Constitution-Making Around the World

An Exceptional Constitution

A Constitution for Somalia

Crowdsourcing Constitutions

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**4 Written Constitutions Around the World**

by Tom Ginsburg

Constitutions in countries around the world exhibit certain similarities, follow trends, and contribute to a larger international understanding about government and the rule of law. Tom Ginsburg shares some of the discoveries that he and his colleagues have identified as directors of the Comparative Constitutions Project, which seeks to scientifically study constitutions around the world.

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**12 An Exceptional Constitution**

by Mila Versteeg

What is the influence of the U.S. Constitution on constitution-makers around the globe? Has that influence changed over time? Mila Versteeg takes a look at the role of the U.S. Constitution in the development of more contemporary constitutions and illustrates how the former is truly an exceptional document.

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**19 Two Years in the Making: A Constitution for Somalia**

by Robin L. Gary

An international rule of law professional offers a window into the constitution-making process that took place in Somalia between 2010 and 2012. She details her experiences, the challenges she and her colleagues faced, and, ultimately, the path to constitutional government in one country.

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**25 Crowdsourcing Constitutions: The Importance of Public Participation in Constitution-Making**

by Joanne Wallis

The role of public input in the constitution-making process is significant. Advances in technology in recent years, particularly social media, make it easier than ever for countries developing constitutions to seek feedback on drafts, and, in some cases, prioritize content.
You probably know the old saying comparing lawmaking with sausage-making—the moral of the analogy being that we are likely better off not delving too deeply into the production process! However, with this issue of Insights we are doing just that – exploring the art and science of constitution-making across the globe. I hope you agree that this deeper dive inspires a renewed respect for the democratic process and an admiration for the players who somehow weave competing individual, group, and governmental interests into an acceptable and binding social contract.

We open the issue with University of Chicago Law School deputy dean and international law professor Tom Ginsburg’s overview of world constitutions. Remarkably, as he points out, the average life expectancy of a national constitution is a mere 19 years. University of Virginia School of Law Professor Mila Versteeg explores what makes the U.S. Constitution exceptional in the catalogue of world constitutions. She concentrates on four key factors: age, rigidity, brevity, and enumerated rights. Joanne Wallis, author of a book on constitution-making and a lecturer at the Australian National University, introduces us to the fascinating topic of crowd-sourcing constitutions. Direct public participation in the constitution-making process, she argues, reaffirms the principle of popular sovereignty. We close the issue with a Profile of Meriem Ben Lamine, an attorney and human rights advocate working to stop violence against women in the Middle East and North Africa. Ben Lamine helped draft the 2014 Tunisian constitution, which included a progressive provision recognizing equality between men and women.

To help you share this rich content with your students, our Learning Gateways provide activities and discussion questions designed to spark a classroom conversation on constitutions and their role in state-building.

Don’t forget to visit www.insightsmagazine.org for additional resources, materials, and useful links to help you bring this and other legal-related topics alive in your classroom. On our site you will find ready-to-use handouts, and other additional instructional supports. Over the next few issues, we hope you will let us know if our changes are helpful, attractive, and easy to navigate. The first 10 readers to submit feedback to our editor will receive our Preview on the U.S. Supreme Court 2015 review issue. It includes summaries of all the decisions and expert articles providing insight into the term.

We welcome your feedback on this issue and on Insights in general. Please let us know if you have any article or issue theme ideas by e-mailing me or the editor directly. We also invite you to share your innovative strategies for teaching the law in your classroom.

Enjoy the issue,

Mabel McKinney-Browning
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As he prepared for the Constitutional Convention in the spring of 1787, James Madison plunged into a thorough study of historical confederacies, from the ancient Greeks to the (then) modern Dutch and German federations. His inquiry, which he had been preparing for several years, was both schematic and thorough: he picked six case studies to focus on, and for each confederacy recorded the various rules of representation, the allocation of powers between center and subgovernment, and various facts about the performance of the system. He assessed costs and benefits—or as he put it in the language of the time, “virtues and vices”—and drew lessons for the project of reorganizing the United States into a viable federal government. Madison’s chief conclusion is that weakness of the federal center was highly risky, leading him to propose a congressional “negative” on the laws of the states, whereby the federal legislature would have “veto power” over state legislatures. While Madison’s negative was ultimately not included in the United States Constitution, the Supremacy Clause, whereby federal legislation preempts that from the states, is a fundamental component.

Modern constitution-makers may not always have the wisdom of James Madison, but they have one advantage that he did not: more than two hundred years of constitutional practice in many different countries. Including now-defunct countries such as the Central American Republic and the Ottoman Empire, there have been more than 220 different nation-states in existence since 1789. These countries have produced more than 900 constitutions in that time span. This collective experience provides a wealth of information for anyone who wants to undertake a Madisonian inquiry into constitutional practice. What factors lead countries to replace their constitutions? Why do some constitutions last and others not? What goes into these documents? And why do some “work” while others do not? My colleagues at the Comparative Constitutions Project and I have been trying to understand these questions, along with many others, using the techniques of social science.

One of our discoveries is that written constitutions—of which the United States Constitution is one of the first for an independent nation state—have become a norm for new countries. The 

Written by Tom Ginsburg

by Tom Ginsburg
figure on page 6 shows the number of countries in the world (the solid line), which has roughly quadrupled since 1789, along with the number that have a document we can identify as a discrete constitution (the dashed line). The two lines converge around 1920, and remain closely linked today. For example, when South Sudan gained its independence in 2011, one of its first acts was to adopt a constitution.

The figure also shows, in the vertical bars, the number of constitutions adopted in each year. It shows that constitutions are adopted in what we might call global waves. The “spring-time of nations” in 1848, World War I, World War II, and the Cold War were all followed by a wave of constitution-making. The timing of constitution-making, then, is to some extent dictated by global forces.

Similarly, the content of constitutional texts is determined in part by global and regional forces. We have the image of constitution-making as the work of a small group of authors sitting around a town hall and debating first principles. Yet for most countries, this image could not be farther from reality. Constitutions written today may include a set of human rights that are influenced by global norms, embodied in human rights treaties. They also look to international practice for matters large and small. Thus we see that standard forms of parliamentarism and presidential government are a starting point for thinking about how to organize government. And, perhaps somewhat surprisingly, minor details reflect a remarkable degree of similarity across constitutions. For example, many constitutions have a minimum age requirement to hold certain offices. The U.S. Constitution requires a person to be at least 35 years old to become president and 25 years old to be a member of the lower house of the legislature. These are still the most popular age requirements for constitutions, despite the significant increase in life expectancies since the 18th century.

The reason for these similarities across time and space is fairly straightforward. Most people writing constitutions have limited experience and knowledge about how to do so. Furthermore, many constitutions are written under great time pressure. And most constitution-makers are, at least implicitly, writing documents that are addressed not only to their own people but to international audiences. Under such circumstances, looking to how other countries have undertaken the task makes a lot of sense. There may be some effort to “fit” global norms to local conditions, but there is also a good deal of borrowing. Increasingly this borrowing is facilitated by international actors—other governments, the United Nations, international organizations, and nongovernmental organizations—that seek to inform and even influence national constitutional practices.

We can trace the rise and fall of different ideas in national constitutions. For example, some rights (such as a right to free speech or a right to privacy) become more popular over time, while others (the right to bear arms) decline in popularity. Constitutional preambles, which one might think are the parts of constitutions most likely to reflect local concerns, also reflect global trends. While many 19th century constitutions were adopted in the name of a separate sovereign, the global community has increasingly come to recognize the dignity and worth of the human person, a recognition that is reflected in national constitutions.

Tom Ginsburg
is deputy dean and Leo Spitz professor of international law at the University of Chicago Law School. Through the Constitute Website (www.constituteproject.org) teachers and students can explore the world of national constitutions in greater depth.
of God, the 20th century witnessed a significant decline, as socialist language rose to the fore. But God has made a comeback since 1990 and has been invoked in almost 10 percent of constitutions adopted since then. Constitutions thus reflect the era in which they are written.

One of the reasons there are so many constitutions is that most of them do not last very long. In a book published a few years ago, my co-authors and I determined that the average predicted life expectancy of a national constitution is a mere 19 years. And in some countries, the situation is even worse. The Dominican Republic, for example, has had by our count 34 different constitutions since it was founded in 1821. At the other extreme, Australia has had only one constitution since 1901. The United States has, in fact, had two constitutions—our current document adopted in 1787 and the preceding Articles of Confederation of 1781. Understanding why some constitutions survive and others do not is an important question, particularly because in any given year, several countries will need to write new ones.

Sometimes constitutions fail because the political regime has collapsed or is in danger of it. When a country is taken over or faces a severe institutional crisis (as did the framers under the Articles of Confederation), it is likely that it will replace its constitution. Sometimes constitutions are replaced by power-hungry leaders, who wish to dismantle democratic constraints, or extend their terms in office. And sometimes constitutions simply fall out of date. Such constitutions ought to be replaced. As Thomas Jefferson once wrote:

I am certainly not an advocate for frequent and untried changes in laws and constitutions. I think moderate imperfections had better be borne with; because, when once known, we accommodate ourselves to them and find practical means of correcting their ill effects. But I know also that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed and manners and opinions change with the change of circumstances, institutions must advance also and keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy as civilized society to remain under the regimen of their barbarous ancestors.

