



Realism vs realism; Syrian Civil society participation in the constitutional process

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1 Introduction and methodology

Since the convening of the 'Syrian National Dialogue Congress' in Sochi 30 January 2018, the constitution-writing process became at the heart of the UN-led Geneva process. Before that the UN was tasked, among other things, with setting 'a *schedule and process for drafting a new constitution*' in the UN Security Council Resolution 2254 (2015)¹. On 23 September 2019 the UN Secretary-General announced the creation of Syrian constitutional committee². The main mandate of this committee is to '*prepare and draft for popular approval a constitutional reform, as a contribution to the political settlement in Syria and the implementation of Security Council resolution 2254 (2015)*'.³

From the outset, stalemate has been the signature of the Syrian conflict. On every front and at every level the opposition was not able to overthrow the regime, and the regime was unable to eliminate the opposition. Stalemate at the UN Security Council hindered solutions. Similar stalemates were echoed at the geopolitical level. The Geneva I communique and the UN SCR 2254 envisaged on paper solutions that would accommodate this no-winner no-loser situation and produce an outcome which can only be achieved if all actors accept that they are not winning and accept a compromise. In reality, the track I never produced an actual political output which fulfils this difficult equation until the constitutional committee was formed in September 2019. In this context, the construction of the constitutional committee with the provision of equal numbers of members from both the regime and opposition side is a significant breakthrough.

In what follows, we argue that internal progress within the constitutional committee is very likely to

¹ Full text of the resolution is available at: <http://unscr.com/en/resolutions/2254>

² 'UN chief announces progress on committee to shape Syria's political future', UN News, 23/9/2019, available at: <https://news.un.org/en/story/2019/09/1047092>

³ Terms of Reference and Core Rules of Procedure, published by the Security Council on 26/9/2019 available at <https://undocs.org/S/2019/775>

enter a stalemate, and that a main exit from this stalemate is to capitalise on the ability of civil society in forging consensus and finding the middle ground through meaningful participation. We argue that such participation is not an idealist viewpoint.

We put forward recommendations on how the process could take gradual incremental steps to allow meaningful participation without endangering the critical geopolitical support needed for the process to take off and without introducing changes to the architecture of the constitutional committee.

We base the discussions and recommendations in this paper on recent consultations with members of Syrian civil society and on the views put forward by participants in two workshops organised in March and April 2019 in Beirut by the LSE research project, "Building Political Legitimacy and Citizenship in the Arab World" research project. Workshop participants included Syrians from different political backgrounds and geographies and involved many of the top leading constitutional and legal academic experts in Syria. The workshops aimed at exploring key obstacles in the way of a legitimate political solution and constitutional process, the risks and opportunities presented by the constitutional process and ways for making the best of the opportunities and overcoming obstacles. In this paper, we only take those workshop outputs that are relevant to direct civil society participation under the UN auspices in the Constitutional Committee, or as independent actors engaged on the fringes of the constitutional process itself. Many other recommendations that were made on the wider issues will be published in a subsequent paper.

This paper also benefits from the results of previous research conducted by the Syria CRP team on the role and impact of the Syrian Civil Society Support Room⁴.

In this paper, we adopt the **wider definition of civil society** which is not confined to Civil Society Organisations and NGOs but also extends to societal leaders such as dignitaries, professionals such as lawyers and academics and community groupings that are engaged in public issues.

2 The realist vs the idealist debate

Since the start of the UN-led process for finding a solution for Syria, two main different schools of thought emerged on how to achieve a solution. Broadly, the realist perspective has argued that the starting point to any solution should be the existing political order and the actual balance of power both on the Syrian and external fronts, while the idealist perspective has argued that the starting point should be the demands of the Syrian people as initially expressed in the demonstrations such as freedom, justice and the right for participation in creating a new more legitimate political order.

Over time, the realist perspective has been challenged by the complex web of actors (Syrian, regional and international) engaged in the country, the continuously changing relations and alliances between the actors, and by the continuously changing and shifting the balance of power. The result is a lack of any firm pragmatic ground on which to build any sustainable process at any moment of time. At several critical junctures during the last eight years, hopes were raised when enough consensus emerged among major external actors, only for them to be diminished very quickly.

According to the realists, however, this complex and dynamic situation does not allow space for a role to be played neither by the actors of the idealist camp, mainly civil society, nor for the normative values it advocates, such as human rights, participation and inclusion.

