CHAPTER 14

In the Name of Diversity

The Disenfranchisement of Citizens in an African Federation

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1 Introduction

The empowerment of ethnic communities is the cornerstone of the constitutional arrangement of the Federal Democratic Republic of Ethiopia. The Constitution organises the state along ethnic lines by using ethnicity as the primary basis to demarcate its internal boundaries. Ethnically defined autonomous subnational units are the basis for the organisation of the federation. At the same time, the Constitution, like many other contemporary Constitutions, provides for a vast array of individual rights. It declares equal commitment to both individual rights and the right of ethnic communities to autonomy.

Despite the constitutional commitment to equally uphold the autonomy of ethnic communities and individual rights, the constitutional practice, this chapter argues, seems to give more weight to autonomy rights and frustrates claims based on the right of an individual to equal treatment. This chapter discusses the status and treatment of individuals that belong to ethnic minorities in a context of a case that was decided by the House of Federation (HoF), the body that is responsible for interpreting the Constitution. The case revolved around the constitutionality of the use of a mandatory language requirement as a condition to be eligible for election. Although the HoF, in its decision, affirmed the rights of individual applicants to stand for elections, a closer scrutiny reveals that the HoF failed to protect the individual's right to stand for election regardless of their linguistic abilities. In fact, the decision of the HoF has the effect of disenfranchising a large number of the population in most urban areas of the different subnational units, undermining the constitutional commitment to equal respect for individual and communal rights and creating a feeling of exclusion among individuals that are deemed not to belong to the empowered group(s).

The chapter is structured in five related parts. The next section introduces the basic architecture of the Ethiopian federation and, particularly, the self-rule aspect of the federation. This is followed by a section that discusses how the Constitution seeks to reconcile autonomy with individual rights. It then

moves to the main business of the chapter and discusses how the Constitution has, in practice, attempted to reconcile autonomy with the principle of equality. It does so by focusing on the case brought before the HoF pertaining to the mandatory language requirement to stand for election. The decision of the HoF is analysed both from the perspective of equal rights as well as from the point of view of the autonomy of ethnic communities that the mandatory language requirement purportedly seeks to advance. The chapter concludes that the decision of the HoF inflicts harm not only on the principle of equality but also onto the commitment of the Constitution to promote the autonomy of ethnic communities.

2 Autonomous Ethnic Communities: The Building Blocks of the Ethiopian Federation

The political map of the Ethiopian federation betrays its major foundation: ethnicity. Unlike other federations, where geography or administrative conveniences have been used to draw internal boundaries, Ethiopia has opted to take ethnicity as the point of departure for the remaking of the Ethiopian state.[1] Although unusual, it was not totally unexpected. The forces that sat around the national table in July 1991 and negotiated the reordering of the Ethiopian state were ethnic based political movements and liberation fronts. For them, the primary question that needed to be addressed in post-Derg[2] Ethiopia was what is usually known as the nationalities question – the claim that the making of the Ethiopian state was predicated on the suppression of the cultural and political aspirations of ethnic communities that inhabit the country. Ethnicity, they declared, should be the basis for the reorganisation of the Ethiopian state.[3] It is that consensus, often touted by its proponents as 'the bold experiment' in Africa, which found its way into the current Constitution.[4]

1 This is clearly stated in the Constitution: 'States shall be delimited on the basis of the settlement patterns, language, identity and consent of the people concerned'; see Article 46 of the Constitution of the Federal Democratic Republic of Ethiopia, 1995 (hereafter the Constitution).

2 Derg was the name given to the military government that ruled Ethiopia from 1974 to 1991.

3 The Transitional Charter, which served as the constitutive document of the Transitional Government from 1991 to 1995, created 14 regions that were explicitly based on ethnicity.

4 Whether an experiment that is novel and bold is always a good thing is a different matter although that is what the proponents of the federation seem to suggest.

The 'bold experiment' saw the creation of nine states.[5] The ethnic foundation of the federation is particularly apparent in five of its nine states.[6] This is not only because of the fact that each of them is predominantly inhabited by one particular ethnic group. They are also named after the dominant ethnic group that inhabits the territory. The ethnic trait is not completely absent either in the makeup of the remaining four states. Although these states are not predominantly inhabited by one ethnic group, the designations of some of the states[7] and their internal organisational structure, that includes ethnic based local governments,[8] indicates that ethnicity is taken seriously in the political and organisational makeup of the states.

The decision of the Ethiopian state to take ethnicity seriously, perhaps too seriously, in the political and geographical reconfiguration of the country has undeniably promoted the cultural and political status of groups that were hitherto marginalised in the past. The cultural upliftment is particularly palpable. A country that for ages used only one language as a language of communication has now given way to a federation whose constituent units use different languages for the purposes of government business within their respective boundaries.[9] This has extended to the education sector where many languages are now used as the medium of instruction at least in the early stages of most primary schools. Perhaps the most visible and colourful manifestation of cultural upliftment comes in the form of the reintroduction of annual traditional celebrations that attract thousands of peoples and are taking the form of 'street festivals'.[10]

The political upliftment may not be equally palpable. Still, as I have alluded somewhere else,[11] the territorial structure of the federation gives ample

5 The nine states are Tigray, Afar, Amhara, Oromia, Benshangul/Gumuz, Southern Nations, Nationalities and Peoples (SNNPR), Harari, Somalia and Gambela; see Article 47 of the Constitution.

