Justice, Rights and Equality:

In Search of the Common Good in an Era of Transition

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The concept of political settlements was introduced in the last decade in debates on state reform. The purpose was to shift away from technical and state-centric approaches to international support in favour of interventions that reflect and attempt to better understand the relationship of politics to both conflict and peace (Dudouet and Lundström 2016: 5; Di John & Putzel 2009: 4; Jones et al. 2012; Laws 2012). The use of the political settlements concept is also driven by studies highlighting that exclusion from economic, political and social realms often leads to violent conflict (Brown et al. 2011) and that exclusion itself is frequently related to how political power is held and exercised (Dudouet and Lundström 2016: 3; Bell 2015; DFID 2010; Parks and Cole 2010). Recognising the links between political settlements, exclusion and conflict has galvanised discussions around the importance of facilitating more inclusive political settlements both at the horizontal level (i.e. the level at which political power is held) and at the vertical level (i.e. the interactions between elite actors and wider society). In particular, facilitating more inclusive settlements is now regarded as a key component of transitioning from conflict to peace. This paper will draw on a growing body of literature that is attempting to understand the relationship of exclusionary political settlements to conflict, the various reasons for and means by which political settlements can become more inclusive, and the difficulties faced when attempting to do so. Following this discussion, this paper will conclude by asking what role human rights might play in transitions from exclusive to inclusive political settlements.

Political settlements, conflict and peace

Crucial to understanding political settlements and their relevance in conflict-affected settings is the link between exclusion and conflict. In attempting to underline these connections, Kelsall (2016) outlines a number of useful diagnostic questions to help identify the nature of a political settlement. Firstly, the author notes that it is important to ask how inclusive/exclusive the political settlement is. Inclusive settlements, as defined by Kelsall, are those in which the majority of elites accept the settlement

and have foresworn the use of violence to achieve their means (2016: 3). Exclusive settlements, on the other hand, are those in which only a minority of elites accept the settlement, meaning most remain willing to use violence to achieve their aims. Secondly, Kelsall asks what motivates elites to accept the political settlement. Under inclusive political settlements, political actors are coordinated around a common purpose, be it nation-building, external warfare or inclusive development (*Ibid.* 4). There may be an expectation of benefits down the line, but these do not take the form of interpersonal *quid pro quo* exchanges (*Ibid.*). Under exclusive political settlements, by contrast, elite actors are given a share of spoils and induced to keep the peace, primarily through access to economic rents or spoils. Finally, Kelsall asks by what norms is the bureaucracy governed. Under inclusive settlements, they might be impersonal rule-following and meritocracy-based while under exclusionary settlements, the bureaucracy is governed by patron–client relations and nepotism (*Ibid.*).

Based on these questions, Kelsall produces a typology of political settlements. For present purposes, two are particularly relevant – one at each opposite. Firstly, a political settlement might be exclusive, spoils-driven, and personalised (*Ibid.*). Here, and similar to North, Wallis and Weingast's (2009) concept of limited access orders, only a minority of elites are included in the settlement's terms which are held together mainly by access to spoils. Personalistic, clientelistic norms govern the bureaucracy. Such settlements are typical of those that lead to exclusion, with only certain sections of society enjoying access to and protection of their rights and entitlements (Rocha Menocal 2015: 11). Conversely, the political settlement might be inclusive, coordinated, and impersonal. Here, a greater section of elites have been incorporated into the political settlement and are coordinated around a common purpose. The bureaucracy functions according to impersonal, meritocratic rules (Kelsall 2016: 3) and rights and entitlements of societal actors are enjoyed on a wider and more equal basis.

These are exaggerated examples in the sense that, as Kelsall's broader range of political settlement types suggests (2016: 4–6), it is likely that political settlements often contain variations of these characteristics. And yet, the distinction is useful for a number of purposes, particularly when thinking about the multifaceted nature of exclusion, the normative nature of discussions on inclusion, and the various arenas through which exclusive settlements might move to those more inclusive in nature.

The multifaceted nature of exclusion

For one, Kelsall's framework helps to identify the various meanings of exclusion and, subsequently, what we might understand inclusion to mean. Firstly, the examples highlight that exclusion can occur horizontally. Under exclusive settlements, only a limited number of elites hold political power (2009: 5). This might be a single person (as is the case in dictatorships) or a certain group (as illustrated in pre-conflict places such as Sri Lanka, Rwanda and Northern Ireland). In more inclusive settlements, on the other hand, political power is held by a more diverse group of elite actors. As an illustration, in the aforementioned case of Northern Ireland, the political settlement achieved under the Good Friday Agreement meant that unionists and nationalists held power collectively

through a consociational style arrangement in contrast to the pre-agreement phase where it was primarily unionists that enjoyed access to political power.

