

Non-discrimination in socio-economic rights

In May 2009, the United Nations (UN) Committee on Economic, Social and Cultural Rights (CESCR) adopted General Comment 20 (UN doc. E/C.12/GC/20[2009]) on non-discrimination in economic, social and cultural (ESC) rights.

The CESCR held a half day of general discussion on non-discrimination and ESC rights during its 41st session in 2008, aimed at reviewing its draft general comment on non-discrimination in the light of comments and suggestions made by experts, such as states parties, UN specialised agencies and bodies, UN human rights mechanisms, national human rights institutions, trade unions, employers' organisations, non-governmental organisations, academic institutions and other interested organisations or individuals.

General comments are the CESCR's interpretation of the content of human rights provisions contained in the International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966. General Comment 20 is an interpretation of the meaning and scope of the right to non-discrimination, guaranteed in article 2(2) of the ICESCR, which requires states parties

to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

General Comment 20 deals with the scope of state obligations, the prohibited grounds for discrimination and the measures that states parties must adopt to ensure implementation at the national level.

Scope of state obligations

The CESCR defines discrimination as

any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on equal footing, of the [ICESCR] rights (para 7).

Discrimination also includes incitement to discriminate and harassment. The CESCR also observes that non-discrimination is an immediate and cross-cutting obligation (para 7).

States parties must eliminate formal (*de jure*)

and substantive (*de facto*) discrimination (para 8). To eliminate formal discrimination, they must ensure that their constitutions, laws and policy documents do not discriminate on prohibited grounds. The CESCR gives the example of laws denying equal access to social security benefits to women on the basis of their marital status as being contrary to the obligation to eliminate formal discrimination. However, it adds that eliminating formal discrimination does not necessarily achieve substantive equality. Hence, eliminating substantive discrimination requires that states parties, instead of merely comparing the formal treatment of individuals in similar situations, should pay sufficient attention to individuals or groups that suffer historical and persistent prejudice. They should therefore adopt measures that prevent, diminish and eliminate the conditions and attitudes that cause or perpetuate substantive discrimination (para 8).

The CESCR acknowledges that special measures such as affirmative action may be required to address substantive discrimination. These measures must be reasonable, objective and proportionate to redressing substantive discrimination, and must be discontinued once substantive equality is sustainably achieved (para 9).

States parties are further required to eliminate direct and indirect forms of discrimination. The CESCR clarifies that 'direct discrimination occurs when an individual is treated less favourably than another person in a similar situation for a reason related to a prohibited ground'. It also includes 'detrimental acts or omissions on the basis of prohibited grounds where there is no comparable similar situation'. The case of a pregnant woman is cited as an example. Indirect discrimination, on the other hand, refers to:

laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of [the rights in the ICESCR] as distinguished by prohibited grounds of discrimination (para 10).

An example of indirect discrimination is requiring the presentation of a birth certificate for school enrolment, which may discriminate against ethnic minorities or non-nationals who do not have or have been denied such certificates.

States parties must also adopt measures to prevent discrimination on prohibited grounds in the private sphere (para 11). This is because discrimination often occurs in families, workplaces and other sectors of society. They must also address systematic discrimination (para 12).

General Comment 20 also deals with permissible differential treatment. The CESCR believes that differential treatment based on prohibited grounds is not discrimination if the justification for the differentiation is reasonable and objective. This will entail assessing the aims and effects of the measures or omissions and their compatibility with the nature of the rights in the ICESCR, and whether they are solely for the purpose of promoting the general welfare in a democratic society. The CESCR adds that 'there must be a clear and reasonable relationship of proportionality between the aim sought to be realised and the measures or omissions and their effects' (para 13). However, states parties cannot use the lack of resources to justify failing to remove differential treatment, unless they have made every effort to use the resources at their disposal to address and eliminate the discrimination as matter of priority.

Prohibited grounds of discrimination

General Comment 20 makes reference to the prohibited grounds of discrimination listed in article 2(2) of the ICESCR – 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. The inclusion of 'other status' shows that the list is not exhaustive (para 15). The CESCR further notes that some individuals or groups of individuals such as women belonging to an ethnic or religious minority could face discrimination on more than one of the grounds (para 17). States parties are required to eliminate all the grounds of discrimination.

General Comment 20 further elaborates on each of the listed grounds (paras 19–26) and implied grounds under 'other status' (paras 27–35). The CESCR encourages a flexible approach to the ground of 'other status', listing some possible grounds but stressing that they are illustrative rather than exhaustive. They include disability, age, nationality, marital and family status, sexual orientation and gender identity, health status, place of residence, economic and social situation.

National implementation

State parties must take concrete, deliberate and targeted measures to ensure that discrimination in the exercise of the rights in the ICESCR is eliminated. They must also ensure that individuals, who may be distinguished by one or more of the prohibited grounds, have the right to participate in decision making processes over the selection of such measures. They must regularly assess whether the measures adopted are effective in practice (para 36).

An indispensable requirement in complying with

article 2(2) of the ICESCR, as the CESCR points out, is the adoption of legislation that prohibits or addresses discrimination. State parties must review laws on a regular basis, and, where necessary, amend them so that they do not discriminate or lead to discrimination in relation to the enjoyment of ESC rights (para 37).

Strategies, policies and plans of action must be put in place to address both formal and substantive discrimination by public and private actors; and temporary special measures be adopted to accelerate the achievement of equality (para 38). Education on principles of equality and non-discrimination is also vital. State parties must adopt appropriate preventive measures to ensure that new marginalised groups do not emerge, take steps to eliminate systematic discrimination and segregation in practice (para 39), remedy violations of the right to non-discrimination, including the provision of effective remedies (para 40), and monitor the implementation of measures to comply with article 2(2) of the ICESCR (para 41). The CESCR further notes that institutions dealing with allegations of discrimination should be accessible to everyone without discrimination (para 40).

Conclusion

Prohibition of discrimination is important in ensuring that individuals fully enjoy their socio-economic rights. As noted by the CESCR in General Comment 20, discrimination 'undermines the fulfilment of economic, social and cultural rights for a significant proportion of the world's population' (para 1). The CESCR adds that non-discrimination is 'essential to the exercise and enjoyment of economic, social and cultural rights' (para 2). The adoption of General Comment 20 is therefore crucial in advancing socio-economic rights, especially as it clarifies what states have to do to ensure equal enjoyment of these rights.

This summary was prepared by **Lilian Chenwi**, a senior researcher in, and coordinator of, the Socio-Economic Rights Project.

Reference

Committee on Economic, Social and Cultural Rights 2008. Half-day of general discussion on 'discrimination and economic, social and cultural rights'. Available at www2.ohchr.org/english/bodies/cescr/discussion17112008.htm [accessed 29 June 2009].

General Comment 20 is available at <http://www2.ohchr.org/english/bodies/cescr/comments.htm>