Chapter 23

Article 26: The Right to Benefit from Social Security

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1. States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realisation of this right in accordance with their national law.
2. The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child.

What Did Children Say?

‘When deciding how much help and money is needed, governments should consider the particular situation of the child and family. Government should provide families with some support and money to help bring up their children. Some families will need more support and money than others. Everybody gets what they need rather than everybody gets the same.’ (*Asia-Pacific*)

‘Government should not take heavy taxes. Because of the heavy taxes, the poor people get more poor and poor.’ (*Asia-Pacific*)

To ensure money is spent on the child, government assistance should only be spent in certain places e.g., government to partner with businesses to accept government vouchers. (*Latin America/Caribbean*)

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Overview

Article 26 deals with the right of the child to benefit from social security and social insurance.¹ As underlined by the Committee, this right is important in itself and plays a key instrumental role in the realisation of other Convention rights (UN Committee on the Rights of the Child, 2003a, para. 6, 2006a, paras. 10, 26, 2007, para. 20; Vandenhoe, 2007, pp. 1, 11–13). It guarantees financial and other support of the child provided by the state in all cases where the adult(s) responsible for the child are not in the position to provide for the child, because they are unemployed or for other reasons, such as illness, disability, childbearing, old age, widowhood, being a single parent and in total absence of both parent (orphanhood) and so on. These are all circumstances that might prevent the adult(s) from securing work and an income.

Contrary to other international legal provisions dealing with the issue of social security, Article 26 does not guarantee the right to social security, but the right to ‘benefit from’ social security. The use of this expression is due to a proposal of the International Labour Organization (ILO) delegation during the drafting of the Convention, which underlined that the recognition to children of the ‘right to social security’ would not mirror the real position of the child in relation to their entitlement to social security benefits. Parents and/or legal guardians hold the rights to receive benefits ‘by the reason of their responsibility for the maintenance of the child’ (S. L. de Detrick, 1999, p. 447; S. Detrick et al., 1992, pp. 364–370) based on Article 18. Therefore, the position of dependency of the child towards their parents or legal guardians and their entitlement to social security had been more adequately reflected by recognising to the child right to ‘benefit from’ social security and not the right to social security.

Nevertheless, Article 26(2) ensures that applications for benefits can be ‘made by or on behalf of the child.’ Furthermore, in the general guidelines for the periodic reports, the Committee asks States Parties to describe in their reports the circumstances and the conditions under which children are authorised to apply themselves directly or through a legal representative for social security benefits (S. L. de Detrick, 1999, p. 447; UN Committee on the Rights of the Child, 1996a, para. 100).

With reference to the implementation of Article 26, it is worth underlining that it is subject to the provision of Article 4, which provides that States Parties are obliged to ‘undertake all appropriate, legislative, administrative, and other measures to the maximum of the available resources and where applicable within the framework of the international cooperation’ (Hodgkin et al., 2007, p. 385). Therefore, the right of the child to benefit from ‘social security is not an immediate States Parties’ obligation, but one of progressive achievement’ (S. L. de Detrick, 1999, p. 447; Vandenhoe, 2007, pp. 24–30). So far, the Committee has not provided yet a comprehensive clarification of Article 26 by way of General Comments, nor through the Concluding Observations on reports of States Parties (Vandenhoe, 2007,

¹Social security and social insurance are used as corresponding concepts.

pp. 1, 15). Therefore, the specific and technical meaning of ‘social security’ needs to be identified in many universal and regional treaties dedicated to the right to social security. In these treaties, ‘social security’ is composed of the nine traditional branches identified by the ILO Convention 102 on Minimum Standards, namely health, care, sickness, unemployment, employment injury, family, maternity, invalidity and survivor’s benefits; and a social security system should comply with the following four principles identified by the (Revised) European Social Charter (1996):

- The social security system should be set up or maintained
- A minimum level should be defined for each social security system
- The principle of progressive improvement of the system should apply
- Equality of treatment should be ensured for nationals of other contracting states, along with ‘granting, maintenance and resumption of social security rights’ (Vandenhoe, 2007, p. 7).

