



# The 2019 Draft for a Syrian Constitution

The role of regions: creation, organization, competences and collaboration

By Damiano Pasquali, Sarunja Kathirgamathamby and Lara Viviroli, Tatjana Jovanovic, Clemence Monnier, Sara Hariri, David Rohrbach

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# The 2019 Draft for a Syrian Constitution

## The role of regions: creation, organization, competences and collaboration

### Introduction

A key feature of a federal state is its division into subnational units that share power but keep certain autonomies. The draft constitution calls these subnational units “regions”. In other federal states they are called governorates, provinces, states, cantons etc. In a post-war country, the way the relationship between the central state and the regions is organized is crucial. Especially in Syria, with its ethnic, religious and linguistic diversity, it is of major importance for a lasting peace that ethnic groups agree with a new composition of the regions.

First, this paper sheds light on the Syrian draft constitution’s proposal to create new regions. Second, the paper deals with the competences the draft constitution assigns to the regional level. Third, it is questioned how major inequalities between the regions can be prevented. Fourth, the interregional collaboration and the relationship between the regions and the federal government as well as the regions and international actors is discussed.

### 1 Territorial organization of the regions

The two most important articles of the draft constitution regarding the regional reorganization are article 2 and article 6 of the appendix which includes transitional provisions. Article 6 of the appendix determines the procedure of the first-time establishment of the regions and article 2 (3) provides rules on how the borders between two regions can be adjusted. This chapter will first discuss article 6 of the appendix, and then continue with an examination of article 2 (3).

#### 1.1 Creating new Syrian regions

The situation in Syria differs from federal states like Switzerland, the United States or Canada, in the way that in Syria it is not pre-existing sovereign units that come together and agree on the formation of a federal state, but Syria has been a centralist country since the state’s foundation. Yet, Syria is not the first country that would have to start a decentralization process and redraw its regional boundaries. With the implementation of a new constitution in 2015, Nepal created seven new subnational units (article 56 (3) and schedule 4, Constitution of Nepal). In order to form these new units pre-existing districts were put together. Thereby, the Constitution of Nepal differs from the draft constitution. The first paragraph of article 6 appendix, draft constitution, stipulates that the boundaries of the regions shall be redrawn. It clarifies that the current fourteen Syrian governorates should not be transformed into subnational units but be entirely dissolved and newly created. The reorganization of the regions should follow certain criteria that are listed in article 2(3,4) of the draft constitution. Once regions are created, according to the procedure laid down, article 6 of the appendix loses its force.

Looking again at the current situation in Nepal, it gets clear how challenging it might be to draw and implement new regional boundaries. In Nepal, there are ongoing debates about the number, the size and the composition of the subnational units. Four parliaments of subnational units have still not been able to agree on one name for their unit. Despite the problems that might occur, drawing entirely new boundaries in Syria, as proposed in the draft constitution, might open up the way for a post-war restart. This seems to be of importance, because, so far, the ethnic, religious and linguistic diversity of Syria has not been reflected in the build-up of the governorates.

It is of importance that the creation of the regions is based on democratic procedures. The Syrian draft constitution foresees the following procedure:

First, under the direction of the United Nations, a commission comprising national and foreign experts shall prepare a proposal for redrawing the boundaries and naming the regions. The consideration of including experts into the commission instead of governmental representatives or delegates of ethnic groups is based on the idea that experts are generally perceived as more independent than politicians (this might be particularly the case for international experts), which is very important for the implementation of a procedure with a very high political sensitivity. The inclusion of experts might reduce negative preconceptions and increase the focus on functionality, which is important for a wide public acceptance of the procedure and results.

Second, the commission should take into account historic, geographic, economic, ethnic, religious and linguistic criteria and carry out consultations (article 6 (2) appendix draft constitution). The draft constitution does thereby not specify how many regions should be created or if the new regions should have similar sizes regarding their territory and population. Apart from the criteria mentioned above, the task of the commission is not limited, which leaves it with a lot of freedom to act. The set-up criteria should prevent the creation of random borders and contribute to the country's stability. In order to prevent long-term conflicts, it is of major importance that most inhabitants have the feeling of belonging to their region. Other constitutions have also set up certain criteria for creating or amending new borders: For example, the German Basic Law states in article 29 (1) that if borders of the subnational units of Germany are to be changed, regional, historical and cultural ties (among other criteria) have to be taken into account. Similar, when Belgium was transformed from a unitary to a federal state, the Belgian territory and population was divided into different groups based on linguistic and cultural criteria.

