerged: ideological and elite-based parties. However, ideological parties remained marginalized, and “[m]uch of the politics hinged on inter- and intra-(confessional) elite rivalries.”<sup>118</sup>

This began to change in the immediate pre-war period, when Lebanon was home to over 15 political parties and groupings that were not only nominally present, but truly active, influential, and organized.<sup>119</sup> This was deemed the heyday of political parties: “[i]n many ways, Lebanon’s political scene resembled the era of the 1960s in Western countries” where “parties of Left and Right, confessional and secular, ideological and non-ideological, radical and moderate”<sup>120</sup> vied for power. It was during this time that secular, particularly leftist, political parties emerged - which represented the first truly mass-based parties.

## **Current Electoral System and Attempts at Reform**

### *Outline of System*

<sup>117</sup> Paul Salem. "Electoral Law Reform in Lebanon. The Experience and Recommendations of the National Commission." *Arab Reform Briefs*, no. 10 (July 28, 2006), <[http://arab-reform.net/IMG/pdf/Electoral\\_Law\\_Reform\\_in\\_Lebanon\\_Paul\\_Salem\\_en.pdf](http://arab-reform.net/IMG/pdf/Electoral_Law_Reform_in_Lebanon_Paul_Salem_en.pdf)>.

<sup>118</sup> Farid el Khazen. "Political Parties in Postwar Lebanon: Parties in Search of Partisans." *Middle East Journal* 57, no. 4 (2003): 608.

<sup>119</sup> Ibid ; Antoine Messara. "Les partis politiques au Liban: Une expérience arabe pionnière et en déclin." In *Partis et forces politiques au Liban: Renouveau et engagement*, edited by Antoine Messara. (Beirut: Fondation libanaise pour la paix civile permanente, 1998);

<sup>120</sup> el Khazen, 609.

The current electoral system in Lebanon does little to address these issues, and in fact may be a leading cause in perpetuating and entrenching them. Before going on to discuss its problematic consequences, let us begin by outlining its mechanism.

Since the establishment of the Republic of Lebanon in 1920, the state has relied on a unique mixture of consociational principles (through the presence of specific sectarian quotas, for instance) with majoritarian and moderating incentives-based electoral rules. The current electoral system is based on a majoritarian principle, whereby “the winner is the candidate with most votes but not necessarily an absolute majority of the votes.”<sup>121</sup> However, unlike most common majoritarian systems (also known as First-Past-the-Post), Lebanon uses multi-member districts where a voter votes for as many seats as there are available in his/her district, either through a prepared ballot or by writing down the names of candidates he/she supports on a blank piece of paper, as opposed to individual candidates.

The system has been summarized as having five basic elements: the right to stand is confessional; the right to vote is non-confessional; voters have more than one vote; voters vote with one single ballot paper; and finally, it is a plurality/majority (as discussed above).<sup>122</sup> Box 1.1 provides an example, as provided by the International Foundation for Electoral Systems, of how this system plays out in practice.

#### **Box 1.1: The Electoral System in Practice: the example of Baabda**

In Baabda, there are six seats: 3 Maronite, 2 Shia and 1 Druze. A Sunni candidate could not stand for election. All voters can vote for up to six candidates, so long as they vote for no more than 3 Maronite candidates, 2 Shia candidates and 1 Druze candidate. The six Deputies elected to Parliament will be:

- the three Maronite candidates who win the highest number of all votes cast for Maronite candidates;
- the two Shia candidates who win the highest number of all votes cast for Shia candidates; and
- the Druze candidate who wins the highest number of all votes cast for Druze candidates.
- the Druze candidate who has the second-highest number of votes would not be elected even if, for example, s/he had received more votes than any of the Maronite or Shia candidates who were elected.

Source: IFES, « Lebanon Briefing Paper: Lebanon’s 2009 Parliamentary Elections, The Lebanese Electoral System », March 2009, available at [http://www.ifes.org/publication/56c0cdaa64aa2cad85b3f5996e37cb4c/IFES\\_Lebanon\\_ESB\\_Paper030209.pdf](http://www.ifes.org/publication/56c0cdaa64aa2cad85b3f5996e37cb4c/IFES_Lebanon_ESB_Paper030209.pdf)

#### *History of Amendments and Reform*

<sup>121</sup> *The New International IDEA Handbook on Electoral System Design*, Institute for Democracy and Electoral Assistance, Stockholm, Sweden : International IDEA (2005), <[http://www.anfrel.org/resources/others/IDEA/ESD\\_full\\_with%20final%20changes%20inserted.pdf](http://www.anfrel.org/resources/others/IDEA/ESD_full_with%20final%20changes%20inserted.pdf)>, 28.

<sup>122</sup> “Lebanon Briefing Paper : Lebanon’s 2009 Parliamentary Elections, The Lebanese Electoral System”, International Foundation for Electoral Systems, March 2009, available at <[http://www.ifes.org/publication/56c0cdaa64aa2cad85b3f5996e37cb4c/IFES\\_Lebanon\\_ESB\\_Paper030209.pdf](http://www.ifes.org/publication/56c0cdaa64aa2cad85b3f5996e37cb4c/IFES_Lebanon_ESB_Paper030209.pdf)>.

The principle whereby Lebanon's main religious communities should be represented in the arenas of power has been present since the 19<sup>th</sup> century during the period of the Lebanese *Mutasarrifiya*. This practice was then adopted and extended by the French authorities during the mandate period.<sup>123</sup> Since that time, Lebanon has had the same majoritarian first-past-the-post system with multi-member districts. Any amendments brought forward have mostly related to the size and composition of districts.

The first major amendment was the 1960 electoral law that divided Lebanon into 26 small-sized districts, called *qadas*. This law is particularly important because it was the one used up until the 1972 elections, the last held before the outbreak of civil war, and has been reintroduced as the basis for the 2008 elections. The Ta'if agreement of 1989, which was designed to bring an end to the civil war, proposed an electoral law that was based on *muhafaza* districts, which are larger districts.<sup>124</sup> It failed to specify exactly how many *muhafaza* there should be, and where the lines would be drawn. The intent was primarily to emphasize the need for larger districts than under the previous electoral law. Subsequent reforms had a seemingly patchwork quality to them; different standards of districting were used in different areas, depending on a number of interests, be they those of Syria, particular local leaders, or broad confessional ones. Box 1.2 highlights the broad outlines of the four post-war electoral laws that have been passed.

#### Box 1.2: Outlines of Post-war Electoral Laws

1992:

- Country was divided into three large-size electoral districts (the North, the South and Beirut) and nine middle-size electoral districts (six in Mount Lebanon and three in the Beqa'a)
- Raised the number of parliamentary seats from 99 in the pre-war period to 128 (instead of 108 as demanded by the Ta'if accord)

1996:

- The three districts in the Beq'a were amalgamated into one single large-size district

2000:

- The large-size district of Beirut was divided into three smaller districts; In Mount Lebanon the number of districts was reduced to four; the North was divided into two smaller electoral districts; the large-size district of the South was also divided into two smaller electoral districts; the recently amalgamated district of Beq'a was re-divided into three districts

Source: Salloukh, 2006.

In 2008, a new electoral law fundamentally altered the districts, reverting to the 1960 system of '*qada*' – or smaller sized districts (as opposed to *muhafazats*, which are larger districts).<sup>125</sup> The country is therefore subdivided into 26 (as opposed to 14, according to the 2000 Law) electoral districts. Two exceptions remained: the *qadas* of

<sup>123</sup> Salem.

<sup>124</sup> Constitution of Lebanon, 1990 (English). In *International Constitutional Law*, translated by Cordelia Koch, edited by Axel Tschentscher. [http://www.servat.unibe.ch/law/icl/le00000\\_.html](http://www.servat.unibe.ch/law/icl/le00000_.html).

<sup>125</sup> See Annex : Graph 1.

Marjeyoun-Hasbaya are merged into one district, and one *qada* is divided into the two districts of Saida and Zahrany. While it may seem that these divisions strive to create districts of similar size, in fact, they vary quite widely in the size of the electorates with the largest district, Baalbeck-Hermel, holding 250 000 voters, and the smallest district, Bcharreh, having just under 45 000.<sup>126</sup>

### The Mischief in Theoretical Perspective

#### *The Mischief*

As it currently stands, the Lebanese electoral system has served to reinforce, rather than alleviate, sectarian competition and perpetuate the phenomenon of sectopolitics. While the electoral system, modelled partly on the idea of moderating incentives-based politics and vote-pooling, has led to some inter-ethnic cooperation, it has resulted in a system where deadlocks are often broken outside of the arena of peaceful politics and policies remain largely fuelled by sectarian and parochial interests, rather than national ones.

The principles of vote-pooling and multi-ethnic coalitions, identified most closely with the work of Donald Horowitz,<sup>127</sup> are applied in Lebanon through the presence of multi-member multi-confessional districts, where members of all confessions within that district are allowed to vote for all the representatives of their district, regardless of the latter's sect. While it is true that most recently inter-communal political blocs have formed in Lebanon that appear to compete along ideological, rather than sectarian lines, such as the March 8 and March 14 blocs, it remains questionable whether these blocks reflect an overcoming of sectarian interests or are simply another instance of short-term political alliances. What remains clear, however, is that inter- and intra-ethnic competition persists and issues continue to be evaluated with confessional, rather than national, interest in mind.<sup>128</sup>

While possibly playing a role in the marginalization of certain extremist groups (such as Salafi groups, for example) from the realm of official politics, these practices have not led to the formation of coherent and relatively stable multi-ethnic coalitions. This is primarily due to the fact that alliances have been of an electoral, rather than political, nature and have served short-term interests rather than any long-term goals of ethnic conflict management. Vote pooling is used by traditional elites to defeat rival lists or political outsiders but falls short of defeating extremist sectarian leaders. This is compounded by the presence of prepared ballots, which are distributed through families and community leaders in advance of election day, or by activists outside polling stations on the day itself. In addition to the consequences of this on the secret nature of the ballot,<sup>129</sup> it also eliminates the need for candidates to truly appeal to members of the other sect; rather, they simply need to strike deals with the leaders (a deal which often includes a form of trading with regards to another district). Instead of creating incentives for

<sup>126</sup> "Lebanon Briefing Paper [...]"

<sup>127</sup> Donald Horowitz. *Ethnic Groups in Conflict*. (Berkeley and Los Angeles, California: University of California Press, 2000 (1985).

<sup>128</sup> John Coakley. "Ethnic Conflict Resolution: Routes Towards Settlement. *Nationalism and Ethnic Politics* 15, (2009): 462-83.

<sup>129</sup> "Lebanon's Briefing Paper [...]"

moderation, these alliances have and in fact served to “harden, rather than ameliorated, sectarian cleavages.”<sup>130</sup>

Moreover, as Horowitz highlights, intra-ethnic competition is among the biggest obstacles to management and reduction in multi-ethnic societies.<sup>131</sup> In Lebanon, intra-sectarian competition has often been more common than its inter-sectarian counterpart. A stark indication of this is presented through the number of deaths caused during the civil war, often depicted as an *inter*-sectarian war, by *intra*-sectarian violence.

[I]ntra-Maronite fighting between the Kataib and the Lebanese Forces and the confrontations with the predominantly Maronite brigades of the fractured Lebanese army caused more than 50 percent of the total fatalities suffered by the LF during the civil war. [...] Similarly, the Shiite power struggle between the Party of God and Amal Movement caused the most fatalities among both groups of militants.<sup>132</sup>

Intra-sectarian competition remained an important issue following the transition to peace, when members of the same sect had to compete, as they had done before the war, for a specific number of seats allocated to their community within the legislature.

While democratic competition exists in Lebanon, it has been described as a country with political parties, but no party system, that is “power is not exercised rationally by organized political groups that are competing to take part in the government or control the executive.”<sup>133</sup> Political parties are therefore rather weak, in an organizational and ideological sense. The current system privileges local, and largely confessional, competition over a partisan one. In consequence, major political parties with strong public support have been unable to translate this support into political power. The ones most negatively affected by this process have been secular parties. Despite the relatively strong public support they enjoyed, they were unable to grow as a secular project and gain much, if any, representation in the parliament. For example, despite having received about 13.5% of the national vote in the 1996 election, the Lebanese Communist Party was unable to elect any candidates to the parliament.<sup>134</sup>

This is due to a number of factors. Firstly, support for secular parties, in contrast to traditional or sectarian parties, is not geographically concentrated. Therefore, due to the fact that the electoral system privileges region-specific support and is based on a first-past-the-post model, national-based parties have difficulty electing representatives. Second, due to their ideological opposition to sectarian politics, secular political parties cannot ‘play the game’ of intra-sectarian competition; rather, they must compete with representatives of all the different sects simultaneously because they seek popular support among all sects. Moreover, their ability to nominate their best candidates is limited by the system of district sectarian quotas, obliging them to often nominate less-than-optimal candidates simply due to their belonging to a certain sect.<sup>135</sup> A case study of the transformation of the Popular Socialist Party from a secular political party to a highly sectarian one will be conducted further on in this chapter.

<sup>130</sup> Bassel F. Salloukh. "The Limits of Electoral Engineering in Divided Societies: Elections in Postwar Lebanon." *Canadian Journal of Political Science* 39, no. 3 (2006): 637.

<sup>131</sup> Donald Horowitz, "Making Moderation Pay." In *Conflict and Peace Making in Multiethnic Societies*, edited by Joseph V. Montville. (New York: Lexington Books, 1990)

<sup>132</sup> Richani, 122

<sup>133</sup> Messara, 65: my translation; also see el Khazen.

<sup>134</sup> Richani, 115.

<sup>135</sup> *Ibid.*

As has been mentioned, Lebanon has seen a great deal of redefinition of districts that has largely exacerbated the hold that local and confessional leaders have on political power. Throughout the course of thirteen rounds of post-Independence elections, the Election Law's districting arrangements were changed nine times.<sup>136</sup> These changes were most often done in response to a crisis of some sort,<sup>137</sup> or in order to favour one political leader or another.<sup>138</sup> This results in the lack of long-term outlook on the effect of the districts; rather, the focus is placed on political expediency. Moreover, "gerrymandered electoral districts privilege local sectarian political agendas over national secular ones."<sup>139</sup>

Not only 'sectarian,' Lebanese politics are often seen as clientelist in nature. As has been argued, clientelist practices have proved remarkably resilient in Lebanon, even enduring the descent into war and the transition to peace.<sup>140</sup> Overall, the procurement of social services is mediated through the local politicians, who vie for the monopolization of the process (and the funds allocated to it) in order to increase support within their local constituencies. "Citizens' rights are re-packaged as "favours" while recipients remain oblivious to the fact that these services are in fact provided for by the state."<sup>141</sup> This has only been further entrenched with the most recent return to the 1960 *qada* districting. Furthermore, Lebanese political parties are overall very weak, further entrenching the power of clientelism.<sup>142</sup>

### *Theoretical Considerations*

In attempting to create an electoral system that addresses the issues highlighted, it is important to understand that electoral systems serve a number of functions and can have very lasting effects on political parties and the efficiency of governance. At the most basic level, electoral rules are a method of translating votes cast in an election into seats held by candidates or parties. However, in deciding upon this method, a number of criteria should be kept in mind: What form of representation does this method provide? Does it make elections accessible and meaningful? What types of incentives does it provide for parties and candidates? Does it facilitate stable and efficient governance? To what extent does it hold governments and individual candidates accountable and to whom? Does it generate a legislative opposition and oversight? Does it provide a sustainable election process? Does it take into account 'international standards'? And, finally, does it encourage the formation of political parties?<sup>143</sup> The electoral system that a state opts for largely depends on the relative weight it attributes to each of these factors, as some often run counter to others.

<sup>136</sup> Ibid.

<sup>137</sup> Thomas Scheffler. "Religious Communalism and Democratization: The Development of Electoral Law in Lebanon." *Orient* 44, no. 1 (2003): 15-37.

<sup>138</sup> Salloukh.

<sup>139</sup> Salloukh, 641

<sup>140</sup> Paul Kingston. "Patrons, Clients and Civil Society: A Case Study of Environmental Politics in Lebanon." *Arab Studies Quarterly* 23, no. 1 (2001): 55-72.

<sup>141</sup> "Lebanon 2008-2009 National Human Development Report: Toward a Citizen's State." United Nations Development Programme, 2008-2009, available at <http://hdr.undp.org/en/reports/nationalreports/arabstates/lebanon/name,3303,en.html>, 27.

<sup>142</sup> Salam, Nawaf. "Reforming the Electoral System: A Comparative Perspective." In *Options for Lebanon*, edited by Nawaf Salam. (London: Centre for Lebanese Studies in association with I.B. Tauris, 2004), 5.

<sup>143</sup> *The New International IDEA Handbook*

Although all of these issues are important, some run in conflict with each other or are even mutually exclusive. Therefore, any process of electoral design must be adapted to the specificities of the country in question. Among the most important criteria to consider when choosing electoral rules for a divided society such as Lebanon are the form of representation, the incentives they provide, and the extent to which they encourage the formation of political parties. These are the ones that most pointedly attempt “to develop rules of the game structuring political competition so that actors have built-in incentives to accommodate interests of different cultural groups, leading to conflict management, ethnic cooperation, and long-term political stability,”<sup>144</sup> which has been identified as the primary goal of constitutional design within divided societies. As we have demonstrated, Lebanon faces a number of problems, most notably the hold that local and sectarian leadership has on the political process, an unfavourable system for the development of ideological secular parties, and pervasive clientelism.

In order to address these issues, we must evaluate the different systems available. The debate on electoral systems generally centres around two opposing visions of the fundamental principles and aims of representative democracy. The first of these, the majoritarian principle, is based on the idea that “‘the winner’s bonus’ for the lead party produces strong but accountable single-party government” and that “single-member districts strengthen links between voters and representatives.”<sup>145</sup> Applied to divided societies, this principle is often coupled with the idea of ‘moderation-focused incentivism’, most closely associated with the work of Donald Horowitz, which focuses on the election of moderate candidates through the use of vote pooling mechanisms and interethnic coalitions. However, as we have seen, it has not had the desired effects in Lebanon. The adoption of this model has had highly distorting effects on political representation, which has only been exacerbated with time. In fact, due to the growing ratio of candidates to seats, the percentage of votes required to elect a candidate has steadily diminished.<sup>146</sup> It has also greatly led to a dilution (if not outright elimination) of the representation of political forces that are not sectarian in nature.

The second vision, which is based on the idea of proportional representation, appears to be more suitable to the case of Lebanon. First, it is generally considered to be more effective at gaining support for the political system among ethnic minorities due to its tendency to facilitate the entry of smaller and often marginalized parties into the legislature. While this claim is contested,<sup>147</sup> it is clear that proportional representation generally does tend to bring about a greater plurality of representation. Moreover, when attempting to eliminate what can be perceived as a tool of minority accommodation, such as sectarian quotas, it is important that minorities are guaranteed that they will not be isolated from political power by a mere plurality of votes. Furthermore, as will be demonstrated, a proportional system implemented in Lebanon will allow for representation to change from a pre-determined model to a self-determined model, allowing for the dynamic nature of identities, and “giv[ing] equal chances not only to all ethnic or other segments, large or small, in a plural society but also groups and individuals who explicitly reject the idea that society should be organized on a segmental

<sup>144</sup> Pippa Norris. "Ballots Not Bullets: Testing Consociational Theories of Ethnic Conflict, Electoral Systems, and Democratization." In *The Architecture of Democracy: Constitutional Design, Conflict Management, and Democracy*, edited by Andrew Reynolds. (Oxford: Oxford University Press, 2002), 206.

<sup>145</sup> Norris, 209.

<sup>146</sup> Salam, 2.

<sup>147</sup> Norris.



basis.”<sup>148</sup> This will, in our opinion, allow ideological secular to gain some footing in the political system.

As has been stated, electoral design invariably affects the development (or lack thereof) of political parties. At the most basic level, political parties serve as “the central intermediate and intermediary structure between society and government.”<sup>149</sup> In this role, they can perform three major functions: aggregating social cleavages, articulating social cleavages, and blocking the politicization of social cleavages. As Boogaards highlights, the most important criteria in determining what function a political party plays is identifying its social base and determining whether this social base is limited to the main cleavage in the country,<sup>150</sup> which, in the case of Lebanon, is sect. If it is, then it is serving the purpose of articulation, if it is broader, it is serving either the function of aggregation or blocking. The latter two forms can be either non-ethnic (blocking) or multi-ethnic (aggregate).

Blocking, in the case of Lebanon, would suppose explicitly banning parties that are founded on a sectarian basis. However, as a method of regulating conflict, it is “of questionable democratic legitimacy and of unproven empirical efficacy.”<sup>151</sup> Firstly, it generally has a differentiated effect, affecting some ethnic parties more than others (those with less economic power). For example, by denying ethnicity a legitimate place in politics, it privileges certain identities over others. Moreover, it is not assured to bring about the desired national integration. Rather, groups that are banned from participating in a meaningful way in formal politics may exit that realm entirely and revert to violent means rather than simply joining non-ethnic parties. This scenario seems to be historically accurate in the case of Lebanon; when ethnic or political groups have felt particularly targeted for exclusion, they have generally turned towards violence. Exclusion of opposition leaders from parliament in 1957 proved to be decisive in igniting the revolt of 1958 – the first important political crisis in the post-independence period, which threatened to bring Lebanon to a state of civil war.<sup>152</sup> Furthermore, the state’s inability to adequately represent the increasingly important Sunni population is often recognized as one of the factors leading up to the civil war of 1975.

