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TEXTE

1 "Writing or not Writing a constitution? That is the question!" Should William Shakespeare's famous sentence in Hamlet (3rd Act, Scene 1) be reformulated to constitution-making processes and would it be relevant for the forthcoming discussions during this conference?

2 This is a rather difficult question as our understanding of the reasons for writing a constitution is usually shaped through our legal culture and our own understanding of the usefulness of the constitution as a legal tool. In short, there are as many answers as constitution-making processes or countries.

3 Asking the question “Why shall we write a constitution?” is nearly impossible to answer as the core elements of the answer are numerous, some non-legal and probably irrational if only seen from a lawyer’s perspective.

4 There are obviously a number of common reasons explaining why a constitution in a form or another is needed: they should be taken into consideration but also be mitigated by each and every context as no constitutional making-process looks like another.

5 Such a question “writing or not writing” cannot receive any answer if we are unable to preliminarily reply to two other questions: “In which context?” and “For what purpose?”.

6 So, it looks like an impossible task to find a global recipe to answer this question! However, we should try and find reasons why the organisers chose this topic as an introductory theme.

7 We can start by playing a rather common game nowadays, asking AI “why should we write a constitution?”. The answers are quite interesting and can help us to initiate a general discussion about these reasons. In a nutshell, the answer is “Writing a constitution gives clarity, legitimacy, and protection—but can also lock in rigidity and create new political struggles. Not writing one preserves flexibility and adaptation—but risks uncertainty and abuse of power”. The elements put forward for the writing of a constitution are: 1) the respect for the rule of law and limits on powers, 2) clarity and accessibility, 3) legitimacy and consensus, 4) protection of rights and 5) predictability for governance. The elements for not writing a constitution are: 1) rigidity, 2) illusion of stability, 3) conflicts in drafting, 4) risk of judicial overreach”. [1]

8 Looking at these elements is not unfamiliar for constitutional lawyers accustomed to constitutional drafting and a number of these elements are definitely entering into this debate. It even seems that the key elements to be discussed lie more into the reasons for “not writing” than the elements in favour of “writing”.

9 However, these answers are quite general and disconnected from any specific context. An interesting element lies in the first sentence given by AI when introducing the answer: “Great question—whether or not to write a constitution is one of the deepest debates in

political and legal philosophy. A constitution is not just a legal document; it's also a political, cultural, and symbolic choice". It puts forward the idea that contextual elements are more important than the technical ones.

10 Leaving this first technological approach about the reasons for writing a constitution, it remains that the question "why" is deeply rooted in the legal culture and history of each country and every person approached to answer this question would probably have different explanations, depending from his or her angle of approach.

11 However, if such an issue has become a key question, this is partly because there has been a growing discrepancy between what we learnt from a theoretical point of view (especially when we were students and when we taught them late) deriving from Constitutional history of the 18th century and the changes brought by new ways of dealing with constitutional needs in many societies embarked in constitution-making processes. The idea of writing a constitution is not only based on the people's will and the sovereignty of the people but has also become a strategy to resolve conflicts in divided societies, necessary in times of changes. From the second half of the 20th century, different waves of constitution writing took place, especially after WW2 and especially from the middle of the 1980's until now, through what has been called the "third wave of constitutionalism".[2] This is quite well known and I do not want to challenge that or deepen too much these explanations. This remains true for the beginning of the 21st century.

12 I would rather focus on what I do consider as a bundle of indicators for writing a constitution. and start by some reminders to put us in the situation of constitutional drafters and the reasons for making such a choice.

13 If one starts with the reasons classically used to explain why a (new) constitution should be written, there are a number of classical elements related to the substance of the constitution that could obviously be mobilised. The writing of a constitution is first and foremost a means to secure a number of rules and principles that are considered as key elements to be entrenched into the constitution. A constitution is comparable as "A rule of the game" for a given society that everybody has to respect in order to make the social and

political life acceptable. Classical elements such as the separation or sharing of powers, the protection and securing of fundamental rights, a system of government, setting up procedures for establishing relationships between State organs, locally and internationally… all these elements remain but are rather focused on the substance of the constitutional text. In a nutshell this is what the discussions about constitution drafting will be about. Writing a constitution is logically seen as a means to protect the society and the individuals from abuse of powers offering them a peaceful and workable environment for their life. So, these classical reasons remain and should still be considered as part of the answer. But still there are a number of parameters that should be taken into consideration, going beyond these classical elements.

