

## **Editorial Comment: Law and Negotiation in Conflict: Theory, Policy and Practice**

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The relationship between law and negotiation is increasingly at the forefront of the international agenda. International organisations whose role includes the mediation of peace, such as the Mediation Support Unit of the United Nations, and the European Union, are seeking to understand the relationship between mediation, law and justice in conflict and post conflict societies. While such organisations acknowledge that international law places normative constraints on the practice of peace making, they also recognise that key principles of mediation, such as consent, inclusivity and local ownership, are crucial to the success of negotiated peace processes (United Nations, 2012). These questions have risen to the top of international policy agendas, but there is little academic scrutiny of how the relationship between law and negotiation itself is to be negotiated (Kastner, 2015). Research to date has focused on discrete aspects of the relationship between law and negotiation, such as the role of human rights in peace agreements (Bell, 2000), or in setting transitional justice priorities (Wierda, 2010; Bell 2008). It has not addressed the overarching question of the relationship between law and negotiation that underpins these divisive issues. Binding norms as well as normative expectations serve to shape the mediation process. Yet while law can play a key role in providing guidance for peacemakers, and in providing legitimacy for peace agreements, it can also come into conflict with the political task of negotiation.

### **1. Core Research Themes**

The papers presented in this issue were initially presented at a symposium on the subject of law and negotiation in conflict, held at Durham University in March 2014. ‘Conflict’ in this context refers both to the physical existence of violence or war in which questions of law and justice must be negotiated, but also to the tension between the normative demands of international law and the pragmatic requirements of peacemakers, whether mediators or negotiators. International lawyers may demand compliance with international standards in terms of justice and accountability, and indeed it has been suggested that a ‘law of the peacemaker’, has emerged in recent years (Bell, 2008). On the other hand, mediators and negotiators must be able to deliver an agreement that brings violent conflict to an end and secures the support of their own constituency. In these contexts it has been argued that international law standards can create additional stumbling blocks for a peace process (Anonymous, 1996). Recent reports have highlighted the continued existence of this tension, and the lack of strategic thinking on how to reconcile the practice of conflict mediation with

the normative requirements of law (Von Burg, 2015; Davis, 2010). In the context of EU mediation activities, one report highlighted how EU mediators are expected to address human rights violations, but have no guidelines that explain how they should do so (Davis, 2010). Similarly while funding is available from the EU to support transitional justice processes, there is insufficient clarity among mediators on how best to support such processes (Davis, 2010 p 10). This highlights the absence of joined up thinking between academics, policy makers and practitioners in the context of setting policies that would help mediators to engage with the normative requirements of international law in conflict and post conflict environments.

Yet law and negotiation need not be mutually exclusive approaches to conflict. They must be used in a way that is complementary to ensure the greatest possible chance of securing a just and lasting peace. In this way balancing the requirements of law and politics is a process of negotiation in itself. International law creates a normative framework within which mediators and negotiators work. Four pillars of international human rights law, international humanitarian law, international criminal law and refugee law combine to create a framework of values within which United Nations must be conducted (United Nations, 2004; Wierda, 2010). Each of these regimes also contains binding legal obligations that will form the backdrop against which peace is negotiated. Conversely, however, the success or failure of a peace agreement will depend on the extent to which it is accepted by a local population. In this regard externally imposed norms are unlikely to create genuine change in conflicted societies (Deng, 2009). Therefore what remains absent is any sustained analysis of how and why these normative frameworks should be applied, what contribution they will make to the negotiation process, and where the boundary between law and politics lies.

It is possible to identify number of claims both for and against the increasing application of law to negotiation.

