

## Research Article

## LEGAL ADAPTATION FOR THE SYRIAN CONSTITUTIONAL COMMITTEE FORMED BASED ON UN SECURITY COUNCIL RESOLUTION 2245

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### ABSTRACT

**Background:** Presumably, constitution-making is a national process reflecting the state's sovereignty and people's will. The severity of the conflict in Syria and its danger led the international community to intervene, and in 2015, the Security Council issued Resolution 2254 to settle the conflict. This resolution, in item 4, called for the start of the drafting process of a new Constitution for Syria; hereby, the Constitutional Committee was formed in Geneva in 2019 with the agreement of the conflict parties, the government and the opposition, and the consent of the international community represented by the United Nations. This research discusses the extent to which the intervention of the United Nations in the Syrian Constitutional Committee's formation and work in Geneva affects the principle of the Constitution's nationalism and state sovereignty. The research also discusses the legitimacy of the powers granted to this committee, whether in drafting a new constitution for the Syrian state or amending the current 2012 Constitution, and whether they conflict with the national sovereignty principle in considering the constitutional law principles.

**Methods:** We relied on the analytical method to study the legal adaptation of the Syrian Constitutional Committee formed based on Security Council Resolution 2254. The impact of the United Nations intervention in the Syrian Constitutional Committee and whether it conflicts with the principle of national sovereignty depends on clarifying the role played by the United Nations in forming the committee and its ability to impose binding decisions on it. Achieving this objective requires analysing the powers of the Constitutional Committee in light of the principles and rules of constitutional law. This entails determining whether the committee possesses the full authority of the original constituent power to establish a new constitution for the state without referring to the people or if its jurisdiction is limited to drafting. Through this analytical method, we shall know whether the formation of the Constitutional Committee and the jurisdiction granted contradicts the principle of national sovereignty, which assumes that the Constitution is a national industry.

**Results and Conclusions:** *The formation of the Syrian Constitutional Committee, authorised by the United Nations through the Security Council Resolution 2254, does not detract from Syrian national sovereignty nor conflict with the principle of constitutional nationalism. Firstly, the formation of the constituent authority responsible for establishing the Constitution is not a legal issue but rather derives its existence from reality, and this applies to the Syrian Constitutional Committee, which derived its existence from the Syrian reality conflict and with the agreement of its parties, government and opposition. Therefore, one cannot say that the formation of this committee is illegitimate or inconsistent with the principles of constitutional law, given the absence of a legal framework governing the mechanism for forming the constituent authority, whether in Syrian constitutional law or comparative constitutional law. The Constitution is a result of the circumstances and situations that have accompanied its emergence and determined the method of its establishment. Secondly, the Constitutional Committee is not a full constituent authority because it does not have the power to approve a new constitution or an amendment to the current Constitution in its sole discretion. It might adapt as a technical consensus committee whose role is limited to formulating proposals that require popular consent. Thirdly, It is arguable that Security Council Resolution 2254 and the decision to form the Syrian Constitutional Committee constitute the legal framework from which this committee derives its legitimacy and work. Therefore, we can say that the issue of forming the Syrian Constitutional Committee and its work has become a legal issue governed by an international legal framework, marking a departure from its previous extrajudicial status under national constitutional law.*

## 1 INTRODUCTION

A state constitution-making body shall require a differentiated body from its governing bodies. That body has a constructivist mission, as it is the one that makes the constitution and derives its existence from it; but vice versa.<sup>1</sup> The constitutional body is an institutional body established as a constituent authority in the name of the people (the sovereign) that exercises its role by formulating a constitutional framework and sometimes adopting it on behalf of the people. The body's shape and composition shall determine the extent to which it effectively represents the people, and thereupon, it is of crucial importance in determining the Constitution's content and legitimacy as well as the constitution-building process as a whole.<sup>2</sup>

The necessity for a new state constitution arises not only when a new state is established but also in cases of conflicts and crises within the state, where, as an initial step, work on a new state constitution begins towards ending the conflict and outlining the new political and constitutional system of the state. As everyone is aware, the crisis in Syria started in March 2011, prompting the ruling authority to establish a new state constitution in 2012, which

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1 Sam Dalla, *Principles of Constitutional Law and Political Systems* (3rd edn, University of Sharjah 2022) 33.

2 Kimana Zulueta-Fülscher and Sumit Bisarya, *(S)electing Constitution-Making Bodies in Fragile and Conflict-Affected Settings: International IDEA Policy Paper no 16* (International IDEA 2021) 8.

was approved by the people in a referendum on February 26, 2012, and went into force the following day<sup>3</sup>.

The constitution, hereinbefore enshrined the principle of political pluralism in its eighth article, did not grant any privileges in leading the affairs of the state to any political party named after it or specifically, and made the exercise of power democratically through voting. It also abolished the mechanism for selecting the Head of State by referendum, which had been in force in the previous Constitution, which had been repealed in 1973, and made it by direct election of the people. However, that had not prevented or alleviated the conflict, nor had it formed the basis for peacebuilding in Syria.

This is what prompted the international community to intervene in the Syrian conflict, where the Security Council adopted Resolution 2254 on December 18, 2015, related to a ceasefire and a political settlement for the situation in Syria.<sup>4</sup> This has led to the international community's interference in the Syrian conflict. To achieve a political settlement led and owned by Syria and under the auspices of the United Nations, this resolution supported the start of a process to draft a new constitution for Syria in its fourth item. Security Council resolution 2254 (2015) mandated the United Nations to facilitate the Syrian-led political process, which, inter alia, set a timetable and process for drafting a new constitution. Herein, free and fair elections should be held under the auspices of the United Nations, by the highest international standards of transparency and accountability, for all Syrians who might participate, including those living in the diaspora.

According to this resolution on the fulfilment of his mandate, the Special Envoy of the United Nations Geir Pedersen, appointed on October 31, 2018, by the Secretary-General of the United Nations to succeed Staffan de Mistura,<sup>5</sup> established a credible, balanced, and inclusive constitutional commission under the Syrian-led and Syrian-owned.

The Constitutional Commission was established based on an agreement between the Syrian Arab Republic Government and the opposition Syrian negotiating body on a package agreement on the terms of reference and fundamental procedural rules, announced by the Secretary-General of the United Nations on September 23, 2019.