The idealists believe that there will be no solution to the Syrian crisis unless all values are realised, all normative good practice guidelines are observed. For them, women and civil society must play a major role in a very inclusive process, and all interfering external powers put an end to their

⁴ 'A process in its own right: the Syrian Civil Society Support Room', Turkmani and Theros, June 2019, Available at <http://eprints.lse.ac.uk/101034/>

interference and prioritise the interests of the Syrian people.

In the context of constitutional writing, civil society participation and mechanisms for bottom-up legitimacy building is even more relevant. While such participation might be ignored in favour of the realist's views on agreeing to the terms of a ceasefire, in the context of constitutional-writing, which touches on sensitive societal issues, there is a serious risk of dismissing inclusion as an idealist viewpoint.

There is an abundance of evidence in the literature that in conflict-affected settings the participation of civil society, as the main conduit for wider societal consultation, is a key ingredient for success and for preventing further violence. Therefore, civil society participation is no longer an idealist position but a requirement to adhere to good practice guidelines. It is an essential ingredient of a constitutional writing process that aims to be part of the solution and not part of the problem. This realist viewpoint focused more on internal Syrian dynamics is confronted with another realist viewpoint which is focused more on the geopolitical ones. Both realists' viewpoints are important for the constitutional committee to make progress along the lines of UN SC 2254.

3 The general case of civil society participation

Based on reviewing many constitutional writing processes, academic literature points out that differences in the degree of participation in the drafting of constitutions have a major effect on post-ratification levels of violence and on the enforcement of terms after ratification in conflict-affected regions such as Africa (Widner, 2005). By comparing the minimal public participation model adopted in the case of East Timor to the extensive public participation in Bougainville. (Wallis,z 2016) argues that public participation in constitution-making is what made all the difference in the outputs, it *"can enhance the likelihood that the constitution produces legitimate and effective state institutions, generates a unifying sense of national identity and establishes sustainable peace"*.

Examples from the region point to a similar conclusion. In **Egypt**, the constitution-making processes in 2012 and 2013 were dominated by a struggle for control by political actors and neglected the value of the process as a step towards a new social contract. The processes ended up as a victory for the realist camp and the marginalisation of the idealists who wanted to push the values of the 2011 protests. By examining the Egyptian model and the subsequent failure of the exclusive process, (Owosuyi, 2016) argues that the Egyptian process confirms that "to limit the effect of the political struggle for power on the process of drafting a constitution, employ a participatory and equal representation of all political and social forces regardless of the electoral strength of each party."

The **Tunisian** experience of constitution writing which started in February 2012 and ended in January 2014 makes a compelling case for the value of civil society participation. The wide consultation and active participation of Tunisian civil society in the process led to the participation of more than 6,000 citizens, 300 civil society organisations and 320 representatives from universities in the process. On paper, this would look like a nightmare for anyone involved in process design but in practice, this involvement led to a real exercise in consensus-building. The result was that when the constitution was issued for ratification by the elected National Constituent Assembly, it was ratified by 200 out of 216 members.⁵ This consensus continues to be the backbone of stability in Tunisia today.

In the case of **Iraq**, and after the removal of Saddam Hussein in 2003, the Coalition Provisional Authority rushed the drafting of a new constitution in six months. It ignored the need for a real, enduring, and inclusive framework for Iraqis to debate and agree on a set of values, a notion of a common national identity, and the nature of the state they desire. The process of writing the

⁵ "Tunisian Civil Society; from a revolutionary to a peace protector" by Dina Jamil. 10/15/2015. Published by World Bank Blogs. Available at: <https://blogs.worldbank.org/ar/voices/tunisian-civil-society-revolutionaries-peace-keepers>

constitution was not only short but also very exclusive. Participation was reduced mainly to Iraqi expatriates, Kurdish parties, religious figures and US officials, excluding many other groups and civil society. As a result, Iraqis still do not feel ownership of their constitution. This failure is closely linked to the levels of violence that still engulf the country (Al-Ali, 2014).

4 Widening participation in the Geneva process

Until 2015, the UN-led peace process for Syria was very exclusive. A gradual shift started after the UN Special Envoy to Syria started the 'Geneva consultations' during which he consulted with a wide range of civic actors. By the beginning of 2016, two new mechanisms to enable more organised civil society participation were formed, the Civil Society Support Room (CSSR) and the Women Advisory Board (WAB)⁶. Both CSSR and WAB are hybrid platforms that enabled the coming together of three different institutions: the UN, Syrian civil society and INGOs. They successfully widened the participation in the process.

