

Legislative – Executive Relations in the Ethiopian Parliamentary System: Towards Institutional and Legal Reform

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DRAFT

"If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary." (James Madison, *The Federalist Papers* No. 51).

Former member of parliament noted ‘until recently (2008/9) the House of Peoples’ Representatives (HoPR) did not even exercise the right to approve its own budget. Its budget was decided by the executive.’¹

Following the death of former Prime Minister (PM) Meles Zenawi, a high level meeting among key political figures was held in the PM’s Office in October 2012. A senior member of the ruling party H. E. Ato Abay Tsehaye spoke publicly about the government’s failure to build democratic institutions such as parliament. He remarked, ‘Parliament’s program on Ethiopian Television is the least attractive.’ The parliament is also largely perceived as subordinate to the strong executive. Yet following the death of former PM Meles Zenawi, parliament did challenge the executive in the first half of 2013 term. It is not clear what this means and whether this will lead to institutional reforms or whether it is the result of shift of political gravity back to where it belongs: the parliament but it does bring some ‘food for thought.’

This article shades light on the legislative executive relations in Ethiopia and looks for factors that contributed to the perceived subjugation of an apparently supreme parliament to the executive. It then suggests some vital institutional and legal reforms that need to be taken to restore the balance in favour of parliament. In doing so, the article goes beyond the obvious conclusion that the reality in Ethiopia is, not parliamentary supremacy but cabinet dictatorship which in itself is a product of party dictatorship. The key finding is that it is difficult to explain the nature of legislative executive relations in Ethiopia without highlighting the nature of intra party politics and its impact on democratic institutions such as parliament. The article mainly focuses on the current legislative-executive relations in Ethiopia (1995-2013). Some comparative insights are drawn from some selected parliamentary systems to explain gaps and controversies to specific issues under discussion. Constitutional principles, policies issued by the government, laws, internal regulations of the House of Peoples’ Representatives (HoPR) and trends observed in the parliamentary practice are some of the useful resources employed in analysing the article.

Background

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¹ Former member of parliament, conversations with the author, Addis Ababa April 2009.

Ethiopia formally established a parliamentary system in the 1931 constitution², later revised in 1955, with the Emperor Haile Selassie (1930-1974) remaining sovereign. While the bulk of the provisions of both constitutions reiterated more on the uncontested power of the Emperor, both constitutions provided for a bicameral House: the Chamber of Deputies and the Senate. These two houses were important instruments for curbing the power of the nobility.³ Close scrutiny over the provisions and the practice revealed that both houses were merely meant to play a strictly *advisory* role.⁴ According to Article 31 of the 1931 constitution, members of the Senate were appointed by the emperor from among the nobility and the local chiefs. As for the chamber of Deputies, they were chosen by the nobility and the local chiefs. The presence of the nobility while providing some semblance of legitimacy at the center, became part of a toothless legislative body and in a way remained the instrument of the centralizing and modernizing process launched by the regime.⁵

The Revised Constitution of 1955 continued to reinforce further the powers of the Emperor. The sketchy provisions regarding the powers and prerogatives of the Emperor were extensively elaborated in the new Constitution. In theory, the Constitution was the supreme law of the land governing even the Emperor. It contemplated even an independent ministerial government responsible to the monarch and parliament, an elected chamber and independent judiciary but these liberal provisions were overshadowed by executive prerogatives reserved to the Emperor who exercised them expansively.⁶ Despite the apparent inclusion of the notion of separation of powers, little change was introduced regarding the position of the Emperor. He was both the head of state and of the government and he continued to oversee the judiciary through his *Zufan Chilot* (Crown Court).

A basic development in the revised Constitution compared to its predecessor was the introduction of the representative principle for the chamber of Deputies whose members were elected on the basis of universal adult suffrage.⁷ But parliament was granted no control over the ministers, who remained responsible to the Emperor.⁸ The Emperor retained direct control

² Pre 1991 parliamentary practice in Ethiopia has been subject of discussion in many publications. See for example Kassahun Berhanu, 'Parliament and Dominant Party System' in Mohamed Salih, ed. *African Parliaments: Between Governance and Government* (New York: Palgrave Macmillan, 2005); John Markakis, *Ethiopia: Anatomy of Traditional Polity* (Oxford: Clarendon Press, 1974); Christopher Clapham, 'Constitutions and Governance in Ethiopian Political History,' in *Constitutionalism: Reflections and Recommendations, Symposium on the Making of the New Ethiopian Constitution* (Addis Ababa: Inter Africa Group, 1993).

³ See Articles 6-17.

⁴ See Articles 36 and 46 for instance. Apparently Article 34 stipulates that a law comes into effect after both houses deliberate and with the confirmation of the emperor but, Article 9 specifically grants the emperor wide powers of law-making.

⁵ See Markakis, *Anatomy of Traditional polity*, *supra* at 273; Christopher Clapham, 'Political Framework: Controlling Space in Ethiopia,' in Wendy James, Donald Donham, Eisei Kurimoto, Alessandro Triulzi eds., *Remapping Ethiopia: Socialism and After* (Oxford: James Currey, 2002) p. 13.

⁶ James C.N. Paul, 'Ethnicity and the New Constitutional Order of Ethiopia and Eritrea' in Yash Ghai ed., *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-ethnic States* (Cambridge University Press, 2000) p. 183.

⁷ See Articles 93, 94, 101; The Senate remained an appointed chamber reserved for the nobility and high officials.

⁸ Markakis, *Anatomy of Traditional Polity*, *supra* p. 278.

over the executive, with the power to appoint ministers and regulate the whole of the executive branch. As indicated later, one of the key principles of parliamentary system is that the executive is appointed, supported and if need be removed in parliament. While one of the two chambers of parliament was popularly elected, it was balanced by the Senate, which was appointed by the Emperor.⁹ There was a parliament but those who were eligible to be candidates were the nobility and wealthy landlords who were opposed even to modest land reform and by so doing they were the ones that created a favorable condition ('land to the tiller') for the 1974 Revolution inevitable.¹⁰ A law approved by both houses could not override the position of the Emperor.¹¹

In 1966 the recommendation to make the Prime Minister become the effective head of the executive with the power to appoint his cabinet, leaving the Emperor in a largely ceremonial role was partly implemented when the Prime Minister became formally responsible for selecting other ministers.¹² Yet later developments indicated that it was a far too premature gesture to be taken seriously. The same dilemma was to be repeated in 1974 when the Revolution was about to erupt through an effort to institutionalize constitutional Monarchy.¹³

The 1974 popular Revolution brought about the end of the Monarchy. The Derg (committee 1974-1991)), through a proclamation that deposed the Emperor transformed itself into the Provisional Military Administrative Council (PMAC), which assumed full state power.¹⁴ Simultaneously it suspended the Constitution, dissolved parliament, banned all strikes and demonstrations and declared *Ethiopia Tikdem* (Ethiopia First) with its socialist doctrine.¹⁵

⁹ Clapham, *Constitutions and Governance*, *supra* p. 35.

¹⁰ Menghistu Fisseha-Tsion, 'Highlights of the Constitution of the Peoples' Democratic Republic of Ethiopia: A Critical Review of the Main Issues,' *Review of Socialist Law*, 14: 2 (1988) p. 129.

¹¹ See Article 88.

¹² The reinstatement of the ministerial government was one of the first things to which the Emperor turned his attention after the liberation. In 1943 two imperial orders set up eleven ministries and the office of the Prime Minister. Although the ministries were empowered to draft their own law and to appoint junior officials, their subservience to the imperial prerogative was spelt out in clear terms. An order in 1966 empowered the Prime Minister to select his ministers but final decisions on policy matters as well as the appointment of all ministers including the Prime Minister remained the Emperor's preserve. The Prime Minister was simply a channel between parliament and the Emperor; Bahru Zewdie, *A History of Modern Ethiopia 1855-1974*, 2nd edn., (Athens, Ohio: Ohio University Press 2001) p. 203.

¹³ The 1974 draft Constitution was aimed at introducing a constitutional monarch of the same intent. What parliament lacked of course was any kind of political party structure, so it could not effectively become a mechanism for representing popular interests in the government of a highly centralized state.

¹⁴ The PMAC was established by Proclamation number 1 of 1974 *Negarit Gazetta* 34, 12 September 1974. It decreed it is hereby prohibited for the duration of the proclamation to conspire against the motto *Ethiopia Tikdem* (Ethiopia first) to engage in any strike, hold unauthorized demonstration or assembly or engage in any act that may disturb the public peace and security.

¹⁵ Bahru 2001, *supra* p. 236.

Following years of consolidating power and rule by decree, the Derg took steps to promulgate a new constitution and the proclamation of the Republic.¹⁶ The process of establishing a vanguard and single party culminated with the set-up of the (Workers Party of Ethiopia) WPE in September 1984 with its chairman Mengistu. The draft constitution was completed in 1986 and was formally submitted to public debate and ratified by a referendum in February 1987. In an election in which a single party, WPE members, participated members of the National *Shengo* (parliament) were elected. While formally the *Shengo* constituted the highest legislative body, in practice, the *Shengo* was not to be sitting continuously but only once a year for a set period.¹⁷ The role of the *Shengo* was undertaken by the State Council. It was the visible administrative organ of state power with the highest responsibility for undertaking the day-to-day state functions. It was also the permanent executive, legislative and administrative organ of the National *Shengo*.¹⁸ Thereby the National *Shengo*'s role was reduced in a rubber-stamping body of the WPE.¹⁹

Following the fall of the Military Junta in May 1991 by the Ethiopian Revolutionary Democratic Front (EPRDF), a national conference convened in Addis Ababa from July 1-5, 1991. The Conference resulted in the signing of the Charter by the representatives of some 31 political parties,²⁰ the creation of an 87 seat Council of Representatives and the establishment of Transitional Government of Ethiopia (TGE).²¹ The Conference also agreed on the modalities of the transition process to last two years. In the mean time, elections for local regional government were to be held, a new constitution was to be drafted, general elections for electing members of the constitutional assembly that ratifies the constitution were to be held and finally the election of the new national assembly was scheduled, thereby ending the Transition.²²

¹⁶ See Proclamation of the Constitution of the People's Democratic Republic of Ethiopia, Proclamation No. 1 1/1987 *Negarit Gazeta* 47th Year No Addis Ababa, 12 September 1987.

¹⁷ See Article 67.

¹⁸ See Articles 81-83.

¹⁹ For an elaborate commentary of the PDRE Constitution see Menghistu Fissehatsion, *supra* p.70.

²⁰ Not surprisingly the event was largely dominated by leaders of 'national liberation movements' in which EPRDF and the OLF constituted its core. For more on the contending views about the TGE see Addis Alem Balema, *Economic Development and Democracy in Ethiopia*, (Rotterdam: Erasmus University, 2003) p. 117; Merera Gudina, Ethiopia: *Competing Ethnic Nationalism and the Quest for Democracy, 1960-2000* (Shaker Publishing: PhD thesis, 2003) p.87; Edmond Keller, 'Regime Change and Ethno-Regionalism in Ethiopia: The Case of the Oromo' in Assafa J. ed., *Oromo Nationalism and the Ethiopian Discourse: The Search for Freedom and Democracy* (Lawrenceville, NJ: The Red Sea Press Inc. 1998) p. 113.

²¹ TPLF, OPDO, EPDM, three main members of EPRDF, each secured 10 seats and two seats were reserved to another member of EPRDF mainly constituting former officers and was later dissolved. In total EPRDF secured 32 seats. The OLF secured 12 seats. Other ethnically based parties by and large were granted seats ranging from 1 to 3. Radical leftist groups that mainly constituted the COEDF were left out, including the former regime, WPE.

