

Social Protection as a Human Right in South Asia

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Abstract

Social protection is variously seen as a right or poverty alleviation mechanism or shield from the vagaries of market. Although Bangladesh, India, Nepal, Pakistan and Sri Lanka have brought out various social protection programmes through policies, legislations, constitutional guarantees and so on, their comprehensiveness and implementation remain a challenge. In this backdrop, this article explores the utility of delineating the foundations of social protection in international human rights law as an advocacy tool to demand the adoption of comprehensive social security systems. This human rights approach is demonstrated through eight key principles, backed with examples from the five countries. The article finds that the social protection measures in South Asia exist as scattered programmes, rather than as comprehensive systems. Most programmes tend to be targeted rather than universal. The article highlights the advantage of the human rights approach to social protection in understanding the gender dimensions and implications for socially marginalized groups, while noting that cost and institutional capacities can pose challenges before its implementation.

Keywords

Social protection, social security, human rights, South Asia, social inclusion

Introduction

The sustainable development goals have identified ‘implementing nationally appropriate social protection systems and measures for all, including floors, and by 2030 achieving substantial coverage of the poor and vulnerable’ as a chief component of Goal 1 ‘ending poverty in all its forms everywhere’ (UN, 2015).¹ 2015 also marked the end of the decade for poverty alleviation of the South Asian Association for Regional Cooperation (SAARC). Various approaches to establishing adequate social protection systems have received attention recently. One example is Recommendation 202 of the International Labour Organization (ILO), which calls on countries to establish national social protection floors that guarantee a minimum set of goods and services and basic income security (ILO, 2012a). Another

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example is the Basic Income Earth Network's (BIEN) approach of basic income, which is a minimum amount paid unconditionally to all individuals (rather than households) as the amount required to ensure the right to life (BIEN, 2015). However, the practical use of such concepts remains a challenge.

This scenario necessitates tools and narratives that can be used to advocate the adoption of social protection measures. Delineating the legal foundations of social protection in international human rights law could be explored as one potential way of underlining the significance of social protection. This is especially relevant to South Asia, which continues to battle poverty and has large sections of society still excluded from any form of social protection. South Asian countries are also characterized by a large informal sector that stands outside formal social protection mechanisms.

Most South Asian countries have ratified the principal international human rights instruments and are obligated to implement the standards prescribed through appropriate national laws and policies. Table 1 shows the ratification status of treaties relevant to this work for Bangladesh, India, Nepal, Pakistan and Sri Lanka. Countries that have ratified the treaties are expected to ensure that domestic laws are compatible with these international standards.

The factual information given in the table serves the purpose of pointing out that South Asian countries indeed have a tradition of recognizing the importance of international human rights standards. This makes the framework adopted in this article pertinent. All five countries have ratified ICCPR, ICESCR, CEDAW and CRC. However, a controversial treaty—the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families—has been ratified only by Bangladesh and Sri Lanka. Admittedly, this elaboration does not suggest that South Asian countries have a commendable track record of advancing human rights; grave human rights violations, including

Table 1. United Nations Treaty Ratification Status of South Asian Countries

Treaty	Bangladesh	India	Nepal	Pakistan	Sri Lanka
International Covenant on Civil and Political Rights, ICCPR (1976)	Ratified (2000)	Ratified (1979)	Ratified (1991)	Ratified (2010)	Ratified (1980)
International Covenant on Economic, Social and Cultural Rights, ICESCR (1976)	Ratified (1998)	Ratified (1979)	Ratified (1991)	Ratified (2008)	Ratified (1980)
Convention on the Elimination of All Forms of Discrimination against Women, CEDAW (1981)	Ratified (1998)	Ratified (1993)	Ratified (1991)	Ratified (1996)	Ratified (1981)
Convention on the Rights of the Child, CRC (1990)	Ratified (1990)	Ratified (1992)	Ratified (1990)	Ratified (1990)	Ratified (1991)
International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (2003)	Ratified (2011)	Not signed, not ratified	Not signed, not ratified	Not signed, not ratified	Ratified (1996)
Convention on the Rights of Persons with Disabilities (2008)	Ratified (2007)	Ratified (2007)	Ratified (2010)	Ratified (2011)	Ratified (2016)

Source: Office of the High Commissioner for Human Rights (2015).

genocides, have been reported in each of these countries. Further, it is important to note that social protection programmes are often finalized and implemented as a result of political negotiations, civil society actions and donor agendas and not necessarily for the fulfilment of international treaties. Notwithstanding these caveats, the obligations of these countries under the treaties can provide a persuasive normative framework to push for social protection in the region.

This article adopts such a strategy and looks at the current situation of the policies viewed from a human rights perspective. The article does not delve into the historical and political economy aspects of welfare policymaking in South Asia as there is already substantial literature on these subjects (see, e.g., Kabeer, 2009, and Koehler & Chopra, 2014 for some recent works). The objective of the article is to demonstrate the human rights approach to social protection drawing on examples from South Asia while scrutinizing the challenges in implementing such an approach.

