

Rules of Procedure

Ideally, a constitution-making body (CMB) will have explicit rules of procedure in place to regulate its activities. Rules of procedure (sometimes called ‘by-laws’) are mechanisms which help to initiate, facilitate, and manage the constitution-making process and can help a CMB to organize itself and achieve its tasks. The rules of procedure can have a significant effect on the outcome of the process and thus due care and time must be taken in their formulation.

This paper discusses the following topics:

1. Variables Affecting the Nature of the Rules
2. Content of the Rules

1. VARIABLES AFFECTING THE NATURE OF THE RULES

A CMB’s rules of procedure will vary depending on a number of factors.

a) Type of CMB

The most significant factors are the form, size, and scope of the tasks of the CMB. For instance, a Constituent Assembly will likely require a more comprehensive set of rules than a smaller Constitutional Review Commission because of the size and complexity of managing an assembly and its processes. A political body will require different procedural rules from a technical one. The mandate of the CMB will also affect the rules – for example, the rules will vary if the CMB is only tasked with producing a draft constitution, as opposed to undertaking other important processes such as public consultations and constitutional ratification.

b) **Source of the Rules**

Generally speaking, rules are either (i) produced before the CMB is established (typically in the enabling statute, a decree, or other legal form), (ii) developed and adopted by the CMB itself, or (iii) most commonly, made in a combination of these two ways. Rules might be adopted prior to the CMB if the key political stakeholders involved (for example, an authority such as a president or legislature or multiple parties to a negotiation) want to ensure specific rules are followed. Rules set forth in an enabling law tend to be less comprehensive than ones established by the CMB itself and the enabling law may specify that the CMB has the right to adopt additional rules. The type of CMB will also impact the source of its rules. Constituent Assemblies, for example, might view externally imposed rules as a violation of their sovereignty.

Establishing the basic decision-making procedures of the CMB in the law that establishes it is wise as it ensures that the CMB knows how to proceed and has a decision-making framework within which to adopt further rules. At a minimum one would expect to find the decision making threshold and the time frame for the constitution making process in the CMB’s legal mandate. Making rules prior to establishing the CMB may also be necessary where parties need assurances in order to buy into the constitution making process itself. Moreover, the process of negotiating often-contentious rules among a range of stakeholders can be ‘agenda-setting’ for

the political stakeholders, can help to establish lines of accountability, and can contribute to the transparency and legitimacy of the process going forward. That said, it is important to note that rules that are contained in an enabling statute will be much more difficult to amend than those adopted by a CMB itself. And allowing the CMB to write at least some of its own rules provides an important opportunity for the CMB to develop *modus operandi* on something less controversial than the constitutional drafting itself, hopefully building trust and confidence in the process.

In Yemen, for example, the six-month process of negotiating rules for the National Dialogue helped to flesh out crucial issues (such as thresholds for adopting substantive recommendations). Many of these rules were carried over in the [Presidential Decree](#) establishing the Constitutional Drafting Commission (CDC). However, the CDC, once established, conducted its own internal discussion on supplemental rules that were not in the Decree. At one of the first discussions of the CDC, the process of adopting rules brought the CDC Members together and contributed to their being able to develop a common vision for their work. When in the process these discussions over the rules should take place, therefore, is as important a consideration as the rules themselves.

The experience with Latin American constituent assemblies is that the constituent assemblies determine their own rules of procedure. In Colombia, basic rules of procedure were spelled out in the decree that convened the Constituent Assembly (#1926 of 1990). However, once elected, the Assembly drafted its own set of rules.

2. CONTENT OF THE RULES

Rules of procedure should address key procedural issues for the CMB. They can be similar in form to parliamentary rules of procedure, in terms of providing a framework for debate, though in other respects (voting thresholds and time lines, for example) they may diverge considerably. In some countries, the existing parliamentary rules of procedure may be a good starting point when developing rules for a CMB, particularly in terms of how to hold thematic committee hearings. That said, parliaments generally focus on majority voting, whereas CMBs should focus on consensus-building rather than majoritarianism (though many, with varying degrees of success, utilize majority vote thresholds). As such, any existing rules should be reviewed and re-worked to promote consensus and broad-based agreement on the forthcoming constitutional draft.

Rules of procedure certainly vary from one process to the next, but the following are central issues which should be covered:

- The overall process
- Leadership/Chairing
- Speaking rules
- Structural organization
- Notice requirements
- Quorum requirements
- Decision-making rules

a) Overall Process

While the law or decree which sets up the CMB will usually also set out the overall process and [timelines](#), the rules of procedure supplement the roadmap for the constitution-building process by providing operational details. For example, the rules may set out a committee structure or how decisions are made at the committee level..