²² See Articles 10, 11 and 12 of the Transitional Period Charter of Ethiopia No. 1 *Negarit Gazeta* 50th year No. 1 Addis Ababa, 22 July 1991, hereinafter called the Charter. The conference presented with a draft paper outlining the principles of co-operation between the TGE and provisional government of Eritrea, which among others recognized the

The outcome of the conference was the adoption of an interim arrangement, otherwise known as the Charter for the TGE. Key institutions envisaged by the Charter were established and towards its end a Constitutional Assembly was elected to adopt a new constitution. In December 1994, the Assembly adopted the new constitution that came into force in August 1995. The Charter was an anomalous document when it comes to the type of government it established but seems closer to a presidential than a parliamentary system.

From the forging discussion, there are important remarks that remain relevant for understanding Ethiopia's constitutional development. In span of six decades (1931-1995), Ethiopia has seen some five 'constitutions,' each constitution on average serving only for a decade with little or no continuity between them (in the sense of positive constitutional and institutional development) and hence a high degree of constitutional instability obviously an outcome of the political instability that reigned for the most part of the 20th century. One can state safely that the 1931, 1955 and 1987 constitutions were imposed rather than outcomes resulting from due considerations of historical, economic, cultural and social realities of the Ethiopia. If Constitutions are meant to be laws in which the various aspirations and values of the public in general are expressed, powers of public institutions defined and at the same time limited, that is, as covenants between the governor and the governed, a democratic expression of the will of the people, then, the constitutions failed to meet these requirements. The constitutions did not succeed in limiting the powers of the leaders. The making of the 1987 constitution marked a new phase as there was an effort to engage the public at grass root level but because of the regime's nature (a military junta) whatever was promised in the constitution never realized in practice and thus remained merely on paper. The short span (only four years) and the civil war as well overshadowed its importance. Another essential point related to the Ethiopian context is that there is a widely held view that considers constitutions merely as *instruments* for promoting the political will of the victorious ones/ruling elites of the time and not of the people *per se* and hence are viewed as instruments of submission, hence the saying "*Negus Aykese Semay Aytare*". They are not results of negotiated outcomes or of a publicly held consensus. We should note that all past constitutions were done away with unconstitutionally and no section of society ever tried to restore them. Thus we have the dilemma of having a constitution but failing to respect/enforce it. These very challenges continue to haunt Ethiopia today. As illustrated in this article, the dilemma whether to build institutions that reign over leaders and party or whether leaders and/or party prevails over constitutionally established institutions still hangs in the air. Indeed this article clearly highlights such a dilemma in concrete terms.

Historical and Constitutional Basis of Parliamentary Sovereignty

'Many forms of government have been tried, and will be tried in this world of sin and woe. No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of government except all those other forms that have been tried from time to time.'²³ It is easy to criticise democracy but with

importance of the free port of Assab and deferred the declaration of the right of the Eritrean people to be determined by a referendum.

²³ Sir Winston Churchill's speech, 1947, quoted in Mary Anne Griffith Traversy, *Democracy, Parliament and Electoral Systems* (London: Pluto Press, 2002) p.2

all its limitations, it continues to be a better system of governance that human genius discovered so far.

Parliamentary systems owe their origin to their founding principle, namely that parliament is sovereign.²⁴ Parliamentary systems²⁵ evolved in Europe,²⁶ particularly in the United Kingdom (UK). As articulated by Dicey, a law enacted by parliament is sovereign and parliament can make and unmake any law whatever.²⁷ No individual or institution is allowed to set aside the act of parliament. This rather peculiar characteristic of parliament has important antecedents that are often less noticed. We know from history that the Monarch was absolute ruler particularly before 1688. There were some vital efforts to limit the power of the Monarch, for example, the signing of *Magna Carta* in 1215 or the Bill of Rights in 1688. Yet these efforts did not succeed in limiting the Monarch's power effectively.²⁸

The evolution of the concept of parliamentary supremacy over the absolute Monarch was certainly a slow process and took nearly three centuries of struggle and negotiation between the Monarch the parliament. The 1688 Revolution was first land mark in putting a limit to the Monarch but even then the cabinet albeit it required securing a majority support in parliament remained King's prerogative until it shifted in favour of parliament in 1832.²⁹ William Orange had to enter a deal with the aristocracy and the nobility to respect the parliament as an institution and to sign the Bill of Rights in order to inherit the Crown.³⁰

More crucial was the slow evolution of accountability of ministers to parliament towards the end of 18th century and the extension of voting rights to a wider size of population. This was followed by the adoption of universal suffrage that gave the parliament a more democratic legitimacy over the Monarch. The consequence of this slow evolution is that the locus of power shifted from an absolute Monarch to a sovereign parliament. In other words, 'parliament inherited the King's (omnipotent) position.'³¹ What needs to be noted here is that it is the occupation of seats in parliament through election that succeeded to limit the power

²⁴ Giovanni Sartori, *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes*, (New York, New York University Press, 1997) p.101

²⁵ About a third of the world's population live under parliamentary systems. Kaare Storm, Wolfgang Muller, and Torbjorn Bergman, 'Parliamentary Democracy: Promises and Problems' in Kaare Storm, Wolfgang Muller, and Torbjorn Bergman eds. *Delegation and Accountability in Parliamentary Democracies*, (Oxford, Oxford University Press, 2003) p.4; There are of course variations among parliamentary systems: for example, we have the Westminster type, often called one party cabinet in which the executive forcefully prevails over parliament; German type where there is a balanced relations between the legislature and the executive and more weak or fragile parliamentary systems based on coalition governments with little party cohesion. See for details, Sartori, *supra* p.101

²⁶ Europe being the heartland of parliamentary systems, such parliaments trace their roots to medieval times. They began as assemblies of aristocrats convened by the king when their support is needed to levy tax or wage war. As Monarch's declined parliament evolved. Patricia Hoogwoods and Geoffrey Roberts, *European Politics Today*, 2nd edn. (Manchester: Manchester University Press, 2003) p. 155.

²⁷ The famous adage in this respect is that there is nothing that the British parliament cannot do except make a woman a man, and a man a woman. This is De Lolme's popular expression quoted in A. V. Dice, *An Introduction to the Study of the Constitution* Tenth edn. (New Delhi: Universal Law Publishing, 2008) p.43.

²⁸ See for details Tim Koopmans, *Courts and Political Institutions: A Comparative View* (Cambridge: Cambridge University press, 2003) pp 15-19; Adam Przeworski, *Democracy and the Limits of Self Government*, (Cambridge: Cambridge University Press, 2010) pp.59-60

²⁹ Kaare Storm, Wolfgang Muller, and Torbjorn Bergman, *supra* pp.6-7.

³⁰ Koopmans, *supra*, p.19

³¹ Koopmans *supra* p.19.

of the Monarch. Democracy understood today is mainly, but not exclusively, manifested through elected legislative body: the parliament. At the heart of democracy is the recognition of the central role of legislature. As former Chief Justice of the Israeli Supreme Court Aharon Barak stated ‘undermining the legislature undermines democracy.’³²

Parliamentary system of government established this way, was then, adapted and applied to other countries with some adjustments. The key new development in this respect is the fact that other countries including Ethiopia have adopted parliamentary sovereignty subject to the supremacy of the constitution (Article 9).³³ Otherwise the declaration of parliament as ‘the *highest authority* of the Federal Government’³⁴ is related to the democratic principle and to this historic development. A parliament as a reflection of the ‘will of the people’ expressed through regular and competitive elections,³⁵ has the highest democratic credentials, compared to executive that gains its legitimacy (indirectly) from the parliament. As illustrated later in this article, the executive comes from and is accountable to parliament. In this respect parliament legitimises the executive and hence is a key institution of governance. As a key public institution, divergent opinions of the people are represented in it and remain the prime source of laws.

Government Accountability to Parliament

‘Instead of the function of governing for which it is radically unfit, the proper office of a representative assembly is to watch and control the government: to throw the light of publicity on its acts, to compel a full exposition and justification of all of them which any one considers questionable; to censure them if found condemnable, and if the men who compose the government abuse their trust... to expel them from office and either expressly or virtually appoint their successors.’³⁶

Explaining the legislative - executive relations within the context of a parliament that is supreme leads us to the second core feature of parliamentary democracies. That is the executive *derives* from and is constitutionally *accountable* to the parliament.³⁷ This is a consequence of the fact that parliamentary systems are based on fusion of power between the legislature and the executive in which the latter is accountable to the former. In other words, the cabinet including its chief, the Prime Minister (PM) is *appointed, supported* and if need

³² See His most influential book entitled *The Judge in a Democracy*, (Princeton, Princeton University Press, 2006) p.226

³³ Other limitations include the introduction of constitutional courts as distinct institutions that check the compatibility of an Act of Parliament with the constitution and the notion of human rights as constitutional entrenchments that the law maker must abide by.

³⁴ Art 50(3), emphasis by the author.

³⁵ See Art 54 (1) that provides that members of the HoPR are elected by the people for a term of five years on the basis of universal suffrage and by direct, free and fair elections held by secret ballot.

³⁶ Mill quoted in Kaare Storm, Wolfgang Muller, and Torbjorn Bergman *supra* p.20

³⁷ In its extreme form it is stipulated ‘parliament makes and breaks the government.’ Daniela Giannetti and Kenneth Benoit eds., *Intra Party Politics and Coalition Governments*, (London: Routledge Taylor and Francis group, 2009) p.10; for details on parliamentary systems see Kaare Storm, Wolfgang Muller, and Torbjorn Bergman *supra* pp.9-10; The rules for cabinet formation vary across parliamentary systems. In some countries the parliament delegates the Prime Minister to select the cabinet where as in others, parliament selects the cabinet as a whole. Yet it is very rare for the PM not to be selected internally among the member of parliaments. *Ibid* p.80; parliaments may also have power of investiture as in Germany for example that cabinets are essentially inaugurated after they have won an investiture vote in parliament. That is parliament requires a cabinet win a majority vote in parliament before or immediately after it takes office. *Ibid* P.149. In Ethiopia, in the first two terms (1995 and 2000) Parliament did make a modest deliberation but in 2005 and 2010 the party simply declared its PM to parliament.

be removed from power by parliament.³⁸ Once appointed to power through parliament, the government must secure a functioning majority in parliament in order to continue in power.³⁹ In other words, the durability of government and its operation is dependant on the continuous support its gets in parliament. Parliamentary majority can force the government to resign.⁴⁰ Executive accountability⁴¹ is ensured through various mechanisms but the vote of confidence

³⁸ Sartori, *supra* p.101, italics by the author; never the less the above scenario may have been adapted to the needs of the 21st century parliament. The notion of executive accountability predates the modern parliamentary system. It was put in place when the role of government was limited. In the UK the reform act of 1832 enlarged the electorate by 50 percent. The House of Commons was liberated from Crown influence and with political parties in an embryonic stage the House entered into more than three decades of making and unmaking of government. Parliament was free from Crown influence exercising full supervision over government affairs, revising, amending or reject draft bills not yet constrained by strict party discipline. Mathew Flinders, 'Shifting the Balance? Parliament, the Executive and the British Constitution,' *Political Studies* (2002) v. 50 p 24. The mid 19th century can be seen as zenith of parliamentary control over executive.

³⁹ Some authors tend to present this scenario as a matter of mutual dependence between parliament and executive resulting from the fusion of power between the two institutions and not as a consequence of parliamentary supremacy. The explanation goes, threat of government dissolution and early elections induce party discipline. In order to remain in government, political parties enforce discipline so that their MP members can be counted on to support the bills proposed by government. Individual MPs in parliament in turn have an incentive to support the government in order to prevent the occurrence of early elections in which they might lose their seats. See Cheibub, *supra* p. 118. So long as a convergence of interest exists among the party, government and MP's, this mutual cooperation and dependence may work but in politics, constituency demands and conflict of interest often demand MP's to exert more pressure on the government which in the end may force government to be ousted. Sartori (p.117) thus states, the fact that parliament is sovereign rules out a reciprocal dependence between parliament and the executive.