One way to think about this is that constitutions face external pressures. Societies change, political bargains erode, and the international environment may shift. Rules adopted for one generation might not make sense for later generations. These pressures might lead people to think about their constitutions as being akin to Jefferson's boyhood coat. But some constitutions, like some human beings, have the ability to withstand external pressures for change. For example, if the constitution is old and venerated, as is our own here in the United States, people might resist any effort to replace it. Constitutional systems that are more flexible, for example by allowing easy amendment, can get rid of outdated institutions and adopt new ones. Besides flexibility, we argue that constitutions that are adopted through more inclusive processes are more likely to endure. When more segments of the population have a stake in the political bargain, they may resist efforts to overturn or replace it. We also find, interestingly, that longer, more detailed constitutions tend to last longer. This is because such documents are likely to include a number of provisions that matter to powerful groups, giving them a stake in the survival of the constitution.

Of course, the features that predict constitutional endurance are ones that are not particularly associated with the United States Constitution. Madison and his colleagues at Philadelphia may...
have represented various conflicting interests, and the ratification process may have facilitated a degree of popular participation, but there were very large segments of society excluded from the discussion. Furthermore, the United States Constitution is notable for its brevity, particularly in comparison with modern constitutions. The average constitution in force in 2013 was over 21,000 words long, while the United States document was just over 4,500 words when adopted and only a bit over 7,500 today. And the United States Constitution is notoriously difficult to amend, requiring the cooperation of Congress and three-fourths of the state legislatures to pass an amendment, or else two-thirds of the state legislatures to call a constitutional convention.

We analogize the United States Constitution to a woman named Jeanne Calment, the oldest human being ever, who died in 1997 at the age of 122. Calment was a lifelong smoker, who did not quit until age 117; her diet consisted largely of port wine and chocolate. While that lifestyle happened to work for her, it would hardly be advisable for most of us! Similarly, the United States Constitution might have endured in our particular soil but would not necessarily be a good model for other countries. And there is increasing debate, at least among scholars, about whether it is outmoded even for ourselves. Whatever one’s views on that controversial question, there is no question that there is much to learn from the constitutions of other countries.

Discussion Questions

1. Why do you think it has “become the norm” for new countries to write and adopt constitutions? What are the pros and cons of a new country having a constitution?
2. Why do you think rights such as freedom of speech and a right to privacy are becoming more popular over time and expressed in constitutions?
3. Do you think the U.S. Constitution is a “boyhood coat” that Thomas Jefferson refers to, and in need of revision? In what ways? What changes would you make?

Suggested Resources

- Constitute, a collaboration with the Comparative Constitutions Project, available: www.constituteproject.org.
- Constitution Finder, a project of John Paul Jones, professor at the T.C. Williams School of Law at the University of Richmond, available: http://confinder.richmond.edu/.

2. See www.comparativeconstitutionsproject.org
Learning Gateways

Case Study: Creating the Japanese Constitution

In the years immediately following World War II, 1945–1947, the people of Japan adopted a new constitution. It was developed under the leadership of the Supreme Commander for the Allied Powers (SCAP), Douglas MacArthur, who was in command of the Allied forces that remained in the country following the war. Drawing on a selection of primary sources from the Japanese National Diet (Japan’s legislature), in this case study, students will learn about the making of the Japanese constitution following World War II, a simultaneously constitutional, legal, political, linguistic, and cultural encounter in international history.

Materials:
• Creating the Japanese Constitution: Background
• Documents 1–5 (see sidebar)
• Preamble of Constitution of Japan (excerpt)

Additional Resources:
• Japanese Constitution Power Point Presentation
• Time Line of Events
• Glossary of Important Terms
• Historical Figures
• Potsdam Declaration
• Constitution of Japan (1947)
• National Archives Document Analysis Worksheet

All materials are available as classroom-ready downloads from www.insightsmagazine.org.

Background

On July 26, 1945, the United States, Great Britain, and China issued the Potsdam Declaration, which called on Japan to surrender without condition and accept military occupation at war’s end, warned that responsible war criminals would face “stern justice,” and insisted on measures to strengthen “democratic tendencies of the Japanese people.” This document became a blueprint for the post-World War II occupation of Japan, following its formal surrender to the Allied Powers in September 1945. The occupation would last nearly seven years.

World War II in the Pacific theater had been long and brutal. Japan was devastated, with millions of combatants and civilians killed and many millions more left without homes and basic necessities. There were severe food shortages—many Japanese were malnourished or starving. Americans would provide the Japanese with vitally needed emergency food relief. Formally, occupied Japan was under the control of the Allied Powers, which included the Soviet Union. Practically, however, the United States assumed control of the occupation. More than 350,000 U.S. troops were stationed in Japan by December 1945.

The American occupation was firmly led by the “Supreme Commander,” General Douglas MacArthur. MacArthur’s rule was indirect, through the existing Japanese government. He quickly issued a directive removing legal restrictions on civil liberties and set standards for humane and respectful treatment of the Japanese people but also vigorously prosecuted suspected war criminals. He had a vision for what a postwar Japan should be—demilitarized, peaceful, and democratic.

Could postwar Japan be democratic and retain its emperor and imperial system? How? What would result? Could Japan be an imperial democracy? Japanese progressives believed the emperor had no place in a democratic Japan based on a principle of popular sovereignty—what Lincoln famously characterized in the Gettysburg Address as “government of the people, by the people, for the people.” Japanese traditionalists, however, could not imagine a Japan without a sovereign emperor. MacArthur felt that Japan had to be both democratic and imperial. The emperor, who had renounced his divinity, had to be a symbolic emperor. MacArthur wrote in January 1946, that the emperor “is a symbol which unites all Japanese. Destroy him and the nation will disintegrate.”

Both the occupying Americans and postwar Japanese leaders moved to reform Japan’s constitutional system. Japan’s then-existing Constitution of the Empire of Japan had been written in 1890. It was seen as ineffective in checking the disastrous militarism that led to conquest and war in the 1930s and 1940s. In the immediate postwar period, reform led to a sense that a new constitution was needed. Many different Japanese groups and scholars developed constitutional proposals, representing a diverse range of political views. Japanese leaders formed the Constitutional Problems Investigation Committee, chaired by Joji Matsumoto. This Matsumoto Committee drafted a constitution that maintained the emperor’s sovereignty.
MacArthur rejected this draft and secretly ordered American military lawyers to draft a constitution for Japan and to do so in less than a week. This “Draft for a Revised Constitution,” initially written in English, was accepted by the Japanese government and the emperor. As it was translated into Japanese and debated in the National Diet, Japan’s national legislature, the document was modified and “Japanized.” In April 1946, the draft constitution was “translated” again into ordinary language, in a style that would be found in newspapers of the day. In November 1946, the new constitution was approved both by the National Diet and by MacArthur. A national public awareness campaign was organized to educate Japanese from all walks of life about the new constitution. On May 3, 1947, the Constitution of Japan was formally enacted. Its first chapter, headed “The Emperor,” states: “The Emperor shall be the symbol of the State and of the unity of the People, deriving his position from the will of the people with whom resides sovereign power.”

**Procedure**

1. Distribute the Background handout to students and ask them to study it, either in class or as homework.

2. Following review of the Background, organize students into five groups and then distribute Documents 1–5, one to each group. **Note that Document 3 includes two documents, A & B.** Ask students to review their documents. **Students might complete Document Analysis Worksheets developed by the National Archives to facilitate study of their respective documents.**

3. Ask each group of students to consider the following questions in relation to their document(s):
   - What is the document? When was it written? Who is the audience?
   - What role did the document(s) have in facilitating the development of the new Japanese constitution?
   - What detail(s) does it add to the story that was provided in the Background?

4. Ask each group to designate a spokesperson to present the document(s) to the rest of the class. **Note that the complementary Power Point presentation is available to project each document for the class as it is reviewed by each group.**

(Continued on page 10)

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**Time Line of the Making of the Japanese Constitution**

**1945**

**July 26** United States, United Kingdom, and China announce the Potsdam Declaration.

**August 15** Imperial speech declaring the end of the war is broadcast at noon.

**August 30** General Douglas MacArthur arrives in Japan to coordinate formal surrender proceedings and oversee the subsequent constitutional development process.

**September 2** Instrument of Surrender signed on the deck of the USS Missouri.

**October 4** MacArthur offers Japanese officials (led by Konoye) suggestions for constitutional revisions.

**October 25** Constitutional Problems Investigation Committee (Matsumoto Committee) is established.

**November 22** Konoye presents a Draft of Constitution Revision to the emperor.

**December 26** Matsumoto Committee announces its “Outline of Constitutional Draft.”

**1946**

**February 1** Mainichi Shimbun (translation: Daily News) runs a scoop on “Constitutional Problems Investigation Committee Draft Proposal.”

**February 3** MacArthur puts forth his “Three Basic Points” and orders Government Section of SCAP to develop its own draft constitution.

**February 8** Japanese government submits the “Gist of the Revision of the Constitution” to SCAP for review.

**February 13** SCAP officials refuse to accept the “Gist of the Revision of the Constitution” and share their developed draft with the Japanese government.

