

ANNEX : PROPOSED CONSTITUTIONAL PRINCIPLES RELATED TO SYRIA'S MISSING AND DISAPPEARED

I. THE ABSENCE OF THE RULE OF LAW AND AUTHORITARIANISM: THE BASIS FOR THE WIDESPREAD PHENOMENON OF ENFORCED DISAPPEARANCES

1. Gross human rights violations, including enforced disappearances, do not occur in states where the rule of law prevails. A direct correlation exists between the absence of the rule of law on the one hand and dictatorship and arbitrariness on the other hand. This may be the reality of the situation in Syria, which has been the scene of widespread enforced disappearances over the past decades, despite some written rights and freedoms that discourage such violations and that are stipulated in the 2012 Constitution and the previous 1973 Constitution. These Constitutions, or the legislative system in place in Syria, contain texts that guarantee, from a purely theoretical point of view, such rights and freedoms. Therefore, the responsibility for the widespread phenomenon of missing persons, enforced disappearances, arbitrary detention and other forms of deprivation of liberty by state agents, is primarily borne by the centralized political system of governance that for decades has dominated all the executive, legislative and judicial powers of the State. This has undermined all the pillars of the state of law, mainly represented by “the rule of law”, “the supremacy of the constitution” and “the independence of the judiciary.”
2. The concept of rule of law refers to “a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.”¹ In this sense, the system of governance in Syria is supposed to be based on a complete separation of powers so that the competencies of each are clear while interaction and complementarity among them are maintained. However, it can be seen that in the current Syrian constitution, as in the previous one, the executive power has almost absolute domination over the legislative and judicial powers, under an authoritarian regime and in the absence of any realistic or constitutional recognition of the opposition in its well-known democratic concept.
3. The independence of the judiciary is strengthened by the implementation of the principle of separation of powers, including the abolition of the dominance of the executive power over the High Judicial Council and thus its interference in the appointment, discipline and transfer of judges, as well as the abolition of exceptional courts and the prevention of the encroachment of military courts into the competencies of civil justice. The independence of the judiciary guarantees rights and freedoms, which deters the crime of enforced disappearances. The Constitutional Court also plays a key role in safeguarding these rights under the rule of law. However, the last decades have been marked by a flaw in the composition of the Syrian Constitutional Court and in the appointment of its members, in clear violation of the principle of the rule of law and separation of power, especially through the intervention of the President of the Republic, as a representative of the executive power, in this process.² Furthermore, under Syria's constitutions, the principle of the rule of law has been infringed by vesting the President

¹ For more information, see the Report of the Secretary-General: The rule of law and transitional justice in conflict and post-conflict societies, /2004/616S, 23 August 2004, p. 5, available at: <https://www.un.org/ruleoflaw/files/2004%20report.pdf>

² As with the 1973 Constitution, the 2012 Constitution stipulates that the President of the Republic appoints all judges of the Supreme Constitutional Court by presidential decree (Article 141) and they take the oath before him (Article 145).

of the Republic with the power to legislate and the possibility to dissolve the Parliament³ and prevent the holding of free and fair democratic elections.

II. SYRIA'S CONSTITUTIONAL HERITAGE AND THE NEED TO INCLUDE IT IN SYRIA'S FUTURE CONSTITUTION

4. The historical context of Syria's constitutions, from the 1920 Constitution⁴ to the 2012 Constitution, indicates a disparity in rights and guarantees in successive constitutions, which have been either expanded or restricted, depending on the nature of the political system that developed the constitution. Article 11 of the 1920 Constitution states that "personal freedom shall be protected against infringement, and no one shall be arrested without legal grounds." It also establishes guarantees of public hearing and the right to defend oneself before courts (Articles 117 and 118), which are among the most important guarantees against enforced disappearances.
5. The 1950 Constitution is considered one of the most comprehensive constitutions in Syria in terms of guaranteeing the prohibition of arbitrary detention and enforced disappearances, which is not surprising given that it was drafted by a democratically established Constituent Assembly composed of eminent Syrian jurists.⁵ Article 9 of this Constitution establishes the principle of public hearings, and Article 10 elaborates under the heading "Individual Freedom is Inviolable", the overarching principles that guarantee the prevention of arbitrary arrest and detention, and thus the end of the practice of enforced disappearances. This article provides that no one may be investigated or arrested, except under a court order or decision, or if the person was caught in the act, or for the purpose of bringing the person before the judicial authorities on charges of committing a felony or misdemeanor. It also prohibits administrative authorities from remanding anyone in custody, except by law in a state of emergency, martial law or war.
6. Article 10 of the 1950 Constitution also gives every arrested person the right to be informed in writing, within twenty-four hours, of the reasons for the arrest and the legal provision on which the arrest is based, and to be handed over to the judicial authorities within a maximum of forty-eight hours of arrest. It also allows each detainee to apply, either by himself or through a lawyer or relative, to the judge competent to challenge the lawfulness of the detention, who must consider this request immediately. The judge also has the right to summon the employee who ordered the arrest to inquire about the matter. If the judge deems the arrest unlawful, the immediate release of the arrested person is ordered. This Constitution, in the same article, prohibits the creation of special criminal courts, or the trial of any person before military courts other than members of the army, and guarantees the right of defense at all stages of the investigation and trial and before all courts.
7. In contrast, such guarantees are not given in the Baath Party's constitutions. In fact, the phenomenon of enforced disappearances increased after the entry into force of the 1973 and 2012 Constitutions, which nonetheless included acceptable principles whose application would have guaranteed the prevention of arbitrary detention and enforced disappearances. The 1973

