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Title:

Constitutional Implementation for Sustainable Peace

Date:

2019

Citation:

Dziedzic, A. & Saunders, C. (2019). Constitutional Implementation for Sustainable Peace. Constitution Transformation Network and Folke Bernadotte Academy.

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Constitution Transformation Network

Melbourne Law School

Constitutional Implementation for Sustainable Peace

FBA Research Report | June 2019



FBA

Funded by the
Folke Bernadotte Academy

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Acknowledgements: This project was generously funded by the Folke Bernadotte Academy, and we are grateful to them for their interest in this research and their support. This project benefitted from oversight by Professor Pip Nicholson, Dean of Melbourne Law School, and input and support from Ms Charmaine Rodrigues, Coordinator of ConTransNet. We also thank Mr Stefan Pislevic and Mr Joshua Quinn-Watson, both from Melbourne Law School, who assisted greatly with preliminary research. A draft of this Report was sent to a small group of practitioners and scholars from Papua New Guinea, including the Autonomous Region of Bougainville, and international experts. While their contribution remains confidential, we express our gratitude to all reviewers for their time, expertise and thoughtful engagement with this project.

The Constitution Transformation Network at Melbourne Law School supports the development and implementation of inclusive constitutions globally, with a particular focus on Asia and the Pacific. The ConTransNet team brings together subject matter and country experts in multiple constitutional fields and has supported constitution-building processes in Asia, the Pacific and in conflict-affected countries globally. ConTransNet organises (with International IDEA) an annual *Melbourne Forum on Constitution-Building in Asia and the Pacific* which brings together regional constitutional experts to exchange good practice and lessons learned, for the practical benefit of ongoing constitution-building processes. ConTransNet team members also regularly run courses at MLS on constitution-making, state-building and comparative constitutional law.

<https://law.unimelb.edu.au/constitutional-transformations>

Constitutional Implementation for Sustainable Peace

A project funded by the Folke Bernadotte Academy

Constitution Transformation Network, Melbourne Law School

June 2019

Summary

Constitutions can play an important part in sustaining peace. However, the inclusion, in a constitution, of commitments made in the course of a peace agreement is only one step towards achieving sustainable peace. While it is important for some kinds of commitments made in peace agreements to be reflected in the text of the constitution through a process of 'textual implementation', these constitutional provisions must themselves be given practical effect, through 'substantive implementation'. Sustainable peace requires that constitutional inclusion mechanisms not only are legally enshrined, but that they also are given effect in practice.

The purpose of this Report is to explore whether and, if so how, the implementation of constitutional inclusion mechanisms (broadly understood) is significant to sustainable peace. This Report develops an analytical framework to firstly assess constitutional implementation and secondly to identify connections between constitutional implementation and sustainable peace. The case of the Autonomous Region of Bougainville, within the state of Papua New Guinea, is used as an initial case-study to test this analytical framework and to systematically understand the connections between peace-building, constitutions, implementation and sustainable peace.

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Introduction

Peace agreements made in conflict-affected settings often call for constitutional change. In intra-state contexts, where most conflicts presently occur, commitments to constitutional change are increasingly frequent. Changes of this kind commonly involve constitutional inclusion mechanisms, directed to dealing with problems of inequality or exclusion that contributed to the conflict in the first place. Depending on the context, such mechanisms might include changes to the composition and procedures of the institutions of government to ensure all substantial groupings within the state have a say in the decisions of government; special protections for the rights of minority groups; or decentralisation to give communities within the state greater autonomy and responsibility for their own affairs.

In such cases, an important part of the implementation of the peace agreement is that commitments of these kinds are enshrined in constitutional law, through a process referred to in this Report as ‘textual implementation’. Importantly, however, these constitutional provisions must themselves be given practical effect, through processes of ‘substantive implementation’, in which constitutional provisions are given effect in law and policies and reflected in political and legal practice. Our hypothesis is that giving effect to constitutional commitments through textual and substantive implementation is likely to make an important contribution to sustainable peace.

The purpose of this Report therefore is to explore the relationship between the implementation (both textual and substantive) of constitutional inclusion mechanisms (broadly understood) and sustainable peace. In doing so, the Report also considers, conversely, whether and, if so, how, failures of implementation have the potential to destabilise peace.

Part I brings together insights from the literature on peace-building and constitution-making to identify the links between sustainable peace and constitutional implementation in states affected by civil conflict. To do so, it develops an analytical framework that seeks to do two things. First, it provides a way to assess *constitutional implementation*, covering textual implementation and different dimensions of substantive implementation, including technical implementation, interpretation of constitutional provisions, and cultural adaptation to change. Secondly, it identifies *connections between constitutional implementation and sustainable peace*, positing that the outcome of implementation – that is, putting the negotiated peace agreement into practice – as well as the processes of constitutional implementation can help to support sustainable peace.

Part II tests the hypothesis that the effective implementation of constitutional inclusion mechanisms makes a contribution to sustainable peace, by applying this analytical framework to the case of the Autonomous Region of Bougainville, a region that forms part the state of Papua New Guinea (PNG). From 1988 until the signing of the Bougainville Peace Agreement (BPA) in 2001, Bougainville experienced a long civil conflict, characterised both by conflict between different groups within Bougainville and between Bougainville and the state of PNG. Bougainville is part of the state of PNG. Nevertheless, the intra-state nature of both the conflict and the peace agreement require some distinction to be drawn between the two entities for the purposes of this inquiry. To this end, this Report uses the term ‘Bougainville’ as shorthand for that region of PNG; and ‘PNG’ to denote the state as a whole.

The peace agreement made in 2001 required changes to the 1975 Constitution of PNG to give Bougainville a high degree of autonomy and to guarantee a deferred referendum on the future political status of Bougainville, including an option for its independence. The case study examines the implementation of four constitutional inclusion mechanisms: (1) autonomy for Bougainville; (2) the

division of power and resources between Bougainville and PNG; (3) mechanisms for shared rule; and (4) the deferred referendum on the future status of Bougainville. The case study demonstrates that there was successful textual implementation of the Peace Agreement in the constitutional laws of PNG and Bougainville but identifies some problems regarding substantive implementation of those constitutional commitments in practice. Part II concludes by collating the insights that might be drawn from Bougainville's experience of constitutional implementation, in terms of the drafting of the Peace Agreement and Constitution, the techniques of delay and deferral, planning for substantive implementation (including cultural change and capacity building), and public participation in constitution making.

This case study is not intended to be an assessment of the success or failure of constitutional implementation in Bougainville and PNG. Rather, we use the experience of implementing the Bougainville Peace Agreement and the constitutional changes that it required as a way to understand the dynamics of constitutional implementation in response to a peace agreement and the relevance of implementation to sustainable peace. We intend Bougainville to be just the first in a series of case studies of states engaged in constitutional implementation following commitments in a peace agreement. We expect that later work, based on other case studies, will shed further and different light on these issues. As the initial case study, we have also used the example of Bougainville to test our framework for more systematically understanding the connections between constitutional implementation, peacebuilding and sustainable peace.

In Part III we discuss what the experiences of Bougainville contribute to our understanding of the relationship between constitutional implementation and sustainable peace. Given some of the unusual features of the Bougainville case, these insights are tentative, but do confirm a connection between constitutional implementation and sustainable peace arising from both the achievements of implementation in practice, and the process of implementation itself. We suggest that not all problems of constitutional implementation present the same risks to sustainable peace. Taken alone, none of the individual issues for implementation identified in the case study are likely to threaten sustainable peace in Bougainville. Collectively, however, issues encountered in the implementation of constitutional commitments in Bougainville may have indirect, but significant, consequences for sustainable peace, because they affect how the people perceive the capacities and motivations of the two Governments and the trust between formerly conflicting parties.

Part I Connecting peace agreements, constitutions and implementation

Making peace agreements and making or changing a constitution can both contribute to sustainable peace. The connections between peace agreements and constitutions have only recently received focused attention from practitioners and scholars.¹ Studies have explored issues such as the

¹ See eg, the recent special issue Christine Bell et al, 'Constitution-making and Political Settlements in Times of Transition' (2017) 6 *Global Constitutionalism* 12; and a research project on *Towards Sustainable Peace: The Nexus of Peacemaking and Constitution Building* <<https://www.berghof-foundation.org/en/programmes/mediation-dialogue-support/conceptual-development/towards-sustainable-peace-the-nexus-of-peacemaking-and-constitution-building/>>.

sequencing of peace and constitutional processes,² the legal status of peace agreements and constitutions,³ and the role of external actors in constitution making in post-conflict transitions.⁴

This Report contributes to this emerging and important field by examining the significance of the implementation of constitutional inclusion mechanisms, mandated in peace agreements, to sustainable peace. In order to understand how the implementation of constitutional commitments is linked to sustainable peace, this Part defines what we mean by a peace agreement, constitutional change, implementation, and sustainable peace; and explains the points of connection between them.

1 Peace agreements

A peace agreement is a formal, publicly-available document that reflects an agreement between parties to a violent conflict that addresses that conflict with a view to ending or significantly transforming it. The parties to a conflict might include state actors and armed non-state actors as well as their political representatives. Our focus here is on the common phenomenon of intrastate conflict, to which the need for domestic constitutional change is a familiar response.

Peace agreements take a variety of forms, which might be divided into two broad categories.⁵ The first category is *partial peace agreements*. Partial peace agreements address only a portion of issues underlying a conflict. They may include, for instance:

- *Ceasefire agreements*, which suspend, at least temporarily, aggressive military action.
- *Pre-negotiation agreements*, which establish agreed procedures for the negotiation of peace. Such agreements might settle issues such as the parties to negotiations, the role of a mediator, the issues to be addressed, the location and schedule of negotiations, and the drafting procedure for a later, comprehensive peace agreement.
- *Interim or preliminary agreements*, which serve to signal a commitment to respect a ceasefire and a commitment to reaching a comprehensive settlement.
- *Framework agreements*, which settle the principles and agenda upon which substantive issues will be negotiated.⁶

The second category is *comprehensive peace agreements*. These are peace agreements reached between all major parties to a conflict that substantively address and seek to resolve the component issues of a conflict. Comprehensive peace agreements are usually the culmination of earlier partial peace agreements which establish the conditions necessary for the negotiation of a comprehensive agreement. The UN Language of Peace Database contains over 1000 partial and comprehensive peace agreements made to address internal armed conflicts since 1989.⁷ The PA-X Peace Agreements Database has more than 1700 peace agreements, from more than 150 peace processes between 1990

² Christine Bell and Kimana Zulueta-Fuelscher, *Sequencing Peace Agreements and Constitutions in the Political Settlement Process* (International IDEA, 2016).

³ Christine Bell, 'Peace Agreements: Their Nature and Legal Status' (2006) 100 *American Journal of International Law* 373.

⁴ Rhodri C Williams, *Constitutional Assistance and the Rule of Law in Post-Conflict Transitions: An Overview of Key Trends and Actors* (Folke Bernadotte Academy, 2013).

⁵ Laurie Nathan, Karl DeRouen and Marie Lounsbey, 'Civil War Conflict Resolution From the Perspectives of the Practitioner and the Academic' (2018) 43 *Peace & Change* 344.

⁶ United Nations Peacemaker, <https://peacemaker.un.org/>.

⁷ United Nations Peacemaker and University of Cambridge, *Language of Peace*, <https://www.languageofpeace.org/#/>.

and the end of 2018.⁸ The Peace Accords Matrix, which focuses on comprehensive peace agreements, identifies only 34 comprehensive peace agreements concluded since 1989.⁹

2 Constitutional change

Peace agreements might expressly invoke constitutional change in a range of different ways. Some of the more familiar examples are as follows.

- *A peace agreement may contain the text of a new constitution.* A prominent example is the 1995 Dayton Accords, to which the Constitution of Bosnia and Herzegovina was annexed.¹⁰
- *A peace agreement may expressly require that a new constitution be made and prescribe procedures and principles for doing so.* For example, Rwanda's 1993 Arusha Accord set out the procedure for drafting and adopting a new Constitution;¹¹ Burundi's 2003 Arusha Peace and Reconciliation Agreement provided for the making of a new Constitution within specified time frames and in accordance with specified principles;¹² and Cambodia's 1991 Paris Agreement provided for the making of a new constitution, setting out procedures for drafting and approval and a set of constitutional principles.¹³
- *A peace agreement may expressly require that an existing constitution be amended, in accordance with specified principles, or to include specified provisions.* For example, El Salvador's 1991 Chapultepec Peace Agreement provided for a number of amendments to the existing constitution.¹⁴ The Bougainville Peace Agreement also falls within this category, although with some distinctive variations.
- *A peace agreement may provide for the establishment of a mechanism for constitutional review.* For instance, Sierra Leone's 1999 Lomé Peace Agreement provided for the establishment for a Constitutional Review Committee to identify constitutional revisions and amendments.¹⁵

It is possible for peace agreements of all kinds to include provisions for constitutional change. However, comprehensive peace agreements are more likely than other forms of peace agreements to provide for constitutional change. Research in the Peace Accords Matrix and UN Language of Peace databases suggest that more than half of all comprehensive peace agreements provide for constitutional reform, compared with less than one-sixth of all peace agreements.¹⁶

⁸ University of Edinburgh, *PA-X Peace Agreements Database*, <https://www.peaceagreements.org/>.

⁹ University of Notre Dame, *Peace Accords Matrix*, <https://peaceaccords.nd.edu/>. The Peace Accords Matrix collects 34 comprehensive peace agreements, which are defined as agreements negotiated in civil conflicts between 1989 and 2012; where the conflict resulted in at least 25 battle deaths per annum; the major parties to the conflict participated in the negotiations that produced the agreement; and the substantive issues underlying the conflict were addressed: Madhav Joshi and John Darby, 'Introducing the Peace Accords Matrix (PAM): A Database of Comprehensive Peace Agreements and Their Implementation 1989-2007' (2013) 1 *Peacebuilding* 256, 261.

¹⁰ Constitution of Bosnia and Herzegovina, Annex IV, *General Framework for Peace in Bosnia and Herzegovina* 1995, UN Doc A/50/79C.

¹¹ *Peace Agreement between the Government of the Republic of Rwanda and the Rwandan Patriotic Front (Arusha Accord)* (4 August 1993) art 41.

¹² *Arusha Peace and Reconciliation Agreement for Burundi* (28 August 2000) art 5.

¹³ *Comprehensive Cambodian Peace Agreement (Paris Agreement)* (23 October 1991) arts 1, 12.

¹⁴ *Chapultepec Peace Accords* (16 January 1992) art 1-III.

¹⁵ *Peace Agreement between the Government of Sierra Leone and the RUF (Lomé Agreement)* (7 July 1999) art X.

¹⁶ Compare Peace Accords Matrix (which includes only comprehensive peace agreements made since 1989) in which 19 of the 34 comprehensive peace agreements provide for constitutional change; with the Language of Peace Database (which

The examples listed above involve peace agreements that *explicitly* provide for change in the written constitution of a state. Even where there is no express provision for constitutional change, it is possible that constitutional change can be *implicit* in a peace agreement. For example, a peace agreement may provide for adherence to new values, new institutions, or a new system of governance, in circumstances that necessitate constitutional change in practice, but without specifically requiring this to occur. Alternatively, the requirements of a peace agreement may call for governance changes that arguably are inconsistent with the existing constitution, suggesting that constitutional change might be prudent to preclude later constitutional challenge. Cases of this kind might be said to *implicitly* invoke constitutional change. These types of cases will not be explored further in this Report, although they will be taken up in subsequent work, when opportunity allows. This Report focuses instead on the case of peace agreements that expressly call for constitutional change, of which Bougainville is an exemplar.

In a peace-building context, constitutional change is likely to centre on constitutional inclusion mechanisms to resolve or ameliorate problems of inequality or exclusion (whether economic, socio-cultural, ethnic, religious, territorial or otherwise) that contributed to the conflict.¹⁷ These mechanisms will vary depending on the particular context of the state involved, the nature of the conflict, and the existing constitutional system. Where the conflict involves deep societal or territorial divisions within the state, constitutional inclusion mechanisms might give effect to or reflect power-sharing arrangements, which seek to guarantee that all major groups within the state will have a share of political and governmental power. This might include, for example, changes to the structure of representative institutions (eg the executive, legislature, sub-national governments) or the processes for electing or appointing representatives (eg through proportional representation or by using reserved seats to ensure minority or special interest representation); general or specific protections for the rights of minority groups (eg through affirmative action programmes or specific minority rights institutions); decentralisation or federalism giving territorially defined groups within the state a degree of autonomy over their own communities; and decision-making procedures that give certain groups a special say or even a veto in decisions that affect them.¹⁸

3 Implementation

While there are several existing strands of research on the implementation of peace agreements or constitutions on which this study builds, none has sought to bring these strands together.

One body of research focuses on the implementation of peace agreements.¹⁹ This work suggests that the degree and effectiveness of implementation of the provisions of a peace agreement is a primary predictor of whether or not the parties will return to conflict.²⁰ Related strands of research examine

contains all peace agreements concluded after internal armed conflicts post-1989) in which 118 of around 1000 peace agreements contain provisions for constitutional reform.

¹⁷ Sumit Bisarya et al, 'Inclusive Peacebuilding in Conflict-Affected States: Designing for Democracy's Resilience' in *The Global State of Democracy: Exploring Democracy's Resilience* (International IDEA, 2017) 248.

¹⁸ Timothy D Sisk, 'Power-Sharing after Civil Wars: Matching Problems to Solutions' in John Darby and Roger MacGinty (eds), *Contemporary Peace Making: Conflict, Violence and Peace Processes* (Palgrave Macmillan, 2002).

¹⁹ See, eg, Stephen Stedman, Donald Rothchild and Elizabeth Cousens, *Ending Civil Wars: The Implementation of Peace Agreements* (Lynne Rienner Publishers Inc, 2002); Nico Schernbeck and Luxshi Vimalarajah, *Paving the Way for the Effective and Inclusive Implementation of Peace Accords: A Strategic Framework* (Berghof Foundation, 2017).

