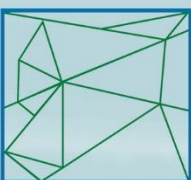


Governance and Judicial Systems in the Syrian Constitution

NED

Syrian Voices for an Inclusive Constitution

سوريون
من أجل
الحقيقة
والعدالة
Syrians
For Truth
& Justice



Syrian Voices for an Inclusive Constitution

Report 4 – Governance and Judicial Systems in the Syrian Constitution

The background of the entire page features a faint, light-colored image of a pair of scales of justice, symbolizing law, equity, and justice. The scales are centered and extend across the width of the page.

Syrian Voices for an Inclusive Constitution

Throughout 2020, Syrians for Truth and Justice (STJ), with the support of the National Endowment for Democracy (NED), organized consultations and documented the perspectives of over 80 Syrian civil society representatives, activists, and civilians in Northeastern and Northwestern Syria on topics related to the constitution-building process in Syria. We chose participants who were not given the opportunity to contribute their thoughts about the new Syrian constitution and gave them the opportunity to discuss issues related to how it should be drafted. Among them, 74.7% believed that the Committee should write a new constitution, and 14.6% believed the current constitution should be amended.

To share the results of our consultations in Syria, STJ is publishing this report as the first of a series of five exploring the following topics:

Report 1: The Formation and Responsibilities of the Syrian Constitutional Committee

Report 2: Inclusivity and Diversity

Report 3: Transitional Justice

Report 4: Governance and Judicial Systems

Report 5: Socio-Ecological Justice and Personal Experiences

Our sixth report summarizes the five published reports, as well as sheds light on the outcomes and notable recommendations which emerged from the project. In this report, we will explore how our participants viewed:

A successful Syrian peace-building process requires mechanisms to bring the conflict to an end as well as mechanisms to ensure the conflict does not recur. Structural reforms written into a new or amended constitution are a vital tool for strengthening governance structures. These reforms include detailing a cohesive policy on the workings and creation of special and exceptional courts¹, ensuring guarantees for an independent judiciary, and eliminating room for impunity in security structures. Outlining fair and neutral governance structures in the constitution can both stabilize a post-war Syria and legitimize the constitution, thereby ensuring that the constitution will be respected as more than merely a declaration of principles.²

During the amendment of the last Syrian constitution in 2012, official structures were neither instituted before nor after the constitution's implementation to incorporate opposing views. In a country already divided by war in 2012, without these official structures in place, a free and fair referendum was impossible. As a result, the 2012 Syrian constitution failed to both address the needs of diverse groups across the country and inspire confidence that the principles included within acted beyond words. As the Syrian Constitutional Committee moves forward to write or amend a new Syrian constitution, official structures outlined in the constitution must be independent, protected, and free from political or power dimensions within the country to ensure that this constitution succeeds in establishing both confidence and stability where its 2012 predecessor failed.³

The following report explores the possible systemic changes that can take place because of the new or amended Syrian constitution by considering the perspective of Syrians from minority communities who feel unheard. They voice their opinions on how they want governance and justice systems structured moving forward, the role religion will play in constitutional and legal systems, and how an independent and impartial judiciary should be organized and governed. Incorporating their insight on governance structures functions as a crucial step in creating a constitution established on the people's consent.

