

EXAMINING THE DESIGN OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIAN CONSTITUTION IN THE LIGHT OF AREND LIJPHART'S GUIDELINES OF CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES

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Abstract

Consociational democracy model is a political model developed by Arend Lijphart as a solution to the problem of unstable democracy in divided societies. Its core idea is that in a divided societies, stable democracy can be realized if diversities are acknowledged and accommodated through mechanisms of a grand coalition, minority veto, proportional representation, and segmental autonomy. However, Lijphart remarks that the practical effectiveness of consociational model presupposes wise constitutional design for which he provided nine main guidelines of constitutional design for divided societies (hereinafter shortly referred as, Lijphart's guidelines): 1) Proportional legislative electoral system, 2) Using the simplest form of proportional electoral system, 3) Establishing parliamentary form of government, 4) Power-sharing in the executive, 5) Ensuring cabinet stability, 6) A ceremonial head of the state who is not directly elected by the people, 7) Adopting federalism and decentralization, 8) Granting non-territorial autonomy, and 9) Power-sharing beyond the cabinet and parliament.

This article examined to what extent the design of the Federal Democratic Republic of Ethiopian Constitution (Hereinafter shortly referred as, the FDRE Constitution) reflects Lijphart's nine guidelines mainly by analyzing the provisions of the Constitution vis-a-vis the guidelines or by considering the existing prevailing political practice in some cases. The overall findings of the examination are summarized into four areas. These are:

- 1) Areas where the design of the Constitution totally deviated from Lijphart's guidelines;*
- 2) Areas where the design of the Constitution remained silent as to Lijphart's guidelines;*
- 3) Areas where the design of the Constitution corresponded to Lijphart's guidelines in form but deviated or at least has potential to deviate in substance; and*
- 4) Areas where the design of the Constitution fully corresponded to Lijphart's guidelines*

The deviations (both in form and substance, or in substance alone), or the silences of the Constitution as to the guidelines are mainly because of the choice of electoral system, lack of explicit constitutional provisions, the absence of established political practice, or silence of the constitution.

Keywords: Consociational democracy, FDRE Constitution, Lijphart's Guidelines, minority, divided societies

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I. INTRODUCTION

A divided society is a society where the diversities, mainly ethnicities become politically salient, that is when the diversities are markers of political identity.¹ The greatest challenge of this society is how to ensure a stable democracy.² Because of this, different policy options like assimilation (total denial of diversity), integration (promoting a common public identity without demanding total ethno-cultural uniformity), and accommodation (recognizing diversities) are recommended at different times to approach the challenge.³

Arend Lijphart believes that accommodation is the appropriate option to address the problem of lack of a stable democracy in divided societies and recommends the application of consociational democracy model for its proper implementation.⁴ The basic impulse of Lijphart's consociational democracy model is to provide a political arrangement in which the tensions between the segments of plural society can be accommodated within a single sovereign state by *sharing, diffusing, separating, dividing and limiting power*.⁵ According to Lijphart, consociation does this through its four components- grand coalition, mutual veto, proportionality, and segmental autonomy all of which deviate from majority democracy.⁶

Grand coalition refers that the political leaders of all of the segments of the plural society jointly govern the country.⁷ It denotes the participation of representatives of all significant communal groups in political decision-making, especially at the executive level.⁸ Mutual veto starts from the premises that although the grand coalition rule gives each segment a share of power at the central political level, this does not constitute a guarantee that a majority will not outvote it when its vital interests are at stake.⁹ Its purpose is providing a complete guarantee to each segment so that the majority will not outvote each segment when its vital interests are at

¹ Sujit Choudhry, *Bridging Comparative Politics and Comparative Constitutional Law: Constitutional Design in Divided Societies*, University of Toronto, Faculty of Law, LEGAL STUDIES RESEARCH SERIES, No.09-01, 5 (2009); Adeno Addis, *Deliberative Democracy in Severely Fractured Societies*, Tulane University Law School, 16 INDIANA JOURNAL OF GLOBAL LEGAL STUDIES, Issue 1, Article 4, 63 (2009); Constance Grewe/Michael Riegner, *Internationalized Constitutionalism in Ethnically Divided Societies: Bosnia Herzegovina and Kosovo Compared (Netherlands)*, 15 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW, 3 (2011).

² Arend Lijphart, *Constitutional Design for Divided Societies*, 15 JOURNAL OF DEMOCRACY, No.2 96 (2004); see also Adeno, *Id.* at 60.

³ AREND LIJPHART, *DEMOCRACY IN PLURAL SOCIETIES: A COMPARATIVE EXPLORATION* 44 (New Haven and London Yale University Press); Choudhry, *Supra* note 1, at 26-27; JOHN MC GARRY AND BRENDAN O'LEARY, *IRAQ'S CONSTITUTION OF 2005: LIBERAL CONSOCIATION AS POLITICAL PRESCRIPTION*, *Symposium 670* (Oxford University Press and New York University School of Law 2007).

⁴ Lijphart did this in several of his writings. But, the study of the Netherlands in *The Politics of Accommodation* published in 1968 by Berkeley: University of California could be considered as his first work where he clearly advocated for consociation.

⁵ Arend Lijphart, *Consociation and Federation: Conceptual and Empirical Links*, 12 CANADIAN JOURNAL OF POLITICAL SCIENCE, No 3, 499 (1997).

⁶ *Id.* at 500. Recently, Lijphart condensed these four components into two components-primary and secondary. The former includes grand coalition and segmental autonomy; the latter includes mutual veto and proportionality. See Choudhry, *supra* note 1, at 18).

⁷ Lijphart, *supra* note 3, at 25; Lijphart, *supra* note 5, at 500.

⁸ Lijphart, *supra* note 2, at 97.

⁹ Lijphart, *supra* note 5, at 501; Lijphart, *supra* note 3, at 36.

stake.¹⁰ Proportionality component of consociation is a concept that serves as the basic standard of government positions: legislative representation, representation in cabinets, civil service, police, military, and the allocation of public funds.¹¹ All groups influence a decision, and receive resource in proportion to their numerical strength.¹² Segmental autonomy refers issues that can be left to the segments alone, together with the proportional allocation of government funds.¹³ It is all about providing autonomy to the segments on issues that are unique to the specific segments and not a common concern to all segments.

These four components are all manifestations of self-determination through shared-rule and self-rule. The frameworks for their practical implementation can be spelled out in a formal legal text or be found in unwritten rules of political practice.¹⁴ They are *not mutually exclusive of one another*. Rather, interdependence among the components exist for the well-functioning of the model.¹⁵

However, the practical effectiveness of Lijphart's consociational model showed variations from country to country. For example, it has been more successful in the Netherlands and Switzerland; has limited success in Northern Ireland and India;¹⁶ and failed in Cyprus (1963) and Lebanon (1975).¹⁷ This invited different criticisms against the model. Some critiques argued that it is not ideally democratic, and some others have focused on its methodological and measurement issues.¹⁸ Although Lijphart responded to the critiques in details in his writings¹⁹ that make the model remain influential to date, he generally contends that the way constitutions are designed to institutionalize the components of consociational democracy model determines the practical success or failure of the model.²⁰ Accordingly, he provided *guidelines*²¹ of

¹⁰ *Id.*

¹¹ *Id.* at38; Lijphart, *supra* note 5; Choudhry, *supra* note 1, at 18.

¹² Lijphart, *supra* note 3, at 1; Lijphart, *supra* note 5.

¹³ Lijphart, *Id.*, p41; Lijphart, Consociation and Federation, *supra* note 5, p500.

¹⁴ Choudhry, *supra* note 1, p19.

¹⁵ Noura Assaf, Consociational Theory and Democratic Stability A Re-examination Case Study: Lebanon, A Thesis Submitted in Fulfilment of the Requirements for the Degree of Doctor of Philosophy in Politics, University of Warwick, Department of Political Science and International Studies, 8, 13 (2004), available at [Http://wrap.warwick.ac.uk/1203](http://wrap.warwick.ac.uk/1203) (accessed on 11 March 2015).

¹⁶ Ashley A. Rees, Why Consociationalism Has Not United Iraq, 4 (A Thesis Presented to the Department of Political Science and the Clark Honors College of the University of Oregon in Partial Fulfilment of the Requirements for the Degree of Bachelor of Arts, (2007).

¹⁷ Lijphart, *supra* note 2, at 99.

¹⁸ *Id.* at 97-98. For example, Donald L. Horowitz criticizes the model saying that it lacks adequate incentive for elite cooperation without which consociational democracy model could not be effective. See Donald L. Horowitz, *Constitutional Design: Proposals Versus Processes*, A CONFERENCE PAPER DELIVERED AT THE KELLOGG INSTITUTE CONFERENCE (1999); See also M-P-C. Van Schedelen, Consociational Democracy: The Views of Arend Lijphart and Collected Criticisms (The Political Science Reviewer, Erasmus University, Rotterdam), available at www.mmsi.org/pr/15_01/Schendelaen.pdf (accessed on 25 February, 2015).

¹⁹ For example, one of his articles entitled *The Wave of Power-sharing Democracy*, The Architecture of Democracy: Constitutional Design, Conflict Management and Democracy (Reynolds ed., Oxford: Oxford University Press, 2002) fully devoted to his responses to the critiques (*id.*, p98).

²⁰ Lijphart, *supra* note 2, at 99. Normally, divided societies need constitutions that do play:

- a) Regulative roles by enabling or disabling decision-making;
- b) Constitutive roles by creating institutional spaces for shared decision-making or changing self-understanding of citizens;

designing constitutions for divided societies that he claims will best fit for most divided societies regardless of their individual circumstances and characteristics.²²

Lijphart's guidelines directly or indirectly explain components of consociational democracy model and address issues of: 1) proportional legislative electoral system, 2) Using the simplest form of proportional electoral system, 3) Establishing parliamentary form of government, 4) Power-sharing in the executive, 5) Ensuring cabinet stability, 6) A ceremonial head of the state who is not elected by the people, 7) Adopting federalism and decentralization, 8) Granting non-territorial autonomy, and 9) Power-sharing beyond the cabinet and parliament.²³

Ethiopia is diverse in terms of ethnicity, language, religion, modes of life, and governance traditions.²⁴ Because of this diversity, her society is also a divided society.²⁵ This indicates that similar challenge of choosing policy option to create a stable democracy exists in Ethiopia.²⁶ For example, until 1991, diversity was not recognized and the attempt was even to erase it.²⁷ That is why Asnake rightly remarks that since the second half of the 19th century, the twin policies of the Ethiopian state regarding ethnic diversity and the state were centralization and modernization.²⁸ The twin policies could not realize stable democracy in the country as this is impossible at least without accepting the value of diversity in divided societies.²⁹ The strategy almost remained without substantial change until the fall of the *Derg* regime in May 1991.³⁰

c) Expressive roles by serving as a means to an end of justice for a society through defining rights and duties, and public institutions for their enforcement; and

d) Instrumental role by serving as a precondition for any meaningful appraisal of the justice of law. Designing constitutions that play these roles is not an easy task. For this, see generally Choudhry, *supra* note 1, at 5-6; See also Efrain Castaneda Mogollón, *Constitutional Design for Divided Societies: The Role of the Constitution in Shaping the Democratic Path of Society*, 26-27 (Thesis Submitted in Fulfilment of the Requirement for the Research Master in Law Degree).