²⁰ Madhav Joshi, Sung Yong Lee and Roger MacGinty, 'Built-in Safeguards and the Implementation of Civil War Peace Accords' (2017) 43(6) *International Interactions* 994; Madhav Joshi, Jason Michael Quinn and Patrick M Regan, 'Annualized Implementation Data on Comprehensive Intrastate Peace Accords, 1989–2012' (2015) 52(4) *Journal of Peace Research* 551; Anna Jarstad and Desiree Nilsson, 'From Words to Deeds: The Implementation of Powersharing Pacts in Peace Accords' (2008) 25 *Conflict Management and Peace Science* 206.

and identify obstacles and drivers to the effective implementation of peace agreements including: the design of the peace agreement to be implemented,²¹ the nature of power-sharing arrangements,²² state capacity,²³ the sequence in which peace agreements are implemented,²⁴ external intervention and peacekeeping,²⁵ institutional safeguards,²⁶ and the inclusivity of the implementation phase.²⁷

A second body of research relates to constitution-making in conflict-affected settings. This research identifies ways in which constitutional design and constitution-making processes may contribute to peace-building. It suggests, in particular, that the prospect of sustainable peace is enhanced where the design of a constitution *and* a constitution-making process are inclusive of the major parties to the conflict, and social groups within the state.²⁸

Much of the work on the implementation of peace agreements and constitution-making in post-conflict settings *assumes* that implementation will be required. Generally, however, the issues of implementation are not examined in depth, insofar as implementation is equated only with ‘technical’ implementation (defined below), for example, when a new constitutional law is made. The Peace Accords Matrix is a partial exception. It provides a chronological account of implementation of disaggregated elements of peace agreements, picking up some points of substantive implementation. The Peace Accords Matrix includes the BPA, following a chronological approach which ends in 2010.²⁹

A third body of research has begun to consider the significance of implementation for the success of a constitution-making project, whether or not it takes place in a post-conflict setting. This work focuses on the period immediately after a new or amended constitution comes into force during which the new constitutional arrangements are given practical effect. Implementation has been described as ‘a process designed to ensure the full, effective and continuous working of a constitution’³⁰ in which the ‘rights, institutions, and aspirations of the constitutional text become a lived reality’.³¹ Constitutional implementation continues for an indefinite period, but is likely to be particularly intense in the first few years.³² Implementation is a critical phase, as important as any other in the constitution-building

²¹ Virginia Fortna, ‘Inside and Out: Peacekeeping and the Duration of Peace after Civil and Interstate Wars’ (2003) 5 *International Studies Review* 97; Dorina Bekoe, ‘Toward a Theory of Peace Agreement Implementation: The Case of Liberia’ (2003) 38 *Journal of Asian and African Studies* 256.

²² Caroline Hartzell and Matthew Hoddie, *Crafting Peace: Power-Sharing Institutions and the Negotiated Settlement of Civil Wars* (Penn State Press, 2007).

²³ See, eg, Karl DeRouen Jr et al, ‘Civil War Peace Agreement Implementation and State Capacity’ (2010) 47 *Journal of Peace Research* 333.

²⁴ Madhav Joshi, Erik Melander and Jason Michael Quinn, ‘Sequencing the Peace: How the Order of Peace Agreement Implementation Can Reduce the Destabilizing Effects of Post-Accord Elections’ (2017) 61 *Journal of Conflict Resolution* 4.

²⁵ See, eg, Virginia Fortna, *Peace Time: Cease-Fire Agreements and the Durability of Peace* (Princeton University Press, 2004).

²⁶ Joshi, Lee and MacGinty (n 20).

²⁷ Bisarya et al (n 17); Véronique Duduot and Stina Lundström, *Post-War Political Settlements: From Participatory Transition Processes to Inclusive Statebuilding and Governance Outcomes?* (Berghof Foundation, 2015).

²⁸ Bell and Zulueta-Fuelscher (n 2); Jenna Sapiiano, *Constitution-Building in Political Settlement Processes: The Quest for Inclusion* (International IDEA, 2015); Kirsti Samuels, ‘Post-Conflict Peace-Building and Constitution-Making’ (2006) 6 *Chicago Journal of International Law* 663.

²⁹ In relation to Bougainville, see search results at

https://peaceaccords.nd.edu/search?search_api_views_fulltext=bougainville&type=provision&sort_by=search_api_relevance&sort_order=DESC.

³⁰ Charles Manga Fombad, ‘Problematising the Issue of Constitutional Implementation in Africa’ in *The Implementation of Modern African Constitutions: Challenges and Prospects* (Pretoria University Law Press, 2016) 11–12.

³¹ Anna Dziedzic, *From Paper to Lived Reality: Gender-Responsive Constitutional Implementation* (International IDEA, 2016) 5.

³² Cheryl Saunders, ‘Constitution-Making in the 21st Century’ (2012) 4 *International Review of Law* 1, 9; Lorraine Updike Toler, ‘Mapping the Constitutional Process’ (2014) 3 *Cambridge Journal of International and Comparative Law* 1260, 1265.

process. Effective implementation is a factor underpinning the legitimacy of the constitution. Ineffective implementation disappoints constitutional expectations, weakens the legitimacy of the constitution, and may contribute to social instability.³³

Little has been done so far to bring together the work on the need for implementation of peace agreements with insights into the significance of constitutional implementation. In a report for the Folke Bernadotte Academy in 2013, Williams identified constitutional implementation as a particularly understudied area in constitutional assistance in post-conflict transitions.³⁴ This is the gap that this research seeks to begin to fill.

In order to assess the process of implementation, we separate it into two distinct steps: textual and substantive implementation.

Where there is a peace agreement which provides, in some way, for constitutional change, implementation involves, as a first step, the incorporation of the commitment in the peace agreement into a constitutional text. This might occur by making a new constitution or amending an existing constitution. This is the step described in this study as *textual implementation*.

Once textual changes to the constitution have been made, the focus of constitutional implementation shifts to *substantive implementation*. Substantive implementation has at least three dimensions:³⁵

- *Technical implementation*: This includes, for example, passing legislation, establishing new institutions and making judicial and other appointments as directed or required by the constitution. Some new constitutions include an implementation schedule which sets out milestones for technical implementation and establish a special institution responsible for monitoring compliance.³⁶ More commonly, however, technical implementation is left to the ordinary legal and political processes of the state.
- *Interpretation*: General, ambiguous or conflicting constitutional provisions must be interpreted in a way that is consistent with a constitution's principles and values. Interpretation is particularly significant where provisions impose standards by reference to values, but questions about meaning may arise in myriad ways. Constitutional interpretation is usually assumed to be a judicial function. Courts give what usually are binding decisions about the meaning of the constitution in the course of resolving disputes of a constitutional kind. Not every question about the meaning of new constitutional arrangements goes to a court, however. Legislatures, executives and other institutions of government also have an important interpretative role in relation to a new constitution, particularly where they have front-line responsibility for the administration of constitutional provisions.

³³ Cheryl Saunders, 'Implementing Fiji's Constitution: Challenges and Opportunities' (at the Citizens Constitutional Forum Public Lecture, Suva, 7 October 2015); DT Hofisi, 'Bottom-up Approaches to Constitutional Implementation: A Civil Society Perspective from Zimbabwe', *ConstitutionNet* (25 May 2015) <<http://www.constitutionnet.org/news/bottom-approaches-constitutional-implementation-civilsociety-perspective-zimbabwe>>.

³⁴ Williams (n 4) 62.

³⁵ Dziedzic (n 31); Saunders, 'Implementing Fiji's Constitution: Challenges and Opportunities' (n 33). Other scholars have described constitutional implementation slightly differently. Michele Brandt et al, *Constitution-Making and Reform: Options for the Process* (Interpeace, 2011) 222–3 outline a process of constitutional implementation, promotion, and safeguarding. Tom Ginsburg and Aziz Huq, *Assessing Constitutional Performance* (Cambridge University Press, 2016) ch 1 propose an understanding of constitutional implementation across two levels: first against the internal perspective of the constitution (which seems to correspond to what we term technical implementation) and against external normative criteria about what constitutions ought to achieve. In our view, the dimensions of implementation adopted here are more suitable for this case study because they reflect the internal point of view on which sustainable peace depends.

³⁶ Eg *Constitution of Afghanistan 2004* s 157; *Constitution of Kenya 2010* sch 6 ss 5 and 15(2).

- *Cultural adaption and change*: Every significant constitutional change affects existing political and legal practices and assumptions, in ways that might broadly be described as cultural. The effective implementation of new constitutional arrangements involves adjusting these as well, so that the requirements of the constitution are reflected in the life of the state and are given substantive effect by those who have responsibility for exercising public power. Cultural change is likely to be an issue when, for example, power is devolved, power-sharing of other kinds is implemented, or the system of government is significantly changed. This dimension of implementation is often the most difficult to achieve since cultural change is not susceptible to regulation or command. It requires buy-in across the institutions of government and vigilance from civil society.

4 Sustainable peace

Our hypothesis is that, where a peace agreement calls for constitutional changes, giving effect to constitutional commitments through textual and substantive constitutional implementation is likely to make an important contribution to sustainable peace.

‘Sustainable peace’ refers to a state of affairs in which violence, war and conflict are not only absent, but unlikely to recur because their root causes have been, or are being, effectively addressed. The concept of ‘sustainable peace’ has been given various definitions in the literature.³⁷ In some cases, sustainable peace is treated as a form of ‘negative peace’, in others, it is treated as synonymous with ‘positive peace’.³⁸ Nonetheless, each of the usages share a common core concept: a peace that is stable and capable of enduring. In this, sustainable peace – that is, a position in which peace is the norm – is the ideal to which all societies aspire.

The United Nations has identified ‘sustaining peace’ as the priority agenda and approach to peacebuilding.³⁹ It defines sustaining peace as:

a goal and a process to build a common vision of a society, ensuring that the needs of all segments of the population are taken into account, which encompasses activities aimed at preventing the outbreak, escalation, continuation and recurrence of conflict, addressing root causes, assisting parties to conflict to end hostilities, and in all its dimensions, and moving towards recovery, reconstruction and development.

The relationship between sustaining peace and sustainable peace has not been clearly defined. ‘Sustaining peace’ seems to imply that achieving or maintaining peace is tenuous or precarious, and that special effort is required to avoid or prevent the outbreak or recurrence of conflict. ‘Sustainable peace’ on the other hand, suggests a position where peace is stable and capable of enduring. The case

³⁷ See eg, Stephen Brown and Jörn Grävingholt, *From Power Struggles to Sustainable Peace: Understanding Political Settlements* (OECD, 2001); Bell and Zulueta-Fuelscher (n 2) 46; Donald Rothchild and Philip Roeder (eds), *Sustainable Peace: Power and Democracy after Civil Wars* (Cornell University Press, 2005); Tonya Putnma, ‘Human Rights and Sustainable Peace’ in Stephen John Stedman, Donald Rothchild and Elizabeth Cousens (eds), *Ending Civil Wars: The Implementation of Peace Agreements* (Lynne Rienner Publishers, 2002) 237.

³⁸ ‘Negative peace’ is commonly defined as the absence of violence or war; while ‘positive peace’ is the absence of violence as well as the presence of stabilising features such as justice, equality or development: see Kristine Höglund and Mimmi Söderberg Kovacs, ‘Beyond the Absence of War: The Diversity of Peace in Post-Settlement Societies’ (2010) 32 *Review of International Studies* 367; Geoff Dancy, ‘Deals with the Devil? Conflict Amnesties, Civil War, and Sustainable Peace’ (2018) 72 *International Organization* 387.

³⁹ United Nations, General Assembly, *Security Council Resolution 2282* (2016); *Report of the High-Level Independent Panel on United Nations Peace Operations on Uniting our Strengths for Peace: Politics, Partnerships and People*, 17 June 2015 A/70/95/S/2015/446; United Nations General Assembly, *Review of the United Nations Peacebuilding Architecture*, 12 May 2016 A/Res/70/262; United Nations, General Assembly, Security Council, *Report of the Secretary-General, Peacebuilding and Sustaining Peace*, 18 January 2018, A/72/707.

of PNG and Bougainville might illustrate the distinction. PNG and Bougainville, like all societies, seek sustainable peace. However, the period following the signing of the peace agreement, during which the commitments made in the agreement are implemented, might be described as a period of sustaining peace. In this report, we consider the significance of constitutional implementation to achieving and maintaining sustainable peace, noting however that this might encompass a period of what the United Nations would describe as ‘sustaining peace’.

The United Nations’ definition directs attention to the *processes* of peacebuilding as well as the goal of peace, which, in its view, encompass developments in political processes, safety and security, rule of law and human rights, social services, governance and economic revitalisation required to address the root causes of the conflict, recover from the effects of past conflict, and prevent it in the future.⁴⁰ This focus on the *process* of sustaining peace resonates with understandings of constitution making and constitutionalism as an ongoing process, and not simply the goal of having a constitution. Vivien Hart explains how the process of participatory constitution making has the potential to be a forum for members of the community to reconcile divisions, negotiate conflicts and redress grievances.⁴¹ In a similar vein, some definitions of constitutionalism focus on how it works, not on what it produces. In other words, ‘constitutionalism is lived; it is how one behaves if one takes constitutions seriously’.⁴² David Feldman, for example, argues that constitutionalism is the ‘commitment to peaceful methods of resolving, temporarily and contingently, a constantly changing set of conflicts between visions’.⁴³ Constitutionalism is therefore a process of working out issues and solving problems continually over time, using arguments about constitutional law, practice, and values.

Peace building and constitution making in conflict-affected contexts also share the broadly framed *goal* of sustainable peace. The focus of peace mediation now extends beyond security alone to encompass a new ‘vision of society’. Similarly, new and amended constitutions made to mark an end to conflict are often understood as ‘transformative’ in that they aspire not only to change the structures of government, but to build cohesive communities and entrench social values through which peace can be maintained.⁴⁴

Our study seeks to move beyond the process for constitution making and the substance of the constitution, to consider the implications of constitutional *implementation* for sustainable peace. Literature across peace building, constitutional change and implementation identifies several points of connection between the implementation of the constitutional commitments made in a peace agreement and sustainable peace.

First, the *outcome* of constitutional implementation is to put the structures negotiated in the peace agreement into practice. As noted above, in a peace-building context, the kinds of constitutional changes mandated in a peace agreement are likely to centre on constitutional inclusion mechanisms to resolve or ameliorate problems of inequality or exclusion that contributed to the conflict. Parties commit to constitutional changes of this kind because they believe they will address the underlying causes of the conflict. To do so, they must be put into practice.

⁴⁰ United Nations Peacebuilding Support Office, *What Does ‘Sustaining Peace’ Mean?* (2017) 2.

⁴¹ Vivien Hart, *Democratic Constitution Making* (Special Report No 107, United States Institute of Peace, 2003).

⁴² David Feldman, “‘Which in Your Case You Have Not Got’: Constitutionalism at Home and Abroad’ (2011) 64(1) *Current Legal Problems* 117, 124.

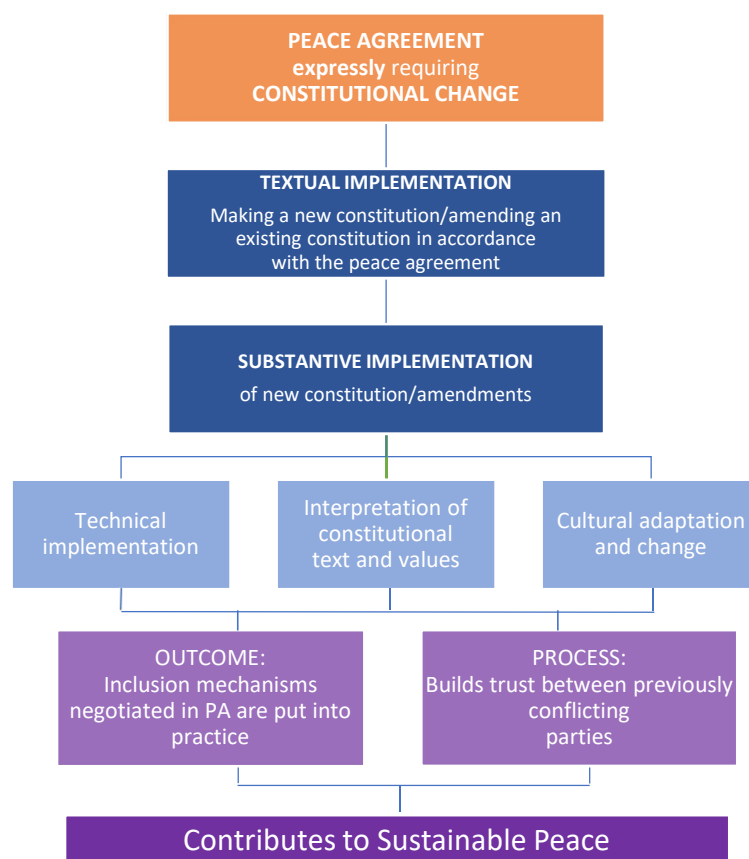
⁴³ David Feldman, ‘None, One or Several? Perspectives on the UK’s Constitution(s)’ (2005) 64(2) *The Cambridge Law Journal* 329, 351.

⁴⁴ Cheryl Saunders, ‘On the Links between Peacemaking and Constitution-Making’ (2018) 8 *UN Constitutional* 8.

Secondly, the *process* of constitutional implementation can also support sustainable peace. Constitutional implementation demonstrates good faith commitment to the peace agreement. Implementation requires more than words. Rather, it can entail significant changes to the structures and procedures of government, incurring significant costs and requiring major adaptation of political and legal practice. Implementation can be difficult, but engaging in the process of implementation signals to other parties to the conflict and to the people a good faith commitment to the substance of the peace agreement. Implementation can, in turn, encourage others to meet their commitments, or buy-in to the processes that sustain peace.

In addition, the process of constitutional implementation builds trust. Madhav and Joshi point out that the 'day to day work of implementing a peace agreement requires continued negotiation, renegotiation, sustained dialogue and continuous dispute resolution between members of the warring parties, sectors of the government and population segments affected by implementation'.⁴⁵ Constitutional implementation also requires work of this kind, and the process of working together jointly to a common constitutional goal can itself build trust between formerly conflicting parties.

