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Building up Federalization: A Third Way of Federal State-formation

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ABSTRACT

This article presents ´building up´ federalization as a 'third way' of federal state-formation, distinct from 'coming together' and 'holding together'. Building up federalization refers to a process in which sub-state entities establish governance structures and constitutional frameworks before the political settlement at the centre is concluded. Drawing on Bosnia-Herzegovina and Somalia, we show how when a federal state is built from below, the resultant constitution institutionalizes a weaker central state with less decision-making power than sub-state entities. This model may be increasingly relevant to understand federal state-formation in contexts where intra-state conflicts cause fragmentation and delays in constitutional agreements.

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Introduction

Two dominant approaches to studying federal state formation – 'coming together' and 'holding together' – have provided valuable insights, yet they often overlook the federalization processes in conflict affected settings. In such settings, due to the central state's weakness, sub-state entities frequently initiate and conclude constitution-making processes prior to the completion of negotiations concerning the restructuring of the central state.

Since the end of the second World War, the number of intra-state conflicts has continuously risen.[1] Particularly after the end of the Cold War (and still today despite the increase of inter-state wars), a significant number of these conflicts have featured territorially-defined and concentrated groups seeking recognition and autonomy, if not outright independence, from the state in which they are located. According to Weller (2009, 111; see also Walter 2009), these types of conflicts 'are among the most persistent and destructive forms of warfare' and can result in an increased risk of state fragmentation.

In these contexts, transitions to peace have often required the negotiation of a new political settlement that would ideally address these demands for recognition and autonomy. These new settlements would sometimes be translated into new constitutional frameworks providing for either the autonomy of a given sub-state entity – or territorially

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delineated part of a country – or the federalization of the state aimed at both sharing power at the centre and dividing responsibilities between the centre and sub-state entities (see Weller 2009, 116; Belser 2021).

In highly-fragmented and conflict-affected societies, the federalization of the state is often considered a potential solution to underlying conflicts (Choudhry and Hume 2011, 363; Weller 2009). In these contexts, federalism is frequently regarded as a mechanism for managing ethnic conflict through the establishment of institutional structures and processes that promote the inclusion of groups identified as constituents of the (restructured) state (Choudhry and Hume 2011, 364, 366; Neudorfer, Theuerkauf, and Wolff 2020; Yimenu 2023). Theoretically, federalization may also prevent the state from further fragmenting and reduce the risk of eventual dissolution (Tierney 2022).

Scholars have attempted to explain the formation of post-conflict federations by using categories developed by the classical literature on federalism. These categories have helped to explain the difference between federations such as the United States or Australia or 'coming together' federations – where the central state emerged anew out of the union of pre-existing political entities or states – and newer federations (or quasi federations) such as Spain and South Africa or 'holding together' federations – which emerged from the transformation of previously centralized political systems, in an attempt to re-legitimize the state by affirming its territorial plurality. A further model – 'putting together' federations – was conceptualized to explain the (forced) union of formerly independent states throughout the Cold War (1945-1990) or after decolonization (Stepan 1999), but it is the concepts of 'coming together' and 'holding together' that represent the two classic ideal-types of federal state formation. To date, these models have served as a framework for analysing federal state formation. However, their explanatory power has diminished over time, particularly with respect to more contemporary cases of federalization (Burgess and Tarr 2012, 11; Popelier, Aroney, and Delledonne 2021).

When looking at states that become federations in response to ethnic conflict, it is often understood that the existing state is restructured along federal lines, and hence post-conflict federations are often described as 'holding together' federations (Choudhry and Hume 2011, 366). However, this perspective on the formation of federal states in conflict-affected settings assumes that the central state, despite potential contestation of its authority, maintains or is perceived to maintain a degree of institutional control over the country's territory (Migdal and Schlichte 2005).

Since the end of the Cold War, and particularly since the early 2010s, protracted conflicts often led to the weakening of the central state, the multiplication of state – and non-state (armed) actors, and the difficulty of (and related delays in) negotiating comprehensive agreements aimed at offering sustainable frameworks for peace and better governance (Bell and Ainsworth 2022). What we posit here is that, in some instances, territorially-concentrated groups (or sub-state stakeholders) create administrative structures and constitutional frameworks at the sub-state level *in advance* of negotiations on the restructuring of the central state concluding. By institutionalising sub-state governance arrangements before there is a new political settlement or before there is agreement on its details, these actors assert constituent power over their sub-state territory and carve out 'constitutional space', which influences the distribution of powers between central and sub-state institutions in a way that increases the latter's autonomy. This is what we call the 'building up' model of federal state formation, or the 'third way' of federalization.

In the next section, we will further define 'building up' federalization and distinguish it from devolutionary or 'holding-together' federations and 'coming-together' federations. We will also explain how our 'building up' model goes beyond Yimenu's (2023) 'building together' federations. We will focus mainly on the fact that in 'building up' federalism sub-state entities attempt to secure their own constitutional decision-making power (or 'constitutional space'), which will only later be formally provided for in the central state constitution. We will then illustrate this new model with the case studies of Bosnia–Herzegovina – the first country that went through this type of federal state-formation – and Somalia, an unfinished case where sub-state entities have adopted (interim) constitutional frameworks while the final central-state constitution is still being negotiated.[2] Finally, we will explore whether this new type of federalization process results in particular constitutional design features, and assess the implications of both process and the resulting design on these states' resilience to conflict.

