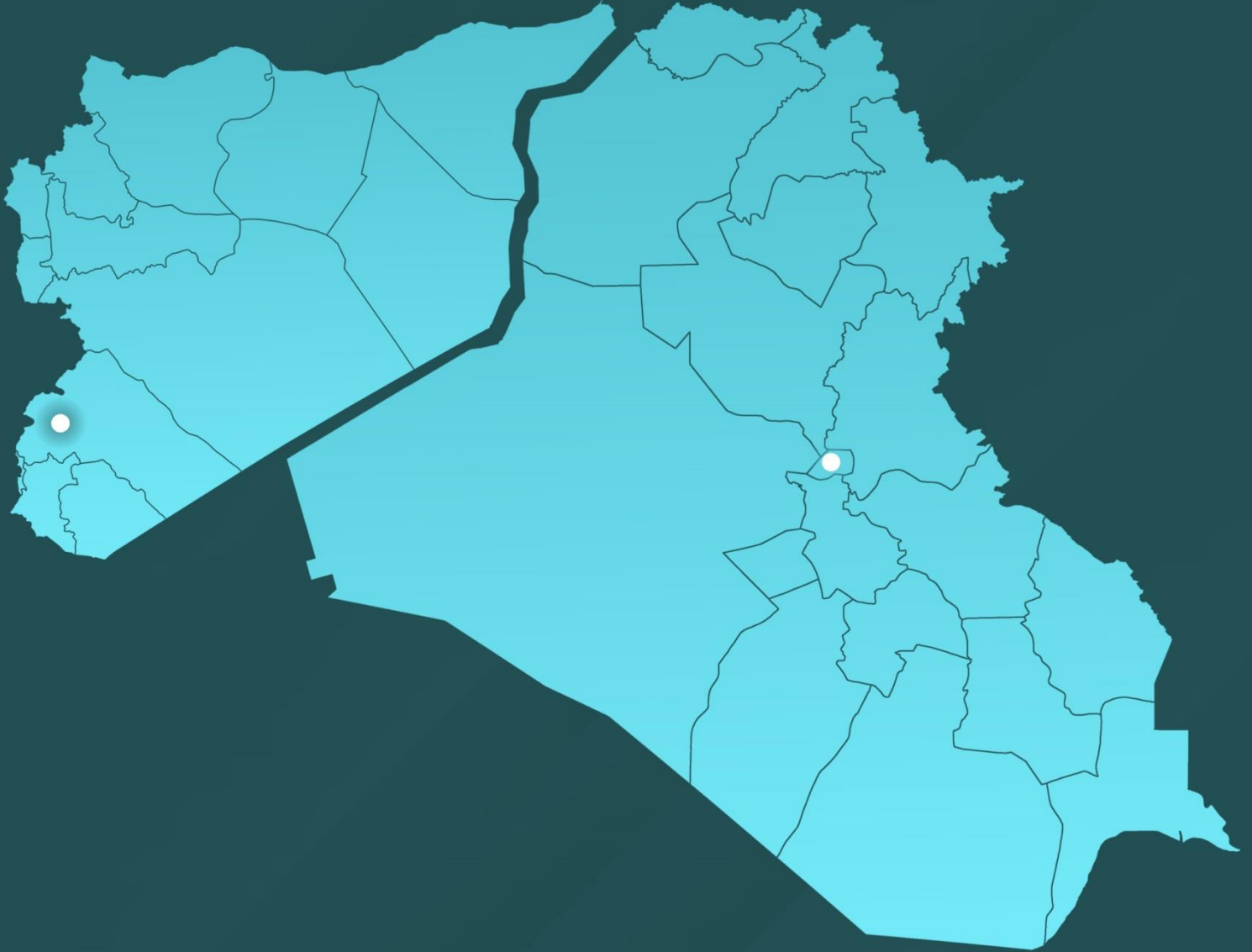


The Constitutional Process in Syria: How Can We Draw on the Iraqi Experience?



Drawing Upon the Experiences of Other Countries
on the Way to a New Syrian Constitution (1)

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1. Introduction:

Syrians for Truth and Justice (STJ), with support from the [National Endowment for Democracy \(NED\)](#), held a series of dialogue sessions entitled “On the Way to a New Syrian Constitution; How to Draw Upon the Experiences of Other Countries?”. The sessions presented the experiences of four countries in constitution drafting with an emphasis on inclusivity. Among these experiences, there are the successful, the partially successful, and the failed efforts in being neutral, unbiased, and inclusive.

The dialogue sessions were a continuation of consultations started in 2020 and 2021 under the title “Syrian Voices for an Inclusive Constitution” that called for the promotion of the representation of minorities and marginalized communities in the new Syrian Constitution. STJ organized and documented the outcomes of these consultations in reports entitled:

1. [“The Formation and Responsibilities of the Syrian Constitutional Committee”](#)
2. [“Syria’s Diversity Must be Defended and Supported by Law”](#)
3. [“Transitional Justice and the Constitution Process in Syria”](#)
4. [“Governance and Judicial Systems and the Syrian Constitution”](#)
5. [“Socio-Ecological Justice and the Syrian Constitution”](#)

Organizers of the 2021 consultations intentionally chose the majority of participants from northeastern and western Syria, taking into account gender and ethnic diversity. The participants included Arabs, Yazidis, Assyrians, Armenians, Syrians, and those who had never participated in similar meetings on the constitutional process in Syria.

As part of the project, STJ will publish four papers on the constitutional experiences of Iraq, Turkey, Lebanon as well as Bosnia and Herzegovina. The papers will approach these experiences with Syria’s current constitutional process in mind and provide recommendations regarding issues of citizenship, diversity, integration of minorities into society, and their inclusion in the constitutional process.

