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Rule *By* Law in Ethiopia: Rendering Constitutional Limits on Government Power Nonsensical*

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Abstract: *Rule of law is one of the most controversial yet universally appealing contemporary legal political concepts, a buzzword for a range of actors – political leaders, international organisations and academics. Jumping on the bandwagon, the Ethiopian Constitution aims to build 'a political community founded on the rule of law' and conditions the success of this laudable goal on the full respect of individual and people's fundamental freedoms and rights. Scholars have distinguished between formal and substantive, "thin" and "thick" conceptions of the rule of law. This paper will assess the constitutional basis and understanding of the rule of law and limits on government power in Ethiopia. It discusses the manifestation of rule by law or the law of rules (much in line with the thin or formal conceptions of rule of law) in practice particularly since the most contested 2005 Ethiopian elections. The article also identifies the different factors that breed and reinforce rule by law and the defiance of the constitutional limits on government power, including those limits embodied in the human rights guarantees. Given the insignificant influence of opposition and civil society groups lacking the capacity to generate the necessary pressure to induce change from below, the paper is pessimistic about the potential of achieving substantive rule of law in Ethiopia in the near future.*

Keywords*: rule by law, constitution, human rights, government power, Ethiopia*

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1. Introduction

> The nature of limitations will vary with the society, culture, political and economic arrangements, but the need for limitations on the government will never be obsolete.[1]

The rule of law has been characterized as an absolute good, a purported "magical elixir".[2] It is recognised worldwide as an essential component and precondition of good governance and sound and sustainable economic development.[3] Its theoretical understanding and practice has, however, been varied and controversial. Tamanaha observed that despite its popularity, the rule of law concept is the least understood, difficult to define and controversial – "everyone is for it, but have contrasting convictions about what it is".[4] Almost every state claims to adhere to and respect the rule of law although they often have their own authentic understanding of the rule of law.[5] Nevertheless, most scholars agree that the rule of law serves two "core" purposes: curbing arbitrary and inequitable use of state power – to "bind power", and protecting citizens' property, liberty and lives from infringements or assaults by fellow citizens.[6] The purpose of this paper is to assess the extent to which the rule of law can serve its first core function within contemporary Ethiopian polity.[7]

Bedner succinctly captured the different understandings of the rule of law that range from mere formal (thin or minimalist) to substantive (thick) conceptions.[8] The formal conception of the rule of law, also referred to as "legality", "is concerned with law as an instrument and a basis of government, but is silent on what the law should regulate"; substantive versions, on the other hand, "set standards to the contents of a norm, which should be morally justified".[9] Formal rule of law only requires that laws emanate from the appropriate authority and that it has certain formal qualities such as clarity, accessibility, predictability, stability, prospective application etc – law with these formal qualities should be complied

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[1] Brian Z. Tamanaha *On the Rule of Law: History, Politics and Theory* (Cambridge: Cambridge University Press, 2004), 101.

[2] Rachel Kleinfeld Belton, "Competing Definitions of the Rule of law: Implications for Practitioners," *Carnegie Papers, Rule of Law Series,* no. 55 (2005): 5. Faundez similarly observed that the rule of law is considered as "a magic wand that promises to resolve virtually every conceivable economic and social problem" – Julio Faundez, "The Rule of Law Enterprise – Towards a Dialogue between Academics and Practitioners," *University of Warwick CSGR Working Paper,* no. 164/05 (2005): 3.

[3] Adriaan Bedner, "An elementary approach to the rule of law," *Hague Journal on the Rule of Law*, 2 (2010): 48.

[4] Tamanaha, *On the Rule of Law,* 3. For Shklar, the "'overuse' of the rule of law has led to it losing its meaning: It would not be very difficult to show that the phrase "the Rule of Law" has become meaningless thanks to ideological abuse and general overuse. It may well have become just another one of those selfcongratulatory rhetorical devices that grace the public utterances of Anglo-American politicians. No intellectual effort need therefore be wasted on this bit of ruling-class chatter" − Judith Shklar "Political Theory and the Rule of Law" in *The Rule of Law: Ideal or Ideology? eds.* Allan C. Hutchinson and Patrick Monahan, 1 (Toronto: Carswell Legal Publications, 1987).

[5] Tamanaha, *On the Rule of Law,* 3.

[6] Bedner, "An elementary approach to the rule of law," 50-51.

[7] Tamanaha noted that 'legal limitation on government … is a *sine qua non* of the rule of law tradition' − Tamanaha, *On the Rule of Law,* 92.

[8] See generally Bedner, "An elementary approach to the rule of law". See also Tamanaha, *On the Rule of Law*. Belton also distinguished between 'end' based whereby rule of law has five distinct, and often in tension, socially desirable goods, or ends: (1) a government bound by law, (2) equality before the law, (3) law and order, (4) predictable and efficient rulings, and (5) human rights; and institution based definitions of the rule of law whereby rule of law requires creating the '"necessary" laws, a "well-functioning" judiciary, and a "good" law enforcement apparatus' – see Belton, "Competing Definitions of the Rule of law," 5.

[9] Bedner "An elementary approach to the rule of law," 54. Raz similarly observed that "legality has no bearing on the existence of spheres of activity free from governmental interference and is compatible with gross violations of human rights" – Joseph Raz 'The Rule of Law and Its Virtue' in *Authority of Law*: *Essays on Law and Morality* ed. Joseph Raz, 220-221 (Oxford: Clarendon Press, 1979). For Tamanaha, formal legality "imposes only procedural requirements, only restrictions about the form law must take" – Tamanaha, *On the Rule of Law,* 94.

with. Substantive conceptions include the formal conception but add to it certain substantive limits, such as requiring law to comply with principles of natural justice and, in the contemporary world, human rights guarantees and other constitutional limits, to the acceptability of law. Substantive conceptions of the rule of law entail a government subservient to law and anticipate certain things that the government cannot make 'legal'; in formal conceptions of the rule of law, referred in this article as rule *by* law, law serves government purposes and the government can do anything as long as there is law to that effect. According to formal conceptions, Apartheid South Africa was a rule of law state.

In this paper, rule *by* law generally refers to the formal or procedural conceptions of the rule of law.[10] It broadly refers to a situation where a state governs based on laws but without any effective substantive restrictions on the nature and implications of such laws. Rule *by* law as used in this thesis largely compares with the Austinian conception of law as the command of the sovereign who is subject to none nor limited by any substantive constraints.

