

# Constitution-Making Bodies' Rules of Procedure *(Comparative Report)*

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## EXECUTIVE SUMMARY

As one of its first tasks, the soon-to-be elected Chilean Constitutional Convention will have to organise the manner in which it will discharge its mandate, i.e., drafting and approving a new constitutional text for the country. During its first sessions, the Convention will have to agree upon rules that will govern its internal structure, the process it will follow to create a constitutional draft, and the rules that will apply to the debate, deliberation and decision-making. The Convention will also have to decide how and to what extent it will involve the public in each of those steps.

All of these issues are commonly regulated in what is typically referred to as ‘rules of procedure’ or ‘standing orders’ of constitutional bodies. Comparative experience shows that these rules are drafted either prior to the establishment of the constitution-making body, by the legislation enabling the process or, as in the case of Chile, by the constitutional body itself. Given that the Chilean Convention has an established deadline within which to fulfil its mandate, promptly agreeing on rules of procedure will be essential for the success of the entire process.

In this context, looking at comparative experience in constitution-making becomes imperative, as the latter is a great source of good practices and ‘lessons-learned’, which may inform and enrich the Chilean constitution-building process. By examining six different constitution-making processes (Colombia (1990-1991), Iceland (2011), South Africa (1994-1996), Spain (1977-1978), Tunisia (2011-2013), and to a lesser extent, the Federal Republic of Germany (1948-1949), which is added in an annex to this paper, the present Comparative Report on Rules of Procedure describes and analyses how these countries structured and organised their distinctive constitutional bodies, how they designed the processes to both write and debate constitutional texts, solve deadlocks and stalemate situations, adopt decisions, and address questions of public participation.

Inter alia, the present Comparative Report found that, in general, constitutional bodies organised their functioning by creating thematic committees and sub-committees where more informal negotiations and discussions could take place. Further, technical committees were also established to assist the work of the political organs of the respective constitutional bodies. With respect to the process whereby a constitutional text was drafted and adopted, the experience of these countries demonstrates the importance of establishing clear timeframes throughout the course of the process, so that the constitution-making as a whole remains on track and thus achieves a successful outcome.

In relation to the drafting and assembling of a constitutional text, the countries studied showed that there is a tendency in constitution-making towards tasking numerous thematic committees with drafting portions of the constitutional text and one specific committee with harmonising and consolidating these drafts into a single text. Further, comparative experience suggests that there is a growing trend in constitution-making towards allowing external parties (such as the general public), to submit proposals to the constitutional body, even while the drafting is ongoing.

Finally, and most importantly, the experience of these six countries evidences that no constitution-making process is free from disagreement. As such, dissent and conflict are inherent parts of constitution-building. Against this background, the relevant question here is how constitutional bodies can solve conflicts with the view of ensuring

progress on substance. The countries analysed here illustrate that constitutional bodies may either formally incorporate deadlock-solving mechanisms in their rules of procedure, or contemplate broader forms of consensus-building in their decision-making. Either way, comparative experience shows that informal negotiations take place almost inevitably, despite the existence or not of such formal mechanisms. As such, the countries examined in this study prove that such informal instances play a relevant role in breaking deadlock or achieving consensus.

## 1. INTRODUCTION

The present Comparative Report addresses the issue of the rules of procedure governing the work of constitution-making bodies, independent of the modality used to create a new constitutional text. The relevance of this topic is that it is one of the first issues Chile's Constitutional Convention (which will be integrated by 155 members to be elected in May 2021, hereinafter the Convention) will have to address before dealing with the 'actual constitution-making'.

The constitutional reform that enabled the current constitution-making process in Chile, Law No 21200 of 24th December 2019, introduced amendments to the Chilean Constitution that touch upon the issue of rules of procedure (*reglamento*), yet the new articles do not address the matter comprehensively.<sup>1</sup> Article 133 of the Constitution, for instance, provides that the Convention will have the power to dictate its own rules of procedure, and that these should be approved by a quorum of two thirds of the delegates in office (*miembros en ejercicio*).<sup>2</sup> Aside from these two aspects, the Constitution does not address in detail the issue of how the rules of procedure will be agreed upon, nor the content of those rules (e.g., how the Convention will organise its work, whether it will work in committees, how voting will take place, etc.) All of these matters will have to be answered by the delegates during the first days after the establishment of the Convention. Given that the latter will have a tight timeframe to discharge its mandate, namely nine months that can be extended if necessary for another three months, the issue of the rules of procedure will have to be sorted out with expediency.

The objective of this Comparative Report is, therefore, to provide examples of other constitutional experiences and their take on the issue of rules of procedure. The idea is not only to highlight the positive aspects those comparative examples offer, but also to identify the challenges other countries faced when regulating their own functioning. The hope is that this comparative exercise will enrich the national debate on the matter.

The Report is divided into two main sections. The first section briefly describes the Chilean constitution-making process as regulated in the Constitution, in particular the aspects that deal with the internal organisation of the Convention, its voting rules, the authorities and bodies that are already provided for in the Constitution, and the relation the Convention will have with the other state powers while in session.

The second section of the report will focus on the comparative experience of five countries that underwent constitution-making processes in the last 50 years.<sup>3</sup> The countries selected are Colombia, Iceland, South Africa, Spain and Tunisia. The selection of these countries followed three criteria: the type of constitutional process and constitutional bodies these countries adopted (i.e., a process led by parliaments, or by specially created constitution-making bodies like in Chile); unique or creative features present in the constitution-making processes of these countries that have turned them into noteworthy case-studies; and similarities or links these countries share with Chile.

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<sup>1</sup> Law No 21200 of 24th December 2019, single Article No 3.

<sup>2</sup> Article 133 Chilean Constitution.

<sup>3</sup> One commentator has observed that the many constitutions put in place after the fall of the Berlin Wall 'generat[ed] a wealth of comparative constitutional experience' that is useful to consider when designing a constitution-making process. C Saunders, 'Constitution Making in the 21st Century' (2012) Melbourne Legal Studies Research Paper No 630.

With respect to the methodology of the analysis undertaken in section 2 of this report, special focus was given to the respective rules of procedure governing each of the five constitution-building processes, together with complementary laws or decrees regulating the processes. In addition, scholarly writings (both from nationals from the respective countries and international scholars) were consulted to complement our understanding of the respective rules of procedure and the context of each constitution-making process, as were reports of international organisations.

The paragraphs that follow briefly explain the reasons justifying the selection of each of these five countries and the individual processes through which they each undertook their constitutional reforms.

### *Contextualizing the Study*

Starting with Colombia, the inclusion of the country in the report was practically a must. Aside from the regional similarities and affinities, Colombia was specifically selected for this paper because the country, together with Chile, is one of the most economically prosperous and developed countries in South America.<sup>4</sup> Moreover, the countries have cultural and linguistic ties, and both have strongly entrenched democratic systems. In 2020, Colombia became a member of the Organisation for Economic Co-operation and Development (OECD), joining Chile and Mexico as Latin American member states.<sup>5</sup> The two countries similarly enjoy co-operation through various other regional and international organisations including the Pacific Alliance and the Organisation of American States.<sup>6</sup>

A study of the Colombian constitution-making process may offer useful lessons for Chile (see **Box no 1** below for details of the process). While the context which drove the decision to convene the Constituent Assembly differs greatly from the situation in which Chile finds itself, the fact that the process was initiated following citizen activism and then a formal plebiscite creates some parallels between the states. For instance, public participation was critical in the constitution-making process in Colombia and the practices invoked may be instructive for the Chilean Convention which will likely be similarly focused on this.

In terms of the working procedure of the Constitutional Convention, lessons may also be drawn from the Colombian experience. For example, the Colombian National Assembly (ANC) made provision for the inclusion of representatives of indigenous groups, women, guerrilla organisations in an attempt to ensure that the new constitutional text was an expression of the whole population's will.<sup>7</sup> This mirrors the situation in Chile where special measures have been taken to ensure the participation of women, indigenous groups and other marginalised persons in the constitution-making process. However, reconciling conflicting political opinions amongst Convention

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<sup>4</sup> UHY, 'The Andean Three: An Economic Powerhouse for Latin America' (2013) UHY <<https://www.uhy.com/the-andean-three-an-economic-powerhouse-for-latin-america/>> accessed on 3rd March 2021.

<sup>5</sup> See OECD news release 28th April 2020 <<http://www.oecd.org/newsroom/global-oecd-welcomes-colombia-as-its-37th-member.htm#:~:text=28%2F04%2F2020%20%2D%20Today,deposited%20its%20instrument%20of%20accession>> accessed on 3 March 2021.

<sup>6</sup> Australian Department of Foreign Affairs, 'Latin American and Caribbean Regional Organisations' <<https://www.dfat.gov.au/international-relations/regional-architecture/Pages/latin-american-regional-organisations>> accessed on 3rd March 2021.

<sup>7</sup> D Rampf and D Chavarro 'The 1991 Colombian Constituent Assembly: Turning Exclusion into Inclusion, or a Vain Endeavour?' (2014) Berghof Foundation IPS Paper No 1, 9.

members will likely be a significant challenge in Chile. Colombia faced similar difficulties and relied upon innovative consensus-building mechanisms, such as the sharing of important offices in the Assembly, including the latter's presidency and committee leadership, amongst representatives of both majority and minority parties within it.<sup>8</sup> Moreover, the fact that Colombia successfully redesigned its constitution in a short period of time – 150 days – may also be instructive for the Chilean Convention which will need to develop procedures that allow it to meet its tight drafting deadline.<sup>9</sup>

Finally, commentators have highlighted that while the Colombian constitution that was drafted during the reform process contains a number of progressive human rights protections, it did not establish sufficient institutional protections to practically enforce these rights.<sup>10</sup> The severe inequality that is still experienced in Colombia may be partly a result of this. As such, Chilean constitutional drafters considering ways to transform the social and economic circumstances through the protection of specific rights in the new constitutional text may want to consider the substantive shortfalls exhibited in the Colombian constitution to avoid them in their own work.

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<sup>8</sup> D Rampf and D Chavarro (n 7) 11.

<sup>9</sup> International IDEA, 'Constitution-building Processes in Latin America' (2018) International IDEA Discussion Paper /2018, 16.

<sup>10</sup> VF Clark 'What's Next for Chile on the Road To a New Constitution?' (2020) The Wire <<https://thewire.in/world/whats-next-for-chile-on-the-road-to-a-new-constitution>> accessed on 3rd March 2021.

### **Box no 1 Colombia**

Colombia's constitution-making process was ignited by swarming political and criminal violence perpetrated by drug cartels, paramilitary and guerrilla groups, which the state was unable to control. Ultimately, the conclusion of successful negotiations and a peace agreement between the government and the M-19 guerrilla group paved the way for the initiation of the country's constitution-making process that took place between 1990 and 1991 and led to the promulgation of a new constitution that replaced the state's 1886 Constitution. The 1886 Constitution, despite being amended on numerous occasions, lacked legitimacy in the eyes of many Colombians.

Calls for the establishment of a constituent assembly came to a head when a university student movement, during the 1990 Parliamentary elections, requested voters to include an additional ballot indicating their support for a constituent assembly (the '*séptima papeleta*'). Through this unofficial process, it was clear that there was popular support for the establishment of an assembly. Resultantly, the President decreed that when voters voted in the Presidential elections later that year, they would also be asked to vote on the establishment of a constitutional assembly (not a constituent assembly). In response to this ballot, approximately 86% of voters voted in favour of convening a constitutional assembly.

Following this, the newly elected President adopted a legislative decree, Decree No 1926, to establish and regulate the working of a constitutional assembly. This decree outlined various political agreements that had been reached between political parties regarding the organisation of the Constitutional Assembly; the matters/topics that this Assembly was to consider; the date by which the Assembly was to conclude its work; the decision-making rules to be applied and the procedures for popular consultation and election of the Assembly.

The constitutionality of Decree No 1926 was challenged at the Supreme Court of Justice. The Court held that the Decree aimed to secure the constitutional goal of peace and was, thus constitutional, despite the fact that it had relied on different procedures to reform the constitution, and not on those envisaged in the 1886 Constitution. However, The Court invalidated certain elements of the Decree, including the limitation of the Assembly's inquiry to only certain topics (the so-called '*temario*'), with the effect that in its first session, the 'Constitutional Assembly' changed its designation to that of 'Constituent Assembly' with the power to draft an entirely new constitution.

In the case of Iceland, the process that began in 2009 (see **Box no 2** below for a description of the context of this process) can also be explained by the tension between, on the one hand, the existing constitutional legal system and, on the other, the needs and demands of Icelandic society at the time. As in Chile, because social unrest drove the decision to initiate constitutional reform in Iceland, considerable efforts were put into ensuring that this process engaged the public to the greatest extent possible. The

innovative public participation methods relied upon in Iceland may be instructive when determining the way that rules of procedure can be used to foster public participation and transparency in the constitution-making process.

Further, in terms of subject matter, there are considerable parallels between Iceland and Chile. Among the issues that dominated the constitutional discourse in Iceland at the time were the need for a new constitutional text to change the country's economic order,<sup>11</sup> and the creation of special protections relating to the environment, including natural resources.<sup>12</sup> Both these topics have figured prominently in Chile's national constitutional debate.

### **Box no 2 Iceland**

Iceland gained its independence from Denmark in 1944 and adopted a provisional constitution which closely replicated Denmark's. It was understood that this text would be quickly revised to suit the newly independent nation's needs. In the decades that followed, the promise of revision did not come to fruition. However, in 2008, when the global financial crisis plunged Iceland into economic depression, public pressure to finally review the 1944 Constitution became overwhelming. The large-scale protests staged against political and economic elites demanded that a new constitutional order be established for Iceland. Responding to this pressure, the government resigned and in April 2009, new parliamentary elections were held. Two minority political parties formed a coalition, took control of Parliament and started the process of constitutional revision.

Iceland's 1944 Constitution was considered out of touch with modern society and as such, insufficiently representative of the social compact which existed amongst the population. Moreover, while the 1944 Constitution was amended in various ways over the years, these amendments were never understood to bring about the social and economic changes that many demanded be included in the constitutional order.

Still, despite the efforts to draft a new constitution, which ended in the production of draft constitutional text, the Icelandic process was unsuccessful, as parliament did not approve the new text.

South Africa and Chile share geopolitical parallels (see below **Box no 3** for a general description of the South African process). When South Africa undertook its democratic constitutional project, it was the richest and most developed state on the African continent. In the years immediately following the end of apartheid, the country became an entry point and frequent partner for foreign investors interested in Africa. Chile, while not sharing South Africa's history of racial segregation, occupied a similar economic

<sup>11</sup> M Bani 'Crowd-sourcing Democracy: The case of Icelandic Social Constitutionalism' (2012) SSRN Online Journal, 12 <[https://dl1.cuni.cz/pluginfile.php/424177/mod\\_resource/content/1/Bani%20Crowdsourcing\\_democracy\\_the\\_case\\_of\\_Icel%20%281%29.pdf](https://dl1.cuni.cz/pluginfile.php/424177/mod_resource/content/1/Bani%20Crowdsourcing_democracy_the_case_of_Icel%20%281%29.pdf)> accessed 4th March 2021.

<sup>12</sup> Article 3 of the Act on a Constitutional Assembly No 90/2010 <[http://www.thjodfundur2010.is/other\\_files/2010/doc/Act-on-a-Constitutional-Assembly.pdf](http://www.thjodfundur2010.is/other_files/2010/doc/Act-on-a-Constitutional-Assembly.pdf)> accessed 6th March 2021.

position in South America. However, despite the relative prosperity of both states, they continue to grapple with varying degrees of social inequality and the marginalisation of certain groups.

In South Africa, the drafting of the new constitutional text created an opportunity to address the social and economic conditions which underpinned this inequality. As such, the text included progressive provisions relating to justiciable socio-economic rights, minority representation and collective rights. These substantive issues may be of relevance to the debates ongoing with regard to the substance of the new Chilean constitution. In order to fully appreciate the debates around these substantive issues in South Africa, it is necessary to understand the procedures through which decisions were taken and drafting was performed.

South Africa's constitution created a break from the country's oppressive past and signified its commitment to democratic transformation. While Chile has celebrated the existence of democracy for many years, this new constitutional project is perceived by some as a similar opportunity to transform a legal framework that has its roots in the country's dictatorial past. In a state where nation-building and social transformation are priorities, South Africa's experiences may be relevant. This is because the process through which South Africa drafted its new constitutional text is often lauded as particularly transparent and inclusive.

### **Box no 3 South Africa**

As part of the negotiated transition which brought an end to decades of apartheid in South Africa, it was determined that a new constitution would be drafted for the country. The process that led to the adoption of this new constitution took place in two phases. First, closed-door negotiations between all political parties and interest groups holding political influence produced an Interim Constitution which paved the way for South Africa to hold its first democratic elections with universal adult suffrage, contained mechanisms for transitional governance, and created a Constitutional Assembly. The Interim Constitution was passed into law in 1993. Second, this Assembly -an elected, proportionally representative body- drafted and adopted the final constitutional text.

South Africa's first democratic elections were held on 24 April 1994, within the framework created by the Interim Constitution. The newly elected National Assembly and Senate, sitting together as the Constitutional Assembly, had two years to draft a constitutional text, substantively constrained by various Constitutional Principles contained in the Interim Constitution. Before this new text could come into force, the Constitutional Court, newly created by the Interim Constitution, had to certify that each provision of the text complied with the Constitutional Principles, and only upon such certification could the Constitution be finally promulgated, the Interim Constitution repealed, and the second stage of the constitutional transition brought to an end.

Regarding Spain, comparisons between the constitutional regimes of both countries are commonplace (see **Box no 4** below for a historical overview of the Spanish process). This is so for a number of reasons, including their historical colonial relationship which left cultural, religious and legal similarities between them. Significantly, scholars compare the staged political transition in Spain following the death of Franco, to Chile's post-Pinochet transition to democracy.<sup>13</sup> This is especially in terms of the way that the transition to democracy in both states displaced political structures but left economic policies in place.<sup>14</sup> Still, some comparative analysis argues that Spain's transition successfully brought about popular sovereignty and governmental legitimacy in a way that was not achieved in Chile.<sup>15</sup> Thus, it is important to bear in mind that despite parallels between the factual situations in the two states, their democracies developed along very different paths.

Further with respect to socio-economic development, both states are members of the OECD. Spain has been a member since 1961 and as such, had to consider the legal instruments and policy decisions of the Organisation both during its democratic transition and beyond.<sup>16</sup> Chile became a member of the OECD in 2010 and policies of the Organisation may be relevant to various aspects of the constitutional design process, including those relating to public governance, education, social and welfare issues and the environment.<sup>17</sup> The procedures applied by other OECD countries, particularly those that share additional parallels with Chile, such as Spain, may therefore be relevant to Chile in its reform process.

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<sup>13</sup> L Whitehead, 'Democratisation in Chile: Long-run and Comparative Perspective' (2019) in *Democracy Under Threat* (Stellenbosch University Transformation Research Unit) 178.

<sup>14</sup> V Navarro, 'What Happened in Chile: Parallels to Spain' (2013) PÚBLICO <<http://www.vnavarro.org/?p=9827&lang=en>> accessed on 5th March 2021.

<sup>15</sup> L Whitehead (n 13) 177.

<sup>16</sup> OECD website <<https://www.oecd.org/about/members-and-partners/>> accessed on 5th March 2021.

<sup>17</sup> Ibid.

#### Box no 4 Spain

The Spanish transition to democracy (1975-1978) was triggered by the death of Francisco Franco, Spain's *caudillo* and Head of State since 1936, on 20th November 1975. As part of the third-wave of global democratisation ongoing in Southern Europe at the time, instead of perpetuating Francoism without Franco, King Juan Carlos I appointed Adolfo Suárez as the second head of government with whom he worked to pass legislation to guide Spain's transition to democracy.

On 15th December 1976, the Law for Political Reform (*Ley para la Reforma Política*) was ratified following a national referendum on the law held on 15th December 1976. This law legalised political parties, trade unions and other private associations and scheduled national parliamentary elections, the first democratic parliamentary elections since 1936, in mid-1977. Following these elections, the democratically elected *Cortes Generales* on 22nd July 1977 undertook the process of drafting of the Constitution of the Kingdom of Spain. This was completed on 27th December 1978, following its ratification through a national referendum on 6th December of that year.

On 29th December 1978, in application of the Eighth Interim Provision of the Constitution, Royal Decree 3073/1978 dissolved the *Cortes Generales* and called for parliamentary elections on 1st March 1979, allowing the Spanish people to elect their representatives under the framework of the new constitution.

Regarding Tunisia, the procedure through which the country drafted its constitutional text, between 2011 and 2014, was not without significant challenges (see **Box no 5** for background information on this process). The nature of these challenges, as well as the methods adopted to solving them make Tunisia a useful case study for members of constitution-making bodies in other jurisdictions.

During the drafting process in Tunisia, different obstacles had to be overcome. These include tensions between members from opposing sides of the political spectrum, political crises involving the assassination of prominent political figures, and conflict over the role played by certain committees. To deal with these challenges, the Standing Orders of the National Constituent Assembly (NCA) underwent numerous amendments, particularly targeting procedural challenges that threatened to force the Assembly's work off-course.<sup>18</sup> Further, in order to address conflict regarding the mandate of certain committees which stalled the drafting process, a new body was appointed in terms of the amended Standing Orders to act as an ad hoc deadlock breaking mechanism.<sup>19</sup> As such, recognising that Standing Orders could be amended to cater to the changing needs of

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<sup>18</sup> See for example: Standing Orders of the National Constituent Assembly, 106 (bis) (as amended on 2nd January 2014). Published in the Journal Officiel de la République Tunisienne on 14th January 2014. See also The Carter Center, 'The Constitution-Making Process in Tunisia: Final Report' (2011-2014), 52 <[https://www.cartercenter.org/resources/pdfs/news/peace\\_publications/democracy/tunisia-constitution-making-process.pdf](https://www.cartercenter.org/resources/pdfs/news/peace_publications/democracy/tunisia-constitution-making-process.pdf)> accessed on 5th March 2021.

<sup>19</sup> Article 41 of the Standing Orders, as amended on 2nd January 2014, gave the President of the Assembly the right to form a Consensus Committee around the Constitution exempt from the composition and procedures of other committees. Article 106 (bis) detailed the role of the committee and the status of the agreements reached within it.

the Assembly was critical to the success of the Tunisian National Constituent Assembly. This flexibility makes the Tunisian Assembly unique and worthy of closer study.

Considering the heated debates currently on-going relating to the rules of procedure for the Chilean Constitutional Convention, as well as the potential for deadlock between Convention representatives from different political persuasions, the approach taken in Tunisia may be instructive. The Tunisian experience illustrates that even where substantial time is spent negotiating rules of procedure, they may not be fully responsive to the unpredictable challenges the Convention may face and as such, should be frequently reviewed and amended accordingly.<sup>20</sup> Further, types of deadlock breaking mechanisms, such as special committees, similar to those inserted into later versions of the Tunisian Standing Orders could be considered for inclusion in initial versions of rules of procedure in Chile.

The Tunisian constitution-making process was characterised by a lack of an imposed timeframe. Because of this, it took place over a period of nearly three years, significantly longer than the timeframe given to the Chilean Convention. However, one of the numerous factors which slowed down the work of the Assembly in Tunisia had to do with their prioritisation of issues in drafting. The Assembly decided to focus on the details of provisions relating to the system of government and human rights before agreeing on the fundamental principles which would guide the creation of the constitution.<sup>21</sup> This is in contrast to countries such as South Africa, also included in this study, which determined the principles regulating the nature of the relationship between the state and the individual prior to examining the details of actual provisions.<sup>22</sup>

Finally, as is the case in Chile, the issues of gender equality and women's rights were of great importance during the Tunisian constitutional reform process. The process in Tunisia is an example of the way that the design of formal protections to ensure that women are equally represented in the constitution-making body may fail in practice or may not translate to the inclusion of women representatives in positions of power.<sup>23</sup> Despite these challenges in Tunisia, the constitution that was finally promulgated made significant gains with regard to women's rights. This is as a result of the inclusion of feminist civil society organisations and attempts to find a unified, cross-party agenda for women members of the Assembly.<sup>24</sup>

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<sup>20</sup> In Chile, however, implementing such flexibility might be difficult given the wording of Article 133 of the Chilean Constitution, which provides that the Convention cannot alter the quora (here read as majority requirement) nor the proceedings for its functioning and approval of its decisions.

<sup>21</sup> Z Al-Ali and DB Romhdhane, 'Tunisia's new Constitution: Progress and Challenges to come' (2014) *OpenDemocracy* <<https://www.opendemocracy.net/en/north-africa-west-asia/tunisias-new-constitution-progress-and-challenges-to-/>> accessed 6th March 2021.

<sup>22</sup> Z Al-Ali and DB Romhdhane (n 21).

<sup>23</sup> R de Silva de Alwis, A Mnasi and E Ward 'Women and the Making of the Tunisian Constitution' (2017) Penn Law: Legal Scholarship Repository, 97-8.

<sup>24</sup> R de Silva de Alwis, A Mnasi and E Ward (n 23) 102.

These experiences may be instructive to members of constitution-making bodies in other jurisdictions, seeking to ensure the involvement of social movements and the mainstreaming of gender equality in the general discourse of the constitution-making body.

#### **Box no 5 Tunisia**

In response to the Jasmine Revolution that started in Tunisia in early 2011, President Zine El Abidine Ben Ali, who had been in power since 1987, fled the country. The President of the Chamber of Deputies was appointed as the interim President and instructed the Prime Minister to form a new government of national unity. This transitional government faced significant opposition and in response to mass rallies, it was announced that elections for a National Constituent Assembly would be held with the aim of preparing a new social contract for Tunisia.

In order to facilitate the election of members to a Constituent Assembly, the 1959 Constitution was temporarily replaced by provisional constitutional arrangements. Members were eventually elected to an Assembly on the basis of proportional representation in elections overseen by an Independent High Authority for Elections. The Assembly spent a considerable amount of time composing its Standing Orders. In terms of these, the constitution-making process took place in two phases – a drafting phase and an approval phase.

During the drafting phase of the process, draft chapters for the constitutional text were compiled by six topic-focused Constitutional Committees. Following the submission of these chapters, the Joint Coordination and Drafting Committee compiled a first draft of the Constitution. Upon its publication, this text generated strong backlash from civil society, opposition members, constitutional experts and international experts. The Drafting Committee received input from the public, experts, the Plenary and the Constitutional Committees on a second and then third draft of the Constitution. This third draft was controversial because it was alleged that the Drafting Committee had made substantive changes to it contravening agreements already reached in the Constitutional Committees. When the draft was tabled before the Plenary, many opposition members protested against it. To avoid a deadlock situation which would derail the process, a new Consensus Committee was established which effectively reached agreement about most provisions of the draft.

During the approval stage, the constitutional draft was carefully reviewed article-by-article by the Plenary and was eventually passed through a vote on the entire text. The President of the Republic, the President of the National Constituent Assembly and the Prime Minister signed this approved constitutional text on 10th February 2014 and it entered into force.

Originally, the case of Germany was not included in the comparative part of this Report. However, as a response to the interest some of our partners have expressed vis-à-vis the

German experience, a description of Germany's post-war constitution-making process has been added to the Report as an annex.

In what follows, section 2 describes Chile's constitution-making process with an emphasis on the existing norms that relate to the composition of the Constitutional Convention, the authorities that will lead the process (President and Vice-president), judicial procedures available in connection to the breach of the rules of procedure, etc. Section 3 in turn covers the comparative analysis of the five selected countries, divided into the following topics: internal structure of the constitution-making body (A); processes (B); deadlock-solving mechanisms (C); and public participation (D). Finally, in order to facilitate the reading of this report, a summary version has been prepared by the Foundation, in which the key findings and most important takeaways are highlighted.

## 2. CHILE'S CONSTITUTIONAL CONVENTION

Chile's constitution-making process is governed by the Constitution of the Republic (Articles 130 to 143), which was amended to incorporate the process of making a new constitution, as this mechanism did not exist in the original constitutional text.<sup>25</sup>

The process began with an entry plebiscite, which took place on 25th October 2020, in which citizens were asked whether they approved the making of a new constitution, and if so, the type of body to be tasked with its drafting. The option '*apruebo*' won the plebiscite with almost 70% of the votes, as did the mechanism of a 'Constitutional Convention' (that is, a body that does not include members of Congress).

Once the members of the Convention are elected, and the election results certified and communicated to the President of the Republic, the latter will convene the first session of the Convention, thereby indicating the location of the meeting.<sup>26</sup> The Chilean Government has already announced that the convention will operate in Santiago.

### A. COMPOSITION

The Chilean Constitutional Convention will have 155 delegates, 17 of which will be representatives of indigenous peoples. The delegates will be elected in May 2021.

The candidacies for delegate of the Constitutional Convention show that political parties are still a driving force behind the process, although various candidates present themselves as either independent backed-up by a party, or independent with no affiliations.

### B. MANDATE OF THE CONVENTION

On the powers of the Convention, the Constitution provides that the Convention shall not exercise the functions or attributions of other bodies or authorities established in the Constitution or in other laws.<sup>27</sup> Further, the Constitution provides that:

It shall be prohibited to the Convention, to any of its members or a fraction thereof, to claim for themselves the exercise of sovereignty, assuming other powers than those recognised to them by the Constitution.<sup>28</sup>

Regarding the content of the new constitutional text, Article 135 of the Constitution includes a so-called '*cláusula de límites*', which provides that:

The text of the New Constitution to be submitted to referendum shall respect the character of Republic of the State of Chile, its democratic regime, final and binding judicial decisions, and the international treaties ratified by Chile that are in force.<sup>29</sup>

Differently from other constitution-making processes (such as Colombia), the Chilean constitution-making process does not contemplate a specific agenda for the Convention, nor a list of issues or topics the Convention is obliged to implement.

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<sup>25</sup> Law 21200 of 24th December 2019.

<sup>26</sup> Article 133 Chilean Constitution.

<sup>27</sup> Article 135 Chilean Constitution.

<sup>28</sup> Article 135 Chilean Constitution. (Our translation).

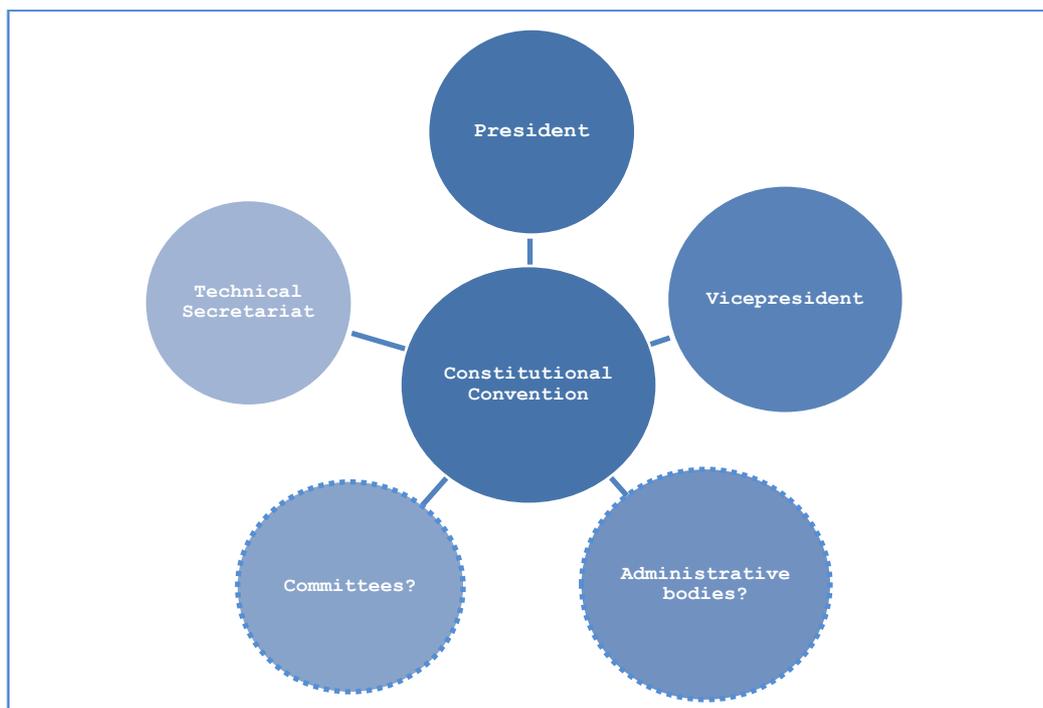
<sup>29</sup> Article 135, final para. Chilean Constitution. (Our translation).