In summary, where a peace agreement explicitly calls for constitutional change, the connections between a peace agreement, constitution, constitutional implementation and sustainable peace may be visualised in the following way:



The next part of this Report moves to the Bougainville case study. The case study is used to test the hypothesis that, where a peace agreement provides for constitutional inclusion mechanisms, the

⁴⁵ Madhav Joshi and Jason Michael Quinn, 'Implementing the Peace: The Aggregate Implementation of Comprehensive Peace Agreements and Peace Duration after Intrastate Armed Conflict' (2017) 47 *British Journal of Political Science* 869, 873.

effective implementation of these constitutional commitments makes a significant contribution to sustainable peace, and conversely, that shortcomings in implementation present a risk to sustainable peace. It applies the analytical framework setting out the textual and substantive components of constitutional implementation to describe and assess the process of implementation in PNG and Bougainville and draws out some of the implications for sustainable peace.

Part II Bougainville case study

1 Purpose and methodology

This case study explores the implications for sustainable peace of the implementation of constitutional commitments in a comprehensive peace agreement. The commitments with which the case study is concerned are those that relate to inclusion, broadly defined as the constitutional mechanisms directed to addressing the causes of conflict. Through the case study, we seek to demonstrate the connections between peace agreements, constitutional change, constitutional implementation and sustainable peace. By identifying aspects of constitutional implementation that might threaten sustainable peace, we also seek to better understand *how* the two might be linked.

Bougainville has been chosen as the case study for this purpose for a number of reasons. The BPA required extensive constitutional change. A sufficient period has elapsed since the BPA was concluded to support reflective analysis of the contribution of implementation at least to the goal of *sustaining* peace. Bougainville also has been an under-researched case, even though it holds considerable interest.

Since signing the BPA in 2001 to end a decade-long conflict, Bougainville has experienced 18 years of relative peace. The BPA provided for autonomy for the territory of Bougainville and a guaranteed but deferred referendum on the future political status of Bougainville.⁴⁶ The BPA required significant changes to Bougainville's constitutional relationship with PNG and to the constitutional laws and institutions within Bougainville itself. Autonomy, in combination with a deferred referendum, offered a significant transition phase of ten to fifteen years, during which the new constitutional arrangements needed to be put into practice. This transition period also gave stakeholders an opportunity to test what autonomy might involve and to evaluate the consequences of independence in the lead-up to the referendum, as the next phase of implementation.

A similar model of autonomy and a deferred referendum has been used or attempted in other peacemaking contexts, including Algeria in 1962, New Caledonia in 1998, Northern Ireland under the Good Friday Agreement in 1998 and South Sudan in 2011.⁴⁷ However, there are some distinctive features of the Bougainville context and the constitutional inclusion mechanisms it adopted in an effort to sustain peace. First, the conflict had two dimensions: an intra-Bougainville conflict between different groups within Bougainville; and, in an intrastate conflict of another kind, between Bougainville and PNG. As a result, constitutional inclusion mechanisms required implementation at both the national PNG level, and sub-nationally at the Bougainville level. Much of the research on peace building has tended to focus on the national level alone, but the Bougainville case study invites consideration of the importance of implementation to sustainable peace at both levels. Secondly, the

⁴⁶ The referendum was to be held between 10 and 15 years after the establishment of the Autonomous Bougainville Government (ABG). The ABG was established in 2005, requiring a referendum between 2015 and 2020. At the time of writing, the referendum has been scheduled for October 2019.

⁴⁷ Katherine Collin, 'Peacemaking Referendums in Oceania: Making or Delaying Peace in New Caledonia and Bougainville' (2019) 18(2) *Ethnopolitics* 139, 140.

peace process utilised the technique of deferral in several ways: most notably by delaying the referendum on the political status of Bougainville for a considerable period of time, but also by deferring resolution of disagreement over whether PNG would accept a referendum decision to secede and in providing for the gradual transfer of autonomous powers to Bougainville. These factors make Bougainville a particularly instructive case through which to examine the role of constitutional implementation in peace building.

This Part of the Report briefly describes the conflict and the peace process in Bougainville, before assessing the implementation of four key constitutional commitments:

- autonomy for Bougainville;
- the division of power and resources between Bougainville and PNG;
- shared rule between Bougainville and PNG; and
- a deferred referendum in Bougainville on its future political status.

Other aspects of implementation of the BPA, which dealt with weapons disposal, amnesties and reconciliations, did not involve commitments of a constitutional kind and are not dealt with in this study.⁴⁸

Achieving sustainable peace in Bougainville is an ongoing process. The civil conflict exacerbated existing tensions and created new divisions between peoples within Bougainville, and between Bougainville and PNG. There is a risk that these tensions will come to the fore again, as the deferred referendum is conducted in late 2019 and in its aftermath. This Report focuses on the outcomes of the implementation of the BPA and the constitutional changes that responded to it as at May 2019. Future events in Bougainville might shed further and different light on the insights that this Report offers into constitutional implementation for sustainable peace.

This case study is not intended to be a critique of either the processes of peace-building or the actions of stakeholders in Bougainville or PNG. The purpose of the case study is to learn from the experience in PNG and Bougainville to better understand the dynamics of constitutional implementation and its relationship to sustainable peace. These are issues for many states in the world of the 21st century, for which the experience in Bougainville offers some assistance.

The account of implementation presented here is based on recent country-led studies, including the 2013 *Joint Review of Autonomy Arrangements* by the Government of PNG and the Autonomous Bougainville Government (ABG)⁴⁹ and reports commissioned over 2017-2019 by the National Research Institute of PNG as part of the Bougainville Referendum Research Project.⁵⁰ It draws also on analyses in the secondary literature and commentaries on the governance of Bougainville since the end of the conflict. Drafts of this Report were distributed to ten reviewers from PNG and Bougainville and external experts in peacebuilding and constitution making. Five reviewers provided substantive feedback, which was used to clarify the detail of implementation and extend our insights into the

⁴⁸ For overview of the implementation of these aspects of the Peace Agreement see Kylie McKenna, *Status and Implementation of the Bougainville Peace Agreement and Implications for Referendum* (National Research Institute Papua New Guinea, January 2019) ch 3.

⁴⁹ A second Review of Autonomy Arrangements was prepared in late 2018-early 2019 but had not been tabled in parliament at the time this Report was written.

⁵⁰ In particular Satish Chand, *Financing for Fiscal Autonomy: Fiscal Self-Reliance in Bougainville* (National Research Institute Papua New Guinea, August 2018); McKenna (n 48). See further <https://pngnri.org/index.php/hosted-programs-projects/bougainville-referendum-research-project>.

peace building, constitution making and implementation processes in Bougainville and to test our conclusions on the implications for sustaining peace.

2 Overview of the conflict and the peace process

Bougainville is a region within the state of PNG. Prior to PNG's independence in 1975, there had been agitation in Bougainville for separate statehood. From 1988, Bougainville experienced a decade-long civil war. It is estimated that several thousand people (approximately 10% of Bougainville's population) died as a result of the war, as casualties in conflict or as a result of the shut-down of vital medical and security services to the people, and up to 40% of the population were internally displaced by the conflict.⁵¹

There were several related causes for the conflict. The trigger was a dispute about the distribution of revenue from a large copper mine, established in Bougainville while PNG was an Australian colony. Royalties from the mine mostly went to the PNG Government, while landowners in Bougainville received only a small proportion. In Bougainville, concerns about the distribution of mining revenue were compounded by limited employment opportunities for Bougainvilleans, the migration of people from other parts of PNG to Bougainville, and the environmental damage and displacement of communities as a result of mining.⁵²

In 1988, mining assets were sabotaged in protest, provoking a heavy response from PNG security forces. Landowner associations militarised and the Bougainville Revolutionary Army was created. Conflict spread and became a civil war. The mine was closed in 1989. The PNG Government pulled its officials, police and military out of Bougainville in 1990, and imposed a blockade, preventing, amongst other goods and services, the importation of medical supplies to Bougainville.⁵³

The conflict mobilised the longstanding secessionist movement.⁵⁴ During and in the immediate aftermath of PNG's independence constitution-making process, representatives of Bougainville were vocal advocates of constitutionally entrenched decentralisation, using the threat of secession to bargain for a high degree of autonomy. In this, they were eventually successful, at least for a time. Constitutional amendments and an organic law passed in 1976, shortly after the introduction of the independence constitution, established a system of provincial government across PNG.⁵⁵ This relatively devolved system of government was however replaced with more centralised arrangements across all of PNG in 1995. Bougainville, deep in conflict at the time, did not have an effective say in these changes.⁵⁶ For some, the civil war came to be a fight for independence.

Over time, the conflict evolved to reflect two broad dimensions: first between the region of Bougainville and the PNG state, and secondly between different groups within Bougainville, some of

⁵¹ Joanne Wallis, 'Ten Years of Peace: Assessing Bougainville's Progress and Prospects' (2012) 101(1) *The Round Table* 29, 29.

⁵² John Braithwaite et al, *Reconciliation and Architectures of Commitment: Sequencing Peace in Bougainville* (ANU Press, 2010) 12–20; Mary-Louise O'Callaghan, 'The Origins of the Conflict' in Andy Carl and Lorraine Garasu (eds), *Accord: Weaving Consensus - The Papua New Guinea-Bougainville Peace Process* (Conciliation Resources, 2002) 6.

⁵³ Braithwaite et al (n 52) ch 3; O'Callaghan (n 52).

⁵⁴ Yash Ghai and Anthony Regan, 'Unitary State, Devolution, Autonomy, Secession: State Building and Nation Building in Bougainville, Papua New Guinea' (2006) 95 *The Round Table* 589, 597.

⁵⁵ Ibid 593–7.

⁵⁶ Ibid 597.

which favoured secession while others opposed it. The complexities of the conflict affected the peace-making processes as well as the kinds of constitutional mechanisms negotiated.⁵⁷

Efforts at brokering peace began early in the conflict. One study counted 11 pan-Bougainville peace initiatives over the course of the 1990s, before the successful Burnham/Lincoln negotiations in the late 1990s led to the comprehensive peace agreement.⁵⁸ In addition to formal negotiations, community level reconciliations, which drew upon customary and Christian traditions, spread across parts of Bougainville, and continue to this day. Peace-building at this level built upon the Arawa Peace Conference of 1994, which although technically cast as a 'failed' peace process, brought together 1,200 members of Bougainville civil society and was seen as a turning point in enabling local leaders, especially women, to establish and spread local zones of peace.⁵⁹ These locally-led, inclusive, reconciliations complemented the formal peace negotiations, and contributed to a strong, local, and tangible peace.

Formal peace negotiations first saw success at the Burnham talks, held in New Zealand in 1997. Reflecting the nature of the conflict across two divides (between Bougainville factions and between Bougainville and PNG), the first round of Burnham talks held in July 1997 were between Bougainville leaders only. It was only in the second round three months later that representatives of the PNG Government were included.⁶⁰ The agreements at Burnham were formalised in the Lincoln Agreement of January 1998. This set out the processes for further negotiations and provided for the security of all participants, capturing agreements as to international monitoring bodies and peacekeepers, the disposal of weapons and amnesties.⁶¹

From 1999 to 2001, negotiations focused on the major points of political contention. The Bougainville parties had worked with advisers to develop and agree a joint position between immediate secession and the status quo. This position was, first, the highest possible autonomy for Bougainville within PNG, and secondly a binding referendum of the Bougainville people on the question of independence, to be deferred until a later date.⁶² This agreed position provided the agenda for two years of negotiations with PNG.⁶³ The referendum proved to be the most difficult issue. In the end, the parties agreed that the referendum would not be binding, in the sense that the referendum result would be subject to ratification by the PNG Parliament. This compromise was reached after international parties, in particular Australia's Minister for Foreign Affairs, persuaded the Bougainville parties that PNG would

⁵⁷ Anthony J Regan, 'Resolving Two Dimensions of Conflict: The Dynamics of Consent, Consensus and Compromise' in Andy Carl and Lorraine Garasu (eds), *Accord: Weaving Consensus - The Papua New Guinea-Bougainville Peace Process* (Conciliation Resources, 2002) 36 ('Resolving Two Dimensions of Conflict'); Peter Sohia, 'Early Interventions' in Andy Carl and Lorraine Garasu (eds), *Accord: Weaving Consensus - The Papua New Guinea-Bougainville Peace Process* (Conciliation Resources, 2002) 16.

⁵⁸ Braithwaite et al (n 52) 129.

⁵⁹ Ibid 36–7, ch 6. On the role of women in the peace process see Nicole George, 'Light, Heat and Shadows: Women's Reflections on Peacebuilding in Bougainville' (2016) 4 *Peacebuilding* 166.

⁶⁰ Braithwaite et al (n 52) 47–8; Robert Tapi, 'From Burnham to Buin: Sowing the Seeds of Peace in the Land of Snow-Capped Mountains' in Andy Carl and Lorraine Garasu (eds), *Accord: Weaving Consensus - The Papua New Guinea-Bougainville Peace Process* (Conciliation Resources, 2002) 24.

⁶¹ *Lincoln Agreement on Peace, Security and Development on Bougainville* (signed 10 October 1997) UN Doc S/1998/287. Regan characterises this as phase one of the peace negotiations: Anthony J Regan, 'Phases of the Negotiation Process' in Andy Carl and Lorraine Garasu (eds), *Accord: Weaving Consensus - The Papua New Guinea-Bougainville Peace Process* (Conciliation Resources, 2002) 32, 33–4.

⁶² See Regan, 'Resolving Two Dimensions of Conflict' (n 57) for a description of how this position was agreed between the Bougainville parties.

⁶³ Anthony J Regan, 'Autonomy and Conflict Resolution in Bougainville, Papua New Guinea' in Ghai, Yash and Sophia Woodman (eds), *Practising Self-Government: A Comparative Study of Autonomous Regions* (Cambridge University Press, 2013) 412, 420 ('Autonomy and Conflict').

be under international pressure to honour the outcome of a vote in favour of independence.⁶⁴ The issue here is a familiar one: any popular vote carries significant political weight, whatever its legal status, as long, at least, as the process was fair and the outcome clear. The referendum, substantial autonomy and weapons disposal formed the three core pillars of the comprehensive Bougainville Peace Agreement, signed in August 2001.

The Bougainville peace process was characterised by substantial local ownership. The Bougainville side was highly inclusive of the previously warring factions although not entirely so: significant armed groups were invited, but some remained outside the peace process. Inclusiveness was facilitated by political circumstances which meant that the rival Bougainville governments formed during the conflict were accommodated in the Interim Provincial Government and People's Congress, a more inclusive arrangement than a single elected government.⁶⁵ The process was also inclusive of civil society more broadly, an outcome facilitated by the Arawa Conference and the local reconciliations across Bougainville.⁶⁶ National ownership was also reflected in the limited role that international actors played. While present, their role in facilitating peace talks, ensuring security and monitoring weapons disposal, was largely mediated by local actors.⁶⁷

3 Textual implementation

Textual constitutional implementation involves the incorporation of commitments of a constitutional kind in a peace agreement into a constitutional text. In the context of Bougainville, this was achieved by translating the articles of the BPA into constitutional form in a new Part XIV of the PNG Constitution and an accompanying *Organic Law on Peace Building in Bougainville* (in PNG, organic laws have a status higher than ordinary law).⁶⁸ This was done reasonably quickly. A joint committee, comprising members from PNG and Bougainville, worked with drafters and technical advisers to turn the provisions of the BPA into constitutional laws.⁶⁹ The amendments to the PNG Constitution and the Organic Law were passed by the PNG Parliament on 27 March 2002.

The timely textual implementation of the BPA was facilitated by several factors.

The first was the emphasis that the Bougainville parties placed on constitutionalisation. The constitutionalisation of autonomy and the referendum was an early and core demand of the representatives of Bougainville, who regarded constitutional entrenchment of autonomy and the referendum as a necessary assurance. The political relationship between PNG and Bougainville was one of deep distrust. PNG also had a record of unstable government, giving rise to concerns that a change in government might also mean a change in attitude to the measures for peace in Bougainville. PNG did, however, have a good record of constitutionalism: governments generally adhered to constitutional limits, and the Supreme Court of PNG had demonstrated its independence and capacity to uphold the constitution, including by deciding cases against the interests of the government of the

⁶⁴ Braithwaite et al (n 52) 57; Ghai and Regan (n 54) 599–600.

⁶⁵ Patrick Nisira, *Leadership Challenges for the Autonomous Bougainville Government* (No Discussion Paper 2017/3, State, Society and Governance in Melanesia, 2017) 3.

⁶⁶ Joanne Wallis, *Constitution Making during State Building* (Cambridge University Press, 2014) 205–6.

⁶⁷ Volker Boege, 'Hybridisation of Peacebuilding at the Local–International Interface: The Bougainville Case' in Joanne Wallis et al (eds), *Hybridity on the Ground in Peacebuilding and Development* (ANU Press, 2018) 115.

⁶⁸ *Constitutional Amendment (Peace-Building in Bougainville – Autonomous Bougainville Government and Bougainville Referendum) Act 2002* and *Organic Law on Peace-Building in Bougainville: Autonomous Bougainville Government and Bougainville Referendum 2002*.

⁶⁹ For description of process see Regan, 'Phases of the Negotiation Process' (n 61) 35.

day.⁷⁰ Constitutionalisation of relevant parts of the BPA was therefore regarded as a way to protect the provisions of the Peace Agreement from political change, symbolically entrenching it in the highest law while at the same time providing the protection of judicial review.⁷¹

Notably however, constitutional entrenchment had not protected Bougainville from the repeal of the system of provincial government included in the PNG Constitution in 1976 and its replacement with the more centralised system in 1995. To prevent a similar occurrence, the BPA specifically provided that amendments to the provisions of the PNG Constitution implementing the BPA would need the support of a majority in the Bougainville legislature as well as a two-thirds absolute majority in the PNG Parliament.⁷² The BPA and the PNG Constitution required that these entrenching provisions were themselves protected from constitutional amendment by PNG acting alone.⁷³

The second factor facilitating textual implementation was the high level of prescriptive detail about constitutional arrangements for which the BPA provided. This flowed from the early understanding that relevant parts of the BPA would receive constitutional protection. Negotiators sought to protect the detail of their agreed positions, rather than to frame principles or outcomes and leave the details to be determined in the textual implementation phase. This detail was readily reflected in constitutional text, as demonstrated by the similarities in the structure and provisions of the BPA on the one hand and Part XIV of the Constitution and the Organic Law on the other. The potential problems for legitimacy of including such detailed constitutional provisions in the BPA were ameliorated by several factors: the inclusive character of the peace negotiations; the relative latitude left to Bougainville to draft its own constitution; and the fact that the obligation on PNG was only to change an existing constitution, following the required procedure for constitutional change, in ways that altered only one, discrete, portion of it.

