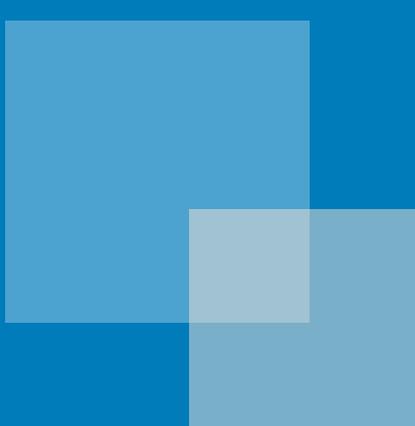




# Sub-State Constitutions in Fragile and Conflict-Affected Settings

9–10 December 2016, Edinburgh

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# Sub-State Constitutions in Fragile and Conflict-Affected Settings

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9–10 December 2016, Edinburgh

*Prepared by Sean Molloy  
and edited by Kimana Zulueta-Fülscher and Asanga Welikala*

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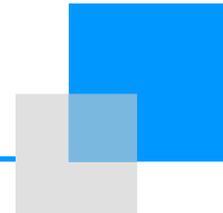
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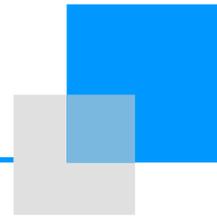
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## Introduction

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This workshop report follows the Third Edinburgh Dialogue on Post-Conflict Constitution Building that was held at the University of Edinburgh on 9–10 December 2016. This workshop, on ‘Sub-state Constitution Building in Fragile and Conflict-Affected Settings’, was organized by the International Institute for 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 dialogue explored the process and design of sub-state constitutions in fragile and conflict-affected settings, and their role in the broader political settlement and/or peacebuilding process. This report will feed into a policy paper on sub-state constitutions in fragile and conflict-affected settings, which will be published by the end of 2017.

Sub-state entities are broadly defined here as the constitutive parts, or territorial subdivisions, of a state. They emerge for numerous reasons, all of which are rooted in a country’s history. These sub-state entities sometimes choose (or are required) to adopt their own constitutions; this report examines such sub-state constitutions primarily in fragile and conflict-affected settings. Spain is included as an example of the use of sub-state constitutions, or their equivalent, in a peaceful transition from dictatorship to democracy.

The dialogue employed a qualitative comparative framework using nine case studies, which span unitary to federal states. The case studies helped participants understand different sub-state constitutional designs and processes, and their impact on specific country or regional conflict dynamics. The case studies were conducted by country experts who responded to a list of eight questions that were sent to them in advance (see the list of questions in Annex 1).<sup>1</sup> The participants in the dialogue are listed in Annex 2. The discussions were held under the Chatham House Rule.

### What are sub-state constitutions?

Sub-state constitutions serve similar purposes within sub-state entities as central-state constitutions do at the central-state level. They define the system of governance of the sub-state entity, outline its institutions and delineate the responsibilities of those institutions. They also promulgate the separation of powers between sub-state institutions, and may codify citizens’ rights vis-à-vis the sub-state entity.



The competences and rights of these sub-state entities and their relations with the state of which they are a part may be set out in the central-state constitution. That is, as constitutive elements of the central state, they are subject to the primary authority of the central-state constitution, which may define the competences that the sub-state entity is responsible for, those that remain the exclusive domain of the central state, and those that are shared between the sub-state entity and the central state. The ‘constitutional space’ refers here to areas that fall within the purview of the sub-state entity in order to adopt a sub-state constitution (or equivalent legal document). In the workshop a sub-state constitution was defined as a written document that structures and/or limits the political power allocated to a sub-state, which has to a certain extent been generated (if not adopted) from within the sub-state territory (as opposed to sub-state constitutional arrangements included in sections of the central-state constitution).

Section One explains sub-states’ motivations for adopting their own constitutions. These underlying reasons are often shaped by past conflicts, the repression or marginalization of certain sections of society, or claims of autonomy. Against this backdrop, Section Two explores the concept of the constitutional space, which can be understood as the mechanism through which the territorial integrity of the central state is maintained, while at the same time fulfilling the particular motivating factors for adopting sub-state constitutions, such as recognizing identity or facilitating varying degrees of autonomy. This section also examines the various stages involved in forming and formalizing the constitutional space. Section Three examines how the constitutional space is reflected in sub-state constitutions, while looking at the various ways that such constitutions might be challenged at both the central-state and sub-state levels. The fourth section examines the presence of international actors in conflict-affected settings—in particular their role in facilitating or impeding the adoption of sub-state constitutions. The final section outlines some general conclusions that emerged from the workshop discussions.

## Why are sub-state constitutions adopted?

Throughout the dialogue, both federal and unitary states where sub-state entities have undergone constitution-building processes were considered. Indeed, federalism is not synonymous with autonomy: some unitary states may permit greater degrees of autonomy than federal states; nor do all federal states allow or require sub-state constitutional frameworks (Saunders 2011: 859). Federal states can be divided into three categories: (1) those that *require* sub-states to adopt constitutions, (2) those that *allow* sub-state constitutions and (3) those that *prohibit* sub-state constitutions. Some federations, such as India, prohibit sub-state constitutions in general, but allow some regions to have them, such as Jammu and Kashmir (J&K). Some formally unitary or quasi-federal states, moreover, might institute different degrees of decentralization/autonomy with all or part of their constituent regions, some or all of which might adopt constitutional arrangements or special statutes negotiated between the central government and the sub-state entity that establish some degree of autonomy of the latter vis-à-vis the central state. Examples include Spain (statutes of autonomy), Papua New Guinea (PNG) (Constitution of Bougainville) and the Philippines (Basic Law of the Bangsamoro, again under negotiation).

There are many reasons for adopting sub-state constitutions. In some cases, they are part of a broader conflict resolution effort. For example, where conflict emerges as a result of discrimination against certain groups, sub-state constitutions might be

drafted as part of the broader agreement to ensure that previously marginalized sections of society achieve greater autonomy over their own affairs. In such cases, the central-state constitution might recognize the legality of such arrangements while also defining (at least some of) the competences, as well as limitations, that constrain the sub-state entity when engaging in its own constitution-building process. Adopting a sub-state constitution further formalizes these competences at the sub-state level, and may bestow an additional degree of legitimacy on the authority of the sub-state entity. In other cases, sub-state constitutions might be adopted in order to protect territorially concentrated ethnic minorities and/or recognize historical claims of autonomy. This section explores some of the underlying factors that explain why sub-state constitutions are adopted or considered for adoption.

