

Wolf in sheep's clothing? The interpretation and application of the equality guarantee under the Ethiopian constitution

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Constitutionally prohibited grounds of differentiation are normally allowed to command the deserved heightened degree of deference before they are set aside in the implementation of the equality guarantee which underpins the remainder of the 'Bill of Rights.' So, too, emphasis should be placed on the imperatives of walking the tight rope in reconciling and balancing competing interests that have a legitimate claim to equal attention in order that the equality guarantee is translated into practice. Nevertheless, the obiter dicta of the House of the Federation in the *Benishagul Gumuz* decision too easily dispensed with explicit constitutional prohibition of distinctions based on attributes such as language and ethnic origin and legitimated the use of the working language of a regional state as a criterion for candidacy in future elections. The driving motive appears to be to promote (the right to) the use of indigenous languages of each regional state as the official working language, a right that has been denied to the great majority of the nations, nationalities and peoples of the country. This paper explores the conceptual and normative underpinnings of the right to equality, in the light of which it argues that the House of the Federation has erroneously responded to one threat with another. The crux of the contention is that instead of devising ways that uphold every citizen's right to the use of one's language anywhere in the country, it takes away the same rights from the non-indigenes of the various regional states, thereby consigning them to the fate either of forced assimilation or permanent exclusion from elections in the path towards public office.

Key words: equality, discrimination, language rights, Ethiopian constitution, Constitutional interpretation, *Benishangul Gumuz*, election, right to vote, ethnic federalism

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1. Introduction

... to labour in the face of the majestic equality of the law, which forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.
Anatole France (1894)²

Ethiopian constitutional disputes involving the right to equality and its flip side (protection against discrimination) have thrown up issues that have seldom been revisited by indigenous scholarship³. Despite the constitutional explication of certain attributes such as ethnic origin and language as prohibited grounds of differentiation among individuals or groups⁴, the House of the Federation (HoF)⁵ has taken an interpretational route that employs or legitimises the use of one's knowledge of a language – or lack thereof – as a precondition for candidacy in elections for public offices. This trend raises concerns about the prevailing (mis)understanding of the normative contours and core content of the right to equality. The ruling of the HoF in the *Benishagul Gumuz case*⁶ is one such decision. Worryingly, such final decisions of the HoF have *erga omnes* effects, binding on any other similarly situated party, as they constitute precedents for similar cases.⁷

This case arose out of the decision of the National Electoral Board of Ethiopia (NEBE)⁸ barring members of the non-indigenous ethnic groups who have been permanent residents of the Benishangul Gumuz Regional State from contesting in the then upcoming (2000) elections for the State's Council. The single most important yardstick for the NEBE's decision was the knowledge (or lack) of the prospective candidates of an in-

2 Anatole France, *Le Lys Rouge (The Red Lily)* (Calmann-Levy, 1894) Ch 7.

3 Some authors have attributed such 'academic silence' to the fear of possible repercussions of an engagement with human rights issues in Ethiopia in general. Tronvoll, for instance, observes that 'most independent Ethiopian academics are reluctant to be associated with critical human rights studies since this might jeopardise their academic tenure and position, or in worst case their personal well-being.' See Kjetil Tronvoll, 'Interpreting Human Rights Violations in Ethiopia: A Rejoinder to Getachew Assefa' (2009) 16 *International Journal on Minority and Group Rights* 475, 278 (emphasis in original).

4 Under Article 25 of the Ethiopian Constitution: All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall guarantee to all persons equal and effective protection without discrimination on grounds of race, nation, nationality, or other social origin, colour, sex, language, religion, political or other opinion, property, birth or other status.

5 The HoF is one of the Federal Houses established in terms of Art 53 of the 1995 Federal Constitution (hereinafter 'the FDRE Constitution' or 'the Constitution'). It has been entrusted, under Art 83(1) of the Constitution, with the power to decide on 'all constitutional disputes.'

6 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 (05 Megabit 1995 Ethiopian Calendar). This case is herein referred to as the 'Benishagul Gumuz case'.

7 See Proclamation No. 251/2001, Consolidation of the House of the Federation and the Definition of its Powers and Responsibilities Proclamation (*Negarit Gazetta*, 7th Year, No. 41, 6 July 2001). Under its Article 11(1), the Proclamation states that '[t]he final decision of the House on constitutional interpretation shall have general effect which therefore shall have applicability on similar constitutional matters that may arise in the future.' See also Takele Soboka Bulto, 'Judicial Referral of Constitutional Disputes in Ethiopia: From Practice to Theory' (2011) 19(1) *African Journal of International and Comparative Law* 99, 121-122.

8 Decision of the NEBE, rendered at its Extraordinary Meeting of 18 February 2000.

indigenous language of the Regional State.⁹ This criterion was based on the Electoral Proclamation (Proc. No. 111/1995),¹⁰ which provides, among other things, that any person who seeks to be registered for candidacy should be well versed in (one of) the indigenous languages of the National Regional State of his intended candidature.¹¹ The complaint challenging the constitutionality of both the NEBE's decision and Article 38 (1) (b) of Proc. 111/1995 was taken to the HoF, which subsequently referred the matter to the Council of Constitutional Inquiry (CCI) for its advisory opinion.¹² The CCI subsequently submitted its Recommendation¹³ to the HoF in which it (by six-to-two majority vote) found that Article 38 (1) (b) of Proc. 11/1995 and the NEBE's decision were unconstitutional. The HoF endorsed the Recommendation of the CCI, and, most importantly, stressed in its decision that the NEBE's decision and the challenged provision of Proc 111/1995 of the Constitution's equality clause as applied to nations and nationalities.

The decision was a mixed blessing at best. Its operative part constituted an important and constructive development by way of addressing the immediate issues that arose in the *Benishangul Gumuz* case. However, the inoperative aspect (*obiter dicta*) of the decision gave rise to worrying interpretational approaches to the understanding and implementation of the right to equality under the FDRE Constitution.¹⁴ Even though the operative part of the HoF decision was far from flawless, it is the inoperative part that *legitimated* the linguistic ability criterion in future electoral processes that does not sit comfortably with the equality clause of the Constitution.

The need to explore the wider implications of the *obiter dicta* of the decision in regions other than (but including) the *Benishangul Gumuz* Regional State spurred the present work. This article analyses the ramifications of the inoperative aspect of the decision. I contend that the *obiter dicta* of the *Benishangul Gumuz* case transposed the positions of the supposed 'victims' and 'beneficiaries' of past laws,¹⁵ policies and practices

9 The indigenous languages of the *Benishangul Gumuz* Regional State are Berta, Gumuz, Shinasha, Komo and Mao languages. However, the working language of the Council of the Regional State is Amharic, a language of the non-indigene Amhara group who constitute a sizeable majority in contrast to the other groups inhabiting the Regional State.

10 See Proclamation No. 111/1995, Proclamation to Ensure the Conformity of the Electoral Law of Ethiopia with the Constitution of the Federal Democratic Republic of Ethiopia.

11 Proc 111/1995, Art 38 (1) (b).

12 HoF referred the case to CCI by a letter numbered 6/50/4/ and dated 25/9/1992 Ethiopian Calendar (2 June 2000 GC). The CCI is an advisory body empowered to investigate constitutional disputes, and to submit its recommendations, whenever it sees the necessity for constitutional interpretation, to the HoF for the latter's consideration and final decision. See Art 84 of the FDRE Constitution.

13 Recommendation of 5 July 2000.

14 The HoF specifically stated that it is unconstitutional to use the indigenous language criterion unless this is at the same time the working language of the relevant regional state council. Thus, according to the HoF decision, it is constitutional to use the knowledge of working language criterion as a precondition for candidacy in elections into regional state councils. See *Benishangul Gumuz* case, p. 12.