The Third Way of Federal State-Formation: 'Building Up' Federalization

In the period after the end of the Cold War, the restructuring of existing but increasingly weakened and contested states and their potential federalization, through state – and constitution-building, became a major tool of peace-building and conflict management (Paris and Sisk 2009; United Nations 2009; United Nations 2020; Wallis 2014). In these settings, 'holding-together' federalization became the prevalent lens through which the international community supported countries' territorial integrity by strengthening central-state structures and facilitating dialogues with sub-state stakeholders. This was in response to two interrelated factors: increasing claims for recognition and autonomy from territorially-concentrated groups, and where such claims were not successfully addressed, the further weakening of central state structures and the risk of eventual partition.

'Holding-together' processes of federalization in these contexts were often an option of last resort for central state authorities to end conflicts while maintaining the state's territorial integrity (Choudhry and Hume 2011; Stepan 1999). Depending on the bargaining power of either side, sub-state entities would be able to exercise a certain degree of self-rule and shared-rule at the centre. Beyond this, in many of these processes the reformed central state constitution often granted sub-state entities the right or the responsibility to draft and adopt their own constitutional framework, under the aegis of the central-state constitution (Zulueta-Fülscher and Welikala 2017).

In conflict-affected settings, however, the process of negotiating and agreeing a new political settlement at the central level that would fundamentally change the state's constitutional structure is often very complex. Actors that have been, or may still be, fighting against each other need to negotiate and agree to a new way of managing and distributing power. In territorially plural societies, where (the lack of) territorial autonomy is one of the root causes of the conflict, deciding on the specific characteristics of a particular territorial power-sharing arrangement may take more time than initially foreseen.

Sometimes pressure to accelerate the proceedings and reach an agreement is compounded by sub-state authorities starting separate processes of constitution-making at the sub-state level. This is the case only in situations where sub-state stakeholders are sufficiently empowered and organized, politically speaking, to assert their own power

to draft and adopt a sub-state constitutional framework. In these cases, sub-state entities would likely expand what is known as their 'constitutional space', that is, the possibility to design their own institutions and processes that will structure governance at the sub-state level, and expand their formal powers and responsibilities (Tarr 2011, 1133–4; see also Marshfield 2011, 1161; Burgess and Tarr 2012; Dinan 2012, 237).[3]

In the category of cases from which we propose to speak of a third model of federalization – 'building up' federalization – sub-state entities carve out their own constitutional space in advance of the central state constitution being adopted, and therefore in advance of the central state constitution *allocating,* and thus delimiting and constraining, this space. In contrast to federal systems that emerge out of the union of pre-existing polities, as in 'coming together' federations, sub-state entities in these contexts have typically not been independent states in the recent past, nor do they necessarily aspire to achieve independence.[4] However weak and contested, the central state will in some form pre-exist sub-state entities, unlike in 'coming together' federations where the sub-state entities constituted independent and sovereign states before establishing the new central state. Beyond this, the decision to maintain unity as a single state is often influenced more by the reluctance of the international community to recognize secessionist states than by economic or security considerations, which were more prominent factors in traditional 'coming together' federations.

In 'building up' federal state formation processes constitution-building at the centre and at the sub-state level generally occur simultaneously, despite the fact that negotiations regarding the central-state constitution may be more complex and challenging to finalize. This implies that the constitutional space initially seized by a sub-state entity may eventually be limited or constrained by the central-state constitution, once adopted. The longer it takes for the central-state constitution to be adopted, however, the higher the likelihood that sub-state governance structures will consolidate, thereby undermining the power of the centre to formally constrain the power of sub-state entities. As a result, even though sub-state constitutions may need to be amended to ensure legal consistency with the central state constitution, these amendments are likely to be minimal. This stands in stark contrast with 'holding together' federations where the central-state constitution will determine not only the degree of shared-rule but also the degree of self-rule, including the degree of 'constitutional space' available to sub-state entities. In other words, 'building up' federalization presumes a greater degree of constitutional agency to sub-state actors than would normally be the case in 'holding together' cases.

This third model of federalization can also be distinguished from the recently conceptualized model of 'building together' federalization, which Yimenu (2023) exemplifies with the case of Somalia. According to Yimenu, this model is a variant of Stepan's (1999) 'putting together' federalization and is principally defined by the weakness of the central state, the lack of a history of federal organization, and the critical influence of both foreign actors and 'constitutive units' in its design (Yimenu 2023, 13). Our 'building up' model of federalization, while not a variant of Stepan's 'putting together' model, does coincide with the aforementioned elements of the 'building together' model, but also adds further complexity: (1) the timing of the federalization process is key, and delays in the negotiations lead to further strengthening of sub-state entities (or 'constituent units') vis-à-vis the central state; (2) sub-state entities carve out a higher degree of

'constitutional space', which may then be reflected in a sub-state constitutional framework adopted in advance of the final central-state constitution; and (3) the central-state constitution then entrenches the weakness of the central state. From our understanding of this new model, BiH would constitute the first and most paradigmatic case of this model of federal state formation, but there are other cases of (proto) federalization that could be explained using this new model, including Somalia.

