

CONSTITUTIONAL REFORM: THE CASE OF SYRIA

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I. INTRODUCTION

The constitution of a country lays out the legal rules which create a system of government and define the use of political power. It defines the rights and freedoms of the citizens as well as the supreme principles of the state. Every subsequent law and decree should be compatible with constitutional rules. Therefore, constitutional provisions are important for the establishment of the rule of law and the protection of human rights, including the rights of women and religious minorities.

The first Syrian constitution (1928) was adopted under the French mandate (1920-1946). In the decades following independence in 1946, the constitution was suspended and redrafted multiple times because of political instability, including military coups, and the establishment of the short-lived United Arab Republic that united Syria with Egypt in 1958. The 1950 constitution is still the most important text from this period because of its legal adoption by the Constituent Assembly on 26 November 1949 and its provisions which put emphasis on citizen rights and the power of the people.¹³⁰ In spite of its significance, the 1950 constitution is not usable today for many reasons. First, its commitment to Arabism and Islamism would affect the rights of non-Arab and non-Muslim minorities, as discussed below.¹³¹ Second, the 1950 constitution was drafted and adopted before Syrian ratification of international human rights instruments. Consequently, a new constitution should be drafted to enshrine Syrian obligations with respect to these instruments. Third, because some systematic human rights violations, such as enforced disappearance (made especially problematic by the immunity of security agencies), had developed under the Syrian dictatorship, certain rights should be guaranteed at the constitutional level to prevent their violation.

Further changes to the constitution took place until the arrival in power of Hafez Assad in a 1971 military coup. On 14 March 1973, Assad's regime promulgated a new, largely politicized constitution. It represents a synthesis between, on the one hand, protection of rights and freedoms and, on the other hand, the protection of the socialist and Baathist regime.¹³² However, the Syrian regime has sacrificed human rights to save its political system. This is reinforced by Article 8, which considers the Baath Party as the leading party in society and state. Furthermore, Articles 48 and 49 require that all organizations have the duty to defend the regime.

^{130.} For example, Article 10, Paragraph 9 stipulates that "No-one shall be judged before the military courts other than members of the army (...)".

^{131.} The 1950 constitution stipulates that Islam is the official state religion and "Islamic jurisprudence shall be the principal source of legislation".

^{132.} Article 1 of this constitution states: "The Syrian Arab Republic is a democratic, popular, socialist, and sovereign state (...)".

The 1973 constitution remained applicable until the Syrian uprising in March 2011. A new Syrian constitution was then drafted and adopted by the Assad regime to reduce political tension in the country and stifle the nascent revolution. This new version removed the above-mentioned Article 8 from the new constitution, but no form of secularization has been adopted and the role of political ideology is still apparent, most particularly with the constitution's commitment to Arabism. Non-Arab minorities, such as Kurds and Assyrians, emphasize that their cultural rights are affected through this constitution. Therefore, the fragility of the Syrian constitutional system is still visible. This paper will analyse in more detail the above-mentioned issues before shedding light on future prospects concerning the role of religion in the constitution as well as suitable constitutional provisions for women, minorities and freedom of religion.

II. CURRENT CONSTITUTIONAL GUARANTEES FOR MINORITIES, WOMEN AND FREEDOM OF RELIGION

As with the majority of constitutions in the Arab world, neither the current Syrian constitution nor the previous versions contained explicit references to the term "minority" nor direct provisions to guarantee their position within the state and the society. Nevertheless, the protection of religious minorities is provided by two main categories of fundamental rights. These provisions relate first to the freedom of religion and, secondly, to the principle of equality. This last category also grants rights to women.

The Syrian constitution guarantees the principle of equality in its preamble as well as through Articles 18, 19, 26 and 33. The preamble insists on "the protection of national unity, cultural diversity, public freedoms, human rights, social justice, equality, equal opportunities, citizenship and the rule of law". Under Article 26.2, citizens shall be equal in handling public service functions. Article 33.3 calls for equality of all citizens "in terms of rights and duties without any discrimination among them on grounds of gender, origin, language, religion or creed". Paragraph 4 of the same article stipulates that "the state shall guarantee the principle of equal opportunities among citizens". This principle means that the prohibition of discrimination among citizens should embrace all laws as well as access to public services. This is not always the case, as has been seen.

