

Legal Frameworks

In ordinary circumstances, constitutions are changed according to the process for constitutional amendment set out in the existing constitution. There are circumstances, however, in which it is not possible to follow the process set out in the existing constitution; for example, in some post-conflict countries or where the established process is deemed inadequate. In such cases a new process or adjustments to the existing process are needed. Usually, the new process or adjustments are established legally, for example, by amendments to the existing constitution, or through a presidential decree, a law adopted by a legislature, or a peace agreement.

This paper discusses the following topics:

1. When is a completely new legal framework needed?
2. When is an existing process supplemented?
3. Why use a legal framework?
4. Peace agreements, constitutional amendment, decrees or laws?
5. What form do legal frameworks take and what do they include?

1. WHEN IS A COMPLETELY NEW LEGAL FRAMEWORK NEEDED?

After revolution or revolt, or other conflict that ends with a total rupture in the constitutional order, it is likely that the old constitution will be discarded and the people will want to start fresh. Rather than following the terms of the existing constitution, a new process may be designed. Benin followed this approach in making its 1990 Constitution, as did Tunisia and Yemen after the revolutions that overthrew their Presidents. Namibia (Security Council Resolution 435 (1978)), Afghanistan ([Bonn Agreement](#) (2001)), and Sudan ([Comprehensive Peace Agreement](#) (2005)) all ended violent conflict and abrogated the previous constitutional order with instruments that included a new framework for constitutional drafting.

Deep political upheaval has led to completely new legal frameworks throughout Latin America. In Colombia in 1991 widespread demand for change ran into a Congress unwilling to respond through the constitutional amendment process. The reform movement, with political support coming from the Presidency and other political actors, got its way in sidestepping Congress by electing delegates to a Constituent Assembly in 1991. In Ecuador (1998) and in Bolivia (2006) the election of constituent assemblies also responded to political crises punctuated by broad demands for reform and the sense that the existing legal framework for reform (through Congress) was not capable or willing to respond adequately.

Similarly, when a military regime seeks to return to constitutional rule after a coup, like Nigeria in 1977, there is likely to be no constitution in place that sets out the process for making a new constitution. This was the case in Libya, following the overthrow Col. Gaddafi – with no constitution in place to guide the constitutional drafting process the Transitional National Congress passed a constitutional decree setting out a new process.

There has been a trend in some Latin American countries to interpret the typical amendment clause of a constitution only to allow for amendment or partial constitutional reform, but not total replacement. Bolivia in 2004, therefore, amended its constitution to allow for the possibility of convening a constituent assembly to replace the existing constitution. Panama did something similar in 2004. (Some Latin American countries have since explicitly provided a mechanism for constitutional replacement - see Colombia, Ecuador, Nicaragua, Venezuela, Bolivia, and Panama.) It is unclear how widespread this practice is; in Europe and the Anglophone world, and likely elsewhere as well, amendment provisions are understood to include the power to replace.

Finally, a completely new legal framework may be necessary during democratic transitions where the pre-existing authoritarian regime did not create a constitution (Costa Rica between 1948-49) or when it did, but lacked the power to impose it as a legal framework for the new democracy (Brazil between 1986-1988).

2. WHEN IS AN EXISTING PROCESS SUPPLEMENTED?

Sometimes, the established process for constitutional change remains in force but, perhaps because the institutions with responsibility for changing the constitution have limited legitimacy or because citizens demand a greater say, it is inadequate. For instance, Kenya's process of constitutional review, started in 2000, was not triggered by revolution but by pressure from civil society over the previous decade. The provisions in the existing 1969 Constitution concerning constitutional amendment remained in force, but the Kenyans who had been the catalysts for constitutional review were not satisfied that the process was sufficiently inclusive. They needed an assurance that the people would have a real voice. In response, Parliament enacted a special law that supplemented the existing provisions in the Constitution to include a Constitutional Commission and a National Conference, and that required the Commission to conduct a programme of public education and consultation. Overall, this process enabled many more people to be involved. Another situation where the existing framework has been supplemented is where amendment procedures are deemed appropriate for partial constitutional reform but insufficient for constitutional replacement – this has been an increasing practice in Latin American; for example Bolivia in 2004, which augmented its amendment procedure (allowing the legislature to pass constitutional amendments) with a new constitutional provision providing for the election of a Constituent Assembly when constitutional replacement is contemplated.