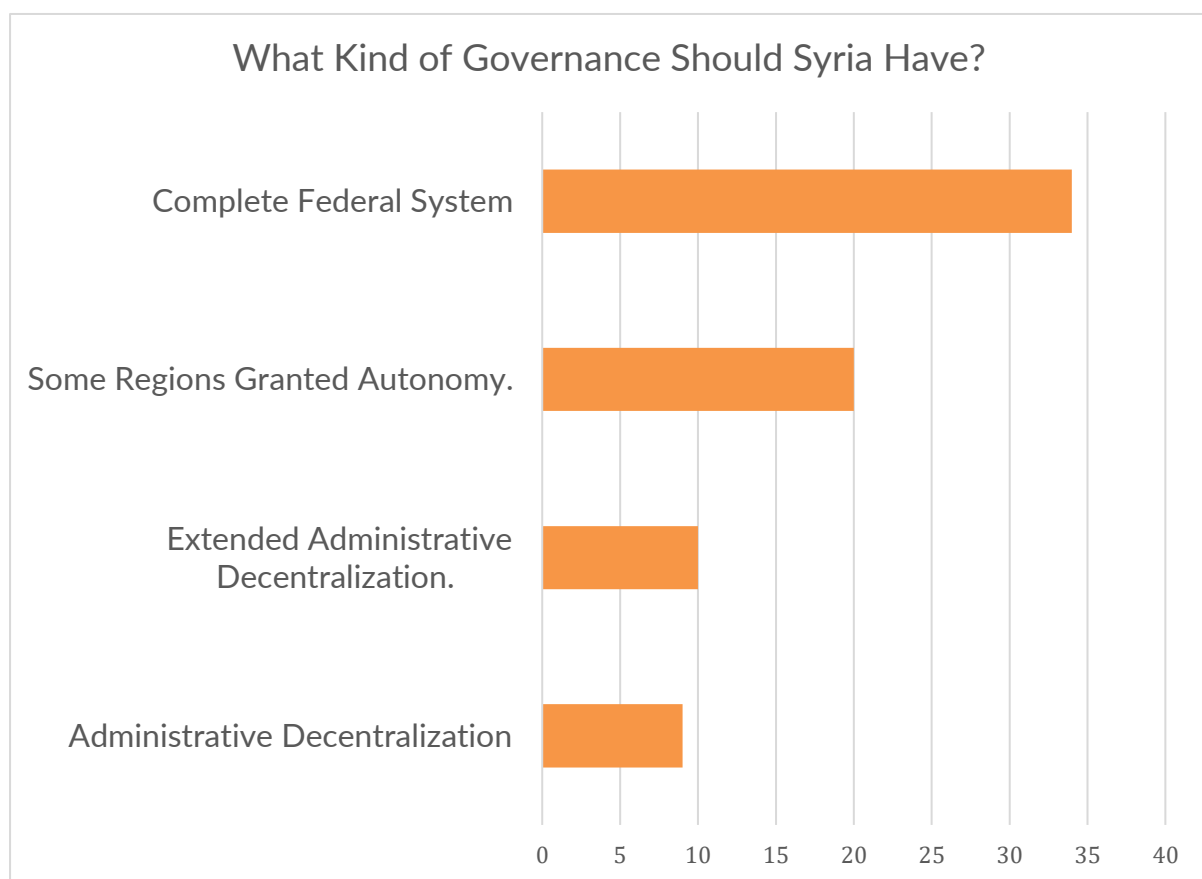
¹ Special courts represent long lasting courts, such as military courts, and the exceptional courts represent temporary ones, such as terrorism courts.

² [Gendered Constitution Building Process for Syria](#), The Coalition of Syrian Women for Democracy (CSWD), 2014

³ I.e. the [Universal Declaration on the Judiciary Independence and the Basic Principles on the Judiciary Independence of the United Nations](#), OHCHR

Governance Systems

During the consultations, we offered our participants a set of different governance systems to choose from. The majority (67.9%) leaned towards a parliamentary system, 9.5% towards a parliamentary-presidential system, and 10.7% towards a presidential system. Throughout the years multiple actors⁴ suggested and discussed a federal system, highlighting a fair and inclusive power distribution among the different regions. The participants were divided on what a possible federal system would look like, of which 40.5% opted for a complete federal system. Only 10.7% of our respondents were in favour of adopting administrative decentralization, whereas the participants to the Day after Project demonstrated the desire for adopting such a political system with 42.4%. The discrepancy between these answers to a possible administrative decentralization might have to do with the different demographics of both respondent groups.



⁴ Which Constitution Does Syria Need?, The Day After, 2018 ; [Constitution building after conflict: External Support to a Sovereign Process](#), IDEA, 2011 ; [Syria's Transition Governance & Constitutional Options, Under U.N. Security Council Resolution 2254](#), The Carter Center, 2016 ; The question of religion in the Syrian Constitutions: historical and comparative review, Turkmani, Rim and Draji, Ibrahim, LSE, 2019

An Independent and Impartial Judiciary

An independent judiciary is crucial for safeguarding the rights of the people and avoiding a culture of impunity. According to international standards, the independence of the judiciary must be guaranteed by the State and included in the constitution or the law of the country. Governmental and non-governmental institutions carry the responsibility of respecting and observing the independence of the judiciary.⁵ Similarly, judges working within the judiciary should be appointed and act independent and impartial.