15 In this context, the word 'victims' is conveniently used to refer to those groups who, before the current constitutional order came into being, were not able to use their languages as a medium of instruction in schools and as a working languages in their respective native regions, while those groups who have had the chance to use their languages at the official level are termed 'beneficiaries.'

of the Ethiopian state, while failing to uproot the very lopsided inter-ethnic relationship it sought to cure.¹⁶ The primary aim of the article is thus not to thoroughly critique the merits and/or demerits of the decision of the HoF in *Benishangul Gumuz* case or its direct effects on the parties thereto. Rather, using the *Benishangul Gumuz* decision as an example, this article seeks to explore the normative content of the right to equality, and the threats of reverse discrimination in Ethiopia that is engendered by the instant decision.

Section 2 distinguishes between the right to equality as a value and as a right, and presents the implications of its enforcement. Section 3 explores the normative content of the equality guarantee and its variants. In section 4, I analyse the structural dimensions of the right to equality. Section 5 explores discrimination and its facets, and its application to the *Benishangul Gumuz* decision. In section 6, I analyse the need for affirmative action measures as tools for the achievement of substantive equality and its relevance to the case at hand. Section 7 revisits the decision of the HoF and analyses the possible win-lose (zero sum) scenario that the decision may have entailed. Section 8 briefly touches upon the pitfalls of affirmative action measures. It demonstrates that affirmative action in its extreme form, instead of being a handmaiden of equality, could lead to reverse discrimination. Conclusions in section 9 complete the study.

2. Equality: a right and a value

Policy makers, legislators and courts in many multi-ethnic societies have been engaged in the formulation and elaboration of principles and fundamental values that inform and/or underlie the constitutional right to equality. This is a result of the recognition that the protection of the fundamental right to equality is a guarantee for the enforcement of the underlying societal values, most of which are captured implicitly or explicitly in constitutional equality clauses. It has been asserted that ‘[p]rinciples of equality should be seen as the thread that draws together human rights, and the values of a democratic society, which flows from them.’¹⁷ The notion of equality as an embodiment of such ‘prized public goods’ or values dictates the distribution of those prized social values, not least individual dignity and worth, to everyone at equal measure.¹⁸ It has been observed that:

“[t]he distinction between the two is worth noting. As a value, equality gives substance to the vision of the Constitution. As a right, it provides the mechanism for achieving substantive equality, legally entitling groups and persons to claim the promise of the fundamental value and providing

16 The HoF, in its *Benishangul Gumuz* decision, stated that the denial of peoples’ right to use their languages both in everyday life and as a medium of instruction in schools has led to the bloodshed that Ethiopia had experienced before the inauguration of the new constitutional order in 1995. Thus, the FDRE Constitution sought to address the uneven societal relationships, a situation that created ‘beneficiaries’ and ‘victims’ of the heretofore prevailing legal and political order. See *Benishangul Gumuz Case*, P 6; See also FDRE Constitution, Preamble, Para 5.

17 Karon Monaghan, Max du Plessis and Tajinder Malhi (ed), *Race, Religion and Ethnicity Discrimination: Using International Human Rights Law* (Justice, 2003) 9.

18 Christopher McCrudden, and Haris Kountouros, ‘Human Rights and European Equality Law’ in *Equality Law in an Enlarged European Union: Understanding the Article 13 Directives* (Cambridge University Press, 2007) 73, 73.

the means to achieve this. The fact that there is a relationship between value and right—the value is used to interpret and apply the right—means that the right is infused with the substantive content of the value.”¹⁹

Thus, the violation of the right to equality disturbs all the values that inform the equality clause as well as the rights guaranteed through the enforcement of the right to equality. In a constitutional framework that seeks to uproot discrimination and to realign societal relationships along a fairer equilibrium, as is sought by the FDRE Constitution,²⁰ equality has a central role both as the underlying value and as a concrete right.

Under such a value driven approach, Fredman identified four intricately related categories: the first stresses individual dignity and worth (individual justice); the second is based on remedial justice seeking to redress past discrimination; the third articulates redistributive objectives; and the fourth is grounded in democratic concerns.

The individual justice model stresses the achievement of individual dignity as an autonomous being as the central element of the notion of substantive equality. Dworkin endorses this view in asserting that:

“What does it mean for the government to treat its citizens as equals? That is... the same question as the question of what it means for the government to treat all its citizens as free, or as independent, or with equal dignity.”²¹

As stressed by the Canadian Supreme Court in the *Miron vs Trudel* case, the purpose of the equality clause is ‘to prevent the violation of human dignity and freedom through the imposition of limitations, disadvantages or burdens, through the stereotypical application of presumed group characteristics, rather than on the basis of merit, capacity or circumstances.’²²

The second value that underlies the equality guarantee focuses on remedial or restitutory aims. This approach usually responds to historical injustices that have been committed against a group – an ethnic group, religious, linguistic group or otherwise – with the specific aim of remedying past ills and the resultant disadvantages in which such groups find themselves. Such an approach is therefore tailored towards addressing specifically targeted historical wrongs and their consequences on the present generation. This seems to resonate with the terms and spirit of the FDRE Constitution which is aimed, among other things, at ‘rectifying historically unjust relationships’ among the nations, nationalities and peoples.²³

19 Cathi Albertyn, and Beth Goldblatt, ‘Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality’ (1998) 14 *South African Journal on Human Rights* 248, 249.

20 The FDRE Constitution is geared towards ‘rectifying historically unjust relationships’ among the different nations, nationalities and peoples of Ethiopia. See Preamble, Para 5.

21 Ronald M. Dworkin, *A Matter of Principle* (Harvard University Press, 1985) 19.

22 See [1995] 2 S.C.R. 418, at 489.

23 The HoF stressed the need to address the lopsided relationships among the various groups that have been at the

The third value underlying equality is the notion of distributive justice that aims at the redistribution of the social goods the access to which the groups in focus have been denied and/or disproportionately excluded.²⁴ This entails a states' positive duty to ensure the proportional representation of previously disadvantaged groups in political power, employment, social services and other major sectors.²⁵

The fourth fundamental value underlying the equality guarantee looks at the bigger picture of group equality and locates the idea of participatory democracy as the litmus test of the realisations of the equality guarantee. In this sense, equality looks beyond individuals' positions vis-à-vis each other and focus on social equality. While it partly seeks to ensure the equitable distribution of social goods, its primary aim is to ensure the full participation and inclusion of everyone in major social institutions while at the same time stressing the need to valuing differences among the different groups.²⁶ In this regard, equality guarantees aim at remedying flaws in majoritarian democracy,²⁷ which has the tendency of permanently excluding certain groups from meaningful participation in the social, economic and political life of the country because of their relatively smaller number.²⁸

3. The normative content of equality guarantee

The right to equality has been captured both in national legislations and international human rights treaties such that it has come to be part of an everyday vocabulary for national and international law making bodies. While there is a somewhat intuitive grasp of its import, its normative content and consequent implications are extremely elusive as it lends itself to varying interpretations. The more closely it is examined, the more shifting its meaning becomes.

It has increasingly become inadequate to follow the usual aphorism that likes should be treated alike which for a long time has been the conventional understanding of equality. While equal treatment of likes is internally consistent and perhaps unassailable as a matter of logic, this initial logic pales in the face of more probing questions. Fedman argues that the question as to when one person or group is so 'like' another that they should be treated 'alike' cannot be comprehensively answered.²⁹ And even if it be agreed that two individuals or groups are similarly situated in relevant respects, doubts may still linger as to whether they

root of the bloodshed that had been taking place in Ethiopia. In its *Benishangul Gumuz* decision it sought to ensure each group's right to self-administration, the use of its language in everyday communication and as a medium of instruction. See *Benishangul Gumuz* case, P. 6.