The reality is that, during historical experiences, building a new constitutional system in conflict situations might be one of the essential components of achieving peace through a negotiating path. At the negotiating table, no decisions are limited to matters of constitutional design; they extend to the constitution-building process itself. Important

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3 Constitution of the Syrian Arab Republic of 2012 <<https://www.wipo.int/wipolex/en/legislation/details/16572>> accessed 5 October 2023.

4 UNSC Res 2254 (18 December 2015) <[https://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=S/RES/2254\(2015\)&Lang=E](https://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=S/RES/2254(2015)&Lang=E)> accessed 5 October 2023.

5 'Geir O Pedersen Special Envoy of the Secretary-General for Syria' (*United Nations*, 31 October 2018) <<https://www.un.org/sg/en/content/profiles/geir-pedersen>> accessed 5 October 2023; *Office of the Special Envoy of the Secretary-General for Syria (UN OSES)* <<https://specialenvoysyria.unmissions.org>> accessed 5 October 2023.

issues for the parties concerned include the type, method of selection, powers, time frames, and decision-making rules of the Constitution-making body.<sup>6</sup>

The Syrian Constitutional Committee was formed of two bodies – an expanded body and a mini-body. The expanded body comprises 150 men and women members: 50 members appointed by the Syrian government, 50 appointed by the Syrian opposition negotiating body, and 50 from civil society selected by the United Nations. The mini body comprises 45 members' men and women, with each party represented by 15 members chosen from among its members in the expanded body.

The Committee was vested with the competence to review the current Syrian Constitution of 2012 in the context of other Syrian constitutional experiences, amend the current Constitution, or draft a new Constitution. The Constitutional Committee may also agree on new rules of procedure or amend the basic rules of procedure as may be necessary to enable the Commission to proceed with its work.<sup>7</sup> Given that the Constitution is the state's most fundamental and supreme law, it is assumed to be a national industry, reflecting the sovereignty of the state and the people's will.<sup>8</sup>

Consistent with this, can the United Nations' intervention in the Syrian Constitutional Committee's work, authorised by the UN in Geneva, be deemed incompatible with the principle of constitutional nationalism and derogating from the principle of the Syrian State's sovereignty?

That is, on the one hand.

On the other, should the terms of reference vest to this Committee, the drafting of a new constitution for the Syrian State or the amending of the current Constitution of 2012, in conformity with the principles of constitutional law or not?

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6 Zulueta-Fülscher and Bisarya (n 2) 8.

7 UNSC S/2019/775 'Terms of Reference and Core Rules of Procedure for a Syrian-led, Syrian-owned, credible, balanced and inclusive Constitutional Committee facilitated by the United Nations in Geneva' (27 September 2019) <<https://specialenvoysyria.unmissions.org/constitutional-committee-0>> accessed 5 October 2023.

8 That is what has been deemed in the preamble of the different states' constitutions. The preamble of the United States Constitution of 1787 states: 'We the People of the United States, to form a more perfect union, establish justice, ensure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.' Similarly, the French Constitution of 1958 affirms: 'The French people solemnly proclaim their attachment to the rights of man and the principles of national sovereignty as defined by the Declaration of 1789, which reaffirmed and completed by the Preamble to the Constitution of 1946, and to the rights and duties as recognized in the Charter for the Environment of 2004.' Likewise, the preamble of the Turkish Constitution of 1982 states: 'Emphasizing the eternal existence of the Turkish nation and the indivisible unity of the state of Turkey, under the notion of nationalism introduced by the founder of the Republic of Turkey, Atatürk... the absolute sovereignty is vested fully and unconditionally in the Turkish nation, and it is against the principles of this Constitution and its legal framework for any individual or body to exercise this sovereignty on behalf of the nation without adhering to the free democracy referred to in this Constitution and the legal system it establishes.'

Thereupon, our first step will be to indicate the compatibility of the formation of the Constitutional Committee with constitutional law and then examine, second, the compatibility of the functions of the Constitutional Committee with the principles of constitutional law.

## 2 THE COMPATIBILITY OF THE FORMATION OF THE CONSTITUTIONAL COMMITTEE WITH CONSTITUTIONAL LAW

Constitutions shall not determine which competent authority shall have the decision to abrogate the current Constitution in force and to make a new state Constitution. Constitutions also shall not indicate the method that should be followed in establishing a new constitution. Instead, they shall determine solely the body or entity responsible for amending the constitution and the procedures that should be followed in the amendment process. This body is called the so-called derivative constituent authority, distinguishing it from the original constituent authority that makes the constitution.<sup>9</sup>

The reason constitutions shall not determine the competent authority to make a new constitution is that the formation issue of such an authority is not a legal one. Therefore, the legitimacy of the original constituent authority shall be governed not by law but by the political consensus of the actors in the State when they are constituted. This is the case with the formation of the Syrian Constitutional Committee in Geneva. Conversely, the impact of the United Nations' intervention in the formation of the Syrian Constitutional Committee on the committee's national identity and the principle of Syrian national sovereignty shall depend on the scope reserved for the United Nations in forming the committee. It also shall depend on the United Nations' ability to impose binding decisions on the Constitutional Committee.

### 2.1. The Formation of the Constitutional Committee is not a legal issue

The Syrian Constitutional Committee was formed in Geneva with the agreement of the United Nations, the Syrian government, and the Syrian opposition. The Committee consisted of 150 members representing the three parties equally: the Syrian government, the opposition, and the list of civil society members chosen by the United Nations and approved by the conflicting parties. This committee was vested with the authority to review the current Syrian constitution of 2012 in the context of other Syrian constitutional

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9 It is worth noting that the problem related to the distinction between the original and established constituent authority and the powers of each of them has been raised in several Arab Spring countries. In the Egyptian case, for example, following the demonstrations of June 30, 2013, which led to the fall of the Muslim Brotherhood regime, the 2012 Constitution was suspended to make limited amendments to it. However, given that these amendments were made in a way other than that prescribed by the 2012 Constitution, Egyptian jurisprudence relied on the formal criteria to consider the 2014 Constitution as new, despite the similarities between these two Constitutions.

Regarding the procedures for preparing the Egyptian Constitution of 2014 and the circumstances in which it was issued, see Ayman Mohamed-Afify, 'La Constitution égyptienne de 2014: entre traditions et tendances révolutionnaires' (2015) 101(1) *Revue française de droit constitutionnel* 121, doi:10.3917/rfdc.101.0121.

experiments and work on amending the current constitution or drafting a new one. In such case, we find ourselves in front of a constitutional constituent body: either the original for drafting a new constitution or an amendment to the 2012 Constitution.

