

**SOCIAL SECURITY: A COMPARATIVE STUDY BETWEEN  
THE INTER-AMERICAN AND THE COUNCIL OF EUROPE  
SYSTEM**

A Thesis

Submitted to the Notre Dame Law School in Partial Fulfillment of the  
Requirements for the Degree of Legum Magister (Master of Laws) in International  
Human Rights Law

By

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**NOTRE DAME LAW SCHOOL**

**NOTRE DAME, IN**

**May, 2017**

*"Opportunity for the individual to secure protection for himself and his family against the economic hazards of old age and death is essential to the sustained welfare, freedom, and dignity of the American citizen. For some, such protection can be gained through individual savings and other private arrangements. For others, such arrangements are inadequate or too uncertain. Since the interest of the whole Nation is involved, the people, using the Government as the agency for their cooperation, should make sure that all members of the community have at least a basic measure of protection against the major hazards of old age and death."*

***The Advisory Council on Social Security of the United States of America, 1937-1938***

## **DEDICATIONS**

This work is dedicated to my grandmother Hilda Rosario Herrera Blanco, my inspiration to write this thesis; my parents Bertha Salome Lopez Herrera and Gustavo Miguel Angel Barboza Rozan; and my sister Mary Cristy Barboza Lopez.

## ACKNOWLEDGMENTS

I would like to begin by thanking God for blessing me with this amazing experience and always guiding my life. I also want to thank the Center for Civil and Human Rights of the Notre Dame Law School, for giving me the opportunity to study at this prestigious University. In special to Sean O'Brien for their support, friendship, and advices gave during all the semester.

No doubt, finish the LL.M. represents for me one of the biggest challenges in my personal and professional life. Now it is time to put into practice all the knowledge and experiences learned here at Notre Dame.

I would like to thank all my family and friends for the support given during this experience. In special to my mother Bertha Lopez who represents for me my biggest example of constancy, personal growth, and dedication. Likewise, to my father Gustavo Barboza for representing my best academic and personal model.

The faculty at Notre Dame Law School, amazing professors Doug Cassel, Paolo G. Carozza, Mary Ellen O'Connell; and especially to my thesis advisor and professor Barbara Fick for the guidance and patience during my academic year at Notre Dame and for believing in me to develop this work.

I also want to thank my best friends Jianphier Pletickosich and Andrea Rodriguez for their support, advice, and for always motivate me to do the best and being a good person.

Also, I would like to thank one person that pushed me to do a thesis, my new best friend and an exceptional human rights lawyer Lea Lemay Langlois.

Finally, I would like to thank all my amazing classmates and friends. Ruth Cormican, Lara Maddah, Natalia Mora, Alejandra Fernandez, Ivanna Molina, Israel Taye, Teng Feng, Imsuk Ha, Kennedy Masiye, Ugochi Okpe, and Jodi-Ann Quarrie.

Thank you very much to all.

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## **SOCIAL SECURITY: A COMPARATIVE STUDY BETWEEN THE INTER-AMERICAN AND THE COUNCIL OF EUROPE SYSTEM**

### **Introduction**

Only 20 % of the worldwide population has an adequate system of social security.<sup>1</sup> Statistics shows that the 80% of the global population not only lack an appropriate social security system due to their informal work condition, but also that 20% of that population are living in extreme poverty.<sup>2</sup>

Countries have a special duty to protect their population through strong national laws on social security,<sup>3</sup> recognizing both contributory and non-contributory methods for providing benefits.<sup>4</sup> This work will focus on the contributory system of social security which provides benefits for invalidity, retirement pension, survival, maternity, medical care, and sickness.

The objective of this investigation is to study the standards established in the International, Inter-American, Council of Europe and domestic systems on social security issues to determine a consensual global standard. To achieve this aim, the present work will also study two domestic systems of social security adopted in Peru and Spain.

The present investigation is divided into three chapters. The first one examines the international standards of social security, analyzing and comparing the Social Security conventions adopted by the International Labor Organization and ratified by Peru and Spain. The second chapter studies the Inter-American standards from the perspective of the regulations established in the San Salvador Protocol, and the jurisprudence of the Inter-American Court of Human Rights (IACtHR) and decisions of the Inter-American Commission on Human Rights. This chapter will also study the justiciability of the right to social security and its interrelation with other civil and political rights as well as analyzing the Peruvian national standards of social security, offering a comparison between these standards and the International Labor Organization standards. The third and final chapter studies the Council of Europe and Spain's standards of social security, offering a comparison between the regional and national systems of social security. The chapter examines the progress made in the regulation of social security benefits by the creation of new benefits by the Council of Europe, such as the paternity benefit; and the advances made by the European Court of Human Rights in analyzing litigated cases relating to social security benefits in Europe.

In conclusion, this investigation shows the importance of having strong domestic regulations of social security in each region that comply with international standards of human rights. Unlike the Council of Europe, the Inter-American System of Human Rights has not established standards for

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<sup>1</sup> ILO. International Labor Organization, *"Facts of Social Security"*. Available at [http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms\\_067588.pdf](http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_067588.pdf)

<sup>2</sup> UN, Committee on Economic, Social and Cultural Rights, *"General Comment No. 19: The Rights to Social Security"*, Res. E/C.12/GC/19, 23 November 2007, para 7.

<sup>3</sup> ILO, International Labor Organization, *"The Right to Social Security in the Constitutions of the World: Broadening the moral and legal space for social justice (Europe)"*, 2016, p. 1.

<sup>4</sup> UN, General Comment No. 19, *supra note 1*, para. 4.

the benefits of social security; this represents a disadvantage for the American countries such as Peru whose domestic legislation is less strong than Spain. Finally, this work concludes that the social security system should take into account the full coverage of the necessities of employees and their relatives in determining both coverage and benefits to be provided.

## CHAPTER I

### The Right to Social Security in the International Arena

#### 1. International Standards of the Right to Social Security

The right to social security is a human right<sup>5</sup> of vital importance for preserving and protecting the human dignity of all persons who are subjected to loss of income caused by work-related contingencies.<sup>6</sup> In establishing a social security system, governments need to consider four interrelated and inseparable pillars: employment, social dialogue, social protection, and fundamental principles and rights.<sup>7</sup>

These pillars are important to ensure access to social security benefits, which can be funded through a contributory or non-contributory system.<sup>8</sup> The present investigation will focus only on the contributory system that implies active contributions by employees of the public or private sector into a social security fund. Benefits furnished by states in a contributory system of social security can be provided in cash or in kind with the aim to ensure the protection of employees from: a) lack of work-related income caused by sickness, disability, maternity, employment injury, old age, or death of a family member; b) unaffordability of necessary health care; and c) insufficient family support, particularly for children and adult dependents.<sup>9</sup>

Social security was recognized in the Universal Declaration of Human Rights (UDHR). This instrument established three basic principles for successful realization of the right: universal coverage,<sup>10</sup> solidarity and higher social spending.<sup>11</sup> The UDHR exhorts states to take into consideration national and international cooperation to provide adequate coverage of social security to ensure the dignity of human beings<sup>12</sup> without discrimination.<sup>13</sup> Likewise, the UDHR,

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<sup>5</sup> ILO. International Labor Organization. “*Recurrent discussion on social protection (social security)*”. Resolutions adopted by the International Labor Conference at its 100th Session. Geneva, June 2011, para.5.a

<sup>6</sup> UN, General Comment No. 19, *supra note 1*, para 1

<sup>7</sup> ILO. International Labor Organization, *supra note 5*, para 4.

<sup>8</sup> UN, General Comment No. 19, *supra note 1*, para. 4

<sup>9</sup> *Id.* para 2

<sup>10</sup> ILO, International Labor Organization, “*Social Security: Standards for the XXI Century*”, 2002, p. 7, Available at <http://www.social-protection.org/gimi/gess/RessourcePDF.do?ressource.ressourceId=2452>

<sup>11</sup> ILO, Regional Office for Latin America and the Caribbean, “*Social protection systems in Latin America: An assessment*”, developed by Jose Antonio Ocampo and Natalie Gomez-Arteaga., ESS Working Paper No. 52. p. 3. Available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---soc\\_sec/documents/publication/wcms\\_538047.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---soc_sec/documents/publication/wcms_538047.pdf)

<sup>12</sup> UN, General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), art. 22.

<sup>13</sup> *Id.*, art.2 and 7.



as part of the protection for the right to work, establishes the necessity to provide during the performance of work adequate means of social protection to employees.<sup>14</sup>

The International Covenant on Economic, Social and Cultural Rights (ICESCR), article 9, also recognizes the right to social security.<sup>15</sup> While the content of this article, by itself, does not specify the benefits covered by social security, subsequent articles of the ICESCR specify the contingencies which social security should address. First, the ICESCR expresses a clear intent to protect and to assist the family, in particular, in the care and education of dependent children.<sup>16</sup> Second, it addresses the need to protect pregnant woman employees both before and after childbirth.<sup>17</sup> Thirdly, it recognizes the right of workers to the highest attainable standard of physical and mental health and a healthy environment in the workplace,<sup>18</sup> including ensuring adequate medical care.<sup>19</sup>

The Convention on the Rights of the Child also recognizes the obligation of states to guarantee social insurance for every child within their jurisdictions.<sup>20</sup> Finally, the Covenant on the Elimination of all Forms of Discrimination against Women also establishes protections for social security benefits for women workers, such as retirement pension, paid maternity leave and medical care.<sup>21</sup>

As can be seen, the right to social security, in addressing workplace contingencies, is recognized in different international human rights instruments. To attain the aim of protecting employees facing these contingencies, a social security system needs to comply with certain conditions:<sup>22</sup>

- Availability: The availability is measured by the types of benefits ensured by governments to cover social risks and contingencies. To ensure availability states need to install a proper administrative system of social security in their domestic legislation, and also redirect their public policies to administer that system. At the same time, availability should be sustainable to ensure adequate social security for present and future generations.<sup>23</sup>
- Adequacy: Adequacy refers directly to the benefits payable by the social security system. These benefits should be adequate in amount (cash or in kind) and duration, taking into consideration the contingency to be covered.<sup>24</sup>
- Accessibility: Accessibility addresses how an employee can comply with the requirements to receive social security benefits. The Committee on Economic, Social and Cultural Rights lists five elements for accessibility. First, all persons, especially the most disadvantaged and

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<sup>14</sup> *Id.* art. 23.3

<sup>15</sup> UN, General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, Treaty Series, vol. 993, art. 9.

<sup>16</sup> *Id.*, art. 10.1

<sup>17</sup> *Id.*, art. 10.2

<sup>18</sup> *Id.*, art.12.1

<sup>19</sup> *Id.*, art. 12.2.d

<sup>20</sup> UN, General Assembly, *Covenant on the Rights of the Child*, 20 November 1989, Treaty Series, vol. 1577, art. 26

<sup>21</sup> UN, General Assembly, *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, Treaty Series, vol. 1249, art. 11.

<sup>22</sup> UN, General Comment No. 19, *supra note* 1, paras 10 (1), (2), (3), (4) and (5).

<sup>23</sup> *Id.*, para 11

<sup>24</sup> *Id.*, para 22

marginalized groups, should be covered by the social security system.<sup>25</sup> Secondly, the requirements to access the system should be reasonable, proportionate and transparent. Some restrictions may be established by states but such restrictions need to be stipulated by law, reasonable, and subject to proper due process.<sup>26</sup> Thirdly, the social security system should be affordable; the amount of the contributions required by states cannot compromise the realization of other rights of the beneficiary employees.<sup>27</sup> Fourthly, in order to ensure participation by insured employees, beneficiaries need to ask for and receive information from states,<sup>28</sup> including information regarding the need to make contributions to the social security system.<sup>29</sup>

- The right to social security is intimately related to other human rights.<sup>30</sup> It contributes to the full realization of the rights of persons with disabilities<sup>31</sup> and older people,<sup>32</sup> helps to combat poverty,<sup>33</sup> and supports the adequacy of health systems.<sup>34</sup>
- Coverage of Social Risks (Benefits): The last condition addresses the social risks and contingencies covered by the system. These contingencies have been developed through nine conventions and recommendations of the International Labor Organization (ILO). The contingencies are discussed next.

#### ***a. Medical Care and Sickness Benefit.***

The need to cover medical care and sickness was recognized in the Declaration of Philadelphia of 1944.<sup>35</sup> Subsequently, the ILO, after the adoption of the Covenant of Minimum Standards of Social Security No. 102, adopted the Medical Care and Sickness Benefits Convention No. 130. This Convention establishes standards to guarantee adequate access to health services<sup>36</sup> and the benefits that states need to provide to employees incapable of working due to their ill-health.<sup>37</sup>

##### *a.1. Medical Care*

Convention No. 102 establishes that medical care of both a curative and preventive nature needs to be covered by states.<sup>38</sup> The aim of this benefit is maintaining, restoring or improving the working capacity of employees.<sup>39</sup>

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<sup>25</sup> UN, General Comment No. 19, *supra note 1*, para 23; ILO, *supra note 5*, para 7

<sup>26</sup> UN, General Comment No. 19, *supra note 1*, para 24

<sup>27</sup> *Id.*, para 25

<sup>28</sup> *Id.*, para 26

<sup>29</sup> *Id.*, para 27

<sup>30</sup> *Id.*, para 28

<sup>31</sup> UN, International Covenant on Economic, Social and Cultural Rights, *supra note 15*, arts 6 and 10.

<sup>32</sup> *Id.*, art. 10

<sup>33</sup> *Id.*, art. 11

<sup>34</sup> *Id.*, art. 12

<sup>35</sup> UN, General Comment No. 19, *supra note 1*, para 6

<sup>36</sup> *Id.*, para 13

<sup>37</sup> *Id.*, para 14

<sup>38</sup> ILO, International Labor Organization, “*Medical Care and Sickness Benefits Convention (130)*”, 1969, arts 7.a and 8; ILO, “*Social Security Minimum Standards (102)*”, 1952, art 7.

<sup>39</sup> ILO, Medical Care and Sickness Benefits Convention (130), *supra note 38*, art 9.

Convention No. 130 establishes that coverage is granted to all employees and apprentices, and its enjoyment should not be subject to a qualification period.<sup>40</sup> This standard is also suggested by ILO Recommendation of Medical Care and Sickness Benefit No. 134,<sup>41</sup> which provides that States should not request employees to share the cost of this benefit unless an employee earns the prescribed minimum earnings as determined by each state. Nor should a state require a contribution by any employee where the disease would entail prolonged care.<sup>42</sup>

Convention No. 130 requires that the coverage of medical care be extended to wives and children of employees or apprentices.<sup>43</sup> This advance is very important because, unlike Convention No. 102 that only requires this benefit for at least 50 % of all employees, Convention No. 130 includes apprentices and covers all employees.<sup>44</sup> Moreover, Convention No. 130 establishes that persons who receive a benefit for invalidity, old age or death of the breadwinner continue being eligible to receive the medical care benefit.<sup>45</sup>

According to Convention No. 102, the medical care benefit includes the following services: a) general practitioner care, b) necessary pharmaceutical supplies, and c) hospitalization.<sup>46</sup> Convention No. 130 includes in addition to benefits established by the Convention No. 102 the added benefits of dental care and rehabilitation.<sup>47</sup> For its part, Recommendation No. 134 suggests benefits for medical aids, such as eyeglasses.<sup>48</sup>

Conventions No. 102 and 130 protect, in exceptional circumstances, an additional entitlement to medical care for employees who started contributing to the system but then suffered a loss of employment which interrupted their contributions. In that circumstance, the benefit can be extended for a period of not less than 26 weeks<sup>49</sup>, or extended for a longer period in cases of prescribed diseases.<sup>50</sup> On this latter point, the Committee on Economic, Social and Cultural Rights in its General Comment No. 19 indicated that such prescribed diseases include tuberculosis, HIV, and malaria.<sup>51</sup>

### *a.2. Sickness Benefit*

The sickness benefit was created to cover contingencies arising from the incapacity to work generated by a morbid condition which results in the suspension of earnings.<sup>52</sup> According to

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<sup>40</sup> *Id.* art 10.b.

<sup>41</sup> ILO, International Labor Organization, “*Medical Care and Sickness Benefits Recommendation No. 134*”, 1969, point 4.

<sup>42</sup> *Id.*, point 7.

<sup>43</sup> ILO, Medical Care and Sickness Benefits Convention (130), *supra note 38*, art 10.b.

<sup>44</sup> ILO, Social Security Minimum Standards Convention (102), *supra note 38*, art 9.

<sup>45</sup> ILO, Medical Care and Sickness Benefits Convention (130), *supra note 38*, art 9

<sup>46</sup> ILO, Social Security Minimum Standards Convention (102), *supra note 38*, art 10

<sup>47</sup> ILO, Medical Care and Sickness Benefits Convention (130), *supra note 38*, art 13.

<sup>48</sup> ILO, Medical Care and Sickness Benefits Recommendation 134, *supra note 41*, point 3.

<sup>49</sup> ILO, Medical Care and Sickness Benefits Convention (130), *supra note 38*, art 16.2.; ILO, Social Security Minimum Standards Convention (102), *supra note 38*, Recommendation 134, point 5.

<sup>50</sup> ILO, Medical Care and Sickness Benefits Convention (130), *supra note 38*, art 16.3; ILO, Social Security Minimum Standards Convention (102), *supra note 38*, art 12.1.

<sup>51</sup> UN. General Comment No. 19, *supra note 1*, para 13.

<sup>52</sup> ILO, Social Security Minimum Standards Convention (102), *supra note 38*, art 20; ILO, Medical Care and Sickness Benefits Convention (130), *supra note 38*, arts 7.a, and 18; ILO, Income Security Recommendation No. 67, 1944, annex 1

Convention No. 130, beneficiaries include all employees and apprentices, as well as their wives and children,<sup>53</sup> whereas Convention No. 102 requires this benefit only for 50 % of all employees.<sup>54</sup>

Sickness benefits, according to Convention No. 130, should be at least 60 % of the previous earnings of the employee, which includes not only direct salary, but also workplace benefits (e.g. bonuses). The state should additionally provide a family allowance during the contingency when the breadwinner has a spouse and/or other dependents.<sup>55</sup> This 60 % rate constitutes an increase from the 45 % established in Convention No. 102.<sup>56</sup> Convention No. 130 allows states to determine the maximum payable amount of this benefit; however, this amount needs to be sufficient to maintain the dignity of beneficiaries and their family.<sup>57</sup>

Like the medical care benefit, Convention No. 130 establishes that the contribution required from the employees to obtain this benefit cannot be unmindful of the necessities of employees who belong to vulnerable groups, such as disabled persons, older people, and pregnant women, among others.<sup>58</sup>

The payment of this benefit is monthly, and according to Convention No. 130, should be made for at least 52 weeks of coverage,<sup>59</sup> with some exceptions in the case of illnesses that deserve special attention, like tuberculosis.<sup>60</sup> The coverage duration was increased under Convention No. 130. Convention No. 102 and the Recommendation No. 67 set the duration for payment at 26 weeks,<sup>61</sup> as well as non-payment for the first three days of the contingency.<sup>62</sup>

Finally, if the person who was receiving this benefit passes away, their survivors can receive a funeral benefit. However, this benefit is optional for states which have recognized the “survivor benefit” established in the Invalidity, Old-Age and Survivors Benefits Convention No. 128.<sup>63</sup>

### ***b. Invalidity, Old-Age and Survivors Benefits***

These benefits have been developed in detail by the Invalidity, Old-Age and Survivors Benefits Convention No. 128, and defined in General Comment No. 19 of the Committee on Economic, Social and Cultural Rights. Old-age (retirement) benefits provide a pension when the work-beneficiary reaches retirement age.<sup>64</sup> Survivor benefits are provided to widows, orphans and other persons economically dependent on the breadwinner.<sup>65</sup> Invalidity benefits are paid when the

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<sup>53</sup> ILO, Medical Care and Sickness Benefits Convention (130), *supra note* 38, art 10.b

<sup>54</sup> ILO, Social Security Minimum Standards Convention (102), *supra note* 38, art.15.

<sup>55</sup> ILO, Medical Care and Sickness Benefits Convention (130), *supra note* 38, art 22.1

<sup>56</sup> ILO, Social Security Minimum Standards Convention (102), *supra note* 38, Annex.

<sup>57</sup> ILO, Medical Care and Sickness Benefits Convention (130), *supra note* 38, art 24.

<sup>58</sup> *Id.*, art. 25.

<sup>59</sup> *Id.*, art. 26.

<sup>60</sup> ILO, Income Security Recommendation (67), *supra note* 52, Annex 3.

<sup>61</sup> ILO, Social Security Minimum Standards Convention (102), 1952, *supra note* 38, art.18.1; ILO, Income Security Recommendation No. 67, *supra note* 52, annex 3.

<sup>62</sup> ILO, Income Security Recommendation (67), *supra note* 52, Annex 2.

<sup>63</sup> ILO, Medical Care and Sickness Benefits Convention (130), *supra note* 38, art 27.

<sup>64</sup> UN, General Comment No. 19, *supra note* 1, para. 15.

<sup>65</sup> *Id.*, para. 21.

workers suffer a partial or permanent incapacity which inhibits gainful employment.<sup>66</sup> In the following paragraphs these benefits are analyzed in more detail.

### *b.1 Invalidity Benefit*

This benefit is payable when an employee has acquired a permanent or temporary incapacity which prevents any gainful activity.<sup>67</sup> According to Convention No. 128, the beneficiaries are all employees and apprentices;<sup>68</sup> whereas Convention No. 102, requires coverage for at least 50% of employees.<sup>69</sup>

The payment of this benefit should be periodical throughout the contingency or until the beneficiary reaches their retirement pension age.<sup>70</sup> Convention No. 128 establishes that the percentage paid to the beneficiary must be 50% of earnings and other allowances received before the contingency;<sup>71</sup> this percentage was increased to 60 % by Recommendation No. 131.<sup>72</sup> This benefit should be paid when employees cannot earn at least one-third of their normal wage.<sup>73</sup>

According to Conventions No. 128 and 102, to be eligible for this benefit employees need to have 15 years of contribution or employment. If, however, an employee has completed 5 years of contribution or employment, the employee is eligible for a reduced benefit.<sup>74</sup>

Some exceptions to the qualification period have been suggested by Recommendation No. 131: the qualification period should not be required to obtain the full benefit either in the case of young workers who have not attained a prescribed age,<sup>75</sup> or when the invalidity is due to an accident.<sup>76</sup>

Income Security Recommendation No. 67 includes a focus on reemployment possibilities for workers with disabilities. It suggests several rules that should be considered by states before payment of the invalidity benefit. For example, the benefit may not be payable to an employee with a disability as a result of a workplace injury if the employee can be-reemployed by the employer. If there is no current position for such an individual, but it is possible to create a position, the employee should receive an unemployment benefit until that position is available. Conversely, if it is not possible to create a position which the employee with a disability can perform, then the individual should be eligible for benefits.<sup>77</sup> Convention No. 128 also addresses the issue of reemployment for injured workers by requiring employers to provide alternative employment

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<sup>66</sup> *Id.*, para. 17.