General Principles

Article 2 The setting up of a social security system should be intended to support those most in need on an equal basis. Therefore, States Parties’ implementation of Article 26 should be fulfilled with no discrimination. In this respect, the Committee, in its concluding observations to various States Parties’ reports, has raised concerns in relation to discrimination related to sex, age, ethnicity, disability, the geographical location of potential beneficiaries, nationality, and so on (2003b, para. 20, 2003c, para. 52, 2003d, paras. 49, 50, 2006b, paras. 45, 46, 2006c, para. 54, 2007, para. 20, 2012a, para. 60, 2012b, para. 62, 2016a, para. 56, 2017a, para. 69, 2017b, para. 51, 2017c, para. 55). With reference to children with disabilities, the *Report of the Secretary General on Status of the Convention on the Rights of the Child* highlights that some social protection mechanisms discriminate against this group of children. For example, conditional cash transfers may be dependent on attending school when places are not available, and additional costs associated with disability are not taken into consideration (2011, para. 57 (ii), (iii)).

Article 3(2) The creation of a social security system is an integrative part of the overarching States Parties’ obligations to undertake all appropriate legislative and administrative measures needed ‘to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her.’

Article 6 Article 26 is instrumental to the fulfilment of Article 6 with reference to the inherent right to life and the States Parties’ obligation to ensure ‘to the maximum extent possible the survival and development of the child’ (UN Committee on the Rights of the Child, 2003a, para. 6, 2006a, paras. 10, 26). The creation of a quality social security service could contribute to the eradication of poverty, hunger,

exclusion, inequality, low level of schooling and health care (Hodgkin et al., 2007, pp. 386–387). There are all factors that dramatically influence the survival and full development of the child.

Article 12 Children’s perspectives on their experience of poverty, and the measures needed to address the problems, should be solicited by States Parties. The Committee has highlighted the imperative for children’s views on budgetary decisions to be heard and taken seriously, and for States Parties to take all necessary measures to facilitate this process (2016b, paras. 52–53).

Articles Related or Linked to Article 26

Based on the interpretation of Article 26 provided by the Committee, this Article is instrumental to the realisation of all the other rights listed in the Convention. In particular, it is instrumental to the fulfilment of:

- **Article 3(2)**, in relation the States Parties’ obligation to ensure to children the necessary protection and care.
- **Article 17**, with reference to the right to be informed about the available social security benefits available and the procedure meant to obtain them. This could be achieved through the setting up of large public information campaigns on benefit entitlements and through more specific information procedure related to detailed vulnerable groups. Furthermore, the dissemination of information could be addressed to children as well as parents, caregivers and legal representatives (Hodgkin et al., 2007, pp. 387–388; UN Committee on the Rights of the Child, 1999a, para. 18, 2005, paras. 71–74).
- **Article 18(2) and Article 18(3)**, respectively, with reference to the States Parties’ obligation to support parents in the exercise of their child-rearing responsibilities and ‘to ensure that children of working parents have the right to benefit from childcare services and facilities for which they are eligible’ (UN Committee on the Rights of the Child, 1996a, para. 101). Furthermore, often social security is limited to financial benefits for families with children. This is important part of social security. However, preventive services, such as services to support parents in the fulfilment of their role, for example to improve their parenting skills or to educate them in non-violent child-rearing techniques, are often absent. There is a need of a better balance.
- **Article 23**, with reference to the right to benefit from social security entitled to children with disabilities meant to avoid further marginalisation.
- **Article 24**, for the fulfilment of the right to health care services and their connection with medical social benefits.
- **Article 27** deals with the children’s right to an adequate standard of living meant to guarantee the child’s physical, mental, spiritual, moral and social development and to provide material and support programmes, with reference to nutrition, clothing and housing maintenance. Article 27(1) represents a general guarantee to

an adequate standard of living, which is specified in Article 26 social security (which covers allowances related to certain risks—sickness, maternity, unemployment, etc.) and Article 27(3) social assistance (in which the individual need is the main criterion for eligibility and the allowances are intended to compensate for a state of need) (Vandenhoe, 2007, pp. 16–17).

