



Constitution-Making Bodies' Rules of Procedure *(Paper for Roundtable)*

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1. INTRODUCTION

The present document is a summarised version of the Comparative Report on the Rules of Procedure of Constitution-Making Bodies (CR), which was also prepared with a view to the roundtable to be held in April 2021 between the Max Planck Foundation for International Peace and the Rule of Law, and academics of the following Chilean institutions: Universidad Católica, Universidad de Chile, and Universidad Autónoma.

The paper begins with a brief overview of the Chilean constitutional framework in relation to the rules of procedure that will govern the constitution-making process, in order to identify outstanding issues that require discussion and agreement amongst the members of the Convention. This is followed by a summary of the detailed analysis contained in the Comparative Study of the experiences of the constitution-making bodies of **Colombia (1990-1991)**, **Iceland (2011)**, **South Africa (1994-1996)**, **Spain (1977-1978)**, and **Tunisia (2011-2013)**, and their rules of procedure for the constitution-making process.¹ Some remarks are further made concerning the constitution-making process in the **Federal Republic of Germany (1948-1949)**.² This comparative law approach is intended to provide an objective background for the choices concerning the rules of procedure for Chile's Constitutional Convention. The paper ends with a number of questions that are meant to guide the discussion on procedural choices.

2. CHILE'S CONSTITUTIONAL CONVENTION

Chile's constitution-making process is governed by the Constitution of the Republic (Articles 130 to 143), as amended.³ These amendments deal in particular with the procedure of drafting a new constitution, yet they do not deal in depth with the issue of the Conventions' rules of procedure.

A. COMPOSITION

The Chilean Constitutional Convention will have 155 delegates, 17 of which will be representatives of indigenous peoples.⁴

Pursuant to the Constitution, 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. 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 composed "by people of acknowledged academic or professional competence" without specifying the functions of this body. According to Article 133 of the Constitution, the Executive

¹ For background history of each processes, see 'boxes' 1 to 5 at CR 9-15. Of all of this constitution-making processes, the only unsuccessful one was the case of Iceland in 2011.

² See Annex to the CR.

³ See CR 17-19. The translations of the Chilean Constitution included in this document are our own, and hence not official.

⁴ 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.

will lend the needed technical, administrative and financial support for the establishment and functioning of the Convention.

B. MANDATE

According to Article 137 of the Constitution, the Convention has nine months, which may be extended only once, for three months, to develop and approve the draft of a new constitution. The Constitution stipulates that the Convention shall not exercise the functions or attributions of other bodies or authorities established in the Constitution or in other laws. The Constitution provides that “[i]t 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 recognized to them by the Constitution.”⁵ Regarding the content of the new constitutional text, Article 135 of the Constitution includes a so-called ‘cláusula de límites’, which provides that “[t]he 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.”

C. RULES OF PROCEDURE

Article 133 of the Constitution 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” (*miembros en ejercicio*). Article 133 further stipulates that “[t]he Convention shall not be able to alter the quorum, or the procedures for its functioning and adoption of resolutions (‘acuerdos’).”⁶ The Constitution further provides that should the population reject the draft prepared by the Convention in the final referendum, then the current Constitution will remain in force.⁷ Once the Convention has drafted and approved the text of the new Constitution, or if the deadline to draft it lapses, the Convention will dissolve *ipso jure*.⁸

D. JUDICIAL OVERSIGHT

The Constitution does not contemplate judicial actions to review the content of the constitutional text elaborated by the Convention.⁹ In case of infractions of the procedural rules applicable to the Convention a complaint may be brought before a 5-member Chamber of the Supreme Court 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’. The Constitution

⁵ Article 135 Chilean Constitution.

⁶ In Article 133 of the Chilean Constitution, the concept of quorum refers to a specific approval majority. In this paper, ‘quorum’ is used to refer to the number of members of any given body required to be present in order for that body to initiate decision-making processes.

⁷ Article 142 Chilean Constitution.

⁸ Article 135 Chilean Constitution.

⁹ Actually, Article 136 of the Chilean Constitution excludes the possibility of filing a ‘reclamación’ against the content of the texts that are being prepared.

excludes the possibility of filing a complaint with respect to the above-mentioned 'cláusula de límites'.¹⁰

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

The Comparative Study, which this paper summarises, contains four sections that discuss: the internal structure of the constitution-making bodies (A); their process (B); consensus-building and deadlock-breaking mechanisms (C); and issues of public participation (D) in each of the countries compared. The four sections below provide a summary of their content and highlight key takeaways in regard to each section. The takeaways are aimed at encouraging discussion among the participants in the roundtable.

With the exception of **Iceland**, where the responsibility for drafting and for deliberating upon and approving a new constitution/new constitutional provisions was distributed between two bodies, the remaining countries included in the Comparative Study (**South Africa, Colombia, Tunisia, Spain** and, to a certain extent the **Federal Republic of Germany**) all featured elected constitutional bodies with the power to both draft and debate, and subsequently adopt a new constitution.

A. INTERNAL STRUCTURE OF CONSTITUTION-MAKING BODIES

Section A of the Comparative Study explores the internal organisation of constitution-making bodies.¹¹ The comparative overview reveals differences in both composition and mandate. Constitution-building bodies take a variety of forms including being comprised of elected constituents, such as in **Iceland**, politicians, as in **South Africa** and **Spain**, or a combination of members of established political parties and independent candidates, as was the case in **Tunisia**. In terms of mandate, in **Tunisia** and **South Africa**, the constitutional assemblies doubled up as legislatures, whereas in **Spain**, the elected parliament assumed a constituent role. In **Colombia**, while the constitutional assembly was exclusively tasked with constitution-making, it eventually resolved to dissolve Congress, claiming a primary constituent role for itself. There exists also the possibility that an independent expert body develops a draft constitutional text (with alternatives), which a constitutional-making body could later take into account as was the case in the **Federal Republic of Germany**.

¹⁰ Article 136 Chilean Constitution.

¹¹ CR 20-43.

RULES OF PROCEDURE

The work of constitution-making bodies is governed by procedural rules. These rules may be contained in the empowering legislation that constitutes the body. Alternatively, constitution-making bodies may create their own rules of procedure. More commonly, however, some rules, particularly in relation to decision-making, are contained in empowering legislation while other rules are left to the body to establish itself, as was the case in **Colombia**, **South Africa**, **Tunisia**, and **Spain**. The empowering legislation in **Colombia** mandated the Assembly to establish its rules of procedure within 10 days from its constitution. While **Tunisia's** Assembly spent more than 9 weeks negotiating and passing its rules of procedure, it still amended these frequently to address arising procedural challenges and adjust to changing circumstances.

