



SECURING HUMAN RIGHTS IN THE NEW LIBYAN CONSTITUTION

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The National Council for Civil Liberties & Human Rights, Libya's human-rights council, and Democracy Reporting International co-hosted an event with 30 Libyan activists, lawyers and constitutional experts. Members of the constitution-drafting committee were invited but cancelled due to unexpected meetings in Al Bayda. Professor Tom Ginsburg of the University of Chicago provided an introduction. The following is a summary.

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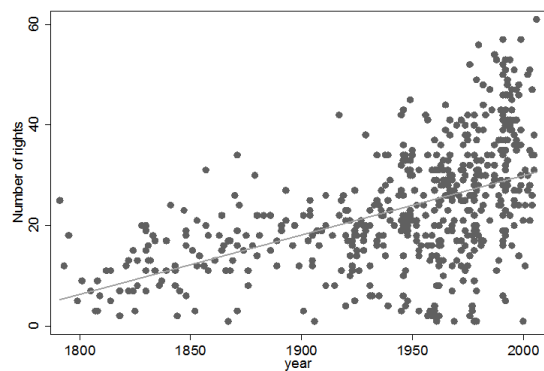
PRINCIPLES GOVERNING HUMAN RIGHTS IN THE CONSTITUTION

The purpose of the event was to help Libyan activists think about constitutional rights not just as words on paper, but to think about the institutions that can ensure that rights are protected. Ginsburg described constitutions as a kind of technology: that their primary function is to set up institutions of government. Human rights are an important part of that institutional arrangement. But ultimately constitutions are just words on paper; people must make them a reality.

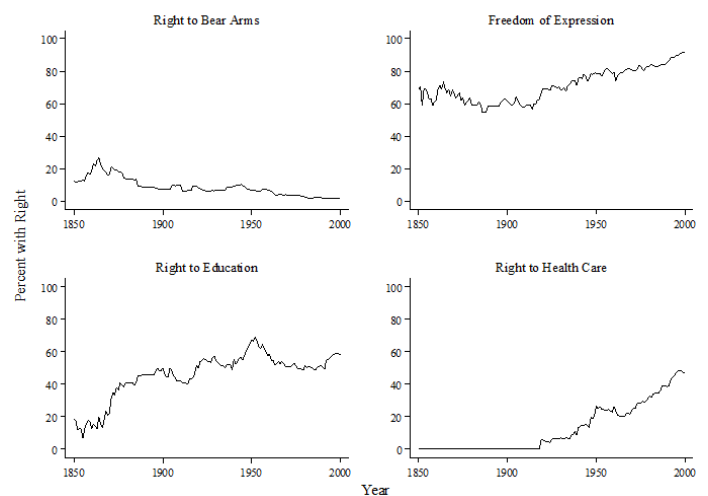
Ginsburg said that there is a misconception that human rights are simple, but nothing could be further from the truth. Rights often conflict with each other. Rights can be categorised in different ways, and it is not clear which types to include. There is also a paradox in rights protection: governments exist to protect rights, but a strong government can also abuse rights. Protection versus abuse of rights is a central challenge of constitutional design. The choice about which rights to include in the constitution is a statement about the values of Libyans, which should be presented for both a Libyan and an international audience.

Rights

Number of rights provided in national constitutions, by year (n = 680 constitutions)



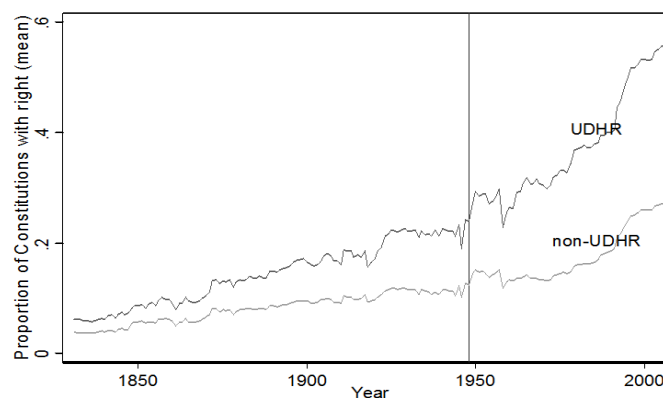
Slide 1



Slide 2

Constitutions have included more and more rights over time, and certain rights more than others (see slides 1 and 2). The Universal Declaration of Human Rights had a major impact on moving towards a consensus on rights to be included (see slide 3). The Libyan constitution of 1951 was a good example and one of the more progressive of its era in terms of rights protections (see slide 4).