Despite the fact that only few cases have in this manner restructured the state from below, we posit that the impact on the content of the final constitution (as well as indirectly on the (non-) resurgence of conflict) may be significant. We presume that federal constitutions, in these settings, may lack details regarding the institutional structure of sub-state entities, but may also limit the power of central-state institutions to constraint the decision-making power of sub-state institutions. Beyond this, these types of processes may proliferate in settings where, against the background of a weakening central state, sub-state stakeholders organize politically as representatives of more or less coherent, if not homogeneous, and territorially-concentrated groups.

Model of Federalization	Description	Nature of the Central State	Role of Sub-State Entities	Examples
Coming together	Pre-existing, independent states/ polities unite voluntarily to form a new federal state	Typically strong, based on consensus of pre-existing states and negotiated balance of powers	Sub-state entities share and divide powers with the centre, retaining substantial self-rule and constitutional space	Australia, United States
Holding together	A previously centralized state restructures itself along federal lines to address internal challenges, often in response to ethnic/ territorial conflict	Relatively strong (in comparison to sub-state entities); maintains the capacity to preserve territorial integrity and central authority	May exercise different levels of self- and shared-rule depending on negotiating power vis-à-vis the central state; constitutional space constrained by central-state constitution	Nepal, South Africa, Spain
Building up	In conflict-affected settings with weakened central authority/institutions and delayed constitutional negotiations, sub-state entities complete their own constitution-making process before a central framework is established.	Weak and contested; central state often limited or undermined by strong(er) sub-state entities	Constitution-making at the sub-state level and negotiations at the centre occur simultaneously; sub-state entities carve out constitutional space independently of negotiations at the centre.	Bosnia–Herzegovina, Myanmar, Somalia

Exploring 'Building Up' Federalization

Once there is a decision that a state needs restructuring to deal with protracted ethnic conflict, key national and international stakeholders often insist that a process of federalization can contribute to both resolving conflict and maintaining the state's integrity. However, federalising a country is a complex endeavour that needs agreement between conflict actors not only on the specific structure of the state and division of responsibilities, but also on how to resolve future disputes between the central- and

the sub-state level. In fragile and conflict-affected settings, conflict parties cannot often agree on the specific design of the federal system within a determinate timeframe, and hence the adoption of the central state constitution is delayed, sometimes indefinitely. In the meantime, politically-organized sub-state authorities may initiate processes in order to legally formalize incipient governance structures at the sub-state level, as well as increase their bargaining power vis-à-vis central-state authorities involved in the state- and constitution-building process at the central level. We proceed here to explore two cases that we believe would better fit under this new 'building up' model of federal state formation: Bosnia–Herzegovina and Somalia.

Bosnia–Herzegovina: The Paradigmatic Case

The Constitution of Bosnia and Herzegovina (BiH) was adopted in 1995 as an annex to the General Framework Agreement for Peace in Bosnia and Herzegovina (the Dayton Peace Agreement; see also Sahadžić 2019, 81, 81-82). Article I.3 of the Constitution of BiH provides, or rather recognizes, that BiH consists of two entities, the Federation of Bosnia and Herzegovina (FBiH) and the Republika Srspka (RS). These two entities, however, were established and adopted separate sub-state constitutional frameworks, in advance of the Constitution of BiH being adopted.

BiH itself was one of the constitutive republics of the Socialist Federal Republic of Yugoslavia (SFRY), together with Croatia, Macedonia, Montenegro, Serbia, and Slovenia. The SFRY emerged in the aftermath of World War II and disintegrated in the 1990s. In 1974, President Tito introduced a new Constitution that gave greater autonomy to the constitutive republics and recognized the autonomous status of the two provinces of Kosovo and Vojvodina (Zahar 2019, 5). The 1974 Constitution was, however, unable to withstand the pressure on SFRY´s unity, gradually after Tito's death in 1980, and more dramatically once the Cold War ended.[5]

BiH was one of the most diverse as well as poorest republics within the SFRY, and had to contend among others with large Croat and Serbian minorities amongst a Bosniak majority (Zahar 2019, 5; Majstorovic 1997, 177). In 1990, elections resulted in three nationalist parties (Serbian, Croat, and Bosniak) dominating parliament. The three parties had differing views on whether or not to stay within the SFRY. The declaration of independence of neighbouring Croatia, and fears of the impending militarization of Serb minorities in all the remaining republics, led a majority in parliament to declare sovereignty in October 1991, and to announce a referendum on independence to be held on 29 February and 1 March 1992. Serb members of parliament walked out and established a parallel Assembly of the Serb People of BiH in January 1992, allegedly representing the Serbian Republic of BiH. A majority of Serbs also boycotted the independence referendum, which resulted in a 99.7 percent vote in favour of independence with a 63.4 percent turnout. In February 1992, the National Assembly of the Serbian Republic of BiH adopted the Constitution of the Serbian Republic of BiH – renamed Republika Srpska in August 1992 – initially as an attempt to secede from BiH (Woelk 2012, 110; see also Sahadžić 2013, 12–13).

