

UNIVERSITY OF THE WESTERN CAPE

FACULTY OF LAW

**THE ROLE OF SECOND CHAMBER IN REPRESENTING SUBNATIONAL UNITS:
A COMPARATIVE STUDY OF NIGERIA AND SOUTH AFRICA**

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DECLARATION

I, **Siboniso Andrew Shabangu**, hereby declare that the work contained in this thesis is my own work and it has not been submitted before for any other degree at any other University. The sources consulted or cited have been indicated in full.

Signature

.....

Siboniso Shabangu

Date: November 2023



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DEDICATION

This thesis is dedicated to my late mother, Dorries Thalitha Moyane, and grandmother, Maria Moyane, who pushed me to work hard and fulfil my dreams. Thank you for always being there for me and guiding me. I can still feel your affection even if you are no longer with me.



ABSTRACT

The purpose of the research is to investigate the effectiveness of representation of subnational units in Nigeria and South Africa in the second chamber. In both countries, the subnational unit is represented equally in the second chamber. In Nigeria, the second chamber guarantees equal representation with three senators to each of the thirty-six states, regardless of size in the senate, plus one senator representing the federal capital territory Abuja. Similarly, in South Africa, each province is equally represented in the second chamber by ten delegates from each of the nine provinces, regardless of population. The distinction between the two countries is that members of the second chamber in Nigeria are elected directly, whereas members of the second chamber in South Africa are appointed by the provincial legislature. Both second chambers enjoy considerable power over bills that affect subnational units. The study found that the second chambers in South Africa and Nigeria are not actually representing the subnational unit in the national decision-making process. Members of the two second chambers are frequently using their substantial powers to pursue their political parties' agendas and choices, that conflict with the goals of their subnational entity. Also, institutional operating procedures prevent subnational unit legislatures from adequately assessing a bill, drafting a mandate that takes these issues into account, and directing their delegates to vote effectively. Therefore, the second chamber remains ineffective representatives of subnational interests, depriving the federation of the benefit of an organization that properly represents the subnational unit.

Keywords: Subnational units; Representation; Second chamber; South Africa; Nigeria; National Council of Provinces; Senate; State government; Provinces



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CHAPTER ONE: INTRODUCTION

1.1 Background

The features of a legislature with a bicameral structure are considered to be highly dependent on the powers and abilities of the second chamber.¹ The second chamber is used in many federal countries to ensure the representation of subnational interests.² For him, representation of subnational interests entails that subnational unit play a role in national administration, a key component of shared rule. This means that the second chamber is an established entity that represents the subnational unit in the federal legislative process and, possibly, additional functions that allow them to exercise shared control in certain areas.³ Representation of subnational unit in the national government is regarded as an important role of second chamber.⁴ The composition of a second chamber plays a very important role in ensuring that the voice of subnational unit is represented in the national government. The way members are selected plays a vital role in ensuring that the voice of subnational interest is represented. For a second chamber to serve as a voice for subnational unit, the powers allocated to the second chamber is also equally important. This implies that the effectiveness of the second chamber in representing regional interests depends on the specific powers allocated to these institutions by the constitution.⁵ This particularly relates to their effectiveness in protecting the jurisdiction of constituent units.

Both Nigeria and South Africa have adopted a bicameral parliament which consists of two houses, the lower and upper house. Nigeria has two elected houses of parliament.⁶ Section 47 provides that the ‘there shall be a National Assembly for the federation which shall consist of a senate and a house of representatives’⁷. Section 90 of the 1999 constitution of Nigeria also provides that ‘there shall be a house Assembly for each of the state of the federation’.⁸ In South Africa, the National Council of Provinces (NCOP) is the second chamber of the country's bicameral parliament. The Constitution indicates that the NCOP is a house of provinces. The

¹ Lijphart A *Patterns of Democracy: Government forms and performance in Thirty-six countries* 2ed (1999) 115

² Fessha Y ‘Bicameralism’ in Grote R, Lachenmann F and Wolfrum R (eds) *Max Planck Encyclopaedia of Comparative Constitutional law* (2018) 1-14

³ Gamper A ‘Second chamber in Federal States’ *50 shades of federalism* available at <https://50shadesoffederalism.com/theory/1045/> (accessed 20 August 2023)

⁴ Fessha Y ‘Second chamber as a site of legislative intergovernmental relations: An African federation in comparative perspective (2021) 314 *Regional & Federal Studies* 497

⁵ Fessha Y ‘Bicameralism’ in Grote R, Lachenmann F and Wolfrum R (eds) *Max Planck Encyclopaedia of Comparative Constitutional law* (2018) 1-14

⁶ Section 47 and 90 of the Constitution of the Federal Republic of Nigeria (as amended)

⁷ Section 47 of the 1999 Constitution of the Federal Republic of Nigeria, 1999

⁸ Section 90 of the 1999 Constitution of the Federal Republic of Nigeria, 1999

Constitution, in Section 42(2), provides that the ‘National Council of provinces participate in the legislative process set out in the constitution’⁹. It further provides in Section 42(4) that the ‘National Council of Provinces represents the provinces to ensure that provincial interests are considered in the national sphere of government. it does this mainly by participating in the national legislative process and by providing a national forum for public consideration of issues affecting the provinces’¹⁰.

1.2 Problem Statement

From the foregoing, it’s clear that the second chambers in South Africa have been established with the goal of representing the interests of subnational units at the national level. The objective is to ensure that subnational units have control over issues that affect them and that subnational representation at the national level is guaranteed. In Nigeria, the senate represent different areas of Nigeria. The main question this study investigates is whether the second chamber in Nigeria and South Africa represent subnational units.

From the foregoing, it’s clear that the second chambers in the two countries have been established with the goal of representing the interests of subnational units at the national level. The objective is to ensure that subnational units have control over issues that affect them and that subnational representation at the national level is guaranteed. The main question this study investigates is whether the second chamber in Nigeria and South Africa represent subnational units.

- What are the factors that determine the effectiveness of a second chamber in representing subnational interest?
- How are members of the second chamber selected in Nigeria and South Africa?
- What are the powers and functions of the second chamber in South Africa and Nigeria?
- How far the second chambers in South Africa and Nigeria are in a position to protect subnational unit interest?

⁹ Section 42(2) of the 1996 Constitution of South Africa, 1996

¹⁰ Section 42(4) of the 1996 Constitution of South Africa, 1996

1.3 Literature Review

The capacity of second chamber to serve as a forum of subnational unit representation is affected by their composition and the powers they exercise. This necessitates research comparisons on subnational unit representation in South Africa and Nigeria's second chambers, as there have been few studies on it. Second chambers provide potential benefits for subnational units, including effective input into decision on common concerns that will affect the entire country. Strong participation of subnational units in decision making at the federal level complements, and can serve as an alternative to, the scope of autonomous powers of the subnational units¹¹. Subnational unit representation in the second chamber has been the subject of scholarly critique, focusing on the capacity of the second chamber to serve as a forum of subnational unit representation and participation in the decision-making process in the national government.

To analyse and clarify conceptual and theoretical matters related to the second chamber, Swenden, in his study of sub-national unit participation in national decisions and the role of second chambers, argued that second chambers have been described as an institution of federal government that represent subnational interests in decision making at the national level¹². He points out that involving second chamber in the process of decision making in national level is crucial if the state is to reach its objectives and fulfil its commitment. Second chambers could be institutional intergovernmental device in which vertically joined up policies such as national issues regulations are discussed and decided upon¹³. He further, argues that second chamber in federal states are hugely diverse in terms of compositions, powers, and the way in which their members relate to overall party system and jointly these factors determine the capacity of second chambers for representing subnational unit in the federal decision making¹⁴. Therefore, Swenden do not address the issue since he is not focusing on subnational unit representation in the second chamber of Nigeria and South Africa, but rather on subnational unit participation in the national decision making. Tsebellis and Money are concerned with the legislative review role of the second chambers.¹⁵ They believe that these institutions influence legislative

¹¹Bulmer E 'Federalism' available at <https://www.idea.int/sites/default/files/publications/federalism-primer.pdf> (accessed 10 September 2023)

¹² Swenden W 'Sub-national Participation in National Decisions: The Role of Second Chambers' in Henrik E, Waelti S and Zuern M (eds) *Handbook of Multi -Level Governance* (2010) 103-123

¹³ Swenden W 'Sub-national Participation in National Decisions: The Role of Second Chambers' in Henrik E, Waelti S and Zuern M (eds) *Handbook of Multi -Level Governance* (2010) 103-123

¹⁴ Swenden W 'Sub-national Participation in National Decisions: The Role of Second Chambers' in Henrik E, Waelti S and Zuern M (eds) *Handbook of Multi -Level Governance* (2010) 103-123

¹⁵ Tsebellis G & Money J *Bicameralism* (1997) 80

outcomes even though they lack the authority to reject legislation and have the same makeup as the first chamber¹⁶. They point out that the emphasis is on the representational function of federal second chambers rather than the legislative review.¹⁷ However, they are not focusing on the issue of subnational representation of South Africa and Nigeria and they are primarily concerned with legislative review role.

Representation of subnational unit in the second chamber has been subject of scholarly critique as a site that accommodate diversity within unity and brings decision making closer to the people. Second chambers provide potential benefits for certain countries, including effective governance, democracy, efficiency, and adequate representation of diverse subnational entities. In this regard, Russell has focused on the premise that the second chamber may establish representation of a different set of interests than those that exist in and commonly dominate the lower house, and the second chamber will give a more alternative voice in what are usually dominated legislative bodies, expressing certain elements of their powers and composition¹⁸. She also points out that the second chamber can act as a veto player in the policy-making process, especially if it has strong formal powers, and that the second chamber can disperse the responsibility of parliamentary work, often allowing functions to be carried out in addition to those pursued by the first chamber. However, she does not address the issue since she is not focusing on second chamber comparisons, but rather on what second chambers are for, and she also fails to address the question of the connection between subnational interests and representation in the second chamber.

Fessha investigates the second chamber as site of intergovernmental relations, focusing on an African federation in comparative perspective.¹⁹ His study explores the capacity of the second chamber to serve as a site of legislative IGR in the context of one African federation, South Africa. He argues that "South African experience shows that a properly designed second chamber may not deliver the desired result of facilitating legislative intergovernmental relations due to internal operational rules that do not allow subnational governments to properly consider a bill, formulate a mandate that reflects subnational concerns, and instruct their delegation to vote accordingly."²⁰ Fessha does not compare the underlying issues of second

¹⁶ Tsebellis G & Money J *Bicameralism* (1997) 80

¹⁷ Tsebellis G & Money J *Bicameralism* (1997) 80

¹⁸ Russell M 'What are second chambers are for?' (2001) 54 *Parliamentary Affairs* 452

¹⁹ Fessha Y 'Second Chamber as a site of legislative intergovernmental relations: An African federation in comparative perspective' (2021)31.4 *Federal and Regional Studies* 499

²⁰ Fessha Y 'Second Chamber as a site of legislative intergovernmental relations: An African federation in comparative perspective' (2021)31.4 *Federal and Regional Studies* 501

chamber subnational participation in South Africa and Nigeria. He is particularly concerned with intergovernmental relations in the second chamber, rather than with the representation of subnational unit interests. Mast have interrogated the second chamber in an analysis of the European parliament, focusing on determining if a comparison with second chamber can better illuminate our understanding of the role played by European Parliament.²¹ As a result, she does not address the context-specific challenges that occur in South Africa and Nigeria, as her research is solely focused on the European Parliament.

Arowolo, examined the implications of Nigeria's bicameral legislature on democracy. He noted that 'Some of the disadvantages associated with bicameral legislature include excessive financial expenditure to manage its operations; unreasonable delay in legislative processes, which is perilous in an emergency circumstance; and avoidable duplication of legislations.'²² He went on to propose that the bicameral legislature should be abandoned in favour of a unicameral legislature with minor adjustments.²³ Therefore, Arowolo does not deal with the challenges of subnational representation in the second chamber. Patterson and Meghan provide detailed descriptions of the composition and functioning of the second chamber in a variety of countries.²⁴ They believe that bicameralism is crucial for the theory and practice of democratic administration. They concentrate on representation and legislative oversight. They determined that the second chamber in the United States has less authority and respect than the first chamber, and that the rationale of the parliamentary system is power concentration rather than power distribution, and that second chambers in these institutions so have fewer philosophical backing. They also argue that, while second chambers are essential and influential parliamentary entities, their performance does not influence policy results. They feel that the second chamber's functioning is more influenced by legislative review than by its representative responsibility. They claim that because members of second chambers do not always have defined constituencies, party competition with the first chamber may be a more important predictor of member conduct than constituency representation. Patterson and Mughan investigate the causes of institutional evolution but neglect to question the function of subnational representation in a second chamber.

²¹ Mast N 'An upper house in all but name? An analysis of the European Parliament' (2002) *Jubilee conference of the Australian Political Studies Association* 8

²² Arowolo DE 'Democracy and Bicameralism in Nigeria: Issues, Challenges and Way Forward' (2015) 3.7 *Review of Public Administration and Management* 7

²³ Arowolo DE 'Democracy and Bicameralism in Nigeria: Issues, Challenges and Way Forward' (2015) 3.7 *Review of Public Administration and Management* 6

²⁴ Patterson SC & Mughan AY *Senate: Bicameralism in the Contemporary World* (1999) 264

Ronald Watts identifies institutional variables that have a direct impact on how second chambers perform their duties.²⁵ These concerns the manner of selecting members, the chamber's composition, and the chamber's powers. Watts maintains that the second chamber's role in legislative review in federal systems is inextricably tied to the representation of regional and minority interests. However, he does mention the prospect of such a chamber playing a part in promoting intergovernmental relations. Watts' study does not delve deeply into the determinants of subnational representation in the second chamber. Agan and Danjuma have focused on Sixty Years of Independence in Nigeria's Federal Structure and the Contending issues, and argued that the '[t]he Nigerian federal arrangement is overloaded by the prevalence of minority exclusion, the central government's overriding legislative power over the federating units, federal dominance of the country's revenue distribution, centralized management and control of the policing system, and the lack of autonomy for the local government as a tier of government.'²⁶ They conclude that 'the core problem is that power concentration in Nigeria's federal structure has tended to favour authoritarianism as engineered by politicians'. They have not discussed representation of subnational unit interest in the second chamber.

Russell interrogates the second chamber's territorial role. In her study's conclusion, she mentions the significant degree of variation in the makeup of the second chamber. She contends that this heterogeneity is linked to countries' varying histories, cultures, and political systems. She proposes that for the second chamber to be effective, it must be composed differently than the first chamber, it must have powers adequate to balance those of the first chamber, and its perceived legitimacy is vital²⁷. She also suggested that the 'second chamber should represent subnational units, that it should not have the power to remove the president from office, that it should have less power over financial legislation than the first chamber, but more power over constitutional change; that it should not be controlled by the government, that it should be directly elected, though indirect election may provide better connections to subnational units; and that it should have fewer members than the first chamber'.²⁸ Therefore, she does not address the context-specific concerns that pertain to South Africa and Nigeria because she has focused her study on other countries rather than those two. The evaluated literature either

²⁵An international conference organized by the Department for Institutional Reforms, Italy, and the Forum of Federations on *Federalizing Process in Italy. Comparative Perspectives- Presentation at Conference* (2010) 1-21, Watts R *Federal Second chamber compared* (2010) 13

²⁶ Agan A & Danjuma Y 'Sixty Years of Independence and Nigeria's Federal Structure: The Contending Issues' (2020) 3.8 *FUJOPIA* 87

²⁷ Russell M 'The Territorial Role of Second Chambers' (2001) 7.1 *The Journal of Legislative Studies* 107

²⁸ Russell M 'The Territorial Role of Second Chambers' (2001) 7.1 *The Journal of Legislative Studies* 107

analyses or assesses the procedures and results of second chamber representation of subnational representation in countries that have implemented this system.

Oni indicated in his study of the legislature and constituency representation in Nigeria's Fourth Republic's democratic administration that the notion of constituent representation expressed in the legislature is a fundamental and indispensable component of any democratically elected government²⁹. He emphasizes that the legislature, in its duty of representation, serves as an essential connection between the government and the governed, the people who vote and the electorate, and those in power and those being ruled. He goes on to suggest that personal ambition, parochial interests, and agendas of politicians are elements that have eroded legislative power in Nigeria. In Nigeria, the self-serving and pathological view of politics is that possession of political power is considered as a method of maintaining one's own selfishness. Thus, Oni's discussion on the Legislature and Constituency Representation in the Democratic Governance of the Fourth Republic of Nigeria, rather than the subnational unit representation in the second chamber of Nigeria, does not adequately address the issue at hand.