### Options for Reform

In an attempt to try to address some of the issues highlighted throughout this chapter, we shall outline some possible options for reform. Following the recommendations brought forward by Andrew Hiatt in Chapter 3, Lebanon would benefit from a complete de-confessionalization of the lower house, where individual members of the legislature would no longer be elected on a confessional basis, and instituting a senate, within which confessional communities would have specified representation.

It is therefore now important to determine the manner in which the members of parliament will be elected in a new de-confessionalized manner, and determine whether

<sup>148</sup> Arend Lijphart. *Thinking About Democracy: Power Sharing and Majority Rule in Theory and Practice*. (New York, NY: Routledge, 2008), 72.

<sup>149</sup> Sartori in Matthijs Bogaards. "Comparative Strategies of Political Party Regulation." In *Political Parties in Conflict-Prone Societies: Regulation, Engineering and Democratic Development*, edited by Benjamin and Per Nordlund Reilly: United Nations University Press, 2008, 49.

<sup>150</sup> Bogaards, 49.

<sup>151</sup> Bogaards, 61.

<sup>152</sup> Salam, 16.

the senate should be elected or appointed, and – if the former – which electoral rules will be used.

### *Electoral Constituencies and Voting Systems*

#### De-confessionalized lower house

Having identified the negative effects that a plurality/majority system has had on the Lebanese system, it is clear that any reform should move towards a system that is based on a proportional or mixed system.

While the issue of gerrymandering is an important one, it would be important not to conclude that a move to smaller districts, such as the *qadas* or even single-member districts, would be the answer. In the absence of strong political parties, smaller districts “would give prominence to the clientelist relations between the candidate and the voter over the role that the political programmes of candidates are supposed to play, and would concomitantly lead to the promotion of parochial considerations at the expense of issues of national interest.”<sup>153</sup> This would only be exacerbated by a plurality/majority system; in that case, small districts would prove to be a large obstacle to the growth of national, and secular, parties – one of the goals of these reforms – as it would provide no incentive for candidates to attempt

Therefore it is, in our opinion important to either remain with the larger *muhafaza* (medium-sized) districting or to opt for a single national district. Within these guidelines, let us now examine the array of possibilities.

The latest major proposition for electoral reform, known as the Boutros Draft Law, in Lebanon is based on a mixed member proportional system, whereby proportional representation is used in six larger districts, and a majoritarian system in the *qadas* or similar-sized district. It assigns fifty-one seats to the larger districts (to be voted on through a PR system) and seventy-seven to the small ones (to be voted on through the current majoritarian system). These districts overlap, and voters vote for candidates in both systems.<sup>154</sup> However, this draft proposal maintains the confessional distribution of seats, and therefore does not address the problem of ‘sectopolitics’ or of temporary electoral alliances that are encouraged within the current majoritarian system. While it is evidently an improvement upon the current system, it is also evident that “[t]he only reason for the Commission's adoption of small districts with a winner- take-all system is to ensure that members of the same sectarian community choose their own representatives and thus prevent any sect with numerical superiority in a given district from selecting the representatives of other sects.” Therefore, any attempt at de-confessionalizing the lower house would not need to be burdened by a two-tier system, when the majoritarian districts are only present for sectarian reasons. For these reasons, the implementation of a mixed member proportional system would not be the ideal way of achieving the de-confessionalizing the lower house.

#### Proportional Representation

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<sup>153</sup> Salam, 8

<sup>154</sup> National Commission on Parliamentary Electoral Law, “Parliamentary Electoral Draft Law,” May 31<sup>st</sup> 2006, available at <[http://www.elections-lebanon.org/elections/docs\\_2\\_1\\_1\\_e.aspx?lg=en#Chapter\\_6\\_>](http://www.elections-lebanon.org/elections/docs_2_1_1_e.aspx?lg=en#Chapter_6_>)

Therefore, it becomes clear that any electoral system that would increase the degree of representation and greatly diminish the sectarian nature of political competition would have to be based on an entirely proportional system with a low threshold in order to allow for a broad representation of political forces and small minorities. Moreover, an elimination of the presence of small *qada* districts would have a positive effect on the preponderance of clientelist practices. This would provide incentives for parties to have a broader range of support, rather than limiting their electoral base to a regionally specific population.

An important question to determine when selecting a proportional system is whether voters would have the option of ranking their preferences within lists – that is whether the lists should be open or closed. In addition to the greater democratic aspect of open-list PR, in Lebanon it is particularly useful for a couple of reasons.

First, its alternative, closed-list PR, would have a tendency to greatly strengthen political parties to the detriment of individual candidates and exacerbate the cult of leadership and lack of intra-party transparency prevalent in the current system. Moreover, Lebanese citizens currently have the ability to eliminate candidates from lists and vote across lists. Removing this right may be viewed as removing a previously achieved right. Furthermore, it helps to ensure that candidates, individually, have a broad support base, rather than just relying on the party's popularity.

Finally, the practice of *tashtib* – or ‘crossing-off of candidates – while a right, is nonetheless not very commonly utilized. Therefore, it may be safe to deduce that the practice will still remain fairly under-utilized when adopting PR, and therefore would still provide a certain degree of power to parties, which may help in solidifying them as coherent political actors, all the while providing a method to keep parties accountable and responsive to the desires of the electorate. Having established that a low-threshold open-list PR is the most suitable system for Lebanon, what remains to be determined is what district size is optimal.

Considering the high incidence of re-districting in Lebanon in response to political crises or short-term interests, one would intuitively be compelled to eliminate electoral districts altogether and opt for a single national district. However, bearing in mind the recommendation of open lists, it becomes clear that one single national district would demand far too much of the voter: ranking preferences of 128 candidates, and having to compare them to candidates in other lists. Therefore, it appears that a division of Lebanon into *muhafaza* districts provides an ideal middle-ground<sup>155</sup>: voters would only have to rank candidates within their districts, and districts would not be so small as to perpetuate the hold of traditional elites and the high incidence of patron-client relations.

### *The Senate*

As Andrew Hiatt noted in the previous chapter of this report, there remains a need for a form of sectarian/communal representation within the political system – a goal that will be achieved through the establishment of a senate composed of religious/sectarian leaders. The following task involves determining whether Lebanon would benefit more from appointed or elected senators.

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<sup>155</sup> See Annex : Graph 2.

Bearing in mind that a senate in Lebanon would serve to provide representation for the different Lebanese sects, in accordance with a fixed number of seats per sect, it is important to consider the best way in which this representation can be deemed legitimate in the eyes of the electorate. If members of the newly deconfessionalized lower house were to appoint the senators, there would be no assurance that those appointed would be responsive to their respective communities rather than the partisan interests that appointed them. Therefore, we recommend that senators be directly elected by members of their respective communities.

Considering the fact that accurate demographic data remains unavailable due to the lack of a national census, we propose that, in the interim period before the holding of a national census, senators be elected through the single transferable vote model within a single national district, thereby assuring that votes are explicitly cast for individual candidates – as representatives of the sect – and not for parties. Moreover, it has the benefit of diminishing the amount of wasted votes. However, due to the high level of candidate-specific knowledge this would demand on the part of the electorate, it is recommended that, once the census has been held and the regional distribution of sects has been determined, the *muhafaza* districts be adopted as electoral districts for the senate elections as well. Moreover, in order to avoid a situation where debates relating to senate elections, which will primarily relate to sectarian interests, dominate debates regarding the elections of the lower house, we recommend that elections to the senate be held at different intervals than those for the parliament, preferably following and not preceding parliamentary elections.

### Additional Recommendations

#### *Independence, Transparency and Legitimacy*

In addition to the electoral system recommendations, we propose a number of important reforms that may help ensure a free, fair, and sustainable electoral process. The first among these reforms concerns the establishment of a truly independent electoral commission. As it now stands, Lebanon has a “Supervisory Commission on the Electoral Campaign,” whose primary focus is electoral spending and advertising, and which remains under the auspices of the Ministry of Interior.<sup>156</sup> However, it is of utmost importance that an electoral commission with broader powers and one that is independent from the government in power, be established. This will also greatly aid in alleviating the burden the Constitutional Council currently faces in managing electoral disputes, as outlined by Adam Tanel in Chapter 6 of this report.

As the Boutros Draft Electoral Law recommends, this represents “a guarantee and a pledge to both voters and candidates that elections are being administered in a neutral and unbiased way, thus ensuring public confidence in the electoral process.”<sup>157</sup> While the provisions regarding appointments to the Commission outlined in the Boutros Draft Electoral Law should be maintained (4 people selected from Court of Cassation, State

<sup>156</sup> NOW Lebanon. "The Role and Responsibilities of the Supervisory Commission on the Electoral Campaign." <<http://www.nowlebanon.com/Library/Files/EnglishDocumentation/Other%20Documents/NOW%20Documents%20IFE-.pdf>>, December 2008.

<sup>157</sup> Civil Campaign for Electoral Reform. "A Guide to the Proposed Draft Law." <<http://www.ccerlebanon.org/pictures/manualpdf/English%20Manual.pdf>>, 3.

Shura Council, National Audit Office and the National Media Council; 3 people from the Beirut Bar Association, Tripoli Bar Association, and the Press Syndicate; and 3 academics working in relevant fields selected by the Prime Minister)<sup>158</sup> we also recommend that these latter academic appointees be approved by the Parliament and that, at the very least, for the first few rounds of elections, there be some international NGO presence on the Commission. This participation can come from such NGOs as the International Foundation for Electoral Systems or the Institute for Democracy and Electoral Assistance, both of which are active on the case of Lebanon.

The Commission should be made responsible for, among other tasks, the regulation of both campaign spending and media coverage of election campaigns. These will allow for a more inclusive electoral competition, attenuating the hold that current sectarian leaders have on media coverage through their private television channels, for example.

### *Inclusion*

A further and necessary reform regards increasing women's representation within parliament. In order to achieve a greater female representation within the legislature, we recommend that a zippered quota for candidate lists<sup>159</sup> be established whereby women must represent 30% of the list, and be placed at every third place on the list in order to ensure that women are not only promised nomination but that they are also not relegated to the bottom of the list, thereby diminishing their chances of getting elected.

### *Eligibility of Voters*

While these previous reforms are aimed at inclusivity for candidates, others aim to make voter participation more inclusive. These reforms would include lowering the voting age from 21 to 18 years, and establishing the capacity for out-of-country voting. The two reforms have been primarily the demands of the Shiite and Maronite communities respectively. Their inclusion as a package makes their acceptance more likely than would otherwise be the case if one were excluded.

Moreover, as has been mentioned previously, the current Lebanese electoral system requires voters to vote in their traditional village, thereby accentuating the hold of traditional elites and the dominance of parochial interests. We recommend that this practice be abolished, and that voters be given the option to vote in their place of residency. This would allow for communal ties to be loosened and for voters to have more meaningful representation.

### *Amendment Process*

Finally, in order to infuse these with more force, we believe it is essential to establish a more meaningful process of electoral reform, which makes it more difficult to change electoral rules and districts for the sake of political expediency. We recommend that this be done through the entrenchment of certain basic structuring principles of the electoral process within the Constitution, such as the proportional and unconfessional

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<sup>158</sup> Ibid.

<sup>159</sup> Drude Dahlerup "Comparative Studies of Electoral Gender Quotas" in *The Implementation of Quotas: Latin American Experiences*, (International IDEA, Stockholm, 2003). Accessible at < [www.quotaproject.org/CS/CS\\_Dahlerup\\_25-11-2003.pdf](http://www.quotaproject.org/CS/CS_Dahlerup_25-11-2003.pdf)>.

nature of the election, senate elections that guarantee the rights of the communities, and districts based on large *muhafaza* districts.

### **Incentives for Adoption and Concluding Remarks**

While electoral rules are, at their most basic, a means to translate votes into seats held by candidates or parties, their consequences go far beyond this task. In fact, they are highly political choices that structure behaviour within a political system. However, as Rein Taagepera notes, it is very rare that one knows exactly what the result of certain rules will be in the long-term. Rules take on meaning when they are constantly used by politicians and voters, in sometimes unpredictable ways. This is where she draws a distinction between electoral rules and electoral systems: “Electoral systems *emerge* when the electoral rules have become embedded in a political culture where actors have acquired reasonable skills in handling the electoral rules for their enlightened self-interest.”<sup>160</sup> In proposing these reforms, we are anticipating a certain structure that will encourage the formation of more broad-based national political parties that are secular in nature. However, we also want to allow for a certain level of dynamism within the electoral rules, allowing them to adapt to changing contexts. For that reason, we are proposing to only entrench certain basic principles, and not the entirety of the rules, within the Constitution.

It is our sincere hope that the Lebanese political elite and decision-makers will deem these reforms acceptable, and that they will garner legitimacy from the Lebanese public. We have designed them with the hope of discouraging a form of politics that is centred on parochial and sectarian interests, and encouraging a more nationally-focused debate, while establishing an institution that ensures that the rights of communities will not be infringed upon. A confessional senate where senators are elected on an individual basis by members of their respective communities helps to achieve that. Other reforms, such as those regarding personal status law outlined by Kathryn Beck in Chapter 5, also allow communities to maintain a form of autonomy and identity.

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<sup>160</sup> Rein Taagepera. "Designing Electoral Rules and Waiting for an Electoral System to Evolve." In *The Architecture of Democracy: Constitutional Design, Conflict Management, and Democracy* edited by Andrew Reynolds. (Oxford: Oxford University Press, 2002)

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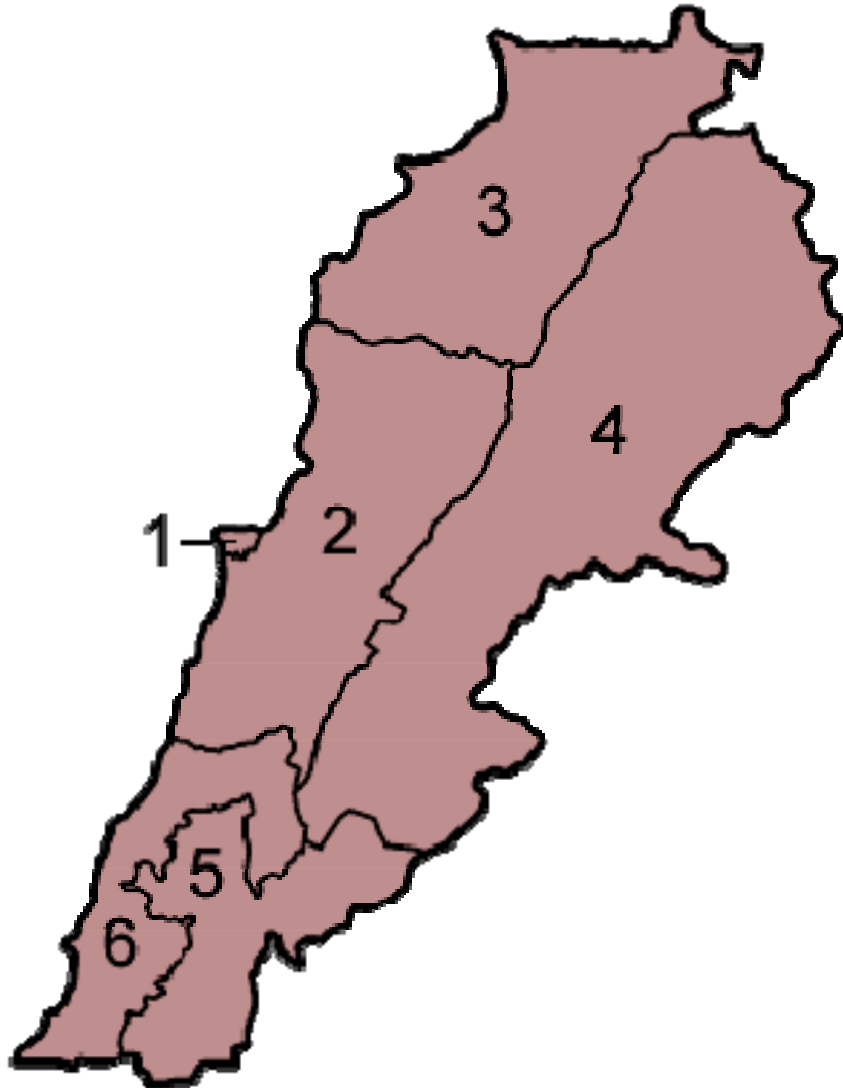
**Annex**

**Graph 1: 2008 Electoral Districts and the confessional distribution within them**



Source: “Lebanon Briefing Paper : Lebanon’s 2009 Parliamentary Elections, The Lebanese Electoral System”, International Foundation for Electoral Systems, March 2009, available at [http://www.ifes.org/publication/56c0cdaa64aa2cad85b3f5996e37cb4c/IFES\\_Lebanon\\_ESB\\_Paper030209.pdf](http://www.ifes.org/publication/56c0cdaa64aa2cad85b3f5996e37cb4c/IFES_Lebanon_ESB_Paper030209.pdf) >.

Graph 2: Example of *muhafaza*-based districting



Source: “Governorats du Liban.” Accessible at [http://fr.academic.ru/pictures/frwiki/76/Lebanon\\_governorates\\_numbered\\_geo.png](http://fr.academic.ru/pictures/frwiki/76/Lebanon_governorates_numbered_geo.png)

## 4. PERSONAL STATUS REFORM – KATHRYN BECK

### Introduction

The deep sectarian divisions that afflict Lebanon are not only evident in the electoral process and in the legislative and executive branches of government; they also exist throughout many of the formal and informal institutions that govern and shape the lives of Lebanese citizens. In order to effect meaningful change, the National Committee will need to give due weight to the role that these other institutions have had in maintaining and perpetuating sectarian divisions as it proceeds in its evaluations and in making its reform proposals.

Personal status law is one of the most important of these institutions that remain strictly divided according to religious affiliation, with each religious sect exercising exclusive control over the law and its administration.<sup>161</sup> This chapter considers the potential for reform of the current personal status legal framework, particularly as it relates to the larger project of critically reassessing the role of confessionalism in Lebanon and laying the foundations of a stable, inclusive and democratic future for the country. As with electoral and power-sharing reform, personal status legal reform should not be approached with the view to complete deconfessionalization and/or secularization. Rather, by identifying the particular mischief of the current system and seeking to address those concerns directly, it may be possible to preserve Lebanon's long and commendable history of diverse religious accommodation while also extending protection of individual rights and freedoms to the realm of personal status.

This chapter will begin by briefly reviewing the history of the personal status issue and reform efforts in Lebanon. It will then consider the mischief of the current system, which actually falls into three broad categories: first, the reinforcement of sectarian division through communal self-administration and barriers to intermarriage; second, the preference given to collective rights at the expense of an individual's freedom of conscience; and third, the negative implications of the many discriminatory provisions for women and children's rights and as well as gender equality.

Next, this chapter will highlight potential options for reform and evaluate them in light of the three dilemmas identified above. Each reform option has benefits but also significant limitations, and in particular, it is important to keep in mind the practical political and social barriers to the acceptance and/or implementation of each. Finally, on the basis of the above considerations this chapter recommends a mixed reform approach over the pursuit of any one option in isolation, in order to best address the multi-faceted nature of the challenges presented by the current personal status framework.

### Summary of Recommendations

- Make personal status law rights and equity issues a political priority through prominent political discussion at the National Committee and through a government committee on the issue (short-term);
- Adopt an optional civil personal status law (short to medium-term);

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<sup>161</sup> Personal status law is the area of law that governs marriage, divorce, child filiation, custody and guardianship, and, for Muslim sects, inheritance.

- Empower civil judicial review of religious courts through a right of appeal to the Constitutional Council on constitutional rights issues (long-term).

## Understanding the Personal Status Issue in Lebanon

### *Background and Previous Attempts at Reform*

‘Personal status’ refers to the body of laws that governs marriage, divorce, custody, and property division. Muslim personal status laws also govern inheritance, while Christian and Jewish sects are subject to a civil law of inheritance.<sup>162</sup> Beyond this civil law of inheritance, however, there is no civil personal status legal code administered by the Lebanese state. Rather, each of Lebanon’s 18 officially recognized religious sects has autonomous control over the personal status law that governs its members, and 15 have their own personal status laws, and three are subject to their closest religious counterpart.<sup>163</sup> The recognized sects are permitted to legislate, administer and enforce their own personal status laws. The result is that each sect not only has distinct personal status laws, but also autonomous legislative and judicial bodies that govern each independent legal system.<sup>164</sup>

This right of self-regulation is provided for in various codes that were approved by the Lebanese government from the 1940s to 1960s.<sup>165</sup> The Lebanese constitution further provides that the government will, “[guarantee] that the personal status and religious interests of the population, to whatever religious sect they belong, is respected.”<sup>166</sup> This guarantee has been interpreted as protecting the collective right of each sect to absolute jurisdiction over the personal status issues of their group members.<sup>167</sup> Yet this guarantee of respect for personal status interests stands beside equally prominent constitutional provisions for the rights to absolute freedom of conscience, equality before the law, and equality of civil and political rights for all Lebanese citizens.<sup>168</sup> As a legal matter, the various personal status codes are subject to the Constitution and the Criminal Code, although in practice the personal status codes are rarely, if ever, held to constitutional account.<sup>169</sup>

The personal status legal system has long been a controversial issue in Lebanon. During the French mandate, a decree to giving civil courts jurisdiction over personal status law resulted in such violent protest that the French High Commissioner postponed the decree indefinitely. Following independence in 1943, there continued to be strong debate about personal status laws. In 1951, the Order of Lawyers declared a strike that

<sup>162</sup> Bilani, Najjar and El-Gemayel, “Personal Status,” 349-350.