In **Iceland**, the Constitutional Council managed to adopt its rules of procedure during one of its first plenary sessions, as the rules were based on the Law on the Constitutional Assembly.¹² While this law did not bind the Council following the invalidation of the Assembly elections, the Council understood it to portray the results of careful political negotiations. Similarly, the **Colombian** National Constituent Assembly (ANC), which was enjoined to adopt its rules of procedure within 10 business days of its establishment, was able to base these on a set of draft rules that were negotiated by a Committee of Delegates of the main political parties prior to the election of the Assembly.¹³ **Tunisia**, too, opted to draw from pre-existing documents – in this case the standing orders of the dissolved Chamber of Deputies. This document was amended to reflect the new multi-party environment of the Assembly and incorporated structures to appease different political groupings.¹⁴ **South Africa's** Constitutional Assembly and **Tunisia's** National Constituent Assembly (NCA) both created specialised committees from amongst their members, which were tasked with drafting the rules of procedures.¹⁵ This was due to the large number of delegates in each of these Assemblies' plenary sessions. **Tunisia** experienced significant challenges passing the rules drafted by its Rules Committee in the plenary. This was because standards for deliberation and debate were not decided upon prior to the tabling of the rules and not all parties felt adequately represented in the Rules Committee.

Takeaways

- ❖ The existence of prior texts upon which the Assembly may base their rules of procedure may reduce the amount of time needed to devise rules of procedure. Pre-existing texts may result from political negotiations preceding the establishment of the Assembly. Alternatively, the constitution-making body may use an existing text (for instance, the rules of procedure of a parliament) as starting point or reference. Where prior documents are

¹² CR at 26.

¹³ CR at 20-21.

¹⁴ CR at 39.

¹⁵ CR at 32 and 39, respectively.

used as a reference, they may require adjustments to ease achieving consensus.

- ❖ The creation of a specialised committee charged with drafting the rules of procedure for the constitution-making body may expedite this process- this was the case in respect of the **Federal Republic of Germany**. It is important to ensure that all political groups are represented to avoid conflict over the rules in the plenary. Moreover, rules governing the debates on draft rules of procedure in the plenary ought to be balanced, giving room to all political groups.
- ❖ Provision should be made to allow for the amendment of rules of procedure. This may be necessary to avoid a deadlock, as was the case in **Tunisia**. However, rules of procedure should only be changed by a qualified majority.¹⁶ Otherwise, the decision-making process could be manipulated, and its legitimacy tainted.

KEY OFFICER BEARERS

The main internal organs of the **Colombian** Assembly were: a Tripartite Presidency; the Bureau Committee; a Secretary; a Rapporteur, and an Administrative Director who were external to the Assembly; five Permanent Committees; and other committees (accidental, ethics, codification, and style committees). **Iceland's** Constitutional Council consisted of a Presidium made up of the Plenary, President, Vice President and the Chairpersons of various committees; and three Thematic Committees. The Constitutional Assembly in **South Africa** consisted of a Chairperson; a Deputy Chairperson; a Constitutional Committee; a Management Committee, over which the chair and deputy presided; six Thematic Committees; and various sub-committees, technical committees and commissions. **Spain's** *Cortes Generales* consisted of the Congress and the Senate, both of which had a Speaker, a Bureau, and Parliamentary Groups; a Congressional Constitutional Committee and its sub-committee (*Ponencia*); a Senate Constitutional Committee; and a Joint Congress-Senate Constitutional Committee. **Tunisia's** National Constituent Assembly was made up of the Plenary; a President and two Vice-presidents representing the tripartite coalition; the Bureau; the Conference of Presidents, which incorporated the heads of the Parliamentary Groups; the General Rapporteur on the Constitution; Parliamentary Groups; six Permanent Constitutional Committees; a Joint Coordination and Drafting Committee; and a Consensus Committee created ad hoc.

Legislation that governs constitution-making bodies regularly establishes that at the body's first sitting, a President and other key office bearers must be appointed. However, comparative experience reveals that the procedural rules to be followed for their election are not always provided for in advance. This was the case in **Tunisia** and **Spain**, where the interim organs of the respective constitutional body were established in accordance to age criteria, as well as **Colombia**, where alphabetical order was opted for. The final rules of procedure spell out the mandate of these office bearers and create other key offices not contained in the law which constituted the body. Frequently, as in the case of **South Africa**, **Colombia**, **Tunisia**, and the

¹⁶ In the case of Chile, however, this takeaway should be read in accordance with Article 133 para 4 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.

Federal Republic of Germany, the offices in a parliamentary assembly are distributed either to reflect the proportional strength of the political groups represented in the body, or to reflect informal political compromises and power-sharing agreements reached between participating groups.

Takeaways

- ❖ From the practices in **Colombia, South Africa, Tunisia, and the Federal Republic of Germany**, it appears that the election of members to key positions, such as president, vice-president, rapporteur, etc., may be an effective site for political deal-brokering. Persons in leadership positions such as these often have influence over the priorities and work plan of the constitutional body as a whole. As such, representation of different political groupings in these positions may give all members, even members of opposition or minority groups, a sense of ownership and control over the broader constitutional process. In **Colombia**, the tripartite presidency meant that its decisions had to be taken by consensus, which favoured the inclusive nature of the process.

COMMITTEES

The constitutional bodies of **South Africa, Colombia, Tunisia, and the Federal Republic of Germany**, as well as the Constitutional Council of **Iceland**, all established a number of thematic drafting committees from amongst their members. In **Spain**, the Congress established a single committee responsible for preparing a draft text, which in turn featured a sub-committee (*Ponencia*), tasked with producing a preliminary draft.

The constitutional bodies of **South Africa, Colombia, Tunisia and the Federal Republic of Germany** further featured committees tasked with harmonising the draft texts produced by the drafting committees. **South Africa** and **Colombia** had additional committees to handle technical aspects, such as drafting style, and to advise the drafting committees on complex legal points.

Spain's Ponencia comprised seven members of the Congress who were also legal experts and were chosen by the political groupings they belonged to. **South Africa's** Constitutional Assembly also had a seven-person panel of constitutional law experts who were nevertheless external to the Assembly. While they were given deadlock-breaking powers, they made no decisions as to the actual content of the draft constitutional text.

South Africa, Colombia, Tunisia, Iceland and the Federal Republic of Germany all relied on several thematic committees to perform the bulk of the drafting work in the framework of their constitutional processes.¹⁷ **South Africa**,¹⁸ **Colombia**¹⁹ and

¹⁷ In the case of South Africa moreover, the President of the Republic (at the request of the Assembly) appointed two commissions to assist the Assembly with its work: the **Commission on Provincial Government** and the **Volkstaat Council**. While 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.; 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.

¹⁸ CR 33-36.

¹⁹ CR at 22.

Tunisia²⁰ each charged one committee with synthesising and harmonising draft provisions which were created by the thematic committees. This system is no guarantee for success. Disagreement arose in **Tunisia** with respect to the mandate of the Joint Coordination and Drafting Committee –the committee charged with harmonising the text. It was not clear whether this committee had the power to amend the provisions drafted by the thematic committees.²¹ This lack of clarity nearly derailed the entire constitution-making process in the country.

