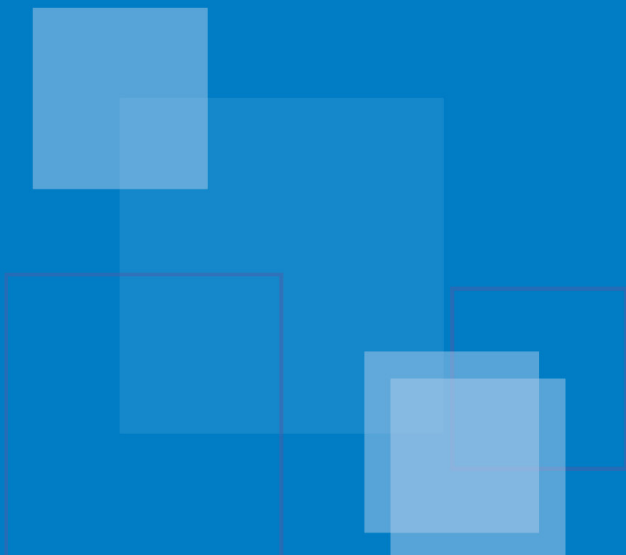




Substate Constitutions in Fragile and Conflict-affected Settings

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International IDEA Policy Paper No. 15

Kimana Zulueta-Fülscher and Asanga Welikala

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Executive summary



What is a substate constitution?

Substate constitutions are broadly understood as written legal instruments that limit and structure political power at the substate level, with legal supremacy regarding other substate laws. Their primary goals are to define the specific governance system of the substate entity, and often to codify citizen rights within its territory. They may also serve to delineate the political community and identity at the substate level. Substate entities, in turn, can be defined as territorially delineated constitutive parts of a country or state.

This paper examines substate constitutions in fragile and conflict-affected settings—in both federal and unitary (or hybrid) states—adopted after the end of the Cold War starting in 1991. The universe of cases comprises 10 countries: Bosnia and Herzegovina, Comoros (Anjouan), Ethiopia, Indonesia (Aceh and Papua), Papua New Guinea (PNG, Bougainville), Russia (Chechnya and Dagestan), Somalia, South Africa, South Sudan and Sudan.

How do substate constitutions come about?

Substate constitution-building processes often seek to assert the substate entity's distinctiveness from the central state and/or from other substate entities. Yet substate constitutions do not necessarily imply enhanced autonomy for the substate entity. The level of autonomy from central-state institutions crucially depends on the degree of 'constitutional space' that is granted to substate entities.

Constitutional space, in turn, is the degree to which substate entities can define their own goals and establish their own government institutions and processes. The constitutional space is usually defined in the central-state (i.e. national) constitution, and sometimes in peace agreements and/or transitional political arrangements. Furthermore, substate constitutional frameworks are subordinate in legal status to the central-state constitution.

The scope of the constitutional space depends on four additional factors: (a) the bargaining power of substate regarding central-state negotiators; (b) the way in which states form and devolve political power, either by unifying pre-existing states or through devolution of power within a unitary framework, whereby the latter will often have a more limited constitutional space; (c) the need to establish asymmetrical arrangements, in which one or more substate entities has comparatively more constitutional space than others; and (d) the different purposes underlying the emergence of substate constitutions, either to recognize and accommodate differences or to emphasize national unity and increase state efficiency, in which case constitutional space will be more limited.



Whatever the resulting scope of the constitutional space, substate entities might sometimes decide not to make full use of it, either by emulating central-state structures or refraining from engaging in a constitution-building process at all. Alternatively, they may push for more constitutional space when the latter is considered insufficient, which can cause disagreements between both levels of government.

Why do substate constitutions come about?

In fragile and conflict-affected states, substate constitutions are often the result of a political settlement that includes assurances of increased constitutional space (and autonomy) for substate entities. In other words, the central state might be interested in accommodating distinct political communities within the state's overall constitutional framework in order to prevent and/or manage conflict.

For substate entities—especially those with concentrated minority and/or marginalized groups—the reasons for engaging in constitution-building processes often concern: (a) legally (and politically) recognizing their distinctiveness, (b) legitimizing both substate authorities and the entity as a whole, and (c) either incentivizing innovation in constitutional design or attempting to offer a degree of institutional stability within the substate entity, in the absence of a settled institutional framework at the centre.

The process of building substate constitutions

The constitution-building process at the substate level is defined by the constitutional space. The constitutional space can be the result of a unilateral decision from central-state authorities, or it may reflect the political settlement parties have reached, further establishing the degree to which substate entities can define their own institutions and processes.

This paper delineates three ways in which substate institutional frameworks are defined: (a) the peace agreement and/or transitional political arrangement sets the initial parameters of the substate entity's institutional framework, which are then expanded in the central-state constitution; (b) neither the peace agreement nor the central-state constitution provides many details about the institutional framework of substate entities, thereby granting considerable constitutional space to the latter, but also enabling central-state constitutions to reclaim constitutional space without the need for constitutional amendments; and (c) while the central-state constitution might be silent regarding the institutional framework of substate entities, peace agreements and/or transitional political arrangements might include significant details.

Process design can be more or less implicit or explicit in the central-state constitution, but comprises three main stages:

1. *Drafting and adoption.* Substate constitutions are usually prepared and adopted either by the substate legislature or by a constituent assembly at the substate level, with the actual drafting usually conducted by an appointed committee (part of the constituent assembly or sub-state legislature). Substate constitutional referendums are extremely rare. There are some interesting variations: sometimes drafting is conducted by an extra-parliamentary commission (e.g. Bougainville), or central-state institutions prepare model constitutions to be adapted by the drafting committees (e.g. South Sudan); central-state institutions might be responsible for adopting the substate constitution (e.g. Indonesia); finally, some central-state constitutions do not specify which body is in charge of drafting and adopting sub-state constitutions (i.e. Bosnia and Herzegovina, Comoros and Somalia).

2. *Pre-adoption certification process.* While it is not a necessary element in substate constitution-building processes, where this is required, it usually involves a Constitutional/Supreme Court that endorses the constitution as respecting the principles and values outlined in the central-state constitution (e.g. South Africa, Comoros). Sometimes the responsibility falls on an executive body at the central-state level (e.g. Bougainville (PNG), Sudan or South Sudan), although its lack of independence can delegitimize the certification process and/or the draft to be certified.
3. *Post-adoption review.* Substate constitutional frameworks are subordinate to central-state constitutions, and hence most countries have a Constitutional/Supreme Court in charge of upholding the central-state constitution where there is a dispute with (or between) substate constitutions after adoption of the latter. There can be variations regarding the subject(s) allowed to bring cases to court, as well as regarding informal ways of resolving such disputes before bringing them to the courts. At the same time, the independence of the Constitutional/Supreme Court is critical to the legitimacy of the rulings.

Other important process-related factors include:

- *Timing/timelines.* Timelines are usually mentioned only in peace agreements and/or transitional political arrangements, not in central-state constitutions. Provided they are realistic, they might provide structure to the post-conflict substate constitution-building processes.
- *Inclusion in establishing the constitutional space and drafting the substate constitution.* Where the constitutional space is negotiated as part of a political settlement process, the level of inclusion can vary greatly, with either elites dominating the process or substate negotiators representing diverse groups. Regarding the drafting of the substate constitution, there is a growing consensus that there needs to be a certain level of local input into structuring the substate authority and the power therein. However, in fragile and conflict-affected settings, public participation is often not mandated by the central-state constitution or any other arrangement. Furthermore, it is difficult to gauge the extent to which public participation has played a significant role in these contexts.
- *The role of the international community.* The role of the international community in substate constitution-building processes depends not only on the needs of the substate entity, but also on the needs (and the demand) of central-state institutions. Therefore international involvement in substate constitution-building has usually been based on the express agreement of the central-state government. International engagement might involve: (a) expert advisory services to key stakeholders at the central and substate levels; (b) guaranteeing the implementation of agreements and mediating disputes; (c) assisting in organizing workshops/roundtables; and (d) capacity building of substate institutions and key stakeholders involved in these processes.



Substate constitutional design

The overall constitution-building process will determine specific constitutional design issues in the substate constitution, as well as how they compare with the central-state constitution. Key issues to consider regarding constitutional design in substate constitutions include:

- *System of government.* In most cases considered in this paper, the design of the substate executive—using a parliamentary, presidential or semi-presidential system—closely resembles that of the central state. One clear exception is Bougainville (PNG), where the central state and the substate entity use a parliamentary and a semi-presidential system, respectively.
- *Form of legislature.* Only Comoros and Bougainville/PNG have unicameral legislatures at both the central and substate levels. In most federations except for Bosnia and Herzegovina, the central-state legislature is bicameral whereas the substate legislatures are unicameral. This seems to follow the pattern that federal states usually have second chambers for regional representation, whereas the legislatures of substate entities do not necessarily have to perform this function. In Indonesia and Bosnia and Herzegovina (except for the Brčko District), all legislatures are bicameral.
- *Constitutional amendment procedures.* Central and substate constitutions are usually more difficult to amend or replace than ordinary laws. Making constitutional amendments at the substate level is usually easier than at the central-state level, although sometimes it is equally hard at both levels, as in Bosnia and Herzegovina or Ethiopia. The authority to initiate amendments at the substate level typically involves the substate legislature and/or executive, with different levels of central-state consultation required. Substate entities are usually not formally involved in amendment processes at the central-state level, although substate views are often aired in second chambers in the central legislatures. The constitutions of PNG and Comoros are the only two in which central-state institutions cannot single-handedly change provisions related to the autonomy of its substate entities.
- *Regulation of local government.* Both central-state and substate constitutions considered in this paper provide for local government, with the exception of Bosnia and Herzegovina, which only makes special arrangements for the Brčko District; the substate constitutions of Amhara (Ethiopia) and Bougainville also contain similar special arrangements. The level of detail in the central-state constitution with regard to provisions for local government varies widely, with Somalia at one end of the spectrum—contemplating a local government level, but offering no further detail—and Indonesia, Russia and South Africa at the other end of the spectrum—with highly developed arrangements in the central-state constitution. Such differences are also found in substate constitutions, with Western Cape (South Africa), Puntland (Somalia), Aceh and Papua (Indonesia) including more details regarding local government provisions.
- *Provision of group minority rights.* Most central and substate constitutions studied here provide for special regimes of enforceable group rights to protect minorities. The central-state constitutions of Indonesia, PNG and Somalia do not include specific minority rights, although some Indonesian provisions recognize traditional communities' customary and cultural rights. Of the substate entities, neither Papua nor Aceh's special autonomy laws refer to minority rights.

- *Provision of substate symbols.* Many of the substate constitutions under consideration provide for substate symbols that are different from those of the central state, although Indonesia makes explicit what is implicit in other cases by expressly stating that substate symbols do not signify potential substate independence.

Impact on conflict prevention and conflict management

The impact of substate constitution-building on conflict prevention and/or management is difficult to gauge. While substate constitutional frameworks are important tools for addressing substate demands for distinctiveness and self-government, they are not a panacea. Only in Bougainville (PNG) and Aceh (Indonesia) is the lack of (recorded) violent conflict clearly correlated with the adoption of a substate constitution. Three other cases—Bosnia and Herzegovina (including the Federation of Bosnia and Herzegovina), Comoros and South Africa—have experienced central-state constitution-building processes after conflict. The resulting constitutions have included relatively ample substate constitutional space (either in legal provisions or in practice), which may have contributed to preventing or managing (recorded) violent conflict. For different reasons, violent conflict has continued and even surged in Chechnya (Russia), South Sudan and Sudan during and after substate constitution-building processes, leading observers to conclude that these processes have had a limited impact (if any) on conflict management.

Key recommendations



1. In order to understand whether (and how) substate constitution-building might help address the relationship between substate communities and the central state, it is important to examine the relationship of territory and identity to conflict. This relationship is shaped by the social diversity of the country as a whole, the territorial concentration of ethnically homogeneous groups, its history of decentralization within central-state institutions, and claims for autonomy among one or more territorially concentrated groups.
2. Once authorities at the central and substate levels decide to embark on substate constitution-building, it is key to understand that this process begins by defining the constitutional space, either in the central-state constitution or a peace agreement.
3. When considering the drafting of substate constitutions, it is important to remember that the right to produce a substate constitution does not necessarily equate to more autonomy. The level of autonomy of substate entities will be defined in the central-state constitution, or sometimes in peace agreements and/or transitional political arrangements.
4. Defining the constitutional space, whether in the central-state constitution or in a peace agreement, often includes determining the process by which the substate constitution is drafted, adopted and certified. Stakeholders at both levels should put some thought into this, especially where the central-state constitution will be built anew or fundamentally amended.
5. To give substate entities enhanced ownership over their constitutional dispensation, the central-state constitution should allow substate institutions to adopt/promulgate the substate constitution as much as possible, while developing a procedure for an independent body to ensure compliance with the central-state constitution.
6. Referendums are often not advisable or feasible in the ratification of substate constitutions in fragile and conflict-affected states (of the cases examined here, only Chechnya had a referendum). This heightens the need for robust and genuine public participation in the development of the substate constitution.
7. The timing for drafting and adopting substate constitutions should be carefully considered. The context may demand more urgent constitution-building processes in some substate entities than in others, and therefore different tracks might need to be

applied for different substate entities. Where they are used, timelines should be realistic.

8. Substate constitutions are mostly easier to amend in practice than central-state constitutions. To enhance ownership at the substate level, a central role should be given to substate institutions and stakeholders in initiating and enacting substate constitutional amendments, while ensuring that proposed/enacted amendments are compliant with the central-state constitution.
9. Substate constitutions should specifically protect minorities and their rights within the substate entity, whether or not the central-state constitution includes specific provisions to protect minorities throughout the state's territory.
10. The international community must seek the express agreement of the central government to engage in substate constitution-building processes.

1. Introduction



Autonomy for substate entities with territorially concentrated societal groups is increasingly understood as a peacebuilding tool in ethnically divided and conflict-affected settings. Recognizing the differences of societal groups that might have been marginalized in the past, and guaranteeing (at least some of) their demands for political voice and power, is one of the main goals of autonomy (Ghai 2000: 8–11).

Autonomy for substate entities can take a number of different forms. While some states devolve governing powers to all their substate entities, others devolve power to one or a few substate entities based on specific historical and/or identity claims. The degree to which power is devolved may also vary greatly: some substate entities have a high degree of autonomy from the central state coupled with decision-making power and representation in central-state institutions (e.g. the senate or upper chamber); others have no representation at the centre but high levels of autonomy; and still others enjoy less autonomy and no say at the centre. While devolution can be the result of a federal state structure, unitary states also often use their central-state constitutions (or other legislation) to regulate different degrees of devolution to (at least some of) their substate entities.