## **2. In Defence of Law**

When faced with a violent and seemingly intractable conflict, there are obvious benefits to using law to frame peace negotiations. The first is that it sets clear parameters for negotiation. It determines what should be on the agenda, and what should not. Waehlich in this issue outlines the increasing way in which both 'hard' and 'soft' norms of international law are used to ensure the inclusion of a range not only interested parties but also thematic issues that may not otherwise be included. There are a number of benefits that flow from this approach. Law can provide a common language in which the parties to a conflict can negotiate. It can help to provide a level playing field for negotiation whereby there is a common understanding of the issues that are subject to negotiation, as well as the parameters for negotiation. For example it sets red lines in terms of what can be negotiated and what cannot. This provides a useful framework within which the parties share an understanding of the extent of the negotiation process. It ensures that mediators work

within a framework of values and are not free to negotiate away fundamental human rights, nor to condone crimes against humanity, for example. This provides a clear starting point for negotiation. Law also provides red lines that parties themselves can use for support, providing a language of political advocacy for traditionally marginalised groups. For weaker parties it strengthens their ability to make certain demands in terms of representation and indeed outcome that may not be possible if negotiations were conducted in purely political terms. Manjoo in this issue highlights the existence of a series of Security Council resolutions requiring the inclusion of women in processes of negotiation, reminding us that international law provides a clear standard that women can use to demand participation. Law can also be the means of bringing issues such as environmental rights or land reform on to the negotiating agenda when they may not otherwise feature in an elite led negotiation process. In this way the language of law can be used by groups from grass roots activists to political elites as a way of framing demands and strengthening their negotiating position through the ability to point to legal obligations. Finally the use of law to ground the negotiation of a peace agreement can ensure legitimacy. It prevents political deals from being struck that provide favourable terms for those regarded as complicit in mass atrocities or human right abuse, for example, and ensures that, to the greatest extent possible, the outcome of the process is viewed as fair by the domestic constituency, and as legitimate by the international community, thereby increasing both national and international support for the process and its outcome. However Waehlich concludes by highlighting the lack of clarity over what constitutes 'good' peacemaking and what is to be regarded as 'illegitimate'. This observation speaks to the fundamental tension between law and politics itself.

While arguments in favour of law are premised on the benefits to be derived from the certainty that law brings there are also downsides to an overreliance on law. By setting red lines and limiting the bargains that can be struck, law ensures that certain 'justice' outcomes can be achieved. However the normative character of law can also make it rigid and exclusionary. This is a theme developed by O'Donoghue in her contribution to this issue. By considering what law 'sees' and therefore regulates, and what it does not see (or chooses to ignore) O'Donoghue explores the limitations of law when applied in highly political contexts. Law is an external force that is brought to bear on a political situation. It will characterize not only the nature of the conflict but also the participants to it depending on whether their actions are deemed to be legitimate or illegitimate in the eyes of the law. In this way it can be exclusionary, determining who is allowed to participate and who is not. This delimitation of legitimate participants will have ongoing implications in terms of who holds the balance of power, and how their interests become enshrined into law. This is a theme illustrated by Lamont & Pannwitz in their contribution. Drawing on extensive field work in Tunisia, the authors explore the ways in which the normative framework of transitional justice came to be associated with an elite led project of reform that ultimately ignored grass roots demands for economic and social justice. Law, through its rigidity, can prevent dialogue. In the Tunisian case Lamont & Pannwitz suggest that reliance on the civil

and political narrative of transitional justice justified the approach taken, but its blindness to calls for social justice undermined support for the process. Where 'red lines' are set this suggests that certain issues are not negotiable. While this is more often viewed as a benefit of law, it can also serve to disincentivise parties from coming to the negotiating table. It also has the potential to mask profoundly political choices, representing them instead as the objective requirements of law.

The final risk of overreliance on law is that of over-reaching. With the rapid expansion of normative regimes in the past decade there has been significant increase in both the range of situations regulated by law and the substantive regimes to which it applies. In these circumstances law risks diminishing its own potential by spreading itself too thin. Excessive use of international law frameworks diminishes certainty as to the content of the law, making it difficult for parties to distinguish the extent of legal obligation. This can render law meaningless, or worse cause regression in terms of legal compliance as parties struggle to understand the extent of what law requires. It also makes it less likely that law in its entirety will be seen as an appropriate framework for negotiation. The more that law is relied on as shaping negotiation processes the less responsibility is left with parties to resolve their conflict. Law removes the element of agency from the negotiation process. This can have ongoing implications for the legitimacy and acceptance of the agreement reached.