## Identity

In some cases, sub-state entities adopt constitutions in order to recognize and protect various territorially concentrated minority groups, particularly in pluralistic societies in which certain sections of society hold power over others. For example, **Ethiopia** began the move toward federalism in 1991 after its 17-year civil war ended with the ouster of the military junta that ruled the country for nearly two decades (1974–91), and with the ascendance to power of the Ethiopian People's Revolutionary Democratic Front (EPRDF), a coalition of four ethnic-based rebel movements. The victors established that the country's problems were rooted in the failure of the old governance systems to cater to the ethnic diversity of the Ethiopian people. A Transitional Period Charter was adopted in June 1991 by 24 ethnic movements, which introduced a *de facto* ethnicity-based federal system that was codified with the adoption of the 1995 Constitution. The country is thus divided into nine ethnically organized states, five of which have a numerically dominant ethnic community; each bears the name of the dominant ethnic group in the state. The other four states are multi-ethnic: no single ethnic community is in the majority. A key feature of the federal constitution, therefore, is its recognition of ethnic diversity: article 39(1) states that 'Every Nation, Nationality and People in Ethiopia has an unconditional right to self-determination, including the right to secession'. Sub-state constitutions can therefore at least nominally empower minority groups to determine their own future, to design and construct their own systems of government, and to recognize and protect ethnic minorities within these sub-state entities (Regassa 2010: 42–43).

In other cases, sub-state constitutions are adopted not only out of a need to protect minority groups, but also as a result of deals struck between ethnic minorities regarding the political settlement of a conflict. In 1991, **Bosnia and Herzegovina** (B-H) joined several republics of the former Yugoslavia and declared independence, triggering a four-year civil war. B-H's population is a multi-ethnic mix of Muslim Bosniaks, Orthodox Serbs and Catholic Croats. In 1995, UN-mandated airstrikes and sanctions helped bring all parties to a peace agreement. During the negotiations that attempted to resolve the conflict, the international community and Bosniaks favoured a strong central state, while the Croats and Serbs demanded self-governing entities in line with agreements reached under previous agreements (the Washington Agreements) (Tzifakis 2007: 87). The compromise reached under the Dayton Peace Agreement was a consociational arrangement that included territorial and political power sharing between two sub-state entities: the Federation of B-H (FB-H),



consisting primarily of Bosniaks and Croats, and the Republika Srpska (RS), with a Serb majority. Each of these entities was permitted to adopt its own constitution.

Further measures were necessary to address the ethnic composition at the sub-state level. Since the RS is a highly centralized and ethnically homogenous entity comprising a largely Serb population, few or no issues emerged. By contrast, the FB-H is ethnically mixed and highly decentralized: in order to accommodate its ethnic mixture of Bosniaks and Croats, it is divided into ten cantons, each of which has its own constitution. Five of the cantons have a Bosniak majority, three have a Bosnian Croat majority and two are ethnically mixed. In the two ethnically mixed cantons, further powers are devolved to the municipality level.

There is another sub-state entity: the Brčko District. As the Bosnian war progressed, an east-west defensive line was established that cut across the Brčko municipality and the surrounding area, leaving the Bosnian Serbs as occupiers of the north, and the Croats and Bosniaks as occupiers of the south. As a result of post-war tensions, control of the Brčko area could not be reconciled at the peace negotiations at Dayton. US Secretary of State Warren Christopher—acting on the suggestion of the president of the Republic of Serbia, Slobodan Milosevic—proposed submitting the Brčko dispute to final and binding arbitration (Karnavas 2003: 111).

On 5 March 1999, the Arbitral Tribunal for the Dispute over the Inter-Entity Boundary in the Brčko Area issued its Final Award, which stated that the territory of the former Brčko Opština belongs to both entities, adding that ‘Neither entity, however, will exercise any authority within the boundaries of the District, which will administer the area as one unitary government’ (Arbitration for the Brčko Area Final Award 1999, paras. 9, 11, 16). In other words, the Brčko district became, in essence, a third sub-state entity regulated by a statute of the Brčko District of B-H. Thus, there are a total of 13 sub-state constitutions in B-H: the two entities, the Brčko District and the ten cantons within the FB-H.

The reasons for adopting sub-state constitutions in B-H are arguably as complex as the political system itself. From the perspective of the central state, for example, the sub-state entities, through adopting sub-state constitutions, further formalize the competencies that are granted to them by the centre. They also reflect the compromise reached between the three constituent parties and the international community regarding the nature of the state. This is reflected in the division of power between the entities and the central state. From the perspective of the two sub-state entities, the RS and FB-H, the sub-state constitutions also represent an expression of ethnicity and the rights of ethnic minorities to enjoy a limited degree of autonomy within the ethnically diverse FB-H. Sub-state constitutions also formally limit the powers that each sub-state entity can assume. That is, adopting sub-state constitutions at the entity level was a means of expressing identity while curbing any attempts to extend beyond those powers in ways that might stoke ethnic tensions. At the cantonal level, similar reasons can be identified: the sub-states outline the relationship between the sub-state entity and the Federation, while limiting the power the cantons can exercise over each other. Finally, in the Brčko District, adopting a sub-state constitution was primarily a means of promulgating the basic laws of the district with an ‘overriding objective [...] to instil the rule of law in the District as a means of pacifying and/or reconciling the tense Brčko community’ (Karnavas 2003: 115).

Sub-state constitutions may also be utilized to ensure that a deal can be struck between those holding political power, particularly when the deal will involve transferring power from one group to another. In the case of **South Africa**, for example, rather than the centre granting constitutional space to marginalized

minorities on the basis of a history of repression, sub-state constitutions can be understood as a component of the deal that facilitated a transition from apartheid to democracy: they were perceived as a mechanism to reassure minority groups affected by the shift to majority rule. In this sense the constitutional right to adopt a sub-state constitution was considered part of the overall negotiated settlement: '[a]lthough views differ, ANC [African National Congress] politicians in general seemed to consider the provincial system an imposition required by the negotiated transition to democracy—provinces are seen as a compromise necessitated by the need to find a system which allowed political space for minority groupings' (Murray 2001). In South Africa, the fact that the constitutional right to adopt a sub-state constitution was seen as a concession to the requirements of the transition may explain the stringent and limited nature of the space afforded by the central-state constitution to adopt provincial constitutions.

## Autonomy

In the above examples, the adoption of sub-state constitutions is connected to issues of identity. Closely related—and at times intertwined—are contexts in which discussions on sub-state constitutions involve issues of autonomy. The conflict in **Bougainville**, for example, was a 10-year civil conflict fought between PNG and the Bougainville Revolutionary Army, a pro-independence Bougainvillean militant group. Following numerous negotiations, both parties agreed to sign a compromise peace agreement in 2001, which provided that Bougainville would be granted autonomy 'under a home-grown Bougainville Constitution with a 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' (Introduction and Outline of the Bougainville Peace Agreement: 5). The Constitution of Bougainville was a key part of the conflict resolution process that sought to deter imminent claims for independence by legally guaranteeing autonomy. At the same time, it guaranteed a referendum on Bougainville's future political status, including the option of independence (Wallis 2014: 208), which helped placate imminent secessionist claims (Bougainville Peace Agreement, sections 309–10; PNG Constitution, sections 338(1), 339).<sup>2</sup> Thus sub-state constitutions can be both vehicles through which to gain increased autonomy as well as devices to manage claims for independence.

