Federal Bicameralism and Second Chamber Powers in Parliamentary Form of Government: A Brief Analysis of the Ethiopian System

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Abstract

The conventional wisdom about the original idea of federal bicameralism is that it works effectively along with a presidential rather than parliamentary governmental form. Second chambers exercise real powers normally associated with their traditional function as institutions organized for representation of vertically dispersed subnational power entities at the national level when the presidential system of governance ensuring clearly separated horizontal and cross-checking distribution of power is superimposed on the federal state structure. In this sense, the parliamentary system adopted in the Ethiopian federation has produced a second chamber significantly weaker than the first chamber. However, a multiplicity of other factors adds to form of government to impact the power configuration in the upper house. Proper concern for these factors in the political design or redesign of the federation would remedy the apparent power deficit second chambers display in the parliamentarian governmental form, and even making parliamentary governance the preferred form for ensuring the central representation of politically salient territorial cleavage patterns in ethnically diverse polity such as Ethiopia.

Introduction

The object of this piece of work is the brief exposition of the formal status and actual function of the second chamber in the Ethiopian federation's two-housed, in broad terms, "legislature". It attempts to shed some light on Ethiopian bicameralism at the national level. In particular, it uncovers the relationship between parliamentarian governance and the extent of powers assigned to the second chamber in the "National Assembly". It is believed that locating the place of bicameralism in Ethiopia would have the capacity to meaningfully affect any attempt of showing the direction and measuring the potential achievement of the Ethiopian federation.

The body proper in this article, other than the introduction and conclusions parts, is divided into two broader parts with further subdivisions under each. The first part brings general insights on the roots of bicameral representation. It attempts to explore possible conceptual links between governmental form and bicameralism. Governmental patterns in almost every republican country take one of the two major forms: parliamentary or

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presidential. The general trend is that either of these governmental forms can be superimposed on a polity having a federal[1] structure as the underlying rule of state organization. But it is claimed that because of the virtually mutual overlapping of executive and legislative powers in parliamentary form, bicameralism and, for that matter, second chamber work better in a presidential form of government where the legislature exists separate from and independent of the executive. The first part considers the validity of these competing claims, and tries to discover and explain the ideal arrangement that gives bicameralism and second chambers a proper status and role they would assume in parliamentary governmental form.

Any federal arrangement, whether parliamentary or presidential in its governmental form, would normally adopt bicameralism and formally confer certain powers on the second chamber. Of course, it is difficult to sustain that bicameralism is in the exclusive nature of federalism; bicameral chambers are also noticeable in countries with unitary state structure. But the rule remains that a federal system works out a mechanism of ensuring the institutional representation of certain collective interests, which necessitated the adoption of the federal alternative in the first place, by addressing the deficit attributed to the democratic principle of majoritarian governance. Such a mechanism usually involves the organization of upper house in parallel to the majoritarian lower house in a bicameral chamber, and the conferring of certain formal powers on this second chamber. The scope of powers could vary from one federal country and governmental form to another and even within parliamentary (or, for that matter, presidential) federal systems, as many other contextual variables that could impact the power balance may be at work in a federation. In light of these general perspectives, the second part makes a relatively in-depth analysis of the constitutional status and power structure (especially in relation to that of the first chamber) of the second chamber in the Ethiopian parliamentary federal system.

Finally, findings and recommendations along with some concluding remarks summarize the major problems associated with bicameralism in Ethiopian parliamentary federalism.

[1] A unitary state structure can also assume either the parliamentary or presidential form of government.

1. Bicameralism in Parliamentary Federation: Feasibility and Effectiveness

1.1. Some Remarks on Representation in a Federal System: Roots for and Importance of Legislative Second Chambers

It is well-documented that *federalism* refers to a primarily ideological interest in the sense that it stands for an analytic approach to human association that has as its point of analysis the question of diversity-in-unity.[2] As a conception constituting "a variable response to opposed demands for the dispersal and concentration of power",[3] federalism deals with both basic "moral questions" – highly charged emotional questions – and "amoral matter-of-fact issues" – such as routine pursuit of economic benefit and security.[4] Also its ideological focus is not limited to any one area; it is multi-faceted in that it is *by its nature* philosophical, constitutional, political, social, economic, cultural and legal.[5] On the other hand, *federation* designates "a more descriptive, institutional arrangement of fact."[6] It is "a distinctive organizational form or institutional fact,"[7] a tangible mode of state organization which instances the division of power along territorial lines between central government and regional governments, and in which the accommodation of the regions is entrenched in the decision-making procedure of the central government through a formal constitutional mechanism.[8]

There exists a "symbiotic relationship" between federalism – concern for difference and diversity, and federation – the institutional expression of such concern.[9] This relationship involves a linkage of very particular importance: the principle of *representation* serves as "a conceptual ligament" tying federalism and federation together.[10] A federal compromise involves the integration of certain territorial units into an overarching sovereignty and, at

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[2] King, P., *Federalism and Federations*, Croom Helm Ltd., London, 1982, p. 20 [hereinafter King].

[3] *Ibid,* p. 21.

[4] Burgess, M., *Comparative Federalism: Theory and Practice*, Routledge, London, 2006, p. 1[hereinafter Burgess]

[5] *Ibid.*

[6] King, *supra* note 2, p. 21.

[7] Burgess, *supra* note 4, p. 2.

[8] King, *supra* note 2, pp. 140-141.

[9] Burgess, *supra* note 4, p. 2.

[10] *Ibid*, p. 207.

the same time, formal constitutional stipulation for entrenching the autonomy of the territorial units. The autonomy of collective interests that are based in territorially organized units is ensured in large part by accounting for special representation of the units in the decision-making processes of the overarching center. The usual institutional response to this demand manifestly noticed in contemporary federations is the organization of confederal-type legislative second chambers in addition and parallel to popular, usually majoritarian, lower houses. Thus, issues of ensuring creation of a central government responsible to the population of the federation as a whole and of preserving the territorial autonomy of the federating units come into direct play. Bicameral, or two-chambered, legislative structure at the center is an oft-sought solution to address these twin questions of representation.

As briefly noted earlier, the organization by formal constitutional means of second chambers in a bicameral setting resulting in a system of institutional duality of the legislature at the center is not the peculiaristic feature of a federal state structure; nor is it the only mechanism of formally ensuring the representation at the center of territorial identities in a federation itself. If viewed simply as one of institutional arrangements alone,[11] the issue regarding separation of legislative powers does not distinguish federal states from non-federal ones. This is because a great variety of states which normally are not federal do have nonetheless featured bicameral legislatures: the Swedish, Dutch, British and French parliaments are typical examples.[12] Thus, mere institutional division in the form of legislative bicameralism is not so much a distinctive feature of federations as the substantive representation of territorially distributed authority by means of constitutional entrenchment.

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[11] *Id,* p. 204. In referring here to the phrase "institutional arrangement alone" we mean that federal and non-federal states alike factually display institutional duality in the legislature at the center, and that it is another factor beyond mere institutional division that distinguishes federal states as regards the question of legislative representation.

[12] King, *supra* note 2, p. 94. Michael Burgess has an additional thing to say regarding the French and British Parliaments: "[The second chamber in the French bicameral Parliament is]…based on indirect elections in the Departments and with mostly a suspensive veto power. [The House of Lords in the UK's two-chambered Parliament is]…an essentially pre-modern…[system incorporating the interests of the aristocracy into the central legislative decision-making process, only] recently reorganized along purely functional lines." See Burgess, *supra* note 4, p. 204. Similarly, the Swedish *Riksdag* is bicameral, though ambiguously so because the difference between the interests the two chambers represent is blurred. See De Minon, M., 'The Passing of Bicameralism', *American Journal of Comparative Law*, Vol. 23, 1975 p. 236 [hereinafter De Minon].

In this sense, it is possible, at least theoretically, to serve the same end of ensuring territorial representation in a federation within a unicameral legislature through a different means.[13] And even where federal second chambers do exist and have the constitutional power to influence legislation, this power may be just "essentially a paper work" proving quite unequal to the task of defending rights of the territorial units, entailing that second chambers are "simply not to be regarded as everywhere and necessarily indispensable to the accomplishment of such a defence."[14] This is considerably related to the question of legitimacy and effectiveness of second chambers and it stands to reason that these questions are, at least to a certain extent, the function of other interrelated factors such as whether the system of governance is parliamentary or presidential, whether the federation is a "coming together" or not, whether the second chamber is organized on the basis of the "senate" or "council" model, whether or not a single national political party controls political power throughout the federation, and, more related to political party power orientation, whether a plurality-vote based or proportional representation driven election system is in place. These are generally the matters considered later on, placing primary focus upon parliamentary governance and the others as they relate to it, which the author believes would help explain bicameralism in the Ethiopian federation. But first, the next two sub-sections reveal the purpose of legislative second chambers in federations.

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[13] *Id*, p. 95. King begins by citing examples of federations with unicameral legislatures, saying that federations in Cameroon, Pakistan and Yugoslavia did not in fact lead to bicameralism. He then goes on to say that "the simplest means [to ensure representation of territorial units] would be for the procedures employed to select (or elect) the members of the second chamber to continue, and once this procedure used to determine membership of the second chamber is fixed, then rather than form a second chamber, the membership – its voting units – might simply be added to those voting members already present in the first chamber. Of course account to balance the number of the representatives and to place special decision-making (such as supermajority or double majority) on some, but not all, matters may be made to maintain the system as ultimately ensuring regional representation. Another writer testifies to the possibility of the same mechanism, summing "… the unicameral federal legislature does not work, despite its name, like a [N]ational [A]ssembly, but follows a new pattern which recognizes the participation of different social sectors, whether states or communities." See De Minon, *supra* note 12, p. 241.

[14] *Id*, pp. 94-95.

1.1.1. Second Chamber Representation and Diversity of Sub-national Cleavage Patterns

It has been highlighted above that the main purpose of a bicameral arrangement in a federation is the entrenched constitutional representation of regional units in the legislative decision-making procedures of the overarching central government. Also, it has already been noted that bicameralism is not the sole alternative available to federations. Nevertheless, it is the alternative in widespread practice in contemporary federations. The purpose of bicameral arrangement needs to be explained having regard to its collective roots in the federation as expressed by formal constitutional means and informal societal mechanisms. Yet, the concern hereinafter is not so much to go back and question the need for second chambers as to explain arguments sustained in the need to have them, especially vis-à-vis lower houses, and for their legitimate position in the federation.

Different representative institutions everywhere are historically the result of societal divisions and differences of some kind – local, class or professional interests; federated states or regions; etc.[15] The upshot of this statement is that the bicameral (or pluricameral) structure of parliament serves little purpose in a homogeneous society and that it gains feasibility in so far as different representative assemblies are rooted in different societal bases.[16] To some extent this claim parallels the critical sociological perspective that questions the very relevance of a federal option to states with social homogeneity, drawing a conceptual debate about the relationship between a 'federal society' and 'federal state' and leading some scholars to describe this view as "the sociological fallacy," dismissing the argument that the federal idea specifically suits countries with a high degree of social heterogeneity.[17] Of course, contemporary scholarship tends to acknowledge the fact that federation is what Michael Burgess calls "a theory of circumstantial causation" that works in the specific context of each state and takes different

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[15] De Minon, *supra* note 12, p.236.

[16] *Ibid.* De Minon alludes to the ambiguously bicameral nature of the Swedish *Riksdag* (where relative heterogeneity exists) and Norwegian *Shorting* (where society is homogeneous). He states that "[w]hereas in Norway they have one chamber and pretend to have two, in Sweden they have two and pretend to have one."