In **Tunisia**, the majority parties in the Assembly similarly dominated membership of the thematic committees, and the Joint Coordination and Drafting Committee.²² In **South Africa**, members of the Constitutional Committee, the committee charged with organising the thematic committees and harmonising the draft text, were elected in proportion to the number of seats their political party had in the Assembly.²³ Representatives of various thematic committees were similarly proportionately selected.²⁴ However, the **South African** rules of procedure did not establish the composition of sub-committees created by larger committees, although some of them played a critical role in negotiations.²⁵ When **Tunisia** created its Consensus Committee to overcome the conflict generated by the work of the Joint Coordination and Drafting Committee, it ensured that it was not dominated by the majority political parties in the Assembly but instead equitably represented all political parties and groupings.

There are examples for the involvement of external persons in the drafting process. In **South Africa**, each thematic committee was assisted by a 4-5-person technical committee made up of legal and drafting professionals who were external to the Assembly.²⁶ Further, the Technical Refinement Committee was composed of legal experts and charged with ensuring that the text of the draft constitution was accessible to the public.²⁷ However, these committees played no role in the political decision-making. In **Colombia**, the Rapporteur (*Relator*) of the Assembly was an external figure whose functions included providing information and undertaking research work requested by members. Additionally, each assembly member had a support team of three persons that included an adviser. Committees were further allowed to invite experts to their meetings.²⁸ In **Tunisia**, at least two advisers were assigned to the thematic committees, and the General Rapporteur on the Constitution, who sat on the Joint Coordination and Drafting Committee, had their own team of advisers which further assisted the committees upon their request. Committees could also invite experts to their meetings. While direct expert involvement in the drafting process was initially not foreseen, as the drafting process became increasingly controversial, the rules of procedure were amended to

²⁰ CR at 42-43.

²¹ CR 65-70.

²² CR at 43.

²³ CR at 32.

²⁴ CR at 33.

²⁵ CR at 33.

²⁶ CR at 34.

²⁷ CR at 35.

²⁸ CR at 22-23.

allow for a group of experts to assist. They were selected on the basis of proposals made by the Chairpersons of the committees. Some countries, such as **Iceland**, opted not to include external experts in the drafting process at all, out of fear that it would compromise the representative nature of the drafting work performed.²⁹ Some commentators have argued that because of this, the draft produced lacked legal coherence and necessary specificity. The **Spanish** approach sought to reconcile representation with expertise. The seven-member *Ponencia*, composed of members of the Congress who were mostly jurists, constituted the technical body of the Constitutional Committee responsible for preparing the draft constitution.³⁰

Takeaways

- ❖ Committees composed of members of the wider constitution-making body are indispensable for negotiation due to their limited size. Moreover, the discussions held in committees are in practice less formal and therefore, provide greater room for compromise. However, it is critical that the membership in such committees be balanced, and that these have a clearly defined mandate.
- ❖ In respect of the composition of committees and sub-committees, it is essential that it be politically balanced.
- ❖ Representativeness on committees does not necessarily require proportionality. In circumstances where committees are tasked to break deadlock or to promote consensus, it may be better – so practice shows – to simply mandate that every grouping in the broader constitution-making body be represented. **Tunisia’s** successful experience with the Consensus Committee highlights the relevance of equitable representation where consensus-building is sought.
- ❖ The creation of specialised committees to perform functions such as evaluating the style used in the draft text, or capturing decisions taken on provisions during debates in plenary, may be of great assistance in finalising a constitutional draft. They also ensure that any draft text fits into the broader legal framework and is accessible to members of the public. **Colombia**, in particular, relied heavily on such committees composed of members of the Assembly.
- ❖ Committees, especially technical committees, may be composed of people who are not members of the Assembly. **South Africa’s** technical committees, which supported each thematic committee, and its Technical Refinement Committee, are examples of where this was done effectively. However, it is important to balance the need for technical expertise with the representative nature required for constitution-drafting and not to cede public power to unelected experts.

²⁹ CR at 28.

³⁰ CR at 37.

B. PROCESS

Section B of the Comparative Study offers an overview of key aspects pertaining to the overall constitution-making process, including the timeframe within which it was conducted, the drafting process, the stages involved, and the quorum and decision-making rules that applied to the different bodies with constitution-making responsibilities, including plenaries and committees.³¹

TIMEFRAME

Establishing a reasonable timeframe for the process requires a careful balancing act between the need to ensure participation and allow for consensus-building on the one hand, and the need to seize the political momentum and keep the process on track on the other. Just as crucial as the question of deciding on the length of the process is determining the timeframe's degree of flexibility and procedures for dealing with delays. While the **Colombian** ANC and the **South African** Constitutional Assembly functioned with a pre-established deadline, the **Tunisian** NCA, the **Spanish** *Cortes Constituyentes*, and the **Icelandic** *Althingi* initiated the process in the absence of one. In **Iceland**, the Constitutional Council, entrusted with preparing a Bill for a Constitutional Act, was given a three-month deadline by the Parliament, whereas in **Spain**, the sub-committee (*Ponencia*) responsible for producing the preliminary draft constitution was given none. In **South Africa**, a detailed procedure was further foreseen in case the Constitutional Assembly failed to meet the deadline. While the **Colombian** ANC and the **South African** Constitutional Assembly successfully met their respective deadlines, the **Icelandic** Constitutional Council required a short extension to its original deadline. In both **Colombia** and **Tunisia**, debate rules were streamlined to speed up the process.

Both the **Colombian** and **South African** constitution-making processes were bound by a timeframe that was determined beforehand, by a body different from the constitution-making body itself. In **Colombia**, the Political Agreements reached by the main political parties determined a timeframe of 150 days. In **South Africa**, the two-year timeframe for the Constitutional Assembly was established in the 1993 Interim Constitution. Unlike **Colombia's** Political Agreements however, **South Africa's** Interim Constitution further foresaw a detailed procedure to be followed if the Constitutional Assembly failed to meet the deadline, which excluded any extension and foresaw the dissolution of the Assembly.³² In **Colombia**, debate rules were streamlined following accumulated delays at the drafting phase, and the periods of time initially foreseen for harmonizing the text and making stylistic corrections were both drastically reduced.³³

In **Tunisia**, where the NCA doubled up as Parliament, neither was a deadline imposed by the provisional constitutional arrangements that preceded the election of the NCA, nor did the NCA establish one following its election and the adoption of new provisional constitutional arrangements. As the process dragged on, the NCA eventually amended its Rules of Procedure, effectively streamlining the debate procedures. In **Spain**, the elected Parliament doubled up as a constituent assembly.

³¹ CR 43-71.

³² CR at 73.

³³ CR at 44-45.