²¹ Although these guidelines are reflected in one or the other writings of Lijphart, his article "The Constitutional Design for Divided Societies", *supra* note 2 fully devoted to them.

²² Lijphart, *supra* note 2, at 99.

²³ *Id.*

²⁴ Christophe Van der Beken, *Ethiopia: Constitutional Protection of Ethnic Minorities at the Regional Level*, AFRICA FOCUS, No. 106, 20 (2007); Hashim Tewfik, *Transition to Federalism: The Ethiopian Experience Forum of Federations*, (The Global Network on Federalism), 4 (2010).

²⁵ For example, the political history of the country reveals that ethnic representing political frontiers like Tigray People Liberation Front (TPLF), Eritria People Liberation Front (EPLF), Oromo Liberation Front (OLF), Ogaden National Liberation Front (ONLF) etc. define themselves for political interests, which are typical features of divided societies. At this point, it is good to note that mere diversity of the country does not automatically make that country a divided society. Diversity makes divided society where that diversity, mainly ethnicity becomes politically salient—that is, when it is a marker of political identity. See generally Choudhry, *supra* note 1; Addis, *supra* note 1.

²⁶ Assefa Fiseha, *FEDERALISM AND THE ACCOMMODATION OF DIVERSITY IN ETHIOPIA: A COMPARATIVE STUDY* (Wolf Legal Publisher, 3rd Revised ed.), 61 (2010).

²⁷ *Id.*; Beken, *supra* note 24; Tsegaye Regassa, *Ethnic Federalism and the Right to Self-determination As A Constitutional Legal Solution to the Problems of Multi-ethnic Societies: The Case of Ethiopia*, (LLM Thesis, Amsterdam University, available at ECSU Library) 59 (2001).

²⁸ Asnake Kefale, *Containing Conflicts through Power-sharing Mechanisms: A Preliminary Survey in the Horn of Africa*, (Paper presented in Third Conference on Constitutionalism and Human Security in the Horn of Africa, Inter-Africa Group), Addis Ababa, 29 (2009).

²⁹ Ronald Watts, *COMPARING FEDERAL SYSTEMS*, (Montreal & Kingston School of Policy Studies, Queens University 2nded., XIV (1999).

³⁰ Beken, *supra* note 24.

Ethiopian Peoples' Revolutionary Democratic Front, the new power holder of 1991 wanted to build the nation based on recognition of ethnic diversity³¹ and hence accommodationist in approach. The Transitional Charter Government that recognized the right to self-determination of Nations, Nationalities, and Peoples up to secession is evidence to this fact.³² The 1995 FDRE Constitution also confirmed the approach already followed by the Transitional Charter. The same Constitution not only recognizes diversity but also reflects some aspects of consociation.³³ For example, Alefe Abeje explains that Ethiopia's model of dealing with deep diversities have a number of elements: the constitutional protection of diversities, i.e., recognition of the right to self-determination in its fullest sense, a constitutional package for power-sharing arrangements which covers three major dimensions – the territorial, fiscal, and political; and affirmation of official multilingualism.³⁴ The elements have many similarities with components of consociational democracy model. In fact, Alefe Abeje argues that the Ethiopian federal arrangement could be described as federal consociational one.³⁵

Similarly, Assefa Fiseha observes the relevance of Lijphart's consociational democracy model by taking into account the ethno-demography of the country. That is to say, since none of the nationalities taken alone constitutes a majority at the federal level, there appears to be a constant rivalry to control the center by any one of them to the exclusion of others.³⁶ He goes on explaining that where no group has a clear majority or capacity for unilateral dominance, a balance of power among ethnic groups is likely to exist and such a balance of power is conducive for consociational settlements.³⁷

However, it is good to note here that neither Alefe Abeje's nor Assefa Fiseha's work addressed the issue that the present study tried to examine. Abeje's work assessed to what extent the Ethiopian power-sharing system reflects Lijphart's consociational democracy model. It focused on the model itself without considering the guidelines designed for making the model effective. Similarly, Assefa Fiseha's work is tangential and only indicates the natural 'favorable condition' of the country calling for consociational arrangement without going to examine guidelines of constitutional design as suggested by Lijphart. The present study is related to, but quite different from both works in that it tries to build the existing knowledge by examining the design of the FDRE Constitution in light of Lijphart's guidelines of constitutional design which are designed to effectively enforce consociational democracy model. Such examination is not

³¹ *Id.*

³² TRANSITIONAL CHARTER PERIOD OF ETHIOPIA, FEDERAL NEGARIT GAZETA, 50th Year No. 1, Addis Ababa, 1991, Art. 2.

³³ It is more common that constitutions reflect one or two consociational practices than the full ensemble of consociational institutions. This is owing to constraints of the process of making constitutions. Constitutions are usually made in times of crisis. As a result, the existing arrangements are largely illegitimate or ineffective or both; and operate under different biases such as model bias, historical bias, etc. See generally Donald L. Horowitz, *Conciliatory Institutions and Constitutional Processes in Post-Conflict States*, 49 WILLIAM AND MARY LAW REVIEW, No.1213, at 1226-1228 (2008).

³⁴ Alefe Abeje, *Evaluating the System of Power Sharing in Ethiopia in Light of Arend Lijphart's Model of Power Sharing*, 9 EUROPEAN SCIENTIFIC JOURNAL, No.31, at 261-262 (2013).

³⁵ *Id.*, at 263.

³⁶ Assefa, *supra* note 26, at 225.

³⁷ *Id.*

made yet. Hence, identifying which accommodative constitutional provisions do contribute, do less contribute, or do not contribute to the main objective of the constitution, i.e., forging unity out of diversity³⁸ is not an easy task. Accordingly, this article tries to answer the following questions:

- 1) To what extent does the design of the FDRE Constitution reflects Lijphart's guidelines?
Other related questions to this are:
 - What is Lijphart's consociational democracy model? What makes it different from the majoritarian democracy model?
 - What are Lijphart's guidelines?
 - What roles do Lijphart's guidelines play to make consociational democracy model effective?
- 2) In what areas does the design of the FDRE Constitution deviate from or correspond to Lijphart's guidelines?
- 3) How can one establish whether the design of a certain constitution reflects Lijphart's guidelines? Should a constitution explicitly address the guidelines or is it enough to recognize them impliedly by established practice?

To properly address the above question(s), methodologically, the researcher first showed the conceptual framework of Lijphart's consociational democracy model and his guidelines for designing a constitution for divided societies. Then, he made analysis to know whether the design of the FDRE Constitution corresponds to or deviates from his guidelines inform and/or substance. To this extent, Lijphart's writings, mainly his "Constitutional Design for Divided Societies" article³⁹ and the FDRE Constitution are used as the main sources. At times, the FDRE Constitution may be silent or less clear on issues under consideration thereby making the task of analysis difficult. In that case, the researcher has used the minutes of the Constitution to understand the spirit of the Constitution or some recent statistical data obtained from the relevant institutions, or key informant interview to show the practical reality on the ground. For example, the number of judges according to their ethnic composition has been taken from the Federal Supreme Court to explain the practice of power-sharing beyond the executive.

With regard to scope, Lijphart's consociational democracy model, which his guidelines to design constitution for divided societies want to foster, is subject to some criticisms. This article, however, did not go into examining the appropriateness or otherwise of the criticisms. Rather, it started from the assumption that the model is appropriate and could explain the Ethiopian situation. Similarly, apart from the nine guidelines listed above, Lijphart's guidelines cover other constitutional issues like amendment, approval, etc. Lijphart's recommendation on these issues is: "follow the patterns found in the world's established democracies".⁴⁰ This is, however, a very general recommendation since it has potential to pose a question as to whose democracy is really

³⁸ This is observable from the preamble of the FDRE Constitution; See also Alefe, *supra* note 34, at 263.

³⁹ Lijphart, *supra* note at 2. This is, however, not to say that the researcher has not used other literatures. Any relevant literature has been employed in the course of the study.

⁴⁰ *Id.*, at 105.

established one. Hence, the scope of examination of the Constitution is limited to the nine guidelines only.

The article is organized into four sections. Following this introductory section, section two is the heart of the paper and examines to what extent the design of the FDRE Constitution reflects Lijphart's nine main guidelines. Finally, section three draws conclusions and recommendations based on the overall discussions in the first two sections. Let us see one by one.

II. EXAMINING THE DESIGN OF THE FDRE CONSTITUTION IN LIGHT OF LIJPHART'S GUIDELINES

In this section, I try to address the core question I framed under section one: to what extent does the design of the FDRE Constitution reflects Lijphart's nine guidelines?

A. Proportional Legislative Electoral System

The electoral system, in general, is the system by which votes are converted into seats.⁴¹ Choosing the electoral formula for such representation is not an easy task for constitutional writers as it involves two main competing normative criteria: to make effective and responsive government on the one hand, and to ensure the inclusion of minorities into politics on the other hand.⁴² Guided by these competing interests, there are three broad available options of electoral formulas to choose from: majoritarian, proportional representation, and intermediate.⁴³

These broad formulas have different categories of electoral formulas under them. Accordingly, a plurality (first-past-the-post), second ballot majority run-off, and alternative vote belong to the category of the majoritarian electoral system.⁴⁴ Similarly, proportional representations can have forms of open party lists system as is the case in Norway, Finland, the Netherlands, and Italy, where voters can express preferences for particular candidates within the list. Proportional representations may be closed as in Israel, Portugal, Spain and Germany, where voters can only select the party, and the political party determines the ranking of candidates.⁴⁵ Likewise, the intermediate category can be subdivided further into semi-proportional systems and "mixed" systems.⁴⁶

The different electoral formulas foster different interests and hence have their own merits and demerits. Accordingly, the majoritarian electoral systems foster an effective government that can easily pass a law but at the expense of minority representation.⁴⁷ Contrary to this, proportional representation ensures the representation of all groups in politics in proportion to their number.⁴⁸ But, it makes difficult to pass a law proposed by the executive because of huge

⁴¹ Pippa Norris, *Choosing Electoral Systems: Proportional, Majoritarian, and Mixed Systems*, 18 FOR CONTRASTING POLITICAL INSTITUTIONS SPECIAL ISSUE OF THE INTERNATIONAL POLITICAL SCIENCE REVIEW, No.3, 1 (1997).