<sup>67</sup> ILO, International Labor Organization, *Invalidity, Old-Age and Survivors Benefit Convention (No. 128)*, 1967, art. 8; ILO, Social Minimum Standards Convention (102), *supra note 38*, art. 54.

<sup>68</sup> ILO, Invalidity, Old-Age and Survivors Benefit Convention (128), *supra note 67*, art 9.

<sup>69</sup> ILO, Social Minimum Standards Convention (102), *supra note 38*, art 55

<sup>70</sup> ILO, Invalidity, Old-Age and Survivors Benefit Convention (128), *supra note 67*, art.10; ILO Social Minimum Standards Convention (102), *supra note 38*, art. 56.

<sup>71</sup> ILO, Invalidity, Old-Age and Survivors Benefit Convention (128), *supra note 67*, Frame of Periodical Payments to Standard Beneficiaries.

<sup>72</sup> ILO, International Labor Organization, *Invalidity, Old-Age and Survivors Benefit Convention Recommendation (No. 131)*, 1967, para. 22.

<sup>73</sup> ILO, Income Security Recommendation (67), *supra note 52*, point. 11.5.

<sup>74</sup> ILO, Invalidity, Old-Age and Survivors Benefit Convention (128), *supra note 67*, art. 11.1(a); ILO Social Minimum Standards Convention (102), *supra note 38*, art. 58.

<sup>75</sup> ILO, Invalidity, Old-Age and Survivors Benefits Recommendation (131), *supra note 72*, para 14

<sup>76</sup> *Id.*, para. 15.

<sup>77</sup> ILO, Income Security Recommendation (67), *supra note 52*, art.11.

opportunities. Employers should also provide rehabilitation services to prepare a person with a disability for resuming his previous activities or a suitable alternative.<sup>78</sup>

Lastly, Recommendation No. 67 addresses the circumstance where the state has established a time limit for the payment of the benefit. The Recommendation suggests that upon cessation of the sickness benefit, if the employee is still unable to work, he/she should begin receiving an invalidity payment. For those persons who have reached the retirement age, the invalidity benefit can be replaced by the old-age benefit.<sup>79</sup>

### *b.2. Old-Age Benefit*

This benefit is granted when an employee attains a prescribed age and has contributed to the system of social security for a certain amount of time.<sup>80</sup> The prescribed age varies based on the different ILO Conventions on Social Security. Recommendation No. 64, which is the last instrument adopted by the ILO regarding old-age benefits, recommends that the prescribed age should be 65 years for men and 60 years for women. This Recommendation also establishes that the retirement age of employees who perform hazardous work or occupy unhealthy positions should be lower than the normal retirement age for employees who are not exposed to this kind of work.<sup>81</sup> Conventions No. 128 and 102 establish 65 years for men and women as the prescribed retirement age.<sup>82</sup>

In addition, employees need to have paid into the system for 30 years or have been employed for 30 years.<sup>83</sup> However, this rule has some exceptions. Convention No. 128 has established that a reduced benefit should be granted when the employee has reached 15 years of contribution prior to retirement age. Additionally, when a person has completed 10 years of contribution he should be eligible for at least 35 % of his pension. Finally, when the employee has contributed between 10 and 30 years, a reduced benefit should be payable.<sup>84</sup>

Recommendation No. 131 suggests that the percentage paid for a full retirement benefit be 55% of the previous earnings and allowances paid to the employee;<sup>85</sup> Convention No. 128 establishes a percentage of 45 %.<sup>86</sup> Recommendation No. 131 also suggests that pension benefits should be periodically adjusted taking into account the national economic conditions and the cost of living.<sup>87</sup>

Recommendation No. 67 suggests that states should consider that casual earnings of a small amount should not be used to reduce or cancel the right to a retirement pension.<sup>88</sup> Recommendation No. 131 proposes that when an employee who has reached the age of retirement and the years of

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<sup>78</sup> ILO, Invalidity, Old-Age and Survivors Benefit Convention (No. 128), *supra note 67*, art 13.1 (a)

<sup>79</sup> ILO, Income Security Recommendation (67), *supra note 52*, part 11 (6).

<sup>80</sup> *Id.*, 79, part 12; ILO, Invalidity, Old-Age and Survivors Benefit Convention (128), *supra note 67*, art 15.1.

<sup>81</sup> ILO, Income Security Recommendation (67), *supra note 52*, part 12 (1)

<sup>82</sup> *Id.*, part 11 (3); ILO, Social Security Minimum Standards (102), *supra note 38*, art 26.

<sup>83</sup> ILO, Social Security Minimum Standards (No. 102), *supra note 38*, art 29.1; ILO, Invalidity, Old-Age and Survivors Benefits Convention (128), *supra note 67*, art 18.

<sup>84</sup> ILO, Invalidity, Old-Age and Survivors Benefits Convention (128), *supra note 38*, art 18.

<sup>85</sup> ILO, Invalidity, Old-Age and Survivors Benefits Recommendation (131), *supra note 72*, para. 22.

<sup>86</sup> ILO, Invalidity, Old-Age and Survivors Benefits Convention (128), *supra note 67*, art 18.b.

<sup>87</sup> ILO, Invalidity, Old-Age and Survivors Benefits Recommendation (131), *supra note 72*, para 24.

<sup>88</sup> ILO, Income Security Recommendation (67), *supra note 52*, para 12.2.

contribution or employment decides to defer retirement, the state should consider increasing the amount of the old-age benefit for such an individual.<sup>89</sup>

In conclusion, the retirement pension or old-age benefit has an important role in ensuring the rights of elderly people to obtain a just and equitable pension according to their monetary contributions or years of work.<sup>90</sup> In cases where the employees have not reached the total years of service or payment quotas to obtain this right, states should ensure a reduced amount of the retirement pension. A total denial of retirement benefits put at high risk the subsistence of elderly people.<sup>91</sup>

### *b.3. Survivors Benefit*

According to Convention No. 102, this benefit covers the loss of support suffered by dependents of the breadwinner.<sup>92</sup> Coverage must be granted to wives, children and other dependents of the breadwinner.<sup>93</sup> Recommendation No. 67 provides a clear definition of who is considered a dependent of the breadwinner: wives, children, stepchildren, adopted children, and illegitimate children; dependents should be defined by the local legislation of each country.<sup>94</sup>

The earlier Convention No. 102 imposes on states the duty to ensure this benefit for 50 % of employees.<sup>95</sup> However, the more recent Convention No. 128 requires states to provide this benefit to all employees and apprentices.<sup>96</sup> Thus, the ILO is advancing towards a wider recognition of this benefit to all employees and apprentices.

To obtain the full benefit, employees are required to have 15 years of contribution or employment.<sup>97</sup> When the employee has between 5 to 10 years of contribution or employment beneficiaries should have the right to claim at least 35 % of the breadwinner's previous earnings and allowances.<sup>98</sup>

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<sup>89</sup> ILO, Invalidity, Old-Age and Survivors Benefits Recommendation (131), *supra note 72*, para 18.

<sup>90</sup> UN. Committee on Economic, Social and Cultural Rights, *Consideration of Report Submitted by Slovenia*, Res. E/C.12/SVN/CO/1, Thirty-fifth session Geneva, 7-25 November 2005, para. 22; UN. Office of the High Commissioner for Human Rights. *Normative standards in international human rights law in relation to older persons. Analytical Outcome Paper*. August 2012, p. 14. Available at <https://social.un.org/ageing-working-group/documents/ohchr-outcome-paper-olderpersons12.pdf>

<sup>91</sup> UN. Office of the High Commissioner for Human Rights, "Key Advocacy Messages on Austerity Measures and the Right to Social Security"; Available at <http://www.ohchr.org/Documents/Issues/SocialSecurity/KeyMessagesSocialSecurity.pdf>; ILO, *supra note 5*, para 7; UN. Office of the High Commissioner for Human Rights, *supra note 90*, p. 12.

<sup>92</sup> ILO, Social Security Minimum Standards (102), *supra note 38*, art. 60.

<sup>93</sup> ILO, Invalidity, Old-Age and Survivors Benefit Convention (128), *supra note 67*, art 22.1 (a); ILO, Invalidity, Old-Age and Survivors Benefits Recommendation (131), *supra note 72*, para. 3.

<sup>94</sup> ILO, Income Security Recommendation (67), *supra note 52*, para. 13.1.

<sup>95</sup> ILO, Social Security Minimum Standards (102), *supra note 38*, art. 61.

<sup>96</sup> ILO, Invalidity, Old-Age and Survivors Benefit Convention (128), *supra note 67*, art 22.1 (a)

<sup>97</sup> ILO, Social Security Minimum Standards (No. 102), *supra note 38*, art 63.1; ILO, Invalidity, Old-Age and Survivors Benefit Convention (128), *supra note 67*, art 24.1(a).

<sup>98</sup> ILO, Social Security Minimum Standards (102), *supra note 38*, art 24; ILO, Invalidity, Old-Age and Survivors Benefit Convention (128), *supra note 67*, art. 63.2.

Convention No. 128 requires states to pay the beneficiary at least 45% of the earnings and allowances paid to the employee.<sup>99</sup> Recommendation No. 131 suggests increasing that percentage to 55%.<sup>100</sup>

Special situations have been considered in the case of widows as beneficiaries. Convention No. 128 establishes that the right of widows to claim this benefit may be conditioned on attainment of a prescribed age, which age cannot be higher than the age for receipt of old-age benefits. In the case of a widow without children, she can be a beneficiary if the marriage has lasted for the minimum duration established by the state.<sup>101</sup> Recommendation No. 67 suggests that no age requirement be imposed if the widow has an invalidity or is pregnant with the child of the breadwinner.<sup>102</sup> Recommendation No. 131 proposes that in the case of a widow who does not meet the age requirement, the duration requirement for marriage, or other conditions, the widow should be paid an allowance for a specific period or a lump-sum death benefit.<sup>103</sup>

In the case of children of the employee, Recommendation No. 67 advises that this benefit is payable until the school-leaving age, or 18 years if the child is pursuing additional education at a satisfactory level.<sup>104</sup>

However, in both cases, if the beneficiary (wives, children or other dependents of the breadwinner) is engaged in any prescribed gainful activity, Convention No. 102 establishes that the survivor's benefit can be suspended or reduced where the benefit plus wage-earned exceeds an amount established by the local regulations of each state.<sup>105</sup>

In general, the amount of the Invalidity, Old-Age and Survivors benefits should be determined by each state, which should fix minimum amounts and also periodically adjust the benefit according to the social reality of each country and its living standards.<sup>106</sup>

Finally, it is important to note that the period of incapacity due to sickness, accident or maternity should be counted to calculate the qualifying period to obtain invalidity, old-age and survivor benefits.<sup>107</sup> In case of a person who is eligible to receive more than one benefit simultaneously, these benefits can be reduced or only the most favorable benefit will be paid.<sup>108</sup> Finally upon receipt of a retirement pension, the payment of other benefits will cease.<sup>109</sup>

### ***c. Maternity Protection***

The Maternity Protection Convention No. 183 establishes that this benefit should be granted to all pregnant employees. This benefit includes perinatal, childbirth, postnatal care, and general medical

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<sup>99</sup> ILO, Invalidity, Old-Age and Survivors Benefit Convention (128), *supra note 67*, Framework: Periodical Payments to Standard Beneficiaries.

<sup>100</sup> ILO, Invalidity, Old-Age and Survivors Benefits Recommendation (131), *supra note 72*, para. 22.

<sup>101</sup> ILO, Invalidity, Old-Age and Survivors Benefit Convention (128), *supra note 67*, art. 21.

<sup>102</sup> ILO, Income Security Recommendation (67), *supra note 52*, para. 13.2.

<sup>103</sup> ILO, Invalidity, Old-Age and Survivors Benefits Recommendation (131), *supra note 72*, para. 10.

<sup>104</sup> ILO, Income Security Recommendation (67), *supra note 52*, para. 13.3.

<sup>105</sup> ILO, Social Security Minimum Standards (102), *supra note 38*, art. 60.

<sup>106</sup> ILO, Invalidity, Old-Age and Survivors Benefits Recommendation (131), *supra note 72*, para. 24.

<sup>107</sup> *Id.*, para. 20.

<sup>108</sup> ILO, Invalidity, Old-Age and Survivors Benefit Convention (128), *supra note 67*, art. 33.1.

<sup>109</sup> ILO, Income Security Recommendation (67), *supra note 52*, point 20, explanation 1.



care for both mother and child.<sup>110</sup> The maternity benefit amount is 45 % of the total earnings and allowances payable at the moment of the contingency,<sup>111</sup> and it covers the following costs: maternity care, maintenance in a hospital or medical establishment, pharmaceutical and medical supplies.<sup>112</sup> However, Convention No. 102 only requires coverage for not less than 50 % of women employees.<sup>113</sup>

The benefit also includes maternity leave<sup>114</sup> for a period of 14 weeks.<sup>115</sup> The subsequent Recommendation No. 191 suggests extending this period to 18 weeks.<sup>116</sup> The employee is entitled to choose when she will take the leave, before or after childbirth.<sup>117</sup> Convention No. 183 also requires that the employee has the right to return to her employment position after the leave expires.<sup>118</sup> Recommendation No. 191 proposes that the time taken during the maternity leave should be counted in determining pension rights or other benefits generated in the social security system.<sup>119</sup>

Convention No. 183 also requires that when maternity leave is necessary due to an illness or complications, a cash benefit must be paid at not less than two-thirds of the previous earnings of the employee.<sup>120</sup>

Additionally, Recommendation No. 191 suggests that pregnant employees should be protected at work with adequate measures to assess any risk that could impair health.<sup>121</sup> The assessment needs to consider: the elimination of risk, the adaptation of working conditions, the transfer of the pregnant worker to another position without losing her monthly payment, and the paid leave established by national law.<sup>122</sup> According to Convention No. 183, the assessment should be carried out by employers and supervised by states periodically. In cases when the employment creates risks to the health of pregnant workers, employers may require a pregnancy test for women applicants.<sup>123</sup>

After childbirth, women workers have the right to breastfeed at work. This right must be granted according to the particular necessities of the mother. The frequency and length of the breastfeeding should be determined case by case.<sup>124</sup>

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<sup>110</sup> UN, General Comment No. 19, *supra note* 1, para 19; ILO, International Labor Organization. *Maternity Protection Convention (No. 183)*, 2000, art. 2.

<sup>111</sup> ILO, Social Security Minimum Standards (102), *supra note* 38, Charter of Contingency Payment; ILO, International Labor Organization, *Maternity Protection Recommendation (No. 191)*, 2000, point 3; ILO, Maternity Protection Convention (183), *supra note* 110, point. 6.7.

<sup>112</sup> ILO, Recommendation Maternity Protection Recommendation (191), *supra note* 111, point. 3.; ILO, Maternity Protection Convention (183), *supra note* 110, point. 6.7.

<sup>113</sup> ILO, Social Security Minimum Standards (102), *supra note* 38, art 48.

<sup>114</sup> ILO, Maternity Protection Convention (183), *supra note* 110, art 3

<sup>115</sup> *Id.*, art. 4.

<sup>116</sup> ILO, Recommendation Maternity Protection Recommendation (191), *supra note* 111, point. 1.3.

<sup>117</sup> *Id.*, point. 1.3.

<sup>118</sup> ILO, Maternity Protection Convention (183), *supra note* 110, art. 8.2.

<sup>119</sup> ILO, Maternity Protection Recommendation (191), *supra note* 111, point. 5.

<sup>120</sup> ILO, Maternity Protection Convention (183), *supra note* 110, art. 6.

<sup>121</sup> ILO, Maternity Protection Recommendation (191), *supra note* 111, point 6.1.

<sup>122</sup> *Id.*, point 6.2

<sup>123</sup> ILO, Maternity Protection Convention (No. 183), *supra note* 110, art. 9.

<sup>124</sup> *Id.*, art. 10.1; ILO, Maternity Protection Recommendation (191), *supra note* 111, point. 7.

Finally, Recommendation No. 191 proposes that in the case of a women worker who dies as a result of pregnancy, the post-natal leave and all the benefits related to the children must be given to her husband.<sup>125</sup>

#### *d. Employment Injury*

The Employment Injury Benefits Convention No. 121 provides for benefits when traumatic injury or disease results from employment. The effect of the injury can be temporary or permanent incapacity or the death of the employee. The beneficiaries are all employees and apprentices, and in the case of the death of the breadwinner, prescribed categories of beneficiaries can receive this benefit, such as wives, children or dependents.<sup>126</sup>

Recommendation No. 67 suggests that work-related diseases or injuries caused by risky work need to be regularly evaluated by employers and supervised by states with the aim of preventing such injuries.<sup>127</sup>

According to Convention No. 121, the contingencies covered are incapacity for work resulting from a morbid condition, total or permanent loss of earning capacity, and the loss of support suffered as a consequence of the death of the breadwinner.<sup>128</sup> The benefit includes the same services provided under the Medical Care Benefit Convention No. 130 discussed above.<sup>129</sup>

According to Convention No. 121, a cash benefit is paid to the worker who suffers an employment injury.<sup>130</sup> The percentage of the payment, which includes the earnings and all allowances payable to the employee during the contingency,<sup>131</sup> is determined as follow: a) in case of temporary incapacity to work, the percentage of the benefit should be 60%; b) in case of the total loss of capacity to earn money or a diminution in earning due to physical incapacities, the benefit should be equivalent to 60%; and c) when the employee responsible for the support of a family dies, the benefit should be 50 %.<sup>132</sup> These percentages were increased by 10% under the Convention No. 121, as compared to the original percentages set by Convention No. 102.<sup>133</sup>

The benefit is not paid during the first three days of the contingency. In the case of the death of the breadwinner, the right to claim this benefit belongs to the widow, to a disabled and dependent widower, to dependent children of the deceased and to other persons prescribed by the local legislation of each country.<sup>134</sup>

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<sup>125</sup> ILO, Maternity Protection Recommendation (191), *supra* note 111, points, 1, 2, and 3.

<sup>126</sup> ILO, International Labor Organization, *Employment Injury Benefits Convention (No. 121)*, 1964, art. 4.1.

<sup>127</sup> ILO, Income Security Recommendation (67), *supra* note 52, points 13, and 16.3.

<sup>128</sup> ILO, Employment Injury Benefits Convention (121), *supra* note 126, art. 6.; ILO, Social Security Minimum Standards (No. 102), *supra* note 38, part. 32.

<sup>129</sup> ILO, Employment Injury Benefits Convention (121), *supra* note 126, art. 4.1.

<sup>130</sup> *Id.*, art. 9. c

<sup>131</sup> *Id.*, art. 19.

<sup>132</sup> *Id.*, Frame of Contingencies.

<sup>133</sup> ILO, Social Security Minimum Standards (No. 102), *supra* note 38, Frame of Contingencies.

<sup>134</sup> ILO, Employment Injury Benefits Convention (121), *supra* note 126, art. 9.b

Independently of the rate received as compensation by the employee or beneficiaries, Convention No. 102 establishes that states should also have a plan to restore the employee with a disability to the workplace, including vocational rehabilitation.<sup>135</sup>

## 2. Common provisions

Through the study of the different Conventions and Recommendations adopted by the ILO, some common provisions have been identified with the aim to ensure the benefits established in the social security system.

### - *Equality:*

Equal treatment is one of the pillars of the social security system. To reach this aim, it is important to take into consideration both gender equality and the special needs of other groups.<sup>136</sup> Therefore, any kind of discrimination based on, for example, the health status of employees, their sexual orientation, or their civil, political or social status, must be eliminated as an impediment to the right to enjoy social security.<sup>137</sup> States must remove direct as well as indirect forms of discrimination that hinder free access to a social security benefit,<sup>138</sup> giving special attention to vulnerable groups,<sup>139</sup> such as older people, people with disabilities, women,<sup>140</sup> minority groups,<sup>141</sup> and LGBTI people.

In regards to LGBTI people, the High Commissioner for Human Rights in its Report about “Discrimination and violence against individuals based on their sexual orientation and gender identity” has identified discriminatory behaviors against LGBTI people in accessing social security benefits.<sup>142</sup> In particular discrimination against LGBTI people has had serious effects on the quality of health services received from public or private institutions.<sup>143</sup> Additionally access to survival pension has been also affected due to the lack of recognition of homosexual marriage by local legislation of states.<sup>144</sup>

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<sup>135</sup> ILO, Social Security Minimum Standards (102), *supra note* 38, art 35.1 and 2.

<sup>136</sup> ILO, International Labor Organization. *Social Protection Floors Recommendation (No. 202)*, 2002, part 3.d.

<sup>137</sup> UN, General Comment No. 19, *supra note* 1, para. 29.

<sup>138</sup> *Id.*, para. 30.

<sup>139</sup> *Id.*, para. 59.b and e.

<sup>140</sup> *Id.*, para 32; UN. Committee on Economic, Social and Cultural Rights, *General Comment No. 16 “Article3: the equal right of men and women to the enjoyment of all economic, social and cultural rights.”* Res. E/C12/2005/3, 13 May 2005.

<sup>141</sup> UN, General Comment No. 19, *supra note* 1, para. 32.

<sup>142</sup> UN. General Assembly. “Discrimination and violence against individuals based on their sexual orientation and gender identity”, Res. A/HRC/29/23. 04 May 2015, para. 16.

<sup>143</sup> *Id.*, para. 50.

<sup>144</sup> *Id.*, para. 67; UN. Committee on the Rights of the Child. *General Comment No. 15 on the right of the child to the enjoyment of the highest attainable standard of health (art.24)*, 17 April 2013, Res. CRC/C/GC/15, para.8; UN. Committee on the Rights of the Child. *Consideration of reports submitted by States parties under article 44 of the Convention on the Rights of the Child*, Res. CRC/C/GAM/CO/2-3, 13 August 2012, paras. 29-30.

