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LEGITIMACY &
CITIZENSHIP
in the Arab world
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THE QUESTION OF RELIGION IN SYRIA'S CONSTITUTIONS

A COMPARATIVE AND HISTORICAL
STUDY

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Cover photo: A flock of pigeons flies in Damascus, courtesy of Iyad Tibi (Damascus, August 2007)

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Legitimacy and Citizenship in the Arab World

Legitimacy and Citizenship in the Arab World is a project within the Civil Society and Conflict Research Unit at the London School of Economics. The project looks into the gap in understanding legitimacy between external policy-makers, who are more likely to hold a procedural notion of legitimacy, and local citizens who have a more substantive conception, based on their lived experiences. Moreover, external policymakers often assume that conflicts in the Arab world are caused by deep-seated divisions usually expressed in terms of exclusive identities. People on the ground see the conflict differently and often perceive it as collusion against the general populace.

The project aims to bridge these gaps and advance our understanding of political legitimacy, thus improving policymaking and constitution writing to achieve sustainable peace and state-building in the Arab world. It also investigates how exclusive identities are deliberately constructed by ruling elites as a way of deflecting democratic demands and hindering the prospects of substantive legitimacy.

While Syria is the project's focus, a comparative analysis is also being conducted to draw relevant lessons learned from post-war Lebanon and Iraq where ethno-sectarian power-sharing agreements were the basis of peacebuilding processes and constitution writing.

The research paper series comprises papers, published sequentially, concerned with the study of pivotal issues in democracy-building, legitimacy-building and identity formation in Syria from a constitutional perspective. These issues, and how they have been addressed in successive Syrian constitutions, are examined in a historical study, from the first constitution drafted in 1920 up until the present day. The developments and deliberations surrounding them are also examined, as per their historical context. A comparative analysis of how other countries' constitutions addressed these issues is also put forward, before presenting solutions and proposals for how they can be engaged with at the current time.

The project is carried out by a team of Syrian and Lebanese researchers and experts, led by Dr Rim Turkmani.

For more information visit the project's website: <http://dustoor.org/> ■

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1 Introduction and Methodology

Examining the place of religion within the state and its relationship with the political system is crucial for two key issues: first, in understanding the nature and characteristics of the governing system, and the source and nature of its legitimacy; and second, in outlining the limits of individuals' rights and freedoms. This state-religion relationship dictates two other important relationships. The first is that between individuals and the holders of political power in the state; rooting political authority in religious legitimacy could serve to lend those in power a certain sanctity, thus obstructing the right of the governed to scrutinise and hold them accountable, and impairing their acceptance that the rights and freedoms of the governed pose a limit to their power. The second is the relationship between people and the laws that govern them; these, if presented as being rooted in divine law, would too be afforded a sanctity which deprives citizens, the principle subject of these laws, of their right to participate in the writing, reviewing and amending of such laws according to the ever-changing needs of their society, or, indeed, their right to assess and criticise these laws.¹

This paper presents an examination of the question of religion within the Syrian constitution, a question which is expected to cause many complications and disagreements in the upcoming constitutional process owing to a crucial division, not between supporters

and opponents of the Syrian regime, but between two schools of thought: a conservative one and a civic one. Conservatives demands that religion is given prominence and that its role is strengthened, both in the law and in the private lives of individuals. Civic advocates, meanwhile, call for the new constitution to be based on the separation of religion from all aspects of public, political and legal affairs, and for state-level decision-making to be made through political and legal institutions in the interests of public good, away from the influence of religious institutions. Civic advocates consider this to be the only way to respect Syria's rich religious diversity, and to preserve freedom of belief for all members of society. Some within this school of thought are unequivocal in their call for Syria to be a secular state, whereas others instead call for a 'civic state' (or civil state)² for a variety of reasons.³

This paper examines how the various Syrian constitutions have, over time, contended with the question of religion. Using a historical methodology, we have relied on primary and secondary sources, and historical archives, in a review of all the Syrian constitutions that entered force between 1920 and 2012, along with the deliberations that accompanied them.

This paper also looks comparatively at other countries' constitutions, both Arab and non-Arab, and how they have dealt with this question, to put forward proposals for how the upcoming constitutional process could contend with this most difficult of questions.

1 Ibrahim Draji, Huda Elsadda, Salsabil Klibi, *Comparative Study on Constitutional Processes in the Arab World: A Gender Perspective*, Ed. Boriana Jonsson and Lilian Halls-French (Paris: EuroMed Feminist Initiative) p. 70.

2 The term civic state is usually used to indicate two meanings. Firstly, it means being a state in which military forces do not intervene in state affairs and is under civilian control. Secondly, it is used to refer to the secular state or the state in which religion is clearly separate from public affairs. In this paper, we have employed both the terms 'civil' and 'civic' state to refer to this meaning.

3 See: *The Betrayed Secularism in Syria*, Mohammed Dibo (Al Awan Publications, 2013). Link: <https://bit.ly/2mkLMyH>

Constitutional drafts for Syria, those which did not enter into force, have not been addressed in this paper, with the exception of the 1920 draft constitution. We have examined the 1920 constitution, owing to its historical, political and constitutional importance as the first attempt to write a Syrian constitution, and as the text upon which many later constitutions were based. The deliberations surrounding the 1920 constitution, which we have examined in this paper, also illustrate how many of the key constitutional issues of the time, those which the founding fathers were discussing and reaching consensus on, remain relevant even today. These deliberations also shed light on how subsequent legislators in Syria reneged on the many of the founding principles, those which were established at the time to build a contemporary, civic and democratic state.

The Syrian constitutions, which were the subject of our research and which are covered in this paper, are:

- 1) **Draft Constitution of 1920:** The Fundamental Law of the Arab Kingdom of Syria, introduced by the Syrian National Congress, which was held between 3 June 1919 and 19 June 1920. It did not actually enter into force owing to France's military invasion of Syria.
- 2) **Constitution of 1930:** Introduced by order of the High Commissioner of the French Republic on 14 May 1930. It was primarily based on the constitution agreed upon by the elected Constituent Assembly in 1928, except for six articles which the French mandate authorities did not agree to. It was suspended several times during the French mandate period.
- 3) **Constitution of 1950:** Approved by the Syrian Constituent Assembly on 5 September 1950.
- 4) **Constitution of 1953:** Introduced on 11 July 1953 by order of the President of the Supreme Military Council.
- 5) **Constitution of 1958:** Introduced on 5 March 1958 by order of President Gamal Abdel Nasser.
- 6) **Constitution of 1961:** The Interim Constitution of the Syrian Arab Republic after its separation from Egypt.
- 7) **Constitution of 1962:** Introduced on 13 September 1962.
- 8) **Constitution of 1964:** Introduced on 24 April 1964 by order of the National Revolutionary Command Council.
- 9) **Constitution of 1969:** The Interim Constitution of the Syrian Arab Republic introduced on 1 May 1969 by order of the Regional Command of the Arab Socialist Ba'ath Party.
- 10) **Constitution of 1971:** The Interim Constitution of the Syrian Arab Republic introduced on 16 February 1971 by order of the Regional Command of the Arab Socialist Ba'ath Party.
- 11) **Constitution of 1973:** The permanent constitution of the Syrian Arab Republic introduced by the President of the Republic by Decree 208 on 13 March 1973, after it was put to a referendum.

12) Constitution of 2012: The constitution of the Syrian Arab Republic currently in force, introduced during the current conflict. It was drawn up by a committee appointed by presidential decree and was put to a public referendum.

These successive constitutions were drafted according to various kinds of procedural models, in keeping with the historical context of the time.⁴ We posit that the constitutions which were drafted by an elected constituent assembly following deliberations which took place in a climate of relative freedom, and thus those giving us reasonable indications as to the discussions surrounding the place of religion in the constitution, were those of 1920, 1930 and 1950. The 1920 constitution, significantly, was the first draft constitution of Syria. The 1930 constitution, although it was written during the mandate period, was mainly drawn up by an elected constituent assembly in 1928 whose documented deliberations show to us that it consistently refused to submit to the will of the mandate authority. The 1950 constitution, meanwhile, was the first constitution to be written by a constituent assembly after the end of the French mandate. The remaining constitutions were either drawn up by an appointed committee during a period of unrest and military coups, introduced by order of the Ba'ath Party Regional Command, introduced by a committee appointed by the Command (as with the 1973 constitution) or introduced by a committee appointed by the president, as with the 2012 constitution. Accordingly, this paper cites the deliberations of the constituent assemblies drawing up the constitutions

of 1920, 1930 and 1950. This is also because these deliberations were recorded and documented in full, while in the case of the other constitutions such records are lacking.

The Syrian National Congress, which gave rise to the 1920 constitution, also released a 16-page, introductory document along with the constitutional text entitled 'Transcript of the Explanatory Statement for Drafting the Basic Law—the Constitution'. This document presents the context in which the constitution was drawn up, and explains the reasons that led the Congress to adopt certain options, and forgo others. This document was signed on behalf of the Constitutional Committee by the editor of the transcript, the representative of Tripoli, Othman Sultan, and we shall cite this document in this paper along with the constitution itself.

It is important to clarify that this is an academic working paper, not a paper advocating one option over another, or commenting on a certain group or individual's values or beliefs, whether the source of said values or beliefs is religious or civil. What it attempts to do, instead, is to give a technical, analytical and comparative presentation of the religion-constitution relationship in the Syrian context, from the time of the first draft constitution of 1920 up until the present day. It also carries out a comparative examination of how other Arab and non-Arab constitutions have engaged with this question; then, from the precedents, experiments and experiences of these countries, it presents proposals and possibilities of how to overcome some of the problematic and potentially divisive and disruptive

4 For details on these different models, see: 'al-masār al-ijrāt li-ad-dasātīr as-sūriyah al-muta'āqibah,' in: *sūriyah: badā'il dustūriyah*, National Agenda for the Future of Syria Programme, ESCWA, 2018. Link: <https://bit.ly/37f3MNL>

issues in any upcoming constitution process. These options are presented while emphasizing the necessity for any model or text adopted to be put up for discussion, and be accepted and agreed upon by the Syrian population, across the social spectrum, without exclusion and without exclusivity of opinion or decision-making. This is crucial if the constitution is to serve as a social contract, encompassing all individuals and all strata of society. ■

2 The Place of Religion in Syria's Constitutions

In examining the role of religion in the constitution, this paper shall focus on two major issues: the official religion of the state, and the relationship between religion and legislation as it is these two issues that proved to be the most impactful in Syria's legal and political systems.

However, on examining the various Syrian constitutions we also find numerous references to religion that go beyond these two issues. It also reveals how particular religious issues were given significant prominence in one constitution, while being neglected or completely disregarded in a subsequent constitution. Such shifts reflect the political landscapes and historical contexts in which these texts were drafted, and the extent to which it involved genuine public participation, allowing for free and objective debates on often highly sensitive religious issues.

In the following section, we present eight core questions related to religion, and the way in

which they were addressed by successive Syrian constitutions.

2.1 The Religion of the State and the Head of State

Contrary to other Arab and Islamic constitutions, successive Syrian constitutions addressed the issue of the religion of the state's ruler, rather than the religion of the state itself. The extent to which this matter gave rise to controversy and division varied significantly in the different constitutional eras. We outline below how each constitution dealt with this issue.

Constitution of 1920: The first Syrian constitution was unambiguous in its designation of the religion of the country's ruler. It stipulated: **'The Government of the Arab Kingdom of Syria shall be a civil parliamentary monarchy; its capital shall be Damascus and the religion of its King shall be Islam.'**⁵ The use of the word 'civil' here to describe the government is highly significant, particularly as a century later, Syrians are still in disagreement about whether this word should be reintroduced into their constitution.

The members of the Syrian National Congress who drew up the constitution presented their rationale for the model they had adopted within the introductory document, the Transcript of the Explanatory Statement for Drafting the Basic Law – the Constitution. Part of this transcript reads:

'Article 1 of the Basic Law states, "The Government of the Arab Country of Syria shall be

5 1920 Syrian Constitution, Article 1

*a parliamentary monarchy; its capital shall be Damascus and the religion of its King shall be Islam." By this, what is wanted is for the country to be a civil and parliamentary country, in which the governance of the nation is carried out by ruling itself by itself, and for purely religious elements not to be allowed in the sphere of politics and public provisions, while respecting the freedom of all religions and creeds present in the country without discriminating between sects, and preserving that which relates to doctrinal beliefs and personal status matters, whereby these remain free according to rituals and religious teachings without the slightest restriction or opposition.'*⁶

According to accounts by Rashid Rida, the president of the Syrian National Congress, the deliberations that ended in this article being agreed upon involved two contrasting proposals. The first advocated for the constitution to stipulate a secular state, while the second called for the constitution to stipulate an Islamic state. The agreement that was reached, therefore, was to refrain from defining the state as either secular or Islamic, in return for stipulating that the religion of the King be Islam. Rida says in his letters:

*'Some of the non-Muslim members of the Congress in this session proposed that it be stipulated by the decision of the Congress for the united Syrian government to be non-religious (secular). Some 'geographic' Muslims agreed,'*⁷

*while others opposed this, proposing instead that it should be decreed as an Arab Islamic government, or that its official religion be Islam. A heated dispute ensued, and I did not see any way of this dilemma except to propose we remain silent on the issue. I said: To declare the state not religious will be perceived by all Muslims that it is a government of godlessness and heresy, one which bound neither by halal nor haram, making it illegitimate and therefore not a state to be approved or obeyed and that should even be overthrown. So the best thing to do would be to keep quiet about it. And this was an opinion which the majority agreed to, on condition that it was stipulated that the official religion of the King be Islam. And It was this which was approved.'*⁸

However, it should be noted that this provision was of little significance and impact in practice, and that what had been agreed upon was, in any case, effectively a forgone conclusion. It had limited significance and impact because the draft constitution had diminished many of the powers of the king in favour of the prime minister, whose religion the constitution had not been stipulated. One way in which the position of the prime minister was strengthened was through the system of government proclaimed in Article 1: 'The Government of the Arab Kingdom of Syria shall be a civil parliamentary monarchy.' The reason the result of this provision could be considered a foregone conclusion, meanwhile, is that the office of the

6 Hasan al-Hakim: *al-wathā'iq al-tārīkhīyah al-muta'alliqah bi-al-qadīyah al-sūriyah: fī al-ahdayn al-arabī al-faysalī wa-al-intidābī al-faransī*, 1915-1946, (Beirut, Dar Sader Publishers, 1974)

7 Sheikh Rashid Rida utilised the term 'geographic Muslims' to describe those Muslims who he believed were a burden upon Islam, as opposed to those he referred to as 'true Muslims'. By 'geographic Muslims', he meant those who are Muslims solely by dint of geography, who are affiliated to Islam by name only, or those who are counted as Muslims in the geography census without knowing, in his opinion, what Islam really meant. 'True Muslims', in his view, were those who understood Islam at its core and had knowledge of it; these, he believed, were few and far between. See: al-Senussi Mohammad al-Senussi, *al-muslimūn al-jighrāfiyūn wa anwā'ihum as-sittah*, (9 October 2018). Link: <https://islamonline.net/27146>

8 *al-'ibra bi-sīrat al-malik faysal*, Al-Manar Magazine, Issue 34, Muharram 1353 AH, p.68

king was constitutionally restricted to the offspring of King Faisal and his Hashemite family, as per Article 5 which states:

'The King of the Syrian Kingdom shall be the oldest of the sons of King Faisal I, continuing thereafter according to this rule; if one of them does not bear a son, the King shall be the oldest of the closest male kin; and King Faisal I does not bear any male kin, the Congress shall collectively elect by two-thirds majority of its members, a king of Syria from the dynasty of King Hussein I, King of Hijaz, and the inheritance of the King shall be to the offspring of Faisal the First.'

This provision, by its very nature, thus eliminated the possibility of the successor to the throne holding any religion but Islam.

Constitution of 1930: This constitution approached the issue of the religion of the head of state in a similar way to the 1920 draft constitution, but replaced the word 'King' with 'President', reflecting the change in the country's political system. The provision now read: **'Syria shall be a parliamentary republic; the religion of its President shall be Islam; and its capital shall be Damascus.'**⁹

This clause was subject to a number of objections when the constitution-writing committee discussed it before the Constituent Assembly. The rapporteur of the committee, Fawzi al-Ghazi, presented the Explanatory Statement of this clause in the twelfth session of the Constituent Assembly, stating:

'I thus bring together the opinion of the Com-

*mittee to observe the custom of the present time and accede to the opinion of many modern peoples; [the Committee] has chosen republican rule in Syria and saw that the president's religion should be Islam. This is because constitutions, if their spirit is derived from universal principles and widely-held, contemporary juristic theories, should not deviate from the country's traditions and customs, or the opinions and beliefs of its people. These fundamental elements have always been front and centre throughout all the constitutions of the country. For this reason, the majority of the committee has decided to adopt this paragraph from Article 1 of the constitution drafted by the 1919 Syrian Congress, and it appears as it is set out in aforementioned Article 3.'*¹⁰

The first objection to this clause came from the representative Nicolas Janji, who believed it violated the principle of equality between Syrians, a principle itself guaranteed by a previous clause of the constitution. He called for state neutrality towards religions, declaring in his objection to the Assembly during its thirteenth session:

'If the religion of the president is limited to a particular religion, this would be in abandonment of the spirit of Article 6, which stipulates that Syrians are equal in their enjoyment of civil and political rights. Some might argue: "Is the tolerance and open-mindedness of the committee in refraining from giving the state an official religion not enough for you?" And yes, I do not deny that there is tolerance, however it is superficial and does not change anything of the current situation, that being, as is well known, the legacy of a state built upon the ba-

⁹ 1930 Syrian Constitution, Article 3

¹⁰ Meeting records of the 1928 Syrian Constituent Assembly, Session 12, 2 August 1928, p. 226

sis of religion. As such, not mentioning an official state religion is a courtesy of language and nothing more. If there really was a will to bring about something new in our social system, that would only be through making the state neutral towards religions, i.e. secularism. This is, according to what the Committee says and believes, is not feasible at the current time, given the attitude of the majority. I do not blame members of the Preparatory Committee for following the majority public opinion whom it represents. However, I ask the Committee to be fair and observe with me that there exists, too, a significant minority, which cannot comprehend how the result of their struggle for this nation's freedom from seven centuries of oppression, would be the continuation of inequality, in a nation which believes the servant is less worthy than the master.' ¹¹

As for the second objection, it came from the representative Fa'iz al-Khoury, the Secretary of the Constituent Assembly, who, although he expressed disappointment, argued that adopting this clause would not be the result of intolerance from the Constitutional Committee members, but for another reason. He said:

'The nation has still not reached the place where we can say we are all brothers, and that Religion is for God, the Homeland is for all, without it being superficial; for it would be as if we were to say: 'read and rejoice, put to the test and despair'. It is this which led the Committee to draft certain provisions which carry with them a hint of religious intolerance and the like. However, with God as our witness, there is not a single person in the Constitutional Committee who thinks like that, or carries in his heart

even the slightest trace of religious intolerance. We cannot, however, discredit what we do not understand, and we are going to come onto this point later.' ¹²

He later went on to consider that restricting the president's religion to Islam would also pose a restriction for the Muslim majority – those who might want to elect a president from another religion. He argued:

'On mentioning the presidency, they say: If the majority of the parliament is Muslim, which it will always be, what is the meaning and use of drafting a provision which stipulates that the president should be Muslim, as long as the majority of parliament is Muslim. For if someone from a minority is eligible and qualified for the presidency, and is elected by the majority, why should he not be elected, and why should the majority be constrained in this way? We want to grant rights to the majority, however in this provision they are, in fact, restricted. This is a pertinent statement and a sound objection. This should have been addressed; however, as we said, it appears that the current status quo does not enable the Committee to address it. If the Assembly saw that this article should be amended, this article is not a divine-given script, and if the majority wanted to amend it, so too may it be amended. For myself, as a Christian, when I am with my Christian brothers, I am not able to defend this point very well; they say to me, these Muslim brothers of yours are placing a huge obstacle in front of you – you and other Christians and the other minorities – so what should I say to them? We are striving, as I mentioned earlier, for unity in words, in everything, and for there not to remain between members

¹¹ Meeting records of the 1928 Syrian Constituent Assembly, Session 13, 7 August 1928, p. 249

¹² Ibid, p. 261

of this nation a difference of any sort. We are striving to reach the day when Syrians can say, 'I am a Syrian' and no-one inquires after his religion, something which is usually done since we are not used to being comfortable around a person until we know his religion. This is an unfortunate and painful state of affairs which I did not want to bring up. However, I shall maintain my position until the time of the discussion of the articles.'