Secondly, exclusion can occur vertically. This relates to the interactions between elites and the wider society. Indeed, according to Di John and Putzel (2009), how inclusive or exclusionary a political settlement is cannot be determined simply by looking at the extent of participation in the bargaining process, or at appointments in the offices of the state. It requires an analysis of the distribution of rights and entitlements. In line with this broader understanding, political settlements have been described as "two-level" games that involve both horizontal interactions between elites and vertical linkages between the elites and society (Laws 2012: 4). As suggested above, under exclusionary settlements, only limited sections of society are afforded their rights and entitlements, usually those connected to the ruling elite. In contrast to exclusive political settlements, under inclusive settlements, a greater number enjoy access to rights and entitlements in ways that better reflect what we normally understand the social contract to be.

From exclusion to inclusion: the normative nature of the discussion

Kelsall's discussion also raises important issues when considering the normative nature of the discussion at hand. As noted, it is increasingly understood that horizontal and vertical exclusion often leads to conflict. North, Wallis and Weingast (2009), for example, argue that limited access orders – where institutions and organisations are controlled by a narrow group of elites and defined by deeply personalised relationships – are more prone to violent conflict than states that are grounded in the rule of law and impersonal (formal) institutions. Recognising these links appears to require that, in order to build peace, political settlements must shift from those exclusionary in nature to those more inclusive – both horizontally and vertically. Thus, the focus reflects the "dialectical relationship between political settlements and conflict" (Dudouet and Lundström 2016: 6). On one level, exclusionary settlements provide a fertile ground for conflict. However, armed conflict serves as a driver for change to the existing political settlement (*Ibid.*). As Rocha Menocal (2015: 22) further suggests, transitioning to peace "involves some kind of re-articulation of the rules of the game about the use and distribution of power, and about the nature of the linkages between state and society. In other words, they involve an alteration in the political settlement undergirding a political system.

Negotiating inclusion: arenas of political resettlement

It is for these reasons that we might speak of political resettlements when considering how the political settlement is being re-articulated (Dudouet and Lundström 2016: 7). Acknowledging the normative nature of the discussion further requires engaging with those events that enable this re-articulating to occur. Thus, specific events like peace agreements or constitution-building processes are understood in the literature as "moments of transition" (Rocha Menocal 2015: 22), "specific opportunities" (Domingo et al. 2013) or "constitutional moments" (Nolutshungu 1991 cited in Smith and McLaughlin

2010) not only to end conflict, but also to build a more inclusive political settlement and, as a result, a more inclusive society (Bell and Pospisil 2017).

These moments of opportunity equate with what Dudouet and Lundström (2016) have succinctly described as clusters or arenas of political (re)settlement. By way of a backdrop, they define these arenas as follows:

- Arena 1: their negotiation through dialogue and decision-making platforms whereby traditional and emerging elites (and sometimes non-elites) shape the contents of new/reformed institutions and the formal and informal "rules of the game" steering state-society relations.

- Arena 2: their codification through official texts formulating the outcomes of decision-making processes, e.g. peace agreements, constitutions or bills of rights, legislative reforms or other sectoral agreements.

- Arena 3: their materialisation through the transformation of state institutions (government, legislature, security/justice sector, political parties and informal institutions), state governance (how new elites in charge of running or participating in state institutions behave and interact with one another) and policy implementation (Dudouet and Lundström 2016: 6–7).

At its most basic then, political resettlements are about utilising various arenas or windows of opportunity in order to broaden out the political settlement at both the horizontal and vertical levels. The difficulty arises, however, in that such processes occur against a backdrop of violence where tensions are high and where difficult decisions must be made regarding how best to end conflict on the one hand, and how to redefine and expand the post-conflict political, social and constitutional order, on the other. This fundamental tension plays out in the literature when discussing how these various understandings of inclusion are integrated into the arenas of political resettlement.

Negotiating inclusion for whom, what and when?

Process inclusion

Those involved in negotiating the end of violent conflict are often those who share power in the post-conflict political dispensation (Bell and Zulueta-Fülscher 2016: 13). Indeed, such is the importance of participating in political resettlement processes that those championing inclusion of those not considered to be "elites", often cite the correlations between process inclusion and the carving of political power that results. It is often possible, therefore, to understand the nature of the political settlement at the horizontal level from who is involved in negotiating the terms during the political resettlement process.

In 2011, the World Bank's World Development Report advanced the argument that to be sustainable, political settlements should be "inclusive enough" consisting of what they termed "inclusive enough coalitions" (WB 2011). But, as Rocha Menocal (2015: 16) queries, what is inclusive enough? Many argue that the criteria are met by including elite-level

actors, and in particular, those who are capable of undermining the political settlement through utilising or threatening the use of violence. Lindemann (2008), for example, has noted that while "inclusive elite bargains" foster political stability, "exclusionary elite bargains" are more likely to lead to conflict. A similar position is that advanced by Bell and Zulueta-Fülscher (2016: 7) who assess that, where any constitution-building process is initiated without sufficient elite buy-in to the political settlement process, public participation will not be enough to build a political settlement (see also Paffenholz 2014: 7). This coincides with some of the findings advanced by the Berghof Foundation's research on inclusive political settlements. Based on empirical investigations into a number of case studies,[1] the authors of a central paper of the project concur that:

> [t]he primary factor explaining the absence of violent relapse by former power contenders is undoubtedly their political inclusion within post-war political settlements: [...] in five out of the six case studies, the former "champions of inclusivity" are currently in power.
> (Dudouet and Lundström 2016: 58; see also Call 2012).