The Committee on Economic, Social and Cultural Rights has clearly stated that sexual orientation cannot be an obstacle to access a widow pension,<sup>145</sup> retirement pension,<sup>146</sup> or other benefits derived from a social security system.

Finally, the Yogyakarta Principles, which is a set of non-binding principles relating to sexual orientation and gender identity, highlights the necessity to take positive measures (legislative and others) to prevent discrimination in access to social security benefits based on sexual orientation or gender identity.<sup>147</sup>

- *Rates:*

States have the authority to determine the scale of rates for benefits described either as a specific percentage of the earnings, or a flat rate according to the position held by the employee.<sup>148</sup> These rates can be reduced if they exceed a maximum amount previously established by the state. Nevertheless, the amount must be enough to maintain the family of the beneficiary and cover the basic necessities of life.<sup>149</sup>

The cost of the benefits should be distributed among all employees, both public and private sector, with the aim to reduce the cost to employees in paying into the social security system.<sup>150</sup> To ensure a viable social security system, states need to make a national effort to look for international financial cooperation<sup>151</sup> where the economy of the state requires additional financial assistance.<sup>152</sup>

States also need to be aware of the cases of negligence in collecting contributions to the social security system by employers, as this can affect the right of employees to obtain a benefit within the system.<sup>153</sup>

Finally, benefits can be suspended in different cases: a) the person is absent from the territory, b) the person is a beneficiary of another social security cash benefit, c) the person has made a fraudulent claim, d) the contingency was caused by a criminal offense, e) the contingency was caused by willful conduct, and f) non-compliance with the verification of the continuity of the contingency.<sup>154</sup>

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<sup>145</sup> UN. Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para.2 of the International Covenant on Economic, Social, and Cultural Rights)*, Res. E/C.12/GC/20, 2 July 2009, par. 32.

<sup>146</sup> UN, Human Rights Committee, *Case Edward Young v. Australia*, Communication No. 941/2000, Res. CCPR/C/78/D/941/2000, 2003, par. 10.4.

<sup>147</sup> UN, Yogyakarta Principles, *Principles on the application of international human rights law in relation to sexual orientation and gender identity*, March 2007, principle 13.

<sup>148</sup> ILO, International Labor Office, *Report: Social Security "Standards for the XXI Century"* developed by Martine Humblet and Rosinda Silva, 2002, p. 9-10, Available at <http://www.social-protection.org/gimi/gess/RessourcePDF.do?ressourceId=2452>

<sup>149</sup> ILO, Social Security Minimum Standards (102), *supra note* 38, art. 67.

<sup>150</sup> ILO, Income Security Recommendation (67), *supra note* 52, point. 26.

<sup>151</sup> ILO, Social Protection Floors Recommendation (202), *supra note* 136, point. 11 and 12.

<sup>152</sup> *Id.*, point 13.1.b

<sup>153</sup> ILO, Income Security Recommendation (No. 67), *supra note* 52, point. 25.

<sup>154</sup> ILO, Social Security Minimum Standards Convention, (102), *supra note* 38, art. 69.

- *Subsequently Adopted Conventions.*

Many conventions and recommendations concerning social security issues have been adopted by the ILO; some provisions in subsequent instruments have increased protection for social security benefits. In such cases, when a state has ratified a more recent convention which covers more aspects of social security, the provisions of the most recently adopted Convention take precedence over a previously ratified one.<sup>155</sup>

- *Social Protections Floors.*

Recommendation No. 202, adopted in 2002, is the most recent instrument dealing with social security issues. This recommendation explores the social protection floors in the social security system. Social protection floors refer to the basic social security guarantees that are essential for all people to have access to public goods and services and which should, therefore, determine the benefits of the system of social security.<sup>156</sup> At a minimum benefits should be provided for maternity, health care, survivor, sickness, invalidity, and old-age.<sup>157</sup> The Recommendation also establishes a valuable set of principles with the objective to prevent and combat poverty, situations of vulnerability, and social exclusion.<sup>158</sup> Some of the most important principles that are pivotal to this study are:<sup>159</sup>

- Universality.
- Entitlement to benefits prescribed by national law.
- Adequacy and predictability of benefits.
- Non-discrimination.
- Social inclusion, including persons in the informal economy.
- Respect for the dignity of persons covered by a social security system.
- Progressive realization.
- Solidarity in financing the benefits.
- Transparency in the administration of funds.
- Fiscal and economic sustainability.
- Coherence with social, economic, and employment policies.
- High-quality public services.
- Tripartite participation with representative organizations.

Meanwhile, in establishing basic social security guarantees, governments at a minimum must consider the following:<sup>160</sup>

- Personal needs in health care.
- Basic income that allows a life in dignity.
- Transparency in the revision of basic social security guarantees.

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<sup>155</sup> *Id.*, art. 86.

<sup>156</sup> ILO, Social protection Floors Recommendation (202), *supra note* 136, point 4.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*, point I.2.

<sup>159</sup> *Id.*, point 3.

<sup>160</sup> *Id.*, point 8.

- The necessity of tripartite participation.

Therefore, social protections floors must be established based on the consideration of<sup>161</sup> the above-enumerated principles and guarantees with the aim to protect benefits that cannot be suspended during times of economic crisis.<sup>162</sup>

To create a national policy which reaches the objective of ensuring floors of minimum protection, states should work to close gaps in access through a horizontal and vertical dimension of the social security system. The horizontal dimension seeks to establish an effective national strategy to cover the minimum floors of social security, ensuring universal coverage for all employees.<sup>163</sup> The vertical dimension seeks to provide higher levels of coverage for each of the benefits provided.<sup>164</sup>

- *Judicial Mechanisms.*

Beneficiaries and potential beneficiaries are entitled to access judicial mechanisms to resolve disputes concerning the application of social security systems;<sup>165</sup> such mechanisms need to be efficient and accessible.<sup>166</sup> It should be noted that Convention No. 202 states that the establishment of a special tripartite administrative tribunal for resolving social security issues alleviates the need for the right of appeal. This provision is problematic, because the refusal to provide a right to appeal is a clear violation of the rights recognized to each human being in his efforts to seek justice even though a special tribunal has been instituted.<sup>167</sup>

States must also guarantee adequate remedies when violations are established, including restitution, compensation, satisfaction and guarantees of non-repetition.<sup>168</sup>

- *Social Security Governance.*

A social security system needs to be effectively administrated. Appropriate policies and political commitments must be created to ensure a well-run administrative system. Creating such policies requires the active participation of employer and employee organizations (social dialogue) to help states reach this objectives.<sup>169</sup>

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<sup>161</sup> UN, Committee on Economic, Social and Cultural Rights, “*An evaluation of the obligation to take steps to the ‘maximum of available resources’ under an optional protocol to the Covenant*” Res. E/C.12/2007/1, 21 September 2007, para. 4.

<sup>162</sup> UN, Office of the High Commissioner for Human Rights, *supra note 91*.

<sup>163</sup> ILO, *supra note 5*, para. 8-9.

<sup>164</sup> *Id.*, para. 11.

<sup>165</sup> ILO, Social Security Minimum Standards Convention, (102), *supra note 38*, art 70.1; UN. General Comment No. 19, *supra note 1*, para 77; UN. Committee on Economic, Social and Cultural Rights, *General Comment No. 9: The domestic application of the Covenant*, 3 December 1998. Res. E/C.12/1998/24, para. 4.

<sup>166</sup> ILO, Social Protection Floors Recommendation (202), *supra note 136*, point 3.O, and 7.

<sup>167</sup> UN. General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1996, Treaty Series, vol. 999, art. 14.5.

<sup>168</sup> UN, Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The Right to Social Security*, 23 November 2007, Res. E/C.12/GC/19, para. 77.

<sup>169</sup> ILO, *supra note 5*, paras 22-26.

### 3. General and Specific Obligations of the States

Having considered all the conditions and contingencies covered by a proper social security system, now it is necessary to analyze what the general and specific obligations of states are to ensure and promote this system.

#### - *General Obligations.*

The International Covenant on Economic, Social and Cultural Rights establishes some obligations subject to immediate realization by ratifying states, including a guarantee that Covenant rights are exercised without discrimination,<sup>170</sup> and that appropriate steps will be taken to ensure the full realization of the rights established in the Covenant.<sup>171</sup> While progressive realization takes into account the national reality of each state, the Covenant requires that states parties utilize the maximum of their available resources as well as securing international cooperation to reach that aim.<sup>172</sup>

International cooperation is very important for the full realization of the right to social security.<sup>173</sup> States need to be aware that any loan request made to an international financial agency that includes an unjustified retrogressive measure impacting current social security rights could be considered a violation of the Covenant.<sup>174</sup>

International cooperation goes hand in hand with the progressive realization of the right to social security. The Committee on Economic, Social and Cultural Rights has established criteria to determine when resource constraints may justify retrogressive measures.<sup>175</sup> This test has six steps: a) reasonable justification for the action, b) to evaluate and consider other alternatives before making a decision, c) the process ensures the participation of potentially affected groups, d) the measures are not directly or indirectly discriminatory, e) the measure will have a positive impact on the social security system, and f) there was an independent review of the measures at the national level.<sup>176</sup> Thus, a measure adopted pursuant to these criteria may be considered legitimate to ensure the right to social security.<sup>177</sup>

#### - *Specific Obligations*

The specific obligations of states are: a) *the obligation to respect* that requires states to refrain from interfering directly or indirectly with the enjoyment of the right to social security, which

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<sup>170</sup> ILO, International Covenant on Economic, Social and Cultural Rights, *supra note 15*, art. 2.2., and 3.

<sup>171</sup> UN, General Comment No. 19, *supra note 1*, para. 40.

<sup>172</sup> *Id.*, paras. 41, and 52.

<sup>173</sup> UN, Committee on Economic, Social and Cultural Rights, “*Public debt, austerity measures and the International Covenant on Economic, Social and Cultural Rights*”, 24 June 2016, Res. E/C.12/2016/1, para 1

<sup>174</sup> *Id.*, para. 4.

<sup>175</sup> UN, General Comment No. 19, *supra note 1*, para. 62.

<sup>176</sup> *Id.*, para. 42.

<sup>177</sup> *Id.*, para. 60.

includes refraining from the arbitrary and unreasonable cut-off of benefits,<sup>178</sup> b) *the obligation to protect* that requires states to prevent third parties, such as companies or individuals, from interfering with the enjoyment of the benefits insured through enacting adequate legislation.<sup>179</sup> and c) *the obligation to fulfill* that is directed to the full realization of the right to social security, which can be accomplished through a system that facilitates assistance to individuals in order to enjoy the benefits of social security, promoting education and public consciousness about the importance of social security, and providing this right to people who cannot afford to contribute to the system.<sup>180</sup>

#### **4. Illustrative cases before Committees of United Nations Office of the High Commissioner of Human Rights.**

While the cases presented below are not claims presented by national employees, but by foreign citizens or non-employed persons in Australia and Spain, they are important for their consideration of the discretionary role that the states have in ensuring a social security system.

Two cases were presented before the Committee on the Elimination of Racial Discrimination (CERD) against Australia. The first complaint, Communication No. 42/2008, was presented by a New Zealand citizen residing in Australia. The petitioner claimed that his right to social security was violated under article 5(e) 1 of the International Convention on the Elimination of All Forms of Racial Discrimination,<sup>181</sup> because the Australian Social Security Act restricted his right to obtain benefits, specifically a retirement pension.<sup>182</sup> According to his testimony, newly enacted social security legislation changed the rules that had governed the social security system, no longer allowing receipt of these benefits if an individual changed his actual Special Category of Visa for a Permanent Visa.<sup>183</sup> The Committee determined that the petitioner was not restricted in applying for a Permanent Visa and that his social security benefits were going to be ensured when he had a Permanent Visa.<sup>184</sup> In this sense, the Committee decided not to declare a violation of article 5 concerning the right to social security.<sup>185</sup>

A similar factual situation was presented in Communication No. 39/2006 to the Committee. The petitioner alleged that he would lose his right to a retirement pension, despite having contributed to the system for 28 years<sup>186</sup> during his residency in Australia.<sup>187</sup> As in the previous case, the

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<sup>178</sup> *Id.*, para. 44.

<sup>179</sup> *Id.*, para. 67.

<sup>180</sup> *Id.*, paras 47-50.

<sup>181</sup> UN, General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, Treaty Series, vol. 660, art. 5 (e) 1.

<sup>182</sup> UN, Committee on the Elimination of Racial Discrimination, *Case D.R. v. Australia*. Communication No. 42/2008. Res. CERD/C/75/D/42/2008, 15 September 2009, para. 2.2.

<sup>183</sup> *Id.*, para. 2.3.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*, para 7.1.

<sup>186</sup> UN, Committee on the Elimination of Racial Discrimination, *Case D.F. v. Australia*, Communication No. 39/2006. Res. CERD/C/72/D/39/2006, 3 March 2008, para. 7.1.

<sup>187</sup> *Id.*, para. 2.1.



Committee determined that the petitioner could regain his rights to social security after acquiring a Permanent Visa.<sup>188</sup>

These two cases emphasize the ability of states to establish rules and public policies concerning eligibility under the social security system regarding foreign citizens who are allowed to work under a special category of visa. While states have the right to determine immigration status pursuant to their internal migration policies, they cannot impair rights previously earned by immigrants under the social security system. The new requirement to obtain a permanent visa, pursuant to new legislation, needs to be proportional and subject to adequate due process.<sup>189</sup> The Committee determined that the new restriction was stipulated by law, and was not disproportionate because the petitioners could request a permanent visa to regain their retirement benefits. However, the Committee neglected to consider the time that a request for the new visa status could take, during which the individual would be unable to access his benefit. Finally, the Committee failed to consider that the petitioners should have had access to reduced benefits according to their monetary contributions to the social security system of Australia.<sup>190</sup>

Another case presented to the Committee on Economic, Social and Cultural Rights involved Spain. The petitioner was a Spanish citizen who had been incarcerated since March 2003. He was awarded a non-contributory disability benefit for € 301.55 per month. Nevertheless, in 2006, that amount was reduced by the Regional Ministry to € 147.71 per month, after taking into consideration the cost of his maintenance in prison, which totaled € 2,062.00.<sup>191</sup> The petitioner alleged a violation of article 9 in conjunction with article 2 of the International Covenant on Economic, Social and Cultural Rights, regarding the right to social security.<sup>192</sup>

The Committee recognized the state of vulnerability of persons with disabilities,<sup>193</sup> especially those in prison.<sup>194</sup> However, the Committee was clear that the reduction in the amount of the pension in the present case was reasonable and established by law.<sup>195</sup> In this sense, states parties have certain discretion in the administration of the taxes that are used to pay some benefits, like the non-contributory disability benefit. The Committee determined that the measure taken ensured a better allocation of resources,<sup>196</sup> and that no violation of the rights established in article 9 of the International Covenant on Economic, Social and Cultural Rights was committed.<sup>197</sup>

This case is particularly interesting because it creates a new standard for state discretion by establishing that the replacement of a benefit granted in cash with another method of payment (in this case payments in kind based on petitioner's "maintenance" in prison) is not a violation of the right to social security. The Committee noted, however, that Spain did not have absolute discretion

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<sup>188</sup> *Id.*, para. 2.4.

<sup>189</sup> UN, General Comment No. 19, *supra note 1*, para. 24.

<sup>190</sup> UN, Office of the High Commissioner for Human Rights, *supra note 91*.

<sup>191</sup> UN, Committee on Economic, Social and Cultural Rights, *Case Miguel Angel Lopez Rodriguez v. Spain*, Communication No. 1/2013, Res. E/C.12/57/D/1/2013, 20 April 2016, para. 2.1.

<sup>192</sup> *Id.*, para. 2.1.; UN, International Covenant on Economic, Social and Cultural Rights, *supra note 15*, arts. 2, and 9.

<sup>193</sup> UN, Committee on Economic, Social and Cultural Rights. *General comment No 5: Persons with Disabilities*, 9 December 1994. Res E/1995/22, para. 28.

<sup>194</sup> UN, General Comment No. 19, *supra note 1*, para. 31.

<sup>195</sup> *Id.*, para. 24.

<sup>196</sup> UN, *Case Miguel Angel Lopez Rodriguez v. Spain*, *supra note 191*, para. 13.3.

<sup>197</sup> *Id.*, para. 15.

to replace the cash benefit, but when a measure taken does not have a disproportionate effect on the beneficiary, it does not constitute a violation of the right to social security.<sup>198</sup>

As can be seen, states have some amount of discretion in managing their social security policies, but any restrictions or new measures taken need to be established by law, proportional, and subject to proper due process.<sup>199</sup>

In conclusion, the right to social security is insured in the international arena, providing for benefits of maternity, old-age or retirement pension, invalidity, sickness, survivors, health care, and employment injury. The guarantees of these benefits need to conform to some basic principles, such as universality, non-discrimination, solidarity, adequacy, transparency, and tripartite participation. The next chapters will analyze the regulation of social security in the Inter-American system of human rights and the Council of Europe, and examine the experiences in the application of the international standards on social security as adopted by the ILO in two specific countries, Peru and Spain.

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<sup>198</sup> *Id.*, para. 13.4.

<sup>199</sup> UN, General Comment No. 19, *supra note 1*, para. 24.

## CHAPTER II

### Inter-American System of Human Rights and the Right to Social Security

This Chapter is divided into two parts. The first will analyze the Inter-American standards which protect the right to social security. The second part will analyze the actual situation of the right to social security in Peru. Finally, a graphic will present a contrast between the regulation of social security benefits in Peru and ILO standards.

#### 1. Inter-American Standards.

##### - *Treaties*

The right to social security has been defined in article 9 of the American Convention on Human Rights (ACHR) and articles XVI, and XXXV of the American Declaration of the Rights and Duties of Man. This right has two dimensions, one social and another individual in the case of workers. For the purposes of this study, the focus will be only on the rights of workers to access social security pursuant to a contributory system. The concept of social security for workers not only includes the obligation of states to protect them from consequences generated by a contingency that obstructs their rights to obtain adequate means of subsistence (social dimension),<sup>200</sup> but also the right to have minimum standards of social security, such as medical care, retirement pension, benefits in case of work accidents or occupational diseases and maternity leave (worker's dimension).<sup>201</sup> To attain these rights, workers have the duty to contribute to the social security system according to their possibilities and circumstances.<sup>202</sup>

The organs of the Inter-American System of Human Rights, such as the Inter-American Commission and Court of Human Rights, cannot determine a violation of the right to social security directly through an individual petition.<sup>203</sup> Nevertheless, this right can be justiciable through article 26 of the ACHR when a retrogressive measure affecting economic, social and cultural rights has been approved without a reasonable justification, or when states do not adopt immediate actions for the progressive realization of these rights.<sup>204</sup>

There are four Inter-American Conventions which directly address state responsibility for social security, however, none of these instruments is enforceable. The recent Inter-American Covenant on Protecting the Human Rights of Older People has clearly established the special protection for

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<sup>200</sup> OAS, Organization of American States, *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador"*, 16 November 1999, A-52, art 9.1; OAS, *American Declaration of the Rights and Duties of Men*, 2 May 1948, arts. XVI, and XVI.

<sup>201</sup> OAS, *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador"*, *supra note* 200, art. 9.2.

<sup>202</sup> OAS, *American Declaration of the Rights and Duties of Men*, *supra note* 200, arts. XVI, and XXXV.

<sup>203</sup> OAS, *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador"*, *supra note* 200, art. 19.6.

<sup>204</sup> OAS, Organization of American States, *American Convention on Human Rights "Pact of San Jose"*, Costa Rica, 22 November 1969, art. 26.

the right to social security for an older person in order to provide a life in dignity.<sup>205</sup> States also need to establish adequate means for the gradual transition from work to retirement.<sup>206</sup> The Inter-American Covenant to Eradicate Violence against Women establishes the free and full exercise of women to economic, social and cultural rights, including social security.<sup>207</sup> The recent Covenants against Racism, Racial Discrimination and Related Forms of Intolerance, and the Covenant against all Forms of Discrimination and Intolerance, clearly prohibit both direct discrimination in the enjoyment of economic, social and cultural rights, and also indirect discrimination that acts to decrease the enjoyment of the rights of LGBTI people, afro-descendant people, and groups of religious minorities, among others.<sup>208</sup>

- *Inter-American Jurisprudence*

The IACtHR has had the opportunity to consider the right to pension, survivors and medical treatment involving cases presented against Peru, Colombia, and Mexico. Additionally, the Inter-American Commission on Human Rights has seen an increase in the number of petitions received during the last year (2016) involving social security issues.<sup>209</sup> Considering that the right to social security established in the Protocol of San Salvador is not by itself justiciable, the Court and Commission have analyzed this issue under four rights: property (art. 21 ACHR), judicial protection (art. 25 ACHR), equality before the law (art. 24 ACDH), and the right to progressive realization (art. 26 ACHR). This section will consider the jurisprudence developed by the Court and Commission concerning the scope of these rights.

- Right to Property

The right to property recognized in article 21 of the ACHR, protects the use and enjoyment of appropriable material and intangible things,<sup>210</sup> as well as other rights derived from the property of each person.<sup>211</sup> However, the right to property is not absolute, it can be subjected to restrictions, but any restriction must be justified by law and based on public utility or social interest.<sup>212</sup>

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<sup>205</sup> OAS, Organization of American States, *Inter-American Covenant on Protecting the Human Rights of Older People*, 15 June 2015 and enter into force on January 2017, art. 17.

<sup>206</sup> *Id.*, art. 18.

<sup>207</sup> OAS, Organization of American States, *Inter-American Covenant on Prevent, Eradicate and Sanction Violence against Women “Convention of Belem Do Para”*, 09 June 1994 and enter into force on May 1995, art. 5.

<sup>208</sup> OAS, Organization of American States, *Inter-American Convention against all Forms of Discrimination and Intolerance*, 05 June 2013, art. 1 (1) and (2); OAS, *Inter-American Convention against Racism, Racial Discrimination and related forms of Intolerance*, 05 June 2013, art 1 (1) and (2).

<sup>209</sup> Personal experience working at the Inter-American Commission on Human Rights in the Registry Section and in the Procedural Backlog Group since 2015 to 2016.