### **3. A space for Politics?**

The alternative, of course, is that without law the business of negotiating an end to conflict is left entirely in the realm of politics. There are some advantages to this approach. The first is the inherent flexibility that comes with a purely political approach. A technocratic approach to law can prevent meaningful change from taking place. Further, relying on legal form denies the political nature of the demands being made and can depoliticize the need for change as a result. This is a theme developed by Swaine in her contribution to this issue. In highlighting the limitations of a technical approach to law, she calls for consideration of how the concept of transformation could help us to re-think the relationship between law and negotiation to recognize the essential elements of both.

In the context of peace negotiations the incorporation of international law into the substance of a peace agreement may be little more than window dressing (Turner & Houghton, 2015). Speaking only in the language of law does not help to assess the motivations of the parties nor their genuine commitment to normative reforms. However, unconstrained by legal rules, mediators and parties to negotiations can be as creative as they like in their approach. What matters is the achievement of an end to conflict rather than the compliance of the end agreement with rules of international law. A political approach encourages deeper understanding of the causes of conflict. Working in a political space allows the mediator or the parties to the conflict to assess

the intentions and motivations of the other parties. This potentially contributes to a greater understanding of the interests of each party that underlie their negotiating positions, and allows for a more nuanced assessment of the causes of the conflict and how it can be prevented from recurring. This is not possible where parties must be constantly vigilant to avoid implicating themselves or to be seen to be the party most sympathetic to the international community. This approach therefore also allows for a greater possibility of local legitimacy. It does not rely on law to supplant existing norms, but rather works within those norms to find a resolution to conflict (Turner 2015). In this way it emphasises the building of consensus and national ownership in a way that international law does not.

This approach also allows for greater inclusivity in the process. Whereas law tends to exclude parties not committed to the rule of law a political approach ensures that all parties in a conflict can be included (Von Burg, 2015). The key advantage of this is that it prevents parties that are skeptical of peace initiatives from becoming spoilers. While the threat of law hangs over the process those with most to lose, for example those likely to find themselves indicted on war crimes charges, will remain absent. A purely political process with the option of negotiating amnesties, or safe passage abroad, for example, is more likely to entice such warring parties to participate. This also speaks to the advantage of politics in that it can act purely in the interests of short term expediency. It can focus on bringing about a ceasefire without having to consider longer term questions of accountability.

Of course there are also limitations to a purely political approach. The first is that by removing any element of judgment or accountability from the process it becomes entirely immoral and simply rewards bad behavior. It is based on a short termist approach that sees the cessation of hostilities as the key goal, regardless of the consequences in the long term. None of the contributors to the symposium suggested that law or legal values had no role to play in negotiation. The terms of a peace agreement will shape the future of the state, so an agreement that enshrines existing power structures into law as a result of imbalances of power at the negotiating stage will simply perpetuate conflict. It is therefore important that the best possible agreement is reached, and in some instances this will require the leverage of law.

The question posed by the symposium was therefore how do we bridge these two approaches? How do we 'negotiate' the relationship between law and politics? To date there has been remarkably little conversation *between* law and politics on how to approach the business of peace negotiation. At the risk of making gross generalisations, legal scholarship and policy emphasizes the authority of law, and the way in which law constrains negotiation. Just outcomes are achieved as a result of the purported universality of law and the certainty and values of justice it brings to negotiation. Political scholarship on the other hand focuses much more on the design and conduct of the process. Just outcomes are achieved under this model by ensuring consent and the inclusivity of the process rather than on its substance. This means that

law and negotiation have their own distinct internal logics. Rather than continuing to operate within this oppositional structure, the symposium considered how to bring the two together. A number of inter-related themes emerged.