Brandt focuses on a structural analysis of the second chamber of the South African Parliament - the National Council of Provinces (NCOP).³⁰ He believes that the process of subnational unit representation in the second chamber requires a great deal of consultation and communication, and this communication ensures that each province is fully informed of the content of the legislation and able to consult public stakeholders³¹ and come up with a mandate in time.³¹ He points out that the emphasis in on the NCOP ensure that national is sensitive to provincial needs and concerns³². However, he does not address the issue of subnational representation of South Africa and Nigeria. He is primarily concerned with the structural analysis of second chamber of South African parliament. Considering studies on second chamber representation in connection to democracy and the impact it has in progressive change, there hasn't been much effort put into examining the second chamber's claim to provide subnational unit representation in the national government. Indeed, no study has undertaken to investigate whether the interest

²⁹ Oni S 'The Legislature and Constituency Representation in the Fourth Republic of Nigeria's Democratic Governance' (2013) *Ife Center for Psychological Studies* 237

³⁰ Brandt ML *from the Senate to the NCOP: A description of the Composition and Working of South Africa's Second Chamber* (unpublished LLM thesis, University of Stellenbosch, 2001) 2

³¹ Brandt ML *from the Senate to the NCOP: A description of the Composition and Working of South Africa's Second Chamber* (unpublished LLM thesis, University of Stellenbosch, 2001) 68

³² Brandt ML *from the Senate to the NCOP: A description of the Composition and Working of South Africa's Second Chamber* (unpublished LLM thesis, University of Stellenbosch, 2001) 67

of subnational units is represented in the second chamber when comparing South Africa and Nigeria. This makes the study distinct and special.

1.4 Significant of the Study

The study focuses on the representation of subnational units in the second chamber. Using case studies from both Nigeria and South Africa, it investigates whether the second chamber of South Africa and Nigeria can truly represent the interests of subnational units. Many countries are striving to establish a second chamber that is a truly representative subnational unit. Those countries will benefit from this research. It will also assist government entities and communities in fostering unity and integration, as well as allowing subnational units to participate in national decision-making processes.

1.5 Methodology

The investigation consists of a review of pertinent pieces of writing, such as law journal articles, books, case law, and any other pertinent documents. The Nigerian second chamber is scrutinized by studying over the Constitution, pertinent legislation, literature, records of the Nigerian Constitutional Parliament, government documents, and any other appropriate resources. The South African second chamber is investigated utilizing similar sources of knowledge that include South African court legislation.

1.6 Structure of the thesis

The thesis is structured into four Chapters. Chapter Two examines second chambers and subnational representation in comparative perspective. This includes a discussion on how second chambers are composed and the powers they enjoy and how that affects their capacity in representing subnational interests. Chapter Three focuses on second chambers and subnational representation in South Africa and Nigeria. The focus is on how second chambers, in both countries, are composed and the powers they enjoy, how that affects their capacity in representing subnational unit interests and discussion on the similarities and differences. Chapter Four provides conclusions and recommendations.

CHAPTER TWO: THE SECOND CHAMBER AND REPRESENTATION OF SUBNATIONAL UNITS

2.1 Introduction

The second chamber provides for subnational representation in the national government. It accomplishes this by facilitating the participation of subnational units in the legislative process. A vital role of the second chamber is to facilitate collaborative rule, in which subnational units are represented and participate in central government making of decisions. In most federations, this is carried out by a legislature with a bicameral structure. In a federal legislature that is bicameral, the first chamber generally represents the population of the whole nation, whilst the second chamber represents the subnational units.³³ Although nearly all federations have bicameral federal parliaments, there is an important distinction in the composition and mission of the second chamber, and hence in its function in the broader federal structure. The level of control the subnational unit has over national laws is heavily influenced by the structure of the second chamber. The second chamber tends to be intended to act as the voice of various interest groups.³⁴ This conviction served as the foundation for the division between national governments and subnational unit governments. This distinction is especially important in South Africa and Nigeria, where the parliament is divided into two legislative bodies. While comparing the composition and functions of second chambers in representing subnational units in Nigeria and South Africa's national decision-making processes, it is vital to consider numerous constitutional design possibilities, as well as consensus on the composition and powers of the second chamber.

The primary goal of this chapter is to provide a comparative overview of the structure and powers of the second chamber. The representation of subnational units in Nigeria and South Africa's second chambers will be explored in the following chapter. Before turning to consider the second chamber's representation of the subnational unit in both countries' national decision making, it will be useful to outline the origins of the second chamber, highlight the key purposes of the second chamber, to focus on the composition of second chamber and powers of the second chamber in representing subnational units in national decision making in comparative perspectives.

³³ Bulmer E 'Bicameralism, Constitution-Building Primer 2' *Stockholm: International IDEA, 2014* available at <https://www.idea.int/publications/catalogue/bicameralism> (accessed 24 September 2023)

³⁴ Fessha Y 'Second chamber as a site of legislative intergovernmental relations: An African federation in comparative perspective (2021) 314 *Regional & Federal Studies* 496

2.2 The Origins of Second Chambers

Second chambers have been around for decades in federal systems.³⁵ Their origins can be traced back to old elite institutions, as evidenced in the name 'senate'.³⁶ Yet, a new form of second chamber was constructed in the 18th century that integrated two key institutional improvements.³⁷ It was the brilliant creation of the US Senate that, while democratizing the dominant second chamber model, and modified it for the goals of federalism.³⁸ During the pre-democratic, legislative bodies usually had two chambers, reflecting the belief that some distinct representation for aristocrats, "elders," or those with property was necessary.³⁹ Second chamber justifications seemed to change as the legitimacy of ideas of different class-based representation deteriorated.⁴⁰ It became necessary for an institution to exert some control over directly elected constituent chambers. Constituent began to take precedence over the necessity of maintaining unique representation for aristocracy and property.⁴¹

There are two types of justifications for a second chamber in today's world. To begin, it is imperative to have a more solid balance between the executive and the legislature. It is also seen as a platform that encourages more equal representation among constituent groups by providing a political forum for individuals who are outnumbered or underrepresented in the lower house. The following variants on the procedure of selecting delegates for the second chamber are commonly used: representatives of regional interests in the way of regional administrations, regional members of parliament, and regional electors or special minorities. Furthermore, to ensure that the 'legislative system operates better and efficiently, the second chamber takes on the so-called "revising role" to keep a close eye on the occasionally rushed decisions of the first chamber's members. Nowadays, fewer than half of national legislatures and, in some cases, regional legislatures have bicameral structures. The composition, selection, and authority of the second chamber in most of these nations are influenced by federal or

³⁵ Luther J 'The search for constitutional Geography and Histiography of Second Chambers' in Luther J & Passaglia P and Tarchi R (eds) *A world of Second Chamber* (2006) 3-31

³⁶ Luther J 'The search for constitutional Geography and Histiography of Second Chambers' in Luther J & Passaglia P and Tarchi R (eds) *A world of Second Chamber* (2006) 3-31

³⁷ Gamper A 'Second chamber in Federal States' 50 shades of education available at <https://50shadesoffederalism.com/theory/1045/> (accessed 15 September 2023).

³⁸ Gamper A 'Second chamber in Federal States' 50 shades of education available at <https://50shadesoffederalism.com/theory/1045/> (accessed 15 September 2023).

³⁹ Coghill K 'A case against bicameralism' (1984) 65(2) *The Parliamentarian* 124

⁴⁰ Brandt ML *from the Senate to the NCOP: A description of the Composition and Working of South Africa's Second Chamber* (unpublished LLM thesis, University of Stellenbosch, 2001) 3

⁴¹ Shell D *The House of Lords, Bristol* (1988) 13

regional architecture. Nearly all federal legislatures have a second chamber whereby the subnational units are represented apart for a few countries.

2.3 The Composition of the Second Chamber

The composition of a second chamber plays a very important role in ensuring that the voice of subnational unit is represented in the national government. The way members are appointed or elected to the senate plays a vital role in ensuring that the voice of subnational interest is represented. In general, discussions about the composition of second chambers require judgements on a wide range of challenges, including the entities represented in the chamber, its size, the allocation of seats within it, the procedure of selecting its members, and the length of office.⁴² In some cases, the second chamber tends to be made up of representatives from the subnational unit, although there are other sorts of entities represented as well. Countries such as Australia, Germany, Nepal, and the United States are good examples in this sense, with members drawn from each subnational unity.⁴³ In India, for example, the second chamber is made up of delegates from each of the 28 states and union territories, which have less independence than states but are not completely under the direct control of the federal level of government.⁴⁴

In some countries, at least half of the second chamber's representatives were selected directly.⁴⁵ For example, in the United States, Senators have been directly elected since 1914, as affirmed by the Supreme Court.⁴⁶ Kenya, Brazil, Australia, Mexico, and Argentina are among the countries where members of second chambers are selected directly by people of their relevant subnational divisions.⁴⁷ Representatives of the second chamber of Switzerland are chosen directly. Elections that are direct promote the democratic credibility of second chamber and are popular in federations with strong second chambers.⁴⁸ Representatives of the second

⁴²Noel T 'Second chambers in federal systems' Stockholm: International IDEA, 2022 available at <https://doi.org/10.31752/idea.2022.63> (accessed 20 September 2023)

⁴³Noel T 'Second chambers in federal systems' Stockholm: International IDEA, 2022 available at <https://doi.org/10.31752/idea.2022.63> (accessed 20 September 2023)

⁴⁴Noel T 'Second chambers in federal systems' Stockholm: International IDEA, 2022 available at <https://doi.org/10.31752/idea.2022.63> (accessed 20 September 2023)

⁴⁵Sharman C 'Second chambers' in Bakvis H & Chander WM *Federalism and the role of the state* (1987) 100-82

⁴⁶ *US Term Limits v Thornton* (1995) 514 US 779

⁴⁷ Fessha Y 'Bicameralism' in Grote R, Lachenmann F and Wolfrum R (eds) *Max Planck Encyclopaedia of Comparative Constitutional law* (2018) 1-14

⁴⁸Noel T 'Second chambers in federal systems' Stockholm: International IDEA, 2022 available at <https://doi.org/10.31752/idea.2022.63> (accessed 20 September 2023)

chamber are directly responsible to the people of the subnational unit that voted them.⁴⁹ Still, direct elections prevent a formal relationship from forming between second chamber representatives and subnational unit parliaments, and they tend to favour political parties in federal decision-making over subnational units.⁵⁰

However, members are better positioned to protect and develop local interests when the decision to nominate representatives to second chambers remains with the subnational unit directly.⁵¹ A noteworthy example is Germany's Bundesrat, whose members are representatives from the Land administrations who are directed by the Bundestag. Members vote as a unit on the direction of each state government. These kind of representation methods, broadly speaking, allow for the expression of regional preferences and the protection of subnational unit interests. In other countries, members of second chambers are appointed by federal authorities. Canada is a country in which members of the second chambers are elected by federal authorities. This is an inefficient method to achieve a common rule because second chamber representatives are chosen by federal-level executives instead of voted by subnational units, and hence may not appropriately serve as a forum subnational unit.⁵² The Senate was created to serve the provinces' aspirations. For example, the governor-general appoints members of the second chamber based on the prime minister's advice,⁵³ giving the federal government sole authority over senator appointments.⁵⁴ As a result, the senate's provincial composition is merely nominal⁵⁵. The federal administration is able to fill the chamber with supporters since senators are permitted to serve until they are 75 years old after being nominated.⁵⁶ The selection procedure used by the federal government prevents the Second chamber from acting as a "productive advocate of regional or provincial interests."⁵⁷

⁴⁹ Noel T 'Second chambers in federal systems' Stockholm: International IDEA, 2022 available at <https://doi.org/10.31752/idea.2022.63> (accessed 20 September 2023)

⁵⁰ Kincaid J 'Comparative observations' in Kincaid J & Tarr GA (eds) *Constitutional origins, structures, and change in federal countries: A global dialogue on federalism* vol 1 (2002) 409-448

⁵¹ Fessha Y *Institutional Recognition and Accommodation of Ethnic Diversity: Federalism in South Africa and Ethiopia* (Unpublished PhD thesis, University of the Western Cape, 2008) 135

⁵² Noel T 'Second chambers in federal systems' Stockholm: International IDEA, 2022 available at <https://doi.org/10.31752/idea.2022.63> (accessed 20 September 2023)

⁵³ Section 24 of the Constitution of Canada

⁵⁴ Fessha Y *Institutional Recognition and Accommodation of Ethnic Diversity: Federalism in South Africa and Ethiopia* (Unpublished PhD thesis, University of the Western Cape, 2008) 135

⁵⁵ Noel T 'Second chambers in federal systems' Stockholm: International IDEA, 2022 available at <https://doi.org/10.31752/idea.2022.63> (accessed 20 September 2023)

⁵⁶ Fessha Y *Institutional Recognition and Accommodation of Ethnic Diversity: Federalism in South Africa and Ethiopia* (Unpublished PhD thesis, University of the Western Cape, 2008) 135

⁵⁷ Hogg P *Constitutional law of Canada* 4 ed (2004) 251

In Spain, the selection method is a bit more complex, yet it has the same impact. Most senators are chosen by the people of the provinces.⁵⁸ There is one additional senator for every million residents of the area, with each province appointing four senators and each autonomous community appointing just one.⁵⁹ The weakness in this structure is that it bases representation primarily on provinces rather than autonomous communities, who are "the true representatives" of ethnic populations in Spain.⁶⁰ In this regard, autonomous regions are the more significant level of government, such massive prejudice in favor of the provinces undermines reality.⁶¹ It is challenging to think of the Second chamber as a body that represents subnational unit concerns because fewer members are chosen from the autonomous regions.⁶² Belgium has a second chamber that reflects the country's various language communities. A total of forty senators are chosen directly, with a linguistic balance of Flemish and French speakers guaranteed.⁶³ The remaining twenty-one representatives are drawn from the three linguistic community councils, with the remaining ten senators co-opting them.⁶⁴ A key problem concerning the composition of second chambers is whether the subnational unit need to be represented equally. For about fifty percent of the world's federations, regardless of size and population, all subnational units have the same number of members in the second chamber.

This system prevents the interests of smaller units from being controlled by greater in population groups by giving all subnational unit's equal influence in decision-making. Based on the legislative process and the sort of veto power possessed by the second chamber, a majority of members from smaller subnational units in the second chamber may be allowed to override or postpone proposals approved by the majority. For example, in Australia, each state is represented in the Senate by twelve senators, regardless of population size.⁶⁵

⁵⁸ Guibernau M 'Spain: A federation in the making' in Smith G (ed) *Federalism: The multi-ethnic challenge* (1995) 239-254

⁵⁹ Fessha Y *Institutional Recognition and Accommodation of Ethnic Diversity: Federalism in South Africa and Ethiopia* (Unpublished PhD thesis, University of the Western Cape, 2008) 135

⁶⁰ Fessha Y *Institutional Recognition and Accommodation of Ethnic Diversity: Federalism in South Africa and Ethiopia* (Unpublished PhD thesis, University of the Western Cape, 2008) 135

⁶¹ Tierney S *Constitutional law and national pluralism* (2004) 221

⁶² Conversi D (2000) 'Autonomous communities and the ethnic settlement in Spain' in Ghai Y (ed) *Autonomy and ethnicity: Competing negotiating claims* (2000) 122-144.

⁶³ Keating M (2001) *Plurinational democracy: Stateless nations in a post – sovereignty era* (2001) 120

⁶⁴ Fessha Y *Institutional Recognition and Accommodation of Ethnic Diversity: Federalism in South Africa and Ethiopia* (Unpublished PhD thesis, University of the Western Cape, 2008) 136

⁶⁵ Stone B 'The Australian Senate: Strong Bicameralism Resurgent' in Luther J Passaglia P and Tarchi R (eds) *A Word of Second Chambers: Handbook for Constitutional Studies on Bicameralism* (2006) 529

Similarly, in the United States, subnational units are represented equally by two delegates.⁶⁶ Other countries that allow for equal representation include Argentina, Australia, and Russia.⁶⁷ However, the demarcation of voting constituencies is a difficult subject in countries where subnational units are equally represented.⁶⁸ For example, the United States Supreme Court overturned a Georgia voting system that treated tiny rural districts similarly to bigger urban districts.⁶⁹ The Supreme Court claimed that this amounts to an infringement of the equality provision, which contains the 'one person, one vote' premise.⁷⁰ It is important to note that demarcation can be instrumentalized and weaponized and be equated to political re-districting to facilitate voting.⁷¹ In other words, demarcation becomes a way for politicians in power exercising their rights to deeply entrench themselves with political advantage. It, therefore, becomes a difficult legal issue on how to contest a demarcation since it is provided for in many constitutions.

Contrary to the USA and Australia, some federations have abandoned the equality requirement in favor of weighted representation, which still favors smaller regional governments. Each federation has a different level of weighting.⁷² The population of each subnational unit is used to apportion seats under weighted representation. Nevertheless, 'representation is frequently not solely dependent on population, as many nations change the representation of subnational unit'.⁷³ Subnational unit with bigger populations receives more seats, although less populated units have greater representation in comparison to their population.⁷⁴ In a system like this, the most populous units are given greater weight during decision-making than the less populous ones, although the latter are nonetheless overrepresented.⁷⁵ Each country has a different level of weighting. For example, in 'Switzerland, in which the second chamber, the Council of the States, is made up of two representatives from each full canton and one representative from

⁶⁶ Amendment XVII of the Constitution of the United States of America (US)

⁶⁷ Fessha Y 'Bicameralism' in Grote R, Lachenmann F and Wolfrum R (eds) *Max Planck Encyclopaedia of Comparative Constitutional law* (2018) 1-14

⁶⁸ Fessha Y 'Bicameralism' in Grote R, Lachenmann F and Wolfrum R (eds) *Max Planck Encyclopaedia of Comparative Constitutional law* (2018) 1-14

⁶⁹ *Gray v Sanders* (1963) 372 US 368

⁷⁰ *Gray v Sanders* (1963) 372 US 368

⁷¹ Wu P Y. & Combs A B (2019) *Proceedings of the Conference on Information Systems Applied* (2019) Cleveland: Ohio.