⁴² *Id.*, at 2.

⁴³ Lijphart, *supra* note 2, at 100.

⁴⁴ Norris, *supra* note 41, at 3-4.

⁴⁵ *Id.*, at 5.

⁴⁶ Lijphart, *supra* note 2, at 100.

⁴⁷ Norris, *supra* note 41, at 5-6.

⁴⁸ *Id.*

diverse interests in the parliament. The intermediate electoral system tries to strike the balance between the extreme merits and demerits of majoritarian and proportional electoral systems. For Lijphart, ensuring the election of a broadly representative legislature should be the crucial consideration regarding divided societies.⁴⁹ Taking that into account, Lijphart recommends pure proportional representation electoral system for divided societies.⁵⁰

The choice of the electoral formula was not an easy task in Ethiopia, too. Different international experts had of diverse opinions as to the appropriate electoral formula for the country before the approval of the Constitution. For example, while Professor Huntington⁵¹ suggested mixed electoral formula, Professor Hyden made it conditional upon what the constitution wanted to attain, i.e., whether the constitution wanted to pull together or pull apart the people and political leaders from different states.⁵² Accordingly, Hyden was of opinion that majoritarian electoral formula is good if the constitution wanted to pull together the people and political leaders of different states. However, if the purpose was to pull apart, he recommended proportional representation electoral system.⁵³ Still, others opined that although proportional representation might produce weak government as its shortcoming, on balance, it would be the right electoral system in Ethiopian political life as it has potential to decrease ethnic polarization, to increase focus on the issue, and to develop broad-based coalitions.⁵⁴

Despite these diverse opinions, at the end of the day, the FDRE Constitution adopted first-past-the-post electoral system. This is explicit under Art. 54(2) of the Constitution which provides that “[m]embers of the House [House of Peoples’ Representatives] shall be elected from candidates in each electoral district *by a plurality of the votes cast.*” In practice, this means that the candidate who gets a simple comparable majority of votes in the district wins the one seat in each electoral district. Based on this electoral system, “apolitical party or a coalition of political parties that has the greatest number of seats in the House of Peoples’ Representatives shall form the Executive and lead it”.⁵⁵

Ethiopia’s choice of plurality electoral system runs the risk of excluding ethnic minorities, as there is no perfect homogeneous ethnic group that coincides with the electoral constituencies. That is why Beza Desalegn wisely observes as follows:

In a country where the states are organized on ethnic lines and where none of these states are ethnically homogenous, the use of such electoral system [First-past-the-post] runs the risk that the seat in each electoral district will be won by the candidate who represents the interest of the largest ethnic group in the district. This is particularly problematic for

⁴⁹ Lijphart, *supra* note 2, at 100.

⁵⁰ *Id.*

⁵¹ Samuel P. Huntington, *Political Development in Ethiopia: A Peasant-based Dominant-Party Democracy?* (Report to USAID/Ethiopia on Consultations with the Constitutional Commission), 17 May 1993, at 12 (available at Ethiopian Civil Service University Library).

⁵² Comments on the Draft Constitution of Ethiopia, By International Legal Experts, November 1994 (available at Ethiopian Civil Service University Library).

⁵³ *Ibid.*

⁵⁴ Symposium on the Making of the New Ethiopian Constitution, A Preliminary Report (Sponsored by Inter Africa Group), 17-21 May 1993, p62 (Available at Ethiopian Civil Service Library).

⁵⁵ FDRE Constitution, Art.56.

*minorities that are to be found dispersed, which will eventually make them a minority in each electoral district.*⁵⁶

Hence, one can see that the general disadvantage of the majoritarian electoral system, the plurality being one, i.e. its exclusion effect is visible in Ethiopian situation. However, plurality electoral system is not absolute. It is a qualified one since 20 seats are guaranteed for minority nationalities and peoples from the maximum 550 seats.⁵⁷ This is good as it increases the opportunity of minority representation in the legislative body than pure first- past- the- post electoral system. Such practice also exists in other federations like India.⁵⁸ But, for Lijphart, such electoral system, i.e., plurality combined with guaranteed representation for specified minorities necessarily entails the potentially invidious determination of which groups are entitled to guarantee representation and which are not.⁵⁹ Because of this, he believes that proportional

⁵⁶ Beza Dessalegn, *The Right of Minorities to Political Participation under the Ethiopian Electoral System*, 7 MIZAN LAW REVIEW, No.1, 80 (2013); Closely related to this, Assefa Fiseha also argues that plurality electoral system created the dominant political party that enables the executive dominance over the parliament although the Constitution explicitly declares supremacy of the parliament. He explains that it is true that parliamentary-fit parties are a condition for a government to stay on power and this is achieved through party cohesion where party members freely discuss outside parliament and enter to parliamentary debate with common stand; or party discipline where party members vote together be it within the party or in parliament – not so much because there is consensus but because party leaders have the leverage to impose party discipline on rank-and-file members. The latter more explains the Ethiopian situation because of democratic centralism and excessive party discipline, which has compromised, if not defeated parliamentary supremacy. See Assefa Fiseha, *Legislative-Executive Relations in the Ethiopian Parliamentary System*, CONSTITUTIONAL BUILDING IN AFRICA, Community Law Centre, University of the Western Cape, Band/Volume 16, 246-247 (2015).

⁵⁷ FDRE Constitution, Art. 54(3).

⁵⁸ Lijphart, *supra* note 2, at 100.

⁵⁹ *Id.* In Ethiopia, too there is a similar kind of reserving seats for minority nationalities or people as provided under Art. 54(3) of the FDRE Constitution. A debatable issue in relation to this is who are these minority Nationalities and Peoples entitled to enjoy the at least 20 reserved seats. The constitution does not define these categories of minorities. However, the amended electoral law, Proc. No 532/ 2007 under Art.20 (1) (d) states that “minority nationalities which require special representation shall be determined on the basis of clear criteria” set in advance by the House of Federation”. Conferring such authority to the House of Federation has logical flow in that it is the House which gives recognition to the different Nations, Nationalities and Peoples of Ethiopia. In as much as the House gives recognition to these entities, it is also logical to empower the same House to determine which of these entities are considered as minorities requiring special representation in the parliament. Nevertheless, the House did not fix clear criteria. Because of this, there are different opinions among scholars. For example: (1) For Fasil, they are part of Nations, Nationalities and Peoples of Ethiopia. See FASIL NAHUM, CONSTITUTION FOR NATION OF NATIONS: THE ETHIOPIAN PROSPECT, 160 (Lawrenceville, NJ, Red Sea Publishers, 1997); (2) Others are of opinion that they are groups who cannot establish their electoral constituencies because of their small number. See Beza, *supra* note 56, at 84-85); (3) Still others do not accept both interpretation and resort to the definition given under Art. 2(6) of Proclamation No.7/1992, which is Nations or People whom because of the small number of their population cannot establish their own *Woreda* or local self-government. Of course, they did not pass without urging the need for defining the term. See Tsegaye, *supra* note 27, at 115; Amare Manjo, *Minorities Right to Representation in the Ethiopian Federal Government Institutions*, (LLM Thesis, ECSU Library, unpublished), 59 (2009).

For the present writer, the third argument seems more plausible at least for two reasons. First, had the definition given under Art. 39(5) works for minority Nationalities and Peoples under Art. 54(3) as construed by Fasil, guaranteeing the special representation under the latter provision would not have been necessary. Second, since Art. 54(3) says “*particulars shall be determined by law,*” it is easy to infer the existence of difference between minority nationalities and peoples under Art 54(3) on the one hand, and the Nations, Nationalities and Peoples who are defined under Art. 39(5). Hence, equating entities under Art. 39(3) with entities under Art. 54(3) is missing the intention of the Constitution. Similarly, considering entities under Art. 54(3) as those who cannot establish their

representation rescues such problems not only by producing proportionality and minority representation but also by treating all groups-ethnic, racial, religious or even non-communal groups in a completely equal and even-handed fashion.⁶⁰

In short, the design of the FDRE Constitution completely deviates from Lijphart's guidelines as far as the legislative electoral system is concerned. This is a paradox in a sense that the Constitution employs the winner-takes-all exclusionary electoral system of first-past-the-post although it is accommodationist in its overall approach.

B. Using the Simplest Form of Proportional Electoral System

This second guideline starts from the assumption that constitutional writers have already chosen proportional representation electoral system. The proportional electoral system is a very broad category, which spans a vast spectrum of complex possibilities and alternatives.⁶¹ These ranges of possibilities and alternatives include:

- Proportional representation that includes a high, but not necessarily perfect, degree of proportionality;
- Multimember districts that are not too large, in order to avoid creating too much distance between voters and their representatives;
- List proportional representation, in which parties present lists of candidates to the voters, instead of the rarely used single transferable vote, in which voters have to rank order individual candidates; and
- Closed or almost closed lists, in which voters mainly choose parties instead of individual candidates within the list.⁶²

Of these available options, Lijphart recommends choosing the one that is simple to understand and operate- criteria that is especially important for new democracies.⁶³ Taking that into account, Lijphart advises constitutional writers to use list proportional representation with closed lists.⁶⁴ He further argues that list proportional representation with closed lists can encourage the formation and maintenance of strong and cohesive political parties.⁶⁵ Here again, the design of the FDRE Constitution deviated from Lijphart's guideline. This is logical because the deviation of the design of the FDRE Constitution from Lijphart's first guideline of the legislative electoral system makes the deviation of the constitution from the second guideline automatic, as the second guideline is normally the extension of the first one.

electoral constituency is not strong interpretation as electoral constituencies are drawn not based on ethnicity but based on population census of a country which may or may not take ethnicity into consideration. See Art. 20(1)(b), Proclamation No.532/2007.