The present paper will discuss the Iraqi experience. It is the outcome of several dialogues held in late May 2021 between project participants and Iraqi experts. The paper will highlight the positives of the Iraqi experience to benefit from and the negatives to be avoided.

2. The Constitution as a Social Contract

Let us go back to the last century, which witnessed the dissolution of kingdoms and empires and the emergence of new countries as a result.

The twentieth century witnessed the dissolution of kingdoms and empires and the emergence of new nation states. After defining their borders, newly minted nations began to define their national identities. However, given their diversity, most of these countries could not reach inclusive identities, but imposed the identity of the nation’s majority without incorporating other minority cultures. This process fueled conflicts in many countries, leading to serious consequences. For example, over the last decade, several referendums asked for the independence of certain territories within several autonomous regions, such as Catalonia,

Scotland, and Iraqi Kurdistan. Serious humanitarian, [political, and economic](#) consequences have faced those who demanded their right to self-determination.

The monopoly of national identity, the marginalization of minorities, and the exercise of unilateral authority are issues with constitutional dimensions which have created long-lasting conflicts in countries like Syria, Turkey, Iraq, Turkey, and Iran. Consequently, settling these conflicts must begin with amendment and redrafting of constitution.

How did dictatorships in Syria, Iraq and other countries come to power and manage to rule for decades without competition? Is such an authority considered legitimate and what are its criteria of legitimacy? Where does the legitimacy of power lie, where does it derive from, and when is it lost? What is meant by the concept of “the rule of law” and how could it be achieved? What institutions are required? What are the powers and authorities such institutions can have? What is the role of the citizen and citizenship in this?

The questions above are raised for discussion before delving into the details of various constitutional experiences in order to establish a deeper understanding “constitutions” and “legitimacy” . The overarching goal is to draft a new Syrian Constitution that respects the rule of law and is proportional to the values of the 21st century.

The fundamentals of modern constitutions were founded in the seventeenth century. The second half of the seventeenth century witnessed the emergence of philosophers like Thomas Hobbes,¹ John Locke,² and Jean-Jacques Rousseau,³ who developed social and political theories that paved the way for intellectual currents, which had a profound influence on shaping the concepts of power, citizenship, and legitimacy. The philosophers studied human nature with the aim of shaping the ideal model of society – a society governed by a “social contract” that best regulates the relations between individuals and the governing powers. Some of the theories of these philosophers established intellectual currents that inspired and contributed to the formulation of the principles of the French Revolution of 1789, as well as the American Revolution of 1765.

3. The Modern Notion of the Constitution

Almost all countries in the world have constitutions, albeit with different contents. These countries consider their constitutions as the supreme law.

New constitutions are normally drafted after critical events in a country’s history. These events can include wars, such as the World Wars. Many constitutions are written following freedom and independence movements, such as the American Revolution. The French Revolution, for example, inspired the formation of constitutions throughout Europe. Lately,

¹ Thomas Hobbes, <https://plato.stanford.edu/entries/hobbes/>

² John Locke, <https://plato.stanford.edu/entries/locke/>

³ Jean Jacques Rousseau, <https://plato.stanford.edu/entries/rousseau/>

the Arab Spring, which spread across much of the Arab world, including Syria, has led to the overthrow of some regimes and the adoption of new constitutions.

It is customary for the constitution to be written or compiled into a single document. However, in some countries, such as the United Kingdom, the constitution takes the form of unwritten customs, practices, and usages that are based on binding provisions of international or regional conventions.

The written constitution is an immutable document that differs from one country to another. A Constitution usually determines the form of the State, its system of governance, regulations of the law drafting process, government structure, designating authorities, and the rights and duties of individuals and institutions. Furthermore, among the most important functions of the Constitution is to define and protect fundamental freedoms and rights.

4. Form of the State, System of Governance in the Constitution

The distribution of power defined in the Constitution indicates the form of the State and its governmental system:

First: the form of the vertical distribution of powers and authorities between the center and the periphery determines the degree of State centralization. For example, Syria is a highly centralized state, where all powers and authorities are stationed in the capital, unlike Iraq, which adopts the federal model.

Second: the form of the horizontal distribution of the legislative, judicial, and executive authorities and the powers given to each determine whether the system of Government is presidential, like in the US. or parliamentary, as it is in the Netherlands, Canada, and Britain.

Some Constitutions attach very special importance to the national identity and usually cite a narrative on it in their preamble, like the Chinese Constitution.⁴ However, there are constitutions that do not contain preambles but promote the national identity in their articles, such as the Dutch constitution.⁵

Some constitutions have portions which are invulnerable to alteration, modification, or suspension by political upheavals, such as the German constitution,⁶ which states in its Article 79.3: "Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible."⁷

The protection of certain provisions against amendments may protect basic concepts and principles, but also may be used to enshrine racist or discriminatory. This indicates the sensitivity and difficulty of drafting or amending a constitution that ensures and guarantees equality among all members of the society under the rule of law and that can be applicable in present and future.

⁴ Constitution of China (People's Republic of China) 1982 (rev. 2018):

https://constituteproject.org/constitution/China_2018?lang=en

⁵ Constitution of the Netherlands 1814 (rev. 2008): https://constituteproject.org/constitution/Netherlands_2008?lang=en

⁶ Constitution of Germany 1949 (rev. 2014):

https://constituteproject.org/constitution/German_Federal_Republic_2014?lang=en

⁷ Ibid, Article 79 (3).

