



The National Agenda for the Future of Syria (NAFS) Programme

Constitutional Options for Syria

Governance, Democratization and Institutions Building

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In 2012, as part of its mandate to promote human development and democratic transition in the region, UN ESCWA launched the National Agenda for the Future of Syria (NAFS) Programme. Its objective is to engage Syrian experts and stakeholders in developing policy alternatives for Syria in preparation for a post-agreement phase.

The Programme is not meant to substitute political negotiations, but rather to supplement them. Similarly, the Programme's policy alternatives for rebuilding Syria, are not in any shape or form meant to impose solutions, nor to support or undermine the legitimacy of any stakeholder, but rather the result of an inclusive participatory dialogue among Syrians, for Syrians, inspiring practical, innovative, and forward-looking scenarios for Syria.

The planning for the future of Syria should be a participatory process determined, agreed upon and owned by Syrians. To this end, the NAFS Programme has involved 165 Syrian experts to discuss and formulate policy alternatives that are most relevant to the country. An additional 1400 Syrian stakeholders have provided their views, valuable comments and validation of the work of the experts. This report was written by Syrian experts from the NAFS working group on Governance.

NAFS has received generous support from Germany, Norway, Finland, Italy and the Carnegie Corporation of New York, allowing the Programme to continue and expand its work.

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Introduction

The United Nations Security Council Resolution 2254 of December 2015 had expressed support for a Syrian-led political process facilitated by the United Nations that “sets a schedule and process for drafting a new constitution.” This support builds on other political discussions and recommendations including those from the Final Communique of the Action Plan for Syria (Geneva I) of July 2012 that raised the possibility of drafting a new constitution for the country.

One of the main activities of the National Agenda for the Future of Syria, given its objective to assist in a post-conflict recovery and reconstruction period in Syria that promotes reconciliation and reflects the needs and priorities of a broad range of Syrian people, is providing substantive support and input to ongoing international negotiations on Syria’s future.

This position paper outlines NAFS suggestions for constitutional options in the post-conflict phase for a temporary and permanent constitution. It builds on several years of stakeholder meetings and discussions on governance options for Syria in the post-conflict phase as well as the NAFS Strategic Policy Alternative Framework.

In order to focus in more detail about such a sensitive and complex issue, NAFS developed a research study specifically to provide in-depth discussions of constitutional options. The first chapter of the study document discusses temporary constitutional arrangements, the second suggests mechanisms for drafting a permanent constitution in post-conflict situations, and the third presents a focus on key constitutional clauses for the permanent constitution.

What follows is a summary of the key conclusions of the research study.

Temporary Constitution

Temporary constitutions, sometimes named interim or transitional constitutions or constitutional declarations, are designed to structure governance in societies emerging from exceptional circumstances, most frequently national independence, international wars, or civil wars. Since 1990, about 30 temporary constitutional documents have been adopted worldwide and 20 of those have been in countries experiencing societal conflict.

Unlike permanent constitutions, the temporary constitution is explicitly designed when written to have an expiration date until which a permanent constitution is adopted. The goal is to allow a national period of trust and consensus building within society. As a result, the deeper the polarization within a society and the greater the societal cleavages, the longer is the desirable period of consensus building for a permanent constitution.

In a survey of over 22 cases of temporary constitutions, NAFS found great variance in the time period under which temporary constitutions remained the supreme law of the land ranging from less than a year (Togo 1992) to Eritrea which adopted an interim constitution in 1992 and though ratifying a permanent constitution in 1997 it is yet to be fully implemented. Similarly, NAFS found significant differences in whether interim constitutions succeeded in ushering in a stable and sustainable end to the conflict in the respective societies in which they were adopted.

In the case of Syria, the adoption of a temporary constitution in the aftermath of an inclusive political settlement is a necessity for several reasons. There is a need to address significant and urgent problems created by the conflict that nevertheless are theoretically temporary and therefore do not belong in a permanent constitution. These include the rights of the refugees and internally displaced populations, resolving problems of citizenship and personal identification documents, decommissioning of militias and reintegration into the Syrian military or society, resolving property disputes created by the conflict, transitional justice and national reconciliation measures, and other issues.

Furthermore, the conflict has created deep divisions within society and therefore the crafting and adoption of the permanent constitution should not be rushed. Rather to acquire more legitimacy it should be created through an inclusive process of national consensus that includes the voices of all sectors of Syrian society as well as refugees instead of quickly imposing a new and permanent constitution on a society still recovering from the wounds of war. This will also allow the development of programmatic political parties and give Syrian civil society a chance to organize itself to play its role in society.

Finally, the temporary constitution, or constitutional declaration, may grant temporary powers to a transitional council whose members may be appointed by consensus among the different parties rather than national election. A temporary constitution signals that this arrangement, and other aspects structuring governance that are not achieved through free and fair elections, is temporary, and will end once a permanent constitution is adopted. All these imply that there should be a temporary constitution to govern this time period.

