

**Constitutional Right to Self-Determination Federative Processes:  
How States Operationalize the Internal Right to Self-Determination**

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## **Abstract**

Since the 1970s, Spain, Iraq, the United States, Canada, and Ethiopia have each effectively created a new constitutional right that operationalizes the internal right to self-determination within their constitutional system using a constructivist approach, which this article shall refer to as a *constitutional right to self-determination*. This new constitutional right confers on certain peoples with common identity markers the right to use a federative process to construct their own new sub-state with self-rule powers. A constitutional right to self-determination federative process is materially different from integrative and devolutionary federative processes because it uses a bottom-up legal process to create a new ethnically distinct sub-state. This article will compare and contrast within these constitutional systems how these federative processes determines: (a) who are the new sub-state's people, (b) what is new the sub-state's jurisdiction, (c) which powers will the new sub-state have, and (d) how is the new sub-state created. By these means, constitutional right to self-determination federative processes can be broadly conceptualized, contextualized, and eventually be made translatable to a diverse range of states.

## Introduction

Public international law recognizes the right to self-determination, which is the right of a “people to freely choose their political status.”<sup>1</sup> When first devised in the early 20<sup>th</sup> century, the right to self-determination was vested in “peoples” or “nations” defined under nationalist school as “cultural or historic units, bound together by shared languages, literary inheritances, customs, religions, or historical traditions.”<sup>2</sup> By the mid-20<sup>th</sup> century, the anti-colonial movement vested the right to self-determination in colonial states as well.<sup>3</sup> Once independent, these postcolonial states moved away from the universal nationalist version of the right to self-determination by precluding peoples within their territory from claiming it.<sup>4</sup> Yet, at the close of the 20<sup>th</sup> century, the right to self-determination shifted from being vested not just in colonial states, but to nationalist sub-states as well (e.g., Slovenia, Croatia, Serbia, Slovakia, Czechia, and Kosovo).<sup>5</sup> Today, the right of a colonial state (e.g., Puerto Rico, New Caledonia) or nationalist sub-state (e.g., Quebec, Scotland, Catalonia) to secede is referred to as external self-determination, whereas the self-rule rights of a distinct peoples *visa vi* the state is referred to as internal self-determination.<sup>6</sup>

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<sup>1</sup> Pawel Von Chamier Cieminski, *A Look at the Evolution of the Right to Self-Determination in International Law*, 25 BIALSTOCKIE STUDIA PRAWNICZE 117, 117 - 118 (2020).

<sup>2</sup> Stephen C. Neff, *A Short History of International Law*. In M.D. Evans, editor, *International Law*, 17 - 18 (2014).

<sup>3</sup> Von Chamier Cieminski, *supra* note 1, at 119.

<sup>4</sup> Miriam Alide Bak McKenna, *The Means to the End and the End of the Means: Self-Determination, Decolonization and International Law*, 2 JUS GENTIUM: J. INT'L LEGAL HIST. 93, 97 (2017). “As decolonized States sought to harness self-determination in order to consolidate and protect their newly achieved independence, they moved away from the expansive, universal notion of the right they had expressed in earlier periods, thereby excluding a new set of claimants from recourse to the right in their own pursuit of sovereignty.”

<sup>5</sup> Glen Anderson, *Unilateral Non-Colonial Secession and Internal Self-Determination: A Right of Newly Seceded Peoples to Democracy*, 34 ARIZ. J. INT'L & COMP. L. 1, 13 (2017). “Firstly, peoples are not confined to the colonial context. The law of self-determination can therefore take effect within a colonial and non-colonial setting. Second, there can be more than one people within a non-self-governing territory or sovereign state. Peoples are thus typically units which coalesce at a sub-state level. Third, peoples are units which possess nationalist overtones...”

<sup>6</sup> Peter Hilpold, *Self-Determination and Autonomy: Between Secession and Internal Self-Determination*, 24 INT'L J. ON MINORITY & GROUP RTS. 302, 326 (2017).

The historic concept of a “people”, “nation”, or “nationality” closely matches the anthropological concept of ethnicity, where an ethnic group is broadly defined as a group of people who share identity markers such as “clan, community, religion, language, race, sect or tribe, and complexion or other physical appearance.”<sup>7</sup> Today’s scholarly debate on ethnicity pits essentialist consociationalism (i.e., ethnic identity is immemorial and fixed) versus instrumentalist transformationalism (i.e., ethnic identity is malleable and fluid).<sup>8</sup> The middle ground constructivist approach argues ethnic identities are fixed or fluid depending on context and their ultimate role in conflict management should be the result of political negotiations within existing constraints of ethnic identity.<sup>9</sup>

This article examines a newly emerging constructivist practice in Spain, Iraq, Ethiopia, United States, and Canada that operationalizes the internal right to self-determination to manage ethnic conflict by conferring on certain peoples with common identity markers the right to use a federative process to construct their own new sub-state with self-rule powers. Since this practice confers a constitutional right on certain peoples to choose their political status within a state’s constitution, it shall be referred to as the *constitutional right to self-determination*. Further, the legal process by which this right creates a new federal sub-state will be referred to as *constitutional right to self-determination federative process*. Using an inductive functionalist approach, this article seeks to compare and contrast how the constitutional right to self-determination federative process functions in a diverse range of states to induce a common functional framework that can be tailored to a broad range of contexts.

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<sup>7</sup> Matthias Basedau, *Managing Ethnic Conflict: The Menu of Institutional Engineering*, GERMAN INSTITUTE OF GLOBAL AND AREA STUDIES WP 171 1, 5 (2011).

<sup>8</sup> Paul Dixon, *The Politics of Conflict: A Constructivist Critique of Consociational and Civil Society Theories*, 18 NATIONS AND NATIONALISM 98, 99 (2011).

<sup>9</sup> *Id.* at 100.

## Comparative Methodology

This article will compare a diverse range of constitutions whose norms and practices create a constitutional right to self-determination and its resulting federative process to develop a common framework.<sup>10</sup> It will use the “concept formation through multitude description” technique by comparing how this common federative process is tailored to perform in variety of contexts through.<sup>11</sup> If a comparator uses a design that results in a non-functioning federative process, then it will be distinguished from the common framework. By understanding a common framework and how it can be tailored to particular contexts, a legal concept can be made transplantable.<sup>12</sup> The following comparators’ constitutional norms and practices create a constitutional right to self-determination and its resulting federative process:

- Spain’s Autonomous Community’s Process: a federative process by which Spain’s provinces may individually or collectively create Autonomous Communities along historic identities and then the Autonomous Communities’ may then negotiate self-rule powers with the Spanish state.<sup>13</sup>
- Iraq’s Federal Regions Process: a federative process by which Iraq’s governates can individually or collectively create Federal Regions and then automatically assume self-rule powers equal to the Kurdish Federal Region.<sup>14</sup>
- Ethiopia’s Regional State Process: a process by which Ethiopia’s nations, nationalities and peoples within the states can individually or collectively form their own Regional States and assume self-rule powers equal to all Regional States.<sup>15</sup>

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<sup>10</sup> Ran Hirschl. *Comparative Methodologies*. In Roger Masterman, editor, *The Cambridge Companion to Comparative Constitutional Law* 11, 34 (2019). This comparative inquiry is meant to “generate concepts and analytical frameworks for thinking critically about constitutional norms and practices... Its focus is not on a single jurisdiction, but on a single practice (or a set of closely related practices) as carried out in or encountered by different jurisdictions.”

<sup>11</sup> *Id.* at 238. “By studying various manifestations of and solutions to roughly analogous constitutional challenges, our understanding of key concepts in constitutional law, such as separation of powers, statutory interpretation, or equality rights, becomes more sophisticated and analytically sharp.”

<sup>12</sup> Ralf Michaels. “*One Size Can Fit All*” – *Some Heretical Thoughts on the Mass Production of Legal Transplants*. In Gunter Frankenberg, editor, *Order from Transfer – Comparative Constitutional Design and Legal Culture* 56, 59 - 60 (2013). The IKEA Theory of Legal Transplant posits that for constitutional norms and practices to be transferred, first it must be decontextualized from its original legal system, then posited in a “Global Reservoir” of knowledge, and finally recontextualized in a new legal system.

<sup>13</sup> Spanish Constitution of 1978, Part VIII, Chapter Three, “The Autonomous Communities.”

<sup>14</sup> Iraq Constitution of 2005, Section Five, Chapter One, “Regions.”

<sup>15</sup> Ethiopian Constitution of 1994, Article 47, “Member States of the Federal Democratic Republic.”

- The United States Tribal Self-Determination Process: a process by which Native American Tribes can individually or collectively negotiate self-rule powers from the United States federal government via self-determination contracts.<sup>16</sup>
- Canada's Aboriginal Self-Government Process: a process by which First Nation Bands could exercise their inherent right to self-government and negotiate self-rule powers from the Canadian federal government and provinces.<sup>17</sup>

The comparators represent a diverse range of states using a common federative process to solve ethnic divides in a European context (e.g., Spain), former settler colony context (e.g., United States, Canada), postcolonial state context (e.g., Iraq), and post-imperial context (e.g., Ethiopia).

The broad range of underlying contexts is designed to produce through induction a common conceptual framework that is applicable to as many states as possible. To induce this common framework, the article will first use legal theory to provide a broad concept of what constitutional norms and practices characterize the constitutional right to self-determination and the federative processes it creates. Second, it will provide a historical narrative of how Spain, Iraq, Ethiopia, the United States, and Canada have implemented the constitutional right to self-determination to mediate ethnic conflict. Third, it will compare and contrast how the comparators tailored the constitutional right to self-determination to fit their underlying context. If in some cases, the constitutional right to self-determination federative process is non-functional, the article will analyze whether complied with the common framework or not to test its functionality. By these means, constitutional right to self-determination federative processes can be broadly conceptualized, contextualized, and eventually made transplantable to a diverse range of states suffering from ethnic conflict.

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<sup>16</sup> Geoffrey D. Strommer & Stephen D. Osborne, *The History, Status, and Future of Tribal Self-Governance under the Indian Self-Determination and Education Assistance Act*, 39 AM. INDIAN L. REV. 1, 6 (2014).

<sup>17</sup> Government of Canada, *The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*, THE OFFICIAL WEBSITE OF THE GOVERNMENT OF CANADA, Sept. 9, 2010. <https://www.rcaanc-cirnac.gc.ca/eng/1100100031843/1539869205136#inhrsg>.