Thirdly, the significance of constitutionalisation to the negotiators from Bougainville also meant that the BPA was relatively clear about the status of the Peace Agreement and its relationship with the PNG Constitution. The first article of the BPA states that the 'Agreement is the basis for drafting the constitutional amendments and other laws', while the second article provides that the implementing constitutional laws will expressly state that they are intended to give legal effect to the Agreement. The BPA also specifies that it is intended to be used as a guide for implementation and that it is to be interpreted liberally to assist courts in interpreting the PNG Constitution and other laws.⁷⁴ This commitment is reflected in the PNG Constitution, which provides that the BPA may be used as an aid to interpretation in relation to the new Part XIV of the Constitution.⁷⁵ In addition, several

⁷⁰ On reasons for the constitutionalisation of the peace agreement see Braithwaite et al (n 52) 57–8; Regan, 'Autonomy and Conflict' (n 63) 420–4.

⁷¹ Kearnneth Nanei, 'Bougainville' (at the Second Melbourne Forum on Constitution Building in Asia and the Pacific - From Big Bang to Incrementalism: Choices and Challenges in Constitution Building, International IDEA and Constitution Transformation Network, 3 October 2017).

⁷² *Bougainville Peace Agreement* art 325; *Constitution of Papua New Guinea 1975* s 345. The majority requirements in the Bougainville legislature depend on the amendments sought: amendments to the autonomy arrangements require a simple majority; amendments to the referendum provisions require a two thirds absolute majority.

⁷³ *Bougainville Peace Agreement* art 328; *Constitution of Papua New Guinea 1975* ss 345–6. In addition, while Bougainville is bound by international obligations entered into by the national government (art 55), the article 75 of the Peace Agreement provides that an international agreement negotiated or signed with the purpose of altering the agreed autonomy arrangements will take effect only with the agreement of both governments. This is reflected in *Constitution of Papua New Guinea 1975* s 293(3).

⁷⁴ *Bougainville Peace Agreement* art 3.

⁷⁵ *Constitution of Papua New Guinea 1975* s 278.

constitutional provisions are expressly framed to be ‘subject to’ or ‘in accordance with’ the BPA.⁷⁶ The result is that the powers, functions and responsibilities of the PNG and Bougainville governments are ascertained by reading the Constitution together with the BPA.⁷⁷ In this case, it is not accurate to characterise the constitutional provisions as superseding or replacing the BPA or vice versa.⁷⁸ Rather, the BPA and the amended PNG Constitution are expressly required to be read together.

A final factor that assisted in the textual implementation of the BPA was the sequencing arrangements for which it provided. Each side to the Agreement committed to specific actions that yielded some of its powers and advantage, provided the other side gave up something in return. Under this arrangement, ex-combatants in Bougainville were obliged to move their weapons into secure storage only once the PNG Parliament had made the constitutional amendments required by the BPA. Meanwhile, the constitutional amendments would not come into effect until the United Nations mission in Bougainville had verified a specified standard of weapons disposal.⁷⁹ This meant that there were incentives for PNG to change the Constitution to formally implement this aspect of the BPA. Additional political pressure was provided by the PNG electoral cycle: PNG lawmakers had to act reasonably quickly in order to meet the procedural requirements for constitutional amendment before the dissolution of parliament prior to general elections scheduled for mid-2002.⁸⁰

The remainder of this section on textual implementation sets out the constitutional inclusion mechanisms mandated by the BPA and explains how they are reflected in the text of the PNG Constitution. These are grouped in four categories: (1) autonomy for Bougainville; (2) the division of power and resources between Bougainville and PNG; (3) shared rule; and (4) a guaranteed deferred referendum in Bougainville on its future political status. The substantive implementation of each of these constitutional commitments is examined in Section 4.

3.1 Autonomy for Bougainville

Autonomy for Bougainville was part of the earliest discussions for a peaceful resolution to the conflict.⁸¹ Bougainville (or the Province of North Solomons as it was then called) had a degree of autonomy under the system of provincial government established across the whole of PNG in 1976, under pressure from Bougainville itself. Initially, Bougainville had the same provincial powers and functions as the other provinces of PNG.⁸² While the Bougainville provincial government was one of the most active, over time governmental powers centralised at the national level, as most provinces were content to rely on national laws.⁸³ The autonomy and powers of the provinces across PNG were significantly reduced by constitutional amendments in 1995.⁸⁴ This reduced level of autonomy

⁷⁶ Eg, *Constitution of Papua New Guinea 1975* s 290 lists the powers and functions that are available for transfer to the Bougainville Government, ‘subject to this Part and to the Agreement’. Section 292 provides that disputes between the PNG Government and the Bougainville Government over which government is responsible for a function or power shall be resolved ‘by applying the principles governing the division of powers as specified in the Agreement’.

⁷⁷ Regan, ‘Autonomy and Conflict’ (n 63) 424.

⁷⁸ Possibilities discussed in Bell (n 3) 393–4.

⁷⁹ Braithwaite et al (n 52) 58–9; Regan, ‘Autonomy and Conflict’ (n 63) 426.

⁸⁰ Regan, ‘Resolving Two Dimensions of Conflict’ (n 57) 41–2.

⁸¹ See, eg, North Solomons Provincial Government, *Provincial Select Committee Report on the Panguna Crisis (Bika Report)* (1989); John R Kaputin (ed), *Crisis in the North Solomons Province: Report of the Special Committee Appointed by the National Executive Council* (1991); discussed in Sohia (n 57) 18.

⁸² In practice, the provision for the distribution of mining royalties applied only in Bougainville, giving its provincial government a degree of fiscal independence: Ghai and Regan (n 54) 594.

⁸³ Ibid 595.

⁸⁴ For analysis see Eric L Kwa et al (eds), *Decentralisation for an Integrated, Strong and Prosperous Papua New Guinea* (Constitutional and Law Reform Commission, 2016) esp 67–79.

became the starting point for the 'greater autonomy' negotiated during the Bougainville peace process.⁸⁵ The pre-1995 experience of provincial government also informed the aspirations of Bougainville leaders for greater self-government.

The BPA made autonomy a central pillar of peace. It specified in some detail what autonomy involved for this purpose and required these arrangements for autonomy to be entrenched in the PNG Constitution and the future constitution of Bougainville. It provided for the establishment of a government for Bougainville (comprising its own three institutional branches) and guaranteed that neither the PNG Government nor the PNG Parliament would have power to suspend the government of Bougainville or withdraw its powers. This was another distinguishing feature of Bougainville from the other provinces of PNG.⁸⁶

The Bougainville parties negotiating the BPA regarded a constitution for Bougainville as an essential element of autonomy.⁸⁷ The BPA set out a process for constitution-making in Bougainville, in terms that later were reflected in the PNG Constitution. It also set some principles to guide the substance of Bougainville's new constitution. It required the Bougainville government to comprise a mainly elected legislature, an executive, a judiciary and some other constitutional offices.⁸⁸ It also provided that the new Bougainville constitution should be generally consistent with the BPA and 'internationally accepted standards of good governance'.⁸⁹ These provisions gave Bougainville substantial room to design and operate its own institutions of government, independently from PNG.

3.2 Division of powers and resources

Powers

The BPA stipulated that powers and functions would be divided between the governments of PNG and Bougainville by listing, as exhaustively as possible, the powers to be held and exercised by each level of government. The BPA set out an agreed list of thirteen heads of power that would remain with the PNG Government, including, amongst other things, defence, foreign relations, immigration, international trade, and communications.⁹⁰ Some details were left to be determined in the course of textual implementation of the BPA, including the matters within the functions and powers of Bougainville institutions,⁹¹ and the mechanism for determining overlaps and conflicts between the powers of PNG and Bougainville.⁹²

These issues were resolved in the course of drafting the amendments to the PNG Constitution. The Constitution specified 58 powers and functions for the Bougainville government to exercise in and in relation to Bougainville.⁹³ Significantly, these included powers in relation to mining, land and natural resources. The issue of conflict and overlap between PNG and Bougainville laws was resolved by constitutional provisions that permit the national level of government to legislate on matters in the

⁸⁵ Regan, 'Autonomy and Conflict' (n 63) 418.

⁸⁶ *Bougainville Peace Agreement* art 268; *Constitution of Papua New Guinea 1975* ss 282, 331.

⁸⁷ Regan, 'Autonomy and Conflict' (n 63) 424.

⁸⁸ *Bougainville Peace Agreement* pt 4.

⁸⁹ *Bougainville Peace Agreement* arts 11, 21.

⁹⁰ *Bougainville Peace Agreement* art 51. The list of powers of the national government in the *Constitution of Papua New Guinea 1975* s 289 came to include three additional matters (customs, quarantine and industrial relations) which were dealt with elsewhere in the Peace Agreement.

⁹¹ *Bougainville Peace Agreement* art 52(b). The Peace Agreement specified only that the list of powers of Bougainville would include identifiable powers not on the national list, beginning with powers available to all provincial governments and the power to decide foreign investment applications for Bougainville: *Bougainville Peace Agreement* arts 52-3.

⁹² *Bougainville Peace Agreement* art 49.

⁹³ *Constitution of Papua New Guinea 1975* s 290.

Bougainville list, but not so as to be inconsistent with Bougainville laws; and permit the Bougainville level of government to legislate on matters in the national list, but not so as to be inconsistent with national laws.⁹⁴ The legislative powers of each therefore are concurrent, with inconsistencies resolved in favour of the government with primary responsibility for the function or power. The PNG Constitution provides that unspecified functions and powers remain with the PNG Government. It also, however, sets out a process whereby either level of government wishing to legislate on an unspecified matter must consult with the other and, if required, may invoke a dispute resolution procedure.⁹⁵

The BPA and subsequent constitution-making process provided a unique opportunity for Bougainville to obtain access to powers formerly held at the national level, and Bougainville negotiators pushed for a significant degree of power.⁹⁶ However, recognising that the ABG would not have the capacity to immediately exercise all of its new powers and functions, the BPA established a process for the gradual transfer of powers. The ABG could initiate the transfer of a specified power, with 12 months' notice, during which time the Governments of Bougainville and PNG were to cooperate to agree a plan to implement the transfer of powers and functions, taking into account the need to develop the relevant capacities and resources in Bougainville.⁹⁷ Until such time as the Bougainville House of Representatives passed laws of its own, PNG laws would apply in Bougainville.

Resources

In the short term, it was expected that Bougainville would be heavily dependent on PNG for financial support. Bougainville's economy had collapsed during the conflict, and the cessation of large-scale mining meant Bougainville had lost its primary source of revenue. Rebuilding war-damaged infrastructure to support social services, the economy and the new government institutions of Bougainville required significant funds. This short-term financial dependence stood in tension with the aspiration of autonomy. As a result, the BPA developed and defined a concept of 'fiscal self-reliance'.⁹⁸ Until Bougainville achieved this standard, PNG would contribute financial support to assist Bougainville to rebuild and to establish and maintain the new autonomy arrangements. The financial arrangements pending fiscal self-reliance are set out in some detail in the BPA. The BPA specifies the national taxes that would continue to apply in Bougainville and how that revenue would be distributed⁹⁹ and the power of the ABG to create and levy taxes and arrangements for their collection.¹⁰⁰ These provisions are reflected in the PNG Constitution as 'basic principles of the fiscal arrangements' with the details set out in the Organic Law.¹⁰¹

⁹⁴ *Constitution of Papua New Guinea 1975* s 296.

⁹⁵ *Constitution of Papua New Guinea 1975* s 292. The dispute resolution procedure, set out in s 333 of the PNG Constitution, provides for a staged process of consultation between relevant government agencies, consultation through the Joint Supervisory Body, mediation and arbitration, and finally to the courts.

⁹⁶ Regan, 'Autonomy and Conflict' (n 63) 431.

⁹⁷ *Ibid.* *Bougainville Peace Agreement* pt 7. The *Organic Law on Peace-Building in Bougainville, Autonomous Bougainville Government and Bougainville Referendum 2002* (PNG) ss 3-6 sets out additional detail on the content of implementation plans and processes for transfer.

⁹⁸ 'Fiscal self-reliance' is defined as the 'first year in which the revenue from company tax, customs duties and 70% of value added tax collected in Bougainville is equal to the value of the recurrent grant on a sustainable basis': *Constitution of Papua New Guinea 1975* s 278.

⁹⁹ *Bougainville Peace Agreement* arts 138, 140, 141.

¹⁰⁰ *Bougainville Peace Agreement* arts 142, 145, 146.

¹⁰¹ *Constitution of Papua New Guinea 1975* ss 324-5; *Organic Law on Peacebuilding in Bougainville 2002* ss 38-46.

In addition, the BPA committed the PNG Government to providing grants to the ABG. The PNG Constitution, and accompanying Organic Law, specified the nature, manner of calculation and allocation of different grants, including:

- an annual recurrent unconditional grant, intended to fund the costs of salaries and operations of the ABG, including those functions assumed under the transfer process;
- restoration and development grants, to be spent in a manner co-ordinated by a 'Bougainville controlled mechanism' in which the PNG Government was represented;
- specific purpose conditional grants, made after consultation with the ABG; and
- a one-off establishment grant.¹⁰²

Recurrent unconditional grants would be made each year until Bougainville achieved fiscal self-reliance. Restoration and development grants were pegged to PNG's National Public Investment Programme and subject to future review.¹⁰³ Once Bougainville had achieved fiscal self-reliance, Bougainville would make a 'fair contribution' to the costs of the PNG Government through specified taxes and revenue sharing.¹⁰⁴

3.3 Shared rule

Shared rule complements autonomy as a mechanism for constitutional inclusion. It is common for arrangements for multi-level government to provide for both self-rule at the subnational level (here, in the autonomous region) and shared rule at the national level. Shared rule provides sub-national levels with a stake in the nation state and provides a vehicle through which they can contribute their perspectives on national issues. While the emphasis of the requirements for autonomy in the BPA is largely on self-rule for Bougainville, some significant arrangements for shared rule between both levels of government were integral to the terms of the political settlement, including, unusually, representation of the central government in some Bougainvillean institutions.

Representation

One common mechanism for shared rule is to provide for representation of the sub-national level of government in national institutions. Often, this occurs in a second chamber of a bicameral legislature. PNG has a unicameral legislature, in which provision for provincial representation is made. Bougainville, like all provinces in PNG, has one member representing the province who sits in the PNG Parliament. In contrast to the provinces, however, in Bougainville's case, this member of parliament is not the Governor of the Province (a position which no longer exists in Bougainville), but the 'Regional Member for Bougainville'. Bougainville, like the provinces, has 'open' constituencies distributed by population size, which each elect one member to the PNG Parliament.¹⁰⁵ While this is a mechanism of shared rule, the arrangements for Bougainville do not differ from those for any of the other provinces of PNG. The representation of Bougainville in the PNG Parliament was not a high priority for the Bougainville during the peace talks; initially, indeed, negotiators sought to reduce their representation at the centre to one member of Parliament. In the end, the decision to retain one regional and three open constituencies was seen as a way of encouraging Bougainville factions to join the peace-making process by providing leadership positions for the members of different factions. Representation in the PNG Parliament also had the potential to provide another avenue to support

¹⁰² *Bougainville Peace Agreement* arts 149–71; *Constitution of Papua New Guinea 1975* s 326.

¹⁰³ *Organic Law on Peacebuilding in Bougainville 2002* ss 48–9.

¹⁰⁴ *Bougainville Peace Agreement* art 135.

¹⁰⁵ *Constitution of Papua New Guinea 1975* s 101, *Organic Law on the Provincial Governments and Local-level Governments 1997*.

the implementation of autonomy.¹⁰⁶ Bougainville's four representatives in the National Parliament (one regional and three from open constituencies) can attend, but not vote, in the Bougainville House of Representatives.¹⁰⁷

Representation of Bougainville in the PNG Parliament does not feature in the BPA or the PNG Constitution. There are provisions in the BPA, however, which later were translated into the Organic Law, that provide a right for Bougainvilleans to participate in national institutions of PNG such as the police, defence force and public service.¹⁰⁸ These provisions were proposed by the PNG Government, and sought to ensure that Bougainville was integrated into national institutions in the same way as other parts of the state.¹⁰⁹ Other instances of Bougainville representation in national institutions required by the BPA are largely limited to matters that affect Bougainville. For example, the BPA specified that a representative of Bougainville should participate in the national body responsible for setting the salaries and conditions of officials in the ABG.¹¹⁰

For its part, the PNG Government was to continue to have some involvement in the government of Bougainville. It was to be represented for example, in the bodies created by the Bougainville Constitution to appoint judges and other constitutional office holders and the heads of the police and corrections.¹¹¹ The PNG Government would also continue to have some oversight of aspects of the ABG. Examples include the requirement to approve any proposed budgetary deficit in the Bougainville budget and the provision of foreign aid to Bougainville.¹¹²

Consultation and cooperation between the levels of government

In addition to these examples of cross-representation in the institutions of each level of government, the emphasis placed on consultation and cooperation between the two levels of government, their institutions and officials also provides for a form of shared rule. The BPA (in terms reflected in either the PNG Constitution or the Organic Law) recognises that for some time constitutional office-holders (such as judges, the Ombudsman and the Auditor-General) at the national level would continue to carry out their responsibilities in Bougainville.¹¹³ It permits PNG and Bougainville constitutional office holders to 'enter into cooperative or agency arrangements to avoid gaps and duplication and to encourage common standards.'¹¹⁴ The BPA also anticipates a variety of cooperative mechanisms to facilitate the exercise of national government powers, including obligations to consult,¹¹⁵ an agreed division of service provision and administration,¹¹⁶ and arrangements under which the ABG could act

¹⁰⁶ Anthony Regan, 'Resolving the Bougainville Self-Determination Dispute: Autonomy or Complex Power-Sharing?' in Niall Johnson, Barbara Metzger and M Weller (eds), *Settling Self-Determination Disputes: Complex Power-Sharing in Theory and Practice* (Martinus Nijhoff Publishers, 2008) 125, 139 ('Resolving the Bougainville Self-Determination Dispute').

¹⁰⁷ *Constitution of the Autonomous Region of Bougainville 2004* s 55(3).