6 These are Tigray, Amhara, Oromia, Somalia and Afar.

7 Take, for example, the state of Harari, which is named after the numerically small but historical inhabitants of the area. The Harari account for less than 9 % of the state population.

8 This is the case, for example, with the SNNPR, which is home to numerous ethnic groups, but is composed of local governments that are defined along ethnic lines.

9 The Constitution, under article 5, leaves the power to decide language policy to each state government.

10 Ashenda, a cultural festival of young ladies in Tigray, Irreecha, a thanksgiving holiday in Oromia, and Fiche Chembelala, a new year festival for the Sidama people celebrated in SNNPR, are very good examples of annual cultural festivals that have gained prominence in the last few years.

11 Yonatan Fessha, *Ethnic Diversity and Federalism: Constitution Making in South Africa and Ethiopia* (Surrey: Ashgate, 2010).

opportunities for local communities to participate in the political structure of the state. In fact, local communities have now been able to benefit from receiving services from leaders that speak their language and share their culture even though the representativeness and autonomy of the leaders is often questionable. True and full empowerment of communities is yet to arrive.

The reconfiguration of the state, because it cannot and has not resulted in separate ethnically pure territorial units, has brought to fore new tensions. On the one hand, it has created a majority–minority tension at the level of the constituent units. Some ethnic communities have suddenly found themselves in a minority position in an area they have traditionally inhabited just because they are taken along with another group that happens to be numerically dominant. Those who find themselves in a minority often complain of political and economic domination by the regionally empowered group. They maintain that they, as a group, are entitled to equal recognition and protection. To their credit, the Constitution as well as the federal and state governments, through acts of parliament and state Constitutions respectively, have put in place few mechanisms to address the concerns of these internal minorities.[12]

The reconfiguration has also created tension between individual rights and communal interests. Protecting and accommodating the interest of communities is not always compatible with the interest of individuals, especially with those that do not belong to any of the groups that traditionally inhabit the area. Often referred to as non-indigenous or settlers, this group of individuals complains of their relegation to a second-class citizen status. They often complain that they are not able to access government services in their language and, more problematically, they are often discriminated against regarding education, employment and other benefits offered by state governments.

The resulting tensions are at the core of this chapter. As they result from the remapping of the state, this situation leads us to wonder how the Constitution envisages the reconciliation of these competing interests. This is a question about how a state can go about empowering groups that were marginalised in the past through autonomous arrangements without undermining its

12 The Constitutions of state governments have provided some mechanisms to accommodate the concerns of these groups. Some of the state Constitutions have also introduced a similar system, but at a lower level, in a form of ethnic based local government, to accommodate identity-related demands from intra-state minorities. Functioning as autonomous entities, these ethnically defined local governments provide intra-state minorities with the territorial space that is necessary to manage their own affairs. For more, see Yonatan Fessha and Christophe Van der Beken, "Ethnic Federalism and Internal Minorities: The Legal Protection of Internal Minorities," *African Journal of International and Comparative Law* 21, no. 1 (2013): 32–49.

commitment to respect and protect individual rights irrespective of the group they belong to.[13] Let us start with the Constitution.

3 The Communitarian Constitution?

One can easily be tempted to classify the Ethiopian Constitution as a communitarian one. With its elaborate list of provisions that presents ethnic groups as the subject of rights, the Constitution might be unparalleled in the attention it gives to ethnic communities. It might be difficult to identify a comparator from its contemporaries. This is not only because it presents ethnic groups as the subjects of rights (which, on its own, is not necessarily common) but also since it defines the Constitution as a compact amongst ethnic communities. It proclaims that it is the coming-together of ethnic communities that has given birth to the federation. In as much as one can easily dismiss this as a constitutional fiction, it is this constitutional premise that underlies the clauses that make up the Constitution. As noted by Kymlicka, '[t]he Ethiopian Constitution reads as if someone attempted simply to deduce the appropriate structure of the federal state from a set of first principles, in conjunctions with a census of ethno-linguistic groups'.[14] It is this preoccupation with ethnic groups and the rights of ethnic groups that has made many wonder whether there is 'a space for the individual' in the Ethiopian Constitution. Even if there is a space for individual rights, they argue, it is of secondary importance to group rights. '[T]he individual is relegated in the constitutional order.'[15]

Even if the unusual attention given to ethnic communities overshadows all other parts of the Constitution, it provides for a detailed list of individual rights. A whole chapter (i.e. chapter three of the Constitution) is dedicated to fundamental rights and freedoms. Part one of that chapter is dedicated to human rights. Part two focuses on what it calls democratic rights. Between the two parts, the Constitution provides for no less than two dozen individual

13 This is not a tension that is unique to the Ethiopian federation. Most multinational federations grapple with this dilemma.

14 Will Kymlicka, "Emerging Western Multinational Federalism: Are They Relevant for Africa?," in *Ethnic Federalism: The Ethiopian Experience in Comparative Perspective*, ed. David Turton (Addis Ababa: Addis Ababa University Press, 2006), 55. It has also led Kymlicka to observe 'the explicitness with which the Ethiopian Constitution affirms the principle of ethno-national self-government and the logical consistency with which it attempts to institutionalize that principle'.