5. Introduction to the Iraqi Constitutional Experiment of 2005

Researchers and historians saw that Iraq's modern history could be broken up into three phases:

The First Phase (1921 – 1968): Before the Arab Socialist Ba'ath Party came to power

After the end of the Ottoman occupation, Iraq was placed under the British Mandate from April 1920 until its independence in 1932. Iraq was governed by a monarchy from 1921 until it was declared a republic in 1958. In 1925, the first constitution of the State of Iraq was issued under the name of "Basic Law". This constitution was the first document that explicitly acknowledged the diversity of Iraq, as it stated:

Article 6: "There shall be no differentiation in the rights of Iraqis before the law, whatever differences may exist in language, race or creed."

Article 13: "Islam is the official religion of the State. Freedom to practice the rites; of the different sects of that religion, as observed in Iraq, is guaranteed. Complete freedom of conscience and freedom to practice the various forms of worship, in conformity with accepted customs, is guaranteed to all inhabitants of the country provided that such forms of worship do not conflict with the maintenance of order and discipline or public morality."⁸

Article 13 did not explicitly mention Christians, Yazidis, or Sabeans, but it guaranteed their freedom to practice their rituals, at least in theory.

Although the "Basic Law" recognized differences and diversity, and even guarantees freedom of belief for all, this era witnessed various "systematic" massacres and displacements against certain sects, religions, and religious groups. In 1933, the Iraqi government, under Rashid Ali al-Gaylani, carried out the massacre known as the "Simele Massacre" against the Assyrian minority in the former Mosul district. This massacre resulted in the killing of at least 3000 Assyrians in more than 60 villages. Furthermore, in 1950, organized forced displacements began against Iraqi Jews, who were the elite of society and the mainstay of the middle class in southern and central Iraq. About 130 Jews were displaced from these areas, as well as 20,000 Jewish peasants from Iraqi Kurdistan.⁹

The Second Phase (1968-2003): The nationalist or socialist "one-party" state until the American invasion

The Arab Socialist Ba'ath Party governed Iraq for more than 35 years under the leadership of Saddam Hussein. This rule was notorious for being violent and corrupt, as torture, extrajudicial executions, arbitrary arrests and enforced disappearances were commonplace. There are still about 300,000 Iraqis missing since that period. In addition, Saddam's rule was marked by brutal military campaigns against marginalized ethnic and religious groups in Iraq. Among these campaigns was the "Anfal" campaign, which resulted in genocide in the highlands of Iraqi Kurdistan. "Anfal" was unleashed from February through September 1988 and led to the arrest and execution of more than 100,000 Kurdish citizens. In southern Iraq, Saddam's regime systematically suppressed the Shiite Muslim population and expelled an

⁸ Constitution of the Kingdom of Iraq, <http://www.dircost.unito.it/cs/docs/Iraq%201925.htm>

⁹ Ali Bakht, Saad al-Sultan, Hisham al-Sharqawi, Karim Abdel Salam: "Transitional Justice in Iraq - Memory and the Future Horizon", p.79.

estimated half a million of them to Iran; in addition to imprisoning and disappearing between 50,000 and 70,000 civilians. Furthermore, Saddam brutally suppressed the 1991 uprising by using arrest, enforced disappearance, and summary execution of thousands of protestors.¹⁰

The Third Phase (2003 – 2005): The American occupation and the writing of the 2005 Constitution

This phase of Iraq’s history witnessed the drafting of the current Iraqi constitution, known as the 2005 Constitution. This constitution was drafted under political and security conditions that were unnatural, to say the least, which had clear implications on the judgement drafting process. For the purpose of writing this constitution, a committee was formed following parliamentary elections boycotted by Sunni Arabs. As a result, the latter were inadequately represented in the constitutional committee, which prompted appeals for them to have a representation equal to that of Shiite and Kurds; that was relatively achieved thereafter.

During the drafting process, members of the constitutional committee were dominated by two differing views related to the philosophy of governance in post-Saddam Hussein Iraq. The first view was adopted by the Kurds and Shiites. It was based on the principle of distributing powers and wealth between the regions in a federal form and not centralizing them in the hands of one central government for fear of repeating the experience of totalitarian rule, as they termed it. However, the Sunni Arabs proposed a different view of establishing a single decentralized government fearing that the distribution of power and wealth as desired by Shiites and Kurds would lead to the division of Iraq and the outbreak of civil wars between its regions and provinces¹¹.

Last-minute amendments to the constitution draft lead to the Yes vote for it and thus to its adoption. The amendments stressed the unity of Iraq and on recognizing it as a multi-national country, as well as its importance as part of the Islamic world and its founding and active role in the Arab League. The new amendments also emphasized the use of the Arabic language alongside Kurdish in the Kurdistan region and dealt with issues of nationality, citizenship, and more.

In one of the dialogue sessions held by STJ on Iraq’s experience in drafting the 2005 constitution, an Iraqi expert commented that despite the positive features of the current Iraqi Constitution, it remains “rigid” (inflexible). The expert critiqued that the constitution was written from the “opposition’s perspective”. For example, Article 142 stipulates:

“Second

The proposed amendments shall be presented to the Council of Representatives all at once for a vote upon them and shall be deemed approved with the agreement of the absolute majority of the members of the Council.

Fourth

¹⁰ Background: A Repressive Recent History, ICTJ, <https://www.ictj.org/location/iraq>

¹¹ Conditions for writing a draft Iraqi constitution, Aljazeera, 15 October 2005, <https://www.aljazeera.net/2005/10/15/%D8%B8%D8%B1%D9%88%D9%81-%D9%83%D8%AA%D8%A7%D8%A8%D8%A9-%D9%85%D8%B3%D9%88%D8%AF%D8%A9-%D8%A7%D9%84%D8%AF%D8%B3%D8%AA%D9%88%D8%B1-%D8%A7%D9%84%D8%B9%D8%B1%D8%A7%D9%82%D9%8A>

The referendum on the amended Articles shall be successful if approved by the majority of the voters, and if not rejected by two-thirds of the voters in three or more governorates.”