⁴⁰ Government accountability to parliament implies that parliament can demand information from executive and as well can impose sanctions: it can veto, block, or amend decision of the executive or it can de-authorise the executive, that is, remove from office or limit its authority; or even impose specific penalty or exercise oversight, monitoring and reporting requirements. See Kaare Storm, Wolfgang Muller, and Torbjorn Bergman, *supra* p.62; yet this is not a straight forward view. In the UK, for example, there are two perspectives on ministerial responsibility. The Whig view which stressed the need for political control to be paramount and for the government to be held accountable for its acts, the House in control of the executive and if need be force them from office. The Peelite view, on the other hand defines ministerial responsibility as a way of limiting democratic control to ensure strong, coherent and stable government. It supports strong government and government's power outstrips parliamentary control of executive. There is emphasis on insulation of ministers and conceives of MP's as loyal parliamentary majority. For details see Flinders, *supra* p. 26. In Ethiopia the widely held perception so far is that parliament is a rubber stamp institution. A combination of factors seem to be at play here: Party discipline; assigning key party and political figures to top executive positions in Ethiopia hints that ours is by design more in line with Peelite view. This state of fact does not seem to change unless Ethiopia introduces Proportional Electoral System which also brings a new set of challenges of how to work in a fragile parliament composed of various parties that is more representative but not necessarily stable.

⁴¹ Very much related to this point is the collegial responsibility of the cabinet to parliament but this is applied differently across parliamentary systems. In the UK, for example, the PM is first above un-equals and cabinet members are more often accountable to the PM and less to the parliament. In other parliamentary systems such as Germany with first among un-equals and the Scandinavian systems where PM is first among equals the collegial responsibility becomes more visible. See Cheibub *supra* p. 34.

or constructive vote of no confidence⁴² in which a parliamentary majority may remove government out office is the prominent one.⁴³

However not all parliamentary systems are the same. Relevant in this regard is the difference one finds between the UK⁴⁴ and Germany. In the former, the leader of the party that has won a majority in parliament automatically becomes the PM and often results in a one party cabinet, though not necessarily one party parliament, a matter that crucially differentiates the HoPR in Ethiopia from the Parliament in the UK.⁴⁵ In Germany, the chancellor is what Sartori calls ‘first among un equals’⁴⁶ that is he is *elected* in parliament to be a chancellor and is often not the party leader.⁴⁷ Any MP with a majority support in parliament has the chance to become PM but once elected the PM heads the cabinet and is responsible for designing the government’s policy and hence stands above his ministers. Yet we should note that German parliament often is run by a coalition of parties and parliament has an active role in the process. This also implies that the Chancellor’s power to establish his government (albeit subject to parliamentary approval) is also limited. The coalition parties decide on their own which ministers to nominate for the position allocated to them.⁴⁸ This paves for a more balanced relationship between the legislature and the executive.

The idea that the executive comes from and remains accountable to parliament is expressly provided in the Ethiopian constitution. As far as the establishment of the government is concerned, it is stipulated ‘The Prime Minister shall be *elected (emphasis added)* from among members of the House of Peoples’ Representatives (HoPR).’⁴⁹ Under Article 74 it is stated,

⁴² What causes the initiation of vote of confidence is less clear. In the UK, if the government says in advance that it is treating a particular vote as a matter of confidence, it is an indication that if defeated it intends to resign. Opposition can also formulate a motion of censure and carry it and though not always conclusive may lead to resignation. Defeat at committee level in parliament is not often a cause as parliament may reverse it in plenary, but a defeat on second reading may cause resignation. In terms of procedure, it can happen either through an ordinary vote of confidence as in UK or through constructive vote of no confidence where parliament not only agrees and votes to remove government but must also agree on the PM’s next successor. See Kaare Storm, Wolfgang Muller, and Torbjorn Bergman *supra* pp. 13-19 for details. In Germany, to avoid an easy procedure of dissolution of government, parliamentary opposition cannot throw out the cabinet simply because it does not like what it is doing. Instead the opposition must affirmatively select a new government before the old PM can be ousted. See Art 67 of the Basic Law also Bruce Ackerman, ‘The New Separation of Powers,’ *Harvard Law Review* v.113 No. 3 (2000) pp.654-655; a motion of censure can also be initiated by the opposition. In Ethiopia, Arts 93 and 94 of Regulation No. 3/2006 require the approval of the Business Advisory Committee and the support of one third of the MP’s to initiate a motion of no confidence. See also Art 6/94 of the same regulation. In Germany for no confidence to be raised in parliament only 10 of members have to support the motion.

⁴³For details on other mechanisms of control see Yves Meny and Andrew Knapp, *Governments and Politics in Western Europe*, 3rd edn., (Oxford: Oxford University Press, 1998) pp. 208 ff.

⁴⁴ In the UK there is this view that contrary to constitutional theory the supremacy of parliament over the executive is thwarted by the latter’s tight party discipline and procedural control of the House’s time table. Over 95 percent of the bills proposed by the executive are adopted and 82 percent of all laws are initiated by the government. See Yves Meny and Andrew Knapp, *supra* p.189; Flinders, *supra* pp.30-31.

⁴⁵ In a few exceptional circumstances such as the post - Tony Blair era government may be a coalition but these are exceptions than the rule.

⁴⁶ Sartori, *supra* p.102; In the UK the PM is ‘first above un equals’ that is parliament has little or no role in his appointment and he is the one who selects his ministers (though with parliamentary approval) and he can hire and fire them with little control from parliament. His powers are more or less comparable with the President in the US.

⁴⁷ Sartori, *supra* p.105

⁴⁸ Stefan Oeter, ‘Republic of Germany,’ in Katy Le Roy and Cheryl Saubders eds., *Legislative, Executive and Judicial Governance in Federal Countries* v.3 p.146.

⁴⁹ See Arts 73/1 of the constitution and Art 95(2) of Regulation No. 3/2006 that reinforce parliament’s mandate to elect the PM. Nevertheless Art 97 (2) of the Regulation hints that the party or coalition of parties that has a majority in the House

the PM is required to submit nominees for ministerial posts to the HoPR for approval. While stating the power of the HoPR, it is stated ‘It (HoPR) shall approve the appointment of ... members of the Council of Ministers, Commissioners...’⁵⁰ Furthermore the constitution unequivocally states the PM and the Council of Ministers are accountable to the HoPR. Yet as illustrated later in this paper the accountability of the executive to the legislature is far from achieved, indeed a reverse accountability seems to be in place.

The concept of accountability of the government to parliament as already hinted may take various complex forms but the confidence vote is vital one. In the Ethiopian constitution, it is stated ‘It (HoPR) has the power to call and question the PM and other federal officials and to investigate the executive’s conduct and discharge of its responsibilities.’⁵¹ The constitution further states ‘It (HoPR) shall at the request of one third of its members, discuss any matter pertaining to the powers of the executive. It has in such cases, the power to take decisions or measures it deems necessary.’⁵² Consistent with parliamentary systems, the constitution thus ensures the supremacy of parliament over the executive. Yet it is not clear as to how ministers who failed to discharge their responsibility are removed. While the appointment of Ministers is subject to parliamentary approval, it is not clear as to who has the final say when it comes to their removal. The leading precedent we have in relation to this is the Tamirat Layne case. Prime Minister Meles Zenawi while reporting to Parliament after dismissing Tamirat (his deputy) expressly stated that he is reporting to the House to get informed of the decision he took and not because this is a mandate of the House. He did hint that this is an exclusive domain of the PM.⁵³ Parliamentary systems may however also require the participation of the HoPR. This is not undisputed power of the PM. The House if it wants can demand explanations and take back the power. It is inherent to parliamentary systems that the executive remains accountable to the House be it on individual or collective level and a House dissatisfied by the performance of the executive can take whatever measures it deems necessary.

At a constitutional level, the fact that the ‘PM is first among un equals’ indicates that the PM in Ethiopia is comparable to the German counterpart than to the Westminster type. The constitution dictates that the PM must be *elected* from among the members of the House. This implies that he is not necessarily the party leader as two or more candidates can be nominated for the position and HoPR can select one. But when we look at the practice, during the first two terms (1995-2000 and 2000-2005) parliament has voted on PM’s appointment albeit there was only one nominee for the position. In the later two terms (2005-2010 and 2010-2012), the party simply declared its decision to the House who the PM is going to be and the parliament did endorse it without voting on it. The appointment of PM Haile Mariam Desalegn as the new PM in September 2012, following the death of the former PM Meles

shall be given the privilege to introduce the candidate PM to the House through the Speaker hinting that the decision of such party does not as such need approval of the House which has problems with Art 73 (1) of the constitution. But once elected the PM enjoys wide powers that undoubtedly places him above his ministers. See Art 74.

⁵⁰ 55 (13).

⁵¹ 55 (17) of Regulation No. 3/2006. Art 4 1 b even goes further in stating that Parliament has the mandate to control government bodies which is more powerful/stronger expression than the softer and often used expression oversight.

⁵² 55 (18).

⁵³ When former PM Meles Zenawi brought the case to the then parliament, he stated clearly that by doing so he wanted to inform parliament that removing ministers is his own domain, parliament is just there to be informed.

Zenawi in August 2012, however seemed to reinstitute the former practice. Parliament was requested to approve the nomination of the only candidate from the party. The former practice indicated EPRDF's (or its leader's) intention to shift away from the German practice to the Westminster type. This is one indicator of party autocracy over an apparently supreme parliament that goes clearly against the letter and spirit of the constitution. This may appear a trivial issue but it is not. It is possible that owing to internal differences within the party, two or more nominees could come to the HoPR. That is where the role of the HoPR becomes vital. It is possible that rivals for the PM's position can emerge in the House even from the same party and then the House may have to make a critical decision in favour of either candidate for the top position.

The above illustration hints that if we were to view the legislative executive relations in a triangle, the legislature takes top level, the executive and the judiciary will take the two bottom corners of the triangle. The executive remains accountable to the legislature which retains the formal power to remove the executive from office. However in the Westminster style of parliament, the dual role of PM as head of the executive branch and concurrently, leader of the majority party in the legislature gives the executive in practice much more leverage than is the case in Germany.⁵⁴ Despite this vital divergence, the executive's accountability to parliament and the latter's supremacy over the former remains cardinal feature of parliamentary systems.⁵⁵

Yet, it appears that there are some important factors that help us grasp the operation of parliamentary systems in general and the Ethiopian HoPR in particular. In some cases these very variables could even lead (as is the case in Ethiopia), to supremacy of the executive over parliament. Three interrelated factors are crucial in this respect: the nature of the party and party's internal rule, overlap of functions between key party leadership and the executive and the widespread practice of delegated legislation with little or no political control. The following sections elaborate these variables in the context of the Ethiopian parliamentary system.

1. Parliamentary Fit Party and Internal Party Rule

A paradox to the notion of parliamentary supremacy and executive accountability to parliament however remains. An effective parliamentary system depends on what Giovanni Sartori calls 'parliamentary fit parties.'⁵⁶ For the government to stay in power, it needs to ensure that its own party members in parliament continue to support and approve its own policies. The government in order to be effective and stay in power must secure the

⁵⁴ In Germany and other parliamentary systems the House elects the PM because it often is composed of a coalition government and there may be no clear majority. Nor are overlaps between the party leadership (in Parliament) and the PM obvious. See Ronald Krotosznski, 'Separation of Legislative and Executive powers,' in Ginsburg and Rosalind eds, *supra* p.242.

⁵⁵ Sartori, *supra*.

⁵⁶ Sartori, *supra* p.102. By this he meant parties that do not cross, in voting on the floor of the House party lines. Same page; see also see Kaare Storm, Wolfgang Muller, and Torbjorn Bergman *supra* p.67.

confidence of the legislature. This is called the 'majoritarian imperative'.⁵⁷ The government may not be able to garner a majority in parliament, if its own MP's rebel in the floor of parliament. The key to achieving government stability is through parliamentary fit party.

