Constitutional review in peace processes

Securing local ownership
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This section of Accord 25 deals with the relevance of constitutional review to building sustainable peace. For this purpose, constitutional review may involve either changes to an existing constitution or making a completely new constitution. Major changes can be understood as renegotiation of the “social contract” between the state and society as a basis for peaceful governance.

Constitutional review often occurs in association with a peace process. Ideally the two will reinforce each other, although in practice this is not necessarily the case. While both a peace process and constitutional review can refer to participation, representation and performance as elements of their legitimacy, the conditions that satisfy these elements may differ between the two. In the imperfect situations of fluid transitions, however, mishandled constitutional review can detract from the achievements of a peace process and vice versa.

This section of Accord 25 aims to enhance understanding of how constitutional review works in the context of peace processes so as to ensure that the relationship between them is as productive as possible. To that end, it draws attention to some of the key pitfalls of constitutional review and identifies ways to enhance best practice.

There are many current examples of constitutional review processes that are associated, in one way or another, with peace processes. Some are discussed in other sections of this Accord, notably in relation to national dialogue in Burma and Yemen. This section draws on three cases in particular: Fiji, Nepal and Somalia. In all three, constitutional review is underway at the time of writing in late 2013, although in Fiji it is almost over, at least for the moment. All three cases also follow a period of significant internal conflict. Otherwise, however, the cases differ: in the nature of the conflict; in the context for constitutional review; in the problems that have arisen in the course of the constitutional process; and in the prospects for sustainable peace. They thus provide a range of diverse experiences from which to draw analysis.

Constitutional review in peace processes

It is no surprise that constitutional review often accompanies peace processes. A constitution may be seen as the means to protect some of the foundations on which peace is agreed, both in the short term and over time. In some cases, constitutional change may be a component of a peace agreement itself, especially if the agreement has a double identity as a founding constitutional instrument. The Interim Constitution of South Africa is a classic example.

Even where constitutional review is not a formal condition of peace, in many post-conflict states there is no existing, appropriate framework for government, and constitutional review is needed in order to provide one. In such cases, both the substance of the new or amended constitution and the process through which it is made can assist to build and maintain trust, engendering a sense of commitment to a shared state.

If the conditions are right, a process of constitutional revision can give both elites and the people understanding and ownership of a new system of government, maximising
chances that disagreement can be managed through politics and that peace can be sustained.

Legitimacy is important for constitutions too. This follows from their role as fundamental law with which other laws and all public action are expected to comply, and which in turn is justified by sourcing the authority for constitutions to the people.

Superficially at least some of the key conditions on which constitutional legitimacy is based are shared with peace processes. Best practice constitution making requires wide public participation and fair representation of all relevant views. The manner in which representation and participation are ensured is one of the principal challenges for any constitution-building process. The performance of a constitution also is a critical factor in sustaining its legitimacy – understood to require the delivery of effective government over time, in ways that are accepted by the people at large.

Both peace processes and constitutional revision thus depend on local context and reaction and can be undermined by external involvement unless it is sensitive, appropriate and informed. The many problems that follow from self-interested or ill-judged international involvement include promotion of the authority of the “wrong” local actors, inappropriate (often meaning rushed) timetables for constitutional revision processes, including elections, that do not fit with the circumstances on the ground, and substantive decisions that do not work or are not locally owned, leading to failure in implementation and compliance.

There is no complete symmetry between the factors that sustain peace processes and constitutional revision, however. Legal legitimacy plays a role in constitutional processes, requiring compliance with provisions for amendment in the existing constitution, or the adoption of a process that is accepted locally as a basis on which a new constitution can be made. Increasingly, constitutional revision culminates in a direct vote, in the form of a referendum, which on the face of it enhances legitimacy, but can fall short in many ways.

A defective constitution-making process is not necessarily fatal over time if the constitution lasts and proves to deliver stable, effective, peaceful and inclusive government. There is now considerable experience with the phenomenon of transitional constitutionalism, in which a flawed constitution made by a flawed process acquires acceptance over time through amendment and effective performance.

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There can be tension between peacebuilding and constitutional revision in some circumstances. The imperatives of peacebuilding may engage stakeholders who are not suitable for leadership under a civilian constitution. This is not to deny the importance of the transformation of coercive actors in the transition from conflict, but to point to the potential pitfalls of encouraging players to take roles in constitutional government to which they may be unsuited.

Similarly, peace processes may involve agreements on principles or practices that are not appropriate in a new or amended constitution, at least in the longer term. Concessions to the military or immunity for wrongdoers are obvious examples, which sometimes can be mitigated through time limits or workable procedures for constitutional change.

Difficulties can also arise from premature agreement on more mainstream constitutional arrangements (including, for example, forms of federalism or autonomy) for which there is no adequate capacity or which entrench divisions that caused the conflict in the first place. Conversely, constitution building can inadvertently undermine a fragile peace, including by moving to normalise politics too early or by taking steps that erode trust.