⁶⁰ Lijphart, *Id.*

⁶¹ Lijphart, *Id.*

⁶² Lijphart, *Id.*, at 101.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

C. Establishing Parliamentary Form of Government

The other important issue facing constitution writers is whether to set up a parliamentary, presidential or semi-presidential form of government.⁶⁶ Each form of government has its own merit and demerit, and the appropriate choice depends upon the specific purpose a country aims to achieve in its specific context. According to Lijphart, “in countries with deep ethnic and other cleavages, the choice should be based on the different systems’ relative potential for power-sharing in the executive.”⁶⁷

The presidential system entails the concentration of executive power at the extreme majoritarian end of the range, i.e., power is concentrated not just in one party but in one person making the introduction of executive power sharing extremely difficult.⁶⁸ That means, “the presidential system encourages the politics of personality by overshadowing the politics of competing parties and party programs.”⁶⁹ It further states that “In a representative democracy, parties provide the vital link between voters and the government, and in divided societies, they are crucial in voicing the interests of communal groups.”⁷⁰ Hence, Lijphart concludes that presidentialism is inimical to the kind of consociational compromises and pacts that may be necessary for the process of democratization and during periods of crises.⁷¹ Similarly, “semi-presidential systems represent only a slight improvement over pure presidentialism.”⁷² Lijphart argues that “although there is considerable power sharing among the President, Prime Minister, and Cabinet, the zero-sum nature of presidential elections still remains.”⁷³

A parliamentary system, on the other hand, has relatively high potential for executive power-sharing as the cabinet in the system is a collegial decision-making body.⁷⁴ Because of this, Lijphart recommends constitutional designers of divided society to adopt a parliamentary form of government.

When we come to Ethiopia, the FDRE Constitution is very explicit in that the form of government is parliamentary.⁷⁵ Ethiopia’s parliamentary choice created mixed impressions among international experts remembering unhappy African experience with the system. For some, it created a feeling of doubt since in African states, where the parliamentary system was adopted at the time of achieving independence, serious friction soon arose between the head of the state and the head of government as to the proper extent and limits of each other’s powers.⁷⁶

⁶⁶ *Id.*

⁶⁷ *Id.*, (emphasis added).

⁶⁸ AREND LIJPHART, THINKING ABOUT DEMOCRACY: POWER-SHARING AND MAJORITY RULE IN THEORY AND PRACTICE, 147 (Routledge 2008).

⁶⁹ Lijphart, *supra* note 2, at 102.

⁷⁰ *Id.*

⁷¹ Lijphart, *supra* note 68.

⁷² Lijphart, *supra* note 2, at 102.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ FDRE Constitution, Art.46: It reads as, “The Federal Democratic Republic of Ethiopia shall have a parliamentarian form of government.”

⁷⁶ Comments given by Professor Carison Anyangwe on the Draft Constitution of Ethiopia, By International Legal Experts, *supra* note 52, at 4.

At the end of the day, the parliamentary system was abandoned and the presidential, semi-presidential, or simply the presidential system was adopted.⁷⁷ For others, it is commendable and trendsetter in Africa since studies show the comparative stability of the parliamentary system has the survival rate of more than three times than the presidential system in Non-Organization for Economic Cooperation and Development countries at the time.⁷⁸

Whatever the feelings may be, a more pertinent issue to examine for the purpose of this research is as to what the FDRE Constitution wanted to achieve when it established a parliamentary form of government. Did it, for example, aim to create a conducive institutional framework for power-sharing as Lijphart suggests, or did it want to achieve any other goals? The minute of the Constitution mentions general attributes of parliamentarism like “representatives of the people are empowered to make laws, government positions are held by individuals recruited from the parliament, easy to pass laws, and facilitates implementation of other provisions of the constitution as reasons for parliamentary choice.”⁷⁹ So, apparently, this form of government was consciously selected because there was a desire to share power among the diverse nations, nationalities, and peoples of Ethiopia.⁸⁰

AlefeAbeje’s opinion is valid if one considers the prevailing trends in Africa at the time of making the Constitution in this regard. As indicated above, parliamentary form of government, where it was adopted in Africa following independence could not bring sustainable peace. The logical deduction one can make from here is that Ethiopia, while adopting her Constitution, was not totally ignorant of this unhappy African experience unless she was initiated to ensure power-sharing arrangement. To this extent, AlefeAbeje’s argument is sound. In addition to this, the collective responsibility of Council of Ministers for all decisions is also clearly enshrined in the Constitution.⁸¹ However, AlefeAbeje’s position may be defective if one considers the electoral system of Ethiopia. That is, if parliamentarism was chosen with the intention to ensure power sharing, why did the FDRE Constitution resort to the plurality legislative electoral system while proportional electoral system gives a better opportunity for the genuine power-sharing arrangement? In this regard, the parliamentary form of government seems to reflect Lijphart’s guidelines more in form than in substance.

D. Power-sharing in the Executive

When Lijphart says a parliamentary form of government has the relative potential for power-sharing, he starts from making two premises: “those ethnic groups are proportionally represented in the parliament by the proportional electoral system and that the Prime Minister and other cabinet members who are collectively responsible are usually drawn from this proportionally represented parliament.”⁸² But, these premises alone do not guarantee the institutionalization of

⁷⁷ *Id.*

⁷⁸ *Id.*, Comment given on the Draft Constitution by Goran Hyden citing Stepan and Skatch in World Politics, Vol.46, No1, 1-23 (1993) on the Draft Constitution.

⁷⁹ Minutes of the Constitution, *Tiraz 4, Hidar 14-20/1987 E.C. at 7 -8 (000076-000077)*.

⁸⁰ Alefe, *supra* note 34, at 263.

⁸¹ FDRE Constitution, Art.72 (2).

⁸² Lijphart, *supra* note 68, at 143.

power-sharing.⁸³ Power-sharing is rather guaranteed when it is institutionalized by the constitution as is the case in Belgium and South Africa.⁸⁴ In Belgium, the constitution stipulates that “the cabinet must comprise equal numbers of Dutch-speakers and French-speakers.”⁸⁵ In South Africa, “executive power-sharing is dependent upon the parties’ seats in parliament where, any party, ethnic or not, with a minimum of 5% of the seats in parliament was granted the right to participate in the cabinet on a proportional basis.”⁸⁶

In Ethiopia, the issue of executive power-sharing can be related to the nature of the country’s federal structure. Studies show that the overall federal structure of the country suggests that it emphasizes more self-rule than shared-rule which is mainly manifested by granting of ‘mother states’ to ethnic groups.⁸⁷ In this regard, Assefa Fiseha observes as follows:

The federal arrangement by territorializing the state concretizes self-rule and as some critics indicate; ‘fragment’ the state but there is an important aspect that is missing. It fundamentally fails to integrate what it ‘fragments’ through power-sharing institutions at the federal level⁸⁸(emphasis added).

Although this is a general observation that one may make and can be taken as a limitation, it does not mean that there is no constitutional framework for executive power-sharing in Ethiopia. There is Art. 39(3) of the FDRE Constitution which provides ‘for equitable representation of Nations, Nationalities, and Peoples in state and federal governments’.⁸⁹ At face value, the scope of this equitable representation at the federal level should encompass all branches of governments: both Houses of the Federal Parliament, the federal executive, and judicial bodies.⁹⁰ With regard to the practice, however, authorities have various opinions. For example, Assefa Fiseha argues that it is limited to executive power-sharing which by itself is conditional upon subscription of the ruling party’s membership and ideology.⁹¹ For others like Alefe Abeje, there are informal arrangements in the selection and recruitment into a federal bureaucracy which correspond to consociationalism’s elite coalition and proportional representation.⁹²

There are two points that worth to be considered here. The first is as to why the authorities do have different opinions on the practical application of Art. 39(3). The second is as to whether the executive power-sharing arrangement in Ethiopia exactly fits the one proposed by Lijphart.

⁸³ Lijphart, *supra* note 2, at 103.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Assefa, *supra* note 26, at 376.

⁸⁸ *Id.*

⁸⁹ Let it be clear that although Art. 39(3) is the main, it is not the only provision we have in the Constitution for ensuring equitable representation. For example, Tsegaye argues that Arts.54(3)-which guarantees minority representation in the HoPR; 62(4)- which empowers the House of Federation to promote equality of the people and consolidate their unity; 88(2)-which lays duty on government to respect identity of Nations, Nationalities and Peoples by strengthening ties of equality, unity and fraternity; and 94(2) –which requires the federal government to give grant with due care that the grant given will not hinder the proportionate development among states are other provisions in the Constitution that serve similar purposes. *See* Tsegaye, *supra* note 27, at 107.

⁹⁰ Alefe, *supra* note 34, at 264.

⁹¹ Assefa, *supra* note 26, at 210.

⁹² Alefe, *supra* note 34.

Regarding the first, the present writer is of opinion that the generality of Art. 39(3) invites for discretionary decision. For example, it is less explicit when compared to the experiences of Belgium which provides for executive power-sharing based on language (French-speaker and Dutch-speaker), and South Africa which provides for executive power-sharing depending upon the number of seats in the parliament. It is also less clear even when compared to the Transitional Period Charter of Ethiopia which clearly provides that the head of state, the Prime Minister, the Vice-Chairperson and Secretary of the Council of Representatives shall be from different nations/nationalities.⁹³

As regards the second, the executive power-sharing is short of the one suggested by Lijphart because of the very nature of the electoral system. Lijphart's 'logic', as indicated under subsection C above, is that when all ethnic groups are represented in the parliament in proportion to their number by the proportional electoral system, the executive members will be drawn from this inclusive parliament. In Ethiopia, the probability of representation of every ethnic group in the HoPR is rare because of plurality electoral system.

Cabinet members, except the Prime Minister who is mandatorily elected from among members of the HoPR, are also drawn either from the two Houses (House of Peoples' Representative and House of Federation) or outside of the Houses as long as they possess the required qualifications.⁹⁴ This may be an opportunity to expand or to restrict executive power-sharing depending upon the commitment of the Prime Minister to executive power-sharing. It has potential to expand executive power-sharing as it gives an opportunity for the Prime Minister to nominate a person to the ministerial position from an ethnic group with no representation in the House of Peoples' Representatives (a state of affair attributable to plurality electoral system). On the other hand, it has potential to restrict executive power-sharing if the Prime Minister restricts him or herself to nominate members of the cabinet from the House of Peoples' Representatives.