What then is a parliamentary fit party? It is an important variable that makes parliamentary system more effective, one could even state that it is a precondition for its success.⁵⁸ Depending upon which parliamentary system one is referring to, parliamentary fit party manifests itself either in the form of *party cohesion* or *party discipline*.⁵⁹ It is here that the role of the political party and the role of its leaders as a central institution that define the legislative - executive relations in parliament come to picture.⁶⁰ It is this factor that is used as a precondition for sustaining or ousting the government in parliament. Its absence could cause a government collapse. Its excess could as well lead to cabinet dictatorship.

In this respect authors often make vital distinctions between cohesive and disciplined political parties.⁶¹ The key entry point is to explain why members of the party in parliament vote together distinct from MP's of another party. One major clue in this regard is the source of cohesion within the party and within parliament. The interest to vote together at either level, according to some key observers, could emanate from two sources: either due to party cohesion or due to party discipline. In the former, members of party vote together or stick to their party line because there is a consensus or a general agreement within a party organization on crucial issues. Intra party organization and democratic decision making process serve as a key tool in ensuring consensus among party members so that MP's could stand by the position of the party in parliament. The cohesion ensures loyalty of party members and voting together in parliament. This feature is commonly observed in Germany and other coalition based parliamentary systems and often leads to a more balanced relationship between the leg and exe. The German parliamentary practice indicates possibilities where parliament operates more or less autonomously. Parliament has the mandate to initiate the agenda on its own that may or may not follow the government's initiative.

Parliamentary autonomy in Germany is further enhanced by MP's view of themselves. The lesson one gets from the German parliament is enhancing the legislature's autonomy by separating the organization of the cabinet and parliamentary leadership. The Chancellor and the leader of the majority party are not necessarily the same person. They have different jobs

⁵⁷ José Antonio Cheibub and Fernando Limongi, 'Legislative Executive Relations,' in Ginsburg and Dixon, *supra* p.222; 11 it refers to the requirement that governments must be composed by parties that together command more than 50 percent of legislative seats. In coalition based parliamentary systems, parties exchange cabinet positions for legislative support. A party is said to be in government if it controls one or more cabinets. When in government a party's members of parliament are expected to vote in support of government measures. If no party controls more than 50 percent of legislative seats, then parties must form a coalition government by sharing government positions.

⁵⁸ This is a generic term selected to explain a much more complex relations between the party and its members both within the internal decision making process of the party and outside of it (usually in public institutions such as parliament and the executive). In some countries the most appropriate term party cohesion is used while in extremely centralized party systems the expression party discipline is often used.

⁵⁹ Giannetti and Benoit, *supra* pp p.1-6; Cheibub *supra*, p.118.

⁶⁰ Whether it is cohesion or discipline as outlined in this paper depends on the nature of the party in power.

⁶¹ Giannetti and Benoit, *supra* pp p.1-6; Cheibub *supra*, p.118.

and hierarchically speaking/in terms of their political position the latter is not necessarily a servant of the former. In short German MP's regard themselves to some degree members of the *Bundestag* (House of Representatives) *first and members of their party second*.⁶² King stated 'members of the Bundestag take seriously their work as members of parliamentary committee and approach it in a non party or more precisely a cross party frame of mind. They examine bills on their merits and make concessions on a cross party basis. As hinted in the Basic Law Article 38 MP's represent the people and are supposed to act as a check on government along their other functions of supporting and attacking government.'⁶³

The Indian parliament (Lok Sabha) albeit started with a dominant Congress Party since early 1950s has on several occasions (in 1979, 1991, 1992, and 1998 has) forced government to resign and is far from controlled by party. There were efforts to limit members of parliament from crossing the floor in order to destabilize governments but this is moderated by the Speakers' of both Houses that decide MP' qualification for election.⁶⁴

With party discipline, however, party members either at parliament or within the party vote together not because there is such general agreement (consensus) but because the party leaders have the leverage to *impose* party discipline on rank and file members. The role of the party and its key leaders takes prominence over MP's. To be precise MPs are members of the party first and that of parliament second. The party system through its leaders determines access to valuable party labels, mobilizes voters during election, finances election campaigns, serves as a gate keeper to political career, nominates candidates to election and office, determines the substance of major policy proposals and at times the order in which those proposals appear on the parliamentary calendar. While the norm is that parliament as an autonomous institution has the full mandate to freely determine its own agenda and rules of procedure,⁶⁵ the net effect is the agenda control of the executive over parliament. In theory the executive proposes and the parliament disposes (may accept, endorses or reject), in reality the legislature takes executive proposals as decisions.⁶⁶ Party controls parliamentary agenda and cabinet enjoys virtually monopolistic agenda control – as policy initiative rests with the executive - which is a source of great power.⁶⁷ This trend also seems valid in Ethiopia. As per Regulation No. 3 of 2006 Article 32 'In all cases, a government agenda shall be given priority and submitted for debate.'⁶⁸ Legislatures function became mainly executive driven operation. The party system remains crucial to political life. These powers are more than enough for the party to ensure loyalty of its members in parliament. Party members who may

⁶² King, *supra* pp.28-29

⁶³ King, *supra* p.27

⁶⁴ Rajeev Dhavan and Rekha Saxena, 'Republic of India,' in Katy Le Roy and Cheryl Saubders eds., *Legislative, Executive and Judicial Governance in Federal Countries* v.3 P.172.

⁶⁵ Hogwood and Roberts, *supra* p.155.

⁶⁶ Michael Laver, 'Divided Parties, Divided Government,' *Legislative Studies Quarterly*, v. 24 No. 1 (1999) p.8; Kaare Storm, Wolfgang Muller, and Torbjorn Bergman *supra* p.71.

⁶⁷ Flinders, *supra* pp.25-26

⁶⁸ Apparently Article 31 of Regulation No 3/2006 states 'Initiating an Agenda The business to be debates may be initiated by:- 1) The Executive, 2) The Speaker, 3) The Committees, 4) Members, and 5) Parliamentary groups.' In practice the executive controls for no less than 99 percent of it.

at the same time be MP's can only achieve their career and policy goals if they act in line with their party preferences.⁶⁹

The assumption is that party members will freely debate inside the party machinery (a key component of intra party democracy) and decide on crucial issues of the day and then will stand as one adhering to their party position in parliament. That reduces MP's from rebelling against their party in the house. In other words, the support and loyalty of MP's in parliament is assured by the right to freely debate within the party. If the party does not ensure this right, then the normal expectation is that MP's may rebel against the party in the floor of the House and that may lead to government collapse and early elections. Absence of cohesive party means defeat in parliament. This is also strongly linked with the issue of whether MP's in parliament are free to decide on issues of public concern or should strictly abide by party dictates. The constitution states the principle 'Members of the House are representatives of the Ethiopian People as a *whole*. They are governed by : the constitution; the will of the people and their conscience.'⁷⁰ Furthermore it is declared '...The House is *responsible to the People*.'⁷¹ The German Basic law as well states 'They (MPs) shall be representatives of the whole people, not bound by orders or instructions, and responsible only to their conscience'.⁷²

The clauses of the constitution resolve the age old issue of whether MP's represent their specific constituency and hence are merely agents of the voter which the latter can dictate or whether once elected they remain as trustee who are competent enough to decide issues on the floor in the way they best understand them freely and without instructions from the voter or the party.⁷³ The fact that MPs represent the whole people does hint that they have the mandate to decide national issues freely not based on specific constituency interests but based on what is best for the country. We should note once again that nowhere in the relevant article is the party mentioned to whom MPs should consult or get instruction from while making their decisions.

Never the less an MP who is tempted to ignore specific constituency demands will pay dearly come next election, if the PM has plans to get re-elected. Nor can MPs afford to ignore the role of the party. As we already noted the party emerges as a visible, if not the only dominant force that influences the decision making process in the House. Political reality indicates that there are three conflicting interests on the floor of the house. One is the voter in each

⁶⁹ Laver, *supra*, p.8; Kaare Storm, Wolfgang Muller, and Torbjorn Bergman *supra* pp.68-69; Flinders, *supra* p.24.

⁷⁰ See Art. 54 (4).

⁷¹ Art. 50 (3).

⁷² See German Basic Law Art. 38(1).

⁷³ In an often quoted speech Edmund Burk responding to this dilemma made the following speech: 'Certainly, Gentlemen, it ought to be the happiness and glory of a representative to live in the strictest union, the closest correspondence, and the most unreserved communication with his constituents. Their wishes ought to have great weight with him; their opinions high respect; their business unremitting attention. It is his duty to sacrifice his repose, his pleasure, his satisfactions, to theirs, - and above all, ever, and in all cases, to prefer their interest to his own. But his unbiased opinion, his mature judgement, his enlightened conscience, he ought not to sacrifice to you, to any, man, or to any set of men living. These he does not derive from your pleasure, -no, nor from the law and the Constitution. They are a trust from Providence, for the abuse of which he is deeply answerable. Your representative owes you, not his industry only, but his judgement; and he betrays, instead of serving you, if he sacrifices it to your opinion.' *Speech to electors of Bristol, Nov 1774*.

constituency that needs MP's to address his priorities and concerns. If MPs fail to address those concerns then the voter may rebel against them come next election. But this is only one side of the story. Parties as noted already nominate candidates, finance the election campaigns and mobilize voters for the election day. This implies that the Party through its leader's has full control over the process.

More critical issue in this regard is what happens if a conflict exists between party priorities on one hand and voter/national priorities or even their conscience? How should MP's decide in such cases? And which interest prevails? The constitution dictates MP's are bound by the constitution, their conscience and will of the people. Party discipline dictates MPs should obey party lines or will be purged from parliament and from party. It is here that the intra party democracy plays a critical role. If the party is internally democratic, it can handle such critical moments where MP's are in dilemma and perhaps also tolerate some MP's to deviate from party line on the floor of the House.

The net effect is that the party dictates the parliament and will give rise to party autocracy instead of parliamentary democracy. In more developed parliamentary systems, the issue of whether some MP's who deviate from party line in the floor of the House should be tolerated or not is strongly linked with whether the government in power enjoys large majority in parliament or is only with a bare minimum majority. If the party enjoys large majority, say for example, 80 percent ruling party control in parliament over 20 percent seat of opposition in parliament then some element of MP's deviation from the ruling party does not necessarily put the government at risk of losing power. The expectation is that the legislature will be more autonomous in its functions as there is little or no fear of government collapse because of defeat in the House. The size of the opposition is not significant enough to cause trouble to the government and hence this will compel the legislature to be vigilant in its business and in its relations with the government albeit from the same party. The legislature in this case is supposed to be 'debating club' so to speak. However, if government enjoys only a bare minimum majority (for example 52 to 48) then, a two or three MP's deviations from the government may be enough to throw it from power. In this context we expect that a responsible party will try to impose tight discipline on its members not to rebel against their party in parliament to make sure the govt continues in power. As a result the parliament now has a dilemma in its relations with the executive that may lead to less parliamentary autonomy for fear of parliamentary dissolution. The compensation here is that MP's will enjoy more freedom in the intra party politics and whatever has been approved at the party level will become government's/parliament's decision in the House.

Since 1995, EPRDF controlled the parliament for consecutive four elections. In none of these elections has the opposition been a threat to EPRDF as the opposition had a fewer seats.⁷⁴ The expectation then is that MP's from EPRDF would remain autonomous in part as there is no threat of government collapse. Yet this was not the case in practice. On the contrary, parliament remained a weak institution un able to monitor the executive and save for the 2005-2010 term (see below) it remained a less vibrant institution in terms of representing

⁷⁴ A coalition of opposition parties secured better seats in parliament following the 2005 election but even then, it was not enough to pose threat to the government.

voter's concern. Excess use of party discipline and the hegemonic nature of the ruling party are the two crucial explanations to this state of situation.