Based upon a comparative interpretation (the development of the German Basic Law, in particular Article 79 para 3, which considers that certain amendments to core principles –e.g., the division of the country into Länder or the Basic Rights established therein– are inadmissible), Article 135 of the Chilean Constitution could be read as providing that the character of Chile as a republic and a democracy are not for change as a matter of principle; and the same goes for the binding nature of final judicial decision and the viability of international treaties ratified by Chile.

### C. INTERNAL STRUCTURE

Pursuant to the Constitution, the members of the Convention will have to elect a **President** and a **Vice-president** by absolute majority of its members during the first session of the Convention.<sup>30</sup> The Constitution does not specify the powers these two authorities will have during the process.

In addition, the Constitution stipulates that the Convention shall create a **technical secretariat**, which shall be conformed “by people of acknowledged academic or professional competence.”<sup>31</sup> However, the roles of these authorities and bodies are still unclear.



*Figure 1. Composition of the Chilean Constitutional Convention.*

Further, Article 133 of the Constitution provides that the Executive will lend the needed technical, administrative and financial support for the establishment and functioning of the Convention, yet the provision does not go into more details.

<sup>30</sup> Article 133, para 2 Chilean Constitution.

<sup>31</sup> Article 133, para 5 Chilean Constitution.

## D. RULES OF PROCEDURE

On the rules of procedure and decision-making, Article 133 para. 3 provides that:

[t]he Convention shall approve the norms and the latter's voting rules by a quorum of two thirds of its members in office.<sup>32</sup>

Further, Article 133 establishes a prohibition of modification of the voting rules mentioned above. Article 133 provides that:

The Convention shall not be able to alter the quorum, or the procedures for its functioning and adoption of resolutions (*acuerdos*).<sup>33</sup>

Regarding 'default rules', the Constitution provides that should the population reject the draft prepared by the Convention in the final referendum, then the current Constitution will remain in force.<sup>34</sup> Should the Convention not reach an agreement, it will dissolve *ipso jure* once the deadline lapses.<sup>35</sup>

## E. JUDICIAL PROCEEDINGS

The Constitution does not contemplate judicial actions to review the content of the constitutional texts elaborated by the Convention.<sup>36</sup> A complaint may be brought before a 5-member Chamber of the Supreme Court, in case of infractions of procedural rules applicable to the Convention.<sup>37</sup> Such complaint shall be signed by at least one fourth of the members of the Convention, and filed within 5 days from having taken knowledge of the alleged violation. The alleged violation must be 'essential'.<sup>38</sup>

Crucially, the Constitution categorically excludes the filing of this complaint with respect to the so-called '*cláusula de límites*' mentioned above. The last paragraph of Article 136 provides as follows:

No podrá interponerse la reclamación a la que se refiere este artículo respecto del inciso final del artículo 135 de la Constitución.<sup>39</sup>

### 3. CONSTITUTION-MAKING BODIES AND THEIR RULES OF PROCEDURE: A COMPARATIVE OVERVIEW

It is often the case in constitution-making that political agreements or, as in the case of Chile, the Constitution itself, contain provisions that outline the course of the whole process. These provisions, however, are usually broad and do not contain the detailed regulation needed to bring constitution-building processes to a successful conclusion.<sup>40</sup> Such detailed regulation is generally included in 'rules or procedure', or 'standing orders' enacted by the constitutional body tasked with drafting and or producing a new

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<sup>32</sup> Article 133, para 3 Chilean Constitution. (Our translation).

<sup>33</sup> Article 133, para 3 Chilean Constitution. (Our translation). The term 'quorum' in Article 133 refers to a specific approval majority, and not to minimum attendance requirement.

<sup>34</sup> Article 142 Chilean Constitution.

<sup>35</sup> Article 137 Chilean Constitution.

<sup>36</sup> Article 136 Chilean Constitution.

<sup>37</sup> Article 136 Chilean Constitution.

<sup>38</sup> Article 136 Chilean Constitution.

<sup>39</sup> Article 136 Chilean Constitution.

<sup>40</sup> M Brandt, J Cottrell, Y Ghai, and A Regan, 'Constitution-making and Reform: Options for the Process' (Interpeace 2011) 180.

constitution.<sup>41</sup> Rules of procedure will usually regulate issues such as, inter alia: the internal composition of the constitutional body, which may include the creation of thematic committees, administrative and technical bodies that regulate the finances of the process; public participation; the decision-making process itself, which may include rules on drafting, debate, sessions quorums and voting; and even ethical rules governing the conduct of the members of the constitutional body.

This section draws on the experience of other constitution-making processes, to shed light on how other countries have structured their respective constitution-building mechanisms, and how they regulated or addressed the following four issues, namely: (A) the internal structure of the constitutional body; (B) the process they followed to produce a constitutional draft and/or a final constitutional text; (C) the mechanisms they devised to build consensus and solve stalemate situations or deadlocks; and, finally, (D) public participation. As mentioned in the introduction to this report, the present section will focus on the constitution-making processes of Colombia, Iceland, South Africa, Spain, and Tunisia.

### A. INTERNAL STRUCTURE OF CONSTITUTION-MAKING BODIES

The design, and hence the internal structure, of constitutional bodies (be them constituent assemblies, constitutional conventions or legislatures) depends largely on the functions or tasks they are entrusted with.<sup>42</sup> For instance, if a constitutional body is tasked with both producing a constitutional draft and approving it, these functions need to inform the way the body is organised. The same holds true if the body in charge of producing a new constitution is the ordinary legislature, as the ordinary legislative process may need adjustments in order to produce a fully new constitutional text.

The present section includes various examples of constitutional bodies, namely, constituent assemblies that produced and approved a constitutional text (Colombia); constitutional bodies that only produced a constitutional draft, which had to be subsequently approved by parliament (Iceland); legislatures that produced and approved a constitution (such as South Africa and Spain); and constituent bodies that doubled as legislatures (Tunisia). All of these constitution-making bodies designed their organisation to fit their final objective. This subsection describes such internal structure.

#### COLOMBIA

Originally, the legislative decree that enabled the constitution-making process (Decree No 1926) contemplated the creation of a ‘constitutional assembly’ (*asamblea constitucional*), yet once the Supreme Court of the country declared that the Constitutional Assembly represented the original constituent power of the country, the Assembly itself, in its first session, changed its designation to that of ‘National Constituent Assembly’ (*Asamblea Nacional Constituyente* or ANC). The ANC issued its own procedural rules (*Reglamento*), which determined the internal organisation of the Assembly and its bodies.<sup>43</sup>

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<sup>41</sup> Indeed, it is common practice that constitution-making bodies are given the power to adopt their own rules of procedure. M Brandt et al (n 40) 180. Throughout this report the terms ‘rules of procedure’ and ‘standing orders’ are used as synonyms.

<sup>42</sup> M Brandt et al (n 40) 229.

<sup>43</sup> The Rules of Procedure of the Colombian ANC are partly included in the Diario de la Asamblea Nacional Constituyente No 2 and No 3 of 6th February 1991 and <<https://babel.banrepcultural.org/digital/collection/p17054coll26/id/3820>>

With respect to the timeframe for the enactment of its procedural rules, Decree No 1926 provided that the ‘constitutional assembly’ would enact its procedural rules within 10 days of its establishment.<sup>44</sup> Decree No 1926 also provided that the President of the Republic would present a proposal of rules of procedure, which in case the ANC did not approve its own rules in time, would be adopted as default.<sup>45</sup> The draft of the Executive on procedural rules –presented to the different political forces before the establishment of the ANC– was rejected as they gave the Executive a preponderant role during the deliberations of the assembly. Therefore, another draft of rules of procedure was produced by a Committee of Delegates of the different political forces. This latter draft served as a base for the discussion within the ANC during its first days of functioning.

The main internal bodies of the ANC were: the Plenary, which had a tripartite Presidency (*Directiva*); a Bureau Committee (*Comisión de la Mesa*); a Secretary; a Rapporteur; an Administrative Director; Five Permanent Committees; Political and Department Representations (*Representaciones Políticas y Departamentales*); and other committees (i.e., accidental, ethics, codification, and style committees) (see figure no 2 below).

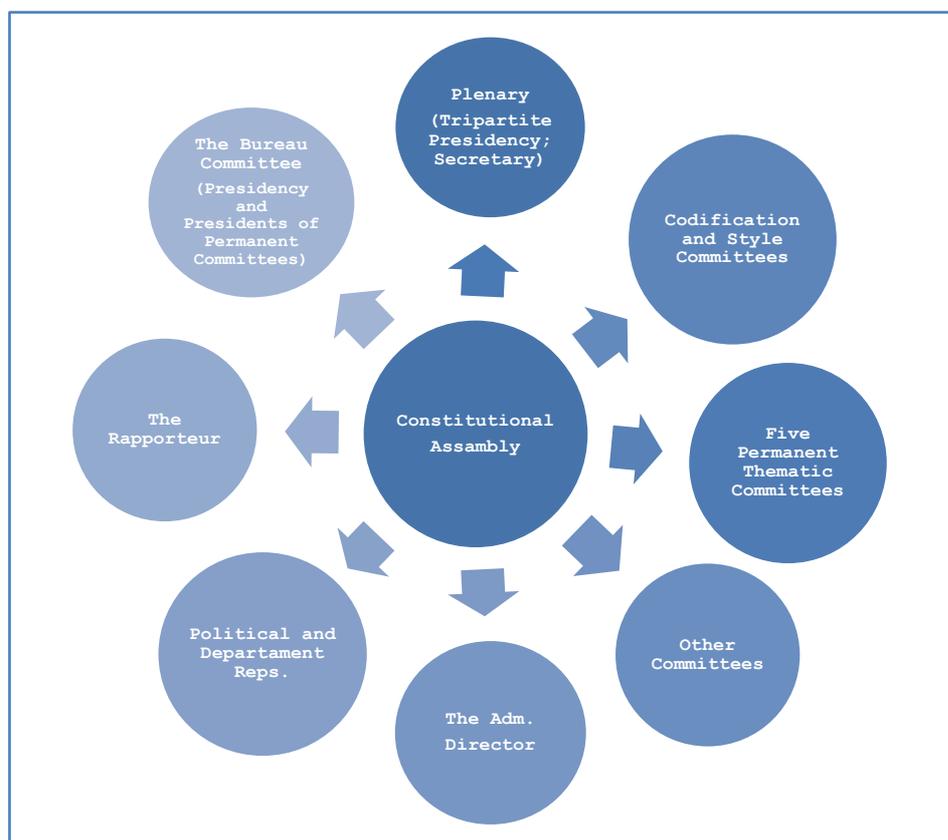


Figure 2. Internal structure of Colombia's ANC.

<<https://babel.banrepcultural.org/digital/collection/p17054coll26/id/3803>> accessed 5th March 2021. Also partially available in Spanish in the website of Banrepcultural <[https://enciclopedia.banrepcultural.org/index.php/Asamblea\\_Nacional\\_Constituyente#Reglamento](https://enciclopedia.banrepcultural.org/index.php/Asamblea_Nacional_Constituyente#Reglamento)> accessed 5th March 2021.

<sup>44</sup> Point 14 of the Political Agreement of 23rd August as incorporated in the recitals of Legislative Decree No 1926 of 24th August 1990 <<http://www.suin-juriscol.gov.co/viewDocument.asp?id=1371701>> accessed 5th March 2021.

<sup>45</sup> Ibid.

The **Plenary** was the main organ of the ANC, comprising all the delegates with a right to vote. The quorum for holding a session was one third of the total number of delegates. To adopt decisions, however, the quorum was of half plus one member. Given that no political party had reached an absolute majority in the election of delegates, the political forces represented at the ANC decided to have a tripartite presidency that included the first three majorities.<sup>46</sup>

The **Bureau Committee** included the Presidency of the ANC (*Directiva*) and the Presidents of the Permanent Committees. Their main task was to assess the administrative functioning of the Assembly and the committees.

The five **Permanent Thematic Committees** had a president and vice-president, and also a secretary. They all had different assigned topics (see table below describing the distribution of issues). Given that the Presidency of the ANC was led by the three main political forces, the presidency and vice-presidency of the committees was accorded to minority forces.<sup>47</sup> Delegates had a right to voice in every committee, but right to vote only in one of them.

First Committee (17 members)	Second Committee (13 members)	Third Committee (16 members)	Fourth Committee (9 members)	Fifth Committee (18 members)
Principles, rights and duties, fundamental guarantees and freedoms; protection mechanisms; democratic participation; electoral system; political parties; constitutional reform.	Territorial organisation of the State; regional and local autonomy.	Government and Congress; Public Force; Emergency state; International Affairs.	Justice Administration and Public Ministry.	Socio-economic and environmental issues.

Figure 3. Topics of Permanent Thematic Committees.

In addition to the five Thematic Committees, the Rules of Procedure provided that the Presidency would establish a **Special Codifying Committee**, tasked with compiling, cleaning and systematising the texts approved during the First Debate.<sup>48</sup> The texts approved during the Second Debate would pass to a **Style Committee**, which would correct the grammar and style of the text. The revised text would then be forwarded back to the Plenary.

Moreover, so-called ‘**Accidental Committees**’ were also considered for matters that due to their nature or urgency required faster or special dedication. Last, an **Ethics Committee** of five members was also contemplated, which would look into issues such

<sup>46</sup> M Meza-Lopehandía, ‘Elementos del Proceso Constituyente Colombiano: Funcionamiento de la Asamblea Constituyente de 1991’ (Biblioteca del Congreso Nacional de Chile May 2020) 5. <<https://obtienearchivo.bcn.cl/obtienearchivo?id=repositorio/10221/28696/3/BCN2020%20-%20Proceso%20constituyente%20colombiano.pdf>> accessed 5th March 2021.

<sup>47</sup> Ibid, 6.

<sup>48</sup> See below section B on the process followed by the ANC.

as incompatibilities, conflict of interests, etc. In addition to this structural organisation, each member of the ANC had a support team consisting of an advisor, an assistant and a secretary.

With respect to the financial and technical support provided to the ANC, the Rules provided that an administrative fund would be established, with resources transferred from the Central Government. The administrative fund was to be managed by an **Administrative Director**, to be elected by the Plenary.

Technical assistance would be provided by the **Rapporteur**, who was tasked with compiling all the documentation produced by the ANC in order to create records of the process, providing information to the delegates, and conducting research.

#### ICELAND

Initially, Iceland's constitutional reform process –which was outlined in the Act on a Constitutional Assembly<sup>49</sup>– was designed to take place in stages (see figure no 4 below on the stages of the process).

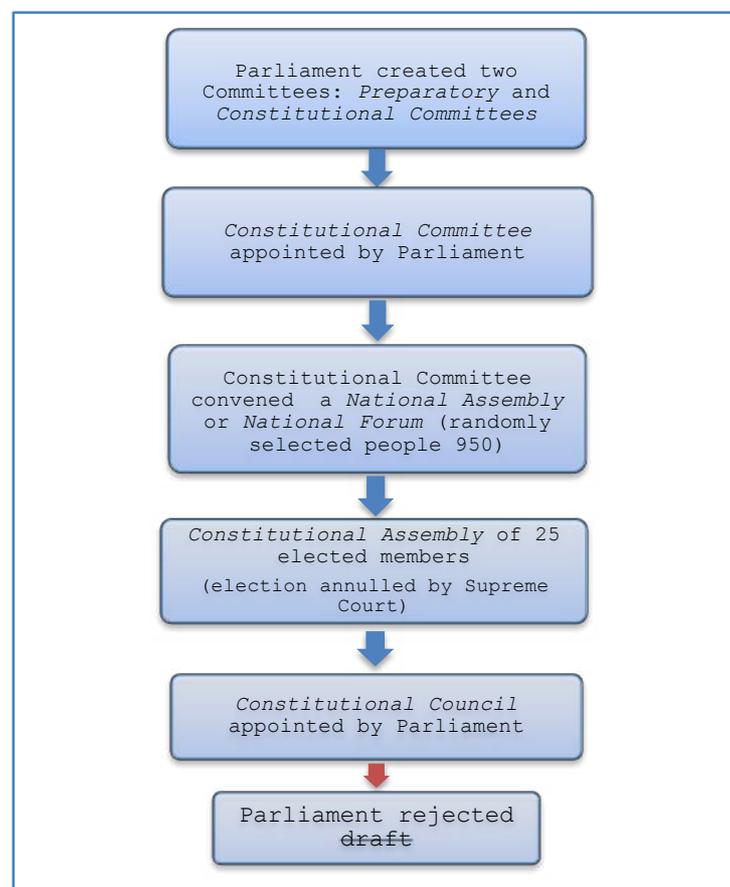


Figure 4. Overview Iceland's Constitution-Making Process.

First, Parliament would appoint a seven-member **Constitutional Committee** made up of academics from fields such as law, literature and science.<sup>50</sup> As a second step, this

<sup>49</sup> Act on a Constitutional Assembly No 90/2010 (n 12).

<sup>50</sup> T Gylfason 'Iceland Shows that a UK Constitutional Convention Should Involve Politicians as Little as Possible' (2014) <<https://www.opendemocracy.net/en/opendemocracyuk/iceland-shows-that-uk-constitutional-convention-should-involve-politi/>> accessed 6th March 2021.

Constitutional Committee would be tasked with convening a **National Assembly** or **National Forum** at which randomly selected members of the public could define and discuss their ideas relating to the contents of a new constitution.<sup>51</sup> The Constitutional Committee would compile a report on the conclusions reached at this Forum. Next, a national election would be held to appoint 25 representatives to a **Constitutional Assembly**, which would be tasked with drafting a new constitution for Iceland drawing from the Constitutional Committee's report.<sup>52</sup> The drafting of the new text was going to be the third step of the constitutional design process. However, this third step of the constitution-making process was in practice performed by a **Constitutional Council** appointed by Parliament rather than the Assembly, as the Icelandic Supreme Court invalidated the Assembly election.<sup>53</sup> The final stage of the process was for the draft to go through formal parliamentary processes to pass it into law, which ultimately did not succeed.<sup>54</sup> The reasons for this failure were largely political, rather than because of the contents of the text. Support for the passage of a new constitutional text had dwindled in the Icelandic Parliament.<sup>55</sup> When the Bill was placed before Parliament, conservative factions managed to delay the decision on the draft until after Parliamentary elections in 2013, which ushered in a new Parliament controlled by political parties which opposed constitutional reform.<sup>56</sup> This new Parliament refused to pass the draft text into law.

Since the Supreme Court of the Country invalidated the results of the election of members of the Assembly, this original process was implemented with modifications.<sup>57</sup> Specifically, the stages that were to take place before the constitution of the Assembly occurred as planned. Indeed, the two preparatory bodies contemplated in the Act were established, that is, the Preparatory Committee and the Constitutional Committee. The Preparatory Committee consisted of three members appointed by the *Althingi* (or Icelandic Parliament). The Committee's role was to prepare the logistics for the appointment of the Constitutional Assembly and make the necessary practical arrangements to hold a National Forum with members of the public.<sup>58</sup> It was further tasked with setting up the Assembly's website, securing premises for it and preparing for the appointment of staff to the Assembly.<sup>59</sup>

The Constitutional Committee was a seven-person committee also appointed by the *Althingi*. This Committee worked independently and performed two key roles prior to the election of the Constitutional Assembly.<sup>60</sup> These were 1) facilitating the National Forum

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<sup>51</sup> Ibid.

<sup>52</sup> Ibid.

<sup>53</sup> The Constitutional Council-General Information, 'Invalidation of the Elections for the Constitutional Assembly' (2011) <<http://stjornlagarad.is/english/>> accessed on 6th March 2021.

<sup>54</sup> T Gylfason (n 50).

<sup>55</sup> T Gylfason, 'Constitution on Ice' (2014) *CESifo Working Paper No 5056*, 15.

<sup>56</sup> Ibid, 18-19.

<sup>57</sup> The elections for members of the Assembly were concluded after a relatively low percentage of the population voted. The result was that 15 men and 10 women were appointed to the Assembly. The members came from different regions and areas of expertise including academia, the arts, farming and religion. However, in December 2010 three complaints relating to the electoral procedures were lodged with the Supreme Court. The Court invalidated the election citing irregularities such as unsatisfactory ballot boxes and unfolded ballot papers. See Iceland Review 'Iceland Election Results Announced' (2010) <[https://web.archive.org/web/20130521002747/http://www.icelandreview.com/icelandreview/daily\\_news/?cat\\_id=16567&ew\\_0\\_a\\_id=370813](https://web.archive.org/web/20130521002747/http://www.icelandreview.com/icelandreview/daily_news/?cat_id=16567&ew_0_a_id=370813)> accessed 6th March 2021; and The Constitutional Council (n 53).

<sup>58</sup> Act on a Constitutional Assembly No 90/2010 Interim Provisions (n 12).

<sup>59</sup> Ibid.

<sup>60</sup> Ibid.

for members of the public on constitutional matters and processing the information collected here into a report and 2) undertaking the collection and processing of all available information and material relating to constitutional matters which might assist the Constitutional Assembly in drafting a new constitutional text.<sup>61</sup> The inclusion of this Committee in the Act on the Constitutional Assembly represented a compromise by the *Althingi* to appease the Liberal Conservatives, who had at first opposed the Bill. The inclusion of the Constitutional Committee ensured that the constitutional review process would be guided by independent experts rather than left entirely to the publicly appointed Assembly.<sup>62</sup>

Individuals were appointed to both of these committees through the ordinary decision-making procedures of the *Althingi*.<sup>63</sup>

Prior to the election of the Constitutional Assembly, these preparatory committees convened the National Forum. In terms of the Act on the Constitutional Assembly, the Forum was to be made up of approximately one thousand people, selected through random sampling from the Icelandic National Population Register with due regard for the geographic distribution of participants and gender parity.<sup>64</sup>

The National Forum was held on 16th June 2010 and brought together 950 people.<sup>65</sup> Through dialogue and deliberation, the Forum established the main viewpoints and points of public concern relating to the country's constitutional framework.<sup>66</sup> The Constitutional Committee supervised the discussions in the Forum and compiled a report which detailed the core themes agreed upon. This report was going to form the basis of the draft constitution compiled by the Assembly. However, after the Supreme Court invalidated the election of the members of the Assembly (yet at no point had challenged the outcome), Parliament undertook to appoint through resolution an advisory Constitutional Council made up of the individuals who had been elected to the Constitutional Assembly, in order to review the Constitutional Committee's report and make suggestions about the necessary changes to be made to the Icelandic Constitution.<sup>67</sup> These suggestions would be presented to the *Althingi* in the form of a bill to the Constitutional Law.<sup>68</sup> The resolution appointing the Council was passed by a majority of members of the *Althingi* present and voting on it.<sup>69</sup>



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<sup>61</sup> Ibid.

<sup>62</sup> C Berg, 'From Crisis to Direct Democracy: The Case of Iceland' (2012) *Democracy International*, 7 <<https://www.mehr-demokratie.de/fileadmin/pdf/Direct-democracy-Iceland-Democracy-International.pdf>> accessed 7 March 2021.

<sup>63</sup> This meant that on the day of the appointment decision being taken, more than 50% of the members of the *Althingi* were required to be present and voting, and that individuals were appointed to these committees by a majority vote of the *Althingi* members voting. Standing Orders of the Althingi (2011), Articles 71(1) and 74 <<https://www.althingi.is/english/about-the-parliament/standing-orders-of-the-althingi/>> accessed 7th March 2021.

<sup>64</sup> Act on a Constitutional Assembly No 90/2010, Interim Provisions (n 12). Moreover, only people with the right to vote in elections and residing in Iceland were eligible for selection for the Forum. It was envisaged that all persons falling into this category would have an equal chance of being selected to participate in the Forum.

<sup>65</sup> Participedia 'Icelandic National Forum 2010' <<https://participedia.net/case/130>> accessed 7th March 2021

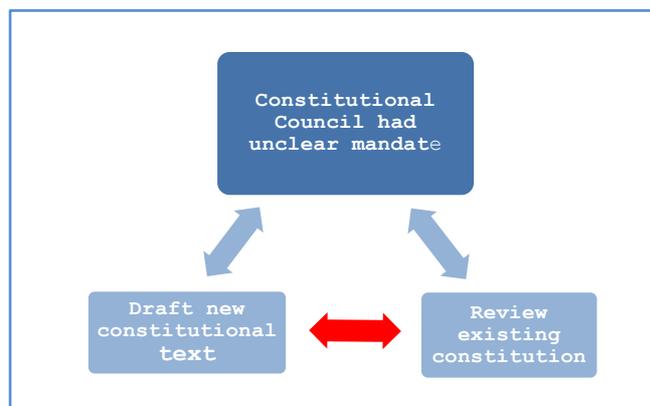
<sup>66</sup> Act on a Constitutional Assembly No 90/2010, Interim Provisions (n 12).

<sup>67</sup> The Constitutional Council-General Information 'Invalidation of the Elections for the Constitutional Assembly' (n 53).

<sup>68</sup> The Constitutional Council-General Information 'Agreement on a Parliamentary Resolution' (n 53).

<sup>69</sup> Standing Orders of the Althingi (2011), Article 74 (n 63).

The Council was not bound by the ‘Act on a Constitutional Assembly’. Instead, it created its own rules of procedure, which it was empowered to adopt by the resolution of Parliament which created the Council.<sup>70</sup> However, the ‘Act on a Constitutional



Assembly’ functioned as a guide to the Council when drafting these rules. As a result of this, despite the Supreme Court’s invalidation, the work performed prior to the election of the Assembly was not lost and the constitutional review process could continue under the direction of the Constitutional Council. The inapplicability of the Act on a Constitutional Assembly, however, did have an effect on the actual mandate of

the Constitutional Council, as it was unclear whether it was supposed to reform the 1886 Constitution, or prepare a whole new draft.

### ***Internal structure of Constitutional Council***

The Rules of Procedure of the Constitutional Council established the process through which key office bearers in the Council were appointed (see below figure no 5 below for a chart of the structure). In terms of these, the eldest member of the Council presided over the Council’s first meeting and the election of a Chairperson of the Council.<sup>71</sup> The Chairperson was nominated from the members of the Council and was elected by a majority vote of all delegates.<sup>72</sup>

The Chairperson, once elected, presided over the election of the Deputy Chairperson, following the same election procedure. However, the Deputy Chairperson had to be of the opposite gender to the Chairperson.<sup>73</sup> The Council was enjoined to establish thematic committees to complete its work.<sup>74</sup> Once the thematic focus of these had been established, the Council elected a Chair and Deputy Chairperson from its members for each committee by a majority vote of all members of the Council.<sup>75</sup> The Chair and Deputy Chairperson of the Council were not eligible to stand for these positions. The election of committee chairs followed the same procedure as that described for the Chairperson of the Council above.<sup>76</sup> This included the portions of the procedure related to gender parity.

The Chair and Deputy Chairpersons of the Council, together with the Chairpersons of the thematic committees formed the Steering Committee or Presidium of the Council.

<sup>70</sup> J Olafsson ‘The Constituent Assembly: A Study in Failure’ in V Ingimundarson et al (eds) *Iceland’s Financial Crisis: The Politics of Blame, Protest and Reconstruction* (Routledge 2016) 256.

<sup>71</sup> Article 1 Rules of Procedure of the Constitutional Council (2011) <<http://stjornlagarad.is/english/rules-of-procedure/>> accessed 7 March 2021.

<sup>72</sup> The rules stipulated that where no candidate received a majority, a run-off vote would be held between the two candidates who had received the highest proportion of votes in the first round. A tie between these candidates would then be settled by a further round of voting and ultimately the drawing of lots if, following this, the candidates were still equal. Article 1 Rules of Procedure of the Constitutional Council (2011).

<sup>73</sup> Article 1 Rules of Procedure of the Constitutional Council (2011) (n 71).

<sup>74</sup> Article 4 Rules of Procedure of the Constitutional Council (2011) (n 71).

<sup>75</sup> Article 2 Rules of Procedure of the Constitutional Council (2011) (n 71).

<sup>76</sup> Article 2 Rules of Procedure of the Constitutional Council (2011) (n 71).

The Chairperson of the Council also chaired the Presidium.<sup>77</sup> The Presidium was charged with various tasks including receiving the report of the Constitutional Committee, preparing this report to be processed in the Council,<sup>78</sup> organising the work schedule of the Council,<sup>79</sup> and harmonising and reporting on the final draft of the Constitution to the Council once work on it had been completed.<sup>80</sup>

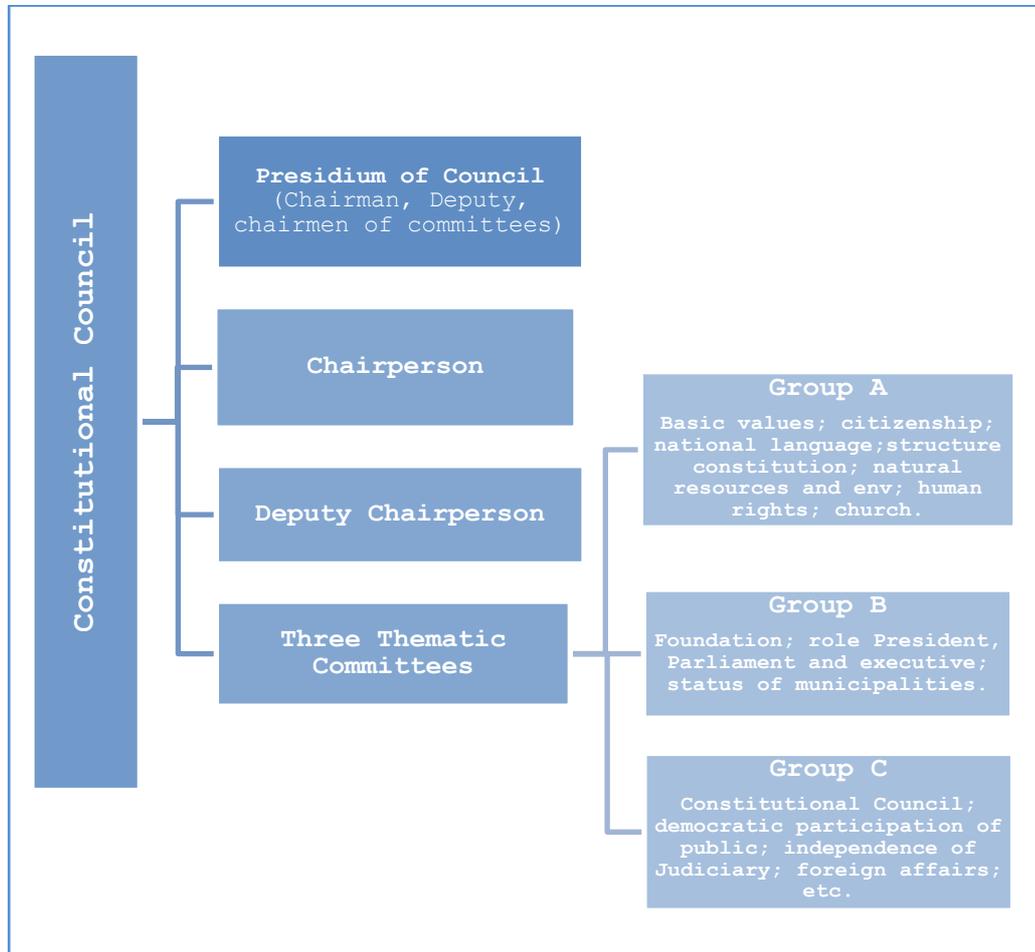


Figure 5. Internal Structure of the Icelandic Constitutional Council.

While Council meetings, comprising all members, were the supreme decision-making forum within the Council, three thematic committees or workgroups drove its drafting work.<sup>81</sup> The Council had the right to decide how many theme committees to establish and what topics they ought to cover.<sup>82</sup> All members of the Council, except for the Chairperson, served on one thematic committee and had voting rights in that committee.<sup>83</sup> Members could switch between committees through a request made to the Presidium but could not hold voting rights on more than one committee at a time.<sup>84</sup>

<sup>77</sup> Article 3 Rules of Procedure of the Constitutional Council (2011) (n 71).

<sup>78</sup> Article 13 Rules of Procedure of the Constitutional Council (2011) (n 71).

<sup>79</sup> Article 3 Rules of Procedure of the Constitutional Council (2011) (n 71).

<sup>80</sup> Article 14 Rules of Procedure of the Constitutional Council (2011) (n 71).

<sup>81</sup> Article 4 Rules of Procedure of the Constitutional Council (2011) (n 71).

<sup>82</sup> Article 4 Rules of Procedure of the Constitutional Council (2011) (n 71).

<sup>83</sup> Article 5 Rules of Procedure of the Constitutional Council (2011) (n 71).