## **What is a Constitutional Right to Self-Determination Federative Process?**

A constitutional right to self-determination confers on certain peoples with common identity markers the right to use a federative process to construct their own new sub-state with self-rule powers. It does not concern the external right to self-determination (i.e., a peoples' right to secession), but rather the internal right to self-determination (i.e., a peoples' right to self-governance within a state). Since it concerns self-governance under a federalism logic, it is different from individual rights-based approaches that limit of state power over individuals found in the United Nations' treaty-based human rights system. Rather, it is a collective human right vested in a people who share common identity markers. Yet, since it creates a new federal sub-state – unlike integrative federative processes – via a bottom-up process – unlike devolutionary federative processes – constitutional right to self-determination federative processes are a relatively new and under-theorized legal concept within the study of federalism in comparative constitutional law.<sup>18</sup>

To understand how constitutional right to self-determination federative processes function, it is necessary to answer four questions about the process determines: (a) who are the new sub-state's people, (b) what is the new sub-state's jurisdiction, (c) which powers will the new sub-state have, and (d) how is the new sub-state created. The first question concerns who are the peoples who may exercise the constitutional right to self-determination and how the process turns them into a constituent power capable of creating that a new sub-state. The second question concerns how the process determines where, whom, what does the new sub-state exercise power

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<sup>18</sup> Getachew Assefa, *The Constitutional Right to Self-Determination as a Response to the Question of Nationalities in Ethiopia*, 25 INT'L J. ON MINORITY & GROUP RTS. 1 (2018). The phrase, "constitutional right to self-determination" only appears in journal articles relating to federalism when specifically describing the Ethiopian Regional State process described in this article. S. Halliday & L. Witteck, *Decision-Making at the End-of-Life and the Incompetent Patient: A Comparative Approach*, 22 MED. & L. 533 (2003). The phrase, "constitutional right to self-determination" also appears in journal articles relating to medical law concepts of bodily integrity and patient choice, but this entirely unrelated to federalism.



over. The third question concerns how the process determines what enumerated powers the sub-state has and may have over time. Finally, the forth question concerns how the sub-state is procedurally created by the people and given its jurisdiction and enumerated powers.

#### A. Who are the New Sub-State's People?

The right to self-determination generally confers upon a people the right to freely choose their political status.<sup>19</sup> A constitutional right to self-determination federative allows a people to create their own new sub-state, yet who are the people who may exercise this right? Since the constitutional right to self-determination is derived from the external right to self-determination under public international law, it is first necessary to understand what the word “people” means under the external right to self-determination.

The antecedent to the right to self-determination was the 19<sup>th</sup> century nationality school, which contended “the true collective unit, for purposes of international law, is not the state, but rather the nation.”<sup>20</sup> While this school of thought fostered integration in Germany and Italy, it conversely fostered disintegration in the Austrian-Hungarian Empire.<sup>21</sup> Prior to that multi-national empire’s dissolution, the ideas of “self-determination” for its nations became widespread within its territory and abroad.<sup>22</sup> This led to individuals self-organizing into national organizations like the ethnic Czech and Slovak immigrants in the United States, who in the 1915 “Cleveland Agreement” committed to “work in unison to form a free, independent, and unified

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<sup>19</sup> Von Chamier Cieminski, *supra* note 1.

<sup>20</sup> Neff, *supra* note 2.

<sup>21</sup> *Id.*

<sup>22</sup> Arzoz Xabier, *Karl Renner's Theory of National Autonomy*, FILOZOFIJA I DRUŠTVO, VOL 31, ISS 3, 301, 301 (2020). Karl Renner – a prominent Austrian politician and legal theorist – posited theories providing self-determination to the empire’s ethnic groups via a democratic federalist arrangement where sub-state territories aligned with ethnic groups.

state for the Czech and Slovak peoples.”<sup>23</sup> After the collapse of the Hapsburg monarchy, this national organization successfully obtained the independence of Czechoslovakia through international advocacy and military action.<sup>24</sup> Thus, in the very beginning the right to self-determination defined peoples to mean individuals who share ethnic identity markers and have voluntarily organized themselves to politically pursue greater internal self-rule within or full independence from a state.

After World War II, the right to self-determination was enshrined in Article 1 of the UN Charter and became the primary vehicle for anti-colonial advocates.<sup>25</sup> In the 1960s, these advocates were able to add the right to self-determination to multiple human rights treaties, which made colonial relations an issue of international law.<sup>26</sup> By these means, colonial states and the peoples within their territory achieved legal status in international law as their own peoples due the right to self-determination.<sup>27</sup> UN General Assembly Resolution 1541, operationalized a colonial state’s right to self-determination by stating the right was exercised when a “non-self-governing territory” that is “geographically separate” and “distinct ethnically” emerges as a sovereign independent state or is equally integrated into another independent state.<sup>28</sup> Yet, unlike after World War I, the right to self-determination became vested in colonial states themselves – not self-organized individuals sharing ethnic identity markers. Instead, the peoples’ right to self-organize and pursue self-determination within postcolonial states was suppressed.<sup>29</sup> Thus, once

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<sup>23</sup> Case Western Reserve University, *The Cleveland Agreement of 1915*, ENCYCLOPEDIA OF CLEVELAND HISTORY. <https://case.edu/ech/articles/c/cleveland-agreement-1915>.

<sup>24</sup> *Id.*

<sup>25</sup> Von Chamier Cieminski, *supra* note 3.

<sup>26</sup> Alide Bak McKenna, *supra* note 4.

<sup>27</sup> *Id.*

<sup>28</sup> UN General Assembly Resolution 1541, Principle VI.

<sup>29</sup> Alide Bak McKenna, *supra* note 4.

decolonization was complete, the universal right to self-determination was extinguished in favor of a “fundamental, collective human right” held by just colonial states.<sup>30</sup>

After the end of the Cold War, the collective right to self-determination had to be “effectively re- conceptual[ed] ... for the post-Cold-War” to apply to seceding ethnically distinct federal sub-states – not just colonial states.<sup>31</sup> When the international community recognized the former Yugoslavia’s ethnically distinct federal sub-states’ right to secede, it expanded the external right to self-determination to ethnically distinct sub-states, not just colonial states.<sup>32</sup> Afterwards, other ethnically distinct federal sub-states like Slovakia, Czechia, Eritrea, Bangladesh, Montenegro, and Kosovo have successfully achieved international recognition after secession.<sup>33</sup> Current secession movements in which independence referendums taken place such as Puerto Rico, New Caledonian, Scotland, Quebec, and Catalonia, either involve colonial states or ethnically distinct federal sub-states. Thus, the external right to self-determination defines people to mean the citizens of a colonial state or ethnically distinct federal sub-state.

The constitutional right to self-determination creates a federative process whereby a group of people sharing common identity markers can self-identify, self-organize, and self-construct themselves into an ethnically distinct federal sub-state. It is a constructivist process that allows ethnic groups to politically effectuate their collective identity through creation of their own sub-state and gain self-rule powers commiserate with the strength of that identity. To do this, a constitutional right to self-determination federative process must first, define which people within the state are eligible to create ethnically distinct sub-states. The process does this by

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<sup>30</sup> Neff, *supra* note 2, at 26.

<sup>31</sup> Von Chamier Cieminski, *supra* note 1, at 126.

<sup>32</sup> Hilpold, *supra* note 6, at 304. “A further change of paradigm has taken place with the unravelling of Yugoslavia and the USSR, when self-determination totally distanced itself from the colonial context.”

<sup>33</sup> Anderson, *supra* note 5, at 2.

giving already existing ethnically distinct non-federal political subdivisions within the state the right to individually or collectively combine to create a new sub-state. If the state lacks ethnically distinct political subdivisions, then it must create a mechanism by which they can be created. These ethnically distinct political subdivision can be created using territorial or non-territorial strategies, which will be explored later in the comparative analysis.

Thus, in a manner analogous to the external right to self-determination defining people to mean the citizens of a ethnically distinct federal sub-state, the constitutional right to self-determination defines people to mean the citizens or members of ethnically distinct political subdivision.

#### B. What is the New Sub-State's Jurisdiction?

Now that it is clear the constitutional right to self-determination ultimately creates a new sub-state by recognizing or combining ethnically distinct political subdivision(s), the next question is what kind of jurisdiction could the new sub-state have? A sub-state's jurisdiction can either be territorial, non-territorial, based on subject matter, or a combination thereof.

Territorial jurisdiction is when a sub-state's ability to enforce and adjudicate laws depends on the geographic location of the persons or events involved or the effect they have on a defined territory.<sup>34</sup> In multi-ethnic states, it is not an uncommon practice to create ethno-federal systems by designing "federal sub unit boundaries ... [to] conform to the territorial distribution of ethnic groups."<sup>35</sup> By conferring self-rule powers upon a territorially ethnically distinct sub-state, the

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<sup>34</sup> Peter D. Szigeti, *The Illusion of Territorial Jurisdiction*, 52 TEX. INT'L L. J. 369, 379 (2017). "Effects jurisdiction relies on a distinction between active and passive territoriality (also referred to as the distinction between subjective and objective territoriality). Active or subjective territoriality refers to an act or event taking place within the territory of a state. Passive or objective territoriality refers to an act or event taking place outside state territory, but having effects within the state."

<sup>35</sup> Liam Anderson, *Ethnofederalism: The Worst form of institutional arrangement...?* 39 INTERNATIONAL SECURITY 165, 165 (2014).

state confers territorial autonomy upon that ethnic group since they now have territorial jurisdiction over the geographic area they predominantly inhabit.<sup>36</sup> This practice has its drawbacks because the de facto boundaries of the ethnic group may change over time based on “immigration, suburbanization, mixed marriages, etc.” and ethnic identity may wax or wane over time as well.<sup>37</sup> Further, in a diverse state where ethnic groups are territorially dispersed, it may be difficult or impossible to draw a boundary that encompasses the residency of an entire ethnic group without including the residencies of other ethnic groups.<sup>38</sup> Thus, territorial jurisdiction alone will likely cause the new sub-state to not have jurisdiction over all persons who ethnically identify with it, while having jurisdiction over persons who do not ethnically identify with the sub-state.

Non-territorial jurisdiction is when sub-state’s ability to enforce laws and adjudicate law depends on the membership status of the persons involved.<sup>39</sup> For example, in multi-ethnic states located in the former Ottoman Empire, it is not an uncommon practice for the state to create separate personal status law (i.e., marriage, divorce and family law) jurisdictions for members of different religious communities.<sup>40</sup> If a sub-state’s membership criteria respects ethnic identity markers, then conferring self-rule powers on such sub-state would create non-territorial autonomy. Non-territorial jurisdiction on its own has the drawback of limiting the full range of

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<sup>36</sup> Wilfred Swenden, *Territorial Strategies For Managing Plurinational States*. In J. Loughlin et al., editors, *Routledge Handbook of Regionalism and Federalism* 62 (2013).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 61.

<sup>39</sup> Karen Barkey & George Gavrilis, *The Ottoman Millet System: Non-Territorial Autonomy and its Contemporary Legacy*, 15:1 *ETHNOPOLITICS* 24, 37 (2016). The Ottoman Millet system based jurisdiction off membership in a religious community despite vast geographic dispersion of its members. “For example, the Greek Orthodox Church had jurisdiction over many different ethnic groups, such as Greeks, Albanians, Bulgarians, Serbians, Moldavians, Ruthenians, Syrians, Arabs and Melkites.”

<sup>40</sup> *Id.* at 37.

enumerated powers of sub-state may be able to exercise, because enumerated powers like provision of internal security and public infrastructure may require a territorial base to provide.