The Ethiopian Constitution aims to build "a political community founded on the rule *of* law" and conditions the success of this laudable goal on the full respect of individual and people's fundamental freedoms and rights. There is no doubt that the drafters of the Constitution established a constitutionally limited government as is reflected in the provision which denies effect to "any law, customary practice or a decision of an organ of state or a public official which contravenes" constitutional provisions.[11] The Constitution provides the critical substantive standards against which legislation and other measures are to be tested. All State organs, especially the legislative and executive organs, should therefore ensure that any measures they take are in line with the constitutional constraints, including those embodied in the human rights provisions. The supremacy of the Constitution and the expansive recognition of human and democratic rights necessarily imply that the Ethiopian Constitution embodies a substantive version of the rule of law. This conflicts with a rule *by* law conception which requires parliamentary supremacy.[12]

However, particularly following the 2005 Ethiopian elections, the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF), the ruling party, has adopted several major laws that target the principal troika democratic entities, namely, opposition political parties, the media, and civil society organizations (CSOs) disregarding the substantive limits on the law making powers of the legislator imposed by the human rights and other provisions of the Constitution. For the first time, Ethiopia was classified as "not free" by the Freedom House in its 2011 *Freedom in the Word Index*. Similarly, the Mo Ibrahim Foundation ranked Ethiopia 34th in Africa in its 2011 *Ibrahim Index of African Governance* (38th in the sub-categories of "safety and rule of law", and "participation and human rights"). The *Economist* classified Ethiopia as an "authoritarian" regime in its 2010 *Democracy Index*.[13]

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[10] Bedner, "An elementary approach to the rule of law," (following Tamanaha, *On the Rule of Law*) identifies four elements of procedural conceptions of the rule of law: (1) rule by law, (2) the subjection of state actions to law, (3) formal legality − law must be clear and certain in its content, accessible and predictable for the subject, and general in its application), and (4) democracy − the source of the law should be a democratically elected legislature − consent determines or influences the content of the law and legal actions). In this paper, rule by law is understood to incorporate all these elements.

[11] Federal Democratic Republic of Ethiopia (FDRE) Constitution, article 9(1).

[12] In describing legislative supremacy in the context of England, Dicey proclaimed that "it is a fundamental principle in English law that parliament can do everything but make a woman a man, and a man a woman" – A. V. Dicey, *An Introduction to the Study of the Law of the Constitution*, ed. E.C.S Wade (London: Macmillan, 1959): 43.

[13] The Economist Intelligence Unit "Democracy Index 2010: Democracy in Retreat" http://www.eiu.com/Handlers/WhitepaperHandler.ashx?fi=Democracy_Index_2010_Web.pdf&mode=wp (accessed 12 December 2011). According to the Report, Ethiopia has become more authoritarian in 2010 compared to 2008 when it was classified as a "hybrid" state. Ethiopia's ranking dropped from 105-118 "reflecting the regime's crackdown on opposition activities, media and civil society".

This paper will discuss within the Ethiopian context an increasing use of legislative power to enact into law ruling party ideologies, despite the unreasonable restrictions they impose on constitutional rights and endangering democracy – two of the main reasons behind constitutionalisation.[14] Simply stated, the paper captures the phenomenon of rule *by* law in Ethiopia – the use of law to legitimise violations of basic human rights.[15] After identifying the manifestations of rule *by* law, the paper argues that Ethiopia is a rule by law state. The enactment of several repressive laws since the 2005 elections indicates that there is very little, if any, the Ethiopian government cannot enact into law – and this without any serious legal or political challenge.[16] It is also argued that socio-cultural, economic, political, constitutional, legal and other factors make rule by law possible and attractive to the ruling party.

With this view, section 2 presents a brief discussion of laws that potentially contravene constitutional rights manifesting rule by law. Section 3 identifies the factors that make possible and reinforce rule by law. The last section concludes the paper.

2. Manifestations of rule by law in Ethiopia

Prior to the controversial 2005 elections, government harassment of politically active groups including opposition members, the media and CSOs was largely in violation of existing laws – it was illegal harassment. Since the elections, however, most of the illegal harassment has been legalised.[17] Legal harassment constitutes rule by law – the focus of this article. This section details some instances whereby parliament (ab)used its law making powers to react to events the political elite considered undesirable or politically threatening, and permanently neutralise, through the use of law, politically critical organisations and individuals.

Perhaps one of the most vivid initial manifestations of rule by law was recorded following the split of the Central Committee of the ruling EPRDF party over the handling of the 1998-2000 Ethio-Eritrean War. Following the split, the winning faction, which included the Prime Minister, enacted anti-corruption laws which provided the basis for the arrest and prosecution of most of the splinters.[18] This was, however, not the end. When the Federal First Instance Court, later confirmed by the High Court, ruled that the accused should be released on bail for lack of evidence, the security forces kept the accused persons in jail.

[14] Issachnaroff identified two major justifications for the idea of constitutionalism in the form of constraints on majoritarian rule and constitutional review: to protect individual and minority rights including against majoritarian will, and to ensure that "majorities can change, that the rules of the game remain fair, and that those elected remain accountable to the electorate" − Samuel Issachnaroff, "Constitutionalizing Democracy in Fractured Societies' *Texas Law Review* 82 (2003/2004): 1862-1863.

[15] "Rule by law" should be contrasted to "rule by men" or the arbitrary exercise of power which is an even greater evil. Rule by law incorporates some qualities referred to by Fuller as the "internal morality of law" such as being general, clear, public, prospective etc − see generally Lon Fuller, *The Morality of Law,* (New Haven: Yale University Press, 1969). As bad as it might sound compared to substantive rule of law, formal rule of law has its own benefits: it can further "individual autonomy and dignity by allowing people to plan their activities with advance knowledge of its potential legal implications" − Tamanaha, *On the Rule of Law,* 94.

[16] It should be noted that this paper does not intend to discuss the theoretical tussle and intricacies surrounding the rule of law – whether it should be substantive or procedural, and whether the Ethiopian Constitution should or should not have adopted a substantive version of the rule of law. The purpose is simply to show that Ethiopia practices rule by law and not the constitutionally sanctioned substantive rule of law.

[17] This in no way means that illegal harassment has miraculously vanished. Indeed, even with the legalisation of most of the harassment, illegal harassment still continues. Illegal harassment is still reported by human rights organisations, both international and national, and opposition groups. This paper, however, focuses on legal harassment.

[18] The laws were adopted in 2001. Siye Abraha was arrested just one working day after the laws were adopted.

In less than two working days after the decision of the Court to release the accused, in the name of Siye Abraha on bail, a law which deprived bail to all persons accused of corruption offences was enacted.[19] Whatever the motivation of the government, the circumstances clearly indicated that the law was enacted with the intention of reversing the decision of the Court and legalising the arrest of the particular splinters.

Even more visibly, following the initial announcement of the results of the 2005 elections, which revealed that the opposition had won all but one of the seats in the Addis Ababa City Council and several seats in the Federal Parliament, the outgoing Parliament quickly enacted several laws which had the effect of making it difficult, if not impossible, for the opposition to implement freely its policies and programmes. The laws particularly stripped the City Administration of its control over financial resources and the security apparatus. Most of the revenue sources for the city administration were moved to the federal government and the city police force was brought directly under federal control. Most importantly, in reaction to the significant inroad made by the opposition forces to the Federal Parliament, the outgoing federal parliament amended the law that regulated its operations to require an absolute majority to even propose an agendum for discussion by the parliament. Previously any 20 out of the 547 members of the federal parliament were allowed to register an agendum.[20] The new parliamentary rules effectively excluded the opposition from meaningfully participating in the parliament even if they had taken their seats and undermined the possibility even of discussing controversial issues.