While no overall deadline was established for the constitution-making process, nor a specific deadline imposed upon the *Ponencia* to present its preliminary draft constitution, the remaining stages in the process were conducted in accordance with the usual deadlines stipulated under ordinary legislative procedure. In **Iceland**, once the draft Bill for a Constitutional Act was passed by the Constitutional Council, its processing would have likewise followed ordinary parliamentary procedures for the consideration of legislation.³⁴

Takeaways

- ❖ Whereas the prospect of dissolution likely served as an incentive for the **South African** Constitutional Assembly to seek to achieve agreement in view of accomplishing its task on time, in **Colombia**, it was the prospect of remaining ‘stuck’ with the 1886 Constitution that likely helped the ANC meet the deadline.
- ❖ In **Tunisia**, **Spain** and **Iceland**, the timeframe for the process was largely informed by the parliamentary term itself. In both **Tunisia** and **Spain**, the constitution was successfully approved before the legislature came to an end, while in **Iceland**, the legislature failed to do so and was ultimately replaced by a new *Althingi* that was not committed to constitutional reform.
- ❖ In **Tunisia**, while it could be argued that the one-year term that many political forces had committed to prior to the election of the ANC would have revealed itself to be insufficient –likely forcing some extension– the choice to operate without a deadline was received with scepticism by the public, initially undermining the legitimacy of the ANC. At the same time, in emphasizing its commitment to complete its task without undue delay, the ANC may have helped raise awareness about the need for sufficient time. It would seem that in this instance, quality and consensus-building were prioritised over speediness, despite the urgency of the revolutionary moment.

³⁴ CR at 49.

THE RIGHT OF CONSTITUTIONAL INITIATIVE

The assemblies of **South Africa**, **Colombia**, and **Tunisia** all incorporated mechanisms for the submission of proposals for content of the constitution both from within and from outside of the assembly. In **Spain**, proposals could only be submitted from within the *Cortes*. In **Iceland**, proposals for the amendment of the “progress document”, which was a working constitutional draft, could be submitted both from within the Constitutional Council and its thematic committees and by the public on an on-going basis over the course of the drafting process.

In **South Africa**, the right of constitutional initiative could be exercised by interested persons and organisations, as well as the members of the Constitutional Assembly on behalf of their political parties.³⁵ In **Colombia**, in addition to the members of the ANC itself, a number of entities could submit constitutional proposals, including the three branches of power (the National Government, the National Congress, members of Congress, the Supreme Court of Justice, the Council of State), a range of social organisations, and guerrilla groups linked to the peace process.³⁶ Proposals had to be submitted in writing to the Secretary of the ANC. The Bureau Committee was responsible for reviewing and distributing them to the relevant Permanent Committees for their analysis and evaluation. In **Tunisia**, external suggestions on the content of the constitution could be submitted to the NCA and were referred by the General Rapporteur on the Constitution to the relevant Constitutional Committee/s. All NCA members could propose amendments to any draft text. Amendments had to be precise and submitted in writing. In **Spain**, the initiative for constitutional reform was exercised by the Congress. The *Ponencia* received proposals from the different Parliamentary Groups, which were presented by chapter. Amendments could be tabled both by Parliamentary Groups and individual members. In **Iceland**, the rules of procedure for the Constitutional Council stipulated that the members of the public could formulate proposals with respect to a “progress document” once it was drafted, which were then considered by the Council for inclusion in the text.³⁷

Takeaways

- ❖ Comparative experience suggests that the possibility for external parties to exercise constitutional initiative has become increasingly frequent, reinforcing the participatory nature of constitution-making.

³⁵ CR at 49-50.

³⁶ CR at 44.

³⁷ CR at 76-77.

DRAFTING, DEBATING AND APPROVING THE CONSTITUTION

In **South Africa, Colombia, Tunisia, Iceland**, and the **Federal Republic of Germany**, the drafting process featured a decentralised model whereby a number of committees established by the constitutional body were tasked with producing drafts in relation to the specific themes they were assigned. In **Spain**, the drafting process was centralised, featuring a sub-committee (*Ponencia*) of the Constitutional Committee tasked with producing a preliminary constitutional draft that was subsequently consolidated at the committee level.

In **South Africa, Colombia and Tunisia**, specific committees were tasked with harmonising the draft texts produced by the drafting committees. While these committees successfully fulfilled their tasks in both **South Africa and Colombia, Tunisia** had to further establish an ad hoc committee to negotiate differences in relation to the work of the drafting committees and the harmonising committee.

In **South Africa, Colombia, Tunisia**, and the **Federal Republic of Germany**, the debate in the plenary involved several readings, with the possibility of tabling amendments to the draft constitution. This was likewise the case at the level of the Constitutional Council in **Iceland**.

In **South Africa, Colombia and Tunisia**, the constitutional text was first approved on an article-by-article basis, followed by a vote on the entire text.

In **South Africa**, the drafting process involved the following organs: an independent panel of constitutional law experts tasked with developing guidelines for the drafting committees as to which rights and institutions ought to be included in the new text; six Theme Committees charged with receiving, organising and evaluating the proposals relating to their thematic focus in light of these guidelines; a Technical Committee attached to each Theme Committee, tasked with assisting its members to negotiate and reach agreements on content and with drafting a report which included a set of formulations of draft constitutional provisions reflecting the agreements reached; a Constitutional Committee, which received the reports, debated them and consolidated their content into a first draft of the constitutional text; and a Technical Refinement Committee tasked with ensuring that the draft constitutional text was technically and grammatically refined. This first draft produced 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.³⁸ The **South African** constitution-making process featured four stages and three readings of the draft constitution.³⁹ The first stage was comprised the drafting process in the committees. During the second phase the draft constitution was submitted to two readings. During the third stage of the process, the Constitutional Assembly debated the details of the draft constitution and each provision of the text was considered and voted upon. Once each of the provisions of the draft and all amendments were dealt with, the draft constitution underwent a third reading. During the fourth and final stage in the process,

³⁸ CR at 50-53.

³⁹ See Figure No 15, CR at 53.

members of the Assembly voted on whether to pass the draft constitution as a whole.⁴⁰

In **Tunisia**, the drafting process involved six Constitutional Committees tasked with producing draft constitutional articles, and a Joint Coordination and Drafting Committee initially tasked with preparing the final draft constitution in accordance with the decisions of the assembly. In the absence of clear guidelines, each committee developed its own approach to drafting.⁴¹ Given the lack of clarity regarding the nature and extent of the mandate of the Drafting Committee in relation to the drafting process, the NCA eventually amended its Rules of Procedure, mandating the Drafting Committee with preparing the final wording of the draft constitution based on the work of the Constitutional Committees and in consultation with the relevant experts.⁴² The **Tunisian** constitution-making process featured a protracted drafting phase; a plenary debate phase; and an approval phase, which featured article-by-article voting followed by a vote on the entire text.⁴³ The drafting phase involved the development of draft chapters by the six Constitutional Committees, followed by three draft Constitutions that the Joint Coordination and Drafting Committee put together with input from the public, experts, plenary debates, and the Constitutional Committees themselves. The third and last draft produced by the Drafting Committee failed to garner consensus, triggering the ad hoc establishment of a Consensus Committee, which was tasked with identifying and reaching agreement on contentious issues. It was the draft produced by the Consensus Committee that was submitted to debate and approval in the plenary.