[17] Burgess, *supra* note 4, p. 108. Also, see Galligan, B., *A Federal Republic: Australia's Constitutional System of Government*, Cambridge, Cambridge University Press, 1995, p. 55, cited in Burgess, *supra* note 4, p. 108. Galligan states that "[f]ederalism is a function not of societal differences but of institutional arrangements and political communities."

forms at different times in different circumstances in a certain state.[18] To that extent institutional design and the role of political elites in constructing federations do matter. But to be successful, these have to be based on at least two preconditions: (1) a coexistence between local-regional community sub-state identities, values and loyalties and significant elements of shared, overarching values and identities in the federation at large; and (2) the dual values, identities and loyalties must be reflected in the central institutions of the federation so that different forms of representation facilitate the expression of different interests on different policy matters.[19]

The analysis once again suggests the intimate relationship between federalism and federation reflected in the presence of certain differences and their representation in central institutions via, most practically, bicameral legislature. The presence of interest cleavages (based on historical, economical, cultural, ethnic, linguistic, religious, communal, traditional, or any other social divisions) is a good ground for a federation, but that alone does not lead to the organization of a federal state and ultimately to representation of these collective interests. As Burgess clearly puts it, "it is not the mere existence of a particular social cleavage that matters in a federation so much as the constellation of cleavage patterns having political salience."[20] A federal design is a structural response to identity groups' political self-consciousness. And, its classical conception requires that these politically self-conscious identities must be territorially organized.[21] It is the representation in central institutions of the federation of such politically salient territorial (and in limited cases non-territorial) diverse interest groups that bicameralism is intended to ensure. Thus, the organization of a second chamber in the legislature presupposes, at least in a federal system, the existence of some

[18] *Id*, p. 109.

[19] Simeon, R. & Conway, D., 'Federalism and the Management of Conflict in Multinational Societies', *in* Gagnon, A. & Tully, J.(eds.), *Multinational Democracies*, Cambridge University Press, 2001, p.361, cited in Burgess, *supra* note 4, p. 139.

[20] Burgess, *supra* note 4, p. 140.

[21] According to the contemporary theories and practices of the federal idea, it is even possible to incorporate non-territorial cleavages having political salience, even though territorial representation remains the normal pattern. This non-territorial form of federalism surfaced during the last days of the Austro-Hungarian Empire and is presently the case in Belgium. Detailed account of this can be found in Burgess, *supra* note 4, pp.141-142, and in Kymlicka, W., 'Federalism and Secession: At Home and Abroad', *Canadian Journal of Law & Jurisprudence*, Vol. 23, 2000, pp.216-219.

degree of heterogeneity of cleavage patterns that have interest and political demand for representation differing from that the lower house represents.

1.1.2. Second Chamber Representation and the Limitation of Conventional Democracy

In its purely classical sense and as the Greek etymological origins of the term indicate, democracy stands for "popular rule"; it is a political system in which the people of a country rule through any form of government they choose to establish, which in modern democracies means that supreme authority is exercised for the most part by representatives elected by popular suffrage with responsibility, at least in principle, to the electorate ensured through the legal procedures of recall and referendum.[22] In a sense democracy implies governance by the choice of the majority of the people in a country. It tends to subjugate choices of the minority. The assembly constituted by elected representatives, working according to rule of the majority, may not only be efficient but legitimate in so far as it is rooted in a homogenous body politic.[23] When the body politic and its representation lack the basic homogeneity that entitles the majority to represent the minority, however, the rule of popular choice does not work satisfactorily. This is because in plural societies where a federation is forged out of diversity, the system works to the detriment of social cleavages conscious of their minority position.[24] A political institution that is constituted by the choice of individual members of the population forming the majority in a socially heterogeneous body politic may still be efficient, but such an institution cannot claim legitimacy from the minority who would seek to have certain distinct collective interests guaranteed. The institutional setup in a socially diverse polity should be concerned primarily with *procedure* of decision-making process and only then with the *outcome* of that process – legitimacy before efficiency – because "efficiency without legitimacy will turn into chaos."[25]

Indeed, it is claimed that in federations "all that is minimally guaranteed" is the "entrenched position of constitutive territorial units, not the

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[22] Richard M. Pious, "Democracy" *Microsoft Encarta* 2009 [DVD]. Redmond, WA: Microsoft Corporation, 2008.

[23] De Minon, *supra* note 12, 242.

[24] *Id*, pp.241-242.

[25] Fleiner, T., 'The Yugoslav Crisis: Challenge for a New Theory of Federalism', *Cardozo Journal of International & Comparative Law*, Vol. 6, 1998, p. 96.

rights of individual citizens."[26] Seen from the perspectives of the historical situations leading to a federation, there is some truth in such a claim. In most cases, member units in federal sates had achieved the status of self-governing colonies, provinces, cantons, or states prior to the federation; without the primary guarantee of the particular interests of these units the federation would probably not have emerged.[27] This is not to say that responsible government and popular representation are not possible or necessary in a federation, but that these matters are overridden by what is called "existential federalism" – the political existence of independent units within the federation.[28] As De Minon explicitly puts:

> "In hyperfederal societies the imperatives of existential federalism overrun the exigencies of democracy. The political subject in direct relation with the state is not the citizen but the federated unit and the same is true in relation to communities in plurinational states. For this reason those entities dominate the legislature or at least play the role of rigid channels for popular suffrage."[29]

The solution to the apparent clash between these two categories of interests lies, among others, in the constitutional organization of second chambers in a bicameral legislative setting of dual representation and incorporation of special legislative decision-making techniques such as the requirement of special and multiple majorities on certain extraordinary constitutional issues. More specifically, the solution is to "constitute the lower, or first chamber, on the majoritarian principle of representation by population" but to "add an upper house, or second chamber, constituted on the federal principle of representation by region" whereby legislation would have to be passed by both chambers.[30] Pending further discussions on the importance of equal representation of units in second chambers, it must now be posited that the federal idea in all federations suggests that representation shall not be solely on the basis of population. And given the peculiar nature of the interest they represent, the status and role of second chambers in

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[26] King, *supra* note 2, p. 88.

[27] Hueglin, T. & Fenna, A., *Comparative Federalism: A Systematic Inquiry*, Broadview Press, Peterborough, 2006, p. 179 [hereinafter Hueglin & Fenna].

[28] Schmitt, K., *Verfassungslehre* , Duncker &Humbler, Berlin, 1928, cited in De Minon, *supra* note 12, p. 242.

[29] De Minon, *supra* note 12, p. 242.

[30] Hueglin & Fenna, *supra* note 27, p. 179.

federations has been an "identity bracelet," for these states are forged out of diverse cleavage groups.[31]

1.2. Second Chambers in Parliamentary Form of Government

In a federal state structure, bicameralism as an institutional and constitutional means of entrenching sub-national units does not normally cling to the form of government. Yet, the status and *modus operandi* of second chambers may differ based on whether the superimposed system of governance is parliamentary or presidential. In this section, the conceptual status of bicameralism in parliamentary governance is discussed. The discussion seeks to get to a theoretical compromise position that both gives effectiveness and fosters the continued operation of parliamentary political supremacy.

The constitutional system with a parliamentarian model of governance is known by the fusion of legislative and executive powers within a single body, the parliament, because the executive, usually called the government and headed by a prime minister, is chosen by a party or coalition of parties that reflect a majority of legislators in parliament whose continuation in office is based on continued majority support in parliament, resulting in a single electoral legitimacy.[32] Because government in a parliamentary system is formed out of a popularly elected legislative chamber, control over government administrators is held by that chamber most representative of the whole population, even within a setting of legislative bicameralism.[33] This means that in federations with a bicameral legislature, the popular chamber, the lower house, usually gains real political authority vis-à-vis the upper house. Such assumption of political hegemony by the lower house within a bicameral legislative setting does not exist in presidential form because of dual (divided) popular legitimacy[34] and the fact that executive political authority is vested in an independent presidency separate from the legislature.

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[31] Burgess, *supra* note 4, p. 204.

[32] Landsberg, B. & Jacobs, L., *Global Issues in Constitutional Law*, Thomson/West Group, St. Paul, 2007, pp. 56-57 [hereinafter Landsberg & Jacobs].

[33] Claus, L. 'Separation of Powers and Parliamentary Government' *in* Amar, V. & Tushnet, M. (eds.), *Global Perspectives on Constitutional Law*, Oxford University Press, Oxford, 2009, p. 48.

[34] A presidential model of constitutional government involves the separate popular election of the chief executive (the president) and the legislature; the independent election suggests that normally neither the president nor the legislature is subject to dismissal by the other,

The idea of presidential federation, cast by the U.S. model and later followed by Latin American countries,[35] is generally regarded as more virtuous to guarantee the creation of limited government, since it combines vertical territorial distribution of authority between levels of government with horizontal separation of powers (along with a system of checks and balances) among the branches of government. The combination of federalism with presidentialism created what the federalists called the "compound republic" intended to provide double security to the rights of the people, by first dividing powers between two distinct governments and then subdividing the portion allotted to each among distinct and separate branches.[36] The structure produces a system of "compounded representation" that incorporates interests across the republic by simultaneously dispersing tendencies of majoritarian tyranny.[37] In a sense, the dispersal of power in presidential governance reinforces the very federalist project of power distribution across various units whose presence and interest is institutionally guaranteed through a bicameral second chamber having co-equal legislative power with the first chamber, suggesting that federalism and presidentialism can be seen as complementing operational principles.[38] Federalism also works in tandem with parliamentary rule, though the fusion of executive and legislative powers in parliamentarism would mean relatively limited federalist dispersal of power in comparison to presidential federalism, the overall virtue of which nevertheless depends on a host of other determinants.

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producing a system of dual legitimacy and not just divided functions but clearly separated powers. See Landsberg & Jacobs, *supra* note 32, pp. 56-57

[35] Hueglin & Fenna, *supra* note 27, pp 58-59, 63-64, 76-77. "Hispanic" countries (so called because they are former colonies of Spain and/or Portugal and inhabited by peoples of Spanish and/or Portuguese descent) such as Mexico, Venezuela, Brazil, and Argentina are presidential federations modeled after the U.S. system. Latin American presidential federations came to be referred generally as "Hispanic" federations.

[36] Madison, J., *Federalist 51*, *in* Hueglin & Fenna, *supra* note 27, p. 105.

[37] Brzinski, J., Lancaster, T. & Tuschoff, C., "Introduction", *West European Politics*, Special Issue, 4-5 (1999), cited in Burgess, *supra* note 4, p. 207.

[38] Hueglin & Fenna, *supra* note 27, p. 59. Such a virtue in presidential federation has not been realized in Hispanic federations where centralist tendency exists owing to the countries' colonial tradition of authoritarianism, Catholicism and clientelism. Authoritarian parties and military dictatorships used the federal structures of regional administration as transmission belts for their nationalist projects. Nevertheless, recent improvements suggest that federalism and presidential governance are opportunity structures for democratization from below.

The system of "parliamentary federalism", that had its origins earlier in the British imperial tradition, emerged in the nineteenth century British colonial territories as part of imperial decentralization. It was an attempt to reconcile the Westminster notion of parliamentary sovereignty with the idea of a basic territorial distribution of power.[39] The Westminster system of parliamentary governance involved and still involves the absolute supremacy of parliament and fusion of executive and legislative powers.

As originally understood, "parliamentary sovereignty" suggests that there is neither judicial nor formal constitutional limit to the power of parliament to make or unmake any law. Everyone including courts is prohibited from acting contrary to any parliamentary act.[40] Moreover, as this formally unlimited power operates on the basis of majoritarian decision-making that is characteristic of a parliamentary system, it may end up effectively in "majority sovereignty". The parliamentary majority operational principle may work well in the context of unitary state with a socially homogeneous electorate.