These two instances indicate the willingness and capacity of the ruling party to use law as an instrument for harassing and emasculating any politically threatening individual or group. They are early manifestations of the willingness and capability of the ruling party to resort to law to manoeuvre and suppress dissent. Indeed, a 1993 document prepared by the EPRDF Government that details the long term goals and strategies of the party to use law to punish and destroy detractors of revolutionary democracy (essentially those 'oppressors' who oppose the ruling party) clearly embodies the spirit of rule by law.[21] It provides that:

> ... the masses will have many parties and oppressors will have the opportunity to organize. If oppressors try to obstruct the masses from exercising their rights, the constitution and other laws will be used to punish them and bring under control their illegal activities.

This document is a clear manifestation of the desire to use law as an instrument to suppress other political parties and organised groups. The early experiences show that the ruling party is enamoured of the option of using law to deny effect to unfavourable judicial decisions as well as to reverse political gains by the opposition.

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[19] Many refer to the law which denied the right to bail to persons accused of corruption offences as "*Siye's* Law". The provision which denied bail to persons accused of corruption was enacted by an amendment to a law adopted two weeks earlier. The amendment was clearly intended to reverse the court decision freeing Siye Abraha. For a detailed discussion of the drama that unfolded following the end of the Ethio-Eritrean war and the trials, see Elizabeth Belai, "Disabling a Political Rival in the Name of Fighting Corruption in Ethiopia: The Case of Prime Minster vs Ex-Defense Minister Seeye Abraha," (August 2004) http://www.fettan.com/Documents/case_against_siye_abreha.pdf (accessed 27 November 2011). After serving its purpose, the law was subsequently revised to affirm the right to bail. Under the current law, persons accused of corruption offences punishable with not more than 10 years have the right to be released on bail except when the person is likely to abscond or tamper with evidence.

[20] These legislative changes partly motivated the decision of most of the opposition forces to boycott parliament.

[21] See EPRDF's "Our Revolutionary Democratic Goals and the Next Steps" (1993). The document was distributed to cadres but was not made public. For a summary of the document see, "TPLF/EPRDF's strategies for establishing its hegemony and perpetuating its rule" *Ethiopian Register* (1996) http://www.enufforethiopia.net/pdf/Revolutionary_Democracy_EthRev_96.pdf (accessed 9 November 2011).

The CSO[22] and anti-terrorism[23] laws have been particularly criticised for undermining the activities of CSOs working on good governance and human rights issues and silencing the media and opposition members. The most restrictive aspects of the CSO law include the funding restrictions. CSOs working on human rights issues including on children and women's rights are prohibited from receiving more than 10% of their funds from foreign sources. The government considers activities related to human rights as "political" and, therefore, reserved exclusively to Ethiopian nationals without any kind of interference from foreign sources, including financial support. For the government, any CSO that receives more than 10% of its funds from foreign sources is considered a CSO of foreigners. As a result of this restriction, the few CSOs working on human rights issues have been forced to cut down on staff, programmes and areas of operation. For instance, the monies the Ethiopian Human Rights Council (currently forced to change its name to 'Human Rights Council' as it did not have sufficient number of branches to maintain its country-wide nomenclature) received prior to the coming into force of the CSO law have been frozen as the Charities and Societies Agency decided that CSOs cannot use money from foreign sources even if the money was received prior to the coming into effect of the law. The Human Rights Council has also significantly reduced its staff and branches.[24] The Government continues to defy international pressure from the Universal Peer Review Mechanism (UPR),[25] UN Committee on the Elimination of Racial Discrimination (CERD),[26] UN Committee against Torture (CAT),[27] and African Commission on Human and Peoples' Rights[28] to amend the law particularly the restriction on human rights and good governance activities based on source of funding. The Government has reaffirmed its belief that human rights are political issues that "should not be left to foreigners and foreign funds".[29]

Moreover, the Charities and Societies Agency is granted wide discretionary powers to control the registration, operation, suspension and closure of CSOs. The CSO law also excludes the possibility of judicial review of the decisions of the Agency in relation to all decisions concerning CSO that obtain more than 10% of their funds from abroad. All in all, Ethiopia suffers from shortage of CSOs working on human rights and good governance issues. The CSO law has crippled the possible emergence of such NGOs.

Another notable piece of legislation that has proved to be a formidable challenge to democratic rights particularly of politically active individuals and entities has been the Anti-terrorism law. The Anti-terrorism law has taken its toll on freedom of expression and association and is being used to muzzle critical voices. The law prohibits "encouragement of terrorism" which criminalises publications that are "*likely* to be understood by some or all of the members of the public to whom it is published as a direct or indirect *encouragement* or other *inducement* to them to the commission or preparation or instigation" of terrorism (emphasis added).[30] Moreover, the listing of terrorist organisations is conducted

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[22] Charities and Societies Proclamation no 621/2009.

[23] Anti-terrorism Proclamation no. 652/2009.

[24] For a detailed discussion of the impacts of the CSO law on the Ethiopian Human Rights Council, see "The impact of the CSO proclamation on the Human Rights Council" (July 2011) http://ehrco.org/images/impact.pdf (accessed 18 October 2011).

[25] UN Human Rights Council Universal Periodic Review, Report of the Working Group on the Universal Periodic Review: Ethiopia, A/HRC/13/17 (4 January 2010) paras 99 (23-26).

[26] CERD, Concluding Observations: Ethiopia, CERD/C/ETH/CO/7-16 (7 September 2009) para 14.

[27] CAT, Concluding Observations: Ethiopia, CAT/C/ETH/CO/1 (November 2010) para 54.

[28] African Commission on Human and Peoples' Rights, Concluding Observations and Recommendations on the 1st, 2nd, 3rd, &4th periodic report of the FDRE, 47th Ordinary Session 12-26 May 2010 paras 45&72.

[29] Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya: Summary of cases transmitted to Governments and replies received, A/HRC/13/22/Add.1 (24 February 2010) para 814.

[30] Article 6 provides as follows: "whosoever publishes or causes the publication of a statement that is *likely* to be *understood* by some or all of the members of the public to whom it is published *as a direct or indirect*

exclusively by the legislative organ upon recommendations of the executive.[31] Already three Ethiopian organisations including one of the major opposition groups in the 2005 elections, now called Ginbot 7, have been listed by parliament. The courts, or any other politically independent organ, have absolutely no role in the proscription process. The CAT has expressed particular concern over the broad definition of incitement to terrorism and the broad powers of the police to arrest suspects without a court warrant.[32] The final outcome of the UPR report also recommended that Ethiopia ensure that the law will not be abused to silence critical voices.[33]