¹⁰⁸ *Bougainville Peace Agreement* arts 61, 191; *Organic Law on Peacebuilding in Bougainville 2002* s 11.

¹⁰⁹ Regan, 'Resolving the Bougainville Self-Determination Dispute' (n 106) 140.

¹¹⁰ *Bougainville Peace Agreement* art 45; *Constitution of Papua New Guinea 1975* s 320(2).

¹¹¹ *Bougainville Peace Agreement* arts 43, 212; *Constitution of the Autonomous Region of Bougainville 2004* ss 102, 142, 149.

¹¹² *Bougainville Peace Agreement* arts 167, 175; *Constitution of the Autonomous Region of Bougainville 2004* s 155(3).

¹¹³ *Bougainville Peace Agreement* art 40; *Constitution of Papua New Guinea 1975* s 289(3).

¹¹⁴ *Bougainville Peace Agreement* art 44; *Constitution of Papua New Guinea 1975* s 321(4).

¹¹⁵ Eg *Bougainville Peace Agreement* arts 194 (on laws to manage the public service); 195 (general pay increases for the public service), 97 (appointments of senior public servants); *Constitution of Papua New Guinea 1975* s 311(4). The requirements of consultation are set out in the *Bougainville Peace Agreement* art 269 and *Constitution of Papua New Guinea 1975* s 278(2).

¹¹⁶ *Bougainville Peace Agreement* art 112.

as an agent or delegate of the PNG Government.¹¹⁷ The BPA also provides for transfers and exchanges of public service, police and corrections personnel; common training and development programs; and regular consultations between senior officers.¹¹⁸

Monitoring and dispute resolution procedures were also framed as cooperative and jointly shared between both levels of government. The BPA required that the implementation of autonomy arrangements would be overseen by a Joint Supervisory Body, consisting of equal numbers of members representing the PNG Government and the ABG.¹¹⁹ The BPA left the details for the resolution of disputes to be determined in the drafting of constitutional changes to give effect to the BPA, noting only that disputes that could not be resolved by consultation should be able to be taken to court.¹²⁰ The PNG Constitution accordingly sets out a range of mechanisms for resolving disputes. These include consultation between officials and through the Joint Supervisory Body, mediation and arbitration and commissioning a panel of experts to provide advice, with adjudication as a final resort.¹²¹ The PNG Constitution also provides for joint reviews of the arrangements for autonomy every five years by the PNG and Bougainville Governments.¹²²

Cooperation between institutions was seen as a way to reduce duplication and costs, and to maintain the benefits of a single legal and administrative system.¹²³ Cooperative arrangements were also a way to make some of the more controversial aspects of autonomy, such as separate police, public service and courts, more acceptable to PNG decision makers, reassuring them of continuing involvement in the government of Bougainville.¹²⁴ More fundamentally, the arrangements for shared rule seek to reflect the idea of the peace agreement as a 'joint creation', and its implementation as a 'joint responsibility' of both levels of government.¹²⁵

3.4 Referendum

A key pillar of the BPA was amendment of the PNG Constitution to guarantee a referendum on the future political status of Bougainville.¹²⁶ The BPA set out 'agreed principles' on the referendum, including that the choice put to the people would include separate independence for Bougainville; that the outcome would be subject to ratification by the PNG Parliament; and that the referendum would be held no earlier than 10 years and no later than 15 years after the election of the first government of Bougainville; and when conditions of good governance and weapons disposal had been met.¹²⁷ The Governments of PNG and Bougainville were to cooperate to ensure that these conditions would be met.¹²⁸

¹¹⁷ *Bougainville Peace Agreement* arts 84 (quarantine), 92 (international civil aviation, international shipping, international trade, and post), 114 (Public Service, Police and Corrections); *Organic Law on Peacebuilding in Bougainville 2002* ss 16, 24, 33.

¹¹⁸ *Bougainville Peace Agreement* art 192; *Organic Law on Peacebuilding in Bougainville 2002* s 12.

¹¹⁹ *Bougainville Peace Agreement* art 264.

¹²⁰ *Bougainville Peace Agreement* arts 266-7.

¹²¹ *Constitution of Papua New Guinea 1975* ss 333-6.

¹²² *Constitution of Papua New Guinea 1975* s337.

¹²³ Regan, 'Autonomy and Conflict' (n 63) 430-1.

¹²⁴ Regan, 'Resolving the Bougainville Self-Determination Dispute' (n 106) 142.

¹²⁵ Regan, 'Autonomy and Conflict' (n 63) 448; Edward Wolfers, "'Joint Creation": The Bougainville Peace Agreement - and Beyond' in Andy Carl and Lorraine Garasu (eds), *Accord: Weaving Consensus - The Papua New Guinea-Bougainville Peace Process* (Conciliation Resources, 2002) 44.

¹²⁶ *Bougainville Peace Agreement* art 309.

¹²⁷ *Bougainville Peace Agreement* pt C.

¹²⁸ *Bougainville Peace Agreement* arts 313(b), 321.

The BPA required that the referendum would be conducted in accordance with constitutional arrangements, to be put into effect through constitutional amendments and organic laws, to be passed together.¹²⁹ The constitutional amendment largely reflected the terms of the BPA.¹³⁰ Much of the detail was left to the Organic Law, including the establishment of an agency to administer the referendum. Schedule 1 of the Organic Law set out rules relating to the conduct of the referendum covering the voters' roll, the conduct of polling, qualifications to vote, the form of the writ for the referendum, advertising and petitions disputing the result. These rules are expressed to be 'for information only' and do not form part of the law.¹³¹ Many issues were left to be determined by later agreement between the two levels of government.

3.5 Conclusion

The purpose of this section has been to describe how the constitutional commitments made in the BPA were included in the text of the PNG Constitution and the accompanying Organic Law. The clear and comprehensive incorporation of these commitments into constitutional form as required by the BPA demonstrates the success of textual implementation in the Bougainville case study.

4 Substantive implementation

Effective textual implementation contributed to the early positive record of the implementation of the BPA. The issues that subsequently emerged derived from the challenge of *substantive* implementation of the constitutional arrangements. Constitutional implementation involves more than alteration of constitutional text, important though the latter may be. It extends to the effectiveness of textual changes in practice, including through application, interpretation and internalisation in the behaviour of institutions, officials and the people.

As outlined in Part I, these dimensions of implementation can be categorised as:

- *Technical implementation* of constitutional provisions by, for example, enacting legislation that the constitution requires, establishing institutions and making appointments;
- *Interpretation* of generally framed provisions and principles of the constitution, in the course of applying the Constitution and in dispute resolution; and
- *Cultural change* so that the principles, practices and values of the new constitution are observed by those who have responsibility for exercising public power and reflected in the life of the state.

Constitutional implementation in this sense gives rise to distinctive issues and is affected by factors that are not necessarily taken into account in assessments of the implementation of peace agreements.

This section examines the substantive implementation of each of the four constitutional inclusion mechanisms included in the BPA and set out in sections 3.1 to 3.4. It seeks to identify both problems of substantive constitutional implementation which might jeopardise sustainable peace and successes of implementation that help to secure peace.

¹²⁹ *Bougainville Peace Agreement* art 314.

¹³⁰ *Constitution of Papua New Guinea 1975* ss 338-343.

¹³¹ *Organic Law on Peace-Building in Bougainville 2002* s 61(2).

4.1 The quality of autonomy for Bougainville

To give substantive effect to autonomy, Bougainville needed a transfer of powers and resources from PNG (discussed in subsection 4.2). Critically, however, it also needed to develop effective political institutions to sustain autonomy and, more generally, to 'constitute' a sense of itself as a polity.¹³²

The first step was for Bougainville to make a Constitution for autonomous government in accordance with the procedures and substantive requirements set out in the BPA and reflected in the PNG Constitution and Organic Law. Consistently with these requirements, the Constitution of the Autonomous Region of Bougainville was drafted over the course of 2002-03 by a broadly representative Constitutional Commission, which conducted a series of public consultations, and was ratified by a Constituent Assembly. It was endorsed by the PNG Parliament in December 2004.¹³³

The promulgation of the Bougainville Constitution represents another success of textual constitutional implementation. The process of constitution-making in Bougainville, however, also contributed to substantive implementation, and the dimension of cultural change in particular. The constitution-making process continued the inclusive, consensus-building qualities of the peace process. The Constitutional Commission included representatives of a wide range of interest groups, including from business, the trade unions, youth, diaspora, and churches. Efforts were made to ensure that the women representatives, local-level government representatives and former combatants were drawn from each of the three regions of Bougainville.¹³⁴ The self-proclaimed Me'ekamui Government – established by Bougainville Revolutionary Army leader Francis Ona and in control of the 'no-go' zone around Panguna, the site of the mine at the centre of the conflict – was invited to nominate representatives to the Commission, although it did not participate.¹³⁵ The timeframe for deliberation was left open, providing the opportunity for public consultations on proposals and amendments. Drafts were amended in light of feedback from public consultations and negotiations with the PNG Government, which, under the BPA and PNG Constitution, needed to endorse the Bougainville Constitution.¹³⁶

As the Constitutional Commission hoped, these features of the constitution-making process themselves contributed to peacebuilding. Peacebuilding was encouraged by the 'consultative and inclusive' process and by mechanisms that encouraged 'previously opposed groups to cooperate'.¹³⁷ Wallis argues that participatory constitution making generated a sense of a common Bougainvillean identity and unified political leaders.¹³⁸ In this, the participatory process for making the Bougainville Constitution sought to lay a strong groundwork for local ownership and understanding of the provisions of the Bougainville Constitution and the cultural changes required as Bougainville moved from conflict to peace and from a province of PNG to an autonomous region.

Building the institutions of government set out in the Bougainville Constitution required attention to the technical dimensions of substantive implementation. The conflict had fractured the existing structures of the former provincial government. The BPA also provided for the creation of additional

¹³² Joseph Kabui, 'Peacebuilding and Consolidation' in Andy Carl and Lorraine Garasu (eds), *Accord: Weaving Consensus - The Papua New Guinea-Bougainville Peace Process* (Conciliation Resources, 2002) 64, 65.

¹³³ For overview of the process, see Wallis (n 66) 212–226.

¹³⁴ Ibid 215.

¹³⁵ Ibid 215, 243. On the Me'ekamui government generally, see Ibid 242–7.

¹³⁶ *Bougainville Peace Agreement* art 22; *Constitution of Papua New Guinea* s 283.

¹³⁷ Bougainville Constitution Commission, *Report*, 18, quoted in Wallis (n 66) 240.

¹³⁸ Ibid 322.

institutions that Bougainville, as a province, had never had. As a result, many institutions had to be established anew.

The institutions of government provided under the Bougainville Constitution took some time to put in place. The legislature (the Bougainville House of Representatives) and the executive branch of government (President and Executive Council) were set up relatively quickly, with both coming into operation in 2005, a year after the Bougainville Constitution was endorsed. The Bougainville police force, has been in operation since 2003 under a national legal framework.¹³⁹ The establishment of other institutions of government, was, however, delayed. Although elections were held in Bougainville in 2005, 2010 and 2015, the first two elections were managed by the PNG Electoral Commission. The Bougainville Electoral Commissioner was not mandated until 2014 and ran its first election in 2015.¹⁴⁰ Legislation to create the Bougainville public service was enacted in 2014, following the transfer of powers from the national level. A new system of local government was established by legislation in 2016.¹⁴¹ A separate court system for Bougainville, as provided under the BPA and the PNG Constitution, is yet to be established. In 2017, the National PNG Ombudsman Commission opened an office in Bougainville, pursuant to an MOU between it and the ABG. Although part of the national Ombudsman Commission, the establishment of this office was regarded as a significant step in autonomy because it provided a level of oversight of the increasing functions and responsibilities of the ABG.¹⁴²

Various reasons have been given for the delays in establishing a more complete set of governance structures for an autonomous Bougainville. In the assessment of the 2013 *Joint Review of Bougainville's Autonomy Arrangements*, political indecisiveness, the absence of a clear 'whole of government' strategy and timetable for autonomy, and poor coordination between the Governments of PNG and Bougainville all contributed to the delay.¹⁴³ Writing in 2012, Regan concluded that the partial establishment of the institutions of the ABG was due to financial constraints and limitations in personnel affecting the ABG.¹⁴⁴ On this view, the difficulty was attributable in part to the slow fiscal transfers from the PNG Government (discussed in subsection 4.2 below), as well as to the difficulties that the ABG faces in attracting and retaining public servants from other parts of PNG.¹⁴⁵

In this context, substantive implementation also requires that new institutions operate effectively in practice. Appointments must be made, officials may require training and support to develop new skills, and new operating policies and procedures need to be developed. In addition, cultural adaptation is likely to be needed, to change established assumptions and patterns of behaviour by political leaders and government officials. In Bougainville, building the institutions of an autonomous Bougainville government required the culture and practices of parliamentarians, constitutional officials and public servants of both Bougainville and PNG to adapt to Bougainville's new status. For example, the existing skill-set of Bougainville public servants meant that many were more experienced in service delivery

¹³⁹ McKenna (n 48) ch 2.

¹⁴⁰ 'Office of the Bougainville Electoral Commissioner' <<http://www.abg.gov.pg/government/electoral-commissioner>>.

¹⁴¹ *Bougainville Community Government Act 2016*. See also 'Department of Community Government' <<http://www.abg.gov.pg/government/departments/community-government>>.

¹⁴² Tanya Lahies, 'Ombudsman Commission Office for Bougainville', *Autonomous Bougainville Government: Media Release* (online at 15 May 2017) <<http://www.abg.gov.pg/index.php/news/read/ombudsman-commission-office-for-bougainville>>.

¹⁴³ *Joint Review of Bougainville's Autonomy Arrangements by Government of Papua New Guinea and the Autonomous Government of Bougainville* (2013) 59–61.

¹⁴⁴ Regan, 'Autonomy and Conflict' (n 63) 428.

¹⁴⁵ Nisira (n 65) 7.

than in creating and leading policy change.¹⁴⁶ Similarly, in PNG, the delay in responding to requests for action under the new arrangements, described in the next subsection, suggests that politicians and bureaucrats there were slow to adapt to the new reality.

In Bougainville, substantive implementation of self-government faced the additional challenge of effectively connecting the new form of government to the people. For many communities in Bougainville, customary and religious governance structures have a greater presence in the day to day lives of the people. However, Masono reports that the people also had high expectations that autonomy would result in better services and outcomes for the people.¹⁴⁷ The quality of autonomy for Bougainville is therefore also affected by the ABG's capacity and effectiveness in providing basic services of government across the whole of Bougainville, which requires both power and resources, issues considered in subsection 4.2.

4.2 The transfer of powers and resources

Autonomy for Bougainville in practice required the ABG to be given and to accept responsibility for a greater range of government functions. It was recognised from the outset, however, that while the exercise of greater law-making authority was an important dimension of autonomy, it would take time and additional resources for Bougainville to develop the capacity to administer new functions and exercise new powers.¹⁴⁸ The result was that the BPA and the PNG Constitution provided for a gradual transfer of powers and continued financial support from PNG to Bougainville. These provisions, outlined in subsection 3.2, demonstrate the attention that negotiators to the BPA paid to issues of the implementation, which, in itself, has contributed to substantive constitutional implementation. Despite these efforts, however, issues of implementation have arisen in practice. This section focuses on two problems in particular: the slow progress on the transfer of powers, reflecting the complexities of implementation on the part of both the Bougainville and PNG Governments; and shortcomings in the financial support provided by the PNG Government to Bougainville.

Transfer of powers

The BPA, in terms that subsequently were reflected in the Constitutions of PNG and Bougainville, set out a process whereby the ABG would 'draw down' on the powers available to it when the ABG considered that it had the capacity and resources to exercise those powers. Until a power was transferred to the ABG, the PNG Government would retain responsibility for its exercise.

The legal process for transfer meant that transfers would necessarily take some time. The PNG Constitution required that Bougainville initiate a transfer by giving 12 months' notice of its intention to seek the transfer. The two Governments are then required to jointly prepare agreed plans for cooperating to implement the transfer, including agreeing upon 'criteria, indicators and targets of capacity and resources available to or required by the Bougainville government'. Where the transfer involves an institution or service organised on a national basis, the Governments have to agree a plan for its division, or if that is not viable, for cost-sharing.¹⁴⁹ The transfer of powers with respect to mining provides one example of the time taken for successful implementation. Bougainville requested the transfer of powers over mining, oil and gas in November 2006. With assistance from the World Bank,

¹⁴⁶ Ibid 6; Edward Wolfers, *Bougainville Autonomy: Implications for Governance and Decentralisation* (State Society and Governance in Melanesia, 2006) 7.

¹⁴⁷ Raymond Masono, *Government Capacity and Citizen Expectations in Bougainville: The Impact of Political Autonomy* (Crawford School of Economics and Government, Policy and Governance Discussion Paper 06-08, 2006).

¹⁴⁸ Braithwaite et al (n 52) 59; Nisira (n 65) 3; Regan, 'Autonomy and Conflict' (n 63) 432.

¹⁴⁹ *Organic Law on Peacebuilding in Bougainville 2002* s 3.

the transfer process began in 2008, when the Governments signed an MOU outlining a 15-step process for the transfer. This resulted in a joint plan, again supported by the World Bank, to establish a mining department in the ABG. Implementing legislation – the Mining Act – was passed by the Bougainville House of Representatives in 2015.¹⁵⁰

The ABG has been selective in the powers it sought to draw down. The 2013 *Joint Review of Bougainville's Autonomy Arrangements* noted that while the ABG had, to that date, requested the transfer of 34 different powers, the status of implementation varied. In relation to some, a notice of intention to transfer the powers had been given to the PNG Government; in others a MOU had been signed; while in others again the Bougainville Executive Council was yet to approve a policy paper or legislation.¹⁵¹ In her study, conducted in 2018, McKenna notes that many of the powers drawn down by the ABG had yet to be given effect in legislation.¹⁵² As McKenna acknowledges, it is difficult to assess the exact number of powers completely transferred to Bougainville, partly because the process is piecemeal and conducted at the level of the relevant government departments and partly because the use of MOUs rather than legislation to implement transfers has become common.¹⁵³

The complexity of the transfer process is one reason for the slow take up and transfer of powers to Bougainville. The legal process requires assessments of capacity, implementation plans and ongoing negotiations between political leaders, bureaucrats and service providers. The involvement of different personnel and a range of different government departments and agencies, depending on the nature of the function to be transferred, presents further problems of capacity, expertise and coordination.¹⁵⁴ As it has developed, the process for transfers is often ad hoc, and as a result, there is varying degrees of compliance with the procedures set out in the law. The 2013 Joint Review was critical of the use of bilateral agency-to-agency MOUs, which it characterised as more akin to delegations than transfers, and which did not always fulfil the assessment and timing obligations required by the Constitution and Organic Law.¹⁵⁵

In a somewhat belated effort to address these issues of technical implementation, on 20 March 2017 the two Governments signed an overarching MOU to guide future transfers. This MOU was intended to help the various agencies within the two levels of government to prepare for transfers and to address problems of coordination.¹⁵⁶ As no transfer has been completed since this overarching MOU was made, it is too early to be clear whether, and how, it has assisted in the process for transferring powers. It may be that it adds yet another layer of complexity and slows the process further. The signing of the MOU does, however, indicate a willingness by the two Governments to find workable ways to support the transfer of powers and progress to autonomy, learning from past experiences.