<sup>210</sup> I/A Court H.R., *Case of Furlan and Family v. Argentina*, Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2012. Series C No. 246, para. 220

<sup>211</sup> OAS, American Convention of Human Rights, *supra note 204*, art. 21; I/A Court, *Case Acevedo Buendia and others (“Cesantes y Jubilados de la Contraloria) v. Peru*, Preliminary Exceptions, Merits, Reparations and Costs. Judgment of 01 July 2009. Serie C No. 198, para. 84; I/A Court H.R., *Case of Ivcher Bronstein v. Peru*. Merits, Reparations and Costs. Judgment of February 6, 2001. Series C No. 74. paras. 120-122; I/A Court H.R., *Case of Salvador Chiriboga v. Ecuador*. Preliminary Objections and Merits. Judgment of May 6, 2008 Series C No. 179, para. 55; I/A Court H.R., *Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 21, 2007. Series C No. 170, para. 174.

<sup>212</sup> I/A Court H.R., *Caso Salvador Chiriboga*, *supra note 211*, para. 54.; I/A Court, *Case Acevedo Buendia and others (“Cesantes y Jubilados de la Contraloria) v. Peru*, *supra note 211*, para. 84.

The IACtHR established that a retirement pension acquires patrimonial effects, also known as the theory of “vested rights”,<sup>213</sup> when the employee pays his contributions to the social security system, and then retires according to the national laws and other regulations established by each country.<sup>214</sup> At this moment, the employee has acquired the right to property for the amount of his pension or other benefits under the social security system.<sup>215</sup>

It is also important to note that a basis of the theory of “vested rights” is the principle of non-retroactivity of law, which implies that a new regulation cannot affect the rights that have already been generated,<sup>216</sup> for instance, the right to pension, invalidity, or survivor benefits.

Once workers acquire the right to property in the amount of the pension, that amount cannot be restricted, reduced or limited, unless it is justified. If a state cannot justify a reduction it will be held responsible under the ACHR for the illegal reduction.<sup>217</sup> Any restriction or limitation of vested social security benefits needs to be: a) proportional -- each state, which knows the special situation of vulnerability of the beneficiary, such as poverty or disability, must ensure that the measure applied does not impact negatively on the beneficiary;<sup>218</sup> and b) the restriction needs to be based on public utility or social impact.<sup>219</sup> This last point is interpreted in light of the social function of the property and as an essential element within a democratic society where, for the maintenance of the common good and collective rights, the existence of proportional measures are pivotal to granting individual rights.<sup>220</sup>

The Inter-American Commission on Human Rights, in analyzing whether a limitation or restriction imposed on the amount of a retirement pension is legal, has adopted the criteria developed by the European Court of Human Rights (ECtHR) in the cases *Kjartan Asmundsson v. Iceland*<sup>221</sup> and *Domalewski v. Poland*.<sup>222</sup> In these cases the ECtHR considered whether any limitations were legal, had a legitimate purpose and were proportional.<sup>223</sup> Legality means that the restriction or limitation needs to be justified by law.<sup>224</sup> The legitimate purpose must be based on keeping the financial stability of the state and maintaining the system of social security based on the principles of equity

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<sup>213</sup>I/A Court H.R., Case of the “Five Pensioners” v. Peru. Merits, Reparations and Costs. Judgment of February 28, 2003. Series C No. 98, para. 102, Case of Salvador Chiriboga v. Ecuador, *supra* note 211, para. 55, Case of Acevedo Buendía et al (“Discharged and Retired Employees of the Comptroller”) v. Peru, *supra* note 211, para. 84.

<sup>214</sup>I/A Court H.R., Case of the “Five Pensioners” v. Peru, *supra* note 61, para. 103.

<sup>215</sup> *Id.*, para. 103, Case of Acevedo Buendía et al (“Discharged and Retired Employees of the Comptroller”) v. Peru, *supra* note 211, para. 85.

<sup>216</sup> I/A Court H.R., Case of Abrill Alosilla et al. v. Peru. Merits, Reparations and Costs. Judgment of March 4, 2011 Series C No. 223, para. 82.

<sup>217</sup> I/A Court, Case Acevedo Buendia and others (“Cesantes y Jubilados de la Contraloria) v. Peru, *supra* note 211, paras. 85 and 88.

<sup>218</sup> I/A Court H.R., *Case of Furlan and Family v. Argentina*, *supra* note 210, para. 222.

<sup>219</sup> I/A Court H.R., *Case Salvador Chiriboga*, *supra* note 211, para. 54; *Case Acevedo Buendia and others (“Cesantes y Jubilados de la Contraloria) v. Peru*, *supra* note 211, para. 84.

<sup>220</sup> I/A Commission on Human Rights, Merits Report No. 38/09. Case 12.670, “*Asociación Nacional de Ex Servidores del Instituto Peruano de Seguridad Social and others*” v. Perú, 27 March 2009, para. 106.

<sup>221</sup> European Court of Human Rights, *Case Kjartan Ásmundsson v. Iceland*. Comunicación No. 60669/00. Final Decision. 30 de marzo de 2005, para. 42.

<sup>222</sup> European Court of Human Rights, *Case Domalewski v. Poland*. Communication No. 34610/97. Final Decision 15 June 1999. Information Note on the Court’s case-law No. 7.

<sup>223</sup> I/A Commission on Human Rights, *Case 12.670, “Asociación Nacional de Ex Servidores del Instituto Peruano de Seguridad Social y otras” v. Perú*, *supra* note 220, para. 111.

<sup>224</sup> *Id.*, para. 113.

and social interest.<sup>225</sup> Finally, the requirement of proportionality requires measures that are suitable for reaching the legitimate purpose.<sup>226</sup>

Additionally, the IACtHR established that the right to property and judicial protection are interconnected. Thus, the right to property is violated when, as consequence of a judicial process, the State does not comply with the judgment that determines the payment of a benefit (survivor or retirement pension) or compensation.<sup>227</sup> Salary, benefits, reparations and increases in the amount of pension established under a judicial judgment are protected under the right to property.<sup>228</sup> While this is properly viewed as a violation of the right to judicial protection, recognized in article 25 of the ACHR, the Court has established that both rights are interconnected, especially when the deprivation of the right to property is related to the non-compliance with a final judgment that recognizes the social security benefit or other benefit derived from the social security system.<sup>229</sup>

- *Right to Equal Protection*

The right to equal protection recognized under article 24 of the American Convention on Human Rights establishes that: “All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.”<sup>230</sup> Thus, domestic legislation of a country should protect all citizens’ access to the social security system without any discrimination.

The IACtHR, in the *Case Duque v. Colombia*, determined that Colombia had violated article 24 of the ACHR “right to equal protection” to the detriment of Mr. Duque. Mr. Duque alleged unequal treatment of the law when the state denied his claim to a survivor pension upon the death of his gay partner.<sup>231</sup> The IACtHR determined that Colombia had not provided an objective, reasonable,<sup>232</sup> and social justification<sup>233</sup> for the denial of the survivor pension to gay couples. The Court relied in part on the analysis used by the United Nations Committee on Human Rights in the case of *Edward Young v. Australia*. This latter case established that the denial of social security benefits to gay couples constituted discrimination based on sexual orientation.<sup>234</sup>

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<sup>225</sup> *Id.*, para. 116.

<sup>226</sup> *Id.*, para. 120.

<sup>227</sup> I/A Court, *Case Acevedo Buendia and others (“Cesantes y Jubilados de la Contraloria”) v. Peru*, *supra* note 211, para. 85.

<sup>228</sup> European Court of Human Rights, *Case of Lelas v. Croatia*, Communication No. 55555/08, Judgment of May 20, 2010, Final, 20 August 2010, para 58; *Case of Bahçeyaka v. Turkey*, Communication No. 74463/01, Judgment of July 13, 2006, Final, 13 October 2006, para 34; I/A Court H.R., *Case of Furlan and Family v. Argentina*, *supra* note 210, para. 221.

<sup>229</sup> I/A Court H.R., *Case of Furlan and Family v. Argentina*, *supra* note 210, para. 222.

<sup>230</sup> OAS, American Convention of Human Rights, *supra* note 204, art. 24.

<sup>231</sup> I/A Court H.R., *Case of Duque v. Colombia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of February 26, 2016. Series C No. 310, para. 1.

<sup>232</sup> *Id.*, para. 106.

<sup>233</sup> *Id.*, para. 107.

<sup>234</sup> *Id.*, para. 111; *Cfr.* UN. Human Rights Committee, *Case Edward Young v. Australia*, Communication No. 941/2000, U.N. Doc. CCPR/C/78/D/941/2000 (2003), para. 10.4 “The State party provides no arguments on how this distinction between same-sex partners, who are excluded from pension benefits under law, and unmarried heterosexual partners, who are granted such benefits, is reasonable and objective, and no evidence which would point to the existence of factors justifying such a distinction has been advanced. In this context, the Committee finds that the State party has violated article 26 of the Covenant by denying the author a pension on the basis of his sex or sexual orientation”.

The IACtHR, in the case *Atala Riffo v. Chile*, which dealt with the withdrawal of custody of the children of a lesbian judge,<sup>235</sup> established that the lack of internal consensus among the states about the respect of the rights of sexual minorities cannot be considered as a valid argument to deny or restrict the rights of LGBTI people or justify the continued historical discrimination against them.<sup>236</sup> The same rule is applied in cases of denial of the right to social security to gay partners.<sup>237</sup>

These cases are pivotal to understanding the principle of “equal protection” as applied to cases of social security. The domestic law of each state needs to provide equal treatment in access to social security benefits without discrimination.<sup>238</sup>

The Inter-American Commission on Human Rights has also had occasion to consider the dimensions of the right to equal protection. The case *J.S.C.H and M.G.S. v. Mexico* dealt with the dismissal of members of the Armed Forces of Mexico based on their current HIV status, pursuant to the Mexican Labor Code which lists HIV status as a cause for dismissal. The dismissal resulted in the petitioners being denied access to their pensions and to adequate health care.<sup>239</sup> The petitioners challenged the legality of the labor code provision allowing for termination due to HIV status. The Inter-American Commission on Human Rights recognized that in some situations the health condition of the employee could determine that they are unable to pursue some kinds of work; however, this conclusion cannot constitute justification for the dismissal of the victim without a prior medical assessment of his health.<sup>240</sup> The justification of the law to dismiss an employee only for the existence of a health condition is not proportionate and reasonable.<sup>241</sup>

Thus, when a state restricts access to a pension or other social security benefit, even if the local legislation allows for the unequal treatment of a minority group of the society, the state still needs to have an objective and reasonable justification to deny this access.<sup>242</sup>

- *Judicial Protection*

The right to judicial protection is recognized in article 25 of the ACHR, which comprises access to a simple and prompt remedy before a competent authority.<sup>243</sup> The majority of cases presented before the Inter-American System of Human Rights involving social security issues denounced the limitations on access to proper remedies based on legal restrictions and the socio-political situation in the country. The Court has been clear that local remedies which cannot be accessed cannot be considered effective, and lack of access cannot be justified by the general political conditions in the country.<sup>244</sup>

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<sup>235</sup> I/A Court H.R., *Case of Atala Riffo and daughters v. Chile*. Merits, Reparations and Costs. Judgment of February 24, 2012. Series C No. 239, para. 3.

<sup>236</sup> *Id.*, para. 92.

<sup>237</sup> I/A Court H.R., *Case of Duque v. Colombia*, *supra note* 231, para. 123.

<sup>238</sup> *Id.*, para. 125.

<sup>239</sup> I/A Commission on Human Rights, *Case 12.689, J.S.C.H and M.G.S. v. Mexico*, Merits Report No. 80/15, 28 October 2015, para 4

<sup>240</sup> *Id.*, para. 110.

<sup>241</sup> *Id.*, para. 113.

<sup>242</sup> I/A Court H.R., *Case of Duque v. Colombia*, *supra note* 231, para. 124.

<sup>243</sup> OAS, American Convention of Human Rights, *supra note* 204, art. 25.

<sup>244</sup> I/A Court H.R., *Case of Acevedo Buendía et al. (“Discharged and Retired Employees of the Comptroller”) v. Peru*, *supra note* 211, para. 69; *Case of Ivcher Bronstein V. Perú*, *supra note* 211, para. 137; *Case of Acevedo Jaramillo et al. v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of February 7, 2006. Series C No. 144,

At the same time, non-compliance with judgments that ensure the right to a pension or another social security benefits also constitute a violation to the right to judicial protection.<sup>245</sup> One of the justifications given by states for non-compliance with a judgment which orders the payment of compensation or the payment of unpaid pensions or benefit, is the financial situation of the country or budget rules. However, this justification by itself is not valid and can constitute a violation by the state.<sup>246</sup>

In cases involving dismissal of judges or employees, states need to provide effective remedies to the victims, because a removal can affect the right of the victims to claim social security benefits. In this respect, the Court established that while states have the discretion to remove personnel based on public necessity or public order in a democratic society, this cannot be a justification to prevent the victims from having access to exhaust local remedies.<sup>247</sup> In this sense, the local laws cannot establish a limitation to access to justice when the social security benefits are in play.<sup>248</sup>

Based on these considerations, it is clear that the state must ensure adequate judicial and administrative remedies in cases of denial, reduction, suspension or unemployment that impairs benefits incorporated in the social security system.

- *Progressive Realization of the Right to Social Security.*

The progressive realization of economic, social and cultural rights is recognized in article 26 of the ACHR, which provision fosters the progressive realization of the right to social security, not only with local efforts, but also through international cooperation.<sup>249</sup>

This progressive realization should consider both the equal status of economic, social and cultural rights, as well as their interdependency.<sup>250</sup> Considering that interdependency, any retrogressive measure needs to be carefully considered not only with the totality of the economic, social and

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para. 213; *Case of the 19 Tradesmen v. Colombia*, Merits, Reparations and Costs, Judgment of July 5, 2004. Series C No. 109, para. 192.

<sup>245</sup> I/A Court H.R., *Case of the "Juvenile Reeducation Institute" v. Paraguay*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 2, 2004. Series C No. 112, párr. 248; *Case of the Sawhoyamaya Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, para. 92; *Case of the "Five Pensioners" v. Peru*, *supra* note 213, paras. 138 y 141; *Case of Cesti Hurtado v. Peru*. Request for Interpretation of the Judgment of Merits. Order of the Court of November 19, 1999. Series C No. 62, para. 133.

<sup>246</sup> I/A Court H.R., *Case Acevedo Buendía y otros ("Cesantes y Jubilados de la Contraloría") Vs. Perú*, *supra* note 211, para. 219; European Court of Human Rights, *Case of "Amat-G" LTD and Mebaghishvili v. Georgia*, Application No. 2507/03, Judgment of 27 September 2005, para. 48; *Case of Popov v Moldova*, Communication No. 74153/01, Judgment of 18 January 2005, para 54; *Case of Shmalko v. Ukraine*, Application No. 60750/00, Judgment of 20 July 2004, para. 44.

<sup>247</sup> I/A Court H.R., *Case of the Dismissed Congressional Employees (Aguado - Alfaro et al.) v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 24, 2006. Series C No. 158. para 110; I/A Commission on Human Rights, *Case of Trabajadores Cesados (PETROPERU, MEF, ENAPU, and MINEDU) v. Perú*, Merits Report No. 14/15, Cases 11.602; 12.385; 12.665 and 12.666, para. 101.

<sup>248</sup> I/A Court H.R., *Case of Canales Huapaya et al. v. Peru*. Preliminary Objections, Merits, Reparations and Costs, Judgment of June 24, 2015. Series C No. 296, para. 104; *Case of the Dismissed Congressional Employees (Aguado - Alfaro et al.) v. Peru*, *supra* note 247, para. 119; I/A Court H.R., *Advisory Opinion OC-18/03, Juridical Status and Rights of Undocumented Migrants*, 17 September 2003. Series A No. 18, para. 126.

<sup>249</sup> OAS, American Convention of Human Rights, *supra* note 204, art. 26.

<sup>250</sup> I/A Court H.R., *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller") v. Peru*, *supra* note 211, para. 101.



cultural rights but also with civil and political rights.<sup>251</sup> Retrogressive measures can impair other rights, such as the right to life, integrity, property, and judicial protection.

Progressive measures to achieve the realization of economic, social and cultural rights should be taken immediately, taking into consideration the economic or political situation within the country. However, states can also take retrogressive economic, social and cultural measures but the government must ensure that such measures are adopted pursuant to a legislative enactment, are for the public good, and are proportional to the achievement of that public good.<sup>252</sup>

The IACtHR has not yet considered the application of article 26 in determining the justiciability of the right to social security. However, the opinion of Judges Roberto Caldas and Eduardo Ferrer Mac-Gregor Poisot in the case *Canales Huapaya v. Peru*, did analyze the impact of article 26 based on the *jura novit curiae* principle, even though the petitioner had not alleged a violation of that article. The *jura novit curiae* principle signifies “in general the judicial power to address a case based on a law or legal theory not presented by the parties.”<sup>253</sup> That principle allows a Court to determine a violation when all the parties have had the opportunity to present and refute the facts in the judicial proceeding.<sup>254</sup>

The Court has used the *jura novit curiae* principle in cases which involved civil and political rights. The Court established in these cases not only the violation of the rights recognized in the ACHR but also in different special Conventions such as the Inter-American Convention to Prevent and Eradicate Torture in the case *Bayarri v. Argentina*<sup>255</sup>, and the Convention over Forced Disappearances in the case *Heliodoro Portugal v. Panama*.<sup>256</sup> The question presented is why not apply the *jura novit curiae* principle in the analysis of economic, social and cultural rights? Unfortunately, in the case *Canales Huapaya v. Peru* dealing with the removal of public servants which affected the right to social security,<sup>257</sup> the IACtHR neglected to apply this principle to the immediate justiciability of economic, social and cultural rights.<sup>258</sup> This omission by the IACtHR occurred despite the conclusions of the Special Commission of Peru which had analyzed the cases of irregular dismissal, and established that the loss of employment for many employees led to the loss of their eligibility for benefits under social security and the national system of pensions.<sup>259</sup> While the Court in the case *Canales Huapaya v. Peru* did not need to declare the responsibility of the State for failing to ensure the right to social security, it should have carried out the analysis

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<sup>251</sup> UN. Committee on Economic, Social and Cultural Rights, *General Comment N° 3: The nature of States parties' obligations (paragraph 1 of Article 2 of the Covenant)*, Res. E/1991/23, 1990, para. 9.

<sup>252</sup> I/A Court H.R., Case of Acevedo Buendía et al. (“Discharged and Retired Employees of the Comptroller”) v. Peru, *supra* note 211, para. 105.

<sup>253</sup> Dinah Shelton “*The Rules and the Reality of Petition Procedures in the Inter-American Human Rights System*”. The George Washington University Law School. Working Paper #2. May 2014, page 21.

<sup>254</sup> The *jura novit curiae* principle was used in the following cases before the I/A Court on Human Rights: i) Case Velásquez Rodríguez v. Honduras; ii) Case Usón Ramírez v. Venezuela; iii) Case Bayarri v. Argentina; iv) Case Heliodoro Portugal v. Panamá; v) Case Kimel v. Argentina; vi) Case Bueno Alves v. Argentina; vii) Case of the Ituango Massacres v. Colombia; and viii) Case Sawhoyamaxa v. Paraguay.

<sup>255</sup> I/A Court H.R., *Case of Bayarri v. Argentina*. Preliminary Objection, Merits, Reparations and Costs. Judgment of October 30, 2008. Series C No. 187, para. 94.

<sup>256</sup> I/A Court H.R., *Case of Heliodoro-Portugal v. Panama*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of August 12, 2008. Series C No. 186, para. 105.

<sup>257</sup> I/A Court H.R., Case of Canales Huapaya et al. v. Peru, *supra* note 248, para. 78.

<sup>258</sup> I/A Court H.R., Case of the Dismissed Congressional Employees (Aguado - Alfaro et al.) v. Perú, *supra* note 247, para. 7.

<sup>259</sup> I/A Court H.R., Case of Canales Huapaya et al. v. Peru, *supra* note 248, para. 47

under article 26 of the ACHR as to the justification for the retrogressive actions which deprived more than 10000 employees of their jobs and social security benefits.<sup>260</sup>

The IACtHR should recognize the necessity for exercising a direct justiciability of the right to social security and other economic, social and cultural rights within the Inter-American System of Human Rights.

Finally, the Inter-American Commission on Human Rights in the Merits Report of the Case *Asociacion Nacional de Ex-Servidores del Instituto Peruano de Seguridad Social v. Peru*, established that the creation of maximum rates for pensions is not incompatible with the essential content of the right to a pension, and is not a retrogressive measure. Establishing such a maximum rate needs to go hand in hand with the financial reality of the country<sup>261</sup> and the benefit to society, as discussed previously with regards to the right to property, and the allowable legal restrictions on social benefits.

The immediate realization and justiciability of the right to social security is necessary within a democratic society, especially taking into account its pivotal role in realizing other rights.

## **2. The Inter-American Court's Analysis of Peruvian Standards of Social Security**

### ***a. Social Security in Peru: A brief history.***

The social security system in Peru was initially regulated by two systems. The Law Decree No. 19990, which established a social security system in which the benefits are generated based on a minimum amount of pension and a determined number of years of contributions, is still in force. The other system, that is now closed, was based on the Law Decree No. 20530, which established a system based only on the years of service and not on years of contributions.<sup>262</sup>

According to Mujica Petit, a recognized specialist in labor law in Peru, in 1992 approximately 300,000 people were pensioners in the System of the Law Decree No. 20530. This system supported approximately one and half million people including the dependents of the pensioners. After the coup carried out by the former President Alberto Fujimori Fujimori, the Government enacted Legislative Decree No. 817 which applied retroactively and closed the Regimen of Law Decree No. 20530. This change affected the right of many pensioners.<sup>263</sup>

The pensioners adversely affected by the change sued the government through “amparos”, seeking a declaration that the former Political Constitution of Peru (1979), which was in force when they started contributing to the national system of pensions, ensured their rights to obtain a pension with an adjustment for currency devaluation,<sup>264</sup> and that the new Political Constitution of Peru (1993) could not be retroactively applied to deny rights acquired under the Law Decree No.

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<sup>260</sup> *Id.*, para. 47.