³ According to the 2012 Constitution, the President of the Republic has the right to dissolve the People's Assembly (Article 111), to prepare draft laws and assume the authority of legislation (Articles 112-113), and to head the High Judicial Council (Article 133).

⁴ This is the first Syrian Constitution drafted after the parliamentary elections that formed the Parliament, called at the time the "General Syrian Congress."

⁵ Such as Abd al-Wahhab Hawmad, Rizkallah Antaki, Munir al-Ajlani and Maarouf al-Dawalibi.

Constitution affirms in Article 25 that “freedom shall be a sacred right and the State shall guarantee the personal freedom of citizens and preserve their dignity and security.” Article 27 states that “citizens shall exercise their rights and enjoy their freedoms in accordance with the law.” Article 28 makes clear that “no one may be investigated or arrested except as provided by law.” This Constitution also guarantees, in Article 28, the right to defense and to counsel before the judiciary.

8. In turn, the 2012 Constitution states in Article 33 that “freedom shall be a sacred right and the State shall guarantee the personal freedom of citizens and preserve their dignity and security.” Article 53 stipulates that “no one may be investigated or arrested, except under an order or decision issued by the competent judicial power, or if the person was caught in the act, or for the purpose of bringing the person before the judiciary on charges of committing a felony or misdemeanor - and any person arrested must be informed of the reasons for his arrest and of his rights, and may not remain in the custody of the administrative authority, except by an order of the competent judicial power.” It also affirms in Article 54 that “any infringement of personal freedom, inviolability of private life or any other rights and public freedoms guaranteed by the Constitution shall be considered a crime punishable by law.” The right to defense and to counsel before the judiciary is guaranteed by Article 51.
9. Although these constitutional principles clearly provide guarantees to citizens, the repressive authorities in Syria have never given them weight or consideration and have contributed to the systematic exacerbation of the phenomenon of enforced disappearances. Indeed, numerous decrees violating these constitutional guarantees have contributed to the spread of this phenomenon, including the State of Emergency Act⁶, which imposed a prolonged state of emergency from 8 March 1963, which lasted for almost half a century without any constitutional restrictions to challenge the validity of its implementation or continued application. Legislative Decree No. 55 of 2011, issued on the same day as the lifting of the state of emergency, granted the judicial police a period of up to sixty days to investigate defendants, during which time they could be forcibly disappeared.⁷

III. RIGHTS AND FREEDOMS

10. The issue of missing persons is linked to several rights and guarantees that are generally stipulated in constitutions to ensure that citizens are effectively protected against arbitrary action by the authorities. Foremost among these constitutional rights are the right to life and personal liberty, the prevention of torture, the accountability of perpetrators, and the guarantee against arbitrary extrajudicial arrest and detention. The defendant must also have a fair trial, in which we are particularly concerned in the matter of missing persons with the two guarantees of public hearings and the right to defense, as they ensure communication with the rest of the public, inform the defendant on the progress of the trial and guarantee continuous communication with a lawyer, which theoretically prevents the defendant from disappearing. In light of the widespread phenomenon of enforced disappearances in Syria, it is imperative that the future Syrian constitution strengthens the rights related to this serious violation and holds the perpetrators accountable.

⁶ Promulgated by Legislative Decree No. 51 of 22 December 1962.