15 See Berihun Adugna Gebeye, "Towards making a proper space for the individual in the Ethiopian Constitution," *Human Rights Review* 18, no. 4 (2017): 439.

rights, including the universal rights that are widely recognised by national Constitutions and international human rights instruments. Importantly, Article 25 of the Constitution declares the right to equality and prohibits discrimination on grounds of, amongst other things, race, nation, nationality, or other social origin, language, religion or other status. The Constitution mandates 'all federal and state legislative, executive and judicial organs at all levels […] to respect and enforce [the fundamental rights and freedoms provided in the Constitution]'.[16]

Although the emphasis on group rights overshadows all other equally important provisions of the Constitution, respect for universal individual rights is given equal status, though not equal attention, to that of communal rights, or as the Constitution puts it, 'the rights of nations, nationalities and people'.[17] This is clearly stated from the outset in the preamble to the Constitution which emphasises the 'full respect of individual and people's fundamental freedoms and rights'.[18] It also declares the need to 'live together on the basis of equality and without any sexual, religious or cultural discrimination'.[19] The HoF, the body that is responsible for interpreting the Constitution, has also confirmed that the Constitution attaches equal weight to individual and communal rights. It declared that individual rights and group rights, as recognised by the Constitution, are 'interdependent, indivisible and equal'.[20] The right of ethnic communities to self-determination should not be given preference over individual rights. Similarly, it is not permissible to limit the right of ethnic communities to self-rule to ensure the realisation of an individual right. Both groups of rights must be seen in harmony with each other and must be enforced accordingly. The question is whether the constitutional practice reflects this equal commitment to communal and individual rights.

The commitment of the Constitution to respect individual and communal rights was at the centre of a case that was brought before the HoF.[21] The case stemmed from a petition that challenged the decision of the National Electoral Board that, according to the claimants, interfered with the right to stand as a candidate. The decision dealt with the use of language requirements

16 Article 14 of the Constitution.
17 Article 39 of the Constitution.
18 Preamble of the Constitution.
19 Preamble of the Constitution.
20 Benshangul/Gumuz case, House of Federation (12 March 2003) House of Federation (2008) 1 *Journal of Constitutional Decisions* 14–34 (Hereafter Benshangul/Gumuz case).
21 Decision of House of the Federation on 'Constitutional Dispute Concerning the Right to Elect and be Elected in Benishangul Gumuz Regional State', 13 March 2003 (Hereinafter the '*Benishagul Gumuz* case)'.

to stand for election in one of the nine states, namely the state of Benshangul/Gumuz. Before analysing the case in detail, a quick account of the socio-political demography of the state has to be provided, which, I believe, gives an insight into the developments that led to the legal battle that is the focus of this chapter.

4 The State of Benshangul/Gumuz and the Use of Mandatory Language Requirements

Unlike the five states, there is no single ethnic group that accounts for most of the population that inhabits the state of Benshangul/Gumuz. The largest ethnic group, the Berta, account for just less than 26 % of the population of the state, closely followed by the Amhara and the Gumuz, each of which account for just above 21 % of the population of the state.[22] Like the five states, however, the designation of the state gives an indication of the ethnic groups that are deemed to be 'owners of the state'. This is because the designation of the state is not ethnically neutral. It actually refers to the two ethnic groups that are deemed to have historically inhabited the area, namely the Berta and the Gumuz. In fact, the Constitution of the state reinforces this perception by singling out the two ethnic groups, along with the Shinasha, Mao and Komo, as the 'owners of the state'.[23]

Nearly half the population of the state does not, however, belong to the ethnic groups that are declared by the Constitution as the 'owners of the state'. In fact, an important feature of the demographic composition of the state is the presence of a large population that have migrated to the area. Many have moved to the state because of the resettlement programs that were undertaken by the military government in the 1980s following the famine that ravaged the northern part of the country. Although these individuals belong to different ethnic groups, more than half of them belong to the Amhara ethnic group, the second largest ethnic group in the country, whose culture and language has been historically dominant. This segment of the population, together with the Oromo and members of other ethnic groups, account for no less than 40 % of the population of the state.

22 The three other ethnic groups are the Shinasha (7.59 %), Mao (1.90 %) and Komo (0.96 %). See Population Census Commission, "Summary and statistical Report of the 2007 Population and Housing Census Results," accessed on 15 July 15 2018, http://www.ethiopianreview.com/pdf/001/Cen2007_firstdraft(1).pdf.

23 Article 2 of the Constitution of the State of Benshangul/Gumuz.

It was the decision of three individuals that belong to the so-called settlers group to stand for election to the parliament of Benshangul/Gumuz that ensued the legal battle that culminated in the HoF. Although the three individuals belong to different ethnic groups, they share the fact that all of them speak Amharic and wanted to contest the 2000 state legislature election. Their decision to contest the election, however, faced a strong objection from one of the local political parties that was vying for the control of the state parliament. An ethnic based party that claims to represent members of the Berta ethnic group petitioned the National Electoral Board of Ethiopia (NEBE) for the exclusion of the candidates from the state election because none of the three candidates speak any of the 'indigenous languages' and, in particular, Berta, one of the five 'indigenous languages' spoken in the state.