<sup>261</sup> I/A Commission on Human Rights, Case 12.670, “Asociación Nacional de Ex Servidores del Instituto Peruano de Seguridad Social y otras” v. Peru, *supra* note 220, para. 143.

<sup>262</sup> Peruvian Legislation, *Statement of Reasons of the Legislative Decree No. 817*, 23 April 1996, point 1.

<sup>263</sup> Mujica Petit, Javier, “*Pensionistas y Derechos Humanos. Abriendo Surcos en Perú*”, 12 July 2002, p. 355. Available at <http://www.corteidh.or.cr/tablas/a12092.pdf>

<sup>264</sup> Peruvian Legislation, *Political Constitution of Peru*, 12 July 1979, Octave Final and General Disposition.

20530.<sup>265</sup> In 2004, the Political Constitution of Peru (1993) was amended and definitively closed access to the regime of pensions of the Law Decree 20530, and deleted the “theory of acquired rights” obtained under this system. The closure of this system was made for reasons of social interest and took into account the financial situation of the country.<sup>266</sup> The amendment of the Political Constitution of Peru (1993) was the only way to modify the national system of pensions based on the social necessity of the Peruvian society as a whole.<sup>267</sup>

The State argued that the system of pensions of the Law Decree 20530 was closed for different reasons. Inspections carried out by authorities determined that many people had been illegally added into the system.<sup>268</sup> The other problem was the lack of equity between pensioners who were in the system governed by the Law Decree 20530 and those in the system under the Law Decree 19990. Under the Law Decree 19990 employees obtained their retirement pension at 65 years of age and with at least 20 years of contributions, whereas in the system of the Law Decree 20530 people who worked 15 years, no matter their age, acquired their retirement pension. This resulted in some employees receiving their retirement pension at the age of 35 years.<sup>269</sup> Finally, the Peruvian Government estimated that the system under the Law Decree No. 20530 imposed a financial burden on the economy of Peru equivalent to half of the external debt of the country.<sup>270</sup> It was for these reasons that the government decided the system should be closed.

In this sense, the Peruvian Government listed three objectives to establish stability for the national system of pensions. The first one was to establish a minimum amount for the pensions according to the years of contribution by the employees, and establishing a maximum limit equivalent to the salary of a congressman.<sup>271</sup> The second objective was guaranteeing the right of the pensioners under the Law Decree 20530, by implementing the possibility that the public employees affiliated to this system could opt to affiliate to a private system of pensions and, in exchange, they would receive a “recognition bond”. This recognition bond was established as compensation for the contributions made by employees during their affiliation to the system of the Law Decree 20530.<sup>272</sup> Finally, in order to stabilize the administration and funding of the pensions, the Peruvian Government created a Consolidated Fund of Reserves to support the pension obligations of the State.<sup>273</sup>

While the Peruvian Government established a valid justification to make some restrictions in the administration of the general system of pensions in Peru, this could not be used as a justification for the non-payment of the adjusted retirement pension, nor could it justify the failure to comply

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<sup>265</sup> Peruvian Legislation, *Political Constitution of Peru*, 29 December 1993, First Final and Transitory Disposition.

<sup>266</sup> Peruvian Legislation, Law No. 28389 “*Ley de reforma de los artículos 11, 103 u Primera Disposición Final Transitoria de la Constitución Política del Perú*”, 17 November 2004, art. 3.

<sup>267</sup> Jorge Toyama Miyagusuku, “*Seguridad Social Peruana: Sistemas y Perspectivas*”, *Themis Law Review*, 2004, p. 216.

<sup>268</sup> Peruvian Legislation, Statement of Reasons of the Legislative Decree No. 817, *supra note 262*, point 1.

<sup>269</sup> *Id.*, point 2.

<sup>270</sup> Jorge Toyama Miyagusuku, *supra note 267*, p. 214.

<sup>271</sup> Peruvian Legislation, Statement of Reasons of the Legislative Decree No. 817, *supra note 262*, point 2 (a).

<sup>272</sup> Nowadays the Peruvian Government recognizes four bonuses: 1992, 1996, 2001, and 20530. See [https://www.onp.gob.pe/Servicios/pertenezco\\_spp/bonos\\_fondos\\_complementarios/inf/bonos\\_reconocimiento](https://www.onp.gob.pe/Servicios/pertenezco_spp/bonos_fondos_complementarios/inf/bonos_reconocimiento)

<sup>273</sup> Peruvian Legislation, Statement of Reasons of the Legislative Decree No. 817, *supra note 262*, point 2 (d); Ministry of Economy and Finances of Peru, “*The Systems of Pensions in Peru*”, May 2004, page. 225.

with some judgments of the Constitutional Court that ordered the payment of the retirement pension and other benefits.

Other cases related to the right to social security involve the situation of more than 300,000 workers fired<sup>274</sup> by the Fujimori government pursuant to the Supreme Decree No. 004-91-PCM which planned a restructuring of the State.<sup>275</sup> Many cases were filed with the Inter-American Commission on Human Rights regarding different groups of fired employees. Many of these employees died waiting for a response from the State and the Inter-American Tribunals.<sup>276</sup>

The IACtHR has had the opportunity to decide three cases regarding social security issues of Peru. At the same time, the Inter-American Commission on Human Rights has issued two Merits Reports regarding this issue, one of which is pending before the IACtHR. The next section will discuss these cases.

***b. Inter-American Court of Human Rights: Cases Addressing the Peruvian Social Security System.***

○ *Case of the Dismissed Congressional Employees (Aguado – Alfaro et.al.) v. Peru*

This case involves the dismissal of a group of 257 workers of the National Peruvian Parliament in December of 1992, during the government of the former president Alberto Fujimori.<sup>277</sup> The government enacted the Law Decree No. 25640 that established a process of rationalization for the use of financial resources by the Parliament of Peru pursuant to which the 257 workers were dismissed.<sup>278</sup>

The Law Decree established that parliament employees who decided to resign were able to receive an economic incentive.<sup>279</sup> In the case of the employees who did not resign, they were placed on a waiting list of the National Institute of Public Administration for possible reassignment to other public institutions; however, if they could not be reassigned they were fired.<sup>280</sup> The victims of the present case decided not to accept the economic incentive and were fired.<sup>281</sup>

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<sup>274</sup>See <http://larepublica.pe/19-04-2011/el-fujimorismo-avasallo-los-derechos-fundamentales-de-los-trabajadores-0>

<sup>275</sup> Peruvian Legislation, Supreme Decree No. 004-91-PCM “*Declaran en estado de reorganizacion a todas las entidades publicas, comprendidas en el Gobierno Central, Gobiernos Regionales, Instituciones Publicas Descentralizadas, Corporaciones de Desarrollo y Proyectos Especiales*”, 8 January 1991.

<sup>276</sup> Personal experience working at the Inter-American Commission on Human Rights in the Registry Section and in the Procedural Backlog Group since 2015 to 2016.

<sup>277</sup> I/A Court H.R., Case of the Dismissed Congressional Employees (Aguado - Alfaro et al.) v. Peru, supra note 247, para. 2.

<sup>278</sup> *Id.*, para. 89.7.

<sup>279</sup> Peruvian Legislation, Law Decree No. 25640, “*Autorizan a la Comision Administradora del Patrimonio del Congreso a ejecutar un proceso de racionalizacion del personal del Congreso de la Republica*”, 21 July 1992, art. 2

<sup>280</sup> *Id.*, art. 4.

<sup>281</sup> Peruvian Legislation, Resolutions No. 1303-A-92-CACL and 1303-B-92-CACL “*Resoluciones que dispusieron el cese de 1,117 trabajadores del Congreso de la Republica del Peru*”, 31 December 1992.

The 257 fired workers submitted constitutional and administrative claims against the government; however, their claims were declared inadmissible.<sup>282</sup> The victims alleged that the Law Decree No. 25640 prevented their ability to seek a constitutional remedy for the resolution that approved their dismissal.<sup>283</sup> The victims also alleged that the measure taken by the government constituted a violation of their right to work and the possibility to have access to a retirement pension and other social security benefits.<sup>284</sup> Based on these facts, the workers denounced the Peruvian government before the Inter-American Commission on Human Rights for the violations of their rights to a fair trial (article 8 ACHR), judicial protection (article 25 ACHR), and the right to progressive realization (article 26 ACHR).<sup>285</sup> The Inter-American Commission on Human Rights decided to present this case before the IACtHR based solely on the violations of articles 8 and 25 of the ACHR.<sup>286</sup>

Peru recognized its international responsibility for actions occurring during the period of the Fujimori Government regarding many irregular dismissals but also argued that Peru had the authority and responsibility to organize its internal operations.<sup>287</sup> Peru pointed out that the subsequent government of Alejandro Toledo enacted Law No. 27487 which authorized the creation of a Special Commission responsible for reviewing cases of irregular dismissals.<sup>288</sup>

The IACtHR ruled that the Peruvian government must carry out a process of rationalization of resources within the parameters of due process, allowing the victims to have access to adequate local remedies.<sup>289</sup> Therefore, the Inter-American Court declared the responsibility of Peru for the violation of the right to a fair trial and judicial protection of the 257 workers who were unable to access judicial remedies against the measures taken by the State.<sup>290</sup> With regard to progressive realization, the Court determined that it was not necessary to consider that issue since it had not been raised by the Commission, and instead focused on the issues of the right to work and social security as components of the reparations given to the victims.<sup>291</sup>

Although the Court determined that there was a violation of judicial guarantees which affected the rights of the victims to claim social security, it did not analyze the possible violation regarding the prohibition of regressive measures with respect to economic, social, and cultural rights.<sup>292</sup> The Court could have analyzed the proportionality of the measures established in the Law Decree No. 25640, and the economic effects that it would have on the victims under article 26 of the ACHR.

The Court should have considered whether the Government took sufficient measures to ensure the economic rights of the victims to their retirement pension and health benefits before making the

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<sup>282</sup> I/A Court H.R., Case of the Dismissed Congressional Employees (Aguado - Alfaro et al.) v. Perú, *supra* note 247, pages 19-20 (Affidavit of the expert Samuel Abad Yupanqui)

<sup>283</sup> *Id.*, para. 117.

<sup>284</sup> *Id.*, para. 134.

<sup>285</sup> *Id.*, para. 2.

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*, para. 108.

<sup>288</sup> Peruvian Legislation, Law No. 27487 “*Ley que deroga el Decreto Ley No. 26093 y autoriza la conformacion de comisiones encargadas de revisar los ceses colectivos en el sector public*”, 21 June 2001, art. 3.

<sup>289</sup> I/A Court H.R., Case of the Dismissed Congressional Employees (Aguado - Alfaro et al.) v. Peru, *supra* note 247, para. 110

<sup>290</sup> *Id.*, para. 119.

<sup>291</sup> *Id.*, para. 136.

<sup>292</sup> *Id.*

decision to dismiss more than 28,123 persons.<sup>293</sup> As the International Committee of Jurists has indicated, the State should ensure the right to a retirement benefit at a minimum level necessary for subsistence through national and international cooperation.<sup>294</sup>

The Court should also have observed that any restriction on the economic, social and cultural rights, such as the right to social security or work, needs to be justified by law according to the social interest, the security of all Peruvian citizens, or the common good.<sup>295</sup> In the present case, the violation of article 26 is evident, because the dismissal of the workers that led to the restriction in obtaining their social security benefits was not justified in the text of Law Decree No. 25640.<sup>296</sup>

In this sense, the Court missed an opportunity to analyze the violation of article 26 of the American Convention regarding the prohibition on regressive measures of the rights to work and social security.

A case involving a similar factual situation was analyzed by the Inter-American Commission on Human Rights. The petition was filed by 1,631 people subjected to irregular dismissal who had been employed in Petroleum of Peru (PETROPERU), Ministry of Education (MINEDU), Ministry of Economy and Finances (MEF), and the National Enterprise of Ports S.A. (ENAPU).<sup>297</sup> The Inter-American Commission examined only the violations of articles 8 and 25 of the American Convention of Human Rights,<sup>298</sup> missing the opportunity to analyze the violation based on the prohibition on regressive measures affecting economic, social and cultural rights.

○ *Case Acevedo Buendia v. Peru*

The victims, a group of 273 members of the Association of Inactive and Retired Workers of the General Controller's Department of the Republic, sued the General Controller's Department and the Ministry of Finances and Economy through a remedy of amparo for the failure to pay their pensions according to the Law Decree No. 20530.<sup>299</sup> The 273 victims had contributed under the system of Law Decree No. 20530.<sup>300</sup> This Law Decree established that the pension gained by the pensioners should be annually adjusted with the increment of the salaries and bonuses received by active employees. However, this provision was subsequently overruled by Law Decree No. 25597.<sup>301</sup>

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<sup>293</sup> *Id.*, para. 89.37

<sup>294</sup> ICJ. International Commission of Jurists, *Principles of Limburg about the Application of the International, Treaty of Economic, Social, and Cultural Rights*, 1986, Limburg Principles No 28.

<sup>295</sup> See Limburg Principles, principle 52-55, Available at <https://www.escri-net.org/resources/limburg-principles-implementation-international-covenant-economic-social-and-cultural>

<sup>296</sup> Peruvian Legislation, Law Decree No. 25640, *supra* note 279.

<sup>297</sup> I/A Commission on Human Rights, Case of Trabajadores Cesados (PETROPERU, MEF, ENAPU, and MINEDU) v. Perú, *supra* note 247, para. 1.

<sup>298</sup> *Id.*, para. 111.

<sup>299</sup> I/A Court, Case Acevedo Buendia and others (“Cesantes y Jubilados de la Contraloría”) v. Peru, *supra* note 211, para. 43.

<sup>300</sup> *Id.*, para. 43.

<sup>301</sup> Peruvian Legislation, Law Decree No. 25597 “*Declaran en reorganización a la Contraloría General de la República*”, 7 July 1992.

The victims won the case before the Constitutional Court of Peru. The Court ordered the General Controller's Department and the Ministry of Finances and Economy to pay to the victims the salaries and bonuses withheld by these institutions from 1993 to 2002.

The victims alleged that the Government failed to comply with the payment of these benefits as ordered by the Constitutional Court of Peru, and filed a complaint against the Peruvian government with the Inter-American Commission on Human Rights for the violation of the right to property (art. 21 ACHR), the right to judicial protection (art. 25 ACHR), and the right to progressive realization (article 26 ACHR).<sup>302</sup> However, the Inter-American Commission on Human Rights only presented this case before the IACtHR for the violation of the right to property and the right to judicial protection.<sup>303</sup>

The Peruvian government argued that it has paid the pensions to the victims since 2002; however, it could not pay the pensions from 1992 to 2002 because the judgment of the Constitutional Court did not indicate where the finances to make the payments would come from.<sup>304</sup>

The Court held that the right to receive an annually adjusted pension had been upheld by Peru's highest court in its judgments.<sup>305</sup> Although the Law Decree No. 20530 was closed in 2004,<sup>306</sup> at the moment of the judgment by the IACtHR (2006), the decision of the Constitutional Court that ordered the payment was in force and constituted *res judicata*.<sup>307</sup>

The IACtHR noted that non-compliance with the decisions of the Constitutional Court of Peru represents an undoubted violation of the right to judicial protection in terms of ensuring the benefits guaranteed to the victims.<sup>308</sup> The IACtHR also highlighted that the Peruvian government should take all means necessary to comply with the judgments, including revising its financial policies.<sup>309</sup> The Court also determined the violation of the right to property caused by the non-payment of the pensions had financially detrimental effects on the patrimony of the victims.

Regarding the right of progressive realization, the IACtHR held that non-compliance with the court judgment cannot be considered as a general retrogressive policy adopted by the government which would impede the progressive realization of the right to social security.<sup>310</sup>

The IACtHR again lost a good opportunity to analyze the violation of the no-regression provision on economic, social and cultural rights under article 26. While the closure of Law Decree No. 20530 was lawful because it was proportional and reasonable based on the financial situation of the country and the social situation of the social security system in Peru, the Court could have at least analyzed the non-retrogressive principle on matters of social security in Peru. The Court,

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<sup>302</sup>I/A Court, Case Acevedo Buendia and others ("Cesantes y Jubilados de la Contraloria) v. Peru, *supra note* 211, para. 4.

<sup>303</sup> *Id.*, para. 2.

<sup>304</sup> *Id.*, para. 5.

<sup>305</sup> *Id.*, para. 52.

<sup>306</sup> Peruvian Legislation, Statement of Reasons of the Legislative Decree No. 817, *supra note* 262.

<sup>307</sup> Peruvian Legislation, *Procedural Constitutional Code*, 28 May 2004, art. VII

<sup>308</sup> I/A Court, Case Acevedo Buendia and others ("Cesantes y Jubilados de la Contraloria) v. Peru, *supra note* 211, para. 72.

<sup>309</sup> *Id.*, paras. 74-76.

<sup>310</sup> *Id.*, para. 106.

however, limited its judgment to the issue of compliance with the judgment of the Constitutional Court of Peru under the principles of judicial guarantee.<sup>311</sup>

○ *Case Canales Huapaya v. Peru.*

This case presents a similar factual scenario as that analyzed by the IACtHR in the case *Dismissed Congressional Employees (Aguado – Alfaro et.al.) v. Peru.*<sup>312</sup>

The victims were three former workers of the National Peruvian Parliament during the government of Fujimori. The victims were fired together with 11,117 other employees,<sup>313</sup> under the Law Decree No. 25640 and were prevented from seeking a constitutional remedy against the resolution that approved their dismissal.<sup>314</sup>

The victims filed a claim against the Peruvian government for the violation of the right to a fair trial (article 8 ACHR), and the right to judicial protection (article 25 ACHR). The Inter-American Commission submitted the case to the IACtHR for the violation of the rights alleged by the victims.<sup>315</sup>

The Peruvian government argued that while the remedy of amparo was prohibited by the Law Decree No. 25640, the victims had the opportunity to present an administrative claim before the Labor Court of the Superior Tribunal of Justice of Peru. Therefore, the victims did not exhaust the local remedies available at that moment.<sup>316</sup>

The IACtHR confirmed the impossibility of the victims to exhaust the constitutional remedy of amparo.<sup>317</sup> The ruling in the present case was the same as that given in the case of *Dismissed Congressional Employees (Aguado – Alfaro et.al.) v. Peru.*<sup>318</sup> The IACtHR declared the responsibility of Peru for the violation of the right to a fair trial and judicial protection.<sup>319</sup>

Once again the IACtHR overlooked the possibility of analyzing article 26 of the American Convention on Human Rights. In previous cases involving civil and political rights, the IACtHR has used the principle *jura novit curiae* to find violations of other rights not alleged by the parties but that are part of the same factual situation in the case.<sup>320</sup> In *Canales Huapaya*, the Court had previous knowledge about the situation in Peru regarding the dismissal of employees during the government of Fujimori and could have applied this principle to study the possible violation of article 26 and advance the development of the criteria for proportionality regarding the acts of dismissal and the effect on social security, and the standard for social interest necessary to justify a regressive measure.

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<sup>311</sup> *Id.*

<sup>312</sup> I/A Court H.R., Case of Canales Huapaya et al. v. Peru, *supra note* 248, para. 1.

<sup>313</sup> *Id.*, para. 89.37.

<sup>314</sup> *Id.*, para. 83.

<sup>315</sup> *Id.*, para. 4.

<sup>316</sup> *Id.*, paras. 88-89.

<sup>317</sup> *Id.*, para. 56.

<sup>318</sup> *Id.*, para. 108.

<sup>319</sup> *Id.*, para 109.

<sup>320</sup> I/A Court H.R., *Concurrent Vote of judges Roberto F. Caldas and Eduardo Ferrer Mac-Gregor* in the Case of Canales Huapaya et al. v. Peru, *supra note* 248, paras. 3-4.



### 3. Current Legislation on Social Security in Peru

The Political Constitution of Peru recognizes the universal and progressive right to social security.<sup>321</sup> The State ensures this right through the public national system of social security or the private system,<sup>322</sup> recognizing that the resources obtained from the contributions of the employees cannot be alienated.<sup>323</sup>

The current social security system in Peru is governed by two legal acts and respective regulations. The first act is the Law Decree No. 19990, which regulates the national standards for the right to a retirement pension, invalidity pension, and survivor pension; the second is the Act No. 26790, which regulates the modernization of the social security system in health, and includes subsidies for temporary incapacity, maternity, and breastfeeding.

#### ***I. Right to Retirement, Survivor and Invalidity Pension: Law Decree No. 19990***

##### ***o General Provisions.***

The current law that regulates the right to pension, survivor, and invalidity benefits in Peru is the Law Decree No. 19990 enacted during the revolutionary period of the government of the former President of Peru, General Juan Velasco Alvarado. The agency responsible for the system of pensions in Peru is the “Oficina de Normalizacion Previsional” (ONP).<sup>324</sup>

The Law Decree No. 19990 is applied to employees of the private sector, employees of the public sector who work in the judicial branch, diplomatic service and the magisterium (Professors of the Public Sector), domestic employees, artists, and other classes of employees that the Peruvian Government authorizes by Supreme Decree.<sup>325</sup> To be eligible for these benefits, employees need to make a monthly contribution of 13% of their insurable wage.<sup>326</sup> The insurable wage does not include extraordinary bonuses based on productivity, or insurance to cover losses for money or equipment given to the employee for use in their work.<sup>327</sup>

The 13% contribution rate is the result of increases during the last several years.<sup>328</sup> The Peruvian government has the option to increase or decrease this percentage based on the financial situation of the country. The law is clear, however, that in cases of financial deficit, this percentage must be reduced only when the deficit is permanent.<sup>329</sup> The ONP bases its determination on whether to

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<sup>321</sup> Peruvian Legislation, Political Constitution of Peru (1993), *supra note* 265, art 10.

<sup>322</sup> *Id.*, art. 11.

<sup>323</sup> *Id.*, art. 12.

<sup>324</sup> Peruvian Legislation, *Law Decree No. 25967*, 7 December 1992.

<sup>325</sup> Peruvian Legislation, *Law Decree No. 19990*, “*Sistema Nacional de Pensiones de la Seguridad Social*”, 30 April 1973, art. 3.

<sup>326</sup> *Id.*, art. 7.

<sup>327</sup> *Id.*, art. 9.

