



**Economic and Social
Council**

Distr.
GENERAL

E/C.12/GC/20
25 May 2009

Original: ENGLISH

**COMMITTEE ON ECONOMIC, SOCIAL
AND CULTURAL RIGHTS**

**Forty-second session
Geneva, 4-22 May 2009**

Item 3 of the provisional agenda

General Comment No. 20

Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2)

I. INTRODUCTION AND BASIC PREMISES

1. Discrimination undermines the fulfilment of economic, social and cultural rights for a significant proportion of the world's population. Economic growth has not, in itself, led to sustainable development and individuals and groups of individuals continue to face socio-economic inequality, often because of entrenched historical and contemporary forms of discrimination.
2. Non-discrimination and equality are fundamental components of international human rights law and essential to the exercise and enjoyment of economic, social and cultural rights. Article 2(2) of the International Covenant on Economic, Social and Cultural Rights ('Covenant') obliges each State Party "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".

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3. The principles of non-discrimination and equality are recognised throughout the Covenant. The Preamble stresses the “equal and inalienable rights of all” and the Covenant expressly recognises the rights of “everyone” to the various Covenant rights such as, inter alia, the right to work, just and favourable conditions of work, trade union freedoms, social security, an adequate standard of living, health and education and participation in cultural life.

4. The Covenant also explicitly mentions the principles of non-discrimination and equality with respect to some individual rights. Article 3 requires States to undertake to ensure the equal right of men and women to enjoy the Covenant rights and Article 7 includes the “right to equal remuneration for work of equal value” and “equal opportunity for everyone to be promoted” in employment. Article 10 stipulates that, inter alia, mothers should be accorded special protection during a reasonable period before and after childbirth and that special measures of protection and assistance should be taken for children and young persons without discrimination. Article 13 recognizes that “primary education shall be compulsory and available free for all” and provides that “higher education shall be made equally accessible to all”.

5. The preamble, Articles 1(3) and 55 of the UN Charter and Article 2(1) of the Universal Declaration of Human Rights prohibit discrimination in the enjoyment of economic, social and cultural rights. International treaties on racial discrimination, discrimination against women and the rights of refugees, stateless persons, children, migrant workers and members of their families and persons with disabilities include the exercise of economic, social and cultural rights,¹ while other treaties require the elimination of discrimination in specific fields, such as employment and education.² In addition to the common article 2 on equality and non-discrimination in both Covenants, ICESCR and the International Covenant on Civil and Political Rights, Article 26 of ICCPR contains an independent guarantee of equal and effective protection before and of the law.³

6. In previous General Comments, the Committee has considered the application of the principle of non-discrimination to specific Covenant rights relating to housing, food, education, health, water, author’s rights, work and social security.⁴ Moreover, General Comment No. 16 focuses on State parties’ obligations under Article 3 of the Covenant to ensure equal rights of men and women to the enjoyment of all Covenant rights, while General Comments Nos. 5 and 6 respectively concern the rights of persons with disabilities and older persons.⁵ The present General Comment aims to clarify the Committee’s understanding of the provisions of Article 2(2), including

¹ See International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); Convention on Elimination of All Forms of Discrimination Against Women (CEDAW); Convention relating to the Status of Refugees; Convention relating to the Status of Stateless Persons; Convention on the Rights of the Child; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; Convention on the Rights of Persons with Disabilities.

² ILO Convention No. 111, Discrimination in Respect of Employment and Occupation; UNESCO Convention against Discrimination in Education.

³ See General Comment No. 18 of the Human Rights Committee.

⁴ See General Comments Nos. 4, 7, 12, 13, 14, 15, 17, 18 and 19 of CESCR.

⁵ See General Comments Nos. 5 and 6 of CESCR.

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the scope of State obligations (Part II), the prohibited grounds of discrimination (Part III), and national implementation (Part IV).