Third, once the commission has finalized drawing the boundaries, the first round of elections for the Syrian parliament and the president shall be held (article 6 (3) appendix). Each region shall form a transitional government, which then appoints representatives to the second chamber of the national parliament and prepares regional elections (article 6 (4) appendix). This proposed solution permits to circumvent the paradox that regional boundaries can only be formed if the parliament approves them, while at the same time the second chamber of the national parliament can only meet if regions and regional governments exist. In order to avoid the problem of democratic legitimation regarding the creation of new subnational units, similar procedures were used in other countries though the exact procedure described in the draft constitution seems to have no predecessors. However, it seems that this proposal was set up to avoid major tensions on how the regions should be created and decrease the risk of the majority determining subnational units without consulting ethnic minorities.

Lastly, few critics/questions have to be mentioned: First, the experts of the commission are attributed with a lot of power regarding the formation of the boundaries. From a democratic perspective this role might be of more importance than non-elected people should actually have. Control-mechanisms to keep the commission members accountable might be useful. Second, questions might come up on how the commission, consisting of national and international experts, would deal with Syria's disputed areas, the Golan Heights and the Hatay. The Golan Heights are internationally recognized as being part of Syria, but are largely under control of Israel. Hatay is considered part of Turkey, but Syria claims the territory for itself. Even though this is more related to external Syrian borders, the commission might be confronted with these questions.

## 1.2 Changing the territory of the regions

After the determination of regional boundaries by the commission, a way to change regional borders has been included into the draft constitution of 2019. Article 2 (3) of the draft constitution stipulates that the territory can be changed if the population that is affected, consents. Consent is given if at least half of the eligible voters participate in voting and at least two thirds vote in favor of the change. Article 2 (4) of the draft constitution stipulates that a merger or a division of a region, which would for example lead to a change in the total number of regions in Syria, needs a two-third majority in both chambers of the parliament.

Provisions for territorial changes of subnational units are also included in constitutions of other federal states, e.g. Switzerland (article 53, Swiss Constitution), Germany (article 29, German Basic Law) and India (article 3, Constitution of India). There are, however, variations regarding the question of who has to agree to territorial changes. In both Germany and Switzerland, a popular vote is one of the conditions for change, which is not the case in India. The US Constitution does not provide regulations if one part of a state wants to switch to another state (Article 4 Section 3 Part 1 US Constitution).

Article 2 (3) of the draft constitution contains unclear aspects. Firstly, it is unclear who should be eligible to vote in a territorial change – only the population in the region that demands the change or also the population in the region that will be affected by the change as it will receive territory as well as population? The first possibility would be that only the population in the territory that is supposed to be switched to another unit has to consent. A second possibility would be that the entire population of both regions has to agree. It seems useful to take a look at the Swiss and German Constitutions to understand the advantages and disadvantages of both options. The Swiss Constitution permits part of one canton to change to another canton if the affected population consents. This means that both regions as well as the Swiss Parliament have to consent (article 53 (3), Swiss Constitution). In Germany, the German parliament must also vote on changes in regional areas. After the approval of the parliament, the residents of the area that wish to change to a new federal state need to vote (article 29 (3), German Basic Law). In summary, in Germany and in Switzerland also the affected subnational units have to give their consent for regional changes. The approach of the draft constitution seems to be different: only the consent of the affected population is necessary, but not the permission of the affected region as a whole. Generally speaking, the draft constitution remains very vague in this area, further clarification might be useful in order to prevent conflict after the constitution's implementation.

## 2 Competences of the regions

In federal states, one of the most important question is who is responsible for what. Which level is responsible for the education system? Which level raises income taxes and who builds roads and hospitals? Clearly identifying the competences of each level, the federal, the regional and the municipal level, is a key step to ensure the stability of the state and autonomy for the regions. Similar to other federal constitutions, the Syrian draft constitution includes provisions to determine these competences. There are certain provisions in the draft constitution that allocate particular competences to each state level.

### 2.1 Specific regional competences

Article 60 of the draft constitution provides a list of competences for the regions. Accordingly, the regions are responsible for: The organization of the region, security and border protection, the education and the healthcare systems, social security, economic development, use and management

of natural resources and public property, regional infrastructure, protection of the environment and cultural assets. This list is not exhaustive since the constitution is based on the principle of subsidiarity. This implies that the regions need to take direct responsibilities in all fields if possible on this level. There are other examples of federal constitutions which also include lists of competences for the subnational units. The Nepalese as well as the South African constitution contain precise lists of regional competences. The South African regions are, amongst others, responsible for provincial roads, ambulance services, libraries, museums, parks and street lighting.