As expected, the Anti-terrorism law has induced serious self-censorship amongst journalists who are not willing to take the risk of legal persecution by an increasingly intolerant government. One journalist, for instance, indicated to the Committee to Protect Journalists (CPJ) that "[i]f a reporter writes anything, except clear denunciation about these [listed terrorist] organizations, she or he is taking the risk of any interpretation".[34] The CPJ reported that the Anti-terrorism law has had a particularly chilling effect on reporting on security issues. Reporters Without Borders similarly condemned the "long-running pattern of attacks against the private press" based on the Anti-terrorism and other laws.[35] The most recent call on the government to stop using the anti-terrorism law to stifle dissent came from a joint statement by Human Rights Watch and Amnesty International.[36] Since June 2011, more than 30 journalists and members of opposition political parties, who are known for being critical of government, have been arrested after being accused of organising terrorist networks.[37] This is the first time the Anti-terrorism law was used against journalists. There are currently at least 10 journalists, eight Ethiopians and two Swedish journalists, who are charged under the anti-terrorism law. The Swedish journalists have already been convicted; they have now applied for presidential pardon. Several other journalists have fled the country for fear of prosecution under the law. The whole staff of *Addis Neger* was forced to flee the country after they were warned of government plans to prosecute them under the Anti-terrorism law. In November 2011, Dawit Kebebe, managing editor of *Awramba Times*, one of the last remaining independent private newspapers, fled the country in a similar fashion after being warned of government plans to re-arrest him.[38]

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encouragement or other inducement to them to the commission or preparation or instigation of an act of terrorism' is liable to punishment with rigorous imprisonment from 10 to 20 years" (emphasis added). The law also allows gathering information through surveillance and interception of all forms of communication. Such information must be kept in secret and is, therefore, inaccessible to suspected terrorists. The law also allows arrest without court warrant and the remanding without charge of suspects of acts of terrorism for up to four months. Also, once charge has been instituted, the suspect cannot be released on bail – articles 14, 19-20.

[31] In many African countries which have Anti-terrorism laws such as Ghana, Nigeria, the power to proscribe terrorist organisations lies with the courts. See section 2 of the Nigerian Prevention of Terrorism Act 2011; and section 19 of the Ghanaian Anti-terrorism Act of 2008.

[32] CAT, Concluding Observations: Ethiopia, CAT/C/ETH/CO/1 (November 2010) para 14.

[33] Universal Periodic Review: Report of the Working Group on the Universal Periodic Review: Ethiopia, A/HRC/13/17 4 January 2010 paras 35 & 44. The recommendations to review some provisions of the Anti-terrorism law were rejected by the Ethiopian delegation – para 51.

[34] See Committee to Protect Journalists, "In Ethiopia anti-terrorism law chills reporting on security," http://www.cpj.org/blog/2011/06/in-ethiopia-anti-terrorism-law-chills-reporting-on.php (accessed 28 June 2011).

[35] "Reporters without Borders condemns latest arrests of journalists in Ethiopia," *Sudan Tribune* http://www.sudantribune.com/Reporters-without-Borders-condemns,39372 (accessed 30 June 2011).

[36] "Ethiopia: Ethiopia using anti-terror laws to stifle dissent," http://nazret.com/blog/index.php/2011/11/22/rights-groups-ethiopia-using-anti-terror-law-to-stifle-dissent (accessed 23 November 2011).

[37] "Ethiopia arrests 2 journalists, 7 Others on Terrorism Charges," *Bloomberg News* http://www.bloomberg.com/news/2011-06-29/ethiopia-arrests-2-journalists-7-others-on-terrorism-charges.html (accessed 30 June 2011); "Ethiopia arrests 9 on terrorism charges," *Associated Press* http://sg.news.yahoo.com/ethiopia-arrests-9-terrorism-charges-161548513.html (accessed 30 June 2011); Committee to Protect Journalist, "Ethiopia accuses two jailed journalists of terrorism plot," http://www.cpj.org/2011/06/ethiopia-accuses-two-jailed-journalists-of-terrori.php (accessed 29 June 2011).

[38] "Dawit Kebede joins Ethiopia's exiled journalists," http://nazret.com/blog/index.php/2011/11/22/dawit-kebede-joins-ethiopia-s-exiled-journalists (accessed 23 November 2011). Dawit Kebede was honoured by CPJ in 2010 for his fearless independent journalism despite ongoing government terror and intimidation.

There is arguably no other country in the world where anti-terrorism laws have almost exclusively been applied against journalists and opposition political party members.[39]

Moreover, the Proscription of the Oromo Liberation Front (OLF), one of the biggest political parties during the Transitional Government of Ethiopia (1991-1995), and Ginbot 7, part of the main opposition group during the 2005 elections, as terrorist organisations means that any politician who is in any way linked to those who are considered members of the groups is subject to terrorist charges. Journalists who report on anything related to these listed organisations risk terrorism charges for directly or indirectly "encouraging" the listed organisations. In November 2011, six journalists were charged with "encouraging" Ginbot 7. The potential link between the proscribed organisations and the active politicians is probably why the Prime Minister almost always accuses the leaders of the currently operating political parties of working with terrorist groups.

Two other less controversial but equally repressive laws include the Media law and the law governing the registration of political parties and the conduct of elections. The most restrictive provision of the media law relates to the provision which criminalises 'false accusations and defamation against the constitutionally established legislative, executive or judicial authorities' even if the person allegedly defamed does not lay a complaint.[40] In direct contradiction of the jurisprudence at the regional and international level calling for greater tolerance towards criticism of public office holders, this provision scales up the protection of office holders against defamation. Clearly, this law is intended to insulate officials from the embarrassment that accompanies a decision to lodge a complaint. The potential criticism that accompanies complaints of defamation by government officials would have served to discourage defamation proceedings by such officials. Moreover, the punishment for defamation committed by the media was significantly increased inducing self-censorship and threatening those daring to criticise government and government officials.[41] The Media law imposes severe restrictions on the funding of the media by foreigners or foreign sources. Any organisation in which foreigners or a foreign organisation has a stake or voting rights cannot own media in Ethiopia.[42] The law moreover makes registration and licensing by the Ministry of Information mandatory before any media can start functioning.[43] There is, furthermore, no provision that establishes procedures through which aggrieved parties can challenge the decision of the Ministry in relation to registration and licensing or cancellation of licenses thereof.

According to the electoral law of Ethiopia, CSOs wishing to observe elections or to conduct voter education must first obtain licenses from the Ethiopian National Election Board.[44] CSOs obtaining more than 10% of their funding from foreign sources are prohibited from observing the elections or conducing voter education. It is only those CSOs that are considered Ethiopian which are allowed to work on human rights and democratisation issues. Similarly, the media is prohibited from reporting on the election process without a license from the Board.[45] Again, the decision of the Board to issue the license or ID to

[39] According to a recent report of the Committee to Protect Journalists, Ethiopia stands only second to the fully blown dictatorial regime of Eritrea in the number of journalist arrests in Sub-Sahara Africa – For a detailed account of the use of the Anti-terrorism law against journalists, see Committee to Protect Journalists, "Ethiopian terror law's wide reach," http://www.cpj.org/africa/ethiopia/ (accessed 15 November 11).
[40] Freedom of the Mass Media and Access to Information Proclamation no 590/2008, article 43(7). After noting the global trend towards decriminalising defamation of public officials, Ross describes this provision as "retrogressive and draconian" – see Tracy Ross, "A Test of Democracy: Ethiopia's Mass Media and Freedom of Information Proclamation' *Penn State Law Review* 114 (2010): 1060.
[41] Proclamation no 590/2008, article 41(2). For criticism of the media law including the fine regime, see Ross, "A Test of Democracy".
[42] Proclamation no 590/2008, article 7(5).
[43] Proclamation no 590/2008, article 9.
[44] Electoral Law of Ethiopia Amendment Proclamation no 532/2007, articles 79 and 89.
[45] Proclamation no 532/2007, article 91.