Al-Khoury was followed by representative Sa'id al-Ghazi, who reiterated the assertion that the adoption of this clause was rooted in reasons beyond the will of the committee. He said, addressing representative Janji:

*'We are aware of the circumstances and conditions that led to the passing of this constitution, and we cannot discuss and speculate about it all the time. [Janji] could have looked into some of the influences that there were, such as the power that forced this Committee, in spite of itself, to stipulate the religion of the president. I believe that it had not occurred to any one of them in the first instance to write anything in that vein. We know that the majority of the Assembly is Muslim; however, conditions came to pass that forced the Committee to put this in as a precaution.'*¹³

Sa'id al-Ghazi did not fail to criticise Nicholas Janji when he perceived a contradiction inherent in how he objected to defining the president's religion and then called for the guarantee of minority rights. He said, 'My esteemed colleague Janji later addressed the topic of minorities; on the one hand he criticised the article relating to the religion of the president, and then on the other hand he held fast to the

rights of minorities, and in this lies a clear contradiction.'

The rapporteur of the Constitutional Committee, Fawzi al-Ghazi, responded to all the objections within the same session, denying that there was any reason outside the will of the committee for the adoption of this clause, and any other than that announced in the previous session. He said in his response to the critics:

'As for my esteemed colleagues Fa'iz al-Khoury and Sa'id al-Ghazi, they were defending and not attacking, so there is no means to go into what they said. My esteemed colleague Shukri al-Jundi discussed the article relating to the president's religion and brought up some important points. And I announce to you from upon this stand that there was not the slightest circumstance leading the Committee to write this article except those which we have mentioned in the Explanatory Statement, whereby we said: "[The Committee] have chosen republican rule in Syria, and saw that the religion of the president should be Islam. This is because constitutions, if their spirit is derived from universal principles and widely-held, contemporary juristic theories, should not deviate from the country's traditions and customs, or the opinions and beliefs of its people. These fundamental elements have always been front and centre throughout all the constitutions of the country. For this reason, the majority of the committee has decided to adopt this paragraph from Article 1 of the constitution drafted by the 1919 Syrian Congress, and it appears as it is set out in aforementioned Article 3." In this, we clarified our opinion plainly, without ambiguity or obscurity. It is true that a country cannot deviate from its traditions, following the

¹³ Ibid, p. 268

*model of the governments of Egypt, Iraq and Turkey, which, despite the progress they have witnessed, were not able to remove this article until very recently. As such, there is nothing obliging us to include this article except the circumstances, traditions and beliefs of the country.'*¹⁴

Given that the Constitutional Committee was working under the French mandate, and given that the committee rapporteur Fawzi al-Ghazi was in continuous negotiation with the mandate authorities during the drafting of the constitution, they are most likely the party which Nicolas Janji and Sa'id al-Ghazi were suggesting was the propeller behind the adoption of the clause on the president's religion. When the Secretary General of the French Commission asked the members of the Constituent Assembly in their fourteenth session to remove six fundamental clauses from the constitution after they had been approved by a majority vote, Fawzi al-Ghazi acknowledged that negotiating with the French during the drafting of the constitution had not been a straightforward process. He indicated that significant differences in vision were taking their toll, despite the policy of mutual understanding that he was striving to achieve. He said: 'I take responsibility for all negotiations that have taken place on this issue, for I have carried out the majority of them by myself; however, what is to be done if the viewpoint of the French does not fit with that of the Syrians?'¹⁵

This was in the final session of the Constituent Assembly, after the majority of members (61

out of 67) rejected the French request in their last session on 11 August 1928, which was followed by the dissolution of the Assembly. The French High Commissioner retained the clause pertaining to the president as it was in the constitution, which was introduced on 14 May 1930. It resembled, at its core, the constitution approved by the Constituent Assembly, but with the amendment of some articles as per the wishes of the mandate authorities.¹⁶

This enlightened discussion brought to light the following key issues:

- 1) Evidence of early attempts to reconcile, on the one hand, modern juristic theories and due democratic principles, and on the other, referencing the religious element as an important legacy for a huge portion of Syria's population.
- 2) The existence of deep concern about the adoption of inherently conflicting constitutional provisions to satisfy different groups; the erasure of the contents of certain provisions by adopting totally contradictory provisions; and attempts to satisfy certain demographics, even at the expense of ignoring the fears of other demographics within the population. Alongside this is an early disregard of the principle of citizenship, by discriminating between citizens on the basis of religious affiliation and belief. This discussion, significantly, reflects an early awareness regard-

¹⁴ Ibid, p. 275

¹⁵ Meeting records of the 1928 Syrian Constituent Assembly, Session 14, 9 August 1928, p. 300

¹⁶ *sūriyah: badā'il dustūriyah*, National Agenda for the Future of Syria Programme, ESCWA, 2018

ing the potentially dangerous consequences of these provisions that are still being discussed today.

- 3) A genuine desire for frank discussion, as opposed to embellished texts and clever phrasing. These discussions shed light on the opinions of some of the committee members who saw that there was no use in articles which contained awareness and tolerance not yet prevailing among those who subject to their provisions. They reveal, in turn, the advent of a dilemma still faced today, which is whether people should be educated, and societal awareness spread, before adopting the necessary sensitive texts; or whether the texts should be promptly amended, leaving societal ideas and convictions to be developed gradually. This process would take a great deal of time, and it appears that some committee members, according to the earlier deliberations, favoured the former option. They refuted the accusation that the Committee was displaying intolerance, obscurity, or subordinating to and being influenced by external pressures and factors. They accounted for their adoption of this provision to the fact that the general population had not yet accepted the principle of absolute religious neutrality of the state, and its complete separation from the political life of the country.

Constitution of 1950: This constitution reaffirmed the stipulation that: **'The religion of the President of the Republic shall be Islam'**.¹⁷

The drafting of this article, however, became a divisive issue in the constitution drafting process, demonstrating the sensitivity and precariousness surrounding the issue. The democratic climate in which the constitution was written allowed there to be an open debate on this topic, thus giving us insights into how the events played out; this has not been the case in any subsequent constitutional process.

There was a fierce debate over this particular article during the sessions of the Constituent Assembly, with one camp calling for Islam to be declared the state religion, and another in opposition to this. The debate was also, technically speaking, uncalled for, given that religion is only pertinent to a conscious and rational being, while 'the state' is a legal personality. At the root of this debate, however, were political aims, and this religious element served as a cover for the underlying dispute.¹⁸

The conservative camp initially succeeded in approving a provision stating **'Islam shall be the religion of the state'** in the first draft of the constitution, as presented by the constitution-drafting committee to the Constituent Assembly during session 21.¹⁹ This was done amidst a clear split among the committee members between those who backed this article and those who were against it. We can see evidence of such a split in verbatim records of this committee's sessions. For example, representative Abd al-Wahhab Sukkar,

¹⁷ Syrian constitution of 1950, Article 3 Paragraph 1

¹⁸ Kamal Ghali, *mabādi' al-qānūn ad-dustārī wa-an-nuzum as-siyāsīyah*, (Damascus: Dar al-'Uruba Publisher, 1978) p. 546

¹⁹ Records of the Syrian Constituent Assembly 12.12.1949 – 29.7.1950, annex of Session 21, published in al-Jarīdah al-Rasmīyah Newspaper

who supported this provision, said:

'The people want to approve what was approved by the Constitutional Committee, that "Islam shall be the religion of the state". It will not be satisfied with any alternative ... And this is their right, for Islamic Arab countries and their peoples have been Muslim for centuries and over many generations, and see it as a major blow if this is not reflected in their constitution.'

20

This point was given backing by a number of representatives as they debated with those who opposed this provision and were apprehensive about its repercussions. Among the opponents of this provision was representative Elias Damer, who, in his interventions, called for the principle of the separation of religion and state to be adopted. He was wary of the dangers of approving the proposed wording of the article, and made the following argument to support his position:

'The West delights in seeing Arabs build their national entity on the basis of religion, and in seeing the non-Muslim communities in these countries feel less of a sense of nationalism than their Muslim compatriots. Restricting the rights of non-Muslims gives the West a basis upon which to build their colonial arguments. I believe that the separation of religion from the state would be akin to a fatal blow from the inside to any claim of this kind ... Some may argue that defining the state's religion as Islam would strengthen the bond between Arab countries and marshal the state. This is a feeble argument, for that would be no way to strengthen the bond between Arab countries. It has no

*value when compared to the existence of the Holy Quran, as revealed to the Prophet Mohammad. It is the Holy Quran, and not the religious designation of the state or president, which alone binds the Islamic peoples. For if this is not the mightiest bond between Muslims, then neither the designation of a state religion nor any other designation could perform this role, for the Holy Book is the singular guarantee and almightiest bond among Muslims! As for the state, it should be marshalled by faith, pan-Arabism, sacrifice, patriotism and devotion, and not by a particular religion, squeezed into the body of the constitution with this pretext, and made into a tool to discriminate between citizens. Gentlemen, leave religion to God alone, and make the state a homeland for all. Do not say: this person is Muslim and that person Christian. For we are all equal in rights and duties, we all live under the same sky, in the same nation, and are united by pan-Arabism and nationalism.'*²¹

As well as angering opponents of this wording within the Assembly, the proposed article also sparked rancour among other confessional groups in Syrian society. The heads of the Christian sects met at the Roman Catholic Patriarchate in Damascus in order to discuss the issue. On 7 April 1950, they issued the following statement:

'There is a divide among the Syrian people concerning an article of the constitution. On the one hand, there is a progressive group which believes the constitution should be written as it was by enlightened nations, led by Muslim thinkers and intellectuals from our coun-

20 Records of the Syrian Constituent Assembly 12.12.1949 – 29.7.1950, Session 38, 24.7.1950, published in al-Jarīdah al-Rasmīyah Newspaper p. 630

21 Ibid, p. 633

try and in accordance with the principles of the recent coup; on the other hand, there are those who want the core of the constitution to state the religion of the state. Regarding this split, the heads of the Christian sects in Syria have deemed the former opinion be the correct one, and the one which represents their viewpoint and is aspired by every person loyal to the nation. They [the heads of the Christian sects in Syria] have decided to announce their strong opposition to the decision taken by the Constitutional Committee, a decision made by a slim majority and in absence of a large number of its members, to include the designation of a specific religion to the state as this designation impose discrimination and divides between the people of the nation, and will have consequences on internal legislating, in contradiction with the resolutions taken by the United Nations which Syria adopted as part of its being a member state. They hereby declare their discontent with this decision by rejecting the greetings offered on the occasion of Easter, in hope for the wisdom of the respected Constituent Assembly and its plenary to be more understanding of the needs of the country and the greater interests of the homeland.’²²

This statement gave rise to considerable debate in Syria,²³ prompting the acting prime minister to call top media figures to a press conference and urge them to stop discussing the issue. He requested they leave it to the Constituent Assembly to manage, arguing that ‘debating this issue offends religious groups and sects in Syria, and gives rise to sectarian

tension.’ He also announced that the government would enforce the state independence protection law against any journalist who continued to broach this question.²⁴

The debate soon came to take on regional dimensions. King Abdullah of Jordan sent a letter to President Hashim Alatas of Syria, on the topic of the state religion; the letter stated ‘King Abdullah’s dissatisfaction with the attempt by some to remove the provision on the religion of the state from the constitution.’ Saudi Arabia, for its part, halted the second instalment of the loan granted to Syria as a result of this ongoing debate.²⁵ In spite of this, the Constitutional Committee and the Joint Parties Committee met in July of that year and adopted new amendments to Article 3, which now read:

‘The religion of the President of the Republic shall be Islam.

Islamic Jurisprudence shall be the main source of legislation.

Freedom of belief shall be protected. The state shall respect all Abrahamic religions and shall guarantee the freedom of performing all its rituals on the condition they do not disrupt public order.

The religious sects shall be protected and respected.’

It was also decided to add the following text to the constitution’s preamble:

22 Mahmoud al-Zibawi, *‘dīn ad-dawla’ fī ad-dustūr as-sūrī*, al-Mudun website, 24.12.2016

23 On the Islamist position during this period, see: the statement issued by Mustafa Al-Sibai on the battle of the constitution on 8 February 1950. See also: Abdullah Sami Ibrahim Al-Dalal, *al-islāmiyūn wa-ad-dīmuqrāṭīyah fī sūriyah* (Cairo: Madbouly Library, First Edition 2007) in particular the first chapter: *mustafa as-sibāī wa-ad-dustūr*, p. 20 and following.

24 Mahmoud al-Zibawi, *‘dīn ad-dawla’ fī ad-dustūr as-sūrī*, al-Mudun website, 24.12.2016

25 Akram al-Hourani, *Akram al-Hourani Memoirs*, Madbouly Library, Cairo, p.1205

'As the religion of the majority of the people is Islam, the state hereby declares its adherence to Islam and its ideals, and the people hereby declare their intention to strengthen their cooperation with the peoples of the Arab and Islamic world, and to build their modern state on the basis of the strong ethics of Islam and other Abrahamic religions, and to fight atheism.'

The records of these sessions show us that the rapporteur of Constitutional Committee Dr Abd al-Wahhab Hawmad commented on this amendment with one sentence: 'I believe that history will treat with fairness those who made commendable efforts to keep the nation united.'²⁶

These same records show us also the position of Mustafa al-Sibai, representing the Islamic Socialist Front. Sibai was the founder of the Muslim Brotherhood movement in Syria, was a member of parliament at the time, as well as being a member of the constitution-drafting committee. Sibai had agreed to the new wording of the article referencing the religion of the president, rather than the religion of the state. He gave justifications for the amendment after it had passed and the reasons he accepted it, in his speech to the Committee, 'so that future generations know something of what took place around this article, so that people treat us fairly, and so that our children treat us fairly.' The following is taken from the verbatim records of Sibai's intervention:

'When the Constitutional Committee began drafting the provision, we asked the people to give us their opinions and asked intellectuals

*to send us their proposals. Upon this, we were presented with hundreds, nay thousands, of petitions and writings calling on the Committee to stipulate in the constitution that the religion of the state be Islam, while we received other petitions and cables giving the opposing view. Controversy flared and was at times raised in newspapers and assemblies. The will of the people as a whole, or as a majority, is what should be taken in such cases, and we were among those who supported this principle, and we demanded the realisation of the wishes of the people, this principle being a natural right... Our Christian brothers were yold, regarding this wording, that it was the prelude to building an Islamic homeland in Syria and that this meant the infringement upon the rights of other confessions...'*²⁷

He then went on to present the division and alarmism that accompanied this article, which had got to the point of:

'The [threat of] withdrawal from the Constituent Assembly as a whole by representatives of both sides, if the desire of each was not fulfilled. Some people began preparing to provoke sectarian strife in the country, fuelled by fervent religious feeling ... All of this led the Parties Committee to think very carefully about a way out of this predicament,' with the decent men of this country hoping that the solution would preserve the dignity of all the people, from all sects. It is right that one sect should not dominate; that one sect should not feel it has been betrayed by another sect; and that the constitution should not make the public feel their will was undermined or their dignity violated. It was

²⁶ Records of the Syrian Constituent Assembly 12.12.1949 – 29.7.1950, Session 41, 29.7.1950, published in al-Jaridah al-Rasmiyah Newspaper, p.667

²⁷ Ibid, p. 669

on this basis that attempts were made to write a new provision which would be in the interests of both parties, and would eliminate the causes of conflict between the public across the sectarian spectrum.²⁸

Despite this, the adoption of this provision led to a disagreement between Sibai, who had agreed to the new wording of the article referencing the religion of the president, rather than the religion of the state, and the sheikhs of the Scholars Association, who did not agree with what the Committee had decided. Sheikh Abu al-Kheir al-Midani, the head of the Scholars Association in Damascus, wrote in a statement on 28 July 1950 that:

'The Scholars Association, supported by the dignified Syrian people, consider that Article 3 of the draft constitution stating that the religion of the state shall be Islam, which gained majority support, is in accordance with the constitutions of neighbouring countries, and is comparable to constitutions of many foreign countries, in stipulating the connection between the state and the religion of the majority, and which was supported by thousands of motions presented by the nation and its many delegations from all bodies and strata, must not be removed or modified.'

Sheikh al-Sibai issued the following in an opposing statement:

'When the majority of the people from across various groups expressed their wish for the religion of the state to be Islam, what was meant was that the state would benefit from Islam-

ic legislation, that ethical guidance would be given to the people, and that brotherhood and cooperation with the peoples of the Arab and Islamic worlds would be preserved. The new wording of Article 3 adopted by the Joint Parties Committee applies these principles.'

Sibai appealed to the well-informed public opinion to study these texts calmly and impartially, stating that: 'Religious people, in particular, should study the provision impartially and fairly before judging its contents.' He went on to say, 'These texts have achieved unity and protected the nation against the disaster of sectarian division, which no reasonable religious person and no loyal patriot could accept.' Thereafter, the Constituent Assembly, at a meeting on 29 July 1950, was able to approve, almost unanimously, the provision agreed upon by the Joint Parties Committee which was inserted into Article 3 of the Syrian Constitution.²⁹

Constitution of 1953: This constitution repeated the same wording employed in the Constitution of 1950: **'The religion of the President of the Republic shall be Islam.'**³⁰

Constitution of 1958: This constitution did not address this issue.

Constitution of 1961: This constitution did not address this issue.

Constitution of 1962: This constitution repeated the wording of previous constitutions: **'The religion of the President of the Republic shall be Islam.'**³¹

28 Ibid.

29 Akram al-Hourani, *Akram al-Hourani Memoirs*, (Cairo: Madbouly Library), p.1206

30 Syrian Constitution of 1953, Article 3 Paragraph 1

31 Syrian Constitution of 1962, Article 3 Paragraph 1

Constitution of 1964: This constitution repeated almost the same wording, with the exception of changing the word 'Republic' to 'State', thereby reading: **'The religion of the President of the State shall be Islam.'**³²

Constitution of 1969: This constitution did not address this issue.

Constitution of 1971: This constitution did not address this issue.

Constitution of 1973: This constitution repeated the wording of previous constitutions: **'The religion of the President of the Republic shall be Islam.'**³³

Constitution of 2012: This constitution also repeated the wording of previous constitutions: **'The religion of the President of the Republic shall be Islam.'**³⁴

The retaining of the provision stating that 'The religion of the President of the Republic shall be Islam' in the 2012 Constitution has been the subject of criticism by both pro-government and opposition actors. Most criticism centres on the fact that, while the constitution stipulates the basic rights of citizens and prohibits discrimination, including on the basis of gender, religion, ethnicity, this article does not allow for the equal treatment of citizens. The article, it is argued, discriminates against citizens based on what is written on their identity cards, rather than their genuine religion. For it

would be sufficient for the civil registry to state that the religion of a person is Islam, for that person to be able to become president, thus excluding people whose civil registry indicates otherwise. As such, it is not a matter of faith; rather, registration as a Muslim in the civil registry would be all that is needed, even if the president were not a believer, or did not adhere to religious practices. It is also arguably discriminatory against minorities, as it is enough for the president to be a Muslim, even if he is not ethnically Arab, while Arab Christians or Druze could not be president. Some justified the retaining of this article with the aim of satisfying Syria's Muslim majority. Others argued that such an aim could not be achieved unless Muslims were treated equally along with others. Otherwise, the argument goes, the majority would request more rights and the minority would be faced with one of two solutions: either changing their religion or migrating. The justification that a Christian or Druze president would not be accepted by the people was deemed unsound, with the answer to this argument posed as follows: if a majority, including Muslims, voted for him, how could we deprive the majority from its right to choose?³⁵

2.2 The Oath of the Head of State

An examination of the successive Syrian constitutions lays bare an interesting irregularity:

32 Syrian Constitution of 1964, Article 3 Paragraph 1

33 Syrian Constitution of 1973, Article 3 Paragraph 1

34 Syrian Constitution of 2002, Article 3 Paragraph 1

35 Moussa Metri, *mulāhizāt qānūniyah 'ala mashrū' ad-dustūr*, published by Baladna newspaper, 15.2.2012. Link: <https://bit.ly/2ogaq4J>

On the questions of religion and the constitution, see: Nathan J. Brown, *Constitutional Rebirth: Tunisia and Egypt Re-Construct Themselves*, a study prepared for the United Nations Development Program (UNDP), with the assistance of Marian Messin and Scott Weiner, (UNDP publications, 12.8.2012), p. 27 and following.

the only constitution in which the oath of the head of state, taken on assumption to office, includes a reference to religion is the earliest constitution of 1920. In later constitutions, the content of the oath omitted such references, leaving nothing more than a religious connotation in the phrase 'by Almighty God'; even this, however, was omitted in certain constitutional periods, as outlined below.

