

DEBATES ON PARTICIPATION MECHANISMS TO APPROVE A PEACE AGREEMENT

INTRODUCTION

Peace talks between the Government of Colombia (GOC) and the Revolutionary Armed Forces of Colombia (FARC) are progressing, with two partial agreements signed and much government assurance that a final agreement will be signed by the end of the year. Discussions in the political and judicial arenas increasingly focus on how a final peace agreement would be approved by the Colombian population, and how the political reforms resulting from the agreement can be made sustainable in the form of a state, not government, policy. Law 134 of 1994 outlines various mechanisms to facilitate citizen participation in political and judicial decision-making processes, ranging from a plebiscite vote on a decision made by the Executive, to a vote on whether or not to revoke the mandate of someone in public office. One of these mechanisms is the referendum, which allows public approval or rejection of a proposed or existing norm. Another is popular consultation through a constituent assembly, which allows the rewriting of all or part of the Constitution by a group of elected representatives.ⁱ

This document focuses on the referendum and the constituent assembly as the two mechanisms that frequently arise in discussions of how to approve a peace agreement. It considers the procedures and uses of each, as well as the arguments in favor and against employing them to approve a final peace agreement.

REFERENDUM



The GOC supports the referendum option as the most suitable for making minor constitutional reforms and implementing programs and laws that result from the peace process. Law 134 defines conditions that must be fulfilled in order to convene a referendum. In the case that this mechanism is used to pass a constitutional reform, at least 5% of the voting population must support the request to convene the referendum. The referendum is formatted as a “yes” or “no” vote on a text that would reform the constitution, for example a paragraph proposed as a result of a peace agreement, defining the parameters of an initiative aiming to facilitate broader political participation by civil society. At least 25% of the voting population must participate in the referendum for its result to be valid. Of that 25%, at least 50% and one

vote constitute the majority necessary for the constitutional reform to pass.ⁱⁱ

A statutory law that would allow a constitutional referendum on the same day as a popular election (prohibited by Law 134) was approved in Congress in November 2013 and by the Constitutional Court in March 2014. This law, numbered 063 of 2013, can be applied once only if the referendum seeks approval of reforms proposed in a peace accord resulting from current talks with the FARC.ⁱⁱⁱ Although the law was planned to allow referendum of a peace agreement on the same day as presidential elections (May 25th 2014), this seems doubtful as the talks are unlikely to reach an agreement in time.

The last referendum to be held was in October 2003, when then-President Uribe attempted reforms to combat corruption and implement other measures.^{iv} None of the 15 questions on the referendum ballot got the 25% participation necessary to pass.^v

CONSTITUENT ASSEMBLY



The purpose of a constituent assembly is to rewrite all or part of the Constitution. The FARC supports this route because they wish to have a hand in the writing of a new governing document. However, the GOC’s stance is that allowing the FARC to override norms and standards upheld by the current Constitution, would be like conceding that the guerrilla group had an upper hand at the end of the conflict, and that the 1991 Constitution was not ample enough in its provisions for human rights and other important norms. The FARC continues to push for this option to be used.

For a constituent assembly to be held, a law must be passed to permit and define the election of representatives who will form the assembly itself, the number of representatives to be included, the assembly’s proposed duration, and its scope. This law must be approved in the Constitutional Court. When it is approved, two separate popular votes will be held in which more than one third of the voting population must participate. The first is a “yes” or “no” vote to approve (or not) the convening of a constituent assembly with the 50% plus

one vote majority. The second vote elects the representatives included in the constituent assembly.^{vi}

No laws have yet been proposed to permit a constituent assembly at the conclusion of the current peace process. In addition, it is important to note that there are no legal precedents for the creation of a constituent assembly and the definition of factors such as its composition and duration under the current Constitution. No laws have been approved by Congress to completely modify this Constitution through a Constituent Assembly.