The current Syrian constitution, as well as the 1973 constitution, provides that: "The State shall respect all religions, and ensure the freedom to perform all the rituals that do not prejudice public order".¹³³ Article 42.1 of the current constitution adds that the "Freedom of belief shall be protected in accordance with the law". Unlike the Lebanese and Jordanian constitutions, the Syrian one does not guarantee the right to the freedom of a religious education.¹³⁴

THE CURRENT ROLE OF RELIGION IN THE SYRIAN CONSTITUTION

The successive Syrian constitutions have neither been fully inspired by religion nor have they adopted strict separation between state and religion. Neither the current Syrian constitution nor the 1973

¹³³. See Article 3 of the current constitution and Article 35 of the 1973 constitution.

¹³⁴. See Article 10 of the *Lebanese* constitution and Article 19 of the *Jordanian* constitution.

constitution declares Islam as the state religion. Furthermore, the Syrian traditional constitutional system is deeply influenced by positive law; however it contains some religious arrangements such as reserving the presidency for a person belonging to the Islamic community and including provisions linked to Sharia as a source of legislation. Indeed, Article 3 of both the current Syrian constitution and the 1973 constitution proclaim that “the religion of the President of the Republic is Islam”.

The current Syrian constitution also stipulates that “Islamic jurisprudence shall be a major source of legislation”.¹³⁵ The main question is how this provision affects state laws and, more particularly, human rights issues. The impact of this provision on the Syrian legal system appears in matters related to family laws, also called personal statutes.¹³⁶ These are the main fields in which Sharia is applied and, consequently, provokes violations of the principle of equality between Muslims and Non-Muslims, women and men, as well as of rights to freedom of religion, thought and conscience.

MUSLIMS AND NON-MUSLIMS

Because of the importance Islamic law on matters related to family laws, a religious pluralist system is applied to these laws. Consequently, Muslims have their own family law and jurisdiction, as do the Christians and Druze. Contrary to the 1973 constitution, the current Syrian constitution has strengthened this plural system by adding a provision regarding the independence of the personal status of the religious communities.¹³⁷ However, far from being a way to protect religious minorities, the separation between Muslims and non-Muslims regarding personal statutes has caused the violation of many human rights.

The above mentioned system includes a tendency toward Islamization when the conversion to Islam is a way to get access to all citizenship rights, to escape the abusive provisions of some non-Muslim legislation and to enjoy some benefits from Islamic law. This conversion is most often performed to obtain a divorce, to get custody of a child or to marry a second woman.¹³⁸ Unlike in Lebanon, the children from a marriage between a Muslim man and a non-Muslim woman are mandatorily registered as Muslims in Syria. According to the Syrian doctrine, children should follow the best of religions, Islam. Non-Muslim mothers are discriminated against because of the position courts take regarding the custody of the child in case of a legal conflict.¹³⁹ The testimony of a non-Muslim is not accepted before Islamic courts. Furthermore, an inheritance from a Muslim to a non-Muslim is forbidden under Article 264 of the Syrian Law of Personal Status (SLPS). Therefore the question of succession can

135. Other constitutional provisions are inspired indirectly from Islam such as Article 20 which states that “The family shall be the nucleus of society (...)”.

136. This includes matters related to marriage, divorce, inheritance, etc. The Syrian legal system was deeply influenced by French law. Islamic law is only used to fill gaps in positive law as stated in Article 1 of the Syrian Civil Code (adopted by Legislative Decree No. 84 of 18 May 1949). However, in addition to personal status matters, Sharia plays a role in other social and political issues such as the justification of the governor’s legitimacy.

137. Egyptian constitutional reform is also considered in Article 3 that: “the canon principles of Egyptian Christians and Jews as the main source of legislation for their personal status laws, religious affairs, and the selection of their spiritual leaders”. Such provisions were already included in Lebanese and Jordanian constitutional systems (see Article 9 of Lebanese constitution and Article 99 of the Jordanian constitution).

138. In some Christian communities, divorce is not allowed, referring to where the Gospel says: “What therefore God has joined together let no man separate”. Thus the conversion to Islam is inevitable to get a divorce judgment in order to enter into a new marriage later.

139. Syrian tribunals follow the famous jurisprudence of the Syrian Cassation Court. On 6 April 1981, this Court ordered the verification of allegations concerning the influence of a child’s religion by his Christian mother (Case No. 301). As a result, the conversion of the Christian husband to Islam allowed him to seek immediate custody of the child.

only be solved when converting Christians to Islam. These restrictions are also applied in the neighbouring states of Egypt and Jordan; however modern interpretation of Sharia by Islamic judges could eliminate such discrimination, such as by granting custody of a child to a non-Muslim mother, which was accepted in the court of law in Jordan.¹⁴⁰