Some substate entities are allowed or required to draft their own constitutions; this scenario is the focus of this paper. Since the end of the Cold War, 17 countries—nine federal and eight unitary states—have had constitution-building processes in all or some of their substate entities (**Azerbaijan**, **Bosnia and Herzegovina**, China, **Comoros**, **Ethiopia**, **Indonesia**, **Israel**, **Papua New Guinea** (PNG), **Russia**, **Somalia**, **South Africa**, **South Sudan** (after independence), **Sudan**, Ukraine, the **United Kingdom**, Uzbekistan and Venezuela); countries in bold text were conflict affected before the substate constitution-building process took place. China (Hong Kong and Macau), Ukraine (Crimea), Uzbekistan (Karakalpakstan) and Venezuela did not have substate constitution-building processes as a result of intrastate conflict, nor did Azerbaijan (Nakhchivan), where the conflict was of an interstate character. Since Israel and the UK have very particular constitutional traditions that make generalizations alongside the other cases difficult, they are excluded from the analysis (see Box 1 for a full list).

Box 1. Countries not included in the analysis

This paper does not address the following: countries on the United Nations list of non-self-governing territories; countries in which substate entities might have drafted but not yet adopted constitutions (e.g. Iraq (Kurdistan), Philippines (Bangsamoro Basic Law)); and substate entities in which the adoption of substate constitutions was meant to ensure independence from the central state, including Abkhazia and South Ossetia (Georgia), Nagorno Karabakh (Azerbaijan/Armenia), Somaliland (Somalia) and Transnistria (Moldova).

One additional case not considered in this paper is Kosovo, where the United Nations Security Council Resolution 1244 (10 June 1999) established ‘an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia’ (art. 10), which eventually led to Kosovo’s declaration of independence on 17 February 2008.

The paper also disregards the Special Statute of the Province of Cabinda (Angola)—an annex to the 2006 Memorandum of Understanding for the Peace and Reconciliation of the Province of Cabinda between the State of the Republic of Angola and the Cabinda Forum for Dialogue—as the authors were unable to confirm its implementation. Similarly, the paper does not deal with the Chittagong Hill Tracts Accord (1997) in Bangladesh as this never envisaged a substate constitution for the three hill districts of Rangamati, Khagrachhari and Bandarban. In any case, central-state legislation providing for greater autonomy to the districts pursuant to the accord have been declared unconstitutional by the High Court of Bangladesh since 2010, on the grounds that even the limited devolution proposed by the legislation violated the principle of the unitary state in the Bangladeshi Constitution.

Finally, the paper also excludes from consideration the recent creation of several federal states and autonomous regions within the Union of India. Some of these have been undertaken in furtherance of negotiated settlements to violent conflicts between the Indian Government and substate actors after 1991. However, some of these negotiated settlements do not meet the criteria of substate constitution used here, such as the 1993 Memorandum of Settlement between the Tripura State Government and the All Tripura Tribal Force, and others define institutional arrangements for entities that would not fall under the definition of substate entity used here, such as the 1993 Memorandum of Settlement (Bodo Accord) and the 2003 Memorandum of Settlement on Bodoland Territorial Council.

In fragile and conflict-affected settings, constitution-making at the substate level often aims not only to restructure political institutions, but also to formally recognize historical and/or ethnic particularities of the substate territory. The articulation of political as well as cultural or symbolic aspects of substate distinctiveness in a substate constitution might help realize the desire for self-government. However, the shape, form and parameters of substate constitutions vary widely across contexts, and the power to adopt a substate constitution does not always denote greater autonomy.

This Policy Paper aims to fill a significant gap in the policy and academic literatures regarding the process and design of substate constitutions in fragile and conflict-affected settings, and their role in the broader political-settlement and peace-building process. The academic and policy literature on substate constitution-building (see Marshfield 2011; Saunders 2011) mainly focuses on federal systems in developed countries. Furthermore, single case studies (e.g. Ayele 2014; Elazar 1982; Murray and Maywald 2006; Saunders 2011; Tarr 1999) are more frequent than comparative assessments (e.g. Burgess and Tarr 2012; Dinan 2008; Ginsburg and Posner 2010; Laforest and Lecours 2016). In addressing this gap, this paper will explore the ‘why’ and ‘how’ of substate constitution-building, as well



as the impact on both constitutional design and conflict management at the substate level. Issues related to the implementation of substate constitutions in fragile and conflict-affected settings are beyond the scope of this paper.

This paper was developed following the Third Edinburgh Dialogue on Post-Conflict Constitution-building held in December 2016 (Molloy 2017), which focused on substate constitutions in fragile and conflict-affected settings. This workshop was organized by the International Institute of Democracy and Electoral Assistance (International IDEA), the Edinburgh Centre for Constitutional Law and the Global Justice Academy in association with the Political Settlements Research Programme at the University of Edinburgh. The paper draws on a number of existing and new data sources, such as the United Nations Peacemaker peace agreements directory, the Constitute database developed by the Comparative Constitutions Project at the University of Chicago and the University of Texas at Austin, data on interim constitutions collected by International IDEA (Zulueta-Fülscher 2015), as well as original data from substate constitutions that is available online. For some countries, the substate constitutional texts were either not available online in any language (e.g. South Sudan and Sudan), or were only available for some substate entities, and were not always officially translated into English (e.g. for Ethiopia, only the Amhara constitution was published online). To distinguish conflict from non-conflict-affected states, the paper uses the Uppsala Conflict Data Program (UCDP), and examines substate constitution-building processes after conflict and after the end of the Cold War.

The paper is structured as follows. Section 2 outlines a conceptual framework that defines substate entities and substate constitutions, including the key concept of ‘constitutional space’. It also explains some of the reasons why substate entities adopt substate constitutions. Section 3 elaborates the universe of cases analysed: fragile and conflict-affected settings after the end of the Cold War. Section 4 examines how central-state constitutions provide constitutional space for their substate entities, and the resulting process-related issues for substate constitution-building. Section 5 discusses some of the determining factors for the substate constitution-building process, such as its timing, inclusiveness and the role of the international community. Section 6 discusses the design of substate constitutional frameworks, and section 7 presents conclusions. The paper also includes three Annexes. Annex A lists the parameters for the substate institutional framework in selected cases. Annex B provides details of the drafting and adoption of selected substate constitutions. Annex C lists links to substate constitutions referred to in the paper.

2. Substate constitutions: a conceptual framework



What are substate entities and substate constitutions?

Substate entities can be broadly defined as territorially defined constitutive parts of a country or state (Molloy 2017). They may be called, for example, regions, provinces, *Länder*, departments, federal member states, autonomous communities, entities or cantons. Although they are often the most politically salient stratum below the central-state level, they may subsist alongside other levels of government in complex multilevel systems. Spain, for instance, has 17 autonomous communities, each of which includes a maximum of eight provinces. Bosnia and Herzegovina is composed of two entities (Republika Srpska and the Federation of Bosnia and Herzegovina); the latter consists of 10 cantons, each of which has its own substate constitution.

The overwhelming majority of states do not allow substate entities to have their own constitutional framework, whereas some states *require* them to draft and adopt substate constitutions. While substate constitutions are more common in federal or quasi-federal states, unitary states may permit them as well (Marshfield 2011: 1157). In unitary states, this can occur through constitutions or quasi-constitutional frameworks—statutes of autonomy or organic laws, for instance—that devolve power to territorial subdivisions.

Substate constitutions are broadly understood here as written legal instruments that limit and structure political power at the substate level, and maintain legal supremacy with respect to other substate laws (see Marshfield 2011: 1153, 1165; Saunders 2011: 859–60; Elazar 1982: 11; Regassa 2009: 37). Their primary purpose is to define the governance system of the substate entity, and often to codify citizen rights within its territory (Molloy 2017). This paper only assesses stand-alone substate constitutions; it excludes substate constitutional arrangements that are only included in the central-state constitution or peace agreements).

While some substate entities may seek to increase their autonomy from the central state via a substate constitution, such documents do not necessarily imply enhanced autonomy for the substate entity, as evidenced in Ethiopia, and even in South Africa. The act of substate constitution-making entails an important symbolic assertion of distinctiveness. More substantively, a substate constitution might help build the authority and legitimacy of substate entities with regard to the central state and further define—and sometimes expand—the political power reserved for them (Marshfield 2011: 1153). However, substate constitutional frameworks are legally subordinate to the central-state constitution (see Saunders 2011: 854; Marshfield 2011: 1159), which usually defines both the level of



jurisdiction of substate entities and their relationship with the central state (Watts 2000: 954), thereby specifying the substate entity's constitutional space.

What is constitutional space, and what determines its scope?

Constitutional space is *the degree to which substate entities can define their own goals and establish their own governmental institutions and processes* (Tarr 2011: 1133–34; Marshfield 2011: 1161). This space is usually defined in the central-state constitution (Burgess and Tarr 2012: 7; see also Marshfield 2011: 1159), although sometimes it is also detailed in peace agreements and/or transitional political arrangements. The specific provisions in the central-state constitution might further be the result of negotiations between stakeholders from the substate entity/entities and the central state, sometimes as part of the broader political settlement process after conflict or during transition. Sometimes, however, the constitutional space might be imposed from above, with limited or no participation from the substate entities.

The constitutional space can include, for example, the power to: draft, amend or replace the substate constitution; set government goals; define specific rights to be protected by the substate entity; structure and divide power among government institutions; create offices; define the process by which laws are enacted in the substate entity; determine the mode of selecting public officials; determine the terms of office and the mode of (and bases for) removing officials; establish an official language; institute mechanisms of direct democracy; create and structure local government; specify who are citizens of the substate entity; and establish qualifications for voting for officials within the constituent unit (Tarr 2011: 1134, note 5).

The establishment of the constitutional space varies substantially according to the context, particularly the sequencing of the post-conflict settlement process, from political negotiation to legal formalization. Notionally, constitutional space is forged as part of peace negotiations, and is formalized with the drafting and adoption of an (interim) constitutional framework, and implemented when the substate entities draft and adopt their own constitutions, as happened in Bougainville (PNG), Western Cape (South Africa), Sudan and South Sudan. In some of the case studies analysed here, such as Bougainville (PNG), the substate constitutional space was created as part of the negotiated settlement to a territorial conflict, which was then formalized through legal amendments to the central-state constitution, and implemented through an act of substate constitution-making. In Ethiopia, South Africa, South Sudan and Sudan, the substate constitutional space was provided as part of a much broader process of post-conflict constitutional transformation. The political settlement for Aceh (Indonesia) was negotiated between the Free Aceh Movement and the Indonesian Government, with international facilitation, and articulated in the 2005 Memorandum of Understanding. The memorandum set out the parameters of the constitutional space, but the constitutional framework was promulgated through a special autonomy law enacted exclusively by central-state institutions—in a similar way as the 2001 Laws on Special Autonomy for both Aceh and West Papua—following the Indonesian Constitution (see Section 4 and Annexes A and B). In Bosnia and Herzegovina and Somalia, the substate entities carved out their constitutional space before the central-state constitutions were adopted.

The way in which the constitutional space is decided on or negotiated, however, does not necessarily affect its scope, which broadly depends on a number of factors, including:

1. the bargaining power of substate as compared to central-state negotiators (see Leftwich 2010);

2. how states form and devolve political power, either as a union of pre-existing states, in which case the substate constitutional space might be ample, or by devolving power within a unitary framework to new substate entities, where resistance to devolution might limit the constitutional space (see Burgess and Tarr 2012: 12–13; Watts 2000: 945; Regassa 2009: 40);
3. the existence of asymmetrical arrangements, as the reasons for asymmetry—the recognition of a particular (historical) identity, for instance—often require more constitutional space for those substate entities (see Burgess and Tarr 2012: 12–13; McGarry 2007); and
4. the different purposes underlying devolution, either to recognize and accommodate territorially concentrated and ethnically defined groups—such as PNG, Indonesia—in which case the constitutional space tends to be broader, or to recognize but emphasize national unity and increase state efficiency (Burgess and Tarr 2012: 13; see also Tarr 2011), in which case the constitutional space might be more limited, such as South Africa or South Sudan.

Whether the political settlement process, and resulting constitution, includes broad constitutional space or not, substate entities may decide not to make full use of it—perhaps emulating the central-state institutional structure and rights framework instead of designing their own, as occurred in Ethiopia and South Africa. However, substate entities might push for more constitutional space (including more governmental powers), and disagreements might arise between both levels of government over the appropriate contours of the constitutional space (Molloy 2017).

Substate entities may challenge the constitutional space for multiple reasons. For example, there may be changing interests and demands at the substate level, or shifts in the balance of power between groups that have different perceptions of the amount of constitutional space needed. Central-state institutions might also renege on the constitutional space technically granted, as their interests and demands might also change over time, as happened in Ethiopia, Russia and Sudan (discussed in more detail below), which may compel substate entities to try again to expand their constitutional space. In other cases, central government negotiators might agree to grant a certain degree of constitutional space to substate entities as part of peace negotiations or a general move towards increased devolution, while other central-state institutions such as the legislature or the judiciary might try to curtail or even reject such commitments (Molloy 2017), as occurred in the Philippines regarding the Bangsamoro Basic Law. Finally, after a substate constitution is adopted, its implementation may trigger judicial review and the curtailment of the constitutional space.

Where constitutional space is less constrained, the substate constitution might be able to respond to specific challenges faced by the substate entity. If successful, this constitutional experimentation might be emulated by other substate entities and the central-state constitution (Burgess and Tarr 2012: 4). If the constitutional space is more constrained, institutional and rights provisions might either be more similar to the ones provided by the central-state constitution or be prescribed from above (see Ginsburg and Posner 2010: 1601). Ethiopia is perhaps an exception: its central-state constitution does not significantly constrain substate entities in making their constitutions. However, due to the political context (including the one-party dominant political system), Ethiopia's substate constitutions replicate the central-state constitution almost entirely in terms of institutions and rights (Regassa 2009: 51; Ayele 2014). For more information see sections 4 and 6, and annexes A and B to this paper.



Why might substate entities seek substate constitutions?

The reasons for substate constitutional frameworks can be manifold, and they can be considered from two different angles: that of the substate entity and that of the central state. In Marshfield's study of substate constitutionalism, he identifies a number of reasons why central states might support substate constitutions. The first, and most relevant to the present discussion, is that allowing substate entities to draft and adopt substate constitutions might enable the central state to accommodate distinct political communities within the state's overall constitutional framework, thus preventing or managing conflicts related to the (real or perceived) lack of autonomy and level of economic and/or political marginalization (Marshfield 2011: 1153–54).

