

The Separation of Powers as a Unifying Factor of the Nation

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Abstract

When we reflect on the separation of powers in the state, even along with the check and balance component, we mainly find the justification for the existence of this principle in preventing the arbitrariness of power. Thus, the monolithic power is fragmented, and between the three emerging powers, there are mechanisms of control that support stopping one power from becoming oppressive. Finally, we can say that the central role of this constitutional principle is to protect individual freedom because it is impossible for an individual to fight against a unitary power that can become oppressive. Of course, this brief explanation is valid wherever we encounter constitutional democracies, but there is at least one political regime where this principle does not stop at this central role, but perhaps even more important than this role is to detension certain sectarian tensions and coagulate the nation. The Lebanese political regime presents unique particularities regarding the separation of powers in the state, also carried out on confessional bases, worthy of a brief but courageous analysis.

Keywords: separation of powers, political regime, religion, nation.

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1. Introduction

Passing through the Western conceptual filter of other "nations" is a hard test for this concept of a nation. In recent research², the three classical conceptions of the nation are criticized for their inadequacy and we believe that this is right. How else could you frame the Lebanese nation, because the three classical conceptions³ do not meet this need, unless we embrace the opinion of the cited author and assume that the binder of the Lebanese nation was rather juridical than other classical elements, such as race, ethnicity, religion, language, or citizenship. Although the Lebanese nation may be bound by elements such as race, ethnicity, language, and now civic affiliation, the religious element has created a cleavage so deep that it almost annihilates the coagulating effect of the other elements. It is possible that the birth factor of the

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² Dan Claudiu Dănișor, *Ce este o națiune din punct de vedere juridic?*, in Mihai Bădescu (coord.), *In Honorem Nicolae Popa: Audi alterum parte*, Hamangiu Publishing House, Bucharest, 2024, pp. 126-161.

³ *Ibid.*

Lebanese nation was the very constitution of 1926⁴, a constitution inherited from the former French colonial power and the coagulating element was the establishment by a political act of a separation of powers in the sui generis state.

Regarding the theory of the separation of powers in the state⁵, we know that two great thinkers laid the foundations of this theory and today we can say that we are still indebted to their reflection on this theory since, in essence, this theory has not undergone major adjustments⁶. In the view of J. Locke, the social contract justified the establishment of control mechanisms between powers in order not to end up in a situation of subjection of the individual to the state⁷. Thus, we can say that J. Locke imagined a rather flexible type of separation based on forms of interaction and control between public powers⁸. The other great thinker to whom we are indebted is Montesquieu and through the development of his theory, he aimed to protect individual freedom in the face of state power⁹. Although these theories present certain differences, Montesquieu's theory representing an improvement of Locke's theory, we can say that both aim to protect the individual from a potentially abusive power, thus protecting against arbitrariness.

Although the theoretical purpose of the separation of powers in the state may not be embraced in practice, very many states in the world have adopted the theory of separation of powers in the state at the constitutional level, whether it is a rigid type of separation or a flexible type of separation. There are cases where the separation of powers in the state is stated expressis verbis, other times it results indirectly from the text of the constitution¹⁰.

The evolution of the theory of the separation of powers in the state among democratic and pluralist states has also highlighted certain causes of the incompatibility of this theory with factual political realities when a political force dominates both the executive and the legislature¹¹. In the case of the Republic of Lebanon, the factual realities are not only political, but confessional.

2. French heritage and the search for a constitutional identity

The secular-religious dialectic cannot be viewed with the same eyes in the case

⁴ Mireille Najm-Checrallah, *The Lebanese Constitution: A Hampered Transition from the Rule of Sects to the Rule of Law*, available at: <https://jcl-mena.org/assets/submissions/issueS01/3.Lebanon.en.pdf>.

⁵ Mihai Bădescu, *Drept constituțional și instituții politice: curs universitar*, 15th ed., Hamangiu Publishing House, Bucharest, 2023, p. 248.

⁶ Dan Claudiu Dănișor, *Drept constituțional și instituții politice. Tratat. Vol. I*, C.H. Beck Publishing House, Bucharest, 2007, p. 390.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid.* p 391.

¹⁰ Georgian Ionuț Stan, „Theocracy - Mysticism and Contemporaneity”, *Perspectives of Law and Public Administration* 13, no. 1 (March 2024), pp.101-106, available at: <https://adjuris.ro/revista/articole/An13nr1/10.%20Ionut%20Stan%20EN.pdf>.

¹¹ Ioan Muraru, Elena Simina Tănăsescu (coord.), *Constituția României: comentariu pe articole*, 3rd edn., C.H. Beck Publishing House, Bucharest, 2022, p.14.

of all political regimes because this dialectic originates in the European space. Thinkers from the Islamic area show some caution in embracing secularism as an immutable value for the constitutional development of a political regime, precisely because the association of this principle with the Western world and implicitly with Christianity is inherent¹². Somehow, the interpenetration of religion with politics within such a political regime appears natural and in opposition to Western values¹³ because, for a long time, these values were imposed on them without the social realities of those geographical areas being taken into account.