14 As previously mentioned, there is a need to understand what is the rationale behind the decision for embarking into the writing of a constitution. These elements are mainly contextual and subjective ones and will be discussed here after.

15 However, two preliminary issues should be pointed out.

16 The question of writing a constitution should be first defined. What do we mean by "writing a constitution"? Is a constitutional amendment part of "writing a constitution" or should these words only be kept for the complete renewal of a constitution, that is to say the writing of a complete new text? Logically, writing a constitution should be limited to the writing of a brand-new text and not to constitutional amendments. However, such a position can be dangerous as in some cases, amendments of the constitution will completely change the structure of the regime and could be evaluated as putting in place a new constitutional regime (See for instance Indonesia where three sets of constitutional amendments have renewed the Constitution). [3] The same goes with the complete renewal of the constitution as changing words does not mean changing the institutions or their relationships. A new constitution can replicate—using different wording—what existed before… Was the writing in such a case useful and necessary or could it be considered as a faked process and a faked new constitution? Is it a real writing if nothing changes?

17 Another preliminary key point is to clearly know what elements should we consider as being included into the question? Writing a constitution is both a result (the text itself) and a process. What do we consider in such a question? The result or the process? And should the implementation be included into this writing process? A choice should be made and the answers can differ dramatically from one person to another or one situation to another. But what kind of credit do we give to the writing-process and the implementation? Should this be part of the reasons why a constitution should be written? This is an issue on which many different positions could be held and on which practical work in constitutional making processes gives some kinds of direction on what to do and not to do.

18 I would here rather focus on two aspects that the AI left aside for answering this question: What are the background reasons for writing a constitution in a given country? (I) And what are the elements to be taken in consideration when making the decision to write or not to write? (II)

I. Background reasons for writing (or not) a constitution

19 I would like to start mentioning the reasons classically or often used to explain why a new constitution should be written. I would say that under certain circumstances, writing is not an option; in some others cases this can be discussed, at least on how to write and what to write. This is obviously related to the context and what B. Ackerman called "The constitutional moment". [4] Even though, every situation is unique, there are some classifications of situations [5] that we can try to identify to make things clearer.

1.1. War, civil crisis, failed state with defeat of the previous ruler

20 One of the first classical elements lies on a situation of chaos when a major crisis occurred, defeating the previous ruler and where a new constitutional dispensation is needed. This major change overturns the previous regime and the call for a new constitution is often the

logical consequence of the end of the armed conflict or the crisis. There is a need for a new constitution because the old one is associated with the past—reminding times when the rule of law and fundamental rights were not respected. A new constitution is sought because nobody wants the old one to remain in force: there is a general agreement amongst the different branches of the society to change the constitution and to create a new constitutional framework. The need for a change is both psychological and legal. Whatever was the content of the previous constitution, it cannot carry on further. This need for a new constitution takes place in a general movement where the former rulers are sued in courts and usually takes place in a kind of chaotic transition where an agreement on a new constitution does not mean an agreement on its content. However, there is a need for a change and a general consensus occurs on the necessity to design a new framework with new principles. This is what Prof. Etienne Mureinik used to call a "bridge" between the evil past and a new society through a constitution. [6]

21 This situation is usually associated with peace processes, national conferences or other types of specific events often gathering those who will be in charge of writing a new constitutional charter. It usually comes in times of transition. The main specificity of this situation lies in the freedom of constitution-makers to decide upon the type of constitution they want to make. Quite often, peace or political agreements already contain a number of constitutional principles or values that the constitutional making-body will have to implement. So, the discretionary power is not complete even in these cases. One has also to take into consideration that the initial consensus amongst the drafters can quickly turn into tensions between them, leading to the necessity of finding compromises.