<sup>328</sup> The percentage of contribution to the National System of Pensions was 9% in July 1995, 11% in 1995-1996, and 13 % in 1997. See Minister of Economy and Finances, “*The System of Pensions in Peru*”, May 2004, p.3. Available at [https://www.mef.gob.pe/contenidos/pol\\_econ/documentos/sistemas\\_pensiones.pdf](https://www.mef.gob.pe/contenidos/pol_econ/documentos/sistemas_pensiones.pdf)

<sup>329</sup> Peruvian Legislation, *Law Decree No. 19990*, *supra note* 325, art. 20.

increase or decrease the percentage from an analysis of the country's financial situation over a five years period.<sup>330</sup>

This percentage needs to be paid to the national system of pensions by the employer, and the amount of the pension should be calculated according to the average of the wage of the employee during the last 12 months before the contingency that generates the pension.<sup>331</sup> It should be noted that the employee receipt of benefits cannot be affected by the employer's failure to forward the employee contribution to the ONP.<sup>332</sup>

This system also provides the employee the right to file administrative complaints before the ONP.<sup>333</sup>

- **Benefits**

- **Invalidity Pension**

This benefit is granted to an insured employee who has suffered physical or mental incapacity and who is unable to earn more than one-third part of his insurable wage.<sup>334</sup> This benefit is also granted when the employee, upon cessation of the sickness benefit, is still unable to work.<sup>335</sup>

This benefit is payable when: a) the invalidity occurs after 15 years of contributions; b) the invalidity occurs after the employee has more than 3 and less than 15 years of contributions, including 12 months of contributions during the last 36 months before the contingency; c) the invalidity occurs after the employee has made contributions for at least 3 years and half of these contributions have been made during the last 36 months before the contingency; d) the invalidity is caused by a work accident or professional infirmity, provided that before the contingency the employee was contributing to the national system;<sup>336</sup> or e) the invalidity occurs after the employee has contributed for more than 1 year and less than 3 years, counting at least 12 months of contributions in the last 36 months before the contingency.<sup>337</sup> It is important to note that when the beneficiary qualifies for a retirement pension or has recovered the capacity to work<sup>338</sup>, the invalidity benefit is canceled.<sup>339</sup>

The percentage of the invalidity pension is 50 % of employee earnings. This percentage may be increased: a) when the years of contributions exceed three years, the Government will pay 1% more for each year that exceeds the three years of contributions;<sup>340</sup> b) when the employee, during the period of invalidity, is responsible for a spouse the amount will be increased from 2 % to 10%; c) when the employee during the period of invalidity, is responsible for children the amount will

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<sup>330</sup> *Id.*, art. 19.

<sup>331</sup> Peruvian Legislation, *Regulation of the Law Decree No. 19990*, approved by Supreme Decree No. 011-74-TR, art. 24 and 53

<sup>332</sup> Peruvian Legislation, Law Decree No. 19990, *supra note 325*, art. 70.

<sup>333</sup> *Id.*, art. 80.

<sup>334</sup> *Id.*, art. 24 (a)

<sup>335</sup> *Id.*, 24 (b)

<sup>336</sup> *Id.*, art. 25.

<sup>337</sup> *Id.*, art. 28.

<sup>338</sup> *Id.*

<sup>339</sup> *Id.*, art. 25.

<sup>340</sup> *Id.*, art. 27.

be increased from 2 % to 5 %;<sup>341</sup> and d) when the employee due to the disability requires permanent care from another person, a minimum remuneration will be granted.<sup>342</sup>

The Peruvian Government reduces the amount of this benefit in cases where the beneficiary is receiving this benefit and is also performing paid work.<sup>343</sup> In cases where the employee has returned to his remunerative activities, it is a duty of the employee to inform the ONP about this event within 30 days after returning to work.<sup>344</sup>

Finally, the beneficiary is also entitled to obtain medical assistance. To obtain this benefit, the employee needs to contribute with a payment of 4% of the invalidity pension to the ONP.<sup>345</sup>

### - *Retirement Pension*

The beneficiaries of the retirement pension are male employees who have reached 60 years of age, female employees who are 55 years old, or employees who have reached the mandatory years of contribution established by the ONP.<sup>346</sup>

The percentage of the retirement pension is equivalent to 50 % of the employee's remuneration for male employees who have complied with 15 years of contributions, and in the case of female employees who have made 13 years of contribution.<sup>347</sup> This percentage may be increased: a) when, after reaching 15 years (men) or 13 years (women) of contributions, the employee continues working and contributing to the system, in which case the State recognizes for each additional year an additional 2 % (men) and 2.5 % (women);<sup>348</sup> b) when the person who has qualified for retirement pension is responsible for a spouse, the amount will be increased between 2 % to 10%; and c) when the person who has qualified for retirement pension is responsible for children, the amount will be increased from 2 % to 5 %.<sup>349</sup> When the employee has at least 5 years of contribution, the employee will have the right to claim a reduced pension in the amount of 1/30<sup>th</sup> (men) or 1/25<sup>th</sup> (women) per year of contribution.<sup>350</sup>

A special case is presented for early retirement when a female employee reaches the age of 50 years with 25 years of contributions, and male employees reach the age of 55 years with 30 years of contributions, the retirement pension is equivalent to 30 % of their previous earnings.<sup>351</sup> The Law Decree No. 19990 does not explain the difference in treatment between male and female workers in receiving this benefit.

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<sup>341</sup> *Id.*, art. 29.

<sup>342</sup> *Id.*, art. 30; Peruvian Legislation, Regulation of the Law Decree No. 1999, *supra note* 331, art. 36.

<sup>343</sup> Peruvian Legislation, Law Decree No. 19990, *supra note* 325, art. 32

<sup>344</sup> Peruvian Legislation, Regulation of the Law Decree No. 1999, *supra note* 331, art. 39.

<sup>345</sup> Peruvian Legislation, Law Decree No. 19990, *supra note* 325, art. 86.

<sup>346</sup> *Id.*, art. 38.

<sup>347</sup> *Id.*, art. 41.

<sup>348</sup> *Id.*

<sup>349</sup> *Id.*, art. 43; Peruvian Legislation, Regulation of the Law Decree No. 19990, *supra note* 331, art. 43.

<sup>350</sup> Peruvian Legislation, Law Decree No. 19990, *supra note* 325, art. 42.

<sup>351</sup> *Id.*, art. 44.

In any case, the retirement pension cannot exceed the maximum amount of S/. 857. 36 (Nuevos Soles) or \$ 280. 00 (US Dollars), and it cannot be less than of S/. 415. 00 (Nuevos Soles) or \$ 150. 00 (US Dollars).<sup>352</sup>

However, a beneficiary can engage in parallel paid work; however, the amount received for that work together with the retirement pension cannot exceed 50 % of the Peruvian Tax Unit (UIT).<sup>353</sup> The Ministry of Economy and Finances approved for 2017 the amount of the UIT in S/. 4050.00 (Nuevos Soles).<sup>354</sup> The beneficiary must inform the ONP of the “parallel paid work”.<sup>355</sup>

Finally, the beneficiary of the retirement pension has the right to receive medical care. To obtain this benefit, the ONP will retain 4% of the amount of the retirement pension to guarantee this benefit.<sup>356</sup>

### - *Survivor Pension*

Peru divides the survivor pension into three subcategories: widowhood pension, orphan's pension, and ascendants pension.<sup>357</sup> As a general rule, these benefits are provided in specific situations: a) when the breadwinner who died qualified for a retirement pension or invalidity pension; b) when the insured employee died as a consequence of an industrial accident or professional illness; and c) when the insured employee died as a consequence of a common accident and was contributing to the national system of pensions.<sup>358</sup>

#### ❖ Widowhood pension

Persons entitled to this benefit are: a) the spouse of the employee or pensioner who died; b) a spouse with a disability; c) or a person over sixty years of age who depended on the employee or pensioner who died.<sup>359</sup>

To be entitled to the spousal benefit, the parties must have been married at least one year before the death of the employee or pensioner, and before the male spouse was 60 years old or the female spouse was 50 years old. There are some exceptions to the year of marriage and age rule: a) the employee or pensioner died naturally, b) the husband has one or more children with the employee or pensioner, and c) the widow is pregnant.<sup>360</sup> In those cases, the amount payable for this benefit is 50 % of the invalidity or retirement pension to which the employee was entitled.<sup>361</sup>

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<sup>352</sup> Ministry of Economy and Finances, “The System of Pensions in Peru”, *supra note 273*. p. 2.

<sup>353</sup> Peruvian Legislation, Law Decree No. 19990, *supra note 325*, art. 45.

<sup>354</sup> Peruvian Legislation, Supreme Decree N° 353-2016-EF “*Aprueban el valor de la UIT para el 2017*”, 21 December 2016.

<sup>355</sup> Peruvian Legislation, Regulation of the Law Decree No. 19990, *supra note 331*, art. 45.

<sup>356</sup> Peruvian Legislation, Law Decree No. 19990, *supra note 325*, art. 86.

<sup>357</sup> *Id.*, art. 50.

<sup>358</sup> *Id.*, art. 51; Peruvian Legislation, Regulation of the Law Decree No. 1999, *supra note 331*, art. 46.

<sup>359</sup> Peruvian Legislation, Law Decree No. 19990, *supra note 325*, art. 53.

<sup>360</sup> *Id.*, art. 53.

<sup>361</sup> *Id.*, art. 54.

### ❖ Orphan Pension

This benefit is granted to the children of the employee or pensioner who are under 18 years old or have a disability preventing any work.<sup>362</sup> However, this benefit can be extended when the orphan children are continuing higher education. Initially this right for orphans who are continuing superior studies ended at 21 years old;<sup>363</sup> now, however, there is no age restriction.<sup>364</sup>

Beneficiaries have the right to receive 40% of the retirement or invalidity pension.<sup>365</sup> An orphan with a disability who requires permanent attention by a third person receives an additional benefit equivalent to a minimum remuneration.<sup>366</sup>

#### - *Ascendants Pension*

This benefit is granted to the surviving parents of the employee or pensioner, provided that the beneficiaries at the moment of the contingency comply with some conditions: a) the parents have a disability and the father is 60 years old, and the mother is 55 years old; b) the parents were economically dependent of the employee or pensioner; or c) the pensioner did not children or a spouse.

The maximum amount payable to the father and mother is 40% of the retirement or invalidity pension of the employee or pensioner.

In general, to continue receiving the survival pension the beneficiary must: a) report each semester to the ONP its survival condition, b) take the medical examinations demanded by the ONP, and c) report that they are receiving for paid work an amount that does not exceed two minimum wages established each year by Peru. If the beneficiary fails to fulfill these requirements the survival pension is suspended by the Government.<sup>367</sup>

The survival benefit also expires when: a) the beneficiary gets married; b) the beneficiary with a disability recovers his ability to work; c) the orphan reaches 18 years old or discontinues studies; or d) when the beneficiary dies.<sup>368</sup>

## II. *The System of Social Security in Health: Act No. 26790*

The system of social security in health offers coverage for health care, social welfare, and work and professional diseases to employees of public or private institutions.<sup>369</sup> The services include prevention, promotion, recovery, and grants to ensure the health and well-being of the

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<sup>362</sup> *Id.*, art. 56.

<sup>363</sup> Constitutional Court of Peru, *Case Colegio de Abogados del Cusco y del Callao y mas de cinco mil ciudadanos v. Parliament of Peru*. Judgment File No. 050-2004-AI-TC, Inciso b) Point No. 2, 12 June 2005.

<sup>364</sup> Peruvian Legislation, Regulation of the Law Decree No. 19990, *supra note* 331, art. 51.

<sup>365</sup> Peruvian Legislation, Law Decree No. 19990, *supra note* 325, art. 57.

<sup>366</sup> *Id.*, art. 30.

<sup>367</sup> *Id.*, art. 64.

<sup>368</sup> *Id.*, art. 65.

<sup>369</sup> Peruvian Legislation, Act No 26790, “*Modernization of the Social Security in Health Act*,” 15 May 1997, art 4; Supreme Decree No. 009-97-SA, *Regulation of the Modernization of the Social Security in Health Act*, 8 September 1997, arts.1 and 3.

beneficiaries. The Institution responsible of managing this system is ESSALUD, which is the Public Institution of Social Security in Health in Peru.<sup>370</sup>

Public and private entities are required to inform the ESSALUD about which employees are contributing to the social security in health, including their dependents.<sup>371</sup>

The monthly contributions to social security in health are equivalent to 9 % of the remuneration received by the employee, and 4 % in case of beneficiaries of retirement, invalidity or survivor pension.<sup>372</sup> In the case of beneficiaries of a pension, the 4% of contribution should be determined without counting the Christmas and national festivities bonuses.<sup>373</sup> These contributions cannot be alienated, so they cannot be subject to provisional measures or judicial executions.<sup>374</sup>

The coverage of the system of social security in health includes a) benefits for preventive care and medical attention; b) benefits of welfare; c) monetary benefits through grants; and d) funeral benefits.<sup>375</sup> To obtain complete coverage the beneficiary must have made monetary contributions to ESSALUD within the 6 months before the contingency. This situation is different in the case of individuals receiving a retirement pension, in which case they are not subject to a time period for contribution.<sup>376</sup>

#### *a. Prevention and Benefits*

Benefits for medical prevention are pivotal to preserving health, and to minimize any risk that might occur.<sup>377</sup> This benefit includes health education, the evaluation and mitigation of risks, and immunizations.<sup>378</sup>

#### *b. Recuperation Benefits*

This benefit provides medical attention during an infirmity, with the aim of solving the deficiencies of health that are present. These benefits are: medical attention, the provision of medication, prosthesis and orthopedic implements, and rehabilitation services. This benefit includes care for pregnant mothers.<sup>379</sup>

#### *c. Welfare and Social Promotion Benefit*

These benefits cover rehabilitation for work, helping employees to return to their work positions.<sup>380</sup>

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<sup>370</sup> Peruvian Legislation, Act No. 26790, *supra* note 369, arts. 1 and 2.

<sup>371</sup> Peruvian Legislation, *Res. N° 26-SG-ESSALUD-2016. Oficina de la Secretaria General del Seguro Social de Salud (ESSALUD) en la que se comunica la modificación del artículo 5° de la Ley N° 29816, que establece las funciones de la SUNAT*, 5 February 2016.

<sup>372</sup> Peruvian Legislation, Act No 26790, *supra* note 369 art 6; Peruvian Legislation, *Supreme Decree No. 009-97-SA*, *supra* note 369, art. 33.

<sup>373</sup> Peruvian Legislation, Act No 30334, “*Ley que establece medidas para dinamizar la economía para el 2015*”, 18 June 2015, art. 3, and 4.

<sup>374</sup> Peruvian Legislation, *Supreme Decree No. 009-97-SA*, *supra* note 369, art.5.

<sup>375</sup> Peruvian Legislation, Act No. 26790, *supra* note 369, art. 3.

<sup>376</sup> *Id.*, art 10; Peruvian Legislation, *Act. 28791, “Ley que establece modificaciones a la Ley No. 26790, Ley de Modernización de la Seguridad Social en Salud”*, 21 July 2006, art. 2.

<sup>377</sup> Peruvian Legislation, *Supreme Decree No. 009-97-SA*, *supra* note 369, art. 10.

<sup>378</sup> *Id.*, art. 11.

<sup>379</sup> *Id.*, art. 12.

<sup>380</sup> *Id.*, art. 13.

d. Unemployment Benefit

This benefit is granted when employment is terminated and the employees contributed for at least five months during the last three years before the contingency. The beneficiaries and dependents are also eligible for health coverage for 12 additional months after the contingency.<sup>381</sup>

e. Economic Benefits: Grants for Temporary Incapacity or Maternity and Breastfeeding

To be eligible for these grants a worker must have contributed for at least three consecutive months or four months of non-consecutive contributions within the six months before the contingency.<sup>382</sup>

i. *Temporary Incapacity grant*

This benefit has the aim to compensate economic losses generated by non-work-related accidents. This benefit is paid in money and covers employees until they are able to return to their work.<sup>383</sup>

The first 20 days of incapacity benefits are paid by the employer and the remainder, up to a maximum of 11 months and 10 days, are paid by ESSALUD.<sup>384</sup>

ii. *Maternity and Breastfeeding grant*

The maternity grant compensates for income loss caused by childbirth and the care of the newborn baby. This benefit is granted for 98 days, which period can be divided before, during or after childbirth.<sup>385</sup> In the case where the beneficiary of the maternity grant is also receiving an incapacity grant, this latter benefit is suspended.<sup>386</sup>

The breastfeeding grant is a monetary amount for the care of the newborn baby.<sup>387</sup> This grant expires six months from the date when the incapacity due to childbirth has ended or the maximum postpartum period, whichever is longer.<sup>388</sup>

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<sup>381</sup> Peruvian Legislation, Act No. 26790, *supra note* 369, art. 11.

<sup>382</sup> *Id.*, art. 12.

<sup>383</sup> Peruvian Legislation, Supreme Decree No. 009-97-SA, *supra note* 369, art.15; Supreme Decree No. 020-2006-TR, “Aprueban normas reglamentarias de la Ley No. 28791 que establece modificaciones a la Ley de Modernización de la Seguridad Social en Salud”, 28 December 2006, art. 4.

<sup>384</sup> Peruvian Legislation, Act No. 26790, *supra note* 369, art. 12.

<sup>385</sup> Peruvian Legislation, Supreme Decree No. 009-97-SA, *supra note* 369, art. 16.

<sup>386</sup> *Id.*

<sup>387</sup> *Id.*, art. 17.

<sup>388</sup> Peruvian Legislation, Act No. 26790, *supra note* 369, art. 12; Peruvian Legislation, Supreme Decree No. 009-97-SA, *supra note* 369, art. 23.

f. Complementary Accident Insurance for High-risk Activities

This benefit provides additional coverage for work accidents and professional diseases to the affiliates of the system of social security in health. Employers are obligated to provide this benefit for the employees, which covers illnesses, invalidity and funeral costs in case of death.<sup>389</sup> This benefit also includes medical attention, rehabilitation and reinsertion to the workplace; however, it does not include the grants of maternity or incapacity that are regulated directly by the ONP.<sup>390</sup>

Peru has ratified ILO Convention No. 102 dealing with social security minimum standards and the ILO Convention No. 183 dealing with benefit of maternity protection, this latter will enter into force on May 2017.<sup>391</sup> Although Peru has not ratified the majority of ILO Conventions on social security, the Peruvian system of social security guarantees the same contingencies established by the ILO Conventions. Therefore, it is necessary to make a comparison between the ILO standards and the national standards with the aim to determine the level of compliance of Peru regarding the ILO Convention No. 102 and standards established in the Inter-American System of Human Rights. The next graphic illustrates that level of compliance.

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<sup>389</sup> Peruvian Legislation, Supreme Decree No. 009-97-SA, *supra note* 369, art. 82.

<sup>390</sup> *Id.*, art. 83.

<sup>391</sup> ILO Convention No. 102 ratified in August of 1961 (only accepted Parts II, III, V, VIII and IX); ILO Convention No. 183 ratified in May of 2016 (not in force until May 2017).



	<b>ILO International Standards</b>	<b>Inter-American Standard</b>	<b>Compliance of Peru</b>
<b>Medical Care</b>	Curative or Preventive Nature. (C. No. 102)	No standard	Granted
	Covered for the 100 % of employees and apprentices, extended to wives and dependents. (C No. 130)	No standard	Not specified. No apprentices covered.
	Benefits: pharmaceutical supplies, general practitioner care, hospitalization, (C No. 102) dental care, and rehabilitation. (C No. 130)	No standard	Granted. Include within the benefits. Prosthesis and orthopedic implements.
	The benefit can be subjected to a qualification period. (C No. 130)	No standard	Granted.
	Additional coverage, when the employee loses his/her job up to 26 weeks for prescribed diseases – tuberculosis, HIV, among other. (C. Nos 130 and 102)	No standard	Not specified.
<b>Sickness Benefit</b>	Morbid condition and suspension of earnings (C Nos 130 and 102)	No standard	Not specified.
	Cover 100% of employees, and apprentices, extended to wives and dependents. (C. No. 130)	No standard	Not specified. No apprentices.
	Monetary benefit received: 60 % of previous earnings, with payment beginning after first three days of contingency. (C. No. 130)	No standard	Not specified.
	52 weeks of coverage. (C. No. 130)	No standard	Not specified.
	Funeral Benefit (C No. 130)	No standard	Granted.

	<b>ILO International Standards</b>	<b>Inter-American Standards</b>	<b>Compliance of Peru</b>
<b>Invalidity Benefit</b>	Temporary or Permanent Invalidity (C Nos. 128 and 102)	No standard	Included physical and mental health.
	Covered 100 % of employees and apprentices. (C. No. 128)	No standard	Not granted to apprentices.
	Monetary benefit received: 60 % of previous earnings. (Recommendation No. 131)	No standard	Monetary Benefit: 50 % of previous earnings. This benefit could increase in special situations: employee responsible for his wife or his children.
	Person with invalidity cannot earn more than one-third of normal wage. (Recommendation No. 67)	No standard	A reduction must be made in case of doing paid work.
	Contributions: 15 years of contribution or employment. (C. No. 128)	No standard	15 years of contribution or employment.
	A proportional reduction of the benefit shall be granted when the person has less than 15 years of employment or contribution. (C. No. 128)	No standard	Granted.
	The State shall provide a proper position to the employee to work and if that is not possible, the invalidity benefit shall be granted. (C. No. 128 and Recommendation No. 67)	No standard	Not granted.

	ILO International Standards	Inter-American Standards	Compliance of Peru
<b>Old-Age Benefit</b>	Eligibility age: 65 years (men), 60 years (women) (Recommendation No. 64)  65 years (men and women) (C No. 128)	No standard	Condition: 60 years (men), 55 years (women)
	Contribution: 30 years of contribution or employment. (C Nos. 128 and 102)	No standard	Contribution: 30 years of contribution (men), and 25 years of contribution (women).
	A proportional reduction of the benefit must be granted when the person has less than 30 years of contribution or employment. (C No. 128)	No standard	Employee has at least 5 years of contributions.  Female employee reaches the age of 50 years with 25 years of contribution, and male employees reach the age of 55 years with 30 years of contributions.
	Monetary benefit received: 55 % previous earnings. (Recommendation No. 131)  45% previous earnings (C No. 128)	No standard	Monetary benefit received: 50 % of previous earnings.
	Not specified	Part of the Right to Property (Acquired Rights)	Intangible rights
	Possible reduction of the amount. No test specified. (C No. 128)	It is possible to reduce the amount: Test: proportionality + social wellbeing + financial situation	Granted.
	Recognizes the interrelation between the right to social security with the right to work. (Committee on Economic, Social and Cultural Rights of the United Nations)	The violation of the right to work is also a violation to the right to the social security	Granted.