The initial design of the constitutional committee was announced in the Sochi 30 January 2018 'Syrian National Dialogue Congress' called for by Russia. It was there where the composition of the membership of the committee to be formed from three main equal parts was discussed. 50 members from both the political negotiating actors, the government and the opposition and 50 members of civil society. The idea to have the 50 civil society members to be named by the UN came during round 9 of the UN-convened intra-Syrian talks in Vienna⁷ a few days before the Sochi conference.

This was initially met with a feeling of triumph and optimism by many in the Syrian civil society community. The UN played the main role in naming the first list of the members of this 'civil society' third. It was a diverse list with civil society figures and legal and constitutional experts from different backgrounds, most of them independent. The process of agreeing the names on the list took very long time, and the more it lasted the more it became dictated mainly by the three Sochi and Astana guarantors; Russia, Turkey and Iran. During this process, the composition of the 'civil society' list or what is now being referred to as the Middle Third was subject to interference by both Syrian political actors and the three guarantors. According to several sources, they were given the right to veto certain number of names from the list of the middle third. Many changes to the composition and credibility of the middle third took place as a result. For example, important figures from the Kurdish civil society, even those who are not aligned with PYD, were vetoed by Turkey, tens of names disappeared and were replaced with other names that satisfy the actors. Although some of the very important figures and experts remained in the list, but the most important value which civil society block could bring together, independence from political and external actors, was lost because of that interference. The process, and its lack of transparency, also undermined the credibility of some of the most credible figures in this list as they became the target of suspicion as to why they were not vetoed like others were.

The geopolitical realists argued that there was no other way but to give the three guarantors a role in this, otherwise, a final list would never have been agreed. The role of these guarantors was acknowledged by the UN Secretary-General in his announcement of forming the constitutional committee.

The final agreed list sent shock waves amongst the Syrian civil society community. Some of the names civil society figures decided to decline the invitation to join the committee because they felt that the civic space left for them was too small to make a difference. Several statements calling for the rejection and boycott of the constitutional committee were published by both political and civil society. Some of these came from the biggest gap of representation in the overall committee which was the actors active in North East Syria. Others came from actors who

⁶ For more information on the Women's Advisory Board, please see <https://bit.ly/31BLymH>

⁷ More information available at: http://www.unis.unvienna.org/unis/en/events/2018/syria-meeting_2018-01.html

either did not believe that constitutional reform is key to the solution or from those who were discouraged with the composition of the committee. The result is that what was meant to be the middle third is not seen by many as sufficient to guarantee meaningful civil society engagement, or enough for civil society to be able to play a role in consensus building.

5 Discussion and Recommendations

The Terms of Reference of the Constitutional Committee⁸ states:

'The Constitutional Committee should be governed by a sense of compromise and constructive engagement aimed at reaching general agreement of its members which would enable the outcome to receive the widest possible support by the Syrian people, and to this end the Constitutional Committee large and small bodies move forward and take decisions by consensus where possible but otherwise by voting requiring support of a minimum of 75% of members in the respective body (i.e. 113 members present and voting in the large body, 34 members present and voting in the small body). The 75% voting threshold shall be a fixed one.'

The 75% voting threshold is going to be extremely difficult to realise on most issues. Deep divisions exist not only between the different thirds but also within each one. However, it will not be difficult for most actors to realise the 25% needed to block decision making. Given the existing polarised positions and the ongoing fight on the ground which is unlikely to end soon and which is likely to hinder the work of the committee, it is very unlikely that the committee will start its work from the position of willingness to make compromise and to reach consensus. Resorting to voting will only entrench the deadlock. This is exactly where civil society could play a key role in undoing stalemates. The ground needs to be prepared for it to be able to play such role.

Given this context, meaningful civil society participation could play several roles:

- Unlocking deadlocks and facilitating consensus-building (based on its track record as explained below)
- Widening societal participation in the constitutional debate
- Enhancing the legitimacy of the process

We realise that satisfying the geopolitical realist viewpoint was crucial to the formation of the constitutional committee and that it will remain important for its progress. But it is also important to note that what we learned from the last eight years is that this balance is very unstable, and relying on it on its own is not a guarantee for progress. The aim of our recommendations is not to disrupt this balance, but to gradually and incrementally steer the process towards another much needed balance anchored in Syrian society.