In **Colombia**, the drafting process involved five Thematic Permanent Committees tasked with preparing draft constitutional articles. The debate within the **Colombian** ANC was conducted in the following phases: a Preliminary Phase, which consisted in a general discussion among all members; a First Phase, which covered the work within the committees that in turned systematised the proposals presented during the preliminary phase; a Second Phase, which included the debate in the plenary and was organised in a First and Second Debate; and, finally, a Revision Phase, during which a Style Committee would revise the constitutional text.⁴⁴ 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 the Second Debate. In practice, due to time restraints, there was no real discussion during the Second Debate, but mainly a second voting.⁴⁵

In **Spain**, the Congress of Deputies tasked a seven-member sub-committee (*Ponencia*) of the Congressional Committee on Constitutional Affairs and Public Liberties with producing a preliminary constitutional draft. Following agreement on a general outline, the *Ponencia* started the drafting process on a chapter-by-chapter

⁴⁰ CR at 53-55.

⁴¹ CR at 65.

⁴² CR at 66-69.

⁴³ See Figure No 19, CR at 66.

⁴⁴ See Figure No 10, CR at 44.

⁴⁵ CR 43-45.

basis. None of the Parliamentary Groups represented in the *Ponencia* shared full constitutional drafts at the outset, nor did all the groups systematically submit proposals for each of the chapters that would ultimately conform the preliminary draft.⁴⁶ The **Spanish** constitution-making process featured the following phases: the First Phase involved the development of a preliminary constitutional draft by the *Ponencia*, a sub-committee of Congressional Committee on Constitutional Affairs and Public Liberties; the Second Phase took place within the Congressional Committee on Constitutional Affairs and Public Liberties, which produced a consolidated constitutional draft; the Third Phase consisted in the approval by Congress of the constitutional draft; the Fourth Phase involved the debate and approval of the constitutional draft approved by the Congress by the Senate's Constitutional Committee; the Fifth Phase consisted in the approval by the Senate of a constitutional draft based on the amendments introduced at the Constitutional Committee Level; the Sixth Phase involved the harmonisation of the constitutional drafts approved by the Congress and the Senate respectively by a Joint Congress-Senate Constitutional Committee; the Seventh Phase involved the approval by both houses of the harmonised constitutional draft; and, finally, the Eighth Phase consisted in the approval of the constitution by referendum.⁴⁷

In **Iceland**, the Parliament tasked the Constitutional Council with putting together a Bill for a Constitutional Act. However, there was lack of clarity at the outset amongst Council members as to whether their mandate was to review the existing Constitution or draft an entirely new text.⁴⁸ It was eventually decided that the Council 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.

The Constitutional Council tasked three thematic committees with drafting the new 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. The committees 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.⁴⁹

In practice, the committees spent two days a week working separately on the various topics allocated to them. 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. 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". The public could make comments and recommendations on this document, which were then considered by

⁴⁶ CR 56-58.

⁴⁷ See Figure No 16, CR at 56.

⁴⁸ CR at 26.

⁴⁹ CR at 46. See Figure No 11, CR at 46.

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.

The **Icelandic** process featured a drafting phase in which the “progress document” was finalised; the compilation of a draft Bill for a Constitutional Act upon the completion of the “progress document” by the Presidium of the Council; and two readings of the Bill. At the second reading, the individual articles of the Bill were debated together with amendments proposed following the first reading, and each article was voted on, along with any amendment to it. Finally, a vote was held on the Bill in its entirety. 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.⁵⁰

Takeaways

- ❖ Comparative experience suggests that assemblies with constitution-making responsibilities generally resort to thematically established committees to undertake the drafting process.
- ❖ Both the **South African** and the **Tunisian** experiences highlight the central role played by committees tasked with putting constitutional draft texts together based on the work of the thematic committees.

QUORUM REQUIREMENTS

In **South Africa**, **Colombia**, and **Tunisia**, different assembly organs had different quorum requirements. Quorum requirements were generally lower for plenary meetings than for committee meetings. Quorum requirements further differed according to whether decisions were to be made by a given organ or not. In **Spain**, while quorum requirements were generally uniform across organs, where the quorum was not met, different procedures applied to different organs. In both **Spain** and **Tunisia**, alternative mechanisms were foreseen in case the quorum requirement was not met.

i. Quorum Requirements for Plenary Meetings

In **South Africa**, plenary meetings could be held when roughly one third of the members of the Constitutional Assembly were present. The quorum for decision-making was similarly one third of delegates of the Assembly. In **Colombia**, plenary sessions could be held if one third of the total number of ANC delegates were present, but the quorum to adopt decisions in the plenary was of half plus one delegates. In **Iceland**, the quorum to adopt decisions in the plenary was likewise of half plus one delegates. In **Tunisia**, a meeting of the plenary could be held if half plus one NCA members were present. However, provision was made to suspend the meeting for one hour if that majority was not attained at the agreed time of the meeting, following which it could resume provided that the number of attendees was no less than one third of the members of the assembly. Where the plenary had to vote on the draft Constitution article-by-article, or on the entire draft Constitution,

⁵⁰ CR at 49. Nearly a year after the Bill was submitted, the Althingi held a non-binding referendum asking the public whether they wanted the Council’s draft to form the basis of a new Constitutional Act. While 67% voted in favour of the Bill created by the Council, it was not passed by the Parliament.

the majorities required for their approval (half plus one and two-thirds respectively) required a higher quorum.

In **Spain**, the quorum for decision-making at the Plenaries of both the Congress of Deputies and the Senate was of half plus one the total number of members. In the Congress, if a Deputy requested that the quorum be verified and it was found that there was no quorum, voting was suspended for one hour. If after the lapse of this time there still was no quorum, voting could proceed provided that at least one third of the members were present. In both the Congress and the Senate, the verification of the quorum could only be requested before voting began, and once it had begun, the validity of the agreement could not be challenged.

ii. Quorum Requirements for Committee Meetings

In **South Africa**, while the Constitutional Committee and the six select Theme Committees could hold meetings without a quorum, the quorum required to take decisions was of half their members, excluding the presiding member. In **Tunisia**, the quorum for Constitutional Committee meetings was of half plus one committee members. After the expiry of one hour, the meeting could proceed as if the requisite quorum had been reached.

In **Spain**, the quorum for decision-making at the Constitutional Committee, as for other committees, was likewise of half plus one committee members. Additionally, for committee meetings, Parliamentary Groups in the Congress and the Senate could replace one or more of their members on a committee by any other member or members of the same group, which made it likelier for the quorum to be met. In Iceland, a quorum in the Constitutional Council and thematic committees was only achieved if half plus one voting delegates were present.