Article 55 (1) of the draft constitution includes the residual clause, which is a significant element of many federal states. All legislative powers that are not expressly reserved to the national level by the constitution are vested in the subnational units. This is also in line with the principle of subsidiarity as expressed in article 9(1) of the draft constitution. The distribution of powers in Switzerland is also based on the residual clause (article 3, Swiss Constitution). Similar, the Tenth amendment of the American Constitution, article 30 of the German Basic Law or article 117 of the Italian Constitution express this principle. Conversely, the Canadian Constitution (article 91(1)) presents an exception to this idea. Here the residual legislative powers are assigned to the national level and not the subnational level. The residual clause ensures that no area the state should take care of is missed out. Even though the main competences of the federal state (article 58), the regions (article 60) and the municipalities (article 61) are listed in the draft constitution some areas might have been missed or will just gain relevance in the future. Furthermore, the legislator cannot be aware of all the competences that exist in a state and the constitution cannot be adopted constantly. The residual clause eliminates the necessity to determine or define every field or competence and allocate it specifically.

In addition to the exclusive allocation of powers to the national or subnational level (article 59 of the draft constitution), there are some legislative areas where both the center and the regions have concurrent competencies. In these cases, the federal legislator usually defines the framework or minimum standards but leaves room for the regional legislators to specify or supplement in legislative areas characterized by concurrent competencies, the regions have to respect federal legislation, which in case of a conflict prevails. However, following the residual clause, if the federal legislator has not legislated, legislative powers remain with the regional level.

In addition to the list of regional competences, it is also the task of the region to draft its own constitution (article 9(2)). Enabling the regions to establish their own constitution means giving them the competence to create their own legislative basis. Federal states like Switzerland, the US or Germany did also obligate their subnational units to have their own constitutions. Additionally, the draft constitution allows the regions to have their own flag, anthem and public holidays (article 12 (3)). By giving the regions the possibility to choose a flag and establish their own public holidays, the federal state promotes the diversity of the state and shows respect for regional differences. The different ethnic, religious and linguistic groups are thus able to promote their own traditions and culture in their regions.

## **2.2 Competences to be added or clarified**

There are some areas, where the Syrian draft constitution could be more precise or which have been left out by the constitution's authors. In the following, it will be explained why it is important to consider including or expanding on these areas and how they are dealt with in constitutions of other states.

### *Transport infrastructure, water and electricity*

A good transport system as well as adequate supply of water and electricity are preconditions for the development of a state. The state needs to build airports, ports, railways, highways etc. to ensure that every part of the territory is accessible, as well as establish and maintain water safety and electricity systems.

Many constitutions have assigned transportation and infrastructure to the federal rather than the regional level. Schedule 5 (19-20) of the Nepalese Constitution, for example, states that the federal state has an exclusive power to legislate on the civil aviation, the international airport, the national transportation policies and the management of the railways and of the national highways. The Constitution of Ethiopia attributes an exclusive competence to the federal state for the development, administration and regulation of the air, rail, waterways, sea transport and major roads that link two or more of Ethiopia's regions (article 51 (9)). The Swiss Constitution gives an exclusive power to the confederation to legislate on rail transport, cableways, shipping, aviation and space travel (article 87). In some other federal constitutions transport and infrastructure are concurrent competences of the federal state and the lower level. This is the case in South Africa (Schedule 4 A) and Bosnia and Herzegovina (article 2 d). Regarding the Syrian draft constitution, it should be specified who has the competence of transportation infrastructure.

Water and electricity are essential for public health and development and should therefore be equitably accessible in the whole country. It should be questioned if it is useful to give this competence to the region or if it might be advantageous to assign these to the central level which should guarantee equal supply for all Syrian regions. In Nepal, the federal state has exclusive power over inland and inter-state electricity transmission lines (Schedule 5 (12)). The Constitution of Bosnia and Herzegovina attributes the exclusive competence to the federal state for "*making the energy policy, including inter-cantonal distribution matters, and providing and maintaining the related infrastructures*" (Chapter 3 article 1). In article 91 (1) the Swiss Constitution states that the confederation legislates on the transport and supply of electrical energy. The constitution of South Africa provides a concurrent competence for the federal state and the provinces over the water supply system (Schedule 4 Part B).

### *Infrastructure relating to telecommunications, post service & other public services*

The draft does not mention telecommunications and other public services such as the post service. Similar to the supply of water and electricity, telecommunication systems should be established in the whole country and should be equally accessible. The Nepalese Constitution provides that the federal state has the exclusive competence over "*telecommunications, allocation of radio frequency, radio, television and postal matters*" (Schedule 5 (8)). In Canada, Switzerland and the United States, postal and telecommunication services are also an exclusively federal competence. In Switzerland, the Confederation has to ensure an "*adequate, universal and reasonably priced provision of services in all regions of the country*" (article 92 (2)). Some other countries attribute those competences concurrently to the federal level and regions, e.g. Bosnia and Herzegovina and South Africa.