	<b>ILO International Standards</b>	<b>Inter-American Standards</b>	<b>Compliance of Peru</b>
<b>Survivor Benefit</b>	Dependents of the breadwinner: wives, children, stepchildren, adopted children and illegitimate children. (C. No. 128)	No standard	Granted with three types of grants: widowhood, orphan pension, and ascendant pension.
	Cover 100% of employees and apprentices. (C No. 128)	No standard	No apprentices.
	Contribution: 15 years of contribution or employment. (C Nos. 128 and 102)	No standard	Not established.
	A proportional reduction of the benefit shall be granted when the person has less than 15 years of contribution or employment. (C Nos. 128 and 102)	No standard	Not established.
	Monetary benefit received: 55% of previous earnings. (Recommendation No. 131) 45 % of previous earnings. (C No. 128)	No standard	Monetary benefit received: a) widowhood benefit (50 % of the invalidity or retirement pension), and b) Orphan Pension and Ascendants pension (40 % of the invalidity or retirement pension or for both parents)
	Special conditions to wives to obtain this benefit. (C No. 128)	No standard	Granted.
	Special conditions to children over 18 years old to obtain the benefit (successful and continuous studies) (Recommendation No. 67)	No standard	Granted.

	<b>ILO International Standards</b>	<b>Inter-American Standards</b>	<b>Compliance of Peru</b>
<b>Maternity Protection</b>	Cover 100 % of all pregnant employee. (C No. 183)	No standard	Not specified.
	Benefits: perinatal/childbirth/ postnatal care, and medical care in general. (C. No. 183)	No standard	Granted.
	18 weeks of coverage (Recommendation No. 191)	No standard	98 days of coverage
	14 weeks of coverage (Convention No. 183)		
	Monetary benefit received: 45 % of previous earnings. (C Nos. 183 and 102)	No standard	Not specified.
	In cases of illness or complications during maternity, a cash benefit could be insured for no less than 2/3 % of previous earnings. (C No. 183)	No standard	Not specified
	Special care to women workers in hazardous work. (C No. 183 and Recommendation No. 191)	No standard	Not specified
<b>Employment Injury</b>	Traumatic injury or disease resulting from employment. (C No. 121)	No standard	Complementary Insurance for Risky Work (SCTR)
	Contingency caused in the workplace or on the way to the workplace (C No. 121)	No standard	Ensured
	Cover 100 % of all employees and apprentices (C No. 121)	No standard	Not specified.
	Monetary benefit received: 60 % of previous earnings (temporal or total incapacity), and 50 % in case when the employee responsible for the support of the family dies. (C No. 121)	No standard	Depends on the insurance policy. No specified amount.
	Benefits: pharmaceutical supplies, general practitioner care, hospitalization, dental care, and rehabilitation. (C No. 121)	No standard	Not specified.
	Vocational rehabilitation shall be provided. (C. No. 102)	No standard	Depends on the insurance policy

The above graphic indicates the main weaknesses and strengths of the international standards, the Inter-American standards and Peruvian national law on social security.

## **Medical Care**

### *- Strengths*

In the case of the benefit for medical care, the Peruvian government provides these benefits to the employees (not apprentices) who contributed 4% of their monthly earnings to the national social security health system and includes the same benefits required by ILO Conventions No. 102 and 130, including prosthetic and orthopedic implements.

ILO Convention No. 130 includes apprentices as beneficiaries of medical care. This provision is very important because also apprentices could require curative or preventive care.

Finally, ILO Conventions No. 130 and 102 grant additional coverage when the employee loses this benefit and is receiving medical treatment against HIV and tuberculosis.

### *- Weaknesses*

The Peruvian Law does not provide coverage for apprentices nor does it extend the duration of coverage for prescribed diseases such as HIV and Tuberculosis.

## **Sickness Benefit**

### *- Strengths*

ILO Conventions No. 130 and 102 cover both employees and apprentices, and extends the benefit to wives and other dependents. This is crucial to comply with the principle of universality in the provision of social security benefits established in the ILO Recommendation No. 202 concerning the minimum social protection floors.

### *- Weaknesses*

Neither the Peruvian government nor the Inter-American System of Human Rights has established clear standards for sickness benefits. Peru has the obligation to regulate this benefit as a member state which has ratified the ILO Convention No. 102.

## **Invalidity Benefit**

### *- Strengths*

The Peruvian system for invalidity benefits includes not only temporary and permanent invalidity but also mental invalidity. The Peruvian legislation also provides an additional monetary benefit in cases when the employee with a disability is responsible for dependents (wife/husband and children).

ILO Convention No. 128 ensures this benefit to all employees and apprentices, which represents an important advance in recognizing that apprentices are also exposed to work-related or common accidents. Moreover, this Convention grants a reduced pension to employees who have not reached 15 years of contribution or employment.

### *- Weaknesses*

Peru does not grant this benefit to apprentices, which is contrary to ILO Convention No. 128. It does not regulate the placement of employees with a disability to another suitable position within their workplace, which is contrary to ILO Convention No. 128 and ILO Recommendation No. 67.

## **Old-Age Benefit**

### *- Strengths*

The monetary benefit granted in Peru is 50 % of previous earnings of the employee, which is 5% more than the percentage established by ILO Convention No. 128. Recommendation No. 131 increases this percentage to 55%; however, this recommendation is not binding on the states, but it reflects an international recognition of the necessity to increase this monetary benefit. Finally, Peruvian legislation recognizes that this benefit cannot be alienated, which goes hand in hand with the theory of “vested rights” developed by the IACtHR.

The Inter-American Court has developed an important test to measure the proportionality of the reduction of a retirement pension or benefit that is also used by the European Court of Human Rights, as will be discussed in the next chapter. This test comprises the analysis of the proportionality, the social well-being and the necessity of the measure in a democratic society.

### *- Weaknesses*

The main weakness with this benefit is the discrimination in treatment between men and women. In Peru, the age to obtain a retirement pension is different than that established by

ILO Convention No. 128. Peru grants this benefit to male workers at the age of 60 years, and in the case of a female worker at the age of 55. Peru also has adopted a system of contributions instead of years of work and establishes a distinction between men and women. In the case of women, they need to have 25 years of contributions, whereas men need to complete 30 years of contributions.

### **Survivor Benefit**

#### *- Strengthens*

ILO Convention No. 128 provides this benefit to wives, children, stepchildren, adopted children and illegitimate children. Independently of the incorrect use of the term “illegitimate children”, the ILO goes a step forward in the recognition of this right to children no matter their filiation with the breadwinner.

Moreover, this Convention clarifies what requirements wives and children need to fulfill to acquire this benefit, thus providing guidance to states about what requirements are necessary to ensure this benefit.

#### *- Weaknesses*

Peru does not grant this benefit to apprentices and their relatives. Likewise, Peru does not establish a period of contribution or years of work that the breadwinner needs to comply with to generate this benefit for his survivors. Therefore, the possibility to obtain a full or a reduced pension is not clear.

### **Maternity Benefit.**

#### *- Strengths*

ILO Convention No. 183 and Recommendation No. 191 emphasize the necessity to establish clear rules for the protection of pregnant workers in hazardous employment. The special care that pregnant women need during perinatal, childbirth and postnatal care should be taken into consideration by public and private employers.

#### *- Weaknesses*

ILO Convention No. 183 only recognizes this benefit to pregnant employees and not apprentices. This is not coherent with the other ILO Conventions that cover both employees and apprentices. Therefore, the ILO must expand the coverage of this benefit to protect all women employees and apprentices.



Peru has not regulated who are the persons covered by this benefit, the monetary benefit received, or the special care that women workers in hazardous work need to have. Additionally, Peru does not establish whether the 98 days of coverage are business or common days; that gap can be problematic.

Since ILO Convention No. 183 will enter into force in Peru in May of 2017, Peru should consider these weak points and adjust their domestic legislation.<sup>392</sup>

## **Employment Injury**

### **- Strengths**

One strength of ILO Convention No. 121 is the wide coverage of medical services that beneficiaries receive. Moreover, the ILO regulates the necessity to provide vocational rehabilitation to employees and apprentices for an employment injury.

### **- Weaknesses**

Peruvian legislation does not specify if apprentices are eligible for this benefit. Peru has, however, established special insurance for some workers who undertake dangerous working activities, such as mining or other extractive industries. Finally, the percentage of this benefit and the medical services that this benefit includes are not specified in Peru, unlike ILO Convention No. 121.

In this sense, it is easy to determine what the weaknesses and strengths of the Peruvian system of social security are, some of which are holdovers from the Fujimori government which continue generating problems with social security before regional tribunals.

The next chapter will complement the present study by analyzing the standards of the Council of Europe and the domestic legislation of social security in Spain.

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<sup>392</sup> See [http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312328](http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312328)

## CHAPTER III

### The Council of Europe and the Right to Social Security.

This Chapter comprises two important parts leading to a general conclusion about desirable standards of social security. The first part analyses the standards of the Council of Europe (CoE) in social security and the main jurisprudential standards developed by the European Court of Human Rights (ECtHR). The second part studies the local standards of social security in Spain to determine compliance by this country with the CoE regional standards.

#### 1. The Council of Europe and Social Security Standards

The CoE is an international organization founded in 1949.<sup>393</sup> This Organization, composed by 47 European member states,<sup>394</sup> is focused on the regulation of three main pillars -- the promotion of democracy, the protection of human rights, and the rule of law in Europe.<sup>395</sup>

Under the pillar of protection of human rights, the CoE has expressed its concern about the regulation of social security issues within its 47 member states. These concerns are reflected in some regional treaties, which provide legal and technical standards for social security and its benefits.

The main regional instruments that regulate the right to social security by the CoE are the European Social Charter, the European Social Code of 1964 and 2009, and the European Convention on Human Rights. These standards are presented in the following sections.

##### - *European Social Charter*

The European Social Charter was enacted in 1961 by the CoE. This treaty has the purpose of guaranteeing fundamental social and economic rights, providing special protection for certain social issues, and welfare.<sup>396</sup> The protections cover workers and their dependents.<sup>397</sup>

Article 12 of the Charter recognizes that each European citizen has the right to a system of social security on a satisfactory level that ensures at least the requirements included in ILO Convention No. 102 on the Minimum Standards of Social Security.<sup>398</sup> Additionally, the Charter highlights the importance of ensuring a high level of social security, imposing on states the duty to ensure progressive realization according to their economic development.<sup>399</sup>

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<sup>393</sup> See <http://www.internationaldemocracywatch.org/index.php/council-of-europe->

<sup>394</sup> See <http://www.coe.int/en/web/about-us/do-not-get-confused>

<sup>395</sup> See <http://www.coe.int/en/web/about-us/do-not-get-confused>

<sup>396</sup> See <https://www.coe.int/en/web/turin-european-social-charter>

<sup>397</sup> Council of Europe. *European Social Charter*, Collected texts (7<sup>th</sup> edition), 1961, part I, point 12.

<sup>398</sup> *Id.*, art. 12.1. and 2.

<sup>399</sup> *Id.*, art. 12.3.

The CoE highlights the importance of establishing bilateral or multilateral agreements to improve the social security system.<sup>400</sup> The agreements need to be governed by rules of equal treatment and ensure the granting, maintenance and resumption of social security rights.<sup>401</sup>

The European Social Charter also requires non-discriminatory treatment between men and women within local legislation. It recognizes the right of women employees to receive the same social security benefits as men.<sup>402</sup> This standard also contributed to establishing a prohibition on differential treatment between nationals and non-nationals of the CoE member states at the moment the individual qualifies for the social security benefits.<sup>403</sup> The Social Charter, however, does not establish the specifics for social security benefits; these specifics are found in the European Codes for Social Security, discussed below.

Finally, to ensure this concept of equality for social security, the CoE created the European Committee of Social Rights.<sup>404</sup> This Committee, composed of 15 members, determines whether State Parties of the CoE are in conformity in law and in practice with the provisions of the Social Charter.<sup>405</sup> In one of its last reports, the Committee discussed the detrimental effects that the financial crisis in Europe has had in relation to the right to social security. The report analyzed the reduction in revenues which implied a reduction of contributions due to a higher level of unemployment and the drop in investment returns of social security funds, and at the same time payment increased due to higher unemployment and higher costs of housing and health care.<sup>406</sup>

### - *European Code of Social Security*

The CoE in 1964 enacted the European Code of Social Security with the aim to define common European benefits under the system of social security,<sup>407</sup> which benefits were not specified in the European Social Charter due to the non-technical nature of that instrument.<sup>408</sup> These standards describe the coverage of the different benefits that social security includes, such as benefits for medical care, sickness, old-age, work accidents and occupational disease, family, maternity, invalidity and survivors.<sup>409</sup>

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<sup>400</sup> *Id.*, art. 12.4.

<sup>401</sup> *Id.*

<sup>402</sup> *Id.*, art. 8.1.

<sup>403</sup> *Id.*, art. 12.4(a)

<sup>404</sup> Council of Europe. *Rules of Procedure of the Governmental Committee of the European Social Charter and the European Code of Social Security*. Adopted by the Committee at its 125<sup>th</sup> meeting, 2012, art. 28; European Social Charter. Governmental Committee of the European Social Charter and the European Code of Social Security, *Ways of streamlining and improving the reporting and monitoring system of the European Social Charter*. Adopted by the Committee of Ministers during their 1196<sup>th</sup> meeting, 2-3 April 2014, para. 1.

<sup>405</sup> Council of Europe, European Social Charter, *supra note* 397, p. 177 (point IV European Committee of Social Rights, Section C, Rule 2).

<sup>406</sup> Council of Europe. Committee of Experts on Social Security (CS-SS). *Meeting Report. Directorate General II – Social Cohesion. Social Police Department*. 5<sup>th</sup> Meeting, Strasbourg, 1-3 June 2010, p. 16.

<sup>407</sup> See <http://www.coe.int/en/web/turin-european-social-charter/treaties1>

<sup>408</sup> Committee of Experts on Social Security, *supra note* 406, p. 12.

<sup>409</sup> *Supra note*. 407.

This European Code of Social Security has two versions, the original enacted in 1964,<sup>410</sup> and the revised edition of the Code enacted in 2009. This revised edition improves on the provisions contained in the first Code of 1964. The most important improvements are higher rates of coverage, the extension of the protection level and duration of each benefit, and the inclusion of a non-discrimination clause which benefits both women and men employees.<sup>411</sup>

One particularity of the CoE codes of 1964 and 2009 is that they are incorporated in two different treaties. Thus, countries that have ratified the code of 1964 are not obligated to comply with the provisions of the code of 2009 if they have not ratified the latter. The Code of 1964 has 21 ratifications and 6 signatures not followed by ratifications;<sup>412</sup> and the code of 2009 has only been ratified by the Netherlands and includes 13 signatures not followed by ratifications.<sup>413</sup>

In addition to both codes, the Protocol of the European Code of Social Security of 1964 was created with the aim to clarify the provisions established in the 1964 Code. It needs to be separately ratified by each member state of the CoE. As of this writing only 7 countries have ratified this instrument and 6 countries have signed without ratification.<sup>414</sup>

The next section examines the social security standards provided by these three instruments, which comprise the medical care, sickness, old-age, work accidents and occupational disease, family, maternity, invalidity and survivors benefits. The present study will focus on the social security benefits for employees, not independent contractors.

## - *Technical European Standards of Social Security*

### a. *Medical Care*

This benefit covers medical care costs for curative and preventive care<sup>415</sup> for employees, apprentices and their dependent spouses and children.<sup>416</sup> The coverage includes caregiving assistance by third parties in cases of morbid conditions caused by an accident or disease.<sup>417</sup> The

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<sup>410</sup> Council of Europe. *European Code of Social Security of 1964*. European Treaty Series No. 48. Strasbourg, 16 April 1964. Available at

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168006b65e>

<sup>411</sup> Council of Europe. *Revised European Code of Social Security of 2009*. European Treaties Series No. 139. Rome. Revised edition of the European Code of Social Security of 1990, 01 December 2009. See

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007b3d6>

<sup>412</sup> Council of Europe. *Chart of signatures and ratifications of the European Code of Social Security of 1964*. Status as of 07 May 2017. Available at [http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/048/signatures?p\\_auth=BQbZWTUn](http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/048/signatures?p_auth=BQbZWTUn)

<sup>413</sup> Council of Europe. *Chart of signatures and ratifications of the Revised Code of Social Security of 2009*. Status as of 07 May 2017. Available at [http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/139/signatures?p\\_auth=BQbZWTUn](http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/139/signatures?p_auth=BQbZWTUn)

<sup>414</sup> Council of Europe. *Chart of signatures and ratifications of the Protocol to the European Code of Social Security of 1964*. Status as of 07 May 2017. Available at [http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/048A/signatures?p\\_auth=BQbZWTUn](http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/048A/signatures?p_auth=BQbZWTUn)

<sup>415</sup> Revised European Code of Social Security of 2009, *supra* note 411, art. 8.

<sup>416</sup> *Id.*, art. 9.1.

<sup>417</sup> Council of Europe. *Explanatory Report to the European Code of Social Security of 1990 (Revised Edition 2009)*. European Treaty. Series No. 139. Rome 6.XI.1990, para. 103.

objective of this benefit is to preserve, restore or improve the health and ability to work for insured persons.<sup>418</sup> Each state has a margin of discretion to determine the best paths to fulfill this benefit.<sup>419</sup>

Under the Code of 2009, at least 80 % employees should receive coverage for this benefit.<sup>420</sup> That percentage differs from the code of 1964 that requires coverage for only 50 % of employees.<sup>421</sup> This is one of the main differences between these codes.

Both codes ensure payment to persons entitled to receive the benefit after compliance with a qualifying period of employment established by each government.<sup>422</sup> The codes themselves do not regulate this minimum period of employment; each country is allowed to determine that period, but it cannot be of such an unreasonable duration that in effect most employees would not qualify.<sup>423</sup>

Likewise, the persons who are receiving, or applying to receive, invalidity or accidental or occupational disease benefits, are entitled to continue receiving this benefit so long as the infirmity exists even when they are also receiving retirement benefits. This benefit is also extended to spouses and children.<sup>424</sup>

One of the advantages of this benefit is that multiple medical services are available to protected persons. In determining the medical service available, states should take into consideration good medical practices.<sup>425</sup> The Code of 2009 recognizes the following services: general practitioner care and specialist care inside or outside hospitals; care provided by a non-medical professional but allied to the medical profession; pharmaceutical supplies; maintenance in a hospital or in other medical institutions; dental care; medical rehabilitation; and transportation of the patient.<sup>426</sup> The Code of 1964 recognizes a more limited range of services: general practitioner and specialist care, pharmaceutical supplies and care during the pregnancy of the protected employee.<sup>427</sup> This latter benefit is covered through the maternity benefit in the Code of 2009.<sup>428</sup>

In the case where an employee loses his employment, states can ensure the continuity of this benefit under prescribed conditions.<sup>429</sup> Nevertheless, the Code of 1964 requires its continuity for at least 26 weeks after job loss in the case of a morbid condition.<sup>430</sup>

Each state is allowed to ask for a partial contribution from the potential beneficiaries to help cover the cost of providing this benefit. This contribution cannot impose an impossible economic burden on a potential beneficiary,<sup>431</sup> especially in cases of persons with chronic diseases or destitute persons.<sup>432</sup> Moreover, the quality of the medical care should not be affected by the fact that the

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<sup>418</sup> Revised European Code of Social Security of 2009, *supra* note 411, art. 10.3

<sup>419</sup> Explanatory Report to the European Code of Social Security of 1990, *supra* note 417, para. 136.

<sup>420</sup> Revised European Code of Social Security of 2009, *supra* note 411, art. 9.4.

<sup>421</sup> European Code of Social Security of 1964, *supra* note 410, art. 9. a

<sup>422</sup> Revised European Code of Social Security of 2009, *supra* note 411, art. 11.

<sup>423</sup> *Id.*

<sup>424</sup> *Id.*, art. 9.3.

<sup>425</sup> Explanatory Report to the European Code of Social Security of 1990, *supra* note 417, para. 124.

<sup>426</sup> Revised European Code of Social Security of 2009, *supra* note 411, art. 10.1.

<sup>427</sup> European Code of Social Security of 1964, *supra* note 410, art. 10.

<sup>428</sup> Revised European Code of Social Security of 2009, *supra* note 411, art. 53.1.

<sup>429</sup> *Id.*, art. 12.

<sup>430</sup> European Code of Social Security of 1964, *supra* note 410, art. 12.

<sup>431</sup> Revised European Code of Social Security of 2009, *supra* note 411, art. 10.2.

<sup>432</sup> *Id.*, para. 131.

individual only made a partial contribution. The required contribution cannot exceed 25 % of the potential costs of medical care or 33.13 % of the costs for routine dental care.<sup>433</sup>

Finally, this benefit can be withheld, withdrawn or suspended in cases where the beneficiary fails to comply with the rules established to verify the existence of the contingency.<sup>434</sup> It is important to note that both codes allow the state to determine the circumstances under which the misconduct of the beneficiary results in withholding, withdrawal or suspension of the benefit.

### ***b. Sickness Cash Benefit***

This benefit covers the incapacity to work derived from a non-work-related illness or accident that causes a suspension of earnings.<sup>435</sup>

Under the Code of 2009 at least 80 % of the employees and apprentices in both the public and private sector must be covered;<sup>436</sup> the Code of 1964, sets this percentage at 50 %.<sup>437</sup>

To be entitled to this benefit, the beneficiaries can be required to have contributed to the system for a specific period. However, this period cannot be so long as to result in making many employees ineligible for the benefit.<sup>438</sup>

The CoE Codes also allow states to impose a waiting period before this benefit is paid.<sup>439</sup> The code of 2009 establishes a waiting period of three days, and the code of 1964 sets a higher period of 26 weeks.<sup>440</sup>

Once the period for contributions and the waiting period are met, beneficiaries have the right to receive periodic cash benefits.<sup>441</sup> According to the Code of 2009, the cash benefit should be equivalent to at least 50 %, with a cap of 65 %, of the wage of the beneficiary employee.<sup>442</sup> The Code of 1964 establishes a lower percentage equivalent to 45%.<sup>443</sup> Both codes establish that the cash benefit is ensured to a person with a spouse and two children. Neither Code establishes a minimum benefit in case of employees without children or a spouse.