Regan suggests that in addition to the complexity of the process, the attitudes of some ministers and bureaucrats in PNG may also have inhibited the transfer of powers.¹⁵⁷ This points, once again, to the importance of cultural change to substantive implementation of new constitutional arrangements, especially where they involve the devolution of powers. Wallis describes how some PNG bureaucrats

¹⁵⁰ McKenna (n 48) 10.

¹⁵¹ *Joint Review of Bougainville's Autonomy Arrangements by Government of Papua New Guinea and the Autonomous Government of Bougainville* (n 143) 8–9.

¹⁵² McKenna (n 48) 10.

¹⁵³ *Ibid* 10–12.

¹⁵⁴ Regan, 'Phases of the Negotiation Process' (n 61) 36.

¹⁵⁵ *Joint Review of Bougainville's Autonomy Arrangements by Government of Papua New Guinea and the Autonomous Government of Bougainville* (n 143) 73–5.

¹⁵⁶ McKenna (n 48) 11.

¹⁵⁷ Regan, 'Autonomy and Conflict' (n 63) 434.

and officials continue to regard Bougainville as ‘just another province’ of PNG.¹⁵⁸ This perhaps illustrates a lack of institutional knowledge about the BPA and its purposes, as well as a failure in the institutional cultures of the PNG Government to adapt to the different requirements of autonomy for Bougainville, which is not uncommon in contexts where powers that were held by the centre are devolved to other levels of government.¹⁵⁹ Other interpretations of the reasons for slow transfers are also possible. Regan has suggested that some officials in PNG regard Bougainville as moving inevitably to independence, and therefore not entitled to assistance from PNG, or have a tendency to see ‘implementation of aspects of the autonomy arrangements as optional’.¹⁶⁰ If this is indeed the case, this attitude is more problematic: it presumes a particular outcome of the referendum and, in doing so, hinders the effective implementation of the autonomy for Bougainville provided for in the BPA. The critical point is that the process for the transfer of powers provided the PNG government with an opportunity to demonstrate its capacity to provide central leadership and deliver on the commitments to autonomy for Bougainville, but shortcomings in implementation have compromised its ability to do so.

The effective exercise of powers devolved to Bougainville is an essential aspect of autonomy. Potentially, it could inform a future decision by the people of Bougainville either to remain as a significantly autonomous unit within PNG or to seek independence. Delays in the transfer of powers may be understandable in light of the challenges of technical implementation and cultural change identified here. However, it has significant implications on the ground in Bougainville. The 2013 *Joint Review* observed that there was considerable confusion among the people of Bougainville about which level of government is responsible for what issues, fuelled by the delayed and gradual process for the transfer of powers itself. It found that autonomy arrangements had limited social impact on the lives of the people, some of whom still did not have the benefit of access to all essential government services.¹⁶¹ This assessment, from 2013, might now be different, with the passage of the *Community Government Act 2016* and establishment of local councils. The point, however, is that perceived shortcomings in the effective implementation of the constitutional provisions for autonomy has the potential to undermine the confidence of the people in autonomous government.

Transfer of resources

The BPA recognised that Bougainville would, at least in the short term, be financially dependent on PNG. While Bougainville has some constitutionally protected sources of revenue of its own, these have been far from sufficient to fund the recurrent budget on a sustainable basis, both because of limited revenue options and reluctance on the part of the ABG to utilise the options it has because of political sensitivities (about mining) or capacity issues (for example in effective tax collection).¹⁶² The BPA, in terms reflected in the PNG Constitution, committed the PNG Government to providing various annual grants to the ABG (outlined in subsection 3.2). The *design* of the fiscal arrangements to support an autonomous Bougainville has been criticised for failing to provide incentives for the ABG to develop its own local economy¹⁶³ or for PNG to contribute additional funds, as it was expected (but not

¹⁵⁸ Wallis (n 66) 264.

¹⁵⁹ See generally, Melbourne Forum on Constitution Building in Asia and the Pacific, *Constitutional INSIGHTS No 2: Implementing Federalism* (Constitution Transformation Network and International IDEA, 2018)

¹⁶⁰ Regan, ‘Autonomy and Conflict’ (n 63) 442–3.

¹⁶¹ *Joint Review of Bougainville’s Autonomy Arrangements by Government of Papua New Guinea and the Autonomous Government of Bougainville* (n 143) 29.

¹⁶² In 2016, the revenue generated internally in Bougainville was approximately 10% of the total government recurrent expenditures: Chand (n 50) 2.

¹⁶³ *Ibid* 17–18; Satish Chand, ‘Fiscal Decentralisation in a Divided State: Bougainville in Papua New Guinea’ (2018) 46(4) *Federal Law Review* 541.

obliged) to do, in an effort to generate support for a vote for Bougainville to remain part of PNG at the referendum.¹⁶⁴

Our interest here, however, is any shortfalls in the *implementation* of the constitutional arrangements. The most serious problem in this regard has been repeated delays and underpayment of the annual restoration and development grant by the PNG Government. In 2010 and 2011, the PNG Government did not include payment of the restoration and development grant in the National Budget at all, claiming that the funding was or would be provided through other means. The grants were eventually paid (14 and 10 months late respectively) after the ABG raised its concerns through the Joint Supervisory Body.¹⁶⁵

Disputes over the payment of grants have continued. The ABG has argued that the amount of the restoration and development grant has not been properly calculated in accordance with the legal requirements, resulting in significant underpayment.¹⁶⁶ The ABG has, however, been reluctant to seek to unilaterally enforce PNG's constitutional commitments through the courts.¹⁶⁷ For example, in 2016 and again in 2017, the ABG threatened, but did not pursue, legal action over further non-payment of grants.¹⁶⁸ In 2018, the Joint Supervisory Body adopted a resolution that the two levels of government jointly appoint an expert to advise on the correct approach to calculating the grant, and if the governments cannot agree on the advice provided, a joint reference should be made to the Supreme Court for a binding ruling on the issue.¹⁶⁹ Despite assurances from the then Prime Minister of PNG, Peter O'Neill, that the funds would be paid, in June 2019 ABG President John Momis continued to raise the issue with the new PNG Prime Minister James Marape.¹⁷⁰

Shortcomings in the implementation of this aspect of the constitutional commitments in the BPA, combined with the ABG's limitations in generating and collecting its own sources of revenue, have significant implications for the substantive implementation of other aspects of autonomy. The unpredictable timing in the payment of grants affect the ABG in its planning, service delivery and accountability. During the autonomy period, the restoration and development grant has effectively provided the only funds to spent at the discretion of the ABG (recurrent grants meet the costs of the public service and the police; internal revenue covers the costs of running the political institutions of government; while specific purpose grants from the PNG Government and funds from international donors are conditional and tied to achieving particular outcomes).¹⁷¹ Nisira claims that, as a result, the ABG is in practice reduced to oversight of basic service delivery, rather than autonomous government.¹⁷² The disputes over whether the PNG Government has met its financial commitments to Bougainville also allow the ABG to deflect responsibility for any of shortcomings in its own performance in service delivery or governance.

¹⁶⁴ Regan, 'Autonomy and Conflict' (n 63) 421.

¹⁶⁵ Ibid 442.

¹⁶⁶ Ibid 438; Nisira (n 65) 10.

¹⁶⁷ Regan, 'Autonomy and Conflict', above n 55, 443.

¹⁶⁸ 'Date for Bougainville Independence Referendum Set in 2019', *Radio New Zealand* (online at 23 May 2016) <<http://www.pireport.org/articles/2016/05/23/date-bougainville-independence-referendum-set-2019>>; 'Bougainville to Take PNG Govt to Court over Money Woes', *Radio New Zealand* (online at 29 May 2017) <<https://www.rnz.co.nz/international/pacific-news/331786/bougainville-to-take-png-govt-to-court-over-money-woes>>.

¹⁶⁹ Meeting of the Joint Supervisory Body, 'Agreed Record of Outcomes' (Arawa, Autonomous Region of Bougainville, 29 June 2018), 8.

¹⁷⁰ 'Momis Tips Marape on Aspects of Referendum', *Post Courier* (online at 5 June 2019) <<https://postcourier.com.pg/momis-tips-marape-aspects-referendum/>>.

¹⁷¹ Regan, 'Autonomy and Conflict' (n 63) 435.

¹⁷² Nisira (n 65) 10.

4.3 Shared rule

The challenges of constitutional implementation in devolving power and resources to Bougainville were, to some extent, recognised and addressed in the BPA, in ways that might be described in terms of shared rule. As explained in subsection 3.3, the constitutional mechanisms for shared rule placed less emphasis on the formal representation of Bougainville in the institutions of the national government, and more emphasis on close consultation and cooperation between the two levels of government. The arrangements for ‘shared rule’ between PNG and Bougainville are thus of a distinctive type, arising less from the idea of shared rule in the centre, than the idea that both levels of government share a ‘joint responsibility’ for implementing the BPA.

As noted in subsection 3.3, the BPA did not provide for any special degree of representation of Bougainville in the PNG Parliament, a common mechanism of shared rule. However, in the course of peace negotiations, it was agreed that Bougainville would continue to have a similar degree of representation in the PNG Parliament as the provinces of PNG. This subsection first assesses the effect on substantive constitutional implementation of this form of shared rule, before turning to consider the implementation of the extensive constitutional requirements for consultation and cooperation between the two levels of government.

Representation at the national level

While not reflected in the terms of the peace agreement, the presence of Bougainville representatives in the PNG Parliament was initially regarded as a mechanism that might support the implementation of autonomy. This has not necessarily been the case in practice, however, as the political interests of the Bougainville members of the PNG Parliament are not always aligned with those of the ABG.¹⁷³ The elected Bougainville members of the PNG Parliament share a claim to the ‘legitimate’ leadership of Bougainville with the ABG and elected representatives within Bougainville, creating competing political structures.¹⁷⁴ The fact that Bougainville members of the National Parliament receive ‘Service Improvement Program’ funds to spend in their constituencies at their discretion, in ways that are not always coordinated with the ABG, further complicates accountability for the provision of government services and how constituents see their representatives in each level of government. This tension offers an example of how entrenched political structures at the national level can provide incentives to retain the status quo, rather than adapt to the new constitutional structures of autonomy.

A Parliamentary Bipartisan Committee on Bougainville Matters was established within the PNG Parliament following the 2013 Joint Review of Autonomy Arrangements.¹⁷⁵ Committee members comprise Members of Parliament from Bougainville and from other PNG constituencies. The Committee is charged with meeting with Bougainvilleans and reporting to the PNG Parliament on matters affecting the people of Bougainville. It is anticipated that this Committee will have a key role in informing the PNG Parliament on the results of the referendum. It has been noted, however, that its work has been hampered by limited access to funding and other support, and has been disrupted by the change in membership after national elections.¹⁷⁶ Instability within the PNG Parliament as a result of the resignation of PNG Prime Minister O’Neill in May 2019 and the appointment of James

¹⁷³ Wallis (n 66) 266.

¹⁷⁴ *Report of the Parliamentary Bipartisan Committee on Bougainville Affairs* (Papua New Guinea Parliament, 2018).

¹⁷⁵ *Joint Review of Bougainville’s Autonomy Arrangements by Government of Papua New Guinea and the Autonomous Government of Bougainville* (n 143) resolution 18.3.e.

¹⁷⁶ Cedric Patjole, ‘Bipartisan Committee Hampered’, *PNG Loop* (online at 16 February 2019) <<http://www.looppng.com/png-news/bipartisan-committee-hampered-82559>>.

Marape in that position may also impact on the Parliament's engagement with the Bougainville referendum result.

Consultation and cooperation between the levels of government

The BPA and PNG Constitution provided several avenues for the continued involvement of PNG in the governance of Bougainville. The most common is the constitutionally enshrined requirement that Bougainville authorities consult PNG counterparts on various appointments and procedures. It is not easy to determine how well this works in practice. It is likely that much depends on the quality of the working relationships between individuals and institutions in the Bougainville and PNG Governments. There have been occasions where different interpretations of constitutional requirements have arisen, but not been resolved through consultation. One example involved a dispute over the power of the ABG to appoint senior public servants. The Organic Law vests this power in the ABG, in consultation with relevant PNG agency. For 30 months over the years 2007-2010 appointments were stalled because PNG officials insisted that the constitutional law was silent on the question of appointments and as a result PNG was the appointing authority. This disagreement was not resolved through any of the formal dispute resolution procedures. In the end, the ABG proceeded to make the appointments unilaterally.¹⁷⁷ This is an example of consultation – and disagreements over constitutional interpretation – delaying, rather than facilitating, the technical implementation of a constitutional requirement.

This example points to the critical role of trust in intergovernmental relations in constitutional implementation in the context of peace-building. The emphasis placed on consultation and cooperation by the BPA and the PNG Constitution require the levels of government to work together, taking 'joint responsibility'. This is a difficult thing to do when the constitutional change is directed to devolving powers from a formerly strong central government to a new regional government. It is even more fraught when there is distrust between leaders and officials in the governments. 'Soft' intergovernmental relations between personnel and agencies have been more successful vehicles for resolving disputes and working together than the formal institutions of shared rule, such as representation in the national parliament and its committees and the formal joint dispute resolution procedures. This might reflect the political cultures of PNG and Bougainville, which place greater emphasis on negotiation, consensus and interpersonal trust, rather than the formal institutions of parliamentary government.

4.4 Preparations for the referendum

The BPA and the PNG Constitution require that the referendum be held by or before mid-2020. They also require that independence be one of the options put to the people at referendum. The referendum is not binding in the sense that the BPA and PNG Constitution require the result to be ratified by the PNG Parliament.

Much of the detail for conducting the referendum was left to be determined between the two governments. In 2013, the *Joint Review of Autonomy Arrangements* identified a range of unresolved, but critical, organisational issues including: the budget to fund the referendum; the body to conduct the referendum; how the two governments would agree on the administrative arrangements for the referendum; eligibility to vote; and the choices to be included on the ballot.¹⁷⁸ Although urged to start preparations early, substantial preparations began in earnest only in 2017. Through meetings of the

¹⁷⁷ Regan, 'Autonomy and Conflict' (n 63) 430.

¹⁷⁸ *Joint Review of Bougainville's Autonomy Arrangements by Government of Papua New Guinea and the Autonomous Government of Bougainville* (n 143) 90–3.

Joint Supervisory Board, the two Governments eventually reached agreement and on the eligibility of non-resident Bougainvilleans to vote in the referendum and on the establishment of the Bougainville Referendum Commission to conduct the referendum.¹⁷⁹ This Commission was established in January 2017, although the Charter setting out the Commission's responsibilities took some further time to settle. The date for the referendum was set down for 15 June 2019. By June 2018, the financial and other support that PNG would provide for the referendum was agreed. The question to be put at referendum: "Do you agree for Bougainville to have (i) Greater Autonomy or (ii) Independence?" was finalised and announced in October 2018. In March 2019, the Joint Supervisory Body postponed the date for the referendum to 12 October 2019, providing more time for necessary procedures such as voter registration and the provision of information to voters. In 2019, the PNG Government promised to meet its funding commitments to support the referendum, but in May of that year, Bougainville leaders expressed concerns that the full amount had not been paid.¹⁸⁰

Unlike the other constitutional inclusion mechanisms under the BPA, there is a strict deadline for the referendum. This has given the implementation of the referendum a different impetus to the implementation of other constitutional inclusion mechanisms, which, without a strict deadline, have been characterised by taking time to develop consensus within Bougainville and with PNG. Similar consensus-building has not characterised preparations for the referendum. For example, PNG's former Prime Minister, Peter O'Neill, who presided over much of the period of referendum preparation, stated repeatedly that 'PNG has no interest in thinking about independence' and that the PNG Parliament might refuse to ratify a vote for independence, or that the referendum itself might not proceed because key conditions for the vote had not been met.¹⁸¹ There have also been questions, from various sources, which have not (yet) been seriously pursued, that the constitutional provisions underpinning the referendum on independence are unconstitutional.¹⁸²

Delays in determining key details of the referendum and uncertainty about the PNG Government's response present a risk to peace and stability in Bougainville. The President of Bougainville, John Momis, has expressed concerns that outbreaks of civil unrest, of the kind experienced most recently in Bougainville in March 2019, could threaten the outcome of the referendum.¹⁸³ There is mistrust and suspicion about PNG's intentions, and the risk that this might be further complicated by political instability in PNG. In May 2019, the Prime Minister, Peter O'Neill resigned, and James Marape took on the Prime Ministership in a relatively smooth political transition. Early meetings between the new

¹⁷⁹ McKenna (n 48) 27–8.

¹⁸⁰ 'MP Appalled at Ongoing Funding Delay for Bougainville Vote', *Radio New Zealand* (online at 27 May 2019) <<https://www.rnz.co.nz/international/pacific-news/390622/mp-appalled-at-ongoing-funding-delay-for-bougainville-vote>>.

¹⁸¹ Rowan Callick, 'O'Neill Rules out Splitting PNG', *The Australian* (16 September 2015) 13; Eric Tlozek, 'Bougainville Independence Referendum "May Not Be Possible": PNG PM', *ABC News* (online at 27 September 2017) <<https://www.abc.net.au/news/2017-09-27/png-pm-casts-doubt-over-bougainville-independence-referendum/8990692>>.