At their core, these arguments reflect the view that the political settlement formed is often about taming politics so that they stop being a "deadly, warlike affair" (Higley and Burton 1998, cited in Rocha Menocal 2015; Laws 2012; Jones et al. 2012) and, therefore, suggest that political settlements are inclusive enough when all of those capable of utilising violence are included (Dudouet and Lundström 2016; Rocha Menocal 2015: 17; Bell 2015a; Jones et al. 2012; DFID 2010: 12; Barnes 2009; Whaites 2008: 4).

In this sense, an elite-focused approach is one that reflects the practice of conflict resolution practitioners who have for some time acknowledged that elite actors must be included in peace negotiations (see Bell 2000) either from the outset or captured in subsequent processes at the earliest possible stage (Bell and Zulueta-Fülscher 2016; Bell and Pospisil 2017). As Fionnuala Ni Aoláinn has noted:

> A political settlement in these places is quintessentially an agreement reached by process of political engagement, negotiation, mediation and barter between parties who have previously been in dispute.
> (2016: 5).

Because these processes are about finding ways to contain as much as resolve the conflict (Bell and Pospisil 2017: 8), the range of actors included in political resettlement processes should reflect the range of actors who might challenge the political settlement if they are not integrated into the newly formed political dispensation.

There are also a number of additional reasons proffered within the literature as to why political resettlement processes should be limited to elite-level actors. For example, some raise issues of efficiency and pragmatism. The multiplication of actors with divergent interests at the negotiating table may make a settlement harder to reach and lead to an unworkable compromise (OECD-DAC: 31–2; Sapiano et al. 2016: 20). Drawing on the case of Sudan, for example, the dilemma of effectiveness versus sustainability is

highlighted by Dudouet and Lundström (2016: 31) citing the research of Jok (2015: 9). On the one hand, bringing too many parties and interests to the negotiation table makes it harder to reach a consensus and might threaten the warring parties, jeopardising their political will to come to any agreement. On the other hand, the representation of actors and their grievances are prerequisite for broader popular support and legitimacy and thus can guarantee the sustainability of any signed agreement. As we have seen, and will discuss further below, the need to end violence while at the same time recognising the opportunity for genuine reform is a recurring tension through political resettlement discussions.

Alternatively, others argue that, in certain circumstances, and subject to the particular context in question, inclusion processes should consist of, as possible examples, all armed groups, political parties, civil society groups including faith-based organisations, special interest groups such as trade unions, professional associations, minority or women's organisations, human rights, relief, development or peace non-governmental organisations, researchers and research institutions, traditional or indigenous groups, or representatives of social and political movements or loose networks of youth (Paffenholz 2014: 6–7). In most cases, and recognising that those additional actors and groups will often be determined by the particular context under discussion, there is nevertheless an implied consensus that the underlying reason for broader process inclusion derives from the relationship between processes and outcomes. This relationship is the focus of the section below.

Linking process inclusion and outcome inclusion

Arguments relating to whether inclusion in processes of political resettlement should be narrow or broad are often directly related to the outcomes reached as a result of political resettlement processes. Many argue that failure to facilitate and enable inclusion during political resettlement processes will adversely affect the outcomes being more reflective of the diverse groups, values and interests within society.

Prior to these arguments, however, it is important to recognise a number of positions to the contrary. For example, some have suggested that even those settlements that may be considered narrow at the horizontal level can produce distributional outcomes that are vertically inclusive (Di John and Putzel 2009). Drawing on the so-called "Asian tigers", including South Korea, Singapore and Taiwan, Rocha Menocal (2015: 16) assesses that these states oversaw socio-economic transformation over a period of 50 years that selectively incorporated groups (business elites) and not others (labour). However, she continues, overall prosperity was much more widely shared and these developmental states became leading examples of performance-based legitimacy (*Ibid*., 17. See Fritz and Rocha Menocal 2007). That is, even political settlements that are narrow at the horizontal level can lead to inclusive settlements at the vertical level. To that end, others have pointed to the fact that more inclusionary processes do not always lead to inclusive outcomes (Dudouet and Lundström 2016).

Notwithstanding these arguments, others advance the claim that broader inclusion in the processes is necessary because of the critical junctures that lead to a settlements

formation. That is, because political resettlement processes such as peace agreements are increasingly about redefining the nature of the state, inclusion in processes is of particular salience to how certain groups are or are not included in the post-conflict era. Broader inclusion, it is argued, is fundamental even at the pre-negotiation stage (Bell 2015a: 12; Rocha Menocal 2015: 5) in order to ensure that outcome inclusion is facilitated within the political settlement (Paffenholz et al. 2016: 9) and reflected in those documents that give legal formality to political settlements.