1.2. No real loser(s) but everybody agrees on the necessity to set up a new contract for the society (a new constitution)

22 A second type of situation is represented by the same outcome than the previous one but without official losers, meaning that the parties

to the conflict (armed or no armed) have to broker a deal that should be reflected in the constitution. This situation is not linked *per se* to an existing physical crisis, but rather as a deadlocked situation where every party to the negotiations look after a political solution. As every party is still around the table, the need for a new constitution is not questioned but its content and balance can be a source of tensions and negotiations. In such a situation a new constitution is seen as a possible path to way out the crisis without turning the situation into a bloodshed. In other words, there is a need for a "new social contract" acceptable by all the parties, not necessarily the best one but at least an acceptable one: moving from a complete deadlock to a workable situation. [7] A new constitution is seen as a tool allowing for each and every party an acceptable solution. The constitution is the final act that should end the crisis and is seen as a kind of legal agreement sealing a deal. This situation usually goes through several steps including possibly a pre-constitutional agreement, an interim constitution… etc., in short, a number of different steps revealing the DNA of the future constitution and possibly an incremental process of writing.

1.3. Accounts of the past have not (yet) been settled and need a constitutional answer: the existing constitution should be amended or changed

Accounts of the past have received some kinds of solution but have not been enshrined into the constitutional text. This discrepancy between constitutional practice and the text of the constitution leads to a rethinking of the content of the constitution. Some amendments can take place at one stage but there could also be a need to reshape or change the constitution. If a "constitutional moment" occurs, there could be a slot for writing a new text reflecting the existing social contract. In such a case, there could be a sufficient will for writing a new constitution. However, this situation can be tricky as there could be discussions and disagreements over the methodology that should be applied to the process (amendment or complete rewriting). One can see here an example of the controversies applying to the original

question (writing or not writing) as it was the case during the recent constituent processes in Chile in 2022 and 2023.

1.4. Putting existing facts & relations in accordance with texts (transitional arrangements, military regimes, non-written constitution)

24 This situation can call for a constitution writing process in order to entrench into the legal framework what facts have already admitted as "law" and also what can be considered as "customary law" by the whole society (actors and spectators). Here the idea is to write a constitution to make things clearer or to establish a formal framework in order to settle an adapted constitutional design. This situation can arise from different perspectives and does not necessarily result from a kind of agreement between all the parties. There is no compulsory need for a dramatic change but for various contextual reasons there is a window for drafting a new constitution. The conditions are met for the adoption of a new constitution. This was for instance the case for former UK Colonies that drafted a constitution based on the Westminster model during the decolonisation process. Such a constitution is not necessarily revolutionary and can reproduce what already exists in terms of substance.

1.5. For no specific reasons: technical writing

25 Writing a constitution can also be a (rare) choice guided by no external specific reason except for the will of getting a new constitution for the better (or the worst) or to include more (or less) people into the process. This is probably the most challengeable category as such a process is not based on a specific event or a constitutional moment. This situation is rather scarce and risky for the promoters of such an idea. It can for instance happen when the Head of state and other powers want to secure an existing system. Quite often this is a closed process and the outcome does not

necessarily reflect the general will of the society or their aspirations. It can also secure the power of an illiberal or authoritarian regime. Readers will probably have in mind many examples of such situations.

26 As one can imagine, the previous proposed classification bears its own limits. The idea here is rather dedicated at identifying situations when writing a constitution is the result of a mix of reasons leading to choose one of the options that seems acceptable to the parties or to the people. Obviously if one speaks in terms of processes, the need for a new constitution is greater where there is none or when the previous one has become unapplicable or unworkable. In most of the cases, the context and especially chaotic contexts explain the "why writing a constitution?" is a rather common shared idea. It is also generally accepted that constitutional moments will be a major element for such a choice. This does not predefine the type of constitution that will be written because the context is just the starting point to decide what to do and which route will be chosen.

27 It should also be noted that the context itself will shape a number of elements defining the process and the content. For instance, if the process is a multistep one, it will be difficult to avoid pre-constitutional agreements that would have already been brokered before.