¹⁸² See eg 'The Constitutional Requirements for the Bougainville Referendum', *Autonomous Bougainville Government: Media Release* (online at 30 July 2018) <<http://www.abg.gov.pg/index.php/news/read/the-constitutional-requirements-for-the-bougainville-referendum>>. It was also reported that the PNG Government had considered taking a constitutional reference to the Supreme Court, should Bougainville vote in favour of independence, but that it had dropped this proposal by March 2019: 'Momis Says Latest Activities Not Good for Bougainville', *New Dawn on Bougainville* (online at 3 March 2019) <<https://bougainville.typepad.com/newdawn/2019/03/030319momis-says-latest-activities-not-good-for-bougainville-new-dawn-fm-news-abg-president-grand-chief-drjohn-momis-says-c.html>>.

¹⁸³ 'Momis Condemns Violence', *Autonomous Bougainville Government: Media Release* (online at 4 March 2019) <<http://www.abg.gov.pg/index.php/news/read/momis-condemns-violence1>>.

Prime Minister and the President of Bougainville sought to ensure that the referendum in October is a priority for the new government.¹⁸⁴

The two Governments have sought to address some of these concerns about progress towards the referendum. Pursuant to a resolution of the Joint Supervisory Body, in April 2019 the two Governments produced a 'key messages and frequently asked questions' document, to provide information on the conduct of the referendum and the choice between 'independence' and 'greater autonomy'.¹⁸⁵ These two concepts were further defined by agreement in May 2019 between the President of the ABG, John Momis, and the then Prime Minister of PNG, Peter O'Neil, which provided that 'greater autonomy' would entail 'a negotiated political settlement that provides for a form of autonomy with greater powers than those currently available under constitutional arrangements'; while 'independence' would be an 'independent nation state with sovereign powers and laws, recognised under international law and by other sovereign states to be an independent state, separate from the State of Papua New Guinea'.¹⁸⁶ There have also been a number of community consultations, education campaigns, and research projects to assist the two Governments to plan for the referendum, and the people of Bougainville to make an informed choice at referendum.

The constitutional requirement for a referendum will not be fully implemented until the referendum is conducted, and the results are considered and ratified (or not) by the PNG Parliament. Much depends on the effective conduct of the referendum, the result, and the responses of the Bougainville and PNG Governments to it. The risk that any of these factors might cause instability and potentially re-ignite conflict in Bougainville is high. In an effort to ensure that, whatever the result of the referendum, both governments will have a joint position, the Joint Supervisory Body resolved in 2018 to establish a Post-Referendum Planning Taskforce, headed jointly by Ministers from the national government and ABG, to conduct 'post-referendum scenario planning' with an emphasis on ensuring peaceful acceptance of the result, consultation between the governments, and developing an agreed basis for the ongoing relationship between Bougainville and PNG.¹⁸⁷ The establishment of this body represents an awareness that implementation will not end with the referendum, but rather that PNG and Bougainville will continue to have a constitutional relationship.

5 Meeting the challenges of constitutional implementation

Drawing on the analysis of constitutional implementation in sections 3 and 4, this section provides some insights from Bougainville's experience on constitutional implementation for sustainable peace. It is necessarily an interim analysis: time (and the outcomes of the referendum) may shed further light on how critical issues of implementation were to sustainable peace. This section identifies five aspects of Bougainville's peace-building and constitution-making processes that have supported constitutional implementation with a view to identifying positive insights which might assist both the Bougainville peace into the future and inform peace building processes elsewhere.

¹⁸⁴ 'PM, Momis Meet to Discuss Implementation of BPA', *Post Courier* (online at 6 June 2019) <<https://postcourier.com.pg/pm-momis-meet-discuss-implementation-bpa/>>.

¹⁸⁵ *Bougainville Peace Agreement and Referendum: Key Messages and Frequently Asked Questions* (2019).

¹⁸⁶ 'Bougainville and PNG Govts Further Define Referendum Choices', *Radio New Zealand* (online at 13 June 2019) <<https://www.rnz.co.nz/news/pacific/391965/bougainville-and-png-govts-further-define-referendum-choices>>.

¹⁸⁷ Meeting of the Joint Supervisory Body, 'Agreed Record of Outcomes' (Arawa, Autonomous Region of Bougainville, 29 June 2018), 5-6. This body is supported by UN Peacebuilding Fund project 'Sustaining Peace in Bougainville'.

5.1 Clarity about the relationship between the Peace Agreement and the Constitution

The Bougainville case study is notable for the success of textual implementation. The terms of the BPA were clear about which provisions were to be incorporated into the PNG Constitution. The constitutional amendments and Organic Law were drafted by lawyers from within PNG and outside, in close cooperation with PNG Government and Bougainville representatives. The sequenced program for the implementation of the BPA and other political factors meant that the constitutional laws were enacted relatively quickly. The commitment of the PNG Government to the BPA ensured that the constitutional amendments received the necessary parliamentary majorities. The PNG Constitution explicitly provided for the status of the BPA, consistently with the terms of the BPA itself. This offered a strong legal foundation on the basis of which substantive implementation of the new arrangements could proceed.¹⁸⁸

The success of textual constitutional implementation in Bougainville provides some potential insights for dealing with the connections between peace agreements and constitutions in other contexts. Textual implementation was facilitated by the high level of detail about constitutionalisation included in the BPA itself.¹⁸⁹ Further, the relationship between the BPA and the PNG Constitution is relatively clearly defined and accepted: provisions in both documents make it clear that the constitutional provisions relating to Bougainville are to be read together with the BPA. Despite occasional threats of litigation, there has been no challenge to the constitutionality of the BPA or the constitutional amendments; nor has there yet been any need to determine which is 'higher law'.

An early and explicit emphasis on constitutionalisation and the prescriptive detail about constitutional provisions included in the BPA contributed to the success of textual implementation in Bougainville. Including a high degree of detail about constitutional amendments in a peace agreement does, however, carry some risks. First, because peace making and constitution making are separate processes, it may not always be possible to amend the constitution in line with the peace agreement. In PNG, constitutional amendment requires the support of a two-thirds majority of the national Parliament, and the requisite majority of the Parliament approved the amendments to the Constitution to reflect the BPA. Different considerations might arise where the procedure for constitutional amendment involves other stakeholders, such as a constituent assembly or a referendum. In all cases, there is the potential that the course of constitution making will require changes to the details set out in the peace agreement. Secondly, the constitutional commitments made in a peace agreement may not sit easily with the existing constitution. For example, where an existing constitution enshrines a unitary state, a commitment in a peace agreement to devolution or a degree of special autonomy might be resisted on the grounds that it is inconsistent with the constitution. These issues, while not pressing in the Bougainville case, demonstrate the need for peace agreements to be developed with an eye to both constitutional legitimacy and the potential difficulties of constitutional change.

There is also a risk that a commitment to constitutional change to implement a peace agreement will open the door to different constitutional issues and be diverted by other concerns. In the case of Bougainville, one concern centred on an apprehension, within PNG, that providing special autonomy for Bougainville would encourage other provinces in PNG to seek a similar status. This risk was managed by emphasising, throughout the peace process, that Bougainville was unique and that the circumstances of its conflict distinguished it from other regions in PNG. The form given to the

¹⁸⁸ Compare with the uncertain legal status of peace agreements in themselves: Bell (n 3).

¹⁸⁹ Bell notes that such precision is a feature in other peace agreements that provide for new political institutions or power sharing: Ibid 396–7.

constitutional amendment – the insertion of a stand-alone new chapter into the PNG Constitution – supported the sense that Bougainville was to have a special and unique status in PNG. The titles given to the constitutional laws, which are framed as laws for ‘Peacebuilding in Bougainville’ also emphasise the context of peace building, which was unique to Bougainville.¹⁹⁰ Some sense of Bougainville’s uniqueness may have eroded over time, however, as demonstrated for example by the suggestion that PNG officials and leaders tend to regard Bougainville as ‘just another province of PNG’.¹⁹¹ Notably, nevertheless, in recent years, the PNG Government has responded to continuing calls for more provincial autonomy by commissioning a review of options for increased devolution to sub-national units. A proposal to grant greater devolution based on the concept of ‘incentivised performance’, is under review,¹⁹² while several provinces have obtained a ‘graduated’ autonomy through the devolution of some powers from the national government.¹⁹³ The outcome of the referendum may have an impact on this debate, whether it favours independence or greater autonomy within PNG.

Despite the emphasis that the Bougainville parties placed on the constitutionalisation of the BPA and the success of textual implementation, Bougainville’s leaders have been reluctant to seek to enforce constitutional provisions in court. This should not, in itself, be regarded as a failure of implementation. The constitutionalisation of many terms of the peace agreement opened the door to judicial review of the actions – and failures to act – of government entities in implementing the constitutional commitments made in the peace agreement. Despite disputes about the non-payment and underpayment of grants from PNG, disagreements about the constitutional processes for making appointments, and some circumvention of the constitutional processes for the transfer of powers through the use of MOUs, constitutional litigation appears to be a last resort. PNG courts have a strong record of upholding claims by provincial governments against the PNG Government, so concerns about the court’s integrity was not at issue, as it might be in other state contexts. Rather, the reluctance to pursue constitutional litigation might be a strategic choice by the parties, in an effort to sustain effective intergovernmental relations in both the short and long term. It might also reflect the limited capacity and funds available to both levels of government, the personal and political links between leaders, and the preference in Melanesian politics for conciliation and consensus.¹⁹⁴

5.2 Delay and deferral

Both the autonomy and referendum pillars of the BPA provided for delayed substantive constitutional implementation. In relation to autonomy, the constitutional procedure for the gradual transfer of powers from PNG to Bougainville permitted the ABG to ‘draw down’ on its powers as its capacity to exercise those powers developed. The referendum on the future political status of Bougainville was deferred to a later date, within a specified window of time but without an explicit indication of how a vote in favour of independence would be handled, other than the requirement that the outcome be subject to ratification by the PNG parliament.

Provisions for delayed implementation have potential benefits both for sustainable peace and effective constitutional implementation. Delaying the significant question of independence for Bougainville contributed to the peace process by postponing the need for an immediate answer to a

¹⁹⁰ Eg, *Constitutional Amendment (Peace-Building in Bougainville – Autonomous Bougainville Government and Bougainville Referendum) Act 2002* (PNG); *Organic Law on Peace-Building in Bougainville, Autonomous Bougainville Government and Bougainville Referendum 2002* (PNG).

¹⁹¹ See Pt 4.2.

¹⁹² Kwa et al (n 84).

¹⁹³ Annmaree O’Keeffe, ‘Deciding the Future for PNG’s Provinces’, *The Interpreter* (19 October 2018) <<https://www.lowyinstitute.org/the-interpreter/deciding-future-png-provinces>>.

¹⁹⁴ Regan, ‘Autonomy and Conflict’ (n 63) 443.

controversial question, while providing mechanisms to address it at a later date after, ideally, greater trust had been built. The device gave different groups within Bougainville and PNG the incentive to participate in the peace process without the final terms being construed as a one-off 'winner-takes-all' negotiation.

Techniques of delay and deferral shift the focus of attention to an interim period of substantive constitutional implementation. It was expected that the PNG Government would use the time before the referendum to generate support for a vote that Bougainville remain part of PNG, by demonstrating that it could work with the ABG as the central level of government.¹⁹⁵ However, as the conflict became more distant, PNG politicians and government officials seemingly lagged on their constitutional commitments, while the wider economic environment prevented the PNG government from committing substantial discretionary additional financial support to Bougainville. This may have implications for sustainable peace, depending on the referendum result and how PNG politicians respond.

Deferring the referendum on independence also gave the ABG the opportunity and incentive to focus on implementing autonomy and to come to grips with the powers available to it under the new constitutional provisions. Deferring the referendum on independence ran the risk that pro-independence and pro-integration groups would harden their stances and maintain their differences. This risk was managed, however, as community peacebuilding led by churches and civil society has continued over time. The Me'ekamui, which refused to participate in the peace process and in constitution-making, has gradually come to participate in governance, as government services slowly extend into their region.¹⁹⁶ In 2017, several key factions committed to unite under the BPA, and work towards a united Bougainville in preparation for the referendum.¹⁹⁷ Many of the pro-independence and pro-integration leaders have, for now, been unified on seeking to present the people of Bougainville with a 'real choice' at the referendum, by showing that Bougainville is capable of self-government within or outside PNG.¹⁹⁸

Deferral comes with some risks, however. One is that the political contexts and the relationships between PNG and Bougainville change over time as the conflict has become more distant and the leaders who worked together to craft the BPA and the constitutional changes have departed public office. The passage of time, loss of institutional memory and changing interests mean that in the leadup and aftermath of the referendum in 2019, stakeholders cannot negotiate on the same terms and with the same sense of urgency as they did during and immediately after the conflict. Likewise, international actors involved in securing peace in 2001 might, nearly 20 years later, take a different position in a changing regional context. While enshrining the commitments made in the peace agreement in constitutional form provided one way to ensure that the commitments would outlast changes in personnel, relationships and context, this study has shown that people, relationships and context are as important to constitutional implementation as to peace negotiations. Deferral requires continued work to retain knowledge, continue personal connections and build new relationships.

The process for the gradual transfer of powers to the ABG provided for a different form of delayed implementation. It was intended to ensure that Bougainville would assume responsibility for exercising powers only when the ABG had capacity to do so. The process has caused some confusion and frustration, but this approach to supporting implementation has given Bougainville time to

¹⁹⁵ Ibid 421.

¹⁹⁶ Wallis (n 66) 242–7.

¹⁹⁷ *Bougainville Peace Agreement and Referendum: Key Messages and Frequently Asked Questions* (n 185) 14.

¹⁹⁸ Wallis (n 66) 242.

construct autonomy in its own way. Rather than the pressure of a strict timetable set out, for example, in a constitutional ‘implementation schedule’, the gradual approach provided the ABG with the opportunity to respond to local needs and priorities and develop its capacities in a sustainable way.¹⁹⁹ Although more capacity building is still required, the incremental approach to assuming full government responsibilities has provided the ABG with the opportunity to strengthen its capacities over time and has mitigated somewhat the ‘post-conflict fatigue’ that can sometimes undermine transitional governments and lead to public disenchantment.

5.3 Planning for implementation

Bougainville is a case in which the challenges of substantive constitutional implementation were expressly considered during the peace process and during constitution-making. It was recognised that, after the conflict, the physical infrastructure of Bougainville as well as the institutions, procedures and capacities of government would have to be rebuilt. The BPA acknowledged this, for example in the provisions for the gradual transfer of powers, ‘taking full account of needs and capacity’,²⁰⁰ and the requirement that Bougainville’s constitution making bodies and its legislature make decisions about Bougainville’s institutions of government ‘only after considering the costs likely to be involved ... and the administrative capacity necessary to implement them.’²⁰¹

The BPA and, subsequently, the provisions entrenched in the PNG Constitution, included a degree of prescriptive detail in relation to implementing key processes, the transfer of powers, consultation and cooperation between government officials and dispute resolution mechanisms. This approach has been successful, but it also carries risks.²⁰² A high level of detail can hinder implementation by mandating inflexible and complex procedures. The complexity of the procedures for the transfer of powers and cooperation between the levels of government in service delivery is one example where the level of detail might have hindered implementation. Another is the risk that implementation will be bogged down over disagreements about the legal interpretation of constitutional provisions.

In Bougainville, difficulties that might have arisen from the level of prescriptive detail have, so far, been mitigated by the inclination of both Governments to avoid litigation to determine disputes, preferring instead consultation through the Joint Supervisory Body or intergovernmental negotiations. The development in 2017 of the MOU to govern the procedures for the transfer of powers across the whole of government is another example of the use of pragmatic cooperation to resolve issues of complexity. The experience in Bougainville suggests that a balance between prescriptive detail and a degree of flexibility to accommodate new or unanticipated issues of implementation can be achieved. The gradual draw down of powers, for example, has left room for trial and error and the opportunity to address difficulties, sometimes in innovative ways.

5.4 Supporting people to embrace transformational change

Despite efforts to anticipate the challenges of implementation of the new constitutional arrangements, a range of issues has arisen. The most frequently cited barriers to substantive implementation concern questions of capacity and culture. Both relate to the need to ensure that people – both the general public and the bureaucrats and political leaders responsible for

¹⁹⁹ Braithwaite et al (n 52) 59–60.

²⁰⁰ *Bougainville Peace Agreement* art 101.

²⁰¹ *Bougainville Peace Agreement* art 34.

²⁰² Bell (n 3) 397–8.

implementing change – are actively engaged in supporting the constitutional transformation intended to underpin sustainable peace.

‘Culture’ here refers to the ingrained attitudes of leaders, government officials and the general public that influence the institutional norms and the practices of government. Cultural change in this sense is a necessary, but also difficult, pre-requisite for the successful implementation of new autonomy arrangements, particularly where the national government has, in the past, exercised a high degree of control and direction over regional or local governments. This has also been true in Bougainville and PNG. Bougainville inherited a public service and government grounded in a provincial, rather than an autonomous, relationship with the centre. PNG leaders and officials, on the other hand, are used to a highly centralised system, where provincial governments are largely dependent on the laws and policies of the national government. As noted in subsection 4.2, parts of the PNG bureaucracy have struggled to adapt to the cultural change required to support Bougainville autonomy, with reports that some continue to treat Bougainville as ‘just another province’ of PNG.²⁰³

Achieving the change in culture that is required when moving from unitary to devolved constitutional arrangements is difficult. It requires political leaders, officials and bureaucrats at both levels of government to adapt to the new idea that power is shared between them. During peace negotiations and in the immediate aftermath of the BPA, one way in which PNG and Bougainville sought to effect cultural change was by emphasising the importance of peace, focusing on the special status of Bougainville’s autonomy and what was at stake in the peace process. In Bougainville, which was most affected by the conflict, this overriding emphasis on peace has continued. Bougainville leaders, foremost among them the current President John Momis, have acknowledged that while views differ about the future status of Bougainville, the overarching priority in the referendum and beyond is ‘peace by peaceful means’, echoing the guiding principle of the peace process 15 years before.²⁰⁴ In PNG, however, there is a sense in which this impetus has faded over time and as leaders and officials directly involved in the peace negotiations have left, affecting the institutional memory and understandings of the conflict and the peace across the political leadership and public service.²⁰⁵ The cultural changes required to support substantive constitutional implementation remain a key challenge.