As is illustrated in the Ethiopian case, the excess of party discipline, not party cohesion, requiring MP's to stand on the side of the government in all contexts undermines parliament's role to hold government accountable and in the worst case turns parliament to a rubber stamp institution serving only as mouth piece of the executive. MP's loyalty to the party in parliament is supposed to be compensated by intra party democracy but as the Ethiopian case illustrates EPRDF also seems to have problems with intra party democracy owing to the practice of 'demo centralism.' That is what some of the party's documents seem to hint.

A document of the ruling party states 'members of the ruling party in parliament or in other places shall have the right and the duty⁷⁵ to support the party's policy and decisions.'⁷⁶ It is vital to note here that the need for absolute loyalty of MP's to the party is not in any way linked to the idea of threat of government collapse or size of the ruling party in parliament. The document goes even further in stating that if MP's find a contradiction between party's policy and his/her own conscience (a matter of principle to the MP) they have the option of leaving the party.⁷⁷ The political implication is that if party's policy and decisions contradict with proposals in parliament as a democratic and autonomous institution then the former prevails.

While the supremacy of parliament over the executive is clearly stipulated in the constitution, in practice the concept of 'democratic centralism' seems to be at odds with the autonomous and sovereign nature of parliament. A recent publication on the nature of 'democratic centralism' and how it is incorporated in the internal regulation of the party, EPRDF, states that democratic centralism as practiced over the years is more or less comparable to the 'command and control/order system' within in the military structure.⁷⁸ The idea is that the lower level party members must accept decisions made by higher level (hence centralism). While the concept does not rule out the option of grass roots participation and influence over higher levels of party structure (hence democratic), the practice indicates otherwise. Whatever comes from the higher level of political leadership must be obeyed at any cost. This in short implies it is 'centralism with little or no democracy.' If this is true, it does hint something on the nature of intraparty democracy within EPRDF in particular and on the nature of the party in general. To be sure political parties since mid 20th century have become

⁷⁵ There is something wrong in this expression. Our jural postulate hints that if someone has a right then there must be an entity that bears the duty. So if MP's have a duty to support their party then the party has the right/authority/power to impose it on the member of parties in parliament. Something cannot be a right and a duty at the same time and the next page makes that clear.

⁷⁶ *Be Ethiopia Ye Democracy Sirat Ginbata Gudayoch*, Addis Ababa, Ministry of Information, (1994) p.66.

⁷⁷ *Be Ethiopia Ye Democracy Sirat Ginbata Gudayoch*, Addis Ababa, Ministry of Information, (1994) p.67.

⁷⁸ See a former *polit bureau* member of the ruling party Siye Abraha's book entitled *Nestinet ena Dagninet be Ethiopia* 2002 pp.38-9 and 48; by now there are many published materials that indicate the way democratic centralism operates in Ethiopia. See for example, Jean-Nicolas Bach, 'Abyotawi Democracy: Neither Revolutionary nor Democratic, a Critical Review of EPRDF's conception of Democracy in post – 1991 Ethiopia,' *Journal of Eastern African Studies* v.5 No. 4 (2011) pp.641-663; Louise Aalen, *Ethnic Federalism in a Dominant Party State: The Ethiopian Experience 1991-2000*, Chr Michelsen Institute 2002.

key institutions of democracy.⁷⁹ The internal politics of party is even more critical in understanding the polity and its impact on democratic institutions. Yet, the Ethiopian experience indicates that the Party is omni-competent and omni-present turning the parliament into subservient of the party.⁸⁰

The Nature of the Party System

The nature of the party system in Ethiopia also supports the thesis that the executive is bound to prevail over the legislature. There is a thin line that distinguishes ‘hegemonic’ parties from ‘dominant’ ones and this distinction has some relevance that illustrates our point further. Certainly there are now growing concerns on whether Ethiopia is a multiparty or one party state which to some extent affects the nature of legislative executive relations.⁸¹ The constitution states ‘A political party, or a coalition of political parties that has the greatest number of seats in the HoPR shall form the Executive and lead it.’⁸² The constitution certainly declares that Ethiopia is multiparty system. Political practice, however, is more complicated.

If we look at the 2010 national and regional state elections, Ethiopia’s transition to genuine multiparty democracy is far from achieved. Ruling party’s aggressive campaigns emanating from fear’s related to the 2005 election crisis, advantages of incumbency (use of government institutions and resources such as the media to its advantage), better organizational structure down to grass root level⁸³ (party structure, mobilized mass and ruling party affiliated organizations such as women, youth, farmers), improved service delivery at grass roots level coupled with controlled freedom to the fragmented opposition⁸⁴ (due to lack of clear and coherent alternative policy, owing to pressure from outside, lack of internal democratic practice and power rivalry within itself) yielded in one party dominated electoral outcome⁸⁵ –only one seat went the opposition and another one for an independent candidate. As a result, some have gone to the extent of concluding that the era of multi party system in

⁷⁹ According to Przeworski, *supra* (p.23) political parties were detested institutions in the 19th century, known by then as factions with parochial interests. Political parties are 20th century phenomenon and no wonder they only found place in some constitutions after WWII.

⁸⁰ A well read local news paper, *the Reporter* in its editorial stated despite the executive submitting reports to Parliament, the latter does not even question the former on the veracity of the reports, nor does it insist to get reply from the executive. See the Reporter editorial entitled ‘The lack of capacity on the Government Institutions and their heads is becoming a gangrene in Ethiopia. Tirr 13/2004 E.C v. 18 No. 18/1224

⁸¹ Kjetil has already concluded it is a one party state. See Kjetil Tronvoll, ‘Briefing: The Ethiopian 2010 Federal and Regional Elections: Re-establishing One Party State’ *African Affairs* (2010) p.1-16.

⁸² See Art. 56.

⁸³ It is now clear that EPRDF has penetrated deep into rural Ethiopia much more than any of its predecessors. *Kebele* was the lowest unit of government administration that the *Derg* invented. EPRDF has gone further in setting up ‘5 to 1’ unit bringing it down to the family level both for electoral, administrative and other purposes. See *And le amist* (one to five) yelimat weyis ye political serawit? The Reporter at <http://www.ethiopianreporter.com/index.php/politics/item/292> as accessed on February 22, 2013.

⁸⁴ There are more than 60 national political parties within the camp of the opposition. It is hardly possible to understand why so many parties exist. If parties were to be organized on ideological basis one could only think of four or so parties such as liberal, social democracy, socialism/communism etc. Rivalry among the leadership often plays a role for the ever flourishing party number in Ethiopia.

⁸⁵ See European Union report on the 4th national and regional state council elections that concluded that seen from two angles: lack of level playing field for all contesting parties and the narrowing of political space, it failed to meet international standards. European Union Election Observation Mission: Ethiopia Final Report on the House of Peoples Representatives and State Council Elections May 2010. <http://www.eueom.eu/ethiopia2010/reports> as accessed on August 22, 2011.

Ethiopia is gone giving way to one party state.⁸⁶ This conclusion is perhaps harsh and too early to take but it does certainly hint where Ethiopia's democratization process is heading.

Relevant discourse in this regard is the thin line that distinguishes hegemonic parties from dominant ones. The ruling party – EPRDF claims, particularly following the 2010 national and regional state elections that Ethiopia needs an *Awra/vanguard/dominant party*.⁸⁷ This claim is illustrated in various documents of the ruling party citing examples from other countries such as Japan (from 1954 to 1993).⁸⁸ In Japan the Liberal Democratic Party (LDP) succeeded to win consecutive elections for nearly four decades. A prominent political scientist, Giovanni Sartori⁸⁹ makes useful classification between a dominant party system and a hegemonic one. As the case of Japan's post WWII development hint in a dominant party system, the political system is not against multiparty as such but it happens that the voter satisfied with the performance of the LDP continued to elect the same party in consecutive elections. In this system there is a regular and free election, opposition parties take part in the competitive election. There is little or no complaint on the electoral process on vote irregularity or fraud. The outcome of the election is also respected by both the winners and the losers. There was no fear that if the LDP loses election it will engage in 'extra-legal measures' to stay in power and when it lost election in 1993, it did hand over power peacefully.

Hegemonic party system is a bit different. To a large extent this type of party system is not competitive and yet is not same with one party state.⁹⁰ As is often associated with the idea of 'developmental state' it aims to create a political and economic hegemony which does not bode well with multiparty democracy.⁹¹ The top political elite in the leadership retains control of the political process and the economic sector. It as such is not against competition as in one party state. However the government plays a *central* role in the market. Indeed the strategy is a state led development and capitalism.⁹²

There are various restrictions made on political parties that want to engage in election. Complaints on the electoral process are very common as either of the parties might engage in various kinds of election rigging. Political pluralism is far from ascertained as well. As many authors hint, competition and

⁸⁶ See Kjetil Tronvoll, 'Briefing: The Ethiopian 2010 Federal and Regional Elections: Re-establishing One Party State' *African Affairs* (2010) p.1-16.

⁸⁷ See *Addis Raey Hamle- Nehase* 2002 v. 3 No. 3 Bulletin of EPRDF pp.30-38. See Tsehaye Debalkew, Whither Ethiopia; Towards a Dominant Party System or a Single Party State? Where he concludes following the 2010 elections and its outcome 'This phenomenon, held under a multi-party contestation, wherein several political parties vie for power and culminating repeatedly by the victory of one party drawing the overwhelming support of the electors, and indeed the population at large is called a dominant party system' Aug 10, 2010 the EPRDF, is emerging as a dominant political party read both part I and II http://aigaforum.com/articles/dominant_or_single_party.htm as accessed on Aug 18, 2012

⁸⁸ See Sartori, *supra* p.109; it is good to note that Japan's politics is very different from Ethiopia. The challenges that are related to managing ethno nationalist groups makes Ethiopian politics distinct in many respects.

⁸⁹ Sartori, Party and Party Systems; see also Cheibub, *supra* pp.29-30.

⁹⁰ In this regime incumbents hold elections because they know they will not lose them. Yet in a democracy, an uncertainty of electoral outcomes is considered as an important indicator of democracy, that is, the outcome of the elections remains unknown before it takes place providing hint that there is level playing field and every competitive party has a chance of winning the election. Another indicator is the requirement of alternation in power, regular and fair and competitive elections Cheibub, *supra* pp.29-30.

⁹¹ For more on Developmental state see Alice Amsden, *Asia's Next Giant: South Korea and Late Industrialization* (Oxford Oxford University Press, 1992).

⁹² See for details Johnson Chalmers, *MITI and the Japanese Miracle: The Growth of Industrial Policy 1925-1975*, (Stanford: Stanford University Press, 1982.)

uncertainty of outcomes are vital elements of a democratic electoral process.⁹³ In hegemonic party type, there are indicators that hint on the certainty of the outcome: the hegemonic party will retain power. More importantly there is no guarantee that if the hegemonic party loses election it will transfer power peacefully. It is uncertain at least.

EPRDF claims that post 2010 Ethiopia is a dominant party system and not a one party system. The analysis is largely based on the comparison with post WWII Japan. Yet the analysis does not mention the various election irregularities mentioned in several international observers and more importantly does not address, as stated above the problem of hegemonic parties that stand somewhere between dominant party system and one party system. The observation is that the constitution and the electoral laws by and large ensure a multi party system, EPRDF claims it is dominant party one but the reality hints Ethiopia is a hegemonic party system. True or not, in nearly all four elections held between 1995 to 2010, various kinds of electoral irregularities are reported.⁹⁴ As illustrated EPRDF plans to have control over the political process and the economy and that certainly creates hegemony. This will surely have impact in emboldening the political leadership in dominating institutions of governance created by the constitution. Institutions are designed as tools for achieving the economic and political goals of the party and are not there to check or balance power. Nor are they superior to (as declared in the constitution) to the party. Parliament is thus one of such tools indicating clear role reversals with the party.