In contrast, a different dimension presents itself when a federal structure based in heterogeneous collective interests is opted for. Where different territorial group identities with different sets of preferences exist, consociational techniques of negotiation and compromise bring harmony and ensure minority participation in governance by mitigating the effects of administration through majority votes on the basis of rights.[41] In order to guarantee diversity-in-unity, a heterogeneous society requires a supreme, federal constitution.[42] Federations are constitutional: a federal design begins with a stipulation of constitutional kind; the constitutional stipulations assume some notion of institutional arrangements, including a bicameral legislature of

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[39] Burgess, *supra* note 4, p. 201. The first country to introduce this system was Canada in 1867 followed by Australia in 1900 and India in 1950. Although the Nigerian federation also somehow resulted from British imperial decentralization, its form of governance is presidential rather than parliamentary. Though evolved on an entirely different course to that of the British former colonies, the German federation has also adopted a parliamentary form with some peculiar features.

[40] Claus, *supra* note 33, p. 49. But the fact that there is no explicitly written constitutional limit on the power of the parliament in Westminster tradition does not mean that there is altogether no limit; there are general conventions of constitutional status that informally limit the power of the parliament. And popular control over parliamentarians can always be exercised (by the electorate) through the democratic and legal procedure of recall.

[41] Hueglin & Fenna, *supra* note 27, p. 48.

[42] De Minon, *supra* note 15, p. 237.

regional representation, sufficiently fixed and stable, or (in other words) entrenched, to require some unusual or extraordinary procedure to overturn them.[43] Thus, federalism does not accept "parliamentary sovereignty" as expression of democracy, but rather "constitutional sovereignty". Hence, the Westminster model is flawed in so far as its *adversarial nature* and *majoritarian thrust* can serve to exclude territorial minorities,[44] for in plural societies, wherein politically conscious minorities exist, the majority is not entitled to represent the minorities and its opinion does not constitute the "general will."[45]

In the light of the foregoing, it is now clear that constitutionally entrenched federal second chambers are generally acknowledged as instruments of ensuring diversity-in-unity. Also, parliamentary federalism, still featuring a fusion of executive and legislative powers in a federation, must incorporate into the legislative decision-making procedure of the center interests of constituent units via a constitutionally fixed bicameral legislature as against merely majoritarian political hegemony of the lower house.

That said, the organization, composition and functioning of federal second chambers are determined within the specific context of each federation since the federation itself is the result of particular circumstances having political salience. Their particular shape does not relate to some "inherent political virtue", but to sheer "political and historic necessity".[46] Indeed,

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[43] King, *supra* note 2, p.145.

[44] Burgess, *supra* note 4, p. 201. King states that "[a] parliamentary system…whose members (or deputies or congressmen) represent nationwide interest, or professional groups only, to the exclusion of entrenched territorial units, is in such degree more aptly to be styled a 'corporatist state' than a 'federation'." See King, *supra* note 2, p. 89.

[45] De Minon, *supra* note 15, p. 241. In a nation divided into, for example, regional entities and racial, religious or linguistic communities, the majoritarian principle makes it possible for a region or community to obtain numerical control of parliament, as was the case in Northern Nigeria between 1963 and 1966. In such a plural society, the other regions or communities – the minorities – are not represented but oppressed by the majority.

[46] Sager, P., 'A Swiss Federalism: A Model for Russia?' *St. Louis–Warsaw Transatlantic Law Journal*, 1995, p.167. As to the specific circumstance in which Switzerland emerged and survived as a model federation, Sager claims "[t]he existence of a threat and the recognition of clear and present danger foster not only fanaticism, but may stimulate rational behavior. This only occurs, however, where the national leaders establish what the threats are and explain the high cost of failure."

James Madison defended bicameralism, i.e. organization of the Senate, not from the dogmatic point of view, but political necessities of the time.[47]

Federalism is a system of guaranteed group protection. And, representation via second chamber is a manifestation of such group guarantee of territorial units. Apparently, there is a theoretical problem with such representation because the participation of the constituent units in the legislative decision-making of the federation conflicts with the democratic principle of “one person, one vote, one value.”[48] But the two different interests involved in federal representation – individual and collective – can be reconciled since representation by region via second chamber is instituted as a complement rather than alternative to representation by population via lower house.

In resorting to bicameral design, constitutional framers would have to settle at least three basic but often “politically charged” questions.[49] These are: (1) in what proportion the sub-national units would have to be represented; (2) in what way the constituent units would have to be represented; and (3) what powers to give the second chamber. Taken as a whole, there would be a connection between answers to these questions and form of government, and, in parliamentary form, between these answers and issues of democratic control and responsible government.

The issue of *in what proportion* to represent the constituent units relates to whether size is considered. The choice of the solution to this problem varies on the spectrum that contains the confederal principle of equal representation regardless of population size at one extreme and the majoritarian rule of representation by number of individual members of the units at the other.[50] This could also include accounting for geographical size of the territorial unit.

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[47] James Madison, *The Federalist*, No.62 cited in De Minon, *supra* note 15, p. 236. Madison in reference to the Senate in the making of American bicameralism said it is “… superfluous to try by the standard of theory a part of the constitution which is allowed on all hands to be the result not of theory but of a spirit of … concession which the peculiarity of our political situation rendered indispensable.”

[48] Burgess, *supra* note 4, p. 205.

[49] Hueglin & Fenna, *supra* note 27, p. 180.

[50] Hueglin & Fenna, *supra* note 27, p. 180. In confederal unions, discrepancy in population of the units is in principle irrelevant because each member participates as a member state (somehow retaining traditional sovereignty under international law), not as a group of people within a state. But the transition to federation involves a somewhat lessened sovereignty and a conferring of the traditional sovereignty to the federal center which incorporates the populations of the units into the central decision-making process.

What is evident here is that mostly federation comprises units with great discrepancies both geographically and demographically.[51] If the one extreme of equality between territories is adopted, then practically it must always to some degree subvert any strict equality between citizens – an incongruity which may characterize a federation as what King posits a practically "incomplete democracy" which nonetheless may have to be accepted as compromise for having the federation.[52] The model of federal bicameralism that combines the equal representation of units in the upper house with representation of the people as a whole in a lower house, as cast by the United States and later followed by Australia and Switzerland,[53] is a classic scheme that hews to a middle point between the majoritarian pattern of "National Assembly" characteristic of unitary systems and the diplomatic conferences of confederations.[54] On the opposite extreme, it is unthinkable, in federation *qua* federation, to institute a second chamber on the strictly majoritarian basis of representation by regional population. This is so for the simple reason that straightforward majoritarianism only duplicates the allocation of seats and votes in the first chamber, which effectively renders the majoritarian basis of unitary tendency as the sole alternative without making any concession to smaller units for guaranteeing the protection of which federalism was founded. What is possible and indeed exist is a middle ground position that takes account of both constituent membership and unequal size. This is a system of *weighted representation* whereby smaller units are given more weight than they would command on the basis of their populations and larger units are still given more seats and votes but cannot automatically dominate the decision-making process.[55] Germany and, to a certain extent, Ethiopia could be regarded as federations where difference in size of the units is weighted for determining their proportion of representation in the second chamber.[56]

[51] *Id*, pp.78 and 180.
[52] King, *supra* note 2, p.91. Equal representation of the units is said to produce pronounced malapportionment in that it results in the overrepresentation of smaller units.
[53] Hueglin & Fenna, *supra* note 27, p. 180.
[54] De Minon, *supra* note 15, p. 238.
[55] Hueglin & Fenna, *supra* note 27, p. 181.
[56] *Ibid*. Pending further discussions on the Ethiopian case, it suffices for now to state here that each Nation, Nationality and People will have at least one representative, and will have one more for each one million of its population; see Article 61(2), FDRE Constitution.

The question of *in what way* to represent constituent units via federal bicameralism is about who or what should be represented. The answer largely lies in whether people or governments of the constituent units are represented.

Although democracy (rather direct democracy) basically contains an aspect of popular self-rule, representative democracy becomes the feasible alternative in larger territorial settings, and people consent to delegate the task of governance to elected representatives. Government is thus instituted, through representation, for persons and their interests.[57] Democracy in a federal political system additionally recognizes that people of the constituent units may have different interests from the majority will of an entire country.[58] This premise would logically lead to the conclusion that second chambers should represent regional *people*.[59] At the same time, people of constituent units in a federation have their own regional governments established through representative democracy, and these democratically legitimized constituent state governments are "constrained in pursuing what may be in the best interest of these regional populations by the powers that have been assigned to the central government."[60] It is logical again that representation in national second chambers should be given to the regional *governments* so that they can codetermine national policies on behalf of their electorates.[61]

The choice of either alternative is related to the kind of second chamber organization. There are two different design models for second chamber representation: *senate* and *council*.[62] Whereas in the senate model second chambers represent regional people, in the council model they represent constituent unit governments.[63] In the senate model, which is adopted in Australia, USA (since 1913)[64] and some Latin American presidential federations, senators come to office through direct election by the population of the constituent units and have as free mandate as that of lower house members. They are not therefore bound by instructions or any other form of

[57] James Madison, *The Federalist,* No.54*,* cited in Burgess, *supra* note 4, p.194.
[58] Hueglin & Fenna, *supra* note 27, p. 182.
[59] *Ibid*.
[60] *Id*.
[61] *Id*.
[62] *Id*, pp.59-61.
[63] *Id*, p.182.
[64] It is ratification of the Seventeenth Amendment to the US Constitution that introduced direct election for the American Senate.

guidance from state governments.[65] In the council model, on the other hand, which is rooted in the German federal tradition and recently adopted in South Africa, councilors are instructed representatives of constituent unit executive governments who may represent the regional people only indirectly.[66]

There is also a half-way approach that combines aspects of the senate and council models: this is *legislative election*, adopted in Austria and India. In this approach, members of the second chamber are chosen by regional legislatures rather than by regional people or executive governments.[67] In a presidential federation, legislative election of second chamber may be assimilated more to the popular than to governmental representation, because the separation of the legislature from the executive branch leaves the latter unrepresented and indirectly allows the regional legislature, which is directly elected by regional population, to indirectly guarantee regional popular preference.[68] In parliamentary federations, legislative election would likely reinforce executive representation. Because the regional executive is always the majority in the regional legislative organ, it easily manages to select the representatives it deems would protect its interest by using its majority votes in the legislature. In effect, this would convert the system to the council model.

In principle, representatives in the legislative election approach may be free to vote as they choose (to which extent the approach more closely approximates the senate rather than the council model). Nevertheless, how they vote may depend on the power configurations in the constituent unit assemblies that elect them. This is particularly the case in parliamentary governmental form,[69] an extreme example being set by the Canadian parliamentary federation's appointed second chamber, where members are

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[65] *Id*, p. 60.

[66] *Id*, p. 60-61,183. The council model of second chamber organization, which is also seen as practically consistent with the federal principle of federating unit representation, is intrinsically associated with *administrative federalism*.

[67] *Id*, pp.61, 182-183. There are two alternative models for second chamber representation in Ethiopia: legislative election or direct popular election. Yet, the former is more likely to prevail as legislatures have the power to decide whether or not to resort to direct popular election. See *infra* note 91.

[68] *Id,* p. 61. Until 1913 when the Seventeenth Amendment came into force, US senators were elected by their respective state legislatures; see also *supra* note 64.

[69] *Id*, p. 182.

appointed by an individual – the provincial governor-general subject to consultation with and approval by the prime minister.[70]

Since upper house design model is a function of circumstantial factors that are specific to each federation, in which form of government may be only one of them, the connection between second chamber organizational models and form of government appears elusive. Yet, most parliamentary federations adopt either the council model or its *affiliates* – legislatively elected or appointed second chambers. Such models have presumably been adopted to facilitate cooperative federalism and, as government and legislature are merged together, to bring the two legislative houses to a common course of effective governance where otherwise it would be likely that government will be crippled because of impasse and legislative deadlock. But the fact that some parliamentary federalism has adopted a senatorial model of directly elected second chamber, where again other factors that prevailed in the polity during federal formation have shaped the kind of second chamber,[71] suggests that generalizations are difficult to make. In such federations, the apparent conflict between popularly elected independent upper house and a Westminster-based parliamentary system is revealed in practice through a party discipline establishing its grip on the political system and eliminating the federal quality of the Senate with a view to artificially avoid the potential for confrontational deadlock between the two houses.[72] Notwithstanding some reservations, it may thus be posited that genuine coherence of federal bicameralism into parliamentarianism in terms of both theoretical validity and practical applicability requires to a large extent the second chamber to be organized on the basis of the council model or its variants in parliamentary federations. On the other hand, the senate model suits presidential federations because it reinforces the separation of powers doctrine and the principle of checks and balances by further dividing the power of the legislative branch to two co-equal chambers, with the executive existing separate from and independent of the legislature considerably reducing the risk of total governmental collapse posed by legislative gridlock.