If there is an existing constitutional process, a number of factors will indicate whether or not it needs to be supplemented by an additional law. In general, a revised legal framework may be called for if:

- The government or legislature wants a more inclusive process than the one set out in the constitution (eg. Iceland 2010);
- Citizens and civil society want guarantees of a more inclusive constitutional review (eg. Kenya 2000);
- Comprehensive or at least fundamental aspects of the constitution are to be reviewed;
- The process set out in the constitution is insufficiently consultative and/or transparent and will not support a public debate about the types of reforms needed;
- Previous processes have failed and a law can put mechanisms in place that will avoid past pitfalls.

3. WHY USE A LEGAL FRAMEWORK?

Constitutions may be drafted outside a legal framework. This may happen when a constitution emerges from a peace process (as in Bosnia & Herzegovina) or when it is imposed by a military regime, for instance. Sometimes a substantial part of a constitution-making process happens during the peace or political transition negotiations themselves. For example, South Africa's 1993 Interim Constitution was drafted in a negotiating forum that was not formally established by law. It was then approved by the Parliament in the manner set out in the existing 1983 Constitution. The [Interim Constitution](#) provided the legal framework for the drafting of the 1996 Constitution.

But, there are strong reasons for establishing a proper legal framework for constitutional review, including to:

- ❖ [Establish a CMB\(s\)](#): There may be formal reasons for a legal framework. For instance, a law might be required to give a CMB the legal powers it needs to operate and to enable the Government to fund the CMB and the CMB to expend money.
- ❖ [Entrench a negotiated transition process](#): A legal framework for constitution-making may secure agreements reached in negotiations. For example:
 - The 1993 South African [Interim Constitution](#) set out the process for drafting a new constitution that was agreed to in the Multi-party Negotiating Forum in 1993;
 - In Kenya, the Accord reached in 2008 to end the post electoral violence led to both a constitutional amendment that changed the process of constitutional review and the [Constitution of Kenya Review Act](#) to guide the process in more detail;
 - The 1991 [Paris Agreement](#) that ended the Cambodian conflict provided the mechanism (constituent assembly), time frame, threshold for adoption, and general principles for the constitution making process.
- ❖ [Promote the rule of law](#): In a constitutional democracy, the constitution is intended to set up the framework by which the country can be governed in accordance with the rule of law. The process by which the constitution itself is made can be a powerful example of the rule of law in operation, if the institutions and individuals involved are bound by law and respect it. A good legal framework is necessary for this. Moreover, if it is necessary, citizens can take legal action if the framework is not adhered to.
- ❖ [Build confidence in the process and making it more secure](#):
 - A law that sets out the full constitution making process can demonstrate the government's commitment and reassure other parties and citizens that what has been promised will be delivered. It may also protect the process from being side-tracked or undermined at a later stage. Although a government may still depart from a process it has committed to in law (for example, Iceland in 2011 and Fiji in 2012), departing from a legal commitment carries a political price and so generally governments will be more reluctant to do this.
 - A clear framework will also help reduce the opportunity for spoilers to obstruct the process because less ambiguity means less room for argument. Also, if the legal framework includes timelines, there will be less opportunity to stall the process. (For examples of such timelines see 2008 [Constitution of Kenya Review Act](#); [Terms of Reference for Technical Committee on Drafting the Zambian Constitution, 2011](#).)
 - The process of adopting the law that sets out the constitution-making process can contribute to building legitimacy. If the adoption of the law is preceded by proper consultations with all concerned sectors of society, it is more likely to provide the basis for a strong and credible process where the final outcomes have greater public support.