⁷² Watts RL (1999) *Comparing Federal Systems 2 ed* (1999) 12

⁷³ Fessha Y 'Bicameralism' in Grote R, Lachenmann F and Wolfrum R (eds) *Max Planck Encyclopaedia of Comparative Constitutional law* (2018) 1-14

⁷⁴ Noel T 'Second chambers in federal systems' Stockholm: International IDEA, 2022 available at <https://doi.org/10.31752/idea.2022.63> (accessed 20 September 2023)

⁷⁵ Noel T 'Second chambers in federal systems' Stockholm: International IDEA, 2022 available at <https://doi.org/10.31752/idea.2022.63> (accessed 20 September 2023)

each of what is referred to as half-cantons'.⁷⁶ On the other end, in India, the weighting is decided by the population size of the individual states, with one delegate for every two million people.⁷⁷ For instance, Uttar Pradesh, the largest-population state with 204 million people has a total of 31 seats in the second chamber, but Sikkim the least populous state with 620,000 people has only one.⁷⁸

In Austria, the state with the highest population has 12 seats in the second chamber, and the number of seats given to the other states depends on how many people they have in comparison to the state with the highest population. Each state is guaranteed a minimum of three members in the second chamber.⁷⁹The Bundesrat of Germany is constituted of Landers determined by the size of the population. In the Bundesrat, 'each Land receives at least three votes. 'Landers with more than two million people will have four votes, Landers with more than six million people will have five, and Landers with more than seven million people will have six votes'.⁸⁰ It is vital to point out that representatives are required to vote in accordance with the instructions of their respective Land by means of bloc voting.⁸¹

2.4 The Legislative Powers of the Second Chamber

In addition to the composition of the second chamber, the powers assigned to the second chamber are essential for a second chamber serving as a voice for subnational units. This implies that the effectiveness of the second chamber in representing regional interests depends on the specific powers allocated to these institutions by the constitution.⁸² For most countries, only one chamber of the legislature is permitted to simply defeat the other. In most countries, the popular elected lower house enjoys more power than the second chamber.⁸³ This applies to every piece of legislation in some countries. In Zimbabwe, when the Bill is approved with amendments or is rejected, it must be referred to the "House of Origin" – the National

⁷⁶Linder W & Steffen I 'Swiss Confederation' in Le Roy K & Saunders C (eds) *A Global Dialogue on Federalism vol. 3 Legislative, Executive and Judicial Governance in Federal Countries* (2006) 289.

⁷⁷Dhavan R & Saxena R 'Republic of India' in Le Roy, K & Saunders C (eds) *A Global Dialogue on Federalism vol. 3 Legislative, Executive and Judicial Governance in Federal Countries* (2006) 166.

⁷⁸Noel T 'Second chambers in federal systems' Stockholm: International IDEA, 2022 available at <https://doi.org/10.31752/idea.2022.63> (accessed 20 September 2023)

⁷⁹Noel T 'Second chambers in federal systems' Stockholm: International IDEA, 2022 available at <https://doi.org/10.31752/idea.2022.63> (accessed 20 September 2023)

⁸⁰ Art. 51, Basic Law of the Federal Republic of Germany: May 23, (1949)

⁸¹ Noel T 'Second chambers in federal systems' Stockholm: International IDEA, 2022 available at <https://doi.org/10.31752/idea.2022.63> (accessed 20 September 2023)

⁸²Fessha Y 'Bicameralism' in Grote R, Lachenmann F and Wolfrum R (eds) *Max Planck Encyclopaedia of Comparative Constitutional law* (2018) 1-14

⁸³Fessha Y 'Bicameralism' in Grote R, Lachenmann F and Wolfrum R (eds) *Max Planck Encyclopaedia of Comparative Constitutional law* (2018) 1-14

Assembly. In the event of disagreement, the National Assembly prevails, and the Bill will be taken to the next stage as dictated by the National Assembly. The constitution does not allow a deadlock. The bottom line, however, is that in Zimbabwe both Houses must consider a Bill. In each House, it goes through all the steps minus the Parliamentary Legal Committee. In the United Kingdom, a bi-cameral legislature is used for a second view on legislation. In these circumstances, second chambers are restricted to fostering communication with the lower house and have no legislative powers. Their function is confined to being reflective chambers.

In other countries, second chamber have co-equal powers with the lower house on certain matters. In Belgium, the Constitution specifies a particular majority requirement for laws relating to cultural and regional issues, mandating that such laws receive a two-thirds majority in the Second chamber for it to become law.⁸⁴ It appears that the second chamber of Belgium is more equipped to defend subnational unit interests. Furthermore, if three-quarters of the senators of one of the Senate's linguistic groups believe that a legislative decision-making not addressed by the special majority provision could be detrimental to their society, a supplementary mechanism known as Alarm Bell Procedure providing legislative unique procedure begins in.⁸⁵ The Belgian Senate has co-equal authority with the lower house over some issues stated in the Constitution, which puts it in a greater position to defend subnational interests. The Belgian Second chamber also, has authority over subjects pertaining to the constitution, international relations, court administration, and interactions between the federal government and subnational unit governments. This demonstrates that, generally speaking, the Senate of Belgium is able to successfully represent the best interests of the subnational units.

Several second chambers have the same authority as the lower legislatures. A prime example of this second chamber is the Canadian Senate, which only has a suspensive veto on constitutional amendments and cannot be overridden by the lower house on other matters.⁸⁶ However, because the Senate's provincial structure is notional, as previously said, the Senate's ability to passionately defend subnational interests is severely limited. The Italian Senato della Repubblica is probably one of the greatest second chambers with equal legislative authority to the lower house. The Senate and the lower house, referred to as the Chamber of Deputies in

⁸⁴Peeters P 'Federalism: A Comparative Perspective—Belgium Transforms from A Unitary to a Federal State' in De Villiers B (ed) (1994) *Evaluating Federal Systems* 204-205

⁸⁵ Art. 54, Coordinated Constitution of the Kingdom of Belgium: February 17, 1994 (As Amended to January 31, 2014) (Belg)

⁸⁶ Pinard D 'The Canadian Senate: An Upper House Criticized Yet Condemned to Survive Unchanged' in Luther J P, Passaglia RT (eds.) *A World of Second Chambers: Handbook for Constitutional Studies on Bicameralism* (2006) 459-520.

Italy, share legislative authority.⁸⁷ A legislative bill cannot become a law unless it receives support from both legislative chambers. Because of this, the Italian process of legislating is known as "the never-ending navette," or the shuttling of a legislative bill from one chamber to the other unless it wins the consent of both chambers.⁸⁸ In an election on senate restructuring conducted in December 2016 in Italy, an initiative to limit the Senate's authority was voted down.⁸⁹ As such, the Italian parliament remains to be a member of the category of legislatures known as "perfect bicameralism."⁹⁰

The legislatures of the United States and Australia are among the other members of the group of countries with strong second chambers. The Australian Senate has complete veto power over all laws under consideration. The main exception is that it cannot create or amend money legislation, but it may reject them.⁹¹ Inability to break disagreements has major repercussions because it can result in the breakup of both houses, which must be immediately followed by voting 'and a joint sitting of the representatives of both houses should the impasse continues'.⁹² The Rajya Sabha of India and the Council of States of Switzerland are two other second chambers having equal legislating authority as their respective lower legislatures. Most laws must be approved by both chambers in both instances, apart from money bills.⁹³ The lower chambers are unable to overrule the second chamber's concerns. In India, impasse is addressed through a joint session of both houses.⁹⁴ The above is not a commonly used procedure, as disagreements are normally settled during discussions between political parties.⁹⁵ Another option is to create a joint committee where the lower house holds a majority to "resolve disagreements."⁹⁶ In a particular vein, this also applies to Switzerland, whereby disagreements are settled by a joint committee of both chambers.⁹⁷ When that fails to resolve the dispute, the

⁸⁷ Cavatorto, S 'The Italian Parliament and EU Affairs' (2012) *OPAL Country Reports* 1

⁸⁸ Manetti M 'The Italian Style Federal Senate' in Luther J & Passaglia P and Tarchi R (eds) *A World of Second Chambers: Handbook for Constitutional Studies on Bicameralism* (2006) 833

⁸⁹ Fessha Y 'Bicameralism' in Grote R, Lachenmann F and Wolfrum R (eds) *Max Planck Encyclopaedia of Comparative Constitutional law* (2018) 1-14

⁹⁰ Fessha Y 'Bicameralism' in Grote R, Lachenmann F and Wolfrum R (eds) *Max Planck Encyclopaedia of Comparative Constitutional law* (2018) 1-14

⁹¹ Section 83, Commonwealth of Australia Constitution Act, July 9, 1901 (as Amended to October 31, 1986)

⁹² Fessha Y 'Bicameralism' in Grote R, Lachenmann F and Wolfrum R (eds) *Max Planck Encyclopaedia of Comparative Constitutional law* (2018) 1-14

⁹³ Biaggini G & Sarott C 'The Swiss Council of States' in Luther J, Passaglia P, and Tarchi (eds) *A World of Second Chambers: Handbook for Constitutional Studies on Bicameralism* (2006) 757

⁹⁴ Section 108 of the Constitution of India (India)

⁹⁵ Dhavan R & Saxena R 'Republic of India' in Le Roy, K & Saunders C (eds) *A Global Dialogue on Federalism* vol. 3 Legislative, Executive and Judicial Governance in Federal Countries (2006) 169

⁹⁶ Fessha Y 'Bicameralism' in Grote R, Lachenmann F and Wolfrum R (eds) *Max Planck Encyclopaedia of Comparative Constitutional law* (2018) 1-14

⁹⁷ Watts RL *Comparing Federal Systems* (2008) 5

bill must be withdrawn. It is evident from the above that second chambers' participation in legislative proceedings differs depending on the kind of legislation members engage in and the degree of authority or influence each house of parliament possesses.

From the foregoing, it is clear that, in some circumstances, however it is uncommon, one house of parliament is unable to overturn another on all laws. Therefore, both houses have equal legislative authority. It happens that the second chamber possesses powers equal to the lower chamber has exacerbated legislative deadlock since the two houses of parliament are unable to readily veto each other. Yet, this has provided those countries' second chambers a significant influence in their legislative systems. In certain countries, and this is only valid for specific legislation, like in Germany, South Africa, and Austria, only legislation influencing subnational interests may be referred to a mediation committee should they do not get the approval of both houses. This nevertheless strengthens the second chamber's ability to uphold and promote the best interests of subnational units.

2.5 Other functions of second chambers and the protection of subnational interests

There are some nations where second chambers serve other purposes besides participating in the legislative process. Some of these functions allow them to safeguard the autonomy of subnational units. Some have “veto authority for national executive decision” and perform an integral part in approving federal appointees.⁹⁸ Some are involved in the ratification of multinational accords. Second chambers in federal states serve a further essential role in approving and terminating federal intervention in a subnational unit. The following paragraphs provide a brief overview of the other different roles of second chambers.

2.5.1. Ratification of International Treaties

Some federations need the ratification of foreign treaties approved by the executive branch by the second chamber. Since certain international agreements have ramifications for the federal level of authorities' mission and subnational units' autonomy, engaging the second chamber assures that the federal government refrains from employing such accords to compromise subnational units' authority.⁹⁹ Nonetheless, as with all areas of the legislative process, it might result in setbacks as well as impasses. For example, treaties between Mexico and the United

⁹⁸ Fessha Y 'Bicameralism' in Grote R, Lachenmann F and Wolfrum R (eds) *Max Planck Encyclopaedia of Comparative Constitutional law* (2018) 1-14

⁹⁹Noel T 'Second chambers in federal systems' Stockholm: International IDEA, 2022 available at <https://doi.org/10.31752/idea.2022.63> (accessed 20 September 2023)

States simply require the approval of the second chamber. The federal constitutions of Argentina, Brazil, Nigeria, South Africa, and Switzerland need both chambers to consent to treaties. In other countries such as Nepal, only specific sorts of treaties, primarily those relating to peace, security, frontiers, and natural resources, require approval by both houses. In Austria, international agreements affecting the competencies of subnational units need to be ratified by a two-thirds majority vote in each chamber.¹⁰⁰ Furthermore, in approving of foreign treaties, the lower house can outvote the second chamber, save for treaties affecting areas which are within the sole authority of the Lander.¹⁰¹ However, the second chamber, the Federal Council, must ratify any international agreements that alter the Lander's authority.¹⁰²

In some countries, both houses of parliament participate in international treaty ratification, but the lower chamber frequently has the final say.¹⁰³ For instance, in Spain, 'both the Senate and Congress participate in the ratification of the majority of international treaties, particularly those with a military, political, human rights, and financial implications for the Treasury nature'.¹⁰⁴ If a treaty fails to be ratified by both chambers, a Mixed Committee made up of representatives from both chambers needs to be established to find a solution that is appropriate to both chambers.¹⁰⁵ In France, as well, 'treaties that have the potential to alter state boundaries and also those that pertain to trade and peace must first need the blessing of both the National Assembly and the Senate to be able to be enforceable on the state'.¹⁰⁶ This also stands when the executive goes into agreements that add to the budget's expense, amends existing laws, and engages into agreements with an international body.¹⁰⁷ In Russia, international agreements approved by the State Duma, the lower chamber, must be evaluated by the Council of the Federation.¹⁰⁸

In other countries, second chambers possess greater authority over specific international accords. For example, the Bundesrat of Germany has greater authority over international treaties that deal with issues which are within the jurisdiction of the Lander. In fact, the approval

¹⁰⁰ Article 50, Federal Constitutional Law of the Republic of Austria, 1920 (as Amended to July 25, 2012)

¹⁰¹ Art. 10, Federal Constitutional Law of the Republic of Austria, 1920 (as Amended to July 25, 2012)

¹⁰² Fessha Y 'Bicameralism' in Grote R, Lachenmann F and Wolfrum R (eds) *Max Planck Encyclopaedia of Comparative Constitutional law* (2018) 1-14

¹⁰³ Fessha Y 'Bicameralism' in Grote R, Lachenmann F and Wolfrum R (eds) *Max Planck Encyclopaedia of Comparative Constitutional law* (2018) 1-14

¹⁰⁴ Section 94, Constitution of the Kingdom of Spain

¹⁰⁵ Andreu J 'The Spanish Senate after 28 Years of Constitutional Experience' in Luther J, Passaglia P and Tarchi R (eds) *A World of Second Chambers: Handbook for Constitutional Studies on Bicameralism* (2006) 891.

¹⁰⁶ Art. 53, Constitution of France: 4 October 1958 (as Amended to July 23, 2008)

¹⁰⁷ Art. 54, Constitution of France

¹⁰⁸ Art. 106, Constitution of the Russian Federation

of international treaties does not always necessitate the approval of the Bundesrat. In terms of other international treaties, the Bundesrat has a delaying function because its disagreements can be overruled by the Bundestag.¹⁰⁹ Furthermore, in Germany, treaties that include the transfer of sovereign power or the amendment of the constitution, pertain to federation politics, which are linked to federal law must be ratified by both chambers.¹¹⁰ This means, for example, that if the basis of the international treaty is comparable to the content of a domestic law that had needed Bundesrat ratification before it became law, therefore the international treaty needs to be ratified by the Bundesrat.¹¹¹

In some nations, the second chamber has the same power as the lower house when it comes to ratifying all international treaties that require authorization from parliament. For example, in Italy and Belgium, ‘the most international agreements need to be approved by both the senates and the chambers of representatives of both nations in order to be ratified’.¹¹² The United States Senate, in principle, performs an essential function in the approval of international treaties than other second chambers.¹¹³ The Senate can only ratify international agreements that the administration negotiates with a two-thirds majority for them to become legally obligatory for the state.¹¹⁴ The lower chamber, the chamber of Representatives, is not involved in voting to approve international treaties.¹¹⁵ This, surely, cannot prevent it from having an impact on the implementation of international treaties, since it may decide not to vote on the authorization of required funds if the treaty demands such expenditure.