The other is, as indicated above, subscribing to the ideology of the ruling party of EPRDF is a condition precedent to share executive power in Ethiopia which indicates clear demarcation of government-opposition. Whatever number of seats the opposition may have in the parliament, there is no practice of executive power-sharing in the Ethiopian context.⁹⁵ In Lijphart's executive power-sharing, there is no such clear demarcation of government-opposition, and the opportunity to share executive power is open.

However, there are attempts that indicate executive power-sharing concern in Ethiopia. One indicator is the expressions the Prime Minister makes when submitting ministerial nominees to the House of Peoples' Representatives following elections. Every time he submits nominees for ministerial posts for approval, he mentions to the parliament to which ethnic group each nominee belongs to although doing this is not clearly provided in the Constitution. The other indicator is the ethnic composition of the current cabinet itself which shows a tendency of distributing

⁹³ See The Transitional Charter Period of Ethiopia, Art.9 (b), NEGARIT GAZETA, 50th Year, No1, Addis Ababa (1991).

⁹⁴ See FDRE Constitution, Arts. 73(1) cum.74 (2).

⁹⁵ Assefa, *supra* note 26, at 210.

executive powers among different ethnic groups. As of November 01, 2016, the current FDRE cabinet comprises 31 ministers (including the Prime Minister).⁹⁶ Of this total number, 8 are affiliated with Oromo Peoples Democratic Organization (OPDO); 8 are affiliated to Amhara National Democratic Movement (ANDM); including the Prime Minister, 7 are affiliated to Southern Peoples Democratic Movement (SPDM); 4 are affiliated to Tigray People Liberation Front (TPLF); 2 are affiliated to Ethiopian Somali People's Democratic Party (ESPDP); 1 is affiliated to Afar National Democratic Party (ANDP) and 1 is not party member but belongs to Oromo ethnic group.⁹⁷ If we correspond the ethnic group of the ministers to their party affiliation (although this is not necessarily the case), the current FDRE cabinet is composed of 9 Oromo, 8 Amhara, 6 from different ethnic groups of the SNNP, 2 Somalis and 1 Afar. Considering the number of ethnic groups in Ethiopia, one can easily see that many ethnic groups are not represented. If we go even by regional states, Gambella, Benishangul Gumuz, and Harari do not have representation in this arrangement and this makes executive power-sharing short of Lijphart's proposal.

In short, one can easily deduce that because of the generality of Art. 39(3) of the FDRE Constitution, the executive power-sharing in Ethiopia is largely left to the discretion of the Prime Minister who nominates ministers either from both Houses of the federal government or outside of the Houses. Its application is not only limited in practice but also fails to include all of those concerned in the process of policy-making.⁹⁸ To this extent, the design of the FDRE Constitution makes a slight deviation from Lijphart's guidelines.

E. Ensuring Cabinet Stability

Parliamentary sovereignty, a cardinal principle of the parliamentary system, implies that "parliament can make and unmake any law whatsoever, that a law enacted by Parliament is sovereign, and that, conversely, no individual or institution is allowed to set aside such an act of parliament."⁹⁹ This principle is also adopted in Ethiopia. Although the country's parliament is subject to the supremacy of the Constitution, the latter enshrines it as 'the highest authority of the federal government',¹⁰⁰ one which expresses 'the will of the people' through regular and competitive elections¹⁰¹ and which serves as the primary law-making body.

With regard to legislative-executive relations, the former, as a result of its sovereignty, establishes, supports, and if need be removes the latter from power.¹⁰² That is to say, the

⁹⁶ List of PM Hailemariam's New Ministers; *available* at: <http://hornaffairs.com/2016/11/01/Ethiopia-hailemariam-desalegn-new-cabinet-ministers/> (last accessed on 23 May 2017).

⁹⁷ *Id.* Although the ethnic groups of the members is not explicitly written, one can easily deduce to which ethnic group they belong from their names and the office they assumed as they are politically figurative ones.

⁹⁸ Assefa, *supra* note 26, at 376

⁹⁹ Assefa, *supra* note 56, at 240-241.

¹⁰⁰ The FDRE Constitution, Art.50 (3).

¹⁰¹ The FDRE Constitution, Art.54 (1).

¹⁰² Sartori G, *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes* 101(1997); Flinders M, 'Shifting the balance? Parliament, the Executive and the British Constitution' 50 *POLITICAL STUDIES* 24 (2002) as cited in Assefa, *supra* note 56, at 242.

executive derives from and is constitutionally accountable to the legislature.¹⁰³ Here comes one potential problem of a parliamentary system that constitutional writers worry about: “the fact that cabinets depend upon majority support in parliament and can be dismissed by parliamentary votes of no-confidence may lead to cabinet instability and, as a result, regime instability¹⁰⁴.”

According to Lijphart, such problem can be tackled by having constitutional provisions such as ‘the constructive vote of no confidence’ which allows the simultaneous dismissal of the previous Prime Minister and the election of a new Prime Minister as is the case in the 1949 Constitution of West Germany.¹⁰⁵ However, such arrangement may create an executive that cannot be dismissed by a parliament, but does not have a parliamentary majority to pass its legislative program.¹⁰⁶ A solution suggested to such potential problem by Lijphart is to have a constitutional provision that gives the newly established cabinet the right to make its legislative proposals matters of confidence which are adopted automatically unless an absolute majority of the legislature votes to dismiss the cabinet as is the case in the French Fifth Republic Constitution.¹⁰⁷ In short, Lijphart believes that cabinet instability- a potential problem in the parliamentary system, can be contained by combining the German and French constitutional rules.

Coming to the design of the FDRE Constitution, to begin with, in its dealing with legislative-executive relationship, the Constitution did not even employ the term ‘vote of no confidence’. However, one can articulate that the idea of vote of no confidence is envisaged in the Constitution. Accordingly, the House of Peoples’ Representatives has the power to call and to question the Prime Minister and other federal officials, and to investigate the executive’s conduct and discharge of its responsibilities.¹⁰⁸ At the request of one-third of its members, the House also discusses any matter pertaining to the powers of the executive to take decisions or measures it deems necessary.¹⁰⁹ The responsibility of the Prime Minister and the Council of Ministers is also to the House of Peoples’ Representatives.¹¹⁰ These provisions show the dependence of the executive upon the confidence of the parliament, which in effect means when the Parliament lost confidence in the executive, the latter could not exist- hence vote of no confidence. However, its practice has not yet been tested in Ethiopia.

Once we construct the idea of vote of no confidence under the FDRE Constitution in such a manner, the next step is to examine whether the idea of constructive vote of no confidence as construed by Lijphart is envisaged under the same Constitution. In this regard, the Constitution provides that when the Council of Ministers of a previous coalition is dissolved because of the loss of its majority in the House of Peoples’ Representatives, the President may invite political

¹⁰³*Id.*

¹⁰⁴Lijphart, *supra* note 2, at 103.

¹⁰⁵*Id.*

¹⁰⁶ *Id.*, at 104.

¹⁰⁷*Id.*

¹⁰⁸ FDRE Constitution, Art. 55(17).

¹⁰⁹ FDRE Constitution, Art. 55(18).

¹¹⁰ FDRE Constitution, Art. 72(2).

parties to form a coalition government within one week.¹¹¹ Here, the element of simultaneous dismissal and selection of the Prime Minister as recommended by Lijphart is missing. To this extent, the design of the FDRE Constitution deviates from Lijphart's advice of constructive vote of no confidence.

F. Selecting the Head of State

As indicated under sub-section C, parliamentary form of government in Africa brought serious friction between the head of the state and the head of government as it created confusion as to the proper extent and limits of each other's powers. Lijphart thinks that such a problem can be tackled by constitutional design, i.e., by limiting the power of the president and deciding how s/he should be chosen.¹¹² Accordingly, the constitution must make sure that the president will be a primarily ceremonial office with very limited power, and be the one who is not elected by popular vote.¹¹³ Popular election provides democratic legitimacy to the president and tempts him/her to become active political participants thereby potentially transforming the parliamentary system into semi-presidential one.¹¹⁴ Lijphart's suggestion is to elect a president by the parliament.¹¹⁵

In this regard, Lijphart appreciates the South African system of not having a separate head of the state at all where the president simultaneously serves both as a Prime Minister and head of state.¹¹⁶ Contrary to this, he criticizes the 1999 constitutional amendment proposal to change the Australian Parliamentary System from a monarchy to a republic. The proposal was to appoint a new president on the joint nomination of the Prime Minister and the leader of the opposition, and to confirm the nomination by a two-thirds majority of a joint session of the two houses of the parliament with a view to encourage the selection of a president who would be nonpartisan and non-political.¹¹⁷ However, this proposal was rejected by the Australian voters as a majority of pro-republicans who strongly preferred the popular election of the president.¹¹⁸ For Lijphart, such preference was an unwise preference for he opposed the popular election of the president.¹¹⁹

In short, with regard to the selection of the head of the state, Lijphart recommends not to have a separate head of the state at all as is the case in the South Africa; or if needs be, to have a president elected by the parliament (not by people) with limited ceremonial power.

Examining the design of the FDRE Constitution from this perspective needs to look at provisions dealing with the status, nomination, and appointment as well as powers and functions

¹¹¹ FDRE Constitution, Art. 60(2). If, on the other hand, the political parties cannot agree to the continuation of the previous coalition or to form a new majority coalition as per the invitation of the President, the House shall be dissolved and a new election will be held. See FDRE Constitution, Art. 60(2) cum. 60(5).

¹¹² Lijphart, *supra* note 2, at 104.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

of the President.¹²⁰ The president is the head of the state.¹²¹ He is nominated by the House of Peoples' Representatives and is elected if a joint session of both House of Peoples' Representatives and the House of Federation approve his candidacy by a two-third majority vote.¹²² Hence, no popular election of the President under the FDRE Constitution.

As regards the powers and functions, the president opens the annual joint session of the two Federal Houses; signs laws passed and international agreements approved by the House of Peoples' Representatives; appoints ambassadors and other envoys to represent the country abroad upon recommendation by the Prime Minister; receives credentials of foreign ambassadors and special envoys; awards medals, prizes and gifts in accordance with prescribed laws; grants high military titles upon recommendation by the Prime Minister; and grants pardon in accordance with conditions and procedures established by law.¹²³ These powers and functions are limited and most of them are initiated by the Prime Minister. Some of them can be implemented even when the President fails to do them.¹²⁴ Therefore, Lijphart's recommendation to give limited and ceremonial power to the President has clearly reflected again.