Issues Related to Defining Social Protection

There are various available definitions of social protection, a term that is often used interchangeably with social security, social safety net and welfare. The ILO considers social protection a human right and goes by its Recommendation 202 to define social protection as a comprehensive minimum standard of life well enshrined in national policies and laws (ILO, 2012b). By contrast, the World Bank links social protection to labour and coping mechanisms in the wake of risks (World Bank, 2015a). This idea of social protection sees it more as a means towards ending poverty and coping with vulnerabilities than as a human right. The Asian Development Bank (ADB) adopts a similar approach and defines social protection as a 'set of policies and programs designed to reduce poverty and vulnerability by promoting efficient labour markets, diminishing people's exposure to risks, and enhancing their capacity to protect themselves against hazards and interruption/loss of income' (ADB, 2013, p. xi). ADB considers social protection as consisting of three components: social insurance, social assistance and labour market programmes. Meanwhile, the European Commission (EC) adopts a middle ground and sees social protection as 'policies and actions that enhance the capacity of all people... and aim at providing a higher level of social security throughout active and inactive periods and periods of need throughout lifecycle' (EC, 2012, p. 3). Although not explicitly couched in the frame of human rights, the EC's definition recognizes the significance of social protection in every stage of the lifecycle and, therefore, can be said to adopt a middle ground.

This article adopts a more contextual view of social protection since social protection in South Asia comes in diverse forms, ranging from contributory and non-contributory policies to social protection laws to legislations ensuring access rights over resources that indirectly provide social protection. Microfinance has not been included in this study as it often tends to be a form of debt. Public works programmes present another category of policies that may or may not have social protection elements. Examining the social protection programmes in Bangladesh, Kidd and Khondker (2013) note that classifying all public works programmes as social protection could be problematic as many of them are focused on building assets and infrastructure, rather than redistribution of income. The authors suggest that only those public works programmes that explicitly focus on income transfer should be counted as social protection. The present article is informed by this lesson. Further, scrutinizing the diversity of social protection programmes that can be adopted, Dreze and Sen (1991) point out the distinction between protection and promotion. While the former is concerned with avoiding any decline in the

standard of life, the latter deals directly with poverty eradication. This article looks at all different kinds of policies and programmes—protective as well as promotive—present in South Asian countries.

Conceptual Framework

The rudiments of social protection as a right can be traced back to as early as 1940s, as exemplified by T. H. Marshall's classic essay *Citizenship and Social Class* (1949, p. 11), wherein he proposed the idea of social citizenship as a set of social rights that range 'from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilized being according to the standards prevailing in the society'. Social security has been enshrined as a right in various international human rights instruments, including Articles 22, 23(3) and 25 of the Universal Declaration of Human Rights, Articles 9 and 10(2) of the ICESCR, Articles 11(1e), 11(2b), 14(2c) of CEDAW, Articles 26, 27(1), 27(2) and (3) of CRC, Articles 27, 54 and 61 of the International Convention on the Protection of the Rights of All Migrant Workers and their Families, Article 28 of the Convention on Rights of Persons with Disabilities and Article 24 of the Convention relating to the Status of Refugees. Other provisions of these treaties may also carry the spirit of social protection. Further, Article 5(e-iv) of the Convention on the Elimination of All Forms of Racial Discrimination recognizes the duty of all state parties to prohibit and eliminate racial discrimination in the enjoyment of the right to social security. That the language of economic, social and cultural rights is not alien to the South Asian region can be gauged from the SAARC Social Charter, which states that the member states should 'support progress and protect people and communities whereby every member of society is enabled to satisfy basic human needs and to realise his or her personal dignity, safety and creativity'.

Distilling the international human rights instruments, Sepulveda and Nyst (2012) provide a framework for assessing the design and implementation of social protection programmes, consisting of a set of fundamental principles. The present article draws on this framework and analyzes the social protection programmes in South Asia from the perspective of the following of those principles:

1. Develop an adequate legal and institutional framework and adopt long-term social protection strategies.
2. Adopt comprehensive, coherent and coordinated policies.
3. Respect the principles of equality and non-discrimination.
4. Ensure the inclusion of disadvantaged and vulnerable groups.
5. Ensure equality and non-discrimination in the selection of beneficiaries.
6. Incorporate the gender perspective.
7. Comply with the standards of accessibility, adaptability, acceptability and adequacy.
8. Ensure access to accountability mechanisms and effective remedies.

The utility of the above framework is that it allows us to deal with many controversial challenges through the lens of established instruments. For instance, Principle 1 checks whether social protection measures offered by a country are policies subject to political uncertainties or whether they are enshrined in law. The advantage of this perspective is that it allows us to check whether a country sees its people as beneficiaries or rights holders with respect to social protection. Principle 2 allows us to assess whether safety nets are implemented in a country in the form of scattered social protection programmes or whether the different measures form a comprehensive social protection system. Principle 4 assesses the extent to

which groups facing significant social insecurity such as migrants, refugees, older persons, persons with disability, among others, have been included. By deliberating the cases of migrants and refugees, this principle allows us to question whether and how public authorities can extend social protection beyond non-residents and non-citizens. Principle 6 extends this to women and persons with non-heteronormative gender and sexual identities. In its minute details, the principle also scrutinizes whether or not the burden of implementing social protection programmes falls on women. Principle 5 allows us to scrutinize the legal basis of universalism vis-à-vis targeting, a persisting challenge before welfare policymakers.

Methodology

The study assesses social protection measures in Bangladesh, India, Nepal, Pakistan and Sri Lanka using the conceptual framework outlined above. The research draws on a number of data sources, including constitutions, bills and laws, policy documents, institutional frameworks, policy evaluations, grey literature from non-governmental sources and academic studies. The article also draws on court cases that have affirmed or rejected the right to social security and the rationales used. Reports submitted by countries to the United Nations (UN) committees monitoring human rights treaties as well as independent evaluations by UN special rapporteurs have also provided useful information.