2.5.2. Appointment of judges and others

Second chambers also take an active role in important national appointments as one of their duties. In general, ‘Federal constitutions frequently provide second chambers some appointment authority, particularly regarding the courts in charge of deciding constitutional and intergovernmental disputes.’¹¹⁶ This place the second chamber in a good position to

¹⁰⁹ Fessha Y ‘Bicameralism’ in Grote R, Lachenmann F and Wolfrum R (eds) *Max Planck Encyclopaedia of Comparative Constitutional law* (2018) 1-14

¹¹⁰ Noel T ‘Second chambers in federal systems’ Stockholm: International IDEA, 2022 available at <https://doi.org/10.31752/idea.2022.63> (accessed 20 September 2023)

¹¹¹ Fessha Y ‘Bicameralism’ in Grote R, Lachenmann F and Wolfrum R (eds) *Max Planck Encyclopaedia of Comparative Constitutional law* (2018) 1-14

¹¹² Art. 80, Constitution of the Italian Republic

¹¹³ Fessha Y ‘Bicameralism’ in Grote R, Lachenmann F and Wolfrum R (eds) *Max Planck Encyclopaedia of Comparative Constitutional law* (2018) 1-14

¹¹⁴ Watts RL *Comparing Federal Systems* (2008) 154

¹¹⁵ Fessha Y ‘Bicameralism’ in Grote R, Lachenmann F and Wolfrum R (eds) *Max Planck Encyclopaedia of Comparative Constitutional law* (2018) 1-14

¹¹⁶ Noel T ‘Second chambers in federal systems’ Stockholm: International IDEA, 2022 available at <https://doi.org/10.31752/idea.2022.63> (accessed 20 September 2023)

consider the concerns and preferences of subnational units when composing courts that rule on intergovernmental disputes. Under the United States Constitution, the Senate is essential for ensuring the appointment of certain government appointees.¹¹⁷ Furthermore, ‘the Senate has the authority to examine nominees for the Supreme Court and Cabinet’.¹¹⁸ It accomplishes this by holding hearings before Congress regarding the president's appointments.¹¹⁹ In furtherance of constitutional protections for judicial independence, including subnational units in the selection of judges who interpret the constitution, can increase public confidence in the court's ability to exercise judicial review.¹²⁰ The appointments shall take effect only with the approval of the Senate.¹²¹ Germany's Bundesrat also plays an active role in the appointment of Constitutional Court judges.¹²² The federal Constitutional Court is appointed by a two-thirds majority vote of the federal legislature's second chamber, which is formed of representatives from the subnational units' executives.¹²³

In Austria, the second chamber has less power over the composition of the Constitutional Court.¹²⁴ The Austrian Bundesrat has the authority to suggest the nomination of Constitutional Court judges.¹²⁵ It is not involved in the election and appointment of any other judges, not to mention federal officials, or in any other appointment affecting significant federal institutions.¹²⁶ On the recommendation of the second chamber, the president appoints three of the fourteen members and one of the six deputy members of the Constitutional Court.¹²⁷ In some federations, second chambers take part in appointments to other various organizations, particularly those that directly affect subnational units. For instance, the Constitution of Nigeria mandates that the Federal Character Commission and Election Commission nominees be

¹¹⁷ Art. II of the Constitution of the United States of America

¹¹⁸ Fessha Y ‘Bicameralism’ in Grote R, Lachenmann F and Wolfrum R (eds) *Max Planck Encyclopaedia of Comparative Constitutional law* (2018) 1-14

¹¹⁹ Watts RL *Comparing Federal Systems* (2008) 154

¹²⁰ Noel T ‘Second chambers in federal systems’ Stockholm: International IDEA, 2022 available at <https://doi.org/10.31752/idea.2022.63> (accessed 20 September 2023)

¹²¹ Dinan J ‘United States of America’ in Le Roy K and Saunders C (eds) *A Global Dialogue on Federalism vol. 3 Legislative, Executive and Judicial Governance in Federal Countries* (2006) 326

¹²² Fessha Y ‘Bicameralism’ in Grote R, Lachenmann F and Wolfrum R (eds) *Max Planck Encyclopaedia of Comparative Constitutional law* (2018) 1-14

¹²³ Art. 94 of the Basic Law (Ger) Basic Law of the Federal Republic of Germany

¹²⁴ Noel T ‘Second chambers in federal systems’ Stockholm: International IDEA, 2022 available at <https://doi.org/10.31752/idea.2022.63> (accessed 20 September 2023)

¹²⁵ Art. 86, Federal Constitution of Austria, 1920

¹²⁶ Gamper A ‘The Austrian Bundesrat’ in Le Roy K and Saunders C (eds) *A World of Second Chambers: Handbook for Constitutional Studies on Bicameralism* (2006) 806

¹²⁶ Fessha Y ‘Bicameralism’ in Grote R, Lachenmann F and Wolfrum R (eds) *Max Planck Encyclopaedia of Comparative Constitutional law* (2018) 1-14

¹²⁷ Noel T ‘Second chambers in federal systems’ Stockholm: International IDEA, 2022 available at <https://doi.org/10.31752/idea.2022.63> (accessed 20 September 2023)

approved by the Senate.¹²⁸In Kenya, the Commission on Revenue Allocation is appointed by the second chamber.¹²⁹

In presidential federations, the second chamber tends to play a major role in impeachment proceedings against the president and other government leaders in several countries. The right to impeachment is reserved for the first chamber, although the final decision frequently necessitates a trial and a vote by a majority in the second chamber. In Brazil, a motion of impeachment against the president must first receive the support of two-thirds of the first chamber's members, and then, following a trial, must receive the same level of support from the second house.¹³⁰The same processes are used in Argentina and the USA, but in each chamber, a two-thirds majority vote is needed.¹³¹ However, second chambers generally are not engaged in the dismissal of administrations in federations with parliamentary systems. In acknowledgment of its supremacy as the representative body of the entire people, many legislative bodies the constitutions limit the second chamber the right to approve a vote of no confidence, thus keeping the power to establish or dissolve governments solely for the first chamber.¹³²

2.5.3. Regulating and overseeing federal interventions.

While the notion of self-rule presumes autonomy in issues falling under their control, there may be rare situations in which federal intervention in a subnational unit is required to maintain security, carry out federal regulations, and guarantee that subnational unit governments provide only the essential services to their citizens.¹³³ Nonetheless, federal constitutions commonly establish conditions and necessitate the second chamber to endorse government involvement to prevent the federal executive from temporarily undermining the autonomy of subnational units for politically motivated reasons.¹³⁴ For example, in Ethiopia mainly the second chamber has the authority to authorize federal involvement in a constituent unit.¹³⁵ In Brazil, 'the president of the country can declare a federal intervention in a subnational unit on particular

¹²⁸ Section 154(1) of the Nigerian constitution 1999

¹²⁹ Article 215 of the Constitution of Kenya

¹³⁰ Article 86 of the constitution of the Federative Republic of Brazil

¹³¹ Abebe A Removal of Presidents, *Constitution-Building Primer 23* (Stockholm: International

¹³²Noel T 'Second chambers in federal systems' Stockholm: International IDEA, 2022 available at <https://doi.org/10.31752/idea.2022.63> (accessed 20 September 2023)

¹³³Noel T 'Second chambers in federal systems' Stockholm: International IDEA, 2022 available at <https://doi.org/10.31752/idea.2022.63> (accessed 20 September 2023)

¹³⁴ Noel T 'Second chambers in federal systems' Stockholm: International IDEA, 2022 available at <https://doi.org/10.31752/idea.2022.63> (accessed 20 September 2023)

¹³⁵ article 62.9 constitution of the federal democratic republic of Ethiopia

grounds but must present the order of intervention to be examined to the federal assembly within a 24-hour period'.¹³⁶ In South Africa, the second chamber has 180 days following the initiation of the intervention to cancel a federal intervention in a subnational unit by a simple majority vote.¹³⁷ The Kenyan Constitution requires parliament to establish legislation governing the mechanism for federal involvement; such legislation must enable the Senate to stop federal intervention.¹³⁸ The Second chamber's ability to fiercely preserve subnational unit interests, nonetheless, is severely limited by the Second chamber's putative subnational unit composition.

2.6 Conclusion

The purpose of this chapter was not to provide a detailed examination of the structure and powers of the various second chambers in representing subnational units. The goal was to demonstrate alternative choices for the composition and powers of the second chamber, as well as to analyse the implications for subnational unit representation in the second chamber. Therefore, it averted from recommending whether a certain country's design of second chamber were the best or not. Second chambers are frequently regarded as legal instruments for bringing subnational unit interests into the functioning of national government. It has confined its focus to establishing the principles of powers and composition that are typically employed in assuring the representation of the subnational unit and how the second chamber converted into practice within the setting of a federal structure. It is evident from the preceding that many second chambers were established with the goal of strengthening the role of representing the interests of subnational units at the national level. The approach is intended to ensure that subnational units have control over issues that affect them and that subnational representation at the national level is guaranteed. However, the capacity of the second chamber to serve as a site of subnational representation is dependent on how members are chosen and the influence it has over laws that affect the power and functions of sub - national unit. The next chapter then attempts to examine the powers and composition of the second chamber in representing subnational units in South Africa and Nigeria, based on the powers and composition outlined in this chapter. The assessment of the composition and powers of the second chamber in representing subnational units in each federation is followed by a chapter outlining the country's history, composition, and power. This is significant because it provides

¹³⁶ article 36.1 of the constitution of the Federative Republic of Brazil

¹³⁷ Section 100 of the Constitution of the Republic of South Africa, 1996

¹³⁸ article 190 of the Constitution of Kenya

a deeper understanding of the range of historical and political causes that influenced the founding, organization, and function of each federation's second chamber.



CHAPTER THREE: SECOND CHAMBERS AND SUBNATIONAL REPRESENTATION - COMPARING SOUTH AFRICA AND NIGERIA

3.1 Introduction

The major function of second chambers in federations is to allow member units to be represented and participate in federal decision making at national level.¹³⁹ The chapter evaluates the role of the second chambers in ensuring the representation of subnational unit in the national legislative processes in South Africa and Nigeria. When examining the role of the second chamber, it is important to trace its history and context. With that in mind, before comparing and contrasting the two countries, the chapter introduces the federal arrangement in both countries. The chapter then moves to determine whether the structure and powers of the second chambers enables the representation of subnational unit.

3.2 South Africa and Nigeria as federations

The Constitution of the Republic of South Africa Act 108, as adopted on 8 May 1996 and Amended on 11 October 1996 by the Constitutional Assembly (hereinafter referred to as the Constitution of South Africa) makes no mention of the term "federalism". But it does establish a structure in which governance is divided into three spheres that are "distinctive, interdependent, and interrelated".¹⁴⁰ It refers to the constitutionally independent national, provincial, and municipal governments. The usage of the term 'sphere' rather than the more usual 'level' is intentional. It is intended to represent the non-hierarchical interaction between the three spheres of government.¹⁴¹

Each sphere of government is directly elected and enjoys some level of autonomy. There are nine provinces in South Africa. The premier of a province is the executive authority of that province, and he or she is selected by the provincial parliament from within its constituents.¹⁴² The premier, as the national President, holds executive power in collaboration with the other members of the Executive Parliament, which functions similarly to the national Cabinet.¹⁴³ Like representatives of the national cabinet, representatives of the executive council are subject to the province legislature for the use of their authority and discharge of their duties on both a

¹³⁹ Watts RL *Comparing Federal Systems* (2008) 88.

¹⁴⁰Section 40(1) Constitution of the Republic of South Africa Act 200 of 1996

¹⁴¹ Fessha Y *Institutional Recognition and Accommodation of Ethnic Diversity: Federalism in South Africa and Ethiopia* (unpublished PhD thesis, University of the Western Cape, 2008) 213

¹⁴² Sections 125 -141 Constitution of the Republic of South Africa, 1996

¹⁴³ Fessha Y *Institutional Recognition and Accommodation of Ethnic Diversity: Federalism in South Africa and Ethiopia* (unpublished PhD thesis, University of the Western Cape, 2008) 216

collective and an individual basis.¹⁴⁴ A province's power to legislate is situated in its provincial parliament, which can have between thirty and eighty legislators.¹⁴⁵ Representatives of the provincial legislature are elected directly by the citizens of the province. The Constitution of South Africa recognizes local government as a separate level of authority. Therefore, it is a constitutionally autonomous sphere of government. Directly elected council of municipalities has legislative as well as executive power in local governance.¹⁴⁶ A two-tiered governance structure with district and local municipalities is allowed outside of urban areas under the Constitution.¹⁴⁷

The Constitution has created a second chamber, the NCOP, that serves as a forum for subnational unit representation. The NCOP is officially charged with representing the interests of provinces. It is also intended to function as a provincial house.¹⁴⁸ This, as we shall see later, is true in terms of its composition as well as the power it possesses in shaping national legislation.¹⁴⁹ The Constitutional Court has the authority to deal with intergovernmental disputes between the national and provincial governments, whereas conflicts between local and other levels of government can also be resolved by other courts.¹⁵⁰ Unlike South Africa, federalism is the form of government that is explicitly recognized by the Constitution of the Federal Republic of Nigeria, 1999, (hereafter, referred to as the Constitution of Nigeria). The Federal Republic of Nigeria is the designation given to Nigeria by the Constitution, which states that it is one sovereign entity that cannot be divided or dissolved.¹⁵¹ It also specifies that "Nigeria shall be a federation composed of states and a federal capital territory".¹⁵² The Constitution identifies the federating states, a total of thirty-six.¹⁵³ Therefore, the fundamental purpose of federalism in Nigeria, as provided for in the Constitution, is to strengthen the

¹⁴⁴Fessha Y *Institutional Recognition and Accommodation of Ethnic Diversity: Federalism in South Africa and Ethiopia* (unpublished PhD thesis, University of the Western Cape, 2008) 216

¹⁴⁵ Sections 104-124 Constitution of the Republic of South Africa, 1996

¹⁴⁶ Section 151(2) Constitution of the Republic of South Africa, 1996

¹⁴⁷Fessha Y *Institutional Recognition and Accommodation of Ethnic Diversity: Federalism in South Africa and Ethiopia* (unpublished PhD thesis, University of the Western Cape, 2008) 216 216

¹⁴⁸Fessha Y 'Second chamber as a site of legislative intergovernmental relations: An African federation in comparative perspective (2021) 314 *Regional & Federal Studies* 501

¹⁴⁹ Fessha Y 'Second chamber as a site of legislative intergovernmental relations: An African federation in comparative perspective (2021) 314 *Regional & Federal Studies* 501

¹⁵⁰ Fessha Y 'Second chamber as a site of legislative intergovernmental relations: An African federation in comparative perspective (2021) 314 *Regional & Federal Studies* 501

¹⁵¹ Section (1) of the Constitution of Federal Republic of Nigeria 1999

¹⁵² section 2 (2) of the Constitution of Federal Republic of Nigeria 1999

¹⁵³ section 3(3) of the Constitution of Federal Republic of Nigeria 1999

national unit and encourage subnational unit involvement in national government decision-making processes.

Each state has an elected leader who serves a four-year term. Every governor is assisted by a deputy governor in handling the state's operations.¹⁵⁴ The governor is the head of the state council and has the authority to select every member in governance, which includes the commissioners and advisers.¹⁵⁵ The governor delegate official duties to commissioners and advisers to better represent the state. These commissioners and advisers are not permitted to be representatives in the state body of assembly and the national legislature.¹⁵⁶ The state executive committee is comprised of the governor, deputy governor, and commissioners. States in Nigeria have a certain level of autonomy as well, but only under the limits set by the Federal Government in the constitution.

The Constitution of Nigeria categorizes the legislative authority as exclusive and concurrent.¹⁵⁷ Exclusive powers are powers for the federal legislature alone, hence the description as exclusive. The federal government has the right to act on the Exclusive Legislative list, and states can pass laws on the provinces named on the list only to the amount specifically provided by federal law.¹⁵⁸ The main justification for the concept of the division of powers in federal states is that issues that affect the nation should be assigned to the central government, and issues that are clearly regional related should be assigned to state governments.¹⁵⁹ Therefore, issues such as national defence, foreign policy, finance, nuclear energy, and finance are typically assigned to the federal government.¹⁶⁰ The state governments oversee several local and regional issues such as social services, basic and secondary education, public health, and other local and municipal issues, among others¹⁶¹. However, where national and regional

¹⁵⁴Afrobarometer 'Term Limits, the Presidency, and the Electoral System: What Do Nigerians Want?' Afrobarometer Briefing Paper No. 35 April 2006 available at <https://www.afrobarometer.org/wp-content/uploads/2022/02/AfrobriefNo35.pdf> (accessed 24 September 2023)

¹⁵⁵. Afrobarometer 'Term Limits, the Presidency, and the Electoral System: What Do Nigerians Want?' Afrobarometer Briefing Paper No. 35 April 2006 available at <https://www.afrobarometer.org/wp-content/uploads/2022/02/AfrobriefNo35.pdf> (accessed 24 September 2023)

¹⁵⁶Afrobarometer 'Term Limits, the Presidency, and the Electoral System: What Do Nigerians Want?' Afrobarometer Briefing Paper No. 35 April 2006 available at <https://www.afrobarometer.org/wp-content/uploads/2022/02/AfrobriefNo35.pdf> (accessed 24 September 2023)

¹⁵⁷Nwabueze BO *Federalism in Nigeria* (1983)41

¹⁵⁸Ibiam E 'Federalism, Democracy and Constitutionalism: The Nigerian Experience' (2016) 53 *Journal of Law, Policy and Globalization* 6

¹⁵⁹Elaiwu J & Longams P and Galadima H 'Federalism and Nation Building' (2008) *National council of inter* 64.

¹⁶⁰ Ibiam E 'Federalism, Democracy and Constitutionalism: The Nigerian Experience' (2016) 53 *Journal of Law, Policy and Globalization* 6

¹⁶¹ Elaiwu J & Longams P and Galadima H 'Federalism and Nation Building' (2008) *National council of inter* 64.

interests overlap, powers are usually regarded as either concurrent or further subdivided into federal and regional domains.¹⁶² Although the list of duties held by the Local Government Council is contained in the fourth Schedule of the 1999 Constitution, the constitution does not directly or implicitly grant legislative powers to local government bodies.¹⁶³¹⁶⁴ The management of local taxes, planning, roads, health care, and education is handled by 774 local administrations.¹⁶⁵ The local government is the layer of government that serves the citizens at the level.