Indeed, one of the lessons drawn from Paffenolz's research on broadening participation in peace processes is that 'who participated in the process determines the outcome' (Paffenholz 2014: 7) and, by implication, that exclusion from processes can negatively impact on how and whether rights and entitlements are subsequently protected. Thus, we need to expand on the importance of outcome inclusion and what outcomes are understood to be. In developing their arenas, Dudouet and Lundström expand on their description of outcomes to be both the codification and materialisation arenas of political settlement to encompassing two main dimensions:

1. The representativeness of state institutions vis-à-vis their citizens, i.e. whether their composition reflects the structure of the society (by instituting gender/ethnic quota systems, power-sharing provisions, electoral reform etc.).

2. The responsiveness of key texts codifying the political settlement and their implementation, with regards to the distribution of rights and entitlements across groups and classes in society: whether they favour dominant groups, or fairly and genuinely reflect the various interests and needs of all societal sectors (2016: 10).

Outcome inclusion, therefore, is explicitly linked to the vertical relationships between the state and society. While process inclusion might be understood as a right in itself, it is the prospect of ensuring that the political settlement is more responsive to society that is the key factor driving demands for greater process inclusion. As such, it is outcome inclusion that is likely to have the greater impact on the largest number of people.

A related argument connecting process and outcome inclusion is one that speaks directly to the informal modalities of negotiations and, in particular, the implications of process exclusion on structural marginalisation. It was suggested above that the threat of violence is particularly salient when deciding who is to be included or excluded during negotiations. However, these informal approaches also operate in terms of outcomes. For example, some highlight that focusing on elite actors tends to entrench the marginalisation of other groups who may not be represented in the political settlement formed. This lack of representation may then lead to the underlying systems of marginalisation engrained in societal norms, customs, and even institutions being completely overlooked. This point is consistently made throughout the literature in reference to women, often involved in conflicts but rarely considered to be what have been termed power contenders (*cf* Cuvelier, J., and Bashwira 2016). As is noted:

> *Political settlements with their focus on elites, appear from the literature to be gender blind; there is little by way of comprehensive scholarly or policy literature available to elucidate the nature and form of the gender dimensions of political settlements*
> (Bell 2015a: 20; Bell 2015c: 2–3).

Through focusing on the role of elite actors in political resettlement processes, the position of those unable to wage violence has meant that they have tended to be overlooked (Ní Aoláinn 2016: 1; Brown and Ní Aoláinn: 129). Their voices are often missing and the broader and deeper structural conditions that perpetuate their particular societal position are not addressed. In line with these realities, in order to achieve favourable outcomes for structurally marginalised groups, it is necessary that they are involved in negotiating the outcomes of political resettlements.

The importance of outcome inclusivity is also advanced from the perspective of legitimacy. Some assess that the more inclusive a settlement is in terms of outcomes, the more legitimate, effective, empowering, stable and resilient it will be (Dudouet and Lundström 2016). In this sense, some suggest that "there is growing recognition in policymaking that inclusive societies, which provide equal opportunity for all, are more likely to be peaceful and stable" (O'Reilly, Ó Súilleabháin and Paffenholz 2015: 7). This point is reiterated by both Paffenholz (2016: 1) who asserts that legitimacy is the most frequently identified rationale in the decision to include additional actors in the multi-stakeholder negotiation processes studied, and by Dudouet and Lundström who note that shortcomings in outcome inclusivity can lay the foundations for violence and instability when power contenders are included in a political settlement but the rest of society remains left behind (2016: 60).

As a final point on the relationship between process and outcomes, some counter the aforementioned arguments by highlighting that, when groups like women are able to influence the political settlement, they have been able to make substantial contributions not only to peace-making and constitution-making negotiations but also to the implementation of final agreements – even if their inclusion is still challenged or met with indifference by many negotiation parties and mediators (Paffenholz et al. 2016: 5; McWilliams 2015).

Discussions on negotiating inclusion in times of transition, therefore, can be crudely summarised from two perspectives. On the one hand, some argue that process inclusion should be limited to those capable of spoiling the political resettlement process by resorting to violence. On the other, opportunities exist for expanding the type of political settlement produced in the aftermath of conflict and some argue that inclusion is fundamental to ensure that those previously marginalised by an existing exclusive political settlement can be brought into the fold in the aftermath of violence. So how can this deadlock be broken? That is, recognising that processes are often limited to elite actors, what opportunities exist to ensure that political settlements are inclusive in terms of outcomes produced? As discussed below, the literature has proffered a number of potential solutions.