[70] *Id,* p. 192.

[71] *Id*, p. 209; the strongly democratic basis of Australian politics, also marked by the homogeneity of the population, reinforced the inclination for a popularly elected version of the American senate model. Furthermore, strong upper houses were an established part of governmental system in the Australian colonies in the late 19th century.

[72] *Id*, p. 214.

The real question that determines the substantive role of second chambers in a federation lies in the legislative power orientation: answering either /both of the two basic questions highlighted above does not matter if the upper house does not have a role to play. Hence, the third basic question, "*what powers* to give to second chamber," needs to be answered.

The power given to second chambers varies with the form[73] of the constitutional government in the federation. While bicameralism with co-equal legislative powers conferred on the two chambers is generally the tendency in presidential federations, weakened second chambers are common among parliamentary federal systems. The argument for equal second chamber powers is that federal bicameralism in its very essence addresses the need to balance the popular or majority will by the compounded will of self-governing regional peoples or their governments, and to guard second chambers against overturning and outvoting by parliamentary majorities in the first chamber.[74] From a federalist point of view, second chambers could even exercise special powers holding a superior role in matters of an inherently federal nature, in addition to joint legislative power with the lower house on other matters.[75] The US Senate, for instance, exercises special powers with regard to the ratification of treaties, approval of executive appointments, and appointments to the Supreme Court.[76]

In parliamentary federal systems, however, requirements of democratic control and responsible government provide serious arguments in favor of weakened second chambers. The very "essence of representative democracy" requires the "most truly democratic" chamber to have the last say on at least the core matters of governance.[77] Moreover, the parliamentary conventions of responsible government may have resulted in weakened second chambers. Historically, this had its origin in the British constitutional tradition, on the basis of which so-called Westminster model federations are adopted, whereby the very character of federal upper houses as second chambers led to their decay because traditionally many of the federal senates or councils had no greater powers than making suspensory veto.[78] In parliamentarian governance,

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[73] Apart from form of government, the status and strength of the constituent units before the federation may contribute to bicameral legislative equality or otherwise.

[74] *Id*, p.183.

[75] *Id*, p.184.

[76] US Constitution, Article II, Section 2[2].

[77] Hueglin & Fenna, *supra* note 27, p.184.

[78] De Minon, *supra* note 15, p.239.

where governmental accountability to the people is ensured through elected representatives, the executive – prime minister and cabinet – is responsible only to the popular house, of which prime minister and cabinet are members, and therefore the popular chamber, the lower chamber, becomes an arena for the true political contest in parliament.[79] Since the executive government cannot be accountable to two legislative chambers which might vote differently on a particular issue and where the stand-off between the two may create a considerable stalemate leading to governmental collapse, second chambers cannot have co-equal powers.[80]

Considering the need for a weakened second power, Hueglin and Fenna state that the relative powers of federal upper houses have been curbed in three alternative ways: to give second chambers only a suspensive veto whereby legislation may only be delayed for a defined period of time but not vetoed altogether; to regard them as organs of last-resort mechanism for resolving disputes; and to limit the policy fields in which second chambers have equal powers.[81] However, second chambers should be given special or exclusive powers with regard to "matters of inherently federal nature" even in a parliamentary federation, regardless of the form of government, in order for them not to remain a paper work.

In light of this backdrop, the next section discusses second chamber powers in the Ethiopian parliamentary federation.

2. Roles and Powers of Second Chamber in the Ethiopian Federation

The 1995 Ethiopian Constitution establishes a federal state structure, the Federal Democratic Republic of Ethiopia (FDRE).[82] Like most federal constitutions, it recognizes a bicameral national assembly, or the "Federal

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[79] Walker, P., 'Federalism in the Commonwealth', *Journal of the Parliaments of the Commonwealth,* Vol.13, 1961, cited in De Minon, *supra* note 15, p.240. The Fundamental Law of the ex-Belgian Congo in 1960 offers counter-evidence to the thesis that prime minister is responsible only to the lower house. The law made the prime minister responsible to both houses that enjoyed the same powers. This was maintained in the 1964 Constitution. De Minon, *supra* 15, p.240.

[80] Hueglin & Fenna, *supra* note 27, p.184.

[81] *Ibid*.

[82] Article 1, Constitution of the Federal Democratic Republic of Ethiopia Proclamation, 1995, *Federal Negarit Gazeta*, Proclamation No.1/1995, 1st Year No.[hereinafter FDRE Constitution]; see also Declaration of the Establishment of the Federal Democratic Republic of Ethiopia, 1995, *Federal Negarit Gazeta*, Proclamation No. 2/1995, 1st Year No. 2.

Houses" as it is called in the language of the Constitution. The bicameral national assembly consists of the *House of Peoples' Representatives* (HPR) and the *House of the Federation* (HoF).[83] Federalism and bicameralism are also made to co-exist with a parliamentarian form of government.[84] Like any federation, the Ethiopian federal exercise is conditioned by the consideration of certain collective territorial interests having political salience. And, it has a constitutionally stipulated bicameral institutional setting at the center in order to guarantee these interests. Below, a brief discussion of what these interests are is followed by an insight into the power configurations of the second chamber. Crucially, the power configuration of the second chamber is examined with a view to assess its effectiveness in guaranteeing the interests within the context, and indeed simultaneous presence, of various factors, both formal (constitutional) theoretical and informal (extra-constitutional) practical.

2.1. Collective Roots of and Interest Distribution in the Bicameral Federal Arrangement

The Ethiopian Constitution establishes the sovereignty of the Nations, Nationalities and Peoples of Ethiopia, declares itself as the expression of their sovereignty, and states that such sovereignty is realized through systems of both direct and representative democracy.[85] Thus, in essence collectivity on the basis of the *nation, nationality* or *people* criteria is constitutionally elevated over and above individuality of persons. It is again these groups – nations, nationalities, peoples – that have primacy of protection via the bicameral scheme of representation in the central decision-making procedure.[86] At first glance, this seems to blur the very relevance of bicameralism since in any order nations, nationalities, and peoples are subjects of primary constitutional protection. In order to evaluate the validity of this statement, however, it is crucial to see various specific constitutional provisions, particularly those on the power structure of the lower house and upper house, and the political practice.

[83] *Id*, Article 53.
[84] *Id*, Article 45.
[85] *Id*, Article 8. The preamble of the Constitution also declares that Nations, Nationalities and Peoples have, through the Constituent Assembly they elected duly and out of free will, adopted the Constitution as a binding instrument.
[86] *Id*, Article 62.

Elsewhere, the Constitution stipulates that the constituent units of the federation, states, are to be delimited based on "settlement patterns, language, identity and consent of the people concerned."[87] This means that the territorial distribution of authority, which is the very essence of a federal design, has as its sole organizing principle ethno-linguistic identity markers. Also, the nomenclature of the nine states listed under Article 47(1) clearly confirms that statehood follows ethno-linguistic identification with sub-national political groups.

Here, it very important to see what a *state* recognized as such on ethno-linguistic lines, which is structured into the membership of the federation and having a distinct and theoretically unassailable government of its own with all the three traditional powers intact,[88] on the one hand, and *nation, nationality* or *people* as a collective identity, endowed with full sovereignty, on the other, would constitute. Is there a difference, in essence, between the interests they represent? If there is, to whatever degree, divergence is bound to occur between their representation at least in the second chamber at the center, as one of them, notably the constituent state, is apparently left unrepresented or underrepresented. The author believes that explaining this situation will help to point out the real collective interests purported to be represented in the bicameral assembly.

What is, then, meant by nations, nationalities and peoples? The literal appearance of these terms in the Ethiopian Constitution seems to suggest a difference in degree among them, but the Constitution does not provide any formal criteria for distinguishing one from the others. What it has instead done is to give a vague common definition that brings each of them, to be so, under the scrutiny of similar set of criteria. According to Article 39(5) of the FDRE Constitution:

> "A 'Nation, Nationality or People', for the purpose of [the] Constitution, is 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 identities, a common psychological make-up, and who inhabit an identifiable, predominantly contiguous territory."

[87] *Id*, Article 46.

[88] *Id*, Article 50. According to the general structure of state organs spelled out under article 50, the Federal Democratic Republic of Ethiopia comprises the federal government and the state members, both having their own legislative, executive and judicial powers with regard to matters constitutionally allocated to each.

Nation, nationality or people, under the definition, refer to a collective entity. It is a "group of people", and each of them, to be so, should undergo an ethno-linguistic identity orientation along territorial lines. To this extent, the interest nation, nationality or people represent coincides with that represented by a state member; it is a nation, nationality or people, fulfilling the definitional criteria, which can form a state member of the federation. But the terms "nation", "nationality" and "people" are still not meant qualitatively to be the same, though they are subject to a similar set of definitional factors and are intended to produce the same effect. According to David Turton, a reason for use of these three different terms could be that they are instrumental in making "constitutional theory" apparently conform with a "highly awkward reality".[89] While the theory makes Ethiopia a country with "ethnically and linguistically homogenous and territorially contiguous constituent units, each with a right to self-determination as a distinct 'nation'," in reality Ethiopia is home to about eighty "ethno-territorial groups varying enormously in size, all of which satisfy the definition but none of which have clear-cut territorial and linguistic boundaries, and only six of which have 'mother states' named after them," leading to a differential reference to the country's ethno-linguistic territorial groups – the six groups as "nations" and the others as "nationalities", or "peoples".[90] Viewed in this sense, the nation-nationality-people formula produces the effect of entitling some ethno-linguistic groups to separate statehood in the federation and putting others in conglomerate

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[89] Turton, D., 'Introduction', *in* David Turton, (ed.) *Ethnic Federalism: The Ethiopian Experience in Comparative Perspective*, James Currey Ltd., Oxford, 2000, p.18 [hereinafter Turton].

[90] *Ibid*; the "nation" concept, as Turton used it, seems to imply cultural and linguistic homogeneity of people inhabiting a contiguous territory, entitling it to self-determination to a separate constituent statehood in the federation and even having the basis for self-determination to the fullest, i.e., to an independent nation-statehood via secession. "Nationality" or "people", on the other hand, describes a small, sometimes tiny, ethnic group, in a mixture of same, which does not constitute an overall majority and is not considered large enough to form its own state in the federation. Oromo, Amhara, Somali, Afar, Tigre, and Harari are the six groups that are considered "nations" and have their own "mother states", but in reality even the states named after these groups are not culturally and linguistically homogenous. The remaining groups are "nationalities" or "peoples" which are contained in the three states displaying cultural and linguistic heterogeneity.

statehood while even leaving some others minorities, thereby rendering the Ethiopian ethno-linguistic federal design “incomplete”.[91]

Of course, Article 47(2) provides that nations, nationalities or peoples within the enumerated nine states have the right, subject to fulfillment of the procedures stipulated by the Constitution, to establish its own state at any time. But this is yet to be realized in the Ethiopian constitutional practice despite persistent claim by some groups for same, and what is being noted here remains unaffected at least for now. Again to this extent, the interest and representation of nations, nationalities and peoples may differ from that of states. Hence, the question “who can claim to have a set of preferences differing from that of the whole federation and, thus, is practically represented in the second chamber – is it the people as individual members, the nations, nationalities or peoples as collective identities, or the states as governments?” must be answered.

