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BACKGROUND PAPER

To seal the deal: mechanisms for the
validation of political settlements

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The Centre for Humanitarian Dialogue (HD) is a private diplomacy organisation founded on the principles of humanity, impartiality and independence. Its mission is to help prevent, mitigate, and resolve armed conflict through dialogue and mediation.

Co-hosted by the Norwegian Ministry of Foreign Affairs and HD, the Oslo Forum, is a discreet and informal annual retreat which convenes conflict mediators, peacemakers, high-level decision-makers and key peace process actors.

The following Background paper was especially prepared for the Oslo Forum 2017 and reflects events until mid-May 2017. It was intended to provide a background to guide and inform discussions at the Oslo Forum, and does not represent the positions of the Royal Norwegian Ministry of Foreign Affairs or the Centre for Humanitarian Dialogue.

To seal the deal: mechanisms for the validation of political settlements

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“I will not give up”, said President Juan Manuel Santos, after learning that the Colombian public had rejected a peace deal negotiated with the FARC rebel group, “I will continue seeking peace until the last day of my presidency.”¹ The deal, narrowly rejected in a popular referendum, was the product of over four years of negotiation, and sought to end an armed conflict which had raged for more than half a century and killed more than 220,000 people.

After sending his team back to Havana to renegotiate the deal, President Santos made the controversial decision not to submit the revised agreement to a referendum. Instead, on 30 November 2016, he had the deal ratified by Congress, where he enjoyed a comfortable majority. The legitimacy of this move was immediately challenged by his political opponents. Although his decision was upheld by Colombia’s Constitutional Court on 13 December, the deal’s implementation remains in question, given that much will need to be done after Santos’ term in office ends in May 2018.

The rejection of the Colombian peace agreement was the latest example of a question increasingly posed by democratic leaders: how should political settlements be validated? Democratic leaders often seem to feel obliged to submit any major political settlement to a popular vote, while populations (often under the influence of self-interested politicians) are not always prone to accept the bargain. Peacemaking, traditionally an elite art, may sit uneasily with democratic values such as transparency, popular participation, and representation through elections.

While autocratic regimes can try to implement political settlements by writ, leaders from democracies are responsive to popular opinion, and must hedge against the chances of the deal being overturned by subsequent governments. This usually necessitates some form of validation within the democratic framework, such as a referendum or parliamentary approval.

But the desire to have a political settlement validated needs to be balanced against the risks of jeopardising the settlement itself. The Colombian referendum shows the risks involved in suddenly asking the population for their views on a process they were only tangentially involved in.

This paper will examine the main ways democratic governments can validate settlements within the democratic framework, without risking or undermining the settlement itself. It recommends that democratic governments wishing to engage in negotiations should:

- seek a broad mandate for negotiating the political settlement (through an election or a mandate referendum);
- seek parliamentary validation of the political settlement once it is reached; and
- have courts judge if the eventual settlement, and the process to reach it, met the terms of the mandate.

In addition, this paper will look at the problems and benefits associated with these methods of validation, and the risks that pursuing any one of them alone (such as a referendum) can entail. It will argue that a careful combination of these methods can provide the deal with legitimacy, without jeopardising it.

The authors will focus on the validation of political settlements, a question which is linked but distinct from the broader issue of public participation in peace processes, on which much has been written.² The decision to involve populations or not in the negotiation of political settlements does not preclude or replace the need to validate the political settlement through some democratic mechanism.

How do democracies validate peace deals?

Referenda

Ex post referenda and popular opinion

A referendum is the most direct way to seek democratic legitimation for a political settlement, and a positive popular vote may be a strong indicator of the sustainability of a deal. Deals which have passed a popular referendum are more difficult for subsequent governments to reverse, and may therefore be more effectively implemented. The referenda in South Africa in 1992 and Northern Ireland in 1998 enhanced two of the most successful peace processes of modern times.³

However, as we have seen with the case of Colombia, the principal risk of subjecting a hard-won compromise to a popular vote is that the population may vote against it, throwing the process into disarray. For every positive story of a referendum bolstering the legitimacy of a deal, such as South Africa and Northern Ireland, there is a cautionary tale, as in Cyprus in 2004 and Colombia in 2016.

One of the principal challenges of holding a referendum on a political settlement is the complexity such deals often entail. The so-called Annan Plan, which sought a comprehensive settlement to the Cyprus conflict, reached 184 pages; the deal put to the Colombian people in October 2016 came in just short of 300 pages. The complexity and sheer length of these deals meant that few people asked to vote on the deal were likely to have read the whole text and grasp the complex trade-offs made therein.