This means that the opinion of two-thirds of the voters in this context is equivalent to that of 18 Iraqi provinces.

The reason for requiring the majority’s approval of such a large percentage to amend the constitution is the Kurdish politicians’ fears of any constitutional amendment that could affect their power.

With regard to de-Ba’athification, the first draft constitution contained a paragraph that defines former Ba’athists and differentiate between those who committed crimes and those who did not.¹²

On 15 October 2005, the [final amended version](#) of the constitution was voted and passed. Article 1 of this latest version states that Iraq is a “single federal state”, where the system of government is republican, representative, parliamentary, and democratic. Furthermore, this version refuses the enacting of any law that contradicts the principles of democracy or the peremptory norms of Islam, and it recognizes the plurality of nationalities, religions, and sects in Iraq.

6. A Glimpse into the Attempt to Draft a New Syrian Constitution

It seems that there is a similarity in the context of the historical succession of the Syrian and Iraqi constitutions, albeit those constitutions had different contents.

Syria became a de facto sovereign state in 1946, with the withdrawal of French troops. Following its independence, Syria experienced a long period of instability during which it witnessed military coups accompanied by constitutional changes. This period also saw the union between Syria and Egypt in 1958, their separation in 1961, the Ba’ath Party’s seizure of power as a result of a military coup in 1963, Hafez al-Assad’ seizure of presidency in a military coup named the “Corrective Movement” in 1971. In 1973, Syria adopted a new [constitution](#), which stipulated the absolute rule of the Ba’ath Party and Hafez al-Assad over the country. The 1973 Constitution was suspended in 2012, following the Syrian uprising, which was part of what was termed the “Arab Spring”.

7. The Syrian Constitution and the 2011 Uprising

The idea of working on a [new constitution](#) for Syria arose in the second half of 2011 as a response to uprisings that broke out across Syria in March of the same year.¹³ This coincided with promises from Syrian President Bashar al-Assad to carry out a set of “reforms” in the

¹² Last-Minute Amendments to the Iraqi Constitution Weigh up the Balance of Probabilities of Voting Yes, DW, October 2005, <https://www.dw.com/ar/%D8%AA%D8%B9%D8%AF%D9%8A%D9%84%D8%A7%D8%AA-%D8%A7%D9%84%D9%84%D8%AD%D8%B8%D8%A9-%D8%A7%D9%84%D8%A3%D8%AE%D9%8A%D8%B1%D8%A9-%D8%B9%D9%84%D9%89-%D8%A7%D9%84%D8%AF%D8%B3%D8%AA%D9%88%D8%B1-%D8%A7%D9%84%D8%B9%D8%B1%D8%A7%D9%82%D9%8A-%D8%AA%D8%B1%D8%AC%D8%AD-%D8%A7%D8%AD%D8%AA%D9%85%D8%A7%D9%84%D8%A7%D8%AA-%D8%A7%D9%84%D8%AA%D8%B5%D9%88%D9%8A%D8%AA-%D9%84%D8%B5%D8%A7%D9%84%D8%AD%D9%87/a-1740446>

¹³ Syrian Arab Republic’s Constitution of 2012, website of the Syrian Parliament, 27 February 2012, <http://parliament.gov.sy/arabic/index.php?node=5518&cat=423&>

country, including redrafting its constitution, or at least making significant amendments to its provisions.

Indeed, on 15 October 2011, Syrian President Bashar al-Assad issued Presidential Decree No. 33 to form a 29-member committee to rewrite the constitution. On 27 February 2012, Legislative Decree No. 94 was issued approving the new constitution of the “Syrian Arab Republic” for the year 2012, after a referendum was held on 15 February 2012. However, this did not calm public outcry; on the contrary, it was met with harsh criticism because it preserved the majority of the provisions and articles of the previous constitution. International reactions to the constitution varied between satisfied, like Russia, and resentful, like France, which, along with other western countries, described the constitutional referendum as “nothing but a farce”, arguing that no credible vote could be held amid continued military operations in the country.

Although this constitution was drafted under pressure from protests that broke out throughout the country in the spring of 2011, it was not able to meet their demands. This Constitution could not move beyond the legacy of the past of marginalization and exclusion of Syrians in general, and of certain components and nationalities in particular, enshrined in the previous successive constitutions. The 2012 Constitution was a copy of that of 1973, which weighed heavily on Syrians and silenced them for decades.¹⁴ A simple comparison between the two constitutions yields few significant differences between them; the numbers and texts of articles are almost the same and sometimes identical. For example, both constitutions adopt “The Syrian Arab Republic” as the name official name of Syria. Furthermore, both constitutions state that: “Syria is part of the Arab homeland; The people of Syria are part of the Arab nation; The system of governance in the state shall be a republican system; The official language of the state is Arabic; The religion of the President of the Republic is Islam.”¹⁵ The two constitutions also stipulate the same economic, social, educational, and cultural principles, as well as principles related to rights and freedoms, the right to litigation, and the rule of law. They also regulate the powers of the legislative, executive, and judicial powers of the state in the same way. The total number of articles in the two constitutions is almost the same.¹⁶

Constitutional reforms in 2012 abolished the leadership of the Arab Socialist Ba’ath Party over the state and society repealed articles saying that no person shall be elected to the office of the President more than twice and removed those which limited the presidential term to seven years. Several years after these amendments, the “Syrian Constitutional Committee” was established under UN Resolution No. (2254). The Committee was officially announced after the “National Dialogue Congress” that was held in Sochi, Russia in 2018 .