**March 6** Japanese government announces, with SCAP, the “Outline of a Draft for a Revised Constitution.”

**April 17** “Draft for a Revised Constitution” is announced to the Japanese public in ordinary language.

**May 22** First cabinet under the Revised Constitution is announced to the Japanese public in ordinary language.

**June 20** Constitutional Revision Bill is submitted to the National Diet, the Japanese Legislature.

**November 3** The Constitution of Japan is approved by both the National Diet and SCAP.

**December 1** Constitution Popularization Society is established to coordinate public education efforts relating to the new Constitution of Japan among the Japanese people.

**1947**

**May 3** The Constitution of Japan is enacted.
Wrap Up

Share with students the excerpt of the Preamble of the Constitution of Japan:

We, the Japanese people, acting through our duly elected representatives in the National Diet, determined that we shall secure for ourselves and our posterity the fruits of peaceful cooperation with all nations and the blessings of liberty throughout this land, and resolved that never again shall we be visited with the horrors of war through the action of government, do proclaim that sovereign power resides with the people and do firmly establish this Constitution. Government is a sacred trust of the people, the authority for which is derived from the people, the powers of which are exercised by the representatives of the people, and the benefits of which are enjoyed by the people. This is a universal principle of mankind upon which this Constitution is founded. We reject and revoke all constitutions, laws, ordinances, and rescripts in conflict herewith. …

Ask the students to discuss the text:

- What words in the preamble stand out to you? Why?
- What does the preamble tell us about who is establishing the constitution? The purposes of the government?
- How does the preamble reflect any of the concepts identified as important constitutional reforms by Matsumoto or MacArthur?

End the case study with a discussion of the roles of both the Japanese and Americans in the constitution-making process and how each shaped the final document.

The Documents

The primary source documents used in this case study are publicly available from the National Diet Library, the archive of the legislative body of Japan. A wealth of resources, including timelines, summaries of major issues facing the Japanese government in 1947, and hundreds of high-resolution primary sources in both English and Japanese, is available from the Library, as part of a “Birth of the Constitution of Japan” online exhibit at http://www.ndl.go.jp/constitution/e/. The documents featured in this case study include:

Document 1

“Reform of the Japanese Governmental System,” October 8, 1945 (excerpt pp. 1–2)

This is a report from the State-War-Navy Coordinating (SWNC) Subcommittee for the Far East, a committee of officials from the U.S. Department of State and military charged with determining the opportunities for constitutional reform in Japan. The subcommittee identified specific “constitutional reforms which the occupation authorities should insist be carried out in Japan.” The report also includes guidelines for implementing the reforms with the help of Japanese authorities.

Document 2

Matsumoto’s “Four-Point Principle for Constitutional Reform,” December 8, 1945

The original document is written in Japanese, as Joji Matsumoto was a Japanese legal scholar who had been a member of the emperor’s cabinet, and was appointed chairman of the Constitution Problems Investigation Committee, a group of Japanese officials doing similar work as the SWNC Subcommittee. He identified four points that he determined were priorities in revising the Japanese constitution:

1. Maintaining the sovereignty of the Emperor;
2. Expanding the powers of the National Diet;
3. Expanding the powers of Ministers of State to the National Diet; and
4. Strengthening protections of people’s rights and liberties.
Document 3A
Telegram, MacArthur to Eisenhower, January 25, 1946 (excerpt p. 1)
This originally classified telegram is visually interesting with headings, government stamps, and a handwritten notation from Eisenhower across the top of the document. The telegram explains that no criminal actions will be taken against the Japanese emperor because no evidence of wrongdoing was discovered. MacArthur also recognizes the emperor's place in Japanese society: "Destroy him and the nation will disintegrate." Eisenhower's notation at the top of the document advises the recipient to "treat this with the utmost care."

Document 3B
MacArthur's Three Basic Points, February 3, 1946
Similar to Matsumoto's four priorities, MacArthur's "Three Basic Points" memo outline important concepts that were to be incorporated into the revised Japanese constitution. The three points reflect MacArthur's message in the January telegram but also outline two major reforms that would significantly change Japan:
1. Emperor is at the head of the state;
2. War as a sovereign right of the nation is abolished; and
3. The feudal system of Japan will cease.

Document 4
Discussions on the Day for Promulgation of the Constitution, October 14, 1946 (excerpt p. 1)
This memo to the chief of the government section of SCAP provides a window into a very important moment in constitutional reform, not only in Japan, but in any nation—how and when to enact the newly drafted constitution.

Document 5
Explanatory Illustrations of the Constitution of Japan
Colorful illustrations produced by the Constitution Popularization Society provide a view into another important moment in the constitutional reform process—public education. These were likely printed in a booklet or brochure and distributed to people in Japan to help explain the reforms that were being adopted under the new constitution. The graphics are engaging and provide opportunities for analysis. English commentary to supplement the Japanese text references in the graphics is also provided.

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Introduction
The United States Constitution was once a model for constitution-makers around the world, but in many ways it is now an outlier among modern national constitutions. This essay highlights four features of the U.S. Constitution that make it unusual by contemporary global standards: (1) its old age, (2) its rigidity, (3) its brevity, and (4) its exceptional catalog of rights. With its over 225-year age, its 27 amendments, its 7,762 words, and its atypical catalog of rights, the U.S. Constitution differs markedly from most of the world’s constitutions.

1. An Old Constitution
The United States is still on the same constitution that was adopted in 1789. The venerable constitutional document turned 225 years old in 2014, making it the oldest in the world. The next constitution—France’s constitution from 1791—lasted a mere two years, and France is now on its fifteenth constitution. As it turns out, the United States, and not France, is the outlier by global standards. France’s constitution-writers are not even particularly prolific in comparative perspective: since its founding, the Dominican Republic has had 32 constitutions, Ecuador has had 27, Haiti has had 24, and Venezuela has had 23.

As these examples suggest, most foreign constitutions have life spans substantially shorter than that of the U.S. Constitution. Research by Zachary Elkins, Tom Ginsburg, and James Melton has shown that the median constitution lasts 19 years on average before it is replaced. As they point out, this number matches, with remarkable accuracy, Thomas Jefferson’s proposed duration of a constitution. Jefferson, who would later be elected President of the United States, wrote in a series of letters addressed to James Madison, that each generation should write its own constitution. Jefferson calculated that a generation lasts 19 years and concluded that 19 years is the natural life span for a constitution. Madison, who would also later be elected President, disagreed with Jefferson. Madison argued that constitutions should be entrenched, that is, established and inflexible, or otherwise, officeholders would abuse their power by changing the constitution to meet their own interests. Madison’s vision of an entrenched document has come to characterize the U.S. Constitution, while the constitutional practices of most foreign countries now fall within the Jeffersonian tradition of an ever-changing document.

2. An Inflexible Constitution
The U.S. Constitution is not only remarkably old but has also seen relatively few amendments over the course of its long life span. Twenty-seven amendments have been added to the original document on 17 occasions. Most foreign constitutions are revised more frequently. A colleague, Emily Zackin, and I have created a measure of constitutional flexibility for all countries: an entrenchment score, which measures “the total number of years a democratic polity has existed, divided by the total number of years in which some constitutional change occurred (either through replacement or amendment).” Using this measure, we found that democracies revise their constitution about every five years on average. When comparing the United States to other democracies, we found that the U.S. Constitution is one of the most...
inflexible in the world, surpassed only by the constitutions of Japan, Denmark, and Paraguay.

This relative inflexibility is no accident—it was built into the Constitution's design. According to a study by Donald Lutz, the U.S. Constitution has the most rigid formal amendment procedures in the world. By requiring a two-thirds majority of both houses, as well as consent from three-fourths of states, the framers made amendment an extraordinary affair. By contrast, the constitution-writers in other countries designed their founding documents to be more flexible. These foreign drafters have done so presumably because they wanted to empower contemporary majorities to update and adjust their constitution to changing circumstances.

Of course, the inflexibility of the Constitution's text does not mean that its meaning has not changed over time; indeed, it has changed tremendously. But the mode of change is different; most changes in the meaning of the U.S. Constitution have come about through judicial interpretations rather than through formal amendments. Indeed, as President Woodrow Wilson observed, the U.S. Supreme Court is like a "constitutional convention in continuous session." In other countries, contemporary majorities have reserved for themselves the power to alter the meaning of their constitution through formal amendment and have not delegated this power to their judicial branch.

3. A Brief Constitution

The U.S. Constitution currently comprises 7,762 words contained in seven original articles and twenty-seven amendments. In print, it usually spans no more than 17 pages. Foreign constitutions tend to be substantially longer. Emily Zackin and I found that the average constitution comprises 21,960 words, nearly three times the length of the U.S. Constitution. India's constitution is currently the world's longest, with 146,385 words, or almost twenty times the length of the U.S. Constitution.

As my colleague Emily Zackin and I explain in our research, foreign constitutions are longer both because they deal with more issues and because they deal with each of these issues in more detail. Foreign constitution-makers typically address more issues to force future officeholders to take action on those issues. For example, constitution-drafters enshrine constitutional provisions on education to ensure that governments provide public education. They include a right to healthcare, attempting to force the government to provide universal access to health care. Or they provide instructions on fiscal spending to ensure that future governments do not overspend. Notably, unlike the U.S. federal government, most foreign governments have plenary, rather than limited (“enumerated”), power, which means that they do not need specific constitutional authorization to exercise a given power. However, by enshrining a range of specific policies in the constitution, constitution-makers effectively limit the policy choices available to future officeholders.