This means that such referenda are open to political manipulation, and public information campaigns around referenda at best over-simplify complex solutions and, at worst, consist of lies and urban myths. The facile claim that an agreement gives impunity to murderers and criminals is almost universal in all public campaigns against peace deals, but other claims are more context-specific. In Colombia, for example, opponents of the agreement suggested that the deal would mean the abolition of private property.⁴ Similarly, in Cyprus, one journalist claimed that locals were told by supporters of the Plan that, if compelled to relocate, they would be resettled in luxurious villas by the government.⁵

In cases where the referendum is put to supporters of all sides, such as in Cyprus, campaigns in support of the deal risk undermining each other. As Neophytos Loizides says, “sides aim exclusively at their own constituencies, often successfully framing their own gains from the negotiations while weakening the position of moderates across the [. . .] divide.”⁶ Trying to get support from your own constituency by arguing that you got a good deal risks making the other side feel that they got a bad deal and therefore reducing their support. This observation implies that a coordinated approach to informing the public about the deal is preferable to each side communicating with the public independently.

Public communication and engagement is often neglected in peace processes. This should also be the subject of serious discussion, and even negotiation, at the latter stages of any process, particularly if public support is sought for the deal. If it is decided that a referendum is necessary, a strong public information campaign, coordinated with all parties to the conflict, should be organised. This need for greater public engagement should be considered as part of the process; the politicised and perfunctory campaigns typically organised around these referenda are woefully inadequate.

One argument in favour of subjecting political settlements to referenda is that awareness that a deal will be subject to public scrutiny may act as a natural brake on the most egregious tendencies of negotiators.

The latter would not dare provide impunity for human rights abuses or try to divide the spoils between themselves with the knowledge that they will need to sell this deal to the electorate.

However, political settlements invariably involve compromise, which may be distasteful to the population at large. For example, the campaign against the Colombian deal was led by former President Alvaro Uribe, whose military strategy (with Santos as his Minister of National Defense) had severely squeezed the FARC and inflicted heavy losses on the rebel group. Uribe insisted that he was not against peace but felt the deal granted impunity to the rebels for violence and crimes; he also suggested the deal was unconstitutional and undermined democratic institutions. Arguments against political settlements typically follow this pattern: the detractor insists they are not against peace, but that a better deal, which respects the imperatives of justice and democracy, can be reached. Whether this is true, or worth waiting for, is often highly contentious.

Ironically, in Colombia, it was those less affected by the ongoing conflict who opposed the deal, rather than the immediate victims of violence. Peripheral rural areas, where much of the fighting took place, voted predominantly to approve the deal, while many urban centres opposed it. This suggests, perhaps, that the lack of an immediate, practical concern about the cessation of conflict created space for emotional arguments about democracy and justice to win out.⁷ The 2005 Algerian referendum on the Charter for Peace and National Reconciliation, although roundly condemned by human rights groups for offering a blanket amnesty for crimes committed by both sides, easily received popular approval from a population tired of protracted conflict.⁸ This demonstrates that populations deeply affected by conflict may be willing to support any agreement which promises to end the fighting.

Mandate referenda and ex ante popular approval

One alternative to seeking validation of a political settlement after it has been agreed is to obtain a mandate for negotiating the agreement. A simple way to do this is through an election, where the government runs on a clear mandate to seek peace and outlines what the terms of such a settlement may look like. The election thus acts as a form of referendum on the mandate. The election of Ranil Wickremesinghe in 2001 in Sri Lanka is a good example: Wickremesinghe ran on an explicit peace agenda.⁹ An election at any point of the process acts as a *de facto* reassertion of the mandate of the government to continue its efforts.

Another way is through a so-called mandate referendum, where the population votes in favour of seeking a political settlement. In the South African referendum, white South Africans were asked “Do you support continuation of the reform process which the State President began on 2 February 1990 and which is aimed at a new Constitution through negotiation?” The white electorate were not being asked to approve the final form of the deal, but to agree to the continuation of the negotiation process. In the final tally, 69% of voters approved continued negotiations.

The risk of having a referendum to establish a mandate is that it may weaken the government’s negotiating position, since the other parties to the conflict are aware that the government is under pressure to deliver a deal and has publically outlined its negotiating position.