What is the legal adaptability of such a committee's formation? Is it a legal issue that should be worked around? Is its formation an issue that is not subject to the law ?

The Constitution, above all, requires a constituent body or authority, and the Constitution shall not be made by the founding authorities but by the constituent body.<sup>10</sup> The formation of the constituent body shall be, thereon, the cornerstone of the constitution, and doctrine defines it as the authority that makes the constitution.<sup>11</sup> Despite the importance of the founding body, different countries' constitutions do not indicate how or what mechanism should be used to form it.<sup>12</sup>

The Syrian Constitution of 2012, subject to review by the Syrian Constitutional Committee in Geneva, did not deviate from this rule. It did not indicate the authority that had the power to abolish it but only identified the body responsible for making amendments and outlined the procedures that should be followed. Jurisprudence holds that the founding body is not a legal issue or subject to legal adaptation. This is because, in drafting a constitution distinct from what currently exists, the process involves not legal practice but rather facing a political consensus to establish legitimacy for a new constitutional system.<sup>13</sup>

The constituent authority is a power derived from reality, characterised by its original and independent nature, obtaining its powers from itself rather than from another authority.<sup>14</sup> As long as it is a power of reality that exists beyond the limits of the law.<sup>15</sup> The constituent authority remains after all change movements<sup>16</sup> and is not subject to any prior legal framework.<sup>17</sup> However, the reality of power unfolds in the wake of political change movements of the state, and the circumstances at hand govern the decision-making process for the formation of the constitutive authority and whom it represents.

Thereupon, the most influential parties tend to wield the constitutive authority.<sup>18</sup> This became evident when the President of the Republic issued Republican Decree No. 33 of 2011, which established a national committee to prepare a new constitution for the Syrian Arab Republic in preparation for its adoption by constitutional rules. Pursuant to this decree, the President of the Republic, who holds and controls the power, unilaterally

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10 Emmanuel Sieyès, *Qu'est-Ce Que Le Tiers Etat?* (Librairie Droz 1970) 180-1.

11 R Carre de Malberg, *Contribution à la Théorie Générale De L'état: Spécialement d'après Les Données Fournies Par Le Droit Constitutionnel Français*, t 2 (CNRS 1962) 510.

12 Contrary to this principle, the Swiss Constitution provides a mechanism to abolish it. Article 138 of the Swiss Constitution of 1999 states: '1- One hundred thousand citizens who have the right to vote may propose a comprehensive revision of the federal Constitution, within 18 months from the official publication date of their initiative. 2- This proposal shall be submitted to the people for a voting.'

13 Louis Favoreu and others, *Droit Constitutionnel* (5th edn, Dalloz 2002) 97.

14 Kemal Gözler, *Le Pouvoir de Révision Constitutionnelle* (Presses universitaires du Septentrion 1997) 27.

15 Georges Burdeau, *Traité de Science Politique*, t 4 *Le statut du pouvoir dans l'état* (3rd edn, LGDJ 1983) 79.

16 *ibid* 82.

17 *ibid* 80.

18 Malberg (n 11) 496.

determined the names of the members of the Constitutional Committee. After completing its work, the Constitutional Committee presented the 2012 constitution draft, and then the President issued a decree setting February 26 as the date for the referendum on the constitution draft.<sup>19</sup> This occurred during the outset of the Syrian crisis.

However, with the increasing intensity of the conflict in Syria and the intervention of international parties in it, countries and organisations, and the inability of any party to end the conflict in its favour, the reality that established the 2012 constitution has completely changed, locally and internationally. The new Syrian context pushed the Security Council's members to agree on Resolution No. 2254 on December 18, 2015, regarding a ceasefire and finding a political settlement for the status quo in Syria. This resolution, in paragraph 4, referred to the start of the drafting process of a new constitution for Syria, and accordingly, the Constitutional Committee was formed in Geneva in 2019 with the consent of both parties to the conflict, the Government and the opposition, and the consent of the international community represented by the United Nations. Given the above, let us briefly summarise our viewpoint within points hereinafter as follows:

1. The mechanism for the Syrian Constitutional Committee's formation in Geneva and the appointment of its members shall be imposed by the reality of the conflict in Syria and by the intervention of the international community. Consequently, it is a realistic authority as the question of its formation is not subject to the provisions of the law. Thus, it could not be said that the committee's formation is illegal or incompatible with the constitutional law's principles in a legal framework's absence governing the constituent body's formation, both in Syrian constitutional and comparative constitutional law. The Constitution resulted from the conditions and circumstances surrounding its emergence, which determined its formation. We agree with the jurisprudence view that the method of constitution-making is not legally adaptable.<sup>20</sup>
2. The Syrian Constitutional Committee in Geneva is not a total original constituent authority. The Constituent Authority has the advantage of being unrestricted and exempt from any proceedings and is free to express its will by the mechanisms it determines.<sup>21</sup> The Syrian Constitutional Committee in Geneva does not have that freedom, which obliged, as stated in the formation decision, to coordinate with the United Nations Special Envoy in convening its meetings and carrying out its work. The formation decision shall require the Syrian Constitutional Committee to submit the result of its work to popular consent. Thus, we could adapt the Syrian Constitutional Committee as a committee or consensus body of a technical nature that exercises its powers as proposals and does not have the authority to impose its decisions by force of law or fact.
3. Even though the constituent body responsible for drafting the Constitution is not a legal issue, we believe that the Constitutional Committee's formation shall derive its legitimacy from Security Council resolution 2254 (2015) and the composition decision

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19 Regarding the method of drafting the Syrian Constitution of 2012, please refer to the following legal academic sources: Hardware Al-Bahri, *Comparative Constitutional Law* (Damascus University Pub 2021) 331-4; Hamoud Tannar, *Constitutional Law* (2nd edn, Aleppo University Pub 2021) 252-5.