To maximize a sub-state's ethnic distinction, both territorial and non-territorial jurisdiction rules could be used at the same time. This can be done by conferring territorial jurisdiction upon the sub-state within its defined territory, while adding non-territorial jurisdiction outside of its borders for its fellow ethnic group members. By this mechanism, members of the ethnic group who reside outside of its sub-state borders could still be subject to its laws. Conversely, a sub-state with residents who do not belong to the ethnic group could have non-members exempted from their territorial jurisdiction. Finally, jurisdiction could also be limited by subject matter, meaning the sub-state's enumerated powers could be subjected to different jurisdiction rules. The variations in how sub-state jurisdiction can be assigned will be shown in the comparative analysis.

Thus, a constitutional right to self-determination federative process can create sub-states with jurisdictions that depend on the person's geographic location within the sub-state's borders, the person's legal status as member or citizen of the sub-state member, and the subject of the dispute or matter at issue.

### C. Which Powers will the New Sub-State have?

The end goal for all constitutional right to self-determination federative processes is to confer self-rule powers from the state to the new sub-state. Such powers can be apportioned equally and automatically per explicit constitutional provisions or asymmetrically via an ongoing negotiation process between the new sub-state and the state.

Self-rule powers are apportioned via enumerated legislative powers and residual powers clauses in a constitution.<sup>41</sup> Enumerated powers are a list of competencies a state may legislate on, which can be stated broadly or in detail.<sup>42</sup> In the logics of the states conferring power to a sub-state via a devolutionary federative process, the state constitution will generally list the sub-state's enumerated powers and the remainder would be residual powers left to the state as the ultimate sovereign.<sup>43</sup> Conversely, in an integrative federative process, the federal constitution will lists the federal state's enumerated powers and the remainder would be residual powers left to the sub-states as the ultimate sovereigns.<sup>44</sup> In a constitutional right to self-determination federative process, this could be done either way because the sub-states by virtue of their ethnic distinction and bottom-up constitution drafting process gain own sovereignty independent of the state.

In addition to enumerated powers and residual powers, fiscal powers of revenue and spending would need to be predetermined.<sup>45</sup> Revenue includes allocation of taxation and mineral rights.<sup>46</sup> Spending and revenue are dependent on the amount of enumerated powers given: more enumerated powers require more spending powers to provide the services; more spending powers requires more revenue powers to fund the services. Finally, self-rule depends on the new sub-state's institutional capacity to provide services and collect revenue. Thus, for a new sub-state to take on enumerated powers it must have commiserate revenue generating ability and institutional capacity to exercise these powers.

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<sup>41</sup> Francesco Palermo, Karl Kössler, *Autonomy of Subnational Entities*, In Comparative Federalism – Constitutional Arrangements and Case Law 125, 139 (2017).

<sup>42</sup> *Id* at 140.

<sup>43</sup> *Id*.

<sup>44</sup> *Id*.

<sup>45</sup> Francesco Palermo, Karl Kössler, Financial Arrangements, In Comparative Federalism – Constitutional Arrangements and Case Law 201, 202 (2017).

<sup>46</sup> *Id*.

In a constitutional right to self-determination federative process, the new sub-state's self-rule powers could either be conferred automatically or be dynamically negotiated with the state. If the state has a say in the sub-state constitution's ratification, then there would be a negotiation on which enumerated powers the sub-state may adopt at a given time. If negotiated, the resulting apportionment of self-rule powers will be asymmetric between other sub-states. This apportionment would depend on the negotiating desires and power of the new sub-state *vis-à-vis* the state. If the new sub-state is large, economically strong, ethnically cohesive, and well organized, then it will likely achieve greater self-rule powers. Conversely, a small, marginal, loosely organized ethnic sub-state may want to start with lesser self-rule powers. Since all new sub-state governments will lack institutional capacity upon creation, sub-states may prefer to start with less self-rule powers and take on more as its capacity increases.

Thus, a constitutional right to self-determination federative process may be an ongoing dynamic process that takes place over time where the new sub-state adopts or even relinquishes enumerated powers over time subject to negotiation with the state. Therefore, a constitutional right to self-determination federative process can stay flexible with an ever-changing ethnic identity. If the ethnic identity grows stronger over time and the sub-state's institutional capacity to take on more self-government increases, then the process can be used to assign greater self-rule powers. Conversely, if the ethnic identity stagnates or grows weaker over time, the process need not continue and can even be reversed.

#### D. How is the New Sub-State Created?

Now that it is established that a constitutional right to self-determination federative process allows a people to create their own sub-state with its own jurisdiction and enumerated powers tailored to ethnic identity markers, the next question is how does this process create the new sub-



state? In short, the constitutional right to self-determination federative process uses a constitution drafting process to create the new sub-state. This is what makes it distinguishable from integrative and devolutionary federative processes, because the new sub-states do not pre-exist the state, but rather must be created via a voluntary bottom-up constitution drafting process.

The sub-state constitution building process follows the same steps as state constitution building or amendment processes: (1) the constituent power initiates the process, (2) a constituent assembly is formed to draft a constitution or amendment, and (3) the constitution or amendment is ratified.<sup>47</sup> In a constitutional right to self-determination federative process the composite ethnically distinct political subdivision citizens or members are the people who may act as the constituent power by initiating the process. This can be done by those people using their ethnically distinct political subdivisions to democratically vote to initiate the process via their governing bodies, petition, referendum, or a combination thereof. Once the necessary voting thresholds are met, a constituent assembly typically composed of the ethnically distinct political subdivisions' elected leaders is formed to draft a sub-state constitution. If the constitutional right to self-determination federative process requires state ratification of the new sub-state's constitution (or an ancillary agreement between the state and sub-state), then the constituent assembly will also have to negotiate with the state. Finally, upon agreement of the constituent assembly on the sub-state's constitution, the new constitution must be ratified by the constituent assembly itself, the state, the people via referendum, or a combination thereof. Since the constitutional right to self-determination federative process can be dynamic over time, the sub-state can adopt or relinquish additional enumerated powers via the same process, albeit a constitutional amendment process.

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<sup>47</sup> Yash Ghai and Guido Galli, *Constitution Building Processes and Democratization*, In International IDEA, *Democracy, Conflict and Human Security* 1, 9 (2006).

## **Comparators' Constitutional Right to Self-Determination Federative Processes**

This section will provide a historical narrative of how the constitutional right to self-determination was implemented in Spain, Iraq, Ethiopia, the United States, and Canada. It will focus on the underlying ethnographic and political contexts which caused these states to implement a constitutional right to self-determination and how the resulting federative process actually functioned or did not function.

### **A. Spain's Autonomous Community Process**

Spain is an ethnically diverse European state, which has four long standing geographically concentrated population groups along its borders that are ethnically distinct in language, ancestry, culture, history, and geography from the dominant centrally located Castilian majority culture: the Basques, the Catalonians, the Galatians, and the Andalusians.<sup>48</sup> Spain was a unitary state with a “longstanding centralist tradition” ruled by a monarchy until the monarch’s abdication in 1931 and after short republican and civil war interlude, a nationalist dictatorship under Francisco Franco until 1975.<sup>49</sup> Prior to his death, Francisco Franco reestablished Juan Carlos I as the monarch, and he led a decentralization and transition to democracy process that culminated in the drafting of a new constitution.<sup>50</sup> The 1978 Spanish Constitution sought to accommodate the Basque and Catalanian nationalists – who were violently suppressed under Franco’s regime – while maintaining the unity of the state.<sup>51</sup>

The Autonomous Community Process was the product of this compromise, which is generally described in Article 143(1) of the Spanish Constitution:

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<sup>48</sup> Francesc Morata, *Spain The Autonomic State*, In Loughlin et al., editors, *Routledge Handbook of Regionalism and Federalism* 274 (2013).

<sup>49</sup> José Tudela Aranda and Mario Kölling, *Spain (Kingdom of Spain) A Union of Autonomous Communities*, In Griffiths et al., editors, *The Forum of Federations Handbook of Federal Countries* 2020 330 - 331 (2020).

<sup>50</sup> *Id* at 24.

<sup>51</sup> *Id*.

In the exercise of the right to self-government recognized in Article 2 of the Constitution, bordering provinces with common historic, cultural and economic characteristics, island territories and provinces with historic regional status may accede to self-government and form Autonomous Communities in accord with the provisions contained in this Title and in the respective Statutes.

Article 143(2) states elected leaders from provinces with the consent of at least two-thirds of the municipalities representing at least half the population within each province have the right to initiate a process towards self-government individually or in combination with others.<sup>52</sup> Once this agreement was secured, a constituent assembly consisting of the province's elected leaders and state legislatures would meet to draft the Autonomous Community's constitution called the Statutes of Autonomy.<sup>53</sup> In the draft Statutes of Autonomy, the constituent assembly could select its self-rule powers from a list of enumerated powers and define its territorial boundaries based on its constituent provinces.<sup>54</sup> The draft Statute of Autonomy would then be sent to the state legislature for approval.<sup>55</sup> Once approved by state, the Autonomous Community would come into existence and could choose to expand its enumerated powers over time by amending its Statute of Autonomy, subject to state legislature approval.<sup>56</sup>

The Autonomous Community Process functioned as it was designed: the ethnically distinct Basque, Catalanian, Galician, and Andalusian provinces immediately used it to create their own Autonomous Communities.<sup>57</sup> This was due to Spain's provincial and municipal borders reflecting historic and ethnic loyalties, which made it a straight forward process for ethnically distinct provinces to combine. Overall, "the Spanish model of political decentralization was

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<sup>52</sup> 1978 Spanish Constitution, Art. 143(2). The use of Article 143(2) came with a 5-year waiting period from 1978 to start the process. Article 151 creates a faster process but requires provincial council, three-fourths municipality consent, and a successful provincial referendum to initiate the process.

<sup>53</sup> *Id.* at Art. 146.

<sup>54</sup> *Id.* at Art. 147, 148.

<sup>55</sup> *Id.* at Art. 146.

<sup>56</sup> *Id.* at Art. 148(2).

<sup>57</sup> Aranda et al, *supra* note 49, at 334. These provinces used the fast track Article 151 process to form their Autonomous Communities.

remarkably successful” and precluded the most nationalistic of the ethnic groups – the Basque and Catalonians – from reengaging in violent struggles for independence.<sup>58</sup> Yet, the Autonomous Community also created an unexpected outcome: less ethnically distinct provinces also chose to form their own Autonomous Communities based on historic or economic ties.<sup>59</sup> These less ethnically distinct Autonomous Communities did not demand as much self-rule powers from the state; therefore, there exists an asymmetry in self-rule powers between Spain’s Autonomous Communities.<sup>60</sup> Thus, Spain’s constructivist approach led to diversity of outcomes for each ethnic group and their associated Autonomous Communities.