The NEBE agreed with the petition and struck off the individuals from the list of candidates. The NEBE based its decision on the electoral law that makes the right to stand for an election dependent on the ability to speak the working language of the region.[24] The individuals appealed to the HoF, objecting to the decision of the NEBE on the ground that the law is unconstitutional. The Council of Constitutional Inquiry (CCI), a standing body established by the Constitution to provide advisory opinion to the HoF,[25] concluded, on a majority vote, that the mandatory language requirement constitutes discrimination. It accordingly advised the HoF to declare the impugned legislation unconstitutional and invalid. The dissenting members of the CCI did not see incompatibility between the mandatory language requirement and the right to stand for election without discrimination.

The HoF reversed the decision of the NEB and affirmed the right of the three individuals to stand for election on the ground that the impugned legislation does not require the candidate to speak the 'indigenous languages' but the working language of the state government. However, the decision of the HoF, as we shall find shortly, fell short of entrenching the right of individuals to stand for an election irrespective of their linguistic ability. This is because the HoF held that the use of the working language of the state as a condition

24 Article 38 (19 (b)) of the Proclamation to make the Electoral Law of Ethiopia conform with the Constitution of the Federal Democratic Republic of Ethiopia (Proc. No. 111/1995), published in *Negarit Gazeta* TGE, 54, no. 9 (February 1995).

25 The CCI, composed of lawyers and politicians, has the powers to investigate constitutional disputes and submit its recommendations to the HoF. In particular, if federal or state law is challenged on the ground that it is unconstitutional, the Council shall consider the matter and submit its recommendations to the HoF. The HoF is not obliged to adopt the recommendations of the Council. See Article 84 of the Constitution.

to stand for election is not inconsistent with the Constitution as it does not constitute a violation of the right of a citizen to stand for election without discrimination.

In what remains of this chapter, I argue that the position of the HoF is problematic both from the perspective of the principle of equal rights and the principle of autonomy. From the perspective of equal rights, the decision to uphold the mandatory language requirement violates the right of an individual to stand for election without any discrimination. From the perspective of autonomy, it fails to effectively reconcile the tension between individual and group right that is inherent in many federal Constitutions which are designed to deal with the challenges of ethnic diversity. Let us start the discussion by focusing on the implication of the decision on the right to stand for election without discrimination.

5 The Equality Argument

The right to stand for election without discrimination is one of the most widely recognised rights, both internationally and nationally. Article 25 of the International Covenant on Civil and Political Rights (ICCPR) recognises and protects the right of every citizen to be elected.[26] All international agreements ratified by Ethiopia are an integral part of the law of the land,[27] making article 25 of the ICCPR a right that can be claimed by an Ethiopian citizen before local courts. Article 38 of the Constitution reinforces the commitment of Ethiopia to political rights by providing that '[e]very Ethiopian national, without any discrimination based on color, race, nation, nationality, sex, language, religion, political or other opinion or other status' has the right 'to be elected at periodic elections to any office at any level of government'.

Although not explicitly mentioned, the right to stand as a candidate cannot be without limitations. The international covenants to which Ethiopia is a party, and based upon which 'the fundamental rights and freedoms' provided in the Constitution must be interpreted,[28] state that the right to be elected

26 Article 25 of the International Covenant on Civil and Political Rights.

27 Article 9 (4) of the Constitution.

28 The Ethiopian Constitution provides that '[t]he fundamental rights and freedoms specified in this Chapter shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and International instruments adopted by Ethiopia'. See Article 13 (2) of the Constitution.

can be restricted.[29] But the restrictions must be reasonable; it is unreasonable restrictions that are prohibited. Whether a restriction is reasonable or not cannot be determined abstractly, but only on a case-by-case basis. It requires one to consider the nature of the limitation and, in particular, the extent to which the restriction limits the right in question. The limitation must not be so extensive that it negates the 'very essence' of the right. Furthermore, the individual right must be weighed against the aims that the limitation seeks to achieve. The aims, in turn, must be legitimate. At the end of the day, restrictions must always comply with the requirements of proportionality. The means used to achieve the 'legitimate aim' shall not be disproportionate.

International law has not yet determined whether mandatory language requirements violate the right to stand for public office. In *Ignatane v Latvia*, the United Nations Human Rights Committee (UN HRC) was given an opportunity to address this specific issue.[30] In that case, the applicant, Ms. Ignatane, a Latvian citizen of Russian origin, was denied the right to stand for local election on the ground that she could not fluently speak Latvian, the official language of the country. According to the Law on Elections to Town Councils and Municipal Councils of 13 January 1994, an individual that does not have level 3 (higher) proficiency in the state Language cannot stand for election. All candidates, except those that completed their education in schools that use Latvian as a medium of instruction, must submit a copy of their language proficiency certificate, demonstrating 'higher level proficiency', along with 'the candidate's application'. In February 1997, the Riga Election Commission, which is responsible for organising elections in the district the applicant was contesting, removed her from the list based on an opinion issued by the State Language Board (SLB). The opinion declared by the SLB, which, in turn, was based on a report prepared by a single examiner, declared that Ms. Ignatane does not have the required proficiency in the official language. The applicant claimed that the decision to remove her from the list of candidates amounted to a violation of her right to stand for election without any discrimination. The State party, the government of Latvia, argued that the mandatory language requirement was consistent with article 25 ICCPR as it is a restriction based on objective and reasonable criteria. According to the State party, 'participation in public affairs requires a high level of proficiency in the State language and such a

29 Article 25 of the International Covenant on Civil and Political Rights states that the rights are granted to every citizen without unreasonable restrictions, suggesting that restrictions are acceptable if they are reasonable.