## Historical claims of autonomy

Adopting sub-state constitutions is a reflection of historical realities. Whether grounded in the need to recognize identity, facilitate a political settlement or address marginalization, the past plays a significant role and contextualizes the spheres within which they are used. In other settings, however, history plays a more central role, particularly in sub-state entities that have enjoyed a degree of autonomy or whose histories are perceived as entitling them to asymmetric relationships with the centre.

In **Spain**, for example, the current territorial model was established to accommodate the historical nationalist claims of Catalonia, the Basque Country and, to a lesser degree, Galicia (Casanas Adam 2016). As such, while the 1978 Constitution is 'based on the indissoluble unity of the Spanish nation', it also 'recognizes and guarantees the right to self-government of the nationalities and regions of which it is



composed' (article 2). The Spanish Constitution, therefore, recognizes the historic regions/communities and included two different procedures for enacting the 'Statutes of Autonomy' (the organic laws through which each region establishes its level of autonomy). First, a more complex—yet faster—procedure enabled autonomous communities to secure a higher level of autonomy via the Statutes of Autonomy. This was included to appease the historic nationalities among whom support for self-government was very strong. Second, a less complex and slower procedure resulted in a lesser level of autonomy for some autonomous communities, at least for the first five years. This was meant for the rest of the Spanish territories, where during the constitution-drafting process it was unclear whether future autonomy claims would be made (articles 143/151).

The fast-track process was an integral initial part of recognizing the historical claims of specific regions. While not recognized as sub-state constitutions *per se*, the Statutes of Autonomy perform similar functions: they are the basic laws of the autonomous regions that regulate relations with the central state and the functioning of the institutions of self-government (with the possible extent of sub-state competencies identified in the central-state constitution). Adopting Statutes of Autonomy, combined with the initial fast-track approaches detailed in the constitution, reflects the asymmetrical traditions of autonomy within the country.

Another example is the case of the **Bangsamoro in the Philippines**. The Philippines has a long history of conflict, with armed groups including Muslim separatists, communists, clan militias and criminal groups active in specific areas. In particular, the Moro have been fighting the Philippines Government for over 40 years on the southern island of Mindanao. The armed conflict has led to the final adoption of three peace agreements: the government signed the Tripoli Agreement with the Moro National Liberation Front (MNLF) in 1976, a Final Peace Agreement with the same group in 1996, and a Comprehensive Peace Agreement with a splinter group—the Moro Islamic Liberation Front (MILF)—in 2014. In 1977 the government, headed by Ferdinand Marcos, established two geographically broad but politically weak autonomous regions, as envisaged in the 1976 peace agreement. The democratic constitution of 1987 provided for the devolution of powers to local government, and autonomy to two regions: Muslim Mindanao and the Cordillera. The government then in 1989 legislated to create the Autonomous Region in Muslim Mindanao (ARMM).<sup>3</sup> This legislation was amended in 2001. In all three cases (1977, 1989, 2001) the MNLF felt that it had not been consulted, as governments in Manila effectively imposed arrangements on Muslim Mindanao. Learning from the 'failed experiment' of the ARMM, the Comprehensive Peace Agreement of 2014 allowed for the creation of a new Bangsamoro self-governing entity.

The 2014 Comprehensive Peace Agreement started with the 2012 Framework Agreement on the Bangsamoro, article II(1) of which states that the Bangsamoro shall be governed by a Basic Law that grants the region the power to pursue self-governance and is driven by the 'historical identity and birthright of the Bangsamoro people to their ancestral homeland and their right to self-determination'.<sup>4</sup> Thus, the Bangsamoro Basic Law (BBL) attempts to address a specific history and minority rights struggle vis-à-vis the centre, and to legally protect both a new way of structuring power in the sub-state entity and the relationship between the sub-state entity and the centre. The 2012 Framework Agreement further states that '[t]he relationship of the Central Government with the Bangsamoro Government shall be asymmetric' (para. 5).<sup>5</sup>

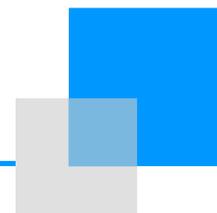
The connection between the use of sub-state constitutions and histories of autonomy is also clear in the case of **J&K**. When India and Pakistan gained independence in 1947, Hari Singh, the Hindu maharaja of Muslim-majority J&K, was undecided as to which state to join. The maharaja entered into a Standstill Agreement with Pakistan, which allowed for the continuation of normal trade and exchanges until a settlement was reached. In the meantime, a rebel faction from Poonch revolted against the maharaja's rule and declared the formation of Azad Kashmir, an independent government that would subsequently become part of Pakistan-administered Kashmir (PaK). When Pakistan attacked J&K in 1947, Hari Singh signed an Instrument of Accession with India that created a *de facto* border that separated J&K into India-administered Kashmir (IaK) and PaK. Article 370 of the Indian Constitution gives special status to J&K in the union, and Pakistan makes special provision for Azad Jammu and Kashmir in section 256 of its constitution. The adoption of sub-state constitutions (or state constitutions as they are known there) in PaK and IaK legally formalizes their levels of autonomy vis-à-vis the central-state governments (although implementation remains far from a practical reality).

Thus sub-state constitutions are adopted for diverse reasons, which are often important when contrasting the expectations that precede the adoption of sub-state constitutions and the degree of constitutional space afforded by the centre and/or negotiated with the sub-state entity. For example, when they are adopted in order to address historical issues related to autonomy, sub-state entities will often expect and require that the central state afford the constitutional space that would permit these entities to operate with a high degree of autonomy. By contrast, where adopting sub-state constitutions relates to recognizing ethnic or some other form of diversity, but not necessarily increasing the autonomy of the sub-state entity, the constitutional space might not need to be as wide. The discussion below focuses on what the constitutional space means and how it is forged and formalized.

1. The drafting of this report has been assisted by the contributions of participants and case study reports submitted for the dialogue. The case study authors were: Dejan Stepanovic (Bosnia-Herzegovina); Kearnneth Nanei (Bougainville); Zemelak Ayele (Ethiopia); Zaid Al-Ali (Iraq); Tahir Aziz (Jammu and Kashmir); Kristian Herbolzheimer (Philippines); Christina Murray (South Africa); Abdi Hosh (Somalia) and César Colino (Spain).
2. <[https://www.usip.org/sites/default/files/file/resources/collections/peace\\_agreements/bougain\\_20010830.pdf](https://www.usip.org/sites/default/files/file/resources/collections/peace_agreements/bougain_20010830.pdf)>; <<http://www.parliament.gov.pg/images/misc/PNG-CONSTITUTION.pdf>>.
3. The ARMM is an autonomous region of the Philippines, located in the Mindanao island group of the Philippines that consists of five predominantly Muslim provinces: Basilan (except Isabela City), Lanao del Sur, Maguindanao, Sulu and Tawi-Tawi.
4. Bangsamoro Basic Law: House Bill No. 4994, Preamble, <<http://jlp-law.com/blog/bangsamoro-basic-law-house-bill-no-4994-full-text/>>.
5. <<http://www.c-r.org/downloads/2012%20Framework%20Agreement%20on%20the%20Bangsamoro.pdf>>.