The rules may also set out internal timelines for different [phases of the constitution making process](#), the working schedule for the CMB, and how the CMB should divide its time in the case

of a legislature doubling up as a Constituent Assembly. The rules may also deal with when and how [public consultations](#) should be conducted, including public hearings of thematic committees.

b) Leadership/Chairing

Rules, especially those designed for legislatures and constituent assemblies, typically provide for the selection of presiding officers - Chairperson, Deputy Chairperson and other positions – the functions and powers of these positions, and contingencies for replacement. For example Article 5 of the [South Africa Rules](#) sets out the election process for Presiding Officers and Chapters 4 and 5 of the [Nepal rules](#) sets out the election process for the Chairpersons and officers. Notably, Articles 24 and 25 the [Tunisia National Constituent Assembly Rules of Procedure](#) set out the role of the Presidency, while Articles 28-37 also establish a management committee or ‘Bureau’.

The Rules of Procedure will also provide guidance on how the leadership of the CMB should chair meetings. This can be important to have agreed in writing at the outset, especially in countries where there is limited trust within the CMB; it can be important that all CMB members are reassured that that will be able to speak on issues and the chair will manage business impartially and fairly. In Colombia, the three parties with the largest pluralities in the Assembly shared in its tripartite presidency. This unique arrangement reflected the actual distribution of power in the Assembly and helped stave off conflict among the three largest parties.

c) Speaking Rules

Especially for larger bodies like constituent assemblies, there are typically speaking rules (eg, [Tunisia rules](#) 99-101), rules of order (eg, [South Africa](#) Articles 103-115), and/or rules of debate (eg, [South Africa](#) rules 116-132). The chair will typically be responsible for regulating the speaking order, in line with the rules. In practice, the rules may simply provide for a Member raising their hand or standing to get the attention of the Chair, who will then keep a list of people who wish to speak on particular topics/articles. Another possibility—drawn from the [Kenyan National Constitutional Conference \(NCC\)](#)—is to provide each member with a large card on which the member’s enrolment number is printed. This is raised to indicate a wish to speak.

It is essential that there be a way to limit the length of speeches in larger bodies to ensure the efficient management of business. There will also need to be rules which deal with attempted interventions – should these be allowed, either in substance or on procedural matters – and questions from the floor to the speaker, to enable clarifications on proposal.

d) Structural Organization

Rules of procedure may establish how the plenary will run. It would be inefficient and ineffective to have the entire scope of the work of the Assembly or Commission conducted by all members. Thus, usually a larger CMB divides itself into specialized committees, and establishes a leadership to oversee the CMB. Rules may therefore detail the number and nature of committees. However, it is also common for rule to simply allow the CMB to create committees at its discretion without specifying which ones are to be created. This approach has the advantage of giving greater flexibility for CMBs to adjust how they conduct their work as the process unfolds. In the event the CMB desires to have committees clarified in its rules, common types of committees include:

- Thematic Committees: responsible for discussing selected themes in the Constitution (eg, the Bill of Rights, power-sharing, security sector oversight, etc.).
- Business Committee: responsible for planning and monitoring the work plan of the CMB.
- Rules Committee: responsible for proposals for amending the rules of procedure.
- Harmonization Committee: responsible for harmonizing the work and drafts of different thematic committees.
- Legal or Drafting or Constitutional Committee: responsible for drafting text and proposed amendments to the text.

- Outreach, [Consultation](#), [Communication](#) and/or [Civic Education](#) Committee: responsible for overseeing the CMB's outreach programme.

Examples of committee organization are found in the [Rules of the South Africa Constitutional Assembly](#); and Chapter 11 of the [Nepal rules](#). The Rules of Procedure may also state conditions for the composition of committees – for example, in Uganda, Article 30.5 provides that gender must be taken into account; and in South Africa, Article 23 provides for proportional representation of political parties at the committee level. The [rules for the 2007 Ecuadorian Constituent Assembly](#) included rules on who could submit proposals for consideration in the CA Committees.

e) Notice Requirements

Rules need to include notice requirements to ensure members of the CMB know when sessions will be conducted and votes taken, thus decreasing the likelihood that members accidentally miss sessions or business is conducted when certain members are not present. The Bolivian rules typically required twenty-four-hour notice for documents. In [Nepal](#), the chairperson was required to give notice of the next meeting of the Assembly at the conclusion of the current meeting, or at least 3 days prior. In some cases of larger/representative bodies, like [South Africa](#), the leadership might be required to publish notice of meetings in a gazette, Order Papers of the CMB, or elsewhere.

(See page 196 of the [Interpeace handbook](#) for more on notice requirements).

f) Quorum Requirements

Quorum requirements often cover meetings of the CMB in plenary, as well as quorum for sub-committees. Quorum requirements may sometimes vary depending on whether a decision is to be made or not. Quorum requirements may require that one-third of the full membership be present (eg, [Sierra Leone Constitutional Review Committee](#)) or that more than half of the total number of members be present. A quorum of only 25% was used in the [Nepal Constituent Assembly](#). Higher quorum thresholds are more common in smaller CMBs under the theory each member is more critical for the CMB to conduct its work, though in Venezuela a quorum of 50% plus one of the constitutional delegates (67/132) was necessary for debate and decision making.