From the perspective of substate entities, there are three main reasons to draft and adopt substate constitutions. First, substate constitutional frameworks might give substate entities the ability to govern themselves *and* the 'ability to determine *how* they will govern themselves' (Marshfield 2011: 1170). Especially when minorities and marginalized groups are territorially concentrated—and when they share a specific identity that sets them apart from other substate entities or the state as a whole—a substate constitutional framework might allow them not only to formally define their governmental structures and processes, but also to recognize their historical claims for autonomy and relevant substate symbols (see also Watts 2000: 946). Second, the substate constitution might contribute to the legitimacy of substate authorities, or the entity as a whole, in the eyes of the substate citizenry because it empowers substate authorities to entrench devolved powers—for example by defining the structure of government, thereby establishing formal limits between central- and substate-level powers. Third, in more stable or peaceful states, substate entities might be able to experiment with their constitutional designs, taking advantage of the relative flexibility to amend substate constitutional frameworks compared to central-state constitutions (see Marshfield 2011: 1184; Section 6). However, in conflict-affected settings with weak institutions (and perhaps a central-state constitution still in the making), substate constitutions might offer a degree of institutional stability from below by allowing substate entities to start building an institutional framework even in the absence of a central institutional framework, such as in Somalia.

In fragile and conflict-affected states, substate constitutions are often the result of a political settlement that includes further assurances of increased autonomy as well as constitutional space for substate entities. Such a political settlement might result from: (a) the reconfiguration of power from a minority group to a majority group (as in post-apartheid South Africa), creating self-government demands from minorities at the substate level; (b) the realization that no group has a sufficient majority, and that therefore every significant minority group should be allowed a degree of independence in designing territorially based political institutions and processes (as in post-war Ethiopia); or (c) a stalemate resulting from intrastate war waged between the state and one or more non-state actors vying for greater autonomy/independence (as in Indonesia, the Philippines and PNG).

3. Substate constitutions in fragile and conflict-affected settings: the data



Categorizing substate constitutions

This paper examines substate constitutions in both federal and unitary (or hybrid) states. Especially in fragile and conflict-affected settings, unitary states and hybrid systems—quasi-federations, constitutionally decentralized unions, confederations involving federal elements, and other innovative autonomy regimes (see Watts 2000)—might have constitutional frameworks as conflict management tools for at least some of their substate entities. These constitutional frameworks can take the form of constitutions, basic laws, statutes of autonomy or special laws that define a substate entity’s structure of government.

Table 3.1. Post-Cold War states with substate constitutional frameworks

	Federal states	Unitary states
Conflict-affected states	Bosnia and Herzegovina Comoros Ethiopia Russia (Chechnya and Dagestan) Somalia South Africa South Sudan Sudan	Azerbaijan* Indonesia (Aceh and Papua) Israel (Palestine)* Papua New Guinea (Bougainville) United Kingdom (Northern Ireland)*
Not conflict-affected	Venezuela	China (Hong Kong and Macau) Ukraine (Crimea) Uzbekistan

* Conflict-affected cases excluded from the analysis.

The paper distinguishes fragile and conflict-affected from non-conflict-affected states by the level of conflict in the substate entity (and/or involving actors primarily located in/ around the substate entity) before the substate constitution was adopted (see Table 3.1). Out of the four non-conflict cases—China, Ukraine, Uzbekistan and Venezuela—Venezuela stands out, as conflict has been ongoing there since at least 1989, but territorially concentrated groups have not been significantly involved and at least two-thirds of the



killings have been carried out by the government, according to UCDP data. Moreover, while most substate constitutions in Venezuela were adopted before the end of the Cold War, even as most of them were amended following the adoption of the 1999 central-state constitution, none of these amendment processes was visibly related to conflict management.

Substate constitutions in unitary and federal states

Federal constitutions recognize the relationship between central and substate entities, define distinct levels of government and guarantee a certain degree of autonomy for the substate entity (Watts 2000: 948–49). Constitutions in unitary states also often, but not always, involve ‘substantial elements of administrative and even legislative decentralization to subnational government’ (Watts 2000: 949), especially when they include territorially concentrated minorities or populations. Furthermore, central-state institutions in unitary states often have the legal authority to unilaterally reduce or expand the jurisdictional purview and constitutional space of substate entities (see Watts 2000: 949).

Currently there are 31 federal states in the world (Anderson 2008: 2; see Box 2). While the degree of autonomy can fundamentally vary from federation to federation and between substate entities, some federations allow or require substate entities to formalize their structure of government and relationship with the central state in substate constitutions, while others prohibit it. Federations that *require* substates to adopt constitutions include Argentina, Australia, Austria, Bosnia and Herzegovina, Brazil, Comoros, Ethiopia, Germany, Iraq, Malaysia, Mexico, Micronesia, Russia, Somalia, South Sudan, Spain, Sudan, Switzerland, the USA and Venezuela. Those that *allow* substate constitutions include Belau/Palau, Canada, Democratic Republic of Congo, St. Kitts and Nevis, South Africa and the United Arab Emirates. Federations that expressly (or by implication) *prohibit* substate constitutions include Belgium, India, Nigeria, Nepal and Pakistan.

While more unitary states devolved power asymmetrically via substate constitutional frameworks *after* the Cold War compared with *during* the Cold War, there are still few such arrangements among unitary states. Given that sovereignty is centralized in unitary states, they tend to be more resistant to the notion of substate constitutional space. During the Cold War, only two out of 15 states that permitted substate constitutional frameworks were unitary states: Tanzania and Spain (arguably, a quasi-federal state). After the Cold War, eight out of 17 states that created constitutions at the substate level were unitary states—Azerbaijan, China, Indonesia, Israel, PNG, Ukraine, the UK and Uzbekistan.

Box 2. Substate constitutions in federal states

The count of 31 federal states (Anderson 2008: 2) includes Nepal, Somalia and South Sudan, which have emerged as federations since Anderson’s study was published. Of these federal states, 20 (Argentina, Australia, Austria, Belau/Palau, Bosnia and Herzegovina, Brazil, Ethiopia, Germany, Malaysia, Mexico, Micronesia, Russia, Somalia, South Africa, South Sudan, Spain, Sudan, Switzerland, the United States and Venezuela) have substate constitutions in some or all of their substate entities. Both India and Pakistan implicitly prohibit substate constitutions, but the region of Jammu and Kashmir on both sides of the border also has a substate constitution.

Symmetrical and asymmetrical arrangements

The constitutional space might be offered symmetrically to all constitutive substate entities, or asymmetrically to only one or a few of them (see Watts 2000: 951). Some states that generally prohibit the adoption of substate constitutional frameworks might allow them in specific substate entities, such as in Aceh and Papua in Indonesia, and Jammu and Kashmir in India. In some cases the intensity with which particular substate entities want to enhance and formalize their autonomy with regard to the central state explains why some are granted more, or any, constitutional space (see Watts 2000: 946), such as Bougainville (PNG) and Aceh (Indonesia). Central-state institutions may grant constitutional space to some or all substate entities either to prevent (a resurgence of) conflict or to manage ongoing violent conflict dynamics, depending on how widespread the conflict is.

Of the 10 post-Cold War conflict-affected cases in the sample, all three unitary states—Azerbaijan, Indonesia and PNG—enacted asymmetric forms of devolution in a substate constitutional framework. Only one federation—Russia—had an asymmetric arrangement for its substate entities; only the republics were allowed to draft and adopt substate ‘constitutions’, while all other substate entities were permitted to draft ‘charters’ (see Annex A). In addition, the arrangement with the State of South Sudan before independence was asymmetric in nature between 2005 and 2011.

Impact of substate constitutions on conflict prevention and management

It is difficult to gauge the impact of substate constitution-building on conflict prevention and/or management. There are only two cases in which the lack of (recorded) violent conflict can clearly be correlated to the adoption of a substate constitution—Bougainville (PNG) and Aceh (Indonesia). In Papua (Indonesia), the 2001 Special Autonomy Law followed more than a decade of non-violent conflict, and even after the adoption of a substate constitution, the levels of conflict have remained low despite questions regarding implementation. Similarly, in Dagestan, violent conflict was only recorded in 1999, followed by its 2003 Constitution. It is therefore difficult to determine whether the lack of conflict in the two latter substate entities resulted from their constitutional frameworks.

Three other countries—Bosnia and Herzegovina (including the Federation of Bosnia and Herzegovina), Comoros and South Africa—have engaged in central-state constitution-building processes after conflict. The resulting constitutions have included relatively ample substate constitutional space (in legal provisions or, in their absence, in practice), and may have helped prevent or manage (recorded) violent conflict. In Somalia, the 2011 Provisional Constitution set the stage for the formation of substate entities and the drafting of their constitutional frameworks. Since the adoption of the Transitional Constitution of Puntland Regional Government in April 2012, there has been no recorded violent conflict in this substate entity.

In Sudan, the conflict with South Sudan took centre stage until the 2005 Comprehensive Peace Agreement was signed, which included provisions for both Sudanese and South Sudanese substate entities to draft and adopt substate constitutions. However, a number of armed groups have been continuously operating in northern Sudan—especially in Darfur, Southern and Northern Kordofan, and Blue Nile regions—since at least 2003, and substate constitution-building processes do not seem to have affected conflict management in these areas. The civil war that followed South Sudan’s independence in 2011 was provoked more by questions related to access to power than the structure of the state. However, the constant



increase in the number of substate entities that started in 2013 might have further boosted violent conflict throughout the country.

During the first Chechen war (1994–96), the December 1995 Agreement on the Basic Principles of Relations between Russia and the Chechen Republic recognized the need to grant a special status to Chechnya as part of Russia, including through creating a substate constitution and other legislation. The legislation established the institutional framework of the Republic of Chechnya, but included no further guidelines. Furthermore, no later agreement mentioned the republic's institutional structure, and the substate constitution was not adopted until 2003—during the second Chechen war (1999–2009). Conflict has continued in the region to date.

These cases therefore yield a mixed picture of the causal relationship between substate constitutions and conflict prevention and management. It is clear that, while substate constitutional frameworks are important tools for addressing substate demands for distinctiveness and self-government, they are not a panacea. Even in the relatively successful cases of Aceh and Bougainville, their use will only produce results if other relevant elements of a successful conflict transformation process are adequately addressed, not least the implementation of the constitutional framework agreed and promulgated after negotiations between stakeholders from the centre and substate entities. In some cases, substate constitutions seem to have had no impact at all (Sudan, South Sudan), whereas in others, substate constitution-building seems to be one of the few available options for rebuilding a post-conflict central state (Somalia). In Ethiopia and South Africa, a substate constitutional space was provided as part of a broader transformation driven primarily by factors other than substate demands, and this (coupled with other critical factors such as a one-party dominant political system at both the central and substate levels) may have contributed to the relative insignificance of the substate constitutional space subsequently. In Bosnia and Herzegovina, the international community created the substate constitutional space as part of a forceful peace agreement that ended all (overt) violent conflict. The case of Russia is much more complicated; the substate constitutional space was reduced after Vladimir Putin became president, and the substate constitutions that were promulgated in conflict-affected regions were imposed from the centre, with little or no participation from substate stakeholders.

4. Designing the substate constitution-building process



The constitutional space defines the substate constitution-building process, for example by influencing the following key issues:

- Is the substate entity allowed to design its own governing institutions?
- Who drafts and adopts the substate constitution?
- Does the final draft need certification from a central-state institution (usually a constitutional or supreme court), and how independent is this institution?
- Does any other central-state institution have the power to ratify or veto the draft before, after or instead of the certification process, and how independent is this institution?
- What institution is responsible for settling disputes between a substate and central-state constitution, or calling for amendments to the substate constitution post-adoption?

Designing the parameters for the substate institutional framework

Central-state constitutions vary in the degree to which they define the substate institutional framework. Sometimes the provisions related to constitutional space reflect a unilateral decision from central-state authorities with regard to substate entities, while in others they might reflect the political settlement the parties reached before the constitution was drafted and adopted (Bell and Zulueta-Fülscher 2016). This paper classifies countries into three distinct categories according to how they define the substate institutional framework (Annex A provides more detailed information on the parameters for the substate institutional framework).

In the first category, the peace agreement and/or interim political arrangement sets the initial parameters of the substate entity's institutional framework, which are then expanded in the central-state constitution. Examples include Bougainville (PNG), the Comoros 2001 Constitution (as amended in 2009) (see Annex A), the Federation of Bosnia and Herzegovina (one of Bosnia and Herzegovina's constitutive entities), South Sudan, Sudan and South Africa. South Africa's 1993 Interim Constitution and 1996 Constitution establish



a (very similar) default provincial institutional framework, and allow provinces to adopt their own constitutional dispensations.

In the second group of countries, neither the peace agreement (and/or interim political arrangement) nor the central-state constitution provides many details about the institutional framework of substate entities, thereby granting considerable constitutional space to the latter. Examples include Bosnia and Herzegovina, Ethiopia, Russia and Somalia. In Bosnia and Herzegovina, the constitutions of both constitutive entities were adopted before the signing of the Dayton Agreement and the Constitution of Bosnia and Herzegovina (an annex to the Dayton Agreement). Hence the Constitution of Bosnia and Herzegovina did not constrain the constitutional space of the entities with regards to the system of government or structure of the state; it only broadly stipulated that they should conform to the central-state constitution. In Somalia, the constituent units that were envisioned in the 2012 Provisional Constitution had not yet been created when the constitution was adopted, and thus the constitutional space was understandably not addressed in the text. Such lack of detail, however, might enable central-state institutions to take back constitutional space effectively granted without having to amend the central-state constitution, as has happened for different reasons in Ethiopia and Russia.

Third, while the central-state constitution might not address the institutional framework of substate entities, peace agreements and/or transitional political arrangements between the central state and the substate entity (or entities) might include significant details in this regard, such as in Aceh (Indonesia).

Drafting and adopting the substate constitution

Substate constitutions are usually prepared and adopted by either the substate legislature or by a substate constituent assembly. An appointed committee (part of the constituent assembly or substate legislature) usually undertakes the actual drafting process. There are, however, some interesting variations in these practices. For example, in Bougainville the substate entity had an extra-parliamentary commission in charge of the drafting, and in Sudan and South Sudan the drafting committees discussed and adapted model constitutions drafted by central-state institutions. While the substate legislature is usually responsible for adopting a draft constitution, in Aceh and Papua the central state (the legislature and executive acted together) adopted the substate constitutional framework. Finally, only three of the central-state constitutions assessed in this paper did not specify the body/bodies in charge of drafting and adopting substate constitutions—the Constitution of the Union of Comoros, the Provisional Constitution of Somalia, and the Constitution of Bosnia and Herzegovina (two of its three constitutive entities predated the drafting of the central-state constitution (Republika Srpska, Federation of Bosnia and Herzegovina)). Furthermore, of the cases analysed in this paper, only Chechnya held, or had a mandate to hold, a referendum as part of the adoption process: two referendums were held to adopt the Chechen Constitution in 2003 and amendments to it in 2007 (see Table 4.1 and Annex B).