"The federal character," a principle recognised by the Constitution of Nigeria provides for a more comprehensive representation of subnational units and other interests in the central administration.¹⁶⁶ The constitutional concept demands for the structure and functioning of governmental institutions to represent the country's ethnic, religious, geographical, and cultural diversity. The president needs an overwhelming endorsement by the national majority. Accordingly, the president is eligible for selection if he or she receives the votes of a majority of voters as well as at least 25% of the votes cast in at least two thirds of the states.¹⁶⁷ The federal character also requires the appointment of at least one minister from each state and stresses that the minister should be an 'indigene' of such state.¹⁶⁸ Furthermore, the other federal executive entities must exhibit a federal character. Therefore, each state of the country must have representation in a number of significant federal organizations, such as the Federal Character Commission, the Revenue Allocation Commission, and the National Economic Council.¹⁶⁹

¹⁶² Elaigwu J & Longams P and Galadima H 'Federalism and Nation Building' (2008) *National council of inter* 66

¹⁶³ Elaigwu J & Longams P and Galadima H 'Federalism and Nation Building' (2008) *National council of inter* 64.

¹⁶⁴ Section 7(1) (6)(b) and 197 and item 22 of the Second Schedule Part 1 of the Constitution

¹⁶⁵ The structure of the Nigerian Government and politics 'Political science' 13 available at <https://project.com.ng/political-science/the-structure-of-Nigerian-government-and-politics/index.html> (accessed 24 September 2022)

¹⁶⁶ Suberu R (2006) 'Attractions and contradictions of ethnic federalism: The Nigerian experience' in Turton D (ed) *Ethnic federalism: The Ethiopian experience in a comparative perspective* (2006) 65-89

¹⁶⁷ Fessha Y *Institutional Recognition and Accommodation of Ethnic Diversity: Federalism in South Africa and Ethiopia* (Unpublished PhD thesis, University of the Western Cape, 2008) 140

¹⁶⁸ Suberu R (2006) 'Attractions and contradictions of ethnic federalism: The Nigerian experience' in Turton D (ed) *Ethnic federalism: The Ethiopian experience in a comparative perspective* (2006) 65-89

¹⁶⁹ Fessha Y *Institutional Recognition and Accommodation of Ethnic Diversity: Federalism in South Africa and Ethiopia* (Unpublished PhD thesis, University of the Western Cape, 2008) 140

3.3 Second Chambers of Nigeria and South Africa

The second chamber of the South African Parliament is called the National Council of Provinces (NCOP). The objective of the NCOP, according to Section 42 (4) of the Constitution, is to "represent the provinces and guarantee that provincial interests are considered seriously in the national arena of government."¹⁷⁰ The NCOP accomplishes such by enabling delegates from provincial legislatures and Executive Councils to take an active role in the legislative process, as well as "by providing a national platform for public discussion on matters concerning the provinces."¹⁷¹ The senate is the name of the second chamber of the Nigerian legislature. The senate oversees creating laws, representing the subnational entity in national governments, approving budgets, and supervising the executive branch of government.

3.3.1 The Historical Background of the Second Chamber of South Africa and Nigeria.

The presence of a second house of Parliament is not unusual in South African constitutional development. To safeguard the interests of the smaller provinces and the "coloured people," the Union of South Africa's drafters decided to establish an upper house of parliament called the Senate when the two British colonies of the Cape and Natal and the two Boer Republics of the Transvaal and the Orange Free State joined forces in 1910 to form the Union of South Africa.¹⁷² Nevertheless, in its existence, the Senate failed to accomplish either of these objectives. To secure a two-thirds majority to exclude "coloured people" from the position of ordinary voters in the Cape, the government led by the National Party easily raised the number of the Senate.¹⁷³ This reality brought the Senate into disrepute, and it was later disbanded in 1980.¹⁷⁴ As the country moved away from apartheid, the 1993 interim constitution established a second chamber of Parliament, the Senate, to safeguard the provinces' interests at the national level.¹⁷⁵ The members of the Senate were elected by their respective parties and committed their seats to them.¹⁷⁶

While the Constitution was being negotiated, several politicians criticized the design of the Senate, claiming that it was simply a repetition of the National Assembly's composition and that the provinces were not effectively represented.¹⁷⁷ The Constitutional Court also

¹⁷⁰ Section 42 (4) of the Constitution of South Africa, 1996

¹⁷¹ De Villiers 'Intergovernmental relations in South Africa' (1997)12 *SAPR/PL* 208

¹⁷² Carpenter G *Introduction to South African Constitutional Law* (1987) 80

¹⁷³ Du Plessis L *An Introduction to Law* 3ed (1999)170.

¹⁷⁴ Carpenter G *South African Constitutional Law* (1987)276

¹⁷⁵ Murray CM *South Africa's NCOP – stepchild to the Bundesrat* (1999) 263.

¹⁷⁶ Section 46 of the Interim Constitution of South Africa, 1993

¹⁷⁷ Malherbe R 'The South African NCOP' (1998) *TSAR* 7780.

demonstrated its displeasure with the Senate's design in the First Certification Judgment, contending that the Senate's representation of the provinces was inadequate and indirect since representatives were appointed by political parties rather than directly by provincial legislatures or citizens.¹⁷⁸

The history of the Senate in Nigeria may be traced back to the territorial absorption of the British Empire, which started in 1861 with the conquest of Lagos, a coastal city, and ended in 1914 with the union of the two British protectorates of Northern and Southern Nigeria.¹⁷⁹ The rise of ethno-regional conflicts in the newly established colonial state prompted the division of Southern Nigeria into Eastern and Western regions in 1939, the formation of a fully functioning federation of three regions in 1954, and the incorporation of the tripartite regional federal system into the 1960 independence constitution.¹⁸⁰ Since 1960, the history of Nigerian federalism has occurred in five significant political periods. The first Nigerian Democratic Republic, which took place between 1960 and 1966, was founded on the clash of parliamentary government with the colonial past of three territorially big and constitutionally influential, yet unequal, states.¹⁸¹ From 1966 to 1979, the regions were fragmented into smaller groups, with twelve states being formed in 1967 and nineteen states in 1976, as an aspect of an extensive strategy of centralization executed by Nigeria's political military personnel.¹⁸² The second Republic, which lasted from 1979 to 1983, was built on the military's foundation of centrist cohesive structures. This comprised a 19-state organization, a separation of the power to

¹⁷⁸ Federal Republic of Nigeria, National Assembly 'Find a committee P8' available at <https://nass.gov.ng/committee> (accessed at 20 October 2022)

¹⁷⁸ Carpenter G *South African Constitutional Law* (1987)241

¹⁷⁸ Du Plessis L *An Introduction to Law*, (1999)170.

¹⁷⁸ Carpenter G *South African Constitutional Law* (1987)276

¹⁷⁸ Murray CM *South Africa's NCOP – stepchild to the Bundesrat* (1999) 263.

¹⁷⁸ Section 46 of the Interim Constitution of South Africa, 1993

¹⁷⁸ Malherbe R 'The South African NCOP' (1998) *TSAR* 7780.

¹⁷⁸ *Ex parte Chairperson of the Constitutional Assembly*: in re Certification of the Constitution of the Republic of South Africa, 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) 1318 para 319.

¹⁷⁸ *Ex parte Chairperson of the Constitutional Assembly*: in re Certification of the Constitution of the Republic of South Africa, 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) 1318 para 319.

¹⁷⁹ Federal Republic of Nigeria, National Assembly 'Find a committee' available at <https://nass.gov.ng/committee> (accessed at 20 October 2022)

¹⁸⁰Suberu Reinventing the Architecture of Nigeria Federalism' (2005) 12 *The Brown Journal of World affairs* 140.

¹⁸¹Suberu F 'Reinventing the Architecture of Nigeria Federalism' (2005) 12 *The Brown Journal of World affairs* 140.

¹⁸² Suberu F 'Reinventing the Architecture of Nigeria Federalism' (2005) 12 *The Brown Journal of World affairs* 140.

legislate, and a presidential system with a robust and ostensibly pan-ethnic central administration, along with a second chamber with equal representation for all states.¹⁸³

From 1984 to 1999, the second period of military control not merely maintained the centralized nature of the first era of dictatorship, involving an increase in the size of states from nineteen to thirty-six, however it also experienced some of the most destructive disorders of military authority.¹⁸⁴ This period was particularly infamous for the establishment of the military head of state's arbitrary authority and the transition away from inclusiveness ethnic practices of the prior period of military power to ethno-religious control.¹⁸⁵ The Fourth Nigerian Republic was established in 1999 using the remains of the failed Third Republic, adopting a revised draft of the 1979 constitution of the Second Republic. Following the death of military commander Sani Abacha, Abubaker began a period of transition that signalled the country's return to democratic governance.¹⁸⁶ This was followed by the lifting of the ban on political activity and the release of political detainees from detention institutions.¹⁸⁷ The military-dominated Provisional Ruling Council reviewed and approved the proposed constitution.¹⁸⁸ The People's Democratic Party, All People's Party, and Alliance for Democracy became the first three political parties to be registered.¹⁸⁹

3.3.2. The Composition of the Second Chamber

The NCOP is made up of delegates from all nine provinces.¹⁹⁰ Each provincial representation in the NCOP is made up of four special representatives and six permanent representatives.¹⁹¹ The various political parties that make up the legislatures in each province propose their permanent representatives, who are selected under a proportional representation system. The approach attempts to guarantee that all parties are represented in the delegation's representation

¹⁸³ Suberu F 'Reinventing the Architecture of Nigeria Federalism' (2005) 12 *The Brown Journal of World affairs* 140.

¹⁸⁴ Suberu F 'Reinventing the Architecture of Nigeria Federalism' (2005) 12 *The Brown Journal of World affairs* 140.

¹⁸⁵ Suberu F 'Reinventing the Architecture of Nigeria Federalism' (2005) 12 *The Brown Journal of World affairs* 140.

¹⁸⁶ Yagboyaju DA 'Nigeria's Fourth Republic and the Challenge of a Faltering Democratization' (2011) 12.3 *African Studies Quarterly* 97

¹⁸⁷ Yagboyaju DA 'Nigeria's Fourth Republic and the Challenge of a Faltering Democratization' (2011) 12.3 *African Studies Quarterly* 97

¹⁸⁸ Yagboyaju DA 'Nigeria's Fourth Republic and the Challenge of a Faltering Democratization' (2011) 12.3 *African Studies Quarterly* 97

¹⁸⁹ Yagboyaju DA 'Nigeria's Fourth Republic and the Challenge of a Faltering Democratization' (2011) 12.3 *African Studies Quarterly* 97

¹⁹⁰ Section 60(1) of the constitution of the Republic of South Africa, 1996

¹⁹¹ Section 60(2) of the constitution of the Republic of South Africa, 1996

and that the size of a political party is represented proportionally in the representation to the Parliament.¹⁹² However, it is not necessary for the permanent delegates to be provincial legislators.¹⁹³ The appointed representative surrenders their membership in the legislature if they are currently a legislator. In turn, his or her party might elect a replacement to the provincial legislature.¹⁹⁴

The South African Local Government Association represents local governments and has ten delegates in the NCOP which can take part in legislative proceedings though cannot vote.¹⁹⁵ This approach enables local governments to communicate their needs and issues to the national legislature. The NCOP regulations stipulate when a local government representative may attend a committee meeting. They are permissible when "a matter under consideration affects the interests of local government".¹⁹⁶ The democratic dispensation established in the South African constitution requires extensive collaboration between the domains of government, and hence the incorporation of local government in the NCOP shows the significance of collaborative governance in the South African constitution.

Representatives usually serve as a permanent until the following general election, when the newly selected provincial legislature will nominate new permanent representatives to the NCOP.¹⁹⁷ When a permanent delegate no longer qualifies for membership, joins Cabinet, or misses the NCOP with no authorisation in accordance with section 62(4)(e), they lose their membership.¹⁹⁸ A permanent delegate also forfeits his or her membership in the NCOP if the political group that selected the person removes the delegate. This could be possible if the person leaves the party and loses the support of the province's legislature or their own political party.¹⁹⁹ The authority of a political party to recall a delegate appears to build an intense connection between the representative and the provincial legislature that selected the individual. It represents a reality that the delegate is responsible for representing the best interests of the subnational unit in the national arena of government, hence facilitating collaboration between the national and provincial levels of government.

¹⁹² Section 61 of the Constitution of the Republic of South Africa, 1996

¹⁹³ Section 62 of the Constitution of the Republic of South Africa, 1996

¹⁹⁴ Section 62(5) of the Constitution of the Republic of South Africa, 1996

¹⁹⁵ Section 67 of the Constitution of the Republic of South Africa, 1996

¹⁹⁶ ¹⁹⁶ Section 67 of the Constitution of the Republic of South Africa, 1996

¹⁹⁷ Section 62(3) of the Constitution of the Republic of South Africa, 1996

¹⁹⁸ section 62 (4) (a) (b) and (e) of the Constitution of South Africa, 1996

¹⁹⁹ Section 62 (4) (c) (d) of the Constitution of the Republic of South Africa, 1996

However, it should be noted that the power to recall a delegate lies with the party, rather than the legislature itself. This is more probable to enhance the political party leadership and ensure party discipline than to increase the permanent delegate's commitment to the provincial assembly. This sense of unity is reinforced by the realization that each NCOP delegation votes as one group with a single vote. The delegation will always represent the preferences and interests of the province legislature's majority. Considering this, it is possible to conclude that the relationship between the permanent delegates and the legislature as an institution is frail. The persons are members of their respective party caucuses, though they are not participating directly in the provincial legislature.²⁰⁰

Each province's legislature must designate three special representatives from its membership to serve on the NCOP.²⁰¹ The premier and the leaders of every party must agree on the nomination, which must be made proportionately to the representation of the major parties in the legislature.²⁰² The special delegates just attend meetings organized for a particular function and duration; they are not based in Parliament. In principle, special delegates had to be nominated for a special session of the NCOP.²⁰³ The delegation is led by the fourth special delegate, who is the premier of the respective province assembly.²⁰⁴ A 'special' delegate, as opposed to the permanent delegates, continues to remain a member of the provincial legislature after being elected.²⁰⁵

The purpose of having special representatives is to bring the NCOP representation closer to the province.²⁰⁶ In addition, special delegates are supposed to be more loyal to their province than to their party's goals.²⁰⁷ The representatives' position required them to follow provincial directives. The measure requiring the premier or the premier's nominee to lead the province delegation in the NCOP will also give provincial delegations a greater role as their executives tend to be required to carry out national laws.²⁰⁸ The Constitution's provisions appear to make it more probable than not that provincial interests will trump party interests in the NCOP. However, the Constitutional Court questions whether the measures pertaining to special

²⁰⁰ De Villiers 'National-provincial co-operation' (1999) 14 *SAPL* 381 407

²⁰¹ Section 60 (2) (a) (ii) of the Constitution of the Republic of South Africa, 1996

²⁰² Section 61 (4) of the Constitution of the Republic of South Africa, 1996

²⁰³ Simeon R & C.M. Murray *CM Multilevel governance in South Africa – an interim report*, p. 11

²⁰⁴ Section 60 (3) of the Constitution of the Republic of South Africa

²⁰⁵ Fessha Y 'Second chamber as a site of legislative intergovernmental relations: An African federation in comparative perspective (2021) 314 *Regional & Federal Studies* 502

²⁰⁶ Ex parte Chairperson of the Constitutional Assembly: In re certification of the amended text of the Constitution of the Republic of South Africa, 1996 1997 (2) SA 97 (CC); 1996 1997 (1) BCLR 1 (CC) para 61.

²⁰⁷ Malherbe R 'The South African NCOP' (1998) *TSAR* 77 88.

²⁰⁸ Section 125 (2) of the Constitution of the Republic of South Africa and Malherbe (1998) 77 93.

delegates will ensure that provincial interests are adequately represented. It was contended in the First Certification Judgment that the arrangement of the NCOP as stipulated in the Constitution is more appropriate for representing province interests. However, the Constitutional Court was unable to definitively establish that the adjustments adopted would certainly benefit the provinces' common interests.²⁰⁹ Its ambiguity stemmed from several unpredictable variables, such as a gap in powers between the two Houses, the procedure of selecting House members, the distinction between direct and indirect representation, different voting methods; and the influence of parties on voting patterns.²¹⁰ The members of the NCOP delegations vote on the province legislature's direction. This represents the NCOP's goal, which is to integrate the provinces into national governance.²¹¹

On provincial issues, members of all the NCOP delegations vote as a single entity, such as a province, and each delegation has one vote, which is cast by the chairperson of each delegation.²¹² When a province is controlled by a coalition of parties, it must first reach an agreement upon how to cast its vote before participating as a delegation in the NCOP.²¹³ The delegation members cast individual or party votes on issues that do not directly concern the provinces.²¹⁴ This shows that the NCOP's primary purpose is to represent the interests of the provinces. The NCOP's involvement in areas that do not concern the provinces is simply advisory. Nevertheless, this duty is extremely essential because it allows the NCOP the authority to postpone the passage of contentious laws.²¹⁵ The NCOP delegations are closely connected to the provincial legislatures due to the requirement that they receive authority from them before they can vote on their behalf.²¹⁶

The Constitution specifies that an Act of Parliament "must set a uniform method by which provincial parliaments grant authority on their representatives to cast votes on the behalf of the provinces."²¹⁷ When the legislation is passed, provinces may determine how power is delegated to their separate delegations.²¹⁸ Since the legislation is still not in effect, the provinces have

²⁰⁹ Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996 1996 (4) SA 744 (CC) ; 1996 (10) BCLR 1253 (CC) para 331.

²¹⁰ Ex parte Chairperson of the Constitutional Assembly: In re: Certification of the Constitution of the Republic of South Africa, 1996 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) para 332.