<sup>163</sup> Shedadeh, “Legal Status,” 503, 517 n. 13. The recognized sects include the Christian sects, divided into Catholic (Maronite, Melkite, Armenian, Syriac, Roman Catholic and Chaldean), Orthodox (Greek, Armenian, Syriac Orthodox, and Nesotrian), and Protestant; the Muslim sects, divided into Sunni, Ja’fari (Shi’a), and Druze; and the Israelite sect (Jewish). The three sects which are recognized by the government but which have no separate and distinct personal status codes are the Alawites, the Isma’ilis and the Orthodox Copts. All three follow the personal status code closest to them: the Ja’fari and Orthodox codes respectively.

<sup>164</sup> Bilani, Najjar and El-Gemayel, “Personal Status,” 267.

<sup>165</sup> *Ibid.*, 267, 377 n. 7. The religious regulations and court rules are provided for in: Law of April 2, 1951 (for the Christian and Jewish sects); Law of July 16, 1962 (Sunni and Jaarafee sects); Law of February 24, 1948; Law of March 5, 1960 (Druze sect).

<sup>166</sup> Constitution of Lebanon, 1990, art. 9.

<sup>167</sup> Tabet, *Women in Personal Status Laws*, 15.

<sup>168</sup> Constitution of Lebanon, 1990, art. 7, 9.

<sup>169</sup> Bilani, Najjar, and El-Gemayel, “Personal Status,” 379 n. 41. The Law of April 2, 1951 provided that all sects had to submit regulations (i.e. their respective personal status codes) to the government for ratification. To date, no ratification has occurred. As a result, the Court of Cassation has held that these regulations are effective *unless they contradict civil law or public policy principles* including if personal status laws contradict the Criminal Code.

lasted for six months to demand a civil personal status law. The issue continued to arise intermittently throughout the 1950s, 1960s, and early 1970s, with periodic protests and proposals made within the government for an optional civil personal status law.<sup>170</sup>

In February 1998, President Elias Hrawi presented a draft proposed law for an optional civil personal status law to the Cabinet, which was the first time such a proposal had come from a member of the executive. Although a majority of the Cabinet ministers supported the bill, Prime Minister Rafiq Hariri refused to sign the bill, thus preventing its passage to the legislative chamber for review.<sup>171</sup> Prime Minister Hariri argued that, although he could accept the principal of an optional civil personal status law, the political timing of the bill was not appropriate. As religious opposition grew, particularly from the Sunni religious leadership, Prime Minister Hariri and the Sunni Ministers who had voted in favour of the bill began to shift to take a more outright stance against the very idea of offering a civil marriage option.<sup>172</sup>

The bill was staunchly opposed by many of the leaders of the religious communities and most strongly by the Sunni religious establishment. Many, though not all, religious leaders attacked the bill, arguing that it violated their respective religious laws. Some believed that the “optional” nature of the bill was a guise for the “establishment of secularism and the relegation of the religious authorities to the sidelines.”<sup>173</sup> Further, it was argued from a moral standpoint that civil marriage would “[herald] the end of the family” and that civil marriage would lead to a corruption of Lebanon’s youth.<sup>174</sup> Supporters of a civil marriage option were warned of being labelled apostates by the Sunni religious leadership, and the Maronite Patriarch threatened to excommunicate any Maronite who was married under civil law. Some clerics were less concerned about the bill because of its optional status but argued that any binding reform had to take place at the communal level.<sup>175</sup>

In spite of the strong reaction against the bill, the civil marriage option was also widely supported. The bill had the support of Shi’ite Speaker of the Parliament Nabih Berri as well as President Hrawi, the foremost Druze political leader Walid Jumblatt, and twenty-two members of the Cabinet as well as some religious leaders.<sup>176</sup> Many secular groups and political parties strongly supported the proposal through petitions, meetings with political leaders, and public protests, but their voices were marginalized due to the confessional structure of the political system.<sup>177</sup> Eventually the controversy as well as the President’s continued filibuster essentially shelved the proposed bill and the Lebanese Parliament never considered it. Advocacy for a civil personal status law has actively continued, although no new executive proposals have been made.<sup>178</sup>

### *The Mischief of the Current System*

<sup>170</sup> El-Cheikh, “1998 Proposed Civil Marriage Law,” 148.

<sup>171</sup> Zuhur, “Empowering Women,” 182.

<sup>172</sup> El-Cheikh, “1998 Proposed Civil Marriage Law,” 154-155.

<sup>173</sup> *Ibid.*, 150-152.

<sup>174</sup> *Ibid.*

<sup>175</sup> Zuhur, “Empowering Women,” 198.

<sup>176</sup> El-Cheikh, “1998 Proposed Civil Marriage Law,” 158-159.

<sup>177</sup> Reinowski and Saadeh, “A Nation Divided,” 113.

<sup>178</sup> See for example: Mahdawi, “Lebanese protest in front of Parliament”; “Civil Marriage in Lebanon,” Facebook; “Civil Marriages in Lebanon,” Online Petition; LebLaique, Twitter.

One of the main assumptions underlying the current system is that communal institutions and leaders are better situated to adjudicate certain legal matters, particularly in the realm of personal status, and community members prefer the rule of their own institutions rather than civil institutions.<sup>179</sup> Collective rights over areas such as personal status and education have been granted in order to preserve these communal institutions and their important identity preservation function.<sup>180</sup> This personal status framework, however, has serious flaws that should not be ignored. Both non-group and group members have been discriminated against and ill-served by the current division of jurisdiction. Furthermore, the “identity” function of personal status law must be approached with some, but certainly not complete, deference. Many religious laws have arisen more from patriarchal cultural norms than the religious texts or traditions themselves and should not necessarily be viewed as “pseudo-divine.”<sup>181</sup> Moreover, the National Committee will need to consider the type of *Lebanese* identity that it wants to foster and encourage in the years to come when approaching personal status reform.

Why should the personal status legal system be reformed? This chapter identifies three major criticisms of the current system, which are distinct but closely related to one another. First, the system is accused of encouraging separation between the sects, thereby perpetuating the sectarian divisions in Lebanon.<sup>182</sup> In the most fundamental meaning of separation, the current system greatly inhibits the practice of intermarriage between the sects in part because many of the religious personal laws are doctrinally opposed to marriage outside one’s sect and in part because there is no civil marriage option. The practical legal barriers to intermarriage appear to have symbolic significance for the cohesion—or lack thereof—of the different sects at the national level. Couples who are prevented from intermarriage because of their religious personal law must either convert (if permitted, usually the woman will convert) or else go abroad for a civil ceremony.<sup>183</sup> Thus, it is argued, the current state of the laws not only encourages separation between the communal groups, but also undermines the central power and national sovereignty of the Lebanese state by forcing its citizens abroad to be subject to the jurisdiction of foreign laws.<sup>184</sup>

A second criticism is that the current system enforces the collective rights of certain groups at the expense of individual rights to freedom of conscience. Members of communal groups are not able to choose to live by secular personal status laws, even if they are secular-minded. Thus, although the right to practice and live according to one’s religion is protected, there is no corresponding right to live *without* religion in the personal status realm unless one can afford to travel abroad to be married. Moreover, minority religious groups that are not officially recognized, including Baha’is, Buddhists,

<sup>179</sup> Joseph, “Problematizing Gender,” 272.

<sup>180</sup> Kymlicka differentiates between collective rights and “group-differentiated” rights, arguing that the former is an unhelpful term because it is too broad and fails to distinguish between the restrictions placed on group member individuals within the collectivity as distinct from the protections given to the collective as against other groups. He further notes that the term encourages a false dichotomy with individual rights. Thus, I have purposefully used the term “collective rights” because Kymlicka’s description accords, in fact, with the way that religious personal status laws have been commonly perceived in Lebanon. See Kymlicka, *Multicultural Citizenship*, 45.

<sup>181</sup> Khouri, “Caught in the middle.” Najla Hamadeh has criticized the Lebanese government’s entrusting of “pseudo-divine family laws” to religious sects, a move that arguably undermines the state’s role in promoting social cohesion and ensuring the equal treatment of all citizens.

<sup>182</sup> See, for example: Zalzal, “Secularism and Personal Status,” and, Saadeh, “Basic Issues,” 455.

<sup>183</sup> Foreign civil marriages are recognized under Lebanese Law. In the case of dissolution of the marriage the courts will apply the law of the foreign jurisdiction. See, Khouri, “Caught in the middle.”

<sup>184</sup> *Ibid.*

Hindus, and some Protestant Christian groups, cannot legally marry, divorce, or inherit property unless they go abroad or—if possible—affiliate themselves with another recognized religious personal law.<sup>185</sup>

A third criticism is that the current system has negative implications for human rights and particularly for women and children’s rights in Lebanon.<sup>186</sup> Most of the religious personal laws differentiate on the basis of gender and almost unfailingly in a manner that discriminates *against* women. Thus, although the Lebanese constitution declares the equality of all citizens and embraces the principle of non-discrimination, nearly half of Lebanon’s population is discriminated against under their respective personal status law. For example, under Shari’a law women are strictly limited in their ability to divorce while men have much more freedom to do so; in addition, women inherit half of what men do. Unequal ability to divorce is also found in many of the other personal status codes, as are child custody laws that favour the father. Minimum marriage ages for girls are very low, generally ranging from 12 to 15, but with some as low as 9.<sup>187</sup>

### *Addressing Personal Status Law in the Context of Deconfessionalization*

There is a widely held perception that “deconfessionalization” is simply concerned with the abolishing of sectarian quotas in government.<sup>188</sup> The personal status issue is, however, fundamentally linked to the confessional balance of power in Lebanon. Indeed, confessional affiliation is itself determined by religious personal status law. Exclusive confessional control over personal status law is one of the most significant sources of power for the religious leadership, in addition to being a key collective rights protection for the religious sects.<sup>189</sup> Thus, personal status law is a highly political issue. It has not only been a past battleground for competing sectarian interests; it is also a key constitutive feature of the sectopolitics that dominates Lebanese society.<sup>190</sup>

Given this strong connection between the personal status issue and the ills of sectopolitics, it is perhaps not surprising that President Hrawi’s 1998 civil option proposal also contained a provision for the creation of a National Committee for the abolition of confessionalism. It is also not surprising that many opposed the 1998 bill on the grounds that it was seen to be a political manoeuvre aimed at underhandedly weakening the power of the confessional communities.<sup>191</sup> Speaker Nabih Berri maintained that, “[t]he real battle isn’t that of introducing a civil marriage law. Civil

<sup>185</sup> U.S. Department of State, *International Religious Freedom Report*.

<sup>186</sup> Although this paper focuses primarily on women and children’s rights, there is an emerging discourse in Lebanon about other forms of gendered discrimination, in particular towards homosexual and transgendered persons.

<sup>187</sup> Shedadeh, “Legal Status,” 505.

<sup>188</sup> Information International, *Abolishing Confessionalism in Lebanon*. A poll by Information International, a Beirut-based firm, published February 2010, showed that 40% of those polled responded when asked: “abolishing confessionalism: what does it mean?” that this meant “abolishing sectarian quotas in government.” Some 24% of those polled responded that they “don’t know” and only 13% of responses thought that abolishing confessionalism meant “equality among all Lebanese regardless of sect.”

<sup>189</sup> See for discussion of the highly politicized nature of personal status law in Lebanon: El-Cheikh, “1998 Proposed Civil Marriage Law,” and Zuhur, “Empowering Women.”

<sup>190</sup> Richani, *Dilemmas of Democracy*, 15. Richani describes sectopolitics as “the mobilization of sects on a political basis. It is an ideology that incorporates communal feelings, values, symbols, and the perceptions of an outside threat. It is the political articulation of status interests (sect/religions), and thus seeks to organize political competition between groups along strictly sectarian lines ... Sectopolitics does not operate in a vacuum; it has agents, such as the state, church, parochial schools, media organizations, research centers, universities, and of course political parties, that participate in making it the dominant ideology in Lebanese society.”

<sup>191</sup> El-Cheikh, “1998 Proposed Civil Marriage Law,” 153-155.

marriages are made abroad and recognized here...The problem is political sectarianism.”<sup>192</sup>

The reality is that, although constitutionally mandated, the establishment of a National Committee to consider deconfessionalization will be a very challenging feat in itself. Once the parties are at the table, however, this will be a critical moment and a rare opportunity for meaningful change. If the parties are serious about ending sectarianism, they should consider and take steps to address the impact that the current personal status law system has in perpetuating social and political sectarian divisions.

Furthermore, personal status law reform has the potential to be a key component in the larger project of building a more democratic and inclusive Lebanon. Legal discrimination against women, non-recognized religious minorities, and secular individuals as a result of the current personal status legal system has profound implications for the country’s democratic character and aspirations.<sup>193</sup> No country can be considered fully democratic if more than half its population is discriminated against and denied equal rights.<sup>194</sup>

With that said, and has been recognized throughout this report, democracy in Lebanon cannot simply mean the rule of the majority, nor the denial of the unique, diverse character of Lebanese society. Lebanon’s history of respect for and protection of communal rights has been commendable, but this does not mean that the tradition has not had its pitfalls. Keeping this in mind, it may be possible to preserve the positive aspects of communal rights protection and religious accommodation in Lebanon while redressing some of its most problematic features.

### Options for Reform

The following section considers several options for reform of the personal status legal system in Lebanon, including the implementation of an optional civil code, non-legalistic approaches to communal reform through political engagement on rights issues, and the expansion of meaningful review of religious court decisions on constitutional rights issues. This section also reviews two other options, the implementation of a universally applicable civil code and the policy of “transformative accommodation,” but explains that neither approach is appropriate or feasible in Lebanon at this time.

#### *Optional Civil Personal Status Law*

Many argue that offering an optional civil personal status code is a politically feasible and culturally sensitive approach to the issue of personal status law reform in Lebanon. This was the model endorsed by President Hrawi in 1998 and is the model that continues to be advocated by many civil society groups. An optional civil code, it is contended, will reflect a more appropriate balance between the individual and communal rights guaranteed by the constitution by empowering individuals to choose whether they

<sup>192</sup> Ibid., 157.

<sup>193</sup> Saadeh, “Basic Issues,” 455.

<sup>194</sup> The scope of these proposals are limited to considering gender discrimination in the realm of personal status law. It should be noted, however, that there are many other areas of the civil and criminal laws in Lebanon that are discriminatory. Under the *Penal Code* for example, homosexuality is illegal and there is no crime of marital sexual assault. A key battleground for women’s rights activists in Lebanon right now is in pushing for reform of the *Nationality Code* which currently prevents the passing down of citizenship from Lebanese women to their children if the father is non-Lebanese.



want to be subject to religious or to secular personal law, while recognizing and protecting the unique customs and traditions of communal groups. Furthermore, supporters argue that there is a ready precedent for an optional civil code because the current Lebanese system essentially already provides an “optional” option by recognizing and applying the law of foreign civil marriages.<sup>195</sup>

The political viability of this path is somewhat shaken by the harsh negative reaction that erupted in the wake of President Hrawi’s 1998 proposed bill. Public opinion on the issue continues to be divided on the issue with around half the population supporting a civil marriage option and half opposed.<sup>196</sup> Pitched without the provision for a National Committee, it is perhaps possible that such reform could precede the larger project of deconfessionalization. However, it is also likely that this reform would meet with the same negative backlash and filibuster as was encountered the last time. This type of reform will likely become much more politically possible following the implementation of deconfessionalization reforms in the political realm—the potential form of which has been considered in the previous two chapters of this report. These reforms would weaken the structural barriers to personal status reform by enhancing the representation and strength of secular voices in Parliament.

An optional civil code would go some way in redressing discrimination against persons of non-recognized minority religious groups, secular persons, and those who wish to intermarry by offering an alternative to the current religious laws. Indirectly, by increasing secular rights, rights of intermarriage, and national jurisdiction over personal status law, it may improve sectarian tensions and help to strengthen the central Lebanese state. However, this type of reform would not necessarily be sufficient to address the range of problems associated with personal status laws in Lebanon.

The type of optional code that has been advocated in Lebanon would rely on a one-time choice, at the time of marriage, to be subject to either religious or civil personal law. Thus, this type of accommodation scheme assumes that individuals are sufficiently empowered to make that choice. If, however, one of the main aims of personal status law reform is to protect vulnerable group members, particularly women and children, then assuming that they are sufficiently empowered to make this legal choice ignores the cultural, religious and social context in which these decisions are often made.<sup>197</sup> Given the importance of familial, kinship, and communal relationships in Lebanese society<sup>198</sup>, it would be an extremely difficult decision for many individuals to choose the secular option.<sup>199</sup> Furthermore, the civil option provides little incentive for changing the

<sup>195</sup> Tabet, *Women in Personal Status Laws*, 18.

<sup>196</sup> Information International. *Abolishing Confessionalism in Lebanon*. According to the poll, conducted in January of 2010, 48% of Lebanese opposed a civil marriage option while 45% supported such a measure (with 7% undecided on the issue). Interestingly, in contrast to the question of the poll that related to deconfessionalization, 38% of Shiites opposed civil marriage although 89% supported abolishing confessionalism and 69% of Maronites supported a civil marriage option but only 31% supported abolishing confessionalism.

<sup>197</sup> See for an excellent general discussion of the choice issues related to this type of accommodation model: Shachar, *Multicultural Jurisdictions*, 103-109.

<sup>198</sup> Joseph, “Problematising Gender,” 277-278. Joseph describes Lebanese society as encompassing much more than “collective” or “individual” rights; but rather being dominated by “relational” rights whereby communities and relational connections are the most important providers of services and guarantors of rights. As Joseph writes, “[in] Lebanon, a person gained access to services of the state, local municipalities, or private organizations not so much because that person was a citizen and had constitutionally guaranteed rights of access. A person had rights because she/he was connected through networks to a series of relationships to people who were situated to provide access.” In its negative form, this relational rights structure is manifest as patronage and corruption, however, it is critical to remember that the importance of the multiplicity of relationships, familial, kinship, communal and beyond, which are not only a source of rights and services to individuals, but also a source of identity.

<sup>199</sup> This type of system is found in India: a secular personal law option co-exists with religious personal status laws for Hindu, Muslim, Christian or Jewish citizens, however, the option is rarely used. See for example: Jenkins, “Personal Status Law and Reservations.”

problematic discriminatory aspects of the religious personal law framework for those who choose to, or who feel obligated to, remain subject to those laws. Thus, while offering a secular civil marriage option will be an important accomplishment, by itself, the reform would be insufficient to overcome the mischief of the current system.

### *Non-Legalistic Approaches to Reform*

The most important question is how to encourage near-term reform at the communal level in the direction of equality and rights protection for women and children, particularly when many leaders remain firmly opposed to any discussion of reform. A crucial first step will be to ensure that gender discrimination and gendered social hardship are placed on the national political agenda, rather than, as often occurs, allowing the issue to be dismissed as a “private” concern. The National Committee could be an opportune catalyst for a national discussion of these issues by considering the gender dimensions of its various reform proposals. As Lama Mourad and Adam Tanel have noted in chapters 4 and 6 of this report, respectively, provisions for women’s representation in key political and judicial arenas should be a feature of reform proposals that aim to achieve broad inclusivity beyond traditional sectarian lines.

At the same time, greater political representation for women should not be relied on as a sufficient protection for women’s rights issues. Even before the National Committee is established, and certainly after, the government should consider appointing a national personal status and women’s rights commission.<sup>200</sup> Such a commission could be specifically charged with engaging with, and encouraging dialogue between civil society groups, political leaders, academia, and communal leaders to encourage the re-evaluation of certain aspects of religious personal law that have particularly egregious effects on women and children. As the recently amended personal status code in Morocco has demonstrated, equality reforms may well be achievable within the religious doctrinal framework through a modern re-reading of core religious texts.<sup>201</sup> Bringing these issues to the forefront of political discussion and debate will be a key first step towards encouraging reform at the communal level.

### *Constitutional or Civil Law Rights Enforcement through Judicial Review*

The key weaknesses of the above-described option are also its greatest strengths, namely, that it is an approach that is gradual and non-binding. Depending on the success of the above-mentioned model in the longer-term, the government of Lebanon could consider a stronger approach to redressing the discriminatory aspects of the various religious personal laws. One way to resolve this issue might be to continue to allow the present division of jurisdiction amongst the various communal groups, but to reserve “baseline” jurisdiction for the state regarding certain fundamental rights of gender equality and freedom of religion. South Africa adopted this type of approach to the co-existence of civil law and customary law in its 1996 constitution. The South African

<sup>200</sup> For example, Syria recently established a Commission for Family Affairs (SCFA) in 2003 with a mandate to raise the national consciousness about women and children’s rights. For more discussion see: Maktabi, “Family Law and Gendered Citizenship,” 21.