Takeaways

- ❖ Comparative experience underlines the importance of establishing quorum requirements for each of the bodies with constitution-making responsibilities.
- ❖ Furthermore, establishing different quorum requirements depending on whether a decision is to be made or not, particularly at the committee level, helps strike a balance between the expediency of holding smaller meetings which can be more conducive to negotiation and the need to ensure that the legal text decided upon is sufficiently representative of the views of the body in question, rather than those of a minority of its members.

MAJORITIES REQUIRED FOR DECISION-MAKING

In **South Africa**, **Tunisia**, and **Spain**, different majority requirements for decision-making were established in relation to the approval of constitutional texts in the plenary and at the committee level. In **Tunisia**, different majority requirements were further established in relation to voting on an article-by-article basis and voting on the entire constitutional draft text. In **Iceland**, decision-making at the Constitutional Council level was based on consensus. At the plenary level, **Spain** and **Colombia** required an absolute majority for the approval of the Constitution while **South Africa** and **Tunisia** required a two-thirds majority, which, in the **South African** instance, was qualified with a two-third majority requirement in the Senate in relation to certain matters. In **Tunisia**, if the two-thirds majority was not reached, a second reading of the draft Constitution had to take place within one month of the first reading, following which it still had to be adopted by a two-thirds majority. In **Spain**, a referendum following the passage of the Constitution by the *Cortes* was required for its ratification.

i. Majorities Required for Decision-making at the Plenary Level

In **South Africa**, different majorities were required for the approval by the plenary of decisions and for voting on the final passage of a draft constitutional text respectively. For the adoption of decisions, a simple majority was required. 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 constitutional text in the plenary. In turn, the passing of the new constitutional text required a majority of at least two thirds of all the members of the Constitutional Assembly. 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.

In **Colombia**, different majorities were required for the approval by the plenary of decisions and of constitutional provisions respectively. For the adoption of decisions, a simple majority was required. provided that more than half the ANC delegates were present. For the approval of the provisions of the new constitutional text, different majorities were required for their approval during the First and the Second Debate of the plenary. Whereas in the First Debate approval required the favourable vote of the majority of members in office (absolute majority), in the Second Debate, the required majority 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 the favourable vote of two thirds of the ANC delegates.

In **Tunisia**, required majorities differed in turn according to whether the draft articles of the constitution were being voted upon, in which case the requirement was of an absolute majority of assembly members. or whether it was the entire draft Constitution, in which case the required vote was of a two-third majority of all the assembly members.

In **Spain**, the final approval of the entire constitutional text required the favourable vote of the absolute majority of the members of Congress and the Senate.

ii. Majorities Required for Decision-making at the Committee Level

In **South Africa**, **Tunisia**, and **Spain**, decisions at the committee level were taken on the basis of a simple majority. In **South Africa** and **Tunisia**, in the event of an equality of votes, the presiding member had the casting vote. In **Colombia**, the Thematic Permanent Committees had to approve the draft constitutional articles on the basis of an absolute majority of their members. In **Spain**, at the subcommittee level of the *Ponencia*, when it came to approving the preliminary constitutional draft, no voting took place on an article-by-article basis. Rather, consensus was sought and, when not reached, individual votes were put forward and conveyed to the Congressional Constitutional Committee as such. In **Iceland**, the Constitutional Council opted for resorting to decision-making by voting only if consensus could not be reached on an item of business. However, its Rules of Procedure did not even specify what level of majority was required if a vote was forced on an issue, including the passage of the final constitutional text. The Constitutional Council reached consensus on the Bill, and unanimously adopted it without a vote.

Takeaways

- ❖ Comparative experience underlines the importance of establishing majority requirements for each of the bodies with constitution-making responsibilities and not just for the approval of the final text of the constitution by the constitutional body. It further suggests that lower majorities are generally required at the committee level. Differentiating between the majority required for the approval of individual constitutional provisions and the majority required for the approval of the entire text may enable different parties to express their support or rejection of specific articles while encouraging them to approve the entire text if enough articles they support are approved.
- ❖ Employing the mechanism of consensus (nobody objects to the adoption without taking a formal vote) is traditionally considered to encourage the reaching of compromises.

JUDICIAL OVERSIGHT

Uniquely, the **South African** process required that the constitution approved by the Constitutional Assembly be certified by the Constitutional Court. In **Colombia**, the Supreme Court of Justice determined that it lacked jurisdiction to exercise oversight of the Assembly. In **Tunisia**, the administrative tribunal considered it lacked jurisdiction over acts of assembly organs.

In **South Africa**, the Interim Constitution envisaged that the Constitutional Court of South Africa would play a significant role in the constitutional design process.⁵¹ 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 thirty-four Constitutional Principles in Schedule 4 to the Interim Constitution. Second, this was also as a result of the power given to the Assembly to refer part of a proposed text,

⁵¹ CR at 54-55.

prior to passage, to the Constitutional Court for advice as to its potential compliance with the Constitutional Principles. In **Colombia**, while the decree convening the Constitutional Assembly initially required that the text approved by the Assembly be sent to the Supreme Court of Justice for it to determine whether the reform was issued in accordance with the outline of topics they established, the court invalidated the requirement, arguing that the Assembly represented the exercise of primary constituent power, which cannot be limited. All references to the outline of topics were struck down, as was the provision that gave the court -a constituted power- the power to review the acts of the Constitutional Assembly.⁵² The assembly subsequently established that the norms it approved were of a constitutional nature and were therefore not subject to any form of judicial review. In **Tunisia**, 70 assembly members filed a lawsuit regarding the Joint Coordination and Drafting Committee's actions at the Administrative Tribunal, which considered it lacked jurisdiction over the constituent process.

Takeaways

- ❖ **South Africa** remains a rare instance of constitution-making where the draft Constitution produced by the Assembly was subject to judicial review on the basis of previously established constitutional principles. It can be argued that prior commitment to those principles, which offered guarantees to all sides, served as a trust-building measure that favoured consensus-building during the process.

C. CONSENSUS-BUILDING AND DEADLOCK-BREAKING MECHANISMS

Section C of the Comparative Report considers both the formal and informal mechanisms that were devised at different stages of the constitution-making process to encourage consensus-building or break deadlock.⁵³

In **South Africa**, the Interim Constitution foresaw two formal deadlock-breaking mechanisms in relation to the approval of the constitution.⁵⁴ The first would have been triggered if a majority of members of the Assembly voted in favour of the constitutional text but this number did not reach the requisite two-third threshold for passage. In this case, the draft had to be referred to the independent panel of constitutional law experts, which had to advise the Assembly as to amendments to the proposed draft which could secure the support required to pass the text. 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. The text presented to the electorate would be approved as the final constitutional text if 60% of the votes cast in the referendum were in favour of it. Where the text was not approved, the Constitutional Assembly would be

⁵² CR at 9, 75.