Social Protection as a Human Right in South Asia

The article would now look at how different social protection measures in South Asia come close to or go away from the human rights approach. The principles are explained in greater detail alongside. There could be many more aspects of the human rights approach that are not covered here. Thus, the principles adopted here should be seen more as an indicative way to assess the compliance of different social protection measures against human rights standards, rather than as the only way to do so.

Develop an Adequate Legal and Institutional Framework and Adopt Long-term Social Protection Strategies

The human rights approach to social protection requires that social protection programmes be grounded in legal and institutional frameworks to ensure that the programmes are immune to political changes and that the beneficiaries are recognized as rights holders (Sepulveda & Nyst, 2012). A well-laid-out legal framework would ensure that duty-bearers are held accountable. The SAARC Social Charter (Article III-4) reiterates the same principle: 'States Parties agree that access to basic education, adequate housing, safe drinking water and sanitation, and primary health care should be *guaranteed in legislation, executive and administrative provisions*, in addition to ensuring of adequate standard of living, including adequate shelter, food and clothing' (SAARC, 2006).

All five countries under study have some or the other guarantee related to social protection enshrined in their constitutions. Annexure I lists these guarantees. The lesson to be drawn is that South Asian countries are by their own constitutions obligated to initiate steps for the welfare of their people. However, it can be gauged from Annexure I that social protection is largely seen as assistance to the most needy, especially those who are not able to take care of themselves, and not so much as a universal human right. Further, the South Asian constitutions have included welfare and social security in the fundamental or

directive principles of state policy, which are guiding principles for the states to frame policies and therefore non-enforceable. A notable exception is the new constitution of Nepal adopted in 2015, which has included social rights such as right to housing, food, health and social security in the list of fundamental rights. It is interesting to note that the Indian constitution, while directing the state to make welfare provisions, mentions the caveat 'within the limits of economic capacity and development'.

Often legal frameworks are a product of civil society action as is evident in the case of the oft-cited example of the Mahatma Gandhi National Rural Employment Guarantee Act (MGNREGA) 2005 of India, which guarantees 100 days of wage employment in a year. The enactment of the law has facilitated a situation in which the onus is on the state to provide the minimum number of labour days. The Employment Generation Programme for the Poorest (EGPP) of Bangladesh and the Karnali Employment Programme of Nepal also endeavour to provide guaranteed labour. These two, however, are mere policy measures that could be altered with changing political regimes. A similar contrast can be drawn between India's National Food Security Act, 2013 and Bangladesh's subsidized grain programme. While the former is enshrined in law, the latter remains a policy programme.

A striking observation from Annexure I is that Sri Lanka has much fewer constitutional provisions related to social protection, while the country has the highest social development indicators, including the Human Development Indicators, amongst the South Asian countries. Recent reports show that although Sri Lanka has been politically committed to welfare, this has changed over the past few decades. Gamage (2009) argues that the United National Party government ushered in liberalization of the economy with simultaneous centralization of power and removal of agriculture protection measures. The author suggests that the latter two reasons were behind the rise of the dissident groups Liberation Tigers of Tamil Eelam (LTTE) and Janatha Vimukthi Peramuna. This goes on to reinforce the importance of constitutional measures that protect social protection measures from political changes.

Further, as noted before, institutional constraints continue to haunt the implementation of many of the laws that guarantee social protection. For instance, evaluation studies of MGNREGA (IAPR, 2009) and EGPP (BRAC, 2009) have found mixed results in ensuring the right to work. Laws would thus require active advocacy and monitoring so that their welfare elements go beyond rhetoric.

Adopt Comprehensive, Coherent and Coordinated Policies

As adopted in the Vienna Declaration and Programme of Action in 1993, human rights are considered universal, indivisible and interdependent and interrelated (Vienna, 1993). Human rights are universal because every person is entitled to these rights. They are indivisible because the enjoyment of one right cannot be the justification for the curtailment of others. From this follows the idea that human rights are interdependent and interrelated. For instance, the right to adequate housing could be considered interdependent and interrelated to the right to health and right to food to ensure an adequate standard of life. The realization of this principle would mean that countries adopt policies and practices that are coherent, comprehensive and coordinated.

The General Comment 19 of the Committee on Economic, Social and Cultural Rights (CESCR), which monitors the implementation of the CESCR recommends that States Parties of the UN adopt a national strategy and plan of action to establish social protection systems. The General Comment further points out that these strategies and action plans

should take into account the equal rights of men and women and the rights of the most disadvantaged and marginalized groups, set targets or goals to be achieved and the time-frame for their achievement, together with

corresponding benchmarks and indicators and contain mechanisms for obtaining financial and human resources. (CESCR, 2008)

The SAARC Social Charter also hints at the indivisibility and interrelated nature of the right to social protection by directing the member countries to 'integrate economic, cultural and social policies so that they become mutually supportive'.

Overall, this would mean the adoption of a comprehensive social protection system rather than a set of programmes. In practice, this becomes extremely difficult as social protection measures in a country are the result of political negotiations and civil society action within each of those countries. The social protection scenario in South Asia can be best described as amorphous, rather than as a comprehensive system. For instance, the Indian Constitution places social security in the Concurrent List (Item 23), allowing both the central and state governments to design and implement social protection programmes. In the absence of overarching frameworks, this can make the range of policies diverse and amorphous. The draft National Health Policy of India 2015, which attempts to provide a common framework for the central and state governments to work on health, admits that the sharing of responsibilities and distribution of accountability between the central and state governments are a strength and challenge at the same time (MoH, 2015).