BiH declared independence on 3 March 1992 (Zahar 2019, 4), after which both the European Economic Community and the United States recognized it as an independent country. However, divisions as to the future structure of the state were rife, with

Bosniaks favouring a unitary state, Croats cantonization, and Serbs continued membership in the SFRY, or at least, the option for Serb areas to re-join the SFRY in the near future (Zahar 2019, 29). Violent conflict followed the declaration of independence and lasted until 1995.[6]

In August 1993, Croat politicians created the Republic of Herzeg-Bosna, after a fallout with the Bosnian government. This state within a state was short-lived, but it was followed by negotiations between Serbs and Croats on the partition of BiH in ethnic blocs (Carmichael 2015, 166). Separately, in March 1994, Croats and Bosniaks signed the Washington Agreement, established the FBiH as an entity within BiH and provided an initial constitutional framework for this entity (Zahar 2019, 9). The Washington Agreement also provided for the establishment of a Constituent Assembly.[7] The resulting Constitution of FBiH established a federation of ten cantons, each of which later adopted its own cantonal constitution. The structure of the FBiH was a prelude to the structure enacted by the Dayton Peace Agreement (Zahar 2019, 8–9).[8]

The Constitution of BiH in turn provides for a system that ensures the collective equality of Serbs, Bosniaks, and Croats, and their representation in central state institutions (Kulenovic 2016, 120). The constitutive entities share these institutions at the central level, including both a bicameral legislature and a parliamentary executive. The shared central state institutions include an independent judiciary, with a dedicated apex constitutional court that has 'the exclusive jurisdiction to decide any dispute that arises under this Constitution between the Entities or between Bosnia and Herzegovina and an Entity or Entities, or between institutions of Bosnia and Herzegovina' (art. VI.3; see also Sahadžić 2019, 93). The central government's power, however, is limited compared to that of the entities (Sahadžić 2019, 84), which hold taxation powers or the right to establish a 'special parallel relationship with neighbouring states' (art. III.2). The Constitution further provides that all residual powers are given to the constitutive entities (article III(3)(a))[9], and is silent regarding both the composition and functioning of sub-state institutions (Sahadžić 2019, 84).

When considering the institutional framework of the two constitutive entities one can discern a number of elements that may help substantively distinguish this third model of federal state-formation. First, the institutional framework and system of government varies between the two entities, and between one of the entities – Republika Srpska – and the central state. As mentioned above, the Constitution of FBiH, which established a federation consisting of ten cantons, and a bicameral system of parliament with an indirectly-elected President and Vice-President (section IV, B, art. 1), served as inspiration for the Constitution of BiH. In contrast, the Constitution of Republika Srpska established a unitary, semi-presidential, and unicameral system. Both entities also provide for a separate constitutional court mandated to protect the constitutionality and legality of the entities' legislation and executive action (Constitution of the Republika Srpska, art. 70).

Second, the constitutional amendment process in both constitutive entities is more onerous than the one provided for in the Constitution of BiH. In FBiH, the amendment process requires a simple majority in the House of Peoples, including a majority of both Bosniac and Croat delegates, and a two-thirds majority in the House of Representatives. The constitutional amendment process in Republika Srpska requires a two-thirds majority of the total number of representatives in the National Assembly (art. 132). In the Constitution of BiH, while rights and freedoms cannot be amended (art. X.2), the

rest of the Constitution can be amended by a two-thirds majority of those *present and voting* in the House of Representatives (art. X.1, emphasis added). This is notable in the sense that usually central state constitutions in federal systems are more difficult to amend than sub-state constitutions (Dinan 2012, 240).

Third, and perhaps most importantly, the supremacy of the Constitution of BiH is provided for in article 11 of the Dayton Agreement: 'the entities and any subdivisions 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.' At the same time, and even though it would appear that this article provides a substantive limitation to the entities' constitutional space, this provision (and article III.5.a. of the Constitution[10]) did offer sufficient flexibility for the entities to maintain their institutional structure and, for the most part, the powers and responsibilities previously secured (Woelk 2012, 113).[11] Powers that were reallocated from the constitutive entities to the central state, as part of post-Dayton constitutional amendments, reflect those that virtually all federations retain at the central level, i.e. international relations, security, and economic policy. Other amendments had to do with reforming provisions related to citizenship and ethnic representation.[12]

Somalia: An Ongoing Case of Federal-State Formation

After decades of civil war and under continuous violence, in August 2012 the Somali National Constituent Assembly (NCA), an 825-member indirectly-elected body, adopted the final draft of what became the Provisional Constitution (PC) of Somalia (Atta-Asamoah 2013, 4; Ainte 2014, 62; see also Elmi 2022, 8). This was the third interim constitution since the year 2000, and the second one that provided a federalization process for Somalia. As part of this process, the PC provides for a two-level structure of government, the Federal Government and the Federal Member States (FMS) (Chapter V, article 48.1). But it leaves the decision on the number and boundaries of FMS to be determined by the lower house of parliament (article 49.1), after receiving recommendations by a specialized national commission – the Boundaries and Federalism Commission (article 49.2 and 49.3).[13]

While the Commission was only established in July 2015 (Goobjoog News 2015), state-formation processes started earlier and outside regulated procedures. Puntland existed as a functioning region (and post-2012 FMS) in the North-East since 1998 (Bryden 2013, 20). After the PC was adopted, four additional administrations were established in South and Central Somalia, including Jubaland (April 2013), Southwest Somalia (June 2014), and Galmudug (July 2014) (ConstitutionNet 2016). On 9 October 2016, two of the three remaining regions – Hiiraan and Middle Shabelle – united to form Hirshabelle (Ahmed 2017). Only the status of the region surrounding the capital Mogadishu is as of yet unresolved (Somali Dialogue Platform 2022). As soon as these new FMS were established, key stakeholders started drafting sub-state constitutions (SSC). This was in advance of the PC being reviewed and becoming the Federal Constitution of the Republic of Somalia, a process that is still ongoing.