Certifying and ratifying the substate constitution before adoption

Not all substate constitution-building processes certify that substate constitutions conform with the central-state constitution. Where it is required, the certification process usually involves a Constitutional Court or Supreme Court that endorses the constitution as respecting the principles and values outlined in the central-state constitution. Sometimes the responsibility falls on a central-state executive body, such as in Bougainville (PNG), Sudan or South Sudan. However, its lack of independence can delegitimize the certification process and/or the draft to be certified.

Table 4.1. Process design for substate constitution-making

(Sub)state	Drafting	Adoption	Certification/ endorsement	Ratification/ assent	Post-adoption review
<i>Federal states</i>					
Bosnia and Herzegovina	High-level Committee (Federation) / drafting committee (Republika Srpska)	National Assembly of Republika Srpska / Constituent Assembly of Federation of Bosnia and Herzegovina (with consensus between delegations of Croatia and Bosnia)	(none)	(Same bodies as for adoption)	Constitutional Court
Federation of Bosnia and Herzegovina	Cantonal legislature	Cantonal legislature	Constitutional Court	(unspecified)	Constitutional Court
Comoros	(not clearly specified)	Island Council/ governor	Constitutional Court	(not clearly specified)	Constitutional Court
Ethiopia	(not clearly specified)	State Council	(none)	State Council	House of Federations (Senate/ Constitutional Court)
Russia (Chechnya and Dagestan)	(not clearly specified)	Substate legislative body (for all substate entities except for republics, where the procedure is not made explicit)	(not clearly specified)	(unclear in general; referendum for Chechnya)	Constitutional Court
Somalia	(not clearly specified)	(not clearly specified)	(none)	(not clearly specified)	Constitutional Court
South Africa	(not clearly specified)	Provincial Legislature	Constitutional Court	Premier of a province	Constitutional Court
South Sudan	Drafting Committees (using Model Interim Constitution of Southern Sudan States)	State Legislature	South Sudan Ministry of Legal Affairs and Constitutional Development (and Sudan Ministry of Justice before independence)	President of Sudan (before independence) / president of South Sudan (after independence)	Supreme Court
Sudan	(not clearly specified)	State legislature	National Ministry of Justice	President	Constitutional Court
<i>Unitary states</i>					
Aceh (Indonesia)	Legislature of Aceh / Provincial government / advisory team of experts	The People's Representative Council/president	(none)	President	Constitutional Court
Papua (Indonesia)	Provincial legislature	The People's Representative Council/president	(none)	President	Constitutional Court
Bougainville (PNG)	Constitutional Commission	Constituent Assembly	National Executive Council	Head of state	Supreme Court (PNG)



In Sudan, the National Ministry of Justice shall declare that substate constitutions are compatible with the Interim National Constitution and the Constitution of South Sudan (art. 2.12.12). In South Sudan, before independence, the certification process had two stages: first, the South Sudan Ministry of Legal Affairs and Constitutional Development reviewed substate constitutions ‘for compatibility with the Interim Constitution of South Sudan’ (Murray and Maywald 2006: 1299–30); second, after the South Sudan Ministry approved the draft, it was sent to the national Ministry of Justice for certification. While the former ministry fairly quickly reviewed drafts for conformity with the Interim Constitution, the latter did not seem willing to follow suit: the South Sudan substate constitutions entered into force without final certification (2006: 1233–34). Apparently the rationale was that if the substate constitutions were compatible with the Interim Constitution of South Sudan, and the Interim Constitution of South Sudan was compatible with the Interim Constitution of Sudan, then this signified that the substate constitutions also conformed with the Interim Constitution of Sudan, and no further certification would be necessary (interview with Susan Stigant). Still, this was a departure from the pre-agreed certification process.

In Bougainville the situation might have been slightly different, in that the central-state constitution was amended to respond to the Bougainville Peace Agreement. Therein, it was mandated that ‘following adoption of the Bougainville Constitution, the Constituent Assembly shall transmit a copy of that Constitution to the National Executive Council’ (article 22(a)), and ‘upon being satisfied that the requirements of the National Constitution for the Bougainville Constitution have been met, the National Executive Council shall advise the head of State to endorse that Constitution’ (article 22(b)).

The South African Constitution’s section 144 is dedicated to the ‘Certification of provincial constitutions’, stating that ‘If a provincial legislature has passed or amended a constitution, the Speaker of the legislature must submit the text of the constitution or constitutional amendment to the Constitutional Court for certification’ (section 144(1)), and ‘No text of a provincial constitution or constitutional amendment becomes law until the Constitutional Court has certified: a. that the text has been passed in accordance with section 142 [on the adoption of provincial constitutions]; and b. that the whole text complies with section 143 [on the contents of provincial constitutions]’ (section 144(2)). The premier of a province must then ‘assent to and sign the text of a provincial constitution or constitutional amendment that has been certified by the Constitutional Court’ (section 145(1)) before the constitution enters into force. The province of KwaZulu-Natal did not pass the certification process as the Constitutional Court identified many flaws, notably the usurpation of national powers (*Certification of the Constitution of the Province of KwaZulu-Natal 1996*, Case CCT 15/96; Murray 2001). The other province that attempted to adopt a substate constitution—Western Cape—while also struck down by the Constitutional Court in first instance, succeeded once it amended the draft following the Constitutional Court’s suggestions (*Certification of the Constitution of Western Cape 1997*, Case CCT 6/97).

In the Union of Comoros, the 2009 amendments to the 2001 Constitution require the Constitutional Court to certify the autonomous islands’ statutory laws in order for them to be promulgated (art. 7) (see Annex A for more details).

Ethiopia has no certification process, and the State Councils have the power ‘to enact and execute the state constitution and other laws’ (art. 52(2b)). Bosnia and Herzegovina has no certification process either, as the constitutions of the constitutive entities were enacted before the central-state constitution. In the Federation of Bosnia and Herzegovina the Constitutional Court shall ‘at the request of the Prime Minister, of the canton concerned, or of one-third of the members of the Legislature of a Canton, determine whether any law or proposed law that has been adopted by that Legislature (including the Cantonal Constitution and any amendments thereto), is in accord with this Constitution’ (art. 10(2)(b)), as ‘the primary function of the Constitutional Court shall be to resolve disputes: (a) between any

Cantons; (b) between any Canton and the Federation Government’ (art. 10(1)). Indonesia also lacks a certification process, though the Constitutional Court ‘shall have the final power of decision in reviewing laws against the Constitution’ (art. 24C). It appears that the Constitutional Court only intervenes after a bill has become law, and hence only has a role in the ex-post review process. In Russia there seems to be no certification process for either its substate constitutions or charters. The constitution only states: ‘The following shall be within the joint jurisdiction of the Russian Federation and constituent entities of the Russian Federation: a. measures to ensure the correspondence of constitutions and laws of republics, the charters, laws and other normative legal acts of krais, oblasts, cities of federal significance, autonomous oblast and autonomous okrugs to the Constitution of the Russian Federation and federal laws’ (art. 72(1)). The nature of this joint jurisdiction is not further defined in the constitution (Küpper 2013: 259). Somalia has no formal certification process, but the Constitutional Court (which has not been properly set up) has the power to invalidate any law or administrative action that may be contrary to the Constitution (art. 4(2)) or to ‘resolve any disputes between the Federal Government and the Federal Member State governments, or among the Federal Member State governments’ (art. 109C(1d)).

Post-adoption review of the substate constitution (in case of dispute)

In case of conflict, central-state constitutions prevail over substate constitutional frameworks (Burgess and Tarr 2012: 10; Saunders 2011: 874). While not all countries have (pre-adoption) certification processes for substate constitutions, most countries have a Constitutional Court or Supreme Court in charge of upholding the central-state constitution if there is a dispute with (or between) ratified substate constitutions (see Table 4.1). Depending on whether the dispute arises between substate entities or between one or more substate entities and the central state, the stakeholders allowed to bring the case to court vary and can range from regular citizens to the governor (or equivalent) in the substate entity or the president/prime minister in the central-state executive. There are often informal (non-court) ways of resolving intergovernmental disputes that are favoured in the central-state constitution *before* bringing the case to the courts.

The independence of a constitutional or supreme court is critical to the legitimacy of its rulings. These institutions are often independent on paper but not in practice, which can directly affect the legitimacy of constitutional frameworks and call the constitutional/supreme court’s rulings into question. However, the substate entity/entities might be represented in the constitutional/supreme court, thereby enhancing the latter’s legitimacy. This is the case in the Union of Comoros, where ‘The President of the Union, the Vice Presidents of the Union, the President of the Assembly of the Union, and the heads of the islands executives shall each appoint one member to the Constitutional Court’ (art. 37 of the Constitution of Comoros (2001(2009))). Both the Constitution of Bosnia and Herzegovina (art. VI (1a)) and the Constitution of the Federation of Bosnia and Herzegovina (art. 9) specifically provide for representation of their constituent entities or people, although as part of a more general logic of ethnic proportionality that excludes other societal group—see the judgements of the European Court of Human Rights in *Sejdić v. Bosnia and Herzegovina* (no. 27996/06 and 34836/06, 22 December 2009) and *Zornić v. Bosnia and Herzegovina* (no. 3681/06, 14 July 2014).

5. Additional considerations for the substate constitution-building process



Timing

Timing and timelines are an important but often neglected issue in substate constitution-building processes. Central-state constitutions are unlikely to mention timelines or deadlines for producing a substate constitution, though sometimes peace agreements do. When realistic, timelines can provide structure to the post-conflict constitution-building process, including at the substate level.

For example, the Memorandum of Understanding between the Government of the Republic of Indonesia and the Free Aceh Movement stipulated a timeline, stating: ‘A new Law on the Governing of Aceh will be promulgated and will enter into force as soon as possible and not later than 31 March 2006’ (art. 1.1.1). The law, however, was only promulgated in August 2006 (May 2008). In Sudan, the Implementation Modalities of the Machakos and the Power Sharing Protocols (Naivasha, Kenya, 31 December 2004) require the state legislatures to draft and adopt state constitutions within three weeks of establishing the state legislature in northern states, and within four weeks after signing the South Sudan Constitution. Within two weeks of receiving the state constitutions, the National Ministry of Justice shall determine their compatibility with the Interim National Constitution in the case of northern states, and for South Sudan according to both the Interim National Constitution and the South Sudan Constitution (art. 2.12.12 of the 2004 Protocol on Power-sharing). These tight timelines were not met in either the north or south (Murray and Maywald 2006: 1212). The Constitution of Bosnia and Herzegovina establishes that the constitutive entities must amend their (pre-existing) constitutions within three months of the entry into force of the central-state constitution (November 2005) (art. 12, par. 2). However, the first post-Dayton amendment of the constitution of the Federation of Bosnia and Herzegovina was adopted only in June 2006, and the first amendment of the Constitution of the Republika Srpska was only adopted in April 2006.

Inclusion in constitutional-space negotiations and drafting substate constitutions

Regarding levels of inclusion in the substate constitution-making process—defined here as the level of public participation and representation of main societal groups—there is a need to distinguish between the establishment of constitutional space and the drafting of the substate constitution. The allocation of constitutional space may be negotiated as part of a broader political settlement process between stakeholders representing both the central-state and the substate entity/entities, as happened in Bougainville (PNG) and Aceh (Indonesia), to a certain extent. Alternatively, constitutional space may be imposed from the centre with no or little substate participation, as occurred in Bosnia and Herzegovina, Ethiopia, South Sudan, and Sudan to a certain extent.

When the constitutional space is the result of negotiations during a political settlement process, the level of societal and political inclusion can still vary greatly. For example, substate elites may dominate the process (and sometimes legitimately represent the population's diversity). In Aceh (Indonesia), the agreement was signed by the Government of Indonesia and the Free Aceh Movement, which the UCDP Database describes as a 'rebel group'. Alternatively, substate negotiators and/or elites might formally (and legitimately) represent societal and political diversity. In Bougainville (PNG), the negotiations were led by the Government of PNG and 'leaders representing the people of Bougainville'. The majority's perception of the legitimacy of the negotiators is likely to influence acceptance of the constitutional space granted to the substate entity, and as a result the substate constitution.

Once the substate constitutional drafting starts, it is usually understood that there needs to be a certain level of local input into how to structure the substate authority and power therein (Marshfield 2011: 1163). Theoretically at least, the process of substate constitution-building should facilitate public deliberation as decentralization decreases the jurisdiction size and citizens can more meaningfully engage in discussions (Marshfield 2011: 1187–88). However, this likely depends on the extent to which the constituent authority of the substate entity (a) is empowered by central and substate authorities to participate and (b) differentiates itself in significant ways from the constituent authority of the central state—often in terms of ethnicity and/or religious belief (Saunders 2011: 874).

In most substate constitution-building processes in fragile and conflict-affected settings, it is difficult to gauge the extent to which public participation at the substate level played a significant role. Most often than not, public participation is not mandated by either the central-state constitution or any other arrangement, such as an interim constitution or peace agreement. In Sudan, for instance, it is not even clear 'to what extent the assemblies complied with the legislative procedure for considering and amending the drafts, how much debate there was, or whether contributions were sought or allowed from members of the public and civil society groups' (Murray and Maywald 2006: 1229). In Ethiopia, according to Regassa (2009: 52), public participation and political debate was not part of the drafting, deliberation or adoption phases for substate constitutions. Bougainville might be the only example where the peace agreement (art. 17) specifically states that the Constitutional Commission shall be representative in terms of the population of Bougainville, though it makes no reference to public participation either. In Indonesia, however, a large public consultation process affected both the clarity and consistency of the law, and led to 'a rather complex and voluminous draft' (May 2008: 42).



The role of the international community

The international community's role in substate constitution-building processes crucially depends not only on the needs of the substate entity, but also on the needs (and the demand) of central-state institutions. Especially where central-state institutions have been eroded after protracted violent conflict, as in Somalia, and/or where the international community has been engaged in brokering or guaranteeing peace agreements between the central state and the substate entity, as in Bougainville (PNG) (or even the central-state constitution-building process as in Iraq or Bosnia and Herzegovina), the international community might have a more significant role with regard to the substate(s) constitution-building processes.