## The constitutional space and its formation

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While during the workshop there was some confusion regarding the definition of the constitutional space, the term is used here to denote the degree to which sub-state entities can define their own goals and establish their own government institutions and processes (Tarr 2010: 1133–34). Hence the constitutional space is not defined by the competences the central-state constitution reserves for the sub-state entity in so-called lists of exclusive or concurrent powers; it is limited to the sub-state entity's powers to design the structure of its government. Since sub-state constitutions are adopted for numerous reasons, they are also preceded by certain expectations from both the sub-state and central-state level regarding what competences the sub-state entity can (and should) assume.

This section further examines the constitutional space and the processes that determine or create it. The constitutional space can be forged in a number of ways. In some settings it is created by peace agreements between sub-state and central-state elites. In other cases, the space afforded to the sub-state entity is the result of bargains that occur outside formal peace processes but which are nevertheless the result of negotiations over how political power is held and exercised. The space may also be dictated from the top with few (or no) negotiations with the sub-state entity.

### Negotiated peace settlements and the constitutional space

#### Forged and formalized in the same process

In some cases, the constitutional space is forged and formalized as part of peace negotiation processes. Owing to the various sequences involved in forging political settlements through peace processes (Bell and Zulueta-Fülscher 2016), this can occur in different ways.

In **Ethiopia**, for example, the constitutional space is defined in the central-state constitution. The Ethiopian Constitution guarantees that the federal government and the states shall have legislative, executive and judicial powers (article 50(2)). Furthermore, it states that regional states have 'all powers not given expressly to the Federal Government alone, or concurrently to the Federal Government and the states' (article 52(1)). The Ethiopian Constitution is a peace agreement constitution: it was formed as a result of (and is itself) a peace agreement. The constitutional space, therefore, was forged and formalized in the same agreement.

The constitutional space might also be carved out in an interim constitution that serves as a negotiated settlement and subsequently leads to adoption as a final constitution (see Rodrigues forthcoming; Sapiano et al. 2016: 11). In **South Africa**, for example, section 160 of the Interim Constitution (1993) provided for the constitutional space of the provinces, as do sections 142 and 143 of the Constitution of the Republic of South Africa (1996). Section 142 provides that ‘A provincial legislature may pass a constitution for the province or, where applicable, amend its constitution, if at least two thirds of its members vote in favour of the Bill.’ In both cases, since the interim and final constitutions operated as peace agreements, the constitutional space was forged and formalized in the same peace process.

Forging and forming the constitutional space in the same process also partially occurred in the case of **B-H**. For example, the constitutional space for the two entities, FB-H and RS, is included in the final constitution. The central-state constitution, when regulating the ‘law and responsibilities of the entities and the institutions’ (Annex 4, article III 3(b) of the Dayton Agreement), states that ‘The Entities and any subdivision thereof shall comply fully with this Constitution, which supersedes inconsistent provisions of the law of Bosnia and Herzegovina and of the constitutions and law of the Entities, and with the decisions of the institutions of Bosnia and Herzegovina. The general principles of international law shall be an integral part of the law of Bosnia and Herzegovina and the Entities.’ As an annex to the Dayton Agreement, and in a similar fashion to the example of Ethiopia, the space is forged and formalized in the same process.

In the case of the FB-H, the central-state constitution does not directly address the constitutional space of the cantons, but specifies that any division of competences must be consistent with the central-state constitution. Rather, the constitutional space of the cantons is defined in the constitution of the FB-H, section V on ‘The Cantonal Governments’, which was adopted in advance of the 1995 Dayton Agreement.

In regards to the Brčko District, the constitutional space of the Brčko constitution (or statute) is outlined in the Final Arbitration for the Brčko Area and is the same as those of the entities. As noted above, as part of the Final Arbitration, both entities were required to hand over any competencies they might have assumed in relation to areas of Brčko that were within each entity’s borders. Brčko then effectively became a third entity similar to those of the RS and FB-H, and is also directly subordinate to the sovereignty of B-H.

### Forged and formalized subsequently

The constitutional space can also be forged as part of a peace process but be formalized in a separate stage. In **Bougainville**, for example, the constitutional space was forged in the Bougainville Peace Agreement of 2001 (sections 46–47), which further outlined the powers and functions to be divided between the PNG Government and the Autonomous Bougainville Government (ABG) in accordance with two exhaustive lists (PNG Constitution, section 292). The agreement was a ‘joint creation’ negotiated by PNG and Bougainvillean leaders that represented ‘an attempt to channel previous, violent conflicts into political processes and institutions’ (Wolfers 2007: 92). Formalization occurred at a later stage compared to B-H.

Hence while the constitutional space was created by the peace agreement, the Bougainville Constitution was drafted in a subsequent process. However, prior to undertaking this process, the sub-state entity required a number of guarantees. For



example, the Bougainville negotiators argued that the peace agreement should be protected from subsequent change, and therefore that as much of the agreement as possible should be constitutionalized. Moreover, they asserted that constitutionalization should involve protecting the arrangements from unilateral change by PNG institutions. Despite initial PNG resistance, both elements were eventually agreed (Regan 2013: 423–24). What came to be called ‘double entrenchment’ ensured that no proposed amendment to PNG constitutional laws—which incorporated most matters provided for in the agreement—implementing the agreement became law unless approved by the ABG legislature (Regan 2013: 423–24). An organic law and constitutional amendment were required to implement the Bougainville Peace Agreement, and thus to formalize the constitutional space.

The PNG Government also demanded that the formalization of the constitutional space forged during the peace agreement involved consultations with relevant PNG institutions. Section 15 of the 2001 peace agreement stated that the PNG Government should be ‘kept informed and allowed adequate opportunity to make its views known as proposals for the Bougainville Constitution are developed’. Moreover, before the constitution was adopted by the Constituent Assembly in Bougainville, the PNG Government had to be consulted about its contents; after the assembly adopted the constitution, it then had to be presented to the PNG Government for endorsement before it came into effect (Bougainville Peace Agreement, section 15; PNG Constitution, sections 283–85). The process was completed in 2004, and elections to the first Autonomous Government were held in May and June 2005.