The Republic of Somalia emerged with the 1960 Constitution after both Italian and British Somaliland gained independence and united. The 1960 Constitution was suspended after General Siad Barre seized power in 1969, and Somalia became a socialist

state. In the 1980s opposition to Barre's military rule grew to the extent that he was ousted from power in 1991 by an armed clan-based coalition (Schmidt 2015; ICG 2008, 3). Soon thereafter, clan-based civil war erupted, causing the collapse of the Somali state.

After several United Nations-led attempts at ceasefires in the 1990s (Saalax and Xildhiban' Ibrahim 2010), in August 2000 the Djibouti-backed Somali National Peace Conference adopted the Arta Declaration, which established an interim constitution – the Transitional National Charter (Atta-Asamoah 2013, 2). Somalia aimed to become a unitary state with a strong government and 18 administrative regions (Bryden 2013, 20), but important clans opposed the new institutional framework and conflict continued (Saalax and Xildhiban' Ibrahim 2010).

At the 2002 Somalia National Reconciliation Conference in Eldoret, Kenya, participants agreed that Somalia would become a federal state (Saalax and Xildhiban' Ibrahim 2010). Details regarding the specific model of federation or the extent of decentralization were, however, not specified. In August 2004, a new Transitional Federal Charter (TFC) was adopted as an interim constitution. Indirect parliamentary elections, based on clan representation through the so-called '4.5 formula' took place in October 2004, and led to the formation of a Transitional Federal Government (TFG). The President appointed a Federal Constitution Commission (FCC), which had the mandate to design a federal system for Somalia (TFC, article 11.5) within a time frame of two and a half years (TFC, article 11.8). However, the concept of federalism continued to be contentious and its top-down imposition aggravated pre-existing tensions (Bryden 2013, 21). Furthermore, the government was increasingly weakened by infighting and by the loss of territory as new insurgent groups emerged (ICG 2008, 2; Atta-Asamoah 2013, 2), which resulted in the constitution-building process being significantly delayed.

At the strong urging of the United Nations and other development partners, in September 2011 the TFG adopted the *Roadmap to End the Transition*,[14] and established a new Committee of Experts (COE) to produce a draft constitution. Despite friction between the COE and the FCC (subsequently called the Independent Federal Constitutional Commission or IFCC), they produced a single draft text. By the time the draft text was finalized, the Minister for Constitutional Affairs had established a Technical Review Committee, which produced a competing text. Eventually, these documents were merged and a compromise document produced. However, this draft constitution removed many of the provisions that had already been agreed by the COE and the IFCC, leaving key sections of the constitution – particularly the design of the new federal system – incomplete (Ainte 2014).

In the meantime, the state of Puntland was in the process of drafting its own constitution, the Transitional Constitution of Puntland Regional Government, which was adopted on 5 June 2001 (Mosley 2015, 14), before the TFC had been adopted. This Transitional Constitution was reviewed and ratified as the Constitution of the Puntland State of Somalia in June 2009, and later adopted by the Puntland Constituent Assembly on 18 April 2012.[15] The other four FMS started drafting their own (provisional or interim) constitutions after their establishment and, as mentioned above, in advance of the Federal Constitution of the Republic of Somalia being adopted. South West State adopted its constitution in November 2014 (Somali News 2014), Galmudug in June 2015 (National News – Parliament 2016), Jubaland in August 2015 (Qaloshe 2016), and Hirshabelle in October 2016 (Dalsan Editor 2016).

When comparing the PC with the Constitution of BiH, the former is (at least textually) unclear about its own legal supremacy, and therefore on whether the constraints on FMS' constitutional space would be applicable. Article 4(1) refers to the 'Constitution of the Federal Republic of Somalia' as the supreme law of the country, not the '*Provisional* Constitution of the Federal Republic of Somalia' (emphasis added).[16] At the same time, article 142 states that '[u]ntil such time that all the Federal Member States of Somalia are established and the adopted Federal Member State Constitutions are harmonized with the Somalia Federal Constitution, the Federal Member States *existing prior to the provisional adoption of this Provisional Constitution* by a National Constituent Assembly shall retain and exercise powers endowed by their own State Constitution' (emphasis added). The implied reference here is to Puntland, the only FMS to have been established and having adopted its own SSC before the adoption of the PC. This *ex post* validation of Puntland's SSC would appear to grant Puntland unrestricted constitutional space, at least until the Federal Constitution is ratified and enters into force.

The constitutions of Galmudug, Hirshabelle, Jubaland, and South West State, to different degrees appear to stretch the few constraints on their own constitutional space. The PC mandates, for instance, that the allocation of powers between the Federal Government and the FMS shall be negotiated (article 54), except on issues related to foreign affairs, national defence, citizenship and migration, and monetary policy, which are reserved for the federal government. In their constitutions, however, the FMS appropriate some of those powers, for instance, defining their own citizenship, limiting a person's eligibility to be elected on the basis of religion and origin, or empowering the state parliament to approve or reject a declaration of war (Max Planck Foundation 2020).