Post 2005 Parliamentary Reforms and Parliamentary Procedure as Set Back

The above illustrations show the shift in favor of the executive and hence reversing the legislative executive relationships. This is also reinforced in Ethiopia owing to EPRDF's dominance of the political process in general and the parliament in particular. Some members of the ruling party often explain this context as something common in other parliamentary systems in the UK but that is an oversimplification of an important difference in the two systems. In the UK, one party cabinet may be a common practice but one party parliament is almost nonexistent. The opposition plays a critical role in parliament. Centuries of parliamentary democratic practice and the media as well counter balance the executive's dominance in parliament. Parliamentary practice in Ethiopia, however, indicates not only one party dominated cabinet but also a one party dominated parliament. One major exception that deserves mention here is the third parliamentary period (2005-2010). The coming into parliament of a significant number of opposition figures have brought to test the nature of parliamentary system in Ethiopia and of the parliament in particular. Following the election outcomes of May 2005, the outgoing parliament was engaged during the summer of the same year in making new laws for the forthcoming parliament composed of the ruling EPRDF and two major opposition parties Coalition for Unity and Democracy (CUD) and United Ethiopian Democratic Forces (UEDF). This gave rise to wide spread uproar in June and November 2005 that led to death of 192 Ethiopians. Once a larger section of the opposition

⁹³ See Cheibub, *supra*.

⁹⁴ See for details even the moderate Jimmy Carter stated critical shortcomings. See Comments by Christopher Clapham on the Ethiopian crisis written on mid Nov. 2005 at http://www.ethiomeia.com/fastpress/Clapham_on_Ethiopia_crisis.html and J. Abbink, 'Discomfiture of Democracy? The 2005 Election Crisis in Ethiopia and its Aftermath' *African Affairs*, 105/419 (2006) p.187; also Terrence Lyons, 'Ethiopia in 2005: The Beginning of a Transition?' *Center for Strategic and International Studies* No. 25 January (2006).

joined the parliament, it soon became clear that internal rules of the HoPR need revision to accommodate the new development in the House. Intense negotiations between the government and the opposition led to an agreement to revise the internal rules of the House. The revision was agreed upon to be based on the practice of existing parliamentary systems of India, Germany, Canada and the United Kingdom.⁹⁵

Among the major reforms that were introduced in parliament was the enactment of a new regulation.⁹⁶ One major pitfall of the previous parliamentary practice was the fact that setting of agenda was only possible through the ruling party. As per the new regulation agendas for debate and the time allocated for discussion are supposed to be decided by consensus in the Business Advisory Committee.⁹⁷ If this fails the matter will be referred to the floor of parliament by the speaker for the matter to be decided by a 1/3 (of 548 seat parliament) vote.⁹⁸ The total number of the opposition seats (very diverse in itself) was 173, if all the opposition were to stand/vote together. In response to this development, a former member of the opposition MP reacted, 'the irony of the matter is that all of the opposition combined cannot add up to 1/3 of the vote of the total members of parliament. It is therefore a foregone conclusion that the ruling party will have a simple majority vote on any issue either in the committee or the floor.'⁹⁹ Another former opposition MP noted, the opposition may have been better represented in parliament than ever before, but this did not improve their effectiveness...the introduction of new parliamentary rules of procedure requiring the support of 183¹⁰⁰ members to table an agenda item for debate, when it had previously required only 20 completely hampered the opposition.'¹⁰¹ Thus despite the reforms, it remains difficult for the opposition to set an agenda in the House without the agreement of the ruling party. The only way for the opposition to set its agenda is through the 'one hour a month' schedule known as 'opposition day' for the opposition to discuss its agenda provided in the regulation.¹⁰²

These were some other modest efforts to accommodate opposition MP's into various committees. The number of committees was increased from 12 to 13 (and after 2010 the number even went up to 16) and membership in each committee increased from 13 to 20

⁹⁵ See the final report of the committee of experts of all these countries entitled 'Integrated Comparative Study of the Rules of Procedures of the House of Peoples' Representatives of the FDRE Ethiopia and the Rules of Procedures of the House of Commons of Canada, of the Bundestag of the Federal Republic of Germany, of the Lok Sabha of the Parliament of India and of the House of Commons of the United Kingdom' 2006 available with the author. The report made important suggestions that served as basis for the new rules of procedure of the HoPR issued in 2006 (Regulation No. 3/2006).

⁹⁶ Entitled 'The House of Peoples' Representatives of FDRE Rules of Procedure and Member's Code of Conduct Regulation No. 3/2006) here in after referred as the Regulation.

⁹⁷ According to Arts 32 and 142 of the Regulation, the House's Business Advisory Committee is composed of the Speaker, the Deputy Speaker and party whips (assumedly includes the government whip in parliament) and is responsible for key businesses related to the House such as setting agenda and time allocation for MP's in parliament.

⁹⁸ See Art 31 and 32 of the Regulation for details; it was suggested by the four experts for the restriction to be removed. P.116

⁹⁹ See Temesgen Zewdie, 'One Year of Experience with Democracy in the Ethiopian Parliament,' in Ulrich Muller-Scholl ed., *Democracy and the Social Question: Some Contributions to a Dialogue in Ethiopia* (Addis Ababa University, 2009) p.150

¹⁰⁰ The opposition combined had 173 elected MP's.

¹⁰¹ Merera Gudina, 'Elections and Democratization in Ethiopia, 1991-2010,' *Journal of Eastern African Studies* v.5 No. 4 (2011) p. 672.

¹⁰² See Art 35 of the Regulation. For an item to be tabled as an agenda as per this provision required the support of the majority of the opposition MP's in the Business and Advisory committee.

allowing member of the opposition to participate in committees. Besides in line with parliamentary traditions elsewhere, the budget and finance affairs standing committee was chaired by the opposition.

The overall impact of the reform though does not seem to have satisfied the opposition. The experts from the four countries stated that despite the differing practices in parliamentary systems 'all have in common either that the opposition parties are given a formal role in drawing up the agenda or as in the UK, are given many safeguards under the rules and practices of the House to provide space for them to pursue their own wishes...' ¹⁰³ The oppositions gain was to be reversed in the 2010 elections as the ruling party controlled 99.6% ¹⁰⁴ of the seats in parliament, unfortunately a major setback to the demo experiment. The experts from different parliamentary systems particularly from Germany indicated that in a parliamentary system it is vital to understand the role of the government and the opposition: the need for the government to bring about the necessary decisions, to pass the laws and to explain the government policy in parliament and the needs of the opposition to control and criticize the government and to present and discuss their political alternatives. ¹⁰⁵ The business of parliament is often decided by a majority and if there is a clear one party dominance in parliament then this may make the life of the opposition in parliament difficult and its voices insignificant. To minimize this risk, a minority in parliament may be given some procedural guarantees to make sure that their voices are heard. Filibustering/blocking is one such rare measure. But if this is over used, it can also make the life of the majority problematic. ¹⁰⁶ To avoid such happening some parliaments have used motion of closure, that is, the Speaker initiates vote to be conducted arguing that enough debate has been made and if supported by majority it terminates the filibustering. ¹⁰⁷

2. Overlap of Functions between Key Party Leadership and the Executive

Another political reality that subordinates parliament to higher level political leadership is the overlap of functions between key political figures and top positions of the executive. There is a clear tendency within EPRDF to assign key political party leaders more to the executive than to parliament. To be sure almost all executive members are MP's but those MP's of the party who do not hold government portfolios and hence are parliamentarians in the strict sense are nearly junior party members. Consider, for example, the key figures holding the top executive positions with the top positions in the legislature. The party chairman and his deputy remain the chairman and deputy chairman of the party and consequently of the

¹⁰³ See the document entitled 'Integrated Comparative Study of the Rules of Procedures of the House of Peoples' Representatives of the FDRE Ethiopia and the Rules of Procedures of the House of Commons of Canada, of the Bundestag of the Federal Republic of Germany, of the Lok Sabha of the Parliament of India and of the House of Commons of the United Kingdom' 2006 available with the author p.115.

¹⁰⁴ Only two seats exist, one for an opposition and another for an independent candidate.

¹⁰⁵ See integrated report p. 38 the same document also suggested for the opposition to be represented in the office of the speaker (for example as deputy). The deputy speaker in Germany comes from the largest opposition party.p.42 It also suggested for the introduction of open, recorded and secret ballots in parliament p.48.

¹⁰⁶ See for details Yves Meny and Andrew Knapp, *Government and Politics in Western Europe* 3rd edn., (Oxford, Oxford University Press, 1998) pp. 202-205.

¹⁰⁷ For details see Meny and Knapp, *supra* pp.202-205.

executive. Not even once has EPRDF assigned the deputy to lead the parliament as the speaker of the HoPR.

As the cabinet often comprises senior members and leaders of the party, the executive is bound to prevail in parliament.¹⁰⁸ This gives rise to what Kaare and Storm label the problem of ‘adverse selection.’¹⁰⁹ How is it then possible that a junior political figure then control or exercise oversight over his own party leaders given the context that doing so will as a consequence of democratic centralism and party discipline, the MP has to obey his political leaders? Certainly these factors explain well the state of parliamentary system in Ethiopia.

Thus in the Ethiopian parliamentary practice, voting together is largely a matter of organizational coercion than of democratic decision making process both at intra party level and in parliament. Consequently, MP’s operating under ‘party discipline’ are not free agents in parliament but are instruments of their party preferences as coerced by the party leaders. In effect, MP’s mandate as trustee is ‘expropriated’¹¹⁰ and at the end of the day the executive stands at the top corner of the triangle and the legislature and the judiciary will take the two bottom corners of the same triangle. The position of the legislature is replaced in practice by the executive, parliamentary supremacy is replaced by cabinet dictatorship. What else could explain the context of the Ethiopian parliament despite the absence of threat of government collapse in the period between 1995-2015 particularly in relation to executive accountability, oversight and setting its own agenda?

Given these reality, one can hardly disagree with the apt observation made by Kassahun Berhanu in relation to legislatures in Ethiopian history including the current one.

‘...the Ethiopian Parliament has consistently depicted a feature of dependence on mainstream centres of power to which it is inextricably linked. ... Successive Ethiopian Legislatures have increasingly been subservient to the wielders of power, notably the political executives.’¹¹¹

An important point that one can draw from parliamentary systems such as Germany and Italy is that the government has no monopoly over parliamentary agenda and bills introduced by government do not necessarily have priority.¹¹² The speaker, not the government defines the legislative agenda. There is also some level of separation between party/executive position and parliamentary leadership. Through this power parliament maintains some autonomy from executive control. Ethiopia has to reconsider amending its internal rules of procedure to allow MP’s more initiative in the legislative process and ensure as well that MP’s can have their own priority which may then pave the way for a more negotiated/reasoned policy making process between the legislature, the executive and the party. Furthermore a healthy

¹⁰⁸ Michael Laver, ‘Divided Parties, Divided Government,’ *Legislative Studies Quarterly*, v. 24:1 (1999) p.8.

¹⁰⁹ Kaare Storm, Wolfgang Muller, and Torbjorn Bergman *supra* p.25 it means in short the legislature as a principal cannot control the executive as agent.

¹¹⁰ That is how notable authors expressed the subordinate position of MP’s in relation to the executive. See José Antonio Cheibub and Fernando Limongi, ‘Legislative-Executive Relations,’ in Tom Ginsburg and Rosalind Dixon, *Comparative Constitutional Law* (Cheltenham, Edward Elgar, 2011) p.226.

¹¹¹ Kassahun Berhanu, *supra* pp.178-179.

¹¹² See Cheibub, *supra* p.131. In the UK the government has complete control of legislative agenda; government bills have priority and 97 percent of bills introduced by government have 97 percent of approval chance. Cheibub, *supra* p. 126. As such the right of individual MP’s is ‘expropriated.’

parliamentary system requires a cohesive, not a disciplined party that does not undermine the autonomy of parliament as democratic institution.