By contrast, if political stakeholders and civil society have no say in the design of the process, there is a danger that they will not support it. In Colombia, the decree which convened the assembly (decree #1926 of 1990) was agreed upon by the government and all the main parties thus ensuring a wide base of support for the process. On the contrary, Venezuelan President Hugo Chavez issued a decree which unilaterally decided on the electoral process to elect the assembly thus sidelining the opposition from the beginning of the process.

- The publication of the law itself is an exercise in transparency. It allows citizens to better understand the roles of respective parties and how the CMB/s will be constituted (also informing them on opportunities to nominate or elected representatives, if this is an option), and how they can participate in any public consultation process.
 - A law may allow the public to take legal action if the prescribed process is not adhered to.
- ❖ Encourage a well-thought out process: Setting out the process formally encourages all those involved in designing the process to think holistically about the process at the onset and allows both those running it and citizens to plan better.

4. PEACE AGREEMENTS, CONSTITUTIONAL AMENDMENT, DECREES OR LAWS?

Legal frameworks can be in the form of constitutional provisions (or amendments), statutes, decrees, peace or other political agreements or, more rarely, UN Resolutions. For example:

- In Libya, the outline of the process was contained in the first [Constitutional Declaration of 2011](#), issued by the Transitional National Congress. It was then amended by the elected General National Congress (legislature).
- Bolivia and Panama (both 2004) amended their existing constitutions to provide for election of constituent assemblies to draft and adopt completely new constitutions. Additional legal guidance in Bolivia was provided via later legislation.
- In many countries including Kenya in 2000 and 2008 and Tanzania in 2012 the full legal framework for the process was set out in an Act of Parliament. In Zambia in 2007, the National Conference was established by an Act of Parliament. In Fiji, a [decree](#) of the Interim Government of the military regime was used to set out the process.
- In Liberia the process was initiated by Presidential decree.
- In Zambia in 2011, the terms of reference including the process the commission was to follow were set out in [terms of reference](#) made under the Inquiries Act.
- Ecuador in 2007 took yet another approach: the President used his constitutional power to call a plebiscite on urgent matters to ask the people if a constituent assembly should be convened. The Decree that convened the plebiscite included regulations for electing members of the Assembly and the basic rules by which the Assembly was to operate.
- In Zimbabwe, a substantial part of the legal framework was included in the [Global Political Agreement of 2008](#) which was, in turn, appended to the existing Constitution.
- In Yemen, the [Implementation Mechanism of the Gulf Cooperation Council](#) sketched out a road map and a presidential decree completed it.
- UN General Assembly Resolution 2001/2 (2001) for East Timor set out the mechanism and time frame for the process.

When constitutional change is to take place without regime change, and the existing constitutional arrangements are not adequate, the best approaches are either a constitutional amendment to

establish an appropriate process or a regular law, properly assented to by the legislature, to supplement the existing constitutional arrangements.

5. WHAT FORM DO LEGAL FRAMEWORKS TAKE AND WHAT DO THEY INCLUDE?

Legal frameworks can be in the form of constitutional provisions, statutes, decrees, peace or other political agreements or, more rarely, UN Resolutions. That said, there are some common questions that arise when drafting a constitutional legal framework, such as:

- Should the entire process be captured in one law or should it unfold more gradually?
- What should be included in a law setting out the process and what can be left to the CMBs to settle themselves?

Answers to each of these and many other questions depend, firstly on the context in which the constitution making process occurs. Below, we sketch some matters that might be considered when answering them.

5.1 Should the entire process be captured in one law or should the process unfold more gradually?

When constitutional reform is the outcome of a negotiated political transition, it may be neither possible nor wise to try to set out the entire process in a law at the outset. Tunisia's rocky process between 2011 and the adoption of its new constitution in 2014 demonstrates how hard it is to anticipate challenges and build mechanisms for dealing with them into a formally set process. South Africa's process is an example of one which built up through negotiations over five or so years. Only the final stage was set out in a law.