By adding detail to constitutional provisions, constitution-makers can attempt to curb the discretion of those tasked with interpreting the constitution, including both legislatures and courts. While the authors of the U.S. Constitution effectively delegated to the Supreme Court the power to interpret terms such as "due process" or "necessary and proper," foreign drafters have been unwilling to grant so much power to the judicial branch and have instead opted to define these concepts themselves. Instead of articulating broad concepts open to interpretation, foreign constitution-makers typically craft their constitutions in substantial detail.

For example, apparently in response to advice from U.S. Supreme Court Justice Felix Frankfurter, the drafters of the Indian Constitution deliberately avoided the term "due process of law" for fear of repeating the American experience, crafting more specific rights instead. Thus, disparities in both scope and detail are responsible for making the U.S. Constitution shorter than most foreign constitutions.

4. Atypical Rights

The U.S. Constitution's particular selection of rights is also unusual by global standards. In terms of quantity, the U.S. Constitution contains fewer explicit rights protections than most foreign constitutions. A colleague, David Law, and I found that out of a catalog of 60 possible rights, the average

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constitution includes 34, while the U.S. Constitution includes just 26.\textsuperscript{11} Moreover, the U.S. Constitution omits a number of rights that are especially common in other constitutions. For example, the U.S. Constitution does not include an explicit protection of gender equality. It also omits reference to any socioeconomic rights, such as the right to education, health care, housing, or workplace protections. While gender equality has been recognized in U.S. Supreme Court decisions, this is not the case for socioeconomic rights. Positive socioeconomic rights are simply not protected in U.S. constitutional law, and the Supreme Court has consistently treated the Constitution as “a charter of negative rather than positive liberties.”\textsuperscript{12} By contrast, about 87 percent of all current national constitutions contain at least one explicit socioeconomic right, and over half contain at least three such provisions.\textsuperscript{13} The U.S. Constitution, thus, is rather unique in its exclusive focus on negative liberty.

Not only does the U.S. Constitution omit some rights that are common elsewhere, it also includes others that are rare by global standards. For example, while most constitutions include a right to religious freedom, relatively few constitutions explicitly provide for a separation of church and state.\textsuperscript{14} Moreover, the U.S. Constitution is one of the last remaining constitutions to include a right to bear arms, along with Guatemala and Mexico.\textsuperscript{15} While gun rights were historically included in more national constitutions, most such countries have since amended their constitution to remove gun rights. In essence, both the inclusion of unpopular rights and the omission of popular ones make the U.S. Bill of Rights different from that of most other countries.

**Conclusion**

The U.S. Constitution is an exceptional document. It is old, inflexible, and increasingly out of sync with global standards. In that sense, it has been likened to an old computer operating system: “Windows 3.1.”\textsuperscript{16} At the same time, it is a document that clearly matters; it is usually respected, plays an important role in popular imagination, and has even been likened to a civil religion. This is not always the case for foreign constitutions, which are often relatively ephemeral, oftentimes fall well short of their aspirations, and in some instances, are downright “shams.”\textsuperscript{17}

The U.S. Constitution is also different from constitutions written at the state level as Emily Zackin and I have pointed out.\textsuperscript{18} The constitutions of the American states are, in many ways, similar to foreign national constitutions.\textsuperscript{19} Like foreign constitutions, state constitutions are frequently replaced and even more frequently amended. Like most foreign constitutions, state constitutions are wide in scope and elaborate in detail. And like most foreign constitutions, state constitutions often contain socioeconomic rights relating to education, labor, and social welfare. Thus, when including state constitutions in an assessment of the American constitutional system, the American constitutional tradition as a whole suddenly becomes much less exceptional. The federal U.S. Constitution, however,
In terms of sheer quantity, the U.S. Constitution contains fewer explicit rights protections than most foreign constitutions.
Learning Gateways

What’s in a Constitutional Preamble?

Many constitutions around the world include a preamble, or introductory text that provides a statement about the full text that follows. Constitutional preambles tend to contain the principles and purposes of the government that the following document outlines. In this lesson, students study the preamble to the U.S. Constitution and then compare it to preambles from around the world. Students also use a chart to identify common preamble phrases and then discuss what these phrases might indicate about the government that is using them.

Materials:
- Preamble of U.S. Constitution
- Preambles from constitutions around the world
- Common Preamble Phrases chart

All materials are available as classroom-ready downloads from www.insightsmagazine.org.

Procedure
1. Depending on student’s understanding of the U.S. Constitution and its preamble, discuss with students the definition of the preamble and its purpose. Share with students the Preamble of the United States Constitution:

   We the people of the United States, in order to form a more perfect union, establish justice, insure 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.

2. Ask students to discuss what they see in the Preamble of the United States Constitution:
   - When was this Preamble written?
   - Who is issuing the statement contained in the Preamble?
   - What does the Preamble say about why they are issuing the statement?

3. Explain to students that they will examine preambles from constitutions around the world. Organize students into eight small groups and assign each group one of the preambles from constitutions in the international community. See the Preambles from Constitutions Around the World sidebar. Preambles are available as handouts at www.insightsmagazine.org.

4. Ask each group of students to consider the following questions in relation to their document(s):
   - From which country’s constitution is this preamble? When was it written?
   - Who is issuing the preamble?
   - What are the purposes of government that the preamble identifies?

5. Share the Common Preamble Phrases chart with students. Ask them to study the chart, and then see how their preamble makes use of any of the common preamble phrases. Students could consider the following questions:
   - Do any of the phrases on the chart appear in your assigned preamble?
   - Are there key phrases in the preamble that do not appear on the chart?
   - What do you think we can learn about the country by reading this preamble and its use, or nonuse, of common phrases?

6. Ask each group to designate a spokesperson to present the preambles to the rest of the class. Groups might develop a 3-minute presentation on their preamble, sharing what they have learned.

Extended Activity
Students might research the preamble of their state constitution, and compare it to the Preamble of the U.S. Constitution and those of other countries around the world. They might also use the Common Preamble Phrases chart to identify common phrases. Constitutional preambles from state constitutions are available at Ballotpedia, at http://ballotpedia.org/Preambles_to_state_constitutions.

<table>
<thead>
<tr>
<th>Phrase</th>
<th>First mention</th>
<th>Total number (%) of preambles</th>
</tr>
</thead>
<tbody>
<tr>
<td>We the people</td>
<td>United States of America, 1789</td>
<td>70 (14.7%)</td>
</tr>
<tr>
<td>Rule of law</td>
<td>Bavaria, 1818</td>
<td>52 (10.9%)</td>
</tr>
<tr>
<td>Rights of man</td>
<td>Haiti, 1805</td>
<td>47 (10%)</td>
</tr>
<tr>
<td>Economic and social</td>
<td>France, 1949</td>
<td>43 (9%)</td>
</tr>
<tr>
<td>Name of god</td>
<td>Spain, 1808</td>
<td>43 (9%)</td>
</tr>
<tr>
<td>We the representatives</td>
<td>Venezuela, 1830</td>
<td>34 (7.1%)</td>
</tr>
<tr>
<td>Universal Declaration of Human Rights</td>
<td>Rwanda, 1962</td>
<td>23 (4.8%)</td>
</tr>
<tr>
<td>Give to ourselves</td>
<td>Iceland, 1920</td>
<td>21 (4.4%)</td>
</tr>
<tr>
<td>Principles of Democracy</td>
<td>Portugal, 1838</td>
<td>20 (4.2%)</td>
</tr>
<tr>
<td>Working people</td>
<td>Mongolia, 1924</td>
<td>19 (3.9%)</td>
</tr>
</tbody>
</table>

Source: Comparative Constitutions Project, University of Illinois, catalog of 476 constitutions
Preambles from Constitutions Around the World

Preamble of the Constitution of the Federative Republic of Brazil, 1824, amended 1988
We, the representatives of the Brazilian People, assembled in the National Constituent Assembly to institute a Democratic State for the purpose of ensuring the exercise of social and individual rights, liberty, security, well-being, development, equality and justice as supreme values of a fraternal, pluralist and unprejudiced society, based on social harmony and committed, in the internal and international spheres, to the peaceful solution of disputes, promulgate, under the protection of God, this Constitution of the Federative Republic of Brazil.

Preamble of the Constitution of China, 1982 (excerpt)
The People’s Republic of China is a unitary multinational state created jointly by the people of all its nationalities. Socialist relations of equality, unity and mutual assistance have been established among the nationalities and will continue to be strengthened. In the struggle to safeguard the unity of the nationalities, it is necessary to combat big-nation chauvinism, mainly Han chauvinism, and to combat local national chauvinism. The state will do its utmost to promote the common prosperity of all the nationalities. …
This Constitution, in legal form, affirms the achievements of the struggles of the Chinese people of all nationalities and defines the basic system and basic tasks of the state; it is the fundamental law of the state and has supreme legal authority. The people of all nationalities, all state organs, the armed forces, all political parties and public organizations and all enterprises and institutions in the country must take the Constitution as the basic standard of conduct, and they have the duty to uphold the dignity of the Constitution and ensure its implementation.

