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# Constituent Assemblies and the Process of Making a Constitution

## What is International IDEA?

The International Institute for Democracy and Electoral Assistance—International IDEA—is an intergovernmental organization that supports sustainable democracy worldwide. Its objective is to strengthen democratic institutions and processes.

## What does International IDEA do?

International IDEA acts as a catalyst for democracy building by providing knowledge resources and policy proposals or by supporting democratic reforms in response to specific national requests. It works together with policy makers, governments, UN agencies and regional organizations engaged in the field of democracy building.

International IDEA's programmes aim to:

- ▶ provide **knowledge resources** in the form of handbooks, databases and websites, training materials, and foster professional expert networks;
- ▶ **develop policy proposals** based on this knowledge as a means to provoke dialogue and debate on how best to strengthen democratic processes;

## What is a Constituent Assembly?

A Constituent Assembly is an assembly of representatives who have been chosen to debate and draft a constitution for a newly created state or to radically alter an existing Constitution as is often the case in states that have recently witnessed civil strife. The drafting of a Constitution through such a process is an act of popular sovereignty.

A Constituent Assembly may be assisted in its task by a Constitutional Commission that prepares the first draft of the Constitution to be discussed, or the assembly may be assisted by other experts and advisers. To reflect the aspirations of the people, a Constituent Assembly needs to consult with the people and seek their input during the drafting process.

In some countries, the Constituent Assembly is in charge of the entire constitution making process; in others it only drafts a Constitution, which has to be adopted through a referendum or ratified by another body such as Parliament or a Constitutional Court later.

## The Impact of a Constituent Assembly

If the constitution building process is undertaken in an inclusive and participatory manner and through national dialogue, a Constituent Assembly can help define the vision of the country, resolve divisions, enhance national unity and help develop a collective agenda for social and political change.

## The Process of Constitution making

A distinction should be made between constitution drafting, which is a legal and technical act, and constitution making, which is the result of political dialogues and compromises. Constitution making is a complex and multi-dimensional venture. It involves various processes and stages, with multiple actors consulting with one another to reach a consensus on the nature of the Constitution. The makers of the Constitution need to decide on the procedures to be followed during the making of the constitution, and they also need to deliberate on relevant matters like the nature of the political institutions that will be set up later. The whole process may be a guided roadmap, which may include the sequence of events to be accomplished within a certain time-frame; and the time-frame may be rigid or flexible.

## Components of the Constitutional Process

- ▶ Agreeing on a broad set of principles and goals;

- ▶ Agreeing on the institutions needed and procedures to be taken for making the Constitution;
- ▶ Preparing the people for consultation by providing civic education on the constitution making process, the country's constitutional history and the constitutional options available;
- ▶ Consulting people and interest groups (including, where relevant, the diaspora);
- ▶ Consulting experts;
- ▶ Using comparative experiences to inform the drafting process;
- ▶ Analyzing opinions;
- ▶ Preparing a draft of the Constitution;
- ▶ Holding public discussions on the draft of the Constitution;
- ▶ Preparing the final version of the Constitution;
- ▶ Enacting the final version into law;
- ▶ Holding a referendum (or any other method of ratification);
- ▶ Bringing the Constitution into force;
- ▶ Implementing the Constitution.

## The Constituent Assembly: Relationship with the Legislature, Membership to the Assembly, Role of the Secretariat

### *Relationship with the Legislature*

The distinction between a Legislature and a Constituent Assembly is often blurred. In some instances, the task of the Constituent Assembly is restricted to making a Constitution (Uganda); sometimes the Constituent Assembly may also double as the Legislature, or the original Legislature in place may double as the Constituent Assembly (India, Pakistan, South Africa, Iraq); and in some instances, the Constituent Assembly is transformed (or transforms itself) into the Legislature after it has completed the task of constitution making (East Timor, Cambodia, Namibia). Each setup mentioned has its advantages and disadvantages, and the relationship between the Legislature and the Constituent Assembly should be carefully defined to avoid conflict and to ensure that the focus of the Constituent Assembly is on the long-term interests of the country as a whole, rather than on short-term political gains.

### **Membership to the Constituent Assembly**

There are various methods for choosing representatives to the Constituent Assembly: representatives may be either elected through a general public election or they

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## Constituent Assemblies and the Process of Making a Constitution

- ▶ provide **assistance to democratic reform processes** in response to national requests and in partnership with regional or other organizations.