The international community can (and has) engaged with these processes in a number of ways in the past, all of which usually have the express agreement of the central-state government, including:

1. expert advisory services to key stakeholders, at both the central and substate levels, on specific process- or design-related issues, including interpreting the constitutional space granted to the substate entity in the central-state constitution;
2. guaranteeing the implementation of agreements between the central state and the substate entities, and mediating between stakeholders where necessary;
3. assistance (financial or any other type) in organizing relevant workshops/roundtables, sometimes extending to broader public fora or civic education campaigns at the substate level; and
4. capacity building of substate institutions and key stakeholders involved in the constitution-building process, for instance trainings, secondment and/or direct funding of staff, or procurement of other types of resources (including the organization of donor conferences).

The impact of international engagement varies depending on the context. The case of Somalia stands out, as the constituent units envisioned in its 2012 Provisional Constitution—the Federal Member States (FMS)—had not yet been created when the constitution was adopted. Only the creation of the FMS would allow for the full implementation of the Provisional Constitution, including the establishment of the Upper House of the Federal Parliament, comprised of representatives of the FMS, with an active role in legislative affairs as well the appointment of key institutions. However, first the Boundaries and Federation Commission must recommend the number and boundaries of FMS (art. 49). The fact that the House of the People took until July 2015 to nominate the commission paved the way for the transitional government to work directly with regional stakeholders in forming the FMS. While lukewarm at first, the international community has increasingly engaged in both the FMS formation and constitution-building processes. By supporting these processes the international community might have been helping the Somali Government bypass the constitution, yet it also supported the state-building process at both the central and substate levels.

In Bosnia and Herzegovina, the international community had the opposite effect. Its two component entities both had substate constitutions previous to the signing of the 1995 Dayton Agreement. The Constitution of the Republika Srpska was adopted in February 1992, before the start of the Bosnian War, 'in a clear act of secession' (Woelk 2012: 110). The Federation was created after the March 1994 Washington Agreement, which halted the conflict between Croats and Bosniacs, and led to the adoption of this entity's constitution in June 1994. Both constitutions had to be fundamentally amended after the internationally

brokered Constitution of Bosnia and Herzegovina (Annex 4 of the Dayton Agreement, art. 11), which reduced the constitutional space both entities had carved out for themselves. Central-state institutions have remained weak with regard to substate constitutional arrangements (Woelk 2012: 113). Using the 1997-conferred 'Bonn Powers' that allowed the UN High Representative to unilaterally legislate and dismiss obstructive public officials (Woelk 2012: 119), the international community attempted to centralize (and strengthen) the political system in order to bypass or counteract (nationalist) spoilers from both entities (Tzifakis 2007). The Venice Commission (2005) called for constitutional reform to transfer competencies from the entities to the state, and to clarify the entities' future relationship to the state (Woelk 2012: 125). A constitutional amendment process has not yet occurred.

PNG is a formerly unitary (though devolved) state that, after 10 years of intra-state war (1988–98) between the armed forces of PNG and the Bougainville Revolutionary Army (a secessionist armed group), agreed to grant (asymmetric) autonomy to Bougainville. The 2001 Bougainville Peace Agreement included the framework of the Bougainville constitution-building process, which was adopted in 2004, as well as the mandate to hold a referendum on Bougainville's future political status within 10–15 years of electing the first Bougainville autonomous government (clauses 309–24) (UN 2001). The international community played a significant role in guaranteeing a peaceful environment for the ensuing constitution-building and implementation processes. International intervention in the constitution-building process itself was minor (Wallis 2016: 371), though it was agreed that the constitution had to meet international standards of good governance (Wallis 2016: 372). Regarding the content of the peace agreement, however, the government of PNG 'was under considerable international pressures to settle the conflict for purposes of regional stability' (Ghai and Regan 2006: 598), which meant making significant concessions regarding the immediate and future political status of Bougainville. Bougainvilleans only accepted a delay to the referendum on the future political status of Bougainville under pressure from the international community, which argued that this was the only way the central-state government would agree to a constitutionally guaranteed referendum (Ghai and Regan 2006: 599–600).

6. Substate constitutional design



This section describes substate constitutional arrangements and compares the following aspects to the corresponding arrangements at the central-state level (and where relevant, other substate entities): system of government: parliamentary, presidential or semi-presidential (see Elgie 2011; Shugart and Carey 1992); unicameral or bicameral legislatures; procedures for constitutional amendment (particularly the relative flexibility and rigidity between central and substate levels); regulation of local government; provision of group minority rights and substate symbols.

Systems of government

In many of the case studies, the design of executives at the substate level closely resembles the central-state design. Although there are differing levels of variation at the substate level, the basic model tends to remain the same. Sometimes, however, this variation can be significant, as illustrated in Russia and Somalia. The clear exception is PNG, where the central state and the substate entity opted for opposing models. There are theoretical cases for both approaches. Similarity allows for ‘user-friendly’ movement across both levels of government, both for political actors and interests. Variation, however, might allow some experimentation, and in some cases might better fit the political circumstances of the substate entity.

In Ethiopia (Amhara) and South Africa (Western Cape) the design of the parliamentary executive is virtually the same as the central-state system. In Indonesia, the central state is headed by the president, whereas Aceh and Papua are headed by governors, but they are both essentially presidential systems headed by a directly elected chief executive. In Bosnia and Herzegovina, again there is substantial resemblance between the central-state and substate constitutions, for example both adopted collegiate presidencies. In the central state, the presidency comprises three elected representatives of the Bosniac, Croat and Serb communities, with the chair rotating among the three during the term of the presidency. In the Federation, the president and two vice presidents must represent the three constituent peoples. While Republika Srpska is more orthodox in its semi-presidential form, all three designs are semi-presidential in nature, with the chief executives being separately and directly elected and the ministers being accountable to the legislature. In Russia, the semi-presidential system of the central state is replicated in Dagestan, whereas in Chechnya the legislature indirectly elects the head of the executive. However, other design features of the Chechen system closely resemble both Russia and Dagestan (e.g. the way the cabinet is constituted, its powers and functions, and in both substates candidates for chief executive are nominated by

the Russian president). The clear exception is PNG (parliamentary executive) and Bougainville (semi-presidential system), where the central state and the substate entity opt for opposing and very different models. Similarly, in Somalia, Puntland follows the central state in opting for a parliamentary executive, whereas Jubaland adopted a semi-presidential model. The diversity of models in this case appears to be a consequence of the country's unique state-formation process, where the central state is weak and does not control all its territory; substate constitution-building, where possible, is in part aimed at building the capacity and legitimacy of the central state from below.

In all the federations except for Bosnia and Herzegovina (the Brčko District is a smaller and special substate entity which has a unicameral legislature), the central-state legislature is bicameral, whereas the substate legislatures are unicameral. This seems to follow the pattern that federal states usually have second chambers as houses of territorial representation for their regions, whereas the legislatures of substate entities within federal states do not need to perform this function. In Bosnia and Herzegovina, two factors clearly influence bicameralism at the substate level: the Federation has a further level of cantonal devolution that requires representation, and bicameralism at all levels is part of an elaborate and complex system of consociational power sharing (with the overall aim of equal representation of all three ethnic communities at all levels). In the unitary states, PNG and Bougainville are both unicameral, and in Indonesia the central-state legislature and those of Aceh and Papua are bicameral. However, in Indonesia, the second chambers are all relatively weak consultative bodies—even though they are directly elected and have specified jurisdictions—rather than checking mechanisms as in conventional understandings of bicameralism.

For more information on systems of government in central and substate constitutions, see Table 6.1. Although Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina are seldom listed as semi-presidential, possibly due to their unique collegiate presidencies, for the purposes of this paper both cases satisfy the definition of semi-presidentialism. They both have presidents with substantive executive powers who are elected directly and separately from their legislatures, and who govern with a cabinet that is collectively accountable to the legislature.

Table 6.1. Systems of government in federal and unitary states

Central state / substate entity	System of government	Brief explanation	Bicameral/unicameral
<i>Federal states</i>			
Bosnia and Herzegovina	Semi-presidential republic	Directly elected consociational rotating presidency and Council of Ministers responsible to legislature	Bicameral
Federation of Bosnia and Herzegovina	Semi-presidential system	Directly elected consociational rotating presidency and Council of Ministers responsible to legislature	Bicameral
Republika Srpska	Semi-presidential system	Directly elected president and cabinet of ministers	Bicameral
Brčko District	Parliamentary system	Mayor elected by the district assembly	Unicameral
Comoros	Anjouan substate constitution not available online		
Ethiopia	Parliamentary republic	Government headed by prime minister formed by party with majority in legislature	Bicameral
Amhara	Parliamentary system	Government formed by party with majority in legislature	Unicameral
Russia	Semi-presidential republic	Directly elected president appoints prime minister and cabinet and is accountable to legislature	Bicameral

Central state / substate entity	System of government	Brief explanation	Bicameral/unicameral
Chechnya	Parliamentary system (Russian president nominates head of republic)	Head of republic elected by legislature	Unicameral
Dagestan	Presidential system (Russian president nominates head of the executive)	Directly elected head of republic is chief executive and governs without parliamentary executive	Unicameral
Somalia	Parliamentary republic	Indirectly elected president is head of state, and indirectly elected prime minister is head of government	Bicameral
Puntland	Parliamentary system	Indirectly elected prime minister	Unicameral
Jubaland	Semi-presidential system	President is elected separately from legislature (although indirectly by a 'Delegates Conference' rather than directly by the people), and cabinet is accountable to legislature	Unicameral
South Africa	Parliamentary republic	Hybrid system in which president combines head of state and head of government functions, and is indirectly elected by parliament	Bicameral
Western Cape	Parliamentary system	Prime minister indirectly elected by provincial legislature	Unicameral
South Sudan	No substate constitutions available online		
Sudan	No substate constitutions available online		
Unitary states			
Indonesia	Presidential republic	Directly elected president/head of state and government	Bicameral (weak second chamber)
Aceh	Presidential-type system	Directly elected governor	Bicameral (weak second chamber)
Papua	Presidential-type system	Directly elected governor	Bicameral (weak second chamber)
PNG	Parliamentary monarchy	Queen represented by governor general as head of state; head of government is indirectly elected prime minister	Unicameral
Bougainville	Semi-presidential system	Directly elected president as head of Executive Council, composed of members of legislature	Unicameral

Procedures for constitutional amendment

Both central and substate constitutions in all cases analysed in this paper are more difficult to amend or replace than ordinary laws, but amendment procedures also vary depending on the country and its legal tradition. While assessing the flexibility of constitutions is difficult, Table 6.2 evaluates constitutions' relative rigidity based on the fact that all central-state constitutions are more difficult to amend than substate constitutions. Other than for Bougainville, there is no requirement of express substate consent in amendments to central-state constitutions even where those amendments affect the substate constitutional space. In

in many cases, however, there is provision for airing substate views within the central-state constitutional amendment process (e.g. through regional views represented in second chambers).

The right or power to initiate constitutional amendments is important in two ways. First, it illustrates the relationship between executives and legislatures. In practice, the right to initiate amendments is widely shared between executives and legislatures. However in some cases such as Russia, the executive has the leading role in initiating amendments, yet in this case the power is shared with the legislature and the substate entities. In other countries the legislature has the predominant role, for example in Indonesia. The second way in which this power is important is that it sheds light on the relationship between the central and substate levels. No amendment of any central-state constitution except Russia may be initiated by substate entities. In some cases extensive consultation is required for central-state constitutional amendment (e.g. in PNG for amendments related to powers devolved to Bougainville). Elsewhere, provincial representation in the lower chamber allows substate views to be heard in initiation proceedings, as in South Africa and Indonesia. Similarly, most substate entities do not recognize a right of central-state institutions to initiate amendments to substate constitutions, except in Amhara, where changes to founding principles and fundamental rights engage a procedure in the Ethiopian Constitution that involves the central as well as all substate legislatures. Since the substate constitutions of Aceh and Papua are provided by Indonesian law, only central institutions can amend them. In PNG and Bougainville, detailed consultation requirements mean that both levels share the power to initiate amendments.

Another important aspect in the relationship between the central and substate levels is the requirement for consultation and consent of levels of government *other than* the one seeking change. All but two of the federations in the current sample require some form of consultation, and very often the legislative consent of their substate entities is needed to amend their central-state constitutions. In Bosnia and Herzegovina, rigidity in this regard is provided through the elaborate consociational requirements of cross-communal consensus built into its procedure of constitutional amendment. In South Africa, substate views are represented through the central second chamber (comprised of provincial representatives) rather than the substate institutions. In unitary states, the picture is more mixed. Indonesia does not give any substate institutions a role in amending its constitution, but the bicameral central legislature sits in joint session when considering constitutional amendments, and the second chamber, though otherwise quite weak, has an opportunity to represent regional views in the proceedings. In PNG, there is no requirement unless the amendment concerns Bougainville, in which case substate consent is required to change the central-state constitution.

Most substate constitutions in federal states do not include a role for the consultation or consent of central-state institutions in their amendment procedures, except in Amhara under the same framework as for initiation (discussed above). Amendments to any substate constitution in South Africa require certification by the Constitutional Court for consistency with the central-state constitution (see Table 4.1). In unitary states, Bougainville is merely required to inform the central-state executive of substate constitutional amendments.

As for the rules of procedure for constitutional amendments, there is the widest possible range, including enhanced legislative majorities, parallel majorities, consociational consensus, parliamentary special procedures including joint or separate sessions of bicameral legislatures, temporal restraints (e.g. with specific timelines to slow down the process), referendums and even provision for Constituent Assemblies (see also Dixon and Holden 2011). Except for Bosnia and Herzegovina and Ethiopia, central-state constitutions are more rigid than substate constitutions (Ginsburg and Posner 2010). Some constitutions contain ‘eternity clauses’ that expressly prohibit any amendment of particular types of provisions (Klein and



Sajó 2012), mostly fundamental/human rights, founding principles and amendment procedures. Even though such clauses are significant in post-conflict settings (Suteu 2017), constitution-makers often use them sparingly because they cannot be legally amended. In the present sample, only the constitutions of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina, Comoros, Somalia, Indonesia and to some extent Russia include them. Indonesia is the only country that protects its unitary statehood through an eternity clause. The 2001 and (amended) 2009 versions of the Constitution of the Union of Comoros both include an eternity clause to protect the integrity of the federal union as well as the autonomy of the substate entities.