⁷ This Decree adds a paragraph to Article 17 of the Code of Criminal Procedure in order to authorize “the judicial police or those commissioned to carry out its functions,” including the security services, to do so. The Decree is available at: <https://groups.google.com/g/syrianlaw/c/XjhkLTJEggY>

11. Guarantees of establishment and affiliation to associations and parties, as well as freedom of expression and information, and of peaceful assembly, are also essential to address the issue of the forcibly disappeared, many of whom have been victims of this violation due to the exercise of these legitimate rights. Equality of citizens is also essential to administer justice and strengthen the rule of law and peaceful coexistence, and thus reduce the conflicts among the Syrian people that have erupted in the past and may continue in the future if discriminatory policies among citizens continue to be applied on various grounds, including religion, race, and sectarian affiliation. Addressing the issue of the missing also requires improving the status of vulnerable groups and focusing on the rights of women who severely suffer from the social, economic, and psychological consequences of their arrest or the disappearance of their male family members.

IV. CONTROLS ON THE RESTRICTION OF RIGHTS AND FREEDOMS

12. All laws and decrees in force must be consistent with the content of the constitution in order to not limit or restrict constitutional freedoms and rights. However, over the past decades, many Syrian laws and decrees have restricted constitutional guarantees, which have placed the constitution in a subordinate position to the provisions of these laws and decrees, instead of having the constitutional rules governing these different laws. A good example is the emergency legislation applied for decades, and then the anti-terrorism legislation currently in force, which resulted in disregarding the fair trial guarantees and rights of detainees provided for in the Syrian constitutions. Remarkably, the establishment of the Military Field Court⁸ has led to an increase in the spread of enforced disappearances due to the implementation of death sentences against thousands of Syrians⁹ pursuant to secret trials lacking legal procedures and fair trial requirements, especially public hearings and the right to defense and appeal,¹⁰ in violation of many guarantees of the 1973 and 2012 Constitutions.
13. Modern constitutions contain safeguards against the enactment of laws that infringe on constitutional rights. In this context, Bernstorff states that “in all well-established liberal democracies, constitutional texts and related judicial practices limit the right of parliament to restrict the freedoms set forth in the respective rights instruments, ensuring that even directly elected democratic parliaments are not permitted to excessively restrict or undermine guaranteed freedoms through the enactment of laws.”¹¹ In this sense, the upcoming Syrian constitution must include clear language regarding the restriction of the rights and freedoms contained therein, such as those contained in many constitutions of developed states.¹²

⁸ Constituted by Legislative Decree No. 109 of 17 August 1968, published in the Official Gazette of 1968 No. 38, p. 12542.

⁹ The death sentences of the courts are carried out in secret, and the bodies of the victims are often not handed over to their families or their fate is not revealed. For more information, see Riad Ali, *Military Field Courts: Courts or Crimes?* Syrian Legal Forum/Arab Reform Initiative, 12 February 2018, available in Arabic at: <http://www.syrianlegalforum.net/publications/view/32>

¹⁰ Article 6 of Decree No. 109 states that their sentences are not subject to any form of appeal. The verdicts are, however, only implemented upon approval of the Minister of Defense, with the exception of the death penalty, which must be ratified by the President of State, according to Article 8 (a) of this Decree.

¹¹ Johann von Bernstorff, *the role of Chapter 49 in the New Tunisian Constitution*, a study prepared for the International Institute for Democracy and Electoral Assistance, unpublished, p. 2.

¹² See, for example, the content of Article 36 of the Swiss Constitution of 1999, available at: https://www.constituteproject.org/constitution/Switzerland_2014.pdf?lang=ar

V. THE SECURITY AND MILITARY SECTOR

14. Over the past decades, the security services have controlled all aspects of life in Syria, enjoying wide privileges and absolute immunity, and committing systematic violations of citizens' rights, including widespread enforced disappearances, arbitrary detention, torture and summary executions in their detention facilities. The army, for its part, has played a key role in maintaining the Syrian regime and perpetrating systematic human rights violations - particularly over the past decade when many army units engaged in indiscriminate bombings, concealment and arbitrary detention of individuals, as well as the murder of individuals at military checkpoints. The security sector and armed forces also enjoy immunity from prosecution, through the adoption of decrees that reinforce the culture of impunity and, therefore, the continued commission of gross violations.¹³
15. In the context of the foregoing, the future Syrian constitution must include guarantees concerning not only the neutrality of the security services and the army, and the end of their domination over citizens and the violation of rights, but also their obligation of ensuring the security of citizens and instilling a sense of reassurance. This constitution must explicitly provide for a neutral and non-partisan role for the security services and the army, as well as ensure their respect for public and individual rights and freedoms in the performance of their duties. It must also provide for oversight mechanisms to ensure that their behavior is controlled and that they are held accountable for any violations committed.