- **Article 28**, again, an instrumental approach to social security benefits helps free the child from needing to work to protect the economic security of the family. Less economically active children will be better equipped to realise their right to education.
- **Article 32**, since social security benefits providing the child with adequate maintenance (allowances) may make the economic activity of the child unnecessary. This makes the child also less vulnerable and strength his/her ability to fulfil the right to education (van Bueren, 1998, p. 268; Vandenhoe, 2007, p. 13).

Relevant Instruments

UN Universal Declaration of Human Rights (1948). Article 25(1). In one single paragraph it refers to both social welfare (adequate standard of living) and social security. With reference to the latter, it enumerates risks, such as unemployment, illness, disability, widowhood, and old age. Thus, compared with the Convention on the Rights of the Child, it provides a more specific provision of social security.

International Covenant on Economic, Social and Cultural Rights (1966).

- Article 9 provides a short and general reference on the right of social security, thereby leaving to the UN specialised agencies (in particular the ILO) to identify the details of this clause (UN Commission on Human Rights, 1951, p. 13; Vandenhoe, 2007, p. 4).
- Article 10(2) accords special protection to mothers during a reasonable period before and after childbirth. To working mothers it offers, during such a period, paid leave or leave with adequate social security benefits.

UN Convention on the Elimination of All Forms of Discrimination against Women (1979).

- Article 11(1) is in line with the scope of the treaty, as it focuses on the equal right to social security for women in a number of specific situations such as retirement, unemployment, sickness, invalidity and old age (like the Universal Declaration of Human Rights).
- Article 14(2) deals with the discrimination against women in rural areas and aims to ensure the right to ‘benefit directly from social security programmes.’

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990):

- Article 27 deals with the equal treatment of migrant workers and members of their families to benefit from social security on the same bases as it is granted to nationals.
- Article 61(3) enable project-tied workers to ‘remain adequately protected by the social security system of their States of origin or habitual residence’.

Even though they are not *stricto sensu* human rights treaties, International Labour Organization conventions are the main international treaties setting and implementing social security standards. Therefore, they are the main source of interpretation of human rights provision on social security (Lamarche, 2002, p. 9; Scheinin, 2001, pp. 214–215; Vandenhoe, 2007, pp. 4–7).

Primarily, ILO Convention 102, Social Security (Minimum Standards) (1952)² covers the nine main branches of any social security system: medical care benefits, sickness benefits, unemployment benefits, old-age benefits, employment injury benefits, family benefits, maternity benefits, invalidity benefits and survivors’ benefits. Based on Article 2, States Parties are requested to comply with at least three out of the nine mentioned benefits and among these, one of the following benefits should be included: unemployment, old age, employment injury, invalidity, or survivor’s benefits. Articles 71 and 72 of this same Convention state that:

- The cost of the social security system is mainly the responsibility of the States Parties and the cost on the employees should not be excessive
- Participation of beneficiaries in the administration of the system should be provided
- A right to appeal should be available in cases of refusal of a benefit and in case of poor quality and quantity of the benefits provided.

European Social Charter (Revised) (1996), Article 12, guarantees the right to social security and identifies four principles to which the system should comply (Vandenhoe, 2007, p. 7). Article 12 also refers to the European Code of Social Security of the Council of Europe (1964). This latter is similar to ILO Convention 102, but the minimum requirements of acceptance for ratification are twice as high for the Code. Thus, it requires a higher standard of social security than provided by the ILO Convention (Nickless, 2002).