24 This consideration also weighed upon the decision of the HoF in the *Benishangul Gumuz* case. See P. 6 of the decision.

25 Sandra Fredman, *Discrimination Law* (Oxford University Press, 2002) 21.

26 *Ibid.*, 22.

27 *Ibid.*

28 See Takele Soboka Bulto, 'The Promises of New Constitutional Engineering in Post-Genocide Rwanda' (2008) 8(1) *African Human Rights Law Journal* 187, 195-196. See also John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980) 103.

29 Fredman (n 24) 1.

should be treated alike as, in some circumstances, equal treatment may practically perpetuate inequalities.³⁰ As Anatole France depicts in the introductory quotation, a law that appears to treat all similarly situated groups alike might weigh more heavily on the poor than on the rich.³¹ Conversely, unequal treatment of two differently situated individuals or groups (as in the case of affirmative actions) might lead to equality of results and/or opportunities relative to a certain fundamental right, say the right to work.

The question that arises therefore is as to how to inequalities caused by equal treatments might be explained, while unequal treatments might lead to equality of results among 'not-so-alike' beneficiaries of a right in question. Much about the answer to the query depends upon the choice between varying conceptions of equality and underlying values and state policies.³²

3.1 Equality as consistency (formal equality)

The most elementary conception of equality is the Aristotelian notion that likes should be treated alike. This formulation of equality derives its genesis and inspiration from the notion of fairness which in turn requires consistent treatment of equals.³³ On a basic level, the principle that equality inheres in consistency of treatments is not objectionable. Practically, it implies that formally exclusionary laws must be scrapped and overtly prejudicial behaviours and/or treatments – such as paying differential wages for equal work – be prohibited.³⁴ Put otherwise, it seeks to proscribe discrimination, while it tends to lose sight of the need to address and remedy the past disadvantages that have perpetuated the inequality among the varying groups. As a result, equality as consistency provides a fragile layer of protection, and has been referred to as *formal equality*.³⁵

Thus, formal equality is usually associated with numerous problems. Firstly, it fails to provide a specific formulation as to when two individuals or groups are relevantly alike. Perhaps it goes without saying that not all distinctions among individuals or groups are discriminatory. Governments classify individuals and groups into differing categories for various but legitimate purposes.³⁶

Secondly, formal equality is a relative principle that requires only that two similarly situated individuals or groups be treated alike. This means that it does not make a distinction between treating two individuals or groups equally badly, and treating both sides equally well.

30 Ibid.

31 Ibid., 1-2.

32 Ibid., 4.

33 Ibid., 7.

34 Ibid.

35 Ibid.: See also Iain Currie, and Johan de Waal, 'Equality' in Iain Currie and Johan de Waal (ed), *The Bill of Rights Handbook* (Juta, 5th ed, 2005) 229.

36 See section 5 below.

The third handicap of formal equality is the need to find a comparator. The application of equality as consistency implies that discrimination can only be demonstrated by finding an individual or group – called a *comparator* – that is similarly situated but has been more favourably treated than the complainant.³⁷ It is not always easy or even possible to find a perfect comparator who is more favourably treated to show discrimination against the complainant. Each individual's or group's situation is determined, *inter alia*, by his/her region, religion, linguistic or ethnic affiliation, social origin, economic or political situation. For a complainant to show that there is discrimination, formal equality requires a comparator that is similarly situated in all these respects yet treated more favourably. This is an extremely arduous task for an individual complaining about discrimination against him/her. The problem of finding a comparator reaches a dead-end when pregnancy rights are at issue as there is no male comparator. If we are to follow equality as consistency, there simply is no appropriate male comparator and therefore no equality complaints can arise.

Finally, equality as consistency is criticised due to the way it treats differences. Since it strives to ensure the similar treatment of similarly situated beneficiaries, it is devoid of the requirement that differently placed beneficiaries receive appropriate treatment according to their difference.³⁸ If a person is doing a work of less value than a comparator, it is appropriate to pay the former less. But the equality as consistency principle does not require that the latter be paid proportionately to the difference in the value of work done.

Thus, while formal equality has a role in eliminating ostensibly discriminatory laws, practices and prejudices it does not consider past and/or present disadvantages and prejudices that lie behind the 'likes' that it seeks to treat 'alike'. The parity of treatment that is a defining element of formal equality offers little assistance in the effort to overcome patterns of social, political and economic disadvantages while it may also contribute towards the perpetuation of the same.³⁹ This has necessitated that the formal equality be pinned to a more substantive approach to the right to equality.

3.2 Substantive equality

Substantive equality transcends the equal protection of the law and requires a 'reconstruction of the state and society, including a redistribution of power and resources along egalitarian lines.'⁴⁰ It is this drive towards social egalitarianism that requires the achievement of equality of substance regardless of differences⁴¹ which in turn entails the eradication of systematic forms of domination and material disadvantages based on race,

37 Fredman (n 24) 8-9.

38 *Ibid.*, 10.

39 Claire L'Heureux-Dube, 'Making a Difference: The Pursuit of Equality and a Compassionate Justice' (1997) 13 *South African Journal on Human Rights* 335, 338.

40 Albertyn and Goldblatt (n 18) 249.

41 L'Heureux-Dube (n 38) 338.

gender, sex, language, ethnic or national origin, class or any other grounds.⁴² In order to reorder a diverse society— such as Ethiopia's— along a new egalitarian equilibrium, substantive equality inevitably engenders the dismantling of structural inequality that is embedded in the economic, political and social fabric of a country.⁴³ The notion of substantive equality in turn falls into two variants of its own: equality of results and equality of opportunity.

i. Equality of results

Substantive equality in the sense of equality of results seeks to ensure that the consequences of the equal treatment of similarly situated individuals or groups should lead to parity of results. In other words, equality of treatment that leads to differential results would be considered discriminatory and leads to a search for legal remedies to rectify the underlying factors that contributes to the disparity in results. Equality of results can therefore be understood in three different ways.

In the first sense, equality of treatment focuses on the individual and is expected to have equal impact on individuals that have been similarly situated. In its second sense, equality of results focuses not on the individual but on the results of equality of treatment among groups. The underlying assumption of this group-oriented version of equality is that in a non-discriminatory environment, any particular body – be it a workforce, an education system, a political body or otherwise – would include a fair spread of members of different sexes, ethnic groups, races, religions, etc.⁴⁴ The implication is that the absence of one group, or, alternatively, its concentration in less/more lucrative or less/more important areas of business or employment is taken as a *prima facie* indication of the fact that discrimination is taking place. In its third sense, 'equality of results' seeks to achieve a more redistributive aim of requiring an equal outcome among groups. This would give rise to the positive duty of public authorities to accord preferential treatment to the underrepresented group.

The 'equality of results' approach has been attractive to groups that have been victims of past disadvantages due to its emphasis on quantifiable results that should emerge as a consequence of the said treatment. In the *Benishangul Gumuz* case, the records of the HOF indicate that there have been debates that resonate with the 'equality of results' approach. Attempt has been made by the HoF to ensure actual access by members of indigenous groups to political power and public offices via suppression of potential competition from the non-indigenes through the language-test criterion.⁴⁵

42 Albertyn and Goldblatt (n 18)248.

43 Sandra Liebenberg, and beth Goldblatt, 'The Interrelationship between Equality and Socio-Economic Rights under South Africa's Transformative Constitution' (2007) 23 *South African Journal on Human Rights* 335, 342.

44 Sandra Fredman, 'Combating Racism with Human Rights: The Right to Equality' in Sandra Fredman (ed), *Discrimination and Human Rights: The Case of Racism* (Oxford University Press, 2004) 9, 19.