In practice, one stage of the process might lead into another. For instance, although in Yemen the [Implementation Mechanism of the Gulf Cooperation Council](#) sketched a full process from a national dialogue to a referendum, it left it to the National Dialogue to set out the details of the process for drafting the constitution. In theory, this meant that a more inclusive and legitimate body made those decisions. Each stage has been initiated and elaborated upon through separate presidential Decrees. This was also the case in Colombia (1991) and Venezuela (1999) where several presidential decrees were needed in order for the constitution making process to take off.

On the other hand, if the public is skeptical about the seriousness of the process, setting it out fully at the outset may increase its legitimacy. In addition, if the entire process is prescribed in law from the outset, the political elite will be less able to manipulate it if it develops in ways that are inimical to their interests. Finally, knowledge of the way in which the process is to unfold may (and usually should) influence those involved in earlier stages. For instance, if a constitutional review commission is aware that the process will culminate in a referendum, it may pay more attention to the views of the public throughout as it knows that the public will be the final arbiter of the content of the draft.

5.2 What should be included in a law setting out the process and what can be left to the CMBs to settle themselves?

There is no one-size-fits-all answer to the question of how much detail should be provided in the legal framework. In part, the answer depends on the type of CMB(s) and the political context. When the executive wants to control a process tightly, it will usually include more detail in the law.

Similarly, when civil society wants more clarity and certainty about a process, it will demand more detail in the law. But, too much detail can introduce rigidity and may limit a CMB's ability to respond to new challenges. For instance, inflexible quorum rules may prevent a CMB from holding simultaneous public hearings in different places; inflexible rules concerning attendance may hamper the ability of a CMB to make decisions; prescriptions about the relationship of a CMB to other bodies may exclude imaginative consensus building processes; detailed specifications concerning support structures may lead to institutions that fail to meet emerging needs of a CMB.

5.3 What might the legal framework cover?

The content of the legal framework will, of course, depend on the context. The legal framework may do the following things:

- ❖ Establish the CMB(s) and their procedures and structures including:
 - Mode of electing/appointing members to the constitution making body
 - Their legal status including contracting power, etc.
 - Their mandate and the scope of the review
 - The responsibilities of members and staff
 - Decision-making rules
 - Codes of conduct
 - Conditions under which members may be removed and procedures for this
 - Obligations in relation to [civic education](#) and [public consultation](#). See Constitution of Kenya Review Acts [1997](#) and [2008](#); Ghana Constitutional Review Commission of Enquiry Instrument 2010; Iceland Act on a Constitutional Assembly 2010.
 - Funding arrangements
 - Support structures
 - When they are dissolved
 - In certain cases, guarantees of independence
- ❖ Set out the relationship of CMBs to other institutions
- ❖ Set out principles or provisions that must be reflected in the new constitution
- ❖ Set out deadlock breaking procedures
- ❖ Provide [timelines](#), including options for extension of the process: A law can set a timeframe within which the process is to take place. That said, timeframes may not be respected. Sometimes this is because the timeframe is not reasonable, but in some cases it may be because the CMB wishes to extend its life for self-interested reasons or as a form of spoiling. To address these problems the legal framework might include a mechanism outside the constitution-making process for the extension of the timeframe or the replacement of the CMB with another process. For instance, in the case of an elected CMB, a legal framework might stipulate that the CMB is dissolved and new elections held if it does not complete a mandated task within a stipulated time; it may stipulate that the elected body is replaced by another if deadlines are missed; or it may set out a default constitutional arrangement if agreement is not reached on something else in the set time.
- ❖ Set out the process for adopting the text: If the constitution making process is to end in a referendum, details of the referendum process such as the form of the question(s), who may vote, what percentage is required etc. may be included in the framework.

How should a commission be established?

A particularly controversial question which is arising more frequently in Anglophone Africa is whether a constitution commission should be established under the Act that gives the executive the general power to establish commissions (usually the Inquiries Act) or under a separate law, designed especially for the constitution commission. Executives usually choose to use the Inquiries Act. Civil society objects because the Act invariably gives the executive full discretion over (i) the membership of the commission; (ii) the commission's mandate; and (iii) whether or not to act upon its recommendations. It usually demands a dedicated law that allows civil society to nominate some members of the commission, includes a requirement of public consultation in the mandate of the commission, and removes the executive's full discretion over the results of the commission's work by establishing another body to endorse the recommendations of the commission.