Legal documents, like the constitution, earn their legitimacy by establishing procedures and rules that allow courts, especially constitutional courts, to withstand political pressure. A failure to explicate and defend the mechanisms of an independent and impartial judiciary results in a judiciary which serves as “a window dressing for rulers who wish to give the appearance of respect for the rule of law without creating real checks on their power.”⁶

The design of a (constitutional) court appointment process must be guided by three principles: widespread participation from different political constituencies; division of the powers to appoint and remove justices; the establishment of qualifications ensuring the selection of independent judges with high legal expertise.⁷

Islamic Law and Religion Under the Constitution

The role religion plays in a constitution, as well as any state representative document or body, remains a divisive issue in both the global and Syrian context. As it stands, the current Syrian constitution is ambiguous in its statement on the role of religion in Syria’s governance. The 2012 constitution states that “Citizens shall be equal before the law and equal in duties and rights, and there shall be no distinction between them on the grounds of sex, origin, language, religion or belief”. This is only the third version of the Syrian constitution (next to 1930 and 1958) that includes this important guarantee of non-discrimination.⁸ However, article 3 of the 2012 Syrian constitution stipulates that “the State shall respect all religions and ensure the freedom to perform all the rituals that do not prejudice public order; The personal status of

⁵[Universal Declaration on the Judiciary Independence and the Basic Principles on the Judiciary Independence of the United Nations](#), OHCHR

⁶ Constitutional Courts after the Arab Spring, Sujit Choudhry, Katherine Glenn Bass, Center for Constitutional Transitions at NYU Law

⁷ *Idem*.

⁸ The question of religion in the Syrian Constitutions: historical and comparative review, Turkmani, Rim and Draji, Ibraim, LSE, 2019

religious communities shall be protected and respected.” While this article professes to protect citizens’ rights to practice their faiths, it also allows for the division of citizens into communities subject to different religious, sectarian and legal systems.⁹ The religious rituals and norms that are protected under this article might be in conflict with other articles if they allow for discrimination and/or exclusion justified by religion.¹⁰ Civil society advocates have criticized the article for justifying a discriminatory personal status law, especially article 306 and 308, and discrimination against Syrian women.¹¹ Hence, this space that is unaccounted for violates the principle of equality and non-discrimination which is itself stipulated in the constitution.¹² Therefore, if religious authorities are seen as the basis for personal status issues, citizens may be -unintentionally- discriminated against on the basis of religion and women potentially deprived of rights determined by contradictory religious interpretations.

The role of Islamic law in deriving legal systems is just as ambiguous. Islamic law was first introduced as part of the Syrian constitution in the 1950’s in an article noting that “Islamic fiqh [traditional scholarly interpretations of Islamic law] shall be the chief source of legislation.”¹³ More recent constitutions, like the existing 2012 constitution, phrase the import of Islamic law to the constitution less definitively: “Islamic jurisprudence shall be a major source of legislation¹⁴”.

In contrast to precedent, only 12% of our respondents believe Islamic law should be a source of legislation and only 9.6% of our respondents think that Islamic law should be the main source of legislation. Instead, 66.3% believe that it is crucial for the constitution to express its neutrality towards religion and affirm the equality of all Syrian citizens regardless of religion. Even though a belief in the state’s religious neutrality aligns with respondents of other groups

⁹ *Idem*.

¹⁰ The practices include mostly the arrangement of relation between men and women, such as marriage rights, child support and marriage dissolutions.