Institutionally, the PC provides that the FMS' constitutions should define the legislative and executive powers of FMS (Article 120). No other details are provided. Thus, FMS have established unicameral parliaments, which are for the most part to be directly elected (Max Planck Foundation 2020, 67)[17], even though in practice they all are indirectly elected. These parliaments choose their own executive, a President and a Council of Ministers, but while the Council of Ministers is accountable to parliament and can face a vote of no confidence, the President can only be removed by impeachment, requiring a qualified parliamentary majority, which strengthens the executive vis-à-vis the legislature (Max Planck Foundation 2020, 69). This contrasts with the institutional structure at the federal level, where the federal government separates the roles of President and Prime Minister, and where while the President can only be removed by impeachment with a two-thirds majority in both houses of parliament, Prime Minister and Council of Ministers may face no confidence votes in the lower house alone. Article 108 of the PC further contemplates a three-level court structure, including a Constitutional Court, the courts at the Federal Government and FMS levels. It further provides that 'the highest court at the Federal Government level shall be the Federal High Court, whilst the highest court at the Federal Member State level shall be the Federal Member State High Court', and that a federal law will provide for the structure of the judiciary (article 105 (2)), which law, it has to be presumed, would also establish the division and sharing of judicial jurisdictions between the federal and FMS courts. FMS constitutions, however, have already established their own judicial structures (and competences), which differ from one another, as well as from the general structure provided for in the PC (Max Planck

Foundation 2020, 72–73). Furthermore, the PC does not allow FMS to establish their own independent regulatory and oversight institutions (Article 111), but FMS constitutions still do. In summary, FMS constitutions have consistently pushed their boundaries.

A comparison between the amendment procedures provided for by the central state constitution and the different FMS constitutions may not be as relevant as in the BiH case, as the Constitution of the Federal Republic of Somalia has not yet been adopted. However, the PC does not allow amendments to Chapter 1, 'Declaration of the Federal Republic of Somalia' (article 132.1). All other amendments need to be adopted by a two-thirds majority in both houses of parliament (article 132.8), except for articles 132 and 136 (respectively, on constitutional amendments after and during the first term of the Federal Parliament, including the adoption of the Final Constitution), which need referendum approval. Most provisions of the Puntland SSC can be amended by a two thirds majority in its unicameral parliament, while a few articles also need a referendum, i.e. those relating to the name and purpose of the state, the supremacy of the law, the founding principles, the system of government, religion and freedom of belief (article 139). In the case of the Jubaland's SSC (article 95), any amendment needs a two-thirds majority in its unicameral parliament.

Once the Constitution of the Federal Republic of Somalia enters into force, it will be possible to see whether the FMS' constitutional space will be further constrained. Given the relative imbalance in negotiating power of some of the FMS vis-à-vis both central-state institutions, and other FMS, one of two scenarios is most likely: (1) an asymmetric form of federalism that would allow some FMS to maintain their institutional framework and level of responsibilities as previously secured, as against other FMS that would see their constitutional space limited to a certain extent, and perhaps forced to reallocate key powers to the central state; (2) the federal constitution would provide all FMS with maximum constitutional space, only reallocating powers to the central state without which the state would be unable to function.

Case Studies in Comparison

Inferences from the case studies highlight how building up federalization is underpinned by two contextual phenomena. First, the impasse in peace and constitutional negotiations at the central level and, second, the fact that sub-state authorities had a certain control over territory and incipient institutions, and were therefore able to control the formal institutionalization of governance structures and powers through the drafting of sub-state constitutional frameworks.

Few countries have become federations since the end of the Cold War. These include, inter alia, Bosnia and Herzegovina (BiH), Comoros, Ethiopia, Iraq, Nepal, Somalia, South Africa, South Sudan, and perhaps for a limited period of time Sudan. Most of these countries used constitution-making processes to underpin transitions to sustainable peace and democracy. And while most of these federal constitutions either allowed or mandated their sub-state entities to adopt sub-state constitutions, in BiH and in Somalia authorities had to wrestle with the fact that sub-state constitutions had been adopted in advance of central state constitutions. These sub-state constitutions partly emerged due to the need to formalize governance at the sub-state level, but these processes also reflected a power struggle, and a struggle for sovereignty, between the centre and the sub-state level.

In BiH, the establishment of Republika Srpska as one of its two constitutive entities followed the announcement of BiH's independence referendum at the end of 1991. The second constitutive entity, FBiH, was established following the signing of the Washington Agreement in March 1994. The (federal) Constitution of BiH was only adopted in November 1995 as an annex to the Dayton Peace Agreement. Both constitutive entities engaged in constitution-making for their respective territories and peoples before the Dayton Peace Agreement was signed, and were able to maintain the institutional structure and most of the powers they had self-allocated in their respective constitution-making processes. Despite the relatively high number of constitutional amendments, many of these amendments were minor or only meant to minimally adjust these constitutions to the Constitution of BiH. This constitution in turn allocated a high degree of constitutional space to both entities, in recognition of the fact that particularly one of the two entities (and its external patrons) – Republika Srpska – would likely not accept its constitutional space being significantly limited. The high risk of a resumption of conflict was a compelling factor for both national and international negotiators in Dayton (Bell 2008).