#### B. Iraq’s Federal Region Process

Iraq is an ethnically diverse postcolonial state with a large geographically concentrated Kurdish minority population in the north and a majority Arab population in the south split along sectarian lines between Sunnis (concentrated in the southwest) and Shiites (concentrated in the southeast) with central cities such as Baghdad containing both sectarian groups.<sup>61</sup> In addition, small geographically concentrated minority groups such as Iraqi Turkmen, Chalydo-Assyrians, and Yazidis are dispersed throughout the Iraq in geographically isolated communities.<sup>62</sup> Like Spain, Iraq was ruled by a centralized monarchy followed by the nationalist dictatorship of Saddam Hussein, who suppressed Kurdish and Shiite Arabs while privileging Sunni Arabs.<sup>63</sup> In 2003, the United States invaded Iraq to topple the Saddam Hussein regime, which quickly led to a Sunni Arab led insurgency against the United States and a sectarian civil war.<sup>64</sup> In drafting the

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<sup>58</sup> *Id.* at 336.

<sup>59</sup> Morata, *supra* note 48.

<sup>60</sup> *Id.*

<sup>61</sup> Barkey & Gavrilis, *supra* note 39, at 37.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

2005 Iraqi Constitution, the Iraqi constituent assembly sought to accommodate Kurdish nationalism and the sectarian divide, while maintaining the unity of the Iraqi state.<sup>65</sup>

The Federal Region Process – closely resembling Spain’s Autonomous Community Process – was the product of this compromise, which established a Kurdish autonomous Federal Region and provided a process whereby the remaining governorates except Baghdad could combine into equal Federal Regions.<sup>66</sup> Either one-third of the council members or one-tenth of the voters of each governorate intending to form the Federal Region may request a referendum initiate to initiate the process.<sup>67</sup> Once requested, a referendum would be held in each governorate to approve the formation of the Federal Region.<sup>68</sup> If a majority approved, the composite governorates could then adopt a constitution that defines the Federal Region’s structure, authorities, and mechanisms to exercise such authorities.<sup>69</sup> The new Federal Region’s powers would equal the Kurdish Federal Region’s powers such as natural resource revenue sharing, internal security autonomy, and ability to amend national legislation to suit regional needs.<sup>70</sup> Small ethnic minorities referred to as “various nationalities” such as Turkomen, Chaldeans, and Assyrians were guaranteed “administrative, political, cultural, and educational rights” but since none of them had their own governorates, they were excluded from this process.<sup>71</sup>

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<sup>65</sup> *Id.* at 38.

<sup>66</sup> 2005 Iraq Constitution, Art. 117 - 120.

<sup>67</sup> *Id.* at Art. 119. According to implementing legislation, if two rival initiatives meet the threshold at the same time, then, unless one of the initiatives enjoys two-thirds council member support, the local authorities must carry out a poll among the population to determine which has greater support. Reider Visser. *The Draft Law for the Formation of Regions: A Recipe for Permanent Instability in Iraq?* [historiae.org. https://historiae.org/aqalim.asp](https://historiae.org/aqalim.asp).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at Art. 120.

<sup>70</sup> *Id.* at Art. 121.

<sup>71</sup> *Id.* at Art. 125.

The Federal Region Process has not functioned according to design, since not a single governorate has utilized the process, nor has ethnic and sectarian conflict within Iraq ceased.<sup>72</sup> This is due in large part to the governorate boundaries being designed purely for administrative purposes rather than reflecting any historic or ethnic loyalties like in Spain.<sup>73</sup> Thus, combining governorates would not create Federal Regions along sectarian lines, nor give autonomy to smaller ethnic minorities like the Turkomen, Chaldeans, Assyrians, and Yazidis.<sup>74</sup> Secondly, Sunni Arabs do not strongly identify along sectarian lines for purposes of collective self-government, but rather self-organize along tribal lines.<sup>75</sup> Shiite Arabs divide along political parties who prefer a Shiite identity aligned with Iran and those who prefer a Arab identity aligned with the Iraqi state.<sup>76</sup> Further, as the majority demographic of a majoritarian democratic Iraqi state, Shiite Arabs have little incentive to reduce the central governments powers. Thus, the Iraqi Federal Region Process is a failed constructivist process, because it does not allow smaller ethnic groups to seek recognition, nor amalgamate into larger groupings capable of self-rule.

### C. Ethiopia's Regional State Process

Ethiopia is an incredibly ethnically diverse post-imperial state with seven large ethnic groups constituting 87% of the population and 70 other ethnic groups 13%.<sup>77</sup> The two largest ethnic groups – the Amhara and Oromo – are geographically concentrated in the center of the state; the other large ethnic groups – Tigray, Afars, and Somalis — the north and east of the state; and, the

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<sup>72</sup> Reidar Visser, *Federalism from Below in Iraq: Some Historical and Comparative Reflections*, [historiae.org](https://historiae.org/federalism-from-below.asp), <https://historiae.org/federalism-from-below.asp>

<sup>73</sup> *Id.*

<sup>74</sup> John McGarry and Brendan O'Leary, *Iraq's Constitution of 2005: Liberal Consociation as Political Prescription*, 5 ICON 4 670, 676 (2007).

<sup>75</sup> *Id.* at 678. Also see. Emma Sky, *Iraq, From Surge to Sovereignty - Winding the Down the War in Iraq*, 90 FOREIGN AFF. 117, 119 (2011).

<sup>76</sup> *Id.* Also see Visser, *supra* note 72.

<sup>77</sup> Belachew Girma Degefie, *Consociation as a Guarantee for the Protection of Minority Rights in Ethiopia*, 26 INT'L J. ON MINORITY AND GROUP RIGHTS 335, 344 (2019).

remaining 70 small ethnic groups, mostly in the southwest of the state.<sup>78</sup> Historically, Ethiopia was centrally ruled by an Amhara dominated imperial monarchy akin to the Austrian Hapsburg monarchy for centuries, which was overthrown by a Marxist military dictatorship called the Derg in 1974.<sup>79</sup> In 1991, a coalition of ethnic groups called the Ethiopian People's Revolutionary Democratic Front (EPRDF) headed by the Tigray People's Liberation Front (TPLF) overthrew the Derg after a decades long civil war and drafted the 1995 Ethiopian Constitution.<sup>80</sup> The EPRDF coalition consisted of regional parties representing the Tigray, Amhara, and Oromia ethnic groups along with the Southern Ethiopian People's Democratic Movement (SEPDM) that represented the 70 small ethnic groups in the southwest.<sup>81</sup>

Since each respective EPRDF coalition party represented a particular ethnic group and their regional homelands, the framers of the 1995 Ethiopian Constitution sought to create an ethno-federal system along the same ethnic lines. Thus, the EPRDF coalition members each had a Regional State created for them in which that ethnic group would be the predominant population (e.g., the State of Tigray, the State of Amhara, the State of Oromia).<sup>82</sup> The SEPDM's southwest region of small ethnic groups had the State of Southern Nations, Nationalities and Peoples created for it.<sup>83</sup> Since this Regional State had numerous ethnic groups in it and some of the larger ones had minority ethnic groups within them, the Ethiopian Constitution drafters created the Regional State Process whereby the smaller ethnic groups by themselves or in combination with others could gain statehood status alongside the other Regional States.<sup>84</sup> To do so, an ethnic group

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<sup>78</sup> *Id.*

<sup>79</sup> Assefa, *supra* note 18, at 25.

<sup>80</sup> *Id.* at 27 - 29.

<sup>81</sup> *Id.*

<sup>82</sup> 1994 Ethiopia Constitution, Art. 47(1)-(3).

<sup>83</sup> Degefe, *supra* note 77, at 351. "There is the SNNP Regional State on the other extreme where more than 56 ethnic groups are merged together."

<sup>84</sup> *Id.* at 352.

first needs a territorially aligned administrative district created for them.<sup>85</sup> To initiate the process, that ethnic group's district council by themselves or in combination with others would have to approve a demand for statehood by two-thirds vote and present the demand to their Regional State's council.<sup>86</sup> Then the Regional State would organize a referendum within a year for all the people within the district(s).<sup>87</sup> If approved by majority vote, the district(s) would become a Regional State with the power to "to enact and execute the [Regional] State constitution" and negotiate a transition plan with the old Regional State, whereby the transfer of powers over time would be negotiated.<sup>88</sup>

Ethiopia's Regional State Process has only recently functioned according to design. From 1995 to 2018, Ethiopian politics were centrally dominated by the EPRDF party under the leadership of the TPLF – who founded the party.<sup>89</sup> This centralization restricted the actual autonomy of Regional States and by extension demands for statehood.<sup>90</sup> After the dissolution of the EPRDF in favor of a Amhara and Omoria backed Ethiopian Prosperity Party, the Sidama people – the largest ethnic group in the State of Southern Nations, Nationalities and Peoples – were the first to successfully gain statehood in 2019, albeit not without controversy.<sup>91</sup> In November 2021, a coalition of ethnic groups organized in five zones and a special Waredo

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<sup>85</sup> *Id.* at 350. Presently, 17 ethnic groups have been allowed to establish zonal administration alongside the States, 17 ethnic groups administer themselves at the Waredo (i.e., district) level, and 7 have been given a special Waredo status.

<sup>86</sup> 1994 Ethiopia Constitution, Art. 47(3)(a).

<sup>87</sup> *Id.* at Art. 47(3)(b)

<sup>88</sup> *Id.* at Art. 47(3)(c)-(e). Art.47(4). Art. 52(2)(b).

<sup>89</sup> Lovise Aalen, *Ethiopia: The Interplay Between Federalism and Dominant Party Rule and the Sidama's Quest for Statehood*, 28 INT'L J. ON MINORITY AND GROUP RIGHTS 972, 973 (2021).

<sup>90</sup> *Id.* at 980. The EPRDF led Federal Government politically and sometimes violently suppressed demands for statehood from the Sidama people out of fear it would create additional demands from other ethnic groups and challenge the SEPDM coalition model.

<sup>91</sup> *Id.* 980 – 982. The Sidama Zone Council voted to demand statehood on July 18, 2018 but the State delayed organizing a referendum leading to protests, violence, and killings took place between statehood supporters and the Sidama's rival ethnic group in the Wolayta Zone. Eventually the referendum was held in November 2019 and approved by 97.5% (non-Sidama minorities boycotted) and the State agreed to a 10 year transition of power plan so the State capital could be moved and the new Sidama State have full control of the former capital.



successfully gained statehood by referendum and drafted a constitution to form the Southwest Ethiopians People's Regional State.<sup>92</sup> Thus, the Regional State Process resulted in a distinct ethnic group forming a Regional State, but also multiple ethnic groups banding together to form a Regional State. Like in Spain, this constructivist process had the unintended effect of creating new ethnic identities and groupings that previously did not exist.

#### D. United States Tribal Self-Determination Process

The United States is a former settler colony with a significant population of Native Americans who descend from the indigenous population who inhabited the present-day territory of the United States politically organized into Tribes. In early American history, the United States government recognized the inherent sovereignty of Native American Tribes and treated them as a distinct people who governed themselves on their own lands and terms.<sup>93</sup> The U.S. Constitution treated Tribes analogously to foreign nations by giving Congress the exclusive authority to regulate commerce with "foreign Nations" and "Indian Tribes."<sup>94</sup> As settlement expanded westward, the Supreme Court altered the construct to find Tribes were not foreign nations, but "domestic dependent nations" akin to a trust relationship with attendant trustee duties.<sup>95</sup> Nonetheless, the federal government pursued an Indian removal policy to relocate Tribes into the smaller and smaller areas called reservations.<sup>96</sup>

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<sup>92</sup> Ethiopian Monitor, *Negash Wagesho Appointed to Lead Newly Formed South West Ethiopia Peoples Region*, Ethiopian Monitor, November 23, 2021, <https://ethiopianmonitor.com/2021/11/23/negash-wagesho-appointed-to-lead-newly-formed-south-west-ethiopia-peoples-region/>

<sup>93</sup> Strommer, *supra* note 16, at 6.