¹¹ The Committee on the Elimination of Discrimination against Women (CEDAW) did so in their concluding observations on the second periodic report on Syria. Committee on the Elimination of Discrimination against Women, Concluding Observations, Second Periodic Report of the Syrian Arab Republic: CEDAW/C/SYR/CO/2 - 24 July 2014 ;

The question of religion in the Syrian Constitutions: historical and comparative review, Turkmani, Rim and Draji, Ibraim, LSE, 2019

¹² [Gendered Constitution Building Process for Syria](#), The Coalition of Syrian Women for Democracy (CSWD), 2014

¹³ Constitution Provisions Making Sharia “A” or “The” Chief Source of Legislation: Where Did They Come From? What Do They Mean? Do They Matter? Clark B. Lombardi, American University International Law Review, 2013

¹⁴ Article 3 Syrian Constitution of 2012 ;

The question of religion in the Syrian Constitutions: historical and comparative review, Turkmani, Rim and Draji, Ibraim, LSE, 2019

like The Day After, our participants' opinions contrast with most participants who consider Islamic law a necessary part of the constitution¹⁵. One possible explanation of this discrepancy may be that many of our respondents are Kurdish, and many other sample groups are Arab.

The President and Executive Powers

One of the most marked critiques of the amended 2012 constitution was its description of the President of Syria, from his personal identity to the executive powers permitted him. The current constitution states that "The religion of the President of the Republic shall be Islam". Critics of the article point to its contradiction with other articles in the constitution which stipulate the fundamental rights of citizens and prohibit discrimination on the basis of religion.¹⁶ In accordance with this article, the religion you identify with, or the one that is portrayed on identity cards, is almost more important than your qualifications when it comes to aspiring a career leading up to presidency. Therefore, such articles do not allow for equal treatment and a structure of manipulation for who can even be considered for presidency is easily created.¹⁷

In addition to being chosen by identity markers, the current constitution provides the President with a control of judicial appointments which entitles him to an almost unchecked power over the judicial branch. According to international guidelines establishing judicial independence and impartiality, the President should not have any major influence over the creation of judicial seats and the appointments of those who fill them. However, both historically and contemporarily in Syria, executive power dominates Constitutional Court appointments, giving the president the power to appoint judges. Recent changes allow for the President to elect all 11 judges of the Constitutional Court. By providing the executive this privilege, current Syrian law curtails the power of an independent and impartial judiciary to check the power of the President.

¹⁵ Which Constitution Does Syria Need?, The Day After, 2018

¹⁶ The question of religion in the Syrian Constitutions: historical and comparative review, Turkmani, Rim and Draji, Ibraim, LSE, 2019 ; [Gender Sensitive Constitutional Principles for Syria](#), The Coalition of Syrian Women for Democracy (CSWD), 2016

¹⁷ The question of religion in the Syrian Constitutions: historical and comparative review, Turkmani, Rim and Draji, Ibraim, LSE, 2019

The Supreme Constitutional Court

The goal of the Supreme Constitutional Court (SCC) is to judge on the constitutionality of national laws or decrees¹⁸. Consequently, if the SCC works in an independent, fair, and impartial manner, it is less likely for discriminative laws to be implemented. This court is therefore an important mechanism for avoiding impunity. However, if the court fails in its purpose, the country fails to hold people accountable for countering the constitution by implementing laws that are often discriminatory, violent, and exclusive in nature. In other words, without an independent and impartial Supreme Constitutional Court upholding the legal precedent of the constitution, the principles, however commendable, outlined within a constitution are void. Consequently, it is both remarkable and regrettable that Syria's Supreme Constitutional Court has issued only a single ruling since 1970. The failure of the Supreme Constitutional Court to fulfill its purpose has undermined its legitimacy, for good reason, among the Syrian people. Recent research shows that few citizens trust the current Supreme Constitutional Court, with critics of the Syrian regime arguing that the Court is under the effective control of the President.

When looking more closely at the amendments to the constitution in 2012 on the SCC, some ensure the independence of the judicial body (article 140¹⁹) and allow for parties before lower courts to submit challenges to the constitutionality of laws (article 147(2)²⁰). Doing so makes the SCC, theoretically, more accessible to the people. At the same time, the independence of the court is called in question by the change of law No.7 in 2014, which gave the president the authority to appoint all eleven judges on the SCC. The current laws in Syria, notably No.7, make an independent SCC impossible and undermine constitutional amendments which may have sought to make the court more accessible, and even answerable, to the people it serves.