30 *Antonina Ignatane v. Latvia* (Communication no 884/1999), Views adopted on 31 July 2001, U.N. Doc. CCPR 72/D/884/1999.

precondition is reasonable and based on objective criteria, which are set forth in the regulations on the certification of proficiency in the State language'.

The UN HRC ruled that the action of the Latvian government violated Article 25 of the ICCPR. It believed that the way the proficiency of the applicant is determined was not based on objective and reasonable criteria. The decision of the Electoral Commission to remove the applicant based on a report issued by a single inspector and only a few days prior to the election is arbitrary and this is despite the fact that the applicant had been given a language aptitude certificate by a board of Latvian language specialists some years earlier. Accordingly, the Committee concluded that the decision of the Election Commission to strike off the applicant from the list of candidates on the basis of insufficient proficiency in the official language had prevented her from exercising her right to public participation as provided in article 25 of the Covenant in conjunction with article 2 of the Covenant.

Although the decision represents a victory for the applicant, it does not help much for those that find themselves in the same position as the applicant. This is because the Committee did not conclude that a mandatory language requirement per se violates the right to public participation without any discrimination. It rather ruled in favour of the applicant based on procedural grounds.[31] In so far as international human rights law is concerned, the question of whether a decision of a state to introduce a mandatory language requirement violates political human rights – irrespective of the way in which proficiency in the language in question is determined – remains unresolved.[32]

31 This is different from the position of the European Court of Human rights that, in an identical case involving Latvia, ruled that the power to determine the language of Parliament falls within the state's exclusive competence and legislation that requires candidates to be fluent in the working language of the parliament is not problematic as it is aimed at ensuring 'the proper functioning of parliament'. 'In particular, members of parliament needed to be able to take an active part in the work of the institution and to defend their electors' interests effectively.' The Court considered that its mandate is only to determine whether the means used by the state to achieve its 'legitimate aim' is proportionate. The Court ruled that the decision to strike off the applicant from the list of candidates was unacceptable. It based its decision, however, on procedural fairness (i.e. the way in which the proficiency of the candidate was determined) and did not find it necessary to examine whether the language requirement violates the right against non-discrimination. See European Court of Human Rights, *Podkolzina v. Latvia* (application no. 46726/99), judgement of 9 April 2002.

32 It must be mentioned that Latvia, under pressure from the European Union and NATO, amended its electoral law, in 2002, to remove the use of the use of language requirement to stand for election. This was welcomed by the UN HRC. See United Nations, *Report of the Human Rights Committee, Volume 1* (U.N. Doc. A/59/40), 1 October 2004, para 65 (4), https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=A%2F59%2F40(Vol.%20I)&Lang=en. However, it must be noted that 'Parliament retained the right to remove any MP lacking command of the official language at the level

Back in Ethiopia, however, the HoF, as mentioned earlier, gave a definitive answer to the same question. The HoF ruled that the decision of the NEBE to strike off the three candidates from the list of candidates was inconsistent with the Constitution. To be precise, it did not do so because it believed that the mandatory language requirement is incompatible with the Constitution. Rather, the HoF found the decision of the NEBE unacceptable because the impugned legislation, despite the decision made by the NEBE, does not require fluency in any of the local languages. What is required is the ability to converse in the working language of the state government, which, in the case of the state of Benshangul/Gumuz, happens to be Amharic. The HoF, therefore, concluded that the decision of the NEBE to exclude the candidates from contesting the state parliamentary election is erroneous as the candidates are fluent in the working language of the state and are not required to be proficient in any of the other local languages.

According to the HoF, requiring a candidate to be versed in one of the local languages (other than or in addition to the working language of the state) is problematic. To use the language other than the working language of the state as a requirement to stand for election, according to the HoF, is to create discrimination based on language. It would also limit the constitutional right of citizens to elect and be elected. Such language requirement, the HoF held, is also problematic because, in addition to infringing constitutional rights, it undermines the constitutional commitment to create one political and economic community.[33]

More significantly, for our purpose, however, the HoF did not see a problem in the mandatory language requirement. It held that the electoral law that makes the right to stand for an election dependent on the working language of the state is not inconsistent with the Constitution. How did the HoF justify its position?

The HoF conceded that the Constitution prohibits the use of language as a ground to deny or limit the right to vote and to be elected. However, the mandatory language requirement, the HoF argues, does not differentiate between or amongst individuals based on their association with a (linguistic) group. It rather differentiates between individuals based on their

necessary for the performance of professional duties', thereby undermining the amendment. See Jennie L. Schulze, *Strategic Frames: Europe, Russia and Minority Inclusion in Estonia and Latvia* (Pittsburgh: University of Pittsburgh Press, 2018), 199.