<sup>201</sup> On the 1994 Mudawwana reform in Morocco, see: Dieste, “Demonstrating Islam.” On the opportunities (and political limitations) of similar reform in Iran in a Shia personal status law context, see: Mir-Hosseini, “How the Door of Ijtihad Was Opened and Closed.” On potential reforms in Orthodox and Catholic family law, see for example: Antokolskaia, “Process of Modernization.”

constitution provides for the right to customary law, however this right is explicitly subject to an obligation to abide by the Bill of Rights.<sup>202</sup>

Such an approach would not necessarily require a constitutional amendment. The Lebanese constitution already contains provisions for non-discrimination and citizens' rights to equality before the law and freedom of conscience.<sup>203</sup> In addition, the Constitution incorporates the United Nations Universal Declaration of Human Rights and other international rights covenants.<sup>204</sup> These rights statements stand side by side with the communal right to protection of personal status and religious interests. Furthermore, the enabling legislation that granted jurisdiction to the communal authorities in the mid-20th century is legally subject to the Constitution and to consistency with other civil legislation. It has been the result of practice and constitutional interpretation, not legal dictate, that these rights have not been extended to the realm of personal status law.<sup>205</sup>

The Lebanese approach to education may be taken as an analogous example of the possibilities and limitations of this type of approach. The state of Lebanon operates a public school system, but a large network of private—generally confessional—schools are also permitted to operate. The Ministry of Education mandates a certain basic curricula that all schools, public and private, must meet; however, private schools can also teach additional curricula subject to a widely permissive approval process by the Ministry. Thus, this combination of centralized and decentralized control allows communal schools to teach religious and cultural subjects, while ensuring that minimal education standards are met across Lebanon.<sup>206</sup> The same may be applied in the realm of personal status law by allowing the application of communal personal status law so long as certain baseline equality and freedom of conscience standards are met. This approach would have the advantage of achieving certain rights standards while placing the detailed negotiation of substantive legal reform in the hands of communal authorities.

The two main obstacles to this approach that have emerged in the education context, and which would undoubtedly challenge its implementation in the personal status law context, are: the initial hurdle of agreeing to baseline standards when it comes to controversial issues, and the enforcement of these standards once they are agreed upon. In education, for example, the basic curricula for mathematics, sciences and other less controversial subjects have been adopted, but modern history is simply not taught in Lebanese schools due to intense disagreement between different groups as to the way that this history should be taught.<sup>207</sup> Agreeing to a proper interpretation of “equality” and “freedom of conscience” amongst the various confessional and secular Lebanese groups would undoubtedly produce as much, if not more, controversy and deadlock.

Furthermore, as the education system demonstrates, the promulgation of basic standards is only a first step; the real work comes with enforcing those standards, which is something that has proven very difficult for the Ministry of Education.<sup>208</sup> In the

<sup>202</sup> See, Grant, “Human Rights, Cultural Diversity and Customary Law.” One of the main criticisms in South Africa of this division of jurisdiction is that the equality provisions in the Constitution have been interpreted so strongly by the South African Supreme Court as to render many customary laws substantively untenable under this system. In Lebanon, however, there is no constitutionalised supremacy of individual over collective rights. Thus, the rights interpretation in the realm of personal status law would necessarily require a difficult but essential balancing of the equality rights of the individual against the collective rights of the community, but of which are guaranteed by the constitution.

<sup>203</sup> Constitution of Lebanon, 1990, arts. 7, 9 and preamble (b), (c).

<sup>204</sup> Ibid. preamble (b).

<sup>205</sup> Bilani, Najjar, and El-Gemayel, “Personal Status,” 379 n. 41. See previous discussion in “Background” section of this chapter.

<sup>206</sup> Frayha, “Education and Social Cohesion.”

<sup>207</sup> Antelava, “History lessons stymied in Lebanon.”

<sup>208</sup> Abouchedid, Nasser and van Blommestein, “Limitations of Inter-Group Learning” *Arab Studies Quarterly* 24, no. 4 (2002) 61.

personal status realm, appeals from religious court decisions are currently confined to that religious court system unless there is a conflict between different religious laws.<sup>209</sup> A religious court's ruling can only be overruled if a civil court concludes that legal procedures have not been followed properly or if the religious court's decision "threatens public order."<sup>210</sup>

This report advocates, in chapter 6, strengthening the Constitutional Council and extending its jurisdiction to hear direct appeals from courts of first instance on constitutional issues. This right of appeal could be extended to religious courts as well, subject to the exhaustion of internal rights of appeal, in order to facilitate the enforcement of constitutional baselines. One problem with this approach is that it essentially places vulnerable group members in the position of being "whistleblowers" on rights violations.<sup>211</sup> This obligation on vulnerable individuals to be rights defenders might be attenuated by a broad interpretation of constitutional standing, which could enable rights organizations to take up constitutional claims through the legal system.<sup>212</sup>

If this new ex post role for the Constitutional Council is not realized, however, it may still be possible to achieve similar gains through legislative bargaining and review at the lower court levels. If the Lebanese Parliament is able to consider, debate, and pass legislation specific to gender equality and/or expanded child rights protection, courts could enforce this legislation while preserving the delicate task of determining the boundaries of constitutional rights and freedoms for the legislature.<sup>213</sup> On the legislative side of the equation, the case of Malaysia may offer a useful example of a possible compromise position. In Malaysia, state law provides that in making religious personal status decisions on the division of property in the event of divorce, all courts "shall incline towards equality of division."<sup>214</sup> Such a law in the Lebanese context—not a requirement of absolute equality, but rather a requirement to interpret and apply the law "in the direction of equality"—could offer a viable middle path to balancing individual and collective rights under religious personal status law.

As to the enforcement of this type of civil law, a recent case at the Lebanese Court of Cassation demonstrates the possibilities of lower court review.<sup>215</sup> In that case, Justice Fawzi Khamis overruled the Sunni Shari'a High Court, which had given a divorced father custody of his ten-year old daughter even though there was evidence of mistreatment. The Court of Cassation found that the civil law protecting children overruled the Sunni Court's decision.<sup>216</sup> This type of judicial review, on the basis of a civil law on equality, could present an alternative to full constitutional review.

<sup>209</sup> In this case, appeal is directed to the Court of Cassation.

<sup>210</sup> Constitution of Lebanon, Article 9 states that "The state...shall respect all religions, creeds and guarantees, under its protection, the free exercise of all religious rites provided that the public order is not disturbed." See also: <http://www.unhcr.org/refworld/topic,4565c22544,4565c25f545,3ae6ab7464,0.html>

<sup>211</sup> Shachar, *Multicultural Jurisdictions*, 113.

<sup>212</sup> See Chapter 6 for further discussion regarding the empowerment of civil society through broader standing rules. It should be noted that much of civil society in Lebanon is confessional and while some organizations aim to enhance the protection of individual rights, others aim to protect collective rights and the status quo on personal status issues. By opening constitutional review standing to all civil society actors, all groups would have access to this mechanism. This would provide a balanced form of review, providing recourse, in addition to those who advocate equality and individual rights protection, to those who feel that *collective rights* guaranteed by the constitution are being undermined.

<sup>213</sup> There is considerable debate about whether defining the boundaries of the constitution is better suited to the judiciary or to the legislature. This debate is considered more fully in Chapter 6 of this report.

<sup>214</sup> Islamic Family Law Act of 1984 (Malaysia), s. 58(1). See Shachar, *Multicultural Jurisdictions*, 132-133.

<sup>215</sup> Shedadah doubts whether the lower level judiciary will be capable of leading the change unless given a clear legislative mandate because, she argues, much of the judiciary is male and conservative and deeply engrained with their own perceptions of gender roles. See Shedadah, "Legal Status," 503.

<sup>216</sup> Maktabi, "Family Law and Gendered Citizenship," 19-20.

*“Transformative Accommodation”*

The options considered so far each have significant limitations. Though not specifically aimed at Lebanon, Shachar has proposed an alternative jurisdiction-sharing model termed “transformative accommodation.” Shachar argues that it is possible to address the challenges of balancing religious personal status accommodation and the need for minimal rights and equality standards, through a more dynamic, dialogue-based approach to personal status reform.<sup>217</sup> According to this model, jurisdiction over personal status law is divided between the state and the communal group, with neither holding a monopoly over any one aspect. Individuals within a given communal group would have clearly delineated “choice options” between state and communal law when it comes to certain “sensitive” issues. For example, an individual who is married under communal religious law might have a “partial exit” opportunity in which civil law would apply when it comes to issues such as divorce or custody where religious law would impose burdensome and discriminatory costs.<sup>218</sup>

This approach offers the potential to overcome the problems of the previous options in that it aims to protect individual freedom of choice to the utmost, including the choice to remain under the purview of one’s communal religious law. Perhaps most importantly, Shachar argues that the provision of these civil options will offer incentives to the communities themselves to review communal laws and redress their most problematic aspects in an attempt to retain jurisdiction over their community members. This is the “transformative” aspect of the approach.<sup>219</sup>

Although appealing from a theoretical point of view, one of the main challenges to the practical implementation of such a system is that it presupposes that the state has both the will to protect vulnerable group members and sufficient strength to force communal group members to engage in this ongoing “negotiation.”<sup>220</sup> Shachar’s model may be better suited to an already strong centralized state that is contemplating the devolution of contingent authority to communal groups as opposed to the current situation in Lebanon where the central state is still quite weak and the communal groups are in a much stronger negotiating position with respect to personal status because they already exercise complete autonomous control in this realm.

The multiple points of “exit” and interaction between state and religious personal law, which are intended to produce dialogue between group and state,<sup>221</sup> would be, particularly in the current atmosphere in Lebanon, likely to incite vehement conflict and power struggles rather than reasoned debate and ongoing re-evaluation of communal laws. The risk inherent in this model, as in the case of the civil law option, is that communal groups may not react to the interference of the state at these “exit option” points by liberalizing, but rather with a hardening of positions and the exclusion of non-conforming group members. It is unlikely that the Maronite and Sunni warnings of excommunication and apostasy during the 1998 civil marriage option debate were idle threats, and it is perfectly conceivable that a similar reaction would be emerge under

<sup>217</sup> Shachar, *Multicultural Jurisdictions*, esp. 117-145.

<sup>218</sup> *Ibid.*, 122-126.

<sup>219</sup> *Ibid.*, 125-126.

<sup>220</sup> Mitnek, “Individual Vulnerability,” 1656-1659.

<sup>221</sup> Shachar, *Multicultural Jurisdictions*, 122-126.

Shachar’s model. Ultimately the state can offer civil options or outlets, but it cannot prevent the application of “unfair” exclusionary religious group membership rules.

### *Secular Civil Code*

There is a small but vocal minority within and outside Lebanon that advocates the complete deconfessionalization of personal status law and the introduction of a secular, universal personal status code. The arguments for abolishing confessional control over personal status are similar to those made generally against confessionalism, namely that the current state of personal status laws perpetuates sectarian division and prevents social integration. Further, it is argued that the laws empower sectarian elites at the expense of individual human rights.<sup>222</sup>

The acceptance of a secular, unified civil code is probably unthinkable given the current political context in Lebanon. The fierce resistance encountered by advocates of even the 1998 “optional” civil code is evidence of this. Moreover, it is arguable that a universal civil code may not be the most appropriate path for Lebanon, even if it were more politically saleable. Lebanon has a strong tradition of protection of rights and freedoms, including respect for religious and cultural rights. While the current system effectively denies the right to choose to not be subject to religious law, the imposition of a secular civil law will not only retract the collective right to communal administration of personal status law, but will also deny the individual right to choose a religious option in lieu of a civil code.

It is clear that personal status law serves an important role in defining the boundaries of the many religions’ group membership and identity.<sup>223</sup> Although some discriminatory aspects of personal status law rise to the level of systemic maltreatment of group members in a way that is unacceptable in a free society that values individual rights protection, other “discriminatory” aspects of personal status law are crucial to defining religious group membership and simply cannot be regulated by the state.<sup>224</sup>

Furthermore, as supporters of multicultural policies and group rights accommodation note, superficially “difference-blind” civil institutions are never completely neutral because they will usually implicitly favour certain groups over others, thereby imposing burdens and exclusions on those non-favoured groups.<sup>225</sup> It is also not unforeseeable that communal groups would simply “opt-out” of the civil system by continuing the application of religious personal law in informal, non-recognized forums. In such a situation, the state would have even less ability to protect vulnerable group members than it already does.

## **Recommendations**

<sup>222</sup> Tayyar al-‘Almani (Movement for Secularism) is one such civil society organization pushing for complete secularization. See: Zalzal, “Secularism and Personal Status,” 37-39.

<sup>223</sup> Shachar, “Group Identity and Women’s Rights.”

<sup>224</sup> For example, personal status laws which require the wife to remain subservient to her husband and prohibit her from working once married are inconsistent with a society that is free and which values the rights of its citizens; however, the Druze approach to intermarriage, which equates the establishment of a dual-religion family with conversion away from the Druze faith and prevents the passing on of the Druze religion to the offspring of mixed marriage (because the only people who can be Druze are those who are the offspring of two Druze parents except in very exceptional and rare circumstances), cannot simply be “regulated” away by the state. See Dana, *Druze in the Middle East*, 15, 116-129.

<sup>225</sup> Kymlicka and Norman, “Citizenship in Culturally Diverse Societies,” 4; see also, Shachar, *Multicultural Jurisdictions*, 23.

In light of the range of options available and the limitations and challenges presented by each, the best approach may be to implement more than one reform in order to address the various challenges and problems posed by the current personal status framework. The provision of a civil option, for example, could be coupled with enhanced promotion of constitutional baseline requirements within communal groups through a constitutional appeal process. The civil option, in spite of its limitations, already has significant political capital because it is widely supported by persons across various sects and by civil society and political leaders alike. Although strong arguments were made in 1998 that the optional personal status law would try to undermine communal rights, in the context of wholesale political reform and deconfessionalization, this path might well emerge as a palatable means of group rights protection rather than being viewed as a threat.

Baseline constitutional requirements may be more challenging to implement; however, the strongest argument in support of this path is that the constitutional provisions for freedom of conscience and equality *already* exist within the Constitution. Although a constitutional amendment could be pursued to strengthen these provisions, ultimately the real results from this approach will come on the enforcement side of the equation. One way to indirectly encourage and facilitate the application of basic constitutional requirements may be to allow broad standing for public interest groups to challenge the constitutionality of certain laws and legal decisions. This is an option that will be explored in greater detail in the following chapter.

Finally, whatever combination of legal reforms the Committee and legislature choose to pursue, making individual and women's rights an important political priority will be critical to building support for the reforms and encouraging individuals to recognize, understand, and act upon their constitutional rights, within and outside the personal status realm. A permanent task force on discrimination in personal status laws may be one way to facilitate an ongoing national dialogue on these issues.

It is important to re-iterate that this chapter is aimed at surveying a number of options for personal status reform, and though it provides certain recommendations, it should not be viewed as a complete or absolute proposal on the issue. Ultimately the most appropriate reform will balance the needs and political realities of Lebanese society and politics, and of course, emanate from the people of Lebanon themselves.

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## 5. THE CONSTITUTIONAL COUNCIL – ADAM TANEL

Judicial review has come to be seen as a cornerstone for democratic regimes that respect the rule of law. However, it remains not uncontroversial because of perceived counter-majoritarian difficulties. At the same time, recognition of the importance of the separation of powers can be traced to thinkers as important (and foundational) as Montesquieu, Locke and even Aristotle.<sup>226</sup> The most obvious benefit of judicial review is the strengthening of the constitution. Courts can act as a “bulwark against executive excesses and misuse or abuse of power.”<sup>227</sup> In this way, Constitutional courts breathe life into otherwise empty minority protections enshrined in a constitution.

Lebanon, a society of minorities (or confessions and communities), has a definite need for the minority protection and mediation offered by a constitutional court. This need was most obvious when the state descended into a protracted civil war. In reaction to this turmoil, judicial review was implemented as part of the Constitutional reform package that ended the civil war.<sup>228</sup> Article 19 of the Constitution states that: “[a] Constitutional Council is established to supervise the constitutionality of laws.”

Constitutional review is almost always established by the legislature to oversee the legislature.<sup>229</sup> As such, political scientists have spent considerable effort attempting to explain this seemingly counter-intuitive derogation of power. One of the most compelling explanations is offered by Tom Ginsburg, who suggests an insurance theory.<sup>230</sup> Ginsburg argues that legislators create judicial oversight as insurance in the case of electoral defeat.<sup>231</sup> Mark Ramseyer has added to this theory, suggesting that two components are necessary for legislators to opt into a judicial insurance scheme. First, legislators must believe that the electoral system will continue to function, and second, that their (or their parties’) electoral success is not guaranteed.<sup>232</sup>

The Lebanese example shows an interesting variation of this theory. Constitutions are most often drafted after a period of violence or revolution. However, at Ta’if, legislators drafted Constitutional proposals in reaction to the violence, and as a means of ending it. Their preference for judicial review must be seen through this lens. While the insurance rationale may very well have played a role in their thinking, continuance of the peace and stability they sought to create was likely also a prominent consideration. Proposing an un-enforced Constitution may have been less likely to induce a cessation of hostilities. The Ta’if effort suggests that legislators saw constitutional amendment as

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<sup>226</sup> Vyas, Yash. “The Independence of the Judiciary: A Third World Perspective” *Third World Legal Studies* (1992): 127

<sup>227</sup> *Ibid* 132

<sup>228</sup> I refer here to the Ta’if Agreement. The Agreement would have created a more powerful Constitutional Council than is actually found in the language of the new Constitution. The Ta’if Agreement called for the Council to interpret the Constitution, whereas, the Constitution only empowers the Council to determine whether legislation complies with the Constitution. *The Daily Star* charged that this discrepancy was a result of Deputies “jealously guarding their prerogatives.”

Bathish, Hani M. “Pandering to the public’s hopes is not political progress,” *The Daily Star* Dec 19, 2007

<sup>229</sup> Interesting this was not the case in the United States, which is seen by many as the birthplace of judicial review. There, judicial review arose out of a series of Supreme Court decisions.

<sup>230</sup> Landes and Posner posit an alternative theory that constitutionalism and judicial review improve the durability of legislation and therefore increase the value of legislation to special interest groups. As such, it is desirable to legislators because it allows them to extract higher prices for legislation. However, in light of the chaotic circumstances under which the Ta’if Agreement was drafted, this long-term consideration seems less applicable in Lebanon.

Landes, William M and Richard A Posner, “The Independent Judiciary in an Interests Group Persoective” *Journal of Law and Economics* 18 (1975): 878

<sup>231</sup> Ginsburg, Tom, *Judicial Review in New Democracies*, (Toronto: Cambridge University Press, 2003), 24

<sup>232</sup> Ramseyer, J. Mark, “The Puzzling (In)dependence of Courts” *Journal of Legal Studies* 23 (1994): 722

necessary to create and preserve peace. As such, it is less surprising that they were willing to cede some power in order to ensure the Constitution's enforceability and durability.

### The Mischief

The Centre for Democracy and the Rule of Law, a Lebanese NGO, had this to say about the state of the Lebanese judiciary:

Everyone in Lebanon knows that in this country, justice can be bought and sold, that politicians can interfere with the judicial process and that there is no such thing as a transparent, fair and independent judiciary.

The judicial system, which has been subjected to decades of manipulation and abuse, has been reduced to an empty, meaningless institution.<sup>233</sup>

Notwithstanding the above indictment the Lebanese Constitutional Council (LCC) showed great early potential. Its first decision was to nullify a law that infringed judicial independence.<sup>234</sup> Unfortunately, its first case was the high water-mark for the LCC. The next year it became mired in a protracted and bitter dispute over electoral laws. The following year, the President of the Council resigned for largely unexplained reasons. The LCC has not properly functioned since 1996.<sup>235</sup> The situation worsened in 2005 when the sitting judges' terms expired and political deadlock prevented new appointments. As such, Lebanon was without a legitimate Constitutional Council from 2005 until 2010, when new appointments were hastily made. The ensuing paragraphs will discuss these two issues, namely, the hyper-politicization of the Council as well as its instability.

In discussing 'other' functions which can be entrusted to constitutional courts Victor Comella uses the term purity, or lack thereof. He argues that if a court's role is not sufficiently pure (that is to say it has other important roles other than settling constitutional disputes), its efficacy can suffer.<sup>236</sup> The LCC's secondary role is to adjudicate disputed Presidential and Parliamentary elections. Working in this highly charged atmosphere creates a number of concerns.

The inherently political nature of its secondary task makes appointments to the LCC more difficult. Legislators do not only have to fear that their legislation will be invalidated, but that future electoral successes may be nullified. As a result, the temptation to attempt to stack the bench, or interfere with it, is that much more powerful. Just a few months ago, the ramifications of this hyper-politicization were felt. There was an upcoming Parliamentary election, but no Constitutional Court existed to oversee it. Parliament selected its five justices. However, with weeks to go before the election, the government had not yet made its five appointments. As a result there was widespread concern over the legitimacy of the pending election, and the recourse losing candidates might take if they could not legally challenge disputed results. Amidst growing pressure

<sup>233</sup> Campaign for Good Governance in Lebanon, "Lebanon's Judiciary is in Desperate Need of Reform," The Center for Democracy and the Rule of Law, <<http://www.cggl.org/scripts/opinion.asp?id=51>> last accessed on April 2, 2010.

<sup>234</sup> Takeiddine, Suleiman, "An Independent Judiciary for a Better Justice" in *Options for Lebanon* ed. by Nawaf Salam (New York: St. Martin's Press, 2004): 29

<sup>235</sup> Bluhm, Michael, "Little merit in Tabbara plan to open way for Suleiman - experts," *The Daily Star* January 4, 2008.

<sup>236</sup> Comella, Victor, "The Consequences of Centralizing Constitutional Review in a Special Court: Some thoughts on Judicial Activism" *Texas Law Review* 83 (2004): 1707-08

from within and outside Lebanon,<sup>237</sup> the cabinet finally made its appointments less than two weeks before the election.<sup>238</sup> This kind of brinksmanship is not uncommon in Lebanese politics, and because of the politically charged nature of the Council's other function, it is predictable that it too is subject to such high-stakes manoeuvring.