⁵³ CR 71-74.

⁵⁴ CR at 72-73.

dissolved, new Parliamentary elections held, and the constitutional design process started afresh.

In **Tunisia**, if the two-thirds majority required for the approval of the draft constitution was not reached following a second reading, the procedure foresaw a deadlock-breaking mechanism consisting in submitting the draft constitution to a referendum. In such case, it had to be approved by the absolute majority of voters. However, the Constitutional Act did not foresee what would happen if the draft Constitution was rejected in the referendum. In addition, when the drafting process stalled, a Consensus Committee was created as an ad hoc deadlock-breaking mechanism.⁵⁵ A vital aspect that enabled it to successfully break the deadlock was the fact that its composition did not mirror that of the Drafting Committee, which was dominated by the majority parties, but was rather much more representative of the political diversity within the assembly.

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.⁵⁶

In **Iceland**, the rules of procedure for the Constitutional Council required that decision be taken by consensus and stated that if consensus could not be reached on an item of business, the issue decided by a vote. However, the rules themselves did not specify what kind of majority was required if a vote was forced on an issue and contained no deadlock-breaking mechanisms. 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 reached consensus on the Bill and it was finally accepted through a unanimous vote of all 25 Council members.⁵⁷

In **Spain**, although no deadlock breaking mechanisms were foreseen in the process, extra-parliamentary negotiations played an important role in resolving deadlocks. 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.⁵⁸

Takeaways

- ❖ In **South Africa**, none of the parties represented in the Constitutional Assembly wanted 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

⁵⁵ CR at 73-74.

⁵⁶ CR at 71.

⁵⁷ CR at 72.

⁵⁸ CR at 73.

Africa's uneasy stability. The South African experience suggests that both the prospect of a referendum and of dissolution favoured consensus-building.

- ❖ The **South African** and **Tunisian** processes further suggest that the establishment of a special committee responsible for dealing with the controversial issues seems essential to the overall success of the drafting process. Crucially, as Tunisia's experience with the Joint Coordination and Drafting Committee suggests, the composition of such a special committee should not mirror the composition of the legislature. Rather, factions should be represented equitably to enable consensus-building. This guarantees that a large, elected body responsible for drafting the constitution does not function in accordance with ordinary parliamentary dynamics where the majority logic predominates, but rather with the extraordinary dynamics of a constitution-making process, where the need for consensus prevails.
- ❖ While consensus-building is important, it can lead to overly vague formulations of constitutional provisions. This was apparently the case in Iceland.
- ❖ The extensiveness of the **Colombian** Constitution (380 articles) has been in part attributed to the need to incorporate, through consensus, the proposals of all the different groups whose participation was enabled by the decentralized model that was adopted.
- ❖ While formal deadlock-breaking mechanisms remained scarce across the comparative examples, extra-parliamentary negotiations played an important role in building consensus or breaking deadlock in a number of processes including **Spain's**, **Colombia's** and **Tunisia's**.

D. PUBLIC PARTICIPATION

Section D of the Comparative Study considers the different forms of public participation and the transparency rules that were adopted in the constitution-making processes of each of the five countries.⁵⁹ The comparative overview features instances of public participation preceding the formal establishment of the constitution-making body, public participation during the drafting process, be it ahead of the development of draft texts to inform their content, or following their development to adjust it in view of the comments to them, as well as referenda for the ratification of the draft Constitution by the people.

⁵⁹ CR 74-80.

The constitution-making bodies of **Colombia, Iceland, South Africa** and **Tunisia** each incorporated rules to ensure that the work of the body was transparent and accessible to the public.

Colombia and **Iceland** both conducted formal public participation activities prior to the election of their constitution-making bodies. During these activities, views of the public and civil society organisations were gathered and used to inform the agenda of the constitution-making bodies once they were constituted. Moreover, each of these four countries received constitutional initiatives and comments from members of the public during the drafting process. **South Africa, Tunisia** and **Iceland** published draft constitutional texts for public comment. **South Africa** and **Colombia** organised public hearings on controversial topics and **Tunisia** convened a 2-month National Consultation on its second draft text. **Iceland** conducted an extensive social media public outreach programme and held a referendum on the final text adopted by the Constitutional Council despite this not being required by law. **Spain** is an exception in this regard and only formally included the public in the constitution-building process by asking them to vote in elections to the *Cortes*, and in the plebiscite held on the final draft text.

The constitution-making bodies in the states studied appear to have adapted their approaches to public participation to their individual contexts. **South Africa** and **Colombia**, for instance, both of which relied on thematic committees to draft new constitutional provisions, empowered these committees to hold hearings to receive evidence relating to certain subject matters. **Iceland**, which has high levels of internet literacy, established in the Council's rules of procedure that information would be transmitted to the public on the Council's website. **Tunisia** developed a plan for a national consultation process which engaged with over 6000 people in under two months, including the Tunisian expatriate communities in Italy and France.

TRANSPARENCY RULES

The rules of procedure for the constitution-making bodies in **Colombia, Iceland, South Africa** and **Tunisia** each contained transparency requirements for their respective body and its committees. These requirements ensured that plenary sessions were open to the public and the media and, in the cases of **Colombia** and **Iceland**, allowed for the broadcast of some or all of the plenary sessions. Some of the constitution-making bodies studied went beyond what was required in terms of transparency in their rules of procedure. **Iceland's** Constitutional Council, for instance, disseminated recordings of sessions, minutes of meetings and interviews with members of the Council on its website and social media pages.⁶⁰ **South Africa's** Constitutional Assembly conducted an extensive media campaign to spread information about the Assembly's work. This campaign included weekly newsletters, radio shows and television appearances.⁶¹

Takeaways

- ❖ Based on the comparative study, it appears that it is common for contemporary constitution-making bodies to include formal transparency requirements in their rules of procedure. These requirements may include details such what logistical arrangements must be made to accommodate

⁶⁰ CR at 76-77.

⁶¹ CR at 77-78.

members of the public in the Assembly chamber, or who may decide that a meeting ought to be held privately and on what grounds.

- ❖ Such transparency rules are critical as they allow interested individuals to personally monitor the work of a constitution-making body and empower the media to accurately report on proceedings. This enhances the ability of the public to hold elected representatives accountable and increases the public's sense of inclusion in the overall constitutional process.

INITIATIVES AND COMMENTS BY THE PUBLIC

As mentioned under Section B above, the constitution-making bodies of **Colombia**, **Iceland**, **South Africa** and **Tunisia** all allowed member of the public to submit constitutional initiatives.

The constitution-making bodies in **South Africa**, **Tunisia** and **Iceland** each published draft constitutional texts for public comment. The comments received and public response have the potential to influence the content of the final draft text. The publication of the draft texts in **Tunisia**, for instance, led to mobilisation against certain provisions deemed to be discriminatory against women, which were eventually removed from the text in response. **South Africa's** Constitutional Assembly released reports following extensive public consultation processes.⁶² The report detailed the proposals and comments received by the body, the process applied to their consideration, and whether and how they had been incorporated into the draft text of the constitution.