33 The preamble to the Constitution refers to the commitment 'to building a political community' and the determination to 'live as one economic community'; see Preamble of the Constitution.

capacity to speak the working language of the state. The law does not, therefore, interfere with the right of individuals to stand as a candidate without discrimination.

Pursuant to the HoF's decision, the mandatory language requirement does not exclude an individual from standing for political office because they belong to a particular group.[34] Excluded are individuals who cannot speak the working language of the state, irrespective of their group membership. An individual belonging to a particular group can be allowed to stand as candidate while another person from the same group may be disqualified if they are not proficient in the working language of the state. In the same way that an Amhara, who is not proficient in Oromifa, will not be allowed to contest an election for Oromia state parliament, an Oromo that does not speak Oromifa will not be allowed to stand as candidate for the same state parliament. Membership to a group is not used as the basis for differentiation. There is, therefore, according to the HoF, no basis to conclude that the law discriminates based on language or ethnic group.

5.1 *Direct and Indirect Discrimination*

On the face of it, the impugned legislation does not seem to discriminate based on membership to a group. The legislation 'lays down the same requirement and obligation for' all individuals that want to contest a state election, regardless of the ethnic or linguistic group they belong to. It treats 'equally all people who seek to' contest a state election. This may lead one to agree with the conclusion of the HoF that there is no discrimination. After all, discrimination begins when we treat two people or groups differently based on their association with a group (or a susceptible ground).

However, discrimination can be direct or indirect. The international jurisprudence has established that a differentiation which, on the face of it, does not seem to discriminate amongst groups on any susceptible ground might still be regarded as indirect discrimination. In *Althammer v Austria*, the UN HRC stated that 'a violation of Article 26 can also result from the discriminatory effect of a rule or measure that is neutral at face value or without intent to discriminate'.[35] This happens when the differentiation has discriminatory effect on a particular

34 The decision of the House seems to echo the advisory opinion given by the dissenting members of the CCI that, as mentioned earlier, did not find incompatibility between the language requirement and the right to stand for election without discrimination.

35 *Althammer v. Austria* (Communication no. 998/2001), Views adopted on 8 August 2003, U.N. Doc. CCPR/C/78/D/998/2001, para. 10.2.

group.[36] As noted by the UN HRC, 'such indirect discrimination can only be said to be based on the ground enumerated in Article 26 of the Covenant if the detrimental effects of a rule or decision exclusively or disproportionately affect persons having a particular race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. In other words, a law or measure that is not specifically directed at a particular group, and which appears to be neutral, may still be considered discriminatory if it has 'disproportionately prejudicial effects on a particular group'.

Arguably, the mandatory language requirement may have a discriminatory effect on individuals that do not belong to a particular ethnic group. This is particularly the case in the states that are dominated by a particular ethnic group whose language serves as the working language of the government. In those states, although the criterion seems to exclude all individuals that are not proficient in the working language of the state from contesting state elections irrespective of their group membership, it is clear that the criterion disproportionately affects individuals that do not belong to the numerically dominant ethnic group. In the state of Oromia, for example, where more than 90 % of the population belongs to the Oromo ethnic group, it is the 3.2 million individuals that inhabit the state but do not belong to the Oromo ethnic group that would be largely affected by this requirement. It is candidates that do not belong to the Oromo ethnic group that are mostly unable to communicate in Oromifa, the working language of the state government, and, as a result, would

36 Indirect discrimination has its source in the famous decision of the Supreme Court of the United States in *Griggs v Duke Power Company*. In that case, the impugned conduct was an employer's requirement that job applicants hold a high school diploma or pass an intelligence test for what was basically an unskilled job, for which even literacy was not necessary. The Court held that the requirement was discriminatory 'because it operated to exclude black applicants at a higher rate than whites, and was not substantially related to the applicant's ability to perform the job'. The Court, in what is perhaps the first formulation of the concept of indirect discrimination, stated: 'What is required by the Congress is the removal of the artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial and other impermissible classification. The act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited'; US Supreme Court, *Griggs v Duke Power Company* (1971, no. 124), judgement of 8 March 1971. There are, of course, those that trace the origin of indirect discrimination to 'some earlier emanations in pre-UN international law'; See Dagmar Schiek, Waddington Lisa and Mark Bell, *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Oxford: Hart Publishing, 2007), 333.

be excluded from the electoral process. The same is true in other states that are home to large numbers of so-called 'settlers' but have chosen the language of the numerically dominant group as the language of government business. The end result is that the mandatory requirement benefits those that belong to the regionally empowered ethnic group and disadvantages those that do not belong to that particular ethnic group. It can therefore be argued that the language requirement has a detrimental effect indirectly on grounds of ethnicity.[37]

5.2 *Based on Objective and Reasonable Criteria?*

As alluded earlier, it is not sufficient to conclude that the law adopted or the conduct in question is discriminatory because it has a disproportionately detrimental effect on a particular group. As problematic as it may appear, such action, on its own, does not constitute discrimination. It is necessary to investigate if the problematic action cannot be explicated by the aim it pursues and the means it uses to achieve the same. According to UN HRC, conducts or laws that have a detrimental effect exclusively or disproportionately on a particular group 'do not amount to discrimination if they are based on objective and reasonable ground'.[38] The remaining question is, thus, whether the mandatory language requirement is a restriction on the right to stand as a candidate that is based on objective and reasonable grounds. The HoF believes so.