Basically HoF, the second chamber, is composed of representatives of nations, nationalities and peoples.[92] It is thus obvious that every nation, nationality or people would be represented as a group in the central decision-making process regardless of whether or not it constitutes statehood in the federation. Seen alone, this gives the impression that a state member formed out of many small nationalities or peoples will have more representatives than a state with more or less homogenous nation. This is particularly so if such a state could have its hands in the selection process by recruiting representatives affiliated with the state government: this appears to be the case in Ethiopia where State Councils, endowed with political supremacy in accordance with parliamentary governance, have the power to elect members of the upper house.[93] This asymmetry in representation could be said to conflict with the “equality of member states” provision of the Constitution – equality of all the

[91] Ethiopia, not unlike other multinational federations, can be considered “partial ethno-territorial federalism”. See, e.g., Duchacek, I., ‘Antagonistic Cooperation, Territorial and Ethnic Communities’, *Publius: Journal of Federalism*, Vol. 7, 1977, pp.17-18, cited in Assefa Fisseha, *Federalism and the Accommodation of Diversity,* Wolf Legal Publisher, Nijmegen, 2005, p. 232.

[92] Article 61(1), FDRE Constitution.

[93] According to Article 61(3) of the FDRE Constitution, it is within the power of the State Council to elect members of the HoF by itself or cause them be elected by the concerned nation, nationality or people. In accordance with the parliamentarian system of government that the FDRE Constitution envisages, the State Council is the highest organ of state authority, with the executive formed out of it and responsible to it; see Articles 45 *cum* 50(3), FDRE Constitution.

states in terms of "rights and powers",[94] especially regarding their status and role in the national government and its institutions, including the second chamber. Similarly, the composition of the HoF through a compounded representation[95] based on the size of nation, nationality and people involves inequality for it, on the one hand, may be counted on to counterbalance the weight of representation a state composed of many nationalities and peoples may have, and, on the other hand, could contravene the constitutionally declared sovereignty of, and thus equality among, each nation, nationality and people upon which the federation is based.

In contrast, the present Indian federal structure, though organized along ethno-linguistic lines with the constituent states formed out of particular ethnic groups,[96] does not give sovereignty to ethno-linguistic territorial groups: it rather recognizes the sovereignty of the people of the union as a whole. Nor does it seek to represent in the Union Parliament's second chamber, the Council of States, linguistic groups that do not constitute statehood in the union.[97] In other words, a group interest based in ethno-linguistic identity orientation would have representation in the second chamber only when these groupings coincide with constituent statehood. Again, because no sovereignty is conferred on the constituent states, federalism in India recognizes no concept of equality of constituent states in terms of rights and powers and, thus, no equality of the states' representation in the Council of States.[98] Because the allocation of seats in the upper house takes account of population size of the constituent units, reinforcing the popular basis of the lower house, the Indian federation is regarded as "one of the most demos-enabling on the world."[99] Apart from the supposed absence of unit equality, the members of the Indian Council of States are, quite similarly with that of Ethiopia, chosen by the constituent states' legislatures

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[94] *Ibid*, Article 47(4).
[95] *Id*, Article 61(2).
[96] Bhargava, R., 'The Evolution & Distinctiveness of Indian's Linguistic Federalism', *in* Turton, *supra* note 89, pp.100-102[hereinafter Bhargava].
[97] Majeed, A., 'Republic of India', *in* Kincaid J. & Tarr, G. (eds.), *A Global Dialogue on Federalism: Constitutional Origins, Structure, and Change in Federal Countries*, Volume I, McGill-Queen's University Press, Montreal, 2005, pp. 183-184, 187 [hereinafter Kincaid & Tarr].
[98] *Id*, p. 187.
[99] Bhargava, *supra* note 96, p.112.

through an indirect election that is more likely to end up in the representation of constituent unit governments rather than the regional population.[100]

Although the classic theory of federalism requires that all the units in a federation be represented in the second chamber on a parity basis instead of representation by population on the basis of majority rule, strict equality results in the overrepresentation of small units. As already noted, the ideal solution to this dilemma is present in the German system of weighted representation – successful in taking account of economic differences between units which are nonetheless culturally homogenous. Even in societies, such as Ethiopia, where the forces of deep cultural-national diversity have resulted in a federal constitution that declares the sovereignty of "nations, nationalities and peoples" and where the need for equality of representation in the second chamber becomes stronger, some account of size may be necessary. Yet, the author believes the composition of the Ethiopian second chamber is based more on "representation by population" than it should be. According to Article 61(2) of the FDRE Constitution, which reads: "Each Nation, Nationality and People shall be represented in the House of the Federation by at least one member; Each Nation or Nationality shall be represented by one additional representative for each one million of its population," does not however stipulate a maximum number of representatives a nation, nationality or people may have in the HoF. Accordingly, a nationality with one million populations will have only two representatives while a nation with thirty million will have thirty-one – a great disparity. As the Ethiopian population is dominated by some five or six nations or nationalities, with more than seventy ethno-linguistic groups having population that is numerically insignificant, one may rightly question the sovereignty and supposed equality that the Ethiopian nations, nationalities and peoples are constitutionally entitled to; because the small groups could still be outvoted in the second chamber that somehow reflects the majoritarian thrust of the lower house.

Of course, the allocation is not purely majoritarian and addresses some degree of proportionality, but it is not proportional enough to answer the myth of sovereignty of nations, nationalities and peoples that the Constitution stipulates. It is so disproportionate as to the interests of smaller nationalities that even some states formed out of many nationalities, such as the Southern

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[100] Hueglin & Fenna, *supra* note 27, pp.61 and 183; see also *supra* note 67 above. In parliamentary governance, legislative election quite effectively ends up in executive representation. Cf. again page 13 above, and *infra* note 104.

Nations, Nationalities and Peoples' State (SNNPS),[101] that theoretically were to have numerous representatives in the HoF as compared to states formed out of homogenous nation in perceived conflict with constitutional equality clause, can be outnumbered and outvoted. Primacy of constitutional protection is given to nations, nationalities and peoples, as their expressly stipulated sovereignty suggests, and not to the states as such. The Constitution is more or less clear in recognizing the nations, nationalities and peoples as the founders of the federation, with the member states as such serving only instrumental purposes, and thus parity (or at least appropriate proportionality) with regard to representation in the HoF of nations, nationalities and peoples is given more constitutional base than equality of constituent states as such. The Indian Council of States also takes account of size of the units by population number, but the federal structure does not confer any kind of sovereignty on the units and even impliedly recognizes inequality in representation.[102] Nevertheless, it can be argued that both in Ethiopia and India, despite some concessions for proportionality of representation by taking account of the number of individual persons of units, second chambers are arenas for representation of territorial entities as a group or collectivity, which more often than not are channeled through constituent states' governments, rather than direct representation of regional population.

For more comparative purposes on this regard, second chambers in Switzerland and Nigeria are relevant, both federations being rooted in diverse ethnic cleavages. In the Swiss federal structure, whose territorial distribution of authority guarantees the protection of asymmetric cultural and linguistic groups,[103] cantonal sovereignty meant that the upper house (the Council of States) in the bicameral parliament (the Federal Assembly) is originally intended to represent cantonal interests on the basis of equality irrespective of size with election of the members by cantonal legislatures.[104] However, the responsibility of electing the deputies to the Council of States has gradually

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[101] FDRE Constitution, *supra* note 82, Article 47(1)(7).

[102] De Minon, *supra* note 15, pp. 238-239.

[103] Schmitt, N., 'Swiss Confederation', *in* Kincaid & Tarr, *supra* note 97, pp. 348-353. But, unlike in Ethiopia and India, linguistic and religious cleavages do not coincide with cantonal boundary, and such cross-cutting of cleavage patterns has undermined the potential for political mobilization along particular identity group and significantly reduced minority-majority tensions which paved the way for the emergence and survival of Switzerland as the longest functioning multicultural federation.

[104] *Id*, pp.354, 358, 360.

been taken away from the cantonal legislatures and nowadays given to the people for election by universal suffrage. This implies that the Council of States is merely another forum for representing the people and its members are not instructed representatives of cantonal interests, but still the people in each canton elects equal number of deputies.[105] In respect of both the interest represented and the proportion of representation, the Swiss second chamber differs from its Ethiopian and Indian counterparts. The prevalence of direct popular and consociational democracy that undermined minority-majority divides despite linguistic and cultural diversity and the simultaneous conservative commitment to sovereignty of the cantons in Switzerland, absent or weak in Ethiopia and India, are the factors that explain the difference.

The Nigerian federation is also a structural design for the accommodation of ethno-territorial cleavages. It is unique in, unlike its Ethiopian and Indian counterparts, recognizing territorial organization on the basis of religion, thereby paving the way for the "establishment of a multiplicity of subunits that are not strictly coterminous with ethnic group boundaries."[106] The Nigerian multi-state federation's legislature is also bicameral, the two federal chambers being the Senate (second chamber) and the House of Representatives (first chamber).[107] Just like the Swiss Council of States, but unlike the Ethiopian HoF and the Indian Council of States, the Nigerian Senate is composed of equal number of representatives from each of the thirty-six states who are directly elected by the state people.[108] But what explains the relative strength in terms of its composition (vis-à-vis the lower house), as senators are free from the instruction or guidance of state government, is the adoption of presidentialism that entailed a strict separation of powers and personnel between the federal executive and legislature.[109]

[105] *Id*, 360. Switzerland is a country where republican values, American system of separation and checks and balances, and direct popular democracy prevail; thus, the system is generally demos-enabling. But the conservative thrust of the federation as a "coming together" and the recognition of cantonal sovereignty have prevailed in maintaining equality of representation regardless of size in the Council of States.

[106] Suberu, R., 'Nigeria: Dilemmas of Federalism', in Amoretti, A. & Bermeo, N. (eds.), *Federalism and Territorial Cleavages*, The Johns Hopkins University Press, Baltimore, 2004, pp.332-338.

[107] *Id,* p. 343.

[108] *Ibid*.

[109] *Ib*.

2.2. HoF's Power Configuration vis-à-vis the Lower House

The form and character of sub-national autonomy and sub-national unit role at the center in a federation partly depends on the specific context in which the sub-national units are established. Also, second chambers are arenas for exercising shared-rule, and these patterns help to explain the extent to which sub-national groups participate in the national policy-making process.

The historical patterns of sub-national unit formation in a federation can be generally categorized into two: devolutionary and aggregative.[110] An aggregative federation is created by the "coming together" of previously independent entities, which was the case with the United States, Switzerland and Australia. In aggregative federation, the concern is more with the establishment of a common government at the center with constitutionally entrenched forums for shared national governance than with the detailed stipulation of the federating units' self-evident autonomy.[111] This pattern suggests that the units would have genuine participation (at least theoretically) at the center via, among others, strong second chamber. A devolutionary federation, on the other hand, is created by the structural rearrangement of a pre-existing larger political union, the purpose of which is usually to "hold together" units; Belgium, Germany, India, Pakistan, Nigeria and Spain are a few examples.[112] The tendency in devolution is to seek ways for ensuring sub-national self-rule.

The Constitution of the FDRE appears to fulfill a "myth of origin" for the federal state structure by declaring it to be the result of a free mutual negotiation and consent of previously independent sovereign nations, nationalities and peoples – as if it is an aggregative federation.[113] However, the reality is in the opposite: the nations, nationalities and peoples and their states did not have prior existence, and the federation is simply created by the devolution of power from a pre-existing centralized unitary state to ethno-linguistic units.[114] Not uncommon in devolutionary federations, such a reality

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[110] Watts, R. 'Foreword: States, Provinces, Lander, and Cantons: International Variety among Subnational Constitutions', *Rutgers Law Journal*, Vol. 31, 2000, p. 945.