20 Gözler (n 14) 26.

21 *ibid.*

authorised by the United Nations and approved by the Syrian Government, as well as by other actors in the Syrian conflict, from the opposition and an international community. Differences of opinion doubtless, interpreting the said Security Council resolution between the Syrian Government and the States' supports, on the one hand, and the Syrian opposition and the States' supporters, on the other, do not affect the legality and legitimacy of the formation of the Syrian Constitutional Committee and do not detract from its powers to draft a new constitution for Syria or to amend the Constitution in force in 2012. In short, it could be said that Security Council resolution 2254 and the formation decision of the Syrian Constitutional Committee form the legal framework within which the Committee derives the legitimacy of its formation and functioning. Thus, we could say that the formation of the Syrian Constitutional Committee in Geneva has become a legal issue governed by an international legal framework from which to derive its legitimacy since it was an extra-legal issue under the national constitutional law.

## 2.2. The Impact of Internationalisation on the Formation of the Syrian Constitutional Committee and its Nationality

There are various types of constitutions, but they all share a common denominator: they are the National Constituent Body-made.<sup>22</sup> The constitution is a national law subject to national sovereignty, and its creation is an internal jurisdiction issue State. Powers and competencies state derive from its sovereignty, and the law, in turn, derives the same.<sup>23</sup> Therefore, international intervention in state constitution-making could attack or diminish national sovereignty. In the case of international intervention, we move on from the nationalism of constitution-making to the phenomenon of internationalisation of constitution-making or internationalised constitutions. The fundamental issue in internationalised constitutions lies in the original constituent body. The internationalised constitution is not solely the result of the National Constituent body's work but rather the result of international organisation's work or other states, whereby these international entities exceed the state's sovereign jurisdiction and take on the sovereign people's role or the role of the bodies representing the state.<sup>24</sup> The last decade of constitutions-making for many countries saw an increase in international intervention in the last decade of the 20th century under the auspices of peacebuilding.

International intervention in constitution-making varies from one case to another. It might be partial, in which case the National Constituent Body shall not be derogated but rather subject to the supervision of an international body or a group of countries that impose a set of principles.<sup>25</sup> Examples of this include the Constitutions of Namibia, East Timor, Cambodia, Macedonia, Cyprus, and Kosovo. The internationalised constitution might also

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22 Carolina Cedra-Guzman, 'Repenser les Constitutions Internationalisées' (2015) 6 *Revue du Droit Public* 1567.

23 Monique Chemillier-Gendreau, 'Le Concept de Souveraineté a-t-Il Encore Un Avenir?' (2014) 5 *Revue du Droit Public* 1283.

24 Nicolas Maziau, 'L'internationalisation Du Pouvoir Constituant : Essai de Typologie : Le Point de Vue Hétérodoxe Du Constitutionnaliste' (2002) 3 *Revue Générale de Droit International Public* 549.

25 *ibid.*



be an entire constitution where the national constituent body is fully controlled by an international organisation or a group of countries, as is the case with the Bosnia and Herzegovina Constitution.<sup>26</sup>

The first case of internationalisation of constitution-making, i.e., partial internationalisation, applies to the Syrian Constitutional Committee. Based on Security Council Resolution 2254 (2015), the Syrian Constitutional Committee was formed under the umbrella of the UN and with its authorisation. It is not just a matter of licensing; the international organisation is represented in the committee formation through a list of civil society members selected by the United Nations, totalling 50, forming one-third of the committee members. In addition, the UN Special Envoy for Syria facilitates the committee work by announcing and supervising the dates of its meetings after the parties' agreement and monitoring the extent to which members comply with their code of conduct. In short, it could be said that the UN- represented by its special envoy, manages the Syrian Constitutional Committee.

Jurisprudence, conversely, considers that the mere imposition of standards on the national constituent body is a contradiction per se to the principle of the sovereignty of the constituent body<sup>27</sup> as a national body. The imposition of international standards at the time of the Constitution's drafting led to the transfer of law-making authority (the Constitution) from the national constituent body to other States or international organisations. This, in turn, leads to a fundamental result of changing or abolishing the traditional concept of the constituent body.<sup>28</sup> In the case of the Syrian Constitutional Committee, its decision to establish imposes a set of controls or standards that the committee must adhere to in its meetings and work.<sup>29</sup>

Regarding its composition, the Constitutional Committee is structured to have a large and a small body. The smaller body is responsible for preparing and drafting constitutional proposals, while the larger body is tasked with adopting them. The large body may convene, in parallel or periodically, as the work of the small body progresses to discuss and adopt proposals.<sup>30</sup> As for its decision-making, both large and small bodies of the Constitutional Committee advance and take decisions by consensus where possible. In cases where consensus is unattainable, decisions are reached through voting, requiring the 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 is a fixed one.<sup>31</sup> As for her chairing, the Constitutional Committee ensures a

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26 Cedra-Guzman (n 22).

27 Marie-Claire Ponthoreau, *Droit(s) Constitutionnel(s) Comparé(s)* (Economica 2010) 154.

28 Cedra-Guzman (n 22).

29 'The United Nations Special Envoy for Syria looks forward to convening under United Nations auspices, in Geneva on 30 October 2019, and facilitating a credible, balanced and inclusive Syrian-led, Syrian-owned Constitutional Committee that operates in accordance with these Terms of Reference and Core Rules of Procedure', UNSC S/2019/775 (n 7) para 6.

30 *ibid*, art 2.

31 *ibid*, art 3.

balanced chairing arrangement with two Co-Chairs – one nominated by the Government of Syria and one by the Syrian Negotiations Commission.<sup>32</sup>

Despite the intervention of the international organisation in the Constitutional Committee's formation, we believe that being a Syrian entity is independent of the Committee's national character. All members of the Committee, who represent the three parties, government, opposition, and the United Nations, and whose number is 150, are Syrians. Furthermore, the decision to establish the Committee herein, the international organisation, does not grant the authority to compel the same members of the Constitutional Committee to accept any proposed constitutional texts from any party. This decision is subject to approval by the Committee members through consensus, if possible, or by a majority of 75% of the members present at the meeting in each of the Committee's bodies.