Alternative strategies for inclusion

There are a number of possibilities that the literature suggests non-elite-level actors might utilise when trying to influence the outcomes of political resettlements. Dudouet and Lundström, for example, advance a model that matches participation with the thematic focus at stake, but through simultaneous rather than sequential arenas of decision-making (2016: 32–33). This approach consists of setting up parallel negotiation tables, each of which would have a thematic focus and be comprised of the most concerned actors, including relevant social sectors, as a guarantee of vertical inclusivity (2016: 32). In support of such an approach they draw attention to Colombia. Citing Rampf and Chavarro's research (2014) they highlight that, during the 1989 negotiations between the government and the M19 guerrilla in Colombia, bargaining on security matters (such as disarmament, demobilisation and reintegration (DDR) and combatant protection schemes) took place exclusively between state (government and army) and power contender representatives. At the same time, parallel talks on political and social reforms were also set up by M19 in the form of analysis and a consensus-building table, which involved various political parties as well as approximately 1,000 citizens from all social sectors (Dudouet and Lundström: 33). Thus, as a compromise, certain issues permitted greater levels of inclusion, while in others the political resettlement process remained limited.

Literature from the Inclusive Peace & Transition Initiative has also examined various modes of inclusion in political transitions beyond those of direct representation at the negotiation table. Thania Paffenholz and colleagues identify that, along with direct participation at the negotiating table, participation can include holding observer status, be facilitated through various forms of consultations, problem-solving networks, inclusive implementation arrangements, and public decision making over mass action (O'Reilly, Ó Súilleabháin and Paffenholz 2015: 13–19; Paffenholz 2014: 13–21). The importance of informal consultative forums to identify key issues, demands and proposals made by women – in parallel to ongoing peace negotiations which were found to be the most common modality of women's inclusion in peace and transition processes – has also been suggested (Paffenholz *et al.* 2016: 7).

Following on, some have also drawn attention to the importance of mass action, coherent strategies and civil society activism to campaign for more inclusive outcomes. Again in reference to women, it has been argued that "more than any other group, women have organised mass action campaigns [...] in order to, amongst other things, enhance women's representation in the ongoing peace processes, as well in the political structure of the post-conflict state" (Paffenholz et al. 2016: 8). This has involved intense lobbying during peace negotiations and constitution-drafting processes (Castillejo 2014). This supports some of Dudouet and Lundström's findings that strong popular mobilisation for structural change, through the combined efforts of social movement mobilisation and power contenders' armed actions, was effective in pushing for the establishment of participatory mechanisms in which these societal actors were invited to participate and formulate progressive provisions to reform exclusionary areas of governance. A related body of scholarship focuses on the role of private sector actors

in peace-making processes (Molloy 2017; Marais and Davies 2015; Iff et al. 2010; Tripathi and Gündüz, 2008; Banfield et al. 2006) while others focus on the role of mediators. Paffenholz et al. (2016), for example, highlight that, when mediators were inclusion-friendly and knew how to manage inclusion strategically, this helped women's groups assert access.

Some within the literature focus on international instruments as mechanisms through which to campaign for more inclusive outcomes and processes. Domingo et al. (2013), as an illustration, highlight how normative instruments, such as UN Security Council Resolution 1325, are instrumental in helping to achieve inclusion, and when read alongside subsequent related resolutions constitute a cumulative process of increasing international commitments to advancing gender equality and women's representation. In this sense, the argument advanced is similar to Bell's focus on the role of law and legal instruments in political settlement processes in shaping outcomes (Bell 2015d). Combining international normative standards and the importance of group action, Catherine O'Rourke (2015) advances the argument that women's groups can utilise international law in order to demand more inclusion for women in process and outcomes. With all of these various strategies, sequencing and timing are frequently highlighted throughout the literature (Bell and Zulueta-Fülscher 2016; Sapiano et al. 2016; Rodrigues 2016; Molloy, Zulueta-Fülscher and Welikala 2017) as a particularly important determinate of when and how to influence the political resettlement.

As a final example, and one that builds on many of the aforementioned strategies, Bell and Pospisil's (2017) concept of the formal political unsettlement is particularly useful. They argue that negotiation processes often produce not a stable political settlement, but rather a "formalised political unsettlement." Arrived at through the use of a threat of the use of violence (*Ibid.* 4), negotiations and agreements reached do not constitute political settlements in the literature sense of the phrase. Political unsettlement "creates a state with political and legal institutions that 'contain' as much as resolve the conflict, by establishing group membership and enabling continuing processes of negotiating as much as substantive shared values." Nevertheless, the formalised political unsettlement offers institutional possibilities for addressing deep identity and political divisions that have resulted in group claims which traditional liberal democratic structures have found difficult to address (*Ibid.* 11). It acknowledges that, while individuals have rights as individuals, it is often through their identity as members of groups that exclusion and discrimination occur, reinforcing identity-based challenges to the state. Secondly, and most importantly for present purposes, because the formalised political unsettlement is characterised by political and institutional fluidity (*Ibid.* 5) it can offer opportunities and tools for re-working and revising the political settlement that enables groups that have lost out to the central deal even at the moment of the peace agreement, to push for greater inclusion over time. The unsettled nature permits opportunities for inclusion to be negotiated at later stages and provides an important framework for helping to identify when and how to employ some of the strategies mentioned above.