To conclude, as far as the selection of the head of the state is concerned, the design of the FDRE Constitution exactly fits (both in substance and form) one of the alternatives of Lijphart's suggestion. That is, if there is a need to have a president, she/he should be selected by the parliament with limited and ceremonial powers and functions.

G. Federalism and Decentralization

For divided societies with geographically concentrated communal groups, Lijphart prefers federalism to unitarianism, since the former provides autonomy for the group.¹²⁵ But, his suggestion does not stop there. Rather, it goes to the extent of covering the powers and composition of the second chamber; and composition and size of the federating units. According to Lijphart, having two legislative chambers with equal or substantially equal powers and different compositions is not a very good design in parliamentary systems as it is difficult to secure the confidence of both chambers for establishing the cabinet with such arrangement.¹²⁶ Moreover, he advises not to over represent a smaller federating unit in the federal chamber as doing so violates the democratic principle of 'one person, one vote'.¹²⁷ In this respect, the German and the Indian models are more attractive than the American, Swiss and Australian ones.¹²⁸ As regards size and composition, Lijphart recommends having relatively small and

¹²⁰ The FDRE Constitution, Arts. 69-71.

¹²¹ The FDRE Constitution, Art. 69.

¹²² The FDRE Constitution, Art. 70(2).

¹²³ The FDRE Constitution, Art. 71(1-7).

¹²⁴ For example, if he does not sign the law within fifteen days, the law can take effect without his signature. *See the FDRE Constitution, Art. 57.*

¹²⁵ Lijphart, *supra* note 2, at 104.

¹²⁶ *Id.*, at 105; he illustrates the point by remembering the 1975 Australian Constitutional crisis where the opposition-controlled Senate and refused to pass the budget in an attempt to force the cabinet's resignation, although the cabinet continued to have the solid backing of the House of Representatives.

¹²⁷ *Id.*

¹²⁸ *Id.* Generally speaking, second chambers show variations in terms of composition, selection of members and powers across federations. But, the German and the Indian models which try to balance the interests of the most

homogeneous federating units so as to avoid the possible dominance of large federating units over the federal government.¹²⁹

In short, Lijphart advises the constitutional writers of divided societies to design the constitution with a federal arrangement to enhance the autonomy of federating units; federalism with the second chamber having no equal or substantially equal powers with the lower house with no overrepresentation of smaller units to a higher degree, and relatively small homogeneous component units. Now, let us assess the design of the FDRE Constitution against these recommendations one by one.

1. *Federalism*

Article 1 of the FDRE constitution explicitly established a federal form of government. It reads as “The Constitution establishes a Federal and Democratic State structure. Accordingly, the Ethiopian state shall be known as the Federal Democratic Republic of Ethiopia”. Therefore, no doubt that the Constitution established a federal form of government. This form of government was opted for considering that it gives better opportunity to develop language rights, to respect history and culture, and to facilitate local decision-making of the Nations, Nationalities, and Peoples by rectifying the past failure of a unitary form of governments and bring sustainable peace.¹³⁰ To this effect, the Constitution guaranteed all “Nations, Nationalities or Peoples in Ethiopia have the right to speak, to write and to develop its own language; to express, to develop, and to promote its culture and to preserve its history.”¹³¹

Moreover, Nations, Nationalities, and Peoples are authorized to establish their own states at any time.¹³² The procedure for doing this is also clearly indicated under Art. 47(3)(a-e).¹³³ States

populous states on the one hand and those of the less populous on the other; and which Lijphart opts for has the following composition, method of selection of members, and powers:

1) **German:**-Composition wise, the German Basic Law stipulates that each Land has at least three votes, Lander with a population between two to six million inhabitants five, and Lander with more than seven million inhabitants has six votes. See the German Basic Law, Art. 51(2)). As regards selection of members, each Land government sends members of its cabinet to represent the interests of the land in the *Bundesrat*. They are simultaneously delegates for the *Bundesrat* and officials of the Land government-hence they can be instructed and recalled by the Land government. As regards power, the *Bundesrat* represents one of the more effective houses in a parliamentary system and full legislative power. It is allowed to initiate legislation, it has the right to examine and comment on all bills proposed by the federal government before they are submitted to the Bundestag (lower house).

2) **India:**-Indian second chamber known as the Council of States is composed of minimum of one representative for the smallest state and maximum of thirty-four for highly populated states. In addition to this, it has twelve other members who are well qualified in science, art, literature or social services. The members are indirectly elected by the state legislature except the 12 qualified ones who are appointed by the President. *See Indian Constitution, Art.80*). It has lawmaking power (For details of second chamber in federations. *See generally* Assefa Fiseha, *supra note 26, Section 3*).

¹²⁹ *Id.*

¹³⁰ Minutes of the Constitution, Discussion made on Art 1, *Tiraz 1, Tikmte 19/1987 E.C.*

¹³¹ The FDRE Constitution, Art. 39(2). Nation, Nationality or People is a group of people who have or share 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 (Art. 39(5)). They are the makers and the owners of the Ethiopian Constitution.

¹³² The FDRE Constitution, Art. 47(2).

¹³³ These procedures are: (a) When the demand for statehood has been approved by a two-thirds majority of the members of the Council of the Nation, Nationality or People concerned, and the demand is presented in writing to

are also autonomous as they have legislative, executive, and judicial powers in their respective jurisdictions,¹³⁴ which in effect means the ethnic groups (Nations, Nationalities or People), are enjoying a sort of segmental autonomy, as the base of statehood creation in Ethiopia is predominantly ethnicity. To this extent, the intention of adopting federalism in Ethiopia is the same as the one intended by Lijphart, i.e., to enhance autonomy.

A point worthy of examining is whether the autonomy guaranteed by the constitution is practically genuine. Several studies show that Ethiopian federalism shows centralizing tendency in practice in spite of what is provided in the Constitution.¹³⁵ This is manifested in two ways: high party centralization and fiscal dependence of the states on the federal government.

According to Riker, the degree of party centralization is measured in terms of two variables: whether the party that controls the central government also controls the regional government; and the degree of the strength of party discipline.¹³⁶ In his view, if a party with rigid party discipline controls different levels of government in a federation, it implies high federal centralization. In Ethiopia, Ethiopian Peoples' Revolutionary Democratic Front or its affiliated parties control both federal and state level governments, to the extent of making the distinction between party and state difficult.¹³⁷ In addition to this, there is no strong opposition political party.¹³⁸ As Ethiopian Peoples' Revolutionary Democratic Front adheres to the principle of 'Democratic Centralism', its leaders at the center can also use organizational and ideological means to discipline party members at the regional level.¹³⁹ This is also supported by *gimgima* (evaluation), which serves as an institutionalized mechanism to discipline party members.¹⁴⁰ Hence, as rightly deduced by Abeje, the Ethiopian situation qualifies both of Riker's variables of measurement of federal centralization: the party controls both the center and regions; and the existence of a rigid party discipline.¹⁴¹

In addition to this, the autonomy of the regional states is determined by the degree of financial autonomy. Complete financial autonomy comes about only when the regional states can

the state Council; (b) When the Council that received the demand has organized a referendum within one year to be held in the Nation, Nationality or People that made the demand; (c) When the demand for statehood is supported by a majority vote in the referendum; (d) When the State Council will have transferred its powers to the Nation, Nationality or People that made the demand; and (e) When the new state created by the referendum without any need for application, directly becomes a member of the Federal Democratic Republic of Ethiopia.

¹³⁴ The FDRE Constitution, Arts. 50(2) cum.52.

¹³⁵ See for example, Alefe Abeje, *The Role of the Federal System on the Structure and Operation of Political Parties in Ethiopia*, *EUROPEAN SCIENTIFIC JOURNAL* (2014); Zemelak Ayitew, *The Politics of Sub-national Constitutions and Local Government in Ethiopia*, 16 *PERSPECTIVES ON FEDERALISM*, Issue 2 (2014); ASNAKE KEFALE, *FEDERALISM AND ETHNIC CONFLICT IN ETHIOPIA: A COMPARATIVE REGIONAL STUDY* (New York: Routledge 2013); Mehari Taddele, *Federalism and Conflicts in Ethiopia*, *Conflict Trend*, available at www.meharitaddele.academia.edu/TeshagerMehari pdf (last accessed on 20 March 2015).

¹³⁶ WILLIAM H. RIKER, *FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE* (Boston: Little Brown, 1964), at 130 as cited in Abeje, *Id.*, at 203.

¹³⁷ Alefe, *supra* note 135, at 203-205.

¹³⁸ *Id.*, at 203.

¹³⁹ *Ibid.*

¹⁴⁰ *Id.*, at 205.

¹⁴¹ *Id.*

generate enough revenue to pay for their expenditure.¹⁴² The study of fiscal federalism in Ethiopia shows that the fiscal powers which have been assigned to the regions do not generate sufficient income that covers regional expenditure-hence high vertical fiscal imbalance which is usually corrected by federal transfer explains the Ethiopian situation.¹⁴³ In this regard, the autonomy of the states is also minimal.

Therefore, from the above paragraphs, one can easily conclude that high party centralization and high vertical fiscal gap challenge the original intention of opting for federal arrangement, i.e., to enhance autonomy of the federating units in Ethiopia.

2. *Second Chamber*

Lijphart's advice is to have a second chamber that tries to balance the extremes of the principles of territoriality and citizen equality, as is the case in Germany and India. The second chamber, the Upper House in Ethiopia is the House of Federation. The composition, methods of selection of members, and the power of the House are provided in the Constitution.¹⁴⁴ Accordingly, the House is composed of representatives of Nations, Nationalities, and Peoples.¹⁴⁵ Although each ethnic group is authorized to be represented at least by one, each Nation, Nationality or People shall be represented by one additional representative for each one million of its population with no maximum limit.¹⁴⁶ This makes the composition of the House different from Germany's *Bundesrat* or India's Council of States. Ethiopia's House of Federation representation formula has a majoritarian element as the ethnic group with many people have much representations with no maximum limit. To make the point clear, let us see the current composition of the House in terms of regions as follows:

¹⁴² Christophe Van der Beken, *Federalism and the Accommodation of Ethnic Diversity: The Case of Ethiopia*, A Conference Paper Presented at 3rd European Conference on African Studies, ECAS, Leipzig, 13 (June 2009) available at www.aegis-eu.org/old/archive/ecas2009panels_round_tables/31.htm (accessed 11 December 2014).