Another irregularity brought to light by the 1920 constitutional precedent, is that the reference to religion in the oath did not specify a particular religion. Instead, religion was included as a commitment to respect 'religious laws' as a whole, on a level footing and without discrimination. This suggests a level of sophistication and progress not attained by subsequent constitutional texts.

Constitution of 1920: This constitution includes the following with regard to the oath to be taken by the King: '**Upon assuming office, the King shall take an oath before the Congress to respect the divine laws and integrity towards the nation and to respect the Fundamental Law.**'³⁶

It is interesting to note that, although this constitution restricted the religion of the king to Islam, the wording of the section was not Islamised, but rather incorporated all divine laws. In doing so, the constitution asserted that the king was not only concerned with the religious majority. We likewise note how subsequent constitutions make no mention of religion within the content of the constitutional oath, bearing in mind the content was changed a number of times to a variety of versions with no reference to religion in any of them. This is

shown plainly in the excerpts from the different Syrian constitutions as outlined below.

Constitution of 1930: The oath of loyalty to the nation and constitution taken before Parliament by the President of the Republic reads: '**I swear by Almighty God that I shall respect the constitution and laws of the country, and that I shall preserve the independence of the country and its territorial integrity.**'³⁷

Although the oath does not make direct reference to religion, the oath is taken in the name of 'Almighty God', thus lending a religious connotation omitted in some later constitutions.

Constitution of 1950: The oath taken before Parliament by the President of the Republic before taking office reads: '**I swear by Almighty God to respect the constitution and laws of the country, to look after the freedoms, interests and wealth of the people, to be loyal to the republican system, and to do everything within my power to safeguard national sovereignty, defend its territorial integrity and work to achieve social justice and the unity of the Arab Nation.**'³⁸

Constitution of 1953: The oath taken before Parliament by the President of the Republic before taking office reads: '**I swear by God and by my honour to be loyal to the constitution and laws of the country, and to respect and defend them; to look after the freedoms, interest, wealth and dignity of the people; to do everything within my power to safeguard the sovereignty of the nation and its republican**

36 1920 Syrian Constitution, Article 6

37 1930 Syrian Constitution, Article 70

38 1930 Syrian Constitution, Article 75

system, and to defend its territorial integrity; and to work towards achieving the freedom and unity of the Arab nation.’³⁹

It should be noted that the oath here is made by ‘God’ and by ‘honour’, thereby preserving the oath’s religious connotation while adding a non-religious element.

Constitution of 1958: This constitution did not address the oath of the head of state.

Constitution of 1961: The oath taken before Parliament by the President of the Republic before taking office reads: ‘I swear by Almighty God to respect the constitution and laws of the country; to look after the freedoms, interests and wealth of the people; to be loyal to the republican system; and to do everything within my power to safeguard the sovereignty of the nation, and to defend its territorial integrity; and to work to achieve social justice and the unity of the Arab nation.’⁴⁰

Constitution of 1962: The oath taken before Parliament by the President of the Republic before taking office reads: ‘I swear by Almighty God to respect the constitution and laws of the country; to look after the freedoms, interests and wealth of the people; to be loyal to the republican system; to do everything within my power to safeguard the sovereignty of the nation and to defend its territorial integrity; and to work to achieve social justice and the unity of the Arab nation.’⁴¹

Constitution of 1964: The oath taken before the National Council by the Chairman of the Presidential Council and each of its members, before they take office reads: ‘I swear by Almighty God to be loyal to the constitution of the country; to defend the constitution, national sovereignty and the interests of the people; to respect the laws of the country; to perform my duty with honour; and to work in pursuit of the revolution’s aims of unity, freedom and socialism.’⁴²

Constitution of 1969: The oath taken before the People’s Assembly by the President of the State before taking office reads: ‘I swear by my honour and my belief, to preserve the people’s democratic system with loyalty; to respect the constitution and laws; to look after the interests of the people and the integrity of the nation; and to work and struggle in the pursuit of the Arab nation’s goals of unity, freedom and socialism.’⁴³

Here, the reference to ‘Almighty God’ has been removed from the beginning of the oath and replaced with the phrase ‘my honour and belief’; as such, even indirect religious connotations have been removed from this wording of oath.

Constitution of 1971: The oath taken before the People’s Assembly by the President of the Republic before taking office reads: ‘I swear by my honour and my belief, to preserve the people’s democratic system with loyalty; to respect the constitution and laws; to look after the interests of the people and the in-

39 1930 Syrian Constitution, Article 85

40 1961 Syrian Constitution, Article 75

41 1961 Syrian Constitution, Article 75

42 1961 Syrian Constitution, Article 49

43 1961 Syrian Constitution, Article 59

tegrity of the nation; and to work and struggle in pursuit of the Arab nation's goals of unity, freedom, and socialism.'⁴⁴

This oath has preserved the omission of 'Almighty God' and its replacement by 'my honour and belief' as per that of 1969.

Constitution of 1973: The constitutional oath was laid out as follows: **'I swear by Almighty God to preserve the people's democratic republican system with loyalty; to respect the constitution and laws; to look after the interests of the people and the integrity of the nation; and to work sincerely and struggle in pursuit of the Arab nation's goals of unity, freedom, and socialism.'**⁴⁵

In this constitution, the phrase 'by Almighty God' was reintroduced into the oath, having been omitted in the previous two constitutions; the phrase 'by my honour and my belief' was, in turn, taken out of the new wording.

Constitution of 2012: The constitutional oath was laid out as follows: **'I swear by Almighty God to respect the country's constitution, laws and republican system; to look after the interests and freedoms of the people; to safeguard national sovereignty, independence and freedom; to defend its territorial integrity; and to act in the pursuit of social justice and the unity of the Arab nation.'**⁴⁶

The current constitution has preserved the

reference to 'Almighty God' while removing reference to 'honour and belief'. As such, it retains an indirect religious connotation.

2.3 Respecting the Freedom of Religion and Belief

In a human rights context, the right to religious freedom or belief means the freedom of an individual to embrace any religious or non-religious ideas. The United Nations recognised the importance of religious freedom or belief in the Universal Declaration of Human Rights adopted in 1948, whereby Article 18 reads: 'Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and to observe any religion or belief he chooses.'⁴⁷

The United Nations' Human Rights Committee later explained that the concept of respecting religions and beliefs includes the freedom to manifest his/her religion or belief and that no one should be forced to reveal his/her thoughts or his/her belonging to any religion or belief. It also includes the commitment to protect monotheistic, non-monotheistic and atheistic beliefs, as well as the right not to embrace any religion or belief. The words 'religion' and 'belief' are also explained comprehensively, these terms not being limited solely to traditional religions, or religions and beliefs that have similar characteristics or rituals to those of traditional religions.⁴⁸

44 1961 Syrian Constitution, Article 59

45 1973 Syrian Constitution, Article 7

46 2012 Syrian Constitution, Article 7

47 See: *Study Guide: Freedom of Religion or Belief*, Center for Human Rights, (University of Minnesota, 2003). Link: <http://hrlibrary.umn.edu/edumat/studyguides/religion.html>

48 United Nations Commission on Human Rights, Session 48 (1993), General Comment No. 22. See: HRI/GEN/1/Rev.9 (Vol. I), 27 May 2008

The way in which successive Syrian constitutions dealt with this principle is laid out below:

Constitution of 1920: This constitution asserted, at an early stage of Syria's constitutional history, that **'Freedom of belief and religion shall not be infringed upon and religious practices of communities shall not be prohibited provided they do not disrupt public order or jeopardize the religious rituals of other religions or creeds.'**⁴⁹

We can note here that freedom of religion and belief according to this constitutional provision comprises two aspects: first, the freedom of religion and belief which may not be infringed, and second, the freedom to observe religion and belief through holding practices specific to this religion. This order was restricted only by the condition of such practices do not violate public order or jeopardise religious rituals of other religions and creeds.

Constitution of 1930: This constitution asserted that: **'Freedom of religion is absolute, and the state shall respect all religions and creeds existing in the country and shall guarantee the freedom to observe all religious rituals and beliefs, provided this does not disrupt public order or contradict with morals.'**⁵⁰ It also stipulated that **'The rights of the different religious communities shall be guaranteed'**⁵¹ and that **'Education shall be independent provided it does not disrupt public order, contradict with morals, or impinge on the nation's dignity or religions.'**⁵² It also dedicated a

specific provision to the Islamic Waqf (endowments): **'The Islamic Waqf shall generally be solely the property of the Muslim community and shall be run by councils elected by Muslims and a special law shall be drawn up to govern how to elect these councils.'**⁵³

In these constitutional provisions, a broader approach was taken in defining the concept of respect of religions; it includes, according to these provisions, the freedom of observing all rituals and religions, to guarantee their rights, and to guarantee that education does not harm religion. It also allocated a specific provision to the facilities of the Islamic Waqf in a way that would guarantee its affairs being managed solely by members of the Muslim community.

Constitution of 1950: This constitution reaffirmed the principles of previous constitutions, stating that: **'Freedom of belief shall be protected and the state shall respect all Abrahamic religions, and shall guarantee the freedom to observe of all rituals of these religions provided it does not disrupt public order'**⁵⁴ and that: **'Islamic Waqf shall belong to Muslims, shall be one of the governmental public institutions, shall enjoy financial and administrative independence, and shall regulate its affairs according to law.'**⁵⁵

Significantly, this constitution mentions 'Abrahamic' religions, whereas in previous constitutions, reference had been made to religion in general without restricting the definition. It

49 1920 Syrian Constitution, Article 13

50 Syrian Constitution of 1930, Article 15

51 Syrian Constitution of 1930, Article 28

52 Syrian Constitution of 1930, Article 19

53 Syrian Constitution of 1930, Article 114

54 Syrian Constitution of 1950, Article 3 Paragraph 3

55 Syrian Constitution of 1950, Article 34

is worth noting that the International Committee of Human Rights had previously indicated that the words 'religion' and 'belief' need to be given a broad definition so that its implementation does not restrict itself to traditional religion, or religions and beliefs of similar rituals to traditional religions. This was in order to prevent discrimination against any religion or belief for any given reason, including newly established religions or those representing religious minorities that could face oppression from a dominant religious sect.⁵⁶

Certain subsequent constitutions preserved the use of the phrase 'Abrahamic religions' in the wording of this principle, namely the constitutions of 1953, 1962 and 1964. Others simply employed the term 'religions', namely the constitutions of 1969, 1971, 1973 and 2012.

Constitution of 1953: This constitution reaffirmed the previous principles, stating that: **'Freedom of belief is absolute and the state shall respect all Abrahamic religions and shall guarantee the freedom of observing all its rituals providing they do not disrupt public order.'**⁵⁷

Constitution of 1985: This constitution did not address this issue.

Constitution of 1961: This constitution did not address this issue.

Constitution of 1962: This constitution reaffirmed the principles of earlier texts: **'Freedom of belief is absolute and the state shall respect all Abrahamic religions and shall guarantee the freedom of observing all its rituals providing they do not disrupt public order.'**⁵⁸

Constitution of 1964: This constitution reaffirmed the principles of earlier texts: **'Freedom of belief is absolute and the State shall respect all Abrahamic religions and shall guarantee the freedom of observing all its rituals providing they do not disrupt public order.'**⁵⁹

Constitution of 1969: This constitution reaffirmed the principles of earlier texts: **'Freedom of belief is protected and the State shall respect all religions. The state shall guarantee the freedom of observing all religious rituals provided that they do not disrupt public order.'**⁶⁰

Constitution of 1971: This constitution reaffirmed the principles of earlier texts: **'Freedom of belief is protected and the State shall respect all religions. The State shall guarantee the freedom of observing all religious rituals provided that they do not disrupt public order.'**⁶¹

Constitution of 1973: This constitution reaffirmed the principles of earlier texts: **'Freedom of belief is protected and the State shall re-**

⁵⁶ United Nations Commission on Human Rights, Session 48 (1993), General Comment No. 22. See: HRI/GEN/1/Rev.9 (Vol. I), 27 May 2008

⁵⁷ 1953 Syrian Constitution, Article 3 Paragraph 3

⁵⁸ 1962 Syrian Constitution, Article 3 Paragraph 3

⁵⁹ 1964 Syrian Constitution, Article 16

⁶⁰ 1969 Syrian Constitution, Article 31 Paragraph 1/2

⁶¹ 1971 Syrian Constitution, Article 31 Paragraph 1/2

spect all religions. The State shall guarantee the freedom of observing all its rituals provided that they do not disrupt public order⁶².

Constitution of 2012: This constitution stated that: 'The State shall respect all religions, and shall guarantee the freedom of observing all its rituals provided that they do not disrupt public order.'⁶³

It is interesting to note that the 2012 constitution distinguishes between the respect of religions and freedom of belief, with each one allocated a separate article. Freedom of belief is mentioned in Article 42 of the constitution.

2.4 Non-Discrimination on the Grounds of Religion

The Human Rights Committee defines the phrase 'prohibited discrimination' to include any discrimination, exclusion, limitation or preferencing for any reason including: race, colour, sex, language, religion, political or other opinion, national or social origin, wealth, descent or other status, that aims at or entails the disruption or obstruction of the recognition of all rights and freedoms, or the enjoyment and practice of these freedoms, for all people equally.⁶⁴

The prohibition of religious-based discrimination is overlooked in the majority of the Syrian constitutions. As is outlined below, only three

out of the twelve constitutions addressed in this study stipulate this principle.

Constitution of 1920: This constitution did not address this issue.

Constitution of 1930: This constitution stated that: 'Syrians shall be equal before the law and shall have the same rights of enjoying civil and political rights, duties, and responsibilities without facing discrimination on the basis of religion, creed, origin or language.'⁶⁵

In the section above on the religion of the head of state, we examined how different representatives argued that the principle of this constitutionally-guaranteed equality would be violated if the president's religion was constitutionally defined.

Constitution of 1950: This constitution did not address this issue.

Constitution of 1953: This constitution did not address this issue.

Constitution of 1958: This constitution asserted that: 'Citizens shall be equal before the law and in duties and rights, and there shall be no distinction between them on the grounds of sex, origin, language, religion or belief.'⁶⁶

Constitution of 1961: This constitution did not address this issue.

62 1973 Syrian Constitution, Article 35 Paragraph 1/2

63 2012 Syrian Constitution, Article 3 Paragraph 3

64 United Nations Commission on Human Rights, Session 48 (1993), General Comment No. 22. See: HRI/GEN/1/Rev.9 (Vol. I), 27 May 2008

65 1930 Syrian Constitution, Article 6

66 1958 Syrian Constitution, Article 7

Constitution of 1962: This constitution did not address this issue.

Constitution of 1964: This constitution did not address this issue.

Constitution of 1969: This constitution did not address this issue.

Constitution of 1971: This constitution did not address this issue.

Constitution of 1973: This constitution did not address this issue.

Constitution of 2012: With this issue having been absent from Syria's constitutions for more than half a century, the 2012 constitution re-adopted and affirmed the principle. It reads: **'Citizens shall be equal before the law and equal in duties and rights, and there shall be no distinction between them on the grounds of sex, origin, language, religion or belief.'**⁶⁷

We should note that the absence of an explicit provision on the prohibition of religious-based discrimination in most Syrian constitutions was not intended as the authorisation of such discrimination, even if this is what *de facto* came to pass, as influenced by certain constitutional provisions. Rather, this absence was related to the fact that the majority of these constitutions simply stipulated equality between citizens in rights and duties, using general terms without linking the principle of equality to that of non-discrimination. An anal-

ysis of the wording of many of such provisions illustrates this; the 1920 constitution stated that **'Syrians shall be equal before the law in their rights and duties'**,⁶⁸ and the 1969 constitution stated that **'Citizens shall be equal before the law in their rights and duties. The State shall fulfil the principle of equal opportunities for citizens.'**⁶⁹ This is also the case in the 1950 constitution, which gave the following stipulation: **'Citizens shall be equal before the law in their rights and duties, and in dignity and personal status.'**⁷⁰

2.5 Subjecting Personal Status Matters to Sects

The concept of personal status incorporates matters and disputes related primarily to the status of persons and family structure. Such matters include: engagement, marriages, marital rights and duties, dowry and [bridal] trousseau, the management of money between spouses, divorce and the dissolution of marriage, separation, recognition and denial of paternity, the relationship between ascendants and descendants, the obligation to maintain financial support for relatives and in-laws, the correction of lineage, adoption, custody, guardianship, wardship, interdiction and authorisation of management, absence and considering a missing person dead, in addition to disputes and issues related to inheritances and testamentary matters, and other matters following death.⁷¹

67 2012 Syrian Constitution, Article 33 Paragraph 3

68 1920 Syrian Constitution, Article 10

69 1969 Syrian Constitution, Article 23 Paragraph 1/2

70 1950 Syrian Constitution, Article 7

71 Egyptian Judicial System, Article 13, No. 147/1949

The Syrian constitution established that matters relating to personal status are subject to the laws of the various religious communities; this is explicitly stated in some constitutions and overlooked in others. However, this principle has been consistently respected and applied in practice, whether or not a specific constitutional provision has existed.

Constitution of 1920: This constitution dealt with this issue explicitly and early on in constitutional history. Article 15 in Chapter 3 reads: 'The way in which the religious courts and sectarian councils, whose laws govern sectarian personal status matters, are managed, and the way in which Islamic Waqfs are managed, shall all be determined by laws issued by the Congress.'⁷²

Some Congress members expressed their hope for 'The abolition of both the spiritual and religious courts, and the establishment of a juridical judiciary, as per that which exists in the majority of European countries.'⁷³ When the first draft of this article was put forward, some of the Christian members of Congress were not happy with it. Indeed, some Christian clergymen feared that it would entitle the executive to intervene in the management of Christian endowments and personal status laws for Christian sects.⁷⁴ In consideration of these fears, Congress President Sheikh Sa'īd Rida did not put this article forward for a vote until he had met with the Greek Orthodox Patriarch in his home, and arrived at a wording

which satisfied him, in order to come to an agreement about this article.⁷⁵

Constitution of 1930: This constitution affirmed that: 'The state shall also guarantee for its citizens the respect their religious interests and personal status, regardless of their sect.'⁷⁶

Constitution of 1950: This constitution laid down the famous sentence that has been repeated verbatim in subsequent constitutions. It stated that: 'The personal status of religious communities shall be observed and safeguarded.'⁷⁷

This clause was not passed without criticism when the draft constitution was put up for discussion before the Constituent Assembly during session 38. The representative of the Nabek district, Abdel Salam Haidar, considered the clause in contradiction with the protection of the family as guaranteed by the constitution. He laid out his criticism as follows:

'The draft constitution contains a great deal of contradiction between its various provisions, and even between the provisions of certain articles. Paragraph 3 of Article 3 stipulates concessions for religious sects and the maintenance of their personal status matters, and Paragraph 16 stipulates the state's protection of the family and marriage, the encouragement of [marriage] and the removal of material and social obstacles that impede it. And given that

⁷² 1920 Syrian Constitution, Article 14

⁷³ Hasan al-Hakim, *al-wathā'iq al-tārikhiyah al-muta'alliqah bi-al-qadīyah al-sūriyah: fī al-ahdayn al-arabī al-faysalī wa-al-intidābī al-faransī*, 1915-1946, (Beirut: Dar Sader Publishers, 1974)

⁷⁴ Jamal Barout, *al-mu'tamar as-sūri al-'ām, al-awwal 1919-1920: ad-dustūr as-sūri al-awwal*, Tabayyun Magazine, Issue 3, Winter 2013

⁷⁵ Ibid.

⁷⁶ 1930 Syrian Constitution, Article 15

⁷⁷ 1950 Syrian Constitution, Article 3 Paragraph 4

*Article 3 approves concessions for sects, the necessary means for protecting the family and marriage have been rendered unavailable. Likewise, the removal of material and social obstacles that impede it have become conditional upon the elimination of such concessions, which, as we all know, is not being carried out. Islamic law necessitates that there is a mahr al-mithl, if there was not a mahr al-musamma [types of dower], and likewise permits the wife and her guardian the annulment of the marriage contract if her husband was not a suitable match for her; the Shiite sect allows mut'ah [temporary] marriage, while Christian tradition observes the dowry principle. All these things impede marriage and put both material and social obstacles in its way.'*⁷⁸

Constitution of 1953: This constitution affirmed that: **'The personal status of religious communities shall be observed and safeguarded.'**⁷⁹

Constitution of 1958: This constitution did not address this issue.