Preamble to the Constitution of Côte d’Ivoire, 2000
The People of Côte d’Ivoire,
Conscious of their liberty and national identity, of their responsibility before history and humanity;
Conscious of their ethnic, cultural and religious diversity, and desirous to build one nation unified in solidarity and prosperous;
Convinced that union with respect for diversity assures economic progress and social well-being;
Profoundly attached to constitutional legality and to democratic institutions;
Proclaims its adherence to the rights and freedoms as defined in the Universal Declaration of the Rights of Man of 1948 and in the African Charter of the Rights of Man and of Peoples of 1981;
Expressing its attachment to democratic values recognized to all, the free people, notably:
—The respect and the protection of fundamental freedoms, individual as well as collective,
—The separation and the equilibrium of powers,
—Transparency in the conduct of public affairs,
Committed to the promotion of regional and subregional integration, in view of the constitution of African Unity,
Gives freely and solemnly as the fundamental law this Constitution adopted by Referendum.

Preamble of the French Constitution, 1958
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, confirmed and complemented by the Preamble to the Constitution of 1946, and to the rights and duties as defined in the Charter for the Environment of 2004.
By virtue of these principles and that of the self-determination of peoples, the Republic offers to the overseas territories which have expressed the will to adhere to them new institutions founded on the common ideal of liberty, equality and fraternity and conceived for the purpose of their democratic development.

Preamble of the Constitution of India, 1949
WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens:
Discussion Questions

1. Thomas Jefferson argued that a constitution should last approximately a generation, or nineteen years. James Madison, however, argued that constitutions should be entrenched, or established, for much longer. Do you think one of them was right? What are the advantages and disadvantages to each of their suggested constitutional life spans?

2. Do you think it is better for constitutional change to occur through court rulings or constitutional amendments? Why?

3. Do you agree with the author that the U.S. Constitution is “old, inflexible, and increasingly out of sync with global standards”?

4. Do you think the U.S. Constitution should include more rights and protections than it currently does, compared to constitutions around the world? Which rights and protections do you suggest?

Suggested Resources


(Continued from page 17)

JUSTICE, social, economic and political;
LIBERTY of thought, expression, belief, faith and worship;
EQUALITY of status and of opportunity;
and to promote among them all
FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation;
IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

Preamble of the Constitution of Iran, 1979 (excerpt)
The Constitution of the Islamic Republic of Iran advances the cultural, social, political, and economic institutions of Iranian society based on Islamic principles and norms, which represent an honest aspiration of the Islamic Ummah.

This aspiration was exemplified by the nature of the great Islamic Revolution of Iran, and by the course of the Muslim people’s struggle, from its beginning until victory, as reflected in the decisive and forceful calls raised by all segments of the populations. Now, at the threshold of this great victory, our nation, with all its beings, seeks its fulfillment. …

Preamble to the Constitution of Ireland, 1937
In the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred, We, the people of Éire, Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial, Gratefully remembering their heroic and unremitting struggle to regain the rightful independence of our Nation, And seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations, Do hereby adopt, enact, and give to ourselves this Constitution.

Preamble to the Constitution of the Russian Federation, 1993
We, the multinational people of the Russian Federation, united by a common destiny on our land, asserting human rights and liberties, civil peace and accord, preserving the historic unity of the state, proceeding from the commonly recognized principles of equality and self-determination of the peoples honoring the memory of our ancestors, who have passed on to us love of and respect for our homeland and faith in good and justice, reviving the sovereign statehood of Russia and asserting its immutable democratic foundations, striving to secure the wellbeing and prosperity of Russia and proceeding from a sense of responsibility for our homeland before the present and future generations, and being aware of ourselves as part of the world community, hereby approve the Constitution of the Russian Federation.
Two Years in the Making:
A Constitution for Somalia

by Robin L. Gary

Editor’s note: This article reflects the author’s general recollections of her time spent working with the Joint Constitution Unit for the United Nations in Somalia on the Somali End of Transition & Constitution-Making process, 2010–2012. These reflections are not meant to be an official report of the details of the process nor represent any organization’s account of the process. Due to length restrictions, many details have been omitted in order to give a general overall picture of the process and the part that the author played in it. Political events that have occurred since 2012 are beyond the scope of this article. The author is available for further discussion.

In August 2012, after decades of warfare and transition, Somalia took a giant step toward peace, security, and progress. Hope returned to the shores of Somalia for the first time in over 20 years, and I was fortunate to have something to do with that.

This article attempts to provide general insight into what it was like to be a part of history in the making, painting a picture of my experiences in playing a pivotal role in developing the foundation and a framework to guide and empower a nation out of conflict and into peace. My hope is for this article to provide you a glimpse into my constitution-making career in Somalia, from the initial drafting stage, through public consultation, final drafting, to, finally, adoption.

Sometime in early May 2010, about three weeks after arriving home from my tenure working in Baghdad on the Iraqi constitution review process, I received an email that gave me chuckle:

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Discussion Questions

1. What were some of the challenges that the team faced in developing and implementing a constitution in Somalia? How did they address certain challenges? Were there challenges that simply could not be addressed?
2. What was the value of a constitution to the Somali people? Why might some people have been opposed to the idea of a constitutional government?
3. Do you think it was important to include public opinion in the constitution-making process? Why?
4. What kind of role did nongovernmental organizations, including the one for which the author worked, have in the constitution-making process in Somalia? How did this facilitate the constitution-making process? Limit it?

Suggested Resources


Want to learn more? Visit us at www.insightsmagazine.org.

"We need your help supporting the drafting of the Federal Constitution in Somalia."

Ha! A constitution in Somalia? Come on, really? Someone is clearly messing with me to see if I’d be crazy enough as to bite … well … I bit and it wasn’t a joke at all. Two and a half years later, Somalia had a new Federal Constitution and a permanent place in my heart.

The United Nations Development Program (UNDP) Somalia recruited me to be the constitution legal advisor on its Constitution-Making Project. The project would support the Independent Federal Constitution Commission of Somalia (IFCC) in its mandate to draft a new federal constitution. My role was to educate the commissioners on constitutional issues and provide them with examples of how other countries approach these issues, guiding them to the questions they needed to answer and helping to facilitate the Commissioners’ debates in their decisions regarding what was best for Somalia. While my role, at first, was very specific, as the constitutional process evolved so did my function. Through my tenure, I performed the duties of a technical advisor, political advisor, deputy head of the project, negotiator, facilitator, and logistical team leader, coordinating the adoption process. I was one of the few non-Somalis present from the start of the drafting of the constitution through its provisional adoption in 2012.

Drafting

On May 17, 2010, I arrived in Djibouti, a small, hot, dusty ocean-side city that was once a French colony. Today, Djibouti is home to many Somalis as well as the only official U.S. military base in sub-Saharan Africa. Some people tout Djibouti’s scuba diving; some call it the armpit of the world (thanks in large part to the 100 percent humidity at all times). Most say if you are not from Djibouti, there is no reason to ever go there. Yet I would stay there for the next three months, and I could hardly wait for what was to come.

The Kempinski hotel, my home in Djibouti, stuck out like a sore thumb, and we came to call it our golden prison. It reminded me of the new American Embassy in Baghdad (largest in the world), with its unnecessary grandeur and seclusion—so cut off from the rest of the city that it was rude. It was a sight for sore eyes after living in a container in Baghdad for years, but this was not what I expected Africa would be like.

Shortly after my arrival, I met the other members of the constitution-making team—all but one were men. They were all African men except for the head of the project, who was British, but had lived in Nairobi most of his life. The mandate of the project was to support the Independent Federal Constitution Commission of Somalia (IFCC) to draft a new federal constitution for the Republic of Somalia. The IFCC represented all the major clans and the spectrum of Somalis, including women. The Commission was comprised of 30 Somali commissioners with varied backgrounds: a few had legal backgrounds, some were formerly in the military, some were former government officials, and some were illiterate. Our task was overwhelming. We faced a tight deadline based on an international organization’s leadership wishing to leave a new constitution as their legacy. I shook my head in confusion and frustration at this point many times—Somalia had not had a constitution in over 20 years, but somehow they now needed one in two month’s time.

Unfortunately, this is the logic of such international organizations. I learned quickly to stop questioning the process. Navigating this logic and system made about as much sense to me as did the Somali language, but as they’ve come to say—“it’s the only organization we’ve got.”

The team started by educating the commission on all things constitutional: providing them with comparative
examples of how other countries approach different issues, what implications those choices had, or how various decisions could play out in the context of Somalia. There were committees and structures created within the IFCC to discuss all aspects of constitution drafting and to decide on the best ways forward for Somalia. These choices were then translated into constitutional language and formatted into a constitutional document. This is how the IFCC came up with the first draft of their new federal constitution.

This all took place in a hot, dusty, five-room villa intended to house a four-person family—we would meet at 8 a.m. and work until 5 p.m. with the commissioners. At five, our team would head back to our golden prison, the hotel, to polish up the decisions of the day into working documents for the commission to continue working on the following day. Once the work was done it was off to sleep, wake up, rinse and repeat for three months.

Public Consultation
By August 2010, the Consultative Draft Constitution for Somalia was printed and distributed to the Somali public for input. Seeking public feedback on draft constitutions is a trend in recent processes aimed at achieving inclusivity. It is an admirable concept, but, for various reasons, is quite difficult to implement. This phase proved to be extremely challenging in Somalia due to the lack of security and mobility coupled with the low literacy rate. The most effective means of outreach were through radio and television programs, broadcasting dramas involving constitutional issues, as well as debates and interviews on relevant subjects with recognizable Somali personalities. The IFCC also held town hall meetings with different groups. In addition to fostering inclusivity, the IFCC commissioners hoped that the public consultations would assist them in making various controversial decisions concerning constitutional provisions upon which they were still unable to agree. This period was meant to last for only a few months, but due to political events, this phase ended up lasting over a year.