Substantively, the temporary constitution should specify a number key issues. These include:

- Articulating the main goals of the transitional period

- A clear time period and roadmap until which a permanent constitution is adopted, mechanisms, benchmarks and timetables for its adoption, and alternatives if those benchmarks are not met by the specified timetable (e.g. if a majority of Syrian voters reject proposed permanent constitution in a national referendum)
- Specifying the make-up, roles and powers of the main executive and judicial bodies in the transitional period
- Specifying the laws that are to remain in place, those that are to be amended or nullified, and new laws that are to be operative in the transitional period
- Enshrining civil rights and human rights and other supra-constitutional principles which includes equality based on citizenship and gender equality as well as freedom of religion and belief.
- The legal framework guiding the humanitarian, economic, and legal impact of the conflict, including the right of safe and voluntary return of refugees and IDPs, transitional justice and reconciliation mechanisms, resolving issues regarding citizenship and national identification, resolving conflict specific property disputes, and amnesty for all political prisoners.
- Clear guidelines on the proper role of the army and security sector including civilian oversight over them

Mechanisms for adopting permanent constitution

The process by which a permanent constitution is written, ratified and implemented is as significant as the substance of that constitution and can entrench or undermine its legitimacy. The current Syrian Constitution, adopted through a national referendum in 2012 was adopted under circumstances that prevent it from achieving national consensus. The entire process, including the national referendum, took place while the violence in the country was still widespread, and significant numbers of Syrians were still being killed, wounded or displaced on a daily basis. Many areas in the country were still active war zones. The National Constitutional Committee was created- and its members appointed-through direct decree and selection by the Presidency. The draft constitution that was put up for referendum was not disseminated for widespread discussion or debate before the referendum, a process which would have been difficult anyway due to the aforementioned circumstances.

NAFS warns that a lack of meaningful societal inclusion, including widespread discussions and consultations solicited from all sectors of Syrian society, and an open and democratic debate surrounding the adoption of a permanent constitution will severely undermine its legitimacy and may not serve the purpose of solidifying the peace process. Inclusion implies consultations with all sectors of Syrian society regardless of region and political perspective and special attention for inclusion of women.

The powers and roles of the constitutional assembly tasked with drafting the permanent constitution and presenting it to the Syrian people for ratification must be clearly articulated in the temporary constitution and referred to in the political settlement. Though in some post-conflict cases the members of this constitutional assembly have been directly elected through national

elections, it is not advisable to have these elections when the country is still recovering from more than seven years of devastating conflict.

There are therefore two options: the constituent assembly may be elected through national elections two years after the end of the conflict and the signing of a political settlement, to give time for societal recovery and the creation of sufficient institutional capacity for carrying on national elections. Alternatively, a special constitutional commission is appointed through consensus among the main political actors and parties to the signing of the political settlement. Special attention that the constitutional commission is representative and inclusive of all political spectrums, regions, and has a minimum of 30% representation of women, keeping in mind that the 2012 constitutional commission included only 3 women out of 27 members or 11%.

The drafting of the constitution is a Syrian led process with outside parties role to assist in addition to diplomatic and political support to financial, logistical and other technical aid. Syrian led means all Syrians, throughout all of Syria's regions as well as those who have been displaced outside and within the country, and whose voices and opinions should be actively solicited.

Consultations, including establishing of forums, meetings, and specially designed consultative sessions with the public should happen to solicit ideas, discuss sensitive issues and foster a sense of national deliberation. Ideally, this would take place throughout the process of writing the constitution and not simply after a draft has been developed. The commission or constituent assembly should actively use the media to disseminate discussion sessions, information, and other relevant information so that citizens grasp the implications of the main issues being discussed.

Though these processes are time and financially consuming, they must not be avoided and are an essential part of the peacebuilding phase. If undertaken properly, they may foster a sense of national inclusion as well as public and democratic deliberation that models peaceful resolution of conflict and strengthens the role of civil society and citizens from all walks of life in the political process.

Main clauses for Syria's post-conflict permanent constitution

Syria's permanent constitution must set the fundamental principles according to which the State is governed, the nature of the State and form of rule, the entrenchment of its clauses and unmodifiable articles, the distribution of sovereignty within the country and hierarchy of laws, separation of powers, and lines of accountability.

As articulated in Article 8 of the July 2012 Final Communique of the Action Group for Syria (Geneva II), a wide range of Syrians consulted expressed an overwhelming desire for a State that is "genuinely democratic and pluralistic, giving space to established and newly emerging political actors to compete fairly and equally in elections... and a commitment to multiparty democracy." In addition they desire a State that "complies with international standards on human rights, the independence of the judiciary, accountability of those in Government and the rule of law" and a State that "offers equal opportunities and chances for all...[with] no room for sectarianism or discrimination on ethnic, religious, linguistic or any other grounds" while respecting the rights of "numerically smaller" communities.

Respect for equal citizenship and full civil and political rights as well as the nature of the state as a democratic pluralistic and non-sectarian can be regarded as the values upon which the state is built. It is essential that a permanent constitution for Syria clearly articulate these desires in its main clauses as well as provide mechanisms to the Syrian people to ensure that these commitments are kept by those in authority.

There are likely to be a series of particularly contentious or divisive issues that nevertheless must be referred to in the permanent constitution. The process of drafting the permanent constitution should pay special attention to holding mediated societal discussions around those issues. These issues include the separation of powers between the executive and legislative branches, the distribution of sovereignty around the country or issues of decentralization, the role of religion as a source of legislation, issues regarding ethnicity and national identity.

However, in the permanent constitution they should be addressed rather than avoided. Vagueness around them or avoiding them may postpone conflict around those issues to a future date rather than prevent it. Acknowledging that these issues are contentious even while addressing them is important.

The constitution should once more declare the State as having a monopoly on armed forces and security sector while at the same time restricting their powers and ability to interfere into realms of governance outside their jurisdiction and subjecting them to civilian oversight. It should permanently resolve any remaining issues resulting from the armed conflict.

In addition, the permanent constitutions should consider the following clauses:

- Limiting the government's ability to invoke emergency powers to specific circumstances that are to be defined
- Affirming political pluralism and the right to establish political parties and other forms of independent organized political organizations
- In addition to the rights of free speech and political affiliation mentioned above, affirming the rights to political opposition within the country as specified in numerous constitutions such as that of Tunisia and Portugal.
- Organizing the electoral process for national and regional elections
- Clearly affirming gender equality as an overall objective for the State and as a component of individual state bureaucracies and institutions and prohibiting all forms of discrimination, and considering quotas for women of at a third representation in the national and local assemblies.



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