²¹¹ Murray CM *South Africa's NCOP: Stepchild to the Bundesrat* (1999) 267.

²¹² Section 65 (1) (a) of the Constitution of the Republic of South Africa, 1996

²¹³ Section 75 of the Constitution of the Republic of South Africa, 1996

²¹⁴ Murray CM & Simeon R 'From paper to practice: The NCOP after its first year' (1999) 14 *SAPR/PL* 96 98.

²¹⁵ Murray CM & Simeon R 'From paper to practice: The NCOP after its first year' (1999) 14 *SAPR/PL* 96 98.

²¹⁶ Murray CM & Simeon R 'From paper to practice: The NCOP after its first year' (1999) 14 *SAPR/PL* 96 98.

²¹⁷ section 65 (2) of the Constitution of the Republic of South Africa

²¹⁸ Constitution of the Republic of South Africa, 1996 -schedule 6, item 21

come up with their own methods for deciding mandate.²¹⁹ Negotiating mandates are offered to direct representatives during the early phases of NCOP deliberations, whilst final mandates are granted to determine the vote in the NCOP sessions.²²⁰ The provinces use various techniques for bestowing the ultimate mandate, all of which allow only limited or no variation from mandates.²²¹ This practice is crucial, because the NCOP decision making processes take place in the provincial legislature.

The Nigeria Senate is made up of 109 members, three from each state and one from the federal capital of Abuja who serve four-year term.²²² Members of Nigeria's second chamber are elected directly to represent the government of a subnational unit.²²³ Senators are elected directly in constituencies with one member by means of first-past-the-post voting.²²⁴ This means that the person receiving the most votes in each constituency is elected to the second chamber. The majority party is the party with the most seats, on its own or as the primary member of a coalition or caucus²²⁵. When there is a tie between two or more parties, the party with the most senators becomes the majority party. The minority party is the second party.²²⁶ Representatives of the same political party may thereby win all the seats in a certain state.²²⁷ The benefits of this type of direct representation is that the chamber is accountable to the people. This fundamentally implies that members of the public are directly involved in the selection of its members and, as a matter of fact, must feel a greater sense of ownership of the chamber as well as its work.²²⁸ In Nigeria, regardless of the size or population of each unit, all states are represented equally by the same number of delegates in the second chamber. In this system, all states have equal decision-making weight, which safeguards the interests of smaller states from being controlled by larger ones. In Nigeria, direct elections are utilized to select members of the second chamber. The citizens of the states directly elect their delegates to the second chamber under this system.

²¹⁹ Murray CM & Simeon R 'From paper to practice: The NCOP after its first year' (1999) 14 *SAPR/PL* 96-118

²²⁰ Murray CM & Simeon R 'From paper to practice: The NCOP after its first year' (1999) 14 *SAPR/PL* 96-119

²²¹ Murray CM & Simeon R 'From paper to practice: The NCOP after its first year' (1999) 14 *SAPR/PL* 96-119

²²² 'The Nigerian Senate' available at <http://www.senat.fr> (accessed 16 October 2022).

²²³ Fessha Y 'Bicameralism' in Grote R, Lachenmann F and Wolfrum R (eds) *Max Planck Encyclopaedia of Comparative Constitutional law* (2018) 1- 14

²²⁴ Noel T 'Second chambers in federal systems' Stockholm: International IDEA, 2022 , available at <https://doi.org/10.31752/idea.2022.63> (accessed 20 September 2023)

²²⁵ 'The Nigerian Senate' available at <http://www.senat.fr> (accessed 16 October 2022).

²²⁶ 'The Nigerian Senate' available at <http://www.senat.fr> (accessed 16 October 2022).

²²⁷ Noel T 'Second chambers in federal systems' Stockholm: International IDEA, 2022, available at <https://doi.org/10.31752/idea.2022.63> (accessed 20 September 2023)

²²⁸ Russell M *Representing the Nations and Regions in a new Upper House: Lessons from Overseas*. (1999) 114

It is important to note that the method of selection can indicate whose interests a legislator will represent, as the person or people who put them someone in power can have a decided impact on whose values and preferences shape the law. Members of the second chamber in Nigeria, as mentioned above, are elected using first past the post electoral system, creating a direct relationship between voters cast and the election outcomes. The democratic credibility of second chambers is strengthened by direct elections. Members of the second chamber are directly answerable to the voters in the states where they were elected. Nevertheless, direct elections prevent a formal relationship from forming between second chamber representatives and states legislatures, and they tend to favour political parties in federal decision-making over states. Members of the second chamber represent the electorates in the senatorial constituency that elected them in this arrangement.

3.3.3 The Powers of the Second Chambers

As established in the preceding chapter, in addition to composition, the powers granted to the second chamber are important. A second chamber must have significant influence in the federal legislative process, if not co-equal powers with the lower house, to serve as an effective locus of subnational representation in the national government.²²⁹ This is particularly critical when it comes to federal constitutional legislation because it could affect the position of the constituent states.²³⁰

The efficiency of NCOP in representing subnational units is determined by the significance of its constitutional powers in safeguarding subnational unit interests. The NCOP's role as a site of subnational unit representation is strengthened by its control over the legislative procedure. The NCOP's influence in the national law-making process is not confined to measures affecting provinces. The NCOP's major constitutional importance within the context of representative governance is emphasized through its primary legislative responsibility.²³¹ The NCOP analyses bills that have no bearing on provinces, known as section 75 laws. Section 75 of the Constitution outlines the method for enacting ordinary measures that have no impact on the provinces. In the case of regular legislation that has no impact on the provinces, the NCOP has the authority to endorse, amend, or reject measures enacted by the National Assembly.²³² In

²²⁹ Fessha Y 'Second chamber as a site of legislative intergovernmental relations: An African federation in comparative perspective' (2021) 314 *Regional & Federal Studies* 509.

²³⁰ Palermo F & Kossler K *Comparative Federalism, Constitutional Arrangements and Case Law* (2017) 217

²³¹ Chaskalson M *Constitutional law of South Africa* (1996) 7.

²³² Section 75 (1) (a) (i-iii) of the constitution of the Republic of South Africa, 1996

certain circumstances, the casting of vote rules in the NCOP are varied. In this regards, members of representatives vote individually, and the legislation needs to be approved by a simple majority of the votes cast.²³³ This plan demonstrates how little impact these bills will have on the provinces. Considering the measures have no direct impact on the provinces, voting on provincial directives is not needed.²³⁴ Should a bill that comes under section 75 legislation is not passed by the NCOP, it may still become law if it is passed by the National Assembly, similarly with a simple majority of its constituents.²³⁵ Hence, the National Assembly has the authority to overrule the NCOP and enact the measure notwithstanding the NCOP's opposition, even though both chambers are obligated to review regular bills that do not affect the provinces.²³⁶

The NCOP exercises greater authority over bills that affect provinces, often referred to as section 76 legislation.²³⁷ Section 76 bill is concerned with laws 'affecting' the provinces and includes any legislation that comes largely within the functional boundaries outlined in Schedule 4 of the Constitution along with those for which the national and provincial governments have concurrent authority.²³⁸ A bill that passes through the National Assembly and impacts the interests of provinces requires the consent of the NCOP before it's signed into law.²³⁹ For these bills to be approved by the NCOP, five of the nine provinces must support them.²⁴⁰ When the National Assembly and the NCOP are unable to reach an agreement on the proposed Bill, a mediation committee comprised of nine members of the National Assembly together with a representative from each provincial representative is formed.²⁴¹ The decision of the mediation committee needs to be approved by five out of the nine members from each chamber.²⁴² When no compromise can be achieved, the National Assembly can nevertheless

²³³ Section 75 (2) (a) (c) of the constitution of the Republic of South Africa, 1996

²³⁴ Murray CM & Simeon R 'From paper to practice: The NCOP after its first year' (1999) 14 *SAPR/PL* 96-102

²³⁵ section 75 (1) (c) (i) of the constitution of the Republic of South Africa, 1996

²³⁶ Section 74 (3) of the constitution of the Republic of South Africa, 1996

²³⁷ Fessha Y 'Second chamber as a site of legislative intergovernmental relations: An African federation in comparative perspective' (2021) 314 *Regional & Federal Studies* 502.

²³⁸ Section 76(3) of the constitution of the Republic of South Africa, 1996

²³⁹ Steytler N (2017) 'The Constitutional Court of South Africa: Reinforcing an Hourglass System of Multi-Level Government' in Aroney N & Kincaid J (ed) *In Courts in Federal Countries: Federalist or Unitarist* (2006) 328-366

²⁴⁰ Section 75 (2) (a) of the constitution of the Republic of South Africa, 1996.

²⁴¹ Section 76 (1) (d) of the constitution of the Republic of South Africa, 1996

²⁴² Section 78 (2) (a) (b) of the constitution of the Republic of South Africa, 1996

pass the Bill with a two-thirds vote.²⁴³ The mediation body may also propose a different draft of the Bill, which must be approved by a simple majority in each parliament.²⁴⁴

The NCOP is allowed to take part in the enactment of bills altering the Constitution's clauses under section 74 of the Constitution. Chapter 3 of the Constitution, which outlines the principles of collaborative government, can be amended, for example, by a two-thirds vote in the National Assembly and a majority of six votes in the NCOP.²⁴⁵ The rest of the Constitutional amendments must have support from two-thirds of the National Assembly and must not have an impact on the provinces.²⁴⁶ The National Assembly can only adopt the bill with the support of six province delegations of the NCOP if modifications affect the NCOP, change provincial limitations, authorities, processes, or structures, or modify a provision that deals particularly with a provincial topic.²⁴⁷ This demonstrates that provinces have the authority necessary to protect themselves from changes that can have a harmful impact on them.

The NCOP's influence is not confined to laws affecting provinces. In addition to its law-making role, one of the primary functions of the second chamber is to oversee the Executive.²⁴⁸ The NCOP is granted certain powers and functions to enforce accountability under Section 42 (4) of the Constitution. When exercising its oversight role, the NCOP plays a key role in defending the autonomy of provincial governments. That responsibility is used, for example, when a particular sphere of government intervenes in the activities of another, thereby violating the autonomy of another sphere of government.²⁴⁹ When an intervention takes place, the NCOP needs not just validate the intervention but also "examine it on an ongoing basis and provide suitable proposals for the provincial executive."²⁵⁰ The NCOP is obligated to promote the acts of one of its constituents when monitoring provincial interference in municipal issues, and when examining national intervention in provincial affairs, the NCOP must deal with activities involving any of its members. In operation, the NCOP is requested to serve as both a regulatory agency and an intermediary, thus satisfying the prerequisites of collaborative government.²⁵¹

²⁴³ Section 76 (1) (i) of the constitution of the Republic of South Africa, 1996

²⁴⁴ Section 76 (1) (h) of the constitution of the Republic of South Africa, 1996

²⁴⁵ Section 74 (3) of the constitution of the Republic of South Africa, 1996

²⁴⁶ Section 74 (3) (a) of the constitution of the Republic of South Africa, 1996

²⁴⁷ Section 74 (3) (b) (i-iii) of the constitution of the Republic of South Africa, 1996

²⁴⁸ Corder H, Jagwath S & Soltau F *Report on Parliamentary Oversight and Accountability*(1999) Ch 4 21-26

²⁴⁹ Section 100 of the constitution of the Republic of South Africa, 1996

²⁵⁰ section 100 (1) (b), 139(b) of the constitution of the Republic of South Africa, 1996

²⁵¹ Murray CM *South Africa's NCOP: Stepchild to the Bundesrat* (1999) 271

In Nigeria, the principal role of the Senate is to make laws²⁵² for the sake of peace, order, and good administration.²⁵³ The senate has the authority to monitor the executive branch of government's operations. It performs the oversight role by examining the operations of government ministries, departments, and agencies to guarantee accountability and sound governance.²⁵⁴ The senate is in charge of approving the appointments of ministers, ambassadors, agency heads, and the executives of legislative bodies. In Nigeria, the second chamber participates in appointments to other institutions, the decisions which impact subnational units and the administration of the national government, as well.²⁵⁵ The Nigerian Constitution, for instance, requires the Second chamber to affirm the president's appointment to the Election Commission and the Federal Character Commission.²⁵⁶ The senate can evaluate the suitability and credentials of nominees during confirming hearings. The senate have a role in impeaching the president and other government leaders. The ability to begin impeachments usually belongs to the first chamber, but the ultimate decision frequently necessitates a trial and a vote by a majority in the second chamber. The constitution mandates that treaties be approved by both houses of parliament.²⁵⁷ 'The proclamation of a state of immediate emergency by the president must be ratified by a two-thirds vote of the members of each chamber of the national parliament in a two-day period unless senate is in operation or within ten days if legislature is not in service'.²⁵⁸ The Nigerian government enters into treaties and agreements, which are then ratified by the senate. Any agreement must be submitted for ratification to the senate so it can be considered to be enforceable. This guarantees that states interest responsibilities are in line with international agreements. The senate takes part in the nation's budgeting process. It examines and approves the annual budget put forth by the executive branch, making certain that public money is distributed properly.

More importantly, for our purpose, it is important to note that the Nigerian federation has one of the strongest bicameralisms in the world. The senate has co-equal powers with the first chamber in all federal government legislative affairs excluding legislative financial matters.²⁵⁹

²⁵² Section 4(1) of the Constitution of the Federal Republic of Nigeria, 1999

²⁵³ Section 4(2) of the Constitution of the Federal Republic of Nigeria, 1999

²⁵⁴ The Contents 101 'The Nigerian Senate and its functions' available at <https://contents101.com/2023/06/13/the-nigerian-senate-and-its-functions/> (accessed 16 September 2023)

²⁵⁵ Noel T 'Second Chambers in Federal Systems' available at <https://doi.org/10.31752/idea.2022.63> (accessed 29 April 2023) 26

²⁵⁶ Section 86 (1) of the Constitution of the Republic of the Federation of Nigeria, 1999

²⁵⁷ Section 12(2) of the Constitution of the Republic of the Federation of Nigeria, 1999

²⁵⁸ Section 305 of the Constitution of the Federal Republic of Nigeria, 1999

²⁵⁹ Article 58 of the Constitution of the Federal Republic of Nigeria (1999)

A bill must be approved by both houses to become law.²⁶⁰ The constitution allows the senate an absolute veto authority over all legislative laws.²⁶¹ This entails that passing law necessitates the consideration and approval of both houses.²⁶² When both houses fail to enact a law in the same form, it fails. An absolute veto exercised by the Senate obviously increases the importance of subnational units in federal decision-making processes. As both houses of the Nigerian parliament are participating in the legislative process, conflicts over a law between the lower house and second chamber are possible, especially given the differing majorities. The Nigerian federation came up with a shuttle method for settling conflicts within the two chambers to avoid persistent deadlocks. A shuttle approach is ‘employed in federations where the two chambers have equal control over all or some sorts of bills: draft laws and amendments bounce back and forth between the chambers until conflicts are overcome and both adopt an identical version’.²⁶³ When neither chamber passes an identical draft, the law is not passed. Shuttle procedures do not ensure that an impasse will be broken; they just give a means for differences to be resolved.²⁶⁴

The Nigerian Constitution further allows for joint sessions to be a conflict-breaking method for budgetary measures, as well as those pertaining to taxes and levies.²⁶⁵ ‘If bills like these receive approval by one chamber and not by the other in a two-month period of the start of a fiscal year, the president of the second chamber must organize a meeting of the joint finance committee of both houses within a period of fourteen days to look over the bill and settle disagreements among the two houses’.²⁶⁶ When the joint committee is unable to overcome such disagreements, the measure is referred to a joint session of the two chambers; if the joint session passes the bill, it goes to the president for assent.²⁶⁷ The Constitution grants the Senate the same legislative authority as the House of Representatives.²⁶⁸ The lower house in Nigeria, for instance, has 360 members, whereas the senate has 109 members. In principle, the lower house should be able to force its ideas on the senate when breaking a deadlock on contested laws affecting the subnational unit through a joint session. In actuality, ‘the decision of a joint

²⁶⁰ Section 58(1) of the constitution of the Federal Republic of Nigeria, 1999

²⁶¹ Constitution of the Republic of Nigeria (1999)

²⁶² Section 58 of the Constitution of the Federal Republic of Nigeria (1999)

²⁶³ Noel T ‘Second Chambers in Federal Systems’ available at <https://doi.org/10.31752/idea.2022.63> (accessed 29 April 2023)

²⁶⁴ Noel T ‘Second Chambers in Federal Systems’ available at <https://doi.org/10.31752/idea.2022.63> (accessed 29 April 2023)

²⁶⁵ Section 81(1) of the Constitution of the Republic of the Federal of Nigeria, 1999

²⁶⁶ Section 59 of the Constitution of the Federal Republic of Nigeria, 1999

²⁶⁷ Section 59 of the Constitution of the Federal Republic of Nigeria, 1999

²⁶⁸ Osieke E ‘Federal Republic of Nigeria’ in Katy K & Saunders C (eds) *In legislative, Executive and Judicial Governance in Federal Countries* (2006) 198-233

session vote is prone to be determined by the balance of parties in the two houses, as members of legislature may vote along party lines instead of house affiliation'.²⁶⁹ This has a negative impact on subnational unit representation, as representatives forget to represent subnational units in favour of political parties.