### Where does International IDEA work?

International IDEA works worldwide. It is based in Stockholm, Sweden, and has offices in Latin America, Africa and Asia.

### Who are International IDEA's Member States?

International IDEA's Member States are all democracies and provide both political and financial support to the work of the Institute. They are: Australia, Barbados, Belgium, Botswana, Canada, Cape Verde, Chile, Costa Rica, Denmark, Finland, Germany, Ghana, India, Mauritius, Mexico, Namibia, The Netherlands, Norway, Peru, Portugal, South Africa, Spain, Sweden, Switzerland and Uruguay. Japan has observer status.

may be nominated, or they may be chosen through a process that includes both voting and nomination. Some processes have special contingencies for the election of women and provide for the appointment of other interest groups, like trade unions, the military, the disabled, professionals and the commercial sector; some provide ethnic groups with their own separate representation (e.g. the Indian Constituent Assembly).

If representation is to be based on general elections, the electoral system to be used must be chosen carefully since different electoral systems will result in a different balance of interests in the constituent assembly. Proportional representation is often preferred over other systems (like first past the post/majoritarian systems) as it produces an assembly in which the make-up of representatives chosen most accurately reflects the preference of voters.

#### Secretariat

The Constituent Assembly will need a secretariat to provide logistical support and to conduct research on its behalf, to record the activities of the assembly and to accurately register the decisions made by the assembly. The assembly should also have a specialist library and needs to be provided with access to a team of constitutional lawyers and political scientists who can be consulted in times of need.

#### Powers and Functions of a Constituent Assembly

A constituent assembly can have different functions depending on its mandate. It may be required to abide by certain fundamental principles (South Africa, Namibia, Cambodia) or draft a constitution taking into account the first draft prepared by a commission, or it may draft a constitution from scratch. It may be required to consult with the people and special groups, oversee a civic education programme, put together options, debate drafts and adopt a final draft through voting or consensus (as in India, Cambodia, East Timor).

In some instances, public consultations and the preparation of a constitutional draft are the responsibilities of other bodies (e.g., a constitutional commission, as in Uganda, Ethiopia and Kenya or a committee set up by the government, as happened in the decolonization processes in India, Africa and the South Pacific).

#### Rules and Procedures to be followed by a Constituent Assembly

The rules and procedures to be followed by a Constituent Assembly depend on whether the assembly is seen as

a ratifying body or a deliberating body. The rules outline the powers and responsibilities of the assembly and the functions and structures of its committees. Sometimes these rules are made by an external body, which are then adopted by the assembly; in other cases, the rules are made by the assembly itself. There is considerable merit in the assembly deciding on its own rules and procedures, even though it may take the assembly a great deal of time to decide on the procedures.

A Constituent Assembly may include a steering committee that is advisory to the chair and is responsible for the programme and day to day work of the assembly, a media liaison committee, an accreditation committee and a committee that oversees matters regarding the privileges accorded to the delegates to the assembly and the disciplinary action that can be taken against the delegates. The assembly may also include various 'thematic committees', drafting committees and harmonization committees to iron out differences and inconsistencies between recommendations of thematic committees.

As a constitution is not just a social charter but also a legal document, the final draft of a constitution should be undertaken by legal drafters. These drafters translate the principles, goals and decisions taken by a constituent assembly. It is important that a constitution be drafted in a plain and clear language.

#### Rules for Adopting a Constitution

Who should adopt a Constitution and by what majority? In some countries, the Constituent Assembly must adopt a Constitution (East Timor); in others, people decide the nature of the Constitution to be adopted by voting in a referendum (Iraq); or the Constitution may be adopted by Parliament (Kenya). In some cases, the adopting body must seek consensus, and they only go to a vote if there is no consensus. Sometimes a huge majority (such as a two-thirds majority) is required to ensure that there is near consensus among parties. A large majority is preferable if the country is deeply divided, especially along regional or ethnic lines, because a large majority gives incentives for all parties to work towards reaching broad agreements.

When adopting a constitution it is important for delegates to determine whether they should vote according to their conscience and judgment or whether they should be required to vote according to the directives of the group they represent. This issue is especially relevant where representation in the Constituent Assembly is based on regional entities or political parties.