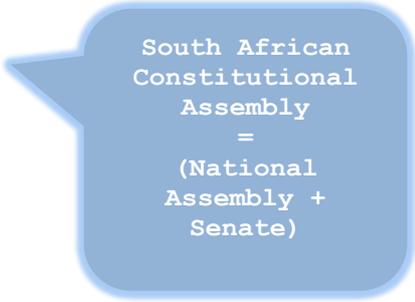
<sup>84</sup> Article 5 Rules of Procedure of the Constitutional Council (2011) (n 71).

Each thematic committee comprised eight members, including the Chair and Deputy Chair of the Committee elected separately. Each group was allocated 14 topics to discuss based on the contents of the Constitutional Committee's report.<sup>85</sup>

When examining Iceland's Constitutional Council, it is worth noting that compared to other constitution-making bodies, it had relatively few internal committee structures. This may be due to a combination of its comparatively small size and the fact that the preparatory and constitutional committees were created separate to the Council prior to its appointment. These committees completed much of the logistic and preparatory work so that the Council could focus on drafting. However, one surprising feature is the lack of an expert legal or drafting committee to advise the Council. This may have reflected the view shared by some that a constitution constituting a social compact does not require legal expertise.<sup>86</sup> Moreover, the desire to ensure that the document created represented the people rather than a small handful of elites may have impacted similarly the Council's decision not to appoint an expert advisory committee.

### *SOUTH AFRICA*

The South African Constitutional Assembly was composed of the two houses of Parliament, the National Assembly and the Senate, sitting jointly.<sup>87</sup> The Constitutional Assembly comprised 490 members – the 400 members of the National Assembly and the 90 members of the Senate (on the election and composition of the Constitutional Assembly see Box no 6 below).<sup>88</sup>



South African  
Constitutional  
Assembly  
=  
(National  
Assembly +  
Senate)

As all members of the first Parliament were automatically members of the Constitutional Assembly, all members of this Assembly were politicians and members of political parties. Seven political parties were represented in the Constitutional Assembly. The largest number of representatives were drawn from the African National Congress (ANC),<sup>89</sup> while the National Party (NP)<sup>90</sup> and the Inkatha Freedom Party (IFP)<sup>91</sup> held a significant minority of seats in the Assembly and four smaller parties held fewer than 15 seats each.<sup>92</sup>

At the outset, it is important to note that the drafting work of the Constitutional Assembly was substantively constrained by 34 Constitutional Principles contained in Schedule 4 of the Interim Constitution. These Principles established a framework which regulated the way that the new constitutional text ought to address key topics such as the character of the democratic state, fundamental rights, the judiciary and legal system, the structure of government, and the relationship between different levels of

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<sup>85</sup> The Constitutional Council–General Information 'Working Procedures of the Constitutional Council' (n 53).

<sup>86</sup> T Gylfason (n 55) 7.

<sup>87</sup> Constitution of the Republic of South Africa Act 200 of 1993 (Interim Constitution), Section 68(1).

<sup>88</sup> Constitution of the Republic of South Africa Act 200 of 1993 (Interim Constitution), Section 48(1) read with Section 40(1).

<sup>89</sup> The ANC had 312 representatives in the Constitutional Assembly.

<sup>90</sup> The NP had 99 representatives in the Constitutional Assembly.

<sup>91</sup> The IFP had 48 representatives in the Constitutional Assembly.

<sup>92</sup> The Freedom Front (VF) had 14 representatives, the Democratic Party (DP) had 10 representatives, the Pan-African Congress (PAC) had 5 representatives and the African Christian Democratic Party (ACDP) had 2 representatives in the Constitutional Assembly.

government.<sup>93</sup> The Constitutional Principles were drafted by the participating parties at the multi-party talks which brought about a negotiated end to Apartheid. The requirement of compliance with these Principles ensured that the key points of agreement reached between conflicting interest groups, such as the ANC, NP and other minority parties, during these negotiations were reflected in any new constitutional text.<sup>94</sup> The work of all of the drafting organs within the Assembly and the Plenary, itself, was allocated and regulated with these principles in mind.

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<sup>93</sup> Constitution of the Republic of South Africa Act 200 of 1993 (Interim Constitution), Schedule 4.

<sup>94</sup> H Ebrahim and L Miller, 'Creating the Birth Certificate of the New South Africa: Constitution Making After Apartheid' in Miller (ed) *Framing the State in Times of Transition: Case Studies in Constitution-Making* (USIP 2010) 121.

#### **Box no 6. Composition of SA Constitutional Assembly**

To understand the composition and election of the Constitutional Assembly, it is necessary to look at the electoral system used to elect members of both houses of Parliament.

The appointment of members to each of the houses of Parliament was governed by Schedule 2 of the Interim Constitution and the Electoral Act of 1993 (The Electoral Act 150 of 1993). The election of members took place using a closed-list system of proportional representation.

More specifically, members of the National Assembly were elected based on the following process. Political parties seeking to contest the 1994 election had to register with the Election Commission (Interim Constitution, Schedule 2(1)). Registered parties submitted a national list of candidates and a list of candidates for each of the nine provinces to the Commission (Interim Constitution, Schedule 2(4)(a)). On election day, voters voted for political parties rather than individuals on a national ballot. Once all of the votes were counted, seats in the National Assembly were allocated to political parties on two-tiers - a regional and a national tier. 200 total seats in the National Assembly were distributed over the nine provinces in terms of the proportions contained in Schedule 2 of the Interim Constitution (Interim Constitution, Schedule 2(5)). The seats at the regional tier were then filled by the various parties contesting the election based on the number of votes on the national ballot a party received in that province, using the Droop quota with largest remainders method (Interim Constitution, Schedule 2(5)). Parties appointed individual members for the number of seats allocated to them based on their regional lists. The seats a party allocated from its regional lists were then summed across the provinces and compared to the allocation of seats the party was due based on its total number of votes received in the national result (Interim Constitution, Schedule 2(6)). Any difference was filled from the national list for the party - the national tier of seat allocation (Interim Constitution, Schedule 2(6)).

Schedule 2 of the Interim Constitution further stipulated the procedure to be followed for the election of provincial legislatures based on the results of votes on a separate provincial ballot (Interim Constitution, Schedule 2(11)). It was the provincial legislatures which were charged with the appointment of Senators to make up the second house of the National Parliament: the Senate (Interim Constitution, Section 48(1)). Parties submitted provincial lists of candidates to the Electoral Commission. Voters voted for a political party on the provincial ballot and the number of seats awarded to each party was determined in proportion to the number of votes received by a party using the Droop quota with largest remainder method (Interim Constitution, Schedule 2(13)). These seats were filled from parties' provincial lists (Interim Constitution, Schedule 2(13)). Within 10 days of the first sitting of the provincial legislature or the election of the National Assembly, each of the nine provincial legislatures were mandated to nominate 10 senators to represent them in the Senate ((Interim Constitution), Section 48(1)). Each party represented in a provincial legislature was entitled to nominate a senator or senators depending on the number of seats the party held in the provincial legislature (Interim Constitution, Section 48(2)).

At the first sitting of the Constitutional Assembly and prior to dispatching any other business, the Interim Constitution enjoined the Assembly to elect one of its members to be the **Chairperson of the Assembly** and another of its members to be the **Deputy Chairperson**.<sup>95</sup>

While not mandated anywhere in the text of the Interim Constitution, the Chairperson and Deputy Chairperson were drawn from the two parties with the largest number of seats in the Assembly. Cyril Ramaphosa, the then Secretary General of the ANC, was elected as the Chairperson and Leon Wessels, an NP MP was elected Deputy Chairperson.<sup>96</sup> This sharing of key offices was an important symbol of the ANC's willingness to include all parties in the drafting of the new constitutional text despite their overwhelming majority in the Assembly.

The Chairperson of the Constitutional Assembly was responsible for convening all sittings of the Assembly, apart from the first sitting.<sup>97</sup> Where the Chairperson was unavailable, the Deputy Chair filled this role, and where both elected office bearers were absent, the President of the Senate was empowered to fulfil the role of Chairperson of the Constitutional Assembly.<sup>98</sup>

The South African Constitutional Assembly did not have a formal or elected rapporteur.

The Interim Constitution empowered the Constitutional Assembly to appoint committees of its members as well as any commissions, technical committees or additional advisory bodies necessary to assist it in its functions.<sup>99</sup> It further gave the Assembly the power to make its own rules and orders in connection with its business and proceedings.<sup>100</sup> Such rules and orders could relate to various issues including the establishment, constitution, powers and functions, procedures and duration of committees of the Constitutional Assembly; the restriction of access to such committees; the venue of sittings of such committees; the designation of officers to preside over these committees, and the conveyance of the power to summon persons to appear before them to produce evidence and documents and the power to receive representations from interested persons.<sup>101</sup>

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<sup>95</sup> Constitution of the Republic of South Africa Act 200 of 1993 (Interim Constitution), Section 69(1). Such election was presided over by the President of the Senate and followed the same procedure as prescribed in Schedule 5 of the Interim Constitution for the election of the President (Interim Constitution, Section 69(2)). This procedure dictated that candidates for the position of Chair could be nominated with the signatures of at least two members of the Assembly (Interim Constitution, Schedule 5(2)). Once nominations had been received, a vote was held on the candidates without a debate beforehand (Interim Constitution, Schedule 5(3)). According to the Interim Constitution, where only one person was nominated for the position of Chair, this person would be declared the Chair without a vote (Interim Constitution, Schedule 5(4)). However, where there were two more nominees, each member of the Assembly present was given one, secret vote (Interim Constitution, Schedule 5(5)). The Chairperson was appointed if a majority of members present voted in their favour (Interim Constitution, Schedule 5(5)). Where no candidate received a majority of votes, the candidate who received the lowest number was eliminated and a second secret ballot conducted on the remaining candidates (Interim Constitution, Schedule 5(6)). This process was repeated until a candidate received a majority of the vote (Interim Constitution, Schedule 5(6)). The exact same processes for nomination and voting were then applied to the election of the Deputy Chairperson of the Assembly.

<sup>96</sup> H Ebrahim and L Miller (n 94) 128.

<sup>97</sup> Standing Rules of the Constitutional Assembly, 1994, Rule 9 <[https://constitutionnet.org/sites/default/files/standing\\_rules\\_for\\_the\\_constitutional\\_assembly\\_rules\\_of\\_procedure.pdf](https://constitutionnet.org/sites/default/files/standing_rules_for_the_constitutional_assembly_rules_of_procedure.pdf)> accessed 5th March 2021.

<sup>98</sup> Standing Rules of the Constitutional Assembly, 1994, Rules 7 and 8 (n 97).

<sup>99</sup> Constitution of the Republic of South Africa Act 200 of 1993 (Interim Constitution), Section 72(1).

<sup>100</sup> Constitution of the Republic of South Africa Act 200 of 1993 (Interim Constitution), Section 70(1).

<sup>101</sup> Constitution of the Republic of South Africa Act 200 of 1993 (Interim Constitution), Section 58(1)-(2).

The Constitutional Assembly adopted its standing orders in August 1994. In terms of these orders, a number of committees were formed, such as the **Rules Committee**, the **Constitutional Committee** and various select **Theme committees** (see figure no 6 below on the internal structure of the Constitutional Assembly).<sup>102</sup>

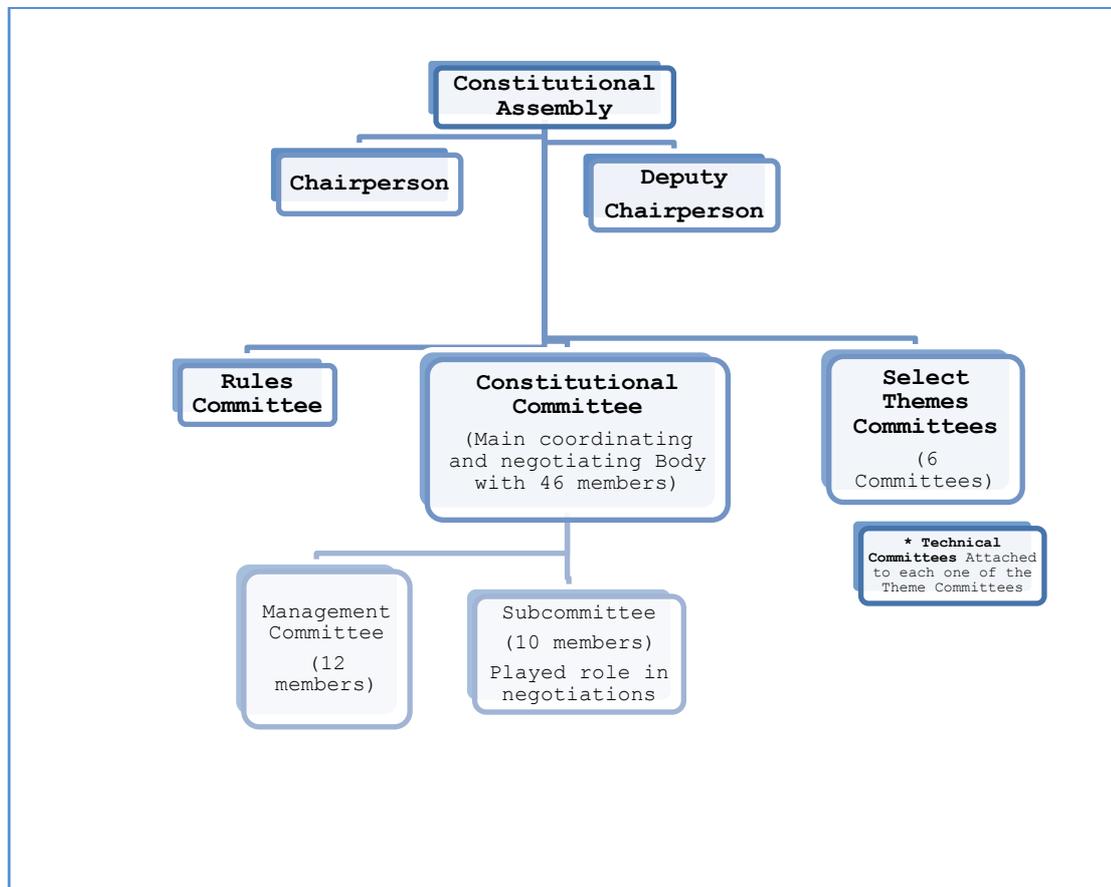


Figure 6. Organisation of the South African Constitutional Assembly.

The **Constitutional Committee** was the Assembly’s main coordinating and negotiating body. It had 46 members and each political party in the Constitutional Assembly was entitled to be represented in the Committee by a number of members representative of the proportion of seats the party held in the Constitutional Assembly.<sup>103</sup> The Chairperson and Deputy Chairperson of the Assembly were also deemed to be the Chair and Deputy of the Constitutional Committee.<sup>104</sup> In terms of the Assembly’s standing orders, the Committee was tasked with coordinating the drafting of the new text and the work of all committees, commissions, technical committees and other bodies; considering and evaluating reports submitted to it by such structures and reporting on these to the Constitutional Assembly; considering and reporting on any matter referred to it by the Constitutional Assembly; periodically submitting reports and recommendations to the

<sup>102</sup> Standing Rules of the Constitutional Assembly, 1994, Rules 18, 19A and 20 (n 97) .

<sup>103</sup> Standing Rules of the Constitutional Assembly, 1994, Rule 19A(2) (n 97).

<sup>104</sup> Standing Rules of the Constitutional Assembly, 1994, Rule 19A(3) (n 97).

Constitutional Assembly; and any other function designated to it by the Constitutional Assembly.<sup>105</sup>

It was foreseen that its relatively smaller size and ability to meet more frequently than the Assembly would enhance the Constitutional Committee's potential to reach consensus on contested constitutional issues.<sup>106</sup>

The standing orders of the Assembly empowered the Constitutional Committee to appoint a **Management Committee** from within its members.<sup>107</sup> This committee regulated the work-schedule of each of the structures within the Assembly, including the Constitutional Committee.<sup>108</sup> The Management Committee comprised twelve members including the Chair and Deputy Chairperson of the Assembly and representatives of each of the political parties in the Assembly.<sup>109</sup> The Committee met once a week to oversee the day-to-day management of the structures within the Assembly and develop a strategy for the internal processes to be relied upon in drafting the new constitutional text.<sup>110</sup> The work of this committee ensured that the Assembly was able to complete its work within the two-year deadline stipulated in the Interim Constitution.<sup>111</sup>

The Constitutional Committee established a ten-member **Sub-committee** from within its members in terms of the Assembly's standing orders. The standing orders did not specify the make-up of this sub-committee or whether all parties in the Assembly had the right to be represented on it as was the case with Committee membership.<sup>112</sup> The sub-committee was not a decision-making body and reported directly to the Constitutional Committee. The sub-committee was used to facilitate more productive negotiation between political parties. Because of its small size, it performed this function particularly successfully on controversial issues on which the larger Constitutional Committee had made little headway.<sup>113</sup>

In terms of its standing orders, aside from the Constitutional Committee, the Constitutional Assembly was further entitled to establish **Select Committees** from amongst its members.<sup>114</sup> Select Committees were appointed under a resolution of the Assembly or in terms of a rule approved by it.<sup>115</sup> They had a maximum of 50 members drawn from both of the houses of Parliament and each political party in the Constitutional Assembly was entitled to be represented in each Select Committee.<sup>116</sup> The number of representatives allocated to each party was determined dividing the total number of that party's members in the Assembly by 16.<sup>117</sup> Each Select Committee was charged with

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<sup>105</sup> Standing Rules of the Constitutional Assembly, 1994, Rule 19A(5) (n 97).

<sup>106</sup> C Barnes and E De Klerk, 'South Africa's multi-party constitutional negotiation process' in C Barnes (ed), *Accord - Owning the Process: Public Participation in Peacemaking*, (Conciliation Resources 2002) 32.

<sup>107</sup> Standing Rules of the Constitutional Assembly, 1994, Rule 19A(6) (n 97).

<sup>108</sup> The Constitutional Assembly: Annual Report (1996), 21-22 <[https://ourconstitution.constitutionhill.org.za/wp-content/uploads/2020/06/wca\\_doc1-1.pdf](https://ourconstitution.constitutionhill.org.za/wp-content/uploads/2020/06/wca_doc1-1.pdf)> accessed 3rd March 2021.

<sup>109</sup> Standing Rules of the Constitutional Assembly, 1994, Rule 19A(6)(b) and (c) (n 97).

<sup>110</sup> The Constitutional Assembly: Annual Report (1996) (n 108) 21-22.

<sup>111</sup> C Barnes and E De Klerk (n 106) 32. Read with Constitution of the Republic of South Africa Act 200 of 1993 (Interim Constitution), Section 73(1).

<sup>112</sup> Standing Rules of the Constitutional Assembly, 1994, Rule 19A(4) read with Rule 27(5) (n 97).

<sup>113</sup> C Barnes and E De Klerk (n 106) 32.

<sup>114</sup> Standing Rules of the Constitutional Assembly, 1994, Rule 20 (n 97).

<sup>115</sup> Standing Rules of the Constitutional Assembly, 1994, Rule 21(n 97) .

<sup>116</sup> Standing Rules of the Constitutional Assembly, 1994, Rules 22 and 23 (n 97).

<sup>117</sup> Standing Rules of the Constitutional Assembly, 1994, Rule 23 (n 97).

appointing a Chairperson during its first meeting and could appoint a Deputy Chairperson with the permission of the Assembly.<sup>118</sup>

Select Committees were given the following powers by the Assembly's standing orders: those mentioned in the resolution establishing the committee; to summon persons to appear before it to give evidence or produce documents; to receive representations from interested persons; and to appoint sub-committee from amongst their members on any matter falling to the select committee's functions.<sup>119</sup>

In practice, the Select Committees established by the Constitutional Assembly were known as the six **Theme Committees**. These Theme Committees were broadly related to the topics contained in the thirty-six constitutional principles with which the new constitutional text needed to apply.<sup>120</sup> These were:

While not specified in the standing orders of the Assembly, the main function of the Theme Committees was to ensure that the constitution-making process was inclusive. They did this by receiving views and ideas, and calling for submissions from political parties, civil society and the broader public on subjects related to their particular thematic focus. The committees then processed these in the form of reports on the potential sections to be included in the new constitutional text.<sup>121</sup>

- Theme Committees
1. Character of the Democratic State;
  2. Structure of Government;
  3. Relationship between Levels of Government;
  4. Fundamental Rights;
  5. Judiciary and

The standing orders empowered the Constitutional Assembly to appoint **Technical Committees** composed of members who were either members of the Assembly or external to it.<sup>122</sup> The orders stated that technical committees could be appointed to draft or supervise the drafting of the new constitutional text or any part of the text; to perform any function which is best performed by persons with professional or technical skills and report on this to the Assembly; and to consider or report on any matter referred to them by the Assembly, the Constitutional Committee or any select committee.<sup>123</sup>

\* Technical Committees were attached to each one of the theme Committees

In practice, the Assembly created a technical committee to support the work of each of the six select Theme Committees discussed above.<sup>124</sup> Each technical committee comprised a handful of legal experts drawn from practice and academia. The members of these committees gave the Theme Committees technical advice and compiled reports to assist the Theme Committees in fulfilling their broad mandate.<sup>125</sup>

Moreover, the Constitutional Assembly appointed a **Technical Refinement Committee**. This Committee consisted of members of the Assembly, law advisors to the

<sup>118</sup> Standing Rules of the Constitutional Assembly, 1994, Rules 25 and 26 (n 97).

<sup>119</sup> Standing Rules of the Constitutional Assembly, 1994, Rules 27 (n 97) .

<sup>120</sup> Constitution of the Republic of South Africa Act 200 of 1993 (Interim Constitution), Section 71(1).

<sup>121</sup> The Constitutional Assembly: Annual Report (1996) (n 108) 10.

<sup>122</sup> Standing Rules of the Constitutional Assembly, 1994, Rules 43 read with 45(1) (n 97) .

<sup>123</sup> Standing Rules of the Constitutional Assembly, 1994, Rules 44 (n 97).

<sup>124</sup> The Constitutional Assembly: Annual Report (1996) (n 108) 10.

<sup>125</sup> Ibid.

Assembly and representatives of the independent panel of experts, discussed below. The Committee was charged with technically and grammatically refining the final text of the constitution once agreement had been reached on this in the other structures of the Assembly.<sup>126</sup> This task was performed in consultation with the technical committees attached to each of the Theme Committees and was aimed at ensuring that the constitutional text was accessible to the majority of the South African population.

In terms of the Interim Constitution, the Constitutional Assembly was enjoined to appoint a **panel of South African constitutional law experts**.<sup>127</sup> It was mandated that these experts were wholly independent and as such, could not be members of Parliament, any provincial legislature or hold office in any political party. As the panel was independent, it could not be considered an actual sub-organ of the Constitutional Assembly,<sup>128</sup> and as such, its decision-making procedures and internal processes were not regulated by the Assembly in the Standing Orders or otherwise. This panel was appointed by the Assembly by a vote of two-thirds of its members.<sup>129</sup> However, the Interim Constitution envisaged a situation where a panel would not receive that number of votes. As such, it stipulated that, in this situation, a panel of constitutional experts consisting of a nominee of each party which held at least 40 seats in the Assembly would be appointed.<sup>130</sup> The panel was tasked with advising the Assembly and the Chairperson of the Assembly on constitutional matters,<sup>131</sup> including the content of the final constitutional text if the Assembly was unable to pass it by the requisite two-thirds majority vote.<sup>132</sup> The panel, therefore, played an important deadlock breaking role in the constitutional design process.

Panel of  
independent  
constitutional  
law experts

In further exploring the mandate of the independent panel of constitutional law experts, it is important to note that the Interim Constitution stipulated that it was the job of elected representatives to draw up and adopt a new constitution for South Africa.<sup>133</sup> While the need for this body to consult experts for technical assistance was acknowledged, the Constitutional Assembly held the view that this did not mean that “experts should be the dominant factor in the writing of the Constitution or that the role of the elected representatives should be confined to endorsing or rubber stamping the ideas of the experts or involving themselves only superficially in the constitution-making process.”<sup>134</sup> Aside from the creation of very broad guidelines, outlined in a later section, the panel of experts did not play a role in the drafting of the new constitutional text.

The Constitutional Assembly was empowered to appoint people to form commissions to investigate matters on which the Assembly required information it could

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<sup>126</sup> The Constitutional Assembly: Annual Report (1996) (n 108) 26

<sup>127</sup> Constitution of the Republic of South Africa Act 200 of 1993 (Interim Constitution), Section 72(2).

<sup>128</sup> GH Grové and N Ndziba, ‘Role of the Panel of Experts’ (1994) Legal Opinion CA 5/94, 2 <<https://www.justice.gov.za/legislation/constitution/history/LEGAL/LCA5.PDF>> accessed 25th March 2021.

<sup>129</sup> However, the Interim Constitution envisaged a situation where a panel would not receive that number of votes. As such, it stipulated that, in this situation, a panel of constitutional experts consisting of a nominee of each party which held at least 40 seats in the Assembly would be appointed. See Constitution of the Republic of South Africa Act 200 of 1993 (Interim Constitution), Section 72(3).

<sup>130</sup> Constitution of the Republic of South Africa Act 200 of 1993 (Interim Constitution), Section 72(3).

<sup>131</sup> Constitution of the Republic of South Africa Act 200 of 1993 (Interim Constitution), Section 72(2).

<sup>132</sup> Constitution of the Republic of South Africa Act 200 of 1993 (Interim Constitution), Section 73(3).

<sup>133</sup> Constitution of the Republic of South Africa Act 200 of 1993 (Interim Constitution), Preamble.

<sup>134</sup> GH Grové and N Ndziba (n 128) 2.

not readily obtain through the Assembly's ordinary procedures.<sup>135</sup> The Assembly could ask the President of the Republic to appoint such Commissions. Members of commissions could be drawn from both members of the Assembly and non-members.<sup>136</sup>

Through the President of the Republic, and at the request of the Assembly, the government appointed two commissions to assist the Assembly with its work: the **Commission on Provincial Government** and the **Volkstaat Council**. The Commission on Provincial Government advised the Constitutional Assembly on provisions of the new constitutional text relating to boundaries, structures, powers and transitional measure for the provinces.<sup>137</sup> The Volkstaat Council created a platform for proponents of the idea of an independent, self-determining Afrikaner homeland to express their views. The Council gathered information on this topic and reported to the Assembly, the Commission on Provincial Government and the Theme Committee investigating self-determination.<sup>138</sup>

## SPAIN

The Spanish constitution-making process, enabled by the Law for Political Reform of 1977, was conducted within the Spanish Parliament. Accordingly, the main bodies leading the process were Congress, the Senate and a Joint Constitutional Committee that included members of both Chambers. In addition, both Congress and the Senate created committees and subcommittees that had constitution-making responsibilities.

The organisation within Congress included the creation of a Constitutional Committee from among the members of Congress, which would be supported by a *Ponencia*, a subcommittee that included members of Congress who were also experts in constitutional law.

The composition of the Congressional Constitutional Committee was to be based on proportional representation, and thus each Parliamentary Group would designate one member for every ten Deputies or a fraction equal to or greater than five Deputies who comprised the group.<sup>139</sup> Political groups having won at least twenty percent of the seats in all of the electoral districts in which they ran were entitled to participate in the same terms.<sup>140</sup> Ultimately, the Constitutional Committee had 36 members (see below figure no 7 on the composition of the Constitutional Committee of Congress).<sup>141</sup>

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<sup>135</sup> Standing Rules of the Constitutional Assembly, 1994, Rules 36(1) and 37 (n 97) .

<sup>136</sup> Standing Rules of the Constitutional Assembly, 1994, Rules 36(2) (n 97).

<sup>137</sup> The Constitutional Assembly: Annual Report (1996) (n 108) 23.

<sup>138</sup> The Constitutional Assembly: Annual Report (1996) (n 108) 24.

<sup>139</sup> Cortes, Diario de Sesiones del Congreso de los Diputados No 4 (26 July 1977) 51-52, Articles 3 and 4 of the motion. <[http://www.transicion.org/pdf\\_hitos/1977\\_07Jul\\_Constitucion\\_g\\_parlament.pdf](http://www.transicion.org/pdf_hitos/1977_07Jul_Constitucion_g_parlament.pdf)> accessed 30th March 2021. (Cortes No 4).

<sup>140</sup> Ibid, 52, Article 4 of the motion.

<sup>141</sup> The Constitutional Committee was made up as follows: 17 UCD members, including its Chairman; 13 PSOE members; 2 PCE members; 2 AP members; 1 Catalan Minority member; and 1 Basque Group member.

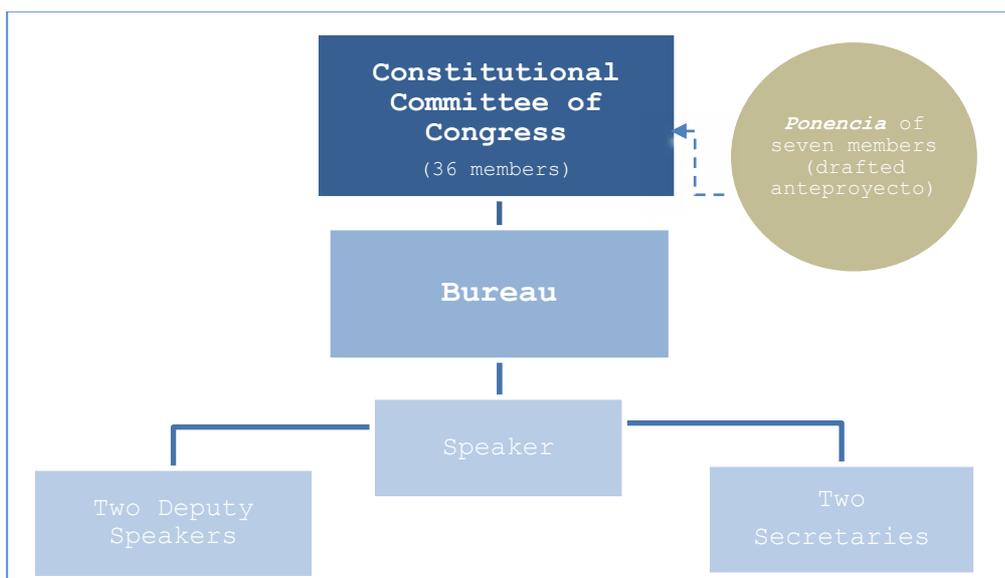


Figure 7. Structure of the Constitutional Committee of Congress.

The Constitutional Committee was to have a Bureau (*Mesa*), which would be composed of a Speaker, two Deputy Speakers and two Secretaries elected among its members.<sup>142</sup>

The *Ponencia* was composed of 7 members, a number that was agreed between the political parties prior to the establishment of the Constitutional Committee. While the composition of the *Ponencia* did not strictly follow the rules of proportionality, it was quite representative of the composition of the Constitutional Committee and of Congress itself. The *Ponencia* did not include women representation, as all its members were men.

Except for the opening and closing sessions of the *Ponencia*, which were presided by the Chairperson of the Constitutional Committee, the *Ponencia* opted for a daily rotating chairmanship that would follow the alphabetical order of the family names of its members.<sup>143</sup> The main role of this body was the elaboration of an '*anteproyecto*', that is, a preliminary draft constitutional text that would be subsequently discussed by Congress and the Senate.

The *Ponencia* was assisted by three *Letrados* (Legal Advisers) of the *Cortes* who attended their meetings.<sup>144</sup> These *Letrados* were responsible for drawing up minutes of what was discussed in the meetings and what stances the rapporteurs expressed, as well as draft the constitutional texts reflecting the agreements they reached. They further provided technical assistance when requested to and occasionally drafted a text themselves upon the request of one or more rapporteurs.

The organisation in the Senate included a Senate Constitutional Committee whose composition was determined on the basis of the participation of all the Parliamentary Groups in proportion to their numerical weight in the Senate.<sup>145</sup> It had 25 members.

<sup>142</sup> Cortes No 4 (n 139) Article 5 of the motion.

<sup>143</sup> Actas de la Ponencia Constitucional (Revista de las Cortes Generales) 255 <<https://www.congreso.es/constitucion/ficheros/actas/actas.pdf>> accessed on 3rd March 2021. (Actas de la Ponencia)

<sup>144</sup> Ibid, 256.

<sup>145</sup> Provisional Standing Orders of the Senate, Article 49 <<https://www.boe.es/buscar/doc.php?id=BOE-A-1977-25702>> accessed on 3rd March 2021.