Popularity of UDHR rights and non-UDHR rights in National Constitutions, by year



Slide 3

Libya's Rights Tradition

Description	Libya 1951	Global % with Right in 2010	Description	Libya 1951	Global % with Right in 2010
General guarantee of equality	X	97.4	Prohibition of slavery	X	66.1
Freedom of expression	X	93.7	Protection from expropriation		65.6
Freedom of assembly	X	92.6	Right to public trial	X	65.6
Freedom of association	X	92.6	Principle of 'no punishment without law'	X	65.1
Freedom of religion	X	91.5	Right to free education		64.6
Right to own property	X	86.2	Equality regardless of religion	X	64.0
Freedom of movement	X	85.2	Freedom of the press		63.5
Right to privacy	X	85.2	State duty to protect culture		63.5
Equality regardless of gender	X	83.6	Universal suffrage		62.4
Freedom of opinion	X	81.0	Support for the disabled		61.9
Punishment from ex post facto laws prohibited	X	80.4	Regulation of evidence collection	X	60.3
Prohibition of cruel or degrading treatment	X	77.2	Right to health care		59.8
Protection from unjustified restraint	X	76.2	Support for the elderly		59.3
Right to life		75.7	Right to form political parties		57.7
Prohibition of torture	X	75.1	Right of petition	X	55.6
Equality regardless of race	X	74.1	Right to choose one's occupation		54.5
Presumption of innocence in trials	X	74.1	Equality regardless of country of origin		52.4
Right to counsel	X	74.1	Prohibition of double jeopardy		50.8
Right to join trade unions		74.1	Protection from self-incrimination		50.8
Right to human dignity		72.5	Right of government to deport citizens		50.3
Right to the environment		66.7	Right to appeal judicial decisions	X	50.3
			Right to fair trial		50.3

Slide 4

Ginsburg outlined several questions that should be considered in designing the rights and freedoms chapter.

- Which rights are enforceable in court, and which are not? The Tunisian constitution includes a right to a clean environment, but it is not clear under what conditions a citizen can sue the state under this right. The Indian constitution includes “directive principles” that were meant to set state policy in the years after independence, but the constitution is clear that they cannot be enforced in court.
- Are rights applied vertically or horizontally? A vertical relationship is between state and citizen, while a horizontal relationship is between citizens. The Kenyan constitution includes an explicit reference to horizontal rights in stating that no citizen can be denied employment (by a firm) on the basis of gender or other status. In other countries, courts have developed answers to this question.
- How detailed should rights provisions be? Some detail is left to ordinary law. Furthermore, constitutions should state that just because a right is not protected in the constitution does not mean that it cannot be protected in law, as in the American constitution, especially since ideas about rights change over time.
- How can rights be limited lawfully, and which rights are inviolable? Most rights can be limited in some circumstances; the freedom of speech, for example, does not usually cover slander. International law provides some guidance on rights limitations.¹ Inviolable rights often include freedom from slavery and torture, and access to a fair trial.
- How are rights treated under states of emergency? Dictators might declare a state of emergency and fail to protect rights. The Siracusa Principles are helpful in limiting executive power during a state of emergency.²
- What is the interaction between international and domestic human-rights law? What will be the position of international law in the Libyan constitution: superior, equal or inferior to Libyan constitutional law? How can a constitution ensure that international obligations are honoured in the future? Can judges apply international human-rights law?
- What are Libyan national values, and how can they be interpreted to advance human rights? Many constitutions include a statement of national values in the first two or three articles of the constitution, which can be interpreted to advance human dignity and the rule of law.

¹ See “Lawful Restrictions on Civil and Political Rights,” Democracy Reporting International, Democracy Reporting International, available at http://www.democracy-reporting.org/files/dri-ly-bp-lawful_restrictions_10102012-2.pdf.

² See “Preventing Dictatorship: Constitutional Safeguards against Antidemocratic Consolidations of Power,” Democracy Reporting International, available at http://www.democracy-reporting.org/files/bp_29_safeguards_1.pdf.

INTERNATIONAL LAW, THE 1951 CONSTITUTION AND THE ORIGIN OF HUMAN RIGHTS

One participant, a lawyer, said that constitution makers should consider those rights that were violated under the former regime in determining which should be protected in the new constitution. Ambassador Christian Much of Germany concurred. He said that the German constitution would not be what it is today if it were not born from the legacy of dictatorship. He said the constitution was also inspired by international obligations, and that it declares certain rights protections unamendable. Further, he noted that the German constitution contains a right to resist unjust authority.