When the public consultation phase was over (I hesitate to say it was “completed,” as they did not and could not reach every Somali, and in reality this consultation phase could continue forever), the IFCC reconvened to review the information gathered and draft the final document. Due to a lot of political intervention during this phase, it was a challenge for the commissioners to make final decisions. Eventually, they were deemed to be in a deadlock on many issues, and in reality the IFCC was declared “defunct.” A new institution, the Committee of Experts, was created and empowered to finish the draft. This led to competing constitutional drafts, which almost derailed the entire process. Eventually, the Traditional Elders were employed to oversee the process and were able to negotiate moving forward with the draft completed by the Committee of Experts.

In the end, issues remained that even the Committee of Experts could not sort out. The process, however, continued and it was determined that the next step would be to take the final draft of the constitution, complete with unanswered questions, to a National Constituent Assembly.

National Constituent Assembly
In March 2012, preparations began to convene a National Constituent Assembly (NCA), whose task it would be to provisionally adopt the constitution. Through various constitutional conventions, political consultations and agreements that our team helped to
broker in the 18 months leading to the assembly, it was agreed that the assembly would be limited to 1,000 persons who would meet in Mogadishu for one week to review the draft constitutional text. Following that, when the security of Somalia permitted, there would be a national public referendum to make the adoption final.

The challenge for our team at this time was to assist the Somalis in preparing a venue and managing logistics to accommodate the largest Constituent Assembly that had ever been held at that time, scheduled to sit in the most dangerous city in the world at that time, to contemplate a federal constitution that could create a democracy in Somalia. A democracy in Somalia might cause people in the West to chuckle. It is something that Somali pirates, warlords, and members of Al Shabaab (an extremist group with connections to Al Qaeda) are against. It is something that just a few years ago, most people, even Somalis and myself, thought was a pipe dream. Another overwhelming task was in front of us.

I accompanied the Deputy Special Representative of the Secretary General of the United Nations (DSRSG) 2 on a scoping mission in Mogadishu. Our objective was to visit possible venues to host the NCA. Until that trip, due to security issues, I had not seen much of Somalia. I had been to Somaliland and Garowe in the North and to the airport compound I had been to Somaliland and Garowe in the North and to the airport compound I had been to Somaliland and Garowe in the North and to the airport compound. This was one of the only times I had been to Somaliland and Garowe in the North and to the airport compound. I had not yet ventured into the “real Mog.”

As we listened to the unarmed UN security officers brief us on the safety precautions, I tried to stop my mind from comparing my current security to the private, armed, security I had been afforded in Baghdad. Despite the potential danger involved with this mission, the United Nations, as a humanitarian organization, does not arm officers. This was one of the only times I thought, maybe my Dad was right, maybe I am out of my d***** mind!

What am I doing?... My colleague fastened my body armor and helmet as I waited to board the African Union Casspir (basically tanks with windows). Sweat was pouring down my body, my face, my hands, and I wasn’t sure if this was due to the insufferable heat or my fear—I didn’t hear anything anyone was saying, I could only hear my thoughts racing back and forth. But I wanted to see Mogadishu more than anything. My craving to physically connect with this place for which I had been working for two years was palpable—I wanted to feel, taste, bond, and be a part of the heart of Somalia—up I went, into the casspir.

As the convoy rolled out of the compound and through the checkpoints, I was keenly aware of our vulnerability and imposing presence on the streets of Mogadishu. Not a building stood which wasn’t all but crumbled, not an empty space existed that wasn’t claimed by a family, their tarp hanging in the most creative manner and protected by several members of the family at all times. Men and boys filled the streets with machine guns flung over their shoulders. Through their veils, women’s eyes stared at us intensely watching every move we made. Whether this was out of curiosity or fear did not matter; we were affecting them in a way we would never understand. The sun shined brightly as children played soccer in the streets and men sat under trees chewing khat. The Indian Ocean waters glistened. Mogadishu was beautiful.

Over the next several months, I led the coordination between the UN, Somali officials, and the African Union troops to successfully transform the former police academy into a suitable venue for the NCA. This included facilitating everything from the preparation of the security systems and provisions, to travel logistics for the NCA delegates and international community, in addition to handling all operational concerns related to the upcoming event in Mogadishu.

In August 2012, the NCA provisionally adopted the new Federal Constitution of Somalia without complication, and I was there to witness it. I was the only American woman, and one of two Americans (not including any Somali Americans who may have been part of the NCA), privileged to be present. A few weeks later, a new Parliament was selected; shortly after that, the Parliament elected a new President, which was followed by the appointment of a new Prime Minister.

History was made, the foundation to lead Somalia out of conflict and to a lasting peace was laid, and the project’s mandate was fulfilled. Exhausted, exhilarated, and proud, I left Mogadishu not knowing what the future would bring to Somalia, or to me, but I left with certainty that I had been a part of something huge, something indescribable, something that helped bring hope to the people of Somalia.

1. I had recently arrived home after working for 30 months with the Iraqi Council of Representatives and the Chief Justice of the Iraqi Supreme Court in Baghdad. During my time in Iraq, I was focused on the constitutional review process and the development of essential implementing legislation. I worked for two nongovernmental organizations, the Institute for International Law & Human Rights (IILHR) & the Public International Law & Policy Group (PILPG). Each had received a grant from the United States Department of State to engage in this work. Most of my time over these years was spent going back and forth to the Iraqi parliament providing comparative legal, constitutional, and legislative avenues and ideas to help tackle various issues, as well as translating decisions made by various parliamentary committees into draft legislative text, which they could then shepherd through the parliamentary process.
2. The Deputy Special Representative of the Secretary-General (DSRSG) is appointed by the Secretary-General of the United Nations to serve under the direct supervision of the Special Representative of the Secretary-General (SRSG) as a key member of the mission’s Senior Management Team. The DSRSG is normally responsible for providing overall vision and leadership to the strategic planning and the implementation of work programs in coordination with partners and in accordance with the comparative advantages of the mission.
3. Political events that have occurred since 2012 are outside the scope of this article.
During the past twenty years alone, numerous countries have undertaken constitution-making processes of one sort or another, including “de novo,” “review and revision,” or transitional/provisional processes.

In some of these countries, constitution-making has taken or is planned to take place amidst violent conflict or its immediate aftermath, on the one hand, and a fragile, barely functioning state apparatus, on the other. Ills plaguing many of these countries include severe poverty, illiteracy, corruption, as well as lack of basic rights and freedoms. The list of problems facing these countries is daunting.

Constitution-making itself is multifaceted and complex. Constitution-making processes generally consist of civic education and public consultation, as well as political negotiations, technical decisions, drafting and ratification. I have observed in countries, specifically Afghanistan, Iraq, Somalia, and South Sudan, that constitution-making processes are normally bundled up with a number of accompanying, overarching tasks considered to be prerequisites for establishing democratic governance. These are usually:

- **Peace making**—ending the conflict through negotiated power sharing arrangements to be enshrined in the constitution;
- **State building**—ensuring that the constitution sets out a blueprint, for state building. Examples include the system of government, the allocation of functions across branches of government, and the empowerment of key state institutions to perform and deliver essential services;
- **Democratization**—ensuring that the constitutional process itself is inclusive and representative through consultation and participation in the ratification process is one aspect of this task; ensuring fair, credible, and legitimate electoral processes thereafter is another related aspect of this task. But beyond electoral events, a state’s capacity to ensure the realization and enjoyment of basic rights and freedoms by its citizens, as well as the achievement of human potential on an individual and collective scale, truly defines democracy.

Standing alone, each of these four tasks are daunting and extremely complex. They would be so even in the United States or most other stable, advanced democracies. But for countries mired in conflict and crippled by state failure, attempting all four tasks simultaneously, often with unrealistic time frames, is extremely challenging. We are seeing the mixed results of these efforts unfold in the countries mentioned.

Each of these four countries has achieved some measure of success, for instance, in actually drafting and adopting constitutions pursuant to reasonably inclusive and legitimate ratification processes (e.g., adoption by a constituent assembly or referendum). However, in terms of the quality of the constitutional texts and actual, successful implementation of constitutional mandates, these countries continue to struggle, if not fail. The same may be said for the other three bundled tasks of peace making, state building, and democratization.

Despite mixed and uneven results, constitution-making continues to be front and center in foreign aid driven interventions in conflict-affected and fragile states. Might it not be time for a critical evaluation of progress thus far in “policy priority” countries such as the four mentioned here? What questions should we be asking ourselves going forward so that constitution-making can truly become an effective development tool, based on lessons learned from historic and more recent experiences?

A central question is fairly self-evident. Should constitutions be forged during an ongoing violent conflict or even in the immediate aftermath of one? Is it realistic to think that constitutional arrangements designed to cease violent conflict now can be sustained over time?

Are we overburdening constitutional processes in conflict-affected and fragile states with unrealistic expectations? For instance, do constitutional processes effectively serve both peace-making and state-building purposes at once? Can they? Should they? Where constitutional processes have been successful, to what extent, and what lessons can
we extrapolate for application in other contexts in the future?

Does it work in practice over the long term to sacrifice technical quality and “implementability” to immediate political mandates? How can drafters reconcile the need for immediate political accommodation, particularly where the constitutional process is serving in part as a de facto peace process, with the need for implementable constitutional provisions necessary to longer term state-building and development goals?