According to the Law for Political Reform, the bicameral **Joint Committee** had to be formed by the Speakers of the Congress and the Senate, four Deputies and four Senators, and chaired by the Speaker of the Cortes.<sup>146</sup> While parity between the members of the two chambers was envisaged, given the composition of the two chambers, the number of members each had (four) was not conducive to multiparty representation. The inclusion of the Speakers of the two chambers, both members of the Government partly meant that the latter would have too much weight on the Committee.<sup>147</sup>

Ultimately, consensus was reached between the parties, and the Joint Constitutional Committee did not end up being a bipartisan committee. The 11 members of the Joint Constitutional Committee were elected on 11th October 1978.<sup>148</sup>

The meetings of the Joint Constitutional Committee lasted between 16th and 25th October 1978.

## TUNISIA

A year after the Jasmine Revolution, interim and unstable government arrangements in Tunisia led to the convening of a Constituent Assembly, tasked with replacing the 1959 Constitution. Elections for the Constituent Assembly were held on 23rd October 2011, and resulted in a body of 217 delegates (89 seats for the Islamist party El-Nahda, 29 seats for the centre-left secular party Congress for the Republic, and 20 for the social democratic party Ettakatol).<sup>149</sup> These three parties formed a coalition called the Troika, holding 138 seats in the Assembly, that is, only 6 votes short of a guaranteed two third majority.<sup>150</sup>

In total, 19 parties obtained representation, in addition to 8 independent candidates. However, this distribution of seats underwent continuous changes due to the frequent mobility of members between parties.<sup>151</sup>

On 22nd November 2011, the Assembly held its constitutive session, which was presided over by the oldest Assembly member, with the assistance of the youngest member. One established the Assembly elected a President and First and Second Vice-presidents.

Pursuant to the Declaration on the Transition Process of September 2011 (a declaration that resulted from political negotiations held before the establishment of the Assembly), two committees were set up, one tasked with drafting a constitutional law on the provisional organisation of public authorities, and the other tasked with drawing up the standing orders of the Assembly.

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<sup>146</sup> Article 2 Law for Political Reform of 4th January 1977 <<https://www.boe.es/buscar/doc.php?id=BOE-A-1977-165>> accessed on 7th March 2021.

<sup>147</sup> Provisional Standing Orders of the Senate, Article 126 (n 145).

<sup>148</sup> Its composition was as follows: 1. The Speaker of the *Cortes* (independent) and the two Speakers of the chambers (UCD members); Deputies: 1 UCD member; 1 PCE member; 1 Catalan Minority member (the three were rapporteurs of the Ponencia), in addition to a PSOE member; and Senators: 2 UCD members; and 2 Socialist members.

<sup>149</sup> The Carter Center (n 18) 24.

<sup>150</sup> The Carter Center (n 18) 24-25.

<sup>151</sup> While Al-Nahda eventually lost 4 members, Congress for the Republic lost 17 and Ettakatol 8. At the same time, the number of female members went up from 49 to 67, owed to the election of the head of Congress for the Republic as President of the Republic by the assembly, and the resignation of a several male members who were replaced by female members on their lists. The Carter Center (n 18) 47.

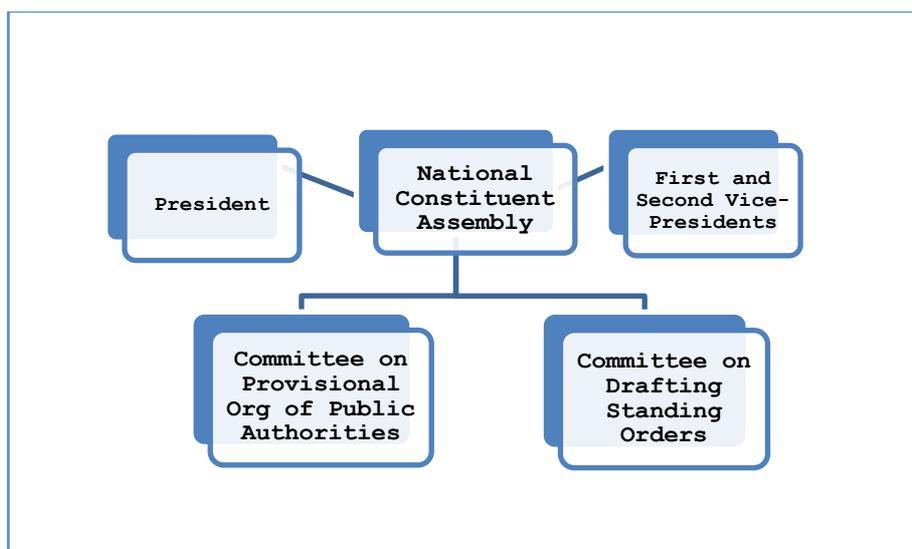


Figure 8. Broader Structure of Tunisia's National Constituent Assembly.

Regarding the provisional organisation of public authorities, and as stipulated in the Declaration on the Transitional Process, the National Assembly issued 'Constitutional Act No 6-2011',<sup>152</sup> which provided for new provisional arrangements in relation to the organisation of power and was informally known as the "Little Constitution".<sup>153</sup>

With respect to its functioning, the Tunisian Constituent Assembly –through the Committee on the Standing Orders– approved its Standing Orders nine weeks after its first session.<sup>154</sup> Importantly, the Constituent Assembly left the issue of a timeframe to complete its mandate open. Ultimately, according to the preamble of the Act, the assembly was to ensure the management of the affairs of the state until the promulgation of the new constitution and the establishment of permanent institutions.<sup>155</sup> According to the Standing Orders, the composition of the NCA was the following (as illustrated in figure no 9 below).

<sup>152</sup> Constitutional Act No 6-2011 of 16th December 2011 on the Provisional Organization of Public Authorities <<https://nawaat.org/2013/02/14/traduction-fr-loi-constitutionnelle-n6-2011-du-16-decembre-2011-relative-a-lorganisation-provisoire-des-pouvoirs-publics/>> accessed 5th March 2021.

<sup>153</sup> M Riahi, 'La Constitution: Élaboration et Contenu' (2016) 156 *Pouvoirs* 31 <<https://www.cairn.info/revue-pouvoirs-2016-1-page-31.htm>> accessed on 29th March 2021. In addition to provisionally organising the functioning of the state, Constitutional Act No 6-2011 contained a single article on the constitution-making process, which established the decision-making procedure for the adoption of the Constitution. On this topic see below Section 3 (B) on Process.

<sup>154</sup> The Committee on the Standing Orders operated on the basis of a draft bill containing 364 articles, as well as a number of documents relating to comparative law, which was to serve as inspiration. The Standing Orders of the dissolved Chamber of Deputies were used as a starting point. The committee had to further ensure that the rules of procedure it proposed were in line with Constitutional Act No 6-2011. Discussions in the committee concluded on 14th December 2011. The resulting draft bill contained 161 articles, which the committee approved unanimously.

<sup>155</sup> Following the approval of Constitutional Act No 6-2011, the Assembly elected the President of the Republic. The opposition did not put forward a candidate and the Electoral Commission rejected nine candidates for not meeting the required criteria. As such, the Congress for the Republic leader was the sole candidate. The opposition cast a blank vote, and the candidate received 153 favourable votes out of a total of 202 votes. B Proctor and I Ben Moussa, 'The Tunisian Constituent Assembly's By-laws: A Brief Analysis', (2012) International Institute for Democracy and Electoral Assistance, 12. <<https://www.idea.int/publications/catalogue/tunisian-constituent-assembly%E2%80%99s-laws-brief-analysis>> accessed on 15th March 2021.

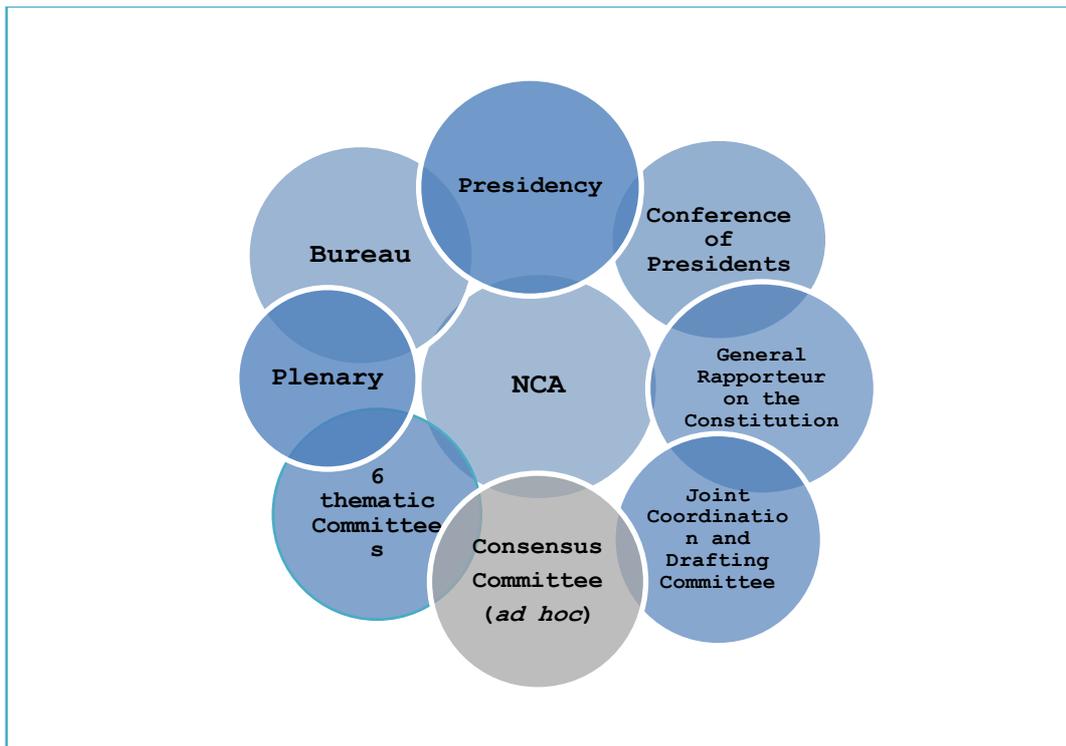


Figure 9. Structure of the Tunisian NCA.

### ***The Plenary***

The Plenary was the meeting of all the members of the NCA. As regards the constitution-making process, the Plenary was responsible for debating on and approving the draft Constitution after the relevant committees had finalised their work and submitted their reports thereon.<sup>156</sup> The meetings of the Plenary were convened by the President of the Assembly at the dates and times determined by the Bureau.<sup>157</sup>

### ***Presidency of the Assembly***

The Presidency of the Assembly was composed of a President and two Vice-presidents. The President of the Assembly was elected for the duration of the Assembly's mandate, by an absolute majority of the members of the Assembly, that is, by more than half the total number of members. The President of the Assembly was its legal representative and had to ensure the application of the Standing Orders and the decisions of the Plenary, as well as the recommendations of the Conference of Presidents. The President chaired and moderated the plenary sessions of the Assembly,<sup>158</sup> supervised its work, and could take any steps necessary to maintain order and security in and around the Assembly.<sup>159</sup>

The President was the Chair of the Bureau of the Assembly, of the Conference of Presidents, and of the Joint Coordination and Drafting Committee. Whenever the President attended the meeting of any committee, they chaired it, with assistance of the Vice-presidents.<sup>160</sup>

<sup>156</sup> Standing Orders of the Tunisian National Constituent Assembly, Article 75 (n 18).

<sup>157</sup> Standing Orders of the Tunisian National Constituent Assembly, Article 79 (n 18).

<sup>158</sup> Standing Orders of the Tunisian National Constituent Assembly, Article 25 (n 18).

<sup>159</sup> Standing Orders of the Tunisian National Constituent Assembly, Article 24 (n 18).

<sup>160</sup> Standing Orders of the Tunisian National Constituent Assembly, Article 25 (n 18).

### ***Bureau of the National Constituent Assembly***

The Bureau had 10 members. In addition to the President of the Assembly, the Bureau was composed of the first and second Vice-presidents, as well as the Assistants to the President, including an Assistant for Legislation, and Liaison with the Government and with the Presidency of the Republic, an Assistant for Public Outreach, Civil Society and Tunisian Expatriates, an Assistant for Foreign Relations, an Assistant for the Media, and three Assistants for Public Administration and Oversight of the Execution of the Budget.<sup>161</sup>

The Bureau was responsible for ensuring that the tasks of the Assembly were undertaken and for supporting its members in their work. It was also responsible for supervising the administrative and financial affairs of the Assembly, and for monitoring the execution of its budget.<sup>162</sup> The Bureau also managed the international parliamentary relations of the Assembly, appointing delegates to represent it, following consultation with the Parliamentary Groups, and taking their relative size into consideration.<sup>163</sup>

### ***Conference of Presidents***

The Conference of Presidents was a steering consultative council headed by the President of the Assembly. It comprised the two Vice-presidents, the Assistants, the General Rapporteur, the Chairpersons of the Assembly committees, and the heads of the Parliamentary Groups.<sup>164</sup>

The main functions of the Conference of Presidents with a bearing on the constitution-making process included: proposing the programme for the Assembly's constitutional work; proposing a system for organising plenary debates to allocate time to the different Parliamentary Groups; and helping the Bureau follow up on the work of the Assembly committees.<sup>165</sup>

Meetings of the Conference of Presidents were not public and were attended by the Secretary General for minute taking. Decisions were adopted by consensus.<sup>166</sup>

### ***General Rapporteur on the Constitution***

The General Rapporteur and their Assistants were elected pursuant to the same rules that applied to the election of the President, that is, on the basis of an absolute majority in the first round, and a relative majority in the second.<sup>167</sup>

The General Rapporteur was the Vice-chairperson of the Joint Coordination and Drafting Committee. In this capacity, the Rapporteurs assumed a number of duties in relation to the work of the Constitutional Committees, including: the receipt of external suggestions on the content of the constitution and their referral to the relevant committees; monitoring the daily work of the committees and coordination between them; providing references or data requested by the committees; and collating, tabulating

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<sup>161</sup> Standing Orders of the Tunisian National Constituent Assembly, Article 28 (n 18). The Assistants to the President were chosen on the basis of the proportional representation of the Parliamentary Groups. Groups with larger numbers of members were given priority in appointing the Assistants and in the choice of their portfolios. Standing Orders of the Tunisian National Constituent Assembly, Article 29 (n 18).

<sup>162</sup> Standing Orders of the Tunisian National Constituent Assembly, Article 32 (n 18).

<sup>163</sup> Standing Orders of the Tunisian National Constituent Assembly, Article 33(n 18).

<sup>164</sup> Standing Orders of the Tunisian National Constituent Assembly, Article 38 (n 18).

<sup>165</sup> Standing Orders of the Tunisian National Constituent Assembly, Article 39 (n 18).

<sup>166</sup> Standing Orders of the Tunisian National Constituent Assembly, Article 40 (n 18).

<sup>167</sup> Standing Orders of the Tunisian National Constituent Assembly, Article 103 (n 18).

and presenting the output of the committees. In view of avoiding duplication, the General Rapporteur received a copy of the decisions made within each committee on a daily basis.

### **Parliamentary Groups**

Any 10 members or more could form a Parliamentary Group.<sup>168</sup> Members were barred from joining more than one group.<sup>169</sup> Groups had a President and a Vice-president.<sup>170</sup> It was not mandatory for members to join a Parliamentary Group.<sup>171</sup>

### **Committees**

The Standing orders initially foresaw the establishment of six thematic Permanent Constitutional Committees and a Joint Coordination and Drafting committee. However, it is important to note in this regard that the Consensus Committee, which played a crucial role in consensus-building, was not originally foreseen in the Standing Orders and was only established ad hoc after the drafting process stalled (see Stages in the Constitution-making process below).

First Committee	Second Committee	Third Committee	Fourth Committee	Fifth Committee	Sixth Committee
Preamble, General Principles and Amendments	Rights and Liberties	Legislative and Executive Powers, and the Relation between them	Committee on the Judicial, Administrative, Financial and Constitutional Justice Systems	Committee on Const'al. Bodies	Committee on Regional and Local Public Bodies

Each thematic committee could consist of no more than 22 members.<sup>172</sup> Membership was determined in proportion to membership in Parliamentary Groups and of independent members.<sup>173</sup> Members of the Government were not allowed to sit on the committees.<sup>174</sup> Members could not sit on more than one Constitutional Committee.

Each committee had a Bureau that consisted of a Chairperson and a Vice-chairperson, a Rapporteur and two Assistant Rapporteurs.<sup>175</sup> The allocation of Bureau positions within the committees had to be based on proportional representation, following consultations with the heads of the groups.<sup>176</sup>

Each Constitutional Committee was responsible for drafting the articles of the draft constitution within its area of jurisdiction before referring its draft text to the Joint

<sup>168</sup> Standing Orders of the Tunisian National Constituent Assembly, Article 16 (n 18).

<sup>169</sup> Standing Orders of the Tunisian National Constituent Assembly, Article 17 (n 18).

<sup>170</sup> Standing Orders of the Tunisian National Constituent Assembly, Article 18 (n 18).

<sup>171</sup> In total, seven groups were initially formed, as follows: Al-Nahda (89 members); Democratic Groups (18 members); Congress for the Republic (16 members); Democratic Transition (13 members); Ettakatol (13 members); Democratic Alliance (12 members); and Wafa (10 members). Additionally, 53 members did not join any group.

<sup>172</sup> Standing Orders of the Tunisian National Constituent Assembly, Article 64 (n 18).

<sup>173</sup> Standing Orders of the Tunisian National Constituent Assembly, Article 42 (n 18).

<sup>174</sup> Standing Orders of the Tunisian National Constituent Assembly, Article 47 (n 18).

<sup>175</sup> Standing Orders of the Tunisian National Constituent Assembly, Article 49 (n 18).

<sup>176</sup> Standing Orders of the Tunisian National Constituent Assembly, Article 50 (n 18).

Coordination and Drafting Committee. The latter could return the text to the committee, requesting it to reconsider some issues before submitting it for debate in the Plenary.<sup>177</sup>

Joint meetings could be convened between two or more committees, at the request of any such committee or of the Joint Coordination and Drafting Committee, to facilitate the consideration of overlapping aspects.<sup>178</sup>

### ***Joint Coordination and Drafting Committee***

The Joint Coordination and Drafting Committee (Drafting Committee) had 22 members. It was composed of the President of the National Constituent Assembly as *ex officio* Chairperson, the General Rapporteur on the Constitution as Vice-chairperson, the first two Assistants to the General Rapporteur, and the Chairpersons and Rapporteurs of each of the six Constitutional Committees.<sup>179</sup> In practice, this composition meant that the Drafting Committee did not precisely reflect the political division of power within the Assembly, as it overrepresented the parties of the tripartite coalition, who occupied numerous Chairperson and Rapporteur positions in the Constitutional Committees.

Among its functions, the Drafting Committee was responsible for coordinating the work of the Constitutional Committees, preparing the General Report on the draft Constitution before its submission to the Plenary, and preparing the final draft Constitution in accordance with the decisions of the Plenary.<sup>180</sup>

Regarding its decision-making, the Drafting Committee decided to take decisions by consensus. In practice, it only issued decisions or comments that had not been rejected by more than two of its 22 members.

With respect to its meetings, these were closed to all observers, including the media.

## **B. PROCESS**

The term ‘process’ in this subsection refers to the various stages of a given constitution-making process, which involve deciding on the content of the constitutional text, its drafting, debating on the content, decision-making mechanisms, voting, approval and adoption of a constitutional text, among other matters.

Most constitution-making processes analysed here organise these steps differently, as the process followed to produce a constitutional text depends greatly on the type of constitutional body selected and the tasks that are entrusted to them.

### **COLOMBIA**

According to the Rules of Procedure of the Colombian ANC, the timeframe for the ANC to discharge its mandate was 150 days (from 5th February to 4th July 1991).<sup>181</sup>

The debate within the Colombian ANC was conducted in the following phases: 1. Preliminary phase, which consisted in a general discussion among all members; 2. First phase, which covered the work within the committees that in turned systematised the proposals presented during the preliminary phase; 3. Second phase, which included the

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<sup>177</sup> Standing Orders of the Tunisian National Constituent Assembly, Article 65 (n 18).

<sup>178</sup> Standing Orders of the Tunisian National Constituent Assembly, Article 66 (n 18).

<sup>179</sup> Standing Orders of the Tunisian National Constituent Assembly, Article 103 (n 18) .

<sup>180</sup> Standing Orders of the Tunisian National Constituent Assembly, Article 104 (n 18).

<sup>181</sup> Article 2 of the Rules of Procedure (n 43).

debate in the Plenary and was organised in a First and Second Debate; and, finally, 4. A Revision phase, during which a style commission would revise the constitutional text (see below figure no 10 on the stages of the Colombian constitution-making process).

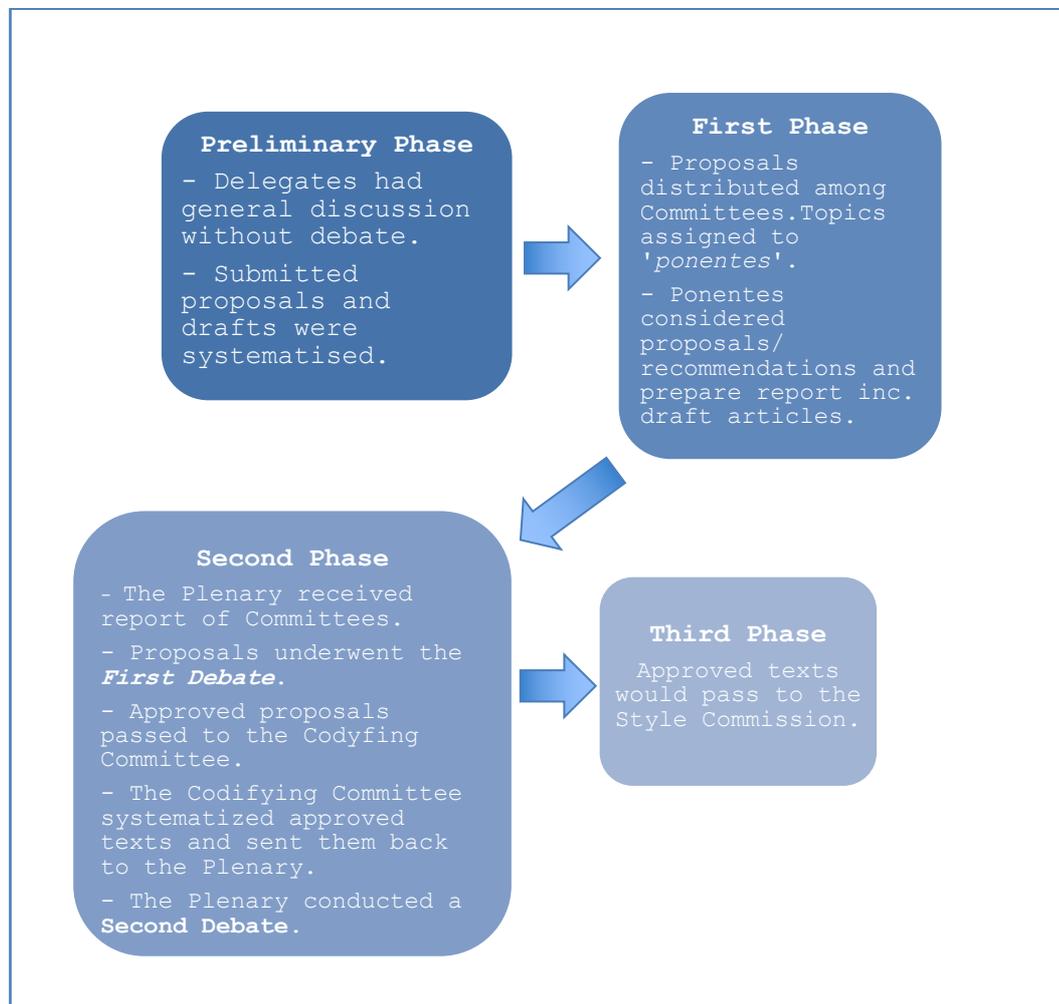


Figure 10. Phases of the Colombian constitution-making process.

The Rules of Procedure of the Colombian ANC included a ‘decentralised’ mechanism to present proposals to the Assembly, that is, that various entities could submit proposals. Thus, Article 28 of the Rules of Procedure provided that

Podrán presentar proyectos los Constituyentes, el Gobierno Nacional por intermedio del Ministro de Gobierno, la Corte Suprema de Justicia y el Consejo de Estado, y el Congreso Nacional a través de las Comisiones Primeras Permanentes del Senado y de la Cámara de Representantes.<sup>182</sup>

During the second phase, in particular throughout the First Debate, the Plenary discussed the reports prepared by the different committees, which included draft provisions. The order of the debate was determined by the order of reception of each report. After the First Debate, proposals passed to the Codifying Committee, which prepared the texts for

<sup>182</sup> Article 28 of the Rules of Procedure (n 43). With respect to the submission of proposals by citizens and other non-governmental institutions see below section D on public participation.

the Second Debate. In practice, due to time constraints, there was no real discussion during the Second Debate, but mainly a second voting.

The ANC's Rules of Procedure included a simple majority rule to adopt decisions other than the approval of constitutional texts. As regards the approval of the provisions of the new constitutional text, the rules made a difference between the approval of provisions during the First and the Second Debate. Whereas in the First Debate, approval required the favourable vote of the majority of members in office (absolute majority); in the Second Debate, the voting quorum depended on whether the vote concerned the approval of substantive modifications to the text approved during the First Debate, or the introduction of new provisions, in which case the approval would require two thirds.<sup>183</sup> The voting method consisted in a show of hands or standing method, but members of the ANC could require a nominal vote. In the latter case, voting was to follow an alphabetical order.<sup>184</sup>

### ICELAND

The rules of procedure for the Constitutional Council (the body that replaced the Constitutional Assembly) did not contain any detail with regard to the preparation of an initial constitutional draft or the receipt of initiatives from members of the Council, interested parties and the public. Rather, the rules stated that the Council must determine, as soon as possible, the manner of starting preparation of a draft text and that members of the public were entitled to express opinions on a 'progress document' once this had been drafted.<sup>185</sup> Further, while the rules stated that communications could be submitted to the Council by persons and groups outside of it, it was unclear whether these communications could contain proposals for constitutional initiatives.<sup>186</sup>

This lack of clarity in terms of the approach to initiating the drafting process created difficulties for the Council. Conflict amongst its members as to whether their mandate was to review the existing Constitution or draft an entirely new text plagued the Council from the beginning.<sup>187</sup> Moreover, members disagreed about how to treat the contents of the Constitutional Committee's report on the National Forum which suggested formulations for certain provisions for a new text (and not a mere reform of the existing constitution).<sup>188</sup> It was eventually decided by the Presidium of the Council that the latter would compose a new text but that the old constitution would be kept at the side, with the new text regarded as an alternative to the current constitution rather than a proposal to change it.<sup>189</sup> Moreover, the drafting of the provisions of the new text would be done with due consideration for the proposals made by the Constitutional Committee.<sup>190</sup>



The new constitutional text would be an alternative to the existing constitution, not a proposal to change it.

<sup>183</sup> Article 63 of the Rules of Procedure (n 43).

<sup>184</sup> Article 64 of the Rules of Procedure (n 43).

<sup>185</sup> Article 14 Rules of Procedure of the Constitutional Council (n 71).

<sup>186</sup> Article 10 Rules of Procedure of the Constitutional Council (n 71).

<sup>187</sup> J Olafsson (n 70) 256.

<sup>188</sup> J Olafsson (n 70) 257.

<sup>189</sup> J Olafsson (n 70) 257.

<sup>190</sup> J Olafsson (n 70) 257.

As allowed for in the rules of procedure, the drafting of the new text was completed by the three thematic committees discussed above.<sup>191</sup> Each committee was responsible for drafting roughly one third of the new constitutional text.

The rules of procedure for the Council did not specify the procedures to be followed within the thematic committees while drafting the new text. This was left to the discretion of the members of the committees. They decided that, rather than developing the document in a traditional linear fashion, they would rely on an agile method, similar to those used in software development, so that the text was developed gradually and completed in several rounds (see figure no 11 on the drafting process).<sup>192</sup>

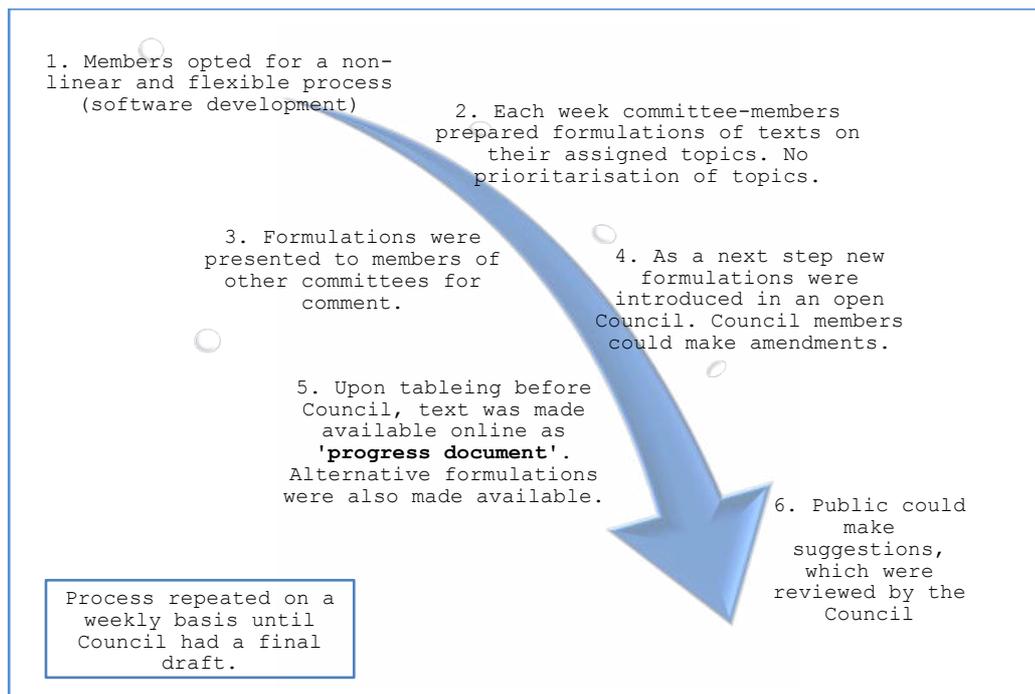


Figure 11. Drafting Process.

Practically, committees spent two days a week working separately on the various topics allocated to them.<sup>193</sup> During this time, they produced formulations for provisions of a new text relating to whichever topics they were examining that week. These formulations were then presented to the members of the other committees for comment and finally, introduced in an open Council meeting where all members of the Council were present.<sup>194</sup> Council members could make further suggestions for amendments at this point. Upon tabling before the Council, the text was also published on the Council’s website as a “progress document”.<sup>195</sup> The public could make comments and recommendations on this document, which were then considered by the Council for inclusion in the text. This process was repeated on a weekly basis, until the Council was ready to make a final draft proposition.<sup>196</sup>

<sup>191</sup> Article 4 Rules of Procedure of the Constitutional Council (n 71).

<sup>192</sup> J Olafsson (n 70) 260 citing E Bergmann *Iceland and the International Crisis* (Palgrave MacMillan 2014) 179.

<sup>193</sup> The Constitutional Council-General Information ‘Working on the Topics’ (n 53).

<sup>194</sup> The Constitutional Council-General Information ‘Working on the Topics’ (n 53).

<sup>195</sup> The Constitutional Council-General Information ‘Working on the Topics’ (n 53).

<sup>196</sup> The Constitutional Council-General Information ‘Working on the Topics’ (n 53).

In terms of the rules of procedure, the progress document could contain alternative options for provisions and even entire chapters provided that each option had the support of a minimum of one fifth of Council members.<sup>197</sup> As such, the public could weigh in on various options at any one time.