In Nepal, while the Old Age Pension scheme (which involves giving an old age pension to everyone above the age of 70 years and is implemented through local governments) is universal, other schemes are still centralized and targeted. In Pakistan, after the 18th Constitutional Amendment, the power of social security legislation has been completely devolved to the provinces. This could lead to differences in the provinces' social security achievements. Within the province of Punjab, the government has created the Punjab Social Protection Authority under an Act of 2015 to bring synergies among different social protection measures, recommend merger or consolidation of different measures for the sake of efficiency. An efforts towards comprehensive policy framework can also be seen in Bangladesh's National Social Security Strategy 2015, which envisages the strategy as a part of the national social development framework (SDF), making social protection a part of a comprehensive set of policies related to education, health, nutrition, population stabilization, gender empowerment, etc.

In Sri Lanka, the safety net programme Samurdhi is administered by the centre and the public assistance programmes are administered by provinces. While both target the poor, transfers received are much smaller in the latter than in the former. The multiplicity of programmes can be said to lead to a lack of coordination between them as they often target the same set of beneficiaries. This view is echoed by Fernando and Moonesinghe (2012, p. 16), who note that service delivery at the local level in Sri Lanka presents a scenario of 'confusion and overlap between currently existing dual structures (elected local government and administrative structures)'. The authors identify the reasons for this scenario as poorly defined and poorly understood mandates, corruption and lack of trust in the community on the local governments. The latter, they note, is also dependent on ethnicity as observed in the higher confidence of Sinhalese people in the local state machinery and, therefore, the better performance of such institutions in Sinhalese regions. The advent of neo-liberalism in South Asia is another key development that has led to incoherent policies wherein some services, or some parts of the services, are delivered by the private sector, while the others are delivered by the public sector. While it is difficult to adjudge whether this has led to the withdrawal of the state from providing social protection, some evidences have come up. For instance, Jayasuriya (2014) opines that the three pillars of Sri Lanka's welfare services, education, social services and health, were fractured when neo-liberalism made inroads in the 1970s.

Overall it can be seen that establishing a comprehensive social protection system, as opposed to programmes, has not been an explicit agenda in South Asian countries, in which scenario formulating coordinated policies becomes an arduous task.

Respect the Principles of Equality and Non-discrimination

The normative elements of equality and non-discrimination can be found in many human rights instruments. Article 2 of the Universal Declaration of Human Rights states that every human is entitled to all human rights ‘without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’. The ICCPR and the ICESCR also stress on equality and non-discrimination. Further, CEDAW (Articles 11(e) and 14), the International Convention on All Forms of Racial Discrimination (Article 5) and the Convention on the Rights of Persons with Disabilities (Article 28) prohibit discriminations with respect to the right to social protection.

The General Comment 19 (paras 29–30) of the CESCR points out that the Covenant prohibits

any discrimination, whether in law or in practice, whether direct or indirect, on the grounds of race, colour, sex, age, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation, and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to social security. (CESCR, 2008)

By explicating such aspects as HIV/AIDS status and sexual orientation, the scope of the Covenant has been expanded much beyond the commonly prohibited grounds of discrimination.

Equality and non-discrimination are at the core of the constitutions of Bangladesh, India, Nepal, Pakistan and Sri Lanka. However, it is notable that the new constitution of Nepal (Article 23) has gone one step ahead by explicitly stating that ‘no discrimination in regard to remuneration and social security shall be made between men and women for the same work’. Non-discrimination has also been affirmed in the domestic courts of the region. For instance, in *Kurukulasuriyage Don Douglas Hemapriya Dayarathna & Others versus Minister of Health and Indigenous Medicine & Others* (1999), the Supreme Court of Sri Lanka held that the right to work is a fundamental right and no discrimination of any kind is permissible. The petitioners had claimed that they were asked to apply for a position of lower qualification after getting selected for a higher qualified position in the medical services. It must be admitted at this juncture that statutory social security benefits written into employment contracts tend to remain confined to the formal sector. Of this, government employees take away a large chunk of social security expenditure (see, e.g., Kidd & Khondker, 2013 for Bangladesh).

Ensure the Inclusion of Disadvantaged and Vulnerable Groups

The General Comment 19 (para 31) of the CESCR also points out that in the pursuit of ensuring social security to all, special attention needs to be given to those who

traditionally face difficulties in exercising this right, such as women, the unemployed, workers inadequately protected by social security, persons working in the informal economy, sick or injured workers, people with disabilities, older persons, children and adult dependents, domestic workers, homeworkers, minority groups, refugees, asylum-seekers, internally displaced persons, returnees, non-nationals, prisoners and detainees. (CESCR, 2008)

From a human rights perspective, thus, inclusion of the vulnerable group becomes crucial in the design and implementation of social protection programmes. An elaboration of this aspect can be found in the

Pakistan Bait-ul-Mal Act of 1992. The programme aims at assisting those persons who are excluded from Zakat, the system that collects religious tax for redistribution to the poor amongst Muslim citizens (Zakat was initiated in 1980 by the dictator Zia-ul-Haq as a part of instituting Islamic policies). The Bait-ul-Mal Act (1992) list the following aims of the programme: (a) to assist the destitute and needy widows, orphans, invalid, infirm and other needy persons; (b) for rendering help for rehabilitation of the persons specified in clause (a) in various professions or vocations; (c) to provide assistance to children of the persons specified in clause (a) for educational pursuits; (d) to provide residential accommodation and necessary facilities to the persons specified in clause (a); (e) to provide for free medical treatment for indigent sick persons and to set up free hospitals, poor houses and rehabilitation centres and to give financial aid to charitable institutions, including industrial homes and other educational institutions established specially for poor and needy; (f) to provide stipends to educated youth during their training before their employment in jobs; (g) to provide stipends and financial assistance to brilliant but poor students who cannot afford to acquire higher technical or medical education abroad for lack of money; and (h) to sponsor and promote self-employment scheme.