### Forged but not formalized

In other cases, the constitutional space might be forged through a peace process but not be subsequently formalized, since constitutions are often subject to ratification by other state institutions. In **the Philippines**, for example, the constitutional space was forged in the 2012 Framework Agreement on the Bangsamoro, in which the parties agreed that the *status quo* was unacceptable and that the Bangsamoro should be established to replace the ARMM (Bangsamoro Framework Agreement, section 15). Moreover, the Framework Agreement states that the Bangsamoro shall be governed by a Basic Law, and mandates the Bangsamoro Transition Commission to work on drafting the BBL and ‘on proposals to amend the Philippine Constitution for the purpose of accommodating and entrenching in the constitution the agreements of the Parties whenever necessary without derogating from any prior peace agreements’ (Bangsamoro Framework Agreement, section 7, para. 4(b)).

Unlike the case of Bougainville, the BBL has not yet been adopted. While the House of Representatives ad hoc committee voted 50–17 in favour of the BBL in May 2015, the plenary did not vote on the BBL, as some Members of Parliament (MPs) argued that it was unconstitutional. While the MILF initially insisted on the need for constitutional reform in order to consolidate the agreements, the government has been reluctant to initiate a process that could be tedious and could open a ‘Pandora’s box’ (Herbolzheimer 2015: 3). The result, therefore, has been that, rather than amending the constitution, the BBL must be redrafted in such a way that it is perceived as complying with the central-state constitution, an approach that the MILF has subsequently accepted. As explored below, this case suggests that tensions can arise between those negotiating on behalf of the central state in peace processes and other elements of the central-state apparatus.

A final issue relates to the unique case of **Somalia**. Somalia adopted a provisional constitution in August 2012, article 1 of which provided for a federal governance arrangement. However, the federal state entities that will serve as the foundation of the projected federation are in the process of being established. Chapter 12 of the provisional constitution briefly states 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’ (article 120), and that ‘the Constitution of the Federal Republic of Somalia and those of the Federal Member States shall be harmonized’ (article 121). Furthermore, the federation requires the federal member states to be formed before the delineation of powers and competences is finalized. Thus, owing to the nature of the constitution-building process in Somalia, defining the constitutional space is particularly ambiguous. While the skeleton of the constitutional space was established in the provisional constitution, the specific contours of that space will be elaborated when the federal state-formation process is complete.

### Forged in the absence of peace negotiations

In other cases, the constitutional space is not forged by peace negotiations but rather in broader political settlement negotiations. In **Spain**, for example, the constitution was the result of a consensus between different political forces in a peaceful transition to democracy after 40 years of dictatorship. The regulation of some of the more controversial elements was left largely undefined (Casanas Adam 2016: 368). As regards political decentralization, the constitutional provisions established a wide framework within which the nationalities and regions could form autonomous communities (Casanas Adam 2016: 368), and could constitute their judicial and political institutions as long as they complied with the central-state constitution (article 147).

This open-ended nature has meant that the constitutional space of the autonomous communities is somewhat contentious. As noted before, the constitution safeguards the ‘indissoluble unity of the Spanish nation’ and ‘guarantees the right to self-government of the nationalities and regions’ (article 2). The autonomy of the autonomous communities is also protected by their Statutes of Autonomy, which the constitution provides are the ‘basic institutional rule of each autonomous community’, and which the central state is obliged to ‘recognize and protect ... as an integral part of its legal system’ (article 147, section 1). However, the distribution of competences is not specifically established by the constitution, but is based on a system of double lists, one of which details the competences that may be assumed by the autonomous communities in their Statutes of Autonomy (article 148) and one that sets out the competences that are reserved for the central state (article 149). Because the constitutional provisions are so open, the most distinctive aspect of Spain’s system is said to be the importance of the Statutes of Autonomy in completing the content of the constitution and completing the general aspects of the territorial power structure (Casanas Adam 2016: 372). As discussed below, the level of ambiguity has led to a number of challenges to the constitutional space. Also, when the particular contours of the space are uncertain, both the state and the sub-state region can dispute the constitutionality of particular actions.

Another example of the constitutional space being forged in the absence of a peace process can be illustrated in the context of **J&K**. It was the result of contentious negotiations in late 1947 between Sheikh Abdullah, who had been appointed prime



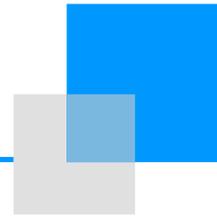
minister of J&K by the maharaja, and Jawaharlal Nehru, the first prime minister of India (Thapliyal 2014). Article 370, adopted by the Indian Constituent Assembly in 1949, specifies the constitutional space for J&K, including limiting Parliament's power to make laws for J&K. In 1951, the Constituent Assembly of J&K was established to formulate the sub-state's constitution. In 1954 the Constituent Assembly ratified J&K's accession to India, while in 1956 it finalized its constitution, which declared the whole of the former Princely State of Jammu and Kashmir to be 'an integral part of the Union of India'.

These examples highlight differences in how the constitutional space is forged and formalized. In some cases, it is the result of peace negotiations in which the space is forged and formalized in the same process. In other cases, peace agreements are used to forge the constitutional space, and subsequent processes are used to formalize them at a later stage. The constitutional space can also be forged in the absence of peace processes, but may still involve varying levels of political bargaining. There are also differences in the scope of the constitutional space afforded to the sub-state entity. In some cases, as in Bougainville and the Bangsamoro, the constitutional space permits a degree of wider discussion on the design of that space, while in others it is more stringent. Furthermore, in some instances the ambiguous nature of the constitutional space makes deciphering the demarcation of competencies between the central state and sub-state entity particularly problematic.

The relevance of these discussions becomes clear when engaging with the various ways in which the constitutional space has been challenged. That is, whether (and to what extent) the constitutional space is perceived to be adequate is often contingent on the expectations that precede it. A fundamental difficulty is that when equilibrium is not achieved between sub-state entities' expectations and the willingness of the central state to provide more constitutional space, tensions can arise, and the constitutional space can be contested in different ways, which are explored in the next section.

## Affirming or contesting the constitutional space?

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The discussions thus far have highlighted that the constitutional space is often forged by elite-level negotiations. There are, however, a number of ways in which the constitutional space can be challenged. In some cases, the government negotiates the constitutional space with sub-state elite actors. However, disagreements can arise between these two levels of government over the appropriate contours of that space. In other cases, similar disputes may occur at the sub-state entity level. For example, while agreements are often forged by elite actor negotiations, the exclusionary nature of these types of deals often means that broader views are not considered.

### Challenges from central-state institutions

The example of the **BBL** illustrates some of the tensions that can arise between various state institutions considering the constitutional space. While President Aquino's government negotiated the constitutional space through the Framework Agreement, Congress has to approve and adopt the BBL, which they have not yet, also due to disagreements about its constitutionality. This is different from the case of **Bougainville**, but only in terms of outcome. While Bougainville's draft constitution was ultimately passed by the Constituent Assembly, the central-state legislature nevertheless had to approve the draft and amend the PNG constitution accordingly.