FREEDOM OF RELIGION

The above mentioned discrimination based on religion is considered a violation of the freedom of religion. This freedom is also affected because of the constitutional provision based on Sharia. The legal and legislative apparatus imposes strong restrictions to an apostate in Islam. Unlike Lebanon, which allows one freedom to change their religion, non-Muslim converts in Syria, just like Muslims by birth, cannot leave Islam.¹⁴¹ It is true that Syrian laws do not deal expressly with the abandonment of Islam; however Article 305 of the SLPS demands the return to the rules of the Hanafi rite to fill in the absence of positive legislation. Therefore, the judges will be forced to return to the Hanafi School laws; i.e. the provisions in the Code of Qadri Basha.¹⁴² This Code forbids apostates to change their religious identity on official documents. They are separated from their spouses and they cannot draw up contracts, including marriage. They are also deprived of their rights to child custody and inheritance. In some cases, such restrictions would not apply, but the Syrian government continues to deal with an apostate as a Muslim.

The ban on leaving Islam has led to the violation not only of the freedom of religion, but also some other fundamental rights of all Syrian citizens, including equality and freedom of speech.¹⁴³ To prohibit the renouncement of Islam in Syria imposes strong restrictions against non-Muslims regarding their legitimate right to proselytize.¹⁴⁴ This must be guaranteed under the right to freedom of speech and the right to follow any religion or belief.¹⁴⁵

The violation of religious freedom also appears when imposing a recognized religion to all citizens. All citizens have to belong to a religion and no form of atheism is allowed in the country. This is a common issue in Arabic countries. Furthermore, some religious minorities are not recognized in Syria, due to their incompatibility either with the political mainstream, such as the Jehovah Witnesses, or with Islam, such as the Baha'i minority. The people belonging to these minorities cannot represent themselves correctly on their national identity cards. They also face persecution from the Syrian authorities when attempting to participate in religious meetings; this constitutes a violation of Article 21 and Article 22/1 of the International Covenant on Civil and Political Rights (ICCPR).

140. See the example of ruling No 65/493 of the Court of Cassation (Supreme Court), published by Bar Association's Journal (Al-Muhamoun) in 1966. Nevertheless, the law's provisions become clearer in this regard following the adoption of the new Jordanian Law of Personal Status in 2010. Article 172b of this code states that a non-Muslim woman loses custody of her child when he or she reaches the age of seven.

141. See Mohamed Zuhir Abdou Al-Hakk, (chariee guide to the judge and the lawyer), Al-Majed, Damascus, 1994, p. 40.

142. Articles: 31-32, 120-130 and 303-309 concerning the status of apostates. For more details, see Sami Aldeeb, *Le délit d'apostasie aujourd'hui et ses conséquences en droit arabe et musulman*, 1994, p. 12, available on www.sami-aldeeb.com.

143. Unlike conversion to Christianity, the conversion to Islam is easily done and procedures are simplified, even if the convert wants to evade the law.

144. See the Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir for the sixtieth session of GA, A/60/399, 2005, para. 67.

145. Freedom to invite others by peaceful means to convert to their religion belongs to the category of freedom of expression. For more details, see Gianfranco Rossi, « Le droit à la liberté de diffuser sa religion », in *Conscience et Liberté*, 59, 2000, p. 123.

WOMEN'S RIGHTS

Non-Muslim women are victims of discrimination at many levels, particularly in cases related to their personal status. Such discrimination is particularly applied to their marriage, during their marriage or its dissolution. Article 48 of the SLPS imposes restrictions on the women's rights to choose a partner.¹⁴⁶ This article stipulates that a marriage between a Muslim woman and a non-Muslim man is void, with the consequence that any child from such a relationship is illegitimate. This violation is related not only to the rights of women but also to non-Muslims and children. The other violations are related to equality in case of succession, inheritance, age for the marriage and polygamy. According to Syrian legislation, women also cannot pass their nationality to their husband or children.¹⁴⁷

The influence of the Sharia constitutional provision was also confirmed through the Syrian ratification of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).¹⁴⁸ In fact, this convention had been approved at the national level according to decree No. 330. However, the ratification was accompanied by many reservations which are motivated by Sharia. Such motivation is expressly stipulated by Article 1 of the above mentioned decree.¹⁴⁹

III. FUTURE PROSPECTS FOR THE ROLE OF RELIGION IN THE SYRIAN CONSTITUTION

It is true that the non-representation of Islam as a state religion in Syria is an almost unique case in the Arab world.¹⁵⁰ However, the above mentioned religious constitutional clauses affect the principle of state neutrality. They constitute a violation of the social and political rights of non-Islamic communities and affect the equality between women and men, of Muslims and non-Muslims and of the freedom of religion. The provision regarding the role of Sharia as a source of legislation is also incompatible with some other constitutional provisions such as the equality among citizens. This creates a complex situation affecting judicial stability in the country.