It should also be added that religion emerged as a concept closely related to Christianity¹⁴, and it is possible that a strictly Western view of a political regime *sui generis* understands things in a superficial manner.

This brief clarification was necessary before moving on to a brief recent history of the Lebanese state and political regime.

Under the French mandate, the state (not independent until 1943) *le Grand Liban* was created, a state that brought together Muslim populations, Christian-Maronite populations, and non-Maronite Christian populations¹⁵. It should be noted that the part of the Lebanese Muslim population was rather integrated into Syria and the Christian part was not. At that time, the Christian population was the majority within *le Grand Liban*. In France in 1926, a constitution was drafted for the Lebanese state, and this fundamental act of the Lebanese state was not drafted through a real consultation of the Lebanese¹⁶.

Although colonial France encouraged a confessional political structure even before 1943, the Lebanese National Pact, a political agreement between sects and an unwritten document, for the first time expressly mentioned a division of political power on a confessional basis¹⁷. This agreement was necessary because Article 95 of the Lebanese Basic Act of 1926 temporarily required that all denominations be represented in a balanced manner in the administration and in the composition of the Government, exclusively, without prejudice to the state interest¹⁸.

The negotiations on this pact were carried out during the French mandate, the former French colonial power also had a strategic interest, namely that the president, as part of the executive branch, retained the most important constitutional prerogatives and had to be marooned. The Maronite population had developed a certain affinity for the French colonial regime.

It is somehow surprising that a political agreement is the source of a separation

¹² Dawood Ahmed, Muhammad Zubair Abbasi, *Democracy under God: constitutions, Islam and human rights in the Muslim world*, Cambridge University Press, Cambridge, 2023, p. 15.

¹³ *Ibid.*

¹⁴ Vintilă Mihăilescu, *Antropologie: cinci introduceri*, Polirom Publishing House, Iași, 2007, p. 161.

¹⁵ Peter Mansfield, *O istorie a Orientului Mijlociu*, translated by Cornelia Dumitru, Humanitas Publishing House, Bucharest, 2015, p. 216.

¹⁶ *Ibid.*

¹⁷ National Pact, reference available at: <https://www.britannica.com/event/Lebanese-National-Pact-1943>.

¹⁸ Issam Sleiman, *Promoting the Rule of Law in the Arab Countries Project, Report on The State of Parliament in Lebanon*, A.C.R.L.I., available at: https://www.arabruloflaw.org/Files/PDF/Parliament/English/P2/Lebanon_ReportP2S2_En.pdf.

of powers on confessional grounds, but even if the act itself has no legal character and is not formally integrated constitutionally, it received constitutional validation with the 1990 revision. With a lot of legal rigors, we can state that the separation of powers in the state is not formally constituted on confessional bases but is adapted in such a way that, at least in theory, it must respond to the consensus confessional¹⁹.

With the constitutional revision of September 21, 1990, the Lebanese Basic Act received a preamble in which, among other things, the principle of separation of powers in the state is proclaimed, with a component of balance and cooperation between public powers²⁰. The revision of September 21, 1990, was a result of the end of the Lebanese civil war and, in legal terms, a partial transposition of the Taif Agreement²¹. Also, through this revision, part of the constitutional powers of the president were transferred to the prime minister, and we consider this fact also a constitutional legal validation of the Lebanese National Pact of 1943, because the aim was to equilibrate the balance of power within the executive power between the president Maronite and Sunni Muslim Prime Minister.

3. The division of power according to sectarian criteria

The preamble of the Lebanese Constitution proclaims a national desire to abolish the division of power on confessional bases, a desire that must be achieved based on a phased plan.

Until this desire is fulfilled, the Lebanese constitutional reality still knows a division of political power on confessional bases.

As we stated before, the Lebanese fundamental act does not enshrine the sectarian division of state power, at least not explicitly. However, we consider that the Lebanese National Pact (1943) entered the constitutional block, especially through the constitutional review carried out in 1990, which, among other things, sought to equilibrate the balance of forces between the president and the prime minister, and this rebalancing had a foundation to transpose a demographic change that has taken place, namely the growth of the Muslim population.

Until the achievement of the desire to abolish the division of power on confessional bases, article 24 of the Constitution of the Republic of Lebanon, as it has been revised several times, enshrines the following principles regarding the distribution of seats in the Chamber of Deputies: i) equal representation between Christians and Muslims; ii) proportional representation of religious groups; iii) proportional representation of geographical regions.

¹⁹ See Cordelia Koch, *The Separation of Powers in a Fragmented State: The Case of Lebanon in Constitutionalism in Islamic Countries: Between Upheaval and Continuity*, Oxford Academic, New York, 2012, <https://doi.org/10.1093/acprof:osobl/9780199759880.003.0021>.