The constitutional space taken by sub-state entities has also been challenged by central-state institutions elsewhere. For example, both the interim and final constitutions of **South Africa** permit provinces to adopt constitutions. In early 1996, KwaZulu-Natal sought to implement its constitutional right to a provincial constitution. Pursuant to section 160 of the Interim Constitution of 1993, the provincial constitution adopted:

- was not to be 'inconsistent with a provision of the interim Constitution' but could impose 'legislative and executive structures' different from those provided for provinces in the Interim Constitution, and it could provide for traditional monarchs;
- had to be passed by a two-thirds majority of the provincial legislature; and
- could be of 'no force and effect' unless it had been certified by the Constitutional Court to comply with (i).



According to these criteria, the KwaZulu-Natal Constitution failed the judicial certification test (Murray 2001). In a forceful judgment, the Constitutional Court identified many flaws, the most serious of which were categorized as the ‘usurpation of national powers’. In the court’s view, many provisions of KwaZulu-Natal’s proposed constitution appeared to have been passed ‘under a misapprehension that [the province] enjoyed a relationship of co-supremacy with the national legislature’. By contrast, the court’s judgment in the certification of the Western Cape constitution was very different (Murray 2001: 3). While the court again exerted its authority by contesting the province’s reading of the national constitution, the provincial constitution was passed after amendments were made, arguably because it was conservative, and contained many verbatim passages from the national constitution (Murray 2001).

Constitutional courts have also challenged the constitutional space taken by sub-state entities in other settings. In **Spain**, under articles 146–48, the 1978 Constitution only establishes the main contents of the regional Statutes of Autonomy, which may take different forms, provided that they do not contradict the constitution. The relationships or conflicts between the central and sub-state institutions are regulated by law, inter-administrative covenants or agreements, and are controlled by the Constitutional Tribunal and other courts.

In 2004, the Catalan Parliament initiated a reform of Catalonia’s Statute of Autonomy (1979), and on 30 September 2005 it approved a draft text with an absolute majority of 120 votes in favour and 15 against. Following the procedure for the reform of the statute established in the Spanish Constitution, the text was then submitted to the Spanish Parliament. In January 2006, agreement was reached between the Catalan government and the Spanish Government (led by the Socialist PSOE, the majority party in the Spanish Parliament at the time), and between March and May 2006, the Spanish Parliament (both the Congress and Senate) approved the new text for the statute. This was passed by a 54 per cent majority in Parliament, and opposed by the main opposition party, the People’s Party (PP), as well as some minority parties. Notwithstanding this support, seven legal challenges were lodged against the statute before Spain’s Constitutional Court, the most important of which was presented by the PP. After four years of deliberation, the Spanish Constitutional Court ruled that 14 articles were not constitutional and that 27 had to be interpreted by the magistrates.

Central-state institutions, particularly constitutional courts, also often provide an ongoing oversight function. A recent example of this can be seen in **Bosnia and Herzegovina (B-H)**. On 16 March 2015, the Constitutional Court of B-H declared that the electoral system of both entities was inconsistent with the principle of non-discrimination, according to article II (4) of the B-H Constitution and article 1 of Protocol no. 12 to the European Convention on Human Rights (Dicosola 2015).

In other cases, and notwithstanding even the express legal protection of the constitutional space, political realities can outweigh legal safeguards. In **Ethiopia**, for example, considerable space might be afforded to sub-state entities, which reflects a number of historical realities pertaining to ethnic diversity, rights to self-determination and past repression. Yet granting such space may considerably limit the power at the centre. However, all levels of government are currently controlled by the EPRDF and affiliated parties, based on a highly centralized decision-making system founded on the principle of ‘democratic centralism’. According to this principle, sub-state institutions are controlled at the central level, which might limit the constitutional space that is

available to the states, highlighting the political rather than legal challenges to this space.

Another issue is how the sub-state constitutional space is protected from possible encroachment by the centre. In **Bougainville**, for example, various safeguards were put in place to ensure that the centre could not undermine the constitutional space forged in the Bougainville Peace Agreement. By contrast, despite the constitutional safeguards provided by article 370 of the Indian Constitution, there is a prevalent view that J&K's autonomy has eroded since 1953. For example, in 1954 the central government's right to make laws for the state was extended. In 1965, the office of an elected *sadr-i-riyasat* (or head of the state) was replaced by that of a governor nominated by the president of India, who had the power to dismiss governments and declare 'president's rule' at the centre's insistence. In 1974 the Kashmir Accord reiterated that the state of J&K was an integral part of the Union of India, with article 370 of the Indian Constitution bearing no resemblance to its original form (Singh 2010: 11).

### Why is the space challenged?

It is difficult to say with certainty why the constitutional space is (or is not) challenged. Views often differ regarding the source of the challenge, the perceived constitutionality of the space afforded, and whether the actions of both state and sub-state actors are legitimate. However, the workshop discussions tentatively offered a number of possible explanations.

It might be the case, for instance, that the constitutional space is challenged as a result of disagreements at the central state level regarding what the appropriate space should be. In peace negotiations, for example, agreements are often reached between elite actors, with government officials entrusted with negotiating on behalf of the central state. However, other factions of the state may consider any concessions to be too broad and attempt to curtail the scope of (state-building) competences afforded to the sub-state entity. Alternatively, political elites at the central state level may reconsider the space afforded in later amendments, or there may be challenges to the implementation of the provisions granting constitutional space, as appears to be the case in Ethiopia and regarding J&K.

The constitutional space might also be challenged after the adoption of a peace-agreement constitution due to the development of competing interests at the sub-state level. In **B-H**, for example, it was noted above that the constitutional space set was as much about limiting the power of different ethnic groups as it was about respecting ethnic diversity. However, Tzifakis (2006) has drawn attention to the increasing number of nationalist parties as a result of the numerous opportunities for political involvement due to the multi-layered system of politics, which have then challenged the constitutional space of the entities.

Contestation can also arise between political actors within sub-state entities, which can be illustrated by the attempts of the Kurdistan region in **Iraq** to adopt a sub-state constitution in 2005. Although a draft was produced, internal fighting between political parties about how power was to be structured eventually prevented the draft constitution from being formally adopted. Thus, contrary to arguments that adopting sub-state constitutions might resolve a conflict, it might also lead to new forms of conflict at the sub-state level.

Political realities at the centre sometimes underpin challenges in numerous ways. In **South Africa**, for example, it is generally accepted that the ANC was not favourable to



granting a constitutional right to adopting sub-state constitutions, and this is reflected in the degree of space afforded to sub-state entities. Similarly, in **Spain**, the primary challenges to the Catalan Statute were advanced by the PP, which considered it to be a violation of the constitution and a threat to the country's unity. The PP strongly opposed the new statute during the debates and amendments in the Spanish Parliament, and then challenged a substantial part of the outcome in the Constitutional Court (Casanas Adam 2016: 376).

Furthermore, challenges to the constitutional space may reflect discrepancies between the expectations of sub-state entity actors on the one hand, and the central state's willingness to grant more constitutional space to match these expectations on the other hand. Approached from this perspective, the constitutional space might be challenged at the sub-state level. For example, a counter-position to the case of the **BBL** could be that the Bangsamoro Transition Commission extended beyond the agreed-upon constitutional space. Alternatively, the **Spanish** example highlights that various interpretations of the constitutional space are possible, and can relate directly to the ambiguous nature of the constitutional space as defined in central-state constitutions.