In [South Africa](#), a quorum for the plenary (which rarely met) consisted of one third the total number of members, and a quorum for sub-committees was one-half the number of members. See Articles 11 and 33 of the [South Africa rules](#). In [Tunisia](#) and [Egypt](#), a quorum for plenary was set at an *absolute majority* (ie, greater than 50% of total eligible votes) of members. Latin American countries frequently use a similar quorum requirement and threshold (eg, [Ecuador 2007 article 5](#)). In [Tunisia](#), if quorum was not met, the sitting was adjourned for one hour following which the meeting could begin if one-third of the total number of members was present.

While quorum requirements are common, they are not without challenges; they can be used by groups to boycott sessions and block the work of the CMB. A large quorum may lead to this result even without intent on the part of a group within the CMB to boycott, simply because members are otherwise preoccupied. A notice requirement for all CMB sessions can also ensure all members have an opportunity to attend and contribute - though of course a notice requirement does not guarantee a minimum threshold of members for work to proceed.

g) Decision-making Rules

Rules regarding decision-making may apply to both the plenary and committee level, and there may be additional rules regarding the final adoption of the constitutional draft. Decision-making rules are often contentious because they determine the ability of minority parties to inform, influence and possibly control the final outcome. For this reason decision-making rules

(especially for final adoption) are often set forth in the [legal mandate](#) of the CMB, rather than left to the CMB itself.

Decision making thresholds can vary among a *simple* majority (50% of those present and voting), an *absolute* majority (50% of the total number of CMB members plus one), *supermajorities* (usually two-thirds) and decision-making by consensus. Rules often call for decisions based on consensus, at least in the first instance, in order to maximize buy-in and legitimacy for the final draft. Arriving at decisions through consensus is usually preferable to ensure that there are no “losers” and all groups buy into the decision. Even super-majority voting may leave some small groups side-lined if their numbers are not enough to be material to the voting balance. However, consensus can turn small constituencies into veto players and provide little incentive to negotiate.

Consensus is difficult to define. It can mean unanimous decision making, but it may also mean something more ambiguous. During the earlier stages of the process in South Africa (including the Multi-party Negotiating Process) constitutional negotiators used the concept of “sufficient consensus”. Although they did not define it, in practice it meant that a decision required support from the two main parties in the negotiations and from a critical mass of the smaller parties. In the negotiations in the late 1990s to bring peace to Northern Ireland, sufficient consensus required not only the agreement of a majority of the parties on a particular provision, but also the agreement of a majority within each broad faction—unionist and nationalist. Consensus may also be defined to mean agreement that is reached without a vote. During Indonesia’s constitution-making process, only one vote was taken (on a minor issue); in all other cases, there was unanimous agreement.

Rules typically provide for a threshold vote in the event consensus is not possible. For decisions on adopting new provisions or a new constitution, Latin American countries have almost always used an absolute majority while outside Latin America the most common threshold is a supermajority – again, to promote as much buy-in as possible for the constitutional draft. The [rules for the Yemen Constitutional Drafting Commission](#) called for a 3/4 majority of the entire CMB membership when consensus could not be reached. In [Tunisia](#), the required vote for constitutional passage at the Constituent Assembly was 2/3 of the entire CMB membership. In addition to super-majorities, other deadlock breaking mechanisms have been employed when consensus is not possible. In South Africa, had the Constitutional Assembly been unable to reach its 2/3 majority threshold, after procedures designed to break deadlocks were exhausted, a constitution approved by a majority of the Constitutional Assembly would have gone to the people to decide through referendum. The same was true in [Tunisia](#) (2011-14) and Bolivia (2007).

Another possible deadlock breaking mechanism is a consensus/harmonization committee. The Tunisian Constituent Assembly had a “Joint Committee for Cooperation and Drafting,” where difficult issues could be referred for negotiation and resolution. However, approval by the Constituent Assembly at large was still required.

(See pages 180-182 and 194-202 of the [Interpeace handbook](#) for more on decision-making rules).

h) Miscellaneous

Rules of procedure may include [codes of conduct](#), such as provisions regarding behavior not acceptable during discussions. A code may extend to the behavior of members outside the CMB and include provisions dealing with conflicts of interest among other things. In some cases rules may list disciplinary measures available to the Chairman or another entity for the enforcement of these provisions (including suspension of membership).

It is good practice for rules to address matters of transparency and openness, including the right of the public to attend sessions of the CMB and whether and when sessions must be televised. The role of the public in terms of: (a) attendance at the CMB deliberations of members of the public and of the media, and (b) the role of Assembly members in public consultations may also be covered in the rules. The rules may not go into any detail on these issues, but it would be wise to make it clear where responsibility primarily lies—though this should not preclude civil society from monitoring and publicizing the work of the body.

The Rules of Procedure may also specify the creation of a [secretariat](#) and its role (see, eg, Articles 140-144 of the [South Africa rules](#), relating to the Office of the Secretary).

Lastly, the elements above cover the core and commonly occurring issues to be covered in rules of procedure. However, each set of rules must be tailored to the unique circumstances at hand. For example, circumstances (including the nature and size of the CMB as well as the general level of trust (or mistrust) among the parties) may dictate how comprehensive the rules should be. While first instinct may be to draft rules for every possible matter and contingency, more limited rules may allow for more flexibility and adaptability as the constitution making process unfolds.

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