II. SCOPE OF STATE OBLIGATIONS

7. Non-discrimination is an immediate and cross-cutting obligation in the Covenant. Article 2(2) requires States parties to guarantee non-discrimination in the exercise of each of the economic, social and cultural rights enshrined in the Covenant and can only be applied in conjunction with these rights. It is to be noted that discrimination constitutes 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 an equal footing, of Covenant rights.⁶ Discrimination also includes incitement to discriminate and harassment.

8. In order for States parties to “guarantee” that the Covenant rights will be exercised without discrimination of any kind, discrimination must be eliminated both formally and substantively:⁷

(a) Formal discrimination: Eliminating formal discrimination requires ensuring that a State’s constitution, laws and policy documents do not discriminate on prohibited grounds; for example, laws should not deny equal social security benefits to women on the basis of their marital status.

(b) Substantive discrimination: Merely addressing formal discrimination will not ensure substantive equality as envisaged and defined by Article 2(2).⁸ The effective enjoyment of Covenant rights is often influenced by whether a person is a member of a group characterized by the prohibited grounds of discrimination. Eliminating discrimination in practice requires paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations. States parties must therefore immediately adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or *de facto* discrimination. For example, ensuring that all individuals have equal access to adequate housing, water and sanitation will help to overcome discrimination against women and girl children and persons living in informal settlements and rural areas.

9. In order to eliminate substantive discrimination, States parties may be, and in some cases are, under an obligation to adopt special measures to attenuate or suppress conditions that perpetuate discrimination. Such measures are legitimate as long as they represent reasonable, objective and

⁶ For a similar definition see Article 1, ICERD, Article 1, CEDAW and Article 2, Convention on the Rights of Persons with Disabilities. The Human Rights Committee comes to a similar interpretation in General Comment No. 18, paras. 6 and 7. The Committee has adopted a similar position in previous General Comments.

⁷ See General Comment No. 16

⁸ See also General Comment No. 16.

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proportional means to redress *de facto* discrimination and are discontinued when substantive equality has been sustainably achieved. Some such measures to achieve non-discrimination may, however, need to be of a permanent nature, such as interpretation services for linguistic minorities and persons with sensory impairments in health care facilities.

10. Both direct and indirect forms of differential treatment can amount to discrimination under Article 2(2) of the Covenant:

- (a) 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; e.g., where membership of a trade union, or employment in educational or cultural institutions is based on the political opinions of applicants or employees. Direct discrimination also includes detrimental acts or omissions on the basis of prohibited grounds where there is no comparable similar situation (e.g. the case of a woman who is pregnant).
- (b) Indirect discrimination refers to laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of Covenant rights as distinguished by prohibited grounds of discrimination. For instance, requiring a birth registration certificate for school enrolment may discriminate against ethnic minorities or non-nationals who do not possess, or have been denied, such certificates.

11. Private sphere. Discrimination is frequently encountered in families, workplaces, and other sectors of society. For example, actors in the private housing sector (e.g. private landlords, credit providers and public housing providers) may directly or indirectly deny access to housing or mortgages on the basis of ethnicity, marital status, disability or sexual orientation while some families may refuse to send girl children to school. States parties must therefore adopt measures, which should include legislation, to ensure that individuals and entities in the private sphere do not discriminate on prohibited grounds.

12. Systemic discrimination. The Committee has regularly found that discrimination against some groups is pervasive and persistent and deeply entrenched in social behaviour and organisation, often involving unchallenged or indirect discrimination. Such systemic discrimination can be understood as legal rules, policies, practices or predominant cultural attitudes in either the public or private sector which create relative disadvantages for some groups, and privileges for other groups.

13. Permissible scope of differential treatment. Differential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is reasonable and objective. This will include an assessment as to whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the Covenant rights and solely for the purpose of promoting the general welfare in a democratic society. In addition, 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. 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

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been made to use all resources that are at the State party's disposition in an effort to address and eliminate the discrimination, as a matter of priority.