Another essential element to consider when addressing subnational unit representation is the dismissing of a representative during his tenure in office. The dismissal takes place as a result of a referendum called by the electoral committee after the submission of an official petition demonstrating a vote of no confidence in the representative from the voters of his district, agreed upon by no fewer than half of the individuals who are eligible to vote in that district level.²⁷⁰

Nigeria's second chamber, together with the federal government, has the authority to make amendments to the constitution. Generally speaking, federal constitutions are rigorous. In a different manner, its alteration necessitates a unique procedure that is written into it²⁷¹. The purpose for this is to prohibit any level of government from exploiting a constitutional clause. This specific procedure is framed in the form of "entrenched clauses," and the constitution can only be amended or changed through the defined system.²⁷² Section nine of the Nigerian constitution outlined a particular method for amending the constitution.²⁷³ Therefore, in order to change any provision of the Nigerian Constitution, a resolution passed by at least twenty-four State Houses of Assembly out of the current thirty-six States of the Federation is required, in addition to the votes of at least two-thirds of the members of the Senate²⁷⁴ and the House of Representatives. The inflexibility of the process for amending the constitution stems from a number of factors, such as the requirement that the Legislature adopt a special majority before any changes can be made in Nigeria ; the requirement that a third party or independence vote to approve the modification like in the house of Assembly passing states of the federation ; or

²⁶⁹ Noel T 'Second Chambers in Federal Systems' available at <https://doi.org/10.31752/idea.2022.63> (accessed 29 April 2023)

²⁷⁰ Section 69 of the of the Nigeria Federal Constitution, 1996

²⁷¹ Amah Ei 'Federalism, Nigerian Federal Constitution and the Practice of Federalism: An Appraisal'(2017) 8 *Beijing Law Review* 294

²⁷² Igwenyi, BO. (2006) *Modern Constitutional Law in Nigeria* (2006) 21.

²⁷³ Section 9 of the Constitution of the federal Republic of Nigeria, 1999

²⁷⁴ Section 48, 49 of the Constitution of the Federal Republic of Nigeria, 1999

the requirement that the amendment be approved through a referendum following the initiation of the change by the Parliament²⁷⁵ intended to foster and fasten the federal idea.²⁷⁶

From the foregoing, one house of parliament cannot overcome another on legislative matters that affects the states. In other words, both chambers have the same legislative authority. The fact that the second chambers in Nigeria have similar powers as the lower houses has exacerbated legislative deadlock. Yet, that also means that the Nigerian Senate has the potential to be an effective site of subnational representation. The senate can act as a subnational unit representation forum of equal partners where subnational units are represented equally, regardless of population size.²⁷⁷ However, this potential is not realized as there is not a clear connection between the Senate and state legislatures. Arguably this is the reason that 'the disposal, particularly among representatives, has been more toward being the national government statesman compared to state representatives.'²⁷⁸ Further, scholars have noted that 'in a parliament with two chambers, where the second chamber shares similarities with the lower house in terms of party composition, the latter is barely anticipated to fulfil its function as an organ of subnational unit representation'.²⁷⁹ This is true regardless of whether the second chamber has identical competence with the lower chamber. In this regard, the Nigeria senate can be hardly expected to serve as site of subnational unit representation. This is because the senate is identical with the house of representation in terms of political composition. Members may use their strong powers in the second chamber to advance the interest of political parties, which may not align with the interest of their respective subnational units' governments.²⁸⁰

3.4 Beyond institutional design

Overall, the design of the NCOP allows for the expression of provincial preferences and the protection of provincial interests. The fact that the authority of appointing representatives to the NCOP is held by provincial parliaments puts representatives in a stronger position to stand up for and promote provincial concerns. Furthermore, the Constitution requires provincial

²⁷⁵ Section 8 of the Constitution of the Federal Republic of Nigeria, 1999.

²⁷⁶ Amah Ei 'Federalism, Nigerian Federal Constitution and the Practice of Federalism: An Appraisal' (2017) 8 *Beijing Law Review* 294

²⁷⁷ Fessha Y 'Second Chamber as a site of legislative intergovernmental relations: An African federation in comparative perspectives' (2021) 31:4 *Regional & Federal Studies* 498

²⁷⁸ Osaghae EE 'Nigeria Struggling to formalize and Decentralize Intergovernmental Relations' in Poirier J , Saunders C and Kincaid J (ed) *In intergovernmental Relations in Federal Systems* (2015) 305-272

²⁷⁹ Fessha Y 'Second Chamber as a site of legislative intergovernmental relations: An African federation in comparative perspective' (2021) 31 *Regional & Federal Studies* 495-517

²⁸⁰ Fessha Y 'Second Chamber as a site of legislative intergovernmental relations: An African federation in comparative perspectives' (2021) 31:4 *Regional & Federal Studies* 495-517

legislatures to guarantee that provincial delegations to the NCOP be representative as feasible. It promotes inclusivity and the province's representation in the national platform as an integrated institution. This is strengthened by the reason that, whenever managing measures affecting provinces, each provincial delegate has only one vote that should be voted in line with the directives of the provincial parliament. The NCOP's position as a guardian of provincial concerns is enhanced even more by the reality that it is vested with significant authorities that assure provinces' successful engagement in national decision-making processes.

The composition, voting procedures, and mandating process of NCOP delegations appear to be a direct response to the common criticism that 'interaction between different levels of government is frequently portrayed as limited to politicians and administrators associated with the executive branches of the respective levels of government'.²⁸¹ Key policy choices in an arrangement of "executive Federalism" are typically decided inside governmental structures controlled by executives and civil servants.²⁸² These options are frequently not clear enough or available for public review.²⁸³ Thus, the absence of openness might cause 'collusion' between administrations who are concerned with their own personal objectives rather than addressing the issues of the voters.²⁸⁴ It seems that involving provincial legislatures in the NCOP is an effort to limit executive authority and ensure stronger legislative oversight of the procedure.²⁸⁵

Yet, there is no guarantee that NCOP delegates are going to vote in accordance with the priorities of their provinces when voting. Following partisan grounds has become prevalent. The NCOP has not been particularly effective in influencing the passage of national bills, which forms one of its most important responsibilities. There have only been a few modifications put forth by provincial legislatures to reflect provincial concerns since the NCOP was established.²⁸⁶ The NCOP's efforts to legislation were "merely limited to the rectification of

²⁸¹Fessha Y 'Second Chamber as a site of legislative intergovernmental relations: An African federation in comparative perspective' (2021) 31 *Regional & Federal Studies* 495

²⁸² Wittneben M 'The Role of the National Council of Provinces Within the Framework of Co-Operative Government in South Africa: A Legal Analysis with Special Regard to the Role of the Bundesrat in Germany' (2002) 35.2 *Verfassung und Recht in Übersee* 258

²⁸³Wittneben M 'The Role of the National Council of Provinces Within the Framework of Co-Operative Government in South Africa: A Legal Analysis with Special Regard to the Role of the Bundesrat in Germany' (2002) 35.2 *Verfassung und Recht in Übersee* 258

²⁸⁴ De Villiers 'National-provincial co-operation' (1999) 14 *SAPR/PL* 381, 405.

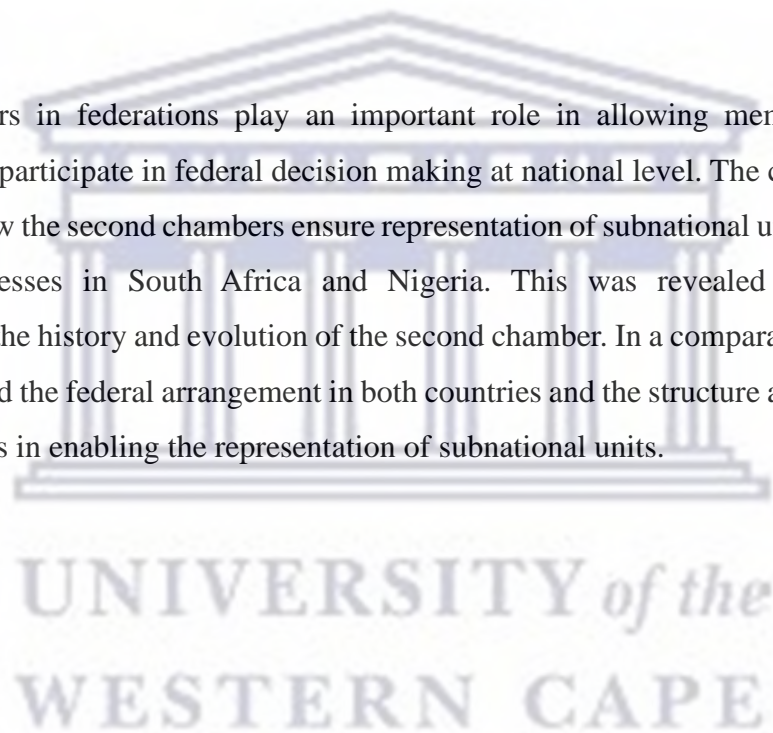
²⁸⁵ Murray C 'Constitutionalizing equality and diversity for the nation' in Maharaj G (ed) *Between unity and diversity: Essays on nation-building in post-apartheid South Africa* (1999) 283-294

²⁸⁶ Murray C 'Republic of South Africa' in Le Roy K & Saunders C (eds) *Legislative, executive and judicial governance in federal countries: Global dialogues on federalism* Vol 3(2006) 259 - 288

textual errors and a few fine-tuning."²⁸⁷ This can be largely ascribed to the political hegemony of one party in both chambers of Legislature and in nearly eight out of nine provinces. The NCOP's ability to affect national legislation is constrained because the two chambers are identical in terms of political composition. Since one party dominates, most essential choices are made under party organizations and executive intergovernmental institutions. This indicates that provincial issues are already being expressed to the respective provincial representatives in the various intergovernmental bodies even before measures are filed to be looked at by the NCOP.²⁸⁸ Under this political setting, the NCOP will find it challenging, if not unattainable, to realize the possibilities that its organizational architecture offers.

3.5 Conclusion

Second chambers in federations play an important role in allowing member units to be represented and participate in federal decision making at national level. The chapter presented and explored how the second chambers ensure representation of subnational unit in the national legislative processes in South Africa and Nigeria. This was revealed by tracing and contextualising the history and evolution of the second chamber. In a comparative analysis, the chapter discussed the federal arrangement in both countries and the structure and powers of the second chambers in enabling the representation of subnational units.



²⁸⁷Steytler N 'The Republic of South Africa' in Kincaid J and Tarr GA (eds) *Constitutional origins structure and change in federal countries, global dialogue on federalism* Vol 1 (2005)20-30

²⁸⁸ Murray C & Nijzink L *Building representative democracy: South Africa's legislatures and the Constitution* (2002) 44,45

CHAPTER FOUR: CONCLUSIONS AND LESSONS

4.1 Introduction

This thesis looked at how the powers and composition of the second chamber were established to allow for subnational unit representation in the national decision-making process in South Africa and Nigeria. It presented the second chamber's responses to the issues of subnational unit representation within the context of the federal organization. It investigated the authority and composition of the second chamber in advancing the interests of subnational units. South Africa and Nigeria was comparatively analysed in the sense that the two federal systems as they take a different approach to the problem of subnational unit representation. The thesis also examined the evolution of the second chamber in subnational unit representation. It then explored the powers and makeup of federal arrangements to establish alternative approaches utilized to enable subnational unit representation. Following the development of an example of second chamber arrangement that indicates how subnational unit representation can provide institutional reality within the context of a federal arrangement, the study went on to examine the composition and power of second chamber responses adopted by South Africa and Nigeria.

This chapter summarizes the study's main findings and highlights the power and composition of the second chamber in representing subnational unit from the studies conducted in the two countries. It does not mandate that nations facing difficulties with subnational unit representation adopt a certain second chamber structure. The goal is to ferret lessons from the experiences of the two countries, while also helping federal states that are attempting to determine how to best utilize the second chamber as a tool to represent subnational units in the federal government's decision-making process. Resultantly, the thesis concluded that the contrasting strategies that show up in the analysis of the two countries' studies point to the importance of, first, the second chamber's composition, and specifically, the process adopted to choose its members as a response to subnational unit representation in national decision-making and, second, its powers. The answer to the issues of subnational unit representation within the second chamber is ascertained by the powers and composition granted to subnational units, which are determined by the historical and political circumstances of the state creation process. In addition to subnational unit representation in the second chamber, the thesis argues that the second chamber must be designed to be formed of representatives of the subnational unit to be able to function as an institution of subnational unit representation. The main argument retains that second chamber representation of subnational units, whether formal or informal, is a vital organizational element of a state seeking to construct a representative state.

However, a federal solution that tries to address the issue of second chamber representation of subnational unit must be aware that just because the second chamber is made up of representatives of the subnational unit, that does not automatically mean that it will serve as a site of subnational unit representation.

4.2 Conclusion

4.2.1 Subnational Unit Representation

One of the main research objectives was to interrogate whether a second chamber is intended to represent subnational units in decision-making. The study concludes that there are a variety of factors that highlight the importance of subnational unit representation in national decision-making. Many federations have subnational unit administrations that act as developers of national policies and regulations. Thus, in bicameral federations, which is prevalent in most of federations, the second chamber is typically created to act as a representative for a distinct interest sector. There are several examples of states that endeavoured to represent subnational units in national decision making and established a bicameral parliament. Federal states in Africa, Europe, and Asia have a second chamber to assure subnational unit representation. In terms of the composition of the second chamber, some nations desired equal or disproportionate representation to secure collaboration for smaller sub nation units. Others sought to have a second chamber where there is over representation of smaller subnational unit. The second chamber of Nigeria developed a fundamental representation of states that was based on equality. States are represented equally in Nigeria, irrespective of their population size, as they are represented equally by three senators except for Abuja, federal capital, which is only represented by a single senator. Furthermore, the nine provinces of South Africa are represented equally in the Second Chamber.

As empirical evidence shows, the method that aims to make the second chamber a site of subnational unit representation in decision making falls short of what is required to create a second chamber that is responsible the subnational unit.²⁸⁹ It is common to assume that only the politicians and officials connected to the executive branches of the various levels of government engage in communication between them.²⁹⁰ This gave the impression that the

²⁸⁹Fessha Y 'Second Chamber as a site of legislative intergovernmental relations: An African federation in comparative perspective' (2021)31.4 *Federal and Regional Studies* 502

²⁹⁰ Fessha Y 'Second Chamber as a site of legislative intergovernmental relations: An African federation in comparative perspective' (2021)31.4 *Federal and Regional Studies* 496

establishment of the second chamber was usually intended for exchanges between members of the executive branches of the separate orders of government. With the constitutional mandate for the establishment of a second chamber, the composition, particularly the mechanism for selection, powers, and proportional representation, has always been important, with the goal of safeguarding the interests of subnational units. An outstanding question is whether Nigerian and South Africa convey the same picture of second chamber being an unlikely site of subnational unit representation.

4.2.2 Subnational Unit Representation in the Form of Federal Character

To ensure that the second chamber effectively represents the subnational unit, the study concludes that there is need to set clearly defined divisions of power between the national and subnational unit governments. The notion that the second chamber is designed to fulfil the role as the voice of the subnational unit in national decision-making is insufficient. It is also critical to put the act of second chamber subnational unit representation into practice. This thesis tries to find the pragmatic embodiment of the principle of second chamber subnational unit representation within the context of two federal government arrangements in Nigeria and South Africa.

4.2.3 Second Chamber as the Expression of Representation of Subnational Unit

The study concludes that the validity of the second chamber is an important component of the state's reaction to subnational unit representation. To properly act as a voice of subnational unit representation, the second chamber's responsibilities as specified in the constitution and other key state documents, must be acknowledged. In relation to the lack of legitimacy, establishing a second chamber appears to be more in line with a unitary representation of the state than with the principle of democracy, that seeks to recognize and represent subnational units within a larger political collaboration. It will appear as if second chambers are unable represent the interests of the subnational unit. In such instances, the second chamber would be seen primarily as an administrative organization in which only the concept of uniformity and homogeneity can ensure equitable representation of subnational units.

In the framework of a federal organization, subnational unit representation in national decision-making institutions is frequently limited to second chambers. A second chamber that is committed about securing a voice for all subnational units in the country cannot neglect the representation of subnational units at the centre. This is concerning maintaining that the subnational entity is represented fairly in the second chamber. It is essential ensuring that the

people in the second chamber represent all the members of subnational unit. In the absence of equitable representation, the second chamber may be proved ineffective in representing subnational units in national administration. The second chamber does not necessarily enable subnational representation in national decision-making. This necessitates a subnational unit purposefully developing various procedures to improve the representational capacity of the second chamber. In terms of representation in the second chamber, this frequently pertains to the election method used, the overall structure and powers of the chamber, and even other crucial executive appointments such as the appointment of senators.

4.2.4 Representation

The study concludes that the manifestation of the second chamber, as a part of the governmental reaction to the representation of subnational units, stems from the discussion of the two countries and the lessons of other federations. This component of the second chamber necessitates a determination on the side of the national government to be able to represent the subnational unit structure of the community which it intends to govern. In the constitution, states can declare that the second chamber should be a representative of the subnational unit in decision-making. South Africa's second chamber is mixed. Each provincial representation comprises six permanent members appointed by the parties in the provincial legislature, the premier of the province, and three members appointed by the premier based on the matter under consideration. Regardless of differences in population, every subnational unit has an equal voice in South Africa and Nigeria. Although direct elections to the parliament in Nigeria are held using a first-past-the-post system, the number of representatives from each subnational entity is considered in the establishment of the second chamber. The member of the second chamber who receives the most votes in each subnational entity is elected. Similarly, representatives to South Africa's second chamber must be appointed in a manner that represents the parties represented in provincial legislation proportionally.