The formation of the constitutional committee was part of an international strategy to resolve the Syrian conflict. The strategy was framed within four “baskets”: achieving a credible non-sectarian transitional government, drafting a future constitution, holding free parliamentary elections within eighteen months under the supervision of the United Nations, and fighting a united war against terrorism. While all four baskets are equally important, the Committee views the process of writing a revised constitution as integral to outlining the

¹⁴ Syrian Arab Republic’s Constitution of 1973 and its amendments, website of the Syrian Parliament, 7 July 2014, <http://parliament.gov.sy/arabic/index.php?node=5518&cat=413&>

¹⁵ Articles 1-2-3-4 of Syria’s 2012 Constitution.

¹⁶ The 1973 and 2012 constitutions each consist of 156 articles.

concrete steps needed to implement the other three baskets. While UN General Secretary António Guterres calls the Constitutional Committee part of a “Syrian-owned and Syrian-led” peace process, there has been significant controversy surrounding which Syrian communities are represented in the Constitutional Committee and the role foreign powers have played in choosing them. Both Turkey and Russia influenced the delegates chosen for the Syrian Constitutional Committee, testifying to the impact foreign powers continue to have not only on the Syrian conflict but on the Syrian peace-building process. However, even as foreign powers arguably have a disproportionate influence on the Constitutional Committee, many Syrian communities find themselves left out of the constitutional process. For example, according to the Middle East Institute, the Committee is “strongly skewed against the Kurds, who comprise only 4% of its total membership, less than half of their percentage of the population as a whole.”¹⁷

8. Delving into the Iraqi Constitutional Experience

The Structure of the State: the transition from a strictly centralized system to a federal system

The word “federal” came from the Latin word “Feuds” which means “unity”. Politically, the federal system presupposes a kind of voluntary union between “separate” political entities or different nationalities or races that have decided to live in one political entity. However, in the Iraqi case, federal means reconfiguring a political system that allows representatives of the ethnic, religious, and sectarian components of society to participate, engage, and discuss, their interests and aspirations, and the constitutional sharing of powers and the distribution of national wealth on a just basis.¹⁸

The federal system in Iraq was first proposed in 1991, after the second Gulf War, by opponents of Saddam Hussein. The opponents saw in decentralization a solution that would prevent a recurrence of the Ba’ath regime’s massacres against them. This was followed by demands from the Kurds to obtain autonomy, which was achieved. These incidents increased demands on the transition to a federal system commensurate with all state administrations and bodies.¹⁹

This was preceded by understandings concluded between the central state and the Kurdistan region led by Mela Mustafa Barzani, head of the Kurdish revolutionary movement. In 1970, a peace agreement was signed between what was called the Revolutionary Command Council and Mela Mustafa Barzani. In 1974, Iraq granted the Kurds limited autonomy under the 1970 agreement.²⁰

The main objective of adopting the federal system in the 2005 constitution was to build a decentralized system that follows Baghdad, taking into consideration the different needs of each Iraqi province. However, the political reality, social motives, the historical context, and the balance of power determined the relationship between the Kurdistan Region and the federal government and thus led to an absolute federal system.

¹⁷ Shaar, Karam, and Ayman Dasouki. “Syria’s Constitutional Committee: The Devil in the Detail.” The Middle East Institute, 6 January 2021, <https://www.mei.edu/publications/syrias-constitutional-committee-devil-detail>

¹⁸ Fawzia Khuda Karam Aziz: “Federalism in Iraq Between the Constitutional Foundations and Political and Economic Realities”, Political Science Faculty/University of Baghdad, p.146.

¹⁹ <https://www.chathamhouse.org/sites/default/files/2021-02/2021-02-05-iraq-federalism-arabic-alkadiri.pdf.pdf>

²⁰ https://www.bbc.com/arabic/middleeast/2014/04/140424_iraq_timeline

The federalism of Iraq is emphasized in Article 1 of its 2005 permanent constitution. Article 116 states that federal system in the Republic of Iraq is made up of a decentralized capital, regions, and governorates, as well as local administrations. Furthermore, Article 117 of the Constitution states: "This Constitution, upon coming into force, shall recognize the region of Kurdistan, along with its existing authorities, as a federal region. This Constitution shall affirm new regions established in accordance with its provisions."²¹

A good number of experts believe that the federal system is the most suitable for such a diverse country like Iraq. Experts argue that federalism allow societies to deal freely with local issues with in a wide strategic range. Article 109 of the Iraqi Constitution of 2005 obliged the federal authorities to preserve the unity, integrity, independence, and sovereignty of Iraq and its federal democratic system. Whereas Article 110 defines the federal government's exclusive authorities in the following matters:

- Formulating foreign policy and diplomatic representation
- Formulating and executing national security policy

Formulating fiscal and customs policy; issuing currency

Drawing up the national budget of the State

Formulating and executing national security policy, including establishing and managing armed forces to secure the protection and guarantee the security of Iraq's borders and to defend Iraq.

Article 114 of the Constitution cites competencies that shall be shared between the federal authorities and regional authorities:

To manage customs;

To regulate the main sources of electric energy and its distribution;

To formulate and regulate the internal water resources policy;

To formulate public health policy;

To formulate the public educational and instructional policy.

Furthermore, Article 120 of the 2005 Constitution gave each region the right to adopt a constitution of its own that defines the structure of powers of the region, its authorities, and the mechanisms for exercising such authorities, provided that it does not contradict this Constitution.