A test of human rights standards in ensuring protection of the vulnerable comes up in the case of migrants and those living in slums. In Bangladesh, in *Ain O Salish Kendra versus Government of Bangladesh and Others* (1999), the court observed that the eviction of migrants living in slums goes against the right to life. But devoid of a strong welfare state objective in the law books, the court ordered that the government ensure resettlement in case of eviction, rather than allowing the persons to stay.

Vulnerability gains increased significance in the South Asian context due to various forms of vertical as well as horizontal differences. Social stratification in South Asia according to class, caste or sect and horizontal differentiation according to language, religion, gender and migrant/refugee status, with overlaps between the two, manifest in multiple forms. India has a long history of reservations for the marginalized castes—a strong social protection guarantee meant to promote upward social mobility. South Asian countries, however, have not initiated specific social protection programmes for the refugees or stateless persons. Inclusion of refugees and stateless persons in the existing programmes is unclear; considering the focus on targeting in most of these countries, it is highly likely that they are excluded from the existing safety nets.

In Sri Lanka, the war between the state and LTTE that lasted for three decades created a scenario of extreme vulnerability in war-affected areas. Fernando and Moonesinghe (2012) conducted a careful analysis of a range of social protection programmes in existence in the country and found that the impact of these programmes varied according to the conflict exposure of the region. Livelihood protection in war-affected zones was impacted by violence, insecurity, displacement, lack of access to natural resources and migration. Morais and Ahmad (2010) note that in the war-torn north and Northeast regions of Sri Lanka, people were engaged in developing their own livelihood mechanisms, however, they were seriously jeopardized by the repressive attitude of the state as well as the dissidents. This shows that whether it is the state or the parallel government, both can go against people's right to basic social security in a complex emergency. This could be seen as a critique of the rights-based approach; the approach places immense trust in the institutions to deliver justice. In practice, the same institutions might be perpetuating structural discrimination and injustice. The normative framework must, thus, be wary of the fact that human rights standards should also include constant monitoring of the institutions.

Ensure Equality and Non-discrimination in the Selection of Beneficiaries

In a human rights approach, beneficiaries are rights holders and as such states are bound to provide social security to all. Examples of this provision in international human rights instruments can be found in

Table 2. Access of the Poor and the Non-poor to Benefits

Country	Unweighted Ratios Relative to 25% GDP Per Capita		Share of Total Potential Beneficiaries (%)	
	Poor	Non-poor	Poor	Non-poor
Bangladesh	0.066	0.036	23.5	76.5
India	0.067	0.045	28.0	72.0
Nepal	0.042	0.075	20.9	79.1
Pakistan	0.033	0.051	18.9	81.1
Sri Lanka	0.188	0.115	8.6	91.4

Source: ADB (2013).

Article 2(1) of the ICESCR and Article 26 of the CRC. From this perspective, the best-suited model of welfare provision would be a universal one meant for all. However, most South Asian states have adopted only targeted social protection programmes, with a few exceptions such as the universal old-age pension of Nepal or the MGNREGA of India.

Table 2 shows the following picture of coverage as in the Social Protection Index Report of the ADB.

It can be noted that in ADB's sample, although the poor in Sri Lanka form only 8.6 per cent of the potential beneficiaries, they received 18.8 per cent of all the poverty line expenditures, compared to 3.3 per cent for Pakistan, although they form 18.9 per cent of the population of potential beneficiaries. This disaggregated data is an indicator of the difference in the access of the poor to poverty alleviation benefits across South Asia. Although the human rights approach would not be able to provide complete explanation for this variation, the principle of inclusion of all gains added relevance in the wake of this variation.

Targeting can become problematic from a human rights perspective as mechanisms such as means tests can collide with rights. The most blatant of these problems is exclusion error, which leads to certain groups, often the disadvantaged, from being kept outside social protection measures. Also, lack of access to adequate information poses a question mark on the fairness of provisions. In terms of implementation-related issues, the procedures are sometimes so lengthy that rights holders often get rejected for want of a few documents. India's Indira Gandhi National Old Age Pension Scheme, for instance, has such lengthy procedures and document requirements that often the support of influential politicians becomes necessary in availing the scheme (Bhattacharya et al., 2015). Kidd and Khondker (2013) observe that in Bangladesh, social protection programmes are pre-occupied with targeting the "extreme poor", in which process, old poverty data get used for currently running programmes, leading to serious exclusion errors. Sri Lanka's safety net programme Samurdhi also targets the poor—through cash transfers (there are additional minor components of microcredit, microinsurance and rural public works, but direct cash transfer forms the lion's share of the programme). Kabeer (2009) has reported that there have been large scale exclusion errors in the programme and that 80 per cent of the benefits were collected by the male members of households. By contrast, Gunawardane (2014) reports that 68.3 per cent of the credit component of Samurdhi is controlled and utilized by the women of the household. The positive response to Samurdhi's implementation is shared by Fernando and Moonesinghe (2012), who point out that although the amounts received as cash transfer is meagre, families across the country still value the programme for the income support.