#### **4. Bridging the Gap.**

The first was the importance of dialogue and debate. Rather than seeing norms as something that constrain negotiation processes, using norms as a framework for negotiation, and indeed for socialization, opens up new possibilities (Turner, 2015). This raises important issues of the enculturation of norms. If norms are not to be regarded as externally imposed and prescriptive then they need to be embedded in familiar narratives and introduced in a language which parties understand. There is no point in using law to introduce culturally alien norms without an accompanying dialogue on what the norms are and why they are important. This highlights the importance of inclusivity and consent in ensuring that parties have access to this negotiation, not only superficially, but in a meaningful way (Turner & McWilliams, 2015). This leads to the second key theme, that of participation. International law provides a number of normative frameworks to broaden the participation of traditionally underrepresented groups in peace negotiations (see Turner, 2015). This concern with participation is mirrored in the core premises of consent and inclusivity that underpin effective mediation. What law can provide in these circumstances is a common ground from which to begin a conversation. It does not necessarily need to pre-empt the outcome, but rather provides a ‘meeting place for interaction’ (Gunning). Viewing law as facilitating effective participation therefore helps to bridge the gap between law and negotiation by combining the authority of law with the flexibility of negotiation to find a solution that enjoys local legitimacy.

Finally, what this approach suggests is that we need to re-think what we understand by ‘law’ in these contexts. Law has both normative and symbolic aspects. A strict legalist approach to law would treat law and legal standards as non-negotiable, and as setting the parameters of a legitimate negotiation process. The risk with this is that it makes an overly hubristic claim in respect of the power and authority of law to effect change. There is a tendency in current debates to make grand claim in terms of the normative limits of peace negotiations. Yet while it is relatively easy to create law, its existence and its invocation in the context of peace processes will not guarantee its effectiveness. Strict adherence to normative frameworks may result in meaningless outcomes where there is no underlying commitment to those particular norms (Turner & Houghton, 2015). Worse, it can result in a political or even violent backlash where no space remains for democratic contestation of those norms (Turner, 2016). However where law can contribute is in its symbolic function. It can provide a basis from which to begin a conversation. Therefore what is to be resisted is the equation of the symbolic and normative functions. More modest claims in respect of normativity may ultimately lead to more effective outcomes.

## **5. Whose job?**

One final question. Who is responsible? Who is responsible for interrogating this relationship between law and negotiation? Does responsibility lie with the practitioner who conducts and oversees negotiation processes? Does it lie with the policy maker who must articulate the values of the state, the intergovernmental organization or the NGO, and set the normative frameworks within which the practitioner must work? Or does it lie with the academic, who has the advantage of distance from the dirty business of practice, allowing them to see the bigger picture?

It is suggested that the responsibility cannot be divided along these neat lines, but rather that all three are connected in a circular relationship. The academic works at the level of theory. They are one step removed from practice and this allows them to observe practice from a distance and to extrapolate up in an effort to produce structural analysis that can inform policy and practice. The role of the academic is therefore to operate with a longer-term focus, assessing the successes and failures of practice, assess the potential for improvements but ultimately looking for patterns that point to more general conclusions that can be of benefit to the policy maker and the practitioner. The policy maker works between the academic and the practitioner. It is their job to seek to understand broader trends and to translate structural analysis into coherent frameworks for action and to provide the guidance that will shape practice. It is the policy maker whose work most directly impacts on the practitioner, and that will determine the value system within which negotiation is conducted. Finally the practitioner provides the critical immediate and short-term response to crisis, and is responsible for conducting their practice within the policy frameworks that have been set. However it should not be assumed that the practitioner is unreflective. An essential part of their job, and a key skill, is the ability to reflect on their practice in a way that not only delivers short-term improvements, but that also feeds in to broader structural analysis. Without the experience and the reflection of the practitioner academic and policy analysis is not possible. In this way the three exist in a circular relationship, and it is critical that there is dialogue between all three and a rejection of the crude understanding of academics as too concerned with critique and practitioners not concerned enough.

## **6. Conclusion**

The contributions to this volume, as well as those of participants at the symposium, all speak to the need to re-think the binary relationship between law and negotiation that shapes thinking in this area. What this project seeks to emphasise is that we need to move beyond asking whether law *or* negotiation is a better approach to resolving conflict. We need to move beyond the question of whether law should constrain political negotiation, or whether law can be subordinated to political expediency. Both law and negotiation have a role to play in peace negotiation. What is important, and to

date underexplored, is the interplay between the two of them. What is suggested therefore is that we now need to shift our focus to the how we can combine the best elements of both law and negotiation in order to ensure more sustainable outcomes. This section seeks to contribute to this debate.

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