Table 6.2. Amendment procedures in federal and unitary states

Central state / substate entity	Relative level of rigidity	Institution that initiates amendment	Amendment rules
<i>Federal states</i>			
Bosnia and Herzegovina	High	Parliamentary Assembly	Two-thirds majority in the lower house (high degree of cross-communal consensus).
		No substate role	
Federation of Bosnia and Herzegovina	High	President in agreement with the vice presidents, the government, a majority in the lower house, and a majority of delegates from each of the three communities in the upper house	A simple majority of delegates of each of the three communities in the upper house, and a two-thirds majority in the lower house.
		No central state role	
Republika Srpska	High	The president of the republic, the government or at least 30 deputies of the lower house	Two-thirds majority of the lower house and a majority of each constituent people in the upper house.
		No central state role	
Brčko District	High	(unclear)	Three-fourths of the total number of elected Councillors of the District Assembly, and at least one-third of Councillors from each constituent people present and voting.
Comoros	<i>Anjouan substate constitution not available online</i>		
Ethiopia	High	Unclear but according to conventions of parliamentarism, likely initiated in lower house by government (majority party)	Two types of procedures depending on specific issues: (1) two-thirds majority in each legislative chamber, plus the approval by simple majority of all substate legislature; (2) two-thirds majority of the two legislative chambers in joint session, plus the approval by simple majority of two-thirds of the substate legislatures.
		Substate legislative consent required	
Amhara	High	One-third of the members of the legislature; or majority vote of the members of the Council of the Regional Government; or majority vote of the members of one of the Nationality Councils within the substate entity; or one-third of all the 'Woreda Councils' within the substate entity; or one-third of all 'Kebele Councils' within the substate entity	Depending on the specific provisions to be amended: (1) following article 105 of the Ethiopian Constitution, i.e. two-thirds majority of the two legislative chambers in joint session, plus the approval by simple majority of two-thirds of the substate legislatures; (2) more than half of all 'Woreda Councils', two-thirds of the members of one of the Nationality Councils, and three-fourths of the members of the legislature; (3) for provisions to do with amendment rules: two-thirds majority of the members of two-thirds of all 'Woreda Councils', two-thirds majority of the members of two-thirds of the Nationality Councils, and three-fourths of the members of the legislature.
		Some provisions amendable only through procedure in central-state constitution, which involves central-state and other substate institutions	

Central state / substate entity	Relative level of rigidity	Institution that initiates amendment	Amendment rules
Russia	High	The president, upper house, lower house, government, substate legislative representatives, or groups of not less than one-fifth of the members of the upper or lower house	Depending on the specific chapters of the constitution to be amended: (1) call of a Constituent Assembly (supported by three-fifths of all members of the lower and upper houses), approval by two-thirds of the total number of its members or call for referendum; (2) three-quarters in the upper house, two-thirds in the lower house, and simple majority in at least two-thirds of the substate legislatures; (3) (regarding adding or changing the boundaries of substate entities) three-quarters in the upper house, and two-thirds in the lower house.
		Substate legislative consent required	
Chechnya	Low	President of the Chechen Republic or the legislature	Two-thirds majority of the substate legislature; if the head of the republic rejects the amendment, a three-fourths majority of the legislature can override this vote.
		No formal central state role	
Dagestan	Medium	President of Dagestan, the legislature, the government, or a group of deputies of the legislature who represent not less than one-third of the total number of deputies of the legislature	Two types of procedures: (1) Call of a Constituent Assembly and a referendum; (2) Two-thirds majority of the substate legislature.
		No formal central state role	
Somalia	High	Lower house	Amendable provisions require two-thirds majority in both legislative chambers and a referendum.
		No substate role	
Puntland	Medium	One-fifth of the substate legislature, or the government of the substate entity, or 5,000 voters	Two successive three-fourths majorities in the substate legislature with a one-month interval between the votes.
		No central-state role	
Jubaland	Low	Two-thirds majority in the substate legislature	Three-fourths majority in the substate legislature.
		No central state role	
South Africa	High	National Assembly (lower house), with the possibility of the upper house to participate	Depending on the specific section/chapter of the constitution to be amended: (1) three-fourths in the lower house, and the support of at least six provinces in the National Council of the Provinces; (2) two-thirds in the lower house, and the support of at least six provinces in the National Council of the Provinces.
		No substate institutional role except for National Council of the Provinces involvement in central processes	
Western Cape	Low	Provincial legislature	Two-thirds majority in the substate legislature.
		No central state role except requirement that Constitutional Court certify all substate constitutional amendments	
South Sudan	<i>No substate constitutions available online</i>		
Sudan	<i>No substate constitutions available online</i>		



Central state / substate entity	Relative level of rigidity	Institution that initiates amendment	Amendment rules
Unitary states			
Indonesia	High	One-third of the members of the MPR (or joint sitting of the lower and upper houses)	Simple majority in a joint sitting of the lower and upper houses, albeit with enhanced attendance requirements (at least two-thirds of the total membership). Provisions relating to the form of the unitary state may not be amended (art. 37 (5)).
		No substate role, except limited role of upper house in representing provincial interests	
Aceh	Low	Both chambers of the provincial legislature, or the central lower house in consultation with the Aceh lower house	The Law on Governing Aceh (11/2006) stipulates only central-state institutions can amend (always in consultation with the Aceh legislature), while the Qanun, related to the implementation of this law, can be amended by Aceh's two legislative chambers.
		Dominant central-state role	
Papua	Low	Both chambers of the provincial legislature	(As all other laws), majority of the central lower house in joint approval with the president of Indonesia.
		Central-state plays dominant role	
PNG	High	Unclear but according to conventions of parliamentarism, likely initiated in lower house by government (majority party)	Depending on the provision: (1) absolute majority; (2) three-quarters majority; or (3) two-thirds majority in the legislature (default); when affecting Bougainville, with significant requirements to consult and coordinate with local stakeholders, and with the additional either two-thirds absolute majority vote of members of the Bougainville legislature or a simple majority of the members of the Bougainville legislature.
		Extensive consultation with substate level if amendment affects Bougainville	
Bougainville	Low	National or Bougainville Government (in consultation)	Absolute majority vote of the Bougainville legislature (art. 195 (4)), while informing the PNG minister in charge of Bougainville affairs (art. 287 of PNG Constitution).
		Minor role for central state	

Note: This paper defines the level of rigidity of substate constitutions *relative* to that of the central-state constitution, which is considered to be 'high' by default, as it is the supreme law of the land and is understood to be more difficult to amend than ordinary law. The 'medium' and 'low' categories are meant to distinguish the level of rigidity *between* different substate constitutions within the same country. If there is only one substate constitution available, and its amendment rules are less rigid (or more flexible) than those of the central-state constitution, these are automatically deemed 'low' rigidity. When there are two or more substate constitutions with different (and more or less rigid/flexible) amendment rules, constitutions that are easier to amend are classified as 'low'. Those that are 'in between' the central-state constitution and the easiest-to-amend substate constitution in terms of rigidity are classified as 'medium'. These classifications are not meant to be exact; they are intended to give a sense of the degree of rigidity/flexibility of each constitution.

Who deals with local government?

Both central-state and substate constitutions in the case studies permit some form of local government, with the exception of Bosnia and Herzegovina, which only makes special arrangements for the Brčko District. This district was established after the Dayton Agreement and currently functions according to the 2008 Statute of the Brčko District of Bosnia and Herzegovina (see also Gavrić, Banović and Barreiro 2013: 23). Such special arrangements are also granted in the substate constitutions of Amhara and Bougainville. Somalia's Constitution contemplates a local government level, but makes no further provision. The 2009 amendments of the 2001 Comoros Constitution state that the

autonomous islands can deal with the administration of local communities, but no further details are provided. Ethiopia and PNG establish the principle of local government autonomy, and the central-state constitution provides a basic framework for their organization and functions. In Bosnia and Herzegovina, Comoros and Somalia, therefore, the design and operation of local government is a matter solely for the substate entities. In Ethiopia, the central-state constitution sets down the essential principles and structure of local bodies, but further operationalization is devolved to the substate entities (although in practice the central government seems to play a more interventionist role). The situation is the same in PNG in relation to Bougainville, although in other regions of PNG the central state has a more direct relationship with local governments.

At the other end of the spectrum, the arrangements for local government are highly developed in the central-state constitutions of South Africa, Russia and Indonesia, albeit in different ways. Local government in South Africa is anchored in the concept of ‘cooperative government’, a cornerstone of the constitution that recognizes the national, provincial and local spheres in a three-tier structure of government. The constitution elaborates the principles on which the three spheres govern in cooperation with each other, and details the powers, functions, composition and structure of the local sphere. The Russian Constitution goes into less institutional detail with regard to local government, but echoes the South African approach in setting out a well-developed conceptual framework for this level. The Russian Constitution recognizes and guarantees the concept of ‘local self-government’ and its distinctiveness from the institutions of substate government. The constitution describes the organizing principles of local self-government, but leaves its specific form open for local communities to decide, while guaranteeing local government independence from the substate entities. The Indonesian Constitution divides the country’s territory into provinces, and the provinces into regencies and municipalities. The constitution also sets out the basic structure of each of these administrative units, which emulate the executive and legislative design of the central state, but leaves the detail to legislation. This is common practice, as most constitutions (both central- and substate) establish the main principles, and leave the details to be regulated by law.

The Russian and Indonesian constitutions also provide for direct institutional links (including through fiscal and financial relationships) between the central state and the local government, which can bypass the substate level. The three-tier system in South Africa also necessitates a direct relationship between the central state and local governments, but that system protects substate autonomy in the relationship between substate entities and local governments.

These characteristics of central-state constitutions are also found in substate constitutions. Jubaland’s constitution is the least detailed, as it only recognizes that local government bodies may exist; it defers everything else to future legislation. The substate constitutions of the Federation of Bosnia and Herzegovina, Republika Srpska, Bougainville, Chechnya and Dagestan all contain some detail, but delay further provisions to legislation. Within this group of substate constitutions, Bougainville has the most distinctive arrangements compared to the central-state constitution, whereas the provisions in Chechnya and Dagestan are close replications of the Russian framework. Much more detail concerning local government is found in Western Cape and Puntland (although again, further substate legislation is contemplated), and the special autonomy laws for Aceh and Papua, which are very similar in this respect, are the most elaborately detailed in regards to local government. This elaborate detail is a function of the structure of even special substate autonomy being closely intermeshed with the unitary structure of the Indonesian Constitution.



Group minority rights

Other than their territorial systems of autonomy, the majority of the central and substate constitutions analysed here provide for special regimes of enforceable group rights to protect minorities. Rights provisions of this type may mutually reinforce each other (i.e. between central and substate constitutions), or substitute for each other.

Bosnia and Herzegovina, Ethiopia, Russia and South Africa have central-state constitutions that include specific minority rights. The substate constitutions of the Federation of Bosnia and Herzegovina, Republika Srpska, the Brčko District and Amhara also provide such frameworks. Those that do not are PNG, Somalia and Indonesia, although certain Indonesian provisions recognize traditional communities' customary and cultural rights, as well as the state's duty to respect and preserve local languages as 'national cultural treasures'. Of Indonesia's substate entities, Papua's special autonomy law makes no reference to minority rights; nor does Aceh's law, although it refers to indigenous traditions, customs and leaderships and their protection, not all of which are necessarily 'minority' rights, but relate to the majority substate population.

Bosnia and Herzegovina, and South Africa, provide the clearest constitutional protections of minority rights. Their past conflicts and post-conflict transitions demanded such protections, and the settlement processes drew heavily on the international human rights discourse. The consociational constitution of Bosnia and Herzegovina fundamentally deals with group rights. In addition to its elaborate provisions for the three constituent peoples and entities, it also includes group minority rights by incorporating or acceding to a series of international human rights instruments in the domestic legal system, including the European Convention of Human Rights, which has supremacy over domestic law, and a number of other international treaties that concern minority rights, including the International Convention on the Elimination of All Forms of Racial Discrimination (1965), the European Charter for Regional or Minority Languages (1992), and the Framework Convention for the Protection of National Minorities (1994). All of these legal protections are binding on the substate entities as well. The Bill of Rights of the South African Constitution guarantees the collective rights of cultural, religious and linguistic communities, empowers parliament to adopt charters of rights to 'deepen the culture of democracy', and the judicial certification process ensures that substate constitutions protect these rights. Moreover, the constitution permits the adoption of national legislation recognizing the right of self-determination of any territorially based community that shares a common cultural and linguistic heritage, but only within the framework of self-determination of the South African people as a whole. Likewise, one of the distinguishing features of the Ethiopian Constitution is the collective rights it confers on internal 'nations, nationalities and peoples'. These groups are given the rights to develop language, express culture and preserve history, to establish territorial institutions of self-government, and (together with the substate entities), the 'unconditional' right to self-determination, including secession.

While it is very unusual for the protection of group minority rights to extend to groups *within* substate entities being given the right to their own constitution, either by the central or substate constitution, such a right is permitted in the Federation of Bosnia and Herzegovina's substate constitution. While the cantons may have their own constitutions, the Federation Constitution provides considerable binding detail about the cantonal structures of government and requires that any cantonal constitution is consistent with the Federation Constitution (see Annex A for further details).

Symbols

Symbols are expressions of substate identity and distinctiveness, and many of the substate constitutions examined here provide for substate symbols that are different from those of the central state. The Western Cape Constitution makes provision for provincial symbols to be created by provincial legislation. The Dagestan constitution provides for its own state symbols, including a coat of arms, flag and anthem to be established by law. Amhara provides for its own flag, emblem and anthem to be instituted by law; the anthem is required to reflect the objectives of the constitution, the belief in living together with the rest of the peoples of Ethiopia and their common destiny. The Jubaland Constitution provides for its own flag, emblem and official seal, but does not mention an anthem. The Federation of Bosnia and Herzegovina permits its own flag, anthem, coat of arms and seal, as well as other symbols to be determined by the legislature, but approval of symbols requires a majority vote in each house, including a majority of Bosniac and Croat delegates in the House of Peoples. The flag, coat of arms and anthem of the Republika Srpska is to be determined by law. Bougainville's Constitution has one of the more elaborate provisions, seeking to institute symbols that are 'of a character and kind unique to Bougainville'. It states that a Bougainville law shall provide for its flag, emblem, motto, seal, pledge, anthem, style of dress, awards, holidays and days of celebration. These substate constitutions therefore provide for their own symbols consistently with what is permitted under their central-state constitutions, but do not refer to a requirement for further central state approval.

The Aceh special autonomy law reaffirms the Indonesian national flag and anthem, but states that the Aceh government may adopt a regional flag, crest and hymn reflecting its special characteristics, by law. Yet the law states that the Aceh regional flag will not be treated as a symbol of Aceh sovereignty. The Papua special autonomy law is virtually identical in this respect.