While Somalia had become a de facto federal state by 2004, all details regarding the type of the de jure federation that Somalia was to become were yet to be negotiated. The territorial structure of the Somali state, which was to be divided into Federal Member States (FMS), was only provided for in the 2012 Provisional Constitution (PC). In 2012, only one of the proposed FMS – Puntland – had previously existed as a region and was governed through a sub-state constitution (SSC). All other FMS were established only after the PC had been adopted, which is also when they started drafting their SSC. While the PC provided for FMS to adopt their own SSC (article 120), it provided little guidance (or limitations) as to their content. And while legal supremacy of the PC is (textually) unclear in general, as noted above, the SSC of Puntland would have unlimited constitutional space at least until the PC had been revised and a 'final' Constitution of the Federal Republic of Somalia had been adopted (article 142). FMS have taken advantage of the PC's lack of definition to assert their constitutional space expansively over the design of their institutional structures and their powers and responsibilities. Given the history of animosity (and power imbalance) between some of the FMS, and the federal government leading the review of the PC, it can be expected that the future Constitution of the Federal Republic of Somalia will provide (at least some of) the FMS with sufficient constitutional space for them not to have to significantly amend their (currently interim) SSCs.

These case studies arguably showcase an additional pathway of federal-state formation, with sub-state constitutions being adopted in advance of the central-state constitution. This 'reversed' sequencing partly responds to the slow pace of negotiations at the centre – which are mostly due to agreements being hard to reach – and the development of (sometimes interim or transitional) governance structures at the sub-state level. We argue that these processes are likely to lead to the institutionalization of comparatively weak central states, with thin central-state constitutions that include shorter lists of enumerated powers, and where sub-state entities have the power to design, without significant constraints, their own institutional framework and legislate on a wide array of issues. This is arguably the case also when comparing BiH and Somalia to holding-together federations such as Comoros, Ethiopia, Nepal, South Africa, or South

Sudan. In most of these states one can observe that the central-state constitution provides for a comparatively stronger central state, for more detailed lists of powers and responsibilities (for either the central or the sub-state level, or both), and for more constrained constitutional space for sub-state entities. We furthermore argue that in these countries there is a higher likelihood that sub-state entities will be responsible for residual powers, as opposed to cases such as Comoros, Nepal, South Africa or South Sudan where the central state controls all residual powers.[18] Central-state authorities in countries that follow the 'building up' federalization model would be more preoccupied with maintaining the basic territorial integrity of the central state, and peace between the constitutive entities, than with exercising power over them.

Conclusion

To recapitulate, the third way of federal state-formation, which we call 'building up' federalization, is distinct both in terms of process and, relatedly, in terms of the resulting content of the constitutional framework, from the two traditional models of federal state-formation, as well as Yimenu's new 'building together' federalization. In certain countries it may be relatively more straightforward to establish and formalize institutions, as well as determine the maintenance and development of specific powers and responsibilities at the sub-state level, which may result in significant sub-state autonomy and constitutional space. This arrangement may also lead to a limited governing role for the central state, both formally and in practice. This is likely to constrain the future development of the central state, as we can see in the case of BiH, and arguably also in the case of Somalia, and may have an impact on the state's degree of resilience to conflict.

The circumstances that provide the basis for our theory concern territorially plural societies that are deeply fragmented, conflict-affected, and as a result, institutionally fragile, at least at the central level relative to the sub-state level. On the other hand, the breakup of the state through sub-state secession is either not possible for external reasons, with the international community strongly preferring the maintenance of the status quo, or not immediately pursued. Five analytical claims arise from this set of empirical circumstances.

First, sub-state actors politically assert sub-state constitutional space before it is later allocated formally by the central state constitution. In return they purport to accept the (future) rule of the law of the central state constitution, once the latter has been constructed responding to their interests. Second, political action including constitution-making is driven by 'territorial group agency', that is, institutionalized, semi-institutionalized, or non-institutionalized sub-state political and/or military actors represent territorially-based groups in the reconstitution of the central state for the purpose of giving expression to its territorial pluralism. Third, such actors at the same time mobilize and represent sub-state territorial groups on a mixture of appeals to the collective identity (e.g. ethnicity, language, religion, sect, clan, nationality) of the sub-state majority if not the whole population, and the capacity to deliver basic services and security for the population within the sub-state territory. Fourth, as a function of the second and third factors, building up federalization processes are exercises in competition, power-broking, and accommodation among and between territorial elites at the central and sub-state levels. In other words, due to the relative strength of the sub-state entities and the relative

weakness of the central state, the normal hierarchy is upended and the relationship between state and sub-state elites becomes more equal and transactional. Finally, even though the hope may be for a gradual growth of democratic constitutional governance in the future, this model of federal constitution-making is primarily about peace and stability through the accommodation of sub-state claims in the short to medium term.

The model of 'building up' federalization also presents risks, stemming from its de facto devolution of the conventional characteristics of 'state-ness' from the central to the sub-state level. The main risk is the entrenchment of weak central-state institutions that may be unable to take decisions within the territory over which they have formal or notional jurisdiction, including in legal, public policy, economic, and citizenship domains. As sub-state entities over time become proto-states in their own right, adapting state institutions and processes at the central level to respond to future challenges will become increasingly difficult as those sub-state entities may be wary of supporting changes that may ultimately impact the extant balance of powers. This would render these central states increasingly unresponsive and outdated, which may in turn have an impact on the state's resilience to conflict.