In imperfect democracies or countries undergoing political transitions, mandate referenda (and *ex post* parliamentary approval) may be impossible or considered illegitimate. In such cases, *ex post* referenda may bolster the deal’s democratic legitimacy. The Yemeni case offers an interesting example of how to do this without jeopardising the political settlement. Following mass protests in 2011, the Gulf Cooperation Council (GCC) mediated a power-sharing agreement between the regime and the political parliamentary opposition. As part of the agreement, the opposition agreed not to field a candidate for the Presidential elections. Abdrabbuh Mansur Hadi, the Vice President of ousted President Saleh, stood uncontested in the election held on 21 February 2012. In what was, *de facto*, a referendum on the political settlement (without the potential destabilising consequences of a “no” vote), 65% of the Yemeni electorate voted for Hadi (and, therefore, in favour of a political settlement) in this bizarre one-man election.

Constitutional referenda

It may be possible to afford voters the chance to express their views on part of the political settlement, while denying them the right to overturn the process as a whole. This type of approach may be advisable where a political settlement is designed both to end the conflict (through a ceasefire, for example) and enact constitutional changes. The public could (and, perhaps, should) be given a vote on the revised constitution, but not on the agreement to end the conflict itself. The chances of such a referendum succeeding may be increased by adopting a staged approach. This may be done by adopting a ceasefire, then launching a constitutional reform process (with strong public participation) and holding a referendum on the revised constitution at a later date. In Burundi, for example, the Arusha Peace and Reconciliation Agreement of 2000 was not subject to a referendum, but the outcome of the constitutional reform process initiated by this agreement was subject to a referendum, and received popular approval in 2005.

The added advantage of this staged approach is that it provides an interim period in which peace can be consolidated (through disarmament, political integration of former insurgent groups, etc.), thereby reducing the likelihood that even a vote against the constitutional amendments proposed by the armed group would result in a return to conflict.

In imperfect democracies or where the political settlement has long-lasting and wide-ranging consequences, a referendum may be needed. However, they should only be undertaken following a robust and coordinated public information campaign.

Parliamentary approval

Cooperative legislatures

Gaining parliamentary approval for peace deals involves many of the same problems as holding referenda on them. In democracies, parliamentarians are often hyper-responsive to public opinion and reluctant to back any deal which would be badly perceived by their constituents. Those in parliamentary opposition, in particular, may want to capitalise on the perceived weakness of the government for political gain.

Negotiating political settlements, although admirable, is rarely a vote winner. Several leaders have negotiated political settlements only to lose their jobs at the next election. For example, Prime Minister José Luis Rodríguez Zapatero of Spain was forced to resign in 2011 over the poor economic situation in Spain, despite the recent success of his long-running negotiations with ETA.¹⁰ Economics clearly trumped peace in the minds of voters.

However, at least in parliamentary systems, governments usually have parliamentary majorities: in such cases, obtaining formal approval for their initiative in parliament is easier and more certain than winning a popular referendum.

Engaging the political opposition in the negotiations may improve the chances that they will accept a proposed solution, give them an option to claim part of the glory for the success of a process, and may reduce any incentive for them to torpedo the agreement (as they do not have plausible deniability of the direction of the talks). For example, in the UK, the leader of the opposition is regularly briefed by the government on important policy issues and matters of national security.¹¹ During the Northern Ireland negotiations, the political leadership in London was sufficiently unified on the issues that the opposition party openly supported the government's efforts, even when they did not agree with the government's approach.¹² To demonstrate that broad political consensus greatly facilitates the process of making peace, Jonathan Powell, the lead mediator of the Northern Ireland process, contrasts the relative bipartisanship found in the UK during the negotiations to end the conflict in Northern Ireland with the situation in Spain, where the People's Party repeatedly attacked the Zapatero Government on its negotiations with ETA.¹³

Of course, briefing the opposition may lead to dangerous leaks, as it did in the Spanish case where the opposition tried to use its knowledge to expose the talks by asking pointed questions in parliament. However, despite the risks of exposing a fragile process, if the parliamentary opposition is totally excluded it may have more incentive to spoil the result.

Courtney Jung argues that democratic negotiators' need to retain the support of their constituencies strengthens their hand at the negotiating table.¹⁴ A natural corollary of this argument is that the partial inclusion of the parliamentary opposition in the talks provides the government negotiator with another argument to gain additional concessions from the armed group. Government and parliamentary opposition may be able to play 'good cop/bad cop' throughout the negotiations to strengthen their bargaining position.