This approach to drafting is unique and clearly genuinely interested in public participation. However, the fact that no formalised procedure governed it and that there was no agreement as to prioritisation or order of dealing with topics in the committees made the process haphazard.<sup>198</sup>



Innovative approach to drafting, yet no prioritisation of topics caused disorganisation

Upon completion of the progress document, the Presidium was charged with compiling a draft Bill for a Constitutional Act (see below figure no 12 on the debate process).<sup>199</sup> In terms of the Council's rules of procedure, this Bill had to be subjected to two readings before it could be passed by the Council (see figure below on the process). During the first reading, the Chair of each thematic committee presented the portion of the Bill for which they were responsible to the plenum.<sup>200</sup> Members of the Council could suggest amendments to these provisions and the Council could decide to include them. Following the first reading, the Bill with any amendments was sent back to the thematic committee responsible for it for consideration.<sup>201</sup>

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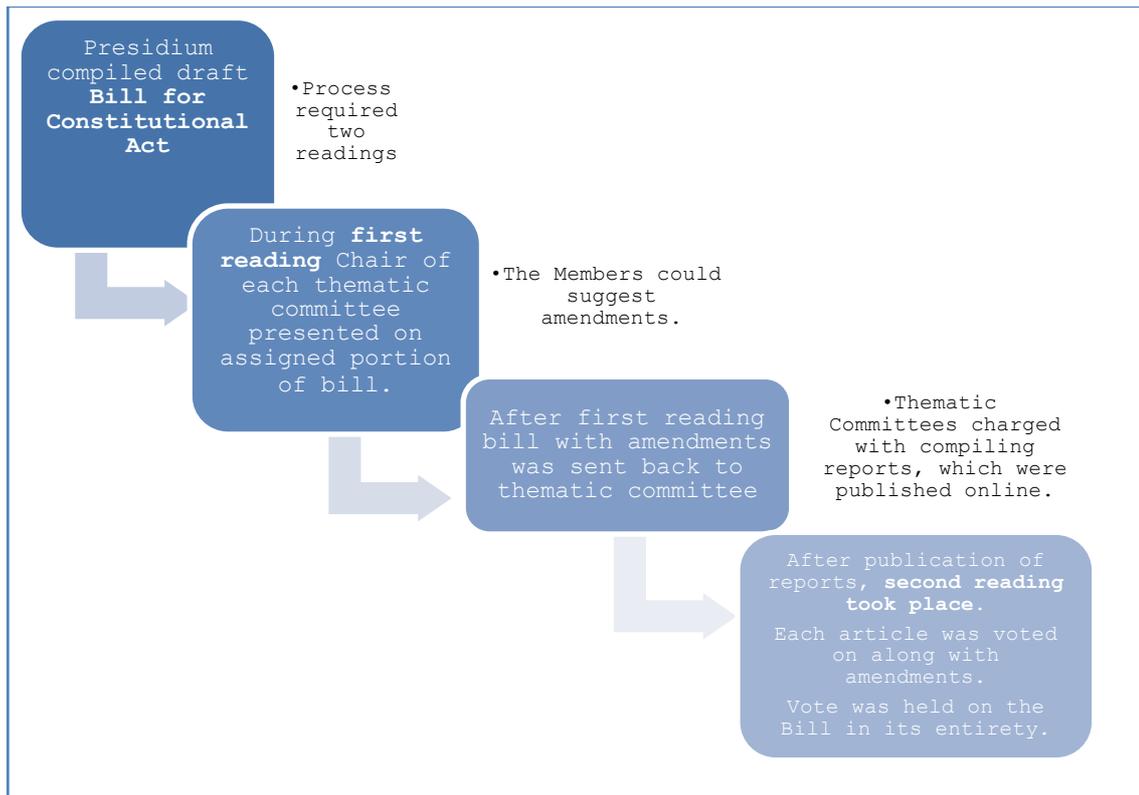
<sup>197</sup> Article 14 Rules of Procedure of the Constitutional Council (2011) (n 71).

<sup>198</sup> J Olafsson (n 70) 260.

<sup>199</sup> Article 15(1) Rules of Procedure of the Constitutional Council (2011) (n 71).

<sup>200</sup> Article 15(2) Rules of Procedure of the Constitutional Council (2011) (n 71).

<sup>201</sup> Article 15(2) Rules of Procedure of the Constitutional Council (2011) (n 71).



*Figure 12. Debate within Icelandic Constitutional Council.*

The thematic committees were then charged with compiling reports on the relevant sections of the Bill and submitting these to the Council.<sup>202</sup> The reports were published on the Council’s website. At least two days after the publication of the reports, the second reading of the Bill took place.<sup>203</sup> At this reading, the individual articles of the Bill were debated together with proposed amendments. At the end of the reading, each article was voted on, along with any proposed amendments to this article, and finally a vote was held on the Bill in its entirety.<sup>204</sup>

In terms of the rules of procedure of the Constitutional Council, a quorum in the Council and thematic committees was only achieved if a majority of voting delegates were present. Moreover, the rules stated that only if consensus could not be reached on an item of business, was the issue put to and eventually decided by a vote.<sup>205</sup> This rule is illustrative of one of the first decisions taken by the Council in that it would aim to use judicious discussion and objective criticism to achieve consensus rather than force a vote.<sup>206</sup> In fact, the rules themselves did not even specify what level of majority was needed to be reached if a vote was forced on an issue, including the passage of the final text by the Council, and did not contain any deadlock-breaking mechanisms. Interestingly, they also did not contain any provisions relating to how to build consensus, despite explicitly preferring it to conducting a vote. Despite this, the Council generally

<sup>202</sup> Article 15(3) Rules of Procedure of the Constitutional Council (2011) (n 71).

<sup>203</sup> Article 15(3) Rules of Procedure of the Constitutional Council (2011) (n 71).

<sup>204</sup> Article 15(3) Rules of Procedure of the Constitutional Council (2011) (n 71).

<sup>205</sup> Article 6(2) Rules of Procedure of the Constitutional Council (2011) (n 71).

<sup>206</sup> J Olafsson (n 70) 255.

reached consensus on the content of the Bill and it was finally accepted through a unanimous vote of all 25 Council members.<sup>207</sup>

Following the passage of the Bill by the Council, it was delivered to the *Althingi* to be processed in line with ordinary parliamentary procedures for the consideration of legislation.<sup>208</sup> The Bill was submitted to the *Althingi* in July 2011, however momentum to bring the Bill into force had dwindled.<sup>209</sup> Nearly a year after the Bill was submitted, the *Althingi* held a referendum asking the public whether they wanted the Council's draft to form the basis of a new Constitutional Act.<sup>210</sup>

The outcome of this referendum did not have a binding effect on the decision of Parliament as to whether to pass the Bill. Nearly 50% of eligible voters voted in the referendum and 67% voted in favour of the Bill created by the Council. Despite this, the Bill was not passed before the Parliamentary elections in 2013 which ushered in a new Parliament controlled by political parties which opposed constitutional reform.<sup>211</sup> As such, the draft Bill was never given force of law by the *Althingi*.

Non-binding  
referendum 67%  
voted in favour of  
Constitutional  
Council's Bill.

Parliament did not  
pass Bill.

### **SOUTH AFRICA**

Starting with the proposals for content of the new constitutional text, these could be made by any interested persons, organisations or members of the Assembly on behalf of their political parties. Two mechanisms allowed for the submission of such initiatives (see below figure no 13). First, in terms of the standing orders of the South African Constitutional Assembly, representations and proposals could be submitted to the Chairperson of the Assembly, for consideration in the drafting of a new constitutional text, or part of that text, by any interested person or organisation.<sup>212</sup> Moreover, a member of the Constitutional Assembly could table before the Assembly any proposals or representations made by the political party which they represented for consideration during the drafting process.<sup>213</sup> The Chairperson of the Assembly referred all proposals or representations received or tabled to the committee of the Assembly most suitable to deal with them.<sup>214</sup> Second, the select Theme Committees were empowered by the standing orders to receive representations from interested persons directly.<sup>215</sup>

<sup>207</sup> The Constitutional Council-General Information 'Working on the Topics' (n 53).

<sup>208</sup> Article 16 Rules of Procedure of the Constitutional Council (2011) (n 71).

<sup>209</sup> T Gylfason (n 55) 15.

<sup>210</sup> T Gylfason (n 55) 16.

<sup>211</sup> T Gylfason (n 55) 18-19.

<sup>212</sup> Standing Rules of the Constitutional Assembly, 1994, Rule 75(1) (n 97).

<sup>213</sup> Standing Rules of the Constitutional Assembly, 1994, Rule 75(2) (n 97).

<sup>214</sup> Standing Rules of the Constitutional Assembly, 1994, Rule 75(3) (n 97).

<sup>215</sup> Standing Rules of the Constitutional Assembly, 1994, Rule 27(4) (n 97).

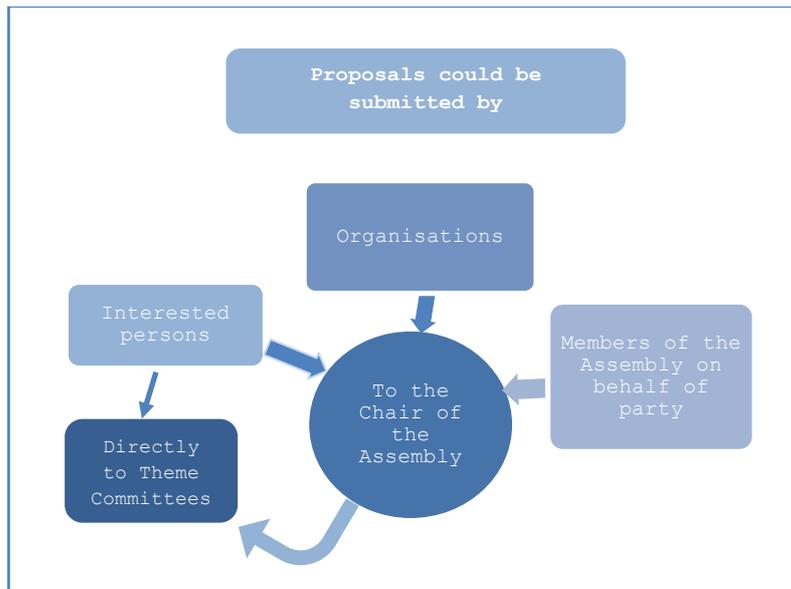


Figure 13. Mechanisms to submit proposals.

The South African Constitutional Assembly was charged with drafting and adopting an entirely new constitutional text within two years of the date of the first sitting of the Parliament elected in the 1994 elections.<sup>216</sup> However, the standing orders of the Constitutional Assembly and the Interim Constitution were both silent on the processes to be employed for the actual drafting of this text. As such, the Constitutional Committee, as the body charged with coordinating the drafting of the new text,<sup>217</sup> created its own ad-hoc procedures to regulate the work of the various committees involved in the process.

No rules on drafting in Interim Constitution or Rules of Procedure.  
Constitutional Committee created ad hoc rules.

It may be possible to glean best practices that could be included in the Procedural Rules of other constituent assemblies by examining the processes that the Constitutional Committee relied upon. First, the independent panel of constitutional law experts was called upon to develop guidelines for the drafting committees as to which rights and institutions ought to be included in the new text. This panel was appointed in terms of the procedures contained in the Interim Constitution and detailed on page 35 of this report, above. The creation of these guidelines was not mandated by the Interim Constitution or the Assembly's Standing Orders. Moreover, their contents were not binding on the committees charged with drafting the actual text. Instead, the panel merely suggested that the following questions could guide the drafters as to what to include in the draft constitutional text:

is this right / institution necessary for effective and democratic government?  
And does the implementation of the democracy and the constitutional state require the inclusion of this right / institution as an institutional necessity or in view of the country's history and needs?<sup>218</sup>

<sup>216</sup> Constitution of the Republic of South Africa Act 200 of 1993 (Interim Constitution), Sections 68(2) and 73(1).

<sup>217</sup> Standing Rules of the Constitutional Assembly, 1994, Rule 19A(5)(a) (n 97).

<sup>218</sup> The Constitutional Assembly: Annual Report (1996) (n 108) 25.

Next, the various Theme Committees were charged with receiving, organising and evaluating the proposals relating to the Committees' thematic focus in light of these guidelines.<sup>219</sup> The Technical Committee attached to each Theme Committee assisted the members of their specific Theme Committee to negotiate and reach agreement as to the content of their portions of the new constitutional text. At the conclusion of the work of each Theme Committee, their Technical Committee drafted a report which included a set of formulations of draft constitutional provisions reflecting the political agreements reached in the Theme Committee.<sup>220</sup> Each report was then submitted to and debated by the Constitutional Committee and consolidated into a first draft of the constitutional text.<sup>221</sup> The drafting part of this consolidation was performed by the Technical Refinement Committee to ensure that the draft constitutional text was technically and grammatically refined.<sup>222</sup> This first draft was then renegotiated, reformulated and expanded in various private meetings organised by the sub-committee of the Constitutional Committee until a final draft was agreed upon in April 1996.<sup>223</sup>

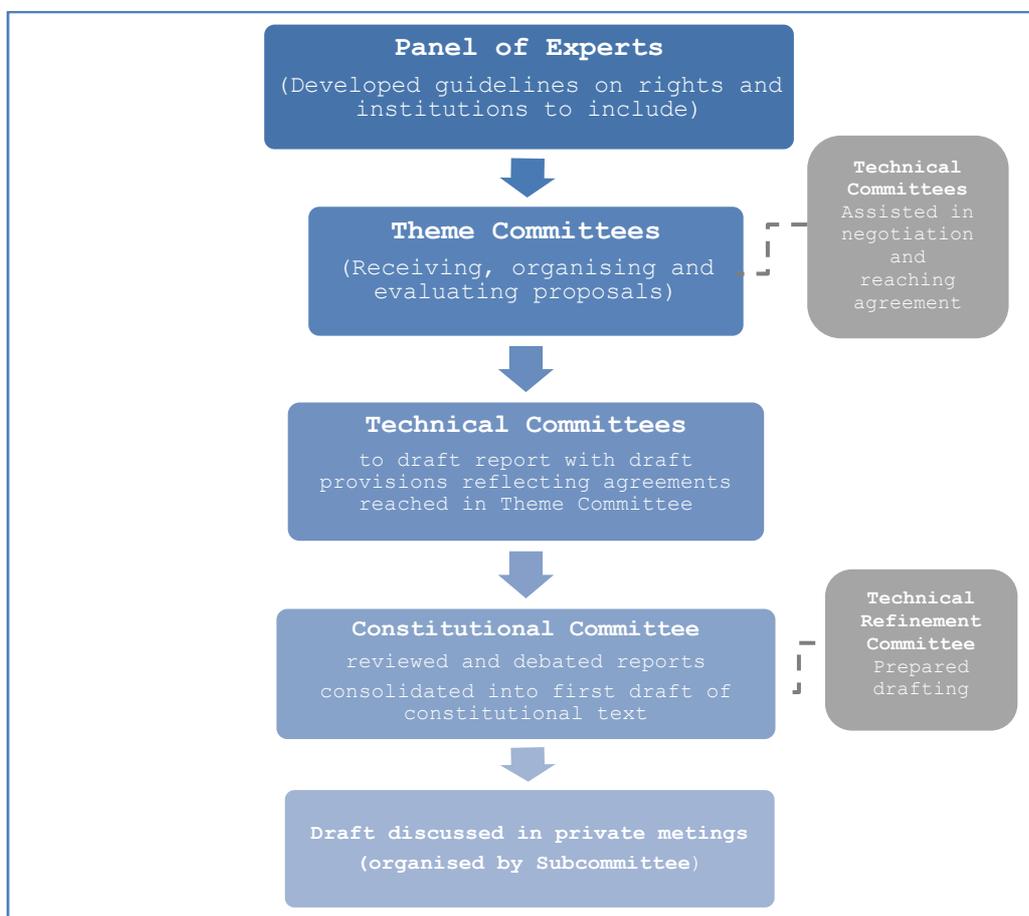


Figure 14. Drafting Process of SA Constitutional Assembly.

While the Interim Constitution was silent on the procedures to be followed in drafting the constitutional text, it did put in place significant limits on the content of such a draft.

<sup>219</sup> The Constitutional Assembly: Annual Report (1996) (n 108) 26.

<sup>220</sup> The Constitutional Assembly: Annual Report (1996) (n 108) 26.

<sup>221</sup> The Constitutional Assembly: Annual Report (1996) (n 108) 26.

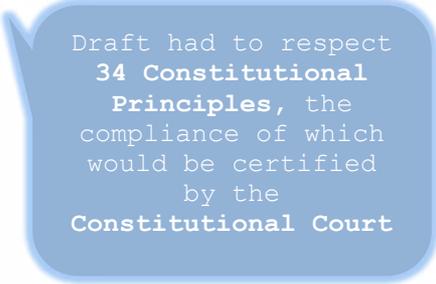
<sup>222</sup> The Constitutional Assembly: Annual Report (1996) (n 108) 26.

<sup>223</sup> The Constitutional Assembly: Annual Report (1996) (n 108) 28. Note that by the time a final version of the text was agreed upon, there had been six versions of the draft constitutional text.

These limits came in the form of the requirement that any new constitutional text had to comply with 34 Constitutional Principles contained in Schedule 4 to the Interim Constitution.<sup>224</sup>

The 34 Constitutional Principles established a framework which regulated the way that the new constitutional text ought to address key topics such as character of the democratic state, fundamental rights, the judiciary and legal system, the structure of government, and the relationship between different levels of government.<sup>225</sup> The requirement of compliance with these Principles ensured that the key points of agreement reached between conflicting interest groups during the negotiations to end apartheid were reflected in any new constitutional text.<sup>226</sup>

To ensure compliance with these 34 principles, the Interim Constitution stated that no new constitutional text passed by the Constitutional Assembly would enter into force and effect unless the Constitutional Court certified that all of the provisions of that text complied with the Constitutional Principles.<sup>227</sup>



Draft had to respect  
34 Constitutional  
Principles, the  
compliance of which  
would be certified  
by the  
Constitutional Court

Once a final draft of the new constitutional text was compiled by the Constitutional Committee, the standing orders of the Assembly mandated that it should be tabled, together with the Committee's report on the text, before the Constitutional Assembly as a whole.<sup>228</sup> The draft text was handled by the Assembly in four stages.<sup>229</sup>

### **Debate**

During the first stage, the draft text was placed on the Order Paper and, following a motion for its first reading, introduced by the Chairperson of the Constitutional Committee.<sup>230</sup> Each political party in the Assembly was entitled to make a statement on the draft text and following this the draft was read for the first time (see below figure no 15 on the stages of the debate).<sup>231</sup>

Next, the draft was placed on the Order Paper for second reading. During the second reading, the Assembly debated the objects and principles of the draft without making any amendments to the text.<sup>232</sup> In terms of the general rules of debate, the members in charge of the draft had an unrestricted amount of time to speak, while all other members were limited to 30 minutes at a time.<sup>233</sup>

During the third stage of the process, the Assembly debated the details of the draft text. The same rules relating to speaking time applied in this debate as were applicable during the second reading. Each provision of the text was considered by the Assembly

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<sup>224</sup> Constitution of the Republic of South Africa Act 200 of 1993 (Interim Constitution), Section 71(1).

<sup>225</sup> Constitution of the Republic of South Africa Act 200 of 1993 (Interim Constitution), Schedule 4.

<sup>226</sup> H Ebrahim and L Miller (n 94) 121.

<sup>227</sup> Constitution of the Republic of South Africa Act 200 of 1993 (Interim Constitution), Section 71(2).

<sup>228</sup> Standing Rules of the Constitutional Assembly, 1994, Rule 76 (n 97).

<sup>229</sup> Standing Rules of the Constitutional Assembly, 1994, Rule 78(1) (n 97).

<sup>230</sup> Standing Rules of the Constitutional Assembly, 1994, Rules 79 and 81 (n 97).

<sup>231</sup> Standing Rules of the Constitutional Assembly, 1994, Rule 82 (n 97).

<sup>232</sup> Standing Rules of the Constitutional Assembly, 1994, Rule 86 (n 97).

<sup>233</sup> Standing Rules of the Constitutional Assembly, 1994, Rule 118 (n 97).

and voted upon.<sup>234</sup> Members could move for amendments to provisions under consideration prior to this vote.<sup>235</sup> Once each of the provisions of the draft and all amendments were dealt with, the presiding officer placed the draft text, as amended, on the Order Paper for third reading.<sup>236</sup> At the third reading, the fourth and final stage in the process, members of the Assembly were asked to vote on whether to pass the draft text as a whole.<sup>237</sup>

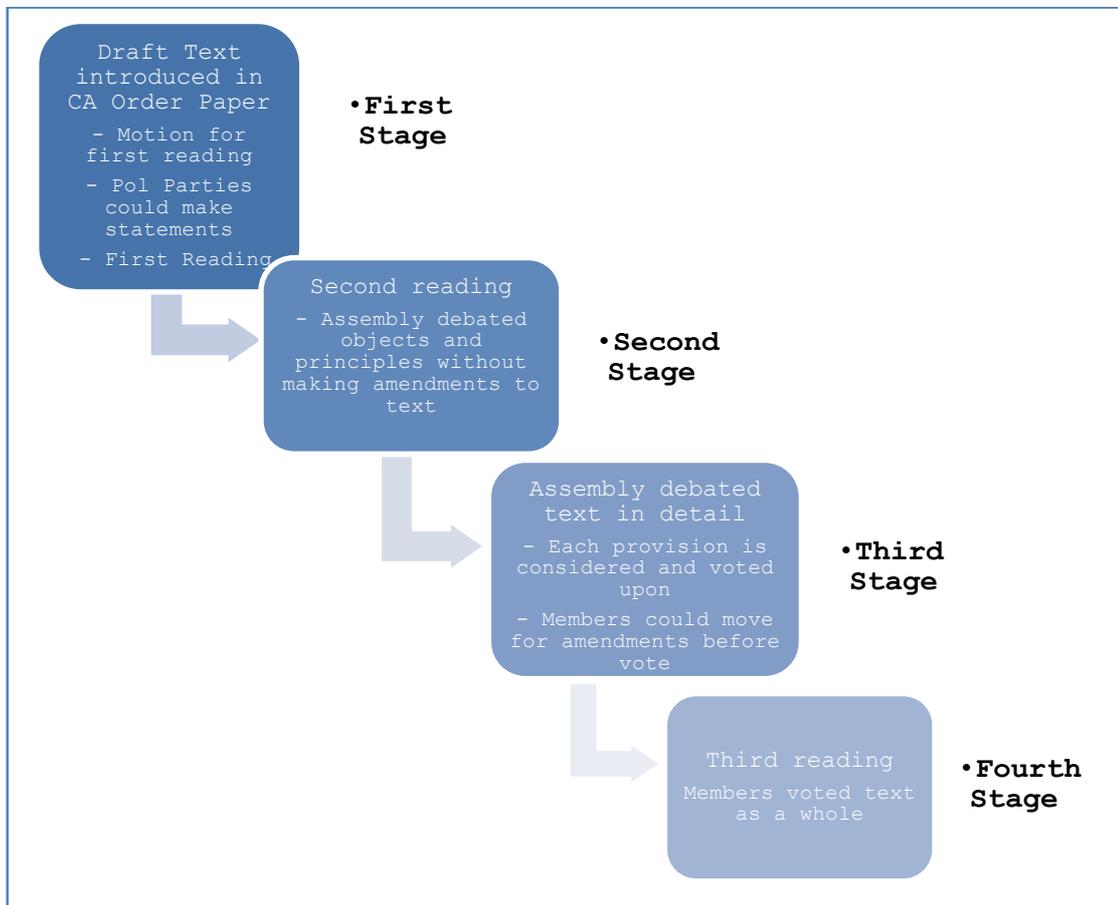


Figure 15. Stages of Debate in SA Constitutional Assembly.

### **Quorum requirements**

Different structures of the South African Constitutional Assembly had different quorum requirements. For instance, to constitute a meeting of the Constitutional Assembly as a whole, a minimum of 164 members, excluding the presiding officer, needed to be present.<sup>238</sup> The standing orders of the Assembly also regulated the quorum necessary to take decisions in the Constitutional Committee and select committees. The Constitutional Committee and the six select Theme Committees played central roles in the drafting of the new constitutional text and needed to be representative when performing these functions. As such, while these committees could convene meetings without a quorum, they could only take decisions if 50% of their members, excluding the presiding member,

<sup>234</sup> Standing Rules of the Constitutional Assembly, 1994, Rule 90 (n 97).

<sup>235</sup> Standing Rules of the Constitutional Assembly, 1994, Rule 91(n 97).

<sup>236</sup> Standing Rules of the Constitutional Assembly, 1994, Rules 93 and 94 (n 97).

<sup>237</sup> Standing Rules of the Constitutional Assembly, 1994, Rule 96 (n 97).

<sup>238</sup> Standing Rules of the Constitutional Assembly, 1994, Rule 11 (n 97). Given that there were 490 members in the Assembly, this amounts to a requirement of the presence of roughly one third of its members.

were present.<sup>239</sup> This requirement balanced the expediency of holding smaller meetings, which were more conducive to negotiation, with the need to ensure that the legal text decided upon represented the committee's views rather than those of a minority of members.

### ***Voting***

The Interim Constitution and the standing orders of the Constitutional Assembly together regulated the way that the various structures within the Assembly, and the Assembly itself, took decisions. Decisions in the Constitutional Committee and the select Theme Committees were taken when a majority of members present and voting voted in favour.<sup>240</sup> Where there was an equal number of votes for and against a decision, the presiding member of the committee was given the casting vote.<sup>241</sup>

In the Assembly, save for voting on the final passage of a draft text,<sup>242</sup> decisions were taken by a majority of the votes cast.<sup>243</sup> This included decisions relating to the acceptance of individual provisions of the draft text and amendments to these provisions tabled prior to the third reading of the draft text in the Assembly.<sup>244</sup> The Interim Constitution stipulated that the passing of the new constitutional text required a majority of at least two-thirds of all members of the Constitutional Assembly.<sup>245</sup> However, this majority was qualified in that provisions of the text relating to the boundaries, powers and functions of the provinces could not be passed without the support of two-thirds of all the members of the Senate.<sup>246</sup> During the final vote on the passage of the Constitution, the text was presented as a whole rather than scrutinised provision by provision. The number of votes in favour of the text cast by the Constitutional Assembly generally and then the number of votes in favour cast only by members of the Senate were recorded separately.<sup>247</sup> This facilitated fulfilment of the qualification in Section 73(2) of the Interim Constitution.

### ***Judicial Intervention***

Uniquely, the Interim Constitution envisaged that the Constitutional Court of South Africa would play a significant role in the constitutional design process. This was first, and most significantly, through the requirement that any text passed by the Assembly be certified by the Court as complying with the 34 Constitutional Principles in Schedule 4 to the Interim Constitution.<sup>248</sup> Second, this was also as a result of the power given to the Assembly to refer part of a proposed text, prior to passage, to the Constitutional Court for advice as to its potential compliance with the Constitutional Principles.<sup>249</sup>



Recourse to the Constitutional Court prior to passage of a draft text

<sup>239</sup> Standing Rules of the Constitutional Assembly, 1994, Rule 19A(4) read with Rule 31(n 97).

<sup>240</sup> Standing Rules of the Constitutional Assembly, 1994, Rule 19A(4) read with Rule 32(1) (n 97).

<sup>241</sup> Standing Rules of the Constitutional Assembly, 1994, Rule 19A(4) read with Rule 32(2) (n 97).

<sup>242</sup> Constitution of the Republic of South Africa Act 200 of 1993 (Interim Constitution), Section 73(2).

<sup>243</sup> Standing Rules of the Constitutional Assembly, 1994, Rule 51(3) (n 97).

<sup>244</sup> Standing Rules of the Constitutional Assembly, 1994, Rule 93 (n 97).

<sup>245</sup> Constitution of the Republic of South Africa Act 200 of 1993 (Interim Constitution), Section 73(2).

<sup>246</sup> Constitution of the Republic of South Africa Act 200 of 1993 (Interim Constitution), Section 73(2).

<sup>247</sup> Standing Rules of the Constitutional Assembly, 1994, Rule 96 (n 97).

<sup>248</sup> Constitution of the Republic of South Africa Act 200 of 1993 (Interim Constitution), Section 71(3).

<sup>249</sup> Constitution of the Republic of South Africa Act 200 of 1993 (Interim Constitution), Section 71(4).

The Assembly opted not to exercise this second power, perhaps because it was under significant time constraints. However, through the certification process, the Court greatly influenced the outcome of the drafting process. The fact that there was an enforcement mechanism for the Constitutional Principles meant that Members of the Assembly were incentivised to negotiate and draft provisions which reflected these provisions in the first place.<sup>250</sup> In spite of this, the Constitutional Court refused to certify the first constitutional text passed by the Assembly. It highlighted nine areas where the text fell short of what the Constitutional Principles required and provided the Assembly with guidance as to how to rectify these.<sup>251</sup>

In response to the Court's judgment, the Constitutional Assembly gathered to redraft the offending provisions. The negotiation of changes to some provisions was relatively simple. While others, such as agreements on provincial powers and local government structures were more difficult.<sup>252</sup> However, the Court's guidance made it immediately apparent which options were available to the Assembly and the process of redrafting was relatively swift.<sup>253</sup> This new text was adopted by the Assembly and tabled before the Constitutional Court which was charged with determining whether it now complied with the Constitutional Principles. The Court unanimously certified this new text.<sup>254</sup> This decision was final and binding and the Interim Constitution stipulated that no court had jurisdiction to enquire into or pronounce on this subject again.<sup>255</sup> As such, the certified text became the final Constitution of South Africa.

## SPAIN

In term of process, the Spanish constitution-making process was governed by the following norms: the Law for Political Reform, which laid out its main stages and key rules of procedure; the Provisional Standing Orders that each of the two chambers adopted; and the internal rules that each of the bodies with constitution-making responsibilities, particularly the *Ponencia* and the Joint Constitutional Committee, further developed.

For description purposes, it may be said that the Spanish constitution-making process involved eight phases (see below figure no 16 for a scheme on the different phases). The first phase involved the work of the *Ponencia* and its drafting of a constitutional text; the second phase took place within the Congressional Committee on Constitutional Affairs and Public Liberties; the third phase consisted in the approval by Congress of a constitutional draft (and the issuing of a *Dictamen*); the fourth phase corresponds to the Senate's Constitutional Committee, which later submitted a text to the Senate's Plenary; the fifth phase consisted in the Senate's approval; the sixth phase covered the work of the bicameral Joint Constitutional Committee; the seventh phase involved the approval of the draft constitution by both houses and, finally, the eighth phase consisted in its approval by the population via referendum.

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<sup>250</sup> H Ebrahim and L Miller (n 94) 139.

<sup>251</sup> *Certification of the Constitution of the Republic of South Africa* (1996) ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC), [31].

<sup>252</sup> H Ebrahim and L Miller (n 94) 142.

<sup>253</sup> H Ebrahim and L Miller (n 94) 142.

<sup>254</sup> *Certification of the Amended Text of the Constitution of the Republic of South Africa* (1996) ZACC 24; 1997 (2) SA 97 (CC); 1997 (1) BCLR 1 (CC).

<sup>255</sup> Constitution of the Republic of South Africa Act 200 of 1993 (Interim Constitution), Section 71(3).

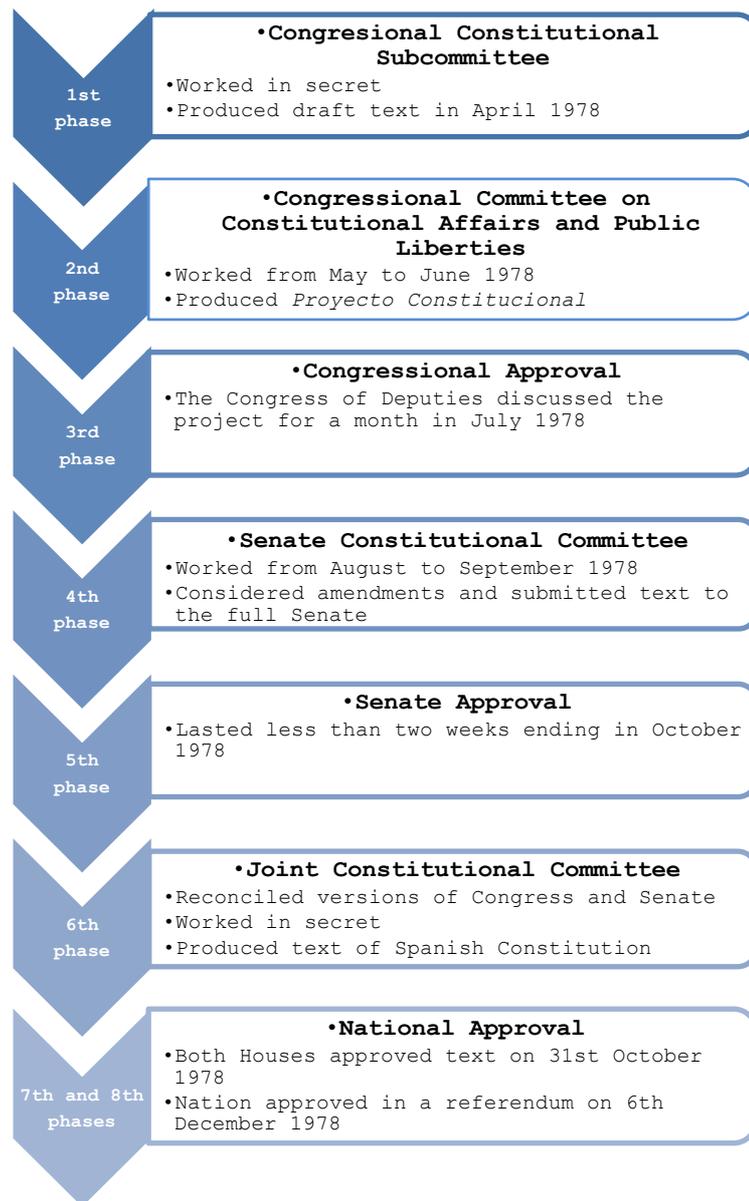


Figure 16. Spanish Constitution-making process.