One could argue that the standards imposed by the decision to establish the Constitutional Committee are standards related to the organisational aspect and confidence-building among the parties involved without affecting the essence of the Committee's mandate, which is to conduct a constitutional review - the most significant aspect. As a constructive body, the Constitutional Committee is a Syrian committee led and owned by Syrians, and the role of the United Nations is limited to facilitation, not imposition or compulsion. This decision affirms the Syrian Constitutional Committee's formation, which refers in its first item to the strong commitment of the Syrian Arab Sovereignty.<sup>33</sup> Therefore, we believe that the United Nations' intervention in the Syrian Constitutional Committee's formation shall not be a substitute for Syrian national sovereignty and shall never detract from the Committee's national character. We agree with the standpoint that the internationalisation of the constituent body is not inherently problematic as long as the state has consented.<sup>34</sup>

The problem is not in the internationalisation of the Syrian Constitutional Committee as long as the conflicting parties have agreed per se; however, the challenge lies in the extent to which this committee shall accomplish its assigned task. It has been about five years since the Constitutional Committee's formation, during which it has held seven meetings, but tangible results have yet to be achieved. We feel that the Syrian Constitutional Committee's internationalisation was not a choice made by the disputing parties but rather naturally the reality of the conflict in Syria and the international community's division over Syria. In such a reality, deciding on a constitutional drafting body through elections or allowing one party to control its formation might be difficult. In this case, the optimal way to choose the constitutional drafting body is through dialogue and consensus among the conflicting parties, as was the case for the Syrian Constitutional Committee's formation in Geneva. Therefore, the internationalisation of the Syrian Constitutional Committee shall not detract from its legitimacy and Syrian national character so long as the United Nations' role is limited to supervision and facilitation and has no effect on the content of the constitutional reform that the Constitutional Committee shall present.

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32 *ibid*, art 4.

33 *ibid*, para 1.

34 Maziau (n 24).

### 3 COMPATIBILITY OF THE JURISDICTION OF THE CONSTITUTIONAL COMMITTEE WITH CONSTITUTIONAL LAW

We pointed out that the Constitutional Committee's formation poses a challenge that must be addressed through legal adaptation due to the reality imposed on the formation's mechanism. Consequently, its legitimacy is rooted in the existing reality.

However, as is well known, the Constitutional Committee's formation is not an end per se, but rather the formation objective, the jurisdiction granted to the committee. It is a legal issue that deserves discussion.

According to the decision to establish it, the Syrian Constitutional Committee can amend the current constitution or draft a new one.<sup>35</sup>

This jurisdiction is consistent with the concept of constituent authority contained in the Constitutional Dictionary, which generally defines it as 'a body with constitutional powers, which has the authority to draft a new constitution or to amend the Constitution in force'.<sup>36</sup>

'It is the same definition adopted by the doctrine of the constituent authority that its function is that of formulating or amending the Constitution',<sup>37</sup> but in contrast, the doctrine distinguishes between two types of constituent authority in terms of the limits and nature of its powers: the first is to draft a new constitution for the State, which is called the original constituent authority, and the second is to amend the existing constitution in part without repealing it, which is called the derived constituent power.<sup>38</sup> Notably, the Syrian Constitutional Committee has been given the power to exercise both competencies and choose the most suitable in between. Accordingly, we will examine within the jurisdiction of the Constitutional Committee as an original constituent authority should it opt to draft a new state constitution and as a derived constituent authority should it choose to amend the existing 2012 Constitution.

#### 3.1. The limits of the jurisdiction of the Constitutional Committee to draft a new Constitution

The Constitution requires, above all, a constituent authority. The authority usually intervenes in the case of a constitutional vacuum in the state, i.e., when there are no legal provisions specifying the government system. Practically, such a constitutional vacuum can occur in the event of the emergence of a new state or in the event of a breakdown in the legal

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35 Article 1 of the decision S/2019/775 to establish the Syrian Constitutional Committee: 'The Constitutional Committee shall, within the context of the UN-facilitated Geneva process, 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). The constitutional reform shall, inter alia, embody in the constitution and constitutional practices of Syria the letter and spirit of the Twelve Living Intra-Syrian Essential Principles.

The Constitutional Committee may review the 2012 Constitution including in the context of other Syrian constitutional experiences and amend the current constitution or draft a new constitution.

36 Olivier Duhamel and Yves Meny, *Dictionnaire Constitutionnel* (Presses Universitaire de France 1992) 777.

37 Jacques Velu, *Droit Public*, t 1 *Le statut des gouvernants* (Bruylant 1986) 139.

38 Gözler (n 14) 7-111.

system.<sup>39</sup> The Constituent Authority may also intervene without a constitutional vacuum when there is a political change in the state and the desire to replace the existing constitution that is no longer compatible.<sup>40</sup> This was exemplified in Syria in 2012. Nearly 40 years after the entry into force of the Syrian Constitution of 1973, following a wave of protests and protest movements in many Syrian cities in the context of the so-called ‘Arab Spring,’ the governing authority in Syria undertook some constitutional reforms to calm the protests.

The 2012 Constitution was drafted by referendum as a new constitution for the country, although this “new” Constitution is only an amendment to the previous Constitution of 1973. However, the 2012 Constitution did not contribute to ending or curtailing protest movements. The conflict became a military conflict, which resulted in the international community's intervention, culminating in Security Council resolution 2254 of 2015 and the formation of the Syrian Constitutional Committee in 2019. The Syrian Constitutional Committee has empowered the jurisdiction to make a new constitution for Syria.

In principle, we believe in granting the Syrian Constitutional Committee the authority to draft a new constitution under an effective constitution - the 2012 Constitution - *not* statute law with constitutional principles. On the one hand, the role of the constituent authority is not limited to intervening only in a constitutional state vacuum; instead, the state constitution shall be designed to make it necessary for the constituent authority's existence. However, what promotes this viewpoint is the current Constitution, the 2012 Constitution, which is subject to review by the Constitutional Committee. Notably, the 2012 Constitution does not stipulate a mechanism for its abolition or specify its ownership.

Thus, entrusting the Constitutional Committee in Geneva with the authority to draft a new Syrian Constitution does not contradict the norms of Syrian constitutional law. However, the crucial question arises: Should the Syrian Constitutional Committee have the authority to abrogate the 2012 Constitution and draft a new constitution? Should the Syrian Constitutional Committee be adapted as an original constituent authority, endowed with the power to abolish the existing constitution and draft a new constitution?