34.9% of our participants believe that the articles in the constitution should be adapted to ensure the President of the Republic does not have the full authority of appointing the SCC

¹⁸ Constitutional Courts after the Arab Spring, Sujit Choudhry, Katherine Glenn Bass, Center for Constitutional Transitions at NYU Law

¹⁹ *Article 140 The Supreme Constitutional Court is an independent judicial body based in Damascus.*

²⁰ *Article 147*

2. Considering the claim of the unconstitutionality of a law or a legislative decree and ruling on it takes place as follows:

a. If an opponent making a challenge claimed the unconstitutionality of a legal text applied by the court whose ruling is being challenged, and if the court considering the challenge found that the claim was serious and should be ruled on, it halts the proceedings of the case and refers it to the Supreme Constitutional Court; b. The Supreme Constitutional Court shall rule on the claim within 30 days of being entered in its register.

members and move into a system where only the Supreme Judicial Council has the power. Another significant group of respondents (25.3%), vouch for granting the appointment authority to multiple parties to be agreed upon and the share of each of those parties' names. Interestingly, a significant number of people testified to not knowing a sufficient solution, more than any other question in the survey. Participants' lack of confidence in answering questions regarding the SCC may be understandable given the Court's silence since 1970 -- for decades, the SCC has been inaccessible to most Syrians and therefore, understandably, deemed irrelevant in day-to-day life. The complicated legal issues which arise in discussions about the SCC, furthermore, may leave discussion of the Court to those within governmental and legal professions. However, as discussed earlier, the SCC plays a vital role in legitimizing the constitution and maintaining its principles. Consultations and public outreach policies will be vital in educating the Syrian people on the SCC and why they should care about the Court. The people's understanding of the Court and advocacy for it will be crucial in achieving fair representation, independence, and impartiality in the SCC.

Extraordinary Courts

Extraordinary courts, set up without clear conditions and regulations, have the power to make decisions with impunity, often negating principles of human rights, equality, and justice. In Syria, extraordinary courts like the Anti-Terrorism Court have been responsible for the imprisonment and execution of hundreds of civilians without a fair trial. Furthermore, current laws in Syria, such as Law No. 10 implemented in 2018, also allow for the creation of special committees in which non-judicial bodies may determine legal matters. These special courts and committees allow unfair and illegitimate determinations to hide behind the rule of law, and in doing so, render the constitution and other legal codes in the country inert.²¹ The vast majority (54%) of our participants believe that the constitution should prohibit such extraordinary courts, whereas 32.5% believe that these courts should only be allowed under certain conditions that are outlined in the constitution.

Conclusion

The need for an independent judiciary in Syria remains of eminent importance. The inactivity of the SCC, and the extraordinary courts that undermine the value of legal professionals and a judiciary system are a danger to any future systemic change in Syria. The judicial appointments

²¹ Judiciary Reformation in Syria, Riad Ali, Abdulkader Mandou, Housein Al-Ibrahim, Transitional Justice Coordination group, 2019

process determines who will interpret the constitution and thus a constitution can be dangerous if not upheld properly by an independent and impartial judiciary. Furthermore, the participants highlighted the need for neutrality of the executive branch in the judiciary system as well as the need for increased public outreach with regards to the working and developments of these systems. Finally, the space between the government and the people is large when it comes to such systemic topics, hence, the people should be better informed and included in any development of a governance system.

Recommendations

Considering the data represented in this report, both from the consultations and the complementary sources, STJ recommends that the Syrian government, the international community, and Syrian Constitutional Committee:

1. Follow the international standards and norms that ensure an independence judiciary system in order to appoint judges and structure the Supreme Constitutional Court in a fair manner;
2. Implement a government structure with a more decentralized power format, one that reflects the will of the Syrian people;
3. Highlight the importance of educating the citizens with a comprehensive national public outreach policy on the working importance of the Supreme Constitutional Court and the dangers of its lack of independence and impartiality;
4. Abolish all exceptional courts and stipulate in the new constitution that the establishment of these courts in the future should be prohibited;
5. Continue the good practice of previous Syrian constitutions of including that citizens shall be equal before the law and equal in duties and rights, and there shall be no distinction between them on the grounds of sex, origin, language, religion or belief.



Our team of researchers and volunteers at Syrians for Truth and Justice are dedicated to uncovering human rights violations in Syria. Believing that diversity has historically defined and benefitted the country, we work everyday to promote inclusivity and justice to ensure that all Syrians are represented, and their human rights secured.