Juma Atigha, a lawyer and former first vice president of the General National Congress, asked Ginsburg whether constitutions should refer to the relationship between international and domestic law, or whether they should ban domestic law that interferes with international law. Ginsburg said that there has been a trend in constitutions to include a binding reference to international law. Another lawyer agreed and said that international law is important as a source of inspiration for the constitution. Libya has a weak legal system and can derive credibility from references to international law.

One lawyer said that all international law should be included in domestic law. He said that, in court, he had used arguments based on treaties that Libya had signed but the judge said those obligations were not binding. He said that the constitution should change this practice since international law would bolster the Libyan legal system.

Atigha described the history of the UN in supporting Libya's constitution-making process in 1951. Libya's committee of sixty members was supported by the UN envoy, and by six foreign experts from the Arab world and beyond. The committee was inspired by new international documents, including the Universal Declaration of Human Rights, and other federal constitutions. The 1951 Constitution was one of the most progressive of the era, and Ginsburg noted that it contained more rights than the average document even today. A lawyer from Misurata agreed that Libya should be held accountable to its international obligations. Atigha went on to say that the 1951 constitution was problematic because it entrenched a dynastic order, and called for a constitutional monarchy. Furthermore, the federal arrangement it came up with did not work. He said that Libyans have an opportunity to write a modern constitution. The 1951 constitution should be a reference point because it was progressive, but Libyans need to start anew.³

Ginsburg said that sometimes after revolutions constitution makers decide to start completely fresh; a legal ground zero. Other times, constitution makers try to preserve legal continuity. Many Libyans seem to be trying to restore the broken chain from the time of the king to the present, which was interrupted by the former regime. Japan placed a lot of emphasis on legal continuity after World War II: the current Japanese constitution is really an amended version of the 1884 document. The German constitution attempted a clean break with Hitler and adopted customary international law as an insurance policy against a return to authoritarianism.

Suliman Ibrahim, dean of the Faculty of Law at the University of Benghazi, warned against exaggerating the differences between human rights and local traditions. Human rights do not come from the West; they are more fundamental than that. And indeed, in the Libyan context, Islam contains a long tradition of protecting human rights.⁴

THE ROLE OF THE INTERNATIONAL COMMUNITY

Many resources are available to Libyan constitution makers and activists. International NGOs have published documents on relevant topics, the UN has seconded experts to Libya and authoritative organizations like the Venice Commission can give targeted advice. Ginsburg noted that in most cases, constitution makers have never done it before

³ See "Assessment of the 1951 Constitution of Libya according to International Standards," Democracy Reporting International, available at http://www.democracy-reporting.org/files/dri-ly-bp28-1951_libya_constitution.pdf.

⁴ See "Conference Report: Democracy Standards in an Islamic Context," Democracy Reporting International and the Libya Centre for Strategic and Future Studies, available at http://www.democracy-reporting.org/files/islam_conference_report_en.pdf.

and likely never will again; it is natural to look for comparative examples to guide the constitution-making process. Libyans should not copy others exactly, but should look elsewhere for inspiration.

Prime Minister Ahmed Maiteeg asked to what extent the Libyan constitution-making process should be open to international organizations. Ginsburg described constitution making as a transnational act: it is watched and assisted by the international community. Most Egyptian constitution makers were not interested in the views of others. Tunisians, by contrast, were very open to international assistance. The Tunisian process was 100 per cent Tunisian, but it was open to more views — and was better as a result. The Kenyan constitution committee had three foreigners and six Kenyans. The UN will coordinate international assistance to the constitution-making process, but Libyans must also have a coordinated way of receiving it. International expertise cannot be received passively; Libyans need to know the arguments and make choices based on what fits.

BUILDING A CULTURE OF HUMAN RIGHTS

Atigha said that Libyans know the word constitution but that they do not know what it means. Libya needs to build a constitutional mentality. Constitutions reflect national and humanitarian values.

One lawyer reiterated that human rights represent a culture, a behaviour. Human rights must be reflected in the daily practice of citizens, officials and police officers. Libyans need education and capacity building, especially civil-society organizations. Civil society plays a key role to play in spreading and disseminating the concept of human rights. Another lawyer mentioned the importance of education and said that children do not yet know “the vocabulary of human rights.”

