CONSTITUTING TRANSITIONS: Options, Drivers and Dilemmas

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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
• Peace agreements have an uncertain legal position in relation to civil conflicts – contrast with international treaties between states.
• Choice of ‘constituting’ legal instrument affects 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.
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.
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?

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