In addition, Article 121 of the 2005 Constitution gives regional powers the right to exercise executive, legislative, and judicial powers in accordance with this Constitution, except for those authorities stipulated in the exclusive authorities of the federal government. The Constitution also states that the regional government shall be responsible for all the administrative requirements of the region, particularly the establishment and organization of the internal security forces for the region such as police, security forces, and guards of the region.²²

²¹ Iraq's Constitution of 2005, https://www.constituteproject.org/constitution/Iraq_2005.pdf?lang=en

²² Iraq's Constitution of 2005, https://www.constituteproject.org/constitution/Iraq_2005.pdf?lang=en

Nevertheless, in practice, Iraq failed to develop a unitary approach to the application of the constitution, or a common vision of the division of powers between the federal government and the regions provided for in it. Thus, each authority used its own interpretation in applying the constitution's provisions. Thereby, the federal government gave itself the right to control the Kurdistan region considering that some of the region's actions amounted to "self-governance", and that they sought to monopolize a large number of issues such as those related to airspace and natural resources.

Some regions refused Baghdad's absolute control and sought to obtain greater independence from its conduct. All this had a traumatic impact on the rule of law, with state institutions refusing to comply with the constitution that governs their work. Thus, several areas were paralyzed, the level of services for individual citizens collapsed, and government interests were disrupted.²³

How did the Iraqi Constitution deal with rights and freedoms after 2003?

Section II of the current Iraqi Constitution deals with rights and freedoms with 33 Articles listing all the economic, cultural, social, civil and political rights that Iraqis will enjoy. Most of these rights and freedoms are contained in international treaties and agreements.

Article 14 states that "Iraqis are equal before the law without discrimination based on gender, race, ethnicity, nationality, origin, color, religion, sect, belief or opinion, or economic or social status."²⁴ However, there is no article in the Iraqi constitution that recognizes the supremacy of international conventions and treaties over domestic laws.

The Iraqi Constitution has several articles that include fundamental guarantees for protecting citizens' rights and freedoms. However, these articles contain vague words, which are open to different interpretations, which may restrict these rights and freedoms. For example, Article 38 states:

"The State shall guarantee in a way that does not violate public order and morality:

First. Freedom of expression using all means.

Second. Freedom of press, printing, advertisement, media, and publication.

Third. Freedom of assembly and peaceful demonstration, and this shall be regulated by law."

The interpretation of the phrase "public order and morality" may differ according to the discretion of the judiciary, the temperament each judge, and the vision of each court and area. Thus, the credibility of these articles is at stake.

In the absence of a strong judiciary (the constitutional judiciary), it may be easy for the government to take advantage of such loose provisions; the government will not face any obstacles to limiting the basic rights stipulated in the constitution.²⁵ Moreover, Article 46 of the Iraqi Constitution limits the rights provided for in section II by stating: "Restricting or limiting the practice of any of the rights or liberties stipulated in this Constitution is

²³ Zaid Al-Ali, Yussef Auf: "The Iraqi Constitution: Analysis of the Controversial Articles-Solutions and Recommendations", <https://library.fes.de/pdf-files/bueros/amman/17146-20210115.pdf>

²⁴ Iraq's Constitution of 2005, https://www.constituteproject.org/constitution/Iraq_2005.pdf?lang=en

²⁵ <https://constitutionnet.org/sites/default/files/volume6web.pdf> P.41-46

prohibited, except by a law or on the basis of a law, and insofar as that limitation or restriction does not violate the essence of the right or freedom.”²⁶

The affirmation that the restriction does not affect the essence of right or freedom in the previous article is positive. However, this affirmation is still open to interpretation and jurisprudence.

As for gender equality, the preamble to the Iraqi Constitution mentions women only once, in the context of concern for them and their rights, without explicitly equating them with men or considering them independent. However, the Constitution prohibits any kind of discrimination against women.

Article 14 states that “Iraqis are equal before the law without discrimination based on gender, race, ethnicity, nationality, origin, color, religion, sect, belief or opinion, or economic or social status.” Article 20 states that “Iraqi citizens, men and women, shall have the right to participate in public affairs and to enjoy political rights including the right to vote, elect, and run for office.”

Contrary to the Syrian constitution, the Iraqi constitution considers anyone who is born to an Iraqi father or to an Iraqi mother as an Iraqi, meaning that it gives women and men the equal right to pass their nationality to their children.

How did the Iraqi Constitution deal with diversity, inclusion, and the treatment of minorities after 2003?

The 2005 constitution recognized Iraq as a country of many nationalities, religions and sects. This is referenced in Article 3: “Iraq is a country of multiple nationalities, religions, and sects...” . However, the constitution also recognizes Iraq as a founding and active member in the Arab league which is committed to its Charter, and also recognizes Iraq as an important part of the Islamic world. The result is that while the constitution recognizes diversity in the country, it privileges Muslim Arab identity.

Article 3 of the Constitution acknowledges Iraq’s diverse nationalities and religions but not the equality between them. That equality cannot be credible after what we read in Article 2, which states that Islam is the official religion of the State and is a founding source of legislation and that no law may be enacted that contradicts the established provisions of Islam. The word “provisions” was not defined in the Constitutions, which caused controversy over its interpretation among several Iraqi circles.

The Constitution’s prohibition of acting laws that contradicts the established provisions of Islam and the principles of democracy is an obvious attempt to please the largest number of Iraqi people.

Views of participants in the dialogue sessions held by STJ differed on the suitability of Article 2. Some participants said that it is acceptable to impose provisions of a certain religion over followers of other religions in a country. Others saw that Islam must be a source of legislation among others and not the only one. This would better reflect Iraqi diversity and the religious and sectarian pluralism that exists in it.

