

Non-Discrimination



Article 2 & Governments' Budgets

ICESCR Article 2(2):

*The States Parties to the present Covenant undertake 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.*

What does the obligation of non-discrimination in article 2 mean?

This is a question that governments serious about realizing their people's rights and living up to their treaty obligations necessarily ask themselves. It is also one that civil society groups monitoring the government's compliance with its human rights obligations will have to address.

The UN Committee on Economic, Social and Cultural Rights (CESCR) is the body that provides the most authoritative interpretation of the meaning of article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The CESCR is charged with overseeing implementation of the ICESCR. States that have ratified the ICESCR must, as part of their treaty obligations, report regularly to the CESCR on steps they have taken to implement the treaty and on the status of the enjoyment of economic, social and cultural (ESC) rights in the country.

The Committee makes comments and recommendations on each country report. These comments and recommendations often set out the Committee's best understanding of the meaning of specific treaty provisions. Occasionally, the Committee also issues a "General Comment" (GC) on a topic that has arisen repeatedly during its deliberations in order to provide greater clarity to governments and others as to the meaning of specific rights and obligations in the ICESCR.

In 2009 the CESCR issued its General Comment 20 (GC 20), which talks about ICESCR article 2(2) on non-discrimination (E/C.12/GC/20). This booklet highlights in particular those parts of GC 20 that have important implications for governments' budgets.

N.B. While this booklet focuses on the obligation of non-discrimination, it is essential when addressing an issue to consider the non-discrimination obligation in conjunction with the other two obligations in article 2—progressive realization and the use of maximum available resources. The meaning and implications of these two other obligations can only be properly understood, and complied with, in conjunction with the obligation of non-discrimination—and vice versa.

Ensuring non-discrimination may require a government to adopt different priorities, and to modify existing policies, plans and programs so that they are in line with the new priorities. It may also mean that the government must implement affirmative action initiatives. Such changes will likely impact the government's budget. GC 20 makes a few direct references to the budget. It says, for example:

Economic policies, such as budgetary allocations [...] should pay attention to the need to guarantee the effective enjoyment of the Covenant rights without discrimination. (para. 38)

While this paragraph makes particular mention of budget allocations, the same standard would apply to the ways governments raise revenue and spend their money. Revenue-raising schemes, in other words, should not only be progressive, but must not unduly penalize particular groups along such lines as gender, ethnicity, religion or income. Expenditures must be similarly non-discriminatory and should, in addition, lead to greater equality.

An immediate obligation

Non-discrimination is an immediate and cross-cutting obligation (GC 20, para. 7).

In other words, while other parts of article 2 talk about taking steps to progressively achieve realization of rights, governments must *immediately* comply with this non-discrimination obligation.

GC 20 directly addresses the situation where a government recognizes that some people are not receiving benefits that others in the population receive, but maintains that it cannot afford to make the same benefits available to all immediately. Of this situation, the Committee says:

A failure to remove differential treatment on the basis of a lack of available resources is not an objective and reasonable justification unless every effort has been made

to use all resources that are at the State party's disposition [...] to address and eliminate the discrimination, as a matter of priority. (para. 13; underlining added)

(See case study on *Non-Discrimination: Discriminatory expenditures based on health status.*)

A government in such a situation must thus reorient its budget to treat all equally. Doing so can be quite complex, and the process should be guided not only by the obligation of non-discrimination, but by the other two article 2 obligations—progressive achievement and use of maximum of available resources. Extending essential goods and services to previously disadvantaged groups, for example, may not be feasible without at least temporarily cutting back on some non-essential goods and services currently provided to the



general population. The government should carefully determine the extent to which the cuts it makes are diminishing the latter's enjoyment of their rights, and should ensure that, as paragraph 13 emphasizes, it is using the maximum of available resources to avoid any retrogression. (See booklets on the obligations of progressive realization and the use of maximum available resources.)

Different types of discrimination

GC 20 provides some interpretations of non-discrimination that, while not explicitly mentioning the budget, have important implications for it. It says, for example, that States parties to the ICESCR must eliminate both

- *formal* discrimination, that is, discrimination explicitly encouraged or allowed in laws, policies, etc.; and
- *substantive* discrimination—where discrimination is not explicitly set out in the laws, policies, etc., but where the impact of the laws and policies is discriminatory (otherwise known as *de facto* discrimination). (para. 8; underlining added)

With regard to the budget, this means, for example, that funds cannot be disproportionately allocated for or spent in areas where a specific ethnic group lives simply out of a desire to favour that ethnicity, or directed away from areas which support opposition parties simply because the government does not like their political opinions. (See case study on *Non-Discrimination: Discrimination in allocations and spending on the basis of geography.*)

Substantive discrimination can be harder to spot in the budget than formal discrimination, since, by definition, the figures would look neutral. Thus, identifying substantive (or *de facto*) discrimination will likely involve looking not only at budget figures, but also analysing the relationship of those figures to other information, including population data, data on the distribution of existing services, information about the needs of different groups, as well as about the impact on different groups of the government's spending (or revenue-raising schemes).