Secularization, which implies separation between religion and state as well as a respect for all religions without any distinction, is essential in the Syrian context. Islam should not be given a dominant role through any Syrian constitutional reform. Indeed, this country is the most diverse one in the Middle East. It is composed of several Christian and Muslim minorities as well as non-Arab ethnic minorities. This diversity and multi-faith situation make it more complicated for the establishment of Islamic constitutional and political dominance. Consequently, the Syrian constitution should be free from any provisions regarding the dominance of Islam or any other religious beliefs. At minimum, the provisions regarding the principles of Sharia or Islamic Fiqh should be "a source" or "one source" of legislation, but not "the source" or "the major source" of legislation.¹⁵¹ This would be a means to

146. Law No. 59 of 1953, modified by law No. 34 of 1975.

147. See the 1969 Syrian nationality law.

148. Adopted in 1979 by the UN General Assembly.

149. Other international instruments such as the ICCPR have been approved without reservations.

150. This article is also absent from the Lebanese and Djibouti constitutions.

151. Regarding the distinction between Fikh and Sharia, see Razi A. Diab Esq, *Religion and the law in Syria*, The Arab Center for International Humanitarian law and Human Rights Education, available on: http://www.acihl.org/article.htm?article_id=26.

facilitate the management of Syrian religious diversity.¹⁵² Such provision should be accompanied by a clause related to human rights principles such as the following: “common principles of Sharia and human rights shall be a source of legislation”. In this case, religious provisions which are incompatible with human rights principles should be eliminated. This also should pinpoint some barriers that need to be respected concerning human rights in the modern interpretation of Sharia, which is one of the main pillars needed to strengthen religious freedom and the rights of women and non-Muslim minorities.¹⁵³ The religious influence could also be reduced by adding provisions based on the citizenship principle, which is essential to build a civil and democratic state. The citizenship notion should be empowered in the Syrian legal system. This principle, which has emerged since the creation of nation states in the Arab world in the early twentieth-century, helped people in this region develop a sense of belonging to their homeland and not to their confession or religion.

SUITABLE CONSTITUTIONAL PROVISIONS FOR WOMEN, MINORITIES AND FREEDOM OF RELIGION

Any new constitutional reform should take into consideration Syrian obligations to respect international human rights law. In fact, Syria participated in the preparatory work on the development of major international instruments guaranteeing the respect of human rights such as religious freedom and the principle of equality. In 1948, Syria was among the states that participated in the elaboration of the Universal Declaration of Human Rights. Syria has also ratified most international treaties, including the Convention on the Rights of the Child (CRC – 15 July 1993) and the two Covenants on Human Rights (21 April 1969) and the CEDAW (25 September 2002). Consequently, even in the case of a change in its regime, Syria is committed to respect international human rights law. This obligation should be confirmed by two essential principles.

First, the Syrian constitution should recognize the primacy of international law over national law.¹⁵⁴ Second, provisions of international human rights law should be incorporated in the Syrian legal system, including its constitution.¹⁵⁵ The constitutions of other Arabic countries take a more progressive position on these issues. The preamble of the Moroccan constitution, for example, stipulates that treaties ratified by the state “take precedence over domestic law”. Furthermore, the preamble of the Lebanese constitution stipulates that “Lebanon is a founding and active member of the United Nations Organization and abides by its covenants and by the Universal Declaration of Human Rights. The Government shall embody these principles in all fields and areas without exception”.¹⁵⁶

Some rights that are recognized in these international treaties do not find their equivalent in the current Syrian constitution. This applies to the protection of minorities (Article 27 of ICCPR), the freedom

152. *Ibid.*

153. Various Muslim schools of law show a greater or lesser severity of Sharia interpretation.

154. In this context, Article 27 of the Vienna Convention on the Law of Treaties stipulates: “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”.

155. The Permanent Court of International Justice recognized the principle of the insertion of international provision instruments into the national legislation. See P.C.I.J, *Case of Exchange of Greek and Turkish Populations*, Advisory Opinion, Ser. B, No. 10, p. 20.