The Constitution of Chechnya is silent on symbols, whereas the Puntland Constitution states that its emblem, flag and anthem are those of the Somali central state. Finally, the statute of the Brčko District is the sole case in the sample that stipulates that there shall be no flag or coat of arms for the district except those of Bosnia and Herzegovina, and its seal and oath affirms that it is part of Bosnia and Herzegovina.

7. Conclusion



This paper has explored conflict-affected countries in which substate constitutional frameworks have been used in a range of ways, from merely organizing substate entities after conflict to managing territorial claims for autonomy. While substate constitutionalism has received policy and scholarly attention in recent years, this analysis has focused on fragile and conflict-affected settings in which substate constitution-building raises distinctive and more difficult questions than in more stable and peaceful contexts with established traditions of constitutional government.

The paper has examined substate entities that are identifiable territorial units within countries, the people of which are perceived to be distinctive in terms of historic, ethnic or cultural identity. Whether the central-state constitutions are federal or unitary affects how the ‘constitutional space’ of the substate entities is understood. The substate constitutional space is usually provided for in the central-state constitution, but may also be defined in peace agreements and/or transitional political arrangements. This combination of legally formalized and more political agreements is critical to a full understanding of the scope and nature of substate constitutionalism in these conflict-affected settings. The sequencing of the broader political settlement process through which the substate constitutional space is created is also significant.

There are many reasons why substate constitutions are adopted. From the central-state perspective, giving a substate constitutional space may help manage conflict in communally plural polities with territorially concentrated groups, and may help improve political participation and representation. From the substate perspective, substate constitutions might give institutional shape to claims for self-government, enhance the legitimacy of these institutions, and/or provide government stability to conflict-affected settings. The case studies portray a mixed picture on the impact of substate constitution-building processes on conflict prevention/management.

Aside from these conceptual parameters of substate constitutionalism, this paper has analysed in great detail the process dimensions of substate constitution-building as well as the substantive content of substate constitutional design. With regard to *process*, it explored a series of critical issues including the extent to which the substate entity is permitted to design its own governing institutions; the institutions vested with the responsibility to draft and adopt the constitution; whether the constitution requires validation by central-state institutions (both judicial and political bodies, and if so, their independence and legitimacy from the substate perspective); and the mechanisms for dispute settlement in a multi-level system. As with any constitution-building process, issues of timing and inclusion are key

elements in the substate sphere; the analysis also examined the role of the international community, where the latter has been relevant.

The paper then turned to *constitutional design*, and explored how substate constitutions (in the context of the constitutional arrangements of their central states and other substate entities) give effect to systems of government (in particular, whether executives are parliamentary, presidential or semi-presidential, and whether legislatures are unicameral or bicameral); procedures for constitutional amendment (in particular, the relative flexibility and rigidity between the central and substate levels); the regulation of local government; the provision of group minority rights; and substate symbols. The case studies revealed a rich diversity of institutional forms, in many cases reflecting unique aspects of the conflict and the circumstances of their settlement, and identifying some general patterns. Even in post-conflict settings, where the provision of a distinctive substate constitutional space implies a relatively high degree of autonomy, the path dependency of pre-existing constitutional traditions is visible, especially in systems of government in which substate entities tend to emulate their central states in the design of their autonomous executives. By contrast, most substate legislatures tend to be unicameral even where the central legislature is bicameral. Moreover, all the federations studied here provide for some form of substate representation through a federal lower chamber, whereas this device is less significant in the unitary states.

Constitutional amendment procedures are generally less rigid at the substate level, in part because the bicameralism of most central legislatures is absent at the substate level. The constitutional provision for local governments below the substate level is often shared between the constitutions of the central-state and substate entities, with the latter (and subconstitutional legislation of both levels) providing further detail to the basic framework established by the former. Not all constitutions provide special regimes of group minority rights in addition to frameworks of substate autonomy, but where they do, they represent cases where international human rights law played a major role in the constitutional transitions. In some cases, the textual provision of rights in constitutions would need to be understood subject to other features of the political system, including strong (or even authoritarian) one-party or dominant-party politics as well as doctrines of constitutional practice such as the principle of democratic centralism. Most, if not all, of the examples of substate constitutions in the sample provide for distinctive regional symbols (flags, crests, anthems), but in some cases the constitutions stipulated that such symbols were not emblematic of a separate sovereignty.

The sample case studies are broadly comparable—territorially plural conflict-affected states that provide for separate substate constitutional frameworks. By comparing aspects of space, process and design across them, this paper has extracted general lessons from their experience that may be of use to other countries considering this option of constitutional conflict management. Notwithstanding varying degrees of success in implementation, which has not been the focus of this paper, it is clear that in the cases analysed here, the substate constitution-building process has been a necessary (though not sufficient) element of conflict management.

Annex A. Parameters for the substate institutional framework



Papua New Guinea (Bougainville)

The **Bougainville Peace Agreement** of 30 August 2001 states that Bougainville (PNG) will have a constitution, and ‘the right to assume increasing control over a wide range of powers, functions, personnel and resources on the basis of guarantees contained in the National Constitution’ (art. 1). Article 11 of the Bougainville Constitution states that ‘the Bougainville Constitution will provide for the organisation and structures of the government for Bougainville under the autonomy arrangements (‘the autonomous Bougainville Government’) in a manner consistent with this Agreement’. The peace agreement calls for an elected and broadly representative legislature, an accountable executive body and an impartial judiciary (or to operate fully or partly under central-state courts) (art. 28–31). The 1975 Constitution of PNG was amended in 2002 after the peace agreement was signed, and it includes a section on the Bougainville Government and Bougainville Referendum that expands the content of the peace agreement. This expansion likely occurred with the agreement of Bougainville stakeholders, and hence any limitation to the constitutional space that one might derive out of the sheer detail with regards to Bougainville governing structures would reflect consensus between the parties following the peace agreement and before the 2004 substate constitution.

Comoros

In Comoros, the island of Anjouan seceded in 1997 and drafted a constitution that was never recognized. After the 2001 **Framework Agreement for Reconciliation in Comoros** (Fomboni Agreement) Anjouan rejoined the Union. This agreement represented a political settlement through which the parties to the conflict decided to build a new Union of Comoros that would adequately divide power between the Union and the Islands to allow the latter to freely administer their own affairs and thereby promote their socio-economic development (art. 1 (ii)). The 2001 Constitution of Comoros furthermore states in article 7 that ‘Each island shall freely establish its fundamental law while respecting the Constitution of the Union.’ However, in 2009 there were major revisions to the Comoros Constitution, authorized by referendum, which aimed to both scale back the size of government and rationalize the system of archipelagic autonomy by reorganizing the central state territory from the federal to the lowest (commune) level. Comoros remains a federal state with

autonomy for the islands, including elected institutions, but these are now better integrated into the central-state institutions. Constitutional changes in this regard include renaming the island's 'fundamental laws' as 'statutory laws', and the increased specificity of the institutional make-up of the islands (effectively decreasing the constitutional space previously granted to the islands). A new article 7.2 details the executive and legislative powers in the autonomous islands: executive power will be exercised by an elected governor assisted by a maximum of six commissioners; governor elections shall use the two-round system, and there shall be a two-term limit; the legislature shall function in the form of a Council, elected through a majoritarian system in single-member constituencies for a five-year term.

Sudan

The Protocol between the Government of Sudan and the Sudan People's Liberation Movement on Power Sharing (26 May 2004) establishes the basic structure of substate legislatures and executives (part IV) as well as the division of powers between the national, South Sudan and state governments (part V, schedules A–F). The protocol was then made part of the Comprehensive Peace Agreement (9 January 2005), which had a significant impact on the substance of substate constitutions in Sudan (and South Sudan), leaving little to be settled in either the **Interim National Constitution of the Republic of Sudan** (6 July 2005) or the substate constitutions (Murray and Maywald 2006: 1212). The 2005 Interim National Constitution of Sudan provides separately for the South Sudanese state institutions (part 11) and the substate institutions of North Sudan (part 12, art. 177–84). Regarding North Sudan, the Interim Constitution specifies the division of powers at the substate level by dealing separately with the state executive (art. 179), the state legislature (art. 180) and the state judiciary (art. 181). It furthermore defines the system of government as presidential, the legislature as unicameral, and the structure of the state as decentralized and composed of states (with no specific mention of federalism). The 4 January 2015 **amendment** to the 2005 Interim Constitution curtailed the substates' autonomy and allowed the president of Sudan to nominate their governors. It is unclear whether the substate entities have amended their constitutions accordingly, and to what extent the decline in autonomy has reduced the constitutional space of the Sudanese substate entities.

South Sudan

The 2005 pre-independence **Interim Constitution of Southern Sudan** 'expands on the powers and functions of the governments of the southern states [with respect to the Interim National Constitution], and includes sections on the structure and functions of the local government system in South Sudan as well as the role of traditional authority and customary law' (Murray and Maywald 2006: 1218). It furthermore declares that the states should have legislative, executive and judicial organs (art. 168(1)). The institutional framework devised in the post-independence 2011 **Transition Constitution of the Republic of South Sudan**, however, diverges in key points from the Interim Constitution. For instance, it only mentions legislative and executive organs as substate institutions (art. 163), not judicial organs, and therefore discards any provision related to substate courts that the Interim Constitution might have provided for. Both constitutions, however, provide that the states will have a presidential system, with an elected governor subject to votes of no confidence, after which the governor would have to call for elections; if the governor wins a vote of no confidence, the legislature would need to be dissolved and newly elected within 60 days (art. 170(4) / art. 164(4)). In both constitutions, state ministers are individually and collectively answerable to both the



governor and the state Legislative Assembly in the performance of their functions (art. 169(4) / art. 165(4)).

Two further differences between the constitutions relate to the fact that in the Transition Constitution the elected governor can appoint his or her Council of Ministers, deputy governor and state advisors in accordance with the constitution, but has to consult with the president (art. 165); the Interim Constitution did not include such a provision (art. 169). And while both constitutions provide for the state governor 'to be elected by the residents of that state' (art. 169(1) / art. 165(1)), in the Transition Constitution the functions of the president also include: 'r. remove a state Governor and/or dissolve a state Legislative Assembly in the event of a crisis in the state that threatens national security and territorial integrity' and 's. appoint a state care-taker Governor who shall prepare for elections within sixty days in the state where the Governor has been removed or the state Legislative Assembly so dissolved in accordance with the provisions of this Constitution, the relevant state constitution and the law' (art. 101). General elections and elections for governors in South Sudan, however, have not been held since 2010. The president has also **appointed** governors for a rapidly increasing number of states: in the past three years the number of states has increased from 10 to 32 (*Sudan Tribune* 2015).

South Africa

The 1993 **Interim Constitution of South Africa** allowed the provinces to adopt provincial constitutions under two conditions: (1) legislative and executive structures and procedures must be different from those provided in the central-state constitution and (2) the substate constitutions provide for a traditional monarch to have a role in the province (section 160). The Interim Constitution therefore establishes a Commission on Provincial Government (section 163) to 'advise the Constitutional Assembly on the development of a constitutional dispensation with regard to provincial systems of government' (section 164(1a)) and 'advise the national government or a provincial government on the establishment and consolidation of administrative institutions and structures in a province (...)' (section 164(1b)). Still sections 125–54 of the Interim Constitution provide an interim institutional framework for the provincial legislatures and executives in advance of the Commission on Provincial Government's report. Sections 104–41 of the 1996 **Constitution of South Africa** detail the legislative and executive institutional structure to be enacted in South Africa's provinces, and repeat almost verbatim the conditions laid out in the Interim Constitution for the provinces to adopt their own constitutions (section 143(1)).

In a second group of cases the central-state constitution (as well as any other previous arrangement or constitutional framework) gives few details on the institutional framework of the substate entities. This might mean that the constitutional space granted is broad, but it also leaves it up to the body in charge of certifying and/or *ex post* reviewing the constitutional text to decide whether or not the latter conforms to the central-state constitution. Examples include Ethiopia, Somalia, Russia, Bosnia and Herzegovina, and Indonesia.

Ethiopia

The **Transitional Period Charter of Ethiopia** (22 July 1991) marked the end of the intrastate war that lasted from 1976 to 1991. The Transitional Charter affirms 'The right of nations, nationalities and peoples to self-determination' (art. 2) but does not specify how self-determination will be structured. Article 13 states that 'There shall be a law establishing local and regional councils for local administrative purposes defined on the basis of nationality. Elections for such local and regional councils shall be held within three months of the

establishment of the Transitional Government, wherever local conditions allow’, therefore creating an institution of crucial importance in the future constitution-building processes at the substate level. The 1995 **Constitution of the Federal Democratic Republic of Ethiopia** in turn defines the federal structure of the state (art. 1), and establishes that the states shall have the power ‘To enact and execute the state constitution and other laws’ (art. 52(2b)). The central-state constitution, however, only gives two indications as to the content of substate constitutions: (1) they shall provide for legislative, executive and judicial powers at the substate level (art. 50(2)) and (2) the state administration should advance self-government and a democratic order based on the rule of law (art. 52(2a)). The State Councils are therefore provided with enough space—at least in theory—to define their institutional framework as best fits their particular context.

Somalia

In Somalia, the 2004 **Transitional Federal Charter of the Somali Republic** stipulates that state governments will control the development of state constitutions (art. 12). It gives no further details on either the process or the structure of the institutional framework. The only constitutional framework agreed at the substate level was in Puntland, which adopted a transitional charter in 1998 with a three-year timeline to adopt a final constitution, which it did in 2001; Puntland adopted an updated version of its substate constitution on 18 April 2012. In 2006 a constitutional review process started in Puntland, which ended with the adoption of a constitutional framework in June 2009. The process was internally led with no guidance from central-state institutions (Ahmed and Zamora 2010). The 2012 **Provisional Constitution of the Federal Republic of Somalia** requires the Federal Member States, once established, to adopt their own substate constitutional frameworks (art. 52(2)). It states—offering no further detail—that ‘The establishment of the legislative and executive bodies of government of the Federal Member States is a matter for the Constitutions of the Federal Member States’ (art. 120). From August 2013 to July 2014 the federal government signed agreements with delegations of three of the five constitutive substate entities—**Jubaland**, **South West State** and **Galmudug**—urging the latter to build interim administrations (in advance of the constitution-building processes). While the agreements with both the South West State and Galmudug delegations only establish the bodies and timeline to create an interim administration, the agreement with Jubaland provides some detail on the structure of this interim administration, and gives a two-year timeline for the constitution to be adopted and the permanent state structures to be established.