American Declaration of the Rights and Duties of Man (1948), Article 16, includes the right to social security in specific areas.

Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights ‘Protocol of San Salvador’ (1988), Article 9 refers to provisions related to old age and disability and to social security benefits for employees in the field of healthcare, work-related injuries, diseases and maternity.

²Others ILO Conventions in this field are the Employment Injury Benefits Convention No. 121 (1964), the Invalidity, Old-age and Survivors’ Benefits Convention No. 128 (1967), the Medical Care and Sickness Benefits Convention No. 130 (1969), and the Employment Promotion and Protection against Unemployment Convention No. 168 (1988).

Attributes

Attribute One: States Parties' Obligations to Undertake All Necessary Measures

As seen in the main concerns of the Committee, many national social security systems, laws, and policies contain shortfalls (Hodgkin et al., 2007, p. 388). The most recurrent one pertains to the inability of ensuring resources to the children most in need of social security benefits (Vandenhoe, 2007, pp. 20–21). Therefore, it remains essential to the renovation and the strengthening of a comprehensive system of social security to:

- Cover all the nine traditional branches of social security: medical care, cash sickness benefits, maternity benefits, old-age benefits, survivors' benefits, employment injury benefits, unemployment benefits, and family benefits
- Follow up on the living reality of the children that benefit from social security
- Set up policy measures meant to facilitate the access to social security benefits by the most disadvantaged groups.

Furthermore, following the provisions of the (Revised) European Social Charter (1996) (Article 12), to ensure the child right to benefit from social security, the system should comply with the following criteria:

- Availability (social security should be set up or maintained)
- The system should be progressively improved in terms of quality and quantity of benefits (risks covered)
- Accessibility should be ensured also to children directly and indirectly in a non-discriminatory manner.

With reference to the last point, for the Committee, medical care, medical insurance, and family benefits are particularly relevant to children and the quality of social security systems (Vandenhoe, 2007, pp. 22, 40–41).

Attribute Two: Focus on the Personal Resources and Circumstances of the Child and Caregivers

Article 26 further underlines that the child's economic stability and social security is generally intertwined with that of their adult caregivers. Thus, States Parties are required to set up tools meant to test the social security of the child and as consequence reinforce the attention for the social security of adults.

The process through which the benefits granted take into account the resources and the circumstances of the child and of the persons having responsibility for the child's maintenance should be particularly keen to detect any other considerations relevant to an application for benefits made by or on behalf of the child.

In relation to this aspect, it should be acknowledged that the Committee invites States Parties to provide a certain financial support to all children regardless of their parents' circumstances as a form of investment on the future stability of the society, strengthening children's ability to exercise their rights, break poverty cycles, and bring high economic returns (Lundy et al., 2015; UN Committee on the Rights of the Child, 2016b, paras. 7, 50; UN High Commissioner for Human Rights, 2014).

Attribute Three: Children's Direct Accessibility to the Application Process to Secure Social Security Benefits

Article 26(2) emphasises that 'it is equally important to ensure that children are directly eligible in their own right where necessary' (Hodgkin et al., 2007, p. 389). As a consequence, even though the right of the child to social security derives from that of their parents, there are cases in which the child might need to lodge an application for social security benefits when parents or other caregivers are for some reason disqualified or unable to claim them (UN Committee on the Rights of the Child, 1996b, para. 34, 1999b, para. 7, 2002, paras. 48, 49, 2004, paras. 10, 11). Children's access to benefits should not be dependent only on their adult caregivers, for example, in cases where children are the heads of households or parents. Therefore, a support system should be put into place in order to facilitate the possibility to submit a claim for social security benefits in a child-friendly manner and to involve in it all those actors supporting the child in this process, including 'persons in public offices or public services' (UN Committee on the Rights of the Child, 1993, para. 50). The child should be provided with all the necessary information to facilitate the procedure, and applications should be dealt with in a timely fashion.

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