The original Constituent Authority is a sovereign and supreme unfettered authority<sup>41</sup> with the authority to abrogate the existing Constitution and draft a new one.<sup>42</sup> Under this description, the Constitutional Committee, if considered an original constituent authority, has the power to draft a constitution. In such a scenario, there is no doubt that the legality or legitimacy of the competence of the Constitutional Committee to draft a new constitution

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39 Bernard Chante bout, *Droit Constitutionnel* (23rd edn, Sirey Universite 2006) 28-9; Edward McWhinney, *Constitution-Making: Principles, Process, Practice* (University of Toronto Press 1981) 14-21; Pierre Pactet et Ferdinand Mélin-Soucramanien, *Droit Constitutionnel* (34th edn, Sirey Université 2015) 111.

40 MR Abdel Wahab, *Constitutional Law* (Manshurat Al-Ma'arif 1990) 88-9; G Sari, *Principles and Provisions of Constitutional Law* (4th edn, Dar Al-Nahda Al-Arabia 2002/2003) 137.

41 The French Constitutional Council affirmed this principle by saying that the Constituent Assembly is a sovereign authority. *Décision no 92-312 DC* (Constitutional Council, 2 Septembre 1992) [1992] 204 Lois et Décrets 13337.

42 Gözler (n 14) 22.

hinges on the legitimacy of the decision to establish it and the agreement of the disputing parties to grant it authority to draft a new constitution.

Meanwhile, the jurisdiction of the Syrian Constitutional Committee to draw up a new constitution depends on the limits established by the formation decision and on the extent to which it is deemed sovereign or not. A constituent authority is considered sovereign if it has the power to draw up and approve a constitution without necessitating presentation to the people by referendum.<sup>43</sup> Conversely, a non-sovereign constituent authority is limited to preparing or drawing up a constitution draft, and the constitution only becomes legally binding upon approval by the people through a general referendum.<sup>44</sup> In the case of a non-sovereign constituent authority, ultimate authority remains with the people who have the final decision-making power to approve or reject the draft constitution prepared by the constituent authority.<sup>45</sup>

### 3.2. Limits of the Constitutional Committee's jurisdiction to amend the existing Constitution of 2012

Referring to the decision to form the Syrian Constitutional Committee, we find that Article 1 regarding the committee states the following jurisdiction: '*The Constitutional Committee may review the 2012 Constitution including in the context of other Syrian constitutional experiences and amend the current constitution or draft a new constitution*'.<sup>46</sup> According to this text, the competence of the Constitutional Committee is not limited to drafting a new constitution only. As part of its constitutional review, the Constitutional Committee can draft a new constitution or amend the existing constitution, as agreed upon by the members of the Committee. If the Constitutional Committee chooses to amend the 2012 Constitution, it will serve as a derived founding authority. In this capacity, does the Constitutional Committee have the power to amend the existing constitution? In other words, what are the limits of its jurisdiction to amend the Constitution?

If the constituent authority, as an original authority responsible for drafting a new constitution, is exempt from the provisions of the effective constitutional law in its formation and determination of its jurisdiction due to its non-legal nature, it is crucial to recognise that the constituent authority, when functioning as an amending body, operates under an entirely different in nature and mechanism of its competencies. The Constitution's amendment is a legal issue where the Constitution determines the competent authority to

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43 That is the situation of the Constituent Assembly that drafted the Syrian Constitution of 1950, where it had sovereign constituent authority. It was responsible for formulating and approving the constitution on behalf of the people. The preamble of this constitution stated: '*We, the representatives of the Syrian Arab people, gathered in a Constituent Assembly by the will of God and the desire of the free people, declare that we have established this constitution to achieve the following sacred goals*'...

44 Similarly, such is the case of the Constitutional Committee, which was currently drafting the Syrian Constitution of 2012, where it has non-sovereign constituent authority. This committee was formed by the President of the Republic, whose work is limited to formulating a new constitution for Syria. After completing its task, the mentioned committee presented the drafted constitution to the President, who referred it to the people for a referendum.

45 Philippe Ardant, *Institutions politiques et droit constitutionnel* (14th edn, LGDJ 2002) 76.

46 UNSC S/2019/775 (n 7) para 8.

amend its provisions and the controls subjected by authority due to the legal process herein. Therefore, the constituent authority as an amending authority derives the legitimacy of exercising its competence in amending the Constitution from the said constitution, contrary to the original constituent authority, which derives its legitimacy from reality (political consensus). As a derived authority, the amendment authority is bound in its work by the scope defined by the constitution that created it and is committed to the procedures drawn for it.<sup>47</sup> Accordingly, any amendment to the Constitution outside the framework specified in the Constitution would be an illegitimate act and constitute an attack on the Constitution. In other words, exercising the jurisdiction to amend the constitution by an entity or body other than that specified by the constitution document would be contrary to the rules of constitutional law.

Regarding the mechanism for amending the Syrian Constitution of 2012, Article 150 regulated the amendment procedures and identified the competent authority to exercise that jurisdiction, as follows:

1. The President of the Republic, as well as one-third of the members of the Syrian People's Assembly, have the right to propose an amendment to the Constitution.
2. The amendment proposal includes the provisions to be amended and the reasons for it.
3. The Syrian People's Assembly shall immediately form a special committee to study the proposal for amendment.
4. The people's Assembly shall discuss the amendment proposal, and if adopted by a three-quarters majority of its members, the alteration shall be final, subject to the President of the Republic's agreement.'

According to this text, we could believe that the constituent authority as the amending authority of the Syrian 2012 Constitution consists only of the President of the Republic and the People's Assembly and shall not have any other body to exercise that competence. The Syrian constitutional legislator has considered the balance between the executive and legislative powers and theoretically maintained a degree of neutrality and objectivity in amending the Constitution. The power to propose an amendment to the Constitution, as a first step in the amendment process, is held solely by the President of the Republic and the People's Assembly. Still, neither of them can complete the amendment process without the approval of the other party. To complete the amending process of the Constitution, the proposed amendment should, as a second step, be presented to the People's Assembly for discussion and voting. Also, the approval of the People's Assembly for the proposed amendment by the required majority is not sufficient for the amendment to be final and effective, as it should be associated with the approval of the President of the Republic as a third step.<sup>48</sup>

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47 Duhamel and Meny (n 36) 778.

48 Hardware Al-Bahri, 'Constitution of the Syrian Arab Republic – Comparative Study between the Constitutions of 1973 and 2012' (2021) 34(2) Damascus University Journal of Economic and Legal Sciences 9.