Professor Sadiq Misurati agreed and mentioned the role of the media in disseminating the culture of human rights. He criticized the media for not speaking with expertise on human rights. He called on activists and the political elite to be more engaged with the media, both to train media professionals and to educate the population. “We have to remove the illiteracy of human rights and expand the number of people who know about human rights,” he said. He also mentioned the importance of reconciliation and transitional justice as a method of lowering the barriers to creating a culture of human rights.

THE PROCESS OF CONSTITUTION MAKING

One lawyer noted the success of the Tunisian process and asked Ginsburg’s opinion on Egypt’s experience with constitution making. Ginsburg identified a failure of process and of substance. His research has shown that the constitutions that last a long time and are successful are inclusive; that they bring together major forces of society.⁵ Ginsburg criticized the Egyptian process for never making clear what the process would be, or how it would guarantee inclusion. Morsi pushed through a constitution that was a compromise between him and the military, but it left out the liberals. There was never a general discussion. The process took a narrow view of who should have a voice in society. Political groups need to get enough of what they want in order to have a stake in the outcome, even if no group gets everything it wants.

Ginsburg asked about mechanisms for including groups that do not participate formally in the process. He said that constitution making should be open to public participation. He criticized the Egyptian process for excluding liberals, Christians and *shi’a*. But what if groups boycott the process? Certainly one group cannot block the whole country; that would be blackmail, known in contract theory as the holdup problem. All necessary players must be brought to the table, but if an important group will not join, the process must continue without them. Smaller groups might be compelled to join the final deal when it is shown that the system that exists is better than going alone. Rhode Island, for example, did not send delegates to the American constitutional convention but joined later when daunted by the prospect of standing alone.

⁵ See Zachary Elkins, Tom Ginsburg, and James Melton, *The Endurance of National Constitutions* (Cambridge, 2009).

Ibrahim argued that public participation in constitution making is an effective way of building a culture of human rights. Libyans should be engaged in discussing which rights should be included in the constitution and how they should be protected. The problem, he said, is that the constitutional committee was elected only by a minority of Libyans due to low turnout. The broader population, including the elites participating in the present discussion, must work to persuade Libyans that the constitution-making process is legitimate. He criticized the short timeline of three months that the constitutional committee has to work, arguing that the South African process took years. He mentioned the challenge of transitional justice, which he said should be included in the constitutional framework, but is too important to fit into a three-month timeframe.

IMPLEMENTING HUMAN RIGHTS

Ginsburg has classified countries according to *de jure* rights protections (whether rights are protected in constitutions) and *de facto* rights protections (whether rights are protected in fact, according to rankings by Freedom House). In slide 5, the upper left quadrant are generally established democracies that protect a lot of rights in practice but have constitutions that were written before broad rights protections were common to include (Australia, France, Norway). In the upper right quadrant are generally newer democracies that promise broad rights protections and deliver on those promises (Portugal, Slovakia, Slovenia). In the lower left quadrant are countries that promise few rights and also do not protect rights; Libya under Qaddafi fell into this category. The bottom right includes countries where the broad rights protections in the constitution are a farce (Uzbekistan, Eritrea). Ginsburg encouraged Libyans to think about how to avoid falling in the lower right quadrant.

Misurati, in a presented paper, identified the interrelationship between rights: the right to vote means little if candidates are not granted the right to free speech or to form political parties, for example. All rights are linked together. Just including them is a theoretical victory; then they need to be applied. Courts and other institutions must have the authority to implement texts of laws. Systems must be set up to oversee the performance of state institutions, and to create a legal order that can establish the rule of law and counteract armed groups. He said that this is relevant even today as some armed groups are violating the basic rights of Libyans through torture and illegal detention. The constitution must be in harmony with the international community when it comes to human rights. The constitution should form the basis of a human-rights culture, which is built through education.

Ginsburg mentioned the American example, where James Madison, chief architect of the constitution, thought that rights protections did not belong in the constitution at all. After all, Madison argued, rights are just words on paper; the state should protect rights, and the constitution should set up institutions that work. The states demanded that rights be protected, so ten were added as the first amendments to the U.S. constitution. But Madison's point remains: that the structure of government is perhaps more important to the protection of rights than simply listing them.

