

Sealing a Colombian peace deal: challenges of citizen ratification

By Silke Pfeiffer

■ Executive summary

While a peace agreement between the Revolutionary Armed Forces of Colombia (FARC) and the Colombian government seems to be within reach, a number of substantial and procedural issues might still cause controversies. One such issue is the question of how a potential peace agreement should be ratified. Both parties have made clear that ratification should involve direct citizen participation. The FARC's proposal for a broadly mandated Constituent Assembly is effectively not politically viable. Other constitutional options have practical, political and legal implications. A final formula will need to deal with the armed group's concern for the legal security of its members while rapidly generating a political mandate to proceed with implementation. The inevitable time lag between signature and ratification will most certainly become a political liability because the FARC is likely to refuse to lay down its weapons in this period. With low levels of trust between the parties and a society deeply sceptical of the guerrilla's intentions to abandon the armed struggle, all sides will feel the need to be protected against risks of non-compliance. The greatest risk related to citizen ratification remains non-approval, because large parts of the population continue to be sensitive – if not opposed – to the idea of granting wide-ranging concessions to the FARC. Mobilising a strong political and social majority behind the peace process and a potential deal is a priority if a final agreement is to survive popular scrutiny and become a foundation for lasting peace.

As peace negotiations between the Revolutionary Armed Forces of Colombia (FARC) and the Colombian government move into their third year, the parties have reached agreements on rural development, political participation and illicit drugs – three of the five substantial agenda points. Ending the longest conflict in the western hemisphere is becoming a real prospect. Yet a deal is by no means secured. Not only will the parties need to find a solution for such delicate matters as dealing with the massive human rights violations committed during the conflict, but a number of procedural issues could also lead to significant controversies.

One of these issues is the question of how to submit a potential deal between the parties to approval by the Colombian population. Point 6 of the framework agreement, which sets out the rules and agenda for the negotiations, establishes that final agreements will be ratified (Colombia & FARC-EP, 2012: 4). These rules do not

explicitly mention the population. Yet both sides have made clear on various occasions that ratification will involve direct citizen participation.

Unprecedented in Colombia's history of multiple peace processes with various armed actors, ratification by the country's citizens is in principle a good idea. Parties have opted this time for negotiating behind closed doors outside the country. Having the Colombian population decide on the fate of an eventual agreement will not only discipline parties in balancing their own interests against those of the entire society, but will also provide a deal with the necessary legitimacy to become what it is meant to be: the basis for collectively building lasting peace.

Initial controversies around the subject have, however, given a foretaste of how difficult it may be to find common ground. At stake are political and legal issues that can be subsumed under three interconnected challenges.

The first is related to the choice of the mechanism that will be applied for ratification. The second has to do with sequencing and aligning ratification with other tasks that will need to be undertaken in the immediate aftermath of an agreement. A final challenge is of a more fundamental nature: how to avoid the Colombian population rejecting the deal.

Choosing the right mechanism

The Colombian constitution offers several options for a ratification procedure with direct citizen participation. In a referendum citizens are called to vote for or against a bill or an existing law, which in the case of a constitutional referendum can be a constitutional rule. In a popular enquiry (*consulta popular*) or plebiscite citizens vote on political decisions and presidential policies, respectively (MOE, 2013; Uprimny, 2013). The choice of the mechanism is hence very much related to the matter and purpose of inquiry. While a referendum could be used to legitimise particularly delicate legal or constitutional changes derived from an agreement between the parties, the other two formulas could serve to mandate the government to sign or – indeed – implement the deal. There are practical and political limitations to the choices. A referendum would necessarily have to be limited to specific provisions while still requiring a significant explanatory effort on the part of the authorities so that citizens can cast an informed vote. A popular enquiry or plebiscite might not do justice to the complexities and profound implications of an agreement.

The FARC has advocated a fourth formula provided by the constitution, a Constituent Assembly (CA). In terms of the constitution, a CA needs to be approved by Congress, the Constitutional Court and popular vote regarding its composition, competencies and period (Colombia, 1991: arts. 374-80). It can have limited competencies or be charged with working out a new constitution. The insurgents have made their ambitions clear. A potential agreement with the government should only be the starting point of a broader transformation process that, the group has stated, would not only ratify the agreements reached in Havana, but find solutions to the points of dissent and, above all, consolidate a new political, social and economic order in the country (FARC-EP, 2014: 3).

While the government and its representatives in Havana have remained silent on which ratification mechanism they would choose, they have rejected the idea of a CA, arguing that, instead of closing a deal, a CA would only open new deliberations and could even derail previous agreements (Semana, 2013b). Receiving a green light from Congress for a broadly mandated CA would be highly unlikely, given the current political landscape. What is therefore behind the FARC's proposal and what formula could be found that balances the group's concerns with political viability?

Apart from using the opportunity for vindicating its political discourse beyond the scope of the Havana agenda and

possible agreements, the FARC is driven by concerns over its members' legal safety. To avoid situations such as in Argentina, where the Kirchner administration annulled a pardon that a previous government had extended to members of the military involved in serious human right violations, the FARC would like to see provisions such as legal benefits for former combatants enshrined in a new constitution.