II. Elements to be taken in consideration when making the decision of writing or not writing a constitution?

28 Making the choice of writing a constitution or changing the constitutional framework because of contextual reasons is obviously a first step. However, even though there could be a will for changing the constitution, some others reasons should be considered before embarking in such a process. "Think twice" could be the advice! The main question remains despite an agreement on changing the constitution (we write a new constitution because we want it) to determine if this is feasible. This is not just an issue related to technical capacity. Writing a text is a rather easy game as the

exercise of asking students to write a constitution in a short amount of time proves it (the so-called “Google constitution”). However existing constraints that should be assessed before starting the process. There are a number of key elements to be looked at in order to avoid its failure: if too many negative elements are present, the question of writing a new constitution should be carefully thought at.

29 We can try to identify some key elements to be taken into consideration before making the decision of writing.

2.1. The Time Frame

30 Writing a constitution is not a race and the constitution-making body should be given enough time to design a balanced constitution. According to various sources, a constitution-making process (participatory ones) should take not least than 18 months and not more than 4 years. [8] It is difficult to find the ideal timeframe depending of the type of process used but this element should be carefully considered. It means that a too short allocated time to this process cannot lead to a reasonable and workable draft and creates a strong risk to fail the whole process. Sometimes it is even intentional, meaning that unrealistic deadlines will lead to stop the process or even if a text is adopted, a quite high risk of inapplicability. By the same token, if the process appears highly conflictual and faces high controversies, the time constraint will lead to accelerate the failure of the writing process. In a nutshell, the time frame should be an indicator of feasibility of the process and if it appears impossible or leads to a faked result, serious doubts can arise about the process itself and the outcome of the constitution drafting. In such conditions, an interim process should be preferred, leading to reconsider the constitution writing process at another time.

2.2. The pre-existing obligation to write a constitution in accordance with previous agreements

31 Another key element of the process of writing a constitution rests on the overall process of transition in which it takes place. If the choice of writing a new constitution is a political (sometimes legal)

commitment and derives from a larger process, then it becomes difficult to avoid such a decision. This is even more complicated when the process is split into different phases and when the parties strongly disagree between themselves. However, if the decision of writing has already been made by other parties than those sitting in constitution-making bodies (or assemblies), the process largely becomes driven from outside: the writing of the constitution is not made with free hands and becomes a quite complicated business (especially when the political agreement entails contradictory requirements).

32 Here it should be noted that the process of writing through pre-constitutional agreements between the parties can lead to a constitution-making body that does not involve at all the people—at least at the beginning in a number of cases—(reviving the myth of the "Sovereign People"). Writing a constitution in this case means resolving a deadlock or a crisis rather than writing a charter for the future of a given country.

2.3. The nature of the process: what is possible and what is not possible? Design, Openness, participation

33 The nature of the process is probably one of the most complicated key elements to analyse before answering to the cornerstone question "why?". Rather than the result—the constitutional text—the nature of the process will determine the trust that people grant to the drafting of the constitution. Then several elements—to be developed further during this conference through the analysis of the Chilean case—will have to be weighted in order to understand if such a process has a reasonable chance to succeed. In other words, the analysis of the nature of the process will allow for evaluating the chances of success of the constitutional process and of the constitution.

34 The design itself, with questions such as the choice of the responsible body for drafting the text (expert body, constitutional assembly), the role of commissions, of the Chair of the process… What we can identify as the "constitutional engineering" is to be

carefully evaluated. The whole process can fell down due to the lack of attention to these aspects, even though caution is exercised.

35 The openness of the process is also key as many constituent processes have a tendency to reduce their original openness to favour efficiency (even though in an abstract manner the two of them do not conflict). A constitution-making process has to find a way to include this aspect of opening the process to those who are not part of it. In other words, a constitution-making process has not only to be achieved but has to be seen and understood to be achieved.

36 Participation is also a key element—without participation there is no possible ownership and without ownership there is no constitution—just may be a constitutional text. This aspect is also to be carefully looked at as it is not just voting through a referendum that could constitute a participatory process but the true understanding of what is going on.

37 These elements are central to reply to the question and should be more developed.

2.4. The involvement of the international community

38 This is also a key element to reply to the question "why writing?". The international community can have both positive and negative effects. In terms of feeding the process, the inputs of the international community can help to find new ideas, to avoid mistakes, to open new options, to offer an external eye on issues related to the challenge of writing a constitution. But the involvement of the international community can also have negative effects by imposing some solutions from outside.