Along with targeting, imposition of conditionalities is also gaining popularity in South Asia, although not as much as they have in Latin America. For instance, Pakistan launched the Waseela-e-Taleem programme in 2012 in five pilot districts as a component of the populist Benazir Income Support Programme (BISP) with the purpose of providing conditional cash transfers of PKR600 per child per quarter on 70 per cent attendance compliance. The Cash for Education Programme of Bangladesh

provides monthly cash transfers to the poor on the condition of enrolling children at school and ensuring a minimum attendance level. Kabeer (2009) reports that about one-third of annual education budget goes into this programme. Reports have come that it has led to increase in school enrolment and near full attendance. While conditionalities might achieve some of the intended results, these could lead to the overlooking of other rights issues such as quality of education provided. In India, the Janani Suraksha Yojana, a conditional cash transfer that aims at increasing hospital deliveries, has improved maternal health conditions, while it has placed the burden of public health care on poor rural women employed at meagre wages. Thus, incorporation of conditionalities into social protection programmes must be done only after a careful analysis of the rights implications.

Incorporate the Gender Perspective

Numerous international and regional legal instruments oblige countries to ensure equality of genders in the enjoyment of welfare. CEDAW, the most important of these instruments seeks substantive equality and requires states to transform unequal power relations between women and men and ensure that all human beings can develop and make choices without the limitations set by stereotypes, rigid gender roles and prejudices (Article 5). Under CEDAW, countries are required by law to take all appropriate measures to modify or abolish domestic policies, regulations, customs and practices that discriminate against women (Article 2).

The most common trend of incorporating the gender perspective in many social protection programmes in countries including those of South Asia is to identify women as the main beneficiaries. The Thriposha programme of Sri Lanka, for instance, is a nutrition programme for lactating mothers and children and has resulted in large-scale improvements in maternal health conditions. In Pakistan, the state's responsibility to pursue the welfare of women and children was affirmed through the case *Fazal Jan versus Roshua Din* (1990). The MGNREGA of India has made provisions for childcare at the worksite. Bangladesh has instituted secondary school stipends for girls to promote their education.

One of the largest social protection programme of Bangladesh is the Vulnerable Group Development (VGD) programme, which is targeted at ultra-poor women. Apart from giving food transfers, the programme also aims at building the capacities of women and provides training for livelihood development. The Rural Employment and Maintenance Programme targets distressed women in building public assets. The programme envisages in making employment generation sustainable. However, most beneficiaries of the programme are deserted or widowed women, including a large number of older women. The imposition of public works on these persons could be questionable.

In *Sunil Babu Pant and Others versus Government of Nepal and Others* (2008), the court observed that Lesbian, Gay, Bisexual and Transgender (LGBT) persons were excluded from fundamental rights including the right to social security. The court directed that the government set up an appropriate committee to look at the recognition of social rights of LGBT persons so that all welfare programmes are equally available to them. This case helped extend the gender debate in Nepal beyond the binary categories of men and women.

The BISP in Pakistan was launched in 2008 to mitigate the rising prices of goods, which reduced the purchasing power of households considerably. A monthly grant of 1000 Pakistani rupees is provided per family. The benefits are transferred to the oldest married woman in the family. The BISP also has a graduation facility which seeks to bring people into vocational training and credit facilities to gradually bring them out of social assistance. The World Bank (2015a) notes the large coverage (approximately 4.8 million families or 18 million people) and consumption smoothing as the success indicators of the programme. However, the programme has been criticized for the low increase in savings of these women

(DND, 2015). Khan and Sara (2010) notes that the delivery of the benefits through smart card and phone banking approach could make women's participation difficult. Also, if BISP is made conditional, for which there are plans, the government will have to provide adequate services such as health care for children's vaccination, etc. These services are highly inadequate at the moment. Further, there is a conspicuous absence of consultative decision-making involving women participants.

Comply with the Standards of Accessibility, Adaptability, Acceptability and Adequacy

The standards of accessibility, adaptability, acceptability and adequacy have been pointed out by the CESCR through several General Comments such as 13, 14 and 19. Accessibility can be understood as making the social protection programme easy for people to reach, understand and use. The General Comment 19 points out the following aspects of accessibility: (a) Coverage: All persons must be covered without discrimination of any kind, especially individuals belonging to the most disadvantaged groups. In order to achieve universal coverage, non-contributory measures in addition to contributory schemes must be used. (b) Eligibility: The selection used for the identification of beneficiaries within a programme must be reasonable, proportionate and transparent. (c) Affordability: If a social protection programme requires contributions, then the contributions must be stipulated in advance. The direct and indirect costs and charges associated with making contributions must be affordable for all. (d) Participation and information: Beneficiaries of social protection programmes must be able to participate in the administration of the programme as well as have the right to seek, receive and impart information on entitlements in a clear and transparent manner. (e) Physical access: Benefits must be provided in a timely manner and beneficiaries must have physical access to attain benefits and information. Particular attention must be paid in this regard to persons with disabilities, migrants and persons living in remote, disaster-prone or conflict areas.

Adaptability could be defined as the design of social protection programmes in a manner that suits the local context. Acceptability means making social protection programmes sensitive towards vertical and horizontal differences that might arise on grounds of race, gender, class, ethnicity, disability and so on. Adequacy means that the benefits (or entitlements, from a human rights perspective) given must be adequate to maintain a minimum standard of life. This means adequacy in terms of amount as well as duration. Articles 10, 11 and 12 of the CESCR stress on ensuring an adequate standard of living as a human right.