CSOs or the media is final and not subject to judicial review. Furthermore, the law prohibits journalist from giving opinions on the results of the election within or outside the country before the official declaration of results. The Proclamation governing the registration and operation of political parties also limits the sources of income of political parties to money raised from membership fees and donations raised only from Ethiopians and Ethiopian companies.[46]

It is important to observe two common themes that run through the CSO, media and political parties registration laws. The first is the desire to ensure that resources from outside sources are not used to support the operation of opposition political parties, the media and human rights CSOs and that any Ethiopian who wishes to donate money to these organisations does so openly. Essentially, according to Government ideology, any Ethiopian who receives financial support from foreign sources is considered a foreigner. Secondly, the laws are designed to ensure that the Government agencies in charge of controlling these entities are given the final say through the exclusion of judicial review. The effect is that CSOs, the media and opposition political parties are put under immense resource constraints making their existence invisible and their influence insignificant. Most importantly, under the laws, the executive has absolute control as to which organisations can or cannot operate in Ethiopia.

It should be noted that all these laws were adopted during the aftermath of the most contested and most controversial 2005 elections. The decision to ban foreign funding of CSOs was in reaction to, among others, their active contribution to the 2005 elections which was considered partial and biased by the government. CSOs and the media are accused of being opposition sympathisers. The massive funding the opposition groups received from the Diaspora in the 2005 elections motivated the banning of all forms of foreign funding including from Ethiopian Diaspora who have lost Ethiopian citizenship. The requirement to obtain licenses to observe the elections or to report on the elections was introduced due to the activities of the media and CSOs in the 2005 elections. The ouster clauses which excluded judicial review were perhaps included in reaction to the decisions of the High and Supreme Court that invalidated the decision of the Electoral Board to preclude CSOs from observing the elections prior to the 2005 elections.[47] As such, the restrictive provisions are not only linked to the 2005 elections; the laws are also the principal reasons for the highly unbalanced 2010 election results with the EPRDF wining almost 100% of the parliamentary seats, a whopping improvement over the 66% it won in 2005.

3. Major factors that reinforce rule by law in Ethiopia

The pervasive use of law to give the ruling party the advantage vis-a-vis other politically relevant and active actors and individuals can be attributed to several factors. History and culture provide the principal background explanation. However, the main reasons that make rule by law possible and reinforce it are attributable to the Constitutional framework and the political dominance of the ruling party and its ideologies embodied in the conception of revolutionary democracy and the developmental state rhetoric.

a. Inheriting rule by law

[46] The Revised Political Parties Registration Proclamation no 573/2008, article 51.

[47] *Organization for Social Justice in Ethiopia et al v Ethiopian Election Board*, case no 38472, Federal High Court (Decision of 3 May 2005); and *Organization for Social Justice in Ethiopia et al v Ethiopian Election Board,* File No 19699, Federal Supreme Court, (Decision of 11 May 2005).

Besides the current regime, contemporary Ethiopia only knows two rather unenviable regimes: one a feudal monarchy and the other a brutal communist regime.[48] These two regimes were based on the idea of the supremacy of the monarchy and of the politburo, Derg, of the communist regime, respectively. During the monarchy, there was a Constitution (the first adopted in 1931, and a revised Constitution in 1955) which minimally guaranteed certain civil and political rights. But the Constitution canonised the legitimacy and supremacy of the Monarch. Political parties were not allowed to operate and the country was led by a "God sent lion of Judah" who served at the helm of all legislative, executive and judicial functions.

During the Derg regime there was nothing like a constitution. The Derg adopted the People's Democratic Republic of Ethiopia (PDRE) Constitution in 1987, after 13 years of a constitutional lacuna, with a view to appease the rising international and domestic political and military pressure. The Derg enjoyed absolute power and enacted any law without any substantive restraint. A natural consequence was that even the most brutal killing, the "Red Terror", was legally sanctioned.

Simply stated, there was nothing the two regimes could not have legalised. The current regime knows exactly how law was used by previous regimes to advance the interests of the monarchy and the one-party state which had in fact victimised the present leaders. There is therefore a conveniently inherited political culture that government can enact into law whatever it desires to. Adebo observed that the current regime has an "autocratic mentality bequeathed by past rigid political culture".[49] Despite the existence of a Constitution (1995) that declares its supremacy, the perception amongst the ruling class, just like their predecessors, is that they have the right to govern and use their legislative power to enact their policies and ideologies regardless of the Constitution. The political understanding is that law is whatever the government of the day says it is. As a result, it is not the Constitution but the ruling party, controlling both the parliament and the executive, which is supreme.

The preceding paragraphs demonstrate inheritance of a rule by law political culture. There is also a social aspect to the rule by law culture. Ethiopian traditional legal conceptions clearly support rule by law. The popular legal and political conception is that governments can and should do whatever they can to stay in power and benefit from their power. The old Ethiopian adage "*semay ayitarus nigus ayikeses"* (roughly "you cannot plough the sky nor sue government"), and "*sishom yalbela sishar yikochewal"* (roughly "if you don't benefit (personally) when in power, you will regret it when out of power") clearly capture popular conceptions of law and political power. The ordinary people still believe that the government is the government of the day and that everyone should make peace with it even when they do not agree with what it does. There is therefore, in Austinian terms, a general "habit of obedience" which makes rule by law possible and politically costless.[50] The legal and political conception of law is therefore deeply positivist, which is inherently in conflict with substantive conceptions of the rule of law. Of course the desire to make peace with government is generated by fear of government retaliation – this fear of government,

[48] For a brief discussion of the impacts of history and culture on democratization in Ethiopia, see Christopher Clapham, "The Challenge of Democratization in Ethiopia' in *Global challenges and Africa: Bridging divides, dealing with perceptions, rebuilding societies* eds. Richard Cobbold and Greg Mills (2004): 71-82 (Report of the 2004 Tswalu Dialogue, the Royal United Services Institute, Whithall Paper 62).

[49] Tarekegn Adeb "Democratic political development in reference to Ethiopia," *North East African Studies* 3 (1996): 53-96.

[50] For a discussion of the Austinian definition of law as the command of the sovereign and the habit of obedience, see B. Curzon *Jurisprudence,* 3rd ed. (Cavendish: United Kingdom, 2001): 139.

which characterises every undemocratic system,[51] is justified as can be witnessed in the historical deeds of the previous and current regimes towards dissidents. This makes it hard for opposition groups, CSOs, human rights advocates and the media to mobilise support against laws, policies and other decisions of the government.