<sup>94</sup> United States Constitution. Art. I, § 8. Also *see* Strommer, *supra* note 93, at 7. This "Indian-Commerce Clause" combined with the Supremacy Clause has been interpreted by the Supreme Court to mean the federal government has plenary power over tribes.

<sup>95</sup> Strommer, *supra* note 93, at 11.

<sup>96</sup> *Id.* at 13.

By the end of the 19<sup>th</sup> century, federal policy switched from removal to assimilation by breaking up the reservations into individual land allotments and disbanding smaller Tribes.<sup>97</sup> The federal government through the Bureau of Indian Affairs took over providing healthcare, education, road construction, and social services to Native Americans directly.<sup>98</sup> In 1934, the federal government repudiated these paternalistic policies and attempted to reconstitute the Tribes through the Indian Reorganization Act that formalized Tribes as political subdivisions through tribal constitutions and formal membership requirements.<sup>99</sup> Yet, in 1953 the federal government changed its approach again towards assimilation and started to repudiate tribal sovereignty.<sup>100</sup>

This all changed 1975, when Congress passed the Indian Self-Determination and Educational Assistance Act, which provided the legal framework for Native American Tribes to exercise their right to self-determination and self-governance.<sup>101</sup> The Act allowed federally recognized tribal governments to assume control over programs, services, and funding allocated to them on an *a'la carte* basis via self-determination contracts. These awarded contracts would allow tribal governments to receive federal funds and directly provide services to members.<sup>102</sup> For those Tribes who lost their federal recognition or were never recognized, a process was created so they too could achieve self-government.<sup>103</sup> If the criteria is satisfied, then the federal government will

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<sup>97</sup> *Id.* at 14.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 15.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 4.

<sup>102</sup> *Id.* at 21-22. In 1994, the Tribal Self-Government Act furthered self-government by allowing qualifying tribal governments with sufficient capacity to receive bloc grant funding and less federal oversight over spending and programs.

<sup>103</sup> 25 C.F.R. § 83, "Procedures for Establishing that an American Indian Group Exists as an Indian Tribe." See also Mark D. Myers, *Federal Recognition of Indian Tribes in the United States*, 12 STAN. L. & POL'Y REV. 271, 273 (2001). This regulatory process is not the only path to federal recognition, since Congress may unilaterally recognize a tribe by an act.

recognize the Tribe and begin offering it services like the other Tribes along with the path towards self-government. The Tribal Self-Determination Process has functioned well over the years and allowed Tribes to “exercise self-determination through economic development, cultural activity, language revitalization, and other aspects of nation-building.”<sup>104</sup> Thus, the Tribal Self-Determination Process is a functional constructivist process which gives individuals with Native American ancestry a path towards reestablishing their former identity and achieving self-governance over time.

#### E. Canada’s Aboriginal Self-Government Process

In Canada – another former settler colony – there are three recognized groups of Aboriginal people: the Indians (i.e., First Nations), the Métis (i.e., half-caste descendants of Aboriginal peoples and European settlers) and the Inuit (i.e., Eskimos).<sup>105</sup> Like in the United States, First Nations were treated like foreign nations through treaties until the Canadian Constitution Act of 1867 gave the federal government legislative jurisdiction over First Nations and the treaty land reserved for them.<sup>106</sup> The later enacted Indian Act of 1876 is the foundation of Aboriginal people law in Canada and has been amended numerous times after.<sup>107</sup> The Indian Act creates First Nation Bands which are defined as a body of First Nation Indians who use and benefit from common lands (i.e., a reserve) or money vested in or held by the Canadian federal government.<sup>108</sup> Each Band must maintain a list of persons belonging to the Band called the “Band List” and may set their own membership rules.<sup>109</sup> Bands may request from the Canadian

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<sup>104</sup> Stromme, *supra* note 93, at 74.

<sup>105</sup> Kristýna Onderková. *The Harper Government, the Aboriginal Right to Self-Determination, and the Indian Act of 1876*. 15 ACTA UNIVERSITATIS CAROLINAE STUDIA TERRITORIALIA 45, 47 (2015). This article will only concern the First Nations, since the Inuit and Métis are dealt with using a separate process.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> Indian Act (R.S.C., 1985, c. I-5), Art (2)(1). Persons who can prove descent from a person registered as an Indian may register as an Indian with the Department of Indian Register and only then be eligible to join a Band.

<sup>109</sup> *Id.* at Art. 8.

federal government by a majority vote of Band members to combine; individual members may also unilaterally request to form their own Bands.<sup>110</sup> If given a reserve, the Band held title to such land in common, so individual members could never receive such land in fee simple.<sup>111</sup> Each Band is also assigned certain monies by the federal government, which the federal government spends on behalf of the Bands.<sup>112</sup>

Under the Indian Act, the Bands had very little control over their reserved land and monies until 1982, when the Canadian government recognized that Aboriginal people have a constitutionally enforceable inherent right of self-government.<sup>113</sup> To avoid litigation on this right, the Canadian federal government has implemented the Aboriginal Self-Government Process, which mandates federal ministries negotiate self-government agreements with the Bands.<sup>114</sup> Duly mandated Band representatives may initiate the process by submitting a self-government plan to a federal ministry in charge of a sectoral area.<sup>115</sup> This triggers a tripartite negotiation with the Band, the province in which the Band is located, and the relevant federal government department in which the Band may choose to negotiate to take control over a list of enumerated powers on an *a'la carte* basis.<sup>116</sup> Since Bands differ in population and reserve size, the results of the negotiation will depend on the Band's capacity and economies of scale.<sup>117</sup>

Once the negotiations are complete, the self-government agreement must be ratified by the Canadian federal government depending on the type of agreement and the Band in

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<sup>110</sup> *Id.* at Art. 17.

<sup>111</sup> *Id.* at Art. 18 - 20.

<sup>112</sup> *Id.* at Art. 61.

<sup>113</sup> Government of Canada, *supra* note 17, Part I.

<sup>114</sup> *Id.* Part III.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*, Part I.

<sup>117</sup> *Id.* Part III

accordance with a process that clearly demonstrates the Band's consent.<sup>118</sup> Side-by-side with this process, the Canadian federal government may also negotiate land claims in which a Band can gain a reserve or expand their current one based on its historical ownership of land. When negotiations concern a Band with a reserve, they also concern jurisdiction and provision of services to non-resident members of the Band's reserve.<sup>119</sup> Finally, this process gives the Band control over drafting their own constitution and structuring their government to effectuate the powers conferred on them. By 2012, Canada has implemented 20 self-government agreements and is negotiating well over 100 more; therefore, the Aboriginal Self-Government Process has functioned properly to date.<sup>120</sup> Thus, the Canadian Aboriginal Self-Government Process is a functional constructivist process whereby First Nation Bands may achieve self-governance.

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<sup>118</sup> *Id.* Self-government agreements can take the form of treaties, legislation, contracts and non-binding memoranda of understanding. If a treaty, then Canadian Parliament must approve and it is given constitutional protection. If implementing legislation, the Canadian Parliament must pass it. All others only require ministry level approval.

<sup>119</sup> *Id.* Part II.

<sup>120</sup> Aboriginal Affairs and Northern Development Canada, *Toward a New Approach to Aboriginal Self-Government Fiscal Arrangements in Canada*, February 2012 Discussion Paper. [https://www.sac-isc.gc.ca/DAM/dam-inter-hq-ai/staging/texte-text/dispaper\\_1363967423864\\_eng.pdf](https://www.sac-isc.gc.ca/DAM/dam-inter-hq-ai/staging/texte-text/dispaper_1363967423864_eng.pdf).

## **Comparative Analysis of Constitutional Self-Determination Federative Processes**

This section will compare and contrast how Spain, Iraq, Ethiopia, the United States, and Canada constitutional right to self-determination federative processes determines: (a) who are the new sub-state's people, (b) what is new the sub-state's jurisdiction, (c) which powers will the new sub-state have, and (d) how is the new sub-state created. This comparative analysis will deductively show how each comparator fits within the common framework described above. If a comparators' system constitutional right to self-determination federative process is non-functional, then this section will address the reasons why it is non-functional by comparing it with the common framework.

### **A. Who are the New Sub-State's People?**

A constitutional right to self-determination federative process defines people to mean the citizens or members of a single or combination of ethnically distinct political subdivision(s). If a state lacks ethnically distinct political subdivisions, then there must be a mechanism to create an ethnically distinct political subdivision. This section will first compare and contrast the ethnically distinct political subdivisions each comparator makes eligible to exercise the constitutional right to self-determination and then the mechanisms by which they may create an ethnically distinct political subdivision.

#### ***1. Ethnically Distinct Political Subdivisions Eligible to Exercise the Constitutional Right to Self-Determination***

A constitutional right to self-determination federative process must first establish which peoples are able to utilize the process by stating which ethnically distinct political subdivisions are eligible to use it. All comparators with the exception of Iraq allow ethnically distinct political subdivisions to use a constitutional right to self-determination federative process.

Spain allows its provinces to individually or in combination form Autonomous Communities to form self-rule powers.<sup>121</sup> Spain's provinces were created in 1833 when the Spanish crown divided Spain into provinces that were based around and named after the capital city of the province.<sup>122</sup> The provincial borders were drawn so every municipality fit within a single province. Further, each province's borders were drawn to align with a historic region (e.g., Asturias, Navarra, Murcia) or in a manner that multiple provinces could combine to form a larger historic region (e.g., Basque country, Catalonia, Andalusia).<sup>123</sup> These historic regions conform with multiple ethnic identity markers such as language (e.g., Basque, Catalanian, Galatian), ancestry (e.g. Basque, Galatian, Andalusian non-Latin ancestry), cultural practices, and historic independent political statuses (e.g., Aragon, Navarra, Valencia, Murcia).<sup>124</sup> Thus, Spain's provinces are territorially ethnically distinct political subdivisions.

Ethiopia allows its nations, nationalities and peoples within its Regional States to individually or in combination form Regional States to gain self-rule powers. Article 39(5) of the Ethiopian Constitution essentially defines "nations, nationalities and peoples" to mean any people share common ethnic identity markers. Yet, Ethiopia originally only had 9 Regional States, but recognizes 77 nations, nationalities and peoples.<sup>125</sup> To avoid the smaller nations, nationalities and peoples gaining equal statehood, Ethiopia organizes territorial political subdivisions called Special Zones or Woredas to align with geographic areas inhabited by a nation, nationality and people.<sup>126</sup> Thus, Ethiopia's nations, nationalities and peoples that have

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<sup>121</sup> 1978 Spain Constitution, Art. 143(1).