39 However, the issue needs to pay attention to the nature of the international intervention as writing a constitution in times of crisis can be a choice to resolve the crisis or the conflict but not necessarily to set up a new political regime that will last for decades. The constitution is then rather dedicated to prevent the return of the past than preparing the future. In deeply divided societies, the constitution-making process can be helped through the implication of the international community provided that the final decision

should always be the one of those to whom the constitution will apply. In a number of cases, the constitution has more modest ambition and is needed to stop a crisis rather than setting up a new constitutional dispensation for the future. However there is absolutely no guarantee of success. In a number of cases, the involvement of the international community has been rejected, seen as an intrusion into a purely domestic process.

2.5. The implementation: The day after

40 Even though the choice of drafting a constitution is focused on an apparently abstract situation (the future that is not yet known), the drafting process cannot ignore the impact of the constitution on daily lives of the population. There is a need to think in operational terms and beyond the drafting of the text, that is to say during the implementation phase of the constitution. This means that unworkable solution or too complicated processes should be avoided in order to avoid impossible implementation of the provisions of the new constitution.

41 So, the ultimate question here is not only “what to change?” but “will the constitution really change the existing situation and bring some solutions to previous problems?”. If the answer is no, it is better to avoid solutions that will create more problems than resolve the existing ones. The implementation phase should always be included at the beginning of the drafting process and not left aside for those who will have to work with the new constitutional text. This should also include aspects and mechanisms to resolve the deadlocks.

As Some Kinds of Final Thoughts: The changes to be brought (the rationale behind the choice of writing a constitution)

42 The writing process of a constitution cannot be simply summed up in a couple of principles and sentences. So many elements and options are left open that giving lessons or directions to those who are in

charge to decide if they want a new constitutional dispensation or not is probably risky or hazardous. The choice of writing a constitution is sometimes an obligation deriving from the past, sometimes a restatement for a community to assert that they are still a Nation or want to be more inclusive. Writing or not a constitution should not just be a game played by academics with no consequence. Writing a constitution can be an act of faith that people want for changing their environment, to take into consideration the evolution of the society, to be part of a larger community. It can also be a means to impose more constraints and to worsen the situation? At the end of the day, the answer to the question "why" should maybe found in other questions such as "what to do for?".

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RÉSUMÉS

Français
Cet article interroge la pertinence de la rédaction d'une constitution au XXIe siècle en mettant en lumière la diversité des contextes dans lesquels une telle démarche peut s'inscrire. L'auteur montre que la décision d'écrire une constitution ne saurait être appréhendée à travers une grille universelle, mais doit être analysée à l'aune des réalités historiques, politiques et sociales propres à chaque État. Au-delà de sa fonction normative, la constitution apparaît comme un instrument de transition, de légitimation et de refondation du contrat social, notamment en période de crise, de sortie de conflit ou de transformation démocratique. Le texte insiste également sur les conditions de faisabilité et de succès du processus constituant, telles que le temps, la participation, l'ouverture, la légitimité institutionnelle et les modalités de mise en œuvre. Il conclut que la question fondamentale n'est pas seulement celle de l'opportunité d'écrire une constitution, mais surtout celle des finalités poursuivies par ce choix.

English
This paper examines the relevance of constitution-making in the twenty-first century by highlighting the diversity of contexts in which such a process may arise. The author argues that the decision to draft a constitution cannot be approached through a universal framework, but must instead be assessed in light of the historical, political, and social realities specific to each state. Beyond its normative function, the constitution is presented as an instrument of transition, legitimisation, and redefinition of the social contract, particularly in times of crisis, post-conflict settlement, or democratic transformation. The text also emphasises the conditions necessary for the feasibility and success of constitution-making, including time, participation, openness, institutional legitimacy, and implementation mechanisms. It concludes that the central issue is not merely whether a constitution should be written, but rather the objectives and transformations such a process is intended to achieve.

INDEX

Mots-clés
droit constitutionnel, processus constituant, transition démocratique, légitimité, contrat social, sortie de crise, participation, État de droit

Keywords
constitutional law, constitution-making, democratic transition, legitimacy, social contract, post-conflict transition, participation, rule of law

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