[111] *Ibid*.

[112] *Ibid*.

[113] Turton, *supra* note 89, p.14. The Preamble as well as Articles 8 and 39 of the FDRE Constitution illuminate the matter.

[114] Assefa Fiseha, 'Theory versus Practice in the Implementation of Ethiopia's Ethnic Federalism', *in* Turton, *supra* note 89, p. 132.

has resulted in an insignificant sub-national participation at the center, and the Ethiopian case is regarded as fit to what is called "withholding federation" whereby the start with a centralized structure and unease with the political implications of devolution tend to make national powers dominant, and more emphasis is placed on "self-rule" than "shared-rule"[115] The overall division of legislative and executive powers places overriding authority in the hands of the center, with the states serving only as instruments of implementation.[116]

This background along with the parliamentary system of government has significantly affected shared rule the states might exercise at the center via the second chamber. The bicameral "Federal Houses" setting at the center does not give a law-making power to the HoF, the upper house. Instead, it confers exclusive legislative authority with regard to virtually all powers allocated to the federal government on the HPR, the lower house.[117] Inconsistent with the constitutionally stipulated sovereignty, nations, nationalities and peoples, as represented in HoF, are stripped off shared power at the center. Relegation of the HoF from the law-making process presents another constitutional conundrum because it conflicts with the entitlement of every nation, nationality and people to equitable representation in the federal government.[118]

The Nigerian federal system – which, like the Ethiopian federal system, is the result of devolution from the centre – appears to provide a puzzling contrast. The Nigerian Senate enjoys equivalent policy-making powers with the House of Representatives, with the former even exercising exclusive authority for the confirmation of major federal appointments.[119] Note however that Nigeria is a presidential federation where there is barely a need, since executive political authority resides in a separate presidency,[120]to compromise the very essence of confederal-type co-equal legislative second chamber as

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[115] Ghai, Y., 'Ethnicity and Autonomy: A Framework for Analysis', *in* Ghai, Y. (ed.), *Autonomy and Ethnicity: Negotiating Competing Claims in Multiethnic States*, Cambridge University Press, Cambridge, 2000, cited in Assefa, *supra* note 114, p. 133.

[116] Assefa, *supra* note 114, p. 133.

[117] FDRE Constitution, *supra* note 82, Articles 51 *cum* 55.

[118] *Ibid*, Article 39(3). The right to equitable representation in the federal government is reduced to almost nothing since representation in government is hardly meaningful without participation in law-making.

[119] Suberu, *supra* note 106, p. 343.

[120] *Ibid*. Cf. note 108 above. Note also that the Nigerian federation is a centralized one, owing not to the domination of the upper house by the lower house but to practical political factors.

forum of non-majoritarian regional group interest guarantee in favor of the popular and majoritarian lower house. Similarly, the two chambers of the bicameral parliament in the Swiss federation have "exactly the same powers".[121] But this appears to have something to do with the aggregative nature of the federation than with the form of governance. As seen below, the Swiss governmental form is not presidential. Incidentally, the Canadian second chamber (the Senate) which was formally given equal powers with the first chamber (the House of Commons) appears to be comparable with its Nigerian and Swiss equivalents.[122] Yet, the Canadian situation has some peculiarity: while the undisputed "primacy of parliamentarianism" and the "appropriateness of popular democratic rule through the lower house", along with the historical creation of the provincial governments by devolution from an existing legislative union, point to a weakened upper house, the Senate has however no legislative role to play except provide "sober second thought". This is because it is elected neither directly by provincial population nor indirectly by provincial governments: instead it is subject to partisan appointment by the prime minister that effectively brings it under the control of parliamentary majority in the lower house.[123]

In Ethiopia, where the parliamentarian form of government is constitutionally prescribed,[124] the lower house (HPR) is entrusted with the highest authority of the central government. The executive is formed and led by a political party or a coalition that has majority seats in this very house.[125] And, the fact that the house is responsible to the people of the federation as a whole indicates its majoritarian tendency.[126] Thus, the very organization of the central government places the task of governance in the lower house, and the second chamber is officially kept out of any meaningful role in shared rule.

Second chambers in other comparable jurisdictions are also generally weak. In India, where the Westminster-style parliamentary federation is established, the power of the lower house of parliament is significant. And, "the government's primary responsibility is to this house rather than to the

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[121] Schmitt, *supra* note 103, p. 360.
[122] Hueglin & Fenna, *supra* note 27, p. 190-193.
[123] *Id*, p. 193; Thus, formal equality is just a paper work, and in practice the second chamber in Canada's parliamentary federation has a diminished legitimacy in the eyes of constituent units that seek a genuine shared rule at the center.
[124] Article 45, FDRE Constitution.
[125] *Ibid*, Article 56.
[126] *Id*, Article 50(3).

upper house of the states."[127] In Switzerland as well, the bicameral Federal Assembly (consisting of National Council and Council of States), elects the executive, the Federal Council, and imposes ultimate supervision on it; there is also overlap of legislative and executive powers despite certain functional differences.[128] Unlike in a typical parliamentary system, however, no one house of parliament can have political hegemony since both houses exercise a joint governing authority and the executive cannot be dissolved by the legislature and vice versa.[129] The workability of the system lies in the fact that the possibility of conflict between the two legislative chambers, the very fear of which leads to lower house political superiority in parliamentary governmental form, is very minimal because the popular election of both national councilors and councilors of state in the same district, despite differences in number, makes them responsive to constituent interests.[130]

The generally weakened position of second chambers in parliamentary forms of government is clear from the foregoing discussion. However, this should not automatically lead a conclusion that territorial group interests remain unrepresented. The "federalization of the lower house"[131] may supplement a weak second chamber. This can be done by the modification of the "representation by population" principle in favor of the formula of sub-representation of demographically large units so that the more populous units would not have overwhelming legislative majority and outvote minorities in small units.[132]

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[127] Majeed, *supra* note 97, p. 181.

[128] Schmitt, *supra* note 103, p. 359.

[129] *Id*, pp. 358-359. The executive is formed on the basis of collegiality principle; it is created having regard to consociational mechanisms and operates subject both to parliamentary procedures and popular will. As explained in relative detail below, Ethiopia should take lessons from such experiences.

[130] Bachtiger A. & Steiner, S., 'Switzerland: Territorial Cleavage Management as Paragon and Paradox', *in* Amoretti & Bermeo, *supra* note 106, p. 36 [hereinafter Bachtiger & Steiner]; here, the author is not suggesting councilors of states are totally unconcerned with the interest of the cantons they represent. Responsiveness to constituent interest is just a matter of degree which could increase with the popular election and freedom (from instructions of cantonal governments) of second chamber members.

[131] De Minon, *supra* note 15, p. 240.

[132] *Id,* pp. 240-241. This was the case with the second Indonesian Constitution of 1949 which tried to equalize the representation of larger and small units. A similar formula was used in Malaysia from 1963 until 1965 in order to keep racial balance despite heavily populated Chinese Singapore. The same solution was resorted to by the Burmese Constitution of 1948 for the Karen and Cachin members of the House of the People.

In Ethiopia too, the Constitution states that the distribution of seats in the HPR should account for the representation of minorities, despite the general provision that this house is constituted through majoritarian popular election on the basis of universal suffrage.[133] Of course, the Constitution states that subsequent legislation is to be enacted for the "special representation of minority Nationalities and Peoples"[134] and out of the maximum 550 seats of the house a minimum of 20 seats is reserved for the representation of minority nationalities and peoples.[135] An electoral statute issued pursuant to this constitutional provision authorizes the HPR, not the HoF, to determine who these minority nationalities and peoples entitled to special representation are.[136] Once again, the HoF – an organ for the protection of nation-nationality-people interests – is removed from this rather slender, but apparently traditional to it, task. Even when these minority nationalities and peoples secure seats in the lower house, they cannot have their votes effectively count on since all laws and decisions in the HPR are adopted via the procedure of parliamentarian simple majority.[137] Thus, the minorities could still have difficulties in influencing decisions pertaining to matters relating to their group interest; and hence, the significance of the special representation given to these groups in the first chamber is elusive.

Having highlighted the generally weakened position of the second chamber in Ethiopia, let us now reflect on the specific powers assigned to HoF under the FDRE Constitution. The most important powers of the HoF can be broadly put into three categories: (1) interpretation of the Constitution, resolution of constitutional disputes and determination of constitutional group rights;[138] (2) determination of the division of subsidies and joint tax revenues;[139] and (3) amendment of the Constitution.[140]

Though a federal system exhibits a constitutional division of power between government levels and among various governmental branches, and

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[133] Article 54, FDRE Constitution.

[134] *Ibid*, Article 54(2).

[135] *Id*, Article 54(3).

[136] Article 2(7) ¶ 3, Proclamation to Make Electoral Law of Ethiopia Conform with the Constitution of the Federal Democratic Republic of Ethiopia (Amendment) Proclamation, 2005, *Federal Negarit Gazeta,* Proclamation No.438/2005, 11th Year, No. 23.

[137] Article 59, FRDE Constitution.

[138] *Ibid*, Articles 62(1), 62(3), 62(6) and 83.

[139] *Id*, Article 62(7).

[140] *Id*, Article 105.

sanctions it through a constitutional supremacy clause, disputes about the terms of this division is inevitable owing to the artificiality and incompleteness of division of power in political life and the generality and inconclusiveness of constitutional language.[141] And, institutions that handle the task of demarcating the boundary of powers and of enforcing the supremacy clause of the constitution have been set up in most federations. It is argued neither federal government nor the states must unilaterally assume this institutional task: there must be a separate and legitimate institution that handles the task.[142] In some federations, e.g. Switzerland, the task is vested in the people via the exercise of participatory democracy.[143] Unlike most federations, the Ethiopian federal system gives the power of review of constitutionality and intergovernmental dispute resolution to a non-judicial, rather political non-legislative body, the HoF.[144] The raison d'être is that constitution is a political covenant, and, thus, the task of fixing its terms in the course of time must be vested in the political authors.[145] Thus, the power of constitutional interpretation is ultimately given to Ethiopian nationalities

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[141] Assefa, F., 'Constitutional Adjudication in Ethiopia: Exploring the Experience of the House of Federation (HOF)', *Mizan Law Review*, Vol.1 No.1, 2007, pp. 4-5; see also Davis, R., *The Federal Principle: A Journey Through Time in Quest of Meaning*, University of California Press, Berkley, 1978, p. 43 and Brudney, J., 'Recalibrating Federal Judicial Independence', *Ohio State Law Journal*, Vol. 64, 2003, p.175.

[142] *Id,* p. 5.

[143] Hueglin & Fenna, *supra* note 27, pp. 311-312. Note however that the Swiss federal system may be likened to that of Ethiopia in that a federal court is precluded from engaging in issues of jurisdictional power settlement and review of constitutionality.

[144] Among parliamentary federations that empower the regular judiciary, usually the Supreme Court, to adjudicate constitutional issues are Australia, Canada, and India, the latter two being multination ethno-linguistic federations. Similarly, the Supreme Court in the Nigerian multinational federation assumes comparable powers. In the German parliamentary federation, the power is given not to a regular judiciary, but to a special court called the Constitutional Court. This pattern is explained in Hueglin & Fenna, *supra* note 27, pp. 275-310. See also Majeed, *supra* note 97, p. 185 regarding India, and Suberu, *supra* note 106, p. 343.

[145] Assefa, *supra* note 126, pp. 10-14. Fear of "judicial adventurism", as Assefa calls it, that might hijack the vey document that contains the "compact between the nationalities" to fit the judges' own personal philosophies, is the reason not to give this power to the courts. Assefa also claims that longstanding negative reputation of judiciary as institution operating under the shadow of administrative branches, and the ruling elites' ideological preferences of popular judge to regular judge, have strengthened the need for a non-judicial political organ.

through the instrumentality of the HoF, a representative institution of nationalities.