Uncooperative legislatures

Where the government doesn't control a majority in parliament, or where parliament is one (perhaps minor) player in a broader field, parliamentary approval can be difficult to secure. Presidential systems, in particular, create situations where parliaments can often be at odds with the position of the executive. The US is the principal example of this, and famously suffers from difficulties in getting international treaties and agreements, negotiated by the President, ratified by Congress.¹⁵ In such cases, involving parliamentarians in the talks may mitigate the risk of a deal negotiated by the government being overturned by the legislature. The degree of involvement will vary from case-to-case.

Where the legislature consistently blocks efforts to end a conflict, a government may decide to take the risk of putting the settlement to a popular vote. In the Republika Srpska in 1993, for example, President Karadžić decided to put the Vance-Owen Peace Plan to a public referendum after being blocked by the National Assembly. The referendum failed and ultimately the Dayton Accords, which represented the solution to the conflict, were never subjected to popular approval of any kind.

Libya provides another example where the approval of the House of Representatives for the 2015 Libyan Political Agreement and the ensuing Government of National Accord has been withheld, thereby undermining the legitimacy of the agreement. However, the House of Representatives is only one (arguably marginal) actor in a complex civil war, attempting to leverage the need for parliamentary approval to advance its position. In such cases, where parliament is acting as a spoiler to a deal, a popular referendum may provide a better chance of receiving democratic legitimation for a deal than a vote in parliament.

Tunisia provides a useful counter-example, where consideration of the likelihood of a deal receiving parliamentary approval was built into the 2013 National Dialogue process. All parties represented in the National Constituent Assembly were represented equally in the National Dialogue process. This meant that, when an agreement on the composition of a technocratic government was reached in the National Dialogue process, it was quickly able to receive a vote of confidence in the National Constituent Assembly.¹⁶ This decision, not to attempt to circumvent parliament in favour of an elite deal between political power-brokers, represents one of the rare situations in which a political settlement can be credited with clearly reinforcing democratic institutions rather than undermining them.

In parliamentary democracies in particular, it may be advisable for governments to seek approval for any deal in parliament, rather than through a popular referendum.

Judicial approval

The judiciary will often be required to rule on the legality of any political settlement reached, though rarely is such a ruling enough to provide the deal with the legitimacy a democratic government would desire. A government which has just concluded a peace agreement would take little reassurance from the news

that courts had decided that their agreement was 'within the law'. However, in a democratic system, judicial approval provides a negative form of validation, guarding against the potential excesses of negotiators. It is necessary, but not sufficient.

Commonly, judicial approval is required when, in order to end some form of civil war, the government has made legal concessions to the rebel party (perhaps involving amnesty for certain individuals, or increased autonomy for the concerned community).

Judges may rule that the negotiators have promised things that are not in their powers, or go beyond the law. In 2008, the Supreme Court of the Philippines blocked the signing of a 'Memorandum of Agreement on Ancestral Domain' between the Government and the Moro Islamic Liberation Front (MILF).¹⁷ The Memorandum concluded between the sides would have stopped the MILF insurgency in return for the government laying out a framework for recognising Moro land claims. The court ruled that the agreement was unconstitutional, as it could lead to the eventual independence of the region.¹⁸ Fighting broke out again weeks later, leading to the displacement of hundreds of thousands of civilians.¹⁹

Similarly, the Supreme Court in Sri Lanka blocked an agreement on humanitarian aid in the wake of the Indian Ocean tsunami in 2005. The Sri Lankan Government and the Liberation Tigers of Tamil Eelam (the LTTE) had reached an agreement to ensure that donor aid could be sent to regions under the control of the LTTE. The agreement was the first time during the peace process that both sides had shown such flexibility during negotiations, and had the potential to be a confidence-building step towards a broader political settlement. However, the court ruled that the proposed location of the Post-Tsunami Operational Management Structure (P-TOMS) and fund for donor contributions were illegal, as it violated laws on providing material support to a terrorist group. The effect of the decision was that the P-TOMS was scrapped, leading to allegations that sufficient aid was not reaching the Tamil areas, undermining the peace process, and arguably prolonging the conflict.²⁰

Examples such as these have made negotiators more wary of how courts might rule on their agreements. In the Philippines, the two sides have worked on developing a law that would withstand judicial review (the Bangsamoro Basic Law – BBL) to create the autonomous region. The government has also included a former judge in the 'President's Peace Council' to review the agreement, and advise on how it should be adapted to ensure its constitutionality.