156. The Jordanian Constitution doesn't state such provision, though, unlike Syria, many court decisions in Jordan recognised the principle of primacy as a Supreme Court ruling No. 38/1991.

to have or adopt freely a religious belief (Article 18 of ICCPR), the protection of children without any discrimination (Article 24 of ICCPR and Article 2 of the CRC), the right to equality before the courts (Article 14 of ICCPR) as well as the equality between spouses in term of rights and responsibilities in the marriage, during the marriage and its dissolution (Article 23 of ICCPR), which are not included in the Syrian constitution.¹⁵⁷ Similarly, many provisions of the CEDAW, such as the equality between women and men before the law aren't included in the constitution.¹⁵⁸

Equality among citizens, Muslims and non-Muslims, men and women, Arabs and non-Arabs, at every level, should expressly be included in the Syrian constitution. Equality is a key aspect of the citizenship principle which is crucial for the unity of the Syrian people as well as the integration of minorities. Equality before laws and courts, when it has to do with rights and duties, is crucial in order to avoid discrimination in matters related to personal issues. In fact, improving the status of religious minorities and women could be achieved by reviewing the personal status codes in the light of international human rights instruments.

It is also important to adopt a unified civil code which applies to all citizens without discrimination based on gender or religion. The Turkish model could succeed in Syria. In 1926 Turkey adopted a civil code which replaced the religious code. This code included many provisions based on positive law and was successful in reducing discrimination in society. In the current political climate in Syria, a total secularization of family laws cannot be easily accepted. This requires a constructive debate in the public sphere as well as spreading the culture of human rights and freedom in the society. Unlike Syria, many political leaders in Lebanon such as Presidents Elias El-Hrawi and Michel Suleiman have supported the legalization of civil marriage. In this country civil society is seeking the establishment of secular law in parallel with the existing religious law. In such a system, the spouses would be free to enter a religious or civil marriage depending on their convictions. Syrian society should join the Lebanese efforts to adopt civil marriage.¹⁵⁹ In this context, attempts to implement reforms in the field of personal status have more chance of success if certified in advance by suitable constitutional provisions, including the right to marriage without discrimination, the right to freedom of religion and the right to equality before the court of law.

Given the Syrian context, violence against women should be prohibited in the constitution and a positive obligation from the state should be included in order to prevent all forms of violence towards women. Any future constitution should also introduce a quota for women to step up their participation in political life. Freedom of religion and conscience should be absolute in the constitution.¹⁶⁰ This right, which is essential for the protection of religious diversity, should necessarily include the freedom of worship to every religion, the freedom to change one's religion, to belong or not to a religious community and to be a believer or not.¹⁶¹ The right of non-discrimination is related to religious free-

157. The future Syrian constitution must include the term "minority" as well as their specific rights. This would allow people belonging to minorities to be more protected according to international human rights law.

158. See Article 15 of the CEDAW.

159. Currently, Lebanese citizens can avoid restrictions regarding interfaith marriage by getting a civil marriage abroad and Lebanese authorities recognize this kind of marriage. Nevertheless, mixed marriage completed abroad is not recognized in Syria when it is incompatible with Syrian legislation such as Article 48 of the SLPS .

160. This clause is included in the Lebanese constitution (Article 9).

161. Individuals who do not belong to one of the official religions (Islam, Christianity) cannot represent themselves correctly on their national

dom; therefore the constitution should also provide a provision in order to punish by law any religious discrimination as well as discrimination based on gender and origin.¹⁶² Finally the right for the parents to choose their child's religious education, which is often subjected to restrictions in Syria as in other Arabic states, should be included in the Syrian constitution.¹⁶³

IV. CONCLUSION

The way to democracy is not easy given the political conflicts which have created an environment not conducive to such change. Improving the status of women and religious minorities in Syria could be achieved by taking serious initiatives. The strengthening of interreligious dialogue is essential to reduce tensions in Syria. The current education system is the source of interreligious tension in Syria, as in the other countries of the Arab world. It is important to restructure education to put it in the service of tolerance, democracy and human rights. We should eliminate discrimination in legislation and revise them in order to respect the rights to freedom of religion and women's rights. Full access of Syria to international human rights and their mechanisms is essential. Strengthening the role of civil society contributes to the establishment of democracy.

It is true that the Syrian constitutional system has contributed to forming the great principles of human rights and, in particular, to introduce the notion of citizenship, which is crucial for the integration of religious minorities and respect for women's rights. However the Syrian constitutional system is far from ideal. Furthermore, the Arab world, including Syria, continues to experience important political and legal reforms. These changes can lead to the introduction of a new political and legal framework that affects the issues of religious freedom, the integration of minorities and women's rights.

identity cards. Those people have to be under religious laws in matters related to personal statutes. Religious freedom is also bound by a number of other human rights, such as freedom of expression and opinion as well as with the freedom of association.

162. Acts of discrimination can be applied by state employees or any other citizen against a person or a group of people.

163. This right is protected according to Article 18 of ICCPR and Article 14 of CRC.