14. Under international law, a failure to act in good faith to comply with the obligation in Article 2(2) to guarantee that the rights enunciated in the Covenant will be exercised without discrimination amounts to a violation. Covenant rights can be violated through the direct action or omission by States parties, including through their institutions or agencies at the national and local level. States parties should also ensure that they refrain from discriminatory practices in international cooperation and assistance and take steps to ensure that all actors under their jurisdiction do likewise.

III. PROHIBITED GROUNDS OF DISCRIMINATION

15. Article 2(2) lists the prohibited grounds of discrimination as “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”. The inclusion of “other status” indicates that this list is not exhaustive and other grounds may be incorporated in this category. The express grounds and a number of implied grounds under “other status” are discussed below. The examples of differential treatment presented in this Section are merely illustrative and they are not intended to represent the full scope of possible discriminatory treatment under the relevant prohibited ground, nor a conclusive finding that such differential treatment will amount to discrimination in every situation.

16. Membership in a group. In determining whether a person is distinguished by one or more of the prohibited grounds, identification shall, if no justification exists to the contrary, be based upon *self-identification* by the individual concerned. Membership also includes *association* with a group characterised by one of the prohibited grounds (e.g. the parent of a child with a disability) or *perception* by others that an individual is part of such a group (e.g., a person has a similar skin colour or is a supporter of the rights of a particular group or a past member of a group).

17. Multiple discrimination.⁹ Some individuals or groups of individuals face discrimination on more than one of the prohibited grounds, for example women belonging to an ethnic or religious minority. Such *cumulative discrimination* has a unique and specific impact on individuals and merits particular consideration and remedying.

A. Express grounds

18. The Committee has consistently raised concern over *formal* and *substantive* discrimination across a wide range of Covenant rights against indigenous peoples and ethnic minorities amongst others.

19. 'Race and colour'. Discrimination on the basis of 'race and colour', which includes an individual's ethnic origin, is prohibited by the Covenant as well as by other treaties including the

⁹ See para. 25 below on intersectional discrimination.

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International Convention on the Elimination of Racial Discrimination. The use of the term ‘race’ in the Covenant or the present General Comment does not imply the acceptance of theories which attempt to determine the existence of separate human races.¹⁰

20. Sex. The Covenant guarantees the equal right of men and women to the enjoyment of economic, social and cultural rights.¹¹ Since the adoption of the Covenant, the notion of the prohibited ground ‘sex’ has evolved considerably to cover not only *physiological* characteristics but also the social construction of *gender* stereotypes, prejudices and expected roles, which have created obstacles to the equal fulfilment of economic, social and cultural rights. Thus, the refusal to hire a woman, on the ground that she might become pregnant, or the allocation of low-level or part-time jobs to women based on the stereotypical assumption that, for example, they are unwilling to commit as much time to their work as men, constitutes discrimination. Refusal to grant paternity leave may also amount to discrimination against men.

21. Language. Discrimination on the basis of language or regional accent is often closely linked to unequal treatment on the basis of national or ethnic origin. Language barriers can hinder the enjoyment of many Covenant rights, including the right to participate in cultural life as guaranteed by Article 15 of the Covenant. Therefore, information about public services and goods, for example, should be available, as far as possible, also in languages spoken by minorities and States parties should ensure that any language requirements relating to employment and education are based on reasonable and objective criteria.

22. Religion. This prohibited ground of discrimination covers the profession of religion or belief of one’s choice (including the non-profession of any religion or belief), that may be publicly or privately manifested in worship, observance, practice and teaching.¹² For instance, discrimination arises when persons belonging to a religious minority are denied equal access to universities, employment, or health services on the basis of their religion.

23. Political or other opinion. Political and other opinions are often grounds for discriminatory treatment and include both holding and not-holding, as well as expression of views or membership within opinion-based associations, trade unions or political parties. Access to food assistance schemes, for example, must not be made conditional on an expression of allegiance to a particular political party.