¹⁴³ Detail discussion as to why vertical fiscal imbalance exists in Ethiopia is well examined by Dr. Solomon Nigussie. See generally, SOLOMON NEGUSSIE ABESHA, *FISCAL FEDERALISM IN THE ETHIOPIAN ETHNIC-BASED FEDERAL SYSTEM* (Utrecht: Universiteit Utrecht, PhD Thesis, 2006).

¹⁴⁴ The FDRE Constitution, Arts.61-62.

¹⁴⁵ The FDRE Constitution, Art. 61(1).

¹⁴⁶ The FDRE Constitution, Art. 61(2).

Table 1: Table showing the current composition of the House of Federation (from 2010-present)

<i>N 0</i>	<i>Region</i>	<i>Total Population Number¹⁴⁷</i>	<i>Number of represented ethnic groups</i>	<i>Total members in HoF</i>	<i>Remark as to the number of ethnic groups in the region</i>
1	Tigray	4,522,124	3	7	In addition to the Tigray people, the Irob, Kunama and the Argoba are recognized as indigenous to the region by the state constitution
2	Afar	1,276,374	1	2	Argoba is considered as indigenous by the Afar Constitution
3	Amhara	20,910,201	4	23	The dominant Amhara, Agew Himra, Agew Awi and Oromo can exercise the right to self-determination as per the state Constitution
4	Oromia	25,489,024	1	26	Many ethnic groups reside in the region but sovereign power resides in the people of Oromo as per the regional Constitution
5	Somali	4,581,794	1	5	Sovereign power resides in the Somali nation as per the state Constitution
6	Harari People	31,869	1	1	Only the nominal Harari is represented by one representative
7	B/Gumuz	446,674	5	5	5 ethnic groups (Berta, Gumuz, Shinasha, Mao and Komo) are considered as indigenous ones by the state Constitution
8	Gambella People	257,142	5	5	5 ethnic groups (the Nuer, the Anuak, the Mejenger, Upo & Komo) are considered as indigenous ones by the State Constitution
9	SNNP	16,077,036	55	62	Has no less than 56 ethnic groups
		Total	75	135	

Source: Profile of Represented Nationalities of the House of Federation in the 4th Term, The House of Federation, Communication Service Directorate, 2003 E.C (in Amharic)

Normally, regions pay attention to the representation of the indigenous groups to the House of Federation. From the above table, one can easily read that an ethnic group with larger population number has many members; and those with small population size have small members in the House of Federation in a similar fashion with the House of Peoples' Representatives.¹⁴⁸ The implication of this arrangement is that the House of Federation has little

¹⁴⁷ Taken from the 2007 Central Statistics Agency (CSA) Ethiopian Census.

¹⁴⁸ The assertion obviously presupposes the case where minority ethnic groups do not block by having a common agenda which they want to defend against encroachment by larger ethnic groups. Otherwise, the combined forces of several minority ethnic groups has great potential to dominate over the dominant ethnic groups in the House of Federation. This can also be deduced from the table where the combined forces of all the major ethnic groups

potential to give protection to ethnic groups with small population size, and this is missing the very rationale of having a second chamber in federations.¹⁴⁹ Hence, composition wise, the House of Federation deviated from the second chamber proposed by Lijphart.

Regarding the mode of selection of members, the Constitution provides two possibilities. They may be elected indirectly by the state legislatures, or the state legislature may decide the members to be elected directly by the people.¹⁵⁰ However, the existing practice so far indicates that the members are elected by state legislatures.¹⁵¹ This invited for different opinions. For example, Manjo argues that “if members of the House of Federation are representatives of Nations, Nationalities, and Peoples, the logic why the state parliaments select the House of Federation representatives is not clear.”¹⁵² He tries to substantiate his argument by showing the experiences of Canada, Germany, and India where the state parliaments select members of the second chamber. For those countries, Manjo argues, this is quite logical, as the second chamber is the representatives of the states, not the Nations, Nationalities, and Peoples as is the case in Ethiopia.¹⁵³ For him, the appropriate mode of selecting the members should be either through direct popular election or through Councils of Nations, Nationalities, and Peoples; not councils of state parliaments.¹⁵⁴

On the other hand, Van der Beken argues that “the fact that the members are selected by regional legislatures is an expression of constitutional logic.”¹⁵⁵ That is, the government tried to realize coincidence between ethnic and territorial boundaries. As a result, all Ethiopian ethnic groups (more than 80) were, figuratively speaking coupled to one (in rare cases several) of the nine regional states. The parliament of a regional state is, therefore, the representative organ of those ethnic groups that have been localized in the state concerned.¹⁵⁶

The constitutional logic that Van der Beken established is quite interesting. It also goes in line with the German and the Indian model which Lijphart recommended for selection of the second chamber. However, practically, it does not guarantee representation of every Nation, Nationality, or Peoples for the simple reason that the ethnic groups are dispersed in different regional states and the members of the state legislatures are elected under plurality electoral system. Had the chosen electoral system been the proportional representation, the election of members of the House of Federation by the state legislatures would have been alright. Hence, the

including Oromo, Amhara, Tigray and Somali add up to secure only 61 seats while the combined forces of other ethnic minorities secured 74 seats out of the 135 total seats.

¹⁴⁹ The rationale for having second chamber in federations is to provide a protective mechanism against federal derogation and the overstepping of delegated authority, and the impairment of the interests of one or more of the units. It is necessary because smaller and more sparsely populated units feel potentially threatened by more densely populated states; See Assefa Fiseha, *supra* note 26, at 124.

¹⁵⁰ The FDRE Constitution, Art. 61(3).

¹⁵¹ Manjo, *supra* note 59, at 70; Assefa, *supra* note 26, at 133.

¹⁵² Manjo, *Id.*, at 70.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Van der Beken, *supra* note 24, at 110.

¹⁵⁶ *Id.* His example is that the Amhara ethnic group has been coupled to the Amhara regional state. That is the Amhara regional state has been created for the Amhara ethnic group. Hence, it is logical for Amhara parliament to select the Amhara representative in the House of Federation.

best way to ensure representation is either following Manjo's suggestion of selection by the Council of Nations, Nationalities, or Peoples; or alternatively to select by state legislatures with the precondition that members of state legislatures are elected under the proportional electoral system.

With regard to power, unlike Germany's *Bundesrat* and India's Council of States which have law-making power with the lower majoritarian Houses, Ethiopia's House of Federation does not have a legislative function. The only provisions where one may by stretch of imagination trace legislative functions are Art. 99 where the House has concurrent power with the House of Peoples' Representatives in the determination of residual powers over taxation, Art. 62(7) where the House determines division of revenues derived from joint federal and state tax sources and the subsidies that the federal government grants to states, and Art. 105 where the House participates in the amendment of the Constitution.¹⁵⁷

In general, one can easily grasp that Ethiopia's second chamber deviated from the one suggested by Lijphart in terms of its composition, power, and partly mode of selection of members.

3. *Composition and Size of the Federating Units*

As indicated above, Lijphart recommends having a relatively small size and homogeneous federating units for such arrangement avoids potential dominance of the federating units over the federal government. In Ethiopia, there are nine states and constitutionally speaking they have equal rights and powers.¹⁵⁸ However, they show great variations in their composition. For example, based on the ethnic composition of their population, Van der Beken grouped the nine regions into four categories:

- 1) The first five regions (Tigray, Afar, Amhara, Oromia, and Somali) are dominated by the title ethnic groups in terms of both numerical and political dominance;
- 2) Benishangul Gumuz and Gambella where there is no dominance of a particular ethnic group, but of two ethnic groups jointly. Accordingly, in Benishangul Gumuz, Benishangul and Gumuz groups; in Gambella, the Nuer and Anuak groups make dominance in the respective regions;
- 3) The Southern Nation, Nationality, and People Region where extreme diversity exists and there is no single numerical dominant ethnic group; and
- 4) The Harari region where Harari the people is politically dominant without having a numerical majority.¹⁵⁹

¹⁵⁷Assefa, *supra* note 26, at 127. Since the House is authorized to interpret the constitution, under the present status quo, making it non-legislative chamber is logical. Allowing it to make a law and at the same time authorizing it to interpret the constitution amounts to judging one's own case and this betrays universally accepted principle. In both Germany and India, a body authorized to interpret the constitution is not second chamber. This task is given to Constitutional Court in the case of Germany, and to the Supreme Court in the case of India. Hence, no overlap of law-making and constitutional interpretation functions in those countries.

¹⁵⁸ The FDRE Constitution, Art.47 (4).

¹⁵⁹ Van der Beken, *supra* note 24, at 115-116.

This shows that as regards composition, the constituent units in Ethiopia range from relatively homogeneous to extremely heterogenous as is the case in the South. As regards the size, one can observe similar variation. Some are large; some are small. For example, while the largest region, Oromia has a total surface area of 353,690 km², the smallest region, Harar has only about 340km². This has its own negative implication on the stability of the federalism, especially in Ethiopian federation where federal supremacy is not declared, and the right to secession is unconditional.¹⁶⁰ Some studies also suggest for the reorganization of the present constituent units.¹⁶¹ Therefore, in terms of both composition and land size; the Ethiopian constituent units deviated from Lijphart's advice.

Generally, based on the above analysis, it is possible to conclude that Ethiopian federalism reflects Lijphart's guideline on federalism more in form than substance.

H. Granting Non-territorial Autonomy

Non-territorial autonomy is the concept that deviates from the paradigm that makes an automatic association between autonomy and territory.¹⁶² In this case, autonomy is granted not to a specific territorial administration, but to the ethnic group which realizes the self-administration of all ethnic groups irrespective of their territorial concentration.¹⁶³ Although federalism is important because it gives territorial autonomy, it is not a perfect solution since the exact coincidence of homogeneous ethnic group to the specific territory is mostly unrealistic in practice. Lijphart proposes non-territorial autonomy for the groups that are not geographically concentrated.¹⁶⁴ Therefore, non-territorial autonomy in effect remedies the defect of territorial autonomy.