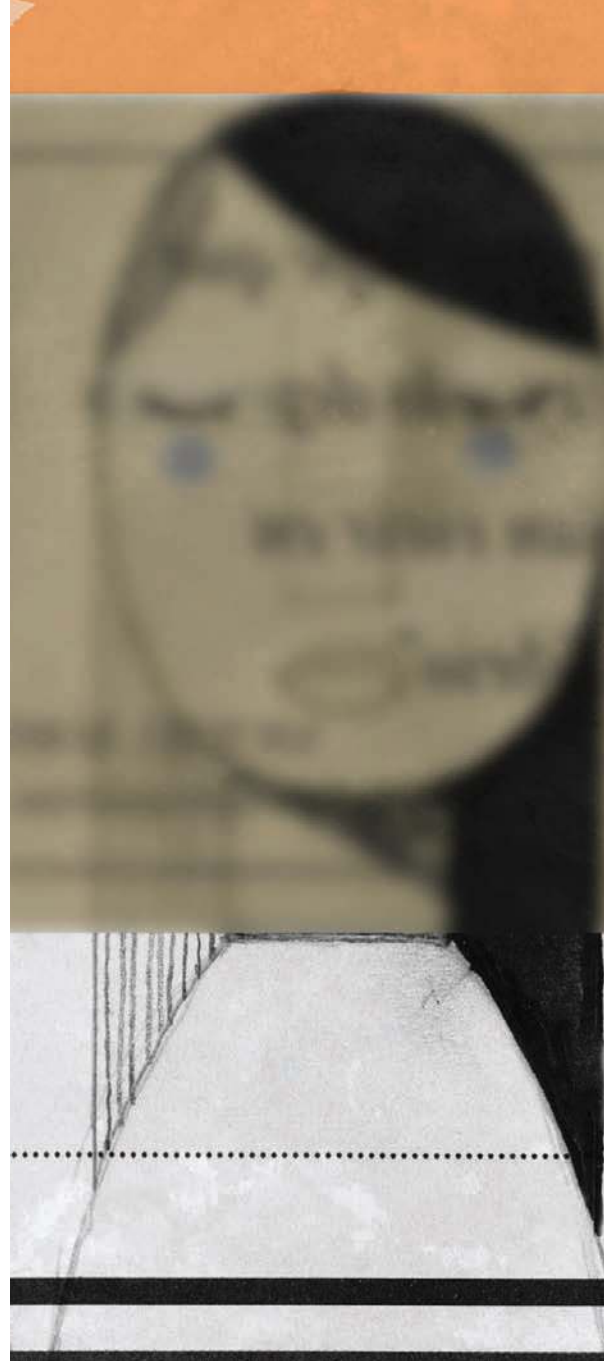


For example, a low-income housing scheme may on its face exhibit a concern for the very poor. However, if the application process involves complicated forms that would be challenging for those with little education, the housing will go to the better educated. Similarly, a job creation scheme that focuses on building roads may be open to men and women, but it may nonetheless be problematical when, for cultural reasons, few women will take advantage of the scheme. Such schemes would be, *de facto*, discriminatory.

In order to identify instances of substantive discrimination and modify programs so that they comply with the obligation of non-discrimination, government should carefully monitor the impact of its programs on different populations. (See case study on *Non-Discrimination: Discriminatory allocations and expenditures on the basis of socio-economic status*.)

GC 20 says that to “attenuate or suppress conditions that perpetuate discrimination,” States parties may, and in some cases should, take special measures, which, in turn, must be discontinued once substantive equality has been reached. (para. 9) These special measures will, in many cases, require not only that government provide greater access to jobs, housing and so on to those groups that have historically been discriminated against, but also that it direct disproportionately greater financial resources to them.

These types of measures and the associated funding are a familiar feature of initiatives that have been designed to redress historic discrimination in a number of countries. (See case study on *Non-Discrimination: Failure to allocate and spend funds specially designated to counter the lingering effects of historic discrimination*.)





Discrimination by private actors

What about discrimination in the private sphere? GC 20 says:

States parties must [...] adopt measures [...] to ensure that individuals and entities in the private sphere do not discriminate on prohibited grounds. (para. 11)

What would this look like in the budget? Among other things, it would mean that the budget should include funding for legislation, monitoring processes and/or the work of regulatory bodies. That funding should be sufficient, for example, to enable the latter to do a proper job of ensuring that private actors (whether individuals or corporate bodies) are providing goods or services in a non-discriminatory manner.

Discrimination by sub-national government

Government authorities at all levels (from the national down to the local) are obligated to be non-discriminatory in their policies, laws, etc.

The primary responsibility for many government services central to the realization of ESC rights—schools, health clinics, water provision, food subsidies, work programs, etc.—rests with provincial and local governments. Their budgets are thus often central to the functioning of these services. GC 20 reminds us that these budgets too must comply with the government's obligation of non-discrimination—both formal and substantive.

(See case study on *Non-Discrimination: Discriminatory allocations and expenditures on the basis of socio-economic status.*)



The Article 2 project

This booklet is part of the *Article 2 & Governments' Budgets* handbook. The handbook has been developed by the Article 2 Project, a working group housed first at the Partnership Initiative of the International Budget Partnership (IBP), and then at the Global Movement for Budget Transparency, Accountability and Participation. The project aims to enhance understanding of the implications of article 2 of the ICESCR for how governments should develop their budgets, raise revenue and undertake expenditures.

Article 2 of the ICESCR sets out that governments are obligated to “take steps, individually and through international assistance and co-operation, [...] **to the maximum of its available resources**, with a view to **achieving progressively** the full realization of the rights recognized in the present Covenant [...], **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”.

This handbook is, primarily, a resource for civil society organizations, human rights commissions, and even legislators, to hold governments to account for their human rights obligations. Download the complete handbook at:
www.internationalbudget.org/publications/ESCRArticle2.

Authors: Ann Blyberg and Helena Hofbauer

February 2014