<sup>122</sup> Visser, *supra* note 72.

<sup>123</sup> *Id.*

<sup>124</sup> Charles E. Ehrlich, *Ethno-Cultural Minorities and Federal Constitutionalism: Is Spain Instructive*, 24 S. ILL. U. L. J. 291, 302 (2000). See also Lana Tsanava, *Regionalism as the Form of Territorial Organization of the State*, 2012 J. LAW 31, 32 (2012).

<sup>125</sup> Degeffie, *supra* note 77.

<sup>126</sup> Degeffie, *supra* note 85.

their own Special Zone or Woreda assigned to them are territorially ethnically distinct political subdivisions.

The United States allows its federally recognized Tribes to individually or in combination use the Self-Determination Process to gain self-rule powers. In 1934, the United States formalized tribal constitutions, membership, and reservation territory rules in the Indian Reorganization Act.<sup>127</sup> To qualify as a Tribe member, persons had to show ancestry through “blood quantum” tests by proving tribal ancestry from  $\frac{1}{4}$  or  $\frac{1}{2}$  of their parentage.<sup>128</sup> Thus, a person could be a member living on or off the Tribe’s reservation territory. When a new Tribe is recognized, it must prove to the federal government that its members share common ancestry to a historic Native American tribe pre-dating 1900.<sup>129</sup> Thus, all tribal members at least share the common identity marker of shared ancestry. Therefore, all Tribes are non-territorially ethnically distinct political subdivisions.

Canada allows its First Nation Bands to individually or in combination exercise their inherent right to self-government and use the Aboriginal Self-Government Process to gain self-rule powers. In 1876, Canada formalized First Nation band membership and reservation territory by creating Band lists. Each Band had to maintain a list of members starting in 1876 and afterwards, a person must show ancestry to a prior listed Band member to qualify to be a Band member.<sup>130</sup> So, a person could be a Band member living on or off the Band’s territory. Thus, all tribal members at least share the common identity marker of shared ancestry. Therefore, all Bands are non-territorially ethnically distinct political subdivisions.

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<sup>127</sup> R. Warren Anderson, Native American Reservation Constitutions, 27 Const. POL. ECON. 377, 378 (2016).

<sup>128</sup> *Id.*

<sup>129</sup> 25 C.F.R. § 83.

<sup>130</sup> *Supra* note 108.



Iraq allows its governorates individually or in combination form Federal Regions to gain self-rule powers.<sup>131</sup> The Kingdom of Iraq was founded from three provinces of the Ottoman Empire: Baghdad, Basra, and Mosul. None of these provinces, nor the subsequent created 18 administrative governorates align with ethnic or sectarian divides.<sup>132</sup> Only the northern Kurdish Federal Region, which had to disrupt former governorate boundaries to be made, corresponds with ethnic borders.<sup>133</sup> Even if the majority Shiite or Sunni Iraqi population favored federalism, there is not an obvious combination of governorates that would create ethnically distinct sectarian sub-states in Iraq.<sup>134</sup> The Federal Region process relies on shared residency in neighboring governorates as a common identity marker, but shared residency alone is not a sufficient identity marker to politically motivate residents to form a sub-state. Thus, all proposed governorate combinations would be arbitrary and ahistorical. Further, none of Iraq's smaller minorities – Turkomen, Chaldeans, Assyrians, and Yazidis – are majority populations in any governorates, so they cannot gain self-rule powers either.<sup>135</sup> Iraq's lack of ethnically distinct political subdivisions is the primary reason its Federal Region process is non-functional. Simply put, for a people to construct themselves they need common identity markers to politically organize along. Non-ethnically distinct political subdivisions make this impossible.

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<sup>131</sup> 2005 Iraq Constitution, Art. 119. The Iraqi Constitution allows any people within “one or more governorates ... the right to into a region.”

<sup>132</sup> Reidar Visser, *Building Iraqi Subunits by Way of Referenda: Special Challenges For Iraq*, [historiae.org, https://historiae.org/federalism.asp](https://historiae.org/federalism.asp).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> Barkey & Gavrilis, *supra* note 39, at 37.

## 2. *Mechanisms to Create Ethnically Distinct Political Subdivisions*

An ethnically distinct political subdivision can be created by territorial or non-territorial means. The former entails aligning borders the territorial distribution of ethnic groups like in Spain and Ethiopia, while the latter aligning membership rules with ethnic identity markers like in the United States and Canada.

Ethiopia's Constitution provides a methodology for how a territorially ethnically distinct political subdivision could be created. First, the Ethiopia's Constitution provides a justiciable definition of what an ethnic group is by defining nation, nationality or people to mean "a group of people who have or share a large measure of a common culture or similar customs, mutual intelligibility of language, belief in a common or related identity, a common psychological make-up, and who inhabit an identifiable, predominantly contiguous territory."<sup>136</sup> It then requires that Regional State borders "be delimited on the basis of the settlement patterns, language, identity and consent of the people concerned."<sup>137</sup> Broadly generalized, the Ethiopian Constitution provides a two-step process to create a territorially ethnically distinct political subdivision: (a) establish if an ethnic group exists according to a justiciable definition, and (b) align a political subdivision's borders along a predominantly contiguous territory inhabited by that ethnic group's members. This alignment process could also consider that ethnic group's settlement patterns via historical evidence and the democratic consent of the people living within the territory via referendums.

The United States federal recognition process provides a methodology for how a non-territorially ethnically distinct political subdivision could be created. Under this process, a

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<sup>136</sup> 1994 Ethiopia Constitution, Art. 39(5).

<sup>137</sup> *Id.* at Art. 46.

petitioner (i.e., a tribal leader) must apply to the federal government proving (a) the petitioner belongs to an American Indian entity on a substantially continuous basis since 1900, (b) the entity is a distinct community that has existed since 1900, (c) they are a political leader of the entity, (d) a membership criterion exists, and (e) the present-day members descend from the historic unrecognized Indian tribe.<sup>138</sup> Broadly generalized, it allows a self-organized group sharing identity markers to have their self-proclaimed leadership submit an application to the state proving (a) the petitioner belongs to a distinct group, (b) the group is a distinct community that has existed over a long period of time, (c) the petitioner is a political leader of the group, (d) the group has membership criteria based on the identity markers and (e) the present day group members match that membership criteria. This application process could allow for objective (e.g., ancestry test) or subjective (e.g., self-identification) membership criteria depending on the identity markers involved.

Iraq could have used a combination of these mechanisms to create ethnically distinct political subdivisions eligible for self-rule powers. For Iraq's geographically isolated Turkomen, Chaldean, Assyrian, and Yazidi communities, Ethiopia's territorial mechanism could have been used to create territorial political subdivisions for each. Due to the security situation, this is effectively the case today.<sup>139</sup> As for the disaffected Sunni Arabs predominately concentrated in the Southwest of Iraq, strong tribal identification still exists.<sup>140</sup> The United States' 2008 "Surge" strategy in Iraq centered around the "Sunni Awakening" which entailed negotiating with Sunni

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<sup>138</sup> 25 C.F.R. § 83.

<sup>139</sup> Barkey & Gavrilis, *supra* note 39, at 37. "Even Iraq's smaller ethnic and religious minorities, such as the Turkmen, Yazidis and Assyrians, have given up working within the boundaries of Iraq's federal system. It has been pointed out that many Turkmen leaders would like 'to carve out an independent state out of the violently contested, multi-ethnic province of Kirkuk.'"

<sup>140</sup> Sky, *supra* note 75, at 119.

Arab tribal leaders to turn against foreign Al-Qaeda in Iraq members.<sup>141</sup> This strategy was successful until the Shiite Arab dominated Iraqi central government refused to integrate these tribesmen into the Iraqi security services in 2013.<sup>142</sup> The United States' non-territorial mechanism could have been used to create non-territorial political subdivisions for each Sunni Arab tribe, so they could have constitutionally been integrated into the Iraqi state.

In conclusion, the comparative analysis shows a functional constitutional right to self-determination federative process must allow ethnically distinct political subdivisions to individually or in combination create the new sub-state. Therefore, any state endeavoring to implement a constitutional right to self-determination federative process must use a mechanism to create territorial or non-territorial ethnically distinct political subdivisions first.

#### B. What is the New Sub-State's Jurisdiction?

Since a new sub-state may be an individual or combination of territorial or non-territorial ethnically distinct political subdivisions, its jurisdiction may be territorial, non-territorial, subject matter dependent, or a combination thereof. This section will compare and contrast how the comparators delineate their new sub-state's jurisdiction in their respective constitutional right to self-determination federative processes.

Spain's Autonomous Communities use a combination of territorial and non-territorial jurisdiction to govern and confer rights upon their citizens. For example, Article 7 and Article 9 of the Catalan Statutes of Autonomy states:

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<sup>141</sup> *Id.*

<sup>142</sup> Barkey & Gavrilis, *supra* note 39, at 37-38.

## Article 7 -

1. Spanish citizens legally resident in Catalonia benefit from the political status of Catalans or citizens of Catalonia. Their political rights are exercised in accordance with this Estatut and the law.
2. Spanish citizens resident abroad whose last legal place of residence was Catalonia also enjoy, as Catalans, the political rights defined by this Estatut; their descendants, who maintain this citizenship, shall also enjoy these rights, if they so request, in the manner determined by law.<sup>143</sup>

Article 9 - The territory of Catalonia is that which corresponds to the geographical and administrative limits of the Generalitat as of when this Estatut comes into force.

Under these articles, Catalonia enforces territorial jurisdiction when it defines the residents within its territory to all be Catalans or citizens of Catalonia subject to its laws and able to enjoy its political rights. Catalonia also provides for non-territorial jurisdiction by conferring rights and benefits on persons whose last place of residence was Catalonia. It even allows descendants of these extraterritorial Catalans to enjoy Catalan political rights by choice. Thus, Autonomous Communities can enforce their laws upon all persons residing within its territorial boundaries, while conferring rights and benefits upon their former residents as well. This combination of territorial and non-territorial jurisdiction allows for Spaniards to retain their citizenship with their respective Autonomous Community even if they have never lived in that Autonomous Community.

Native American Tribes and First Nation Bands also utilize a combination of territorial and non-territorial jurisdiction, but their territorial jurisdiction over non-members is either limited or non-existent. Each uses a membership criterion to determine non-territorial jurisdiction. If a person is a member of the Tribe or Band, then they are subject to the laws of the Tribe or Band. By these means a Tribe or Band can exercise non-territorial jurisdiction

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<sup>143</sup> 2006 Catalonia Statutes of Autonomy, Art. 7.

irrespective of the member's residence. A Tribe or Band's territorial jurisdiction first depends on whether it has a reservation assigned to it. In the United States, some tribes have territorial jurisdiction over tribal lands with their own police and court systems, but generally they do not have full territorial jurisdiction over non-members on tribal lands unless given to them by the federal government.<sup>144</sup> In Canada under Section 81 of the Indian Act, Bands have territorial jurisdiction in reserve lands in areas such as traffic control, residency, public health, law and order, property uses, and intoxicants, but they currently lack their own police and court system to enforce it against non-members as well.<sup>145</sup> Thus, Tribes and Bands can have territorial jurisdiction, but it is limited for non-members who are still subject to the laws of their States or Provinces respectively. This combination of territorial and non-territorial jurisdiction allows Tribe and Band members to retain power over their members who live outside the reserve territory, but also limits the power Tribes and Band's power over non-members within reserve territory.