In India, in *Bayer Corporation and Another versus Union of India and Others* (2010), the drug manufacturing company Bayer's petition claiming violation of its patent by the large-scale generic production of life-saving drugs was dismissed on the grounds that it was a public health issue. This could be cited as a shining example of acceptability in which social protection programmes need to look at the multiple socio-economic and cultural realities of the context. Also in India, in a series of court orders related to right to food, the Supreme Court has consistently affirmed people's right to adequate levels of food. For instance, in public interest litigations, the court ordered all the state governments to implement the mid-day meal scheme within a set deadline (1 September 2014) and provide affirmative action to Dalits in the appointment of cooks and helpers and mid-day meals. The court also directed the centre to issue *Antyodaya Anna Yojana (AAY)*, a food transfer programme for the poorest of the poor, to all primitive tribes.

The Sri Lankan Constitution explicitly states the principle of adequacy in Chapter VI Directive Principles of State Policy and Fundamental Duties:

Article 27(2) (c): The State is pledged to establish in Sri Lanka a democratic socialist society, the objectives of which include the realization by all citizens of an adequate standard of living for themselves and their families, including adequate food, clothing and housing, the continuous improvement of living conditions and the full enjoyment of leisure and social and cultural opportunities.

In Nepal, in the case *Prakash Mani Sharma et al. on Behalf of Forum for Protection of Public Interest (Pro Public) versus Prime Minister and Office of Council of Minister et al.* (2008), the court gave special emphasis to the duty of the government to provide affordable and accessible food to all people.

At this stage it is important to note that one of the limits of the framework adopted here is that it places the onus on the government to initiate social protection programmes. In reality, social protection is also provided by a large number of NGOs. The most well-known example of this is perhaps BRAC, which has initiated the large Targeting the Ultra Poor (TUP) programme. Although commendable for its coverage, Kidd and Khondker (2013) report that the increase in income levels of the families has been minimal.

Ensure Access to Accountability Mechanisms and Effective Remedies

Article 8 of the Universal Declaration of Human Rights and Article 2(3) of the ICCPR call for effective remedies to human rights grievances by a competent or judicial authority. Accountability mechanisms and effective remedial measures are crucial to the adoption of social protection as human rights, precisely, because social protection is often seen as a luxury, rather than as rights, by states, despite constitutional guarantees. The judicial culture of considering public interest litigations has been crucial in Bangladesh, India, Nepal, Pakistan and Sri Lanka in considering many a case related to economic, social and cultural rights. Langford (2009) points out that India is often credited with developing what can be called the first economic, social and cultural rights jurisprudence at the country level. The first such case was *Municipal Council Ratlam versus Vardhichandand Others* (1980) in which the Supreme Court judge Justice V. R. Krishnaiyer ordered a municipality to provide drinking water to its inhabitants. This got expanded with the case *Bandhua Mukti Morcha versus Union of India* (1984) in which the right to life was interpreted to include economic, social and cultural rights. Recently, transparency has been incorporated into the design of the BISP by placing accountability and evaluation mechanisms (World Bank, 2015b). But all South Asian countries suffer from similar issues of judicial delays and costly remedial measures. Between 2002 and 2014, Bangladesh, India, Nepal and Pakistan have recognized right to information (RTI) as a crucial tool of ensuring accountability and transparency.

Conclusion

The elaboration of the human rights approach to social protection using various examples from South Asia brings out some key lessons in terms of ensuring social protection for all.

First, while there are scattered examples of universal programmes, social protection in South Asian countries remain scattered in the form of multitude of programmes and do not form a coherent social protection system. From a human rights perspective, elements of social protection are indivisible and interdependent. Recognition of this principle means that South Asian countries need to review how different social protection programmes and policies converge or diverge from one another and how they can be interlinked to form a continuum of safety net.

Second, it was seen that targeted social protection is problematic from the perspective of human rights; universal unconditional social protection is a better means from a human rights perspective as it avoids exclusion errors and imposition of development targets on women and children. Although conditionalities have not gained popularity in South Asia, barring Bangladesh and now Pakistan, South Asian countries must be careful about the human rights implications that they can pose on the rights holders.

Third, precisely because of the scattered nature of social protection in South Asian countries, it is difficult to rank them and pose any one of them as a model. The role of political consternation and civil

society action, which are vibrant in all five countries, needs to be acknowledged here. Thus, while Sri Lanka has seen considerable progress in social indicators and social protection coverage, the impact of these efforts show considerable regional variations so that the conflict affected regions of the North and Northeast face extremely weak systems in place.

Fourth, the limitations of the human rights approach itself needs to be recognized while making recommendations that use the rights narrative. For one, the cost associated with universal social protection could be huge since the fiscal space for social protection is limited in South Asia as noted before. For another, judicial delays and issues related to transparency mean that effective use of the human rights approach takes time. However, it was also noted that public interest litigations and RTI laws can be leveraged for economic, social and cultural rights as well. The ongoing debates and discussions in Sri Lanka must take cue from other South Asian countries to advocate the different rights connections of access to information to build pressure for the passage of the recently drafted RTI Bill.