### **First phase (Ponencia, Subcommittee of Congress)**

The first phase of the Spanish process consisted of the creation of a preliminary constitutional text. The Provisional Standing Orders of Congress did not provide any deadline for the *Ponencia* to prepare the text.<sup>256</sup> The *Ponencia* began its work on 22nd August 1977, on the basis of a general outline of topics agreed upon with the Bureau of the Constitutional Committee. In addition, Parliamentary Groups were allowed to prepare draft texts as well.

Despite having outline, Ponencia was said to have had a blank slate start.

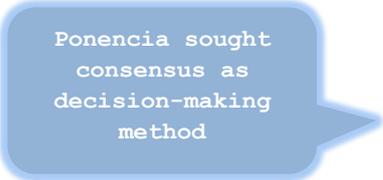
The *Ponencia* adopted a number of agreements regarding its internal organisation and its working method. From the outset, the members decided unanimously to keep their deliberations secret. At the same time,

<sup>256</sup> Provisional Standing Orders of the Congress of Deputies, Article 112 <<https://www.boe.es/buscar/doc.php?id=BOE-A-1977-25701>> accessed 5th March 2021.

it was agreed that following the end of each meeting, the Chairperson would inform the press in general terms about the matters that had been discussed that day. The confidentiality rule extended to the proposals made by the different Parliamentary Groups, the deliberations that took place among the members, and the agreements that were reached.<sup>257</sup> Still, minutes of all meetings were prepared, together with the agreements that had been reached during each session. The minutes were submitted to the members of the Ponencia in the following meeting for their approval.<sup>258</sup>

The *Ponencia* decided to prepare one single constitutional text, rather than several constitutional laws. The text was to be as short as possible but include everything necessary.<sup>259</sup> All members or rapporteurs addressed, jointly, every topic, as there was no division of issues among the members. It was initially agreed that the *Ponencia* would start with the preliminary part that dealt with general or fundamental principles, followed by the powers of the Head of State.<sup>260</sup>

Regarding its working method, the *Ponencia* began its work in each meeting on the basis of the proposals of the different groups presented by chapter. As such, none of the Parliamentary Groups shared full constitutional drafts at the outset.<sup>261</sup> Groups did not systematically submit proposals for each of the chapters either.<sup>262</sup>



Ponencia sought consensus as decision-making method

The Ponencia worked on a consensual basis, and its members tried to determine so-called ‘minimum points of agreement’ among their different positions.<sup>263</sup> Accordingly, the *anteproyecto* was not approved on an article-by-article basis. Rather, where consensus was not reached, individual votes were submitted and conveyed to the Congressional Constitutional Committee.

The Provisional Standing Orders of the Congress required the publication of the *Ponencia*’s preliminary draft and, where applicable, any individual votes in the Official Gazette of the *Cortes*. This opened a period of twenty calendar days for the tabling of amendments by Parliamentary Groups and Deputies. Amendments could include both general modifications to the text, as well as specific drafting proposals in places they deemed appropriate.<sup>264</sup> The preliminary draft of the *Ponencia* was published in the Official Gazette on 5th January 1978.<sup>265</sup> More than 3000 amendments were tabled. Following the end of the twenty-day period, which was extended, the *Ponencia* was required to issue a report on the tabled amendments, which had to be printed and distributed to all the members of the Committee of Constitutional Affairs and Public Liberties as well as those

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<sup>257</sup> Actas de la Ponencia Constitucional (n 143) 254-255. The confidentiality rule also covered the requirement not to communicate to the press about what was dealt with, and a prohibition for the members of the *Ponencia* to make statements, even in a personal capacity, on constitutional issues. It did not imply, however, the obligation on the part of the various political groups, not to make public their stances on constitutional matters.

<sup>258</sup> Actas de la Ponencia Constitucional (n 143) 255.

<sup>259</sup> Actas de la Ponencia Constitucional (n 143) 255.

<sup>260</sup> Actas de la Ponencia Constitucional (n 143) 255.

<sup>261</sup> M T Freixes Sanjuan, ‘Crónica de una constitución consensuada’, (1984) 40 Revista de Estudios Políticos, 6-7 <<https://dialnet.unirioja.es/servlet/articulo?codigo=26793>> accessed 29th March 2021.

<sup>262</sup> Ibid, 7.

<sup>263</sup> Actas de la Ponencia Constitucional (n 143) 256.

<sup>264</sup> Provisional Standing Orders of the Congress of Deputies, Article 113 (n 256).

<sup>265</sup> Boletín Oficial de las Cortes No 44 (5 January 1978) <[https://www.congreso.es/public\\_oficiales/L0/CONG/BOCG/BOC\\_044.PDF](https://www.congreso.es/public_oficiales/L0/CONG/BOCG/BOC_044.PDF)> accessed 20th March 2021.

Deputies having tabled the amendments, at least fifteen days prior to the beginning of the debate within the Constitutional Committee.<sup>266</sup>

On 9th February 1978, the *Ponencia* began by examining each amendment, which it expressly accepted or rejected. Decisions were not always recorded. As for the individual votes, the *Ponencia's* position was that they were not part of what had to be included in the report. In preparing their report, the rapporteurs had the technical support of the team of legal advisers that had assisted them with the first draft. The rapporteurs failed to reach consensus on four important matters: the chapter on the Self-governing Communities; religious freedom; collective negotiation and the right to strike; and the right to education. Failure to reach consensus resulted in the temporary withdrawal of the Socialist member, yet he eventually signed the report alongside the other rapporteurs. The report of the *Ponencia* was published in the Official Gazette on 17th April 1978.<sup>267</sup>

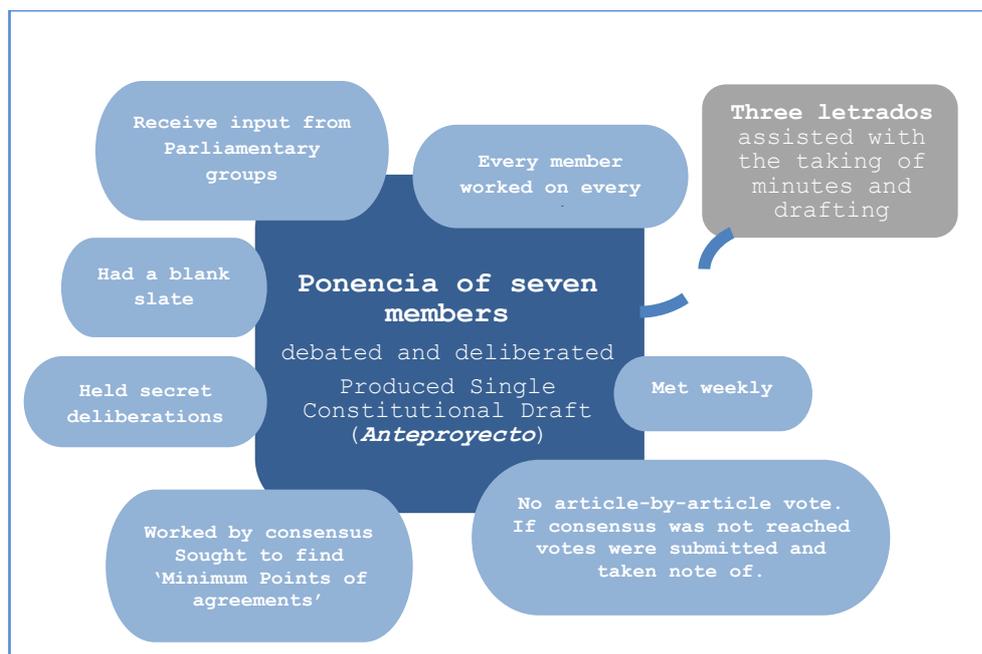


Figure 17. Work of the Ponencia.

### **Second Phase (Congressional Committee of Constitutional Affairs and Public Liberties)**

The second phase of the process at the level of Congress consisted in the revision of the draft by the Constitutional Committee and the adoption of the preliminary constitutional draft. According to the Provisional Standing Orders of Congress, the proceedings within the committee would begin with a general debate.<sup>268</sup> Interventions could last for a maximum of forty-five minutes. A member of the Government was also allowed to intervene.<sup>269</sup> Following this first round of the general debate, additional interventions to make corrections or respond to references were allowed, lasting a maximum time of ten

<sup>266</sup> Provisional Standing Orders of the Congress of Deputies, Article 114.

<sup>267</sup> Boletín Oficial de las Cortes No 82 (17 April 1978) <[https://www.congreso.es/public\\_oficiales/L0/CONG/BOCG/BOC\\_082.PDF](https://www.congreso.es/public_oficiales/L0/CONG/BOCG/BOC_082.PDF)> accessed 20th March 2021.

<sup>268</sup> In the debate one Deputy could intervene for each Parliamentary Group or political group that, having expressly and independently run in the elections as such, had achieved representation in the Congress.

<sup>269</sup> Provisional Standing Orders of the Congress of Deputies, Article 115.1 (n 256).

minutes per speaker.<sup>270</sup> The general debate on the preliminary constitutional draft began on 5th May 1978.

The quorum for the Constitutional Committee, as for other committees, was the absolute majority of its members, that is, half their number plus one.<sup>271</sup>

Following the general debate on the *Ponencia's* preliminary draft, it would be put to a vote as a working document. Its acceptance or rejection would be decided on the basis of the vote in favour or against it of a simple majority of the committee members present and voting (abstentions did not count).<sup>272</sup> Each Parliamentary Group was granted a fifteen-minute turn to explain their vote.<sup>273</sup>

The outcome of the process within the Constitutional Committee of Congress was a *Dictamen*, which was published in the Official Gazette of the *Cortes*.<sup>274</sup>

The Debate in the Committee can be analysed in three phases:

- A first phase (until 22nd May 1978), in the course of which 23 articles were approved, more or less smoothly, while more divisive topics were put on ice.
- A second, extra-parliamentary phase in which agreements were reached between representatives of the Parliamentary Groups. These negotiations excluded two groups which left the Committee in protest. As a result of these agreements, more than 20 articles were unanimously approved without discussion, including the most divisive topics.
- A third and final phase avoided extra-parliamentary agreements. Members that had left re-joined Committee.

The *dictamen* of the Constitutional Committee was published in the Official Gazette on 1st July 1977, including the individual votes and amendments mentioned above, and a date set for the debate in the Plenary. The Committee introduced significant changes to the *Ponencia's* preliminary draft.

### ***Third Phase (Congressional Approval)***

According to the Provisional Standing Orders, the debate in the plenary of the Congress was to take place in similar fashion to the debate within the Constitutional Committee.<sup>275</sup>

The amendments and individual votes included in the *Dictamen* would be allotted one round of arguments in favour and one against them, of a maximum of thirty minutes, followed by voting.<sup>276</sup> As per the Law for Political Reform and the Provisional Standing Orders, the final approval of the entire constitutional text required the favourable vote of

<sup>270</sup> Provisional Standing Orders of the Congress of Deputies, Article 115.2(n 256).

<sup>271</sup> Provisional Standing Orders of the Congress of Deputies, Article 32 (n 256).

<sup>272</sup> Provisional Standing Orders of the Congress of Deputies, Article 116 (n 256).

<sup>273</sup> Provisional Standing Orders of the Congress of Deputies, Article 116 (n 256).

<sup>274</sup> Provisional Standing Orders of the Congress of Deputies, Article 122 (n 256).

<sup>275</sup> Provisional Standing Orders of the Congress of Deputies, Article 123.1(n 256).

<sup>276</sup> Provisional Standing Orders of the Congress of Deputies, Article 123.2 (n 256).

the absolute majority of the members of Congress, that is, of more than half of all its members.<sup>277</sup>

The debate in the Plenary took place between 4th and 21st July 1978. The minutes reveal that some of the articles that had been approved by the Constitutional Committee were not even discussed but immediately voted upon. Others, in contrast, precisely those that touched upon the matters that had been the subject of disagreements, were thoroughly debated.

On 21st July, the Plenary of Congress approved the draft Constitution by 258 votes in favour, 14 abstentions and 2 votes against.<sup>278</sup> The majority that was required for its approval was 176 votes in favour. On 24th July, the “text of the draft Constitution approved by the Plenary of the Congress of Deputies” was published in the official Gazette.<sup>279</sup>

#### ***Fourth Phase (Senate Constitutional Committee)***

The Provisional Standing Orders of the Senate stipulated the establishment of a legislative committee on the Constitution.<sup>280</sup> The composition of legislative committees, including the Constitutional Committee, was to be determined on the basis of the participation of all the Parliamentary Groups in proportion to their numerical weight in the Senate. The number of members per committee was generally set at 25 members,<sup>281</sup> including with regard to the Constitutional Committee.<sup>282</sup>

According to the Provisional Orders of the Senate, once the Senate received the text approved by the Congress, the Speaker was required to send it to the Constitutional Committee of the Senate and have it printed and distributed among all the Senators. Upon its receipt, the Senators had ten business days to table their amendments to it.<sup>283</sup> 1254 amendments were tabled upon the deadline.

The Constitutional Committee of the Senate had fifteen days to discuss the amendments and adopt its *Dictamen*, which would include the amendments it voted to incorporate to the draft Constitution approved by the Congress.<sup>284</sup>

Voting in the committee was based on the simple majority of the Senators present and voting (abstentions did not count), provided that more than half of the total number of Senators were present.<sup>285</sup>

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<sup>277</sup> Provisional Standing Orders of the Congress of Deputies, Article 123.3 (n 256).

<sup>278</sup> The eight Deputies of the PNV abandoned the hemicycle moments before the vote. The Parliamentary Group of AP abstained, as well as the 2 Deputies of *Esquerra Republicana de Catalunya*. A Deputy of *Euskadiko Ezquerria* and a Deputy of AP (its rapporteur in the *Ponencia* and member of the Constitutional Committee, Manuel Fraga) voted against.

<sup>279</sup> Boletín Oficial de las Cortes No 135 (24 July 1978) <[https://www.congreso.es/public\\_oficiales/L0/CONG/BOCG/BOC\\_135.PDF](https://www.congreso.es/public_oficiales/L0/CONG/BOCG/BOC_135.PDF)> accessed 20th March 2021.

<sup>280</sup> Provisional Standing Orders of the Senate, Article 44 (n 145).

<sup>281</sup> Provisional Standing Orders of the Senate, Article 49 (n 145).

<sup>282</sup> The composition of the members of the Constitutional Committee of the Senate was as follows: 12 UCD members; 5 members of the Socialist Group; 2 members of the Progressives and Independent Socialists Group; 2 members of *Entesa deis Catalans*; and 1 member from each of *Agrupación Independiente*, the Independent Parliamentary Group, and the Mixed Group.

<sup>283</sup> Provisional Standing Orders of the Senate, Article 119 (n 145).

<sup>284</sup> Provisional Standing Orders of the Senate, Article 120 (n 145).

<sup>285</sup> Provisional Standing Orders of the Senate, Article 56.1 (n 145).

The *Dictamen* was to be accompanied by the individual votes that would be defended before it.<sup>286</sup> For such defence to take place before the Plenary, it was necessary for at least one member of the committee to have supported an amendment, thus turning into an individual vote.<sup>287</sup>

### ***Fifth Phase (Senate)***

The debate in the Plenary took place between 25th September and 5th October 1978. As per the Provisional Standing Orders of the Senate, the debate was required to begin with a general discussion of the *dictamen*. There were two rounds to argue in favour and two to argue against the *dictamen*. The Speaker could further give the floor to the Spokespersons of the Parliamentary Groups who did not intervene in the said rounds or to members of their groups designated by them.<sup>288</sup>

Following this general debate, the tabled amendments and individual votes to each article had to be discussed, with one round of arguments in favour and one against. The order had to be established by the Bureau of the Senate, starting with those that most diverged from the *Dictamen*, or, where applicable, from the text approved by the Congress.<sup>289</sup> Interventions to rectify facts or concepts, for a time not exceeding five minutes each were further allowed.<sup>290</sup> The Government and the committees could intervene whenever they deemed it appropriate.<sup>291</sup>

At the proposal of the Speaker of the Senate, the Government, or ten Senators, the Senate could decide by an absolute majority that an article was sufficiently discussed, so that no other amendments could be debated or interventions for rectification made. Once said agreement was taken, the text of the *Dictamen* and the amendments to it would be put to the vote, beginning with those that diverged from it the most.<sup>292</sup> Voting in the Plenary was based on the simple majority of the Senators present and voting (abstentions did not count), provided that more than half of the total number of Senators were present.<sup>293</sup>

Since there were discrepancies between the text approved by Congress and the text approved by the Senate, the Bureau of the Senate had to draft a text that included, on one side, what was approved by the Congress, and, on the other, the modifications proposed by the Senate on the basis of what was voted on.<sup>294</sup> Subsequently, the Speaker of the Senate had to report this to the Speaker of the *Cortes* and then forward the text of the proposed modifications to the Joint Committee provided for in Article 3.2 of the Law for Political Reform.<sup>295</sup>

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<sup>286</sup> Provisional Standing Orders of the Senate, Article 93.1 (n 145).

<sup>287</sup> Provisional Standing Orders of the Senate, Article 93.2 (n 145).

<sup>288</sup> Provisional Standing Orders of the Senate, Article 121.2 (n 145).

<sup>289</sup> Provisional Standing Orders of the Senate, Article 121.3 (n 145).

<sup>290</sup> Provisional Standing Orders of the Senate, Article 121.4 (n 145).

<sup>291</sup> Provisional Standing Orders of the Senate, Article 121.5 (n 145).

<sup>292</sup> Provisional Standing Orders of the Senate, Article 123 (n 145).

<sup>293</sup> Provisional Standing Orders of the Senate, Article 56.1 (n 145).

<sup>294</sup> Provisional Standing Orders of the Senate, Article 124 (n 145).

<sup>295</sup> Provisional Standing Orders of the Senate, Article 125 (n 145).

The text with the modification introduced by the Senate to the draft Constitution adopted by the Congress was published in the Official Gazette of the Cortes on 13th October 1978.<sup>296</sup>

### Sixth Phase (Level Joint Constitutional Committee)

Pursuant to the Law for Political Reform, if the Joint Constitutional Committee failed to reach an agreement, or that the agreement it reached failed to garner the approval of either chamber, the decision would require to be made by the *Cortes*, in a joint meeting of both chambers, on the basis of the absolute majority of the total number of members both chamber combined.<sup>297</sup> Were the Joint Constitutional Committee to reach an agreement, its *Dictamen* would have to be approved by each chamber separately, on the basis of the absolute majority of its members.

The meetings of the Joint Constitutional Committee were not public. Following the meetings, however, the Chairperson spoke to the press. Documents reflecting the agreements that were progressively reached were also shared with the press. During the meetings, no speeches were made and speaking turns were not strictly observed. Discussions were lively and fluid.

The Secretariat of the Senate had prepared for the Committee a table with four columns that included, respectively: the text approved by the Congress; the text approved by the Senate; the text approved by the Constitutional Committee of the Senate; and an empty column for the Joint Constitutional Committee. On this basis, the Committee first focused on identifying **discrepancies**. To do so, it was important to clarify how discrepancies were to be understood. While the mandate of the Joint Constitutional Commission could not be understood to allow it to replace a text with an entirely new text, it also could not be understood to be limited to having it opt for one text or the other. Some middle ground allowing a degree of flexibility was required.

On this basis, a little over 200 discrepancies were identified between the text of the Congress and the text of the Senate.

After identifying discrepancies, the Joint Committee resorted to three means to solve them:

#### What was a Discrepancy?

The Law for Political reform referred to discrepancies "in the terms", to mean both their signifiers and their meaning. Discrepancies in the signifiers would result from the employment of different expressions, whether wilfully, incorrectly, or by mistake (*errata*), requiring mere corrections of style.

As for discrepancies in relation to the meaning of the text, these could result from the smallest signifier, even a comma. If any doubt was cast on the meaning of the text owed to such differences, then they ought to be considered discrepancies.

<sup>296</sup> Boletín Oficial de las Cortes No 161 (13 October 1978) <[https://www.congreso.es/public\\_oficiales/L0/CONG/BOCG/BOC\\_161.PDF](https://www.congreso.es/public_oficiales/L0/CONG/BOCG/BOC_161.PDF)> accessed 21st March 2021.

<sup>297</sup> Article 3.2 Law for Political Reform (n 146).

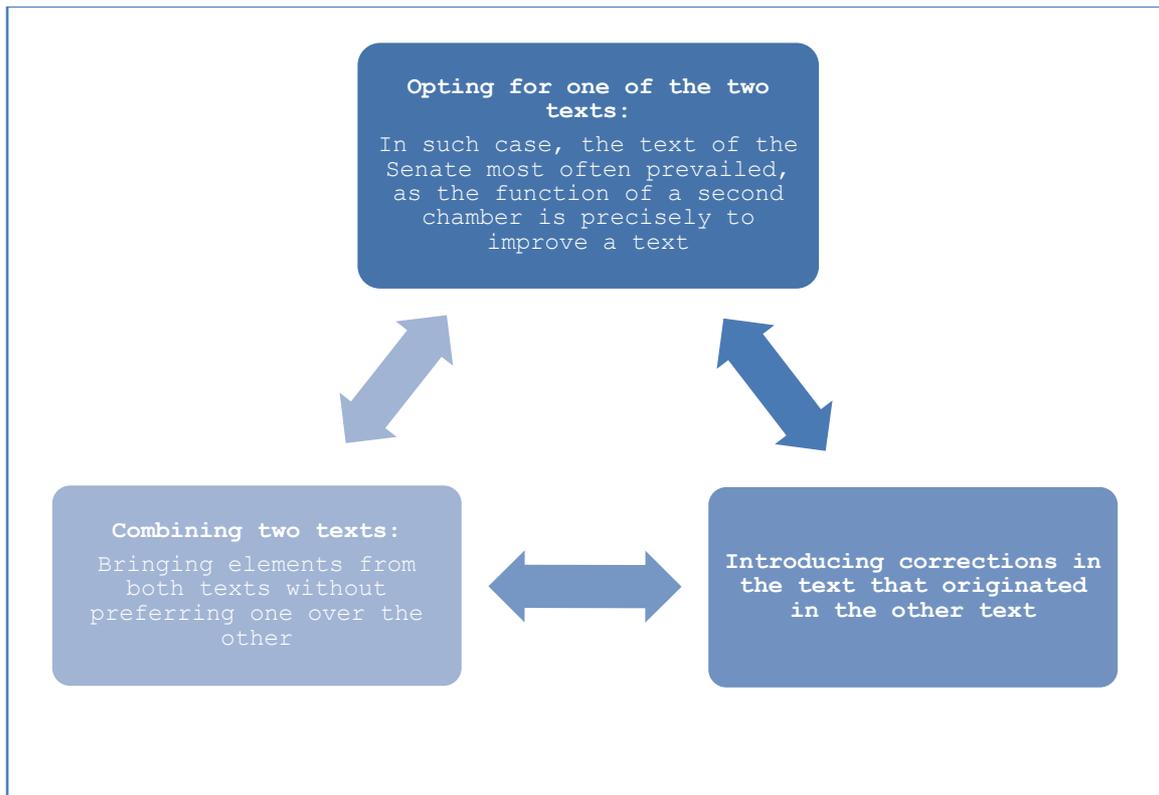


Figure 18. Mechanisms to resolve discrepancies in the Joint Committee.

Importantly, however, not all the corrections were drawn from one of the two texts. Some elements that were introduced were not drawn from either. To ensure overall consistency, correlations within the system, whereby a correction somewhere could produce an impact elsewhere, were taken into account.

While voting was occasionally suggested, it was ultimately not practiced. On 28th October 1978, the Joint Constitutional Committee published its *Dictamen*.<sup>298</sup>

### **Seventh Phase (Congress and Senate)**

On 31st October 1978, the Plenary of the Congress met to vote on the *Dictamen* of the Joint Constitutional Committee. The Speaker of the Congress began by explaining that while 114 discrepancies had been identified, they were relatively minor, and by no means had their resolution entailed a substantial modification of the decision that the chamber had made in relation to the future framework of political coexistence.<sup>299</sup>

In accordance with the Provisional Standing Orders of the Congress, the Speaker, in agreement with the Bureau, decided to hold a nominal and public vote, following the procedure outlined therein, whereby voting began with the Deputy whose name was first drawn by one of the Secretaries, followed by those whose names fell after alphabetically, up to the last name, and back to the first letter, up to the name of the Deputy whose name had been drawn.<sup>300</sup>

<sup>298</sup> Boletín de las Cortes No 170 (28 October 1978) <[https://www.congreso.es/public\\_oficiales/L0/CONG/BOCG/BOC\\_170.PDF](https://www.congreso.es/public_oficiales/L0/CONG/BOCG/BOC_170.PDF)> accessed 25th March 2021.

<sup>299</sup> Further, the Speaker explained that while the *Dictamen* was presented in the form of a full text, and not a proposal referring only to certain specific articles, such form should not mislead the Deputies into thinking the text had been substantially modified. Ibid.

<sup>300</sup> Provisional Standing Orders of the Congress, Article 74.

Before the votes were cast, the Speaker requested one of the Secretaries to read the Preamble of the Joint Constitutional Committee's Dictamen only, while allowing the Deputies to request that the entire text be eventually read. Such requirement was not made.

Congress approved constitutional text  
as follows:  
attendees: 345; votes in favour, 325;  
votes against, 6; abstentions, 14.

The Plenary of the Senate held a vote on the same day as Congress. According to the Provisional Standing Orders of the Senate, the debate in the Senate would include three alternative rounds in favour of the text and three against it were foreseen. The Speaker would give the floor to the Spokespersons of the Parliamentary Groups who did not intervene during the debate, if they so requested.<sup>301</sup> Approval required the favourable vote of the absolute majority of the chamber.<sup>302</sup>

The Senate approved constitutional  
text as follows:  
attendees: 239; votes in favour, 226;  
votes against, 5; abstentions, 8.

### ***Eighth Phase (Referendum)***

The Law for Political Reform stipulated that the constitution had to be ratified by referendum before its promulgation by the King.<sup>303</sup> The referendum was held on 6th December, the draft Constitution approved by the *Cortes* was ratified by the people. 67.11% of the census participated in the referendum and 91.81% of the votes cast were in favour. On 27th December 1978, the King promulgated the Constitution in a joint session of the Congress of Deputies and the Senate.

On 29th December, it was published in the Official Gazette, effectively entering into force. That same day, the President of the Government announced the dissolution of the *Cortes* and the calling of general and municipal elections.

### ***TUNISIA***

The Tunisian constitution-making process was characterised by the absence of an imposed timeframe and the reluctance of the Assembly to impose internal deadlines at the outset.

The Tunisian process can be divided into three phases: Drafting; Debate and Adoption (voting).<sup>304</sup>

Tunisian NCA  
had no fixed  
timeframe

<sup>301</sup> Provisional Standing Orders of the Congress Article 127.2.

<sup>302</sup> Provisional Standing Orders of the Congress, Article 127.3.

<sup>303</sup> Article 3.3 Law for Political Reform (n 146) .

<sup>304</sup> The drafting process, which lasted between February 2012 and July 2013, featured numerous delays, owed in part to procedural challenges. The debate in the Plenary, which began in July 2013, was eventually interrupted for more than 3 months amidst increasing tensions between majority and minority members. The approval phase, which

## ***Drafting***

The drafting of a new constitutional text began with the work of the six Thematic Committees of the NCA, which drafted specific chapters of the constitution on a 'blank slate' basis (see figure no 19 below on the drafting process). These separate chapters were later compiled and revised by the Drafting Committee. It has been said that this body did not properly coordinate the work among the six Committees. Hence, in practice, each Committee worked independently, and without a specific deadline to submit their respective drafts.<sup>305</sup>

In June 2012, mounting public criticism of the Assembly led its President to announce 15th July 2012 as a deadline for the Committees to submit a first draft of their respective chapters.<sup>306</sup>

### ***First Draft***

Once the first deadline was set, the drafting process within the Committees was considerably accelerated, at times at the expense of finding consensus on controversial issues. The Committee on the Legislative and Executive Powers did not meet the deadline, nor was it successful in reaching consensus. As such, it chose to submit multiple versions of articles related to the system of government. Other Committees adopted the same approach to difficult issues. As a result, each of the six Committees followed one of two procedures: Some presented multiple formulations of controversial articles, while others presented only articles that had been approved by the absolute majority of committee members.<sup>307</sup>

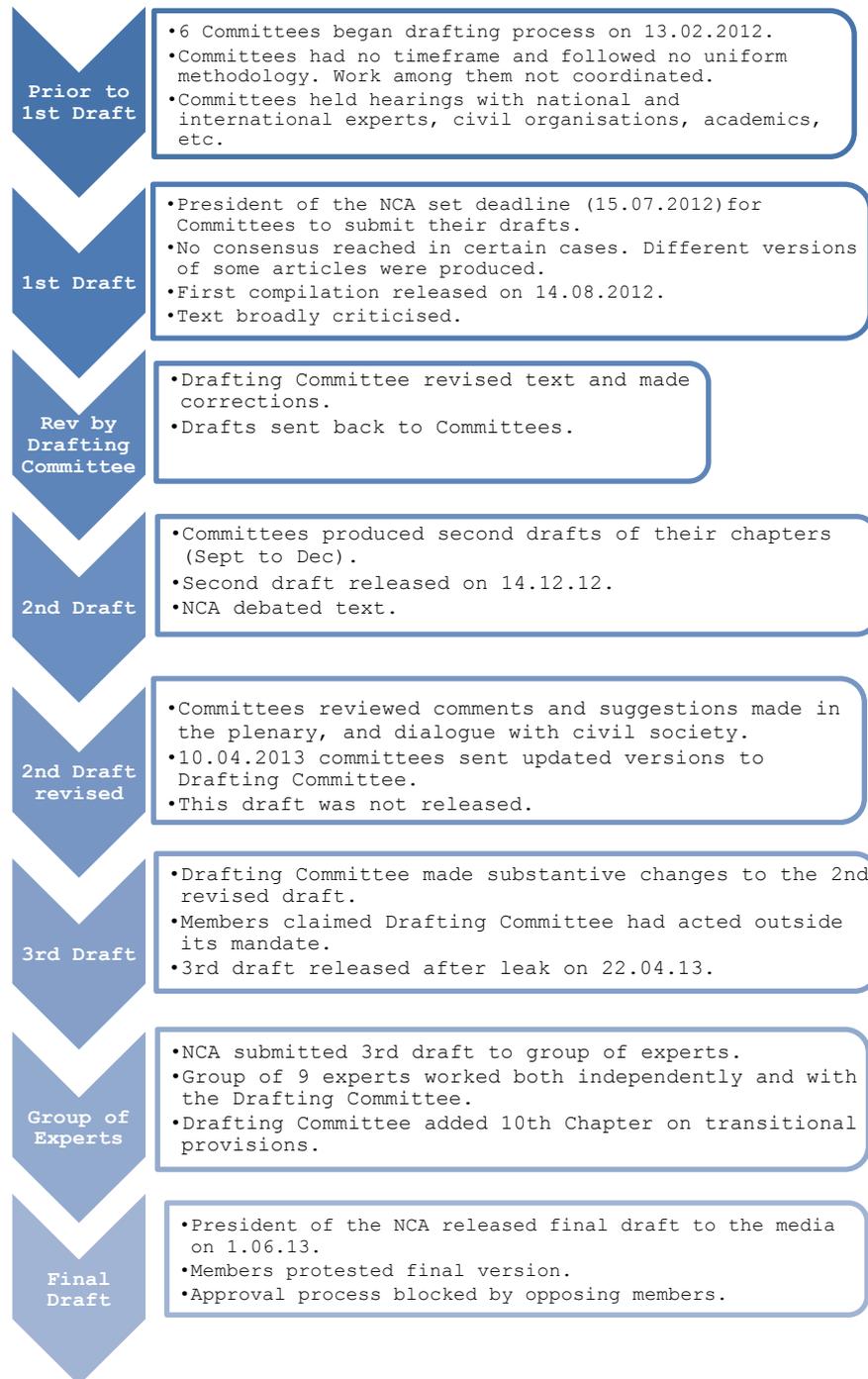
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featured article-by-article voting followed by a vote on the entire text, lasted between December 2013 and January 2014.