Ethiopian Regional States also uses overlapping territorial jurisdictions to govern their residents by giving over some of their enumerated powers to autonomous zones. Since Ethiopia has more ethnic groups than Regional States, this creates the problem of "minorities within minorities" where diaspora minorities from other Regional States or smaller ethnic groups within a Regional State are discriminated against and denied self-government.<sup>146</sup> To solve for this, the Regional States also carve out smaller territorial political subdivisions for minority ethnic groups to have autonomy. For example, Article 73 of the Amahara Regional State Constitution creates a

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<sup>144</sup>Jane M. Smith, *Tribal Jurisdiction over Nonmembers: A Legal Overview*, Congressional Research Service, November 26, 2013. <https://sgp.fas.org/crs/misc/R43324.pdf>. Tribes do not have inherent sovereignty over non-members on tribal land, but may acquire such jurisdiction by agreement with the United States.

<sup>145</sup> Indian Act (R.S.C., 1985, c. I-5) 81(1) Solving the Indian Act by-law enforcement issue: Prosecution of Indian Act by-laws.

<sup>146</sup> Degefie, *supra* note 77., at 348.

“nationality administration” for the “geographic areas ... inhabited by the Himra, Awi, and Oromo peoples” where they can exercise minority rights to use their own language and promote their culture.<sup>147</sup> Article 68 of the Southern Nations, Nationalities, and Peoples Regional State Constitution similarly provides for the “establishment of zonal or special waredo administrative councils by taking into account the settlement of [ethnic groups] of the State.”<sup>148</sup> By the Regional State conferring some of its enumerated powers to these autonomous territorial delimited zones, it limits its territorial jurisdiction within those zones based on subject matter. Conversely, the autonomous territorial delimited zones do not have jurisdiction beyond their borders and their enumerated powers. This combination of territorial and subject matter jurisdiction prevents the majority ethnic group in the Regional State from dominating the smaller ethnic groups within the Regional State.

Iraq’s Constitution only provides that Federal Regions “shall be responsible for all the administrative requirements of the region” including internal security forces and a share of national revenue.<sup>149</sup> The only Federal Region in existence is Kurdistan, but it has not passed a constitution to date despite one being drafted in 2006.<sup>150</sup> The 2006 draft constitution stated:

Iraqi Kurdistan consists of Kurds and other nationalities (Turkomans, Chaldeans, Assyrians, Armenians and Arabs) and according to law, they are all citizens of the Region.<sup>151</sup>

This draft constitution would have adopted just territorial jurisdiction like Ethiopia without creating autonomous zones for the other ethnic groups. Today, Kurdistan’s unclear jurisdiction

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<sup>147</sup> 2001 Amahara Regional State Constitution, Art. 73(1). Each nationality administration has its own nationality council (legislature), nationality administrative council (executive), and judicial body.

<sup>148</sup> 1995 Southern Nations, Nationalities, and Peoples Regional State Constitution, Art. 68(1).

<sup>149</sup> 2006 Iraq Constitution, Art. 121(3)(5).

<sup>150</sup> Michael J. Kelly, *The Kurdish Regional Constitutional within the Framework of the Iraqi Federal Constitution: A Struggle for Sovereignty, Oil, Ethnic Identity, and the Prospects for a Reverse Supremacy Clause*, 114 PENN ST. L. REV. 707, 709 (2010).

<sup>151</sup> *Id.* at 775

has been dictated by security officials who determine at checkpoints who could enter Kurdistan territory on an ad hoc basis coupled with movement restrictions and surveillance while within Kurdistan's borders.<sup>152</sup> Further, Kurdistan does not claim to have non-territorial jurisdiction over ethnic Kurds residing in Iraq outside of Kurdistan, so it forcefully occupies mixed and disputed areas by gaining *de facto* security control over them.<sup>153</sup> The Kurdistan example shows that territorial jurisdiction alone is problematic because it does not account for internal ethnic minorities, nor fellow ethnic group members residing outside of the sub-state's borders. If Kurdistan conferred permanent citizenship for its former residents like Catalonia and autonomous zones for its minority communities like Ethiopia, then it could clarify its jurisdictional issues.

In conclusion, a new sub-state could creatively layer territorial, non-territorial, and subject matter jurisdiction rules to accommodate geographic dispersion of its fellow ethnic group members outside its borders and minority ethnic group members within its borders. A functional constitutional right to self-determination federative process gives the sub-state flexibility to define its jurisdiction accordingly.

### C. Which Powers will the New Sub-State Have?

Once the new sub-state's people and jurisdiction is established, it is necessary to determine what powers the new sub-state will have. Under the logics of federalism, these are called enumerated powers. To confer enumerated powers, the process must provide a list of enumerated powers available to the new sub-state and a mechanism by which these enumerated powers are granted asymmetrically or symmetrically and whether they are all granted upon the

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<sup>152</sup> Kerem Can Uşşaklı, *Securitizing Citizenship and Politicizing Security in Iraqi Kurdistan*, Middle East Research and Information Project, <https://merip.org/2020/08/securitizing-citizenship-and-politicizing-security-in-iraqi-kurdistan/>.

<sup>153</sup> *Id.*



new sub-state's formation or over time. This section will compare and contrast how comparators do this.

### *1. List of Enumerated Powers*

The comparators all provide within their state constitutions a list of enumerated powers the sub-state may exercise upon formation. This list can be broad giving maximum self-government powers or narrow giving minimum self-government powers. The comparators' lists will be described from broadest to narrowest.

Canada – the Canadian federal government recognizes that Bands have an inherent right of self-government and therefore “require the jurisdiction or authority to act in a number of areas in order to give practical effect” to the right. Under this approach, it lists a number of “subjects for negotiation” that Band governments could assume.<sup>154</sup> The remainder is retained by the Canadian federal government.

United States – Since Tribes are considered domestic nations under federal trustee control, the federal government traditionally had unlimited authority to provide government services to Native Americans. Section 102 of the Indian Self-Determination and Educational Assistance Act gave the Department of the Interior and Health and Human Services authority to contract out the services it provides to Native Americans directly to tribal governments, so they may provide such services themselves via a self-determination contract. This construct has been expanded to other federal departments as well, so in theory, Tribes can assume self-government powers and funding equal to what the federal government directly provides.<sup>155</sup>

Spain – Article 148(1) of the Spanish Constitution gives a detailed list of powers Autonomous Communities “may assume” and Article 149(1) provides an even more detailed list of powers the state retains.<sup>156</sup> Article 149(3) confers residual powers not listed to the Autonomous Communities, but requires them to explicitly state that power in their own constitution. Article 150 gives the state authority to transfer or delegate its

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<sup>154</sup> Government of Canada, *supra* note 17, at Part I – Scope of Negotiations. The list of subjects includes internal government institutions, membership, family law, culture, education, health, social services, justice system, policing, property rights, land management, taxation, public works, infrastructure, urban planning, and business regulation.

<sup>155</sup> Strommer, *supra* note 15, at 67. The federal government has historically provided public health, education, works, and safety service to Native Americans, so through contracting with the Departments of Interior, Health and Human Services, Transportation, Justice, Agriculture, and Environmental Protection Agency, they can gain a large amount of self-governance.

<sup>156</sup> Autonomous Communities may assume powers such as organization of their government institutions, internal political subdivisions, urban planning, public works, infrastructure, land management, culture promotion, social assistance, public health, and public safety. They are excluded from powers such as immigration, international relations, armed forces, administration of justice, civil and criminal law (subject to modifications), customs, monetary system, weights and measures, state budget, social security, sea fishing, state infrastructure, mining and energy, media regulation, census, academia and professional services.

powers to the Autonomous Communities. Article 157 gives the Autonomous Communities taxing authority and a right to state funds based on volume of state services they have assumed.

Iraq – Article 110 of the Iraqi Constitution gives a detailed list of the state’s exclusive powers; Article 114 a list of shared powers with the Federal Regions; Article 115 a statement giving residual powers to the Federal Regions; and Article 121(5) explicitly giving Federal Regions control over internal security.<sup>157</sup> Article 111 and 112 keeps oil production and revenue with the Iraqi state, but requires it to distribute it fairly with the Federal Regions.

Ethiopia – Article 52(2) of the Ethiopia Constitution gives a short list of the Regional State’s powers; Article 51 a longer list of the Ethiopian state’s powers; and Article 52(1) a statement giving residual powers to the Regional States.<sup>158</sup>

The United States and Canada theoretically offer the broadest amount of self-rule powers to Tribes and Bands (i.e., self-rule powers equal to what the state can directly provide), but in reality, bureaucratic reluctance plus the small size and poor economic situation of some Tribes and Bands may make this impossible to achieve. Spain’s Autonomous Communities can practically achieve the largest measure of self-rule powers and fiscal autonomy due to their size and economic base (e.g., Basque Country, Catalonia). Iraq’s Federal Regions have broad powers in theory, but the state retains control over oil & gas resources which make up a large amount of the Federal Region’s revenue, thus making the Federal Region dependent on the state.<sup>159</sup>

Ethiopia’s constitution has been criticized for giving the federal government broad powers and leaving relatively little to the Regional States, which is apparent from comparing the lists of

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<sup>157</sup> The Iraqi state retains sole power over international relations, armed forces, immigration, monetary system, weights and measures, state budget, media regulation, census, oil production, and oil revenue distribution. It shares powers in customs, energy, land management, public health, public education, and water resources.

<sup>158</sup> The Ethiopian state retains power over international relations, armed forces, immigration, monetary system, weights and measures, state budget, public health & education, land management, infrastructure, and public safety. Ethiopian Regional states only have power over organization of their government institutions, land management, levy taxes, public safety, and broad “economic, social and development policies.”

<sup>159</sup> In reality, Kurdistan has the greatest autonomy of all the comparators’ sub-states, but this is more of a result of the Iraqi constitution non-functioning than by design. The allowance of Kurdistan to provide its own internal security also prevents the Iraqi state enforcing the constitution by force, so Kurdistan has been developing its own gas and oil resources and prohibits Iraqi state security forces from entering its territory. In retaliation, the Iraqi state will periodically resort to withholding state oil and gas revenues as a result. See Kelly, *supra* note 150, at 732 – 734.

enumerated powers.<sup>160</sup> Thus, a broad list of enumerated powers with commiserate revenue generating powers is necessary to create an sub-state with real self-rule powers.

## 2. *Conferral of Enumerated Powers*

The comparators are divided on whether they provide the same enumerated powers to all sub-states (i.e., symmetric) or different enumerated powers to each sub-state (i.e., asymmetric). The same divide exists whether they provide all enumerated powers immediately upon sub-state formation (i.e., automatic) or over time as sub-state capacity increases (i.e., dynamic). Ethiopia and Iraq automatically provide symmetric enumerated powers to the Regional States and Federal Regions respectively, whereas Spain, the United States, and Canada dynamically provide asymmetric powers to the Autonomous Communities, Tribes, and Bands respectively.