Tied to the problem of politicization is that of instability. The LCC was inoperative from 2005-2010. As it is the only judicial review organ in the state, this is incredibly problematic. Furthermore, the LCC is the only body capable of nullifying unconstitutional laws. As such, for five years, regular courts were in the difficult position of enforcing and applying laws regardless of their constitutionality. This instability is not unique to the LCC. In fact, it is one of the weaknesses Comella has identified with constitutional courts that exist outside of the ordinary judicial system. By virtue of the fact that they are not essential in the day to day functioning of the judiciary, constitutional courts are dispensable. As such, Comella argues, their position must be constitutionally guaranteed.<sup>239</sup> However, in Lebanon, a constitutional guarantee has proven insufficient.<sup>240</sup> As such, reform is necessary to ensure that the Council does not only serve when it is convenient for the government or legislature. Such an arrangement would be the antithesis of the separation of powers doctrine enshrined in the Lebanese Constitution.

Another possible cause for the seeming dispensability of the LCC is the lack of citizen engagement with or reliance on the Council. The restriction of access to political and religious leaders can lead to the perception that the court is a political instrument not of a judicial one. This may make it seem reasonable to the populace for the body politic to determine when the Council should exist and when it should be disbanded. Citizen non-reliance also leads to this perception. The lack of citizen access to the Council makes it difficult for ordinary citizens to appreciate what purpose it serves for them.

The consequences to the dispensability of the LCC are very real. In 2008, while the LCC was inoperative, Prime Minister Siniora declared Hezbollah telecommunications to be "illegal and unconstitutional",<sup>241</sup> and militia fighting ensued. There was no court in which the government or Hezbollah could litigate the charge. There is certainly no guarantee that had the LCC existed, legal instead of military action would have been pursued, but the LCC's non-existence did absolutely preclude a judicial resolution.

This situation prompted the *Daily Star* to call for "sweeping judicial reform aimed at the restoration of basic credibility and integrity of Lebanon's constitutional and judicial systems."<sup>242</sup> The ensuing suggestions represent an attempt to answer this call for

<sup>237</sup> Speaker of the House Berri called publicly for the formation of the Constitutional Court in advance of the Parliamentary elections.

"Berri: Constitutional Council basis of electoral process." *The Daily Star*, April 15, 2009.

International leaders like Joe Clark and Madeline Albright echoed this call as discussed in:

"Observers urge Lebanese to take key steps ahead of vote." *The Daily Star*, May 8, 2009.

<sup>238</sup> Qawas, Nafez, "Cabinet approves appointments to Constitutional Council," *The Daily Star*, May 27, 2009.

<sup>239</sup> Comella, *supra* note 9 at p. 29

<sup>240</sup> This is apparent in the fact that the Lebanese Constitution explicitly calls for a Constitutional Council, but there was no functioning Council from 1996-2009. Furthermore Ginsburg (*supra* at note 6) and Stephenson agree that a paper guarantee is insufficient to guarantee effective and independent judicial review.

Stephenson, Matthew C. "When the Devil Turns...: The Political Foundations of Independent Political Review" *Journal of Legal Studies* 32 (2003): 62

<sup>241</sup> Gambill, Gary C., "Still Standing: Aoun After the Elections" *Mideast Monitor* 4 (2009)

<[http://www.mideastmonitor.org/issues/0907/0907\\_1.htm](http://www.mideastmonitor.org/issues/0907/0907_1.htm)> last accessed on April 2, 2010

<sup>242</sup> Muhamad Mughaby. "The syndrome of one-time exceptions and the drive to establish the proposed Hariri court." *The Daily Star*, July 28, 2008.

sweeping reform. The LCC is chosen as the subject for these reforms because it is the most important body for Lebanon’s democratic aspirations.<sup>243</sup>

Why reform now? Following Ramseyer’s thesis (outlined above), now is an opportune time to vest the LCC with greater powers of judicial review. The other chapters of this project deal with ensuring political stability and continuing elections, meaning Ramseyer’s first requirement is likely met. Furthermore, the Ramseyer/Ginsburg insurance model is relevant due to the electoral and institutional reforms proposed. These reforms create some uncertainty as to who will have electoral success. As such, all parties have an interest in creating a Council that will keep electoral winners in check, and provide a forum for the electoral losers to challenge legislation. Finally, it is relevant that France recently (March 2010) reformed its Constitutional Council as the Lebanese model is based on the French one. Many of the reforms proposed herein are similar to the ones enacted in France.

#### Proposals

Formal Constitutional protection of the LCC is necessary but not sufficient for it to function and maintain its independence.<sup>244</sup> What is absolutely essential for the proper functioning of the judicial system, is that public faith in it be rebuilt. Currently, public faith in the judiciary is extremely low.<sup>245</sup> There is a chicken and egg problem inherent in this situation. The court needs to function smoothly and fairly in order to regain public confidence, but it may well need public confidence in order to achieve these goals. As such, the following institutional design suggestions attempt to create a court that can grow to be more than a just a formally guaranteed body.

For the sake of this analysis, proposals have been divided into three broad areas: overall function of the court, administrative issues, and judges. Within each grouping, some suggestions are less likely to create controversy, while others may require more time and discussion to fully implement. Further, some suggestions are more important than others. These factors must be considered with respect to the timing of any reforms.

#### Overall Function

<b>Area to be Examined</b>	<b>Current System</b>	<b>Proposed System</b>
Type of review	Centralized	Centralized
Access	Questions referred by President, Prime Minister, Speaker of the House, any ten Deputies, or religious leaders if question of personal status law	Maintain current access with addition of judicial referral and constitutional complaint by citizens
Time of review	<i>Ex ante</i> (within 15 days of a laws promulgation)	<i>Ex ante</i> and <i>ex post</i>
Other function	Resolve electoral disputes	none

<sup>243</sup> “The ultimate caretaker of Lebanese democracy is still flat on its back.” *The Daily Star*, October 9, 2008.

<sup>244</sup> Stephenson, at p. 61

<sup>245</sup> World Bank “Lebanon: Legal and Judicial Sector Assessment” 2003

### Centralization vs. Decentralization

If the Constitutional Council is to be examined and reformed, one of the primary questions is of centralized versus decentralized review. While it is certainly tempting for common law scholars and lawyers to prefer a decentralized system, it is important to recognize the advantages of a centralized system.

One oft-touted benefit of centralized review is that it relieves political pressure from the ordinary judicial system. By cabining constitutional (in other words political and controversial) questions in one court, the system protects the legitimacy of the ordinary courts. However, one can certainly make the argument that this has gone too far in Lebanon, and without tangible benefit. Firstly, as discussed earlier, the LCC has become too politicized and this has led to a barrage of attacks on its credibility. Secondly, the benefit to the ordinary judicial system has not been realized. One enduring legacy of the civil war is rampant distrust of the legal system.<sup>246</sup> The lack of legitimacy and respect for ordinary and Constitutional Courts may not be a result of centralized review, but it is worth noting that as of yet, centralized review in Lebanon has not resolved this mischief.

One mischief that centralized review could resolve in Lebanon is in addressing the lack of independence and capacity in the ordinary judicial system - and the corresponding lack of public faith in the system.<sup>247</sup> Garlicki proposes that the Kelsenian (centralized review) model is most appropriate when the existing legal system lacks “structural independence and intellectual assertiveness”.<sup>248</sup> According to a high ranking member of the Lebanese judiciary, judicial independence in Lebanon exists only as an illusion.<sup>249</sup> As for “intellectual assertiveness,” it is widely acknowledged that Lebanon’s judiciary is understaffed and under trained.<sup>250</sup> Mallat describes the judicial system as the “first casualty of the civil war.”<sup>251</sup> The justifiable lack of faith in Lebanon’s judiciary suggests that increasing their responsibilities and powers by decentralizing review would not be advisable at this time.

Centralized review also carries with it the benefit of greater certainty, because it does not allow for conflicting interpretations of the Constitution from different courts. This benefit would be amplified in Lebanon because of the existence of religious as well as secular courts and the Court of Cassation’s limited power of review over the former set of courts.<sup>252</sup> Decentralized constitutional interpretation could lead to contradictory, and possibly irreconcilable constitutional interpretations. Such a situation would only serve to increase confusion with respect to outcomes and disrespect for those who render them.

If centralized review is to be maintained then, it is worth looking at the disadvantages of such a system and how they can be mitigated. Instability caused by dispensability is the most obvious concern when one looks at the LCC’s brief history.

<sup>246</sup> Mallat, Chibli, “The Lebanese Legal System” in The Lebanon Report No. 2

<<http://www.mallat.com/articles/T/The%20Lebanese%20Legal%20System.pdf>> last accessed on April 2, 2010.

<sup>247</sup> The Maronite Council of Bishops stated unequivocally that: “The judiciary has lost the faith of the people.”

Takeiddine, Suleiman, “An Independent Judiciary for a Better Justice” in *Options for Lebanon* ed. by Nawaf Salam (New York: St. Martin’s Press, 2004): 24

<sup>248</sup> Garlicki, Lech “Constitutional Courts versus supreme courts,” *International Journal of Constitutional Law* 5 (2007): 45

<sup>249</sup> Takeiddine *supra* note 20 at p. 23

<sup>250</sup> World Bank at p. 30

<sup>251</sup> Mallat at p. 19

<sup>252</sup> UNDP, “Lebanon National Human Development Report: Towards a Citizens State,” 2009: 71

Ensuing sections of this chapter will discuss strategies to alleviate this concern by de-politicizing the court and increasing citizen interaction with it.

Centralized review also carries with it the potential for conflicts between the constitutional court and other courts where the constitutional court engages in *ex post* review. Garlicki suggests such conflict is almost inevitable.<sup>253</sup> Nonetheless, I will later make the case for *ex post* review, as such, it is necessary to discuss a procedure to resolve judicial conflict.

Conflict most often arises when there is confusion as to the roles of the respective branches of the judiciary. This confusion can be brought on by uncertainty as to what the lower courts roles are vis-à-vis apparently unconstitutional legislation, and by uncertainty as to how binding the constitutional court's rulings are – as is the case in Poland.<sup>254</sup> The first issue is a non-starter in Lebanon, as lower courts are explicitly prohibited from any form of oversight with respect to constitutionality.<sup>255</sup> However, the second issue is a live concern. The first step to resolving this concern is to ensure that the statutory framework is clear on the issue. Currently there is no statutory framework because there is no possibility for conflict/enforcement difficulties. However, if the court is to engage in concrete *ex post* review, statutorily mandated supremacy and enforcement mechanisms will be necessary. In Germany, the constitutional court's power is augmented by allowing parties to appeal to the constitutional court.<sup>256</sup> As such, judges in the ordinary judicial system are more likely to follow constitutional court decisions or risk being overturned.

Conflict can also be brought on by interpretive decisions. Statutory interpretation is *prima facie* a non-Constitutional issue, however, constitutional courts will sometimes engage in the practice to bring legislation in compliance with the constitution. Many scholars and practitioners have questioned the legitimacy of such a practice because it borders on positive legislating. In Italy, this practice led to open conflict between the Italian Court of Cassation, the ultimate authority on statutory interpretation, and the Constitutional Court, the ultimate authority on the constitution.<sup>257</sup> This example serves as a caution against interpretive decisions; one that is all the more relevant for a nascent constitutional court in a volatile political environment. That is not to say that the LCC must be barred from engaging in statutory interpretation, but that any forays into statutory interpretation must be exceedingly cautious.

A Constitutional Court also suffers from the fact that it is more ever-present in the public's eye than even a Supreme Court is. This is because a Constitutional Court rules only on constitutional issues, thus the issues are not submerged in less controversial areas of law.<sup>258</sup> However, as Comella points out, courts enjoy more popular support, the less people know what they are doing.<sup>259</sup> As such, since institutional features will keep it very much in the public eye, there is a real onus on justices of the LCC to preserve their own legitimacy by not pushing the boundaries of their power.

Maintaining centralized review may also be essential to allow for other reforms. Increasing judicial review, while also diversifying its forms is not likely to be palatable to

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<sup>253</sup> Garlicki at p. 63

<sup>254</sup> Garlicki at p. 58

<sup>255</sup> Mattar, Mohammad, "On Corruption" in *Options for Lebanon* ed. by Nawaf Salam (New York: St. Martin's Press, 2004): 192

<sup>256</sup> Garlicki at p. 53

<sup>257</sup> *Ibid* at p. 55

<sup>258</sup> Comella at p. 26

<sup>259</sup> *Ibid* at p. 27



legislators. By maintaining the status quo here, some assurance is given to political actors uncertain about handing over too much power to another branch of government. The mutual oversight between the LCC and the Chamber of Deputies is more feasible than a proposed system that would have courts at all levels in Lebanon suddenly being empowered to oversee the legislature.

### Access

If centralized review is the model to be chosen, one must next consider the question of who has access or recourse to the court. The current access system undermines the LCC by keeping it closely tied to political actors.<sup>260</sup> As discussed earlier, the current Lebanese model alienates the Council from the citizenry, and this contributes to its politicization and instability. It contributes to politicization by keeping the Court closely tied to the political system; and to instability because citizens' lack of recourse to the LCC makes it difficult for them to see it as essential.

Increased access to the LCC is one of the more difficult reforms proposed here, because it does remove some power from legislators. However, as discussed earlier, Constitutional oversight does provide benefits of insurance, certainty, and increased value of special interests legislation. Further, this reform is one of the most important ones for the long-term stability and utility of the LCC. Deputies and political actors could derive benefits from a more stable legal and political framework in Lebanon.

The German model is instructive as to how reform could be implemented. The German Constitutional Court, the *Bundesverfassungsgericht*, was established post-conflict at a time when there was little faith in the legislature or the ordinary judicial system. The German Constitutional Court was therefore given a strong oversight role. The means by which this was conferred was through *Verfassungsbeschwerde*, or the process of Constitutional complaint. Ginsburg argues that open access is the most important ingredient in judicial power.<sup>261</sup> Open access empowers watch-dogs like NGOs and also makes it far more likely that politicians will be challenged. There is something intensely ironic about the current LCC access system. The Council was set up to oversee the legislature and the executive, but only does so when specifically requested by one of those branches. Open access provides for real separation and balance of powers. In Germany, the Constitutional complaint system has enhanced the Court's power, keeping the legislature and the ordinary judicial system accountable to the citizenry and the Constitution. The same level of accountability would be beneficial in Lebanon.

Accountability and stability are even more important in light of the reforms proposed in other chapters. In a time of political flux, it is crucial that the LCC address citizen complaints. In doing so it could provide a much needed guarantee that the Constitution, and its enshrined protection of minority rights, will be respected.

Where access is granted via constitutional complaint, one must determine whether the appellant can go straight to the Constitutional Council from the court of first instance, or whether they must first exhaust all other appeals. Since the LCC would operate in a wholly distinct jurisdiction, it is reasonable to allow appeals directly from the court of first instance.

In Poland, the system of requiring an appellant to exhaust all other appeals has led to negative outcomes. It becomes an onerous, time-consuming and expensive process

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<sup>260</sup> Mallat at p. 33

<sup>261</sup> Ibid at p. 37

for both the individual and the state. Further, it puts the Constitutional Court in a difficult position because by the time it hears a case, it is confronted with a number of judgments, (including one from the highest non-Constitutional court). The intricacies of different jurisdictions may be lost on observers, but what can become apparent is that the two highest courts disagree on the outcome of a case. This situation also aggravates the aforementioned inevitable conflict between the Constitutional Court and other courts. It may prove easier for a trial court -which is already subject to appeal- to accept being over-ruled repeatedly, than it would be for the Court of Cassation.

It may be beneficial to also add judicial referral to the LCC access system. In other jurisdictions, this allows judges to suspend a case and refer a question to the Constitutional Court if they believe the case involves an unresolved constitutional question. This is especially important in Lebanon for two reasons: Firstly, because of the limited capacity and training of the ordinary judiciary; Secondly, the ordinary judiciary's statutory inability to nullify unconstitutional laws forces them to apply these laws and in so doing lose credibility. Allowing referral by judges to the LCC answers these problems.

These two forms of review, complaint and referral, are less likely to pit the LCC against the legislature. There is significant delay inherent to this form of review. The judicial veto occurs not directly after passage of the legislation, but only upon its application. This delay serves to dampen conflict between courts and legislatures.<sup>262</sup> In so doing, this system assists further in the de-politicization of the LCC. These changes would also empower the LCC and enable it to fight back against the “subjugation, control and curtailment of its competency and efficiency” by political actors.<sup>263</sup> De-coupling it from political actors empowers both the citizenry and the LCC itself.

Increased access to the Council brings with it the question of whether the court will continue to only analyze legislation *ex ante*, or whether *ex post* analysis will be added. Obviously, the reforms proposed above contemplate the addition of *ex post* analysis. *Ex post* analysis provides a more meaningful protection by allowing for the effects, and not just the text of legislation to be examined for constitutionality. The ability to rule on concrete cases where a citizen' or citizens' rights have been violated is central to building a link between the citizenry and the LCC. If only *ex ante* analysis is permitted, litigants who rely on the court (and thus have a vested interest in its existence) will be more limited to politicians and interest groups.

While *ex post* review is preferable, it may be necessary to forego this reform in order to garner consensus for others. The access/standing issue is more important than the timing of review. Citizen access can occur *ex ante*, by allowing concerned citizens/NGOs to challenge legislations. While this would not create the relationship that concrete review enables, it would be preferable to the current model.

### Screening

Broadening access to citizens, courts and NGOs will undoubtedly increase the number of cases brought to the LCC. Some form of screening is therefore necessary to separate the wheat from the chaff. Again, the German model stands out as particularly effective. The German Constitutional Court's screening system deals effectively with

<sup>262</sup> Shapiro, Martin “Judicial Review in Developed Countries,” in *Democratization and the Judiciary*, ed. by Siri Gloppen, Roberto Gargarella and Elin Skaar, (Portland: Frabk Cass Publishers, 2004): 17

<sup>263</sup> Takeiddine at p. 30

95% of cases.<sup>264</sup> It does so with panels of three justices. When all three justices vote to hear the case, the case is brought before the court proper. However, if all three justices agree to a solution that does not override the legislature then the case can be dealt with by the screening justices. Further, if one of two justices would like the case heard, they can bring it to the attention of justices not on the screening committee. If any three justices vote to have a case heard it goes before the court. This level of efficiency would be helpful in Lebanon where there is likely to be a deluge of Constitutional complaints if they become permitted.

The old French model did not allow for complaints, but did have a system of limiting referrals. Questions from the judiciary for the Constitutional Council are referred to the highest court that has jurisdiction. That court then vets the questions before submitting them to the Constitutional Council.<sup>265</sup> Now that the system allows for citizen complaints/appeals, they are vetted not by a screening mechanism associated by the Council, but by the ordinary judicial system. The efficacy of this system is difficult to determine because it has only been in place since March 2010 (less than two months before the writing of this report).

The German model is preferable because of its proven efficiency in dealing with constitutional complaints. Further, it does not create tension between the Constitutional Court and other high courts as can be the case with the French model.<sup>266</sup> By allowing the screening committee to decide cases where there is unanimity and no override of the legislature, the process blends efficiency with respect for the legislative branch.

### Other Functions

Put simply, the role of resolving electoral disputes distracts and detracts from the Council's main function. A constitutional court will already face more publicity and scrutiny than an ordinary court.<sup>267</sup> It therefore seems unwise to add to this scrutiny and controversy, especially in a politically volatile environment. Electoral questions have twice hobbled the LCC.<sup>268</sup> Furthermore, the inherent politicization that this function carries with it creates perverse incentives for the legislature. As such, this function should be allocated to a transparent and independent commission. Elections in Lebanon are already subject to international scrutiny, and receive some logistical support. Allowing a Lebanese commission to take a more active role in the process would allow for this continued international involvement without a loss of independence. It is also worth noting that the current arrangement has not been effective in enforcing electoral law. An Interior Ministry study found almost 300 individual electoral violations in four days during the 2009 parliamentary election.<sup>269</sup> However, no elections were overturned by the

<sup>264</sup> Kommers, Donald P and Russell A Miller, "Germany: Das Bundesverfassungsgericht: Procedure, Practice and Policy of the German Federal Constitutional Court" in *Constitutional Courts: A Comparative Study* ed. by Andrew Harding and Peter Leyland, (London: Wildy, Simmonds and Hill Publishing, 2009): 107

<sup>265</sup> Ponthoreau, Marie Claire and Fabrice Hourquebie, "France: The French Conseil Constitutionnel: An Evolving Form of Constitutional Justice" in *Constitutional Courts: A Comparative Study* ed. by Andrew Harding and Peter Leyland, (London: Wildy, Simmonds and Hill Publishing, 2009): 88

<sup>266</sup> *Ibid* at p. 89

<sup>267</sup> Comella at p. 26

<sup>268</sup> In 1996 it led to the resignation of the President and in 2010 almost de-railed the appointment process.

<sup>269</sup> "Interior Ministry committee reports 293 violations of electoral law." The Daily Star, May 8, 2009

LCC. The current system mires the court in a political process, detrimental to its overall functioning, without any real benefit for democracy in Lebanon.

This aspect of the proposed reforms is essential to the de-politicization of the LCC. It need not be contentious because no new powers are being ceded or created. This reform is a mere a shifting of the electoral oversight function from the LCC to the independent electoral commission (which is discussed at more length in chapter 2).