Case studies: Nepal, Fiji and Somalia

The interdependence of peace and constitutional review processes, together with many of the difficulties that arise, are illustrated by the cases of Nepal, Fiji and Somalia. All three cases involve intra-state conflict to which constitutional revision is seen as part of the solution. While the nature of the conflict is different, in all three conflicts the process of constitutional revision has raised acute problems about inclusion that are relevant to sustainable peace. There has also been substantial international involvement in all three cases, not only in geopolitical pressures placed on the states concerned, but also in the design and operation of the constitutional revision processes themselves.
So far the process of constitutional revision followed in each of these states has been flawed, raising concerns about legitimacy and the potential implications for peace. But each case shows progress, too, providing grounds for measured optimism about the future – depending on how things are handled.

In Nepal, the first Constituent Assembly failed to produce a constitution, leading to widespread disillusionment and the installation of an interim government by questionable legal means. On the other hand, the militia have been absorbed into the institutions of the state and the conflict parties are pursuing their goals through a continuation of the constitutional revision process rather than through further armed conflict.

An election was held for a new Constituent Assembly in November 2013, from which a constitution will be expected to emerge with at least broad majority support. If this occurs, the process is likely to be seen to have been broadly inclusive, however unusual, moving the focus of attention to the implementation phase. This will be challenging if, as seems likely, the constitution makes provision for both federalism and semi-presidentialism, each of which is completely new to Nepal.

The reasons for the failure of the first Constituent Assembly are complex, making lessons difficult to draw – apart from a somewhat negative conclusion that an apparently inclusive process will not deliver results if the real bases of power do not engage with it. If nothing else, however, the Nepali example illustrates the point that initial failure of a process is not necessarily fatal, either to constitutional revision or to peace.

In Fiji, a new constitution was made by military decree in September 2013 and the government asserted it would be final by the end of the year. The process was seriously flawed and continues to be contested, but evaluation of the outcome is more complex. The new constitution provides permanent immunity for the coup leaders and will be difficult, if not impossible, to amend in the future. And it is weak in its express protection of civil and political rights.

On the other hand, it is (almost) racially neutral in its application for the first time in modern Fijian history, thus striking at the source of the original conflict. At this point, the political elite, civil society and the people of Fiji face a difficult choice between adopting strategies to make the best of this constitution during the implementation phase or rejecting its legitimacy altogether.

It therefore remains to be seen whether the new constitution of Fiji can initiate a process of transitional constitutionalism, providing a more satisfactory framework for government over time for a stable, non-discriminatory Fiji, or whether the degree of mistrust engendered by the constitution-making process and its outcome are too great. The case of Fiji illustrates the challenges of constitutional revision while military rule is ongoing, suggesting the need for more nuanced procedures that take realistic account of the circumstances on the ground and accept the possibility of phased transition.

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In Somalia, a new provisional constitution in 2012 makes elaborate provision for the adoption of a final constitution at the end of the current parliament. Already, however, the process to date has been complex, multi-staged, opaque and protracted. It can be criticised on a variety of fronts: the degree of external involvement; the self-interest of political actors; the marginalisation of minorities; and continuing division over institutional arrangements, including the form of federalism.

But there are also signs of incremental progress. A president has been elected in accordance with the terms of the constitution and the task of constitutional revision has required negotiation between the clans. There are lessons to be learnt from the case of Somalia about the limited effectiveness of external actors in devising and imposing workable constitutional institutions and processes. Nevertheless, while much remains to be done to consolidate peace in Somalia there is now a constitutional platform on which local capacity can be built to develop local solutions that fit the local context.

Constitutional best practice

Constitutional revision is one tool that peacebuilders can usefully use. As peace is consolidated, a constitution will be necessary in any event and can help to sustain peace in the longer term. But there are pitfalls in linking peace processes and constitutional revision that must be avoided if both are to be effective.

The exigencies of peace processes can entrench the position of actors or principles that work against peaceful,
constitutional co-existence in the longer term. Where a peace process is assisted by external actors, there is a danger that the constitution itself will be perceived as externally imposed. The gradual transition to a final constitutional settlement may take longer than anticipated when the peace accord was negotiated.

Some obvious prescriptions can assist to avoid these pitfalls. Peacebuilders and constitutional experts should work together closely enough to be aware of each other’s perspectives. Both need to give priority to local knowledge and context. It follows that international assistance should be selective and carefully considered, devised in consultation with appropriate local interests that also are chosen with care.

Constitutional revision may require novel processes and solutions not in existence elsewhere to fit the circumstances of a given community. Above all, patience is necessary and rushed processes can be counter-productive. Elections and other key decisions should be determined by conditions on the ground and may take time. Outcomes are rarely perfect, from either a local or external perspective. Implementation is as important as initial agreement and design and is likely to require attention for years. An imperfect constitution may prove with hindsight to be part of a longer transitional process.

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