²⁶ Article 46 of Iraq’s Constitution of 2005, https://www.constituteproject.org/constitution/Iraq_2005.pdf?lang=en

Article 41 grants Iraqis the freedom to commit to their personal status according to their religions, sects, beliefs, or choices, while emphasizing that this commitment shall be regulated by law. Furthermore, Article 42 states: “Each individual shall have the freedom of thought, conscience, and belief.”

Article 2 guarantees the Islamic identity of the majority of the Iraqi people and guarantees the full religious rights to freedom of religious belief and practice of all individuals such as Christians, Yazidis, and Mandaean Sabeans²⁷.

However, the Article does not mention all of the religions in Iraq. Moreover, it states that Islam is the official religion of the State and is a founding source of legislation. This may be considered a timid recognition of religious minorities and can enforce the sentiment that Islam is preferred as a religion over others in Iraq.

In the same vein, Article 43 states that followers of all religions and sects are free in the practice of religious rites, including Husseinite rituals. Analysts interpreted the mentioning of the “Husseinite” rituals in particular as an attempt to protect these rituals in a binding constitutional provision.

The Iraqi Constitution recognizes the Arabic language and the Kurdish language as the two official languages of Iraq. The constitution also gives Iraqis the right to educate their children in their mother tongue, such as Turkmen, Assyrian, and Armenian in government educational institutions in accordance with educational guidelines, or in any other language in private educational institutions. In the context of acknowledging the languages rights, the constitution states that the Turkmen language and the Syriac language are two other official languages in the administrative units in which they constitute a sizable portion of the population.²⁸

Iraq and Transitional Justice

Transitional justice refers to judicial and non-judicial measures through which societies respond to the legacies of massive and serious human rights violations. These measures include: judicial redress, truth commissions, reparations programs, fact-finding, and various forms of institutional and political reforms. The implementation of any of these measures must be in accordance with international legal standards and obligations.²⁹

The implementation of transitional justice in Iraq was not according to special program but it was in the form of disconnected steps which began after the U.S. invasion. Many decisions and laws were issued in this context by several institutions, mainly, the Iraqi Governing Council (IGC). Among the most effective decisions was the order that sought to uproot and eliminate the Ba’ath Party by removing its leadership from positions of authority and responsibility in Iraqi society, investigating them and banning them from any future employment in the public sector. Under those decisions, the Ba'ath Party entities and institutions were dissolved, its property and assets were seized, and Ba'athists responsible for human rights violations were investigated.³⁰

²⁷ <https://constitutionnet.org/sites/default/files/volume6web.pdf> p. 26

²⁸ Iraq’s Constitution Of 2005, https://www.constituteproject.org/constitution/Iraq_2005.pdf?lang=en

²⁹ <https://www.ictj.org/what-transitional-justice>

³⁰ Ibid, p.p. 92-95.

The National Commission for Accountability and Justice (The De-Ba'athification Body 2003-2008), was established as one of the first institutions of transitional justice in Iraq along with the Supreme Iraqi Criminal Tribunal, which organized the trial of members of the Ba'ath Party regime. In the same context, Iraq Property Claims Commission (IPCC), established. It was mandated to address disputes resulting from the wrongful confiscation and reallocation of properties under the former government for political, racial, or religious reasons.³¹

Furthermore, Iraq issued a law regulating the judicial system and developed new legal frameworks, such as the Independent Supreme Judicial Council, to oversee the Iraqi judiciary. In that year, Law No. 1 of 2003, then known as Law of the Supreme Iraqi Criminal Tribunal, was adopted. This Law was ratified under the Law of Administration for the State of Iraq for the Transitional Period (TAL). The Tribunal have jurisdiction on genocide, crimes against humanity, war crimes, and

violations of Iraqi laws listed in Article 14 of this law. The TAL also ratified the establishment of the Central Criminal Court of Iraq, (CCCI), which consists of two chambers: an investigative court and a criminal court. This court was created to handle cases involving serious crimes such as governmental corruption, terrorism, and organized crime, as well as acts of ethnic, religious, and national violence.³²

Iraq's transitional authority also issued laws related to weapons' control, integration of irregular militias, the criminalization of joining militias, and the demilitarization of prison facilities.³³

Furthermore, amendments were made to the Political Parties and Entities Law, ending one-party rule and acknowledging political pluralism. The same period witnessed the creation of legal frameworks regulating the right to establish and operate civil society organizations, the registration and work of international organizations, and the conditions of professional and cooperative unions.³⁴

The TAL did not neglect the compensation file. In 2005, the Martyrs Foundation was established. This Foundation is a governmental institution whose mission is to deal with the general situation of the martyrs' families and to compensate them materially and morally and provide them facilities in the medical, educational, social, economic, and employment fields. In addition, the Foundation glorifies martyrs and commemorates them through events and memorials. The same year also witnessed the establishment of the Political Prisoners Foundation, which was mandated with dealing with the general situation of political prisoners and detainees and to compensate them financially and morally, in proportion to the gravity of the violations and the harm suffered.³⁵

9. How Can Syrians Draw on the Iraqi Experience?

The majority of the participants in the 2021 dialogue sessions entitled "On the Way to a New Syrian Constitution; How to Draw Upon the Experiences of Other Countries?" viewed Iraq's

³¹ Ibid, p.p. 111-117.

³² Ibid, p.p. 95-100.

³³ Ibid, p.p. 100-104.

³⁴ Ibid, p.p. 109-111.

³⁵ Ibid, p.p. 118-121.