45 It was argued that this is necessary especially in electoral districts where the non-indigenous groups out-number the indigenes. See Minutes of the HoF, 5th Working Year, Extraordinary Meeting, 07 July 2000 (30 June 1992 EC), p. 31-34.

ii. *Equality of opportunity*

The *equality of opportunity* variant takes the middle ground between formal equality and equality of results. The starting point of this approach requires the recognition of the demeaning effects of past discrimination which would make it inordinately difficult for members of particular groups to fulfil the minimum threshold of similarity that is required to trigger the right to like treatment.⁴⁶ Metaphorically speaking, it asserts that true equality cannot be achieved if individuals or groups begin the race from different starting points. The ‘equality as opportunity’ approach casts its focus on the levelling of the playing field, and accepts the necessity in some cases of special measures to equalise the starting point among the competitors.

The ‘equality of opportunity’ approach differs from ‘equality of results’ variant in that the former will have achieved its target once the grounds of discrimination have been removed and individuals and groups have been placed on a par at the starting point of the race. The crux of the equality of opportunity approach is therefore to provide the actors involved with an equal means while disparity in results would depend on the individual differences of the competitors. Thus, as long as all groups are provided with similar means and are put on par at the starting point, the right to equality has been ensured. The upshot of the theory is that once the grounds of discrimination are addressed through fair distribution of opportunity and means, fairness dictates that competitors be treated on the basis of their individual qualities irrespective of their sex, language, ethnic or social origin or any other ground. Consequently, this model of equality rejects policies that aim at rectifying imbalances in various sectors through quotas or any other policy even if its ultimate aim is to ensure equality of results.⁴⁷

Nevertheless, it is the metaphor of equal starting points that has been the soft-belly of the theory. The question of the types and amount of measures needed to ensure that competitors are genuinely able to start from the same starting point is a decisive variable. Distinctions have been made between procedural and substantive sense of equality of opportunities.⁴⁸ The procedural view of equality of opportunity would demand the removal of obstacles to the advancement of the disadvantaged group but does not guarantee that this would lead to greater substantive fairness in terms of result. The substantive sense of equality of opportunity, in contrast, requires measures such as education and training to be taken to ensure that persons from all sections of society have a genuinely equal chance of winning the race and access to benefits with respect to which the competition is taking place. However, as Hepple argued, one is not given genuine equality of opportunity if the law, policy or practice under consideration applies an unchallenged criterion of merit to beneficiaries who have been deprived of the opportunity to acquire the merit.⁴⁹

46 Fredman (n 43) 20.

47 *Ibid.*

48 *Ibid.*

49 Bob Hepple, ‘Discrimination and Equality of Opportunity-North Irish Lessons’ (1990) 10 *Oxford Journal of Legal Studies* 408, 411.

4. Structural dimensions of the equality clause

At least two structural dimensions of the right to equality or of non-discrimination impinge upon the substantive aspect of the right to equality. The first of these has to do with the status of the right itself in a given legislation: it turns upon whether the right is autonomous or auxiliary. The other major structural question pertains to the scope of the equality guarantee and the prohibition of non-discrimination. We will now turn to the discussions of the two dimensions.

i. *Equality clause: free-standing or auxiliary (subordinate)?*

While constitutions and international human rights treaties invariably provide for the right to equality or the protections against discrimination, some of these instruments protect the equality guarantee as a free-standing right while others do so only in relation to the enjoyment of a few identified substantive rights. A right to equality is autonomous if the proviso that gives the legal basis to it provides for the protection of a free-standing (autonomous) right, i.e., if the right is guaranteed in its own right. And the right is subordinate where it is provided for only in the context of its utility to the enforcement of other substantive rights and freedoms.⁵⁰

It is not uncommon for different international human rights treaties to provide for a subordinate right of equality. Article 2(1) of the United Nations Convention on the Rights of the Child, for instance, obliges states to respect and ensure ‘the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind.’⁵¹ Thus the right to equality, at least on the face of it, can only be invoked when there is discrimination in the enjoyment of those other rights and freedoms explicitly guaranteed in the Convention.

The main legal basis for the right to equality under the FDRE Constitution is Article 25 wherein the Constitution guarantees ‘equality before the law’ and ‘equal protections of the law’ to all persons ‘without discrimination.’ Here the Constitutional equality clause is not pinned to any other provision for its application or invocation and is a stand-alone guarantee. Therefore, if a person is discriminated against in relation to voting rights, not only Article 38 of the Constitution which guarantees freedom to vote and be voted for, but the general equality guarantee of Article 25 would also be violated. As a normative source of equality guarantee, Article 25 can be invoked in all cases where a person or group can prove discrimination on any grounds.

Fredman argued that an autonomous right to equality is crucial for the substantive right to equality to become a reality.⁵² Subordinate right to equality provides for an abridged form of non-discrimination guarantee in that it upholds equal enjoyment of only those rights that are explicitly guaranteed in a specific legal instrument. A subordinate

50 Anne F Bayefsky, ‘The Principle of Equality or Non-Discrimination in International Law’ (1990) 11(1) *Human Rights Law Journal* 1, 3.

51 Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989; Entry into force 2 September 1990, in accordance with article 49 (emphasis added).

52 Fredman (n 43) 22.

right to equality clause provides a parasitic, ancillary protection of the right that does not come into application unless the substantive right on which it hangs is violated.⁵³

ii. *Equality clause: open-ended or self-contained?*

Another structural dimension of a legal provision that may affect its scope is whether the relevant legal provision is open-ended or self-contained. One of the typical self-contained provisions for the equality guarantee is to be found under Article 1(3) of the United Nations Charter, which provides for the enjoyment of human rights and fundamental freedoms without distinction based on *specifically named* grounds: race, Anne F Bayefsky, 'The Principle of Equality or Non-Discrimination in International Law' (1990) 11(1) Human Rights Law Journal 1, 3. sex, language, and religion.⁵⁴ On the other hand, Article 2 of the Universal Declaration of Human Rights (UDHR)⁵⁵ and Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR)⁵⁶ prohibit discrimination on a clearly open-ended or *indeterminate* number of grounds. Both instruments proscribe distinction of 'any kind, such as...' So, too, the African Charter on Human and Peoples' Rights (African Charter), under its Article 2, prohibits 'distinction of any kind such as...' ⁵⁷ In other words, not only the grounds of discrimination named in the relevant instruments but also other not-so-explicitly prohibited grounds that have the purpose or effect of restricting or excluding an individual's or group's enjoyment of the fundamental human rights and freedoms would be illegal.

A provision that is open-ended or indeterminate as to the possible grounds of discrimination comes with a significant interpretative advantage. The determination of whether a given distinction violates the non-discrimination principle would raise the issue of whether the ground of distinction at issue is covered by the non-discrimination prohibition or not.⁵⁸ In an open ended equality clause every distinction – be it on the ground of language, ethnic origin, political opinion, or any other – would trigger the invocation of the equality clause or of the protection against non-discrimination.⁵⁹

Under Article 25 of the FDRE Constitution, an elaborate list of non-discrimination grounds – often referred to as 'protected grounds' – have been listed. Article 25 of the Constitution enshrines 'equal and effective protection without discrimination' not only on the explicit grounds but also on the grounds of 'other status.' The prohibition of 'any discrimination' clause under Article 25 excludes the possibility of limiting the protected grounds to those listed under the Constitution. As a result, it could safely be concluded

53 Monaghan, du Plessis and Malhi (n 16) 10.

54 The Charter of the United Nations was signed on 26 June 1945, in San Francisco, at the conclusion of the United Nations Conference on International Organization, and came into force on 24 October 1945.

55 Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948.

56 Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966; entry into force 23 March 1976, in accordance with Article 49.