Given these realities, it is hardly possible that parliamentary reforms that were made in the post 2005 election although brought some improvements in favour of multiparty did not bring a shift in the relationship between the parliament and the executive. If there is going to be a shift, it needs a major overhaul to the parliamentary system that goes much further than small amendments to internal rules of procedure of the House. Indeed political scientists do indicate that the most important variable for understanding parliamentary systems is not the number of parties in parliament but the number of parties in government.¹¹³ The current operative law in Ethiopia¹¹⁴ is First Past the Post (FPTP). In an ideal parliament with three parties A, B, C each with 3,4,5 votes in parliament of 12 seats respectively, C becomes the winner though it secures less than half of the votes. Indeed 7 (sum of the votes of A and B) of the voters are against C. Party A and B get zero seats in Parliament, while Party C gets 100 % of the seats although it has not won with an absolute majority ('50' plus one vote). The votes of A and B are thrown into dust bin. Thus our electoral system wastes many voters preference and the winner is not necessarily winning with absolute majority, it is a relative majority.¹¹⁵

Perhaps it is too early for now but in the long run Ethiopia has to consider shifting from FPTP towards the proportional (PR) electoral system where parties with a minimum threshold of 5-10 percent voter support can share both legislative and executive positions which provides the basis for a genuine power sharing and multiparty democracy.¹¹⁶ That is the way for improving the participation of the opposition in parliament. The first measure would need to reform the electoral law to require an absolute majority to win in elections, that is, requiring a candidate to win 50 plus one majority in each district. A More radical reform would need shifting the current electoral system from FPTP to a proportional one (PR). Mere capacity building by donors to MP's or a mere attitudinal change by MP's in parliament is not going to cure Parliament's current weaknesses. Ethiopia needs to accommodate political pluralism and PR is the closest instrument to translate seats in parliament and executive to voter preferences. Whether PR system can work in Ethiopia is of course a more troublesome question but the debate should head along that line to ensure that parliament remains a representative institution of the various views in society.¹¹⁷

¹¹³ As the number of parties in parliament increases, it gives rise to complicated process of government formation, theories of coalition formation, issues related to sustaining a fragile government in parliament etc. See Lijphart, *supra*, (1977) pp.68-75.

¹¹⁴ Article 54 (2) states Members of the HoPR shall be elected from candidates in each electoral district by a plurality of the votes cast.

¹¹⁵ See for details Lijphart, *supra*, (1977).

¹¹⁶ That FPTP also called winner takes all is inadvisable to multiethnic countries is now beyond contest. See Sartori, *supra*, p.105; Donald Horowitz, 'Constitutional Design: Proposals, Process' in Andrew Reynolds ed. *The Architecture of Democracy: Constitutional Design, Conflict Management and Democracy* (Oxford: Oxford University Press, 2002); Arend Lijphart, 'Constitutional Design for Divided Societies' *Journal of Democracy*, v.15 No.2 (2004) pp. 96-109.

¹¹⁷ The challenges of coalition based parliaments are well known but there are workable ones like the German case. Sartori, *supra* p.111. What is to be shared and with whom and to what extent are critical questions that cause parties to break apart tolerated and negotiated and are the parties in an way ready to give and take?. The coalition formed after difficult negotiation may easily collapse and thus the polity will have a fragile government. Trust and cooperation among the key actors is also a precondition, a factor that is missing in Ethiopia as there is strong mistrust among the political elite owing to differing historical narrations and varying conceptions about the future. It is hardly possible to have effective power sharing unless the political elite shows clear commitment to it and is willing to 'give and take.' In reality, this factor is also missing within the political elite in Ethiopia. For the details on how power sharing schemes operate see Arend Lijphart, 'Consociationalism and Federalism: Conceptual and Empirical Links' *Canadian Journal of Politics* 12:3 (1979) pp.499-515; John McGarry and

3. Wide Spread Practice of Delegated Legislation and Lack of Political Control

At the core of the notion of limited government is the assumption that all administrative authority must be conferred by legislation. Consequently, if the executive assumes powers not conferred by the constitution or proclamation, it can be challenged either as unconstitutional or *ultra vires*, that is, beyond delegated authority. Delegated legislation is often preceded by some guidelines and principles that are stated either in the constitution or in a proclamation. In other words delegated legislation is a conditional grant of power by the legislature to the executive. Yet as discussed in this section the wide spread practice of delegated legislation¹¹⁸ and the parliament's failure to exercise effective political control over it can be considered as a final factor that contributes towards the executive's predominance. To be sure there are variations among parliamentary systems with respect to instruments of political control over delegated legislation but there is a wide spread consensus on the fact that executive's discretion has increased significantly and there is a need to employ some type of political control over it.

With the shift from the *laissez faire* state to the welfare state in the second half of the 20th century, the role of the state in society and in the economy hugely expanded. Herman Punder argues that there are some justifications to the expanded role of the government. Owing to lack of time and resources, the complexities of modern politics and technicalities that come with it, the legislature cannot be expected to get involved in the level of detail required in regulations.¹¹⁹ Comparative studies made in several countries hint that governing by regulations issued by the executive has become the rule than the exception; it has become a fact of politics.¹²⁰ In the UK some 3000 regulations are made annually and in the US the

Brendan O'Leary, *The Northern Ireland Conflict: Consociational Elements* (Oxford: Oxford University Press, 2004) pp1-51; Andreas Mehler, 'Introduction: Power-Sharing in Africa', in: *Africa Spectrum*, 44:3, (2009), pp. 2-10.

¹¹⁸ Powers exercised under delegation from parliament are known by different names across jurisdictions. In some jurisdictions they are called subordinate laws, secondary laws, delegated legislation, statutory instruments, regulations etc. For our purposes these names can be used to mean the same and we will use regulations as it is the familiar expression in Ethiopia.

¹¹⁹ Herman Punder, 'Democratic Legitimation of Delegated legislation: A Comparative View of America, Britain and German law,' *International Comparative law Quarterly* v.59 (2009) p.354; See the leading case that gave end to the non-delegation doctrine in the US. *Mistretta v. US* 1989 488 US 361, 371-372. The essence is the non delegation doctrine is 'dead/morbund' as it has not been practised since 1935. The doctrine fell into disuse in the aftermath of the New Deal. See Cass R. Sunstein, *Designing Democracy: What Constitutions Do*, (Oxford: Oxford University Press 2001) P. 138. A. L. A. *Schechter Poultry co. Vs US* (1935) 295, US, 495. US practice indicates that there is wide room for delegation but this is compensated by imposing on the executive or individual minister.

¹²⁰ In the UK for example regulations in exceptional cases amend the parent statutes nick named as Henry VIII clause rooted in ancient law that allowed Henry VIII to legislate/rule through regulations. For delegated law theory and practices see Edward Page, *Governing by Numbers: Delegated Legislation and Every Day Policy Making* (Oxford: Hart Publishing, 2001)

number even goes up to 7000.¹²¹ In Ethiopia as well the number of regulations issued every year is estimated to be much more than the proclamations issued by parliament.¹²²

The increased role of the government is not, however, without consequences. With it comes the risk of arbitrariness and abuse of power that calls for executive accountability to parliament. Increased executive discretion results in multiplication and confusion of legal sources. Legislative excess of delegation brings legislation inflation that degrades democracy, the rule of law and increases legal uncertainty which is a menace to the rule of law. Another difficulty emanates from the idea of separation of powers and the specialized roles of each branch. As it is well known, the main function of parliament is to make laws and if the parliament delegates too much rule making powers to the executive then it loses its relevance and brings with it the more difficult question of whether it can delegate its main function. There is also the concern that delegated legislation gives birth to the fear that we are to be ruled by the bureaucracy often called the new despotism.¹²³ Delegated legislation brings issues related to whether or not there are sufficient mechanisms of political control over such delegated powers. More importantly powers exercised through delegation face the problem of democratic deficit (legitimacy) as overuse of delegated authority causes a shift of significant power from the legislature that derives direct legitimacy from the voter. The executive in parliamentary systems is indirectly responsible to the electorate via the legislature that represents the will of the people in law and policy making. To address the democratic deficit and accountability of the executive, parliament must exercise political control over delegated legislation.

In the US, although the concept of non delegation doctrine has almost become irrelevant in terms of limiting executive's discretion particularly since late 1930s, the canons of the doctrine continue to apply in relation to human rights. Cass Sunstein argues that the concept is relocated than abandoned. The executive and its agencies may not engage in certain controversial activity unless and until Congress has expressly authorized them. This particularly is related to human rights. When fundamental rights and interests are at stake, the choices must be made by Congress, not by the executive. Without such congressional authorization courts will not permit the executive to intrude on liberty. Only Congress with its diverse membership, bicameral houses and multiplicity of voices can authorise such limitations on rights.¹²⁴

Otherwise US practice on delegated power apparently grants wide powers to the executive but this is misleading because there is a wide spread practice of political and judicial control that checks the executive. The democratic legitimacy of regulations (issued by the executive as a body) and rule making (directives issued by all kinds of agencies or individual ministers) is compensated by the requirement that such acts can only be made with the participation of the public. The American Administrative Act provides for participation by all interested

¹²¹ Page, *Supra* pp.4;14.

¹²² A recent study hints that between 1991 and 2010, the parliament enacted 313 proclamations while the government issued 325 regulations see Express repeal of Delegated Legislation in Ethiopia by Liku Worku at www.abysinnialaw.com as accessed on June 10, 2012.

¹²³ Punder, *supra* p. 356.

¹²⁴ See his insightful book entitled, *Designing Democracy: What Constitutions Do*, *supra* pp.138-139.

persons as a necessary step in all cases of delegated legislation (553 APA). The Act also provides other vital details on how the process of rule making should go, the form and time of participation etc and the entire process is strictly monitored by the federal and state courts.¹²⁵ Public participation in rule making serves as a compensation for the lack of substantive predetermination by Congress.

Another mechanism to enhance the legitimacy of regulations is to narrow down the extent of executive discretion by requiring that regulations can be made when there is an explicit provision in primary legislation (parent law/proclamation). In the UK, for example, nearly all regulations issued by the executive must derive their legitimacy from primary legislation and consequently should remain consistent with the parent law. Regulations cannot stand on their own. There is as such no inherent power of the executive to make regulations separate from the primary source. Besides delegated legislation must be implemented in line with the wishes and intentions of the parent law.¹²⁶ Delegated powers are only used for the purpose expressly or implicitly stated in the parent law. They are issued to give details and meaning to the plans of the legislature as expressed in the parent law.¹²⁷ Setting guidelines and main principles in the parent law, the details of which are to be filled by regulation is what some call 'parliamentary substantive predetermination of executive rule.' This is the *ex ante* political control of delegated legislation.

The UK practice as well as theory on delegated legislation also provides *ex post* parliamentary mechanisms of control over delegated authority. Other than the normal requirement that executive provides details about the delegated authority to parliament through the reporting and question time, it might take many forms. Most regulations are subject to affirmative resolution of either the House of Commons or both Houses. And there are various ways to achieve this affirmative requirement. First the draft regulation is laid before parliament and parliament has to approve it within a certain period of time to come into effect. Parliament may then either annul or approve it. Second possibility is requirement that the regulation be made and laid before parliament and may come into effect immediately but only for a specified period (often 40 days) and its fate depends on whether it is approved by parliament or not. In other words, unless approved within a specified period by parliament, its life ends there. Thirdly there is the negative resolution by parliament over the regulation. The negative check by parliament over the executive permits the House to annul the regulation within a stated period after submission to a special committee. If not annulled, the regulation operates and remains effective. In other words, if it is not annulled within, say 40 days since its submission, it becomes fully operative where as in the third case it has to be approved within 40 days to be effective.¹²⁸

¹²⁵ Punder, *supra* pp.369-370.

¹²⁶ Punder, *supra* p. 357 another mechanism of control over regulations is through judicial review of secondary legislation for their compliance with or consistency to parent law that is an accepted practice both in many parliamentary and presidential systems alike. This has nothing to do with constitutionality as the main concern is whether the executive has exceeded its power or not (*Ultra vires*).