These most basic questions are generally not addressed in scholarship and integrated into practice with any real rigor grounded in evidence derived from contemporary constitution-making.

These questions in turn raise concerns regarding how to measure results achieved—by which milestones, benchmarks, and indicators? For instance, do we measure success and efficacy by the degree of adherence to timeliness and the extent of post-adoption implementation of constitutional mandates? At what point in time or stage is evaluation meaningful if one accepts that each country is unique and it’s trajectory determined by discrete, historically and contextually bound factors?

Foreign donors and country nationals essentially attempt to engineer moments of political transition and development in war-torn countries premised on the historical pathways taken by older and more advanced constitutionalist democracies. Should we not be more rigorous about understanding the preconditions that might make such transitions possible in the first instance, and actually transformative in the second, given current or contemporary circumstances in conflict-affected and fragile states—including social, political, and economic conditions?

Does external intervention and assistance do more harm than good? What about national ownership of the process, the resulting text, and the resulting institutional reality?

External assistance inevitably involves numerous foreign experts, such as myself and other colleagues, descending en masse upon drafting bodies waving around copies of other constitutions as possible routes for drafters to follow. This in turn inevitably results in the “pick and choose, copy and paste” approach to drafting. We must ask ourselves, does this help or hurt countries attempting to solve intractable problems such as ethnic, political, or social conflict; civil war; and economic underdevelopment? Is too much emphasis placed on looking at what other countries have done? Or should drafters undertake rigorous examination and analysis of their own country’s unique history and circumstances in order to ascertain what arrangements might best suit it?

Would not evidence-based drafting methodology better connect public participation and consultation—deemed essential to ensuring inclusive, representative constitutional processes—to decision making and what ends up in the constitutional text? Data gathered during the public consultation phases of constitution-making is essential primary evidence. Is what the people actually say as important as the fact that they were asked to speak to the issues at all? Public participation is absolutely required, but we must ask ourselves if we are adequately paying attention to and utilizing the rich data gathered to design effective solutions to governance problems in fragile, conflict-affected countries.

The quality of the process is critical, yes, but what about the technical quality and sufficiency of the constitutional text itself? Constitutional design, as set forth in the text itself, is critical to the functioning of state institutions, governance, human rights, socio-economic regulation, and service provision, not to mention the legal system itself. Why then are technical problems in draft texts seemingly glossed over in favor of quick political fixes? How could constitution-making processes themselves be better designed to allow the time and space to reconcile this tension between technical rigor and political necessity or expediency?

The list of questions is potentially endless. These questions are ones I and other practitioners have been debating in the field, even as we forge ahead, often relentlessly pushing constitutional processes along to the next stage. But, as crisis after crisis deepens and new ones arise, it seems to me that a deep rethink is in order so that resources are utilized more effectively and the people of conflict-affected countries are better served by the international community and, in particular, their own leaders. A well-designed process and text can indeed be effective in legal and governance reform. It is precisely for this reason that we need to reevaluate and recalibrate our thinking and practices around constitution-making.

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Crowdsourcing Constitutions:
The Importance of Public Participation in Constitution-Making

by Joanne Wallis

Many state-building operations conducted since the end of the Cold War have had disappointing results. Afghanistan, Iraq, and parts of Asia, the Balkans, Africa, and the Pacific states have remained weak, or in some cases have lapsed into conflict again, as state institutions have struggled to achieve control over, or the loyalty of, their fragmented and divided societies. This raises the question: how can fragmented and divided societies that are not immediately compatible with centralized statehood best adjust to state structures?

The answer to this question rests in part on the role that public participation in constitution-making can play in state building. Constitution-making can play a central role in state building because constitutions create state institutions, provide a legal framework for the exercise of state power, define the political bond between the people, and establish the relationship between the people and their government. This suggests that the process of constitution-making should be viewed not only as a technical exercise conducted by constitutional lawyers, but also as an important political process.

Indeed, as the liberal principle of popular sovereignty holds that ultimate political authority resides in the political will or consent of the people, this implies that, at least in states that aspire to be liberal democracies, people should be given the opportunity to participate in making their state’s constitu-

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Crowdsourcing Constitution
Recent Examples

Libya
Agora Libya, an organization of young Libyans united in their commitment to Libya, democracy, and civic participation, has launched the Libyan Constitution Project. It is described as “an online town hall for Libyan citizens, civil society activists, and decision makers to crowdsourced ideas for the new Libyan constitution.” www.agoralibya.org

Iceland
Iceland made news when recent attempts to redraft its constitution relied heavily on social media, public input, and citizen-driven proceedings. In 2013, the country came close to passing into law, but ultimately did not, the world’s most inclusively and transparently written constitutional text. Iceland’s constitutional redrafting process included several nontraditional features. First, 950 Icelanders were selected to participate in a National Forum, where they were asked to list the rights that they would like to see included in redrafted constitution. Next, 25 people were selected from a pool that purposely excluded professional politicians. The committee then opened the process to the public via social media, including Facebook and Twitter. Approximately 3,600 comments flooded the committee, which then listed 360 suggestions for constitutional reform. Finally, a draft constitution was approved by voters during a referendum in 2012. The crowdsourced constitution stalled in the country’s legislature.

United Kingdom
The United Kingdom does not have a formal constitution, but is governed by a series of documents. The London School of Economics’ Institute of Political Affairs has launched Hacking the UK Constitution, which invites citizens to participate online in drafting a formal constitution. The top 20 contributors will be invited to a constitutional convention, and the draft constitution presented to Parliament in 2015. www.constitutionuk.com

The Social Contract
According to the liberal principle of popular sovereignty, the legitimacy of a government is drawn from the people’s consent, which they express by entering into the social contract. Early analyses of the social contract were concerned with the contract between the ruler and the ruled, although the feudal reality of the day meant that this contract was fictitious. In the early 16th century the concept of political community emerged, characterized as a partnership among individuals, created by a contract among them. This shifted the understanding of the social contract to one between individuals to create a political community that would establish rule. When accompanied by the emerging belief that all individuals are inherently free and equal, this gave rise to the idea that all legitimate rule is constituted by those who are to be ruled simultaneously agreeing to act in unity and be bound by that rule.

However, theorists continued to treat the social contract as a fiction because popular sovereignty was understood hypothetically. This was partly because the idea of “the people” was itself a fiction, since in reality the people are not a corporate body capable of speaking in one voice. To navigate past the impracticality of individuals governing themselves by themselves, theorists such as Jean-Jacques Rousseau conceived of the idea of the general will to identify what the people would want if they were acting reasonably. This was expanded by John Rawls in the 20th century to recognize that individuals may have conflicting—as well as common—interests. It was argued that individuals were only likely to enter into a social contract once they had agreed that they would each be offered the protection of basic principles of justice.

The Constitution as Social Contract
The social contract has been described by Martin Loughlin and Neil Walker as “an exercise of the imagination” and no political theorist claims it to be a historical event. Instead, liberal theorists often regard the constitution as its tangible manifestation, with Thomas Paine observing that: “The constitution of a country is not the act of its government, but of the people constituting its government.” This idea was relatively uncontroversial when applied to the early written constitutions adopted in Western states in the late 18th century. Influenced by Abbé de Sieyès, it was thought possible to identify the people’s hypothetical general will according to which they would exercise their popular sovereignty, or constituent power, to make a constitution. The constitution then codified the institutionalization of the people’s will in a government, converting their sovereign power into constituted power.

Constituent Process
When written constitutions were being made in relatively well-established Western states, it appeared relatively uncontroversial to argue that the people’s hypothetical general will could
be identified, even if it generally represented a convenient rhetorical device more than a reflection of actual societal harmony. However, the question of who “the people” are, and consequently what their general will would be, is much more difficult in the fragmented and divided societies that populate many new states which have emerged since the latter half of the 20th century.

In many new states the assumptions on which liberal democracy are based require us to rethink how that popular sovereignty is exercised. My book, *Constitution Making during State Building* (Cambridge University Press 2014), proposes the idea of a *constituent process*, whereby public participation in constitution-making provides fragmented and divided societies with the opportunity to resolve their grievances and agree upon common values and norms in order to generate a general will. Importantly, in fragmented or divided societies in which local sociopolitical practices and institutions remain highly legitimate and effective, public participation can also enhance the legitimacy and effectiveness of state institutions by encouraging the recognition of these practices and institutions and achieving syncretism between them and liberal ones.

Providing opportunities for people to elect a constituent assembly to draft and/or ratify the constitution, or to ratify the constitution at a referendum, are examples of public participation. The extensive participation involved in recent constitution-making processes has developed the idea beyond this. Participation now includes civic education, consultations with political parties, public debates and open meetings, written public submissions, and publicity in the media.

There are five key ways in which public participation in constitution-making can play a positive role in state building.

First, public participation can have positive effects on the constitution-making process. It can improve the accountability of constitution-makers if participants are given opportunities to challenge them and can broaden their minds by exposing them to more information and ideas. There is also evidence that the public wants to participate and will enthusiastically take up the opportunity. Indeed, the growing number of participatory constitution-making processes has created a demonstrational effect, whereby there is an emerging expectation that future processes will involve a degree of participation. However, participation must be perceived to be genuine and not just cosmetic.