57 See Art 2, African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986

58 Quoted in Bayefsky (n 49) 5.

59 *Ibid.*

that the FDRE Constitution provides for an open-ended non-discrimination ground and, consequently, any ground of distinction that has the effect of restricting or excluding anyone from equal benefits of the rights and freedoms guaranteed under the Constitution would trample the equality/non-discrimination guarantee.

5. Discrimination: introducing the concept

The violation of the right to equality is another way of referring to discrimination. Yet, not every distinction is a violation of equality guarantee or is discriminatory. The Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948. equality clause does not imply everyone to be treated the same and it does not prevent the government from making distinctions on rational and legitimate grounds. There are permissible instances where governments may treat some individuals or groups differently to others. Indeed, failure to take note of differences or treating unequally situated beneficiaries equally can have the same discriminatory consequences as treating similarly situated beneficiaries differently. As Aristotle noted, there is a ground for complaint ‘... when either equals have and are awarded unequal shares, or unequals equal share.’⁶⁰ It is thus crucial to distinguish between constitutionally permissible and lawful distinctions and exclusions from those that are discriminatory and hence unlawful.

5.1 Differentiation vs. Discrimination: levels of enquiry

Granted that the right to equality does not imply identical treatment of its beneficiaries, nor does it flatly prohibit differentiation among the subjects, it is crucial that the dividing line be drawn between mere differentiations (categorisation for legitimate purposes using proportional means) and differentiation that constitutes discrimination, an approach that has been accepted in South African constitutional jurisprudence. This approach relies on a structured, step-by-step approach to the analysis and adjudication of cases involving complaints of violations of the equality guarantee and could be instructive for our analysis of the newly emerging jurisprudence on equality in Ethiopia. The approach involves two-tiered stages of enquiry.⁶¹

i. Mere differentiation

A starting point of enquiry is whether the law or conduct under consideration differentiates between individuals or groups. If it does not make any distinction between groups or individuals, then the violation of the right to equality or the protection against discrimination is not at issue and a complaint pertaining there to would fail instantly. If, however, there is a differentiation of a kind, one needs to establish a rational connection (legitimate cause) between the differentiation and the purpose sought to be achieved in so doing. Absent such link, the differentiation *prima facie* violates the equality clause.

60 Quoted in Bayefsky (n 49) 11.

61 Currie and de Waal (n 34) 235.

If such a link is proved, the differentiation might still amount to discrimination and the enquiry goes one step further (to step ii below). This is very much about neutrality of conduct or of law and the enquiry is related to whether formal equality has been trampled. If the conduct or law that is complained of does not affect formal equality, then the issue of discrimination does not arise.⁶²

If, however, the conduct or law in issue is found to have differentiated between similarly situated individuals or groups, it would be adjudged discriminatory unless it meets both prongs of a two pronged test: the end it sought to achieve must be rational and legitimate and the means used must be proportional.⁶³ This has been stressed by the Inter-American Court of Human Rights in a case involving Costa Rica:

“[T]here would be no discrimination in differences in treatment of individuals by a state when the classifications selected are based on substantial factual differences and there exists a relationship of proportionality between these differences and the aims of the legal rule [and conduct] under review. These aims may not be unjust or unreasonable, that is, they may not be arbitrary, capricious, and despotic or in conflict with the essential oneness and dignity of human kind.”⁶⁴

As the judgement of the Court starkly explicates, there are two defining criteria of a differential treatment that is not discriminatory: firstly, that the distinction (differentiation) in treatment must be based upon an objective and reasonable justification that is made in pursuit of legitimate governmental aim; and, secondly, that there must be a link of proportionality between the aim sought and the means used to achieve it.⁶⁵

In the *Benishangul Gumuz* case, the HoF decided that it is appropriate to use a potential candidate’s knowledge of the working language(s) of the relevant Regional Council as a criterion for the candidate to run for public office in an election. Clearly, this makes an important distinction between those who know the relevant language and those who do not.

Whether the language criterion is reasonable or legitimate in such circumstances is debatable. As the HoF reasoned, a candidate’s lack of knowledge of the language of his constituencies or of the working language of the relevant regional council could make it difficult for such candidate to express the will and the wishes of the constituency in the deliberations of a regional council as well as to communicate with his/her own constituencies.⁶⁶

62 Currie and de Waal (n 34 above) 236.

63 Bayefsky (n 45 above) 11.

64 Inter-American Court of Human rights, Amendments to the naturalization provisions of the Constitution of Costa Rica, Advisory Opinion of 19 January 1984, Para 56.

65 The same approach had been adopted by the European Court of Human Rights and, more recently, by the United Nations Human Rights Committee. See, respectively, Case Relating to Certain Aspects of the Laws on the Use of Language in Education in Belgium, European Court of Human Rights, Judgment of 23 July 1968; Series a, Volume 6, Para 10; and, General Comment No. 18, ‘Non Discrimination,’ adopted by Human Rights Committee, at its thirty-seventh session, on 10 November 1989, Para 13.

66 *Benishangul Gumuz* case, p. 8.

This argument seems to pre-empt popular will in a way that is paternalist or top-down in orientation. It could be argued that the best way out is to allow the people to decide for themselves regarding the suitability of the potential candidate that is to represent them. As for the candidate, by the time s/he comes forward for registration to run in an election, s/he will have gathered the necessary number of signatures of her/his endorses, and have already communicated her/his plans to the electorate.⁶⁷

Besides, serious communications are made through interpreters, including in the deliberations of the HoF and in cases involving human rights litigations and criminal cases. The candidate can work, if elected, through interpreters. This would obviously involve additional cost implications for the particular state. Yet, to foreclose individuals' and groups' fundamental rights (including their right to be elected) in order to curb the potential cost and administrative inconvenience that would be entailed by the need to provide interpreting services to such potential representatives is a far cry.⁶⁸ In any event, the criterion of knowledge of local language consigns the settler section of the population of a regional state to a fate of permanent exclusion or of forced assimilation.⁶⁹ In either case, their right to participate in the management of public affairs, including taking of public offices, is stifled. In the final analysis, to make a case that a candidate who does not speak the regional council's working language cannot effectively represent his constituencies does not really cut mustard.⁷⁰

ii. *Is the differentiation a prohibited discrimination?*

Is the legitimate differentiation (above) tantamount to unfair discrimination? This will in turn raise a two-pronged enquiry:

A) In the first place, does the differentiation amount to 'discrimination'? The response to the query depends upon the ground upon which the differentiation has been made. It is of paramount importance to note the interpretational difference between the named (listed) grounds of non-discrimination (protected grounds) and 'other' analogous grounds.

If the differentiation is made on the grounds of the explicitly protected grounds under Article 25 of the Constitution (i.e., 'race, nation, nationality, or other social origin, colour, sex, language, religion, political or other opinion, property, birth'), *prima facie*, discrimination will have been established and the burden of proof of non-discrimination

67 Under Art 38 (1) (e) of Proc 111/1995, it is a precondition of candidature that a potential candidate produces endorsement signatures of not less than 500 people (if representing a political party) and not less than 1,000 signatures (if an independent candidate) before being registered as a candidate.

68 It is important to note that the cost implications and the possible administrative inconvenience of a non-indigenous member of a regional state's council had some weight in swaying the HoF decision in favour of legitimating the knowledge of the concerned region's working language as a precondition for candidacy. See Minutes (n 44 above), p. 30-33.

69 Such approaches have been put to test in countries such as the USA, India, and Sri Lanka without much success. It indeed bred the roots of division and hatred among the various groups. See generally Duane Champagne, 'Beyond Assimilation as a Strategy for National Integration: The Persistence of American Indian Political Identities' (1993) 3 *Transnational Law and Contemporary Problems* 109; Herbert M Jauch, *Affirmative Action in Namibia: Redressing the Imbalances of the Past?* (New Namibia Books, 1998).