4.2.5 Constitutional design

The constitution tends to indicate whether a state's second chamber is representative of a subnational unit in the decision making. As the experiences of South Africa and Nigeria demonstrate, the constitution considers the second chamber representation of subnational units in decision making. The constitution of South Africa provides, that the NCOP represents the provinces to ensuring that the interests of the provinces are fully taken into consideration in the national domain of government. On the other hand, the Constitution of Nigeria provides that

there shall be a national Assembly, which consist of the house representation and the senate. The constitution further stipulates that both houses represent the best interest of the people.

4.3 Lessons

An effective second chamber response to the challenges of subnational unit representation in the national decision-making process involves a three-stage approach. The first is concerned with the composition of the second chamber, which refers to the discussion over who should be represented in the second chamber. Second, the composition of second chambers is associated with the selection process, which is how members are selected to the second chamber. Third, the function of the power allocated to the second chamber by the constitution. This section outlines the most important second chamber representation of subnational unit lessons without attempting to impose a specific second chamber form.

4.3.1. Who Should be Represented in the Second Chamber?

The question of who should be represented arises as a key component of the government's reaction to the second chamber subnational unit representation, based on the discussion of the two countries and the experience of other federations. This component of the second chamber necessitates a determination on the side of the national government to be able to represent the subnational unit structure of the community which it intends to govern. In the constitution, states can declare that the second chamber should be a representative of the subnational unit in decision-making. Second chambers are often organized as representatives of subnational units. This is especially true in federations. It is significant to note that in order for the second chamber to act as a forum for subnational unit representation, it must be constructed to be formed of representatives of subnational units. As the expressions of Nigeria and South Africa demonstrate, what should be reflected through the second chamber plays a significant role in achieving successful subnational unit representation in the second chamber.

In Nigeria, the second chamber is composed of representation from each subnational unit. Each state has three senators representing it equally, regardless of how many people live in it, apart from Abuja, the federal capital, which has just one senator.²⁹¹ Largely, the constitution guarantees equal powers to all members of subnational units. The constitution also gives the

²⁹¹ Fessha Y 'Second Chamber as a site of legislative intergovernmental relations: An African federation in comparative perspective' (2021)31.4 *Federal and Regional Studies* 503

senate as much legislative freedom as it gives to the lower house.²⁹² The equally representation of state in the national decision-making process facilitate vertical and horizontally intergovernmental relations, reflects the diversity found in the country and sustain unity and equality. The very purpose of the second chamber is to participate in the legislative process, to check and balance the power of the federal government of Nigeria, and to represent the interests of the subnational unit, particularly minorities, at national decision making. Although the objective of the second chamber has always been to protect subnational unit interests and the legislative process, there was also a secondary principle that it was to be a check and balance on the federal government of Nigeria, and this was so because the senate received a direct mandate from the people.

Given this contrast in roles, subnational unit interests, national interests, or this check and balance mechanism, there has regularly been a movement in focus from local to national interests, and that this is frequently contradictory to the express intention and object of the founding provisions of the constitutions. In South Africa, on the other hand, the second chamber is made up of members from each of the nine provinces as well as local governments. Local governments are represented by the South African Local Government Association, which has ten representatives in the upper chamber who can debate legislation but cannot vote. This system allows local governments to communicate with the national legislature about their demands and issues. Subnational unit units are the primary type of representation in a national government that tries to ensure shared rule.

From the foregoing, it is evident that any study of the efficacy of the second chamber in representing the interests of subnational units ought to examine into the composition method. The approach of selection is essential to deciding whether the second chamber uses authority in favour of or against the subnational unit. In circumstances where the choice to choose representatives belongs to the national government, the representation of subnational unit has been minimal.²⁹³ However, it is as significant to delve beyond the composition system to understand what is represented.

²⁹² Osieke E 'Federal Republic of Nigeria' In Katy K and Saunders C (ed) *Legislative, Executive and Judicial Governance in Federal Countries* (2006) 198–223.

²⁹³ Fessha Y 'Bicameralism' in Grote R, Lachenmann F and Wolfrum R (eds) *Max Planck Encyclopaedia of Comparative Constitutional law* (2018) 1-14

4.3.2. The Composition of the Second Chamber in Terms of the Selection Process

Nigeria and South Africa present a number of lessons on how to transform the composition of the second chamber, particularly the selection process, into practice. In countries that aim to ensure that the second chamber properly represents the interests of the subnational unit, the selection process of members of the second chamber has arisen as a key means by which the principle of representation might be realised. The approach of selecting members of the second chamber often requires an agreement between each institution's subnational units. This specific approach of selection has an enormous effect on the representation of the second chamber, to a degree that it pertains to the structures of the subnational unity and its reliability. In Nigeria, members of the second chamber are directly chosen by inhabitants of their subnational unity. However, the fact that the 'Senate is a directly elected body implies that there is no direct link between the senate and the subnational unit'.²⁹⁴ Maybe this is the reason 'the propensity, particularly among senators, has leaned more toward being federal statesman instead of subnational unit representatives.'²⁹⁵ The Nigerian second chamber has divided each state equally, with the exception of Abuja, the Federal Capital, into three senatorial districts, with citizens of each district directly choosing a senator. When members of the second chamber are directly elected, they tend to be obligated to the citizens of the subnational that selected them. However, Nigeria uses the single-member constituency first-past-the-post electoral system. In this system, the candidate who wins the most votes in each constituency is elected to the second chamber, therefore, members of one political party might secure every seat from a specific state. In these circumstances, representatives of the second chamber serve the senatorial constituency that elected them rather than the voters of the whole subnational unit.

On the other hand, in South Africa, the second chamber's members are chosen by a procedure known as mixed selection. For example, subnational unit representatives indirectly elect sixty percent of each province delegation to the second chamber, whereas provincial executives select the other forty percent.²⁹⁶ The second chamber of South Africa's structure, in terms of representation of the subnational unit, has provided voters with an opportunity for participation in politics and representation in the institutional framework of their particular provinces. In this regard, the South African constitution provides that all parties having representatives in the

²⁹⁴ Fessha Y 'Second Chamber as a site of legislative intergovernmental relations: An African federation in comparative perspective' (2021)31.4 *Federal and Regional Studies* 495-517

²⁹⁵ Osaghae EE 2015. 'Nigeria: Struggling to Formalize and Decentralize Intergovernmental Relations' In Poirier J, Saunders C and Kincaid J (ed) *Intergovernmental Relations in Federal Systems* 272-305

²⁹⁶ Section 60, 61 of the Constitution of the Republic of South Africa, 1996

provincial parliament are entitled to proportional representation in the delegation. This provision guarantees that the delegation's composition reflects the political diversity of each province. In both countries, policies enabling for representation in the national decision-making process strengthen the selection methods of the second chamber subnational unit representation. It is clear from the foregoing that both countries implement different approaches for selecting members of the second chamber. The system applied for selecting members of the second chamber has effects on the manner in which the second chamber can be exploited to further the interests of subnational units. When evaluating countries where members of the second chamber participate in the appointment of members to those where members are directly elected, the influence of the second chamber selection process becomes clearer. These countries usually provide greater chances for voicing subnational preferences and defending subnational interests. In reality, there is no certainty that the members of such legislatures will cast votes following subnational unit authority, just as voting along partisan lines is typical.²⁹⁷ Although the certainty, is that the capacity of selecting representatives to the second chamber remains with the subnational unit itself, members are in a stronger position to protect and stand for the subnational unit. For example, in South Africa, when it comes to issues affecting provinces, each provincial delegate has only a single vote that is required to vote as per the guidance of the provincial parliament. This means, for example, that members of subnational unit governments can choose to disagree on a law or comply with subnational unit government directives.

4.3.3 The Power Allocated to the Second Chamber by the Constitution

Nigeria and South Africa demonstrate a number of lessons on how the powers delegated to the second chamber can be converted into practice in terms of representation of subnational units in the national decision-making process. The necessity of enhancing second chamber with a countervailing focus on subnational unit's representation necessitate a structure that involves the second chamber by federal arrangement, as well as integrating constitutional imperatives at the spectrum of regional government, which include a suitable election process. The efficiency of a second chamber is determined by the precise authorities assigned to the chambers by the constitution. A fundamental challenge concerning the power of the second chamber is the

²⁹⁷Fessha Y 'Bicameralism' in Grote R, Lachenmann F and Wolfrum R (eds) *Max Planck Encyclopaedia of Comparative Constitutional law* (2018) 1-14

argument over what power the second chamber should have in an effort to truly represent the subnational unity.

In Nigeria, the second chamber has co-equal powers with the lower house. This indicates that a bill will not become law provided it has been endorsed by both houses of legislature. This provides the second chamber influence in the federal legislative process. In South Africa, the NCOP does not enjoy co-equal power with the lower house. It "cannot get involved with two of the most significant legislative votes, those for the establishment and dissolution of governments."²⁹⁸ The NCOP's influence in the national legislative system is not confined to measures affecting provinces.²⁹⁹ It also considers measures that do not affect provinces, known as section 75 bills. It nevertheless holds greater authority over bills affecting provinces, often known as section 76 bills.³⁰⁰ prior to becoming law, a bill that passes through the National Assembly and impacts the provinces must be approved by the second chamber.³⁰¹ The National Assembly may approve a section 76 measure that has been denied by the NCOP only if a mediation committee comprised of equal representatives from both houses fails to produce a bill that is satisfactory to both houses and if it can win the approval of two-thirds of its constituents.³⁰² Although it is "unlikely that a party or coalition that fails to get the approval of five provinces in the NCOP might form a two-thirds majority in the National Assembly,"³⁰³ the measure expires if this does not happen. It must be noted that the NCOP also possesses the authority to introduce legislation on issues mentioned in Schedule 4 of the Constitution, though it does not frequently do so.³⁰⁴

The aforementioned suggests that South Africa's second chamber is in an ideal condition to truly represent and serve subnational concerns. In terms of design, it looks to be perfectly suited to serve as a forum for subnational representation. The NCOP has a significant influence on national legislative processes. The NCOP has significant influence on legislation that impacts

²⁹⁸ Stepan AC 'Federalism and Democracy: Beyond the US Model' *Journal of Democracy* (1996) 10.4 *Journal of Democracy* 23

²⁹⁹ Fessha Y 'Second Chamber as a site of legislative intergovernmental relations: An African federation in comparative perspective' (2021)31.4 *Federal and Regional Studies* 502

³⁰⁰ The power of the NCOP extends to constitutional amendments that affect provincial boundaries, institutions, powers and functions

³⁰¹ Styler N 'The Constitutional Court of South Africa: Reinforcing an Hourglass System of Multi-Level Government' in Aroney A & Kincaid J (eds) in *Courts In Federal Countries: Federalist or Unitarist* (2017) 328-366

³⁰² In matters that do not affect provinces, the National Assembly can override an objection from the NCOP by a simple majority. In those cases, members enjoy an independent vote and often vote along political party lines

³⁰³ Murray C 'Republic of South Africa' in Le Roy K & Saunders C (eds) *Legislative, executive and judicial governance in federal countries: Global dialogues on federalism* Vol 3(2006) 259 - 288

³⁰⁴ Section 68(b) of the Constitution of South Africa, 1996

provincial authorities and functions, but the level of influence depends on the type of bill under consideration. It is also directly linked to provincial legislatures. In addition, the same party politics that governs debate in the lower house also governs debate in the second chamber, members of this body cannot help but be influenced by 'the political over the regional component. As a result, the problems they raise and the changes they propose do not reflect subnational interests. However, in both Nigeria and South Africa, the strength of national partisanship in the second chambers may be linked to party politics and rigid party allegiance.

The examples of South Africa and Nigeria show that the second chamber, regardless of its structure or powers, does not function as a voice for subnational organizations. The operation of both countries' second chambers reveals a lack of subnational representation. The reality of both countries clearly demonstrates that the interest protected by a second chamber is the political context in which it occurs, and partisan allegiance frequently takes primacy. As a result, the second chamber is likely to evolve into a national institution addressing national concerns for national consultation, particularly in South Africa and Nigeria. This is unfortunate since it denies the South African and Nigerian federations honest and open subnational representation. For a second chamber to successfully represent the subnational unit in national decision making, it must have greater legitimacy to exercise its powers. It must also evaluate how probable, or how different, the second chamber is from the lower house's partisan composition. In this regard, the second chamber must have "distinct composition, and the reasoning behind the acceptance of bicameralism was to represent different interests, the system will be seriously damaged if the two chambers have membership distinct, but in modern party-dominated parliament the second chamber is most likely to be efficient if it has a different party balance to the first house."³⁰⁵ The exception occurs when other variables, such as strong regional ties, offer the executive limited influence over the government party participation in the upper house'.³⁰⁶ It accomplishes this by incorporating a subnational unit approach in which regions work on national laws impacting the provinces, instead of dividing the regions to debate potentially national issues inside a regional framework. It is critical for the federation's sustainability to establish a more equal method of representation or shared decision - making at the central institution among subnational units. In Nigeria, the minority states should be

³⁰⁵ Russell M 'What are second chambers are for? (2001) 54 *Parliamentary Affairs* 451

³⁰⁶ Russell M 'What are second chambers are for? (2001) 54 *Parliamentary Affairs* 452

given the opportunity to not only express their concerns and interests, but also to truly engage in and impact the decision-making process of shared powers.

A second chamber should have more tangible powers to effectively represent the interests of subnational units. Until it has powers, provinces' impression of their potential to influence national legislation will be entirely based on their regional representatives. As a result, the senate provides the opportunity to bring subnational unit together to have a more deliberate and widespread effect over national policy that concerns the provinces. More importantly, the second chamber should be principally the venue for provinces to collaborate with the National government and share the country responsibility in terms of provincial matters. The second chamber has the impact of shifting power away from contesting subnational legislators, executive powers, and who exercises power. In the national parliament, where the second chamber plays an important role, and subnational units. Aside from the types of powers that they would have, the ramifications for the Senate include how it is formed and composed. Regarding the powers of the second chamber, it must have authority over the Federation's law-making institutions, because it is the Parliament of State, National, and Peoples that serves as the foundation of the federation, the interests of these subnational units should be reflected in the national legislative process.

The composition should perhaps consider the influence it has on the interests of subnational unit with minority populations in the decision-making process on powers granted to the second chamber and should vary considerably from that of the first house in order to establish a reliable check and balance system of the federation as it allows the minority subnational units to protect their interests by countering the majority ones. For the senate to successfully represent the subnational unit, it must also maintain a closer contact with the subnational unit than the current senates in South Africa and Nigeria. For example, in Nigeria, the senate is appointed for four years and does not have an ongoing connection with the subnational unit, and it is possible that one would like to conceive of a strategy to make the senate more inclusive, rather than direct elections, have delegates come straight from state lawmakers on a continuing basis, subject to mandates. In this approach, the states cannot say anything or feel disconnected from the proceedings. As a result, there is a significant presence. The significance of this is that it alters the perception of how the Second chamber operates. Therefore, the senate becomes a site where subnational unit experts, those active in a governance and the executive in the provinces, may come to the senate wherever it may be and establish joint committees with the national legislature to determine national health issues for example and based on the specialist areas

that necessitate some determined influence by the specialists of the executives of the location where resources are really supplied to play a role in developing strategies, programs, and regulations relating with nationwide delivery of services. Finally, subnational units shall not be given lesser powers by the constitution; rather, they must be given significant authority to influence national legislation and powers to pass provincial legislation for the benefit of subnational units.

4.4 Concluding Remarks

The problems of second chamber subnational unit representation in the national government must be addressed when countries seek to prevent political turmoil and, lack of subnational unit representation in the national decision making. This is primarily because the basis of the second chamber subnational unit representation, to some degree, lies in constitutional design of the country, which provides the powers and composition of the second chamber. The thesis argues that the second chamber, as an institutional design underpinned by the concept that allows for the expression of subnational unit preferences and the protection of subnational unit, is a proper institutional response that can assist countries in dealing with the second chamber subnational unit representation in the national decision-making processes. The effectiveness of the second chamber in achieving subnational unit representation is dependent, among other factors, on the specific character of the second chamber design and its ability to appropriately respond to the subnational unit representation of the countries in question. As stated before, a second chamber in a federal system can function as a forum for subnational unit representation. One key implication of this perspective is that not all second chambers are forums for subnational unit representation. A second chamber's ability to successfully represent a subnational unit is dependent on the powers granted to it by the constitution and its composition. The right approach to the issues of second chamber subnational unit representation is dependent on a successful analysis of the root causes of inadequate second chamber subnational unit representation in decision making process. An important lesson arising from this thesis is that a good constitutional design does not necessarily guarantee that the second chamber will be a representative of subnational unit in the national decision making. The mere fact that the second chamber has more authority for laws affecting the provinces does not convert it into a forum for subnational unit representation. The way members of the second chamber use their authority may be determined by other political objectives. Legislators can use their significant powers in the second chamber to advance their political parties' agendas

and preferences, which may or may not be aligned with the objectives of their respective subnational unit governments.³⁰⁷



³⁰⁷ Fessha Y 'Second Chamber as a site of legislative intergovernmental relations: An African federation in comparative perspective' (2021)31.4 *Federal and Regional Studies* 501

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