Administrative Issues

Area to be Examined	Current System	Proposed System
Number of Justices	10	More than 10 (number to be determined based on study into number of qualified candidates)
Who hears cases	Heard <i>en banc</i>	Random selection of predetermined odd number of justices
Tenure	6 years (non-renewable)	Life appointments OR 12 year non-renewable terms
Appointment procedure	5 Justices selected by Parliament, 5 selected by government	Cooperative appointment by executive with approval of supermajority from the Senate OR representative appointment with transparent dialogue and negotiation between appointers

**Number of Justices**

There is a compelling argument that when designing a constitutional court, bigger is better, to a point.<sup>270</sup> This is especially true when there is limited capacity or trust in lower courts.<sup>271</sup> A larger Constitutional Council would allow the council to hear more cases and thus provide more oversight and constitutional protection. However, this would only really have an effect if the Council ceased its practice of hearing all cases *en banc*.

As a baseline for discussing the number of Judges on the LCC, it is worth noting that “for new constitutional courts set up after 1989, the mean number of justices was 11.25.”<sup>272</sup> The number of justices on the LCC could be increased, and the Council could begin hearing cases without all Justices presiding. The Council could be split into two bodies, one to overhear appeals from regular courts and one to overhear appeals from religious courts. This second option is facially appealing but carries with it the risk of increasing sectarian divides. The LCC should be seen as a body that applies the supreme law of the state, whether to criminal, administrative or religious matters.

Due to the problems in the lower courts, a larger Constitutional Council that can hear more cases is a good starting point. The next question to be addressed is how many

<sup>270</sup> Ginsburg at p. 48

<sup>271</sup> Ibid at p. 48

<sup>272</sup> Ibid at p. 48

justices hear each case, and who decides which justices hear which cases. Transparency is absolutely essential here. The court would lose credibility very quickly if benches were stacked one way or another for specific cases. A random selection of an odd number of justices may be the fairest system. This eliminates the possibility of a tie (a situation which exists currently, the tie being broken by the President of the Council). The number of members of the LCC and the number who hear each case is a decision best left for those who can gauge the number of qualified candidates.

### **Tenure**

Judges currently sit on the Constitutional Council for 6 year non-renewable terms. While fixed non-renewable terms can lessen interference, not all such systems are created equal. One factor that creates a potential for interference is government control over post-bench employment. If the government has a strong say in what jobs will be available for a justice after their term expires, there is a strong incentive to tow the party line. The length of the term can also come into play. Lebanon's relatively short 6 year term provides less independence and security than the 8 years allotted in France and the 12 years in Germany.

The best way to increase non-governmental post-bench option is to create a vibrant and expansive private legal sector. This cannot be done through constitutional design, and in any event is an evolutionary process. As such, the only remaining option is to alter term lengths. Life terms are one effective way of ensuring judicial independence.<sup>273</sup> This would totally free the Council of pressures arising out of occupational concerns. Furthermore, it staggers the timing of judicial retirement, and thus staggers the timing of judicial appointment. This makes the system less prone to collapse due to political deadlock. In 2005 the entire bench's term expired, so by not appointing new justices, parliament essentially shut down the court. With mandatory retirement at a specified age, the staggering of the timing would make the process of shutting down the council much lengthier and would allow groups, institutions and individuals to mobilize and face-down the threat to the rule of law.

If life terms are seen to give too much power to the Council, the next best option may be 12 year terms. This length ensures that any justice appointed in their fifties need not be overly concerned with post-bench employment. It also creates a longer lengthy interval between appointments. This may be beneficial because of difficult the process can be (and will likely become in light of the foregoing suggestions to strengthen the Council, and the ensuing suggestions as to how to alter the appointment procedure).

Any measures that increase independence, lessen legislative influence and power. That is indeed what the measures are designed to do. One way of providing reassurance to sceptical legislators would be to delay the implementation of this measure. The newly empowered LCC should operate for at least one 6 year term before the limits are increased. Judicial discretion during this period could re-assure concerned parties that the increase in independence will not trench overmuch on their domain

### **Appointment Procedure**

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<sup>273</sup> Rosenn, Keith S. "The Protection of Judicial Independence in Latin America" *University of Miami Inter-American Law Review* 19, (1987): 17

The procedure for the most recent appointments was to have the confessional parliament choose 5 judges. The confessional cabinet chose 4, and the President (a confessional leader) choose the remaining judge, and appoint him President of the Council.<sup>274</sup> The most obvious problem with this formula is that it is contrary to the legislation which established the Council. Law 250 of 1993 states that the Constitutional Council shall meet and elect their own President. The current arrangement was negotiated by cabinet in the Lebanese tradition of last-minute ad hoc solutions. This representative system (where the legislature chooses a portion and the executive chooses a portion) also carries with it some serious design flaws.

The representative formula requires amendment. As Ginsburg points out, representative courts have a more pure agent relationship than those that develop within the context of co-operative appointment.<sup>275</sup> Cooperative appointment carries with it the risk of political deadlock, a risk that cannot be discounted given the recent history of the situation. However, representative appointment can lead to deadlock within the court, as well as a lack of legitimacy. There is significant risk for a loss of legitimacy when judges that have less incentive to work in concert because they serve and/or are seen to serve different political masters. This lack of cohesiveness can lead to in-fighting that is disastrous for public confidence. Ginsburg argues that representative courts are also more likely to be polarized and issue low quality decisions. As alluded to, the counter-balancing benefit is a smoother appointment process. However, in Lebanon, even this benefit has not been realized.

Cooperative appointment leads to a more cohesive court less prone to divisive internal conflict. The possibility for dissent and disagreement cannot and should not be eliminated entirely. However, judicial institutions are likely to benefit in the long run if the judges appointed are moderate. This is especially important in a court's nascent stages. Cooperative appointment that requires a super-majority in the legislature leads to a moderate judiciary with more legitimacy and less pure agent relationships vis-à-vis their appointers.

If this possibility is seen as too prone to tumult as a result of previous appointments, an alternative does exist. That is to have a pre-established timeline for executive and legislative appointments. In the last round of appointments the legislature appointed its five members five months prior to the executive. This delay creates an incentive for the legislature to appoint partisan and non-independent members, because it does not yet know who the executive will select. In turn, the executive has an incentive to do the same. Some kind of established timeline that enables negotiation and transparency may create an incentive to appoint moderate members if there is some guarantee the other branch will reciprocate.

This measure may be less contentious than other parts of this chapter because there is no real loss of control or power involved. All the parties that have traditionally had a say in appointment to the LCC will continue to have a say. As such, this reform may be adopted more immediately than others. In light of past difficulties with respect to appointments, the procedure should be agreed upon and implemented well before it is actually to be used to select the next bench.

## Judges

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<sup>274</sup> "Constitutional Council seats remain vacant with elections approaching fast." The Daily Star, April 29, 2009

<sup>275</sup> Ginsburg at p. 44

Area to be Examined	Current System	Proposed System
Qualifications	Candidates must have 20 years experience as lawyers, judges or legal academics	Unchanged (unless necessary to allow appointment of women and/or necessary to have sufficient pool of candidates for larger Council)
Additional qualifications	Sectarian divide, court is ½ Muslim, ½ Christian	A Constitutional amendment to broadly mandate that the court be reflective of society.

### Qualifications

There are no pressing concerns with respect to qualifications. As it is recommended that the Council take on a more court-like role, it continues to be good policy to appoint lawyers, judges and legal academics. The reasoning behind the experience requirement remains no less valid today. However, one concern is that such a lengthy experience requirement exorcises disadvantaged minorities from being potential candidates. The current makeup of the Council mitigates this concern to a degree as it contains not just Maronite, Sunni and Shia members, but also Druze, Orthodox and Catholic members as well.<sup>276</sup> Notably, a ‘minority’ that is not represented is women. Indeed, no woman has ever been appointed to the Council. Whether this deficiency is in part caused or exacerbated by the qualifications requirements ought to be the topic of study and thought. As US Secretary of State Hillary Clinton recently pointed out in the *Globe and Mail*, when women are involved in institutions they are “more effective and responsive.”<sup>277</sup> Considering this truism, Parliament should form a committee to investigate how best to integrate women in the Constitutional Council. This committee should be cognizant of the fact that diversity is most likely to be successful when the government makes an explicit commitment to its pursuit.<sup>278</sup> If this requires an amendment to qualifications, than that is something that must be considered.

The involvement of women is hugely important for civil rights in Lebanon. However, it is also likely to be very contentious. As such, implementation measures must proceed with utmost caution. It may even be necessary to decouple this important reform from the others proposed herein.

### Religious Qualifications

The current LCC mirrors the legislature in that it is one half Muslim and one half Christian. This split is mandated by law.<sup>279</sup> While it is fundamentally important that a constitutional court is reflective of the society,<sup>280</sup> this 50/50 requirement limits the pool

<sup>276</sup> “Panel endorses new law on Constitutional Council.” *The Daily Star*, October 14, 2008.

<sup>277</sup> Clinton, Hillary, “Foreign aid: Women’s progress is human progress, and human progress is women’s progress,” *The Globe and Mail*, March 29, 2010.

<sup>278</sup> Harding, Andrew, Peter Leyland and Tania Groppi, “Constitutional Courts: Forms, Functions and Practice in Comparative Perspective” in *Constitutional Courts: A Comparative Study* ed. by Andrew Harding and Peter Leyland, (London: Wildy, Simmonds and Hill Publishing, 2009): 19

<sup>279</sup> “Panel endorses new law on Constitutional Council.” *The Daily Star*, October 14, 2008.

<sup>280</sup> Shetreet, Simon, “The Challenge of Judicial Independence in the Twenty-First Century” *Asia Pacific Law Review* 8 (2000): 166

of qualified applicants and reinforces confessional divides. It also precludes the participation of other (non-Christian/Muslim) minorities. De-confessionalization of the Council will be a difficult task, especially as it becomes more involved in overseeing religious courts. However, it may be necessary to the success of overall efforts that re-conceptualize confessionalism. A Constitutional amendment that guarantees that the LCC would have to be reflective of society may provide the flexibility, certainty and representation necessary for an effective LCC. An unwritten Constitutional principle may emerge as to what the exact composition of the Council is, but by remaining unwritten it is at least a step away from symbolic sectarianism and it is also more fluid.

De-confessionalization of the LCC has potential risk for leaders of the Druze and Catholic communities. This is because both are over-represented on the current LCC. As such, a commitment to ensuring that the LCC remains reflective of society will be important to help gain their support. While the difference between “confessional” and “reflective” may seem to be one merely of semantics, there is an important symbolic element to re-considering the Council’s confessionalism.

### **Conclusion**

This chapter contains a number of proposals, some more ambitious than others. It is important at this juncture to note that these reforms will not perfect Lebanon’s judicial system - the issue of capacity building has been left out entirely. However, reform of the judiciary is a necessary component of overall progress. The judiciary must be strengthened, and perhaps more importantly, this fortification must be visible. Public reliance on and faith in the judiciary is a necessary ingredient if long-term political stability is to be achieved.



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## 6. TRANSITIONAL JUSTICE – NICOLE BETEL

Lebanon is home to eighteen officially recognized sects. When the 1943 National Pact provided for the establishment of a confessional state,<sup>281</sup> it was thought that this model of power sharing would enable the different groups in Lebanon to live in peace, unity, and prosperity.<sup>282</sup> With the signing of the National Pact, there was a general consensus that a common identity would eventually be agreed upon and the multi-confessional Lebanese state would become a bastion of tolerance, coexistence and diversity.<sup>283</sup> However, reality had alternative plans for the fragile state. The consociational model has ensured that the sectarianism transcends every level of Lebanese society. While it is not ideal for secto-politics to be defining the nature of political competition in a proclaimed democratic state, it is the translation of sectarian divisiveness into violence that is of particular concern. Diversity in Lebanon is a source of divisiveness and conflict evident by the 1958 crisis and the recent civil war.<sup>284</sup> Nevertheless, even today, there are many who believe confessionalism is the only force capable of keeping Lebanese sectarianism in check. Despite this assertion, which has been made by academics and, as the continual outbreaks of violence in Lebanon today confirm, the confessional system can be said to not only have exacerbated sectarian tensions, but it has made the country inherently divisive.<sup>285</sup> While the bulk of this report speaks rather poignantly to the management of secto-politics in the political spheres, it is the objective of this chapter to address the expression of sectarian divisions in violent conflict by exploring the various mechanisms of transitional justice. Transitional justice can play a valuable role in helping Lebanon to not only deal with the atrocities committed along sectarian lines during the civil war, but possibly break the cycle of sectarian violence that has been plaguing the country.

After a quick reflection on the civil war years, this chapter will look at the broader cycle of sectarian violence that has plagued Lebanon for centuries in order to ground the forthcoming discussion of transitional justice in Lebanon. This chapter will also explore the different options retributive, restorative and reparative justice have to offer the Lebanese transitional project in light of the particulars of the Lebanese case.

### Summary of Recommendations

- Hold perpetrators of sectarian violence in the post civil war era accountable in the domestic court system;
- Promote tolerance, reconciliation and a common historical experience through one or a combination of the following:
  1. Truth Commission
  2. Establish the National Narrative Commission, mandated with the task of collecting and recording the private civil war memory of the Lebanese public in order to bridge the gap between private and public memory. The histories collected will then be used to create an inclusive national

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<sup>281</sup>A.J Abraham, *Lebanon in Modern Times*, (New York: University Press of America, Inc., 2008)

<sup>282</sup> *Ibid.*, 123

<sup>283</sup> *Ibid.*, 123

<sup>284</sup> *Ibid.*, 130

<sup>285</sup> Mohammad F. Mattar, "Is Lebanese Confessionalism to Blame?" in *Breaking the Cycle: Civil Wars in Lebanon*, ed. Youssef Choueiri (London: Stacey International, 2007), 49

3. narrative that is able to account for the civil war period that will be incorporated into the history curriculum in Lebanese schools;
4. “Civil War Workshops” The workshops will be tasked with teaching a unit on the civil war experience in Lebanese schools throughout the country. The workshops will be taught by trained individuals from the major sects and will ultimately present a history of the civil war in the form of a dialogue with no solid conclusions. The dialogue will illustrate to the next generation of Lebanese that a common suffering and common responsibility exists for the events that transpired during the civil war, as well as a common power to change the future;
5. Intergroup exercises to promote inter-sectarian understanding and tolerance;
6. Alternative or traditional mechanisms of restorative justice.

### **Background: The Lebanese Civil War, its Aftermath and Implications**

Fighting broke out between the Phalangists and the Palestinians in April 1975 and soon spread to the rest of the country.<sup>286</sup> The fighting was triggered by an assassination attempt against right wing-leader Shaykh Gemayel, of the Phalangist/Kata’ibist party.<sup>287</sup> The conflict has been described by different academics as a struggle between the left and right wing factions in Lebanon,<sup>288</sup> a struggle between different confessional groups,<sup>289</sup> or, a particularly brutal episode of inter-sectarian violence that is a actually part of a larger cycle of revenge and counter revenge.<sup>290</sup> Regardless of how one describes the fighting, the consequences of state failure, breakdown of law and order and widespread destruction remain the same. The increasing instability and violence in the country led to the Syrian intervention in 1976 and subsequent occupation until Syria’s withdrawal in 2005.<sup>291</sup> Similarly, in the year 1978, Lebanon saw light Israeli intervention to fight the Palestinian Liberation Organization (PLO) operating out of southern Lebanon waging a war of liberation against Israel. The so called light intervention of 1978 would only be followed by a full scale war in 1982 and subsequent Israeli occupation that would last until 2000.<sup>292</sup>

Not only did the war destroy Lebanon’s state apparatus, military, and physical infrastructure, but the crumbling of law and order in the country saw the widespread and gross violations of human rights.<sup>293</sup> Among the abuses perpetrated during the civil were the killing of non-combatants and the “disappearance” of Lebanese, Palestinians and as foreigners.

The Sabra and Shatila Massacre, where the Christian Lebanese Forces entered two Palestinian refugee camps on the outskirts of Beirut – Sabra and Shatila – and

<sup>286</sup> A.J Abraham, *Lebanon in Modern Times*, 146

<sup>287</sup> Ibid. 146

<sup>288</sup> Ibid., 144

<sup>289</sup> Kamal Salibi, *A House of Many Mansions*, (London: I.B. Tauris and Co. Ltd., 1988).

<sup>290</sup> Thomas Friedman, *From Beirut to Jerusalem*, (New York: Anchor Books Doubleday, 1989)

<sup>291</sup> A.J Abraham, *Lebanon in Modern Times*, 149

<sup>292</sup> Ibid., 150-153

<sup>293</sup> While human rights violations are always unacceptable, such actions are especially concerning in this case because it stands in direct contradiction to the strong Lebanese value for upholding human rights, which can be seen by the role Lebanon played in the drafting of the Universal Declaration of Human Rights, its commitment to a number of other human rights conventions and domestic legal provisions protecting human rights. Amnesty International, *Lebanon: Human Rights Developments and Violations*, NGO, Amnesty International, 1997.

massacred between 800-1000 of its inhabitants is unfortunately only one example of the disproportionate killing of civilians.<sup>294</sup> While acting as United Press International's Beirut correspondent, Thomas Friedman recounts the horrors he witnessed upon entering the camps after the three day killing spree,

The first person I saw in Shatila was a very old man with a neatly trimmed beard and a wooden cane by his side. I would guess he must have been close to ninety. By the time I met him, he had been dead for hours...But mostly I saw groups of young men in their twenties and thirties who had been lined up against walls, tied by their hands and feet, and then mowed down gangland-style with fusillades of machine-gun fire. Where were the 2,000 PLO fighters supposed to have been left behind in the camps? If they ever existed, they certainly would not have died like this.<sup>295</sup>

According to a 1997 report by Amnesty International, 17 415 individuals were disappeared over the course of the civil war, majority of whom remain unaccounted for today.<sup>296</sup> Thomas Friedman also offers a telling account of the first time he had witnessed a disappearance in Beirut:

Suddenly I saw of to my right four men with pistols tucked into their belts who were dragging another man out his front door. A woman, probably his wife, was standing just inside the shadow of the door, clutching her bathrobe and weeping. The man was struggling and kicking with all his might, a look of sheer terror in his eyes. Somehow the scene reminded me of a group of football players carrying their coach off the field after a victory, but this was no celebration. Just for a second my eyes met those of the hapless victim, right before he was bundled into a waiting car. His eyes did not say "Help me"; all they spoke was fear. He knew I couldn't help him. This was Beirut"<sup>297</sup>

According to official data, 144, 240 people died during the war and 197, 506 were left wounded.<sup>298</sup> The murder of so many innocent civilians during the civil war years needs to be addressed and those disappeared need to be accounted for, both to honour the memory of those murdered and disappeared, as well as to provide families who still wonder the fate of their loved ones with answers.

In 1989, the civil war was officially ended. A peace accord was signed in Ta'if, Saudi Arabia. The accord called for various political, administrative, judicial and electoral reforms that would, in effect, deconfessionalize Lebanon.<sup>299</sup> Unfortunately, very few of these reforms have actually been implemented in Lebanon today. Moreover, completely absent from Ta'if, aside for a brief mention of the need for educational reform and a common Lebanese national identity, was the call to implement mechanisms of

<sup>294</sup>Sune Haugbolle, "Public and Private Memory of the Lebanese Civil War," *Comparative Studies of South Asia, Africa and the Middle East* 25 (2005): 192; Friedman, *From Beirut to Jerusalem*, 163

<sup>295</sup> Friedman, *From Beirut to Jerusalem*, 162

<sup>296</sup>Amnesty International, *Lebanon: Human Rights Developments and Violations*, 5

<sup>297</sup> Friedman, *From Beirut to Jerusalem*, 21

<sup>298</sup> Oren Barak, "'Don't Mention the war?' The Politics of Remembrance and Forgetfulness in Postwar Lebanon," *The Middle East Journal* 61 (2007): 52

<sup>299</sup> Taif Agreement, *NOW Lebanon*,

<http://www.nowlebanon.com/Library/Files/EnglishDocumentation/Official%20Documents/Taif.pdf> (Accessed March 14, 2010)

transitional justice that would facilitate Lebanon's post-war transition.<sup>300</sup> In overlooking the area of transitional justice, the Ta'if Accords failed offer a holistic set of reforms that would enable Lebanon to transition from a state of post war to one of post conflict.

The inability of Ta'if to bring about a sustainable peace still haunts Lebanon today, as sectarian violence and instability continues to plague the country – albeit in a milder form than during the civil war. The prevalence of sectarian violence in the post-Ta'if period is indicative of two things; suppressing what transpired during the civil war has not been beneficial and the civil war should be understood as part of a larger conflict – a long history of sectarian division and violence. Various historians have imposed different parameters to capture the Lebanese experience and explore the issue of sectarian violence in the country. Kamal Salibi, for example, casts a rather broad net and traces the divisions back to the days of the Ottoman Empire.<sup>301</sup> Other academics have used a more narrow scope and have chosen to begin their study of Lebanese tensions as late as the 19<sup>th</sup> or 20<sup>th</sup> centuries.<sup>302</sup> Regardless of the point in time that one selects to explain the dynamics of modern Lebanon, one thing remains consistent: Lebanon has been and is caught in an unrelenting cycle of violence, which culminated in the most recent and destructive outbreak of fighting during the civil war. If the civil war is understood as an extension of a broader cycle of revenge and counter revenge between different sectarian groups, the need for transitional justice in helping Lebanon escape or break out of its seemingly unrelenting cycle of violence becomes more apparent. Thus, this chapter will propose that mechanisms of transitional justice be implemented to address the civil war experience, as well as the broader issue of sectarian divisiveness and violence in Lebanon.