2005 Constitution as a generally “positive Constitution” which provides numerous rights and freedoms, along with the guarantees to protect and defend them.

However, participants believed that the Iraqi Constitution was written in haste, as it was discussed and drafted within only five months before being put to a popular referendum. This resulted in contradictory, and sometimes incomprehensible, articles in the constitution. Iraqi experts stated that this was due to pressure from the U.S. government, specifically civil governor Paul Bremer, to draft a new constitution in record time. During our dialogue sessions, some participants saw that the 2005 constitution was written from the “opposition’s perspective” or the “perspective of the oppressed”, due to the large scale of persecution that most of the Iraqi people were subjected to during the rule of Saddam Hussein and the Arab Socialist Ba’ath Party. In addition, several participants described Articles of the Iraqi Constitution as “illogical”, including Article 43, which only mentioned the “Husseini rituals”, discriminating against the rituals of other sects and religions.

Some of our participants saw that the Iraqi Constitution’s attempt to balance Iraq’s diversity and the emphasis on Iraq’s Arab and Islamic identity of Iraq resulted in contradictory articles. This is evident in Article 2, which states in its first paragraph: “Islam is the official religion of the State and is a foundation source of legislation” and then directly says:

“A. No law may be enacted that contradicts the established provisions of Islam

B. No law may be enacted that contradicts the principles of democracy.

C. No law may be enacted that contradicts the rights and basic freedoms stipulated in this Constitution.”

Participants suggested that it was better to emphasize the separation of religion and the State to avoid giving preference to a particular religion over another, or a particular language over another in a country of diverse ethnicities and religions like Iraq.

On the other hand, some participants believed that the writers of the constitution focused on racial and religious quotas during the drafting process rather than on meeting the basic needs of the Iraqi people. With regard to religious components, the constitution mentioned Islam, Christianity, Mandaean Sabians, and Yazidis, but ignored Zoroastrianism, Judaism, Baha’i, Kaka’i and others. Furthermore, the Constitution mentioned Arab, Kurdish, Turkmen, Syriac, and Assyrian nationalities, but ignored other nationalities such as Shebek.

A number of participants believed that it was better either to talk in general about minorities and not to specify any or to mention all races, nationalities, and religions without referencing any in the constitution.

Iraqi experts who participated in the dialogue session considered that the use of the term “components” was a poor choice, as this prevents positive discrimination of minorities, and equates them with the larger groups in number. To account for the largest bloc and to obstruct many laws to protect minorities, because any measure includes everyone, and therefore any dominant group will dominate the decision and benefit from the advantages over other groups.

One of the things that a number of participants also felt that should be avoided is the issue of the rigidity of the Iraqi constitution. In other words, the process of changing or amending the

constitution is a very complicated process, as it requires the approval of two-thirds of the 18 Iraqi provinces and is decided through a popular referendum.

Therefore, a number of participants supported the importance of achieving equivalence with the rigidity and flexibility of the constitution. Participants explained that the constitution must be flexible, with the capability to prevent any changes that might forfeit the rights of certain groups of the Iraqi people and repeat the injustices against them.

Participants saw that the Syrians could gain inspiration from many articles within the Iraqi constitution. These articles include those related to the establishment of a sound political system. These articles provide for the peaceful transfer of power, the establishment of a decentralized political system, the recognition of the diversity of Iraq, the recognition of several languages as official languages in Iraq, and the assurance to guarantee basic rights and freedoms, such as that of allowing Iraqi women to pass their nationality to their children.

10. Recommendations

1. Ensuring that there is a genuine political will and a true consensus on the commitment to apply any constitution drafted and accepted by all Syrians. Any constitution will be of little real value if it is not obeyed or the basis of laws.
 2. Avoiding vague and loose words, especially those open to different or contradictory interpretations, like the phrase “public decency”, which could be interpreted in an unduly expansive way that restricts freedoms and rights.
 3. Clearly acknowledging transitional justice and its constituent elements, and stipulating this in the constitution. That shall be with taking into consideration the challenges that may face the implementation of transitional justice, especially in the areas of compensation and accountability.
 4. Ensuring effective representation of all components of the Syrian people in the constitutional committee and their real participation in the drafting process. For this, representatives shall conduct extensive local consultations during the drafting period and educate people on the importance of participating in the drafting process and the later referendum process.
 5. Writing a constitution with a neutral approach towards all religions, sects, and nationalities, and which aims for an inclusive national identity without any exclusion or discrimination.
 6. Drafting Articles that are compatible with the ideas and visions of different societies, considering religious and ethnic minorities.
 7. Avoid writing a constitution that enshrines the sectarian or national quota system with a focus on establishing a country that respects the rights of all its citizens. This must be accompanied by urgent and exceptional measures to redress the victims of injustice.
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About STJ:

Syrians for Truth and Justice (STJ) started as an idea in a co-founder's mind while attending the U.S. Middle-East Partnership Initiative's (MEPI) Leaders for Democracy Fellowship program (LDF) in 2015. The idea became a reality and flourished into an independent, non-profit, impartial, non-governmental human rights organization.

STJ's beginnings were more than humble; initially, it only reported stories of Syrians who experienced arbitrary arrest, enforced disappearance, or torture. Planted in fertile soil, the seed of this project grew into an established human rights organization licensed in the Middle East and the European Union. STJ today undertakes to detect and uncover violations of all types committed in all Syrian parts by the various parties to the conflict.

Convinced that Syria's diversity is a wealth, our researchers and volunteers serve with unflinching dedication to monitor, expose, and document human rights violations that continue unabated in Syria since 2011, regardless of the affiliation of the victims or perpetrators.