While arguing for the adoption of a human rights approach, it is also important to consider one of the main challenges to its implementation—cost. To assess how much fiscal potential South Asian countries have in bearing the cost of ensuring social protection, it is worthwhile to look at the fiscal space available for social protection in South Asia. Heller (2005) defines fiscal space as ‘the availability of budgetary room that allows a government to provide resources for a desired purpose without any prejudice to the sustainability of a government’s financial position’. The author suggests raising the tax/GDP ratio to at least 15 per cent in the low income countries. Bonnerjee (2014) suggests that the fiscal space available for welfare policymaking is limited in the region. This constrains the expansion of social protection considerably. The SPI report of the ADB shows that the SPI, constructed as the ratio of total expenditure on social protection to total number of beneficiaries, is the lowest in South Asia (0.061) (ADB, 2013). The highest SPI of 0.24 was recorded in East Asia. The *World Social Protection Report 2014–15* prepared by ILO provides recent data on expenditure on social protection as a percentage of GDP (ILO, 2014). The data shows that Sri Lanka stands ahead in the region, followed by Bangladesh. To understand how this stands against the fiscal space available in each country, the tax/GDP ratio has been shown in the last column of Table 3. Although the data may not be comparable owing to the different years in which they were collected, a broad generalization that can be drawn is that countries like Sri Lanka and Bangladesh are spending more on social protection in spite of having lesser fiscal space compared to a country like India or Nepal.

The second set of constraints to the effective implementation of social protection systems that are commonly identified in the case of South Asia include lack of institutional capacity, corruption, bureaucratic delays and other governance aspects. While the human rights approach by itself cannot remedy these shortcomings, what it can do is provide a strong reason to pursue institutional reforms. The approach articulated in this article can be tapped as a useful advocacy tool to push for higher spending as well as plugging institutional constraints that hamper the extension of social protection to all.

Table 3. Spending on Social Protection in South Asia

Country	Expenditure on Social Protection (Excluding Health) as Percentage of GDP (Year)	Tax Revenue as Percentage of GDP (2016)
Bangladesh	1.58 (2011)	9.0
India	1.42 (2012)	16.7
Nepal	0.66 (2013)	15.3
Pakistan	1.30 (2010)	10.5
Sri Lanka	1.69 (2012)	11.6

Source: ILO, 2014 (for expenditure on social protection) and Heritage Foundation, 2016 (for tax/GDP ratio).

Annexure I

Table I. Constitutional Guarantees on Social Protection in South Asia

Country	Section of Constitution	Provision(s)
Bangladesh	Part II: Fundamental Principles of State Policy—Article 15 (e)	Provision of basic necessities—It shall be the fundamental responsibility of the State to [secure]...the right to social security, that is, to say public assistance in cases of undeserved want arising from unemployment, illness or disablement, or suffered by widows or orphans or in old age, or in other such cases.
India	Part IV: Directive Principles of State Policy—Article 41	The state shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.
	Part IV: Directive Principles of State Policy—Article 46	The state shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.
Nepal	Constitution of 2072: Part 3—Fundamental Rights	Single women, disabled, children, those unable to take care of themselves and citizens of endangered ethnicity in economically poor, incapacitated and helpless state shall have right to social security as provided by the law.
	Part 3—Article 23:	Right to Equality—No discrimination in regard to remuneration and social security shall be made between men and women for the same work
	Part 3—Article 39 (2)	Every worker and employee shall have the right to appropriate remuneration, amenities and social security.
	Part 3—Article 40	Right Related to Health: (1) Every citizen shall have the right to basic health services free of cost and no one shall be deprived of emergency health services.
	Part 3—Article 41	41. Right Related to Food: (1) Every citizen shall have the right related to food.
	Part 3—Article 42	42. Right to Housing: (1) Every citizen shall have the right to appropriate housing.
	Part 3— Article 43	43. Rights of Women: (1) Women shall have equal ancestral right without any gender-based discrimination. (5) Women shall have the right to get special opportunity in education, health, employment and social security on the basis of positive discrimination.
	Part 3—Article 45 (3)	Special provision shall be made according to the law to provide health and social security for the Dalits.
	Part 3—Article 46	Right of Senior Citizens: Senior citizens shall have the right to receive special protection and social security from the state in accordance with the law.
	Part 3—Article 47	For the protection, uplifting, empowerment and development of citizens of economically poor and endangered communities shall have the right to get special opportunity and benefit in education, health, housing, employment, food and social security.
Part 3—Article 48	48. Right to Social Security: Single women, disabled, children, those unable to take care of themselves and citizens of endangered ethnicity in economically poor, incapacitated and helpless state shall have right to social security as provided by the law.	

Country	Section of Constitution	Provision(s)
Pakistan	Chapter 2—Principles of Policy	The state shall promote with special care, the educational and economic interests of backward classes or areas.
	Article 37 (a):	
	Chapter 2—Principles of Policy	The state shall provide for all persons employed in the service of Pakistan or otherwise, social security by compulsory social insurance or other means.
	Article 38 (c):	
Sri Lanka	Chapter 2—Principles of Policy	The state shall provide basic necessities of life, such as food, clothing, housing, education and medical relief, for all such citizens, irrespective of sex, caste, creed or race, as are permanently or temporarily unable to earn their livelihood on account of infirmity, sickness or employment.
	Article 38 (d)	
	Chapter VI—Directive Principles of State Policy and Fundamental Duties	The state shall ensure social security and welfare.
	Article 27 (9)	

Sources: Constitutions of Bangladesh, India, Pakistan, Nepal (2015) and Sri Lanka.

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