Accordingly, based on the above, we see that the Constitutional Committee in Geneva is not legally authorised to exercise the jurisdiction to amend the 2012 constitution, neither in terms of formulating a proposal for amendment nor in terms of approving that amendment. Therefore, the exercise of the Constitutional Committee for the authority to amend the 2012 constitution would be inconsistent with the rules of Syrian constitutional law. For the constitutional amendments formulated by the Constitutional Committee to be legal and legitimate, the amendment process should be carried out under Article 150 of the Constitution, which requires that the proposed amendments be presented to the People's Assembly and obtain its approval and that this be associated, as a final step, with the consent of the President of the Republic. We see that there is an opportunity or possibility to overcome the problem of the unconstitutionality of the Constitutional Committee's exercise of the power to amend the 2012 Constitution.

Nothing is preventing the adoption of the amendments formulated by the Constitutional Committee by the President of the Republic or one-third of the members of the People's Assembly by the provisions of Article 150 of the Constitution. This approach is possible from either the President of the Republic or the Assembly. Any amendments proposed by the Committee shall only adopted when approved by the members of the Constitutional Committee in Geneva who represent the Syrian government. Therefore, any amendments adopted by the Constitutional Committee will reflect the Syrian government's point of view and will receive its approval. In this case, the President of the Republic can adopt the amendments agreed upon by the Constitutional Committee and present them as a proposal to amend the Constitution under Article 150 of the Constitution.

On the other side, more than 20% of the fifty members representing the Syrian government on the Constitutional Committee in Geneva are members of the Syrian People's Assembly.<sup>49</sup> Therefore, nothing is preventing the People's Council from adopting the amendments agreed upon as a proposal to amend the Constitution and implementing them under Article 150 of the Constitution. That might be possible, especially if we consider that the Chairman of the Constitutional Committee in Geneva, representing the Syrian government, Mr. Ahmed Kuzbari, is a member of the People's Assembly and serves as the Chairman of the Constitutional Committee herein.

On the other hand, the decision to form the Constitutional Committee did not vest the authority to make ultimate and effective decisions. If it chooses to amend the Constitution, the committee's work is limited to formulating and approving proposed amendments without admitting. To admit an amendment, as stipulated in Article 1 of the decision to form the Constitutional Committee, shall require popular consent during a referendum. Article 1 of the decision formulating the Constitutional Committee shall require presenting the result of the committee's work for popular consent but not change the illegitimacy of the Constitutional Committee's exercise of the authority to amend the Constitution. It is undoubtedly unconstitutional to enact a constitutional amendment in this way because it violates the procedures for amendment outlined in Article 150 of the

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49 Among these members are: Ahmed Kazbari, Mohammed Al-Ajlani, Mohammed Khair Al-Akam, Raymond Hallal, Maha Al-Ajlili, Nora Arisian, Jamal Kaderi, Safwan Qarbi, Sherine Al-Youssef, and Khaled Al-Abboud.

2012 Constitution, which shall not require presenting a proposed constitutional amendment to the people for voting due admitting.

Moreover, we assert that the illegitimacy of the Constitutional Committee's authority to amend the 2012 Constitution is reinforced by the illegitimacy of the text of Article 1 of the decision to establish the Constitutional Committee, which serves as the legal foundation for its work. Contrary to the rules of Syrian constitutional law, the text adopts a mechanism for amending the 2012 Constitution that violates the amendment mechanism specified in Article 150. Therefore, the text of Article 1 of the decision to form the Constitutional Committee, in the form in which it is presented, constitutes an amendment to the Constitution before the amendment.

Additionally, the approval of the conflict parties represented in the Constitutional Committee's membership could not confer legitimacy on the committee's authority to amend the Constitution. The legitimacy of the constitutional amendment requires the amendment to be made according to the procedures specified in the Constitution herein. Any constitutional amendment made contrary to that shall be illegal and illegitimate.

On the other hand, could the presentation of the constitutional amendments agreed upon by the Constitutional Committee for popular consent be considered a means of legitimising the Constitution's amendment? This notion stems from the idea that the people are the sovereign and the ultimate authority in the constitutional founding process, capable of exercising this power in each abrogation and amendment. In this context, some constitutional jurisprudence contends that legal formalities do not restrict the people's founding authority, as popular sovereignty is implicit in the popular founding authority. Therefore, if the Constitution binds derived authorities, it should not restrict the original founding authority, which is the source of the Constitution. Based on this, the people could amend the Constitution outside the procedures specified in the Constitution.<sup>50</sup>

This view is reinforced by what is stated in the provisions of the Syrian Constitution of 2012. The Constitution affirmed in its provisions that 'sovereignty belongs to the people, and no individual or group may claim it. It is based on the principle of the people's rule by the people and for the people to exercise sovereignty within the forms and limits prescribed in the Constitution.'<sup>51</sup> The referendum is one of the forms of exercising popular sovereignty stipulated by the Constitution, where Article 49 of the Constitution states that 'voting and referendum are a right and duty of citizens, and their practice is regulated by law.'

The authority to determine the timing of resorting to the referendum and to determine its subjects has been entrusted to the President of the Republic by Article 116 of the Constitution, which states that.

'the President of the Republic may hold a referendum on important issues related to the country's higher interests, and the result of the referendum is binding and effective from the date of its announcement, and the President of the Republic publishes it'

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50 Georges Burdeau, 'Essais d'une théorie de la révision des lois constitutionnelles en droit positif français' (thèse pour le doctorat, Faculté de Droit de Paris 1930) 9.

51 Constitution (n 3) art 2, paras 2, 3.



The referendum can take various forms - legislative, political, or constitutional. The constitutional referendum, in turn, might be founding or amending, and it is defined as a referendum that aims to enact or amend the state's Constitution. This process involves presenting the draft constitution or amendment - as prepared - to the popular vote for approval or rejection.<sup>52</sup> Returning to the rules regulating the referendum process in Syrian law, it becomes evident that the referendum process is limited to the situation of the Constitution's drafting only. The language used, specifically the expression '*in the referendum on the constitution and any other popular referendum*,<sup>53</sup> lacks a precise definition of the term's content. This ambiguity leads us to infer that, according to Syrian law, a referendum on the constitution encompasses both the drafting and amending of the constitution.