70 See also further arguments in Section 5.2 below.

shifts to the government or the body that contends that the law, policy or conduct under consideration is non-discriminatory. Accordingly, saving proof to the contrary, the decision of the NEBE in the *Benishangul Gumuz* case and Article 38 (1) (b) of Proc 111/1995 are presumably discriminatory as they make a distinction on language related grounds. If, on the other hand, differentiation is contested as discriminatory on the non-specified 'other status' grounds under Article 25, the complainant will have to submit a *prima facie* evidence to establish that the differentiation is not based on rational grounds and/or the means used and the extent of limitation imposed on the complainant's rights are not proportionate to the purpose it sought to achieve (proportionality test).

B) If the differentiation is proved to be discriminatory, then the question of whether the discrimination is 'unfair' arises. It is important to note that not all discrimination is prohibited or is unfair. If the differentiation/discrimination is based on any of the specifically prohibited grounds (under Article 25), unfairness is presumed.⁷¹ Language related differentiations legitimated by the HoF in the *Benishangul Gumuz* case therefore represents unfair discrimination. The defendant in the case (usually the state) must show why the discrimination is not unfair, and such proof was not given in the instant case. In cases where discrimination is based on non-specific (analogous) grounds, the complainant must prove unfairness of the law or conduct complained of before such is adjudged discriminatory. Not all differentiation is discriminatory. Similarly, not all discrimination is unfair. It is only a discrimination that does not have a legitimate or rational basis for the distinction that is unfair and, as such, unlawful. Only in this latter case can constitutional violation of the right to equality be found.

5.2 Direct discrimination vs. indirect discrimination

Legal protections of the right to equality have been increasingly sophisticated in response to the challenges of subtle forms of discrimination which elude the eye of a neutral spectator. The formal equality approach, as outlined above, would work towards the prohibition of direct and overt discrimination as it requires the treatment of likes alike. However, in societies that have a history of discrimination against certain groups (as has Ethiopia), formal equality proves inadequate to curb the insidious effects of discrimination. An equality guarantee that requires equality of treatment without levelling out the starting point of a race is myopic as it fails to pay due regard to the differences between the persons or groups concerned, and may entrench existing disadvantages.⁷²

Approaching the right to equality from the perspective of legal prohibition of indirect discrimination offers a more constructive path to challenge deep-seated discrimination that arises out of structural factors which the consistency in treatment (formal equality) approach cannot capture. One of the early cases on the subject matter of indirect discrimination is the famous decision of the United States' Supreme Court in the *Griggs v Duke Power* case.⁷³ In this case, the defendant had an open policy of excluding black ap-

71 See *Benishangul Gumuz* case, p. 7; Currie and de Waal (n 34 above) 235.

72 Monaghan, du Plessis and Malhi (n 16 above) 11.

73 401 US 424 (1971)

plicants from employment in the company (direct discrimination). As direct exclusions of blacks became increasingly objectionable, the defendant replaced the overt preference of whites over blacks by a new criterion that potential candidates have high school qualifications or pass literacy test. The employment in issue was mainly unskilled labour and the qualifications were not necessary for the carrying out of the work. Yet, the effect of the literacy test and the requirement of high school qualification resulted in the continued exclusion of the blacks from employment. This was due to the then prevailing effects of discrimination in the education system against black pupils, such that a greater majority of black pupils failed to achieve a high school qualification or reach a standard of literacy sufficient to pass the literacy test imposed by the defendant.

Thus, while black candidates were subjected to the same requirement as white candidates for the purpose of employment – hence formally equally treated – black candidates were disproportionately disadvantaged as a result of the test that was applied as a precondition for accessing employment. Considering that much smaller proportion of black candidates could comply with the precondition, and that the requirement was not necessary for the effective performance of the job, the US Supreme Court held that such seemingly equal treatment is (indirectly) discriminatory against the black candidates.

Similarly, the approval, in the *Benishangul Gumuz* case, by the HoF of the requirement of knowledge of the working language of the regional council in which a candidate seeks to compete weights far heavily on the candidates from the ‘non-indigene’ group than on the ones from the ‘indigenes.’⁷⁴ If anything, the requirement may never be applicable to a candidate from the particular Region to a meaningful degree while it may be a crunch yardstick which many of the ‘non-indigene’ candidates find it difficult to fulfil. Interestingly, the dissenting opinion of the CCI dismissed this argument off hand⁷⁵ and contended that ‘in as much as an indigene Oromos who cannot speak *Afaan Oromoo* cannot run for elections in Oromia, non-Oromos who do not speak *Afaan Oromoo* are not allowed to present themselves as candidates in elections in the Oromian Regional State.’⁷⁶ Thus, it stressed the neutrality of the provision of Art 38 (1) of Proc 111/1995 and its congruence with the Constitution.

The contention of the dissenting opinion is misguided at best. Whereas its apparently attempt at treatment of likes alike is neutral at face value (hence ensuring formal equality), its application could have generated indirect discrimination against the non-indigene groups. To find an indigene non-speaker of *Afaan Oromoo* who lives in Oromia proper is rather an exception, but the situation is different in relation to non-indigenes living in Oromia. The same holds true for potential non-indigene candidates residing in the other regional states such as Oromos in Amhara State or Tigres in Gambella Regional State. The requirement that all candidates shall ‘equally’ meet the requirement of lan-

74 As Maclem noted, there is an indirect discrimination when a rule that is neutral on its face has a disparate impact on the various groups to which it applies. See Patrick Macklem, ‘Minority Rights In International Law’ (2008) 6(3 & 4) *International Journal of Constitutional Law* 531, 543.

75 *Benishangul Gumuz* case (note 11above) Dissenting Opinion, p.2.

76 *Ibid.*

guage before presenting themselves to the electorate means, almost obviously, that the indigene candidate who almost naturally speaks the language of her/his region passes the linguistic precondition which may not be to the advantage of the non-indigene candidate. The requirement of meeting the linguistic ability requirement therefore engenders a differential and heavier burden (hence indirect discrimination) for the would-be com As Maclem noted, there is an indirect discrimination when a rule that is neutral on its face has a disparate impact on the various groups to which it applies. See Patrick Macklem, 'Minority Rights In International Law' (2008) 6(3 & 4) International Journal of Constitutional Law 531, 543. petitioner whose origin is from the non-indigenous groups. The situation is thus akin to the metaphor of prohibiting both the rich and the poor to beg in the streets.

Moreover, the introduction of the language requirement represents a contradiction in the practice of the HoF itself. While many of its own members do not understand the working language of the HoF (Amharic) to express their opinions on national issues of equal importance, they still communicate the concerns, wishes and wills of their constituencies in the HoF deliberations through translation services. If the members of the HoF who represent the interests of the same constituencies as those of the regional councils—both represent nations, nationalities and peoples of Ethiopia⁷⁷—are able to express themselves and work through interpreters without much problem, then one is left to speculate why the same cannot be said of members of the regional councils.