‘Capacity’ refers to the financial, physical and human resources, and the administrative and legal systems, required to implement the constitutional commitments of autonomy and the referendum.²⁰⁶ A lack of capacity is often cited as a reason for shortcomings in substantive implementation in Bougainville.²⁰⁷ It arises not only from inadequate or delayed funding for government services. The relative isolation of Bougainville and the challenges that distance and smallness present in attracting, training and employing personnel are also barriers to building the capacity of government officials and institutions.²⁰⁸

²⁰³ Wallis (n 66) 264.

²⁰⁴ See eg ‘Peace the Ultimate Goal, Says ABG President Momis’, *One PNG* (online at 6 July 2018) <<https://www.onepng.com/2018/06/peace-ultimate-goal-says-abg-president.html>>; ‘Momis Urges Vote for Independence’, *New Dawn on Bougainville* (online at 21 March 2019) <<https://bougainville.typepad.com/newdawn/>>. See also Moi Avei, ‘Making, Building and Sustaining Peace by Peaceful Means’ in Andy Carl and Lorraine Garasu (eds), *Accord: Weaving Consensus - The Papua New Guinea-Bougainville Peace Process* (Conciliation Resources, 2002) 62.

²⁰⁵ Regan, ‘Autonomy and Conflict’ (n 63) 434; Wallis (n 66) 264.

²⁰⁶ Masono 31

²⁰⁷ See, eg McKenna (n 48) 16–17; Nisira (n 65) 6; Regan, ‘Autonomy and Conflict’ (n 63) 430.

²⁰⁸ Nisira (n 65) 7.

The challenges of cultural change and capacity facing Bougainville are familiar to other contexts in which new constitutions provide for the devolution of powers in a formerly highly centralised state.²⁰⁹ While the BPA and PNG Constitution anticipated these challenges and contained innovative techniques to address them, such as the gradual draw down of powers and cooperative processes, Bougainville's experience illustrates the difficulties of building capacity and cultural change in practice. The difficulties in internalising the values of self-government and shared government, resistance at the national level to relinquishing long held powers and functions, and the potential for misunderstandings of the laws and legal processes can present barriers to effective implementation which constitutional design can only partly address.

5.5 Participation in constitution making

Literature on constitution-making contends that participatory and inclusive procedures for making a new constitution will generate public awareness and enhance the willingness of the people to defend the constitution and achieve its implementation.²¹⁰ In Bougainville, there was a great deal of public involvement in making the BPA and the Bougainville Constitution. In her study of the effect of participatory constitution making on state-building and nation-building, Wallis found that participatory constitution making has generated a sense of common Bougainvillean identity and unified political leaders.²¹¹

Masono reports that the promise of political autonomy for Bougainville increased citizens' expectations of the government's ability to address the problems facing the people.²¹² However, meeting these high expectations has proven challenging. The 2013 Joint Review of Autonomy Arrangements collected the views of members of the Bougainville public, who reported some dissatisfaction with shortcomings in service delivery, which they blamed on a failure of autonomous government. ABG officials also acknowledged the challenges of weak service delivery, but expressed concerns about the capacity of officials and impediments to the process for transferring powers.²¹³ These studies demonstrate the importance of effective implementation – in the sense of achieving tangible outcomes for the people – in shoring up support for a new autonomous government.

Another reason for the divergence between the views of officials and the public may be that the complexity of the constitutional arrangements for autonomy inhibit the extent to which the public can understand and monitor constitutional implementation.²¹⁴ For example, the slow transfer of powers has led to some confusion about which level of government is responsible for providing particular government services.²¹⁵ Public participation in the Bougainville constitution-making process has supported Bougainvilleans in holding their leaders to account for achieving the desired outcomes of autonomy – peace, a national or sub-national identity and improved service delivery – but not necessarily in monitoring compliance with the legal processes for transferring and exercising new powers.

²⁰⁹ Constitution Transformation Network and International IDEA, *Implementing Federalism* (Melbourne Forum on Constitution-Building: Constitutional INSIGHTS No 2, 2018) <<https://www.idea.int/publications/catalogue/implementing-federalism>>.

²¹⁰ Brandt et al (n 35) 11.

²¹¹ Wallis (n 66) 322.

²¹² Masono (n 147).

²¹³ *Joint Review of Bougainville's Autonomy Arrangements by Government of Papua New Guinea and the Autonomous Government of Bougainville* (n 143) 14–18.

²¹⁴ Regan, 'Autonomy and Conflict' (n 63) 151, 156.

²¹⁵ Wallis (n 51) 33.

Despite the emphasis on ‘joint responsibility’ in the BPA, the formal lines of accountability for constitutional implementation lie separately to each of the Governments of Bougainville and PNG. Accountability is hindered by shifting the political responsibility (and blame for failures in implementation) between the two Governments – as is common in political discourse in Bougainville and in PNG. Deflection of responsibility in this way has affected how the public in Bougainville perceive both Governments, with questioning of the PNG Government’s commitment to the BPA, and the ABG’s capacity for autonomous government. These perceptions may have implications both for the people’s choice at referendum and for harmonious future relations between Bougainville and PNG.

While the people of Bougainville have a direct line through which they can hold the ABG responsible for constitutional implementation, there is not the same degree of public pressure on the PNG Government. During peace negotiations, it was assumed that the international community might instead provide some form of accountability: Bougainville negotiators agreed to a non-binding referendum on the basis of assurances from international players that the international community would place pressure on PNG to honour the outcome of the referendum.²¹⁶ The nature and extent of international involvement in this way is an issue for the future. For now, international actors have expressly focused on supporting the PNG government and the ABG in ensuring a fair, credible and secure procedure for the referendum.

Part III Conclusions: The significance of constitutional implementation for sustainable peace

In Bougainville, the constitutional inclusion mechanisms of autonomy and the referendum were regarded as central to sustainable peace. This connection between constitutional change and sustainable peace was expressly acknowledged in the BPA, which stated that autonomy would ‘assist in building a new relationship between Bougainville and the nation as a whole’, while a new government for Bougainville would ‘end institutional divisions and encourage cooperation among Bougainvilleans’.²¹⁷ These measures were designed to recognise and address the inequalities and exclusions within Bougainville and between Bougainville and PNG, giving Bougainville a *sui generis* status under the PNG Constitution, and permitting Bougainville to establish its own structures of government suited to its distinctive history and culture, and the post-conflict social and economic conditions.

Peace negotiators and leaders in Bougainville and PNG also recognised the importance of the *implementation* of these constitutional inclusion mechanisms to sustainable peace. Sir Moi Avei, former Minister for Bougainville Affairs, wrote:

*Securing peace is more than a matter of signing agreements. It involves giving the strongest possible foundations in the community it is intended to serve. Implementation requires a comprehensive approach, which looks beyond agreeing to end violent conflict ... [Peace] is a goal which is closely related to other projects which are best pursued across a broad front and on a bipartisan basis – such as nation-building, strengthening civil society, and building both economic and governmental capacity.*²¹⁸

²¹⁶ Braithwaite et al (n 52) 57.

²¹⁷ *Bougainville Peace Agreement* art 340.

²¹⁸ Avei (n 204) 62.

As noted in Part I of this Report, there has not yet been much attention paid to how constitutional implementation might support sustainable peace, and conversely how failures in constitutional implementation might have the potential to destabilise peace. Drawing on the literature, Part I proposed broadly framed reasons why constitutional implementation may be significant for sustainable peace, in the particular context we consider here, namely, where a peace agreement explicitly provides for constitutional changes. Some of these reasons relate to the *outcome* of constitutional implementation, that is, the successful operation in practice of the substantive constitutional commitments made in the peace agreement. Others relate to the *process* for constitutional implementation, highlighting how the process itself can contribute to sustaining peace. In this concluding section, we show how Bougainville's experience demonstrates some of these connections. We also highlight some complicating factors, deserving of further study, for the assessment of the significance of constitutional implementation to sustainable peace.

1 Outcomes of constitutional implementation and sustainable peace

Constitutional inclusion mechanisms seek to address the root causes or exacerbating factors of conflict, such as inequality or social exclusion. The successful implementation of these mechanisms in practice should logically therefore contribute to sustainable peace.

The experience of Bougainville, which by design factored in a long period of implementation in the lead up to the referendum, makes it an unusual case to assess the outcome of implementation. Its experience to date, however, demonstrates that even partial and incremental implementation of constitutional commitments can contribute to peace. Since signing the BPA in 2001, Bougainville has experienced 18 years of relative peace. The success of textual implementation, as the provisions of the Peace Agreement were incorporated into the PNG Constitution, Organic Law and the Bougainville Constitution, established an early and positive record of implementation. Substantive implementation of these new constitutional structures has been more mixed: the ABG still does not exercise autonomously all of the powers available to it, the PNG government has not provided all of the financial support it promised under the peace agreement, and the referendum has been delayed, although it is still planned to occur within the period agreed in the peace agreement. Nevertheless, and despite some problems and delays, many of the constitutional commitments made in the peace agreement have been at least partially implemented over the 18 years since the peace agreement was signed.

Autonomy, in combination with a deferred referendum, offered a significant transition phase of 10 to 15 years. During this transitional period, stakeholders had the opportunity to test what autonomy for Bougainville within PNG might involve in the lead up to a referendum in Bougainville on independence. In this context, the implementation in practice, with tangible outcomes, was critical to informing how the people of Bougainville might choose to vote at the referendum.

The Bougainville case study shows how problems of implementation consumed part of the important transitional period leading up to the delayed referendum, in ways that might affect the decision on Bougainville's future political status. Autonomy and the delayed referendum have underpinned relative peace in Bougainville for the past 18 years, allowing time for the conflict to cool and for peacebuilding initiatives amongst the Bougainville community. This interim period also provided the opportunity for PNG and Bougainville to consolidate a new form of government. However, shortcomings in constitutional implementation – informed by mistrust about the political will to adhere to autonomy and to the referendum arrangements and lack of knowledge and capacity – have hindered PNG from making a strong case for Bougainville to remain part of PNG as an autonomous

region. It has also potentially limited the ability of leaders within Bougainville to show that Bougainville is ready for self-government, either as an autonomous region of PNG, or as an independent state.

The record of constitutional implementation in Bougainville appears to have been sufficient to sustain peace in the interim period. Constitutional implementation is, however, as yet incomplete, both because autonomy for Bougainville has not yet been fully realised, and because the referendum is yet to take place. The potential risk to peace is at its highest in relation to the referendum, where there are fears about the risk of renewed conflict within Bougainville should the referendum be further delayed, the legitimacy of the process or the result disputed, or if the outcome is not honoured by the PNG Parliament. Whatever the outcome of the referendum, Bougainville will continue to have a high degree of autonomy in relation to its own governance, and will retain a close relationship with PNG, whether as a region within that state, or as a close neighbour. Sustainable peace is necessary to the success of Bougainville's own autonomous governance and its future relationship with PNG.

Because it is incomplete, the case of Bougainville does not provide the opportunity to consider the implications of the successful implementation of the constitutional commitments made in a peace agreement. Ideally, a completed process of constitutional implementation, in combination with other peacebuilding measures, would result in sustainable peace – that is, a state of affairs in which peace is the norm, in which conflict is not only absent, but unlikely to arise because the root causes of conflict have been effectively addressed. Once such an outcome is achieved, there is a question whether some of the constitutional commitments arising from a peace process are 'spent' or must continue, even as peacebuilding gives way to 'ordinary rule of law' and 'ordinary politics'.²¹⁹ In other words, how might peace and the distance of time from a conflict create a situation where a return to earlier constitutional arrangements or the development of new ones will not threaten peace? Other case studies might be used to shed light on relationships between peace agreements and constitutions over time, as states move from sustaining peace to sustainable peace.

2 Processes of constitutional implementation and sustainable peace

Given that constitutional implementation is as yet incomplete, the experiences of Bougainville demonstrate how the *processes* of constitutional implementation can make a significant contribution to sustaining peace, while shortcomings in constitutional implementation risk aggravating distrust between previously conflicting parties.

The nature of the conflict in Bougainville required building trust between PNG and Bougainville and formerly warring factions within Bougainville itself. Shortcomings in implementation – such as delayed or underpaid grants, appointments left unmade, and the slow transfer of powers – are perceived in Bougainville as evidence of PNG's reluctance to support autonomy and the peace process.²²⁰ Such perceptions are exacerbated by what Bougainvilleans see as a longer history of the PNG Government's broken promises in relation to decentralisation.²²¹ This runs the risk that people will become frustrated with a lack of progress towards the expected benefits of autonomy.²²² The people of Bougainville had high expectations of autonomy. Masono reports that the establishment of the ABG increased citizen expectations, 'not only on what the government can, but perhaps more so, on what it should do, to improve their wellbeing'.²²³ With 'a new beginning, a new spirit, and a new

²¹⁹ Williams (n 4) 62.

²²⁰ Regan, 'Autonomy and Conflict' (n 63) 445.

²²¹ Wolfers (n 146) 11.

²²² Regan, 'Autonomy and Conflict' (n 63) 432.

²²³ Masono (n 147) 5.

Bougainville' the ABG was expected to deal with longstanding issues and improve social and economic conditions of Bougainville.²²⁴ Problems of constitutional implementation, even if understandable, can dampen the community's faith in the new constitutional arrangements. A similar risk arises around community expectations of the referendum and independence: if a vote favouring independence is ratified, independence will not immediately solve pressing constitutional, social and economic issues facing Bougainville. Whatever the result, there will be a period of transition and further negotiations between the ABG and PNG government. For Bougainville, there is also a risk that independence will remove PNG as the scapegoat for community frustrations, and frustrations will instead be directed towards the ABG and other leadership groups within Bougainville, challenging the institutions of government.

In conflict-affected settings, perceptions about the reasons for problems of constitutional implementation can quickly shift from understandable problems of transition, cultural change and capacity to evidence of bad faith on the part of other governments and parties to a Peace Agreement. Shortcomings in implementation can give rise frustrations and disillusionment with leaders, governments and other parties arising from shortcomings in implementation, destabilising faith in the political settlement and contributing to the kind of instability and uncertainty in which tensions can potentially flare again.

In summary, the Bougainville case study shows that while constitutional implementation can contribute to sustainable peace, not all problems of constitutional implementation present the same risks to sustainable peace. Taken alone, none of the issues of constitutional implementation identified in this study individually and by themselves threaten peace. Collectively, however, issues in the implementation of constitutional commitments have two indirect, but significant, consequences for sustainable peace. The first is that problems of constitutional implementation consumed valuable time and energy during a transitional period that had the potential to consolidate peace and to demonstrate effective self-government and collaborative shared government. Secondly, shortcomings in constitutional implementation have undermined some of the trust built between formerly conflicting parties, creating conditions of uncertainty in which tensions are more likely to flare again.

3 Avenues for further research

In this Report, we have developed a framework that seeks to show the links between peace agreements, constitutions, the implementation of those constitutional provisions and sustainable peace. Of course, sustainable peace requires more than constitutional implementation. Our argument is that constitutional implementation makes a contribution to sustainable peace, in ways that are yet to be fully explored in the literature on peace building and constitution making.

The application of our framework to the case of Bougainville shows that, in that case, successes in constitutional implementation have contributed to sustaining peace in the short term, as Bougainville has experienced 18 years of relative peace since the signing of the Peace Agreement in 2001. While there was successful textual implementation, substantive constitutional implementation is only partially complete. Significantly, the referendum on independence, to be held before 2020, will test both implementation and, potentially, peace. This study has identified several problems with constitutional implementation. While none of these issues individually threatens sustainable peace,

²²⁴ Ibid 5–6.

they have tended to erode trust between the previously conflicting parties and the confidence of the people in the two Governments.

In this project, we tested our analytical framework by applying it to one case study, that of Bougainville. The consideration of other case studies would further strengthen and refine the insights from this research into the links between peace agreements and constitutions, and the significance of constitutional implementation for sustainable peace. Bougainville's experience has many features that make it a distinctive case study. In the terms of our analytical framework, Bougainville is a case in which the peace agreement expressly provided for constitutional change; but in which the course of constitutional implementation was incomplete. Experiences in the constitutional implementation of peace agreements in other parts of the Asia-Pacific region provide examples with different features that would be instructive comparative case studies to further test our analytical framework. For example, the civil war in Nepal came to an end in 2006 when the Government of Nepal and the Communist Party of Nepal signed a comprehensive peace agreement that called for an Interim Constitution, which in turn required the inclusion of particular matters in a final constitution, including a new federal system of government.²²⁵ Like Bougainville, the Nepal peace agreement explicitly called for constitutional changes; in contrast, however, the process of implementation is complete.

Another important line of research would be to consider the kinds of issues that arise where a peace agreement implicitly invokes constitutional change, but does not expressly provide for it. Within this category are cases where a peace agreement necessitates changes to existing constitutional principles, institutions or values. As an example, the Indo-Lanka Accord of 1987 sought an end to civil war in Sri Lanka. It provided for devolution of powers from the central government to the provincial level. The Thirteenth Amendment to the Sri Lankan Constitution sought to reflect this commitment, but this provision has been narrowly interpreted by the Sri Lankan Supreme Court to fit within the judges' understanding of Sri Lanka's unitary constitution. A second example within the category of peace agreements that implicitly invoke constitutional change is where a peace agreement calls for governance changes that arguably are inconsistent with the existing constitution. Case studies of this kind might include the implementation of the Comprehensive Agreement on Bangsamoro between the Government of the Philippines and the Moro Islamic Liberation Front in 2014 and the Helsinki Agreement signed by the Government of Indonesia and the Free Aceh Movement in 2005, both which sought an end to conflict in specific provinces of each state respectively.

Detailed consideration of these three examples, through country case studies, would build a more complete understanding of the relationship between peace agreements, constitutions and sustainable peace and test rigorously the analytical framework developed here. Comparison between the different cases would also provide important insights for practitioners into the challenges of constitutional implementation in conflict affected settings and the ways in which they might be addressed, with the potential to inform peace building and constitution making processes elsewhere.

²²⁵ *Comprehensive Peace Accord signed between Nepal Government and Community Party of Nepal (Maoist)* (22 November 2006); *Interim Constitution of Nepal 2063* (2007).