According to this attitude, the mechanism for amending the 2012 Constitution stipulated in Article 150 does not restrict the original founding authority possessed by the Syrian people, nor does it prevent them from amending the Constitution because the latter is a sovereign authority transcending the former. The derived authority is of a legal speciality, and it is a secondary or subsidiary authority that operates according to the specified jurisdiction in the constitution and amends the constitution according to the objective and procedural constitutional set restrictions. On the other hand, the original founding authority responsible for drafting the Constitution has the authority to review or replace with others.

In the context of effecting fundamental changes,<sup>54</sup> given that the original constituent authority is, by definition, an authority outside or above the Constitution and therefore not subject to it in its activities,<sup>55</sup> it could be seen that the Syrian people, as the sovereign, could disregard the procedures for amendment stipulated in Article 150 of the 2012 Constitution and approve a constitutional amendment through a constitutional referendum. Consequently, if a proposal to amend the Syrian Constitution for 2012, submitted by the Syrian Constitutional Committee in Geneva, were to be coupled with the approval of the people, this would lend legitimacy to the amendment process because the people are the ones who approved the constitution through a popular referendum, and whoever owns the whole owns the part.

## 4 CONCLUSIONS

The study of the Syrian Constitutional Committee's formation and work, established based on UN Security Council Resolution 2254, is of utmost importance. As is well known, the Constitution is a national law subject to national sovereignty, and its creation is an issue that falls within the internal jurisdiction of the state. Therefore, international intervention in constitution-making can be an attack on or a diminution of national sovereignty. In the case

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52 Majed Ragheb El-Helou, *Popular Referendum and Islamic Sharia* (2nd edn, University Press House 1983) 181.

53 Article 1 of Legislative Decree No. 3 of 1973, which includes the rules of Referendum in Syria.

54 Essam Said Abd Al-Obeidi, 'Amendment of Constitutional Rules in a Democratic System' (2016) 30 Moroccan Law Journal 115, doi:10.37258/1282-000-030-003.

55 Munther Al-Shawi, *Philosophy of the State* (Jordanian Dar Ward for Publishing and Distribution 2012) 397-9.

of international intervention, we move on from the nationalism of constitution-making to the phenomenon of internationalisation of constitution-making or internationalised constitutions.

The intervention of the international organisation in the Syrian conflict and the issuance of UN Security Council Resolution 2254 was not an end per se; it aimed to put an end to the conflict and find a political settlement. The formation of the Syrian Constitutional Committee, authorised by the United Nations and given the power to conduct a constitutional review, was a step in this direction. The claim that international intervention in constitution-making conflicts with national sovereignty and diminishes it is a relative matter determined by the extent of the role played by the international community in the constitution-making process. Through this research, we have concluded that international intervention in the Syrian Constitutional Committee was partial and limited to supervision, facilitation, and achieving consensus among Parties to Syria's conflict without detracting from the national character of this committee as a Syrian entity. Without the conflict parties' consent, including the government and opposition, the United Nations resolution on formulating the Syrian Constitutional Committee would not have been issued. The formulating committee's resolution came as an expression of the Syrian government's will and approval, and the issuance of this resolution by the United Nations does not detract from the legitimacy of the committee's work.

Therefore, we can say that the issue of forming the Syrian Constitutional Committee in Geneva has become a legal issue governed by an international legal framework after it was previously outside the framework of national constitutional law. With the intervention of the international organisation in the Constitutional Committee's formation, we believe that being a Syrian entity does not detract from the Committee's national character. All members of the Committee, who represent the three parties, government, opposition, and the United Nations, and whose number is 150, are Syrians. Furthermore, the decision to establish the Committee herein, the international organisation, does not possess the authority to compel the same members of the Constitutional Committee to accept any proposed constitutional texts from any of the parties. As a constructive body, the Constitutional Committee is a Syrian committee led and owned by Syrians, and the role of the United Nations is limited to facilitation, not imposition or compulsion. This decision shall confirm the Syrian Constitutional Committee's formation, which refers in its first item to the strong commitment of the Syrian Arab Sovereignty.

Therefore, we believe that the United Nations' intervention in the Syrian Constitutional Committee's formation does not replace Syrian national sovereignty and does not diminish the Committee's national character. The Constitutional Committee is not a complete founding authority because it lacks the autonomy to adopt a new constitution or amend the current one at its discretion. It is a consensus committee of a technical nature whose role is limited to formulating proposals that require popular consent. The Syrian people are the sovereign who have the final say in approving any constitutional review proposed by the committee. In other words, the approval of any constitutional reform will be in the name of the people, by the people, and attributed to them, not to the Constitutional Committee.

As a result, the internationalisation of the formation and work of the Syrian Constitutional Committee is acceptable per se as long as the state has given its consent. The problem is not in the internationalisation of the Syrian Constitutional Committee as long as the conflicting parties have agreed per se. It has been about five years since the Constitutional Committee's formation, during which the committee has held seven meetings but has yet to achieve any tangible results.

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**Competing interests:** No competing interests were disclosed.

**Disclaimer:** The authors declare that their opinions and views expressed in this manuscript are free of any impact on any organisations.

## ABOUT THIS ARTICLE

### Cite this article

Tannar H, Mohamed Afify A and Dalla S, 'Legal Adaptation for the Syrian Constitutional Committee Formed Based on UN Security Council Resolution 2245' (2024) 7(1) Access to Justice in Eastern Europe 149-69 <<https://doi.org/10.33327/AJEE-18-7.1-r000101>>

Submitted on 15 Oct 2023 / Revised 5 Nov 2023 / Approved 7 Nov 2023

Published ONLINE: 1 Dec 2023 / Last Published: 1 Feb 2024

DOI <https://doi.org/10.33327/AJEE-18-7.1-r000101>

**Managing editor** – Prof. Iryna Izarova. **English Editor** – Julie Bold.

**Summary:** 1. Introduction. – 2. The compatibility of the formation of the Constitutional Committee with constitutional law. – 2.1. *The formation of the Constitutional Committee is not a legal issue.* – 2.2. *The impact of internationalisation on the formation of the Syrian Constitutional Committee and its nationality.* – 3. Compatibility of the jurisdiction of the Constitutional Committee with constitutional law. – 3.1. *The limits of its jurisdiction of the Constitutional Committee to draft a new Constitution.* – 3.2. *Limits of the Constitutional Committee's jurisdiction to amend the existing Constitution of 2012.* – 4. Conclusion.

**Keywords:** *constitution-making, original constituent authority, constituent power, sovereign authority.*

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