¹²⁷ Page, *supra* p.20

¹²⁸ Page, *supra* pp. p.26; 155-157.

The third parliamentary practice on delegated legislation emanates from Germany. German practice provides even stricter requirements for issuing regulations. The Basic Law Article 80 (section 1) provides, 'The Federal government, a Federal Minister, or the Land (state) governments may be authorised by a law to issue statutory instruments (regulations). The *content, purpose and scope* of the authority conferred shall be specified in the law...'¹²⁹ The Basic Law provides a substantive limit on parliaments' power to delegate. There is a constitutional requirement to state a head in the proclamation the 'content, purpose and scope' of the delegated authority. This requirement is more restrictive than the practice in the UK. Not only is delegated authority required to emanate from parent law but the parent law also determines the content, scope and purpose. If this is not complied with, the Constitutional Court can quash the law for failing to meet constitutional requirements. Ordinary courts are also competent to check the compatibility of the regulation with the parent law. In short there is no broad authorization by parliament. Just like the practice in the UK, parliament can also veto delegated legislation issued by the executive, often called post enactment political control. These requirements ensure that parliament as representative of the people bears political responsibility for all laws issued by the executive. The process as well guarantees the executive's constitutional responsibility to the parliament.¹³⁰ All these procedures are tools for exercising political control by parliament over the executive. In other words, they are means for legitimizing delegated legislation to address the problem of democratic deficit.

Ethiopia has a very weak system of political control over delegated legislation. On the contrary there is wide practice of delegated legislation which is not subject to either prior substantive predetermination by parliament or plenary/committee approval of delegated legislation after enactment by the executive. The common trend is for the parent law to state a general statement for the executive to issue regulations with little or no details.

Let's consider, for example, two experiences in relation to delegated legislation. The first one is related to the re-organization of the executive. Article 34 of Proclamation No 691/2010 on the Re-organization of Federal Government states:

'The Council of Ministers is hereby empowered, where it finds it necessary, to Re-organize the Federal Government executive organs by issuing regulations for the closure, merger or division of an existing executive organ or for change of its accountability or mandates or for the establishment of a new one.'

One can easily notice how broad the mandate given to the executive is. Such a broad authorization to the executive to literally 'make and unmake' itself does not go well with the core parliamentary principle that the executive derives its existence from and is accountable to parliament. Parliament not only gave what is inherently its own but also abdicated its core function which apparently is non delegable. As Scalia noted, 'the legislative power is the power to make laws, not the power to make legislators.'¹³¹ As such, the core function of parliament is non delegable. That is the very essence of separation of powers. What is parliament supposed to do if it delegates one of its primary functions of organizing,

¹²⁹ Emphasis by the author.

¹³⁰ Punder, *supra* p. 358.

¹³¹ Antonin Scalia, *A Matter of Interpretation*, (Princeton, Princeton University Press, 1997) p.35

supporting and supervising the executive? What is worse, parliament set no guidelines/principles against which it will later check as to whether the executive complied with parliamentary intentions. The delegated authority transforms the executive to something similar to the president's power in a presidential system than to a parliamentary system proper. In a presidential system, the President gets direct mandate owing to his/her direct election and remains the sole office for making and unmaking the executive. This power, however, does not normally fall with the PM/Council of Ministers in a parliamentary system. So the executive is in other words taking away one of the powers of parliament and keeping it on the dark on one of its core functions. It hints how emboldened the executive and how impotent the parliament is in Ethiopia.

The second example relates to the extent of the executive's mandate that emanates from a parent law.

Proclamation No. 587/2008 that deals with the establishment of Ethiopian Revenue and Customs Authority (herein after referred as Authority/ERCA) authorizes the Council of Ministers to issue regulation concerning the employees of the authority. Article 19 sub 1 (b) of the proclamation states 'the administration of the employees of the Authority shall be governed by regulation to be issued by the Council of Ministers.' This proclamation is meant to serve as parent (enabling) law to the regulation to be issued by the Council of Ministers. The latter issued Regulation No. 155/2008. Article 37 of this regulation states:

1. "Notwithstanding any provision to the contrary, the Director General may, *without adhering to the formal disciplinary procedures*, dismiss any employee from duty whenever he has *suspected* him of involving in corruption and lost confidence in him.
2. An Employee who has been dismissed from duty in accordance with sub article 1 of this Article may not have the right to reinstatement by the decision of any *judicial body*."

By virtue of this regulation, the Director General is mandated with two contested powers. One is the fact that the Director General is not required to prove that the employee is corrupt. A mere suspicion is enough to dismiss an employee.¹³² Secondly, the Director General, contrary to the concept of separation of powers, is a judge on its own case. The Director can undertake the dismissal without the need to subject the case to the investigation by an impartial body or the decision of a court. Besides the Director General can dismiss the employee without adhering to the formal disciplinary procedures provided in laws governing civil servants.¹³³ More importantly, the parliament set no guiding principles against which the decisions of the Director General are to be checked through the institution of political control. It issued something comparable to a blank check, where the executive is free to fill whatever it wants. It even went further in ousting the judiciary from adjudicating cases arising from

¹³² Article 20 sub 3 of the Constitution states '...accused persons have the right to be presumed innocent until proven guilty...' No doubt corruption is increasingly becoming a serious issue in Ethiopia and question of proving such sophisticated crimes is a difficult job. Recently Transparency international ranked Ethiopia 113 out of 176 countries. See <http://cpi.transparency.org/cpi2012/results/> as accessed on Dec 13/2012. But one wonders if such measures help in any way to the reduction of corruption. Ever since the issuance of this regulation there is no proof that the level of corruption is reduced from the level of corruption that existed before the issuance of the regulation. So why violating constitutional rights? And is not it possible to fight corruption without violating rights?

¹³³ See Proclamation No 515/2007, Federal Civil Servants Proclamation Articles 69 and the following where details on disciplinary measures are provided. The proclamation also establishes Tribunal composed of judges with a specific mandate on civil servants.

such unlawful dismissal, a power that the executive lacks the mandate as per the Ethiopian constitution.

As illustrated above we can see that the executive enjoys wide and unrestrained discretion. What is worse both the judiciary and parliament exercise little or no control over this discretion. For example, there is no specific mandate in the standing committees of the HoPR that allows them to exercise political control nor does parliament as a plenary do that. Parliament as an author of the enabling legislation needs to ensure to the voter that its enactments are implemented according to its laws and policies and not according to the executive's discretion. Power must be exercised for the purpose intended in the legislation of the parliament. We can conclude therefore that executive enactment of delegated legislation in Ethiopia though widely practised is not subject to accountability and is often democratically deficit. Rectifying this major problem of lack of accountability that has contributed significantly in favour of the executive needs a major political overhaul to the parliament as an institution. To redress these problems parliament needs to limit executive discretion in regulations by stating some general principles when it authorizes secondary legislation. Each standing committee must also be expressly empowered by the HoPR to check the compatibility of delegated legislation of the respective executive wing with the law enacted by parliament. Besides the committees need to check whether executive discretion has been exercised in line with the purpose stated in each specific legislation. A more stronger institutional reform would require parliamentary approval of regulations issued by the executive before they come into effect. Such institutional reforms are hoped to mitigate executive's influence and restore some balance in favour of the HoPR.

Conclusion and Recommendations

The article broadly discussed the key features of parliamentary systems with an emphasis on parliamentary supremacy and government accountability to parliament. The Ethiopian case is analysed against this general framework. The role of parliament as a key democratic institution is very much dependant on the nature of the party system and its internal decision making process. If the practice of the Ethiopian parliament is of any guide, parliament's role as an institution of democracy is highly dependant on intra party democracy. If the party is internally authoritarian, the parliament will end up becoming 'rubber stamp' for the executive wing that is often composed of senior leaders of the party. The executive will prevail throughout the process. As a result, parliament's supremacy is replaced by executive supremacy or cabinet dictatorship that in itself being the result of party autocracy. In contrast if there is intra party democracy, parliament may become a viable institution for debate on policy issues and to exercise oversight over the executive. Closely related is the fact that parliament must serve as a representative of the diverse views in society. This is the often claimed advantage of a parliamentary system over a presidential system associated with the 'winner takes all.' Yet the Ethiopian case, except for the 2005-2010 term has largely been a one party dominated parliament. Parliament as such was not a fairly representative institution that brings issues related to the electoral system. This has been the case because Ethiopia's electoral system is the FPTP type. Revisiting this law is crucial to ensure a better representation of diverse political views in parliament.

As a matter of principle, the presence of a powerful legislature is a blessing for democracy. The legislature as representative institution symbolizes democracy. As studies elsewhere hint, strong legislature implies strong democracy.¹³⁴ The current reality within the parliamentary practice in Ethiopia unless rectified through series of reforms, subordinates the legislature to the executive. This undermines the democratization and the institution building process in Ethiopia. It undermines horizontal accountability of the executive and the ability of the people to control/monitor the government through the legislature.

Parliamentary system is based on the presence of ‘parliamentary fit party’ based on party cohesion instead of party discipline. To be sure parliamentary systems need to have some kind of party rule at their disposal to ensure that MP’s in parliament continue to support their party positions in parliament. Yet that should not be extended to allow party leaders to impose party discipline on their members in parliament under all circumstances. The bits and pieces of details in Ethiopia so far indicate that MP’s in Ethiopia must support their party decisions at all costs or risk dismissal from the party. The practice also indicates that the obligation to stand along the position of the party is not based on the threat of government collapse in parliament or has little to do with the size of the party in parliament. It instead is a matter of party discipline. MP’s loyalty to the party need to be strongly related to the size of the ruling party in parliament. Under circumstances where there is as such no real threat of government collapse, MP’s need to be guaranteed the free will as stipulated in the constitution to decide free from the party’s influence. Owing to the executive’s institutional and positional advantage, the reality now is that the excess of party discipline and democratic centralism, parliamentary supremacy is largely compromised, if not defeated in Ethiopia.

The party’s visible impact on parliament is clear. Its impact ranges from the determination of major policy proposals to control of fate of individual MP’s within and outside of the parliament. This has certainly undermined parliamentary supremacy and its power to hold government accountable. It has turned parliament into a rubber stamp institution serving only as a mouth piece of the executive and the party. What a healthy parliamentary system requires is a cohesive, not a disciplined party that does not undermine the autonomy of parliament as a democratic institution. It is therefore recommended that there should be a shift from party discipline to the practice of party cohesion. Parliament may then have means to initiate policy and laws on its own. The parliament through the speaker and party whips should have undisputed mandate to set its own agenda and revise its own internal rules of procedure in a manner that confirms to its supremacy. The overlap of functions between top executive leadership and of the party needs to be reconsidered. The fact that top heads of the party are becoming automatically the heads of the executive sends the message that the legislative body is less important in the opinion of the party and that implies that voters will also attach that mentality to the parliament. It is crucial to assign key party figures to head the legislature without taking executive positions. This new approach can pave the way for the evolution of the differing institutional interests and enhance parliament’s role as a democratic institution. Otherwise it is too naive to expect junior political figures in parliament to exercise

¹³⁴ Steven Fish, ‘Stronger Legislatures, Stronger Democracies,’ *Journal of Democracy*, v.17 No. 1 (2006) pp.5, 18.

effective oversight and political control of the executive and the party leadership at the helm of power.

The absence of *ex ante* and *ex post* control of parliament over delegated legislation and the wide spread practice of executive discretion is something that parliament has to give a priority and establish mechanisms for checking the executive. As is the case in other parliamentary systems, executive discretion is subject to either parliamentary guidelines set before secondary legislation is enacted or to approval by parliament subsequent to their enactments by the executive. None of these mechanisms exist both in theory and in practice in the Ethiopian parliamentary system right now. It is high time to revise internal rules of parliament and establish these practices with a view to enable parliament to exercise political control over the executive.

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