The transitional justice project in Lebanon will necessarily be a fragile one. With all the benefits transitional justice has to offer a society in transition, transitional justice, also runs the risk of opening up a Pandora's Box, where dealing with the past can reigniting the spark of violent conflict in the present. While Lebanon has not been completely at peace and the political system has been tenuous at best, the extreme level of violence that characterizes the civil war period has not erupted in the streets since the signing of the Ta'if Accord. Therefore, transitional justice in Lebanon must become a balancing act that creates justice by accounting for the atrocities of the past, while simultaneously maintaining the tenuous peace that currently exists.

## **Transitional Justice**

Before exploring how transitional justice can be applied to the Lebanese case, it would be worthwhile to take a moment to explain, what is transitional justice?

Transitional justice is primarily concerned with helping societies in their effort to transition from a state of post-authoritarianism or post-conflict.<sup>303</sup> In cases where societies have just recently stopped fighting, there is often a disconnect between the creation of an official peace – the Ta'if Accord – and the emotions and attitudes, which can translate into actions and behaviours of the individuals who make up the parties involved. A treaty agreed upon by officials is only as good as the support it carries by

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<sup>300</sup> Ibid

<sup>301</sup> Salibi, *A House of Many Mansions*

<sup>302</sup> Abraham, *Lebanon in Modern Times*; Friedman, *From Beirut to Jerusalem*

<sup>303</sup> Ruti Teitel, *Transitional Justice*, (New York: Oxford University Press, 2000)

society at large. For peace and harmony to exist, reconciliation is necessary. After the fall of an authoritarian dictator or the cessation of hostilities, societies find themselves in an incredibly challenging position where they must not only rebuild the country, politically, infrastructurally, economically etc., but they must also confront the atrocities of the past so that society can reconcile differences and move forward.<sup>304</sup>

How society deals with its past has enormous implications for its future. In light of this, the literature on transitional justice offers three broad mechanisms that can be used to facilitate a post-authoritarian or post-conflict transition. Retributive, restorative, and reparative justice each hold a different understanding of justice and thus provide different tools that transitioning societies can draw upon in their pursuit of justice. Retributive justice finds its roots in the western legal tradition and is most commonly associated with courts. Restorative justice sees justice as the restoration of harmony in society and since the fall of apartheid is most commonly identified with truth commissions. Reparative justice is also known as redistributive justice and involves both moral and material compensation for the past. The tools that fall into the different categories are not mutually exclusive. Rather, they are complementary and the success of transitional justice often depends on the use of more than one mechanism at a time. Nevertheless, it must be recognized that the realities that post-conflict societies must face sometimes makes it impossible to pursue all three mechanisms at once.

It must be acknowledged that transitional justice, itself, is a highly controversial field. While there is a strong case to be made on behalf the many merits of transitional justice, there are also critics who see very little value in the field and argue that the implementation of transitional justice is more damaging than productive for a transitioning society. It is the opinion of this author that doubts about the legitimacy and efficacy of transitional justice are rooted in the currently unresolved peace versus justice debate.

Within the transitional justice literature there is a rather heated debate surrounding the whether or not a trade-off exists between peace and justice. Proponents on both sides of the debate argue that the pursuit of one will necessarily come at the cost of the other. Applied to the Lebanese case, some might argue that pursuing justice by holding perpetrators of crimes against humanity and war crimes committed during the civil war period can only be met at the cost of compromising the fragile short term peace the currently exists in Lebanon. They argue that such initiatives would have the consequence of putting almost all of Lebanon on trial, destabilizing the country, reinforcing sectarian divisions and violence, and thus, leading the country into a certain state of war. As a result, advocates of this position tend to discredit the field of transitional justice saying it has nothing to offer post-conflict societies other than further instabilities. On the other hand, the opposition demands that in the interest of a long term peace, perpetrators must be brought to justice, as holding these individuals accountable will operate as a future deterrent for similar crimes. This chapter does not seek to reconcile this debate and recognizes the merit presented on each side. However, it also recognizes that the field of transitional justice is broader than the confines of retributive justice and that mechanisms of restorative justice, although new and still being developed, can play a very significant role in finding a balance between peace and justice and more generally, in resolving inter-sectarian conflict and helping to create social reconciliation in the wake of a peace

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<sup>304</sup> Martha Minow, *Between Vengeance and Forgiveness* (Boston: Beacon, 1998), 118

agreement. Therefore, this chapter present peace and justice as values that can be pursued in tandem. In pursuing justice, beyond the purely retributive understanding of the concept, Lebanon will not necessarily have to compromise the fragile peace the currently exists in the country. In other words, the possibility of a peaceful and just society can manifest itself in Lebanon’s future. With that being said, the transitional justice process will not be easy and it will require some fine balancing. The different options, if pursued prudently, can serve to reinforce each other and help to maintain the fragile peace of Lebanon in the short term, pursue justice and set the foundation for a stable, just and sustainable peace in the future. This chapter will be organized in a way that enables the exploration of the three different transitional justice mechanisms and will present the advantages and disadvantages of a number of different transitional justice options that Lebanon currently has on the table, within each of the three frameworks. The reason for this structure is that the transitional justice options presented in this report should not be considered as choices to be made between categories but within them.

### **Retributive Justice: Some Options**

As mentioned earlier, retributive justice is most closely associated with the western-legal tradition and its conception of justice.<sup>305</sup> It emphasizes retribution, which speaks most strongly to ideas surrounding punishment for crimes committed and revenge.<sup>306</sup> Accountability is also central to the concept of retributive justice.<sup>307</sup> Criminal trials are resorted to as the primary mechanism for bringing the perpetrators of the gravest of international crimes – crimes against humanity, war crimes and genocide – to justice. Such trials can be carried out by international tribunals, such as the International Criminal Tribunal for the former Yugoslavia (ICTY) or the Special Court for Sierra Leone (SCSL); national tribunals, such as the prosecution of suspected *genocidaires* in Rwanda or by way of universal jurisdiction, as in the case of Augusto Pinochet. Alternatively, perpetrators could be brought before the International Criminal Court.

From a theoretical standpoint, mechanisms of retributive justice offer a number of benefits to the Lebanese case. However, the limitations stemming from the 1991 Amnesty Law make the pursuit of retributive justice for atrocities committed during the civil war years a significant challenge. As a result, this chapter will recommend the pursuit of retributive justice to hold perpetrators of sectarian violence accountable in the post-1991 period.

One particularly strong benefit of retributive justice is that trials individualize guilt.<sup>308</sup> By holding individual perpetrators accountable for their actions during the civil war, retributive justice could help curb the tendency of groups to attribute collective guilt to those who are members of another confession. Attribution of collective guilt between the different sects will only serves to further polarize and divide Lebanese society, legitimating sectarian violence in the future and challenging reconciliation efforts. Therefore, individual accountability can be considered fundamental to avoiding the collectivization of guilt, which criminalize entire communities and increase the likelihood

<sup>305</sup> Joanna R. Quinn, “Are Truth Commissions Useful in Promoting Restorative Justice?” in *Crosscurrents*, 4<sup>th</sup> ed., ed., Mark Charlton (Toronto: Nelson Canada, 2004), 1

<sup>306</sup> *Ibid.*, 1

<sup>307</sup> *Ibid.*, 1

<sup>308</sup> Luc Huyse, “Justice,” in *Reconciliation after Violent Conflict: A Handbook*, eds. David Bloomfield, Teresa Barnes and Luc Huyse (Stockholm: International Institute for Democracy and Electoral Assistance, 2003), 98



of indiscriminate acts of both collective violence and individual acts of vengeance carried out against individual members of the other group.<sup>309</sup> For example, in holding individuals, such as Gemayel, accountable for the crimes committed at Sabra and Shatila in 1982, Palestinians will have a specific individual they can hold accountable for the atrocities committed and thus will be less inclined to seek revenge indiscriminately against Christians, more generally.

Trials can also help to curb vigilante justice by channelling such desires into formal structures, i.e.: the courts.<sup>310</sup> In addition to breaking the cycle of impunity that often plague transitioning societies, trials can also help to strengthen legitimacy and democratization processes.<sup>311</sup> Therefore, retributive mechanisms have the ability to support the other reforms being proposed in this report. Furthermore, in holding perpetrators accountable for their crimes, retributive justice can serve to deter corruption and other crimes (crimes against humanity and human rights violations, in particular), especially by political officials in the future.<sup>312</sup> Finally, the accountability that is fostered by the pursuit of retributive justice can serve to legitimate institutions that are currently weak and lack credibility.<sup>313</sup>

While the positive benefits of trials and retributive justice mechanisms are great, the 1991 Amnesty Law stands in the way of its pursuit in Lebanon. On August 26, 1991, the Lebanese government issued the General Amnesty Law no. 84/91. Amnesty was granted for all crimes committed before March 1991, with a few exceptions.<sup>314</sup> Among the crimes excluded from the general amnesty provisions are crimes against external state security, crimes sent to court before the law came into effect, and crimes of attempted or successful assassination of religious figures, political leaders and or foreign or Arab diplomats.<sup>315</sup>

Abolishing the amnesty law in the interest of pursuing retributive justice is one option Lebanon has on the table. Repealing the law would enable Lebanon to hold all perpetrators of crimes committed from 1975-1991 accountable, creating justice (in the retributive sense) and deterring future perpetrators, as well. However, the costs of repealing the law are too great to warrant it as a recommendation. Repealing the amnesty law would destabilize Lebanon politically, as it would result in the indictment of a significant number of Lebanese politicians. If the bulk of the current parliament is awaiting trial, how can politics function in the present?

Additionally, almost everyone in Lebanon is both a perpetrator and a victim, which would make it rather difficult to determine who to put on trial. As well, the Lebanese judicial system is already overburdened and, simply put, does not have the capacity to try all those who are potentially guilty.<sup>316</sup> Holding perpetrators accountable would backlog the Lebanese courts even further. Fair trials, which are essential for retributive justice, are an expensive endeavour and given the weak state of the Lebanese

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<sup>309</sup>Ibid., 98

<sup>310</sup>Ibid., 98

<sup>311</sup>Ibid., 98

M. C. <sup>312</sup>Bassiouni, "Searching for Peace and Achieving Justice: The Need for Accountability," *Law and Contemporary Problems*, 59(1996): 13

<sup>313</sup>P. Akhavan, "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?" *The American Journal of International Law*, 95(2001): 29

<sup>314</sup> Amnesty International, *Lebanon: Human Rights Developments and Violations*, 7

<sup>315</sup>Ibid

<sup>316</sup>Chibli Mallat, "The Lebanese Legal System," in The Lebanon Report No. 2

<http://www.mallat.com/articles/T/The%20Lebanese%20Legal%20System.pdf> (Accessed April 14, 2010)

economy, it would be hard to justify the necessary financial investment for holding all perpetrators from the civil war accountable in court. In addition, repealing the amnesty law would send a contradictory message to Lebanese society at large that would discredit and breed further distrust for the state apparatuses that passed the law.

Holding individuals accountable for crimes committed during the civil war period through mechanisms of retributive justice, in the case of Lebanon is more risky, than beneficial. Thus, the amnesty law can somewhat cynically be regarded as a blessing in disguise. Nevertheless, retributive justice and the many benefits it has to offer are still relevant to Lebanon in the context of the broader picture of sectarian violence because since the civil war, violence still remains a part of Lebanon's reality.

The assassination of former Prime Minister Rafiq Hariri is probably the most commonly known case of post-Ta'if violence. In line with the theory of retributive justice, the Special Tribunal for Lebanon (STL) has been established to investigate the attack of February 14, 2005, which killed former Prime Minister Hariri and other attacks in Lebanon that occurred between October 1, 2004 and December 12, 2005.<sup>317</sup> While the existence of such a tribunal can be regarded as positive because on the surface it casts the image of accountability, there are a number of issues with this tribunal that serve to undermine the traditional benefits of retributive justice and further reinforce the need for retributive justice at the national level, rather than international level. The tribunal has an incredibly narrow mandate.<sup>318</sup> Therefore, it is unable to deal with the multitude of other crimes committed in Lebanon since the end of the civil war. Also, the tribunal is an ad hoc international body.<sup>319</sup> Once its mandate expires, it will be unable to continue fostering the values of justice and accountability in Lebanon.<sup>320</sup> Furthermore, the tribunal does not have jurisdiction over international crimes – the nature of the crimes being continuously committed in Lebanon – but over terrorism.<sup>321</sup> While a tribunal to address crimes of terrorism is important for the progress of international law, it does not deal with the issues of sectarian division and violence in Lebanon and therefore, is not contributing to the transitional justice effort in Lebanon.

Lebanon, instead, needs to restore legitimacy, transparency and credibility to its national judicial system by using the domestic courts to address crimes of sectarian violence after 1991. In doing so, it can begin to reinforce the values of accountability and acknowledgement, but more importantly punish current perpetrators of sectarian violence and deter such activities in the future. As seen thus far, the pursuit of retributive justice is limited in the Lebanese case and thus highlights the importance of pursuing justice through alternative means.

### **Restorative Justice**

The area of restorative justice and its broader understanding of justice can be incredibly useful in the Lebanese effort to transition. Restorative measures can help to overcome some of the limitations challenging retributive justice in regards to the civil war years, as well as help Lebanon to break the cycle of violence. Also, if done tactfully,

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<sup>317</sup>International Center for Transitional Justice, *Handbook on the Special Tribunal for Lebanon*, NGO, International Center for Transitional Justice, Prosecutions Program, (New York: International Center for Transitional Justice, 2008), 10

<sup>318</sup> *Ibid.*, 9-12

<sup>319</sup> *Ibid.*, 9

<sup>320</sup> *Ibid.*, 10-11

<sup>321</sup> *Ibid.*, 10

mechanisms of restorative justice can help to create accountability for the civil war years, fulfil the desire of Lebanese civil society to address the civil war period, facilitate Lebanon in its effort to craft an inclusive national narrative and foster intergroup cooperation, tolerance and harmony – all things that will be essential for a peaceful, stable, and cooperative Lebanon in the future.

In his role in the South African Truth and Reconciliation Commission Archbishop Desmond Tutu has helped to redefine our understanding of justice. Rather than seeing it as purely retributive and often punitive, restorative justice, understands forgiveness, truth and reconciliation to be a rather significant part of how one can understand and pursue justice. Joanna Quinn defines restorative justice as, “a process of active participation in which the wider community deliberates over past crimes, giving centre stage to both victim and perpetrator in a process, which seeks to bestow dignity and empowerment upon victims, with special emphasis placed on external factors.”<sup>322</sup> The most significant distinguishing factor between retributive and restorative justice is that punishment and revenge are largely absent from considerations of restorative justice considerations.<sup>323</sup> It is the non-punitive nature of restorative justice that enables it to speak directly to the Lebanese case and they key factor that will allow Lebanon to sidestep the amnesty law and confront the past without destabilizing society. In addition, restorative justice aims to reconcile society by emphasizing the importance of acknowledging the past so society can move forward. Confronting the past is controversial because it has the potential to inflame old and hostile emotion that may have dissipated over time. Remembering often involves revisiting old emotions of anger and could potentially be destabilizing in Lebanon. However, facing history is necessary for a society to reconcile and embrace the future.<sup>324</sup> As Martha Minow asserts, “to seek a path between vengeance and forgiveness is also to seek a route between too much memory and too much forgetting.”<sup>325</sup> Therefore, Lebanon will need to be strategic in its efforts to confront the past. Balancing the need to remember so society at large can move on, without falling into the trap of too much remembering will be fundamental.

Facing the civil war period can help Lebanon in its efforts to create a common identity and an inclusive national narrative that not only represents Lebanese diversity but accounts for the civil war years. This will be important for the development of the Lebanese history curriculum. In finally settling on a historical narrative that accounts for the civil war, restorative justice will be contributing to setting a solid foundation for tolerance and cooperation in the future, which are all part of the restorative understanding of justice.

While the amnesty law made exploring the crimes committed during the civil war through trials impossible, the broadcasting law of 1994 also challenged public discourse about the conflict. On the one hand, the 1994 broadcasting law can be regarded as a proactive effort to overcome sectarianism, as the law forbids the use of content that seeks to inflame or incite sectarian or religious chauvinism.<sup>326</sup> However, in actuality, the law indirectly created a culture of self censorship in Lebanon where people refrain from discussing and dealing with the civil war period.<sup>327</sup> Both the 1991 Amnesty Law and

<sup>322</sup> Quinn, “Are Truth Commissions Useful in Promoting Restorative Justice?” 3

<sup>323</sup> *Ibid.*, 3

<sup>324</sup> *Ibid.*

<sup>325</sup> Martha Minow, *Between Vengeance and Forgiveness*, 118

<sup>326</sup> Haugbolle, “Public and Private Memory of the Lebanese Civil War,” 193

<sup>327</sup> *Ibid.*, 193

broadcasting law of 1994 are supporting the state sponsored amnesia of the civil war period<sup>328</sup> and as a result, stifling national recovery and reconciliation in the post war period.

In essence what these two laws have done is force the Lebanese people to forget. They force the Lebanese to forget the long inherited legacies of intergroup intolerance, mistrust and violence.<sup>329</sup> Societies cannot simply forget and move on. To move forward, the balance between forgetting and remembering must be found.<sup>330</sup> Despite direct and indirect efforts of the state to keep a lid on the events that transpired during the civil war, the daily reminders make such a task nearly impossible. The streets of Beirut are littered with reminders of the horrors that took place two decades ago.<sup>331</sup> In addition, civil society is demonstrating a strong desire to confront their past – also reason to warrant confronting the civil war.

Oren Barak has identified four subdivisions of civil society – academics, journalists, writers/poets/filmmakers/photographers and private organizations – that have begun the process of engaging with the civil war years in different ways.<sup>332</sup> Academics have demonstrated this desire engage through writing on the period. In particular, there is a vast literature on collective memory from the civil war years. Journalists have attempted to use media outlets to engage with the period, while writers, poets, filmmaker and photographers have used their respective avenues to address the past. Despite official efforts to suppress discussion of the civil war, there are a number of films that have been produced in the last few years that speak, albeit subtly, to the period and deal with issues of responsibility and accountability.<sup>333</sup> Finally private organizations have taken on a more assertive role in challenging the “state sponsored amnesia.” For example, “Memory of the Future” is a civil society group that actively works to stimulate discussion and thus deal with the civil war years. In 2005, they launched a number of competitions, such as their national monument contest<sup>334</sup> geared towards stimulating discussion of the civil war and facilitating the daunting task of moving on. These grassroots initiatives should be taken as a serious sign that Lebanese civil society is not only ready to address the past but they want to, as well. This section has explored the theoretical benefits of facing the past – a cornerstone of restorative justice – and the domestic desire to do so. As a result, the only remaining question for this discussion on restorative justice in Lebanon is in what shape should it take?

### *Restorative Justice: Some Options on the Table*

#### Truth Commission

Truth Commissions are probably the mechanism most commonly associated with restorative justice. Truth commissions, as the name suggests involves coming forward before a commission to share the truth about the past and is a process necessary to engage

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<sup>328</sup> Ibid., 197

<sup>329</sup> Alexandra Asseily, “Breaking the Cycle of Violence in Lebanon and Beyond,” in *Breaking the Cycle: Civil Wars in Lebanon*, ed. Youssef Choueiri (London: Stacey International, 2007)

<sup>330</sup> Hovil and Quinn, *Peace First, Justice Later: Traditional Justice in Northern Uganda*, 9

<sup>331</sup> Haugbolle, “Public and Private Memory of the Lebanese Civil War,” 200

<sup>332</sup> Barak, “Don’t Mention the War? The Politics of Remembrance and Forgetfulness in Postwar Lebanon,” 54-55

<sup>333</sup> Ibid., 61

<sup>334</sup> Ibid., 68

in to move forward.<sup>335</sup> Although almost always an official body, truth commissions can take a number of forms. The South African Truth and Reconciliation Commission (TRC) is most famous, however, it must be noted that it differs from the numerous other truth commissions that have been established. The South African TRC was unique in that it had the power to grant individualized amnesty.<sup>336</sup> It also has search and seizure, subpoena and witness-protection powers connecting it intimately with retributive justice efforts that were in simultaneous operation.<sup>337</sup> One of the benefits of the South African model is it provided incentives for perpetrators to come forward on their own initiative. With the prospect of amnesty, individuals were inclined to come before the TRC and offer their truth. The commission established in Chile between 1990 and 1991 was different in that it was constrained by a blanket amnesty provisions.<sup>338</sup> Nevertheless, it was able to help Chile in its reconciliation efforts because it acted as a forum for truth telling. It compiled a list of victim and acknowledged the suffering of the Chilean people under the Pinochet dictatorship.<sup>339</sup>

There is much utility in truth telling to a society in transition and thus a number of positive benefits that Truth commissions have to offer. As mentioned earlier, confronting the past is necessary for moving forward.<sup>340</sup> Discovering what transpired during the civil war can be fundamental to creating accountability and responsibility. As well, collecting evidence of human rights abuses is important for combating impunity and creating an official record in the Lebanese case. Furthermore, such processes can identify patterns in society so preventative policies can be developed.<sup>341</sup> In the case of Lebanon, patterns surrounding the cycles of violence can be identified from truth telling and solutions based on empirical evidence, rather than speculative theory can be found. The process of truth telling is also therapeutic and serves to empower victims. In sharing their stories in a legitimate forum where they can receive official acknowledgement for their experiences, those who come forward become survivors instead of victims.<sup>342</sup> This can also facilitate personal forgiveness among individual Lebanese civilians for the wrongs that were perpetrated against them during the civil war years.