THE DEBATE

Since shortly after the GOC-FARC peace process was announced in August 2012, judicial and political debates have frequently addressed the mechanisms that could be used to gain popular approval of a final peace agreement. The GOC has supported the referendum, while the FARC and various political parties favor a constituent assembly. There are various concerns at play. A priority is to ensure that political initiatives and agreements made in Cuba become state policy and are not government specific. For example, the implementation of agreements to support citizen participation or rural reform programs should not be tied to President Santos' administration, but rather preserved as state policy that transcends changes. The FARC are eager that agreements on their reintegration not be rejected by future governments. This includes norms facilitating ex-combatants' participation in politics, alternative sentences, and reintegration support ex-FARC combatants will receive, as stated in the dialogue agenda. The GOC's interests lie in showing commitment to lasting peace, and therefore ensuring that the legal groundwork is laid for future governments to continue and build upon initiatives resulting from the current talks.

Both sides consider it necessary to implement constitutional reform in order to protect initiatives that result from a final peace agreement. However, they differ in the depth of the reform they believe to be necessary and therefore the mechanisms they think should be used to gain popular approval and thereby implement the changes. For its part, the GOC asserts that the Colombian population should be given the last word on a peace agreement and, as necessary, some associated reforms. The mechanism defined in Law 134 that most closely meets this need is the referendum, which would present a series of "yes or no" questions to the voters, for their approval of the reforms. These questions would directly stem from the reforms and initiatives proposed in the agreement reached by the GOC and the FARC.

The constituent assembly, on the other hand, is a mechanism designed to start afresh with a blank slate, and build a new constitution or at least make significant and broad reforms to the current document. The GOC argues that instead of simply asking whether or not the Colombian population approves agreements reached with the FARC, the constituent assembly would open the door

to those agreements and previous constitutional standards on human rights and obligations being disregarded and a new set of reforms created in the form of a new governing document. In addition, no agreement was ever reached to establish a constituent assembly related to the peace process. The FARC, on the other hand, promote this option because they claim it will facilitate broader participation in the implementation of reforms resulting from the peace process, because a wide range of representatives of different sectors of society could be included in the assembly. The GOC, however, highlights that this broad participation has already been exercised, in the constituent assembly that led to the 1991 Constitution. Participants in that assembly included the demobilized M-19 guerrilla group, by that time a political party. The FARC did not participate in that assembly, leading some contemporary analysts to believe that the group is pushing for a constituent assembly now because they did not have a say in the last one and therefore in the current Constitution. In addition to the FARC, ex-President Uribe and his supporters are calling for a constituent assembly, as they too want to rewrite the Constitution.

It is important to note that one of the main reasons that the GOC opposes the constituent assembly is that it considers the current Constitution to be very comprehensive in terms of providing for a wide range of human rights and civil liberties. Any modifications to the document could therefore imply a loss of protections rather than their amplification. A referendum would allow rights protections to be better defined or implemented, which may be necessary. However, a complete overhaul of the Constitution could cause backtracking in human rights.

CONCLUSION

Should a final peace agreement with the FARC be reached, popular approval of the accord will be crucial for its legitimization and implementation. While legal progress is occurring for the use of a referendum, neither legal action nor precedents exist to support a constituent assembly. The priority is the creation of state, not government, policy that can be implemented irrespective of the administration in power. It is also important that the agreement reached be upheld by the mechanism used, and not disregarded in the rewriting or reform of the Constitution. As the debate continues, it remains to be seen how much disruption will be caused by the issue of which mechanism to use to gain necessary popular approval of a much-anticipated final agreement.

ⁱ Colombian Congress, Law 134 of 1994.

ⁱⁱ <http://www.alcaldiaibogota.gov.co/sisjur/normas/Norma1.jsp?i=330>

ⁱⁱⁱ Colombian Congress, Law 134 of 1994 and Banco de la República, *El Referendo*.

^{iv} www.banrepcultural.org/biaavirtual/ayudadetareas/poli/poli44.htm

^v Congreso de la República. Proyecto de ley 063 - 2013 estatutaria. and Eje 21. A revisión

Constitucional pasa proyecto de ley estatutaria del referendo para la paz.

^{vi} <http://www.eje21.com.co/actualidad-secciones-48/81447-a-revision-constitucional-pasa-proyecto-de-ley-estatutaria-del-referendo-para-la-paz.html>

^{vii} Semana Magazine. *Texto del Referendo*. <http://www.semana.com/on-line/articulo/texto-del-referendo/61128-3>

^{viii} Colombia: lo ocurrido en el referendo.

^{ix} <http://www.analitica.com/va/internacionales/opinion/5241612.asp>

^x Colombian Congress, Law 134 of 1994.