In theory, a new Ethiopian Regional State assumes its enumerated powers upon its formation, but in reality, it takes time for actual state power to be transferred to the new Regional State. For example, the old State of Southern Nations, Nationalities and Peoples established a ten-year transition period for the new State of Sidama to achieve full state powers.<sup>161</sup> This gives both Regional States enough time to establish new capitals, “construct necessary infrastructure, and have enough time to settle the division of administrative tasks and assets.”<sup>162</sup> Thus, Ethiopia’s conferral of enumerated powers has asymmetrical and dynamic elements to it, which makes it a functional approach. Iraq has not formed a new Federal Region to date, so it is not possible to determine if its approach would be functional or not.

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<sup>160</sup> Degefie, *supra* note 77, at 348. “This power devolution under the FDRE Constitution has been criticized on the ground that Article 51 enumerates important powers that are ‘all-embracing that may swallow up those rights given to the states.’”

<sup>161</sup> Aalen, *supra* note 89, at 973.

<sup>162</sup> *Id.*

The choices of Spain, the United States, and Canada to provide asymmetric and dynamic enumerated powers is functional within their respective contexts because their sub-states radically differ in size, economic base, institutional capacity, and ethnic cohesiveness upon formation. The methods by which they do this differ: Spain allows Autonomous Communities to amend their constitutions periodically to add enumerated powers subject to state approval; the United States allows tribal governments to negotiate self-determination contracts individually; and Canada engages in an ongoing negotiation with Band governments regarding conferral of powers. Regardless, these examples show a constitutional right to self-determination federative process can be an ongoing dynamic affair, which allows a constructed identity group to achieve more or less self-rule dependent on that group's political will to achieve it.

In conclusion, a functional constitutional right to self-determination federative process must make a broad list of enumerated powers available to the new sub-state with commiserate revenue generating power available as well. Further, a dynamic element that allows sub-states to adopt enumerated powers over time to match institutional capacity is necessary as seen in all comparators except Iraq. If the new sub-states vary in size, economic base, and ethnic cohesion, then asymmetric distribution of self-rule powers will also be necessary to accommodate diverse underlying contexts.

#### D. How is the New Sub-State Formed?

So, a constitutional right to self-determination federative process constructs a sub-state's people, establishes the sub-state's jurisdiction, and confers powers upon the sub-state. But, how does this federative process actually happen? What are the procedural steps by which the sub-state is created? All constitutional right to self-determination federative processes follow the same steps as all constitution building or amending processes: (1) the constituent power initiates

the process, (2) a constituent assembly is formed to draft a constitution or amendment, and (3) the constitution or amendment is ratified. Each of the comparators abide by these steps, but use varying degrees of thresholds and democratic practices to suit their particular context.

### *1. The Process is Initiated*

All comparators give existing eligible political subdivisions – preferably ethnically distinct political subdivisions – the right to democratically initiate the constitutional right to self-determination federative process. The only difference is the democratic mechanisms by which it may be initiated:

Spain – a province or multiple provinces in combination may initiate the Autonomous Community Process by a majority vote of each provincial council in addition to the agreement of two-thirds of municipal councils within the respective provinces that represent over half the province’s population.<sup>163</sup>

Iraq – a governorate or multiple governorates in combination may initiate the Federal Region Process by each passing a referendum that could be requested by one-third of a governorate council or a petition signed by one-tenth of a governorate’s voters.<sup>164</sup>

Ethiopia – a nation, nationality, and people with their own assigned political subdivision or multiple may initiate individually or in combination the Regional State Process by passing a referendum within the respective political subdivisions involved requested by a two-thirds of the political subdivisions’ councils.<sup>165</sup>

United States – a Tribe or multiple Tribes may initiate individually or in combination the Tribal Self-Determination Process by respective tribal governments passing a resolution requesting a self-determination contract or participation in self-governance.<sup>166</sup>

Canada – a Band or multiple Bands may initiate individually or in combination the Aboriginal Self-Government Process by respective Band governments requesting to negotiate a self-government agreement with the relevant Canadian federal department and provincial government.<sup>167</sup>

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<sup>163</sup> 1978 Spain Constitution, Art. 143.

<sup>164</sup> 2005 Iraq Constitution, Art. 119.

<sup>165</sup> 1994 Ethiopia Constitution, Art. 47(3).

<sup>166</sup> 25 USC § 5361 for self-governance participation and 25 USC § 5301 for requesting self-determination contracts.

<sup>167</sup> Government of Canada, *supra* note 17, at Part I.

Based on the comparators choices, democratic mechanisms for initiating a constitutional right to self-determination federative process involve supermajority (e.g., Ethiopia), majority (e.g., Spain, United States, Canada) or minority (e.g., Iraq) political subdivision government votes, referendums (e.g., Ethiopia, Iraq), and lower level political subdivision approvals (e.g., Spain). All mechanisms are functional, except the Iraqi governorate minority voting threshold which could theoretically result in multiple competing referendums at a time if differing governorate combinations are proposed.<sup>168</sup>

## 2. *A Constituent Assembly is Created to Draft the Constitution*

Once the constitutional right to self-determination federative process is successfully initiated, the new sub-state's people are constructed by the elevation of the ethnically distinct political subdivision to sub-state status or the combination of ethnically distinct political subdivisions to create the new sub-state. The new sub-state's people (i.e., the citizens or members of the former political subdivisions) must now appoint a constituent assembly to draft the sub-state's constitution and negotiate with the state. Some comparators specify who may be in the constituent assembly and what they are to negotiate, while others do not:

Spain – the newly formed Autonomous Community's constituent assembly consists of the former provinces council members and the respective provinces elected representatives in the state legislature.<sup>169</sup> This constituent assembly is tasked with negotiating the Autonomous Community's Statute of Autonomy amongst themselves and the Spanish state legislature who has final approval authority.

Iraq – the newly formed Federal Region has the power to adopt a constitution that specifies its structure, authorities, and mechanisms to exercise authority. The Iraqi constitution does not specify who belongs to the constituent assembly.<sup>170</sup>

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<sup>168</sup> Visser, *supra* note 132.

<sup>169</sup> 1978 Spain Constitution, Art. 146.

<sup>170</sup> 2005 Iraq Constitution, Art. 120.

Ethiopia – a newly formed Regional State immediately gains the authority to enact and execute a constitution, but does not become effective until it's former Regional State transfers its powers to the new Regional State via a transition agreement.<sup>171</sup> The Ethiopian constitution does not specify who must be in the constituent assembly.

United States – a Tribe entering the Tribal Self-Determination Process must alter its constitution to comply with the process' requirements and negotiate self-determination contracts with the federal government. It's constituent assembly is whatever tribal government voting threshold is necessary to amend the Tribe's constitution to meet the process' requirements and adopt the new self-rules.

Canada – a Band entering the Aboriginal Self-Government Process must alter its constitution to adopt additional self-rule powers therefore its constituent assembly is whatever government voting threshold is necessary to amend the Band's constitution to meet comply with the self-government agreement.

A functional constitutional right to self-determination federative process ought to specify who belongs to the constituent assembly and what its negotiating duties are, but this may not be necessary if the logics of the process necessitate an outcome. For example, the Tribe and Band constitutions predate their respective self-rule processes, so these constitutions prescribe what is the constituent assembly for each Tribe and Band. Further, Ethiopia's ethnically distinct political subdivisions already have their own elected leaders that could determine for themselves who the constituent assembly will be. Conversely, the failure of Kurdistan to adopt its own constitution to date shows the perils of a constitution not providing clarity on who must be in the constituent assembly and conditioning the transfer of power on adoption of such a constitution.<sup>172</sup>

### 3. *A Sub-State Constitution is Ratified*

Finally, upon the agreement of the constituent assembly on the new sub-state constitution and any adjoining agreements with the state, these legal instruments must be ratified. All comparators except Iraq require the agreement of the constituent assembly and the state

<sup>171</sup> 1994 Ethiopia Constitution, Art. 52.

<sup>172</sup> Kelly, *supra* note 150, at 709.

transferring its enumerated powers to the new sub-state for these instruments to be ratified: Spain requires its state legislature to enact the Statutes of Autonomy<sup>173</sup>; Ethiopia requires the former Regional State to formally transfer its powers to the new Regional State; the United States requires federal government approval of self-determination contracts; and the Canadian federal and provincial governments must accede to self-government agreements. Conversely, Iraq's constitution does not require the approval of the Iraqi state to form a Federal Region or transfer enumerated powers. The longstanding disputes between Kurdistan and the Iraqi central government over distribution of powers and state revenue show the dangers of not securing state approval before transferring of powers.<sup>174</sup>

In conclusion, a functional constitutional right to self-determination federative process requires at a minimum at least majority governmental support within the political subdivisions initiating it; legal clarity on who makes up the constituent assembly; and state ratification of the resulting sub-state constitution or ancillary agreements. For dynamic processes like in Spain, United States, and Canada, this process may be continuously repeated for the new sub-state to alter its self-rule powers and jurisdiction as well.

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<sup>173</sup> 1978 Spain Constitution, Art. 146. There is an exception to this general rule under Article 151 which adds the additional step of referendum approval by the Autonomous Community under particular circumstances.

<sup>174</sup> Kelly, *supra* note 150, at 732 – 734.



## **Conclusion**

Whether it be a European state with historic minority ethnic groups like in Spain, a postcolonial state with arbitrary borders trapping warring ethnic groups like in Iraq, a post-imperial state with a multitude of subject peoples like in Ethiopia, or a former settler colony with indigenous peoples like in the United States or Canada, a constitutional right to self-determination federative process can be tailored to convert a unitary state into an ethno-federal state. Through legal theorization and comparative analysis of a diverse range of states who confer on certain peoples the constitutional right to self-determination, this article has provided a common framework for understanding how constitutional right to self-determination federative processes function.

Further, using a comparative functionalist method, this article has derived the following functional design rules for all constitutional right to self-determination federative processes:

- To construct a people around common identity markers, the process must allow ethnically distinct political subdivisions to individually be elevated to sub-states or combine to form sub-states. If the state lacks ethnically distinct political subdivisions, then it must implement a territorial or non-territorial mechanism to create them.
- A new sub-state must be able to flexibly tailor territorial, non-territorial, and subject matter jurisdiction rules to include people who identify with it and exclude those who do not.
- A new sub-state's enumerated powers must be conferred commiseratively with its revenue generating and institutional capacity; therefore, such powers could be conferred asymmetrically to account for diversity and over time to account for institutional capacity.
- The process to create the new sub-state must be initiated by at least a majority of the ethnically distinct political subdivisions' government; clarify who the sub-state's constituent assembly will be; and require state ratification of the sub-state constitution.

By providing this common framework and functional design rules, this article seeks to start a new line of research, legal theory, and eventually broad application of this newly emerging constructivist federative practice.

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