Materialisation of outcomes

The final arena of political resettlement is that of materialisation. While, in some cases, the outcomes of political resettlements can help to address exclusion and the aforementioned strategies adopt different approaches to try and make the political settlement more inclusive, it is also increasingly recognised that such advancements are futile if they are not implemented. Amongst a number of findings of the Berghof Programme on Political Settlements, for example, it was noted that materialisation of inclusive outcomes is often lacking. In attempting to understand why, they note that the informal modalities of political settlements often impact on the prospects of inclusive outcomes reaching fruition. According to Rocha Menocal (2011: 1722), history shows that political settlements can remain highly exclusionary even after a peace agreement that is intended to be more inclusive has been negotiated. She explains this discrepancy through the distinction between formal and informal elements of political settlements: while negotiated settlements may look good on paper, especially in terms of protecting those who have historically been most marginalised, translating their often high rhetoric into reality is a completely different matter.

The literature suggests a number of reasons why progressing towards more formalised political settlements might be opposed by various actors and while informal forms of governance remain appealing.

For example, drawing on the work of Desai and Woolcock (2014), Hickey notes that one of the key insights from recent work on political settlements and limited access orders is that elites will only agree to the establishment and functioning of institutions, including around the rule of law, if such institutions ensure the distribution of resources and status in their direction. To the extent that the rule of law can act as a constraint to elite behaviour, then elites may have good reasons to restrict the establishment of the rule of law and particularly its progressive roll out beyond the limits of the initial elite bargain (Hickey et al. 2014). When settlements are overly inclusive, the literature suggests that the incentives often decrease and with it adherence to the rule of law through constitutional provisions.

One such theory highlighting this fact is that of the political marketplace. De Waal, for example, notes that the political marketplace is a contemporary system of governance in which politics is conducted as the exchange of political services or loyalty for payment or licences (2016b). It is characterised by pervasive monetised patronage, in the form of exchange of political loyalty or cooperation for payment. In the political marketplace, political businessmen seek to increase revenue. The best income streams are rents – payments in excess of what would be determined by supply and demand. Political rents derive from owning land or natural resources, from the privilege of being able to assert sovereignty, from external patronage, and from using or threatening violence (De Waal 2015: 21). Central to the workings of such a system is the political budget. This is, according to De Waal:

> *the money available for a politician to spend on whatever purposes he may choose – especially for renting the loyalty or cooperation of other politicians.*

The political budget is not the same as government revenue: it is money for which no accounting is required. [...] it is not equivalent to the defence budget but consists instead of bribes paid by arms contractors and the funds paid to commanders, accounted for as payments to ghost soldiers"
(Ibid. 22).

As this budget is not indefinite, elites are often unwilling to share in the spoils as this reduces their capacity to maintain support. As is noted:

[...] They seek to limit the entry of competitors into the market and discourage rival or replacement products... "Political businesses can expand. A political entrepreneur can increase his market share at the expense of his rivals. He can become so effective at renting the services of those lower down the chain and adding value to their activities, that he can challenge and displace his erstwhile patrons
(*Ibid.,* 22; De Waal: 2016a).

In other words, elite actors, through access to rents are able to sustain themselves in positions of power so long as they are not forced to share these spoils.

A similar reality exists in respect of discussions on multi-layered security governance (Hoffman and Vlassenrrot 2016). The idea behind multi-layered security governance is that local actors should be used alongside state security forces in the hope, particularly against the backdrop of repressive state approaches in the past, that legitimacy will be increased. However, the authors also note that one of the fundamental challenges was the clientelistic norms of security governance by Congolese state security forces. With patronage being a prevalent, but not all pervasive, feature of security governance in DR Congo, high-ranking security officials and politicians are engaged in a constant struggle to accumulate resources. Thus, they were concerned that these local actors "would expose and denounce their illegal revenue-generating activities, which are a crucial support base of patronage networks within the security forces".

In these cases, access to material resources provides the justification for resorting to violence and the impetus for opposing broader ideas of inclusion that might limit the spoils. While violence is highlighted as a barrier to inclusive settlements, it is also necessary to understand the particular reasons that elite actors might continue to use the threat of violence. In the above examples, political elites stand to gain from narrower settlements and to lose from more inclusive ones.

Summary

Thus, the issue of inclusion in times of political resettlement is highly contested. Firstly, at a conceptual level, inclusion can be understood in terms of horizontal inclusion and vertical inclusion and is frequently a response to exclusion at both levels. As such, negotiating inclusion in times of transition involves some kind of re-articulation of the rules of the game about the use and distribution of power, and about the nature of the linkages between state and society (Rocha Menocal 2015: 22). Secondly, the practicalities of renegotiating political settlements, and in particular the potential for power contenders to utilise violence, often impedes inclusion in political settlement processes. Given that these moments of opportunity are about more than merely ending violence, omission from these processes can have impacts on the extent to which other actors are included in the outcomes of settlements. Accordingly, others have focused on strategies for influencing the terms of political settlements through less direct routes. Yet, discussions on the materialisation of outcomes also suggest a number of underlying reasons that prevent inclusion from the political settlement. Recognising the connections between those holding power and the ability to use this power for self-gain highlights the underlying difficulties presented by informal aspects of political settlements.