In short, historically in Ethiopia, the political and social conception is that law is an instrument of power, and power is the source of law, and not the reverse. The Ethiopian conception of law highly resembles the Austinian conception of law as the command of the sovereign. This conception of law still prevails despite its formal constitutional rejection in favour of constitutional supremacy.[52]

b. One-party dominance

One of the main preconditions for rule by law is the existence of one-party dominance. In Ethiopia, this precondition has existed since the first national elections. There is a vicious cycle that connects rule by law and one-party dominance – one makes the other possible. Rule by law strengthens one-party dominance and one-party dominance makes rule by law possible and attractive.[53] The Ethiopian federal parliament has been disproportionately controlled by the EPRDF and its allies – 82.9% (1995), 87.9% (2000), 66% (2005)[54], and 99.6% (2010). Due to the parliamentary form of government the Constitution establishes, the winning party in the parliament also controls the executive. As a result, the parliament merely serves as a stand-by rubber-stamping institution to the initiatives of the Central Committee of the party. Indeed, the parliament has never initiated any major legislative proposal. Nor has it rejected or even substantively modified any executive initiative. This absolute dominance of the legislative and executive organs of government enables the ruling party to effectively enact into law its own ideologies regardless of their constitutional implications.[55]

Moreover, the one-party dominance has also led to the centralisation of power in spite of the clear constitutional intention to decentralise power to the Regional States.[56] The direct consequence of the one-party dominance is that despite the letters of the Constitution which actually creates strong Regional States,[57] the Ethiopian state is still characterised by

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[51] Perhaps the main distinction between democratic and undemocratic regimes is that in democracies governments are afraid of being voted out by the people whereas in undemocratic systems the people are afraid of government.

[52] This is in line with Markakis's observation that, in Ethiopia, human rights are considered as privileges granted by the government and that their inclusion in the Constitution is simply a matter of formalism − John Markakis, *Ethiopia: Anatomy of a Traditional Polity* (Addis Ababa: Shama Books, 2006): 333.

[53] Of course the one-party dominance stands on the back of a weak and powerless opposition. The absence of strong opposition parties clearly militates against rule of law and opens up the possibility for rule by law. Rule by law can in turn be used to further weaken opposition political parties.

[54] However, as most of the candidates for the major opposition groups primarily the Coalition for Unity and Democracy (CUD), the biggest opposition at the time, boycotted the parliament and were subsequently convicted of charges of attempting to illegally overthrow the government, the EPRDF won most of the seats during the by-elections.

[55] Such as a belief that human rights issues are 'purely political' reserved for citizens to the exclusion of foreigners and anyone who receives any form of financial support from foreign sources is considered a foreigner or a foreign agent; as such Ethiopian CSOs receiving funds from foreign sources, including Ethiopians who have lost their citizenship for any reason, cannot engage in 'political' activities such as human rights advocacy.

[56] See generally Lovise Aalen "Ethnic Federalism in a Dominant Party System: The Ethiopian Experience 1991-2000," (2002) (Chr. Michelsen Institute, Development Studies and Human Rights) http://bora.cmi.no/dspace/bitstream/10202/186/1/Report%202002-2.pdf (accessed 12 January 2012).

[57] Haile criticised the Constitution for creating a weak Central/Federal Government. He observed that "[t]he tribal homelands, or the "states"…, have been given such a disproportionately large measure of competence that it can reasonably be questioned whether the "federal government" the constitution purports to establish in fact exists at all" – see M. Haile 'The New Ethiopian Constitution: Its Impact upon Unity, Human Rights and Development," *Suffolk Transnational Law Review* 20 (1996-1997): 24.

a strong and centralised government with immense power and control over the Regional States.

c. Revolutionary democracy and the developmental state rhetoric

The kind of democracy the ruling party actively propagates – Revolutionary Democracy - is very different from liberal conceptions of democracy that underpin substantive conceptions of the rule of law. Although it has not been properly defined, revolutionary democracy is presented by the government as a rival to liberal democracy. Indeed, a liberal democrat is demonised by the government as communists were vilified in the West during the Cold War. Revolutionary democracy greatly encourages and leads to the fusion of state and party.[58] Yet, the fusion of the state with party is inherently antithetical to multi-party democracy.[59] The fusion leads to the use of the state machinery including particularly law-making powers to bolster their position and advance the interests of the ruling party.[60] Most importantly, revolutionary democracy propagates for a state apparatus that exercises effective control over the political, economic and social activities of society. Similarly, revolutionary democracy is founded on an 'unshakable conviction carried over from a Marxist upbringing, that there is only one "correct line" and only one genuine revolutionary movement'.[61] The result is, Markakis observed, the 'EPRDF's contempt for its political opponents [which] translates into denying them the space needed to function properly'.[62] Rule by law therefore emerges as the principal tool through which the ruling party can advance its interests cripple potential competitors.

Moreover, the EPRDF propagates a Korean- and Taiwanese-style developmental state approach which believes that economic development and political stability can only be achieved through massive state involvement and guidance. Although the Ethiopian government, including the Prime Minister,[63] has repeatedly argued that a developmental state can also be a democratic state, this is questionable. Contrary to the government's view, a developmental state needs a regime that should rule for more than a few electoral periods.[64] According to Peter Evans, a developmental state needs to be autonomous from society; it must have an 'embedded autonomy'.[65] Fritz and Menocal also observed that matching a developmental with a democratic state is challenging as 'democracy has an inherent tendency to disperse power and slow down decision-making processes, and it also makes the state less autonomous and less insulated from societal demands...thus

[58] Merera Gudina, a veteran opposition member, considers revolutionary democracy as "the mother of all evils".

[59] Multi-party democracy needs "a neutral state whose institutions provide a level playing-field on which political parties can compete fairly" – Alex Thomson, *An Introduction to African Politics,* (New York: Routledge, 2010): 256.

[60] Vestal observed in this regard that "the work of [EPRDF] cadres blurs the line between the state and the ruling party giving them a two-edged sword with which to cut down the opposition" – Theodore Vestal, "Democratic governance and Human Rights: How to Win Elections in Ethiopia', Presented at the Conference on Ethiopia and the Horn of Africa, 9-11 April 2010, http://www.ethiopianreview.com/content/27575 (accessed 9 November 2011).

[61] John Markakis, *Ethiopia: The last two frontiers* (New York: James Currey, 2011): 243.

[62] Ibid., 250.

[63] Meles Zenawi, "States and markets: Neoliberal limitations and the case for a developmental state," in *Good Growth and Governance in Africa: Rethinking Development Strategies,* eds. Akbar Noman *et al* (Oxford: Oxford University Press, 2012): 140-174.

[64] The government admits that a developmental state is a long term project that needs more than winning a few regular elections. It, however, assumes that a coalition of strong ethnic-based parties, which the EPRDF is, can secure consistent electoral victories necessary to complete the transformational agenda of the developmental state.

[65] Peter Evans, *Embedded Autonomy: States and Industrial Transformation* (New Jersey: Princeton University Press, 1995). A developmental state must be sufficiently autonomous from society "capable of constructing long-term projects of social change that transcend short-term interests of specific groups".

slowing down the process of building of a developmental state'.[66] The need for autonomy and to dominate political power for longer periods necessitates using different tools including mainly law to ensure that the ruling party gains advantages over opposition groups. Giving advantages to the ruling party is exactly the impact of the laws dealing with opposition parties, the media, and CSOs considered above.