Constitution of 1961: This constitution did not address this issue.

Constitution of 1962: This constitution reaffirmed that: **'The personal status of religious communities shall be observed and safeguarded.'**⁸⁰

Constitution of 1964: This constitution did not address this issue.

Constitution of 1969: This constitution did not address this issue.

Constitution of 1971: This constitution did not address this issue.

Constitution of 1973: This constitution did not address this issue.

Constitution of 2012: This constitution employed the same wording from the 1950 constitution, stating: **'The personal status of religious communities shall be observed and safeguarded.'**⁸¹

In accordance with these constitutional provisions, on 17 September 1953, the president issued legislative decree No. 59/1953 which included the personal status law. This law included provisions related to personal status, comprising rules related to marriage, divorce, birth, descent, custody as well as eligibility, legitimate representation, testamentary matters and inheritance. The preparation of this law was based on five sources: family law that had been used and become customary, and upon which case law has been based; Egyptian laws with some amendments in accordance with local interests; Qadri Basha's 'Legal provisions on personal status'; schools of jurisprudence other than the Hanafi school where the Committee saw this necessary; the regulations the Committee developed that did not contradict with Islamic rulings; and, finally, the personal status draft law of the Damascus Judge, Sheikh Ali Al Tantawi.

⁷⁸ Records of the Syrian Constituent Assembly 12.12.1949 – 29.7.1950, Session 38, 24.7.1950, published in al-Jaridah al-Rasmiyah Newspaper, p.639

⁷⁹ 1953 Syrian Constitution, Article 3 Paragraph 4

⁸⁰ 1962 Syrian Constitution, Article 3 Paragraph 4

⁸¹ 2012 Syrian Constitution, Article 3 Paragraph 4

Article 306 of the personal status law states that these provisions are to be implemented on all Syrians, except the provisions in two articles that exclude the Druze, Christian and Jewish communities. This is in consideration of the religious provisions specific to each sect.

Hence, Syrians are subject to more than one personal status law according to their religious and sectarian affiliation; Article 308 of the personal status law states: 'Christians and Jews are governed by each sect's religious provisions related to engagement, marriage conditions and contracts, alimony and child support, marriage annulment, marriage dissolution, separations, dowry and custody.' This means that Christian and Jewish communities are subject to the provisions of the general personal status law specified for Muslims, with the exceptions of the matters included in this article, whereby they are subject to the relevant religious legislation.⁸²

On 27 September 2010, the president issued Legislative Decree No. 76, whose articles made amendments to Article 308, adding 'inheritance and testamentary matters' to the text of this article, which allows people belonging to these communities to be governed the rulings of their relevant religious legislations with regard to these issues as well as those previously listed. Following this, a number of pieces of religious legislation were passed in relation to these issues.⁸³

It should be noted that the constitutional provisions which paved the way to the enactment of manifold religious and confessional personal status laws have been widely criticized, for a number of reasons: they render religious authorities the basis for personal status issues; citizens are discriminated against on the basis of religion; and women in particular are deprived of rights as and when these rights contradict religious texts and their various interpretations. The personal status law governs, first and foremost, the relationship between a man and a woman, opening the possibility for the violation of women's rights, as does any classification that is based on anything other than citizenship, but particularly an exclusively sectarian one.⁸⁴ These constitutional formulations have, moreover, ignored calls for a genuine acknowledgement of the principle of state secularism in order to ensure that the treatment of all persons, women and men, is as citizens.

The constitutional texts divide citizens into communities and subject them to different religious, sectarian and legal systems. This entails differentiating between citizens based on their sectarian affiliation, violating the principle of equality and non-discrimination which is itself stipulated in the constitution. These texts also confirm the custodianship of the 'religious' class over other social classes, as guaranteed by the state itself.⁸⁵

The Committee on the Elimination of Dis-

82 Some such legislation is in force, e.g. the Greek Orthodox Personal Status Act No. 23 of 2004, the Syriac Orthodox Personal Status Act No. 10 of 2004, and the Catholic communities Personal Status Act No. 31 of 2006.

83 Some examples: Legislative Decree No. 7/2011, which includes the Syriac and Roman Orthodox Inheritance and Testament Act; Legislative Decree No. 7/2012, which includes the Inheritance and Testament Law of Armenian Protestants; Law No. 4/2012, which includes the Inheritance and Testament Law of the Orthodox Armenians; and Law No. 2/2017, which includes the Inheritance and Testament Law of the Evangelical denomination in Syria.

84 See: Ivin Doba, *al-mar'a as-sūriyah wa-ad-dustūr: sharākah fi-al-ma'rakah la fi-al-maghānim*. Link: <http://women-spring.org/news.php?go=fullnews&newsid=218>

85 Rustum Mahmoud, 'ahwāl al-mar'a as-sūriyah fi-al-'ahad al-ba'athī: saytarat an-nā'imah,' in: *huqūq an-nisā' fi sūriyah qabl wa-'athnā' ath-thawrah: al-khitāb wa-al-wāqī'*, Knowledge Programme, Civil Society in West Asia, Special Publication 2, May 2014, p. 7

crimination against Women (CEDAW), in their concluding observations on the second periodic report on Syria, expressed concern at 'the reinforcement by Article 3 of the Constitution of religious communities' rules, a situation which will further complicate and delay efforts towards the elimination of discrimination against women, in detriment of women's rights.'⁸⁶

The Syrian government has, crucially, held on to these discriminatory constitutional provisions as a way to justify discrimination against Syrian women and to legitimise the discriminatory personal status law, which is also consistent with the provisions of the discriminatory constitution. The Syrian government, in its periodic reports to the CEDAW, pointed to difficulties in amending the personal status law, and justified the delay by writing in its 2012 report:

'It must be recognized that some bills, particularly those that directly touch upon the cultural and religious heritage of the country, require the broadest possible input and frequently encounter opposition from several groups, which occasionally impedes the promulgation of such laws.'⁸⁷ ... The personal status law in Syria guarantees many rights, but what is needed is to become aware of these rights and the ability to exercise them. The Personal Status Law is in harmony with the country's Constitution with

respect to freedom of faith based on social and cultural diversity for all religious denominations and sects for both males and females. Some articles of this law are derived from religious texts which are quite difficult to amend in a conservative and largely religious society. While international conventions supersede national laws, they do not supersede divine law and what it stipulates in this regard.'⁸⁸

2.6 Religion and Legislating

The relationship between religion and legislation has a particular significance during the drafting process of the constitution. International precedents and practices emphasise that the recognition and institutionalisation of a specific religion, granting it concessions or applying its laws, could have a detrimental effect on the rights of particular groups, namely: those who have left said religion; religious minorities; those who have no religion; and those who are religious but who do not agree with the interpretation of religion's role in public and private life. It could also aggravate tension between those belonging to a particular religious community and those who have left this community.⁸⁹

Syria's constitutions can be divided into three broad categories in terms of how it addresses religion as a source of legislation:

⁸⁶ Committee on the Elimination of Discrimination against Women, Concluding Observations, Second Periodic Report of the Syrian Arab Republic: CEDAW/C/SYR/CO/2 - 24 July 2014

⁸⁷ United Nations, Committee on the Elimination of Discrimination against Women, Consideration of reports submitted by State Parties under article 18 of the Convention, Second periodic report of States parties, Syria, 24 July 2012, CEDAW/C/SYR/2- 25 October 2012, p.13

⁸⁸ Ibid. p.17

⁸⁹ *Al-'alāqāt bayn ad-dīn wa-ad-dawla*, International Institute for Democracy and Electoral Assistance, September 2014, p.1. Link: <http://constitutionnet.org/sites/default/files/religion-state-relations-arabic.pdf>

1. **Constitutions that did not address the relationship between religion and legislation:** The following constitutions did not address religion as a source of legislation, or tackle this issue in any way:

- Constitution of 1920
- Constitution of 1930
- Constitution of 1958
- Constitution of 1961

2. **Constitutions that used the phrase 'Islamic jurisprudence is the main source of legislation':** Those in this category addressed the role and authority of religion as a source of legislation by employing a provision repeated verbatim throughout each of these texts. This provision was: **'Islamic jurisprudence shall be the main source of legislation.'** The following constitutions adopted this phrasing:

- Constitution of 1950 (Article 3 Paragraph 2)
- Constitution of 1953 (Article 3 Paragraph 2)
- Constitution of 1962 (Article 3 Paragraph 2)

3. **Constitutions that used the phrase 'Islamic jurisprudence shall be a main source of legislation':** This group of constitutions addressed the role and authority of religion as a source of legislation by employing a provision slightly altered from the above and again repeated verbatim throughout each of these constitu-

tions. This provision read: **'Islamic jurisprudence shall be a main source of legislation'**. The following constitutions adopted this phrasing:

- Constitution of 1964 (Article 3 Paragraph 2)
- Constitution of 1969 (Article 3 Paragraph 2)
- Constitution of 1971 (Article 3 Paragraph 2)
- Constitution of 1973 (Article 3 Paragraph 2)
- Constitution of 2012 (Article 3 Paragraph 2)

In jurisprudential terms, there is a key distinction between Islamic jurisprudence being **'the main source of legislation'** and being **'a main source of legislation'**. We can explain this in the following outline:⁹⁰

- Stating that Islamic jurisprudence is the main source means that it is the highest-ranking source, surpassing and exceeding all other sources. As a result, the legislator must always refer to the provisions of Islamic jurisprudence, if not to quote them directly then to ensure the avoidance of any contradiction with them. This wording, crucially, does not mean that provisions of Islamic jurisprudence are implemented automatically by the relevant authority, such as the judicial authority, but that they must be taken on by the legislator drafting the laws. Thus, the constitution here is not bestowing upon them self-binding power, even while considering them the main official source.

⁹⁰ See: Ali Youssef Al-Shakri, *al-wasīt fī falsafat ad-dustūr* (Beirut: Zain Legal Publications, First Edition 2017), p. 87-88

- On the other hand, stating that it is a main source means that it is one among other sources of equal value, without surpassing any of them. In this case, the legislator is not obliged to adhere to the provisions of Islamic jurisprudence, but can choose whether or not to do so. This is because, given it is considered a source among other sources, overlooking it would not result in an appeal against the constitutionality of the law or the infringement of its legitimacy.

However, from a jurisprudential perspective there is, in fact, no difference between ‘a main source’ and ‘the main source’ **as long as the constitution does not mention another source except Islamic jurisprudence, as is the case in all the Syrian constitutions. What follows from that is that Islamic jurisprudence alone should be the main and highest source.** It follows, too, that legislations should therefore be in accordance with the principles of Islamic jurisprudence, and that, otherwise, it would be considered in violation of the constitution, and could be appealed on the grounds of unconstitutionality.

There is an important constitutional precedent relevant to this debate, which brings to light an early awareness about the values of not imposing religious authority as a source of constitutional legislating. This precedent comes from the Syrian National Congress deliberations of 1919, which gave rise to the first draft constitution of 1920. In deliberations concerning an article related to the rights of women,

the records show how among the defenders of such rights were religious leaders who did not attempt to lend the articles of the constitution a religious character. They displayed a broad-minded understanding of religion and sought to separate it from constitutional rule and reduce its influence upon constitutional provisions. This was in contrast with those who attempted to ensure religion was the sole authority, employing a narrow reading and strict interpretation of religious provisions, or giving more weight to prevailing traditions and social customs than even the contents of the religious text itself.

Among the adherents of enlightened thoughts was Sheikh Sa’id Murad, who is referred to in the records of these sessions as ‘a champion of women’s rights.’⁹¹ During one of his interventions before the Congress, he said:

‘In the traditions of the East, there is nothing recorded which says that half of the nation should be ignorant. We are prepared, at any opportunity, to do away with this ignorance for women and men both. The issue of women could only be discussed from the knowledge perspective. Islamic law decreed the acceptance of the testimony of women and the hadith [sayings of the prophet Mohammad] that women report, and acceptance of women as teachers and judges in legal matters except in criminal cases. This issue is one of a right for women. He who gave us the right to legislate in this assembly also gave women the right to vote. The issue of women is purely one of knowledge. We have to recognise that God gave women the rights He gave you. Be merciful to those on earth and the

⁹¹ From the records of the Syrian National Congress session in which women’s right to vote was discussed, cited in: Mary Almaz Shahrestan, *al-mu’tamar as-sūri al-‘ām 1919-1920*, (Beirut: Amwaj Publishers, 2000), quoting from Difa’ Newspaper, Issue 89, published on 27.4.1920

*He Who is in heaven will have mercy on you. This is a social issue for which the Quran gave us clear, undeniable benefits.'*⁹²

This opinion was taken on by a number of members of the Congress, who relied upon and cited what he had said. One such member was Ezza Druza, who cited Murad's comments during the deliberations and added:

*'Islamic law gave women rights that are no less than those of men. It envisaged her as smart, prudent, hard-wording, knowledgeable, eloquent speaker, modern and so forth. Accordingly, it cannot be said that an Islamic law, which puts women in such positions, could also prevent them from participating in certain public affairs.'*⁹³

Other members also supported this right being granted, but from a social rather than a religious perspective; Du'as Jurjus was one such advocate:

*'In our examination of this subject, namely the right of women to vote, we lay down a social right, which is respected by all kingdoms, states and sects. We do not want to remain like a paraplegic person— half well and half ailing. The nation is made up of men and women, and the family is made up of a father and a mother; thus, she is held in great regard and has even greater prestige. I am not addressing this from a religious perspective, for that is for someone else, but rather from a social perspective; and in that, I say: This proposal must be considered with impartiality and sincerity.'*⁹⁴

A similar idea was expressed by Subhi al-Tawil from Latakia:

*'An educated woman is better than a thousand ignorant men. There are some areas where men understand nothing – one educated woman is superior to these men, so why do we give them the right to vote and deprive educated women of this right?'*⁹⁵

There were, on the other hand, conservative-minded members of the Congress who relied on social arguments, rather than religious ones, in their opposition to giving Syrian women the right to vote. That is to say, they utilised social realities and customs as opposed to religious ruling, when making their arguments. We can take, as an example, the intervention made by Hama representative Sheikh Abd al-Qader al-Kilani:

*'Ninety-nine percent of our women are not educated. If it is the furtherance of women you want, open schools for them and teach them so they may teach their children. Then look to the future generations; for buildings crumble if they are not built upon solid foundations. In my opinion, having a female voter, a female elected official, or a female delegate, within this level of ignorance and corruption of morals, would be harmful, not beneficial. Once good morals have been developed, then this matter can be considered.'*⁹⁶

Others from within the same camp went as far as arguing that even if religion permits such a provision, social custom forbids it. Such arguments were put forward, for example, by Adel

92 Ibid.

93 Ibid.

94 Ibid.

95 Ibid.

96 Ibid.

Zu'eytar, the Nablus representative for the Congress, who said:

*'Yes, it could be argued that Islamic law permits women to participate in these kinds of matters; however, Islamic law does not say that the nation is obliged to put in place laws and systems which permit women to do so. Our prevailing traditions compel us not to enter into such a dangerous impasse.'*⁹⁷

What the above discussion illustrates is that there was a considerable awareness, early on in the country's constitutional history, about the importance of not incorporating religion into all matters of legislation. This was true even of those in opposition to the granting of certain rights, including religious leaders and those who did not draw from religious texts to back up their arguments. However, despite this early constitutional precedent, and despite many similar debates which took place as part of the deliberations of the 1930 and 1950 constitutions (see, for example, the deliberations referred to in the section on the religion of the ruler and the religion of the state), the issue of the relationship between legislating and religion continued to pose a major dilemma both for those drawing up the constitution and those implementing it.

2.7 Prohibition of Religious-Based Political Activity

The issue of religious-based political activity was not addressed by any Syrian constitutions before 2012. One explanation for this is that the majority of Syrian constitutions were drafted in exceptional circumstances (such as a revolution, a coup, political unification or separation, and so on), thus in conditions where political life would have been completely absent, or where political parties would have been almost completely non-existent. This was true, moreover, for all constitutions written under the leadership of the Arab Ba'ath Socialist Party. The Ba'ath Party was designated as per Article 8 of the 1973 constitution as being 'the leading party in society and state,' which prohibited the establishment of political parties other than those prescribed. The only political parties allowed to function were the ruling Ba'ath Party and a limited number of parties with which an enforced coalition was formed, under the umbrella label of the National Progressive Front.

The 2012 Constitution removed the notorious Article 8,⁹⁸ and introduced political plurality. Alongside this, a provision was added to prevent the foundation of political parties on a religious basis. This provision stipulates in clear terms that: 'Carrying out any political activity or forming any political parties or groupings on a religious, sectarian, tribal, regional,

⁹⁷ Ibid.

⁹⁸ Article 8 of the 1973 Constitution states that: 'The Socialist Arab Ba'ath Party shall be the leading party in society and state. It shall lead a patriotic and progressive front seeking to unify the resources of the people's masses and place them at the service of the Arab nation's goals.' This article had several negative outcomes, including the abolition of political pluralism (the core of political democracy); the introduction of legal discrimination among citizens by dividing them according to their political affiliation; the monopolisation of power resulting in stagnation in society and state; and the reversing of the party's relationship with society and state, so that instead of the party serving the state and the society, as it should, they become hostage to the party leading them, as per the constitution. See: Razan Zaitouneh, *ad-dustūr ad-dīmuqrātī wa-al-dustūr as-sūrī*, Al Adab magazine, 10.11.2018

class-based or occupational basis, or on discrimination based on gender, origin, race or colour may not be undertaken'.⁹⁹

2.8 Religious Education

The United Nations' Human Rights Committee emphasis that the teaching of certain topics related to religious education in public schools, such as the general history of religions and ethics, as long as teaching is carried out in a neutral and objective manner. In cases where public education includes instruction in a specific religion or belief, provisions shall be made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians, while guaranteeing the freedom of legal parents and guardians to allow for their children to obtain religious and ethical education according to their beliefs.¹⁰⁰

Back to the Syrian constitutional texts, the **1930 Constitution** was the only constitution to have a provision allowing religious communities to establish their own schools in their own language. It stated that: **'The rights of the various religious communities shall be guaranteed and these communities shall be entitled to establish schools to teach minors in their own language provided they uphold the principles set forth in the law.'**¹⁰¹

This provision has not been repeated in any subsequent constitution; one interpretation of this is that this constitution was in force during

the French mandate period, which could give some explanation as to the background of this provision.

There were, however, a number of other constitutional provisions related to religious education in those constitutions which stipulated compulsory education. A number of constitutions included clear provisions on the compulsory nature of religious education during the early stages of schooling, and stated that this education should be in accordance with the specific beliefs of every religion, as is clarified in the following constitutional provisions:

Constitution of 1950: 'Teaching religion shall be compulsory in levels of schooling for each religion as per its beliefs.'¹⁰²

Constitution of 1953: 'Teaching religion in these levels for each religion shall be as per its beliefs.'¹⁰³ In this text, religious education is not stipulated as being 'compulsory', but it is maintained that such teaching should be as per the specific beliefs of each religion.

Constitution of 1962: 'Teaching religion shall be compulsory in these levels for each religion according to its beliefs.'¹⁰⁴

Such a provision has been absent from any constitution since that of 1962, even though this principle has continued, in reality, to be enforced and implemented to this day. ■

99 2012 Syrian Constitution, Article 8 Paragraph 4

100 United Nations Commission on Human Rights, Session 48 (1993), General Comment No. 22. See: HRI/GEN/1/Rev.9 (Vol. I), 27 May 2008.

101 1930 Syrian Constitution, Article 28

102 1920 Syrian Constitution, Article 28 Paragraph 1

103 1953 Syrian Constitution, Article 21 Paragraph 5

104 1962 Syrian Constitution, Article 28 Paragraph 1

3 The Question of Religion in Comparative Constitutions of Non-Arab States

When comparing the Syrian constitutions to those of other countries, a number of different approaches to dealing with the question of religion are brought to light. There are countries which constitutionally commit to funding, supporting or endorsing religion, or which recognise the religious basis of the people, or of the public authority. Countries and their constitutions also differ in terms of the amount of control that religious institutions and laws have over the country, and how much influence they exercise.¹⁰⁵ While it is difficult to draw general and all-encompassing conclusions, since the issue relates to the specific circumstances of each country, we can draw out a few broad models, as laid out below.