<sup>305</sup> The Carter Center (n 18) 34.

<sup>306</sup> The Carter Center (n 18) 34.

<sup>307</sup> The Carter Center (n 18) 35.



*Figure 19. Drafting Process within the Tunisian NCA.*

By 10th August 2012, all the Committees had submitted their draft chapters to the Drafting Committee.<sup>308</sup>

The compilation of the different chapters by the Drafting Committee was not explicitly regulated in the Standing Orders, and neither were the powers the latter committee had with respect to the preparation of the final draft. Indeed, the Standing Orders required the Drafting Committee to prepare the final draft Constitution ‘in

<sup>308</sup> The Carter Center (n 18) 35.

accordance with the decisions of the Assembly',<sup>309</sup> a formulation that vaguely defined the powers of the Committee. In the course of the drafting process, this lack of clarity led to a major stalemate within the NCA.<sup>310</sup>

The first draft of the Constitution proved highly controversial, generating a strong reaction from Tunisian civil society organisations, opposition members, constitutional experts, and international actors. Concerns were expressed on many issues, including language pertaining to the status of women, the inadequate protection of the freedoms of belief and speech, and the system of government.<sup>311</sup>

The Drafting Committee worked on the draft text but did not make substantial changes. It did however highlight inconsistencies, gaps, repetitions, and unclear phrasing. After this review, the Drafting Committee sent the texts back to the Constitutional Committees for review, pursuant to the Standing Orders.<sup>312</sup>

In parallel, while the committees reviewed their drafts, the first full draft was discussed in the Plenary in October 2012.

### *Second Draft*

Between the end of September and mid-December 2012, each Committee submitted updated draft chapters to the Drafting Committee, several of which addressed issues of concern raised by civil society, including those supporting women's rights.<sup>313</sup> On 14th December 2012, a second draft Constitution was put together on the basis of the draft chapters reviewed by the six Committees. Two days later, a national consultation process was launched.

While national consultations took place from December 2012 to February 2013, the Assembly held plenary debates on the various chapters of the draft Constitution, enabling members, including those who did not participate in the six constitutional committees to present their views.<sup>314</sup>

The result of the work of the Committees was the elaboration of updated chapters, which were sent to the Drafting Committee. The reviewed second drafts were however not released.<sup>315</sup>

### *Third Draft*

The Drafting Committee reviewed the updated chapters prepared by the Committees and modified them extensively. The Drafting Committee even went so far as to decide on the various proposals on the form of government, which the respective Committee itself had left open (see Box no 7 on the amendment of the rules of procedure).<sup>316</sup>

In parallel to the drafting process within the NCA, the Government launched a 'national consultation process' that also discussed the draft constitutional text.

Consultation took place from Dec 2012 to Feb 2013.

<sup>309</sup> Standing Orders of the Tunisian National Constituent Assembly, Article 104 (n 18).

<sup>310</sup> See section C below on deadlock solving mechanisms and the creation of a consensus committee.

<sup>311</sup> The Carter Center (n 18) 35.

<sup>312</sup> The Carter Center (n 18) 35.

<sup>313</sup> The Carter Center (n 18) 36.

<sup>314</sup> The Carter Center (n 18) 36.

<sup>315</sup> The Carter Center (n 18) 36.

<sup>316</sup> The Carter Center (n 18) 36-37.

Subsequently, the Drafting Committee prepared a third draft, which was leaked to the press. This leaking forced the Drafting Committee to release the third draft officially on 22nd April 2013, even though it had not intended to.<sup>317</sup>

**Box no 7. Amendment of the Standing Orders of 15th March 2013**

Following the assassination of a prominent political party leader on 6th February 2013, the Assembly sought to confront the crisis by accelerating the drafting process. To this end, it sought to clarify the role of the Drafting Committee in the drafting process and to streamline debate procedures during Plenary debates.

The original wording of Article 104 of the Standing Orders stipulated that one of the duties of the Drafting Committee was the preparation of the final *draft Constitution* 'in accordance with the decisions of the assembly'. Following its amendment, it referred to the preparation of the final 'wording of the draft Constitution based on the work of the Committees and in consultation with the relevant experts.'

However, the new wording failed to clarify whether the Drafting Committee could make substantive changes or add or remove draft articles. At any rate, the amendment of the rules was pushed through amidst strong opposition in the Assembly and claims that it constituted an attempt at placing the drafting process under the control of the General Rapporteur on the Constitution and the President of the Assembly.

In turn, the streamlined procedures for debate limited the number of amendments to the draft Constitution that could be proposed in plenary sessions. A minimum number of 5 members was established for the tabling of amendments, and members were given a total of four days per chapter to table them.

The assembly also tasked the Constitutional Committees with studying the comments and recommendations made on the draft during plenary sessions, as well in the dialogue sessions held with civil society in September 2012 and the national consultations. The committees were given 10 days to do so.

As a next step, the Drafting Committee submitted the draft to a Group of Experts, nine experts in total, some of them renown constitutionalists, who worked from 23rd April to 2nd May 2013.<sup>318</sup> The Group of Experts worked independently and at some point together with the Drafting Committee. Eventually, the Drafting Committee continued working on the text, incorporating some of the political agreements that had been reached in the parallel national dialogue process.<sup>319</sup> Further, the Drafting Committee added a 10th chapter to the draft text, which concerned transitional provisions.<sup>320</sup> The resulting product of this work was a fourth draft of the constitutional text which was unexpectedly released by the President of the NCA on 1st June 2013.

#### *Fourth Draft*

The release of the fourth and final draft of the constitution led to a crisis within the NCA, as many members felt that the proposals drafted in the Committees had not been incorporated, and that the Drafting Committee itself had acted *ultra vires*.<sup>321</sup> As a result,

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<sup>317</sup> The Carter Center (n 18) 37.

<sup>318</sup> The Carter Center (n 18) 37.

<sup>319</sup> The Carter Center (n 18) 37.

<sup>320</sup> The Carter Center (n 18) 37.

<sup>321</sup> The Carter Center (n 18) 38.

many members tried to actively block the progress of the constitution-making process, by not attending the meetings or by not convening the respective Committees.<sup>322</sup> Eventually, the Committees reviewed the fourth draft and issued reports that presented the articles proposed by each one of them, and the changes that had been done to them by the Drafting Committee.<sup>323</sup> The individual reports were submitted to the Drafting Committee, which in turn produced a final report on the constitution.<sup>324</sup>

The Committee reports were submitted to the Drafting Committee, which, pursuant to Article 104 of the Standing Orders, had to prepare the General Report regarding the draft Constitution before presenting the draft to the Assembly. A draft report was drawn up by the General Rapporteur on the Constitution and subsequently discussed within the Drafting Committee, where amendments were suggested. The General Rapporteur then worked with the suggested amendments to produce a final draft report that was approved by the Drafting Committee. The report was filed at the Registration Office on 14th June 2013, along with the reports of the committees. The General Report explained how the draft Constitution was framed and detailed the various stages it passed through. It also addressed the content of the draft Constitution, explaining the purpose behind the amendments made by the Drafting Committee.

### ***Debate in the Plenary***

Once the draft Constitution was ready, the President of the National Constituent Assembly had to place it on the order of business of the Assembly, ordering its distribution to all Assembly members, the President of the Republic, and the Prime Minister, together with the General Report on the Draft Constitution and the Reports of the six Constitutional Committees, at least two weeks before the plenary session in which the draft Constitution would be considered.<sup>325</sup>

According to the Standing Orders, the debate on the draft Constitution in the Plenary would start with a presentation of the General Report on the Draft Constitution before the assembly members.<sup>326</sup> Yet, as the General Rapporteur read out the report protests broke out in the plenary, as many members were against the changes introduced by the Drafting Committee.<sup>327</sup>

To solve the crisis, the President of the NCA announced the creation of an ad hoc Consensus Committee that would discuss the main contentious issues around the draft. This decision helped ease the tensions, and allowed the debate in the Plenary to resume. The debate lasted two weeks, between 1st and 15th July 2013. It was characterised by low attendance, with at times less than 60 members present during the debates.<sup>328</sup> The Consensus Committee was in place by the second week of July 2013.<sup>329</sup> Given that the work of the Consensus Committee is so relevant from a stalemate-solving perspective, the role and function of this committee are analysed in Section 3(C) below.

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<sup>322</sup> The Carter Center (n 18) 38.

<sup>323</sup> The Carter Center (n 18) 38.

<sup>324</sup> The Carter Center (n 305) 38.

<sup>325</sup> Standing Orders of the Tunisian National Constituent Assembly, Article 105 (n 18).

<sup>326</sup> Standing Orders of the Tunisian National Constituent Assembly, Article 106 (n 18).

<sup>327</sup> The Carter Center (n 18) 38.

<sup>328</sup> The Carter Center (n 18) 39.

<sup>329</sup> The Carter Center (n 18) 39.

Aside from the internal crisis within the NCA created by the fourth draft, external political events also impacted the work of the Assembly. For instance, on 25th July 2013 an NCA deputy was assassinated, which led to the suspension of the NCA's work, which only resumed on 4th November 2013.<sup>330</sup> Still, upon restart of its work, the Assembly went into the next conflict, which concerned another amendment to the rules of procedure that could allow for the speedier approval of the constitutional text. In particular, the amendment touched upon the possibility of penalising members for repeated absences.<sup>331</sup>

The negotiations regarding the modification of the rules of procedure were part of broader negotiations among the main political parties, and other organisations, such as the Workers Union of Tunisia. One of the thorny points was the formation of a new government. Eventually, however, tensions eased up and agreements on this last topic were reached. By mid-December the NCA was again working normally.<sup>332</sup>

In December 2013, 256 proposed amendments were proposed in the plenary of the NCA, following the stricter rules of procedure on the matter.<sup>333</sup>

### ***Adoption (Voting)***

The article-by-article voting began on 3rd January 2014. In this part of the vote, the passing of provisions required an absolute majority only. According to the Constitutional Law No 6-201, only at a final stage would the constitution be voted *en bloc*. In this last case, the quorum of approval was that of two-thirds majority.<sup>334</sup>

Overall, the voting stage of Tunisia's constitution-making process was not exempt from controversy. The Consensus Committee was involved in the voting phase, and intervened by making adjustments to certain provisions on the spot.<sup>335</sup> Slowly, however, the capacity of the Consensus Committee to solve the deepest controversies (e.g., the eligibility of the president of the republic) diminished and so by mid-January the General Rapporteur announced the end of the work of the Consensus Committee.<sup>336</sup>

Throughout the voting stage tensions ran high among opposing members at the NCA, with various public altercations and mutual accusations.<sup>337</sup> Again, broad interpretations of a key provision of the Standing Orders (specifically Article 93) were used to overcome the stalemate.<sup>338</sup> A flexible interpretation of Article 93 of the rules enabled the reopening of discussions regarding certain articles of the constitutional text, which were amended until right before the final vote.

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<sup>330</sup> The Carter Center (n 18) 40.

<sup>331</sup> The Carter Center (n 18) 40.

<sup>332</sup> The Carter Center (n 18) 41.

<sup>333</sup> The Carter Center (n 18) 42.

<sup>334</sup> Article 3 of Constitutional Law No 6-201; Standing Orders of the National Constituent Assembly, Article 107 (n 18).

<sup>335</sup> The Carter Center (n 18) 44.

<sup>336</sup> The Carter Center (n 18) 45.

<sup>337</sup> The Carter Center (n 18) 45.

<sup>338</sup> Article 93 of the Standing Orders stipulates that "If any amendments made to any part of a draft text require consequential amendments to any part previously agreed to, the Assembly may reconsider the earlier part and vote on it again.

The Assembly may also reconsider an article previously adopted if so requested by the government representative, the chairman or rapporteur of the relevant committee, or the general rapporteur on the constitution, if new circumstances have arisen before deliberations on the whole text have been concluded."

After a reading of the final draft by the General Rapporteur, the constitution was voted as a whole. 200 out of 216 votes were cast in favour of approving the Constitution (145 favourable votes were needed for its passage), and the text was adopted on 26th January 2014.<sup>339</sup>

### C. MECHANISMS TO SOLVE DEADLOCKS

Throughout the course of a constitution-making process, it is highly likely that those involved in producing and approving a constitutional text will have disagreements that might endanger the successful completion of the process. This is why rules of procedure sometimes identify mechanisms to resolve these differences, either explicitly or more indirectly by designing rules that seek to achieve consensus rather than a voting-majority. In general, differences in constitution-making processes may be divided into procedural and substantive.<sup>340</sup> This classification is useful to determine the type of solving-mechanism adequate to resolve a given disagreement. For instance, in the case of procedural differences, recourse to judicial mechanisms might be a useful way to avoid stalemate.<sup>341</sup> By contrast, in the case of substantive disagreements, recourse to judicial bodies may exacerbate the problem, as substantive issues are more likely to require compromised solutions.<sup>342</sup>

Contrary to the previous subsections, not all the processes studied in this report contain specific provisions on deadlock-solving in their rules of procedure. Still, all of them dealt in one way or another with stalemate situations and made conscious efforts to bring the process forward. Thus, whereas in some cases voting to approve draft articles was avoided altogether, and so decision-making relied heavily on different forms of consensus; in other cases, specific bodies were created in order to moderate and ease off disagreements.

In any case, it is important to bear in mind that given the complexity of constitution-making processes, it is common for situations of stalemate to be dealt with 'outside' official channels and constitution-making bodies. This could for instance take place through political negotiations or innovative techniques that entail consulting the general population. Accordingly, for an overview of deadlock-solving mechanisms it is always crucial to look at the general context of a given constitution-making process.

#### COLOMBIA

In Colombia, neither Decree No 1926 nor the Rules of Procedure of the ANC foresaw any formal deadlock-breaking mechanisms with regard to the approval of the constitution. However, the fact that no absolute majorities were held by a single party neither at the level of the assembly, nor at the level of the committees, meant that decision-making necessarily required consensus to achieve the absolute majority requirement to adopt constitutional proposals. The only deadlock-breaking mechanism in Decree No 1926 involved the obligation for the ANC to adopt rules of procedure developed by the President of the Republic in case the ANC failed to do so within the established period of time.

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<sup>339</sup> The Carter Center (n 18) 45.

<sup>340</sup> M Brandt et al (n 40) 27.

<sup>341</sup> Ibid.

<sup>342</sup> Ibid, 27-28.

## ICELAND

The rules of procedure of the Icelandic Constitutional Council preferred consensus over voting. Only if consensus could not be reached on an item of business, was the issue decided by a vote.<sup>343</sup> This rule is illustrative of one of the first decisions taken by the Council in that it would aim to use judicious discussion and objective criticism to achieve consensus rather than force a vote.<sup>344</sup> Actually, the rules themselves do not even specify what level of majority needed to be reached if a vote was forced on an issue, including the passage of the final text by the Council, and do not contain any deadlock-breaking mechanisms. Interestingly, they also do not contain any provisions relating to how to build consensus, despite explicitly preferring it to conducting a vote. Despite this, the Council generally reached consensus on the contents of the Bill and because of this, it was finally accepted through a unanimous vote of all 25 Council members.<sup>345</sup>

Rules of procedure did not contain majority requirements.

Consensus was preferred.

Process criticised for producing ambiguous provisions.

While consensus-building is important, the Icelandic approach has been criticised as leading to overly vague formulations of constitutional provisions. Once the text was analysed after its passage by the Council by legal and constitutional scholars, it was found to include many provisions which could be interpreted in a number of different ways.<sup>346</sup> This suggests that the prioritisation of consensus-building worked against deeper deliberation and resulted in insufficient attention being paid to excluding certain interpretations from the text. The desire to foster consensus seemingly resulted in an avoidance of discussions about difficult trade-offs between contrary interpretations and formulations of provisions.<sup>347</sup>

## SOUTH AFRICA

A number of areas of conflict arose between the parties in South Africa's Constitutional Assembly during the drafting and negotiation process. These included the reintroduction of the death penalty, land redistribution, and various elements of the right to education.<sup>348</sup> In the final weeks before the deadline for the passage of the new constitutional text, the threat of the invocation of two main deadlock-breaking mechanisms, contained in Section 73 of the Interim Constitution, spurred parties to reach agreement on these issues.

The first of these mechanisms would have been triggered if a majority of members of the Assembly had voted in favour of the text but this number did not reach

First deadlock-solving mechanism:  
Recourse to Panel of Experts

<sup>343</sup> Article 6(2) Rules of Procedure of the Constitutional Council (2011) (n 71).

<sup>344</sup> J Olafsson (n 70) 255.

<sup>345</sup> The Constitutional Council-General Information 'Working on the Topics' (n 53).

<sup>346</sup> J Olafsson (n 70) 256.

<sup>347</sup> J Olafsson (n 70) 256.

<sup>348</sup> H Ebrahim and L Miller (n 94) 130.

the requisite two-third threshold for passage.<sup>349</sup> In this case, the draft would have been referred to the independent panel of constitutional law experts which would have advised the Assembly as to amendments to the proposed draft which might have secured the support required to pass the text.<sup>350</sup>

If this amended draft text then failed to receive the support of two-thirds of the members of the Assembly, the second deadlock-breaking mechanism would be triggered. In terms of this, a draft text could be passed by a majority of members of the Assembly but would then be subjected to a public referendum as to its final acceptance or rejection.<sup>351</sup> The text presented to the electorate would be approved as the final

Second deadlock-  
solving mechanism:  
Public Referendum

constitutional text if 60% of the votes cast in the referendum were in favour of it.<sup>352</sup> Where the text was not approved, the Constitutional Assembly would be dissolved, new Parliamentary elections held, and the constitutional design process started afresh.<sup>353</sup>

All parties in the Constitutional Assembly feared a referendum. Members of the Assembly worried a referendum would threaten compromises already reached, lead to adversarial campaigns and highlight socially contentious issues jeopardising South Africa's uneasy stability.<sup>354</sup>

#### SPAIN

In Spain, no deadlock breaking mechanisms were formally foreseen in the process, yet extra-parliamentary negotiations played an important role in resolving deadlocks. Moreover, the decision made by the *Ponencia* to seek minimum points of agreement and refrain from voting on the preliminary draft lay the first stone of a consensus-driven constitution-making process.

#### TUNISIA

To solve the crisis that had emerged for the elaboration of the fourth draft by the Drafting Committee (see above section B), the President of the Tunisian NCA created a 'Consensus Committee', a body of 23 members that included representatives from the various political blocs at the time as well as some independent members.<sup>355</sup> The General Rapporteur of the Constitution was also a member of the Consensus Committee in their capacity as Rapporteur. The role of the Consensus Committee was to identify and reach agreement on contentious issues in the final draft, so as to pave the road for the adoption of the Constitution with as broad support as possible.<sup>356</sup>

<sup>349</sup> Constitution of the Republic of South Africa Act 200 of 1993 (Interim Constitution), Section 73(3).

<sup>350</sup> Constitution of the Republic of South Africa Act 200 of 1993 (Interim Constitution), Section 73(3).

<sup>351</sup> Constitution of the Republic of South Africa Act 200 of 1993 (Interim Constitution), Section 73(5) read with Section 73(6).

<sup>352</sup> Constitution of the Republic of South Africa Act 200 of 1993 (Interim Constitution), Section 73(8).

<sup>353</sup> Constitution of the Republic of South Africa Act 200 of 1993 (Interim Constitution), Section 73(9)-(10).

<sup>354</sup> H Ebrahim and L Miller (n 94) 127 and 133.

<sup>355</sup> The Consensus Committee was composed of: the President of the assembly (Ettakatol); the General Rapporteur on the Constitution (Al-Nahda); 5 Al-Nahda members; 2 Ettakatol members; 2 Congress for the Republic members; 3 members of the Democratic group; 3 members of the Liberty and Dignity group; 1 member from the Democratic Alliance group; and 6 non-affiliated members who were either independent or belonged to minority parties. The Carter Center (n 18) 33.

<sup>356</sup> The Carter Center (n 18) 33.

As the Standing Orders did not foresee the Consensus Committee, they were amended on 3rd January 2014, to give the committee formal status.<sup>357</sup> Similarly to the Drafting Committee, the meetings of the Consensus Committee were closed to outside individuals.

Regarding the process followed by the Consensus Committee, the latter began by identifying a range of contentious issues in the final draft.<sup>358</sup> This list was narrowed down to key contentious issues. Rights and freedoms were the first set of provisions tackled. Rapid progress was made in that area, reaching key agreements on 24th July 2013.<sup>359</sup> Throughout the work of the Consensus Committee, legal precision was sometimes put aside in order to reach political consensus. In this case, one of the General Rapporteur's duties was to draw the Committee's attention to any unforeseen side effects posed by the wording reached through consensus to the consistency of the overall text.<sup>360</sup>

Crucially, the Consensus Committee was able to meet even when the work of the NCA was suspended. From the end of June to the end of December, the Consensus Committee reached an agreement on 52 contended points.<sup>361</sup> In addition, the Consensus Committee reached out to experts on constitutional law to advise on the topic of transitional provisions.

One of the most important points with respect to the work of the Consensus Committee was to get the members of the NCA to respect the agreements that had been reached by this body, as its decisions were not binding.<sup>362</sup> The problem of the binding nature of the Consensus Committee's work was solved through yet another amendment of the rules of procedure, to include a modification that stated that the modifications emanating from the Consensus Committee were binding.<sup>363</sup>

#### D. PUBLIC PARTICIPATION

A recent trend in constitution-making is that these processes are increasingly trying to achieve broad public participation, and the inclusion of groups that have been marginalised from power by political and economic forces.<sup>364</sup> As one author observes: "[p]articipatory constitution-making is today a fact of life, as well as good in itself."<sup>365</sup>

Comparative experience shows that there are various forms of public participation in constitution-making. The most common form is that of plebiscites or referendums that consult the population if they approve or not a constitutional text. There are also forms of participation that entail a more direct involvement of the public in the drafting of constitutional texts, such as, the right to present motions directly to the constitutional

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<sup>357</sup> Article 41 of the Standing Orders, as amended on 2nd January 2014, gave the President of the assembly the right to form a Consensus Committee around the Constitution exempt from the composition and procedures of other committees. Article 106 (bis) detailed the role of the committee and the status of the agreements reached within it.

<sup>358</sup> The Carter Center (n 18) 39

<sup>359</sup> The Carter Center (n 18) 39

<sup>360</sup> H Khedher, 'The General Rapporteur of the Constitution and of the Joint Commission for the Coordination and Drafting of the New Constitution', in *Constitution of Tunisia: Process, Principles and Perspectives* (2016) UNDP 2016 <<http://www.arabstates.undp.org/content/dam/rbas/doc/Compendium%20English/Part%202/07%20Habib%20Khedher%20EN.pdf>> accessed 29th March 2021.

<sup>361</sup> The Carter Center (n 18) 42.

<sup>362</sup> The Carter Center (n 18) 42.

<sup>363</sup> The Carter Center (n 18) 42.

<sup>364</sup> M Brandt et al (n 40) 25.

<sup>365</sup> V Hart, 'Democratic Constitution Making' (2003) 107 Special Report United States Institute for Peace, 2.

body or to a specialised agency within it, submitting reports and comments on drafts, and or forming part of ad hoc focus groups established for the purpose of public outreach.<sup>366</sup>

This subsection addresses the many forms the five constitution-making processes studied here dealt with public participation.

## COLOMBIA

The constitution-making process in Colombia contemplated aspects of public participation, in particular during the time preceding the establishment of the Constitutional Assembly. Concretely, the Agreement of 23rd August concluded between various political forces, provided that an agenda (*temario*) would be elaborated in the context of a national debate, the results of which would be studied by so-called Preparatory Commissions (*Comisiones Preparatorias*) that would be formed by

expertos y dirigentes de todas las vertientes ideológicas y representantes de las diversas fuerzas políticas, sociales y regionales, tales como gremios de los principales sectores de la economía, organizaciones cívicas y comunales, organizaciones indígenas y de minorías étnicas, organizaciones estudiantiles y juveniles, organizaciones campesinas, organizaciones feministas y de mujeres, organizaciones de jubilados y pensionados, organizaciones de militares y policías retirados, organizaciones de ambientalistas y ecologistas, organizaciones de derechos humanos, asociaciones de profesionales, asociaciones de universidades públicas, asociaciones de universidades privadas, Iglesia Católica y otras Iglesias.<sup>367</sup>

Pursuant to the August 23rd Agreement, the agenda would be approved by the citizens in the elections for delegates of the constitutional assembly.

Although the Supreme Court of the country declared that giving a *temario* to the constitutional assembly was unconstitutional,<sup>368</sup> the Preparatory Commissions were nevertheless created, as were Regional Working Groups (*Mesas de Trabajo Regionales*), convened by President Gaviria.<sup>369</sup> The work of these local groups would be systematised by Preparatory Groups (*Mesas Preparatorias*), and the results would become the input for the work of the Preparatory Commissions. The overall goal of convening these different participation instances was to collect the ideas and proposals of, inter alia, ordinary citizens, experts, academics, and social and indigenous organisations, so that the executive could prepare its proposal on constitutional reform and present it to the constitutional assembly.<sup>370</sup> The Preparatory Commissions held approx. 1500 public hearings from September to December of 1990 and included about 900 experts.<sup>371</sup>

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<sup>366</sup> M Brandt et al (n 40) 26, 81.

<sup>367</sup> Point 16 of the Agreement of 23rd August, included in the text of Decree No 1926 of 24th August 1990 (n 44).

<sup>368</sup> Supreme Court of Colombia, Sentencia No 138 of 9th October 1990, 34-104. <[https://cortesuprema.gov.co/corte/wp-content/uploads/subpage/GJ/Gaceta%20Especial%20Sala%20Constitucional/GJ%20I%20\(1991\).pdf](https://cortesuprema.gov.co/corte/wp-content/uploads/subpage/GJ/Gaceta%20Especial%20Sala%20Constitucional/GJ%20I%20(1991).pdf)> accessed on 5th March 2021.

<sup>369</sup> M Meza-Lopehandía (n 46) 4.

<sup>370</sup> Point 18 of the Agreement of 23rd August, included in the text of Decree No 1926 of 24th August 1990 (n 44).

<sup>371</sup> M Meza-Lopehandía (n 46) 4.

When the ANC was already in session, the Rules of Procedure stipulated that both plenary and committee sessions would be public, and that the Presidency could request that specific sessions be broadcasted via radio and public television channels.<sup>372</sup>

Regarding public participation per se, this consisted, mainly, in the submission of proposals to the ANC's Secretary. According to the Rules of Procedure, representatives of national non-governmental organisations, universities and guerrilla groups participating in a peace process coordinated by the Government could submit proposals to the ANC. The proposals were studied by the Bureau and distributed to the respective Permanent Commissions for their assessment.<sup>373</sup> Additionally, the Permanent Commissions could hold hearings with experts or social leaders and, in general, with any person whose opinion could be of relevance for the work of the Assembly. Further, delegates conducted on-site visits, although these were not provided for in the Rules of Procedure.<sup>374</sup>

### *ICELAND*

Public participation at all stages of the Icelandic constitutional design process was critical. For instance, the Act on a Constitutional Assembly mandated that a National Forum, made up of nearly 1000 Icelandic citizens, be held prior to the election of the Assembly.<sup>375</sup> This Forum was aimed at gathering the principal viewpoints and issues of public concern prior to the start of the drafting process. The fact that the Constitutional Committee's report on this Forum acted as a foundational text in the later drafting process illustrates the importance placed on the views gathered at the Forum.

The Act further envisaged that once the Assembly was elected, public participation would be key to its functioning. It stipulated that the Assembly was to establish a website to disseminate information on the constitutional draft and to broadcast meetings of the Assembly.<sup>376</sup> Moreover, the Assembly was enjoined to advertise extensively to the public and interest groups in an attempt to encourage them to present proposals to the Assembly.<sup>377</sup>

Even after the Assembly elections were invalidated, the rules of procedure regulating the Constitutional Council elected in the Assembly's stead similarly prioritised public participation. For instance, these stipulated that the documents produced in Council and thematic committee meetings were to be published promptly on the Council's website;<sup>378</sup> that all Council meetings were open to the public and that thematic committee meetings were permitted to be open to the public;<sup>379</sup> that parties outside the Council could submit communications and recommendations and be invited to attend Council and committee meetings;<sup>380</sup> and finally, that Council meetings were to be broadcast live on the Council website.<sup>381</sup> Transcripts of the deliberations in the Council

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<sup>372</sup> M Meza-Lopehandía (n 46) 15.

<sup>373</sup> Article 29 of the ANC Rules of Procedure (n 43).

<sup>374</sup> M Meza-Lopehandía (n 46) 15.

<sup>375</sup> Act on a Constitutional Assembly No 90/2010, Interim Provisions (n 12).

<sup>376</sup> Act on a Constitutional Assembly No 90/2010, Article 20 (n 12).

<sup>377</sup> Act on a Constitutional Assembly No 90/2010, Article 20 (n 12).

<sup>378</sup> Article 8 Rules of Procedure of the Constitutional Council (2011) (n 71).

<sup>379</sup> Article 9 Rules of Procedure of the Constitutional Council (2011) (n 71).

<sup>380</sup> Article 10 Rules of Procedure of the Constitutional Council (2011) (n 71).

<sup>381</sup> Article 10 Rules of Procedure of the Constitutional Council (2011) (n 71).

during the first and second reading of the draft Bill once it was tabled by the Presidium were also uploaded on the Council's website.<sup>382</sup>

Aside from these requirements which essentially ensured the transparency of the Council, the active attempts to encourage the public to engage with the draft constitutional text are remarkable. The rules of procedure established that the public could express their opinion on the progress document on the Council's website.<sup>383</sup> In practice, the Council went even further than this. It held public discussions on social media platforms such as Facebook and YouTube, filmed and released interviews with Council members and issued a weekly newsletter updating the public on the progress of the constitutional design project.<sup>384</sup> It is because of these measures that the Bill compiled by the Council has been called a "crowd-sourced constitution".<sup>385</sup> The reliance on the internet negated the need to call people to make in-person representations before the Council.<sup>386</sup> This was important because of the short period within which the Council was to draft the new text.<sup>387</sup>

More than 3000 proposals were received by the Council through Facebook alone.<sup>388</sup> However, because the rules of procedure did not specify how submissions made by the public and interest groups would be processed and filtered, some commentators have argued that the Council was ineffective at translating public submissions into workable legal provisions.<sup>389</sup>

The Council's rules of procedure envisaged reliance on online communication between the Council and the public, such as through their website. However, this created issues of inclusivity for individuals without internet access. In response to this, Council members distributed their personal telephone numbers so that members of the public could contact them.<sup>390</sup> Such a response would be inappropriate in the context of many other states. This ad-hoc solution highlights the importance of designing rules of procedure, especially those relating to public participation, with the needs and capacities of all people, including marginalised groups, in mind.

### *SOUTH AFRICA*

The standing orders of the Constitutional Assembly allowed members of the public and the media to be present during all committee, commission, technical committee or other meetings of the bodies of the Assembly. The public could only be excluded in exceptional circumstances where the body deemed it necessary for its proper functioning.<sup>391</sup> This rule enhanced the transparency of the Assembly's proceedings. Moreover, as mentioned above, any interested person or organisation was empowered to submit a proposal or representation relating to the new constitutional text.<sup>392</sup> This ensured the involvement of

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<sup>382</sup> Article 11 Rules of Procedure of the Constitutional Council (2011) (n 71).

<sup>383</sup> Article 11 Rules of Procedure of the Constitutional Council (2011) (n 71).

<sup>384</sup> The Constitutional Council-General Information 'The Public's Participation in the Work Process' (n 53).

<sup>385</sup> T Gylfason (n 55) 13.

<sup>386</sup> A Meuwese and T Gylfason 'Digital Tools and the Derailment of Iceland's New Constitution' *CESifo Working Paper No 5997*, 9.

<sup>387</sup> The Constitutional Council was given 4 months to complete their work.

<sup>388</sup> C Berg (n 62) 8.

<sup>389</sup> J Olafsson (n 70) 260.

<sup>390</sup> A Meuwese and T Gylfason (n 386) 12.

<sup>391</sup> Standing Rules of the Constitutional Assembly, 1994, Rule 17A(1) (n 97).