Had such type of autonomy been granted in Ethiopia, it would have taken the form that every Nation, Nationality, or People of Ethiopia has the right to establish legislative, and executive councils that are not linked to a particular territory.¹⁶⁵ The authority of these ethnic institutions will be limited, however, to the members of the concerned ethnic group, but it will extend to all members of the group, regardless of where they live on the territory of the state.¹⁶⁶ As to its relevance in Ethiopian context, Van der Beken observes that it could be applied not totally by replacing the existing territorial autonomy, i.e., federalism but by complementing the latter.¹⁶⁷ He goes on saying "while powers that now belong to the regions in the areas related to ethnic identity protection (language, culture, and education) would be transferred to the non-territorial institutions in which only members of one ethnic group are represented, powers that

¹⁶⁰At this juncture, one may wonder whether or not Lijphart's federalism and decentralization guideline extends to include secession. The guideline does not explicitly address such query. However, it is possible to infer that it is short of secession. The overall effort of Lijphart is to bring a stable democracy in divided societies by bringing them together within a single sovereign state. As such, it is reasonable to argue that the design of the FDRE Constitution by making the right to secession unconditional deviated from Lijphart's recommendation.

¹⁶¹ Assefa, *supra* note 26, at 374-375

¹⁶² CHRISTOPHE VAN DER BEKEN, *UNITY IN DIVERSITY-FEDERALISM AS A MECHANISM TO ACCOMMODATE ETHNIC DIVERSITY: THE CASE OF ETHIOPIA*, 303 (Muenster, Lit Verlag, 2012).

¹⁶³ *Id.*

¹⁶⁴ Lijphart, *supra* note 2, at 105.

¹⁶⁵ Beken, *supra* note 162.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

are territorial because of their very nature such as police, land administration, agriculture would continue to be under the authority of the regional institutions.”¹⁶⁸

In spite of Lijphart’s proposal and possible applicability of the concept of non-territorial autonomy in Ethiopia, the FDRE Constitution does not give recognition to it. However, this does not mean that there is no practice of non-territorial autonomy in Ethiopia. One instance is the case of Harar where members of Harar National Assembly (one of the constituent chambers of the regional Parliament) are elected by members of the Harari ethnic group, even when the latter live outside of Harar.¹⁶⁹ The practice of learning in one’s own mother tongue in a region where the working language is different from the mother tongue of the community concerned is also manifestation of non-territorial autonomy. For example, even though the working language of the respective regions is not Amharic, there is the practice of offering primary education in Amharic in Oromia and Somali regional states. Similarly, even though the working language of the Chartered Dire Dawa is Amharic, there are Afaan Oromo schools in it. These are, however, exceptions and do not warrant to conclude that in spite of the failure of the Constitution to recognize the concept of non-territorial autonomy, its practice is prevalent. Hence, it is discernible that the design of the FDRE Constitution deviated from Lijphart’s guideline of constitutional design for divided societies in this regard.

I. Power-sharing beyond the Cabinet and Parliament

Lijphart suggests that in divided societies, broad representation of all communal groups is essential only not in the cabinet and parliaments but also in the judiciary, civil service, police, and military.¹⁷⁰ Lijphart provides two alternative mechanisms for doing this. The first is by instituting ethnic or religious quotas, which do not necessarily have to be rigid. For example, instead of mandating that a particular group is given exactly 20% representations, a more flexible rule could specify a target of 15-25%.¹⁷¹ The other, which he thinks is more appropriate than the first mechanism, is to have an explicit constitutional provision in favor of the general objective of broad representation and to rely on the power-sharing cabinet and the proportionally constituted parliament for the practical implementation of this goal.¹⁷²

In this regard, the general framework provided under Art. 39(3) of the FDRE Constitution seems to correspond to the second mechanism proposed by Lijphart. However, a close examine shows that the correspondence is not a real one as Lijphart starts from the premises of proportionally constituted parliament and this is lacking in Ethiopia because of the chosen plurality electoral system, an issue discussed in sub-section A above.

In this regard, the existing practice is not consistent. For example, in Ethiopian Federal Police, although there is an attempt to consider different ethnic composition administratively, for example, by recruiting police members from all regional states, it cannot ensure

¹⁶⁸*Id.*, at 304.

¹⁶⁹ This is mandated by the regional constitutions. See The Revised Constitution of Harar Regional State, Art. 50(2).

¹⁷⁰ Lijphart, *supra* note 2, at 105.

¹⁷¹ *Id.*, at 105-106

¹⁷² *Id.*

representation.¹⁷³ One reason is the presence of significant turnover of human resource in the Commission. Because of this, the concern of the Police Commission is more on recruiting competent police officers than balancing different ethnic groups.¹⁷⁴ On the other hand, Assefa Fiseha contends that the practice of power-sharing in Ethiopia is limited to executive and does not extend beyond that.¹⁷⁵ The existing trend in the federal judiciary more explains Assefa's conclusion.¹⁷⁶

Table 2: *Table showing ethnic composition of federal judges at Supreme, High and First Instance Courts*

No	Ethnic Group	No of judges at Supreme Court	No of judges at High Court	No of judges at First Instance Court	Total number of judges	No of judges in %
1	Amhara	7	24	52	83	37.99
2	Tigre	6	15	20	41	18.72
3	Oromo	5	14	21	40	18.26
4	SNNP ¹⁷⁷	3 ¹⁷⁸	18 ¹⁷⁹	18 ¹⁸⁰	39	17.81
5	Somali	0	1	0	1	0.5
6	Afar	0	1	0	1	0.5
7	Harari	1	0	1	2	0.91
8	Agew	1	2	2	5	2.28
9	Argoba	0	0	1	1	0.5
10	Shinasha	1	0	0	1	0.5
11	Amhara-Oromo hybrid	0	0	4	4	1.83
12	Amhara-Burji hybrid	0	0	1	1	0.5
Total					219	100%

Source: *Federal Supreme Court, Judicial Administration Council (synthesized by the researcher, May 2015).*

From the above table, one may observe two things: the ethnic composition and the proportionality of the composition as suggested by Lijphart. Composition wise, of the existing 75

¹⁷³ Interview conducted with Mesfin, Commissioner, Ethiopian Police Commission; Commander Yemane, Criminal Directorate, Ethiopian Police Commission, April 16, 2015.

¹⁷⁴ *Id.*

¹⁷⁵ Assefa Fiseha, *Supra* note 26, p210.

¹⁷⁶ Data taken from Federal Supreme Court, Judicial Administration Council reveals that the federal judiciary has 24 judges at the Supreme Court, 75 judges at High Court, and 120 judges at First Instance Court together making total number of 219 judges.

¹⁷⁷ As per the 2007 census, there are 56 ethnic groups in the South. Of these, only 14 ethnic groups, viz., Gurage, Sidama, Hadiya, Gedio, Alaba, Gamo, Malee, Dwro, Kembata, Bench, Silte, Kafa, Konta, Kebena are represented in the federal judiciary.

¹⁷⁸ These are 1 Hadiya, 1 Gedio, 1 Alaba

¹⁷⁹ These are 5 Gurage; 4 Sidama; 1 Hadiya; 1 Gamo; 1 Alaba; 1 Malee; 1 Dwro; 1 kembata; 1 Bench; & 2 Silte.

¹⁸⁰ These are 5 Gurage; 1 konta; 2 Hadiya; 1 Kebena; 1 Sidama; 2 Silte; 2 Kafa; 2 Gamo; 1 Alaba; & 1 Dwro

ethnic groups of the country,¹⁸¹ the federal judiciary is filled by 23 ethnic groups, 4 Amhara-Oromo hybrids, and 1 Amhara-Burji hybrid. Hence, the accommodative capacity is less than 1/3rd of total ethnic groups. The proportionality element is also not reflected. As per 2007 census, the Oromo, the Amhara, the Southern Nations, Nationalities and Peoples, the Somali, and the Tigre people respectively stood the first five ranks. However, the Amhara with 37.99%, the Tigre with 18.72%, the Oromo with 18.26%, the Southern Nations, Nationalities and Peoples 17.81%, the Agwe with 2.28% representation respectively occupy the first five ranks. Therefore, although diversity is reflected to a limited extent in the judiciary, the proportionality is by no means taken into consideration.

Of course, one may expect the practical challenges that may encounter Ethiopia in ensuring ethnic representation in the federal judiciary. Compared to other branches of government, arguably, one may say that because of its nature, the judiciary needs well trained, skilled, and knowledgeable judges and getting these judges from all ethnic groups in proportion to their number may be difficult. This is a problem of inefficiency and as explained in the first section, one of the critiques against Lijphart's consociational democracy model. However, since consociational democracy model emphasises representation of ethnic groups than the individual merit, it cannot be a valid explanation for not considering proportionality element.

In short, neither the Constitution explicitly provides nor the practice reveals the existence of power-sharing beyond executive in Ethiopia. If at all it exists, it depends upon the willingness of leaders and cannot exactly explain the one suggested by Lijphart.

III. CONCLUSION

This paper examined to what extent the design of the FDRE Constitution reflects Lijphart's nine guidelines for constitutional design. The findings of overall examination can be summarized into four areas.

First, the FDRE Constitution showed a significant and clear deviation from Lijphart's guidelines on the choice of electoral system. Lijphart recommends a proportional electoral system for divided societies. But, the FDRE Constitution adopted plurality electoral system.

Second, in areas of a constructive vote of no confidence for ensuring cabinet stability in the parliamentary form of government and non-territorial autonomy, the FDRE Constitution remained silent as to Lijphart's guidelines.

Third, there are areas where the design of the FDRE Constitution correspond to Lijphart's guidelines in form but deviated or at least has potential to deviate. The design of the FDRE Constitution on issues of the parliamentary form of government, federalism, and power-sharing within or beyond the executive fall under this category.

Fourth, the design of the FDRE Constitution fully corresponds to Lijphart's proposal with regard to the selection of the head of the state (the President) as the President is elected by the parliament (not directly by the people) with limited ceremonial powers (Arts.69-71).

¹⁸¹ According to the 2007 Ethiopian Population and Housing Census, more than 80 ethnic groups exist in the country. However, at present, the House of Federation recognized only 75 ethnic groups. See *the 2007 census cum supra Table 1*.

The deviations (both in form and substance, or in substance alone), or the silences of the FDRE Constitution as to the guidelines are mainly because of choice of electoral system, lack of explicit constitutional provisions, the absence of established political practice, or silence of the constitution.

Considering the above findings, one would normally expect to recommend the revision of the FDRE Constitution to the extent that it totally deviated from the guidelines or changing the existing political practice where the Constitution corresponded to the guidelines in form but deviated in substance. However, the author deliberately restrained from making such recommendations for the reason that such recommendations need first to test and establish with empirical evidence that Lijphart's consociational democracy model and his guidelines are proved values for Ethiopia. This study, however, is short of doing that as it already started from warranted assumption that the model is appropriate and can explain the Ethiopian situation.

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