3.1 Constitutions based on Secularism

Secularism is a concept which is distinct, in its definition, from atheism. It does not mean the rejection of religion, or prohibiting religion as a particular practice or belief; rather, it refers to the rejection of religious concessions, of religious inequality, and of the influence of religious leaders on public legislation and policy-making.¹⁰⁶

Upon drafting a constitutional text, the drafters thereof should take into account that sec-

ular systems can take a number of different forms, and that there is no single, ideal model. The constitutions of France and the United States, however, could be taken as examples although they differ in terms of the extent and force of secularism stipulated.¹⁰⁷

The first article of France's Constitution of the Fifth Republic, currently in-force, states the following: 'France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs.'

According to the French model, the state acknowledges the right of religious freedom and safeguards this right within the personal and private life of its citizens. However, it takes a conservative attitude towards public religion, which it sees, primarily, as a possible or real threat to the powers of the authorities and the secularity of the Republic. The state emphasises, meanwhile, its civil, republic nature, something which is encouraged, rather than imposed, in the school system and civic rituals.

Given this principle, French secularism is compatible with the prohibition of overt manifestations of religious affiliation in public places, such as banning the headscarf in public buildings or banning the wearing of religious emblems in public schools. All public ceremonies, from the inauguration of the president to local celebrations presided over by the mayor, are characterised by a total lack of any religious

¹⁰⁵ *Al-'alāqāt bayn ad-dīn wa-ad-dawla*, International Institute for Democracy and Electoral Assistance, September 2014, p.4

¹⁰⁶ Ibid.

¹⁰⁷ Silvia Suteu and Ibrahim Draji, *ABC for a Gender Sensitive Constitution: Handbook for Engendering Constitution Making*, Ed. Boriana Jonsson, Maya Alrahabi, (the Euromed Feminist Initiative, 2016), p. 58

quality.¹⁰⁸ The French government has always maintained in its periodic reports to the United Nations that it 'guarantees the free practice of religion, but does not recognise any religion in particular.'¹⁰⁹

As for the Constitution of the United States, Article 6 states: 'No religious test shall ever be required as a qualification to any office or public trust under the United States.' The First Amendment, meanwhile, states that: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.'

The neutrality of the state in matters relating to religion is reflected in the United States model. It neither supports nor criticises religion, does not discriminate between religious values and beliefs, and does not permit the public practice of any religion, or its financing by a public authority.¹¹⁰ At the same time, authorities may not prevent, restrict, promote or support religious beliefs or practices, nor may any religion be discriminated against or favoured. Therefore, the state's neutrality toward religion does not restrict the freedom of public figures from expressing their religion. We observe, for example, how the inauguration ceremony of the US president usually begins with prayer, and

state officials are sworn in on a religious text when they take office, although they do so as their personal choice or social custom, rather than it being required by law.

According to the US Constitution, Congress may not issue any law that specifically establish a particular religion or prohibit the free exercise of any religion.¹¹¹ This provision has strengthened the separation between the Church and the state, and the freedom of practising religious beliefs regardless of what these beliefs are. This is the 'wall of separation' between the Church and the state which was originally intended by Thomas Jefferson,¹¹² and the United States, accordingly, has no official religion. The government is also prohibited from giving any preference to one religion over another. This was affirmed by a Supreme Court decision in the sixties, when it decreed that in order to identify whether a law or a governmental policy has violated the provisions of this separation, the following standards must be met:

- 1) Its goal must be a secular one;
- 2) It must have a principal or primary effect that does not advance or inhibit religion;
- 3) It shall not lead to excessive gover-

108 *Al-'alāqāt bayn ad-dīn wa-ad-dawla*, International Institute for Democracy and Electoral Assistance, September 2014, p. 4

109 A/HRC/WG.6/2/FRA/1 - 2 May 2008.

110 The purpose of neutrality is not to protect the state from religious manifestations, as is the case with secularism, since the state is neutral toward religion. What is meant is that the state does not recognise particular values, but rather constitutes a 'melting pot' in which different religious interests and opinions can coexist freely and participate, on an equal basis, in social and civil life. See: *Al-'alāqāt bayn ad-dīn wa-ad-dawla*, International Institute for Democracy and Electoral Assistance, September 2014, p. 5

111 The First Amendment of the United States Constitution from 1791. The underlying reason for why the writers of the constitution introduced the First Amendment two years after its adoption was the calamitous religious conflict in Europe; they wanted to move the country away from potential future conflict, and so decreed not to establish any official religion for the country and considered any action to the contrary a fundamental breach of freedom and fundamental rights.

112 Thomas Jefferson, the third president of the United States, declared in 1808: 'Because religious belief, or non-belief, is such an important part of every person's life, freedom of religion affects every individual ... Erecting the "wall of separation between church and state," therefore, is absolutely essential in a free society.' See: *Al-'alāqāt bayn ad-dīn wa-ad-dawla*, International Institute for Democracy and Electoral Assistance, September 2014, p. 2

ment involvement with religion.¹¹³

As a result, the Supreme Court found that the majority of public aid to church-supported schools should be considered unconstitutional, with the exception of loans for schoolbooks and buses for student transport, as these are considered neutral activities that foster child welfare rather than religious values. The United States government may not compel anyone to abide by a religious belief or to practice certain religious rituals, and as such, the Supreme Court ruled that atheists should not have to take the public oath upon taking office because of the faith and belief it expresses in God. It should be noted, however, that 'freedom of practice' does not constitute a license to commit religious practices which are harmful to society. It was on this basis, for example, that the Supreme Court prohibited polygamy, despite its sanctioning by the Mormon Church.¹¹⁴

3.2 Constitutions based on Accommodating Diversity

Some countries' constitutions serve to protect the religious neutrality of the state, not by withdrawing the support or endorsement of religion (as is the case with secularism), but by promoting equal and non-discriminatory treatment of all religions, with the state working to accommodate 'all religions' and cooperate with religious institutions in their social functions. Within this model, the law recognises the plurality of religious groups, which

are equal to one another, and the state must neither favour one over another, nor discriminate between them. Thus, it is recognised that all religions have an important role in society, and that religious institutions, as a whole, shall be partners with civil authorities in achieving common good. Examples of such provisions can be found in the prevailing constitutions of South Africa and Germany.

The Constitution of the Republic of South Africa, adopted in 1996, affirms 'the freedom of religion, belief and opinion.' It states that 'Everyone has the right to freedom of conscience, religion, thought, belief and opinion,'¹¹⁵ and that 'Religious observances may be conducted at state or state-aided institutions.'¹¹⁶ It also establishes the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, and gives it powers to 'monitor, investigate, research, educate, lobby, advise and report on issues concerning the rights of cultural, religious and linguistic communities.'¹¹⁷ It also, however, guarantees the preservation of the religious neutrality of the state, and the strengthening of equal and non-discriminatory treatment of religions. This is clearly expressed through the following principles and restrictions:

- **Affirming the supremacy of the constitution, and the requirement that any other legislation must be compatible with the constitution:** This is established in Article 2 of the constitution: 'This Constitution is the supreme law of the Republic; law or

113 Larry Elowitz, *Introduction to American Government*, translated by Jaber Said Awad (Cairo: Publications of the Egyptian Society for the dissemination of Global knowledge and Culture, First Arabic Edition 1996), p. 237.

114 Ibid, p. 238.

115 1996 South African Constitution, Article 15 Paragraph 1

116 1996 South African Constitution, Article 15 Paragraph 2

117 1996 South African Constitution, Article 185

conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.’ The significance of this text is that the enactment of any behaviour, statutory or divine law shall be conditional, according to that which is prevailing in South Africa, on its compatibility with the provisions of the constitution. This is in contrast to Syria and many other Arab countries where the opposite holds; the application of laws in these countries, including the application of the constitution as the supreme law of the country, is conditional on their compatibility with the religious provisions and their jurisprudential interpretations by religious leaders.

- **Affirming equality and the prohibition of religious-based discrimination:** Article 9 of the constitution stipulates that: ‘Everyone is equal before the law and has the right to equal protection and benefit of the law.’ This article, crucially, prohibits the state from unfairly discriminating, directly or indirectly, against anyone on the grounds of religion or belief. It also prohibits any person from unfairly discriminating, directly or indirectly, against another person on the same grounds and obligates the state to issue national laws to prevent or prohibit unfair discrimination.
- **Imposing restrictions on the performance of religious rituals in state or state-affiliated institutions:** These

rituals should follow the rules placed by the appropriate public authorities, be held in an equitable manner, and their attendance should be voluntary.¹¹⁸

- **Stipulating that personal status or family laws, as well as any rituals held according to any customary tradition or religious law, must be in accordance with the provisions of the constitution.**¹¹⁹

We can observe a similar model in the **Basic Law for the Federal Republic of Germany**, the name of the German constitution in force since 1949, which clearly affirms freedom of belief and conscience. It states that ‘Freedom of faith and of conscience, and freedom to profess a religious or philosophical creed, shall be inviolable,’¹²⁰ and also that ‘The undisturbed practice of religion shall be guaranteed.’¹²¹

However, in order to maintain the religious neutrality of the state, Germany’s constitution also stipulates:

Prohibition of discrimination based on religion and belief: It is stated that ‘No person shall be favoured or disfavoured because of sex, parentage, race, language, homeland and origin, faith or religious or political opinions.’¹²²

Consigning religious education to the decision of parents, the supervision of the state and the conviction of the teacher: The constitutional text states that ‘Parents and guardians shall have the right to decide whether

118 1996 Constitution of South Africa, Article 15 Paragraph 2

119 1996 Constitution of South Africa, Article 15 Paragraph 3

120 1949 Basic Law for the Federal Republic of Germany, Article 4 Paragraph 2

121 1949 Basic Law for the Federal Republic of Germany, Article 4 Paragraph 2

122 1949 Basic Law for the Federal Republic of Germany, Article 3 Paragraph 3

children shall receive religious instruction;¹²³ that religious instruction shall be considered part of 'the regular curriculum in state schools, with the exception of non-denominational schools;¹²⁴ and that: 'Without prejudice to the state's right of supervision, religious instruction shall be given in accordance with the tenets of the religious community concerned. Teachers may not be obliged against their will to give religious instruction.'¹²⁵

Enjoyment of rights and eligibility for office regardless of the adherence or non-adherence to a religious belief: It is stated in the constitution that: 'Neither the enjoyment of civil and political rights nor eligibility for public office nor rights acquired in the public service shall be dependent upon religious affiliation.'¹²⁶

Protection of a person against any disadvantages based on their religious stance. This is clearly indicated in the following provision: 'No one may be disadvantaged by reason of adherence or non-adherence to a particular religious denomination or philosophical creed.'¹²⁷

3.3 Constitutions which Acknowledge a Formal State Religion

A third group of countries designate a religion to be the official religion of the state, but with differing implications among different countries, as outlined below:

Some constitutions stipulate a formal state religion, without requiring the head of state to be a follower of this religion. An example of this model would be the Constitution of Argentina. After the removal of the requirement that the president must be Catholic as part of the 1994 amendments, the Section 2 of the current constitution now reads: 'The Federal Government supports the Roman Catholic Apostolic religion.'

Other constitutions, meanwhile, stipulate for a formal state religion while upholding that the head of state must be a follower of this religion. An example of this model would be the Norwegian Constitution, which has long been considered a leading country in terms of the level of its democracy. For a large part of its history, Norway had a constitutional religious institution which made the Lutheran Evangelical Church the official Church of the state. In 2012, the position of the Church changed as per constitutional amendments, but was not removed entirely. The amendments reflect the way in which a constitutional change can be enacted, decreasing the power of a state's religious institution, while preserving religion's non-discriminatory role.¹²⁸ The original text of Article 2 of the Norwegian Constitution stated that: 'The Evangelical-Lutheran religion shall remain the official religion of the State. The inhabitants professing it are bound to bring up their children in the same [manner].' However, after the 2012 amendments, it became 'Our values will remain our Christian and

123 1949 Basic Law for the Federal Republic of Germany, Article 7 Paragraph 2

124 1949 Basic Law for the Federal Republic of Germany, Article 7 Paragraph 3

125 1949 Basic Law for the Federal Republic of Germany, Article 7 Paragraph 3

126 1949 Basic Law for the Federal Republic of Germany, Article 33 Paragraph 3

127 1949 Basic Law for the Federal Republic of Germany, Article 33 Paragraph 3

128 *Al-'alāqāt bayn ad-dīn wa-ad-dawla*, International Institute for Democracy and Electoral Assistance, September, 2014, p.7

humanistic heritage. This Constitution shall ensure democracy, a state based on the rule of law and human rights.’ Under this amendment, we note the shift from the existence of a sole official religion, to a symbolic reference to religion and human values which guarantee the rule of law and human rights. It is also worth noting that the provision on the mandatory religious upbringing of children was removed.

While Article 4 of the constitution used to state that **‘The King shall at all times profess the Evangelical-Lutheran religion, and uphold and protect the same,’** after the 2012 amendments it stated simply that **‘The King shall at all times profess the Evangelical-Lutheran religion.’** Accordingly, the religion of the King continued to be stipulated, while the part stating he should uphold and protect this religion was removed.

Article 16 of the constitution had previously stated that **‘The King ordains all public church services and public worship, all meetings and assemblies dealing with religious matters, and ensures that public teachers of religion follow the norms prescribed for them.’** The same article after the 2012 amendments now states:

‘All inhabitants of the Realm shall have the right to free exercise of their religion. The Norwegian church, an Evangelical-Lutheran church, shall remain the Established Church of Norway and will as such be supported by the State. Detailed provisions as to its system will be laid down by law. All religions and religious communities should be supported on equal terms.’

Under the new amendments, the constitution now stipulates the freedom to practice religious ceremonies for all inhabitants of the Kingdom and for all religions, which have come to enjoy the same support as the main Evangelical-Lutheran church.

A third category for this constitutional model is comprised of constitutions which stipulate an official state religion with the condition that this religion be one of the sources for legislation or its main source. This is the case for many Islamic and Arab countries, and we shall dedicate the next section to an examination of some such examples. ■

4 The Question of Religion in Comparative Constitutions of Arab States

There are over 2 billion Muslims worldwide,¹²⁹ the majority of whom lives in countries which either proclaim the state to be secular, or which have not made any stipulations designating Islam as the official state religion. There are 46 countries worldwide which have a Muslim majority, out of which 25 countries stipulate Islamic law as a singular source of legislation within their constitutions. Among these countries are Saudi Arabia, Iran, Yemen, Afghanistan, Bahrain, Mauritania, Oman and Pakistan. There are 12 countries, meanwhile, whose constitutions stipulate Islam as the state religion, without this reflecting on the nature of the country’s political system; such

129 World Population Review, Muslim Population By Country 2020, <https://worldpopulationreview.com/countries/muslim-population-by-country/>

countries include Egypt, Iraq, Algeria, Bangladesh, Jordan, Malaysia, Morocco, Tunisia and the United Arab Emirates.¹³⁰

Meanwhile, the constitutions of 11 Muslim-majority countries stipulate plainly that the state is secular, namely: Burkina Faso, Chad, Guinea, Mali, Niger, Senegal, Azerbaijan, Kyrgyzstan, Tajikistan, Turkey and Turkmenistan. The remaining Muslim-majority countries have constitutions which mention neither the religious nor the secular nature of the state; this last group includes Indonesia, Albania and Uzbekistan.¹³¹

A study which evaluated the constitutions of particular Arab countries in the post-Arab Spring period concluded that discussions on the place of religion with the state, and its relationship with the political sphere, occupied a crucial space, whether within the institutions responsible for drafting the constitutions, or within society at large. It demonstrated how religious movements took advantage of the opportunity presented by revolutions and uprisings to bring the issue of religion back to the fore. In those Arab countries which witnessed revolutions, uprisings or protests, the discussions of such questions during the writing or amendment of constitutions illuminated significant intellectual differences among societal groups. A key divide came to light between conservatives, who argued that it was necessary to establish the Islamic identity of the state and make religion the basis of governance; and modernists, who advocated for

the secularism of the state, and the need to establish political authority and law based on the free will of all people regardless of sex, religion, origin or other considerations.¹³²

In the following pages, we present how the constitutions of four Arab countries have tackled the question of religion. We have specifically chosen countries which have witnessed significant challenges in regard to the issue of religion within the constitution, either in the content of the texts, or the way in which they have been applied.

4.1 The Iraqi Constitution of 2005

Iraq's first constitution entered into force on 11 March 1925, under the auspices of the British mandate. It was called 'the Fundamental Law of Iraq' and established a constitutional monarchy with a parliamentary system. This constitution remained in effect until the revolution of 14 July 1958 and the declaration of an interim constitution for the establishment of the First Republic. One of the most significant achievements of that period was the adoption of the Personal Status Law No. 68/1959. The constitution stated in Article 4 that 'Islam is the religion of the state,' acknowledged partnership between Arabs and Kurds, and relied on the provisions of the Egyptian 1958 Constitution. However, the 1958 Constitution was suspended after the coup of 8 February 1963 and the establishment of the

130 See: Tad Stahnke and Robert Blitt, *The Religion-State Relationship and the Right to Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitutions of Predominantly Muslim Countries*, United States Commission on International Religious Freedom, March 2005, p.7 and following.

https://www.uscifr.gov/sites/default/files/resources/stories/pdf/Comparative_Constitutions/Study0305.pdf

131 Ibid.

132 Ibrahim Draji, Huda Elsadda and Salsabil Klibi, *Comparative Study on Constitutional Processes in the Arab World: A Gender Perspective*, Ed. Boriana Jonsson and Lilian Halls-French (Paris: EuroMed Feminist Initiative) p.70 and following.

Second Republic. The National Revolutionary Command Council thereafter issued Law No. 25/1963 which included 19 articles; this law made no reference to the source of legislation or the religion of the state. It did not include, moreover, any provision related to human rights, did not state its position in relation to the 1958 Constitution, and did not guarantee the writing of a permanent constitution.

With a change in the governing political system and the beginning of the Third Republic, an interim constitution was issued on 29 April 1964, with the goal being a rapprochement with other Arab countries, especially with the United Arab Republic. This constitution also stipulated that Iraq was a social democratic state. After a coup led by the Ba'ath Party, and the establishment of the Fourth Republic, two interim constitutions were issued on 21 September 1968 and 16 July 1970 respectively, followed by a draft constitution in 1990 that did not enter into force. As such, the 1970 constitution remained valid until the removal of the Ba'ath regime following the US occupation of Iraq in 2003.

The Iraqi Governing Council (IGC) was established in July 2003, under the US occupation of Iraq. It consisted of 25 members, the majority of whom were from the exiled Iraqi opposition, and was based on a sectarian composition reflecting, as the US administration saw it, the prevailing diversity of Iraq. Accordingly, the IGC was composed of 12 Shiite members, five Sunnis, five Kurds, one Turkman, and one Christian. This paved the way for what was known as Iraq's 'Lebanonisation,' i.e. the in-

stitutionalisation of sectarianism throughout the various Iraqi institutions. US diplomat Paul Bremer's plan was for the constitution to be written by an appointed committee rather than an elected one. Based on this constitution, a parliament could then be elected. But on 30 June 2003, before the formation of the IGC, Ayatollah Ali al-Sistani issued a fatwa saying he would not accept a constitution written by an unelected committee. The IGC and the US Administration tried various ways to circumvent the fatwa, but eventually had no choice but to accept it. A timetable for the political process in the transitional period was announced on 15 November 2003 and was approved by Sistani.¹³³

The constitution was eventually approved in a referendum with the approval of 78.59% of the voters. The constitution was, however, rejected in Sunni areas: it was rejected by 96.96% in Anbar, by 81.75% in Salah al-Din, by 55.08% in Nineveh, and 51.27% in Diyala. Nevertheless, a two-thirds rejection vote in three provinces, which is what was required for an overall rejection of the constitution, was not achieved, and the constitution was therefore able to be approved.¹³⁴

The 2005 Iraqi constitution should not, in our opinion, serve as a model or exemplar with regards to religion and its position within the constitution. This is because it was issued under exceptional circumstances related to the US occupation of the country and includes many concerning provisions giving rise to a deeply-entrenched religious status quo; this is despite attempts made to conceal this reality

¹³³ Ibrahim Draji, Huda Elsadda, Salsabil Klibi, *Comparative Study on Constitutional Processes in the Arab World: A Gender Perspective*, Ed. Boriana Jonsson and Lilian Halls-French (Paris: EuroMed Feminist Initiative) unpublished papers.