The HoF argued that the ability to speak the working language of the state is essential if candidates are going to introduce and convince the electorate about the superiority of their respective political program or the program of the political party they represent. A command of the working language of the state, the HoF argued, is also crucial if a member of parliament is to engage fully and effectively in the debates and discussions of the state parliament. Speaking the working language is essential, if not indispensable, for the effective representation of the electorate in parliament, the HoF concluded.

Clearly, the mandatory language requirement is imposed to achieve a legitimate aim, namely the effective functioning of parliament. It is true that effective representation can be enhanced by the ability to speak the working language of the parliament. A member of parliament that does not speak the working language might be incapable of following the debates in parliament

37 See also Takele Soboka Bulto, "Wolf in Sheep's Clothing? The Interpretation and application of the Equality Guarantee under the Ethiopian Constitution," *Afrika Focus Journal* 26, no.1 (2013): 11–35.

38 *Althammer v. Austria* (Communication no. 998/2001), Views adopted on 8 August 2003, U.N. Doc. CCPR/C/78/D/998/2001, para. 10.2.

and its committees. That would not only undermine the representative capacity of the members of parliament, but it might also seriously hamper the functioning of parliament. But effective representation does not only depend on the capacity of the elected to participate in the works of parliament. It also depends on the capacity of the candidate to communicate with the electorate. Yet, the House, though it has mentioned both dimensions of what makes an effective representation, seems to disproportionately focus on the capacity of the candidate to participate in the activities of the parliament. This is evident from the fact that it did not consider it necessary for an individual that contests a seat in the federal parliament to speak the working language of the state they come from. Proficiency in the working language of the state, the House ruled, should not be a precondition to stand as a candidate for the federal parliament. In consequence, a person that does not speak Oromifa can stand as a candidate to represent an Oromifa-speaking constituency in federal parliament. Obviously, the capacity of the candidate to communicate with the electorate is not a key consideration. For the House, what matters most is that the elected understands the language of parliament and is able to participate in its activities. The House failed to emphasise the fact that effective representation, more than anything else, requires being able to effectively communicate with the electorate.[39]

Furthermore, the means that the law is using to achieve its objective of maintaining a well-functioning parliament, which is excluding candidates from the electoral process, is disproportionate. There are other mechanisms through which language constraints can be addressed. The provision of translation facilities can, for example, easily alleviate language constraints. In fact, the federal parliament uses translation services to facilitate the participation of members that do not have sufficient knowledge of Amharic, the federal working language.

Furthermore, the House has also not addressed the problematic nature of determining the proficiency of a candidate in a working language. What should be the procedure for assigning the proficiency of a candidate in the working language of the state? Who would be responsible for organising the test and determining whether a candidate has sufficient skills in the language of the state? Would the test be limited to oral examination? Or would the candidate be assessed also based on their writing skills, the breadth of vocabulary used and observance of grammatical rules? There is nothing in the electoral law or

39 This, at the very least, involves speaking the languages of the electorate or the constituency one seeks to represent.

any other law, for that matter, that outlines the procedure that must be followed in determining the proficiency of a candidate in a particular language. In the absence of clear procedures and guidelines, it is likely that the process that will be followed in determining proficiency in a working language of the state would in itself be arbitrary and without objective criteria and hence in violation of the right to stand as a candidate without discrimination.

6 The Autonomy Argument

One may argue that there are usually historical and political circumstances that might justify the adoption of such restrictive laws. In fact, the dissenting members of the CCI, who, as mentioned above, did not find incompatibility between the mandatory language requirement and the right to stand for election without discrimination, based their decision partly on the commitment of the Constitution to 'rectify historical injustices'[40] and the mode of federal arrangement Ethiopia has chosen. As mentioned at the beginning of this chapter, the Ethiopian federalism is primarily designed to accommodate ethnic diversity. Self-rule of ethnic communities is a central pillar of the federal order. In fact, the constituent units are designed in a manner that they embody the empowerment of ethnic communities. Most of them are demarcated in such a way that each of them is home to a particular ethnic group. Each constituent unit is free to determine its language policy. They are basically crafted in a manner that allows members of the concerned ethnic community to dominate the leadership structure of the state, thereby ensuring communities manage their own affairs. Without the language requirement, goes the argument, local institutions that are meant to empower local communities would be dominated by individuals from outside the group, thereby undermining the right of ethnic communities to manage their own affairs. This is particularly the case in areas where members of the dominant ethnic group have moved and settled in large numbers.

According to the dissenting members of the CCI, the manner in which the mandatory language requirement is formulated represents an effective way to reconcile the tension between the right of ethnic groups to administer their own affairs and the individual right to be elected. The electoral law, it is argued, does not exclude an individual from contesting an election in a particular state because they belong to an ethnic group that does not hail from the state. In

40 Preamble of the Constitution.

other words, the law does not enforce mirror representation and does not require that members of a particular ethnic or linguistic group must be represented by an individual that hails from the concerned group. It simply requires the person to speak the working language of the state. This, according to the dissenting members of the CCI, represents an attempt to protect the right of ethnic groups to administer their own affairs without infringing the right of the individual to stand for election without discrimination.