²⁰ Lebanese Constitution, available at: <https://www.lp.gov.lb/backoffice/uploads/files/Lebanese%20%20Constitution-%20En.pdf>.

²¹ Taif Agreement, signed at Ta'if, Saudi Arabia in September 1989 and approved by Lebanese Parliament on 4 November 1989, available at: https://www.un.int/lebanon/sites/www.un.int/files/Lebanon/the_taif_agreement_english_version_.pdf.

After 98 years of the adoption of the Lebanese Constitution, the essence of Article 95 of the Constitution of the Republic of Lebanon is not altered, although the text of the article has undergone two revisions. After almost a century, we are still in the presence of a transitional phase, specifying an improvement in the principle of the representation of sects in the administration, justice, army, and security forces, imposing the principle of expertise and competence in occupying these positions, to the detriment of sectarian affiliation. The vision was not deep because the same article stipulates that for the posts of the first degree, an equal division between Christians and Muslims is necessary, but without the prior reservation of a post on confessional grounds at the expense of expertise and competence.

But the most important division of power along confessional lines is established by the National Pact of 1943 which, among other things, divides the most important political positions in the state as follows: the president must be a Maronite Catholic, the prime minister a Sunni Muslim, and the head of the National Assembly a Shiite Muslim.

4. An eternal transition?

The constitutional and political situation in the Republic of Lebanon can be attributed to the French heritage, but the confessional manifestation within this space has caused debate and has been claimed to have started long before the French mandate in Lebanon²².

Since 1926, the year of the adoption of the Lebanese constitution, the elimination of the distribution of power on confessional bases has been considered, but the initial differences of vision still exist today. Do not all the populations on the territory of Lebanon feel like part of the Lebanese nation? Is membership of a religious group more relevant to them or has membership of a particular religious group always been used to seize political power? Of course, to these questions, a rather sociological answer is preferable in the first phase and then, depending on this answer, a constitutional answer can follow.

All critical periods in the short history of the Lebanese state led to certain agreements or constitutional revisions, but all the negotiations and consensus could not eliminate once and for all the confessional vision of power distribution.

The last period of political and economic crisis since 2019²³ led to the impossibility of achieving a political consensus between the sectarian groups and from 2022 and until now the most important political position in the state, that of the president, is vacant. Also, many other key posts are currently vacant, also, which accentuates the political crisis and further shakes the Lebanese constitutional identity²⁴.

²² Farid el-Khazen, *The Communal Pact of National Identities – The Making and Politics of the 1943 National Pact*, Centre for Lebanese Studies, Oxford, 1991, available at: <https://lebanesestudies.com/wp-content/uploads/2012/03/8b844d712.-The-Communal-Pact-of-National-Identities-The-Making-and-Politics-of-the-1943-National-Pact-Farid-el-Khazen-1991.pdf>.

²³ See Sonia Martínez Girón, Anna Lorenzini, *Lebanon: a story of crisis upon crisis*, 2024, available at: <https://www.itssverona.it/lebanon-a-story-of-crisis-upon-crisis>.

²⁴ *Ibid*.

At this point, a constitutional revision that removes the constitutional provisions which impose the sectarian view of the separation of state power is unlikely to occur. Of course, some constitutional revisions or even the adoption of a new constitution are preceded by moments of difficult social balance, but in the case of the Republic of Lebanon, this difficult balance concerns even the national identity of the Lebanese, because even in almost a century, belonging to the Lebanese nation has not determined sectarian groups to renounce the sectarian division of power and to realize that always in the case of any population there are things that differentiate them, but above all in these things stands a common and invisible will which alleviates these differences and gives unity to the people.

5. Conclusions

Our short research has revealed a different view of the answer to the principle of the separation of powers in the state, which, if in the classic case it serves as a response to protect individual freedom against the arbitrariness of the state, in the case of the Republic of Lebanon, this principle is also the means of dividing state power on confessional grounds.

Although from the beginning, namely from 1926, with the Lebanese constitutional history, it was desired that the division of state power on confessional grounds would be a transitory situation, here is how, almost a century after that moment, the division of state power is still based on the configuration Lebanese sect.

The purpose of this division of power and implicitly this principle of the separation of powers in the state was supposed to serve the unification of the Lebanese nation and finally to eliminate the distribution of power on a sectarian basis, and in this transition period, this principle still had the role of ensuring the exercise of state power by consensus.

We cannot say that this unique mode of separation of powers in the state has answered its purpose, and perhaps in the future it will answer, and at that time it can be said that it was a successful model.

In any case, the constitutional situation in the Republic of Lebanon is much different from the one we are used to, and the classic concepts of constitutional law do not have the same valences as in the case of the Western space; therefore, an attempt to force social realities through the Western vision is almost useless. The separation of powers in the state is not only classically separated, but in the case of the already separated powers, a fragmentation of power is practiced, this last time to reflect the confessional fragmentation in the Republic of Lebanon and thereby solidify the Lebanese nation.

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