It is important to note that civil society participation should not be monopolised by one particular platform. Civil society is all about diversity and about the debate. Public participation should be encouraged to take place by different actors and through different means such as the media and public meetings and debates in different areas inside and outside Syria that engage in all the matters discussed by the constitutional committee. In this paper, we limit our recommendation for direct participation mechanisms via the UN and for what the UN could do to encourage the widest participation.

What we recommend is to build on existing mechanisms for widening civil society participation, and the current architecture of the constitutional committee which allows some openings in order to gradually allow civil society to play a role in facilitating wider input and harvesting existing consensus-building power.

⁸ Terms of Reference and Core Rules of Procedure, published by the Security Council on 26/9/2019 available at <https://undocs.org/S/2019/775>

I. Building on existing mechanisms and architecture

The years of efforts that the UN and Syrian civil society and donor support to develop the CSSR including all its expert groups and the WAB as mechanisms to widen participation should not go in vain. Trying to set up a new mechanism at this stage would add further complications and its success may not be guaranteed. What is needed is new settings that link these mechanisms to the constitutional committee and the OSE within clear roles, rules and procedures and lines of communications.

LSE conducted empirical and analytical research⁹ that explored the impact of CSSR, the research involved an online survey of 118 CSSR participants, focus groups, interviews, secondary sources, and discussions with policy-makers. Several strengths were identified in this research that could be capitalized on during a constitutional process. These are:

- The CSSR is an already **established mechanism** with the requisite support instruments and with a format that is valued by its participants. The majority of CSSR participants favour the existing format of the UN/OSE working together with Noref and swisspeace to facilitate the operation of the CSSR.
- Having a very **wide network of participants** from all over the country and the diaspora community. More than 500 members of Syrian civil society participated in the CSSR including Syrian experts and technocrats. Most participants perceived CSSR as a safe space for participants and for dialogue.
- In facing deadlock around key issues, CSSR (and the WAB) made progress **in signposting the way forward** by demonstrating the possibilities for consensus-building and areas of agreements. CSSR's ability to promote consensus-building on foundational issues is just what is needed to underpin any constitutional process. It is remarkable that in a context where violence has damaged social cohesion, most respondents believed that the CSSR brought them much closer together and that the work of CSSR should focus consensus-building on common goals and shared values that can create the blueprint for a peace process.
- Play an exemplary **pioneering role** model for all actors, especially political negotiating ones, by demonstrating that Syrians from all different backgrounds are able to sit together, work on their differences and make progress in breaking barriers and finding common ground. This value could be leveraged when talks reach a stalemate.
- Members of CSSR have a strong sense of collective **ownership** of the CSSR, which built a proactive positive attitude by participants who took upon themselves to produce their own internal meetings reports and their own evaluation exercises between rounds and propose new ideas for the design. 80% of them wanted it to continue its work even in the absence of political talks.

Although the WAB format is slightly different from that of the CSSR, it also enjoys similar values. While both the WAB and the CSSR could continue to play the variant roles, they were able to play in the past, additional roles could also be played in the context of the constitutional process. We outline in the next sections the different roles that they could play. These roles also build on the terms of reference and core rules of procedure of the constitutional committee which allow for some entry

⁹ 'A process in its own right: the Syrian Civil Society Support Room', Turkmani and Theros, June 2019, Available at <http://eprints.lse.ac.uk/101034/>

points. These include:

- That the Special Envoy shall facilitate the Constitutional Committee's work
- That '*the Constitutional Committee may agree on further rules of procedure within the Constitutional Committee process to ensure its efficient and sustainable work on all issues without preconditions*'.
- That '*the Constitutional Committee may agree on any adjustments that may be necessary along the road in these Terms of Reference and Core Rules of Procedure to enable the Constitutional Committee to move forward*'
- The possible functions of the co-chairs as laid out in these rules and procedures include '*receiving and putting forward ideas on the work as may be appropriate*' without specifying the source of these ideas.

II. Interface for wider input and consensus building power

The CSSR and WAB could play a vital role in widening participation and helping the Geneva process to be closer to its declared aim of achieving a "*Syrian-led, Syrian-owned, credible, balanced and inclusive Constitutional Committee*". Both CSSR and WAB already have made progress on agreeing on constitutional principles through a process of deliberation and consensus-building. They were ahead of the political game in terms of being able to sit together and reach middle ground out of a true belief that this is the only way forward. The membership of CSSR and the WAB include people who are well-versed in constitutional and legal matters and have a history of constructive engagement with the UN.

