

Social protection legislative frameworks in South Asia from a children's rights perspective

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An important element of social protection systems are regulatory frameworks. The absence of a legal framework for social protection leaves individuals and communities in need exposed to arbitrary decision-making and political change—resulting in narrower and more difficult access to assistance. A strong statutory basis which recognises social protection as a right ensures accountable institutions (intended as duty-bearers) and enables individuals (as rights-holders) to make legitimate claims and enforce their rights, thus creating legal awareness, which is central to the legal empowerment of the most vulnerable members of society. Further, the enactment of social protection legislation is a precious occasion for setting long-term objectives for social protection systems and to foster coherence between programmes, financing and administration modalities.

The first objective of a recent study by the IPC-IG and the UNICEF Regional Office for South Asia (ROSA) (Lazzarini 2020) was to assess the state of children's right to social protection by analysing the legal frameworks supporting national social protection systems.

Social protection is part of the wider human right to social security as enshrined in the International Covenant on Economic, Social and Cultural Rights (ICESCR), which has been ratified by each country in South Asia, except for Bhutan. While the right to social security should be realised progressively, States, as duty-bearers, need to provide, at a minimum, access to essential health care, basic shelter and housing, water and sanitation, foodstuffs and basic education. Further, all countries in the region are State Parties to the Convention on the Rights of the Child (CRC). As a consequence, besides adopting the necessary measures to achieve the full realisation of children's right to benefit from social security in accordance with national law, State Parties are obliged to provide, in case of need, material assistance and support programmes to realise the right to an adequate standard of living.

From a national perspective, the firm commitment of South Asian countries to provide social protection to their populations can be inferred from their respective constitutional settings. Each constitution contains a provision related to social protection, excluding Afghanistan's, which, nevertheless, provides for the protection of certain vulnerable groups.

However, at the statutory level the analysis reveals that only Maldives and Nepal have a general regulatory framework for social protection. The other countries (i.e. Afghanistan, Bangladesh, India and Sri Lanka) have opted for legislation regulating particular aspects of social protection, such as sectoral institutional arrangements, identification and payment modalities. India's National Food Security Act, which provides common normative grounds for the provision of food security, demonstrates how the realisation of other economic, social and cultural rights contribute to social protection. Finally, it should be also noted that most social protection legislation in South Asia has been enacted within the last 6 years. This trend can be interpreted as a step towards building social protection systems anchored in a rights-based approach.

In terms of child-focused legislation, the typical approach in the region is the regulation of single issues (e.g. child protection, education etc.) through a single set of legislation. This approach has generated a considerable amount of legislation over time, which occasionally results in conflicting provisions. Further, the CRC Committee, which oversees the implementation of the Convention, noted in its latest concluding observations that national legislation in most South Asian countries does not fully implement or comply with the CRC. Against this background, it is commendable that, between 2018 and 2019, Afghanistan, Maldives and Nepal adhered to the recommendations of the CRC Committee with statutes which, besides enshrining children's right to social protection, aim to systematise children's rights.

From a rights-monitoring perspective, National Human Rights Institutions (NHRIs) have been set up in each country except for Bhutan. NHRIs represent a key guarantee in human rights monitoring, including those of the child as well as the right to social protection. The need for this control function appears to be even more fundamental, as no country in the region is a State Party to the ICESCR Optional Protocol, which allows potential victims to file a complaint before the Committee on Economic, Social and Cultural Rights; moreover, South Asia is the only region without a regional human rights system (or a regional mechanism to address human rights violations).

At the programme level the analysis indicates that only 18 out of a total of 51 programmes are embedded in regulatory frameworks. The remaining 33 measures are, worryingly, not governed by any set of enforceable rules, thus hindering the implementation of a human rights-based approach to social protection.

The second objective of the study was to evaluate the compliance of regulatory frameworks in support of social protection programmes with different aspects of the human rights-based approach to social protection. The analysis reveals that the only criterion with which each of the 18 regulatory frameworks integrally complies relates to the definition of roles and responsibilities.

Regarding compliance with the other dimensions of the human rights-based approach, 78 per cent of the regulatory frameworks relating to social protection in the region define clear eligibility criteria; 68 per cent set out long-term financial requirements; 67 per cent define transparency mechanisms; 58 per cent regulate the predictability of benefits; 41 per cent provide accessible complaints/appeals mechanisms; and a mere 26 per cent define participatory channels.

It should be strongly emphasised that the lack of compliance in relation to complaints and appeals mechanisms poses an almost insurmountable obstacle to the implementation of a human rights-based approach to social protection, given that institutions cannot be held accountable if rights-holders are not in a position to enforce their rights.

Reference:

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