Another interesting example of how courts can play a proactive role in guiding political settlements can be seen in the debate over Quebec's independence. In an unusual step, in 1998 the Supreme Court in Canada ruled that a referendum on Quebec's independence would not be legally valid, only three years after such a referendum had failed. The decision instead made it clear that if a clear majority of people in Quebec wanted to secede, they would have to negotiate a constitutional amendment with the rest of Canada. While this is not a ruling on a peace process, it does provide an example of how courts can preempt and guide a process of political settlement. The issue of Quebec's status is as delicate as other secession claims around the world, but has been managed in a non-violent manner, partly as a result of the democratic mechanisms put in place to address the grievances of the populations concerned. By clarifying the legal issues early on, the courts have hopefully avoided a scenario where negotiations over Quebec could lead to a referendum on a settlement which was later ruled illegal.

When deployed carefully, judicial approval can reinforce the legitimacy of an existing process. Judges could be called on, for example, to say whether the political settlement reached obeyed the terms of a mandate referendum. In Colombia, the courts ruled at several stages of the peace process, approving both the initial referendum and the eventual parliamentary validation of the peace deal. Although not sufficient to bestow the sort of legitimacy which leaders in democratic systems invariably feel they require, the judiciary can play an important role by overseeing the process. As in Colombia, judicial oversight can be used to provide assurance that the process is following the law, and negotiators are not making promises beyond their powers.

Conclusion

Democracies increasingly recognise that they must make efforts to overcome the legitimacy deficit created when small groups negotiate political settlements on behalf of broader populations. However, gaining this validation can be risky, as the recent Colombian example shows. The sort of validation chosen can spell the difference between a successful settlement and years of work down the drain.

This paper suggests that a political settlement can be validated in a way that improves the legitimacy of the deal. To the greatest extent possible, multiple mechanisms should be involved in the validation of a political settlement made by a democratic state: the government could receive a popular mandate to negotiate, either through a referendum or an election; parliament could have some oversight over the process and approve the final deal; and (along with the judiciary) could act as a check to ensure that the negotiators obeyed the terms of the mandate.

By contrast, only in very limited cases should an ex post referendum on a peace deal be held in mature democracies. As the political theorist and philosopher Edmund Burke argues, “Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion.”²¹ The nature of representative democracy means that representatives are elected to master the details of complex political settlements, and make the difficult decisions and compromises such deals entail.

Referenda may be used more productively to validate constitutional changes made after a constitutional reform process (perhaps following a peace deal), when the heat of the conflict has died down to some extent and the dividends of peace are felt by the population.

Furthermore, the various examples in this paper have all, in one way or another, highlighted the need for democratic governments to be as inclusive and transparent as possible throughout the process. Transparency is generally limited during negotiations, and for good reasons. But some measures can be taken to ensure that the public, the parliament and the courts feel that they are involved in the process, and well informed about why the deal is being made. For example:

- Prior to elections, governments should make their intention to enter into negotiations for a political settlement clear and, therefore, through the elections, receive a strong mandate for conducting such negotiations.
- Before a final deal is announced, robust public information and civic outreach should be used to explain to the public the challenges of the process and the concessions made; perfunctory campaigns prior to a referendum on the deal are not sufficient.
- To the extent possible, when a political settlement requires long-lasting and wide-ranging changes to the fundamental structure of the state, this aspect should be separated from discussions to end the fighting, and public participation in any constitutional reform process should be encouraged (including, perhaps, through a referendum).
- The parliamentary opposition (or the legislative branch in presidential systems) should be engaged in some way during the negotiations in order to both discourage it from spoiling the deal and to provide the negotiators with a useful tool for leveraging a better deal. The degree of engagement will vary on a case-to-case basis, depending on the politics of the deal.
- Negotiators should read the deal with the existing legal and constitutional framework in mind to offset the risk of the judiciary overturning the hard-won agreement; necessary changes to the legal framework should be foreseen and made before the deal is scheduled to come into effect.

Negotiating political settlements remains an elite process. It requires expertise, time and dedication which cannot be expected of an entire population. This paper has suggested ways in which the process can be opened up in order to ensure the legitimacy of the settlement and gain popular validation for it – which will also enhance the sustainability of the deal. Yet these should support the work of small groups of negotiators, rather than undermining their efforts.

Endnotes

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