Against this backdrop, and in keeping with the broader theme of the role of human rights in times of transition, the final section briefly sketches out a number of ways in which human rights might both help and hinder transitions from exclusive to inclusive settlements.

Political settlements, inclusion and human rights

Human rights and process inclusion

Firstly, human rights can be used in political resettlement processes to facilitate accommodation between elite actors (Bell 2000, 2006, 2008, 2013). In South Africa, for example, human rights guarantees helped to appease concerns of the black majority that the same violations committed under apartheid would not be repeated while the white minority whose political power was to be diluted in the new political settlement was given assurances that it would not be subject to marginalisation or discrimination. Thus, human rights can help in forging inclusive enough pacts at the horizontal level by providing a common language through which to address common concerns related to both the past and the future.

Secondly, human rights might also be used by those outside of political settlement processes to advocate for inclusion (O'Rourke 2015). This can relate to inclusion in political settlement processes themselves or inclusion in the outcomes of those agreements. In Nepal, as an illustration, human rights were used as a vehicle during the campaign for institutional and political reforms to contest the inequalities of the caste system. In drawing on universal principles, human rights can be used as a basis from which to challenge the *status quo* while at the same time providing a normative basis for more inclusive process participation.

Human rights might, however, also be used to deter process inclusion. It was suggested above that inclusive enough settlements are those that include actors capable of undermining the political settlement through using or threatening the use of violence. One could argue, therefore, that there is a human rights justification for "inclusive enough" coalitions that exclude other non-elite-level actors as a result of the need to end violence and ensure that no further human rights violations occur. This of course could be challenged by those who refute any such assertion that more inclusive settlements somehow impede agreement being reached.

Human rights and outcome inclusion

The inclusion of human rights can also be transformative. For example, exclusion at the vertical level can also be understood from the perspective of human rights. Given that international human rights law places obligations on states to ensure that rights are respected, protected and fulfilled, exclusion can be understood as a breach of the state's duties under international law. As such, including human rights provisions can be understood as transformative: they can be utilised in order to address both the underlying causes of conflict by ensuring that states adhere to their obligations in the future (Márquez Carrasco et al. 2014; Sriram et al. 2014; Aroussi and Vandeginste 2013; Frerks, 2012; Parlevliet 2010; Mertus and Helsing, 2006).

Secondly, human rights arguments are relevant to discussions on transitional justice and can be understood from both a positive and negative perspective. On one level, human rights can be, and have been, used as the basis for demanding accountability for violations of international human rights and breaches of international criminal and humanitarian law. Peace with justice arguments suggest that, for peace to be achieved, a degree of accountability is necessary and that justice is a way of recognising exclusion through reparative, correctional or redistribution-based means. Conversely, well-rehearsed arguments that suggest demands for accountability have the potential to destabilise political settlements and, in undermining progressions towards peace, continue to sustain exclusionary processes.

A further and more nuanced perspective on transitional justice and political settlements helps to introduce another facet of the discussion on human rights. Authors such as Christine Bell (2015b; 2016) and Dustin Sharp (2016) have noted the political nature of transitional justice and recognise the levels of political contestation that surround how best to contend with the past. These discussions highlight the importance of inclusion given that concepts of justice and the "common good" become subject to contestation and negotiation. It would appear necessary, therefore, to adopt a broad approach to inclusion. There are also important discussions around local ownership and the cultural insensitivity of human rights. As some have noted in regards to accountability, for example, the legalism of human rights in the context of transitional justice often risks overlooking other cultural practices that might be better able to deliver justice (McEvoy 2007; Lundy and McGovern 2008; Nagy 2008).

In contrast to the aforementioned potential of human rights to help in conflict resolution and transformation, there is also the need to question the "what next" and

to acknowledge that human rights can sometimes be both divisive and, at times, even dangerous. Given that human rights are negotiable, and notwithstanding the fact that they might help to push the deal through, it is also the case that human rights can become captured by elites. In regards to the discussions on a Bill of Rights in post-conflict Northern Ireland, for example, the connections between politics and human rights discussions are apparent. Here, any agreement on a potential bill has faced continuous disagreements on the content of rights to be included. In particular, deep ideological divisions have penetrated the discussions with, as just one example, nationalist parties pushing for the inclusion of economic and social rights, with unionist parties more attached to individual freedoms and limited state interference (see generally Smith, McWilliams, and Yarnell 2014; Whitaker 2010). The implications of this are that human rights can become part of the conflict, undermining their normative potential for change. At the same time, it is perhaps also the case that contestation over human rights should be embraced. As Bell and Pospisil contend, the political unsettlement recognises that conflicts are contained rather than resolved. Contestation over rights provides a language through which ongoing disagreements can occur without resorting to the use of violence. Arguing over human rights, in this context, might simply be viewed as part of an ongoing national conversation about the type of society that is being, or should be, constructed.