24. National or social origin. ‘National origin’ refers to a person’s State, nation, or place of origin. Due to such personal circumstances, individuals and groups of individuals may face systemic

¹⁰ Outcome Document Durban Review Conference, paragraph 6: “*Reaffirms* that all peoples and individuals constitute one human family, rich in diversity, and that all human beings are born free and equal in dignity and rights; and strongly rejects any doctrine of racial superiority along with theories which attempt to determine the existence of so-called distinct human races.”

¹¹ See Article 3 of the Covenant and General Comment No. 16..

¹² See also General Assembly’s Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, proclaimed by General Assembly resolution 36/55 of 25 November 1981.

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discrimination in both the public and private sphere in the exercise of their Covenant rights. ‘Social origin’ refers to a person’s inherited social status, which is discussed more fully below in the context of ‘property’ status, *descent-based discrimination* under ‘birth’ and ‘economic and social status’.¹³

25. Property. Property status, as a prohibited ground of discrimination, is a broad concept and includes real property (e.g., land ownership or tenure) and personal property (e.g., intellectual property, goods and chattels, and income), or the lack of it. The Committee has previously commented that Covenant rights, such as access to water services and protection from forced eviction, should not be made conditional on a person’s land tenure status, such as living in an informal settlement.¹⁴

26. Birth. Discrimination based on birth is prohibited and Article 10(3) specifically states, for example, that special measures should be taken on behalf of children and young persons “without any discrimination for reasons of parentage”. Distinctions must therefore not be made against those who are born out of wedlock, born of stateless parents or are adopted or constitute the families of such persons. The prohibited ground of birth also includes *descent*, especially on the basis of caste and analogous systems of inherited status.¹⁵ States parties should take steps, for instance, to prevent, prohibit and eliminate discriminatory practices directed against members of descent-based communities and act against dissemination of ideas of superiority and inferiority on the basis of descent.

B. Other status¹⁶

27. The nature of discrimination varies according to context and evolves over time. A flexible approach to the ground of “other status” is thus needed to capture other forms of differential treatment that cannot be reasonably and objectively justified and are of a comparable nature to the expressly recognised grounds in Article 2(2). These additional grounds are commonly recognised when they reflect the experience of social groups that are vulnerable and have suffered and continue to suffer marginalisation. The Committee’s General Comments and Concluding Observations have recognised various other grounds and these are described in more detail below. However, this list is not intended to be exhaustive. Other possible prohibited grounds could include the denial of a person’s legal capacity because he or she is in prison, or is involuntarily interned in a psychiatric institution, or the *intersection* of two prohibited grounds of discrimination, e.g., where access to a social service is denied on the basis of sex and disability.

28. Disability. In General Comment No. 5, the Committee defined discrimination against persons with disabilities¹⁷ as “any distinction, exclusion, restriction or preference, or denial of

¹³ See paras. 22, 23 and 33 respectively.

¹⁴ See General Comments Nos. 15 and 4 respectively.

¹⁵ For a comprehensive overview of State obligations in this regard, see General Comment No. 29 of the Committee on the Elimination of All Forms of Racial Discrimination.

¹⁶ See para. 14.

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reasonable accommodation based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights.”¹⁸ The denial of reasonable accommodation should be included in national legislation as a prohibited form of discrimination on the basis of disability.¹⁹ States parties should address discrimination, such as prohibitions on the right to education, and denial of reasonable accommodation in public places such as public health facilities and the workplace,²⁰ as well as in private places, e.g., as long as spaces are designed and built in ways that make them inaccessible to wheelchairs, such users will be effectively denied their right to work.

29. Age. Age is a prohibited ground of discrimination in several contexts. The Committee has highlighted the need to address discrimination against unemployed older persons in finding work, or accessing professional training or re-training and against older persons living in poverty with unequal access to universal old age pensions due to their place and residence.²¹ In relation to young persons, unequal access by adolescents to sexual and reproductive health information and services amounts to discrimination.