Nevertheless, we believe that both the scholarly and practitioner communities need to contend with this emerging form of 'building up' federalization and with its potential impact on the broader state-building agenda. This initial theorization of the model is based on a discrete set of characteristics of a particular set of cases, but there may be other cases on the horizon, for instance Myanmar, Syria, or Yemen. Our hope is that the model will help broaden the understanding of federal state-formation beyond the traditional 'coming together' and 'holding together' dichotomy, and more practically, assist in the identification of these types of processes in cases that are empirically similar. In other words, we expect to see more countries following the 'building up' model of federal state formation. This may allow for further research and more robust findings on potential similarities in these systems' design of constitutional frameworks, as well as its impact on building sustainable peace.

Notes

1. For more information on the changing nature of conflict check Uppsala University, Uppsala Conflict Data Programme, https://ucdp.uu.se.
2. An additional case we do not specifically deal with is Rojava, the Kurdish region in Syria, which also drafted its own sub-state constitution in advance of a new Syrian constitution, which never came into force.
3. Sub-state constitutional space may include, among others, the power to: draft, amend, or replace the sub-state constitution; create offices, structure powers, and set goals of government; establish law-making processes; define rights, citizenship, and suffrage; institutionalize public services; establish official languages; institute mechanisms of direct democracy; and provide for local government (Tarr 2011, 1134).
4. Although oftentimes they maintain a certain degree of pressure on central state authorities that independence may be an option in case that (at least some of) the demands of constituent units are not met. This is a political strategy sub-state entities also often maintain in ´holding-together´ processes of state federalization.
5. In 1991 Slovenia and Croatia decided to leave the SFRY, followed by BiH in 1995, after the signing of the Dayton Peace Agreement.
6. Bosnian Serb paramilitary groups in collaboration with the Yugoslav army fought against independentist forces in BiH (Holbrooke 1999, 30; Silber and Little 1996, 171–172). This

was followed by ethnic cleansing of the Bosniak population, mainly by Serb forces but not only (MacLean 2018).

7. The Constituent Assembly was to consist of those representatives elected at the 1990 elections to the Assembly of the Republic of BiH, whose mandate was still valid (Washington Agreement, Article VII).
8. Under immense international pressure, the Dayton Peace Agreement was signed by the President and the Prime Minister of BiH (representing the Bosniacs), the President of the Federal Republic of Yugoslavia (representing the Serbs), and the President of Croatia (representing the Croats). There was no direct involvement by the Bosnian Serbs or the Bosnian Croats (Zahar 2019, 6; Holbrooke 1999). The Agreement was also the successor to a number of agreements (and failed agreements), which started with the 'Statement of Principles for New Constitutional Arrangements for Bosnia and Herzegovina' developed by the European Community Conference on the Former Yugoslavia (established in 1991) whereby Bosnia would be an independent state partitioned in cantons; the failed 1992 Vance-Owen Peace Plan whereby Bosnia would be a decentralized state consisting of nine provinces and a capital district, where each of the three communities would constitute the majority in 2 of the 9 provinces; the attempt by Serbs and Croats to then establish a confederation with three separate republics; and then the March 1994 Washington Agreement (Zahar 2019, 9).
9. This is often then case in 'coming-together' federations (Popelier, Aroney, and Delledonne 2021, 14), and as we will see also in 'building up' federations.
10. It states that BiH 'shall assume responsibility for such other matters as are agreed by the Entities; are provided for in Annexes 5 through 8 to the General Framework Agreement; or are necessary to preserve the sovereignty, territorial integrity, political independence, and international personality of Bosnia and Herzegovina (…)' (emphasis added).
11. The FBiH has so far amended its Constitutions 109 times after the Constitution of BiH was adopted (26 of which were enacted in 1997). The Constitution of the Republika Srpska was amended 79 times after the Constitution of BiH was adopted.
12. A significant percentage of these amendments were actually imposed by the Office of the High Representative. Notably, Annex 10 of the Dayton Peace Agreement gave the Office of the High Representative wide-ranging powers, which were interpreted as including the power to directly amend the constitutions of the two Entities. One example relates to the requirements to include representation of all constituent peoples—Bosniaks, Croats and Serbs—in all sub-state institutions, making explicit that all three languages and scripts would be co-official (Banning 2014; see also Sahadžić 2019, 89).
13. According to the PC, the boundaries of the future FMS should be based on the boundaries of the 18 pre-1991 administrative regions (article 49.5), and two or more regions had to merge to form a FMS (article 49.6).
14. See the 'Roadmap to Ending the Transition', Mogadishu, 6 September 2011, Roadmap on Ending the Transition | UNPOS (unmissions.org), accessed 1 July 2023
15. A brief history of Puntland Federal Member State can be found on the state's official website, at http://plstate.so/about/, accessed 1 July 2023. The Puntland Federal State Constitution, as adopted in December 2009, can be found here: https://faolex.fao.org/docs/pdf/som197962.pdf, accessed 1 July 2023.
16. The 2020 Max Planck Foundation report interprets references to the Constitution of the Federal Republic of Somalia in articles 4(1) and Article 121 to refer to the Provisional (Federal) Constitution, which is currently being revised. The authors of this paper are unclear as to whether references to the ´Constitution of the Federal Republic of Somalia´ would refer to the unfinished 2012 Provisional (Federal) Constitution or to the future Constitution of Somalia.
17. South West State is the only FMS where clan elders formally select members of parliament.
18. Exceptions to this rule would include Ethiopia (article 51.2 of the Constitution of Ethiopia) and Iraq (article 115 of the Constitution of Iraq).

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