### *Protection of the environment*

The articles 59 (d) and 60 (i) of the draft constitution address the protection of the environment. Nevertheless, the issue is mentioned in the list of concurrent competences as well as in the competences list of the region. This duplication might leave the interpreter with open questions. Furthermore, by looking at other federal constitutions, it seems necessary to include a more detailed

provision of how the protection of the environment should look like. The Constitution of South Africa for instance provides detailed examples of how the environment should be protected. Schedule 4 A, for example includes the “*administration of indigenous forests*” and “*pollution control*”. Similarly, the Nepalese Constitution states that “*forests, wildlife, birds, water uses, ecology and biodiversity*” are concurrent powers of the federation, the state and the local levels (Schedule 9 (7)). The Swiss Constitution mentions “*sustainable development*” (article 73) and contains a list of specific environmental matters that are assigned to the confederation, such as water, forest, fishing and hunting and protection of animals (article 76).

### 3 Preventing inequalities between the regions

When analysing this list of competences, one has to keep in mind that assigning the regions with high legislative power and autonomy might cause inequalities between the regions. Regional differences might also be caused by variations regarding the reception of tax revenues and income from natural resources, or in the effectiveness and performance of regional governments. These disparities in regional developments might lead to major internal migratory movements. People might move to more privileged regions where services and goods are better than in their regions of origin. One example where major regional inequalities would be problematic is the education system: Let us assume that one region has a very good education system. Graduates from this region receive certificates that are perceived as qualitatively higher and therefore have better job opportunities in the whole country. Many families might move to that region in order to have access to better education for their children. The number of children in regions with better education systems would increase. The schools would be overcrowded and the quality of education would decrease. This may impact research and innovation. The education system exemplifies the importance of preventing vast regional differences. The education system in the Syrian draft constitution has been allocated to the regions (article 60 (c)). According to article 59 (d), it is a concurrent competence of the federal state and the regions to ensure the safeguarding of education and the comparability and recognition of educational qualifications. Article 59 therefore provides a mechanism to prevent the development of major educational disparities between the regions.

### 4 Cooperation between the levels

Article 56 of the draft constitution clearly states that a cooperation between the different state levels and between the regions is necessary and that the regions and the federal state “*shall take their respective interests into consideration*” (article 56 (1)) and collaborate with each other (article 9 (4)). This kind of *cooperative federalism* stands in contrast to *dual federalism*, which is based on the idea that the central state and the regions are responsible for distinct spheres and cooperation between the levels is not necessary. Cooperative federalism means that although competences are divided, it is still aimed to reach a harmonious cooperation between the levels.

If we examine how other post-conflict federal states treat the relationship between different state levels, we notice that it is very common to set cooperation and collaboration as guiding principles. In article 50 (1) of the Nepalese Constitution it is mentioned that cooperative federalism should be a directive principle and also the South-African Constitution contains a specific chapter about the cooperative government and explicitly regulates the intergovernmental relations (article 41 (1)). Accordingly, South African public authorities should cooperate in a “*mutual trust and good faith*”. It is even more precisely mentioned that the cooperation should happen through the conduct of friendly relations, support and assistance, informing and consulting one another on matters of common

interest, coordination of the actions and legislation and avoiding legal proceedings against one another.

Regarding the principle of cooperative federalism there seem to be similarities between the Swiss Constitution and the Syrian draft constitution. The Swiss Constitution contains a specific chapter on the relationship between the confederation, the cantons and the communes. Article 44 refers to a general principle of cooperation and support between the confederation and the cantons. The cantons shall participate in the federal legislative process (article 45 (1)) and be consulted anytime their interests are affected (article 45 (2)). Cantons can make agreements with other cantons and jointly undertake some of their tasks (article 48). Similar provisions are made in the Syrian draft constitution.

In addition to the collaboration between the regions and the central state, the draft constitution provides for interregional cooperation (article 56 (3)): *“Within the scope of their powers and responsibilities, the regions and municipalities shall be able to collaborate with other regions and municipalities”*. Other constitutions also have provisions for interregional cooperation. In Switzerland, the cooperation between cantons is called *“concordat”*, interstate cooperation in the United States is named *“compacts”*. In Austria, for example, the heads of the regional Austrian governments, different departments and the regional administrative authorities meet in periodic conferences, where they discuss topics that are of national relevance. The Syrian draft constitution provides only for the regions active participation in the federal legislation and the region’s right *“to be consulted when their interests are affected”* (article 56 (2)). Even though the regions have no legislative power in certain fields, e.g. foreign policy, they should be encouraged to meet regularly in order to discuss issues of national relevance.

The draft constitution also allows for collaborations between regions and international actors (article 56 (3)). This provision, however, is restricted to certain fields, namely infrastructure, development, and the provision of services to the population. The provision including its restrictions to certain fields seems to be important, since the regions have the competence of taking care of regional infrastructure. For regions bordering neighbouring countries, it is important to ensure a good connection of streets on both sides of the border and ensure cross-border water and energy supply. This requires close cooperation between both countries, respectively two regions of two countries.

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