Legal Mandates¹

<i>Country</i>	<i>Type of Instrument</i>	<i>Main Elements</i>
Nicaragua (1987)	Statute	Act of Parliament enacted an electoral law for a CA.
Brazil (1988)	Statute	Constitutional Amendment 26 of Nov. 1985 empowered next Congress to double as Constituent Assembly to adopt new constitution.
Namibia (1990)	GA Resolution	GA Resolution 435 prescribed the formation of a CA to draw up and adopt a constitution for an independent Namibia. 1982 constitutional principles were developed among various internal and international stakeholders.
Colombia (1991)	Presidential Decree	1990 presidential decree (under state of emergency law) led to the election for the CA. Limited mandate of CA was to meet for 150 days and draft and approve a single set of amendments to constitution.
Cambodia (1993)	Peace agreement	1991 <i>Paris Agreements</i> detailed elections but not much on CMP; included an annex of constitutional principles.
Uganda (1995)	Statutes	<i>Constitutional Commission Act</i> of 1988. <i>Constituent Assembly Election Act</i> of 1993.
Bosnia and Herzegovina (1995)	Peace agreement	<i>Dayton Agreement</i> (General Framework Agreement for Peace in Bosnia and Herzegovina), Nov. 1995; Annex 4 was the new constitution. So technically no separate legal framework beyond peace negotiations.
South Africa (1996)	Interim Constitution	1993 Interim Constitution required the newly elected Parliament to also serve as a CA to adopt a final constitution, included constitutional principles, and gave certification rights to constitutional court.
Poland (1997)	Statute	Apr. 1992 <i>Constitutional Law on the Procedure for Preparing and Enacting of the Constitution</i> ; established constitutional committee of parliament and timeline.
Eritrea (1997)	Statutes	1994 proclamations of Provisional Government for (i) participatory CMP; and (ii) establishment of Constitutional Commission of Eritrea.
Albania (1998)	Statute	Parliament's <i>Decision 339</i> (1997) provided the legal framework; designated a 21 member parliamentary commission to lead the process, set parameters for public participation, set 5 substantive groupings, called for a referendum in early spring of 1998.
Fiji (1999)	Statute	Act of Parliament to form a Commission to review and amend 1990 Constitution.

¹ The information in this table is derived from the United States Institute of Peace (USIP) 2010 publication *Framing the State in Times of Transition: Case Studies in Constitution Making*, which is available online at: <http://www.usip.org/publications/framing-the-state-in-times-transition>.

<i>Country</i>	<i>Type of Instrument</i>	<i>Main Elements</i>
Venezuela (1999)	Decree	Feb. 1999 presidential decree intended to call a referendum on the formation of a CA to amend constitution and affirm Chavez
Zimbabwe (2000)	Statute	<i>Commissions of Inquiry Act</i> gave President sweeping powers to control and “alter, revoke, or stop” the process. Allowed President to appoint Commission and pick and choose from Commission’s recommendations.
East Timor (2002)	Treaty and SC Resolution	May 5, 1999 Agreement between Indonesia, Portugal and the UN led way for UNAMET and the Secretary-General to consult the East Timorese people on the constitutional framework for autonomy annexed to the Agreement. Security Council Resolution 1272 created UNTAET, which acted as transitional government and was mandated in part to assist the East Timorese “in the development of a constitution”.
Afghanistan (2003)	International accord	<i>Bonn Agreement</i> (Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions); this Dec. 2001 transitional accord included timetable, call for Constitutional Commission (within 2 mos. of est. of TA) and Loya Jirga (within 18 mos. of est. of TA) and set up simultaneous peace-building and state-building processes.
Iraq (2005)	Transitional agreement	Transitional Administrative Law (TAL) (interim const., Mar. 2004); article 60 mandated National Assembly to draft a permanent constitution; article 60 created deadline of Aug. 15, 2005 for draft and Oct. 15, 2005 for referendum.

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