Second, public participation may assist nation building, which can motivate people in fragmented or divided postconflict societies to feel sufficient unity to develop the kind of long-term political solidarity that can create a political community capable of sharing a general will and exercising constituent power. Public participation can achieve this by requiring people to provide reasons for their proposals and to negotiate issues of mutual concern. This may result in them agreeing to common societal values, aspirations, and shared symbols that may produce sufficient solidarity to unify a political
discussion questions

1. What do you think is the role of public opinion or input in shaping a nation’s constitution?
2. What are some examples of public participation in the constitution-making process? How might modern technology change the methods and role of public participation?
3. What is meant by “popular sovereignty”? In what ways do you think people "consent" to government, if at all?
4. How might a constitution unify an otherwise fragmented society?

suggested resources


community, particularly if these values, aspirations, and symbols resonate widely. Constitutions can also play a role in recognizing and organizing the popular sovereignty of the people, establishing binding, reciprocal relationships between them, and serving as an expression of their self-determination. However, when there is insufficient participation, these efforts can entrench a potentially divisive, exclusionary, and destabilizing view of the state and its people’s identity, as occurred in Iraq.

Third, if it provides a forum in which grievances can be addressed without resorting to violence, public participation can encourage parties to a conflict to mediate their differences, refine their aspirations, and compromise. This may encourage reconciliation, and constitution-making has increasingly been utilized in conflict resolution. Reconciliation can also be facilitated if constitution-making is accompanied by a combination of international or domestic criminal trials, truth commissions, reparations, rehabilitation, and indigenous peace initiatives. At the same time, constitution-making can prolong or restart a conflict if it perpetuates the political dynamics that gave rise to the conflict, or fails to achieve genuine consensus.

Fourth, if public participation involves the distribution of information and the provision of education it can play a role in what James Tully has described as “citizenization,” whereby individuals become citizens who are educated about their rights and responsibilities, become interested in government, and seek future opportunities for political participation. It may also help to inculcate an ethos of constitutionalism, whereby the people see the constitution, and the state institutions and legal system that it creates, as legitimate and worthy of their respect. An ethos of constitutionalism may also encourage citizens to channel their grievances through state institutions rather than to resort to open conflict. It may also inspire the emergence of an active public sphere in which the media and civil society empower citizens to engage in political participation.

Fifth, public participation can affect the contents of the constitution so that it reflects the culture, history, and knowledge of the people. The resulting state institutions may therefore reflect social forces and interests. While there is room for scepticism concerning how many public submissions are incorporated into final constitutions, examples from the Asia-Pacific demonstrate that participation can result in constitutions that recognize local sociopolitical practices, institutions, and customary law, as people exercise their constituent power to create institutions that reflect their society. The literature is also optimistic that participation will see the constitution include more provisions to protect human rights, although scepticism has been expressed about this outcome.

Case Studies

The research described in my book uses case studies of Timor-Leste and Bougainville (an autonomous region of Papua New Guinea) to examine the role that public participation has played during state building and the consequences it has had for the performance of the state. I have found that extensive public participation in constitution-making in Bougainville generated a constituent process that built a relatively strong political community by creating a sense of common identity and by reconciling the most severe divisions between societal groups. In contrast, there was minimal public participation in Timor-Leste, which did not generate a constituent process and consequently did not create a unified political community, and certain societal divisions remain unreconciled, while others have become salient. The constituent process generated in Bougainville also produced a constitution and state institutions that make sense to Bougainvilleans, as it recognized local customary sociopolitical practices. In contrast, the Timor-Leste process produced a constitution and state institutions that did not recognize the local practices that regulated most Timorese people’s lives, which has challenged their legitimacy. The experiences of Timor-Leste and Bougainville as new, postconflict states are not unique and provide lessons for future constitution-making and state-building processes.

Conclusion

Inviting the people to participate in constitution-making reflects the original
Learning Gateways

Will the Revolution Happen on Facebook?

In this activity, students analyze a political cartoon and text and discuss how social media has been, and might be used to effect political change.

Materials:

• “Platforms of Mideast Power” political cartoon
• Excerpt from “Small Change,” by Malcolm Gladwell

Procedure

1. Distribute copies of, or project, the cartoon to students. Note: Handout and presentation-ready copies of the cartoon are available for free download at www.insightsmagazine.org. Ask students to discuss what they see in the cartoon. Students might observe the city on the left, and what appears to be a dictator shouting from a tower, with the note “then.” On the right, students might observe the “facebook” text enlarged to mimic the city on the left, with the note “now.” Students might also observe the cartoon heading, “Platforms of Mideast Power.”

2. Ask students to discuss the cartoon:

• What messages about power do you think the cartoonist is sending on the left of the cartoon? On the right? How are they different?
• What do you think the cartoonist is saying about the power of Facebook, or social media? Do you agree or disagree with what the cartoonist is saying?
• What sort of “power” do you think the cartoonist is referring to in the heading of the cartoon? How might social media affect such power?
• Can you think of examples in which Facebook, Twitter, and other social media outlets have played a role in political activism?

3. Distribute copies of, or project, the excerpt from “Small Change,” by Malcolm Gladwell:

The world, we are told, is in the midst of a revolution. The new tools of social media have reinvented social activism. With Facebook and Twitter and the like, the traditional relationship between political authority and popular will has been upended, making it easier for the powerless to collaborate, coordinate, and give voice to their concerns. …


4. Ask students to discuss the excerpt:

• What is the author saying about the role of social media in political activism?
• How is this author’s message different from that of the cartoonist’s?
• Do you agree or disagree with the author?

5. To conclude the activity, ask students to discuss what kinds of benefits, and limitations, social media might offer to political activists.

intent of the principle of popular sovereignty, by recognizing that the state cannot be legitimate without the voices of its entire people being involved in a discussion about its purpose. If the people are given the opportunity to exercise their popular sovereignty through a constituent process, this can deimperialize constitution-making by engaging with the local voices, which are supposed to be part of the social contract upon which the liberal state is built. This approach reinserts popular sovereignty into state building by arguing that it should take account of, and engage with, local voices and differences by encouraging the local population to participate in the design of their state. Therefore, crowdsourcing constitutions in fragmented or divided new or postconflict states might generate positive effects for state building and the longer term performance of the state.
Constitutional Victories for Tunisian Women

Q: To what extent were you involved in drafting the new Tunisian constitution?

I was involved in the process of drafting the new Tunisian constitution by working with participating NGOs in Tunisia, including the Tunisian Association of Women Lawyers. We focused our efforts on promoting women’s rights by organizing round table discussions on specific articles or themes within the constitution to discuss them from a legal point of view. Our main goal was not only to ensure that the new constitution did not contradict the original intent of Tunisia’s 1956 Code of Personal Status—which abolished polygamy, set an age minimum for marriage, and granted the right to divorce—but also to further women’s rights by introducing terminology in the constitution that would ensure equal rights to both genders. For example, we worked hard to oppose the theological concept of female complementarity to males and promoted the principle of equality, which is now in effect in our new constitution.

During this process, I also conducted comparative research on the constitutions of other Arab countries, as well as European constitutions. I also connected with local NGOs for their feedback in order to ensure that the constitution was relatable to all citizens, including those who had no legal background.

Q: What are the most significant elements of reform in the new Tunisian constitution?

There are numerous innovative articles in the new constitution, such as Article 2, which defines Tunisia as a civil state based on citizenship, the will of the people, and the supremacy of law. This article did not exist in the previous constitution and is vital for the establishment of Tunisia as a civil, secular society.

Articles 21 and 46 call for equality between men and women. Article 21 explicitly declares male and female citizens to be equal in rights and duties before the law. The specific use of terms “male” and “female” did not exist in the old constitution, which became necessary to reduce the ambiguities that previously favored men over women. Article 46 strengthens and guarantees the presence of women in elected assemblies, as well as ensures the protection of women against the scourge of violence. These constitutional rights now enable us to consolidate and enforce a framework of law on violence against women and equal treatment of women.

Q: Was there any opposition to the new constitution’s inclusion of gender equality?

Initially, yes. There were objections to the terms of equality between men and women and the principle of the universality of human rights in general. This opposition mainly came from the Islamist Ennahda party. They specifically opposed the principle of equality between genders and proposed the concept of complementarity, per their interpretation of Sharia law. This concept does not recognize women as individuals, but rather as a collective entity within the family or as an extension of the husband. This would have been seriously detrimental to single mothers and single women in general, and thus it was revoked from the draft after protests from both committee members and the general public.

Q: Tunisia is often referred to as the only Arab country to succeed in implementing meaningful reform after the Arab Spring. Do you think that the new constitution is one of these reforms that sets Tunisia apart from its counterparts in the region?

In my opinion, Tunisia is ahead of other Arab Muslim countries in terms of the advancement of family law. The Moroccan constitution is also worth mentioning, as a referendum on constitutional reforms was held in Morocco in 2011, resulting in the adoption of a new Moroccan constitution. However, Tunisia remains the only Arab country to adopt the reforms I mentioned above, namely those concerning women’s rights.
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Find links to sites that allow you to view and compare constitutions from around the world, side by side.

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October 29–30, 2015, National Law-Related Education Conference, Philadelphia, PA
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On the eve of the 50th anniversary of *Miranda v. Arizona*, arguably the most well-recognized Supreme Court decision of all time, *Insights* takes a look at the criminal justice system and the ways in which the procedural protections guaranteed by the U.S. Constitution safeguard the liberty of all citizens.