<sup>392</sup> Standing Rules of the Constitutional Assembly, 1994, Rule 75(1) (n 97).

members of the public in the constitution-building process. The Assembly received nearly 18000 submissions in terms of this provision which it processed through the Technical Committees attached to each Theme Committee.<sup>393</sup>

However, it is notable that these are the only two rules in the Assembly's standing orders which relate to public participation in the constitutional design process. In spite of this, in practice, the Assembly carried out extensive public participation processes. For instance, the various Theme Committees conducted orientation workshops for the public to assist them in preparing proposals and representations.<sup>394</sup> Moreover, public hearings were held by these Committees on controversial aspects of the draft text such as state languages and equality and affirmative action,<sup>395</sup> and the draft text was published for public comment and the Assembly released a detailed study of the comments received and whether they had been incorporated and why.<sup>396</sup> These were complimented by extensive media campaigns including weekly newsletters, radio shows and television shows detailing the progress of the work of the Assembly.<sup>397</sup> While these efforts were admirable, it is advisable that assemblies seeking to ensure meaningful public participation include rules to this effect in their standing orders to avoid this important aspect of constitutional design being left to the discretion of individual members or committees.

#### SPAIN

The constitution-making process featured direct forms of public participation in the form of elections to the *Cortes Generales* and the constitutional referendum for the ratification of the Constitution. While the elections to the *Cortes Generales* were not explicitly referred to as constituent elections, the different political parties that ran for the elections made it clear that they intended to embark on a constitution-making process as soon as the *Cortes* were elected. Excepting the elections to the *Cortes* and the referendum, during the different phases of the process, the public was not directly consulted.

This is not to say that there were no indirect channels for public participation. The media played a crucial role in this regard, providing information throughout the process and promoting public debate on constitutional matters. The press conferences that were inaugurated with the *Ponencia* shed some transparency on its work. As the matters under discussion transcended, the preliminary draft, when published, did not come as a full surprise. Rather, the public was gradually prepared to accept a text that did not fully reflect the preferences of any of the parties, while the confidentiality of the proceedings limited precipitated public reactions while enabling agreements among the rapporteurs.

The publication of draft constitutional texts at various stages of the process enhanced the overall transparency of the process. Further, the fact that the constitutional text approved by the Congress was published prior to its consideration by the Senate further meant that the Senate was made aware of the public reactions it evoked, allowing it to further attune it to public sensitivities.

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<sup>393</sup> The Constitutional Assembly: Annual Report (1996) (n 108) 11-19.

<sup>394</sup> H Ebrahim and L Miller (n 94) 129.

<sup>395</sup> H Ebrahim and L Miller (n 94) 129.

<sup>396</sup> H Ebrahim and L Miller (n 94) 130-131.

<sup>397</sup> The Constitutional Assembly: Annual Report (1996) (n 108) 48-54.

## TUNISIA

Formal requirements for public participation in the Standing Orders were limited to direct engagement between Assembly members and the public. However, the Bureau for Public Outreach, Civil Society and Tunisian Expatriates conducted a number of outreach activities at various stages of the drafting process. Civil society played an important monitoring role, and, amidst a dearth of official information sources on the work of the assembly, ultimately became a crucial resource for public information on the process.<sup>398</sup>

### ***Public Outreach Activities Conducted by the National Constituent Assembly***

#### *Outreach weeks*

According to the Standing Orders, in between plenary and committee meetings, Assembly members had to be allocated one week per month to reach out directly to citizens.<sup>399</sup> However, these outreach weeks never materialised. There was no administrative, financial, or logistical support provided by the Assembly for outreach activities, which were left to the initiative of the members.<sup>400</sup> Eventually, as the assembly faced mounting pressure to accelerate the process, these weeks were cancelled altogether.

#### *Receipt and processing of external correspondence*

Pursuant to the system that was put in place to open the process up to those external to it, including citizens, associations, parties and independent experts, the Assembly received correspondence relating to the substance of the constitution on a daily basis.<sup>401</sup> Some of these were suggestions in complete legal wording, while others were just ideas. Some were suggestions relating to the entire constitution, while others merely referred to one section or a number of sections relating to one topic.

This correspondence was referred to the General Rapporteur on the Constitution, who reviewed the content and then decided to pass it on to one, or more, or even all of the Constitutional Committees.<sup>402</sup>

#### *Two-day Dialogue Session with Civil Society Organisations*

On 14-15 September 2012, the Bureau of Public and Civil Society Relations organised a dialogue session on the content of the draft Constitution that was released in August 2012. Civil society organisations were requested to register online for the event, which drew 300 civil society organisations from all over the country and from abroad. However, several civil society organisations boycotted the event, because, at that time, no guarantees were put into place to ensure that comments and recommendations made by those organisations during these two days would be considered by the Constitutional Committees.<sup>403</sup>

#### *National consultation process*

Two days after the second draft of the Constitution was released on 14 December 2012, the Assembly undertook a series of public consultations, which were organised by the Bureau of Public and Civil Society Relations. The consultation process began with two

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<sup>398</sup> The Carter Center (n 18) 58.

<sup>399</sup> Standing Orders of the National Constituent Assembly, Article 79 (n 18).

<sup>400</sup> The Carter Center (n 18) 68.

<sup>401</sup> H Khedher (n 360) 6-7.

<sup>402</sup> H Khedher (n 360) 7.

<sup>403</sup> The Carter Center (n 18) 69.

sessions held with student representatives in two Governorates. These were followed by public hearings held through January 2013 in Tunisia's 24 Governorates, at a rate of six Governorates each weekend. A total of 18 meetings with Tunisian expatriate constituencies in France and Italy were also organised in January and February 2013. One or more members of the Joint Coordination and Drafting Committee oversaw each one of these meetings.<sup>404</sup>

In total, the consultations involved around 6000 citizens over a two-month period.

Initially, the Standing Orders were silent on how and to what extent suggestions made by citizens and civil society organisations should be taken into consideration in the drafting process. Following their amendment on 15th March 2013, the Constitutional Committees were given the authority and responsibility to study the comments and suggestions made during the debate in the plenary and national consultations.<sup>405</sup> The submissions resulting from these meetings were gathered and classified by the advisers to the Assembly, in coordination with the General Rapporteur on the Constitution. The Chairpersons of each of the six Constitutional Committees were handed these submissions during an official meeting on 19 March 2013.

One of the specific positive outcomes of the national consultation process was the inclusion in the draft Constitution of the rights of the political opposition, an issue that was raised during the national consultations.

#### *Website of the National Constituent Assembly*

In September 2012, the assembly launched a consultative mechanism on its official website to allow citizens to make suggestions on constitutional issues. However, the mechanism was not advertised beyond a short press conference, and only 217 online contributions were made, despite the fact that more than 41% of the population had access to the Internet.<sup>406</sup>

#### ***The Monitoring and Information-sharing Role of Civil Society***

Civil society played an important role in monitoring the assembly and the process. Particularly the civil society organisation Al Bawsala created a website that sought to inform citizens about the process by giving them improved access to information regarding the Assembly, including votes made in plenary sessions and the attendance rate of each Assembly member. The website also offered an interactive platform to comment on each article of the draft Constitution and created another platform to give individuals the possibility to address questions directly to specific assembly members and to comment on each article of the draft Constitution.

Al Bawsala, which "live tweeted" from committee and plenary sessions and published the details of the votes by members on its website, became an important resource for the assembly, notably during the adoption process of the constitution, when the organisation was systematically consulted by assembly members to know the positions taken by other members during the article-by-article vote.<sup>407</sup>

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<sup>404</sup> H Khedher (n 360) 4.

<sup>405</sup> Standing Orders of the National Constituent Assembly, Article 114 (as amended on 15th March 2013).

<sup>406</sup> The Carter Center (n 18) 69.

<sup>407</sup> The Carter Center (n 18) 58-59.

## ANNEX: THE DEVELOPMENT OF THE GERMAN ‘GRUNDGESETZ’ (BASIC LAW)

### 1. INTRODUCTION

The development of the German constitution – originally the constitution of the Federal Republic of Germany (Grundgesetz – Basic Law) has to be seen from the perspective of the legal situation prevailing after the Second World War (see historical background in **Box No 8** below).<sup>408</sup> The development of the Basic Law was meant to constitute a fresh start. Its drafters did not only want to mark a very clear and visible break from the National Socialist regime, but also, they wanted to distance themselves from the previous Weimar Constitution, which was considered as a culprit for the rise of anti-democratic political parties.<sup>409</sup> The drafters of the Basic Law wanted to establish a constitution which had learned from the organisational shortcomings of the previous constitutional system and would provide for mechanisms to mitigate against the rise of undemocratic extremism. The desire to draft a new constitution to create a new start for Germany was both a challenge and an opportunity for innovation.

The present contribution will highlight the preconditions existing during the German constitution-making process and will assess the procedural steps taken towards its drafting. From the outset, it should be emphasised that when the German constitution-making process started, it could not rely on an existing constitution, nor on a functioning German government. As such, there was no fallback position. The German constitution-making process, therefore, had to be successful; no real alternative existed.

The German constitution-making process is said to have started with the so-called ‘*Frankfurter Dokumente*’, which were issued by the three Western Allied Powers on 1st July 1948.<sup>410</sup> The ‘*Frankfurter Dokumente*’ consisted of three documents: 1. A mandate to the Prime Ministers of the West German Länder to convoke a constitutional assembly; 2. A document containing the main elements of the Statute of occupation regulating the relationship between the German government and the military government of the Allies. (This document was of relevance until 1952); and 3, A mandate for the territorial reorganisation of West Germany. (Such reorganisation was undertaken in the South West only in 1952.)

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<sup>408</sup> On the development of the Basic Law see J Isensee and P Kirchhof, *Handbuch des Staatsrechts der Bundesrepublik* vol I (3rd edn, CF Müller 2003) 315 - 354 with further references. Very instructive is the book of M Feldkamp ‘*Der Parlamentarische Rat 1948 1949*’ (Vandenhoeck und Ruprecht 2019).

<sup>409</sup> The Weimar Constitution was not accepted by a significant part of the German population and was associated with the defeat of Germany in the First World War. It was argued that it did not include a mechanism to protect the State against political parties, which used the parliamentary procedure to dismantle democracy. Further, the German population was faced with a most significant economic crisis while the government did not have the strength to provide for an amelioration of the situation.

<sup>410</sup> As result of the London Conference in spring 1948, the three Allied military governors formulated the "Frankfurt Documents" and handed them over to the prime ministers at Allied headquarters in Frankfurt on 1 July 1948. The Frankfurt Documents authorised the prime ministers to convene a Constituent Assembly whose members would be selected by each of the existing countries according to the procedure and guidelines that would be adopted by the legislative body in each of those countries. The tensions between West Germany and East Germany were exacerbated by the agreements at this conference. The Allies and leading German political figures rejected a proposed plan made by the USSR for a united Germany out of fear that this would result in the establishment of a socialist state. Whether the rejection of this plan was politically wise was for a long time discussed controversially in particular circles.

### **Box No 8. Historical Background behind the Development of the German Basic Law**

The German Government surrendered to the Allies in World War II unconditionally on 7/8th May 1945 and the four victorious States, the United States of America, the USSR, Great Britain and France, took over the government of Germany.

On 5th June 1945, the supreme commanders of the Four Powers (USA, Great Britain, France and the Soviet Union) assumed supreme governmental authority over the whole of Germany by the Berlin Declaration. This was vested in the Allied Control Council based in Berlin. Between 17th July and 2nd August 1945, the representatives of the USA, Great Britain and the Soviet Union met in Potsdam to discuss the reorganisation of Europe and the future development of Germany. In the Potsdam Agreement they agreed on five political principles for Germany: demilitarisation, denazification, decentralisation, decartelisation and democratisation. France acceded to the agreement on 7th August.

Ultimately, Germany was divided in four occupation zones. Although the policy pursued by each single occupying power differed, some common principles applied:

It was agreed among the Allies that the German Reich (from now on Germany) should remain as an entity; the earlier ideas of fragmenting Germany were abandoned. The so-called Potsdam Agreement of 2 August 1945 was quite clear in this respect.

The Allies exercised all public power of Germany individually (except for Berlin, where the Allies acted jointly). This administration was headed by military governors.

The German government was dismantled at all levels (including the municipal level).

It was agreed that the status of Germany would be decided later in a peace treaty.

The development concerning Germany was overtaken by the East-West conflict, which ultimately resulted in the division of Germany into a Western and an Eastern part. Both parts were developed differently.

In West Germany, the Allies appointed Minister Presidents (or Prime Ministers), thus consolidating federalism in West Germany. Contrary to that, in East Germany, those in government advocated for a socialist central State. The re-organisation of Germany started on at the municipal level. As of today, the rules governing municipalities mirror the impact that the individual military governments had.

After the failure of several conferences in 1948, the three Western Allies called a Conference of six neighbouring States (excluding the USSR) on which one paramount agreement was reached, namely that Germany should become a federal State which would attribute to the Länder (provinces or States) sufficient power to develop their own identity but also to establish a sufficiently strong central government. It is important to emphasise that federalism, though agreed by the allies, was not imposed on Germany, as German constitutional system was also characterised by the federal approach.

Document I of the *Frankfurter Dokumente* contained several leading principles for the future constitution including: Democracy; Federalism; and a rule on the entry into force of the constitution, namely, that the latter would come into force upon the assent of the three military governments and a positive vote (simple majority) in two thirds of the parliaments of the Länder.<sup>411</sup>

The Prime Ministers of the Länder in West Germany, by a decision of 1st August 1948, accepted the mandate issued by the three Western military powers in the *Frankfurter Dokumente* to convene a constitutional assembly. However, they expressed some misgivings concerning the procedure envisaged in these documents and on certain substantial issues.<sup>412</sup> Most importantly, they insisted that the final document be called “Basic Law” instead of the Constitution. By this, it was made clear that the drafting of a final constitution should also include the German Democratic Republic or East Germany (GDR).<sup>413</sup>

## 2. CONSTITUTION-MAKING IN GERMANY

This section focuses on: the internal structure of the body tasked with drafting a new constitution, i.e., the Parliamentary Council; the process this body followed; deadlock mechanisms and public participation.

### A. INTERNAL STRUCTURE

As indicated above, the Basic Law had to be developed by a legitimised institution. Since it was not an option to have the members of such an institution elected directly – due to the time constraints set by the Allied Powers – it was decided that a constitution-making body could be legitimised through the issuing of a mandate by each of the Länder Parliaments.<sup>414</sup> No law existed to give the Länder Parliaments the democratic basis to issue such mandates, however. As such, the Prime Ministers of the Länder created a joint constitutional committee, made up of representatives from the Länder, which drew up a model law for the “Establishment of the Parliamentary Council”.<sup>415</sup> This law stated that a **Parliamentary Council** would be established to develop a Basic Law for the 11 Länder named in the law. Moreover, the law decreed that the Parliamentary Council should be composed of representatives elected by the parliaments of the Länder and that each Land should have one representative per 750,000 inhabitants.<sup>416</sup> The political parties involved agreed amongst themselves that every parliamentary group should be represented in the Council in proportion to their relative strength in each parliament of the country.<sup>417</sup>

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<sup>411</sup> ‘Frankfurter Dokumente’ (1st July 1948) <[https://www.1000dokumente.de/index.html?c=dokument\\_de&dokument=0012\\_fra&object=pdf&st=&l=de](https://www.1000dokumente.de/index.html?c=dokument_de&dokument=0012_fra&object=pdf&st=&l=de)> accessed on 20th March 2021.

<sup>412</sup> See Nos 5, 6, and 9 of the Aide-Memoire of the Minister-Presidents of the West German Länder of 22nd July 1948, reproduced in J V Wagner, *Der Parlamentarische Rat 1948-1949. Akten und Protokolle*, vol I (Harald Boldt 1975) 270

<sup>413</sup> Although it seemed at that time that there was no chance for unification, it was the common desire to keep the option open. For the same reason the Prime Ministers further opposed holding referenda for the final adoption of the constitution since this would have excluded the population of the GDR from participating in the constitution-making process and thus, deepened the rift between the two parts of Germany. The Prime Ministers of the Länder did not want the Basic Law to be considered the final Constitution

<sup>414</sup> A Bauer-Kirsch, ‘Zur Legitimation des Bonner Grundgesetzes – Das Selbstverständnis des Parlamentarischen Rates wider die Kritik’ (2002) 49 ZfP 171, 179.

<sup>415</sup> R Ley, ‘Die Mitglieder des Parlamentarischen Rates. Ihre Wahl, Zugehörigkeit zu Parlamenten und Regierungen: Eine Bilanz nach 25 Jahren’ (1973) 4 ZParl 373.

<sup>416</sup> Angela Bauer-Kirsch (n 414) 180.

<sup>417</sup> ‘Die Zusammensetzung des Parlamentarischen Rates’ <<https://www.bundestag.de/resource/blob/503340/7dcf0f289ed590c52e688112ea07c166/Die-Zusammensetzung-des-Parlamentarischen-Rates-data.pdf>> accessed 26th March 2021; See also R Ley (n 415) 373.

The Parliamentary Council, once the Länder had appointed all their representatives, consisted of 65 members plus five observers from Berlin. The fact that Berlin was only represented in the Council by observers was due to its unique position under the control of the four allies jointly. The Allied Powers insisted on this point. Adenauer was elected President of the Parliamentary Council, and invited the observers from Berlin to be members of the Council. He was strongly criticised for this by the Allies.<sup>418</sup>

The seat of that Assembly was in Bonn. It is noteworthy that the Parliamentary Council was dominated by political parties. This is unique but it is the logical consequence of the procedure chosen for its establishment. This composition also underlined the intended provisional character of the constitution to be developed.

The main feature of the Parliamentary Council was that it was politically oriented; there was no quota set for particular interest groups, such as churches, trade unions, the industry and refugees (despite refugees forming a significant group in German society with a population of over 14 million). All members of the Parliamentary Council had political experience and a significant number of them were lawyers.

The Parliamentary Council developed its own rules of procedure,<sup>419</sup> which were quite rudimentary and reflected the procedure used to issue Acts of Parliament. The Parliamentary Council depended greatly on informal arrangements made between the major political groups.

The organs of the Parliamentary Council were the **Presidency** consisting of a **President** and **two Vice-Presidents** (First and Second Vice-President) and **four secretaries**.<sup>420</sup> The powers and functions of the President and Vice-Presidents were defined in the Council's rules of procedure, as were the functions of the secretaries. They were identical to the powers and function of the Speaker, Deputies and their secretaries under the traditional parliamentary rules of procedure. Apart from that, the rules of procedure created a **Council of the Elders** which consisted of the Presidency and of one representative of each parliamentary group. The function of the Council of Elders was to assist the Presidency. At the same time, this Council of Elders constituted a mechanism that enhanced the exchange of views between the various groups in the Parliamentary Council.

The Parliamentary Council performed much of its basic work through **committees**. The rules of procedure provided for various standing committees and for the establishment of an ad hoc committee.<sup>421</sup> The standing committees were topic-oriented and they deliberated on the items entrusted to them by the plenary of the Council. The standing committees included a committee for fundamental questions (*Grundsatzfragen*: 12 members). It was considered the most important committee and was chaired by a

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<sup>418</sup> J V Wagner (n 412) 411; K Kröger, 'Die Entstehung des Grundgesetzes' (1989) NJW, 1318. The composition in the Parliamentary Council was politically balanced – the Social Democrats (SPD) and Christian Democratic Party (CDU) had the same number of representatives (27), the Liberals (FDP) had 5 and the Deutsche Party, German Political Party, the Zentrum – a Catholic political party – as well as the Communists (KP) each had two members on the Council. The distribution of seats between the CDU and the SPD was not decreed but mirrored the composition of the parliaments of the Länder.

<sup>419</sup> Adopted 28th September 1948.

<sup>420</sup> § 5 Rules of Procedure.

<sup>421</sup> A Bauer-Kirsch, *Herrenchiemsee-Der Verfassungskonvent von Herrenchiemsee -Wegbereiter des Parlamentarischen Rates* (Dissertation Universität Bonn 2005) 43.

representative of the SPD since the CDU occupied the position of the President. The other committees included:

- The committee concerning the organisation of the Federal Government, the Constitutional Court and the judicial system (22 members). Later this committee was split into two.
- The committee on the delineation of competences (10 members),
- The committee on financial issues (10 members),
- The committee on the electoral system (10 members) and
- The committee concerning the Statute on the status of the Allied Powers (12 members).

All of these committees had to report back to the Presidency and the Main Committee (discussed below). The standing committees deliberated behind closed doors. Public information about the work of the committees was limited.

Decisions of the committees were taken by the majority. However, the Committee on Fundamental questions avoided voting. Instead, it submitted alternatives if no agreement could be reached.<sup>422</sup> This proved beneficial since premature votes have the tendency to solidify opinions.

Further, a **Main Committee** (21 members) was established.<sup>423</sup> Its function was to put the Draft together based on the reports of the topic-oriented committees. At the end of the deliberations, the Main Committee established a sub-committee (the Group of Five) to find a compromise concerning the last outstanding issues, such as the composition and functioning of the second legislative chamber. This Draft agreed upon by the Group of Five and compiled by the Main Committee was thereafter reviewed by a **Committee on Editing**.<sup>424</sup>

## B. PROCESS

### *Drafting*

Before the formal deliberations started on a draft text of the Basic Law, several drafts were circulated within the political parties.<sup>425</sup> The most influential draft submitted before was the Draft of *Herrenchiessee*. This was prepared by an expert group which met at the behest of the governments of the Länder.<sup>426</sup> The group comprised 11 representatives, one for each of the then existing 11 Länder. These representatives had either administrative or judicial expertise and were appointed by the governments of the Länder. The group was assisted by 14 additional experts.

The group understood its mandate to be apolitical and it considered itself an expert forum. The Draft (in short: *Herrenchiessee Entwurf*) was written in 14 days. It contained

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<sup>422</sup> Feldkamp (n 408) 70.

<sup>423</sup> Even before the deliberations began, it was planned to divide the Convention into different committees for reasons of division of labour. Accordingly, the establishment of committees was already discussed on the first day of the meeting. In this first plenary session it was decided to appoint three committees, which in turn eventually gave rise to subcommittees. A Bauer-Kirsch (n 421) 43 ff.

<sup>424</sup> M Sachs, *Grundgesetz Kommentar* (8th edn, CH Beck 2018) Einführung.

<sup>425</sup> Starting in the spring of 1947, there were a number of preliminary drafts prepared by the SPD or the CDU/CSU, but no joint draft that could have been supported by the majority of the members of the Parliamentary Council.

<sup>426</sup> J Isensee and P Kirchhof (n 408) 232.

various alternative formulations of provisions relating to the most critical political issues to be included in Germany's Constitution.<sup>427</sup> The most contentious issue in the draft was whether Germany should be a confederal or a federal state. In spite of these controversies, there was a principled agreement on various issues (see box below).

#### **Herrenchiemsee Entwurf's Main Areas of Agreement**

As far as the legislature was concerned, there would be a legislative body consisting of two chambers. The one chamber was to be elected in democratic elections (Parliament) whereas the second chamber consisted of members appointed by the Länder. In respect of the latter aspect, two alternatives were proposed in the Group's draft text.

The Federal Government was dependent upon the Parliament and required the confidence of a majority within the Parliament to remain in place. There would be no government that depended solely upon the confidence of the President as had been the case under the Weimar constitution.

The head of State (President) had to be politically neutral. The Draft did away with the presidential system of government which was created by the Weimar Constitution. Here again, alternatives were included in the draft, namely the establishment of a collective head of State.

The right to declare a state of emergency was entrusted to the federal government rather than the head of State. This again was an abdication of the presidential system under the Weimar Constitution.

The Federal Government had a supervisory role over the governments of the Länder. The Federal Government was given access to federal courts to exercise this supervisory role.

There was an assumption that the exercise of legislative, executive and judicial powers rested with the Länder.

The finances of the Länder were to be separated from the finances of the Federal Government.

The draft contained no elements related to referenda, except in order to modify the constitution.

Any modification of the Basic Law which would endanger the democratic structures was prohibited. This clause in the Group's draft finally became the eternity clause of the Basic Law.

Although the establishment of this Group of experts was not foreseen by the Allies, its draft, de facto, played an important (however not a dominant) role in the deliberations of the Parliamentary Council (discussed below). In particular, the *Herrenchiemsee* Draft identified the most sensible points to be dealt with and by providing alternatives made the deliberations of the Parliamentary Council more focused. What is worth mentioning is that the experts provided for a different balance concerning the distribution of powers between the federal level and the level of the Länder than that contained in the subsequent Basic Law.

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<sup>427</sup> A Bauer-Kirsch (n 421) 12 ff.

Aside from the *Herrenchiemsee Entwurf*, the Parliamentary Council had before it several drafts, which were semi-official, and also private. Churches, trade unions and the industry submitted memoranda on particular issues. Still, the most important draft before the Council was the *Herrenchiemsee* draft.

### ***Deliberation Process***

Technically, the rules of Procedure followed the parliamentary technique of deliberating bills in three readings. During the first reading, a general discussion on the guiding principles was held based on the drafts developed outside of the Parliamentary Council, particularly the *Herrenchiemsee* Draft. Issues arising from this debate were submitted to the relevant thematic committees to review.

The second reading in the Plenary dealt with the draft Basic Law text compiled by the **Main Committee** on the basis of reports of the committees. This text was then amended and finally approved following a third reading, which only dealt with text of the constitution and several outstanding issues such as the composition and functioning of the second legislative chamber (Bundesrat).

Decisions were taken in plenum by a majority of the members present. The Plenary could take decisions if 50 per cent of its members were present.<sup>428</sup> The decision-making procedure in the committees followed the same pattern. The procedure for adopting the draft text to be tabled before the plenum by the Main Committee also had three readings.

Despite political differences within the Parliamentary Council, the members agreed on a number of main constitutional principles which were beyond dispute. The main constitutional principles beyond dispute were: Democracy; Federalism; Rule of Law; and Social State, which did not mean providing for social rights).<sup>429</sup>

The name by which the new West German democracy was to be known was disputed and the one ultimately agreed upon constituted a compromise. However, it was the name already in frequent usage in many main documents and constitutional drafts: The Federal Republic of Germany. This issue was voted upon separately and the "Federal Republic of Germany" was accepted with only four votes against.

An issue discussed intensively was whether the Basic Law should have a Bill of Rights. This was accepted only under the condition that the rights contained herein be different from the Weimar Constitution's individually enforceable rights. The Bill of Rights was predominantly negotiated and drafted in the Main Committee.<sup>430</sup>

The Parliamentary Council did not attempt to develop a constitutional order concerning the economy and the social system, although German trade unions did submit a constitutional draft which requested the inclusion of such systems.<sup>431</sup>

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<sup>428</sup> § 36 Rules of Procedure

<sup>429</sup> The Parliamentary Council agreed that the Federal Republic of Germany should be a "social constitutional state" in contrast to the traditional liberal constitutional state. This term was coined by H. Heller (*Rechtsstaat oder Diktatur*, 1930, pp. 9 f., 26) and, according to oral tradition, was proposed by Carlo Schmid (SPD) in the Parliamentary Council. After the acts of terror and injustice committed by the National Socialist regime, the members of the Parliamentary Council were united by the common conviction that the West German state could only be constituted as a material constitutional state. Almost without exception, however, basic social rights and norms governing the economic and social order were not included. See: K Kröger (n 418) 1321.

<sup>430</sup> A Bauer-Kirsch (n 421) 97 ff.

<sup>431</sup> K Kröger (n 418) 1321.

Another area of intense debate centred on the composition of the Bundesrat. This is commonly referred to as the “Second Chamber” of Parliament but, in fact, is not a second chamber but rather a federal institution in its own right. Compromise and agreement on the composition of this institution was reached in the Main Committee. It was agreed that the Bundesrat would comprise members of the governments of the Länder instead of directly elected members, as is the approach employed in states such as the USA. Agreement on this issue was reached by balancing the composition against the functions which would be exercised by federal institutions in legislative procedure.

Finally, the system of government did not follow the one contained in the Weimar Constitution. Instead, it provided for a parliamentary system, and for the appointment of a government by Parliament with a reduced role for the President of the country. In terms of the Basic Law, the President only has a constructive role in cases where Parliament fails twice to vote affirmatively for a proposed candidate to a governmental position. This, however, does not mean that the President may not exercise some informal influence.

### **Approval**

The passage into law of the Council’s draft text required approval by three bodies. First, it was adopted in the Parliamentary Council by 53:12 votes.

Next, the draft had to be approved by the Allied military governors. The military governors had initial objections to the draft Basic Law as they wished it to create stronger powers for the Länder. However, the three Western military governors eventually accepted the Draft<sup>432</sup>.

Finally, in order for the draft to enter into force, it had to be approved by the Parliaments of the Länder. Ten of the eleven Länder voted in favour of the draft and only the Bavarian Parliament objected. However, this objection was coupled with a declaration that Bavaria wanted to remain a State within Germany. The votes of 10 out of 11 Länder Parliaments in favour of the Basic Law fulfilled the requirement that two-thirds of the Länder Parliaments approve a draft to give it force of law. It should be noted that reliance on this requirement was heavily contested between the Länder and the Allied Military Governors. The Governors wished a referendum to be held in order to bring the Basic Law into effect. It was only in response to various negotiations with the Prime Ministers of the Länder that the Governors eventually agreed to forgo the referendum in favour of the two-thirds requirement.<sup>433</sup>

The Basic Law entered into force on 23 May 1947; general elections followed.

### **C. DEADLOCK-SOLVING MECHANISMS**

The Main Committee, the function of which was to put the Draft of the Basic Law together, played an important role in overcoming major political disagreements. Nearing the end of the deliberations, moreover, the Main Committee established a sub-committee (the Group of Five) to find a compromise concerning the last outstanding issues, such as the composition and functioning of the second legislative chamber.

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<sup>432</sup> K Kröger (n 418) 1324; E Huber, ‘Quellen zum Staatsrecht der Neuzeit: Deutsche Verfassungsdokumente der Gegenwart (1919–1951)’ vol II (Matthiesen 1951) 217; ‘Schreiben der Militärgouverneure der drei Westzonen an den Präsidenten des Parlamentarischen Rates’ (1949) 35 2B Amtsblatt der Militärregierung’ 29 <[https://www.kas.de/c/document\\_library/get\\_file?uuid=7076fb85-1b1d-6da5-4add-9fa06d100d7c&groupId=252038](https://www.kas.de/c/document_library/get_file?uuid=7076fb85-1b1d-6da5-4add-9fa06d100d7c&groupId=252038)> accessed on 7th April 2021.

<sup>433</sup> A Bauer-Kirsch (n 414) 187.

#### D. PUBLIC PARTICIPATION

The German process of constitution-making did not include relevant features regarding public participation. As such, the main feature of the Parliamentary Council was that it was politically oriented. Hence, there was no quota set for particular interest groups, such as churches, trade unions, the industry and refugees (despite refugees forming a significant group in German society with a population of over 14 million). Still these groups submitted proposals to the Parliamentary Council on important constitutional issues.

Regarding the openness of the work of the Parliamentary Council, it can be said that the committees deliberated behind closed doors, and that public information about the work of the committees was limited.

#### 3. CONCLUSION

It has been argued that the Basic Law has a legitimacy deficit, as the Parliaments of the Länder did not have the legitimacy to represent the German population at large, as a result of foreign influence in the appointment of these institutions following Germany's surrender in World War II. However, the general elections which followed the adoption of the Basic Law may be read as providing *ex post facto* legitimacy. This is because those political parties who were in favour of the Basic law received 71,2% in these elections.

A number of positive lessons may be drawn from the process through which the German Basic Law was drafted. First, although not planned, it was effective to have two different institutions working on the draft text of the Basic Law. In this context, the expert group, which compiled the *Herrenchiemsee* draft prior to the appointment of the Parliamentary Council, and the Council itself, worked together. The expert group was legal and technically orientated and was limited in size, while the Parliamentary Committee was large enough to reflect the plurality of people interested in the process.

A second positive feature of the German process of creating the Basic Law lies in the Parliamentary Council's decision to create smaller committees and subcommittees to deliberate particular issues and report on these to the plenary or parent committees. This chain of institutions from topical committees to a Main Committee to the Plenary was successful in streamlining the drafting process. It is critical to note, however, that any drafting will be successful only if there is a readiness to compromise and a general agreement amongst all participants on the overall guiding principles for a new constitutional text.

The German approach to drafting the Basic Law which first empowered an expert group to compile a draft law with options and then relied heavily on decentralised committees within the Parliamentary Council has been effectively employed in other contexts. For instance, in the context of international codification conferences, the Vienna Convention on the Law of Treaties was negotiated using this method. First, a draft of the Convention was prepared by the International Law Commission, an expert body, and thereafter, small bodies refined the draft prepared before it was eventually passed in the plenary of the conference.

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