The example of **Bougainville** highlights yet another aspect to consider: why is the space not challenged? In Bougainville, it would appear that a level of equilibrium was reached whereby the constitutional space forged under the Bougainville Peace Agreement was a true expression of what both the sub-state and central state governments were willing to accept. In **Somalia**, while the constitutional space of the sub-state entities expanded in the absence—or due to the weakness—of the central state, the constitutional drafts of the sub-state entities were strikingly similar to the existing Somali Provisional Constitution.

Thus there are multiple ways in which the sub-state constitutional space is challenged, and numerous possibilities that might explain why. In some cases, it appears that the challenge derives from disagreements between central-state institutions. Contestation can emerge over interpretations of how wide the space should be, and can reflect varying levels of coordination among central-state institutions and differing political positions within them. Similarly, the legal aspects of the constitutional space may be insufficient to encourage elite actors to relinquish political power, while in other cases the constitutional space can be gradually eroded over time through constitutional evolution. Still again, the space may be challenged by sub-state actors who consider the space too stringent. This raises the issues of coordination within sub-state entities and the legitimacy of those negotiating on behalf of the sub-state entity. Finally, ambiguities in the central-state constitution may impede a clear determination of the respective remits of the central and sub-state levels, thereby adversely affecting the constitutional space of sub-state entities.

## What role for international actors?



A discernible feature of many conflict-affected settings is the presence of international actors, which may either support or sometimes undermine the processes. Furthermore, the international community sometimes encourages countries to adopt systems of government that may include sub-state constitutions.

While in some countries international actors appear to have little involvement regarding sub-state constitution-building processes, for example in **Ethiopia**, in other cases international involvement has not had the intended impact. In **J&K**, for instance, since the relevant UN resolutions are in the form of recommendations, they can be enforced only if both parties to the dispute, India and Pakistan, consent to their application.

International involvement, particularly by the United States, has dominated **Iraq**'s recent history. Under the 2004 interim constitution, known as the Transitional Administrative Law, a constitution-drafting process was undertaken with a view to adopting a new statewide constitution by 2005. Some hold the international community responsible for instituting a federal system in Iraq in order to hold the territorially diverse polity together. The prominence of the Kurdish claim in the choice of federalism, and particularly in the distinctive institutional form of federalism that emerged in the Iraqi process, has led some experts to argue that the (notional) creation of a sub-state constitutional space was more closely related to the international community's interest in resolving Kurdish claims and did not consider the views and interests of the Iraqi majority (Al-Ali 2013). Yet given other more serious problems like protracted violence and the threat of state failure that have plagued Iraq since the US invasion, it is perhaps unsurprising that sub-state entities have not fully claimed the sub-state constitutional space.

The nature of international involvement is also often shaped by a country's particular circumstances. For example, it has been suggested that in **Somalia**'s attempts to federalize from the bottom up, the central state-building process is dependent on the federal member state formation process. For this reason, the international community is slowly increasing its support at the sub-state level, which raises a number of difficulties. For example, devoting attention to the sub-state level may detract focus and resources from building federal government capacity. The state-building process is unconstitutional in many respects, and international actors might be contributing to eroding the prospects for establishing a system of the rule of law. For example, under article 49, the House of the People determines the number and demarcations of the federal member states. The provision does not give the federal



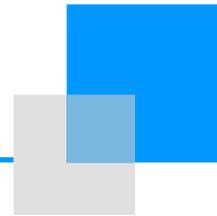
government or the House of the People the authority to create the states or their borders. Rather, the federal Parliament is required to enact a law that will establish a national and independent Boundary and Federation Commission that will help establish new states (article 49(2)). Yet, in the absence of the commission, states are being formed in contravention of the constitution, and thereby possibly weakening it.

A counterargument is that because Somalia's federal system is itself dependent on the formation of the federal member states, the international community's approach is ultimately directed towards establishing the federal government. Directly related to both points, the federation as it currently exists is highly ambiguous, contradictory on some points, and in need of reformulation on certain issues. Some suggest, therefore, that the international community should refocus its efforts on building the necessary commissions to give effect to constitutional provisions.

Perhaps nowhere has the involvement of the international community been so prevalent as in **B-H**. The adoption of a multi-layered, consociational system of government under the Dayton Peace Agreement has motivated the creation of numerous political parties to challenge the established order and demand either greater levels of autonomy or complete secession. As a result, the international community decided in 1997 to indefinitely extend its mandate in Bosnia, vesting the high representative with the power to pass laws and decisions at any constitutional level, and to dismiss any non-cooperative elected representative, party officer or public official (Tzifakis 2007: 96). The international response to the nationalists' obstructionism has been the transformation of the Dayton Agreement into an ongoing process, which has moved the country's political system towards a more centralized model of governance (Tzifakis 2007). This shift has included the transfer of substantial competences from the entity to the state level with the establishment of seven additional state ministries, the reunification of Mostar, the removal of all references to statehood from the constitution of the RS, and the revision of both Entities' constitutions following the ruling of the Constitutional Court regarding the equality of all three ethnic groups throughout the country (Tzifakis 2007: 96). Thus the international community has attempted to reverse the constitutional space afforded to sub-state entities by reallocating sub-state level competencies to the centre.

## Key conclusions

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The following conclusions can be drawn from the above discussion.

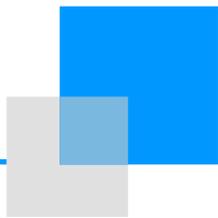
1. Sub-state constitutions can be adopted for a range of reasons, and serve numerous purposes. In some cases, they are adopted to express identity and have that identity recognized in turn. In other cases, they are adopted to facilitate greater levels of autonomy. Both autonomy and identity are directly related to history—either a history of marginalization and discrimination or a prior arrangement of autonomy (or a combination of both). Given that sub-state constitutions are often adopted against backgrounds of conflict, they have the potential to be conflict resolution mechanisms.
2. Whether (and to what extent) the constitutional space of the sub-state entity is perceived as sufficient is often directly linked to the underlying reasons that motivate the adoption of sub-state constitutions.
3. The potential adverse implications of allowing or requiring sub-state constitutions to be adopted must be understood. In **B-H**, sub-state constitutions were adopted as a means of recognizing and protecting ethnic diversity. However, doing so can also help cement ethnic divides and impede any prospects of future inter-ethnic integration. In both **Ethiopia** and **Somalia**, for example, conflicts have arisen within sub-state entities regarding how power is to be held between different groups.
4. When considering the parameters of the constitutional space, it is important to identify the underlying motivations behind those who support sub-state constitution-building processes. As the discussions on **Bougainville** and the **Bangsamoro** highlight, the constitutional space granted must reflect claims of autonomy at the sub-state level. In other cases, when the underlying reasons appear to be more about expressing identity than acquiring autonomy, the particular scope of the space may be less important. Complicating matters further is the fact that identity will often be linked to the issue of autonomy. Understanding the underlying motivations is particularly important, and should underpin any discussion of the constitutional space.
5. The processes in which sub-state constitutions are forged and formalized must be brought to the fore. In some cases, the constitutional space is forged and



formalized through peace agreement processes. They thus involve negotiations that permit agreements to be reached and enable discussions on both the state and sub-state's positions on the scope of the space. Even where there is no peace agreement, there can still be opportunities for negotiations. However, sometimes the constitutional space is imposed from the top, and where it is supposed to deal with claims for autonomy, important opportunities might be missed to appease tensions.