30. Nationality. The ground of nationality should not bar access to Covenant rights,²² e.g., all children within a State, including those with an undocumented status, have a right to receive education and access to adequate food and affordable health care. The Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation.²³

31. Marital and family status. Marital and family status may differ between individuals because, *inter alia*, they are married or unmarried, married under a particular legal regime, in a *de facto* relationship or one not recognized by law, divorced or widowed, live in an extended family or kinship group or have differing kinds of responsibility for children and dependents or a particular number of children. Differential treatment in access to social security benefits on the basis of whether an individual is married must be justified on reasonable and objective criteria. In certain cases, discrimination can also occur when an individual is unable to exercise a right protected by the

¹⁷ For a definition see Article 1, CRPD: “Persons with disabilities include, but are not limited to individuals with “long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others”.

¹⁸ See General Comment No. 5, para.15.

¹⁹ Article 2, CRPD: “Reasonable accommodation” means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

²⁰ See General Comment No. 5, para. 22.

²¹ See further General Comment No. 6.

²² This paragraph is without prejudice to the application of article 2(3) of the Covenant, which states: “Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals”.

²³ See also General Comment No. 30 of the Committee on the Elimination of All Forms of Racial Discrimination on non-citizens (2004).

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Covenant because of his or her family status or can only do so with spousal consent or a relative's concurrence or guarantee.

32. Sexual orientation and gender identity "Other status" as recognized in article 2(2) includes sexual orientation²⁴. States parties should ensure that a person's sexual orientation is not a barrier to realising Covenant rights, for example, in accessing survivor's pension rights. In addition, gender identity is recognized as among the prohibited grounds of discrimination; for example, persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment in schools or in the work place.²⁵

33. Health status. Health status refers to a person's physical or mental health.²⁶ States parties should ensure that a person's actual or perceived health status is not a barrier to realizing the rights under the Covenant. The protection of public health is often cited by States as a basis for restricting human rights in the context of a person's health status. However, many such restrictions are discriminatory, for example, when HIV status is used as the basis for differential treatment with regard to access to education, employment, health care, travel, social security, housing and asylum.²⁷ States parties should also adopt measures to address widespread stigmatisation of persons on the basis of their health status, such as mental illness, diseases such as leprosy and women who have suffered obstetric fistula, which often undermines the ability of individuals to enjoy fully their Covenant rights. Denial of access to health insurance on the basis of health status will amount to discrimination if no reasonable or objective criteria can justify such differentiation.

34. Place of residence. The exercise of Covenant rights should not be conditional on, or determined by, a person's current or former place of residence; e.g., whether an individual lives or is registered in an urban or a rural area, in a formal or an informal settlement, is internally displaced or leads a nomadic lifestyle. Disparities between localities and regions should be eliminated in practice by ensuring, for example, that there is even distribution in the availability and quality of primary, secondary and palliative health care facilities.

35. Economic and social situation. Individuals and groups of individuals must not be arbitrarily treated on account of belonging to a certain economic or social group or strata within society. A person's social and economic situation when living in poverty or being homeless may result in pervasive discrimination, stigmatisation and negative stereotyping which can lead to the refusal or unequal access to the same quality of education and health care as others as well as the denial of or unequal access to public places. .

²⁴ See General Comments No. 14 and 15.

²⁵ For definitions, see Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity.

²⁶ See General Comment No. 14, paras. 12b, 18, 28, and 29.

²⁷ Office of the UN High Commissioner for Human Rights and Joint United Nations Programme on HIV/AIDS (2006), *International Guidelines on HIV/AIDS and Human Rights, 2006 Consolidated Version*. Geneva: UNAIDS and OHCHR. Available online: http://data.unaids.org/Publications/IRC-pub07/JC1252-InternGuidelines_en.pdf.

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IV. NATIONAL IMPLEMENTATION

36. In addition to refraining from discriminatory actions, States parties should take concrete, deliberate and targeted measures to ensure that discrimination in the exercise of Covenant rights is eliminated. Individuals and groups of individuals, who may be distinguished by one or more of the prohibited grounds, should ensure the right to participate in decision-making processes over the selection of such measures. States parties should regularly assess whether the measures chosen are effective in practice.