¹³⁴ Jonathan Morrow, *Iraq's Constitution Process II: An Opportunity Lost*, Special Report 155, United States Institute of Peace, November 2005, p.3

through the issuing of more acceptable provisions. This will be made evident in the following outline of key constitutional precepts:

Highlighting the religious identity of the state and its relationship to legislation: The Iraqi constitution affirms that 'Islam is the official religion of the state and is a foundation source of legislation.'¹³⁵ It also stipulates that 'no law may be enacted that contradicts with the established provisions of Islam'¹³⁶ and guarantees 'the Islamic identity of the majority of the Iraqi people,'¹³⁷ while also affirming that 'Iraq is a part of the Islamic world.'¹³⁸

Reaffirming religious pluralism: The 2005 constitution states that 'Iraq is a country of multiple nationalities, religions and sects.'¹³⁹ As such, it guarantees 'the full religious rights to freedom of religious belief and practice of all individuals such as Christians, Yazidis, and Mandeans Sabians.'¹⁴⁰

Subjecting citizens to their religious laws in personal status matters: Although the constitution stipulates equality among citizens and non-discrimination on the basis of religion, discrimination is effectively and constitutionally realised when all citizens are subject to their narrow religious law in personal status matters. This is based on the provisions of the constitution, which states: 'Iraqis are free

in their commitment to their personal status according to their religion, creed, beliefs or choices.'¹⁴¹

This particular article gave rise to intense debate and difficult negotiations during the drafting of the constitution. The Shiite United Iraqi Alliance (UIA) concentrated its efforts on the presence of a provision in the constitution that would allow for additional Islamisation of the personal status law as per the Shiite faith. This was met with opposition by secular Kurds, who did not call for the establishment of a secular law, but rather for the limitation of further Islamisation of Iraqi institutions. Sunni Islamic parties, for their part, opposed attempts which they saw as a way to 'Balkanise Iraq' and divide it into separate communities governed by different laws.¹⁴² As Haidar al-Hamoudi argues in his book, *Negotiating in Civil Conflict: Constitutional Construction and Imperfect Bargaining in Iraq*:

*'The battle, in their opinion, was not about Islamic rulings, but about who had the authority to lay down these rulings in the state and from what position ... At the end of day, it was a conflict of different visions for the state and its role in regulating family matters, rather than substantive issues relating to family law.'*¹⁴³

This issue was concluded by the formulation of above-quoted Article 41, which many saw

135 2005 Iraqi Constitution, Article 2, First

136 2005 Iraqi Constitution, Article 2, First, A

137 2005 Iraqi Constitution, Article 2, Second

138 2005 Iraqi Constitution, Article 3

139 2005 Iraqi Constitution, Article 3

140 2005 Iraqi Constitution, Article 2, Second

141 2005 Iraqi Constitution, Article 41

142 Haidar Al Hamoudi, *Negotiating in Civil Conflict: Constitutional Construction and Imperfect Bargaining in Iraq*, (Chicago and London: The University of Chicago Press 2014), p.100.

143 Haidar Ala Hamoudi, *Negotiating in Civil Conflict: Constitutional Construction and Imperfect Bargaining in Iraq* (Chicago and London: The University of Chicago Press 2014), p.100.

as a conciliatory and ambiguous article, as it gives citizens the 'freedom' to choose the laws governing personal status matters according to their different sects.

Non-discrimination on the basis of religion:

The Iraqi constitution includes the traditional provision included in most Arab constitutions in regard to the prohibition of discrimination on multiple bases including religion, sect and belief. It states that: 'Iraqis are equal before the law without discrimination based on gender, race, ethnicity, nationality, origin, colour, religion, sect, belief or opinion, or economic or social status.'¹⁴⁴

The protection of the individual from religious coercion:

This is considered a noteworthy provision in this constitution, stating unambiguously that: 'The State shall guarantee protection of the individual from intellectual, political and religious coercion.'¹⁴⁵

Guaranteeing freedom of worship and observance of religious rituals:

The Iraqi constitution affirms that: 'The State shall guarantee freedom of worship and the protection of places of worship.'¹⁴⁶ This is a provision that includes the practice of specific rituals of all religions and creeds; however, other constitutional provisions were laid down which refer to the religious rituals of a specific sect, with the constitution also stating that: 'The followers of all religions and sects are free in the practice of religious rites, including the Husseinian rituals.'¹⁴⁷ A separate article had already been

allocated to this issue in the constitution, with Article 10 reading: 'The holy shrines and religious sites in Iraq are religious and civilizational entities. The State is committed to assuring and maintaining their sanctity, and to guaranteeing the free practice of rituals in them.'¹⁴⁸ It should be kept in mind here that this provision relates to practices from previous political regimes, where the religious activities of a particular community had been prohibited, suppressed and criminalised. These provisions, as such, were included as a 'constitutional retaliation' and an attempt to reassert rights and establish a particular reality after decades of prohibition and exclusion. This might be understandable in real terms, but is not common constitutionally.

Ensuring that religious experts are represented in the Federal Supreme Court:

One of the unusual provisions in this constitution is the reservation of seats for Islamic jurisprudence experts, specifically, on the Federal Supreme Court. The constitution states that: 'The Federal Supreme Court shall be made up of a number of judges, experts in Islamic jurisprudence, and legal scholars.'¹⁴⁹

These various provisions illustrate how the relationship between religion and the state during the process of writing the 2005 Iraqi constitution was a central issue for the conflicting political, religious, and national groups regarding their conception of the new state. The Shiite bloc wanted to maximise the role of Islam in legislation and recognise the role of

144 2005 Iraqi Constitution, Article 14

145 2005 Iraqi Constitution, Article 37, Second

146 2005 Iraqi Constitution, Article 43, Second

147 2005 Iraqi Constitution, Article 43, First, A

148 2005 Iraqi Constitution, Article 10

149 2005 Iraqi Constitution, Article 92, Second

Shiite clerics in Najaf. The vision of the Sunni parties, meanwhile, assigned Islam an important place in the state, but only according to their historical inclination towards the building of an Iraqi nation state; as such, they strongly opposed granting Najaf and its Shiite clerics special status. As for the Kurdish leaders, given their trust in gaining autonomy through a federal system, they did not care greatly about the attempts to Islamise the constitution, as long as it gave freedom of implementation to the Kurdish Regions. It should be noted, finally, that all parties agreed to the provision stipulating Islam as the religion of the state, and none of the leading figures put forward any options that would convey the secularity of the state.¹⁵⁰

4.2 The Tunisian Constitution of 2014

Tunisia's constitutional heritage dates back to the 19th century, with the introduction in 1857 of the Fundamental Pact, a declaration of rights and freedoms for the inhabitants of the kingdom. The first article of the Fundamental Pact stipulated the protection of the inhabitants of the kingdom from any oppression on the part of the government, and stipulated, in relation to this, non-discrimination on the basis of religion, language or ethnicity. It was guaranteed to: 'Ensure the security of all our subjects and inhabitants of our districts regardless of religion, language, or colour. This shall extend to their respected persons, their sacred possessions, and their honoured reputation. The only exceptions shall be in cas-

es which call for the judgement of the council through consultations, which shall be submitted to us, and it will be up to us to either order the enforcement, commute the sentence or order a reconsideration.' The second and third article added the principle of equality.

After Tunisia's independence from France, its national constitution was adopted in 1959. This constitution remained in force until the 2011 Tunisian Revolution, which paved the way for the introduction of the current 2014 Tunisian Constitution.

One of the most divisive issues for the National Constituent Assembly in their drafting of the constitution was the place of religion within the state, and the relationship between religion and the political sphere. The disagreements and negotiations eventually resulted in the adoption of the following principles:

Islam is the religion of the state and head of state: The constitution states clearly that: 'Tunisia is a free, independent, sovereign state; its religion is Islam, its language is Arabic, and its system is republican.'¹⁵¹ The constitution also explicitly restricts candidacy for presidency to Muslims, stipulating in plain terms that: 'Every male and female voter who holds Tunisian nationality since birth, whose religion is Islam shall have the right to stand for election to the position of President of the Republic.'¹⁵²

The state is a civil state: The Tunisian constitution is unique in stating explicitly that: 'Tunisia is a civil state based on citizenship, the will of the people, and the supremacy of

¹⁵⁰ Haidar Ala Hamoudi, *Negotiating in Civil Conflict: Constitutional Construction and Imperfect Bargaining in Iraq*, (Chicago and London: The University of Chicago Press 2014), pp.82-107

¹⁵¹ 2014 Tunisian Constitution, Article 1

¹⁵² 2014 Tunisian Constitution, Article 74

law.¹⁵³ This constitution is credited for the strengthening of the principle of the civil state, and its protection from any subsequent constitutional amendments, as it clearly states in the same article that 'This article may not be amended.'¹⁵⁴

This article is linked to the failure of the civil political current within the Constituent Assembly to include the principle of the secularism of the state, as it was able in return to impose the text of Article 2 of the constitution, which recognizes that Tunisia is a 'civil state'. This article went even further and defined the way in which the state would be civil, by asserting that the basis of its civil nature would be citizenship. This means that the only common denominator linking the people belonging to the country, and their relationship with it, shall be their nationality and all the rights and duties that this entails, without consideration to any other aspects – religious, sectarian, or other. The civil state is also based on the will of the people and the supremacy of the law and therefore leaves no space for a metaphysical sacred will to govern the country and its people. A paragraph was added to this article, too, stating that it may not be amended.¹⁵⁵

Freedom of belief and free exercise of religious practices: The constitution affirms that 'The state is the guardian of religion. It guarantees freedom of conscience and belief [and] the free exercise of religious practices.'¹⁵⁶

The state is obliged to ensure that religious work is separated from partisan work: The Tunisian constitution is also credited for imposing constitutional obligations on the state to ensure that mosques and places of worship are not used for political and partisan work, stating explicitly that: 'The state ... guarantees the neutrality of mosques and places of worship from all partisan instrumentalisation.'¹⁵⁷

The state is obliged to spread tolerance and to prohibit incitement of hatred: This constitution also requires the state to 'Disseminate the values of moderation and tolerance and the protection of the sacred, and the prohibition of all violations thereof. It undertakes equally to prohibit and fight against calls for Takfir and the incitement of violence and hatred.'¹⁵⁸

Finally, it should be noted that in the draft constitution of 2013, Article 141 was included in the section on the procedures for amending the constitution and asserted that '**the Constitution may not be amended in terms of Islam being the religion of the state.**' The reactions of the opposition within the Constituent Assembly and in large sections of civil society were very strong, arguing that the revolution had not taken place for the establishment of an Islamic state, and that the mention of Islamic in Article 1 does not refer to the state but rather to a characteristic of Tunisian society. Following this campaign, the draft article was later abandoned, meaning that it was accepted that Article 1 may not, under any circumstances, be used in the future as a basis for

153 2014 Tunisian Constitution, Article 2

154 2014 Tunisian Constitution, Article 2

155 Ibrahim Draji, Huda Elsadda and Salsabil Klibi, *Comparative Study on Constitutional Processes in the Arab World: A Gender Perspective*, Ed. Boriana Jonsson and Lilian Halls-French, EuroMed Feminist Initiative, Paris, unpublished papers

156 2014 Tunisian Constitution, Article 6

157 2014 Tunisian Constitution, Article 6

158 2014 Tunisian Constitution, Article 6

the legislator, in law-making or the judiciary, to interpret the applicability of these laws; this is because sovereignty belongs to the people and the laws that governs them may only be those written by them.¹⁵⁹

4.3 The Egyptian Constitution of 2014

Egypt's 1923 Constitution is considered the country's first real constitutional text in the modern sense of the word. The period following the drafting of this constitution witnessed a number of constitutional violations resulting from conflicts; with the various political groupings unwilling to respect the provisions of the constitution, they became 'meaningless texts in a book that did not concern anyone.'¹⁶⁰ The 1923 Constitution ended up being repealed as a result of the unconstitutional political conflicts, and the 1930 Constitution was introduced. However, this constitution was met with severe opposition, both by political parties and at the grassroots level; this opposition remained until the 1923 Constitution was reinstated by royal order in 1935.

Following the Free Officers Revolution of 23 July 1952, the 1923 Constitution was abrogated, and on 10 December 1952 a new Constitutional Declaration was announced. Under this declaration, a 50-member committee was formed to draft a new constitution reflecting the new era after the removal of the king and the declaration of a republic. The committee finalised the draft constitution in 1954 and sub-

mitted it to the Revolution Command Council (RCC), but they rebuffed it, refusing to pass it. Instead, the RCC formed a small committee that drafted a constitution introduced in 1956, 'establishing the rule of the individual and the principles of the free officers alone in constitutional provisions, and removing any space or possibility for disagreement, interaction or political evolution in Egyptian society.'¹⁶¹

In 1958, after the political union of Egypt and Syria, an interim constitution was issued for the new United Arab Republic, which laid down the rule of the individual and asserted the principles of socialism – the prevailing ideology in the Arab world at the time. After the failure of the Egypt-Syria union in 1961, a new constitution was declared in 1964, which did not differ greatly from the 1958 Constitution. Then, after assuming the presidency, Anwar al-Sadat introduced the 1971 Constitution, to which a series of amendments were introduced over the next 40 years, and which remained in place until the revolution of 2011. Several constitutional declarations were issued before the 2012 Constitution was adopted, under the rule of the Muslim Brotherhood. Finally, the current constitution, drafted by a 50-person committee in 2014, was introduced after the expulsion of the Muslim Brotherhood.

There was an unspoken agreement during the drafting of the 2014 Constitution not to attempt to address the religion-state relationship, owing to the prevailing sensitivity surrounding this issue. The religion-state relationship had been addressed in the 1971

159 Ibrahim Dragi, Huda Elsadda and Salsabil Klibi, *Comparative Study on Constitutional Processes in the Arab World: A Gender Perspective*, Ed. Boriana Jonsson and Lilian Halls-French, EuroMed Feminist Initiative, Paris, unpublished papers

160 Mohammad Nour Farhat and Omar Farhat, *at-tārīkh ad-dustūrī al-masrī, qirā'ah min manzūr thawrat yanāyir 2011* (Doha: Doha Center for Research 2011), p.32

161 Ibid

Constitution, with Article 2 stipulating that 'Islam is the religion of the State, the Arabic language is its official language, and the principles of Islamic law are the main source of legislation.' There were no subsequent serious attempts to resolve the relationship between religion and the state, and any attempts that were made were limited to the drafting of specific provisions. The task of interpreting the provisions and the extent of their compatibility with Islamic law was left to the Supreme Constitutional Court.¹⁶² This is reflected in the adoption of the following principles and rules in the current Egyptian constitution:

Affirming the state religion without stipulating the religion of the president: The constitution clearly stipulates that 'Islam is the religion of the State.'¹⁶³ Interestingly, however, the Egyptian constitution, in contrast with most of the constitutions in the region, does not require the president to be a Muslim, with no such requirement being mentioned in the constitutional provision related to candidacy. Rather, it states that:

*'A presidential candidate must be an Egyptian born to Egyptian parents, and neither he, his parents or his spouse may have held other citizenship. He must have civil and political rights, must have performed military service or have been exempted therefrom by law, and cannot be younger than 40 years on the day that candidacy registration is opened. Other requirements for candidacy are set out by law.'*¹⁶⁴

It should also be noted here that the Presidential Election Regulation Act No. 22/2014 was subsequently passed, laying out the conditions for presidential candidacy; this, too, does not require candidates to be Muslim. This is in contrast with the constitutions of most Arab countries.

Giving prominence to religion in law-making:

The Egyptian constitution clarifies the role of the Islamic law in legislation; it states clearly: 'Principles of Islamic Sharia [Islamic law] are the principle source of legislation.'¹⁶⁵

Recent decisions by Egypt's Supreme Constitutional Court have reinforced principles which have prevented this constitutional stipulation (that Islamic law is the main source of legislation) from transforming Egypt into a religious state. The following are relevant examples of Supreme Court rulings on the place of Islamic law in law-making:

'This provision is intended for the lawmaker, and not for the judge. As such, the judge may not overlook statutory law and directly implement Islamic law, even if he considers the text of the statutory law to be contradictory to the provisions of Islamic law;

What is meant by Islamic law, as the main source of legislation, is the overall general provisions which all schools of Islamic jurisprudence agree upon, without entering into these schools' differences, especially that which is related to relative, cultural matters which have become outdated;

162 Ibrahim Draji, Huda Elsadda and Salsabil Klibi, *Comparative Study on Constitutional Processes in the Arab World: A Gender Perspective*, Ed. Boriana Jonsson and Lilian Halls-French, EuroMed Feminist Initiative, Paris, unpublished papers

163 2014 Egyptian Constitution, Article 2

164 2014 Egyptian Constitution, Article 141

165 2014 Egyptian Constitution, Article 2

*What is meant generally by Islamic law being a principle source of legislation is that these legislations should not contradict the general provisions of Islamic law, without this meaning that they should be drawn directly from early jurisprudence. The principle of 'best interest' allows for significant authority to be conferred to the legislator within the modern state.'*¹⁶⁶

Submitting citizens to religious laws: In the regulation of individual personal status matters, as well as the regulation of religious and spiritual matters, the Egyptian constitution renders its citizens subject to the specific laws of their religion. The provision reads as follows: 'The principles of the laws of Egyptian Christians and Jews are the main source of laws regulating their personal status, religious affairs, and selection of spiritual leaders.'¹⁶⁷

Prohibition of discrimination on the basis of religion: The Egyptian constitution prohibits discrimination based on religion and incitement to hatred. It stipulates the establishment of an independent body to ensure this proscription, the provision reading as follows: 'Citizens are equal before the law, possess equal rights and public duties, and may not be discriminated against on the basis of religion, belief, sex, origin, race, colour, language, disability, social class, political or geographical affiliation, or for any other reason. Discrimination and incitement to hate are crimes punishable by law. The state shall take all necessary measures to eliminate all forms of discrimination, and the law shall regulate the establishment of an independent commission for this purpose.'¹⁶⁸

Freedom of belief and observance of religious rituals: The constitution guarantees freedom of belief and observance of religious rituals to all followers of Abrahamic religions. The text reads: 'Freedom of belief is absolute. The freedom of practising religious rituals and establishing places of worship for the followers of Abrahamic religions is a right organised by law.'¹⁶⁹

Prohibition of the establishment of political parties on a religious basis: The constitution lays out certain controls on how political parties may be established and function; significantly among these, political parties may not be established on religious or sectarian grounds. The constitution stipulates: 'Citizens have the right to form political parties by notification as regulated by the law. No political activity may be exercised, or political parties formed on the basis of religion, or discrimination based on sex, origin, sect or geographic location, nor may any activity be practiced that is hostile to democracy, secretive, or which possesses a military or quasi-military nature.'¹⁷⁰

Giving religious prominence to al-Azhar: The Egyptian constitution allocates a constitutional provision to strengthen al-Azhar as an Islamic religious authority, committing the state to providing the necessary budgets and prohibiting it from interfering in al-Azhar's matters of leadership. The constitution states as follows: 'Al-Azhar is an independent scientific Islamic institution, with exclusive competence over its own affairs. It is the main authority for religious sciences, and Islamic affairs. It is

¹⁶⁶ For the presentation of these principles, see: Mohamed Nour Farahat, *ad-dīn wa-ad-dustūr fī misr*, p.5

¹⁶⁷ 2014 Egyptian Constitution, Article 3

¹⁶⁸ 2014 Egyptian Constitution, Article 53

¹⁶⁹ 2014 Egyptian Constitution, Article 64

¹⁷⁰ 2014 Egyptian Constitution, Article 74

responsible for preaching Islam and disseminating the religious sciences and the Arabic language in Egypt and the world. The state shall provide enough financial allocations to achieve its purposes. Al-Azhar's Grand Sheikh is independent and cannot be dismissed. The method of appointing the Grand Sheikh from among the members of the Council of Senior Scholars is to be determined by law.¹⁷¹

The right to construct and renovate churches: The constitution allocates a specific provision to the construction and renovation of Egyptian churches, owing to the country's long-standing problems related to this issue. It should be noted, however, that the constitution simply refers this matter to the law and obliges the state to pass the necessary legislation. The provision reads: 'In its first legislative term after this Constitution comes into effect, the House of Representatives shall issue a law to organize building and renovating churches, guaranteeing Christians the freedom to practice their religious rituals.'¹⁷²

4.4 The Lebanese Constitution of 1926

The Lebanese constitution, adopted in 1926 during the French mandate period, is one of the oldest constitutions in the Arab region. It remains valid and binding today despite all that has taken place in Lebanon and the wider region over the course of the past century. Unlike other Arab constitutions, which have been repealed and replaced multiple times across military coups and political changes, over the

course of over 90 years, the Lebanese constitution has been subjected to only a limited number of amendments.