Despite the many benefits of truth telling in the form of a truth commission, there are a number of risks that must be acknowledged. By engaging in truth telling, truth commissions expose victims to the possibility of re-traumatization by forcing them to relive their experiences.<sup>343</sup> Also, evidence collected through a truth commission can be manipulated and used for corrupt purposes, such as political blackmail.<sup>344</sup> In addition, false documents that look authentic can be brought forward enabling the creation of a false truth.<sup>345</sup> This would be particularly devastating to the effort to create a truthful, inclusive historical narrative that would be taught in Lebanese schools. Although, the above mentioned concerns are legitimate, especially in a transitioning society, rigorous methodology, transparency and objectivity in the process of documenting truth can help

<sup>335</sup> Louis Bickford, Patricia Karam, Hassan Mneimneh, and Patrick Pierce, *Documenting Truth*, NGO, International Center for Transitional Justice, (New York: International Center for Transitional Justice, 2009), 4-6

<sup>336</sup> Quinn, "Are Truth Commissions Useful in Promoting Restorative Justice?" 5

<sup>337</sup> Ibid., 5

<sup>338</sup> Ibid., 6

<sup>339</sup> Ibid., 6

<sup>340</sup> Minow, *Between Vengeance and Forgiveness*, 118

<sup>341</sup> Bickford, *Documenting Truth*, 18

<sup>342</sup> Ibid., 25

<sup>343</sup> Ibid., 18

<sup>344</sup> Ibid., 15

<sup>345</sup> Ibid., 15

avoid political black mail, and false truths.<sup>346</sup> With that being said, truth telling in the Lebanese case could be a very dangerous endeavour as it could further polarize and divide Lebanon because Lebanon's history, as Lebanese understand it, cannot be reconciled.<sup>347</sup> Haugbolle points out a perceived Gordian knot that exists in many circles, "Forgetting the war might make it repeat itself at some point, but remembering it will most likely make it happen again right away."<sup>348</sup> These concerns must be taken into account and balanced with the popular desire to confront the civil war.

While a truth commission can offer many advantages to the Lebanese transitional justice project, it must be recognized that it is a very risky endeavour and of all the restorative options proposed would likely be the most explosive. Therefore, this report will not recommend the establishment of a truth commission. Instead, another mechanism, one that is able to harness the benefits of a truth commission, yet control some of the more risky aspects of it will be proposed. The creation of a national narrative commission, mandated with the specific task of creating a national narrative that is able to account for the civil war years is an alternative where the benefits of truth telling can be rechanneled without necessarily breaking the fragile peace in Lebanon.

### National Narrative Commission

As already noted, there is a serious need and desire within Lebanon to confront the past and reconcile the events of the civil war. The gap between private memory and public discourse desperately needs to be filled – something that a national narrative can do.<sup>349</sup> Also, a national narrative that fairly includes and confronts the civil war will be essential for the future of Lebanese society. Studies have demonstrated that there is a link between social cohesion, identity, nation building and education.<sup>350</sup> Currently the history of the civil war is not taught in Lebanese schools<sup>351</sup> – another reform of Ta'if that failed to materialize. Ta'if called for educational reforms that would see the development of new curricula for history and civics textbooks. In the post war era the texts would be published by the Educational Centre for Research and Development and developed by "Plan for Educational Reform," a government body that was established in 1994.<sup>352</sup> The new curriculum to be offered would be one that not only would be able to account for the civil war period, but one that would be inclusive and therefore instrumental in the reconciliation project of Lebanon. Instead of going to learn about the civil war from the different and often conflicting private memories of family members at home,<sup>353</sup> the next generation of Lebanese children would be able to learn a single national narrative in school, thus unifying the population and reducing levels of divisiveness. Having students learn about the civil war years at home alone is problematic because it could serve to unintentionally entice sectarian divisions and intolerance in the next generation and thus must be dealt with. How can Lebanese history, let alone tolerance, be fostered in the next generation if a collective memory and historical narrative does not exist?

<sup>346</sup> Ibid., 16

<sup>347</sup> Barak, "'Don't Mention the War?': The Politics of Remembrance and Forgetfulness in Postwar Lebanon," 62

<sup>348</sup> Haugbolle, "Public and Private Memory of the Lebanese Civil War," 197

<sup>349</sup> Ibid., 14-15

<sup>350</sup> Nemer, Frayha, "Education and Social Cohesion in Lebanon," *Prospects* 33, no. 1 (March 2003), 77

<sup>351</sup> Natalia Antelava, "History Lessons Stymied in Lebanon," *BBC News*, April 8, 2009. [http://news.bbc.co.uk/go/pr/fr/-/2/hi/middle\\_east/7988399.stm](http://news.bbc.co.uk/go/pr/fr/-/2/hi/middle_east/7988399.stm).

<sup>352</sup> Nemer Frayha "Education and Social Cohesion in Lebanon," 84

<sup>353</sup> Natalia Antelava, "History Lessons Stymied in Lebanon"

In an effort to respond to this question, the establishment of a National Narrative Commission will be recommended. This commission will be able to continue the work that the “Plans for Education Reform” has yet to complete. Like a truth commission, it will be a travelling body that will hear testimonies from the public. However, its mandate will necessarily be very narrow. It should be specifically tasked with bridging the gap between private and public memory of the civil war years and it will only collect information that speaks to its mandate. As a result, the information collected will not be used for purposes other than creating an inclusive national narrative that can then be incorporated into the history curriculum in Lebanese schools. In collecting the private memories of Lebanon the National Narrative Commission can also serve to promote a common responsibility for the civil war years by revealing that everyone is a perpetrator and a victim.

The National Narrative Commission, to prove effective, legitimate, and as widely representative of the different private memories across Lebanon as possible, will need to actively encourage the widespread participation of the Lebanese public. The desire of people to confront the civil war period, while strong and certainly necessary is not sufficient. An intensive outreach campaign educating people about the nature of the National Narrative Commission and the impact their voice can have in the greater project of crafting a national narrative and inclusive national identity will be essential.<sup>354</sup>

Given the current level of distrust for official state apparatuses, it would be advisable for the commission, if established, to be an independent body composed of both communal leaders, as well as an unaffiliated international non-governmental organization (NGO) that has experience in documenting truth.<sup>355</sup> Despite the limited role for the state in the National Narrative Commission’s earlier phase, the state will still play a very important role in the project. After the private memories are collected, the state, together with the commission itself, will mould a public memory out of the private ones collected. In addition, the state will need to play a role in ensuring that this public memory enters into the curriculum of both the public and private school system throughout the country.

Although a meticulously planned National Narrative Commission staffed with a highly professional and representative body that holds an incredibly narrow mandate, ensures the widespread participation of the Lebanese public and establishes counter measures for all the different risks associated with a traditional truth commission can hold a lot of advantages; the National Narrative Commission, if established will not only be ambitious, but it will also be controversial. Despite the narrow mandate, the commission would be limited by, even the strictest provisions cannot control the content people will reveal when they come forward. To filter or censor the private memories of those coming forward in the interest of avoiding controversy and conflict, would be undemocratic and compromise the transparency of the commission and thus, the overall credibility of the project. However, like a traditional truth commission, this commission also runs the risk of being somewhat of a Pandora’s Box, unleashing unintended and possibly terrible consequences as a result of its activities. Finding that balance between allowing individuals to express freely and controlling the content brought before the commission so that only relevant stories are heard, in reality is almost impossible.

<sup>354</sup> Antonio Cassese, "Special Tribunal for Lebanon: Annual Report (2009-2010)," Legal, 2010

<sup>355</sup> Kirsten McConnachie, *Truth Commissions and NGOs: The Essential Relationship*, NGO, International Center for Transitional Justice, (International Center for Transitional Justice, 2004)

Aside from controlling the particularities of what is revealed and the impact that it can have on the tenuous stability that currently exists, the notion of constructing a national narrative is inherently controversial. While constructivists may see most of the world as a constructed reality and relate quite well to this idea, it is unlikely that this idea will be palatable to the public at large. The notion of a constructed identity, without the academic literature standing behind this claim and explaining it creates the image of an artificial reality and thus can exude a negative connotation. As a result, the public, whether they hold primordialist understandings of their identity or constructivist ones, will likely find the notion of a national narrative being constructed rather hard to swallow. Furthermore, how the National Narrative Commission would actually create a narrative that is acceptable and legitimate to all the different groups in Lebanon is a question that remains to be answered. Moreover, how the various conflicting private memories are to be melded into a single and cohesive public memory, without a level of reconciliation at the societal level is a challenge that will also need to be overcome.

Despite the ambitiousness and controversy inherent in the aforementioned project, Lebanon nonetheless needs an inclusive national narrative that can account for the civil war years. In that the Plan for Educational Reform has yet to succeed in its mission, perhaps there is the possibility that Nation Narrative Commission could be useful in fulfilling its task. However, given the ambitiousness and many challenges in the face of the proposed commission, perhaps it would be best to see this option materialize in the near or distant future, after the other reforms proposed in this report have taken root. Deconfessionalization at the political level would produce a level of cooperation that would make the aforementioned project not only more manageable, but more palatable. Furthermore, with the potential that this project has to spiral out of the control, there is the possibility that this commission could jeopardize the other reform efforts proposed in this report. Thus, it will be recommended that if this option is pursued, it should be pursued in the long term.

### *Civil War Workshops*

Another option that falls within the framework of restorative justice is what will be called, “Civil War Workshops.” Instead of producing a historical narrative that accounts for the civil war years, these workshops will instead be tasked with teaching a unit on the civil war experience in Lebanese schools does not espouse a single or “correct” narrative. Rather, through a dialogue between the instructors that illustrating the varying war time experiences, will be presented. The workshops, will include instructors from the major sects and ultimately, through a dialogue between these individuals, illustrate to the next generation of Lebanese, both a sense of common suffering and common responsibility for the events that transpired during the civil war. Also, present in the workshops will be a message that teaches Lebanese youth that a future of cooperation, tolerance and peaceful coexistence is in their hands. The civil war workshops can be regarded as a good option for a number of reasons. These workshops are less ambitious in that they are not mandated with the enormous task of constructing a national narrative and less controversial because they will not require any vast conclusions to be made about controversial issues, such as the causes and responsibility of the civil war. Also, these workshops can be introduced in the short term, without



necessarily interfering with the other reforms proposed. This option is also beneficial because it will encourage engagement with different confessions (as the team of instructors will necessarily be diverse), as well as cross generational engagement and learning.

While this option would be easier to carry out on the ground, in that it will be considerably less expensive than a truth commission or National Narrative Commission and it will enable Lebanese society to fulfil its desire to confront the civil war years, it is limited in that, to a certain extent it avoids engaging directly with issues that are most controversial. Therefore, there may be the perception that these workshops are not working to create a true sense of justice for the past. Furthermore, similar to the next option that will be proposed, these workshops tend to stray away from the field of transitional justice and borrow from the field of conflict management. This can be regarded by some as somewhat problematic, as the intended focus of this chapter is on transitional justice. However, it should instead be taken as an indicator that the nature of conflict, in reality does not fit neatly into the different categories that academia creates. Rather, conflict is inherently interdisciplinary and thus creative and effective proposals should be interdisciplinary, as well. Like the case of Lebanon, many post conflict societies, even after explicit fighting has stopped, need to manage conflict at the social level – something that the literature on transitional justice fails to provide for. In order to fill this void, the next option that will be proposed will also be drawn from the conflict management literature.

### *Inter-Confessional Group Exercises*

The introduction of intergroup exercises falls within the theoretical realm of a neo-functionalist approach to conflict management. This option, unlike the others presented is predominantly forward looking, and thus, it will be recommended that it should be implemented alongside an initiative that is also retrospective. This option will necessarily be a grassroots project with the objective of involving individuals from different groups in a cooperative setting. When it is realized among the participants that cooperation can be achieved in this setting, the hope is that there will be a “spill-over” effect into the other more contentious areas of life. There are many different creative and exciting initiatives that have been tried in the context of the Israeli-Palestinian conflict and may be worthwhile replicating in the Lebanese context. For example, the Arab-Jewish Community Centre in Jaffa, that caters simultaneously to Jewish, Muslim and Christians living in the diverse Ajami neighbourhood provides its community with different non controversial and apolitical projects, activities, events, and experiences.<sup>356</sup> In working together, the hope of the centre is that the different groups will learn about each other and become more trusting and tolerant, enabling these sentiments to foster cooperation in other spheres of life.<sup>357</sup> Among their many initiatives is the Voices for Peace choir, which is comprised of children from the different groups the community centre is home to.<sup>358</sup> A nice feature of initiatives like this is that cooperation and

<sup>356</sup>The Arab-Jewish Community Center. Inter-Agency Task Force on Israeli Arab Issues. [http://www.iataskforce.org/afi\\_ajcc](http://www.iataskforce.org/afi_ajcc) (accessed April 20, 2010)

<sup>357</sup>The Arab-Jewish Community Center. Inter-Agency Task Force on Israeli Arab Issues. <http://www.iataskforce.org/iatf/mission> (accessed April 20, 2010)

<sup>358</sup> [http://www.iataskforce.org/afi\\_ajcc](http://www.iataskforce.org/afi_ajcc) (accessed April 20, 2010)

tolerance education takes place in the community itself where political compromises, will need to materialize in the future.

Another interesting, yet somewhat different project is the Seeds of Peace summer camp. The philosophy underlying the camp stems from Gordon Allport's contact hypothesis, which asserts that personal contact among individuals can serve to reduce hostilities and conflict and promote tolerance, understanding and cooperation.<sup>359</sup> The camp was established in 1993 with the objective of bringing Israeli and Palestinian youth together to live in a non-hostile, de-politicized environment.<sup>360</sup> At this overnight camp, which is located in Maine, youth from different sides of the conflict live together in cabins, eat meals together, play sports and also receive conflict management, tolerance and leadership training.<sup>361</sup> Since 1993, the camp has expanded its mandate and now hosts youth from conflict areas around the world, including the Balkans and South-East Asia.<sup>362</sup> One of the benefits of this initiative is that the participants are removed from the context of the conflict and thus reconciliation, cooperation and tolerance are theoretically easier to foster. However, a major challenge that this initiative is forced to confront is the translations of the success achieved in the camp context to the conflict ridden context the participants return home to. Nevertheless, the possibility of a Lebanese contingent in the near future might be a worthwhile endeavour, as it could help to foster tolerance, reconciliation and conflict management skills that would contribute to breaking the cycle of sectarian violence in the country and also, perhaps, facilitate political deconfessionalism.

These two initiatives are some of the many new and innovative approaches that are being experimented with in conflict ridden societies. While they seem to be effective among those who participate, further research still needs to be done in order to better understand how to successfully translate the values these programs breed to the broader society and thus, whether they are a worthwhile investment. With that being said, there is currently a lot of optimism surrounding the potential for these initiatives.

### Alternative Transitional Justice

Alternatively, another mechanism of restorative justice worth pursuing further research on and possibly implementing in Lebanon is that of traditional or alternative mechanisms of restorative justice. These mechanisms are considered alternative because they involve the use of local and traditional mechanisms of conflict resolution to facilitate transition and bring about justice. Joanna Quinn has conducted rather extensive field research in Northern Uganda. In her work, she has found that the Acholi people of the north have a conflict resolution tradition called *mato oput* (drinking a bitter herb), which is perceived as more legitimate and thus, more effective than other transitional justice mechanisms.<sup>363</sup>

Another example of alternative justice is that of the *gacaca* courts that have been widely used throughout post-genocide Rwanda. These courts are a pre-colonial court system that has been adapted to meet post-genocide transitional justice needs in the

<sup>359</sup>Daniel A. Powers and Christopher G. Ellison, "Interracial Contact and Black Racial Attitudes: The Contact Hypothesis and Selectivity Bias," *Social Forces* 74 (1995): 205.

<sup>360</sup>Seeds of Peace. <http://www.seedsofpeace.org/about> (accessed April 20, 2010)

<sup>361</sup>Ibid

<sup>362</sup>Ibid

<sup>363</sup>Hovil and Quinn, *Peace First, Justice Later: Traditional Justice in Northern Uganda*, 26

country.<sup>364</sup> The *gacaca* courts have been instrumental in helping Rwanda to deal with the incapacity of the local court system to hold all the accused current in prison accountable and restore justice after the genocide.<sup>365</sup> The *gacaca* example of alternative justice speaks more strongly to the Lebanese case than the other example of alternative justice offered because it is more similar to western conceptions of justice, yet culturally distinct, which will likely be the case in Lebanon if further research is conducted to find a relevant form of alternative justice. Practices vary between societies, therefore it is very important to conduct the necessary empirical research in Lebanon and not to universally apply models that prove effective in one context, as it may be futile, or even destructive, in Lebanon.<sup>366</sup>

As noted above, for the shape of such alternative mechanisms of restorative justice to be found, there is a need for empirical research, which has yet to be conducted. However, investigating this option further would certainly be worthwhile for transitional justice efforts in Lebanon because it could be regarded as more legitimate than other processes and it could have a greater capacity to create justice with fewer resources and a shorter amount of time than some of the other options proposed.

### Reparative Justice

The final category, reparative justice is primarily concerned with restitution. This concept of justice sees providing both material and moral reparations in the aftermath of conflict as necessary for restoring justice in society.<sup>367</sup> Material reparations imply monetary compensation. The most widely cited reparations program is the post-Holocaust German reparations program, which provided monetary compensation to both individual victims of the Holocaust and the state of Israel.<sup>368</sup> The advantage of reparative justice is that it is both forward and backward looking.<sup>369</sup> The monetary compensation serves to acknowledge wrongs committed in the past, while simultaneously providing means for material rebuilding in the future. Moral reparations, on the other hand, often take the shape of an official apology.<sup>370</sup> One example of this is Australia's "National Sorry Day" where the country officially apologizes to the indigenous populations for the wrongs perpetrated against them in the past.

While reparative justice certainly holds value, there is not a strong enough demand for it in Lebanon. Furthermore, as already discussed, almost everyone in Lebanon can be regarded as both victim and perpetrator, making it too expensive and too great a challenge to determine who is eligible to claim reparations. As well, the distribution of compensation to individuals that some perceive as undeserving could see to the renewal of violence in Lebanon.

One reparative option that could overcome some of the aforementioned concerns is the notion of collective reparations. Collective reparations provide reparations to

<sup>364</sup> Charles Mironko and Ephrem Rurangwa, "Post-Genocide Justice and Security Reforms," in *Constructing Justice and Security After War*, ed. Charles Call (Washington DC: United State Institute for Peace, 2007), 204-206

<sup>365</sup> *Ibid.*, 193

<sup>366</sup> Quinn, *Are Truth Commissions Useful in Promoting Restorative Justice?* 3

<sup>367</sup> Naomi Roht-Arriaza, "Reparations in the Aftermath of Repression and Mass Violence," in *My Neighbour, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, eds. Eric Stover and Harvey M. Weinstein (Cambridge: Cambridge University Press, 2004) 121-139

<sup>368</sup> *Ibid.*, 124

<sup>369</sup> *Ibid.*, 122

<sup>370</sup> Kathleen A. Gill, "The Moral Functions of an Apology," in *Injustice and Rectification*, ed. Rodney Roberts (New York: Lang, 2002)

communities at large and are often funnelled into community development projects.<sup>371</sup> While this can help with post conflict rebuilding, this mechanism of justice is criticised because community development projects theoretically should fall within the responsibility of a state. Thus, when reparative funds are channelled into community development projects their reparative value can be said to be diluted. To compound this issue, people who were not necessarily victims end up benefiting from the reparations.

Moral reparations could be provided in Lebanon in the form of an official apology from parliament. However, this would be inappropriate because the sectarian violence that was perpetrated during the civil war and the broader picture of Lebanese sectarian violence is not state sanctioned, nor was it state sponsored. Therefore, an apology would, in effect, be the government apologizing for crimes that it did not directly commit and as a result, it would hold very little value.

### Conclusion

Diversity can incite intolerance, divisiveness and violence, as it has been in the case of Lebanon. However, diversity does not necessarily need to be negative; alternatively, it can inspire tolerance, social cohesion and harmony. For these values to take root in a diverse society, intergroup trust and equality must be encouraged and fostered. Evident by the discussion in this chapter, this is no easy task. However, the different transitional justice tools offer means to facilitate this process of trust building, tolerance, cooperation and reconciliation. Transitional justice does not offer, “one size fits all” remedies. Mechanisms that are effective in certain contexts could prove disastrous in another. Therefore, the transitional justice options pursued in a given post-conflict society must speak directly to the specific context it will be operating in, in order to maintain that fine balance between peace and justice. With that in mind and the understanding that the options presented in this chapter are neither exhaustive, nor absolute, this chapter recommends that the transitional justice project in Lebanon works towards tolerance and intergroup understanding through initiatives like the civil war workshops and/or inter-confessional cooperative exercises, in the short term and save some of the more ambitious initiatives, such as the National Narrative Commission for the long term (if at all). This report also recommends holding perpetrators of sectarian violence accountable in domestic Lebanese courts in order to reinforce a culture of accountability and deter similar acts in the future.

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<sup>371</sup> Naomi Roht-Arriaza, "Reparations in the Aftermath of Repression and Mass Violence," 127-128

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