We propose to rely on these mechanisms to become the main entry point for wider participation in the process by continuing the meetings and work of the CSSR and the WAB and the expert groups and by widening their participation to become more balanced and representative, while working on some of the design issues outline in the '*A process in its own right: the Syrian Civil Society Support Room*' paper¹⁰.

But to manage and facilitate such wide and diverse input into the constitutional process, we propose the construction of a smaller **civil society committee** comprised of CSSR and WAB members, a committee that is not part of the architecture of the constitutional committee but one that is able to communicate with it. The committee could play the following roles:

- To become the main interface between the CSSR, the WAB and expert groups on one side, and the OSE and the constitutional committee on the other side
- To receive the agenda items of the constitutional committee and put it to CSSR and WAB for discussion. The aim of the discussions should be to incorporate diverse viewpoints and to put forward constructive recommendations on where consensus lies on divisive issues and on solutions to unlocking stalemates and overcoming barriers of progress.
- To communicate their discussions and recommendations back to the OSE and the Constitutional committee through written reports. Reports should be made public.
- When possible, meetings between this committee and the co-Chairs of the constitutional committee and/or its smaller group could also be organised.

III. Monitoring role

We propose forming a **monitoring committee** to monitor the work and progress of the constitutional committee. Monitoring brings in many values, including:

¹⁰ *Ibid*

- Enhancing the transparency of the process
- Enabling wider and public participation in the debate by making available the agenda items and issues to be discussed
- Formal monitoring from actors outside constitutional committee would help to curb rumours and leaks which could be damaging to the process. At least three of the members of the constitutional committee whom we spoke to expressed their desire to publish their own monitoring reports of the process. Having one independent monitoring report would decrease public and media confusion resulting from multiple reports and partisan narratives.
- It enhances the performance of constitutional committee members and their adherence to the rules and procedures.
- It puts obligations on constitutional committee members to adhere to the agreed output of the constitutional committee.

Monitoring the constitutional writing process and legal reforms has been used successfully before. For example, Zimbabwean civil society established ZZZICOMP to provide independent civic monitoring of the constitution-making process in Zimbabwe in 2010. They trained monitors to attend and observe official consultations. They published their findings in a final baseline report¹¹. Tunisian civil society also formed [Al Bawsala](#) (Arabic for The Compass) tasked with observing the work of legislative and executive public institutions at all levels. One of its main projects is Marsad Majlis (Arabic for the Monitor of the Assembly) which monitors Tunisia's National Constituent Assembly (NCA).

We propose that the monitoring committee comprise five members, three named by CSSR and two by the WAB. More monitors may be needed if sub-committees are formed. Such a committee would need technical support and monitors should be chosen carefully and should receive minimal training. The composition of the monitoring committee should also maintain balance and political independence. Members of the monitoring committee could be rotated. Their roles could include:

- Making public the agenda of the meetings and the topics of the discussion
- Attending the constitutional committee meetings without interfering in its work
- Adhering to all the privacy rules of the constitutional committee and agreeing with the SE the rules of reporting such as whether members should be mentioned in the report by name or only by reference to the third that they represent. If the voting in the constitutional committee is going to be anonymous, then the reporting should be on how issues were deliberated but not on how issues were voted.
- Producing monitoring reports on the progress of the work of the committee, including the papers presented by members of the constitutional committee and any agreed terms. The aim of the reports should be to educate and engage the public and to make the constitutional committee accountable, but it should not be aimed at naming and shaming actors.

IV. Promoting gender mainstreaming and the role of women

One of the functions of the co-chairs as laid out in these rules and procedures is 'promoting gender mainstreaming'. The WAB, given its mandate, could play a key role here. The WAB could produce papers for the constitutional committee on gender mainstreaming, the constitutional architecture under discussion; and it could provide recommendations on how to ensure that the process protects women's rights and participation and implements UN SC 1325 and subsequent UN SC resolutions on Women, Peace and Security (these are 1820, 1888, 1889, 1960, 2106, 2122, 2242 2467).

¹¹ ZZZICOMP Baseline report, published 16/6/2016 , Available at http://archive.kubatana.net/html/archive/demgg/100616zzzicomp.asp?sector=HR&year=2010&range_start=421

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