The Lebanese constitution was approved by the Council of the League of Nations on 24 July 1922, and it was adopted by the French mandate authorities on 23 May 1926. It incorporated France's prevailing constitutional principles of the time, and those which were included in French constitutional laws adopted in July 1875, during the period known as the Third Republic.¹⁷³

Neither the end of the French mandate and the independence of Lebanon, nor the country's involvement in multiple regional and civil wars, led to a change in the country's constitution. The constitution was similarly unaffected by the Arab Spring movements, which gave rise to several constitutional processes in many other countries in the region. Lebanon's constitution remained somewhat rigid – resistant to either change or substitution.

The Lebanese constitution reflects the socio-political realities of the country's societal structure, which is based on sectarian groupings and cultural diversity. The way in which this socio-political structure is manifested in the constitution is evident in four key articles of the constitution, namely Articles 9, 10, 24 and 95. These articles are related to freedom of belief; the autonomy of sects in managing their own affairs; the autonomy of sects in applying their own legislations in personal status matters; and the existence of their own inde-

171 2014 Egyptian Constitution, Article 7

172 2014 Egyptian Constitution, Article 235

173 Samir Sabbagh, *ad-dustūr al-lubnānī min at-ta'dīl ila at-tabdīl*, University Foundation for Studies, (Beirut: Publishing and Distribution, First Edition 2000), p.293

pendent judicial system in order for sects to be fairly represented in governing, administration and parliament.¹⁷⁴

Despite its relative resistance to change, there have been certain amendments made to the Lebanese constitution since its adoption, affecting some of its features and provisions. In 1927, one amendment abolished the country's Senate, and in 1929, an amendment was adopted to authorise the merging of parliamentary membership with ministries. In 1943, the year of Lebanese independence, the principle of appointment was rescinded, the constitution was liberated from the restrictions of the French mandate, and the French flag replaced with the Lebanese flag. Later amendments included extending the presidential term, and placing restrictions and exceptions on the election of judges and first-level officials.

The two most significant amendments to the Lebanese constitution, however, were made in 1943 and 1989, respectively. The first amendment involved the approval of what became known as the National Charter; this was an unwritten customary agreement which did not amend the constitution in writing but rendered some of its provisions subject to a sectarian agreement that remains in force till this day.¹⁷⁵ The second, and arguably most important, amendment to the Lebanese constitution resulted from the Taif Agreement, which was

concluded in 1989 and introduced written amendments to the constitution which came into force in 1990, marking the end to the Lebanese Civil War.

The Taif Agreement of 1990 was introduced in order to solve certain intractable problems relating to Lebanon's identity, its Arab belonging, and political sectarianism. The solutions found to these issues were put forward in the preamble to the constitution.¹⁷⁶

The Taif Agreement also involved the amendment of 31 articles of the constitution, stipulating the following: that Lebanon is a democratic and representative republic; that the people are the source of power; and that the system of governing is based on the separation, balance and cooperation of powers. The Agreement, significantly, also stipulated that members of parliament be allocated according to their region and their religious sect, reflecting the Lebanese particularity of sectarian and territorial distribution. The people are then represented in parliament by an equal number of Christian and Muslim members. The Taif Agreement also included a number of principles to prevent civil war breaking out again, and to ensure equal power sharing by Muslims and Christians, and collective participation in governing. Under the Taif constitutional amendments, Lebanon's president, rather than being the head of the executive

174 Khaled Qabbani, 'at-tajrubah al-munjazah fī lubnān fī wad' wathīqat al-wifāq al-watanī, at-ta'if,' in: *Siyāghat ad-dasātīr fī at-tahawwalāt ad-dīmuqrātī, al-khibrāt al-'arabiyyah wa-ad-dawaliyyah min manzūr muqārīn*, Lebanese Foundation for Permanent Civil Peace, (Bibliothèque Orientale 2014), p.125

175 The National Charter, concluded in 1943, was an agreement between Bechara al-Khoury, Lebanon's first post-independence president, and Riad Al Solh, the country's first post-independence prime minister. The Charter is an unwritten, customary document, but nevertheless put limits on the constitution and determined its future course. One of its most significant provisions stipulates that the president must be a Maronite Christian, the prime minister must be a Sunni Muslim, and the speaker of parliament must be a Shiite Muslim. Despite being a customary agreement, the Charter has remained a cornerstone in how relations between the different sects in the Lebanese framework are maintained. It has been relied upon in order to manage crises Lebanon has witnessed at various times in the intervening period.

176 Khaled Qabbani, 'at-tajrubah al-munjazah fī lubnān fī wad' wathīqat al-wifāq al-watanī, at-ta'if,' in: *Siyāghat ad-dasātīr fī at-tahawwalāt ad-dīmuqrātī, al-khibrāt al-'arabiyyah wa-ad-dawaliyyah min manzūr muqārīn*, Lebanese Foundation for Permanent Civil Peace, (Bibliothèque Orientale 2014), p.129

and procedural authority, became the 'Chief of State,' as per Article 49 of the constitution. A further Taif constitutional amendment was the establishment of a Constitutional Council to review the constitutionality of laws and decide on disputes and appeals.

Below are some of the pertinent rules and principles adopted by the Lebanese constitution:

Freedom of belief and observance of religious rituals: The Lebanese constitution states: 'Freedom of conscience is absolute. In assuming the obligations of glorifying God, the Most High, the State respects all religions and creeds and safeguards the freedom of exercising the religious rites under its protection, without disturbing the public order.'¹⁷⁷

Subjecting citizens to the laws of their religions: The Lebanese constitution stipulates that the Lebanese people are subject to the laws of their own sects and creeds in relation to personal status matters and religious systems, with it stated that: '[The State] also guarantees the respect of the system of personal status and religious interests of the people, regardless of their different creeds.'¹⁷⁸

Sharing of government positions on the basis of religious and sectarian affiliation: The amended constitution seeks to cancel political sectarianism and sectarian power sharing, and to set mechanisms to guarantee the elimination of this sectarianism. However, the constitution also lays out mechanisms to be followed in the 'transitional stage' for the sharing of government posts and positions on a sectarian basis. The constitution states as fol-

lows:

'The Chamber of Deputies, elected on the basis of half Muslims and half Christians, must take the appropriate measures to eliminate political sectarianism, according to an interim plan, and the formation of a National Council under the presidency of the President of the Republic consisting, in addition to the President of the Chamber of Deputies and the Prime Minister, political, intellectual and social notables. The mission of the Council is to study and suggest the means capable of eliminating sectarianism, and introducing them to the Chamber of Deputies and the Council of Ministers, and to follow up on the interim plan. In the transitory period:

- a) *The sects are fairly represented in the formation of the Cabinet.*
- b) *The rule of sectarian representation is abrogated. Jurisdiction and efficiency are adopted in public employment, the Judiciary, the military and security establishments, the public and mixed organizations, according to the exigencies of national harmony, with the exception of the jobs of the first rank and the equivalence of the first rank therein. These jobs are equally divided between Christians and Moslems without specifying any job to a specific sect, taking into consideration the two principles of jurisdiction and efficiency.'*¹⁷⁹

We should bear in mind that, as of 2019, these constitutional provisions for the elimination

177 1926 Lebanese Constitution, Article 9

178 1926 Lebanese Constitution, Article 9

179 Article 95 amended by Constitutional Law 9.11.1943 and Constitutional Law 21.9.1990

of political sectarianism have yet to be implemented. The sharing of government positions on a sectarian basis remains the norm, and continues to be the most respected and adhered to rule in the constitutional system as a whole.

The division of parliamentary seats on the basis of religious affiliation: Religious-based power sharing is not only limited to public posts, but extends to the sharing of seats in the elected parliament, as confirmed by the constitution, which states that:

'The Chamber of Deputies consists of elected representatives whose number and the manner of the election are determined by the electoral laws in effect. Until the Chamber of Deputies issues an Electoral Law, outside the sectarian record, representative seats are distributed according to the following rules:

- a) *Equally between Christians and Muslims.*
- b) *Proportional between the sects of both sides.'*¹⁸⁰

It should also be noted that, up till this date, the Chamber of Deputies has not yet drafted an 'election law outside the sectarian system.' As such, the sectarian election laws since the beginning of parliamentary elections in Lebanon remain in force.

Granting clerics the power to challenge the constitutionality of laws related to religion: The constitution grants clerics the power to challenge any law on such matters before the Constitutional Council, thus strengthening

their authority and their control of religion matters. The scope of religious matters was expanded to include: personal status, freedom of belief, religious observance, and freedom of religious education. The constitutional provision reads as follows:

*'A Constitutional Council is established to review the constitutionality of the laws, and to decide on the disputes and protests resulting from the presidential and the representative elections. The President of the State, Chairman of the Chamber of Duties, Prime Minister or three members of the Chamber of Duties and the chiefs of legally recognized sects have the right to audit this council in regard to controlling the constitutionality of laws. This is exclusive to issues regarding personal status, freedom of belief and observance of religious rituals, and freedom of religious education.'*¹⁸¹

It is clear from the above that the Lebanese constitution, despite its amendments, has not been able to eliminate the sectarian nature of its articles and guidelines. The constitution recognises the Lebanese people as a collection of sects, and founds a system in which the three branches of power, and administrative positions and offices, are distributed upon this basis.¹⁸² Furthermore, the major sects were granted official authority, including special executive, legislative and judicial powers. As a result, the system has been able to be leveraged for sectarian benefit, while the principle of the separation, balance and cooperation of powers has been distorted; rather than being used to serve the democratic system, it has been used to serve political-sectarian

¹⁸⁰ 1926 Lebanese Constitution, Article 24 (amended)

¹⁸¹ 1926 Lebanese Constitution, Article 19 (amended)

¹⁸² Mohamed Al Majzoub, *al-qanūn ad-dustūrī wa-an-nizām as-siyāsī fī lubnān*, (Beirut: Al Halabi Legal Publications, Fourth Edition 2002), p.243

interests. Meanwhile, sectarian leaders have been granted legal personality, allowing them to audit the Constitutional Council equally alongside the heads of the three branches of power. This places the religious leaders on equal footing with official authorities, something which is unheard of in any other political system operating in the world today.¹⁸³

Finally, Articles 9 and 10 of the Lebanese constitution enshrine the freedom of the sects to exercise their beliefs, perform religious ceremonies, regulate personal status matters of the sect, and establish their own schools, unless this disrupts public order. These constitutional articles have had very serious negative consequences. This is despite the fact that Decree 60 L.R/1936 and Law No.2 issued in April 1951 obliged each sect to submit their personal status laws and trial procedures to government and to parliament for review and ratification, with parliament only able to ratify them if they are free of provisions which are 'contrary to public security, morals, state and sectarian constitutions or the provisions of this decision.' This means that personal status laws are, in principle, obliged to comply with the constitution and public order. Parliament, however, has failed to apply this in practice. There are many reasons for this, including religious sects failing to comply with rulings, and some sects being excluded from the scope of the rulings. In other cases, the sects submitted the relevant laws for review, but refused to amend clauses which were deemed problematic; these clauses were therefore not ratified by parliament, but nevertheless continued to

be effective, operative and binding, with laws such as these going back to the 1950s. Further to this, the Court of Cassation, the court responsible for the resolution of disputes, in most cases does not review the judgements given out by the personal status courts.¹⁸⁴ ■

5 Recommendations for Overcoming the Obstacles of Writing the Constitution and Addressing the Question of Religion in Syria

From the preceding pages, we can see how the question of religion will pose a significant challenge to any upcoming constitutional process in Syria. The protracted Syrian conflict has pushed this issue beyond the bounds of intellectual, objective and rational debate – that which is strengthened by reasoned arguments and evidence. In the shadow of war, it has become, instead, a matter of life and death, an expression of victory or defeat, embodying the respect or disregard for the sacrifices and bloodshed of many. Yet as the previous section has shown, the heightened sensitivity of this issue is not new – neither in Syria nor in many countries around the world for which the failure to resolve this issue has been to their detriment.

183 Ahlam Baidoun, *qirā'ah fī an-nizām al-lubnānī bayn al-qānūn wa-at-tatbīq, waqā'ī al-mu'tamar as-sanawī al-awwal*, Lebanese University, Conference: President's Powers, Between the Constitution and Political Practice. Link: <http://www.ul.edu.lb/lawMag/8.aspx>

184 See: *Unequal and Unprotected: Women's Rights under Lebanese Personal Status Laws*, Human Rights Watch, January 2015

The practical reality of Syria and many other countries reveals significant contradictions in the way the issue of religion is dealt with; there is often a dislocation between that which is laid down in writing and what is put into practice. Some countries adhere closely to particular religious texts, in order to satisfy popular views, while policies and practices contradict the form and content of the religious text. Accordingly, there are many cases where religious texts are adopted, while policies based on injustice, violence, corruption and exclusion – those contrary to any divine teachings – are followed in practice. Likewise, other countries have adopted civil, secular provisions, while practising harmful discriminatory and sectarian policies. There are, however, a number of possible solutions to these kinds of difficulties, which we have outlined in the section below.

5.1 Addressing Procedural Challenges

The most fundamental issue that is likely to face Syria's constitution-drafting process is the fact that deliberating the question of religion openly and in depth requires real societal debate, wide popular participation, and inclusive dialogue. All of this does not look workable. Also, many millions of Syrians are now either refugees or internally displaced and they should be able to have a say in the content of any future constitution.

To face this challenge, our key recommendations are:

1. To refrain from the option of imposing a top-down permanent constitution

unless it is put forward for wide societal debate and genuine popular participation. Historical examples demonstrate that periods of war and conflict are not the most fit for drafting a permanent constitution, even if the constitution itself is among the sources of conflict. Indeed, writing a permanent constitution without popular participation has the potential to create new conflicts, and engender new injustices for certain demographics in the religiously and culturally diverse Syrian society.

2. Temporary constitutional options and solutions should be sought, until the right circumstances for drafting a permanent constitution emerge, whereby a participatory approach is possible and a suitable environment for inclusive popular participation exists. This is, after all, one of the key sources of constitutional legitimacy. An interim constitutional document could be developed, one which takes on some of the solutions adopted in similar contexts to deal with problematic issues, such as 'recognition without establishment' and 'neutrality and inclusive recognition' which will be expanded upon in the upcoming paragraphs. An interim constitution should also provide two guarantees: the respect of freedom of religion and belief, and absolute non-discrimination on the basis of religion or belief. These are both considered basic human rights.
3. The issue of religion should not be dealt with using the approach of 'protecting the religious right of minorities,' since the notion of 'minorities' in

and of itself is in contradiction with the principle of equal citizenship, which should be at the core of any upcoming constitutional process. Moreover, some of the proposed mechanisms suggesting the use of the quota for confessional representation should be avoided; the implementation of similar mechanisms in certain Arab countries as discussed in this paper, has laid bare the damage they can do to both the state and individuals.

5.2 Recommendations: Addressing Divisive Issues

In drafting a constitution, there are typically certain issues that are agreed upon smoothly and adopted without difficulty, while others can create major divisions. Reaching consensus on divisive issues often proves to be an enormous challenge, while failure to do so can also jeopardise peace process and can potentially lead to the resumption of violence. These divisive issues are often the same issues that drove the violent conflict, such as power-sharing, governance, minority rights, political regime change, and the restructuring of the military and security forces. They can also be issues which are at the root of longstanding social divisions, such as religion, secularism, or issues of women's rights.

Divisive issues usually represent fundamental

concerns and are often discussed in emotive language. Such issues often have their roots in historical narratives involving past discriminatory practices and claims to human or collective rights. The basic rule regarding these kinds of issues is that, when drafting a constitution, they cannot be settled simply by voting on them, as may be the case with more regular types of contentious issues; doing so could impact the legitimacy of the constitution and affect its popular acceptance.¹⁸⁵

Drafters of the future Syrian constitution are expected to face major challenges in working out how to engage with the issue of religion. International practices and experiences present potential strategic solutions to overcome such divisive issues. Below, we cite some of these solutions, which we believe could be useful in the Syrian context, as they were laid out in the study 'Constitution-making and reform: Options for the process'.¹⁸⁶

1. **Formal, symbolic recognition of problems and rights:** Groups which have suffered decades of marginalisation and oppression often require recognition of their suffering, and the place they will occupy in the new political order being laid out by the constitution. Coming to a suitable, balanced wording will require negotiations of significant sensitivity.¹⁸⁷ One possibility is to employ the constitution's preamble or in one of its articles to reference religion as a

¹⁸⁵ See primarily for a presentation of the problems and strategies for dealing with divisive issues: Michele Brandt, Jill Cottrell, Yash Ghai, and Anthony Regan, *Constitution-making and reform: Options for the process*, Interpeace, Lebanon, July 2012, pp. 202–207. Link: <https://bit.ly/345c0G2>

Yasin Farouk Abu al-Einin and Nadia Abdel Azim, *al-mushārikāh wa-banā' at-tawāfuq al-mujtama'i fī 'amaliyat wad' ad-dustūr: durūs mustafādah min at-tajārub ad-duwaliyah*, (Cairo: Publications of the Social Contract Center 2013), p.32

¹⁸⁶ Michele Brandt, Jill Cottrell, Yash Ghai, and Anthony Regan, *Constitution-making and reform: Options for the process*, Interpeace, November 2011. Link: <https://constitutionmakingforpeace.org/the-constitution-making-handbook/>

¹⁸⁷ Ibid.

spiritual value for many demographics and strata of society, but without there being any consequences, benefits, or deprivation for believers or nonbelievers of a particular religion.

2. **Time-limited provisions:** This means agreeing to introduce certain provisions, such as the protection of a specific right, for a limited timeframe. One example of this is during the independence of Rhodesia-Zimbabwe, where the protection of the special rights of European settlers with regard to land and political representation was defined for a period of ten years. In the case of Fiji, their 1990 constitution was accepted by the Indo-Fijian and other minorities on the basis that it would be reviewed within seven years from the date of its endorsement. Indeed, the subsequent amendments did in fact result in significant changes. The advantage of this option is that it allows a longer time period for the establishment of mutual trust among different parties, facilitating future negotiation processes and understanding. This option is not, however, workable for all rights and demands. It may constitute one of the negotiating options when drafting the provisions on religion by 'agreeing' to the provision of a principle or disregarding it for a certain period of time, after which this principle is reconsidered; it will either be rejected, retained, disregarded or excluded, based on what was learnt from its practical application. This could be an appropriate option if a temporary constitutional option in

Syria is agreed as a first and preliminary stage for the approval of a final constitution of the country. During the negotiation stage on the final constitution, a decision on how the inclusion of religion in the constitution will be adopted may then be taken.

3. **Postponement of the issue till a later date:** This is the approach which was taken in Iraq, to postpone settling the issue of the Kirkuk region. This could be a suitable option, as mentioned above, especially if an interim constitution is approved as a first step, in which controversial issues, such as those relating to religion, are postponed to when the final constitution is drafted. This option is usually only employed with particularly controversial issues around which it is almost impossible to achieve consensus.
4. **Employing the assistance of experts; regulating the matter through subsequent legislation or through the judiciary; employing third-party mediation and assistance by international organisations or specific countries:** Examples of mediation are the role that Norway played in the Sri-Lankan conflict; the European Union and the United States in Sudan, the United Nations and United States in Iraq, and the United Nations in Afghanistan, Cambodia, Namibia, and Timor Leste. Such interventions, however, could also pose risks and give rise to further problems, which should be avoided. The approach could, for example, marginalise local communities, and render that which

had been achieved by community participation ineffectual. In such cases, conflict would merely have been postponed, with solutions imposed but not solved with real conviction. As such, the option of mediation might not be a suitable solution for settling the question of religion in the constitution.

Other options and mechanisms exist which have been utilised in other countries, but which we would not recommend for the case of Syria. These options are as follows:

1. **Constructive ambiguity:** This involves giving each party what they understand to be their right. Such a solution does not resolve disputes, but simply postpones them until the implementation of the provision or the claiming of a particular right. We would categorically not recommend this option, as it would defer the conflict and division until such time as the need to clarify this ambiguity emerges. When that time arises, it would have extremely dangerous consequences for the overall constitutional and political process.
2. **Holding a popular referendum to settle a dispute:** Referendums were held in Greece and Spain, for example, in order to resolve the controversial issue of the monarchy and its role in governing the country, and in Canada in relation to the region of Quebec. There was a referendum, likewise, in the Maldives over the choice between the parliamentary system and the presidential system

of government. It is also possible that the constitution itself stipulates the holding of a referendum over particular issues which were not resolved, as was the case with the Ugandan constitution of 1995 and the Kenyan constitution of 2005. In these cases, special legislation was drawn up regarding the writing of the constitution that stipulated the referral of the contentious issues, those which did not achieve a two-thirds majority vote in parliament, to the people. We should recognise here that the holding of a referendum may deepen a country's division, and we do not recommend this option to resolve the question of religion in the constitution in Syria. This is because the country requires a constitution of consensus, one which does not engender a feeling of victory or defeat among certain sections of society, whether they are advocates for or against religion's prominence in the constitution, and one which does not give rise to new grievances among either religious or secular communities.