6. The *Benishangul Gumuz* decision as an affirmative action measure

Any meaningful attempt to achieve substantive equality among citizens must look beyond formal equality and take note of the political, socio-economic and cultural harbingers which form the backdrop of current inequality. State neutrality in the sense of formal equality does not bode well for uprooting existing asymmetries in the prevailing positions of each individual and group. There is a need for a state's positive action towards enabling all citizens to start the race from the same starting point.⁷⁸ Neutrality may painfully fail to achieve this end. As has been famously stated by the former US President, Lyndon Johnson:

"Imagine a 100 yard dash in which one of the two runners has his legs shackled together. He has progressed 10 yards, while the unshackled runner has gone 50 yards. How do they rectify the situation? Do they merely remove the shackles and allow the race to proceed? Then they could say that 'equal opportunity' now prevailed. But one of the runners would still be 40 yards ahead of the other. Would it not be the better part of justice to allow the previously shackled runner to make up the 40 yards gap; or to start the race all over again? That would be affirmative action towards equality."⁷⁹

77 See Art 61(1) and (2) of the FDRE Constitution.

78 As Maclem noted the effective protection of the equality guarantee calls for, in some circumstances, for state's positive actions to ensure that all the groups in the race start from a level ground. See Maclem (n 73) 543.

79 Quoted in Jauch (n 65 above) 1.

In the same vein, the HoF seemed to have sought to redress the situation of indigenous groups whose access to political power, the use of their languages at the official level and associated cultural rights had been severely limited or curtailed.⁸⁰ As a means to achieving this end, it sought to limit the amount of competitions for public offices from non-indigenous groups, while at the same time protecting linguistic rights of indigenous groups in a particular regional state.⁸¹ In other words, it is affirmative action in its subdued form.

This resonates well with the constitutional premises of 'rectifying historically unjust relationships' in which the use of own language for so many ethnic-linguistic groups both as a working language and as a medium of instruction in schools had been curtailed.⁸² Indeed, the policy of inter-ethnic discrimination in relation to linguistic rights in Ethiopia reached its zenith in relation to the largest ethnic group,⁸³ the Oromo, whose language was excluded from public spaces until after the downfall of the Dergue regime in May 1991.⁸⁴ Despite being the largest single nation within Ethiopia, the Oromo had long been subjected to a 'total denial of their right to use their language' for official purposes.⁸⁵ So, too, many of the nations, nationalities and peoples of Ethiopia lacked equitable access to political power.⁸⁶ The policy of enhancing the use of the indigenous languages of groups inhabiting the particular state is thus an important consideration – rightly so – that informed the *Benishangul Gumuz* decision. In its deliberations, the HoF expressed its concerns about the possible domination of the non-indigenous groups over the indigenous ones unless certain restrictions are imposed on the formers' rights.⁸⁷

However, the equality clause under Article 25 of the FDRE Constitution guarantees 'equality before the law', 'equal protection of the law' and the 'effective protection' against discrimination on open-ended grounds, but it does not incorporate an explicit and comprehensive provision on affirmative action. The only context where affirmative action is explicitly provided for is the situation covered under Article 35, which is specifically designed to remedy the 'historical legacy of inequality and discrimination' against women. Thus, for instance, there is no semblance of affirmative action under Article 38 in relation to the right to vote and/or contest for an election to public office. 'Every Ethiopian national' has been put on a par in the exercise of the right to vote and be elected and

80 *Benishangul Gumuz* case, P 8-9.

81 *Ibid.*

82 *Id.*, P 6.

83 As Habte Selassie observed, 'the Oromo - next to the Fulani and the Hausa – form the largest grouping in sub-Saharan Africa that speaks a mutually intelligible language.' See Bereket Habte-Sellassie, *Conflict and Intervention in the Horn of Africa* (Monthly Review Press, 1980) 77-78.

84 As Baxter noted, '[e]ducated Oromo bitterly resent being deprived of the use of their native language for anything but domestic purposes.' See P T W Baxter, 'Ethiopia's Unacknowledged Problem: The Oromo' (1978) 77(308) *African Affairs* 283, 289. See also Paul Baxter, 'The Problem of the Oromo or the Problem for the Oromo' in I M Lewis (ed), *Nationalism and Self-Determination in the Horn of Africa* (Ithaca Press, 1983)

85 Habte-Selassie (n 82 above) 81.

86 Such a scenario led to conflicts and internal strife in the past. *Benishangul Gumuz* case, P. 6.

87 *Benishangul Gumuz* case, P 8.

there is nothing in Article 38 to explicitly provide for the necessity of differential treatment among citizens that are eligible for the exercise of the rights in issue.

Nevertheless, it may be argued that the need for affirmative action can be derived from the main equality clause itself. Under Article 25, not only are all persons entitled to equality before the law without any discrimination, they are also entitled to an effective protection of their right to equality. It is axiomatic that the effective protection of equality guarantee goes beyond the prescription of neutral state treatment which, taken at face value, will perpetuate the existing inequality that owes its causes to past marginalisation in accessing public resources such as political power. Thus the effective enforcement of the equal protection of the law under Article 25 would dictate the levelling of the starting point of the race which in turn would require a special treatment of those that have been 'left behind' due to past inequalities. It is not difficult to understand the legitimacy of concerns of the HoF in the *Benishangul Gumuz* case, in which it attempted to devise a special protection for those ethnic groups that have been victims of past marginalisation.

There is cause for concern, however, at the manner in which the HoF tried to balance those competing interests. The HoF ruled that 'it is not unconstitutional to use a candidate's knowledge of the working language of the regional council as a criterion of candidacy.'⁸⁸ This decision might not have adversely affected the different nations and nationalities inhabiting the Benishangul Gumuz Region as the Regional Council works in Amharic, a language which is commonly spoken by the majority of the population of that Regional state.

The situation is much different in the other Regional states. There are different ethnic groups inhabiting the particular Regional states of Ethiopia that do not speak the language of the regional councils. The Oromo whose sizeable population lives in Southern Regional state are a good example. The fact that the majority of the Oromo in this state do not speak the working languages of the Regional Council (Amharic) would entail their exclusion (and it has actually done so) from the benefit of running for elections for public office.

7. Beyond the zero-sum formula

As noted above, language-based exclusions fall within the prohibited grounds of differentiation and any distinction on the ground of language automatically gives rise to the presumption of unfair discrimination. Not only under Article 25 (equality clause) but the relevant provision of Article 38 (1) (b) clearly prohibit differential treatment on the ground of language. Indeed, the use of language as a precondition for the right to be elected intricately coincides with the 'national origin' of the groups concerned, another ground on which distinctions are prohibited (Article 25 and 38 (1)).

As noted above, the HoF does not apply the language-based yardstick to its own members who represent nations, nationalities and peoples much like the members of the regional councils. The application of the linguistic ability as a precondition for electoral

88 *Ibid.*, page 12 (emphasised) (translation mine).

candidacy is thus selective, if not discriminatory. Secondly, any individual is trusted to communicate his/her case via translation in matters involving her/his life, liberty and property in any case against him.⁸⁹ The language barrier could be seen in the same light when it applies to electoral campaigns of regional states. Would it not be up to the electorate to vote for a candidate of their choice? If the imperatives of encouraging the use of an indigenous language of a particular region as the region's official language are the driving motive – and they should be – the non-indigene candidates can still work through interpreters without affecting the indigenes' right to use their languages in their particular state. Or the particular regional state might consider the possibility of adopting two working languages, depending upon the population size who speaks the second language, so as to facilitate the inclusion of the non-indigenous groups.

Thirdly, imposing the limitation on candidacy under the present circumstances may effectively deny a class of voters a real chance of voting for their most favoured representative as some potential candidates would find it impossible to present themselves in electoral campaigns due to language-based preconditions of eligibility. The non-indigene nations, nationalities and peoples who do not speak the working language of a regional council of their Regional State would find it inordinately difficult to be represented by a candidate from their own linguistic and ethnic group. Or, at least, their chance of exercising this right would be severely limited. This clearly compromises the peoples' right to self-determination that is guaranteed under Article 39 of the Constitution.