Matters of technicality or legality that constitutional interpretation entails are not overlooked by the Ethiopian Constitution, however. The important political question of representation is made to operate in tandem with a competing issue of constitutionalism, and the application of these two values results in a tribunal composed of legal professionals and politicians, tribunal that is both "theoretically valid and politically legitimate."[146] The requirement of legal expertise in constitutional interpretation is provided by the Council of Constitutional Inquiry (CCI), albeit merely an advisory body to the political HoF.[147] Being assisted by the technical expertise of the CCI, the HoF not only decides on constitutional disputes in the concrete sense, but also is empowered to resolve issues of vertical division of powers and horizontal separation of powers in the abstract sense.[148] Thus, as nations, nationalities and peoples do not have a direct law-making power via the HoF at the center, their power as ultimate interpreters of the Constitution helps them to vindicate their interests by enabling them to, *ex post facto*, check on the constitutionality of laws and decisions adopted by the legislative lower house.

The second category of HoF's powers relates to revenue and financial matters.[149] Since the real functioning of governmental levels in a federal system is highly affected by their relative financial strength, it is no surprise that the advantaged fiscal position of most national governments would result in the centralization of federations.[150] The powerful revenue bases of the central government and the simultaneous enormous growth of expensive public services provided traditionally by constituent unit governments give

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[146] *Id*, p. 11.

[147] Council of Constitutional Inquiry Proclamation No. 250/2001, *Federal Negarit Gazeta*, 7th Year – No. 40, and FDRE Constitution, *supra* note 80, Articles 82-84,

[148] *Id*, Articles 21-23, and Assefa, *supra* note 141, pp.10, 18-20, 22-24. In relation, and addition, to this, the HoF has the power to resolve interethnic/interstate border disputes and decide on right to self-determination of nations and nationalities (the right to form their own institutions of self-government, whether sub-state or state, including secession); see Articles 62(7), 98, 99, FDRE Constitution, and Articles 3(3), 3(5), 19-33, Consolidation of the House of the Federation and Definition of its Powers and Responsibilities Proclamation, 2001, *Federal Negarit Gazeta*, Proclamation No.251/2001, 17th Year, No. 41[hereinafter Proclamation No. 251/2001].

[149] *Id*, Articles 3(6), 3(10), 35, and FDRE Constitution, *supra* note 80.

[150] Hueglin & Fenna, *supra* note 27, p. 322.

rise to vertical fiscal imbalance.[151] The same can be observed in Ethiopia where powers of taxation tilt toward the center.[152] The discrepancy between the revenue raising capacity and spending responsibilities of the two governmental levels is so huge that mechanisms of vertical fiscal transfer to correct the mismatch are put in place.[153] Unlike most federations with vertical imbalance, the intelligent side of Ethiopia's revenue sharing institutional setup is that fiscal transfers from the center to the ethno-linguistic states are made by the very body that represents the ethno-territorial units, the second chamber (HoF),[154] and this has the potential to defend the financial interest of the units.

HoF's power over the sharing of revenue between levels of government has three aspects. One pertains to "concurrent power of taxation"[155], i.e., revenue sources on which both the federal government and the states are mandated to jointly levy and collect: taxes on profit, sales, excise, and personal income arising from jointly established enterprises;[156] taxes on profits of companies and on dividends due to shareholders;[157] and taxes on incomes derived from large-scale mining and all petroleum and gas operations, and royalties on such operations.[158] The HoF determines the

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[151] *Id,* p. 322-323.

[152] Articles 96-97, FDRE Constitution; incidentally, there are federations, e.g. Switzerland and Canada, where revenue bases between the federal government and sub-national governments are more evenly balanced, see Hueglin & Fenna, *supra* note 27, p. 323.

[153] *Id,* pp.323-333; Australia exhibits a high degree of vertical fiscal imbalance. While it provides for financial assistance states, it also gives the Parliament (effectively the lower house) the power to do so. In India, it is even recognized that the Union Government is in a better position to raise revenues and the States in a best position to manage developmental programs and to deliver most services, and thus the imbalance is corrected by continuous transfers through the instrumentality of such institutions as the Finance Commission, the Planning Commission, and the National Development Council. For more on India, see Majeed, *supra* note 97, p.196. Nigeria's oil revenue is greatly centralized and the subnational units share in the nationally collected revenue through a system of distributive federalism. See Suberu, *supra* note 106, p. 347.

[154] Article 62(7), FDRE Constitution.

[155] Article 98, FDRE Constitution.

[156] *Ibid*, Article 98(1).

[157] *Id*, Article 98(2).

[158] *Id*, Article 98(3); incidentally, while the mining, petroleum and gas operations are normally found in the states' territory, the *revenue that may be obtained generally from running these operations* – in case they are governmentally run – is exclusively under federal power (see Articles 51(5) and 55(2)(a), FDRE Constitution). What is to be shared with the concerned state is only the *tax revenue* collected in relation to such operations.

division of these joint tax revenues by devising systems and mechanisms for carrying out same.[159] The second aspect of HoF's power over financial matters has to do with subsidies the federal government would provide to states – both general purpose grants and emergency/rehabilitation/ development assistance – in a manner that does not hinder the proportionate development of the federating states.[160] The HoF is empowered to set "a reliable and an ongoing improvement formula of subsidies."[161] Sharing in the federal subsidies is not an inherent right of the states, though; the HoF sets its formulae in a manner that eventually makes the states independent from subsidies.[162] The third aspect of HoF's financial powers involves "undesignated power of taxation" – a power which, unlike the above two, is exercised jointly with the HPR.[163] There are various tax sources that are left out of the explicit constitutional assignment of tax powers – there is no such thing as "residual power" with regard to tax powers – such as capital gains tax and value added tax (VAT) which are currently included in federal tax laws. The problem with HoF's power with regard to undesignated taxes is that the conjoint decision-making power of the HPR makes the HoF outvoted by the more numerous and majoritarian HPR, and is likely to result in ceding such power to the federal government at the expense of the states.

The third major power HoF exercises relates to amendment of the Constitution, which, as a supreme legal document, is rightly considered "legally immutable", and hence, subject to change through extraordinary procedure and authority beyond the normal legislative process.[164] A federal constitution must be rigidly entrenched against any opportunistic change on the one hand, and needs to incorporate flexibility by providing for an anticipated and authoritative mechanism of change on the other – it contains "not only rules about the political system it is describing, but also rules about itself."[165] Thus, a federal constitution stipulates for the authoritative procedures of its amendment.

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[159] Article 35(3), Proclamation No.251/2001, *supra* note 148.
[160] Article 62(7) *cum* 94(2), FDRE Constitution.
[161] Article 35(1), Proclamation No.251/2001, *supra* note 148.
[162] *Id,* Article 35(5).
[163] *Id,* Article 3(10) *cum* Article 99, FDRE Constitution.
[164] Dicey, A., *An Introduction to the Study of the Law of the Constitution*, 8th ed., Macmillan, London, 1915, pp. 142-143, cited in Hueglin & Fenna, *supra* note 27, p. 247.
[165] Hueglin & Fenna, *supra* note 27, p. 247.

The amendment procedures of a federal constitution vary from one federation to the other. Nevertheless, as a federal constitution is a rule of game fixed by bargain among various interest groups, the change to that rule of game somewhat requires a higher (than that adopted in ordinary legislative process) procedure that ensures the participation of these groups. As a compromise resulting from bargains, federal constitutions typically rely on special majority requirements: super majorities (such as two-thirds, three-fourths, or any procedure that well goes beyond simple and absolute majorities), multiple majorities (such as approval by the two legislative bodies and the states), or a combination of the two.[166] In some specific cases even unanimity is required, as is in Canada for amendments on parliamentary representation and language policy; but most federations, presidential and parliamentary alike, require super majorities (along with double/triple majorities): two-thirds super majority in the two chambers of India, Germany and the US, three-fifths in Spain and Brazil, and three-fourths in South Africa.[167]

Coming back to the constitutional amendment procedures in Ethiopia, a mixture of super majority and double/triple majority rules operate, and the HoF participates in each. Less rigorous, somewhat alternative, procedures are laid with regard to *initiation* of amendments: a proposal for amendment stands if it is supported by two-thirds majority vote in the HPR, *or* by a two-thirds majority vote in the HoF, *or* by one-third of the State Councils of the Member States, each Council adopting a majority vote.[168] It appears simple for states to initiate amendment as only three of the nine states (each state's Council passing the proposal by an absolute majority vote), but difficulty in coordination across states may render the procedure no less simple than as it is for the HPR and HoF. Still, it remains good for states to be able to initiate constitutional amendments.[169]

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[166] *Id*, p. 248.
[167] *Id*, *p.* 250.
[168] Article 104, FDRE Constitution.
[169] In some jurisdictions, such as the US, India and Australia, states are not entitled to initiate constitutional amendment. To be sure, Ethiopia is not the only one to allow states to initiate amendment, as provincial governments in Canada, majority of state legislatures in Brazil and autonomous communities in Spain can all initiate amendments. In Switzerland, however, the people can initiate amendment; see Hueglin & Fenna, *supra* note 27, pp. 250-251.

Under Articles 104-105 of the FDRE Constitution, the rules of super majority operate in conjunction with double or triple majority. The Fundamental Rights and Freedoms provisions,[170] the Initiation of Amendments provision,[171] and the very provision[172] stipulating procedures of amendment are amended by a triple majority , i.e., two-thirds super majority in both HPR and HoF each and unanimity of State Councils with each Council voting on the basis of absolute majority. This is a rather rigorous procedure which attaches significant importance to the concerned constitutional provisions, among which the provision that recognizes the group rights of nations, nationalities and peoples to equitable shared rule and full measure of self-determination including secession is one. All the other provisions of the Constitution can be amended based on a relatively less rigorous procedure that requires a two-thirds super majority of the joint session of the HPR and HoF and two-thirds super majority of State Councils each voting on majority basis.[173] This resembles the double majority system than the triple majority as the HPR and HoF vote jointly rather than separately; and the size of HPR is far greater than that of HoF the latter's power is likely to give way in favor of the former. Overall, the involvement of the HoF in the constitutional amendment process, one of the traditional roles of second chambers,[174] would ensure amendments are in the interests of the collective building blocks – nations, nationalities and peoples.

In addition to the three categories of major powers discussed above, HoF exercises some additional powers that do not directly impinge upon its role as the guardian of nationalities and that are less clear and effective. It is, for example, involved in the appointment of a nominal head of state.[175] It can also determine civil matters that it considers are important for sustaining one economic community, only a proposal for the HPR to legislate upon.[176] Finally, the HoF has the power to order federal government to intervene if any constituent state, in violation of the Constitution, endangers the constitutional order.[177]

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[170] Chapter Three, FDRE Constitution.
[171] *Ibid*, Article 104.
[172] *Id*, Article 105.
[173] *Id*, Article 105(2).
[174] De Minon, *supra* note 15, pp. 239-240.
[175] Article 70(2), FDRE Constitution.
[176] *Ibid*, Article 62(8).
[177] *Id*, Article 62(9).

2.3. Status of HoF in the Current Ethiopian Parliamentary Political Reality

In light of all the purpose for which second chambers are established and maintained in a federal system, it is all clear that the federal system must be reasonably decentralized in order for sub-national units to effectively exercise power of shared rule. Parliamentary form of governance tends to weaken the power of the upper house. As the principal procedure in a centralized Westminster system is majority rule, the centralizing majority principle of the Westminster system conflicts with the right to self-determination of nationalities in the Ethiopian Constitution: the "two contradictory principles introduced in one constitution seem to be doomed to an insoluble conflict."[178] This suggests that the institutional setup in an ethnically divided country should be designed to tame majoritarian tendencies to give way for politics of compromise and accommodation. Parliamentarism in its pure and simple form as divorced from such kinds of consociational arrangements would end up in majority tyranny particularly in heterogeneous societies. However, parliamentary governmental system cannot be regarded as the sole factor for an all-round majoritarian rule that renders the second chamber powers and politics of consociation ineffective, and indeed it is possible to bring accommodative procedures into the realm of parliamentarian governance. In contrast to the presidential system's "one-person executive," the collectiveness and inclusiveness of the executive in parliamentarism is a fine instrument of ethnic accommodation.[179] It is possible and practicable to arrange an inclusive scheme of "executive power-sharing among broad coalitions",[180] and thereby ensure the accommodation of various ethno-territorial groups into central decision-making process.