VI. THE ROLE OF INTERNATIONAL HUMAN RIGHTS LAW

16. Many constitutions affirm their commitment to the International Bill of Human Rights¹⁴ and the supremacy of international law over domestic law. This is one of the most important guarantees for ensuring respect for human rights and preventing the adoption of laws that violate them. In addition, some international human rights conventions expressly require state parties to amend their legislation or repeal legislation that is incompatible with these conventions.¹⁵ However, Syrian constitutions do not recognize the supremacy of ratified international instruments over domestic laws. Legislative Decree No. 3, by which Syria acceded to the International Covenant on Civil and Political Rights in 1969, gave the Covenant the status of domestic legislation.¹⁶ Thus, the provisions of the Covenant transcend the laws that preceded its ratification and override provisions of subsequent laws when there is a conflict with them.
17. In this context, and in order to avoid any abuse by the future Syrian authority, including bypassing the implementation of ratified international human rights instruments, it is necessary to include a constitutional article guaranteeing the principle of the supremacy of international law over domestic law, as well as other articles reinforcing the role of the International Bill of Human Rights in the future of Syria.

¹³ For example, Legislative Decree No. 14 of 1969 on the creation of the State Security Administration guarantees immunity to its staff for crimes committed on duty.

¹⁴ The preamble of the Lebanese Constitution states that the country is "a founding and active member of the United Nations Organization, committed to its Charter and the Universal Declaration of Human Rights. The State embodies these principles in all sectors and scopes without exception."

¹⁵ See for example Article 2 of the International Convention on the Elimination of All Forms of Racial Discrimination. The text of the Convention is available at: <https://www.ohchr.org/ar/ProfessionalInterest/Pages/CERD.aspx>

¹⁶ This was also confirmed by one of the decisions of the Civil Chamber of the Syrian Court of Cassation, decision No. 366/1905, dated 21 December 1980, published in the magazine "The Lawyers", p. 305 of 1981.

VII. CONSTITUTIONAL BODIES

18. The importance of the constitutional bodies has become evident in light of the lack of respect for constitutional guarantees over the past decades in Syria. The rights and freedoms stipulated in the constitution remain worthless if their implementation is not guaranteed. Such bodies or mechanisms will contribute to the implementation of the provisions of the constitution and the strengthening of the rule of law. The importance of constitutional support for such bodies increases in countries like Syria, which has experienced decades of authoritarianism and domination by the executive power over state institutions that will suffer greatly as they seek to break free from the political regime during the transition period. For these bodies to succeed in the tasks entrusted to them, they must have the necessary independence, impartiality and powers. In this context, the future Syrian constitution must include a section on constitutional bodies that stipulates at least the formation of a commission for the respect and promotion of human rights.¹⁷ The Syrian context also requires the formation of special constitutional commission as part of the implementation of transitional justice measures, as indicated below.

VIII. TRANSITIONAL JUSTICE MEASURES

19. Many state constitutions that have emerged from conflict or authoritarian rule and have witnessed gross human rights violations, including the systematic practice of enforced disappearances, contain texts on the issue of missing persons.¹⁸ These states must commit to taking all necessary measures to address serious human rights violations, including revealing the fate of the disappeared and providing reparations to the victims of enforced disappearances and the violations that often accompany it, such as arbitrary detention, torture and summary executions, and to hold perpetrators accountable. This also requires the inclusion of constitutional guarantees of non-repetition, which is achieved by addressing the underlying causes of loss and disappearance, particularly the lack of rule of law and the conflict that has affected all Syrian people. Guarantees of non-repetition can include the inclusion in the constitution and laws of protections against arbitrariness and infringement of freedoms, as well as accountability for any violations, so as to lay the foundation for national reconciliation and sustainable peace.
20. The implementation of transitional justice measures, including the disclosure of the fate of missing persons, also requires the establishment of a competent body of a constitutional nature. This body must have the independence, impartiality and powers necessary to carry out its tasks, such as revealing the truth about the circumstances of serious human rights violations, without any obstruction or interference in its work and in cooperation with state institutions. Such a body will take all measures to reveal the fate of the disappeared and locate or identify their remains, before contributing in taking the necessary steps to compensate the victims, both materially and morally, and to help conduct the necessary investigations to prosecute the perpetrators.

¹⁷ Also called the National Institution for Human Rights, which UN member States commit themselves to establish it according to the principles relating to the status of national institutions to promote and protect human rights (Paris Principles). See General Assembly Resolution 48/134 of 20 December 1993, available at: <https://www.ohchr.org/ar/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>

¹⁸ For more information, see Report of the Working Group on Enforced or Involuntary Disappearances, Human Rights Council, Sixteenth Session, A/HRC/16/48/Add.3, 28 December 2010, p. 4.