

Substance

Equality / non-discrimination – article 2

The right to non-discrimination/equality is ‘imperative for the respect and enjoyment of all other rights and freedoms protected in the Charter (*African Commission on Human and Peoples’ Rights v Kenya*, application 006/2012, Judgement, 26 May 2017, para 137). The scope of this right extends beyond equal treatment of the law and has practical dimensions which allows individuals to enjoy the rights enshrined in the Charter without distinction (*African Commission on Human and Peoples’ Rights v Kenya*, application 006/2012, Judgement, 26 May 2017, para 138)

The right not to be discriminated against (article 2 ACHPR) is associated with the right to equal protection by the law (article 3(2) ACHPR) (*Tanganyika Law Society, The Legal and Human Rights Centre v The United Republic of Tanzania*, application 009/2011; *Reverend Christopher R. Mtikila v The United Republic of Tanzania*, application 011/2011, judgment, 14 June 2013, (*Separate Opinion of Judge Ouguergouz*), para 119); (*African Commission on Human and Peoples’ Rights v Kenya*, application 006/2012, Judgement, 26 May 2017, para 138).

However, in the separate opinion of Judge Ouguergouz, the principle of non-discrimination applies to the rights enshrined in the African Charter, whereas the principle of equality applies to all the rights applicable within the municipal legal system even where they are not provided for by the Charter. And where it is found that a different treatment was meted out to different sets of people, the Court must clarify that differential treatment does not necessarily mean discrimination (*Mtikila*, paras 36 - 37).

The expression ‘any other status’ as part of the prohibited grounds of discrimination, refers to grounds of discrimination ‘which could not have been foreseen during the adoption of the Charter’. The Court would therefore take into account the ‘general spirit of the Charter’ in determining a ground falls under this category (*African Commission on Human and Peoples’ Rights v Kenya*, application 006/2012, Judgement, 26 May 2017, para 138).

While differential treatment on the specified grounds, are generally prohibited, not all forms of distinction or differentiation amount to discrimination. A distinction or differential treatment only qualifies as discrimination ‘when it does not have objective and rational justification and, in the circumstances where it is not necessary and proportional (*African Commission on Human and Peoples’ Rights v Kenya*, application 006/2012, Judgement, 26 May 2017, para 139).

The refusal to recognise an indigenous community (Ogiek) as a tribe, which would enable them access to their lands, while other communities similarly placed were granted such recognition amounted to an unjustified distinction based on ‘ethnicity’ or ‘other status’ (*African Commission on Human and Peoples’ Rights v Kenya*, application 006/2012, Judgement, 26 May 2017, paras 141 & 142).

The protection of the right to non-discrimination in legislation *per se* is not enough to fully guarantee the right. The right can be effectively enjoyed ‘only when it is actually respected’ (*African Commission on Human and Peoples’ Rights v Kenya*, application 006/2012, Judgement, 26 May 2017, para 144). Thus, the failure of a state to recognise an indigenous community cannot be justified by a purported need to preserve the natural ecosystem in a forest which serves as the dwelling place of the indigenous community and consequently amounts to a violation of article 2 of the Charter (*African Commission on Human and Peoples’ Rights v Kenya*, application 006/2012, Judgement, 26 May 2017, paras 145 & 146).