5.3 Addressing the Question of Religion in the Writing of the Constitution

It is important to emphasise that the problem regarding religion in the constitution does not lie in the mention of religion, or lack thereof. Reference to God or to certain religions does not in itself pose complications, as long as the rights of all citizens, whether believers

or non-believers, are protected. The Brazilian constitution of 1988, for example, makes reference to God and the country's Catholic history, while the Spanish constitution declares that 'No religion shall have a state character. The public authorities shall take into account the religion beliefs of Spanish society shall consequently maintain appropriate cooperation relations with the Catholic Church and other confessions.' The Portuguese constitution, however, bears no reference to God whatsoever. Despite these differences, however, all these constitutions share a common denominator: their guarantee of freedom of belief and religion, as well as equality of rights and duties for the followers of all religions.¹⁸⁸ There are, therefore, several democratic options within this framework that could be utilised in the Syrian context, such as:¹⁸⁹

1. Recognition without establishment:

This means granting constitutional recognition to the religion of the majority in order to satisfy the popular demand to identify a religious identity, while reaching a settlement with those who are against enshrining a particular religion, by avoiding granting special concessions to that same religion. For example, the role of a religion in a country's culture or identity can be noted in the preamble or an article of the constitution, but without religious institutions or laws being incorporated into the state.¹⁹⁰

2. Religion–state neutrality: In such case the state neither endorses nor

criticises religion and if religion is referenced in the constitution such as by acknowledging [the existence of] God, then this could be done without using particular terminology related to a specific religion.

3. Constructive silence: Some constitutions make no reference to the state's position on religion whatsoever, neither recognising a particular religion nor declaring the state secular. Such constitutions leave these issues to be decided upon by laws and customs. In this way, conflicts of religious identity can be avoided during the writing process of the constitution, particularly in post-conflict set-ups. Chile and Sierra Leone are two countries which have applied this approach in the writing of their respective constitutions.¹⁹¹

Whatever option is to be adopted, in Syria or elsewhere, it is vital that it is consistent with what was set out by the United Nations Human Rights Committee. In its General Comment No. 22 of its Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, it was stated that:

'The fact that a religion is recognized as a State religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the Covenant ... nor in any discrim-

188 Gerald Stang, *al-islāh ad-dustūrī fī al-awqāt al-intiqāliyah: ta'mīn shar'iyat masār banā' al-mu'assasat ad-dīmuqrātiyah*, ed. Alvaro Vasconcelos, Arab Reform Initiative (Paris: 2014), pp.12-13, Link: <https://bit.ly/2MPuTH4>

189 Religion–State Relations, International Institute for Democracy and Electoral Assistance, Ibid, pp.13-14

190 Ibid.

191 Ibid.

*ination against adherents to other religions or non-believers. In particular, certain measures discriminating against the latter, such as measures restricting eligibility for government service to members of the predominant religion or giving economic privileges to them or imposing special restrictions on the practice of other faiths, are not in accordance with the prohibition of discrimination based on religion or belief and the guarantee of equal protection under article 26.'*¹⁹²

It later states:

*'If a set of beliefs is treated as official ideology in constitutions, statutes, proclamations of ruling parties, etc., or in actual practice, this shall not result in any impairment of the freedoms ... or any other rights recognized ... nor in any discrimination against persons who do not accept the official ideology or who oppose it.'*¹⁹³

5.4 The Alternative of an Optional Civil Personal Status Law

Amending personal status laws is expected to be a particularly controversial issue in any future constitutional process in Syria, between those who support establishing a civil code for personal status matters in place of the current religious laws, and those who wish to keep them as per the current set-up. One of the options put forward for deliberation to resolve this issue the adoption of an optional civil personal status law alongside the current, operative personal status laws which fall under a

religious framework. According to this model, each citizen would have the right to choose the system which is agreeable to him or her for marriage contracts, whether in the civil or religious framework as per official laws. This option is rooted, firstly, in the acknowledgement of how difficult it would be, at the current time, to rescind the operative, religion-based personal status laws and replace them with a comprehensive civil code applying to all citizens; and secondly, in the acknowledgement of the unjustness of imposing religious models on citizens who do not wish to submit to them. A compromise which does not allow for the religious and civil advocates to overpower one another, but which rather concentrates efforts on writing a civil law while maintain sect-specific personal status laws, would perhaps be the most suitable option.

Under such a system, for example, any two people who wish to get married would have the freedom of choosing between the civil law and the religious law, or even integrating the two frameworks.¹⁹⁴ The civil option does not necessarily mean that a couple may not carry out a religious marriage ceremony. However, where the couple choose to combine the civil option with religious ceremonies at the same time, and if a conflict arises, the application of the law is derived from civil law in some countries, such as Turkey and the UK, and from the religious law in other countries, such as Lebanon.

Some proponents of this option see that equal citizenship necessitates that the legal models put forward before citizens relating to person-

¹⁹² HRI/GEN/1/Rev.9 (Vol.I) p.206

¹⁹³ HRI/GEN/1/Rev.9 (Vol.I) p.207

¹⁹⁴ Na'il Jurjus, *madā intibāq mashrū' qānūn al-ahwāl ash-shakhsīyah al-sūrī ma'a manzūmat huqūq al-insān*, al-Heqar al-Mutamaddin, Issue 2682, 19.6.2009. Link: <http://www.ahewar.org/debat/show.art.asp?aid=175600&r=0>

al status matters should not automatically be derived from the sect in which they were born, without any choice in the matter. They also consider the imposition of the religious model as the sole option a violation of the rights of citizens who do not want to adopt religious or sectarian classifications and frameworks. In order not to infringe upon the rights of those who want their personal status matters to remain governed according to religion and sect, adding the civil option in parallel to the religious option would be an acceptable compromise solution.

On the other hand, those advocating establishing a civil personal status code as the sole model argue that marriage is a civil concept, related to the rights of civilians, and not one which should be imposed or intervened in by religious institutions. As such, they argue, issues such as marriage, the decision of a married couple to divorce, or inheritance, should not be under the authority of a religious power. Such a law, moreover, would eliminate the religious, confessional and racial disparities between the couple, who would obtain all their civil, social and political rights according to the country's laws.¹⁹⁵ The success of this kind of demand in Middle Eastern societies would be dependent on certain prerequisite steps, such as the consolidation of the culture of human rights and citizenship, and amending incorrect educational material.¹⁹⁶

France was one of the first countries which

adopted a civil personal status law, civil marriage falling under a law introduced in 1804, which was developed and promoted by Napoleon Bonaparte. The core of this law was the compulsory nature of civil marriage and the voluntary nature of religious marriage, meaning that the former is a necessary obligation, with the latter an optional supplement to this. As such, it is mandatory for a couple to first sign their marriage contract with the relevant government authority. This marriage would by itself be legally binding, with the supplementary religious marriage having spiritual significance alone. It is worth noting that the French law has been strict on the necessity and primacy of civil marriage, with clergymen who conclude a marriage without ensuring that a civil marriage has already been conducted subject to penalty of a fine or a prison term.¹⁹⁷

In Turkey, civil laws began to be adopted in parallel with religious laws in 1839. However, from 1926 onwards, civil laws came to be the only legal source in relations to personal status matters. Although civil marriage is the only recognised and official type of marriage, people in Turkey are still able to get a religious marriage after registering a civil marriage. In order to bypass the civil system, some families in Turkey decide to hold a religious ceremony only, without registering a civil marriage, which is in violation of the law.¹⁹⁸ In order to prevent these unofficial religious marriages, the government issued a law allowing clergymen to perform civil weddings. This way, Muslims in Turkey were able to combine a civil

195 Rasha Helwah, *az-zawāj al-madani dimān la-huqūq al-mar'a wa-al-musāwāt bayn al-jinsayn*. Link: <https://bit.ly/2qp-CJi1>

196 Na'il Jurjus, *madā intibāq mashrū' qānūn al-ahwāl ash-shakhsīyah al-sūrī ma'a manzūmat huqūq al-insān*, ibid.

197 See: Mohammad Michel Gharib, *az-zawāj al-madani fī lubnān wa fī al-qānūn al-muqārīn fī kitāb tawsiyāt al-mu'tamar al-islāmī al-awwal li-ash-sharī'a wa-al-qanun*, (Lebanon: Tripoli University), p. 133, cited in: Tarek Mohammad Chendib, *al-haqq fī al-usrah fī hall ishkāliyat az-zawāj al-madani wa tafarru'ātihi*, Link: <https://www.tihek.gov.tr/dr-tarek-chendib/>

198 Ihsan Yilmaz, *Secular Law and the Emergence of Unofficial Turkish Islamic Law*, Middle East Journal, Vol. 56, No. 1 (Winter 2002), pp.113-131

marriage with Islamic ceremony; this is done as per the couple's wish, with Islamic weddings not being a legal necessity.¹⁹⁹

Today, civil contracts are a legal requirement for marriage in many countries across the world, including Sweden, Germany and Latin American countries, and some Muslim-majority countries such as Turkey and Indonesia. In many European countries, it is possible to combine civil and religious marriage on the condition that the marriage is registered with the country's civil authorities.²⁰⁰ In other countries, such as the United Kingdom, one can get a religious marriage without having to register it under civil law; however, in this case, it means that such marriages are not considered legal by the state, and as a result couples do not have the option of recourse to civil courts for disputes or divorce.²⁰¹

In the United States, there are several religious courts assigned by religious sect. The Catholic Church, for example, has around 200 courts under the authority of dioceses, which work with various kinds of cases. For example, these courts consider the annulment of approximately 15,000 to 20,000 marriages per year.²⁰² However, recourse to the religious option is voluntary in the United States, since the First Amendment of the US Constitution prohibits the government from adopting religious law as a mandatory legal authority.

It should be noted that some Arab countries adopted the idea of 'civil marriage,' but apply different conceptions and restrictions to this model depending on the country, in terms of implementation, conditions and provisions. In Egypt, civil marriage is linked only to the Copt community, who face difficulties in matters such as divorce and second marriages; Egyptian Muslims, meanwhile, have no recourse whatsoever to civil marriage. In Algeria, civil marriage takes on a different form; it is recognised so long as it is 'legitimate and does not violate Islamic law.' The Ministry for Religious Affairs and Endowments issued a decree stipulating the registering of a civil contract before a religious one; this was in order to prevent problems arising from customary marriages and to protect women's rights. Tunisia, meanwhile, is considered the only Arab country to fully recognise civil marriage after separating religion from law and citizens' personal status matters in 1956. President Habib Bourguiba introduced amendments to the personal status law, including the prohibition of marrying multiple wives, and prohibiting any kind of marriage outside civil marriage.²⁰³

Other Arab countries, meanwhile, permit the registration of civil marriages once the contract has been signed outside of the country, one example of which is Lebanon.²⁰⁴ Some Lebanese individuals who wish to get a civil marriage rely on a gap in the law to avoid a

199 <https://bit.ly/2qo8EPK>

200 <https://www.ncronline.org/news/world/european-countries-distinguish-between-religious-civil-marriages>

201 See the Guardian's investigation into the subject, which concludes that Islamic weddings in the United Kingdom are not legally recognised, because they have not been registered under civil law. Link: <https://bit.ly/34CShOf>

202 *Proceedings of the Seventy-Third Annual Convention*, Canon Law Society of America, 2011, p.337

203 Mona al-Rifai, *az-zawāj al-madani fī-al-'ālam al-arabī: man ma'ahu wa man diddahu?* Sasa Post website, 3.1.2018. Link: <https://www.sasapost.com/opinion/civil-marriage-in-the-arab-world/>

204 It should be noted that, despite the similarity in the Syrian and Lebanese situation, the Syrian courts subject Syrians' civil marriage contracts made abroad to legal restrictions and obstacles which are imposed in Syria. This is based on the text of Article 15 of the Syrian civil code, which confirms that 'If one spouse is a Syrian at the time the marriage contract is concluded, Syrian law applies only, except for the condition of marriage eligibility.' See: Na'il Jurjus, *az-zawāj al-madani fī zill al-qarār 60 L/R*, Legal Agenda, 2.4.2013. Link: <https://www.legal-agenda.com/article.php?id=315>

sectarian-based marriage; they remove their religious affiliation from the civil registry, a process known as 'civil registry reference deletion,' and is simply an administrative procedure, and does not prevent people from being able to practise religious ceremonies. After completing this procedure, such individuals are able to get a civil marriage; however, the absence of a Lebanese civil marriage code means that, when recourse to the judicial system is needed, their options are either to go through the religious courts, or to name a civil marriage law from another country as the legal basis for the marriage upon registration. If a couple in Lebanon opts to combine a civil and religious marriage, the legal preference is given either to the religious law or to civil law, at the discretion of the judge.²⁰⁵ The Lebanese Bar Association, Lebanese civil society, and some political parties have been calling for a civil personal status law since the early fifties. At the start of 2019, the Ministry of Interior began working to open up a serious discussion on an optional civil law for personal status matters in Lebanon.²⁰⁶

In 2018, the possibility of introducing a law for an optional civil marriage was put forward in Syria.²⁰⁷ This gave rise to significant controversy, with arguments circling about its ineligibility and poor timing. Advocates for an optional civil marriage draft campaign clarified that working on this law would happen over two phases. The first phase would be a comprehensive and precise legal review, in

order to ensure it would not conflict with other Syrian laws, and in order to draw on other countries that apply similar laws. The second phase would be on the social level, namely an attempt to foster an acceptance of this law among society, given the amount of tumult and misconception over the notion of civil marriage. The following is from the supports of such a campaign:

*'Part of the explanation that still requires further clarification is that it is an optional law, and not a compulsory one. This means that one would be able to choose between a religious or a civil marriage. Everyone would be free to utilise the model they choose, and we should not prevent them from opting for a model in which we personally might not believe.'*²⁰⁸

Advocates for such a model consider civil marriage to be part and parcel of the concept of a civic state; namely, it denotes equality between all members of society. They also argue that marriage is strengthened by laws and legislation guaranteeing the sustainability of the family, from which a secular state and society could begin to be built.

Of course, calls for a comprehensive civil code have been met with significant criticism, levelled by conservative religious circles from across the sectarian divide. They consider such campaigns attempts to break down the idea of the family, and to legalise marriage

205 Jinan S. Al-Habbal, 'Institutions, Sectarian Populism, and the Production of Docile Subjects,' in: Bassel F. Salloukh, Rabie Barakat, Jinan S. Al-Habbal, Lara W. Khattab, and Shoghig Mikaelian, *The Politics of Sectarianism in Postwar Lebanon*, (London: Pluto Press 2015), pp.32-51

206 <https://anbaaonline.com/news/8154/>

207 See: Zeina Shahla, *qirā'ah mu'aqqamah la-ta'dīlāt qānūn al-ahwāl ash-shakhsīyah as-sūrī*, Raseef 22 website, 5.3.2019. Link: <https://bit.ly/36HloAL>

Hala Ibrahim, Nour Dalati and Riham al-Asaad, *az-zawāj al-madani yab'ath 'an tariq ila al-mujtama' as- sūrī*, Enab Baladi website, 17.6.2018. Link: <https://www.enabbaladi.net/archives/235530>

208 Wissam Abdallah, *az-zawāj al-madani fī.sūriyah*, Youm3 website, 6/18/2018. Link: <https://bit.ly/2PREKye>

which goes against nature and human instinct. Some religious movements, however, see the option of an optional civil personal status law to be the embodiment of a legal principle from the Quran, which reads: 'There is no compulsion in religion.' ■

6. Conclusion

Over the course of this paper, we have examined the debates and discussions surrounding the question of religion throughout the various manifestations of Syria's constitution over the last century. We have seen how this discussion has progressed over time, continuing all the way up to the current controversy, illustrating how the question of religion continues to be a key contentious issue in the context of any constitutional process. This is evidenced by the fact that, following the first round of discussions of the Syrian Constitutional Committee, convened in Geneva in October 2019, the issue of religion and its position in the new constitutional draft, or prospective constitutional amendment, was the issue most prominently subject to leaks, denial and controversy. The discussions were held amidst various accusations, either that the Committee had adopted the civic state model, had held fast to Islamic law as a main source of legislation, or had rejected this option entirely.

The records of the deliberations surrounding the constitutions of 1920, 1930 and 1950, also known as the Founding Fathers discussions, show us how the debate around the

question of religion took on different dimensions depending on the context of the time, and the social and political climate in which the constitutional argument took place. It is significant that the discussions and disagreements did not start out as being between the religious and the non-religious; rather, they took place between those who followed enlightened thought, and those who adhered to conservative thought. The latter would, at times, hold fast to a narrow interpretation of religion, while at others would forgo religion in their arguments in favour of prevailing social customs and traditions. We have clear examples of this from the verbatim records of the sessions in which these first constitutions were drafted; they showed, unequivocally, how many members of the drafting committees who were themselves men of religion did not attempt to lend the articles of the constitution a religious tone. Such individuals revealed a broad-minded understanding of religion, and strove to separate it from the rule of the constitution, and reduce its influence on constitutional provisions. This was in contrast to those, however, who sought to make religion the sole authority, adopting a narrow understanding of religion and strict interpretation of its provisions, or else giving weight to prevailing traditions and social customs, even over the contents of the religious text itself.

These deliberations also bring to light an early awareness among the country's representatives, about the importance of caution in introducing religion into matters in which it has no place, or in implicating religion in that which it does not rule against. Such awareness was discernible among conservative as well as liberal voices, and among those who did not take advantage of religion to further their positions

and perspectives; on the contrary, they spoke frankly of their refusal of a particular proposal on social rather than religious grounds. This is considered highly progressive in comparison with what later came to dominate, and what continues to dominate to this day, in terms of rooting all matters in religion, and levelling accusations of takhwin and takfir against those who oppose certain ideas and proposals.

The outcomes of the first constitution's deliberations also show us how certain issues ended up following that which was societally prevailing, regardless of the position of religion in the given question. This is corroborated by a large number of subsequent legal provisions and practices, where we can observe how religion was adhered to as an exclusive authority in some questions, but overlooked, and its provisions ignored, in others. It should be noted that the questions of family and personal status, in particular, continue to be wholly subject to religious authority within all religions, creeds and sects, while religious provisions are overlooked in the case of many other issues, such as those of a criminal, civil or commercial nature.

This paper has also demonstrated how the majority of temporary constitutions, or those adopted in the wake of troubles, revolutions or coups, did not stipulate the official religion of the state or the head of state. This can be interpreted as an attempt to bypass divisive and controversial issues, and to avoid imposing top-down, unilateral solutions during such exceptional circumstances. Such issues, moreover, were not put up for discussion in a context which did not allow for it, and it is incumbent upon those writing up any upcoming constitutional document to take this into

account, drawing from previous constitutional experiences and practices from the last century.

The deliberations surrounding the drafting of Syria's early constitutions (1920, 1930 and 1950) clearly demonstrate the significance of the participants of the drafting committees and the values they held. An examination of their records reveals in-depth discussion, thorough understanding, strong patriotic sentiments, and a sophistication in ideas and proposals, even where disagreements arose. This is Syria's long-established constitutional legacy, whose developments and appraisals we cannot, unfortunately, follow any further, as a result of the absence of the later constitutions' drafting records. This sheds light on another interesting irregularity: how is it that we can read through, observe and assess the records of exactly what happened in 1919, when the 1920 Constitution was being drafted, and yet have no access to what took place during the drafting of the 2012 Constitution, for example, despite all the technical, logistical and digital advancements that have come to pass in the intervening time?

A comparative examination of Arab constitutional experiences shows us that there are a number of negative practices which should be avoided in the Syrian context, and whose mistakes must not be repeated – mistakes which came to light in the failure to implement the desired end goal. This examination also, however, illustrates several positive practices that Syria can benefit from, where similar wordings, befitting the local Syrian context, could be employed.

In this research paper, we have sought, overall, to shed light upon an exceptionally critical

issue, both in the life of individuals and in the state. We have worked to present and analyse the constitutional texts and examine and provide comment on the debates that surrounded them. We also strove to present diverse experiences, the positive and negative among them, and put forward a range of ideas and proposals. This is in an attempt to open up a serious, objective discussion around this issue, and provide support and assistance to any ongoing or future constitutional effort which aims to draft a new social contract with all Syrians, men and women, without exception, exclusion or discrimination. ■

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