In this way, courts play an essential function in protecting constitutional rights. Constitutions should determine whether all courts should have jurisdiction over the constitution, or whether only a specific court has the authority to rule on the constitutionality of laws and executive actions. A special court is perhaps better suited to civil-law systems like Libya. In that case, the constitution should make provisions for a new constitutional court to, among other tasks, protect the rights enshrined in the constitution and guarantee citizens' access to justice.⁶

Ginsburg highlighted the need for protecting judicial independence, especially through the appointment and removal of judges. But there is also a need for judicial accountability. Research shows that it is particularly important to protect the judicial appointment and the removal process from political interference.⁷

Ginsburg also mentioned other constitutional bodies that protect rights, such as human-rights commission and ombudspersons. The office of an ombudsperson or public advocate would not require legal standing for a person to

⁶ See "Constitutional Review in New Democracies," Democracy Reporting International and the Center for Constitutional Transitions, available at http://www.democracy-reporting.org/files/dri-bp-40_en_constitutional_review_in_new_democracies_2013-09.pdf; "Constitutional Courts after the Arab Spring," Center for Constitutional Transitions and International IDEA.

⁷ See "International Standards for the Independence of the Judiciary," Democracy Reporting International and the Center for Constitutional Transitions, available at http://www.democracy-reporting.org/files/dri-bp-41_en_international_standards_for_the_independence_of_the_judiciary_2013-09.pdf.

bring a complaint; it could also investigate issues on its own initiative. The office would just receive a complaint about public policy. Human-rights commissions often hear complaints about human-rights abuses. Having multiple institutions to address human rights can back up the work of courts. Human-rights commissions can also produce reports for a domestic audience, submit reports to international bodies like the UN Human Rights Committee as an independent voice, and in some cases help defend rights by bringing cases to court. One lawyer agreed with the idea of backing up courts in defending human rights. She said that the judicial system should be the last resort, and that other institutions should be more proactive in preventing and seeking justice for human-rights abuses. The National Council can play this role, and it should be enshrined in the constitution.

Ginsburg concluded that most people interact with government for small things, like administrative actions. Constitutions should also guarantee fair administrative treatment as a general duty, and as a question of equity. These principles can be more important than the more prominent traditional rights.

THE LIBYAN JUDICIARY

Misurati highlight the important role of the judiciary in protecting human rights and wondered whether the Libyan judiciary is up to the task. He questioned the judiciary's quality and independence, and wondered how to improve both. He said that Libyan judges have a lack of legal knowledge due to a lack of education. A lawyer said that the judiciary is not able to play its role in an appropriate way. She noted the problem of militant militias trying to influence judges by breaking into courts and threatening judges personally, at times assassinating them.

Ginsburg noted the problem of transforming judiciaries. He mentioned two problems: cleaning the judiciary of the very bad people while preserving some expertise, and ensuring judicial independence and accountability moving forward. He said that judicial lustration is a very sensitive issue. Kenya vetted judges through interviews with every single judge, asking simply, "Is the judge fit to serve the country going forward in the new regime?" A committee of Kenyans and foreigners assessed the answers, in either public or private sessions according to the will of the judge. Only a dozen were lustrated, but the Kenyan judiciary was changed due to the new orientation of service embodied by the lustration process and the new constitution.

Moving forward, and assuming a clean judiciary, comes the problem of judicial independence. With no independence, there is no accountability. Many constitutions create a judicial council with judges and non-judges so that it is not dominated by one group. The public is involved so there is transparency. Other constitutions set up a judicial training institute.

PROMOTING PUBLIC PARTICIPATION THROUGH THE CONSTITUTION

Rihab Elhaj, president of the New Libya Foundation, hoped that the new constitution would protect the freedom of speech and expression in order to promote public participation. She said that Libyan politics are patriarchal and patrimonial; political processes are not accountable, participatory, or transparent. Officials are elected fairly, but when they are in office, they do not act democratically. She asked, "How are principles of representation included in constitutions?"

Ginsburg said that democracy is not perfect anywhere. In the United States, he said, some rich people have captured the media. Around thirty countries have media commissions to promote professionalism, but that is not necessarily a perfect solution. The problem is found elsewhere. The challenge is to instill principles of representation in leadership. The logic of democracy is that elections are iterative, but that is not the case yet in Libya. It is difficult to discipline the people in power at the moment. Kenya had terrible politicians: they are some of the most corrupt and least accountable in the world. Today they are not great, but the new constitution included a whole chapter about the principles of leadership and integrity. The constitution included mechanisms for dealing with official corruption. The situation improved through instilling the right principles into the culture, which were put into practice in an iterative manner. But constitutions, in the end, are just one piece of the puzzle, and require on-going maintenance to succeed.