A developmental state is a long-term project which might be endangered by short-term electoral calculations that can abort its transformational agenda. The developmental state therefore needs to be unobstructed by short-term electoral calculations. For this to happen, laws and other tools must be used to give the government intrinsic advantage over other opposition forces. Rule by law becomes a valuable tool to ensure that elections are won comfortably before they are organised. Indeed, historical experiences of famous developmental states such as South Korea, Taiwan, and Singapore, which now serve as models for the Ethiopian government, were characterised by the existence of laws that legalised the one-party state or otherwise restricted political competition - rule by law.[67]

The combined effect of the conceptions of revolutionary democracy and the developmental state rhetoric is to require the entrenchment of the ruling party giving the regime the time necessary to achieve its developmental agenda. This has created a mismatch between a liberal Constitution and an illiberal political ideology and practice of the ruling party. Even assuming the genuineness of the transformational agenda of the ruling party, there is need for government to use everything including law as an instrument to ensure that the ruling party stays in power. Rule by law therefore becomes a necessary and attractive venture for the ruling party. It helps the government to win elections before they happen.

d. Claw-back clauses

Constitutional rights represent the principal critical substantive standards constituting the rule of law. However, the manner in which the human rights provisions in the Ethiopian Constitution are formulated has denied the rights any substantive content. One of the main constitutional formulation deficiencies that reinforces rule by law is the fact that the Constitution allows the limitation of the human rights guarantees by any "law" – commonly referred to as "claw-back clauses" − without any substantive requirements as to the kind and quality of the law that may be used to limit a right. For instance, there is no requirement that limitation of constitutional rights should be a last resort and justifiable and necessary in a democratic society – accepted standards in international human rights law. The rights to life, liberty, freedom of association, bail and other rights may be limited based on circumstances "established by law".[68] This allows the government to simply enact laws to limit these and other rights without actually violating the Constitution. The government has the absolute discretion to determine the circumstances under which constitutional rights may be limited. For instance, the anti-corruption laws that denied the right to bail to anyone charged with corruption offences were held to be in line with the Constitution simply because the Constitution allows the limitation of the right to bail by "law".[69] The

[66] Verena Fritz and Alina Rocha Menocal, "Developmental States in the New Millennium: Concepts and Challenges for a New Aid Agenda," *Developmental Policy Review* 25 (2007) 536-537.

[67] See Randall Peerenboom and Weitseng Chen, "Developing the Rule of Law" in *Political Change in China: Comparisons with Taiwan,* eds. Bruce Gilley and Larry Diamond Boulder: Lynne Reiner Publishers, 2008)

[68] FDRE Constitution article 17(1) – right to liberty; article 19(6), right to bail; article 31, right to association.

[69] The case concerning the constitutionality of the law that excluded bail in corruption offences, Council of Constitutional Inquiry (2004) (on file with author). What is interesting is that the provision that denied bail to all charged with corruption was after the decision of the Council amended to only apply to those charged with corruption offences that might entail 10 or more years of imprisonment.

CSO law that highly restricts the right to association may perhaps also be justified on this ground.[70]

Simply stated, the claw-back clauses have the effect of making the legislator rather than the Constitution supreme. Any law enacted by the government is seen as a legitimate tool to effectively undermine the relevance of constitutional rights. Hence, despite the fact that the laws considered above have serious implications to several constitutional rights, they are in line with a literal understanding of constitutional rights provisions.[71]

Closely related is the fact that the current constitution actually represents the political and social ideologies and preferences of the ruling party (EPDRF). The Constitution was adopted almost exclusively by the current ruling party.[72] This dominance gave the ruling party the opportunity to incorporate into the Constitution policies, systems and institutions, such as the electoral system and the constitutional adjudication system, that were calculated to give it the edge against potential opposition groups.[73] To this extent, the Constitution represents an instance of rule *by* the constitution and not rule *of* the Constitution. This is probably why the government and the ruling party run a calculated agenda of the Constitution as a sanctified, untouchable "Holy Grail" and consider any call for constitutional amendment or reform as an attempt to overthrow the government. Nevertheless, although some aspects of the Constitution can be described as embodying elements of rule *by* the constitution, the Constitution also incorporates certain genuine limits on government power including in the form of human and democratic rights. To this extent, it serves as a critical standard against which laws and other measures are to be tested. Legislative respect of constitutional limits in fact serves as the standard for rule *of* law. Disregarding the limits on the other hand demonstrates rule *by* law.

e. Jurisdictional ouster clauses

One of the essential requirements of the rule of law is the existence of an independent judiciary with the power to review the decisions of administrative agencies. However, it was indicated above that the Electoral law excludes judicial review of the decisions of the Electoral Board in relation to the granting of license or ID to observe or report on elections; the CSO law makes the decisions of the Charities and Societies Agency final; the Anti-terrorism law does not subject the listing or proscription of terrorist organisations to any form of judicial review or control − listing is done exclusively by the legislator at the behest of the executive.

Interestingly, a constitutional challenge against an Executive Regulation which authorised the Director of the Customs and Revenue Authority to dismiss any employee whom he/she suspects might be corrupt – a decision not subject to judicial review − was rejected by the Constitutional Council of Inquiry.[74] The Council ruled that in a parliamentary form of government, the legislature has the discretion to limit the jurisdiction of courts, and, hence, jurisdictional ouster clauses do not violate the constitutional right to access to justice.[75]

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[70] This constitutional defect may actually partly explain why the CSO law has so far not been challenged even by CSOs and other interested parties.

[71] For a detailed discussion of the effects of the claw-back clauses, see Adem Abebe "Limiting Limitations of Human Rights under the Ethiopian Constitution," *Ethiopian Constitutional Law Series* 4 (2011).

[72] John Young, "Regionalism and Democracy in Ethiopia" *Third World Quarterly* 19 (1998): 195.

[73] This is why many people tend to describe the Constitution as the "TPLF\EPRDF" Constitution and not the "Ethiopian" Constitution. This also explains the fact that most of the opposition groups currently oppose not only the government but also the Constitution itself.

[74] The Council is the advisory organ to the House of Federation which has the final power of constitutional interpretation. See section 3f. below.

[75] Case concerning the validity of ouster clauses, Council of Constitutional Inquiry (10 February 2009) (on file with author).

Despite its constitutional status, the right to access to justice can be abridged at a stroke of legislation. The implication of this ruling is that any potential challenge to the ouster clauses included in the CSO, Anti-terrorism and Electoral laws will not succeed.