Thirdly, human rights might also be viewed as an obstacle to reaching group accommodations. In Bosnia and Herzegovina, for example, group rights were prioritised in the consociational nature of the deal struck. As an illustration, under the Bosnian Constitution, the office of President is to be held by a member of each of the constituent groups – Bosniaks, Serbs and Croats. This effectively excludes others such as Romas or Jews. From the perspective of human rights, this can be understood as a clear violation, with human rights providing a basis the political settlement struck. However, and countering such claims, others might suggest that, in times of transition, principles must give way to pragmatism.

Materialisation and human rights

Human rights are also relevant to discussions on the materialisation of outcomes. Firstly, international human rights norms are largely driven by organisations such as the UN who are also often responsible for ensuring that peace processes are implemented. As such, human rights can be used as a normative basis for interventions, particularly in highly complex contexts. Others are highlighting the role that international human rights institutions such as the UN Human Rights Treaty Bodies are playing in overseeing the implementation of peace agreement provisions in areas that fall within their competences. For example, the Committee on the Elimination of Discrimination Against Women has mentioned post-conflict contexts in a number of General Recommendations.[2]

There are, however, some less positive aspects when considered from the perspective of implementation. The move towards political settlements is part of a broader push back against new institutionalism and the liberal peace ideal (see for example, MacGinty 2011; Franks and Richmond 2009). However, human rights are often considered an integral

part of the liberal peace package. They have a particular view on the state which, under international human rights law, has obligations to ensure that individuals enjoy their rights. This requires not only a state in the Westphalian sense, but also formal institutions through which to implement and enforce these obligations. Imposing human rights assumes and requires a state and appears in some ways to undermine any suggested departure from technocracy and state-building.

A further implication of this is that the projection of the liberal ideal often requires a particular type of human rights. As numerous scholars from the field of transitional justice have noted, the attachment of human rights to the liberal peace ideal has meant a prioritisation of civil and political rights over economic, social and cultural rights (see, for example, Miller 2008; Nagy 2008; Waldorf 2012). Because the liberal peace ideal advances the importance and utility of markets under its economic limb, second- generation rights are often seen as interfering in limited governments required to enable deregulation and liberalisation of markets (Franzki and Olarte 2014; McDougal 2014; Laplante 2008).

Following on, the technocratic and institution-dependent nature of human rights can mask over the important questions as to how power is manifested and held. For example, to argue that women's rights must be respected because this is what international law states, without grappling with the structural systems of patriarchy present in many settings, may well render the human rights project an obsolete component of a technocratic exercise. Those advocating the importance of human rights often assume that their adoption into domestic legal systems can somehow promote inclusion because of the normative nature of these standards in spite of deeply entrenched cultural traditions that remain unchallenged behind the veil of inclusive normative standards.

Perhaps most importantly, however, a focus on international human rights law might overlook the possibilities of less formal approaches to delivering rights and entitlements for individuals. For example, de Waal's earlier work (2009) on the concept of "political marketplaces", does not simply assume that the political marketplace is always a bad thing. He urges a re-examination of patronage systems that, in certain circumstances, may be describable as locally grounded, legitimate governance mechanisms (Hoffman and Vlassenroot 2016). Although running against the liberal and rational-legal models of public authority, the combined force of rent-seeking elites, expectant client populations and a balanced distribution of power is seen to have the potential to lead to "developmental regimes" or "developmental coalitions" (Hoffman and Kirk 2013: 8 citing Parks and Cole 2010: 22; Laws 2012: 17). In other words, and as Hoffman and Kirk's (2013: 2) work on public authority concludes, even informal systems based not on state institutions and formalised politics, but rather on informal relationships and systems of patronage, can help to deliver what we might understand rights to be in certain circumstances.

Concluding remarks on human rights in times of transition

There are, therefore, numerous roles that human rights can play, some positive, some negative. As is often the case in discussions around conflict, peace and peacebuilding, rather than leading to any specific and reliable conclusions, whether, and to what extent, human rights have a role to play in transitions from exclusive to inclusive settlements, is often dictated by the context in question. At the same time, even acknowledging this may be progress of a sort, particularly when considered against the backdrop of technocratic interventions that frequently overlook the very specifics of the contexts they are being applied in.

Endnotes

1   Colombia, El Salvador, South Africa, South Sudan, Aceh and Nepal. For methodology see Dudouet and Lundström 2016: 13–18.

2   See, for example, "CEDAW GR 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations" Available at: www.dawnnet.org/feminist-resources/content/ cedaw-gr-30-women-conflict-prevention-conflict-and-post-conflict-situations.

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