6. The constitutional space is often forged as a result of negotiations between elite actors. It is important to identify who is negotiating, why they are negotiating and what their level of legitimacy is within the sub-state entity. If the negotiators lack significant support, it is more likely that the space forged will be challenged. It is also important to extend discussions beyond a few elite actors.
7. The underlying political settlement and its impact on discussions of the constitutional space must be well understood. Furthermore, where the space is forged through negotiation, it is important to have provisions safeguarding the constitutional space. As the **Bougainville** example highlights, doing so can greatly allay any fears of the sub-state entity, particularly in low-trust settings. And most importantly, it can help ensure that the space forged is the same space that will be formalized.
8. Challenges to the constitutional space or its implementation can be mounted by the central state through the legislature or the courts. They can also be mounted from the bottom in a deliberate attempt to push the boundaries of the space set. Defining precisely where the challenges occur may be difficult, not least due to the ambiguous nature of the constitutional space in some central-state constitutions.
9. In some cases, the centre has deliberately encroached upon the constitutional space, and international actors play a minimal role. In other settings, the international community can help support both the broader peace process within which the constitutional space is forged and the sub-state constitution-building process using a number of different tools and mechanisms.
10. The international community must attempt to better understand the context in which these sub-state constitution-building processes are developed and engaged in. Key issues to consider include understanding whether sub-state constitutions are allowed, prohibited or required; engaging the central state and the sub-state entity to better understand the underlying motivations; understanding which processes are most likely to work in a given context, and what safeguards and trust-building measures can be put in place; identifying who should be involved in these processes; and how both state and sub-state entities can make these processes more inclusive and coordinated.

## References and further reading



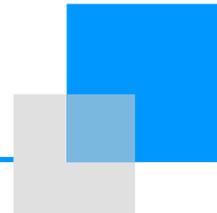
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## Annex 1: Questions for country case study experts

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### Questions for Country Case Study Experts

The Third Edinburgh Dialogue on Post-Conflict Constitution Building will focus on the process and design of sub-state constitutions in fragile and conflict-affected settings, and their role in the broader state-wide political-settlement and/or peace-building process. The workshop will be resourced by scholars and practitioners of comparative constitutional law and peace-building, as well as country case study experts.

To assist the discussion—and to briefly set out relevant constitutional issues, historical background, and political context—we invite the country case study experts to provide written answers to the questions below. These responses will be circulated to all participants in advance of the workshop. This will enable us to get directly to the discussion questions in each session, without expending time on setting out background and context. Your answers to each question should be no longer than half an A4 page (and can be shorter where appropriate). Please avoid lengthy accounts, as most participants will be reasonably well informed about the basic facts of each case.

Nevertheless, if there are short articles or other sources to which you would like to refer other participants, so that they can read them in advance, please send them to us and we will circulate these as well. (These questions are written in the present tense but obviously apply to past cases as well.)

1. Why is a sub-state constitution being considered in your country/territory? What purposes is it intended to serve? Did a sub-state constitution, or some other politically salient tradition of autonomy, exist before the onset of conflict?
2. Who defines the ‘constitutional space’ available to your sub-state entity to design its own constitutional framework? Is it the central state, the sub-state entity itself, or a combination of the two? Are there other factors that have a bearing on how this space is created and maintained (e.g., a *de facto* balance of military power, the formal terms of a peace agreement, etc.)?



3. How constitutionally well-protected is the sub-state constitution? Does the central state constitution guarantee the sub-state constitutional space? Are there other factors that provide non-legal protections for the sub-state constitution (e.g., international guarantees, the sub-state entity's own military power, etc.)?
4. In the sub-state constitution-building process, who negotiates on behalf of the sub-state entity, and what level of popular participation or inclusion of different elites groups is there?
5. What design options are available for the sub-state constitution? Is the range of such options limited or defined by the central state constitution (or by a peace agreement)? How are human rights protected? How is the constitutional relationship between the sub-state and central state institutions governed?
6. Where there is more than one sub-state entity with separate constitution-building processes, were the latter conducted in parallel? Are there key similarities between the different sub-state entities' constitutions? And what explains these similarities or eventual dissimilarities?
7. Does the sub-state constitution (or an attempt to draft one) serve to prevent or manage conflict? Or does it exacerbate conflict, or have the potential to do so? If the latter, please briefly explain why?
8. If applicable, who are the main international actors and what is the role of the international community in your case? Does the international community encourage or discourage sub-state constitution-making? What are the reasons for their position?

## Annex 2: List of participants

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### Participants to the Third Edinburgh Dialogue

1. Adem Abebe
2. Zaid Al-Ali
3. Tahir Aziz
4. Christine Bell
5. Sumit Bisarya
6. Elisenda Casanas Adam
7. César Colino
8. Tom Ginsburg
9. Tom Daily
10. Kristian Herboltzheimer
11. Adam Ibrahim Aw-Hirsi
12. Sean Molloy
13. Christina Murray
14. Kearnneth Nanei
15. Ciaran O'Toole
16. Nicholas Ross
17. Jenna Sapiano
18. Cheryl Saunders
19. Stephen Tierney
20. Asanga Welikala
21. Kimana Zulueta-Fülscher

## About International IDEA



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The International Institute for Democracy and Electoral Assistance (International IDEA) is an intergovernmental organization that supports sustainable democracy worldwide. International IDEA's mission is to support sustainable democratic change by providing comparative knowledge, assisting in democratic reform, and influencing policies and politics.

### What does International IDEA do?

In the fields of elections, constitution-building, political parties, gender in democracy and women's political empowerment, democracy self-assessments, and democracy and development, we undertake our work in three activity areas:

1. providing comparative knowledge derived from practical experience on democracy building processes from diverse contexts around the world;
2. assisting political actors in reforming democratic institutions and processes, and engaging in political processes when invited to do so; and
3. influencing democracy building policies through the provision of our comparative knowledge resources and assistance to political actors.

### Where does International IDEA work?

International IDEA works worldwide. Based in Stockholm, it has offices in Africa, the Asia-Pacific, and Latin America and the Caribbean. International IDEA is a Permanent Observer to the United Nations. Chapter heading



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