Russia

Likewise, Russia’s Constitution does not explicitly describe the institutional framework of its substate entities. It states in article 1(1) that ‘Russia is a democratic federative law-governed state with a republican form of government.’ In article 5 it continues by saying that ‘1. The Russian Federation shall consist of republics, krais, oblasts, cities of federal significance, an autonomous oblast and autonomous okrugs, which shall have equal rights as constituent entities of the Russian Federation’ and ‘2. A republic (state) shall have its own constitution and legislation. A kray, oblast, city of federal significance, autonomous oblast and autonomous okrug shall have its own charter and legislation.’ The constitution does not further differentiate between substate ‘constitutions’ and substate ‘charters’. It only states in article 68(2) that ‘Republics shall have the right to establish their own State languages. In state government bodies, local self-government bodies and State institutions of republics they shall be used together with the State language of the Russian Federation.’ In article 70(1) it further establishes that ‘The system of government bodies of republics, krais, oblasts, cities of



federal significance, autonomous oblast and autonomous okrugs shall be established by the constituent entities of the Russian Federation independently in accordance with the basic principles of the constitutional order of the Russian Federation and the general principles of the organisation of representative and executive State government bodies which are established by federal law.’ ‘The constitution is silent regarding the procedure for electing or appointing the heads of the executive organs of state power of the subjects of the federation’ (Domrin 2006: 235). The 1999 parliamentary act, ‘On the General Principles of the Organization of Legislative (Representative) and Executive Organs of State Power in the Subjects of the Russian Federation’, provides for the state legislatures to be elected under universal suffrage. The president, however, has had the power to appoint governors since 2004 (see Küpper 2013: 256; Roth 2013). None of the (peace) agreements signed to end the first Chechen war (1994–96) included details on the institutional framework the Republic of Chechnya was to adopt. The December 1995 **Agreement on the basic principles of relations between the Russian Federation and the Chechen Republic** recognizes the need to establish a special status for Chechnya, as part of Russia, and to adopt a substate constitution and other legislation. The latter would establish the institutional framework of the Republic of Chechnya, according to this agreement, though there are no guidelines for creating such a framework. No later agreement mentioned the institutional structure to be adopted by the Republic of Chechnya, and it took until 2003—during the second Chechen war—for the constitution to be adopted.

Bosnia and Herzegovina

Two of the constituent entities of Bosnia and Herzegovina—the Republika Srpska and the Federation of Bosnia and Herzegovina—were established before **the General Framework Agreement for Peace in Bosnia Herzegovina** was signed in 1995, while the third—the Brčko District—was established post-Dayton and currently functions according to the 2008 Statute of the Brčko District of Bosnia and Herzegovina (see also Gavrić, Banović and Barreiro 2013: 23). The Federation was established after a peace agreement, and Republika Srpska through a bid for independent statehood. The Serb deputies of the former People’s Assembly of Bosnia and Herzegovina established a separate assembly—the Assembly of the Serb People in Bosnia and Herzegovina—in opposition to the declaration of independence of Bosnia and Herzegovina that the former assembly had approved. The newly created Assembly of the Serb People adopted the Constitution of the Serbian Republic of Bosnia Herzegovina—Republika Srpska—in February 1992. This constitution had to be amended after the Dayton agreement. The 1994 **Framework Agreement for the Federation** [Washington Agreement] established the Federation of Bosnia and Herzegovina, composed of Bosniacs and Croats. Section III of the agreement provides minimal direction regarding the constituent cantonal governments—the executive authority, the legislature and the judiciary—including that the cantons shall have their own constitutions but must act consistently with the Constitution of the Federation. In June 1994 the Constitutional Assembly of the Federation of Bosnia and Herzegovina adopted the Constitution of the Federation of Bosnia and Herzegovina. In Part V on ‘The Cantonal Governments’ it states that each canton shall have a constitution, ‘which shall provide for: (1) the institutions described below; and the protection of the rights and freedoms described in this Constitution’ (art. 4). The constitution then details the structure and some of the procedures for decision-making of the cantonal legislature (art. 5-7, V.2.7A, V.2.7B), the cantonal executive (art. 8–19) and the cantonal judiciary (art. 11). The 1995 Dayton Agreement, which included the Constitution of Bosnia and Herzegovina in Annex IV, did not further constrain the constitutional space of the entities with regards to system of government, structure of the state, or bicameralism versus unicameralism.

Indonesia

In Indonesia, as part of the post-Suharto decentralization reforms, two provinces—Aceh and Papua—were granted ‘special autonomy’ status under specific legislation, and pursuant to chapter VI on ‘Regional Authorities’ of the 1945 (as amended through 2002) Constitution of the Republic of Indonesia. Therein it states that Indonesia is a unitary state divided into provinces (art. 18(1)). These provinces, and other constitutive parts (e.g. regencies and municipalities) will have power over their own affairs (art. 18(2)), and will include an elected Regional People’s House of Representatives (art. 18(3)) and elected heads of regional governments (art. 18(4)). Regional authorities will exercise wide-ranging autonomy (art. 18(5)), and ‘shall have the authority to adopt regional regulations and other regulations to implement autonomy and the duty of assistance’ (art. 18(6)). The constitution further regulates the relationship between the central government and the regional authorities of the provinces, regencies and municipalities, as well as among the latter. Without mentioning Aceh and Papua, the constitution states that ‘The State recognises and respects units of regional authorities that are special and distinct, which shall be regulated by law’ (art. 18B(1)). The central-state constitution, however, does not specify the structure and functioning of the institutional framework at the substate level. In 2001, the president of Indonesia decided to stipulate special autonomy laws in both autonomous provinces; the drafting followed negotiations between state and substate stakeholders. These special autonomy laws specify the institutional structure of both provinces, including their legislative and executive powers as well as special courts for distinct communities. In Papua, the 2001 Special Autonomy Law gave substate authorities a higher degree of decision-making power—at least on paper—than many other provinces had even after the systematic decentralization process in the late 1990s (see Chauvel 2010: 313). On 15 August 2005, the Government of Indonesia and the Free Aceh Movement signed a Memorandum of Understanding to enhance Aceh’s autonomy and powers. The memorandum confirms the separation of powers between the legislature, the executive and the judiciary (art. 1.4.1), and the fact that there will be an independent and impartial court system, including a court of appeals, to function within the judicial system of Indonesia (art. 1.4.3). These provisions are further developed in the 2006 Law on Governing Aceh.

Annex B. Drafting and adopting the substate constitution



Papua New Guinea (Bougainville)

The 2001 Bougainville Peace Agreement states that the Bougainville executive and legislature will, in consultation with each other, establish both a Constitutional Commission (to prepare a draft constitution) and a Constituent Assembly (to debate, amend and adopt the draft constitution) (art. 14). The Constitutional Commission is separate from (not appointed by) the Constituent Assembly.

South Africa

In South Africa, provincial legislatures are allowed to propose provincial constitutions, and have to adopt the text by a two-thirds majority (art. 142 of the Constitution of South Africa), but it is unclear whether they used appointed drafting committees for the actual drafting.

Russia

In Russia, the substate 'legislative bodies' are responsible for adopting the charters of *krais*, *oblasts*, cities of federal significance, an autonomous oblast and autonomous *okrugs* (art. 66(2)). It is unclear whether the same body is also in charge of (drafting and) adopting the constitutions of the constituent republics. Regarding republics, the Constitution simply says that 'The status of a republic shall be determined by the Constitution of the Russian Federation and the constitution of the republic' (art. 66(1)).

Sudan and South Sudan

In Sudan it is unclear whether the (Northern) state legislatures used appointed drafting committees to do the actual drafting. The Protocol between the Government of Sudan and the Sudan People's Liberation Movement on Power Sharing (26 May 2004) states that the state legislatures should 'prepare and adopt state constitutions provided that they are in conformity with the National Constitution, the Peace Agreement, and for Southern States, also in conformity with the Constitution of Southern Sudan' (art. 4.4.4). The protocol also calls for establishing a National Review Commission to prepare model constitutions for the

substate entities (art. 2.12.11; see also Murray and Maywald 2006: 1219). However, it is not clear *whether* these model constitutions were used in (Northern) Sudan or *how* they were used, or whether the debates took place within the state legislatures or outside.

The protocol further established a 14-member committee for South Sudan (in December 2005 and January 2006) that drafted a model interim constitution for the substate entities of South Sudan, which was presented to drafting committees from all ten states at a conference in Rumbek (South Sudan) (Murray and Maywald 2006: 1222–24). ‘Once the state drafting committees had collectively agreed on a final version of the Model, each committee considered that version and made amendments that they believed were important for their individual state’ (Murray and Maywald 2006: 1229). After this, the drafting committees then presented the draft constitution to their governors, who presented it to their respective Council of Ministers and State assemblies. The state assemblies then reviewed and amended the draft and adopted a final version (Murray and Maywald 2006: 1229).

Ethiopia

In Ethiopia the state legislatures were responsible for drafting and adopting the substate constitution. The State Councils are the substate entity’s legislatures, and while the constitution does not specify how they are selected, the electoral law confirms they are popularly elected. The State Council, according to the Constitution, is the ‘highest organs of State authority. It is responsible to the People of the State’ (art. 50(3)). The 1995 Constitution of the Federal Democratic Republic of Ethiopia states that the State Council ‘has power to draft, adopt and amend the state constitution’ (art. 50(5)). However, it is unclear which body or individuals deliberated on and drafted the substate constitutions (Regassa 2009: 52). According to Ayele (2014: 91), ‘all levels of governments in Ethiopia are controlled, directly or indirectly, by one party the Ethiopia People’s Revolutionary Democratic Party’, which might indicate a centrally-led drafting process in the substate entities. Furthermore, the 2000 amendment process of the substate constitutions took place in the president’s office, ‘on his order, and without involving the regional authorities; indeed, it took place without their knowledge’ (Ayele 2014: 105). The constitutional space might have existed on paper, but the substate entities were unable to use it.

Indonesia (Aceh)

In Aceh (Indonesia), while drafting was the responsibility of the substate legislature, adoption was the responsibility of central-state institutions. The 2005 Memorandum of Understanding between the Government of Indonesia and the Free Aceh Movement establishes that the legislature of Aceh is responsible for redrafting the legal code for Aceh (the 2001 law on special autonomy for Aceh) (art. 1.4.2). It appears, however, that ‘the provincial government took over from the provincial parliament and finalized the draft with the help of an advisory team of legal experts’ (May 2008: 43), before submitting the draft to the central government, which substantially reviewed it before submitting it to the Indonesian lower house (May 2008: 43). Article 20 of the Indonesian Constitution states that the lower house has the authority to establish law, and each bill has to be discussed by this body and the president to reach joint approval. Once both parties jointly approve, the president signs the bill into law. If the president does not sign within 30 days after approval, the bill automatically becomes law. The lower house used this opportunity to review and reformulate the draft to make it conform to existing laws and regulations (May 2008: 43).



Bosnia and Herzegovina

In Bosnia and Herzegovina, two of its three constitutive entities—the Federation of Bosnia and Herzegovina and Republika Srpska—predated the Dayton Agreement and therefore the central-state constitution (Annex IV of the Dayton Agreement). The Serb deputies of the former People’s Assembly of Bosnia and Herzegovina established a separate assembly—the Assembly of the Serb People in Bosnia and Herzegovina—after boycotting the vote on a ‘Memorandum on Sovereignty’ for Bosnia and Herzegovina. The Assembly of the Serb People adopted the Constitution of the Serbian Republic of Bosnia Herzegovina—what would later be called Republika Srpska—in February 1992 (Sahadžić 2013: 12–13). This constitution had to be amended after the Dayton Agreement. The Washington Agreement—which established the Federation of Bosnia and Herzegovina—provided for a Constituent Assembly to promulgate its constitution, but approval of this constitution required consensus ‘between the delegation of the Croat people, comprising all representatives of Croat nationality, and the delegation of the Bosniac people, comprising all representatives of Bosniac nationality’ (section VII). Section VIII of the Washington Agreement states that ‘The two parties agree to establish a high-level Committee which will prepare a draft Constitution of the Federation and coordinate other matters related to the implementation of the Framework Agreement. The Committee will start its work in Vienna on March 4, 1994.’ In the 1994 Constitution of the Federation of Bosnia and Herzegovina, section V on Cantonal Governments states that each canton shall have a constitution (art. 4), and the cantonal legislature shall ‘prepare and by a two-thirds majority vote and approve the Cantonal Constitution’ (art. 6(a)). The constitution does not stipulate which body has drafting responsibility.

Annex C. List of substate constitutions and agreements



- ‘Agreement: An Inclusive Interim Administration for the South West Regions of Sonmalia (Bay, Bakol and Lower Shabelle)’, 22 June 2014, <<http://peacemaker.un.org/somalia-interim-admin-southwest-14>>, accessed 10 October 2017
- ‘Agreement between the Federal Republic of Somalia and the Jubba Delegation’, 27 August 2013, <<http://peacemaker.un.org/somalia-jubba-delegation2013>>, accessed 10 October 2017
- ‘Agreement on the basic principles of relations between the Russian Federation and the Chechen Republic’, 14 December 1995, <<http://peacemaker.un.org/russia-relationschechenrepublic95>>, accessed 10 October 2017
- Bougainville Peace Agreement, 2001, <<http://peacemaker.un.org/png-bougainville-agreement2001>>, accessed 11 October 2017
- ‘Central Regions State Formation Agreement (Mudug and Galgaduud)’, 30 July 2014, <<http://peacemaker.un.org/somalia-centralregions2014>>, accessed 10 October 2017
- Constitution of the Federal Democratic Republic of Ethiopia, 1995, <https://www.constituteproject.org/constitution/Ethiopia_1994.pdf?lang=en>, accessed 11 October 2017
- Constitution of South Africa, 1996, <<http://www.justice.gov.za/legislation/constitution/SACConstitution-web-eng.pdf>>, accessed 10 October 2017
- Framework Agreement for Reconciliation in Comoros [Fomboni Agreement, unofficial translation], 17 February 2001, <<http://ucdp.uu.se/downloads/fullpeace/com20010217.pdf>>, accessed 11 October 2017
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Substate constitutions are broadly understood as written legal instruments that limit and structure political power at the substate level, with legal supremacy regarding other substate laws.

Their primary goals are to define the specific governance system of the substate entity, and often to codify citizen rights within its territory. They may also serve to delineate the political community and identity at the substate level. Substate entities, in turn, can be defined as territorially delineated constitutive parts of a country or state.

This Policy Paper examines substate constitutions in fragile and conflict-affected settings—in both federal and unitary (or hybrid) states—adopted after the end of the Cold War starting in 1991. It aims to fill a significant gap in the policy and academic literatures regarding the process and design of substate constitutions in fragile and conflict-affected settings, and their role in the broader political-settlement and peacebuilding process.