



# CONSTITUTING TRANSITIONS:

Options, Drivers and Dilemmas

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AHRI 2018

# CONSTITUTING INTERIM GOVERNANCE?

- Relationship between legal 'constitutionalisation' and political tasks and dilemmas.
- Frame: what drives interim governance
- Options for 'constituting' transitional arrangements
- What drives legal form?
- Enabling and limiting adaptive management



# THE PROBLEM

- Peace agreements have an uncertain legal position in relation to civil conflicts – contrast with international treaties between states.
- Choice of 'constituting' legal instrument effects legitimacy, legality, and political outcomes of transition.
- Can throw up obstacles to peace process:
  - Philippines 2008
  - Bougainville 1998



## WHEN IS INTERIM GOVERNANCE NEGOTIATED VIA PEACE AGREEMENTS?

- Coup d'états and attempted coup d'états.
- Authoritarian push-back
- Electoral disputes
- Exits from civil conflict (both national and secessionist disputes)
- External use of force (not the focus of this analysis)



# FIVE OPTIONS FOR 'CONSTITUTING' INTERIM GOVERNANCE

1. Within existing legal frame without amendment
  - Unilateral offer of reform (Bahrain 2000)
    - Incumbent response to unrest.
  - Negotiated sub-state peace or transition process (Philippines 2012/14; Bougainville 1994)
    - PA within the constitutional space without need to amend existing order.
  
2. Constitutional amendment within existing order
  - Negotiated peace or transition process (SA '93, Zimbabwe '08)
    - Constitution formally amended under legal procedure to adhere to PA.
  - Negotiated sub-state peace or transition process (NI '98)
    - Formal legal amendment to constitution with creation of sub-state constitutional order.



## FIVE OPTIONS FOR 'CONSTITUTING' INTERIM GOVERNANCE

3. Context specific instrument (ambiguous status)
  - Executive orders, legislative regulations or other instruments with constitution still in place, but targeted for reform.
  - Comoros 2010; Gabon 1994; Honduras 2009 (attempted); Lebanon 2008
4. Supra-constitutional amendment within existing order
  - Temporary deal providing for access to power (elections, powersharing) before reverting back to constitution
  - Liberia 1990/93/94/95/96; Mali 2012; Guinea 2010; Sierra Leone 1999; Togo 2006.



## FIVE OPTIONS FOR 'CONSTITUTING' INTERIM GOVERNANCE

- Supra-constitutional replacement
  - Formulation of a new constitutional order out-with existing constitution.
  - Afghanistan 1992/2001; Bosnia 1992/94; Burundi 2000/03; Cambodia 1990; DRC 2002/04; Ethiopia 1991; Iraq 2003/04; Libya 2011; Madagascar 2009; Rwanda 1992/93; Somalia 2000; South Sudan 2014/15.



# DRIVERS OF LEGAL FORM

- Not mutually exclusive:
  - Balance of Power
  - Constitutional Adequacy/nature of transitional tasks
  - Nature and length of transition
  - Pre-existing institutionalisation
  - Salience of the symbolism of continuity or rupture.



# CHALLENGES THAT IMPACT CONSTITUTIONALISATION

- 'Tent-widening'
- Ossification of arrangements as indefinite rather than temporary.
- Enabling adaptive management?

Thank you to the PSRP team and Christina Murray for comments on earlier drafts.