37. Legislation. Adoption of legislation to address discrimination is indispensable in complying with Article 2(2). States parties are therefore encouraged to adopt specific legislation that prohibits discrimination in the field of economic, social and cultural rights. Such laws should aim at eliminating *formal* and *substantive* discrimination, attribute obligations to public and private actors and cover the prohibited grounds discussed above. Other laws should be regularly reviewed and, where necessary, amended in order to ensure that they do not discriminate or lead to discrimination, whether formally or substantively, in relation to the exercise and enjoyment of Covenant rights.

38. Policies, plans and strategies. States parties should ensure that strategies, policies, and plans of action, are in place and implemented in order to address both formal and substantive discrimination by public and private actors in the area of the Covenant rights. Such policies, plans and strategies should address all groups distinguished by the prohibited grounds and States parties are encouraged, amongst other possible steps, to adopt temporary special measures in order to accelerate the achievement of equality. Economic policies such as budgetary allocations and measures to stimulate economic growth should pay attention to the need to guarantee the effective enjoyment of the Covenant rights without discrimination. Public and private institutions should be required to develop plans of action to address non-discrimination and the State should conduct human rights education and training programmes for public officials and make such training available to judges and candidates for judicial appointments. Teaching on the principles of equality and non-discrimination should be integrated in formal and non-formal inclusive and multicultural education, with a view to dismantling notions of superiority or inferiority based on prohibited grounds and to promote dialogue and tolerance between different groups in society. States parties should also adopt appropriate preventive measures to avoid the emergence of new marginalised groups.

39. Elimination of systemic discrimination. States parties must adopt an active approach to eliminating systemic discrimination and segregation in practice. Tackling such discrimination will usually require a comprehensive approach with a range of laws, policies and programmes, including temporary special measures. States parties should consider using incentives to encourage public and private actors to change their attitudes and behaviour in relation to individuals and groups of individuals facing systemic discrimination, or penalize them in case of non-compliance. Public leadership and programmes to raise awareness about systemic discrimination and the adoption of strict measures against incitement to discrimination are often necessary. Eliminating systemic discrimination will frequently require devoting greater resources to traditionally neglected groups.

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Given the persistent hostility towards some groups, particular attention will need to be given to ensuring that laws and policies are implemented by officials and others in practice.

40. Remedies and accountability. National legislation, strategies, policies and plans should provide for mechanisms and institutions that effectively address the individual and structural nature of the harm caused by discrimination in the field of economic, social and cultural rights. Institutions dealing with allegations of discrimination customarily include courts and tribunals, administrative authorities, national human rights institutions and/or ombudspersons, which should be accessible to everyone without discrimination. These institutions should adjudicate or investigate complaints promptly, impartially, and independently and address alleged violations relating to article 2(2), including actions or omissions by private actors. Where the facts and events at issue lie wholly, or in part, within the exclusive knowledge of the authorities or other respondent, the burden of proof should be regarded as resting on the authorities, or the other respondent, respectively. These institutions should also be empowered to provide effective remedies, such as compensation, reparation, restitution, rehabilitation, guarantees of non-repetition, public apologies, and State parties should ensure that these measures are effectively implemented. Domestic legal guarantees of equality and non-discrimination should be interpreted by these institutions in ways which facilitate and promote the full protection of economic, social and cultural rights.²⁸

41. Monitoring, indicators and benchmarks. States parties are obliged to monitor effectively the implementation of measures to comply with Article 2(2) of the Covenant. Monitoring should assess both the steps taken and the results achieved in the elimination of discrimination. National strategies, policies and plans should use appropriate indicators and benchmarks, disaggregated on the basis of the prohibited grounds of discrimination.²⁹

²⁸ General Comments No. 3 and 9. See also the practice of the Committee in its concluding observations on reports of States parties to the Covenant.

²⁹ See the Committee's General Comments on education, health, water, author's rights, social security, and its new reporting guidelines.