While constitutions are less volatile than government policies, they can, however, be changed. An important factor for the sustainability of a deal and related constitutional provisions is therefore the prospect of wide political support. Also, with Colombia having adhered to a system of international law in the areas of human rights and international humanitarian law, going beyond certain boundaries would imply prohibitive political costs.

In the realm of constitutional options for ratification, the FARC's concerns could be met by submitting key and sensitive provisions of a deal to a constitutional referendum. This mechanism could be combined with a popular enquiry to politically approve the agreement. To underscore the symbolic meaning of closing half a century of conflict and lend a new framework to the transformations derived from a peace accord, one could think of a CA in the medium term with a clearly limited mandate. All this notwithstanding, it is possible that the parties may come up with a solution that is currently not foreseen in the constitution or that does not involve citizen ratification, although the latter course of action would carry high costs for either side.

A problematic time lag

Whatever the choice of the mechanism, parties will have to deal with a second challenge, i.e. the time lag between the signing of an agreement and its popular ratification. All the options will inevitably take several months to organise and produce an outcome, because they involve procedural and political hurdles (such as the approval of Congress and the Constitutional Court in the case of a referendum). Promoters and opponents of the deal will also need to be given time to campaign. This brings up the question of what should happen to the FARC in the period between signature and popular approval and how ratification should be sequenced with the group's disarmament.

From the FARC's perspective, laying down its weapons before a deal is sealed by the population is impossible. As an organisation whose bargaining power is primarily built on its remaining military strength, it will want disarmament to be a gradual process. There is deep mistrust on both sides and parties are likely to insist on guarantees for compliance before giving up strategic assets. The FARC's demobilisation is also likely to take place in a complex security environment, with illegal armed groups and criminals potentially assaulting former combatants. In this context the organisation will hesitate to give up its capacity to defend itself and depend on the Colombian armed forces and/or international blue helmets for protection.

Submitting a deal to popular approval while the FARC remains armed would, however, place a heavy political burden on the process after ongoing military hostilities during the Havana talks have strained popular support. Opposition forces have started to rail against what they announce would be “an armed referendum with guns pointed at citizens’ heads” (*Semana*, 2013d). A solution would therefore have to establish conditions that would guarantee an effective and verifiable cessation of hostilities until the agreement is ratified. In addition, provisions put to the popular vote would have to be under the suspensive condition that they will be implemented subject to the FARC’s disarmament.

Approval – the greatest challenge

Bridging the time lag without eroding public support will be difficult, because non-approval of the deal by the Colombian population remains a serious risk. The required participation thresholds are high for all ratification mechanisms, ranging from 25% of registered voters in the case of a referendum to 50% in the case of a plebiscite. These are high bars for a country where voter participation even for the second round of the recent presidential elections was well below 50%. Reducing the risk of failure from low turnout, a law has been passed that would allow a referendum to be held simultaneously with an election. As part of a broader political reform bill, Congress is also debating whether to introduce obligatory voting. If it is ready in time, a peace agreement or its provisions could then be put to a referendum during the October 2015 local elections, although there are doubts that obligatory voting – if approved – would be implemented by then.

From their outset the Havana talks have been met with scepticism and/or outright opposition from large parts of Colombian society. Decades of violence and three failed negotiation processes with the FARC have left many Colombians deeply distrustful of the guerrilla’s intentions – and the government’s capacity – to achieve peace. Eight years of democratic security policy under President Juan Manuel Santos’s predecessor, Álvaro Uribe, made many people believe a military victory was possible and, indeed, within reach. The price people are willing to pay for a negotiated settlement is hence not very high.

The secret nature of the negotiations and the lack of a mutually agreed ceasefire during the talks, which has led to ongoing violence, including against civilians, have strained the social legitimacy of the negotiations. For the first time in Colombian history a peace process faces an explicit opposition grouping in Congress. Founded by now-Senator Uribe, the Democratic Centre Party accuses Santos of selling off the country to “terrorists”. For a time the close run-off between Uribe’s candidate, Óscar Zuluaga, and the incumbent in the June presidential elections threatened to thwart the Havana process. While Santos’s eventual victory gave the talks an important new mandate, the elections also proved that more work was needed to achieve greater support for the peace process.

Whether this will happen and succeed is unforeseeable for now. Because Santos is unable to seek another term, his political capital and leverage over local politicians could well decline as he approaches the second or even third year of his second term. Prominent faces of the government delegation in Havana have taken on a more public role in explaining and defending the process, but the government seems to lack a clear advocacy policy and a team of high-profile figures to put such a policy in place beyond the members of its delegation. The president has so far failed to make good on his electoral promise to convene the National Peace Council, whose mandate is to collectively develop and implement a national peace policy. Notably, a number of civil society organisations and social movements are mobilising in defence of the process, but their outreach and impact remain limited so far.

Ensuring broad buy-in for a deal will not be easy in a polarised country. The two parties to the talks accepted the challenge when they agreed that an agreement would have to be ratified by popular vote. Going beyond their narrow interests or those of certain interest groups and working towards the broadest possible national consensus will ultimately be in the parties’ and Colombia’s best interest. It will secure the survival of the deal and thereby become a foundation for lasting peace.

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