Takeaways

- ❖ It is important that the rules of procedure stipulate how and to what extent representations made by the public must be considered during the drafting process. **Iceland's** Constitutional Council received thousands of submissions from the public but its lack of a clear procedure to analyse and include these in the draft text has been highlighted by many commentators who argue that the proposals were not coherently incorporated. In **Tunisia**, the rules of procedure of the Assembly initially did not speak to this topic either. As such, they were amended to give the thematic constitutional committees the authority and responsibility to study the comments and suggestions made by the public.
- ❖ While rarely contained in rules of procedure, the process of reporting on public initiatives and comments received may encourage the public to buy into the work of a constitution-making body. This is because the process of public reporting ensures that members of the public feel that their views have been taken into account and indicates why certain ideas were excluded. To streamline this process, it need not individually address each specific comment or proposal received. Instead, comments and proposals may be grouped into general themes and reported upon.

⁶² CR at 78.

ADDITIONAL INNOVATIVE APPROACHES TO PUBLIC PARTICIPATION

Many of the public participation processes that were conducted by the constitution-making bodies in **Colombia**, **Iceland**, **South Africa** and **Tunisia** were not explicitly or implicitly mandated in their rules of procedure. Despite this, a number of innovative approaches were employed. In **South Africa**, for instance, public hearings were held by the thematic committees on controversial topics such as affirmative action. The constitution-making bodies in **Iceland** and **Tunisia** relied on their websites to both disseminate and receive information.

Iceland, in particular, also used social media websites such as Facebook and YouTube to convene public debates and share information.⁶³ Because these platforms reach millions of users, they replaced the need for the Council to rely on in-person representations as South Africa and Colombia did. **Tunisia** established a platform on their website through which individuals could comment on draft constitutional provisions. However, due to a failure to advertise this platform properly, few people actually used it.

Takeaways

- ❖ It is noteworthy that the majority of public participation initiatives conducted by the constitution-making bodies studied were not specifically mandated in their rules of procedure. While numerous innovative public participation programmes were pursued despite this, it is preferable for rules of procedure to make full provision for this.
- ❖ Public hearings may be useful both during the drafting and the negotiating portions of the constitution-building project. Public hearings are, by their nature, open to the public and may be used to gather a variety of opinions on the same topic. Moreover, they encourage the public to discuss controversial topics which may be reflected in the constitutional text before this text is passed into law. This facilitates feelings of inclusion in the decision-making process and allows for citizen advocacy which may be critical in fostering acceptance of controversial provisions, once they are law.
- ❖ Relying on online methods of engagement with the public creates the opportunity to reach members of the population who may otherwise be excluded due to their location or lack of access to mainstream media. However, reliance on online solutions is only possible where there is high internet connectivity and cannot be the only means of engaging with the public or it runs the risk of excluding those population groups who do not or cannot access the internet.

REFERENDA

A final, but critical, observation relating to public participation is that some states rely on a public referendum to approve the final text drafted by the constitution-making body. This too, is a form of public participation, in that it is the people who finally enact the new constitutional text. For instance, **Spain** held a referendum in 1978 following the approval of a draft text by both houses of its constitution-making

⁶³ CR at 77.

body.⁶⁴ In **Iceland**, a non-binding referendum was held on the draft text despite the fact that the legal framework did not require one.⁶⁵

Takeaways

- ❖ As with other forms of public participation, it is important that the public have access to information about the draft text and specifically about the choice that they are exercising in the referendum. Referenda will generally be governed by national law rather than the rules of procedure of the constitution-making body, but the body may wish to consider releasing material in favour of the passage of the draft text.

4. OUTSTANDING QUESTIONS IN THE CHILEAN CONTEXT

While some aspects of Chile's constitution-making process are addressed in the Constitution, most require to be determined by the Convention following its election. The brief section below outlines questions with which the Convention will have to deal while negotiating its rules of procedure.

A. INTERNAL STRUCTURE OF THE CONVENTION

As an initial concern, the Convention will need to determine how to draft and adopt its rules of procedure. It is critical that this process does not delay the drafting of the actual constitutional text.

Concerning the internal structure of the Convention, in addition to determining the functions of the President, the Vice-President, and the technical secretariat, the Convention will need to determine: what other organs it will establish; whether it will establish thematic drafting committees and, if so, how their size and composition will be determined; whether it will establish other committees to assist in the drafting process, and if so, how their size and composition will be determined. In relation to the technical secretariat, the Convention will have to define its role in the drafting process, and whether its members will integrate any of the committees and, if so, in what capacity. It may further need to define the role of the technical secretariat in relation to public participation and compliance with the transparency rules it will establish. It will be important to consider how the appointment of individuals to internal structures may be used to achieve political goals, such as consensus-building and equitable representation of opposing groups within the Convention.

B. PROCESS

Beyond the roadmap established in the Constitution the Convention will need to define the drafting process. Key decisions involve determining the extent to which such process will be decentralised, including: whether the right to submit proposals on content will be extended to entities that are external to the Convention, and if so at what stage/s of the process; whether several thematic committees will be tasked

⁶⁴ CR at 56, 64.

⁶⁵ CR at 49.

with drafting constitutional provisions or whether the preliminary draft shall be entrusted to a single internal committee or to an external commission of experts; and whether to involve external experts in the drafting process and if so, how, and at what stage.

The Convention will also have to consider the number of readings that the constitutional text will be subjected to, and the rules that will apply to these readings, particularly in relation to the possibility to table and discuss amendments. While Article 133 of the Chilean Constitution provides that “the norms” of the Constitution will require a two thirds majority for approval, the Convention will have to decide when it will hold such voting, and whether it will apply to every provision, or to the entire text. Importantly, the Convention will have to determine the quorum for the plenum, and whether it will vary depending on whether decisions are to be made or not. It will also have to consider quorum requirements for committee meetings, and decision-making rules (majority) at the committee level.

C. CONSENSUS-BUILDING AND DEADLOCK-BREAKING MECHANISMS

Bearing in mind the relatively tight deadline within which the Convention will have to complete its work, the Convention may need to pay special attention to the question of how to promote consensus-building, be it at the committee level or at the level of the plenary.

D. PUBLIC PARTICIPATION/TRANSPARENCY

The Convention will have to determine, among other matters: the modalities through which it will seek to engage with the public; whether it will consider suggestions and comments from the public, and, if so, at what stage/s of the drafting process; and, if submissions from the public are admitted, the manner in which it will consider them.

The development of constitutions over the years shows that increasing attention is being paid to the transparency of the constitution-making process. However, an assessment of comparative practice equally demonstrates that to achieve consensus – which means to achieve a compromise, which satisfies the required majority – it may be necessary to provide for a forum (a particular committee), which negotiates behind closed doors.