Ultimately, the *Benishangul Gumuz* case threw up a scenario that carries the potential and tendency of major exclusion of certain groups to an extent that surpasses the limitations that are permissible in the implementation of fundamental human and peoples' rights. Incidentally, the right to elect and be elected under Article 38 of the Constitution does not contain any limitation arising from linguistic abilities and ethnic origin. The equal enjoyment of this right as guaranteed under Article 25 admits no limitation or derogation whatsoever. Indeed, the equality clause is one of the four provisions of the Ethiopian Constitution that cannot be subject to derogations even in situation of national emergency.⁹⁰ The introduction of the language of limitation or derogation into the right to equality in the *Benishangul Gumuz* case through the criterion of linguistic abilities is simply against the words and the spirit of the Constitution.

If one were to follow the lines of the *obiter dicta* of the HoF's decision in the *Benishangul Gumuz* case, troubling questions need to be answered. Under what circumstances, if any, would non-indigenes of a regional state who do not speak the working language of the council of the particular regional state be able to compete in elections into the relevant regional councils while working in their own non-indigenous mother tongue? One conceivable scenario is that their right to run for elections is foreclosed forever unless and until they start to speak the relevant language. This brings about a forced assimilation of non-

89 See Art 19(1) of the FDRE Constitution.

90 Under Art 93 (4) of the FDRE Constitution reads: 'In the exercise of its emergency powers the Council of Ministers cannot, however, suspend or limit the rights provided for in Articles 1, 18, 25 and sub-Articles 1 and 2 of Article 39 of this Constitution.'

indigenes while it fails to ensure equality in diversity. The non-indigenous groups would ascend to equality (only) when they start to speak the official language of the regional council of the state that they inhabit. The alternative avenue, albeit cynical, is for them to go back 'where they belong.' This would clearly create an indigene-non-indigene divide in the same regional state, and may lead to a sense of permanent exclusion of certain groups.⁹¹

Of course, one cannot take issue with the right of the 'indigenes' or of the 'majority' group of a region to use their own language as the region's working language. The point being made is not an argument against the policy of encouraging the use and advancement of each group's language and identity. The contention is that the lack of knowledge of the official language of a regional state council should not be a yardstick for access to political power or to take part in elections for the non-speakers of the official language who have a constitutional claim to have their own 'non-indigenous' language to be equally recognised.⁹² The approach taken in the *Benishangul Gumuz* decision would deny non-indigenous groups the right to use their own respective languages for official purposes in the states they inhabit, and compel them, at the cost of losing access to political power, into learning indigenous languages. The attempt by the HoF in legalising the use of language as a precondition for candidacy in elections thus tends to conflict with the right to equality but also runs counter to many other rights, not least the right to self-determination, the right to elect a candidate of one's choice, the right to equality of the potential candidates.

A more plausible approach could be the use of a variant of the formula provided under Article 61 (2) of the FDRE Constitution, where every non-indigenous group in a state is represented by at least one member with the possibility of additional representatives in proportion to the population size of the particular ethnic group in the Regional State in question.⁹³ The approach should not employ linguistic abilities as a precondition for candidacy in election-related matters. While respecting the concerns of protecting the rights of indigenous groups, this approach would also ensure that every single nation, nationality and people is represented in its respective regional council.

8. The threats of reverse discrimination

The application of affirmative action measures as a means of achieving equality involves on the one hand the need to maintain a delicate balance between favouring the victims of past disadvantages and on the other hand the state's duty not to jeopardise the right of those who have been 'favoured' in the past or have not been victims of past discrimination. The crucial guiding principle in the exercise should be to elevate the dis-

91 Such developments are at odds with the expressed aspiration of the Constitution, which seeks to build a 'political community' that has been established 'through continuous interaction on various levels' the preservation of which requires an environment where the political community lives 'together on the basis of equality and without any sexual, religious or cultural discrimination.' See Constitution, Preamble, Para 2-4.

92 Under Art 4 (1) of the Constitution, '[a]ll Ethiopian languages shall enjoy equal state recognition.'

93 Art 61 (2) provides that: 'Each Nation, Nationality and People shall be represented in the House of the Federation by at least one member. Each Nation or Nationality shall be represented by one additional representative for each one million of its population.'

advantaged group without jeopardising the rights of the hitherto 'not-so-disadvantaged' groups who have a similar claim to the equal protection of the law.

Drawing a line between these two considerations necessitates the need for the clarification of the interplay of affirmative action with the general principle of the right to equality. There exist dual approaches to the affirmative action. On the one hand, there is the view that affirmative action is an *exception* to the right to equality. According to this view, affirmative action is synonymous with 'reverse discrimination', a practice of favouring victims of past discrimination and discriminating against those who were favoured in the past.⁹⁴

On the other hand, there is a view that sees 'affirmative action as a means to the end of a more equal society.'⁹⁵ This view advocates the implementation of specifically tailored programmes and measures that are aimed at eradicating the consequences of past discrimination in view of progressive improvement of their conditions. While the result expected is progressively incremental, the measures taken within the context of affirmative actions should have a causal link with the achievement of equality for the victims of past discrimination.

If Ethiopia were to heed the former view (reverse discrimination), it would freeze the equality 'stake' of the beneficiary of past discriminatory policies unless and until the victims of those policies attain equality. It is a reversal of past injustice, but it meets 'fire with fire' as it corrects past discrimination with present discrimination rather than uproot discrimination in all its semblances.⁹⁶ It is a move from one extreme to the other.

In the end, reverse discrimination would create new victims while perpetuating discrimination within the legal, social and political fabric of a polity. Coming back to the *Benishangul Gumuz case*, it might be expected that a degree of affirmative action be accepted as a remedial measure to erase the ills of the past. Yet, jeopardising the right of those who have not been victimised in the past (and past victims such as the Oromo) is not the same as injecting affirmative action into the legal, political, economic and social system to improve the conditions of past victims. The language bar seems to serve the effect of transposing past victims and past beneficiaries, while the systemic disadvantages remain alive in the system.

9. Conclusion

The upshot of the foregoing is that the implementation of the right to equality and the protection against discrimination would necessitate a departure from the aphorism of treating likes alike. At its best, treating likes alike would ensconce the *status quo* of both the 'favoured' and 'not-so-favoured' groups. In the search for a substantive form of equality that opts to eradicate the existing social, economic, and political inequalities before and besides starting to treat likes alike, affirmative action is a useful tool. Yet, while attempting to elevate the positions of the victims of past policies, laws, practices, there

94 Currie and de Waal (n 34) 264.

95 *Ibid.*

96 Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1978) 223-224.

is a concomitant need to guard against discriminating against the formerly 'favoured' groups as well as to ensure their inclusion in new constitutional arrangements. Seen in this light, affirmative action that takes the form of reverse discrimination is a wolf in sheep's clothing: it seems to serve as a tool of eradicating discrimination while in fact it perpetuates it.

The overriding effect of the *Benishangul Gumuz* decision, for all its attempts to remedy past ills, is to generate the potential of entrenching reverse discrimination. In effect foreclosed the rights of the non-indigenous groups inhabiting many of the regional states from contesting elections for regional councils simply because of their linguistic inabilities. To the degree that it tends to discriminate against certain groups in the various regional states, the constitutionality of the *obiter dicta* of the *Benishangul Gumuz* decision is suspect at best. Offered with the perfect opportunity to provide an interpretational guide on the equality clause and its interplay with affirmative action measures, the HoF poured the baby away with bathwater and failed to do justice to the development of the much needed nuanced constitutional jurisprudence on the right to equality. In the end, the *Benishangul Gumuz* case has the potential of introducing new victims (non-indigenes) to the scene while attempting to remove the old ones (indigenes) out of picture, a development that warrants a critical examination of the vicissitudes of the solution carved out by the HOF in the instant decision. In short, the *obiter dicta* of the *Benishangul Gumuz* case runs the risk of fighting one form of discrimination with another.

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