Ouster clauses give the legislature and the executive the final say as to what the Constitution requires in particular instances. The cumulative effect of the claw-back and ouster clauses coupled with the rulings of the Council rejecting constitutional challenges against jurisdictional ouster clauses is to legitimise rule *by* law.

f. Absence of an independent constitutional adjudication system

One of the main features of modern constitutional democratic states, especially federal states, is the recognition of human rights and establishment of strong and independent constitutional review systems capable of resolving constitutional disputes mainly involving constitutional rights and disputes amongst centrifugal and centripetal forces. An independent constitutional adjudicator is particularly important in Ethiopia as there are no other veto points within the government system against legislation or other measures that contradict the Constitution. In the U.S. constitutional system, for instance, there are multiple veto points that can ensure that no legislation that contravenes the U.S. Constitution comes into effect. Hence, the House of Representatives, the Senate or the President of the Republic are authorised to veto any decision of the other branches. And even when all these three organs have agreed on a particular piece of legislation, the courts provide additional veto points to expunge any unconstitutional law. In the Ethiopian context, however, there are no veto points within the political organs which makes an independent constitutional review system all the more important. The parliamentary form of government the Constitution establishes makes it easy to enact laws without any challenge within the state structure. On top of this, the power of constitutional review belongs to a political organ.

In Ethiopia, the constitutional adjudication system is highly politicised. The power of constitutional adjudication lies with those whose power the Constitution intended to limit – political power-holders. Constitutional review is exercised by the House of Federation (HoF), a purely political organ which consists of representatives of ethnic groups. The members of the HoF are nominated every five years by the legislative councils of the regional states. The Constitution therefore establishes the Council of Constitutional Inquiry which largely consists of legal professions to advise the HoF on whether there are constitutional issues and, if yes, to provide recommendations on constitutional issues. The Council has eleven members including the President and Vice President of the Federal Supreme Court; three members nominated by the HoF from among its members; and six others appointed by the House of Peoples Representatives (HPR) upon nomination by the President of the Federal Democratic Republic of Ethiopia (FDRE). However, the Council only has screening and advisory functions. Given that the government has the monopoly in adjudicating constitutional disputes including those involving individual rights, challenges against government measures for violating political rights are doomed to fail. Neither the House nor the Council can provide an independent and neutral forum to adjudicate disputes involving the government alleging violations mainly of political rights. There is therefore nothing within the state system that can ensure that the substantive limits on government power are respected.

Although one expects the Council to be more welcoming and sympathetic toward human rights issues, some of the decisions in politically sensitive cases reveal an apologist and justificatory pattern in its reasoning. In one case,[76] the Council had to determine whether a

[76] Emergency declaration case, Council of Constitutional Inquiry (14 June 2005) (on file with author).

sole declaration by the Prime Minister to suspend the right to assembly and demonstration following the 2005 elections was in line with the Constitution. The Constitution clearly authorises only the Council of Ministers, not the Prime Minister, to declare a state of emergency subject to subsequent approval by the HPR.[77] Rather than merely applying the procedure for declaring emergencies established in the Constitution, the Council was searching for other provisions from which it could imply the "power" of the Prime Minster to surpass the explicit constitutional provision.[78] The Council should have simply declared that the Council of Ministers, not the Prime Minster alone, can declare a state of emergency.[79] Similarly, in a constitutional challenge against a regulation that empowered the Director of Customs and Revenue Authority to discharge any employee whom he/she suspects to be corrupt without judicial review, the Council ruled that in the Ethiopian parliamentary system the HPR has the power to preclude judicial review even if the Constitution clearly guarantees the right of everyone to access to courts. Any law that is said to serve the "public purpose", the Council ruled, can provide the basis to limit constitutional rights.

4. Conclusion

Although this paper considers all the major factors without discussing each factor in great depth, it provides a fair picture of the prevalence of rule by law in Ethiopia. Clearly, despite the constitutional sanction of substantive rule of law, the Ethiopian state has fully joined the rule by law camp. As a result, Ethiopia has regressed from a constitutional state to a state organised under the concept of "rule by the government".[80] Despite constitutional guarantees of rights, the democratic system has been used to establish rule by law and undermine the democratic system itself by entrenching the ruling party. Markakis concluded that "[t]he ruling front makes full use of the state machinery and resources including its monopoly of mass media and instruments of repression, to relentlessly and ruthlessly harass [political opponents]".[81] Quite simply, the rules of a fair democratic game have been significantly rigged through the use of law to cripple the principal political actors. This is in line with the desire of the EPRDF declared early in 1993 that it "should win the initial elections and then *create a conducive situation* that will ensure the establishment of this hegemony [of the EPRDF]" (emphasis added).[82]

The paper only discusses the absence of effective domestic safeguards against regression into rule by law. The list of factors is clearly not exhaustive. On top of the absence of domestic safeguards, and despite the abysmal human rights and democratic record, international pressure for democracy and substantive rule of law on Ethiopia has largely been indecisive – Ethiopia has managed to continue to be a donor-darling - of both West and East.[83] The cumulative effect of all the factors that reinforce rule by law is that there is nothing that can stop the government from enacting any law regardless of its implications to constitutional rights. There is nothing within or outside the state structure that can

[77] FDRE Constitution, article 93.
[78] It should also be noted that despite the fact that the case concerned derogation from rights, the Council was discussing the requirements applicable to limitation of rights.
[79] The Council has failed to tackle even the most flagrant violations.
[80] Tamanaha observed in this regard that rule by law "has no real meaning, for it collapses into the notion of rule by the government" − Tamanaha, *On the Rule of Law,* 92.
[81] Markakis, *Ethiopia,* 250.
[82] See note 21 above.
[83] Axel Borchgrevink "Limits to Donor Influence: Ethiopia, Aid and Conditionality' *Forum for Development Studies* (2008): 195 observing that donors have failed to influence Ethiopian political policies. The West considers Ethiopia a strategic ally in the war against terrorism and extremism in the Horn of Africa. Because Ethiopia hosts the African Union, China considers Ethiopia as the gateway to resource-rich Africa. This has enabled Ethiopia to continue to receive huge amounts of money in foreign aid and loan from the international community. Also due to figures indicting encouraging economic growth, international financial institutions and the UN want to sell Ethiopia as a success story.

ensure compliance with substantive rule of law. There are no veto points within the state structure, or popular or opposition forces outside the state that can mobilise constituencies against violations of the Constitution. In reality, as well, Ethiopia only adheres to the formal conceptions of the rule of law: the combination of factors makes rule by law not only a possible but also an attractive venture to the government.

Clearly, the main source of the rule by law saga in Ethiopia is the lack of unwavering commitment to constitutional provisions by the ruling party. Given the difficulty of stirring change from below due to the overriding presence of the State and its military might coupled with the utter absence of strong opposition and civil society groups,[84] the nurturing of rule of law can only be achieved if the ruling elite see value in adhering to it. This is unlikely since rule by law benefits the current ruling elite better and given the hovering possibility of losing power that loyalty to the substantive rule of law ideal breeds. Most importantly, domestic as well as international pressure for a full-fledged state of rule of law in Ethiopia has so far been unorganised, incoherent and, therefore, insignificant. The Government has so far been able to do things its way without significant domestic and international resistance or serious condemnation. In short, given the factors identified in the previous section are destined to continue, achieving substantive rule of law in Ethiopia will likely take time.

[84] This does not mean that pressure from below cannot induce change. It is unlikely in the short-term but not impossible. If the 2011 Arab Spring Revolution can teach us anything it is the reality that even the most stable dictatorships can collapse in a short time. Indeed, the momentum that accompanied the 2005 elections in Ethiopia also tells us that change is not impossible.

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