There is no doubt that there are centralizing tendencies in Ethiopian federation despite the well-founded virtue of federalism to questions of self-rule and power-sharing by sub-national units in an otherwise ethno-linguistically plural country. One of the reasons for such centralizing drives, it seems, is lack of commitment to federalism on the part of political elites who championed it at its start. While it is to be noted that a positive political

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[178] Fleiner, *supra* note 25, pp. 94-95.

[179] Lijphart, A., *Democracy in Plural Societies: A Comparative Exploration*, Yale University Press, New Haven, 1977, cited in Suberu, *supra* note 106, pp. 344.

[180] El-Gaili, A., 'Federalism and the Tyranny of Religious Majorities: Challenges to Islamic Federalism in Sudan', *Harvard International Law Journal,* Vol. 45, 2004, p. 512.

commitment to federalism for its own sake is a primary factor in the success of any federal experience, the leaders themselves must "feel federal", and "[i]f the political commitment underpinning a federal system is only a commitment to short-term goals based upon tertiary factors, federal institutions survive so long as tertiary goals continue to be important."[181] There are valid claims that in federations such as Mali and Ethiopia political elites at the center often perceived federalism as "a transient step toward unification,"[182] perhaps because it "tempered any separatist demands of minorities while the nascent state furthered national integration."[183] The "lack of instrumental motivation", which empties federalism of its meaning, has been the reason for the failure of federal projects in African countries.[184]

Another reason has to do with the nature of political party controlling the executive. The federal system becomes more and more centralized, and effectiveness of the upper house declines, where hegemonic political parties and nationalist movements drive the political system to the concentration of power that federalism tries to keep dispersed.[185] De Minon states that "[i]n so far as they are under the 'whips' of a national party controlling central and regional legislatures and, through the parliamentary system, the governments too, [second chamber members] represent the political choices of the party in power more than their own parochial interests."[186] The party presently in power in Ethiopia, the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF), appears at first sight to be based in regional governments; but in practical terms, it is highly centralized with strong party discipline and "controls all the regional state governments in the Ethiopian federation, either directly through its member parties or indirectly through its affiliate parties."[187] What is more, the EPRDF had its centrally appointed heads responsible for running, or at least overseeing, regional governments, which

[181] Franck, T., 'Why Federations Fail', *in* Franck, T. et al. (eds.), *Why Federations Fail: An Inquiry into the Requisites for Successful Federalism*, New York University Press, New York, 1968, pp.173-174, cited in el-Gaili, *supra* note 180, p. 517.

[182] Nueberger, B., 'Federalism in Africa: Experience and Prospects', *in* Elazar, D. (ed.), *Federalism and Political Integration*, Turtledove Publishing, Tel Aviv, 1979, p. 178, cited *in* el-Gaili, *supra* note 180, p.517.

[183] El-Gaili, *supra* note 180, p.517.

[184] *Ibid.*

[185] De Minon, *supra* note 15, p. 238.

[186] *Ibid.*

[187] Assefa, *supra* note 114, pp.156-157.

justified the view of citizens that "the persons running the regions were not, in fact, the elected regional officers but the appointees of the federal government."[188] This shakes governmental legitimacy in the states and weakens the functionality of the HoF at the center as an institution of shared-rule, and generally creates political instability.[189]

A more related issue to the question of political party structure is the electoral system in place for assuming political power. The effectiveness of second chambers is not merely the function of the powers allocated to them; it is also the function of the power structure in the lower house, or in the executive. At one extreme is found the plurality based election of legislative and executive officers that adopts a winner-takes-all zero-sum politics, and that based on parity principle at the other extreme. Election of MPs (members of parliament) to the HPR, the lower house, in the Ethiopian parliamentary federal system is made on the basis of plurality of votes cast in each single-member electoral district.[190] This is essentially a first-past-the-post, winner-takes-all electoral system that has the effect of disregarding electoral votes in what is basically a heterogeneous country. This means that if many political parties compete to win the single-member constituency election, the one that obtains greater number, not majority, of votes cast than that of the rest wins the election while the others lose out. It turns out to be unrepresentative of popular preferences particularly when the numerous political parties obtain proportional votes. In Ethiopia, an ethnically divided country, it is proportional representation (PR), not representation based on first-past-the-

[188] *Id,* pp. 154.

[189] In comparative parlance, Nigeria seems to provide a similarity to Ethiopia regarding the tendency toward single-party rule, but displaying a fairly limited integration and hegemony. Despite the formal prohibition of ethnic parties in Nigeria, the ruling Peoples' Democratic Party (PDP) is a "heterogeneous and fractious association of power brokers from different communal constituencies", with lack of party discipline and limited cohesion between national and state party branches leading to more self-governance and less federal intrusion (see, e.g., Suberu, R., 'Federalism and the Management of Ethnic Conflict: The Nigerian Experience', *in* Turton, *supra* note 89, p. 85). On the other hand, Indian ethno-linguistic federation, though once was under domination of national Congress Party, gave way to state-based parties that have managed relatively to exercise both self-rule in the state and shared rule at the center(see, e.g., Bhargava, *supra* note 96, pp. 107, 115 and 116.).

[190] Article 54(2), FDRE Constitution.

post system that is more suitable.[191] PR is fundamental to "consensus democracy" that is needed in a more diverse country; it helps to achieve many "qualitative aspects of democracy" such as minority representation, proximity between government and median voters, and governmental legitimacy to reasonable citizenry.[192] It is even argued that PR is an instrumentality to a truly collective and inclusive system of parliamentary governance, referred to by Ackerman as "constrained parliamentarianism", suggestive of a "one-and-a-half house solution" that combines the federalist principle of regional differences with popular democratic legitimacy, ultimately ensuring the system's "acceptability" before its "workability".[193] In view of that, PR is employed in Italy and Spain, where political parties gain a share of parliamentary seats proportional to their national vote.[194] The German system has even another version of proportionality, called the "mixed-member proportional (MMP), whereby voters cast two kinds of votes – one for an individual candidate and one for their preferred party – so that half of parliamentary seats in the lower house go to the directly elected members, and the other half is filled by members from regional party lists in such a way that the final seat distribution is proportional to the result of the national vote.[195]

In a more informal sphere of government practice, Ethiopia can learn from the experiences of Switzerland and Nigeria. Though it is somehow formally grounded, the Swiss executive's operation on the basis of the collegiality principle demonstrates that different interest groups can be accommodated into central governance on an informal basis (meaning, even in the absence of express constitutional stipulations for such).[196] The joint session of the two legislative chambers elect the Federal Council, the executive; this is a collegial body chosen on a consociational basis, on the

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[191] Lijphart, A., 'The Future of Democracy: Reasons for Pessimism, but also for Some Optimism', *Scandinavian Political Studies,* Vol. 23, No. 3, 2000, p. 265. Available at http://img.kb.dk/tidsskriftdk/pdf/spso/spso_ns_PDF , last visited on August 25, 2009.

[192] *Ibid*, pp. 268-269.

[193] Ackerman, B., 'The New Separation of Powers', *Harvard Law Review*, Vol. 113, 1999-2000, p. 635.

[194] El-Gaili, *supra* note 180, p. 512.

[195] Hueglin & Fenna, *supra* note 27, p. 200. An undue multiplicity of political parties in the house can be avoided by excluding those getting votes below certain threshold. In Germany, access to the *Bundstag* was limited to parties that garnered at least 5 per cent of the national vote.

[196] Hueglin & Fenna, *supra* note 27, p.77.

basis of "voluntary proportional rule", that, according to "an unwritten rule", incorporates all the country's linguistic and religious cleavages.[197] Elsewhere, Nigeria has a relative success story in ensuring shared-rule despite the claim that presidentialism's bestowal of executive power on an independently elected individual makes it less preferable in a rather ethnically heterogeneous country. Nigeria's presidential federation is successful in diffusing centrifugal forces and accommodating ethno-religious groups into shared rule, through the adoption of the federal character principle and certain procedures for increasing legitimacy of presidential election.[198] A candidate running for presidential office must obtain a broad territorial support: he/she must "get highest number of votes, plus not less than one-quarter of the votes cast in each of at least two-thirds of all the states in the Federation and the Federal Capital Territory, Abuja."[199] The federal character principle calls for appointment to other executive offices to be based on the diversity of people, and it specifically requires the president to appoint at least one indigene minister from each state.[200] Thus, there is no reason why a more inclusive parliamentarianism cannot accommodate ethno-territorial groups, perhaps more effectively than presidentialism.

Concluding Remarks

As a formula for the accommodation of diversity into unity in a federal design, the constitutional entrenchment of both shared- and self-rule is critical. Shared rule is usually accomplished by the organization of a second chamber in the central decision-making institutions. The institutionalization of a sensible and effective second chamber that compounds the lower house in an ethnically divided nation such as Ethiopia paves the way to what Thomas Fleiner calls "Composed Nation" – a nation concept that must be developed notwithstanding ethnicity, and, at the same time, must accept multiple and border-crossing loyalties.[201] While the power of second chambers may vary based on the form of government, matters of essentially federal nature must be vested in the second chamber. The parliamentary system of government in Ethiopia allocates political power at the center in favor of the majoritarian

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[197] Bachtiger & Steiner, *supra* note 130, p. 34. For more details, the authors refer us to: Elazar, D., *Exploring Federalism*, University of Alabama Press, Tuscaloosa, 1987, 208.
[198] Suberu, *supra* note 106, p. 344.
[199] *Ibid*.
[200] *Ibid*.
[201] Fleiner, *supra* note 25, p. 93.

lower house as against group interests of sovereign nations, nationalities and peoples. In so far as majoritarian rule is not (or cannot be) made to co-exist with nation-nationalistic group identity, the federal design remains a paper work or rather a poor design.

This author however believes the design is not that much poor; what is lacking is the commitment to the federal idea proclaimed in the Constitution. Elsewhere, India and Nigeria[202] have succeeded in ensuring shared rule at the center by incorporating ethno-territorial units, no matter how centralized the federation as a whole may be. Legitimacy, in the eyes of the ethno-linguistic groups, of the central institutions, including the second chamber, must be accounted for. The HoF needs to be empowered and equipped to deal authoritatively with questions of federalism.

The practical political centralization of federalism in Ethiopia may explain why the look-good-on-paper constitutional provisions have so far not been put into practice. A centralized political party structure with high party discipline, retaining power at all levels of government, has led some to describe the Ethiopian federal project as a "federation in form than in operation."[203] State-based multi-party system needs to be encouraged and made to share power in order to create a national sense of belongingness among the country's various nationalities. And as divided ethnically Ethiopia is, winner-takes-all electoral system ought to be replaced by a system of proportional representation. Although there are some concessions made constitutionally in favor of "special minorities" for special representation in the lower house, it is far from being adequate. Powers given to the HoF make sense only if the lower house also exhibits some compromise politics. And if institutional legitimacy is assured, then I believe efficiency will come easier.

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[202] A disclaimer must be made as regards Nigeria, however. A fairly stable federalism has been impossible so far in Nigeria owing to group tensions resulting from deep religious divides and, to a certain extent, from local dissatisfaction with the purportedly over centralized exploitation and distribution of oil wealth.

[203] Assefa, *supra* note 114, p. 137.