As argued elsewhere, the anxieties of members of 'indigenous communities' that were subjected to cultural and political marginalisation in the past must be taken seriously and addressed properly. These are legitimate concerns and it is particularly crucial considering that '[t]hey suffered as a result of exclusionary rules and institutions that favored members of ethnic communities to which the settlers belong to'.[41] A federal system that is designed to accommodate diversity must ensure that other mechanisms and processes do not undermine the commitment of the system to empower groups that were marginalised in the past. Otherwise, the constitutional commitment may turn out to be a hollow promise. The challenge is thus to ensure respect for individual rights without, at the same time, sabotaging the commitment of the Constitution for self-rule.

As it is clear by now, autonomy in the context of Ethiopian federation is basically about allowing members of a community to freely determine how and by whom they should be governed. Whether the candidate is in a position to effectively represent the community cannot and should not be determined by law, governmental authority or any other body. This should be left to members of the community that are eligible to vote. The electorate can either accept or reject a candidate based, amongst other elements, on their capacity to relate to the concerns and wishes of the community which they seek to represent in parliament. If a candidate not proficient in the working language of the state is elected, it is 'either because that person represents many people who are in the same situation or, in any event, because the electorate indicated that with their votes their confidence in his or her ability to represent their interests in the legislature'.[42] This would be an exercise in self-determination as opposed to the mandatory language requirement that predetermines for the community.

41 Yonatan Fessha, "Empowerment and Exclusion: The Story of Two African Federations" in *Revisiting Unity and Diversity in Federal Countries: Changing Concepts, Reform Proposals and New Institutional Realities* eds. Alain-G Gagnon and Michael Burgess, (Brill, 2018), 57–78.

42 Fernand De Varennes, "Equality and Non-discrimination: Fundamental Principles of Minority Language Rights," *International Journal on Minority and Group Rights* 6, no. 3(1999): 307–318.

Furthermore, the electoral law could have tried to allay the fears and address the concerns of ethnic communities without undermining individual rights. As the United Nations Human Rights Committee ruled in the *Ballanyne et al. v Canada*,[43] it is not necessary for a state to undermine individual rights in order to protect the vulnerable position of a minority group. The law must endeavour to achieve the protection of vulnerable groups in ways that do not violate the individual rights of others. In this case, the law, in addition to avoiding mirror representation, could have found other ways of enhancing the presence and power of minority groups in the decision-making processes of the state. It could have enhanced their presence by, for example, allowing for the overrepresentation of minorities in major institutions of the subnational government. It could have reserved seats, including important offices, for members of the minority groups. On the other hand, it could have also enhanced the power of such communities by allowing them to block certain decisions that would threaten their interests. It could have given such minority groups veto powers over matters that affect them. In this way the state could have reconciled the fears and concerns of minority groups with the right of individuals to enjoy equal rights.[44]

Far from reconciling the tension between the right of an individual to stand as a candidate and the self-governance rights of ethnic communities, the legitimisation of the mandatory language requirement has, in fact, the effect of undermining the right of ethnic communities to administer their own affairs. In those ethnically diverse states where no one group is numerically dominant and, as a result, Amharic is adopted as the language of government business, the mandatory language requirement has the effect of excluding members of indigenous ethnic groups that are not proficient in Amharic from the electoral process. This is the case in the ethnically diverse states of Gambela, Benshangul/Gumuz and SNNPR. In these states, the mandatory language requirement in fact undermines the primary commitments made by the Constitution to respect and promote the right of communities to manage their own affairs, the very same objective that the mandatory language requirement seeks to promote.[45]

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43 *Ballantyne, Davidson, McIntyre v. Canada* (Communication nos. 359/1989 and 385/1989), Views adopted on 31 March 1993, U.N. Doc. CCPR/C/47/D/359/1989 and 385/1989/Rev.1 (1993), para. 11.4.

44 Some of these measures, some may argue, also violate individual rights and the principle of equality. But these deviations can often be easily justified.

45 The good news is that the government has mitigated the damage on self-rule by introducing an electoral amendment that rectifies this problem by stating that a candidate must be versed in the working language of the state or the area of his or her intended

7 Conclusion

The decision of the HoF to legitimatise the mandatory language requirement and, as a result, usurp a decision-making power that belongs to the electorate, inflicts a double harm to the Constitution. On the one hand, the language requirement, in addition to interfering with the right of an individual to stand as a candidate without discrimination, makes it impossible for the electorate to vote for persons that do not belong to the titular ethnic group who, often, are not proficient in the language of the state. By doing so, it undermines the primary purpose of the right to vote and to be elected without discrimination, which is to allow for 'the expression of the will of the people in a free and fair election'. On the other hand, it inflicts harm on the principle of autonomy that the Constitution espouses. It poses a threat to the right of ethnic communities to self-administration by excluding individuals who are indigenous to the state but not proficient in the working language of the state, from the electoral process.

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