The benefit is paid for the duration of the qualifying sickness, or until the individual is eligible for payment of old-age, invalidity or rehabilitation cash benefit.<sup>444</sup> In no case, however, must the

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<sup>433</sup> Explanatory Report to the European Code of Social Security of 1990, *supra note* 417, para. 129.

<sup>434</sup> Revised European Code of Social Security of 2009, *supra note* 411, art. 74.1.d

<sup>435</sup> *Id.*, art. 13; Explanatory Report to the European Code of Social Security of 1990, *supra note* 417, para. 141.

<sup>436</sup> Revised European Code of Social Security of 2009, *supra note* 411, art. 14.

<sup>437</sup> European Code of Social Security of 1964, *supra note* 410, art. 15.a

<sup>438</sup> Revised European Code of Social Security of 2009, *supra note* 411, art. 16; Explanatory Report to the European Code of Social Security of 1990, *supra note* 417, para. 151.

<sup>439</sup> Revised European Code of Social Security of 2009, *supra note* 411, art. 17.1

<sup>440</sup> European Code of Social Security of 1964, *supra note* 410, art. 18.

<sup>441</sup> Revised European Code of Social Security of 2009, *supra note* 411, art. 15

<sup>442</sup> *Id.*, part iii - schedule to part XI (periodical payment.)

<sup>443</sup> European Code of Social Security of 1964, *supra note* 410, part. iii - schedule to part XI (periodical payments to standard beneficiaries.)

<sup>444</sup> Revised European Code of Social Security of 2009, *supra note* 411, art. 17.3.

payment exceed 52 weeks for each illness, or 78 weeks total during a period of three years of work.<sup>445</sup>

The sickness benefit is not paid if the employee is already receiving old-age, invalidity or rehabilitation benefits.<sup>446</sup> These latter benefits are considered to cover the necessities derived from sickness.

Finally, this benefits is ensured to survivors and dependents or other persons and includes a payment to cover funeral costs.<sup>447</sup> However, the CoE codes do not specify criteria for the payment of funeral costs.

### *c. Old-Age Benefit*

This benefit covers employees who have reached 65 years of age. The age for eligibility can be increased by states according to the demographic, economic and social conditions of each country.<sup>448</sup> However, any increase needs to be adequately justified by each state.<sup>449</sup>

This age of 65 can, in some cases, be reduced by states<sup>450</sup> based on particular circumstances, such as:

- Employees who work in arduous or unhealthy occupations, where as a consequence of these activities, employees can acquire an occupational disease. Some activities which are normally considered arduous or unhealthy are shift work, split-shift work, all-weather work on building sites, underground work, assembly-line work, and work at sea.<sup>451</sup>
- Employees who are unable to work due to an incapacity. This case is subject to two conditions: (i) the existence and degree of incapacity can be prescribed by each country, and (ii) each country can set a minimum age for eligibility.<sup>452</sup>
- Employees who are not employed. To qualify a person must comply with two conditions: (i) reach a prescribed age, and (ii) be unemployed at least the entire year before attaining the prescribed age of 65 years old.<sup>453</sup>
- Employees who have contributed to the benefit fund for a prescribed period.<sup>454</sup>

As with the other benefits, old-age benefits should be granted to at least 80 % of the work force;<sup>455</sup> the Code of 1964 set the percentage at 50%.<sup>456</sup>

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<sup>445</sup> *Id.*, art. 17.3.

<sup>446</sup> Explanatory Report to the European Code of Social Security of 1990, *supra note* 417, para. 157.

<sup>447</sup> Revised European Code of Social Security of 2009, *supra note* 411, art. 18.

<sup>448</sup> *Id.*, art. 26.

<sup>449</sup> Explanatory Report to the European Code of Social Security of 1990, *supra note* 417, para. 204.

<sup>450</sup> Revised European Code of Social Security of 2009, *supra note* 411, art. 27.1

<sup>451</sup> Explanatory Report to the European Code of Social Security of 1990, *supra note* 417, para. 208.

<sup>452</sup> *Id.*, para. 209.

<sup>453</sup> *Id.*, para. 212.

<sup>454</sup> Revised European Code of Social Security of 2009, *supra note* 411, art. 27.1

<sup>455</sup> *Id.*, art. 28.b

<sup>456</sup> European Code of Social Security of 1964, *supra note* 410, art. 27.a

Once employees have qualified, this benefit should be paid periodically<sup>457</sup> and for the duration of the contingency.<sup>458</sup> To qualify for a full pension benefit, the Code of 2009 requires employees to have made contributions, engaged in occupational activity and/or maintained a residence in the country for 40 years in total.<sup>459</sup> The Code of 1964 ensures this benefit after 30 years of contribution and employment, or 20 years of residence.<sup>460</sup> This period of time can be reduced by states but cannot be increased.<sup>461</sup> States cannot require more than 15 years of contributions, occupational activity or residence in order for an employee to qualify for a reduced pension.<sup>462</sup>

Once an employee has qualified for the old-age benefit, the amount of the benefit must be at least 50 %, with a cap of 65 %, of the wage of the employee according to the Code of 2009.<sup>463</sup> The Code of 1964 establishes a lower percentage, equivalent to 40 %.<sup>464</sup> In both codes, the percentage is established based on a family comprised of a spouse and two children; there is no clear regulation about the minimum percentage in cases of single child families, families with no children, or single employees.

Finally, a pension can be withheld, withdrawn or suspended when employees are involved in gainful activity.<sup>465</sup> While the Codes allow for the possibility of withholding, withdrawal or suspension of the benefit for other reasons, the Codes do not specify what those reasons can be.

#### *d. Work Accident and Occupational Disease Benefit*

This benefit covers work-related accidents or occupational diseases caused by the performance of work. States have the duty to ensure that in the public or private sector, according to the Code of 2009, at least 80 % of the workforce is covered by this benefit;<sup>466</sup> the Code of 1964 establishes a lesser percentage equivalent to 50 %.<sup>467</sup>

Persons entitled to this benefit include employees and apprentices, and their survivor spouses and children. In the cases of apprentices, states have the freedom to determine some qualifying criteria for this benefit,<sup>468</sup> and in the case of surviving spouses, states can require the proof of dependency status to the breadwinner at the moment of death, or when the surviving spouse is incapable of meeting his/her own needs.<sup>469</sup>

This benefit covers the following categories:<sup>470</sup>

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<sup>457</sup> Revised European Code of Social Security of 2009, *supra note* 411, art. 29.1

<sup>458</sup> *Id.*, art. 31.

<sup>459</sup> *Id.*, art. 29.2

<sup>460</sup> European Code of Social Security of 1964, *supra note* 410, art. 29.1.a

<sup>461</sup> Explanatory Report to the European Code of Social Security of 1990, *supra note* 417, para. 234

<sup>462</sup> Revised European Code of Social Security of 2009, *supra note* 411, arts. 29.4 and 30.

<sup>463</sup> *Id.*, part iii - schedule to part. XI (periodical payments)

<sup>464</sup> European Code of Social Security of 1964, *supra note* 410, part iii - schedule to part XI (periodical payments to standard beneficiaries)

<sup>465</sup> Revised European Code of Social Security of 2009, *supra note* 411, art. 74.1.j

<sup>466</sup> *Id.*, art. 35.

<sup>467</sup> European Code of Social Security of 1964, *supra note* 410, art. 33.

<sup>468</sup> Explanatory Report to the European Code of Social Security of 1990, *supra note* 417, para. 264.

<sup>469</sup> *Id.*, para. 267.

<sup>470</sup> Revised European Code of Social Security of 2009, *supra note* 411, art. 32.



- The cost of necessary medical care,
- The total loss of earning capacity,
- The loss of support of the surviving spouse and children in the case of the death of the breadwinner.

These payments are made from the initial occurrence of the accident or disease and continues during the duration of the incapacity to work. This benefit guarantees both personal and familial necessities. The personal necessities cover the cost of medical assistance to continue treatment until recovery or death of the victim.<sup>471</sup> Familial necessities include the payment to a surviving spouse or children of a cash benefit that covers the loss of means of support due to the death of the breadwinner.<sup>472</sup>

The CoE has highlighted the importance for the state to clearly identify what constitutes work-related accidents or occupational disease. Specifically regarding occupational disease, the state should publish a detailed list of occupational diseases, including the conditions causing such disease.<sup>473</sup>

The CoE details the medical services provided by this benefit. The Code of 2009 specified the following services:

- General practitioner care and specialist care, inside or outside hospitals
- The assistance of non-medical personnel.
- Pharmaceutical supplies.
- Maintenance in a hospital.
- Dental care, which includes prostheses.
- Medical rehabilitation
- The transportation of patients.
- Care in the workplace, which includes emergency care for victims of serious accidents and follow-up care for victims of minor injuries.

For its part, the Code of 1964 only specifies general and specialist care, the provision of pharmaceutical supplies, and dental care.<sup>474</sup> Therefore, the Code of 2009 provides a wider range of benefits than the services listed in the Code of 1964.

Payments should be periodical,<sup>475</sup> and if governed by the Code of 1964 the benefit should be 50 % of wages earned by the male employee who has a wife, and two children; and in the case of a male employee's death, the cash benefit to his widow and two children should be equivalent to 40 % of his wage.<sup>476</sup>

The Code of 2009 not only increases the percentage of the benefit but also recognizes the equality between men and women in receiving this benefit. Thus, in cases of incapacity to work or total loss of earnings, an employee with a spouse and two children should be granted a benefit equal to

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<sup>471</sup> *Id.*, art. 41.

<sup>472</sup> Explanatory Report to the European Code of Social Security of 1990, *supra note* 417, para. 295.

<sup>473</sup> Revised European Code of Social Security of 2009, *supra note* 411, art. 34

<sup>474</sup> European Code of Social Security of 1964, *supra note* 410, art. 34.

<sup>475</sup> Revised European Code of Social Security of 2009, *supra note* 411, arts. 37 and 38.1.

<sup>476</sup> European Code of Social Security of 1964, *supra note* 410, part VI – schedule to part XI (periodical payments to standard beneficiaries)

50% to 65 % of the wage of the employee.<sup>477</sup> In case of death of the breadwinner with a surviving spouse, the cash benefit must be at least 50 %, with a cap of 65 %, of the wage of the deceased employee; or in the case of death of the breadwinner with a surviving spouse and two children, the cash benefit should be equivalent to 65 % of the wage.<sup>478</sup>

To qualify for this benefit, employees are not required to make any contributions,<sup>479</sup> and the employee and his beneficiaries receive the medical care benefits for as long as the employee is unable to work due to the accident or illness.<sup>480</sup>

Finally, the CoE emphasizes the importance for states to take action to prevent work accidents or occupational diseases, with the aim to improve the health of employees and detect diseases that they can acquire at work.<sup>481</sup> Additionally, the Codes require the provision of occupational rehabilitation services to prepare employees to resume their work functions or facilitate them in obtaining a new work.<sup>482</sup>

#### *e. Family benefit*

This benefit ensures adequate financial maintenance for children of employees and apprentices.<sup>483</sup> The Code of 1964 guarantees this benefit to 50 % of the workforce,<sup>484</sup> whereas, the Code of 2009 establishes that this benefit should be granted to all employees and apprentices.<sup>485</sup>

This benefit should be provided through periodical payments, which can be a combination of cash benefits, tax relief, benefits in kind or social services for families.<sup>486</sup> Employers cannot require employees to contribute to the cost of the benefit.<sup>487</sup>

This benefit should be also granted to children of employees who are residents of the country independent of their nationality. In such a case, however, states can request such employees to make contributions for a period of six months.<sup>488</sup>

According to the Code of 2009, the value of this benefit is equivalent to 1.5 % of the gross domestic product or 3 % of the minimal wage of an ordinary laborer.<sup>489</sup> The Code of 1964 establishes the value of this benefit at 1.5 % of the wage of an ordinary adult.<sup>490</sup>

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<sup>477</sup> Revised European Code of Social Security of 2009, *supra note* 411, part VI - schedule to part XI (periodical payment)

<sup>478</sup> *Id.*

<sup>479</sup> Explanatory Report to the European Code of Social Security of 1990, *supra note* 417, para. 295; Revised European Code of Social Security of 2009, *supra note* 411, art. 40.

<sup>480</sup> Revised European Code of Social Security of 2009, *supra note* 411, art. 36.

<sup>481</sup> Explanatory Report to the European Code of Social Security of 1990, *supra note* 417, para. 301.

<sup>482</sup> Revised European Code of Social Security of 2009, *supra note* 411, art. 42.

<sup>483</sup> *Id.*, art. 45; Explanatory Report to the European Code of Social Security of 1990, *supra note* 417, para. 307.

<sup>484</sup> European Code of Social Security of 1964, *supra note* 410, art. 41. a

<sup>485</sup> Revised European Code of Social Security of 2009, *supra note* 411, art. 46.

<sup>486</sup> *Id.*, art. 47.

<sup>487</sup> *Id.*, art. 48.

<sup>488</sup> Explanatory Report to the European Code of Social Security of 1990, *supra note* 417, para. 326.

<sup>489</sup> Revised European Code of Social Security of 2009, *supra note* 411, art. 49.

<sup>490</sup> European Code of Social Security of 1964, *supra note* 410, art. 44.

Finally, the duration of this benefit expires once the children reach 16 years old or an older age as established by domestic legislation.<sup>491</sup>

#### *f. Maternity Benefit*

The objective of this benefit is to protect women employees or apprentices who have suffered the suspension of earnings due to pregnancy.<sup>492</sup> It also provides benefits to dependent female children and wives of employees<sup>493</sup> due to pregnancy, confinement and its consequences.<sup>494</sup>

The Code of 1964 establishes that private or public employers should provide this benefit to at least 50 % of women employees and apprentices.<sup>495</sup> This protection was expanded in the Code of 2009, to include all women employees and apprentices.<sup>496</sup>

This benefit takes two forms: the first one is a cash benefit, and the second is the provision of medical care.

##### ○ *Cash Benefit:*

Entitlement to the cash benefit can be subject to the employee contributing to a fund for a period (the duration of which is not defined by the codes). However, it cannot be an unreasonably long period.<sup>497</sup> The CoE allows each country to establish the period for qualification.

States can also request a partial contribution by women employees or apprentices to obtain this cash benefit, but that contribution cannot impose hardship or render the medical protection less effective.<sup>498</sup>

Payment in case of suspension of earnings should be in the form of periodic payment,<sup>499</sup> equivalent to 45% of the regular wage of the employee per the Code of 1964;<sup>500</sup> under the Code of 2009 this percentage must be at least 50%, with a cap of 65%, of a person with a spouse and two children.<sup>501</sup> The payment is not required to exceed fourteen weeks unless the period of absence from work is longer.<sup>502</sup>

Finally, the Code of 2009 provides for parental leave allowing either the father or mother to choose who is going to receive the cash benefit to look after the child.<sup>503</sup> This provision is very important to break stereotypes that only mothers are responsible to take care of a newborn.

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<sup>491</sup> Explanatory Report to the European Code of Social Security of 1990, *supra note* 417, para. 330.

<sup>492</sup> Revised European Code of Social Security of 2009, *supra note* 411, art. 51.

<sup>493</sup> *Id.*, art. 52.

<sup>494</sup> *Id.*; Explanatory Report to the European Code of Social Security of 1990, *supra note* 417, para. 331.

<sup>495</sup> European Code of Social Security of 1964, *supra note* 410, art. 48.

<sup>496</sup> Revised European Code of Social Security of 2009, *supra note* 411, art. 48.a

<sup>497</sup> *Id.*, art. 55.

<sup>498</sup> *Id.*, art. 53.2.

<sup>499</sup> *Id.*, art. 54.

<sup>500</sup> European Code of Social Security of 1964, *supra note* 410, part VIII – schedule to part XI (periodical payments to standard beneficiaries)

<sup>501</sup> Revised European Code of Social Security of 2009, *supra note* 411, part VIII - schedule to part XI (periodical payments)

<sup>502</sup> *Id.*, art. 56.

<sup>503</sup> Explanatory Report to the European Code of Social Security of 1990, *supra note* 417, para. 372.

○ *Medical Care:*

Medical care is provided during pregnancy, confinement or its consequences.<sup>504</sup> No partial contribution by women employees or apprentices is required to receive this benefit.<sup>505</sup>

According to the code of 2009, medical care should include the following services:<sup>506</sup>

- Pre-natal, confinement and post-natal care, inside or outside the hospital.
- The assistance of non-medical personnel, when assistance is necessary.
- Pharmaceutical supplies
- Maintenance in a hospital
- Dental care.
- Medical rehabilitation.
- Transportation of the beneficiary.
- Hospitalization.

The Code of 1964, however, only recognizes pre-natal, confinement and post-natal care, and hospitalization.<sup>507</sup>

Finally, the CoE specifies that a state must pay maternity benefits, even if the individual is also receiving invalidity, old-age, survivor or unemployment benefits. Nevertheless, states have the option to establish rules regarding the continuation or suspension of the invalidity, old-age, survivor or unemployment benefits while the individual is receiving the maternity benefit.<sup>508</sup>

***g. Invalidity Benefit:***

Invalidity benefits are normally paid after the exhaustion of the sickness benefit. This benefit covers the incapacity to work or earn money after the expiration of a prescribed period of sickness.<sup>509</sup>

The Code of 1964 establishes that this benefit should be granted to at least to 50 % of the workforce;<sup>510</sup> the Code of 2009 establishes that at least 80 % of the workforce needs to be ensured by their private or public employers.<sup>511</sup>

To qualify for this benefit, the Code of 2009 requires employees to comply with 15 years of contributions, occupational activity or residence.<sup>512</sup> The Code of 1964 only requires 10 years of contributions, occupational activity or residence in order to qualify.<sup>513</sup> In cases where employees

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<sup>504</sup> *Id.*, para. 335.

<sup>505</sup> *Id.*, para. 367

<sup>506</sup> Revised European Code of Social Security of 2009, *supra note* 411, art. 53.1.

<sup>507</sup> European Code of Social Security of 1964, *supra note* 410, art. 49.2.

<sup>508</sup> Revised European Code of Social Security of 2009, *supra note* 411, art. 52.3.

<sup>509</sup> *Id.*, art. 58.

<sup>510</sup> European Code of Social Security of 1964, *supra note* 410, art. 55.a

<sup>511</sup> Revised European Code of Social Security of 2009, *supra note* 411, art. 59.

<sup>512</sup> *Id.*, art. 60.5.

<sup>513</sup> European Code of Social Security of 1964, *supra note* 410, art. 57.1.a

have made contributions, carried out occupational activity or residence for less than 15 years, they are entitled to receive a reduced benefit.<sup>514</sup>

This benefit is paid on a periodical basis<sup>515</sup> during the contingency.<sup>516</sup> The Code of 1964 establishes that in case of a man with a wife and two children the benefit is equivalent to 40 % of the wage of the employee.<sup>517</sup> The Code of 2009 increases this percentage to a scale from 50 % to 65 % of the wage of employees, and also changes the term “man” to “person” which requires coverage for female workers.<sup>518</sup>

While an employee receives this benefit, states also have the duty to provide functional and occupational rehabilitation facilities to prepare the employees for resuming their functions or being relocated to another labor position.<sup>519</sup> This provision complements the obligation to take adequate measures to facilitate the movement of persons with disabilities within the workplace, and promotes other measures to achieve the social integration of disabled persons with disabilities,<sup>520</sup> as envisioned in the Strategy on the Rights of Persons with Disabilities 2017-2023 approved by the CoE in November 2016.<sup>521</sup>

Finally, this benefit can be withheld, withdrawn or suspended when the beneficiary is engaged in a gainful activity.<sup>522</sup> Once again the CoE does not clearly establish what situations justify withholding, withdrawal or suspension of the benefit.

#### *h. Survivors benefit*

This benefit covers the loss of support suffered by surviving spouses and children after the death of a breadwinner who was an employee or apprentice.<sup>523</sup> In the case of apprentices, each state is free to regulate the specific conditions under which this benefit will be provided.<sup>524</sup>

Under the Code of 2009, states should ensure that public or private employers provide this benefit to at least 80 % of the workforce; the Code of 1964 establishes a smaller percentage equivalent to 50 %.<sup>525</sup>

To qualify for this benefit, surviving spouses need to attain a prescribed age no older than 65 years,<sup>526</sup> but states are encouraged to reduce that age.<sup>527</sup> There are some exceptions which prohibit

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<sup>514</sup> Revised European Code of Social Security of 2009, *supra note* 411, art. 60.5

<sup>515</sup> *Id.*, art. 60.1

<sup>516</sup> *Id.*, art. 63.

<sup>517</sup> European Code of Social Security of 1964, *supra note* 410, part III - schedule to part. IX (periodical payments to standard beneficiaries)

<sup>518</sup> Revised European Code of Social Security of 2009, *supra note* 411, art. 63.

<sup>519</sup> *Id.*, art. 62.

<sup>520</sup> *Id.*

<sup>521</sup> Council of Europe, *Disability Strategy 2017-2023 “Human Rights: A reality for all”*, 30 November 2016, paras. 16, 19 and 21.

<sup>522</sup> Revised European Code of Social Security of 2009, *supra note* 411, art. 74.1.j

<sup>523</sup> *Id.*, art. 64.1.

<sup>524</sup> *Id.*, art. 65.1.a

<sup>525</sup> European Code of Social Security of 1964, *supra note* 410, art. 65.1.b

<sup>526</sup> Revised European Code of Social Security of 2009, *supra note* 411, art. 64.2.

<sup>527</sup> Explanatory Report to the European Code of Social Security of 1990, *supra note* 417, para. 416.

states from requiring compliance with a prescribed age, such as when the spouse is unable to work, or when the spouse has at least one dependent child.<sup>528</sup>

An additional criteria for qualification according to the Code of 2009, requires the deceased breadwinner to have completed a period of fifteen years of contribution, occupational activity or residence.<sup>529</sup> The Code of 1964 establishes the same period of fifteen years in cases of contribution and occupational activity, but in the case of residence, deceased employees need only have 10 years.<sup>530</sup>

A reduced benefit amount can be granted in cases when breadwinners have completed five years or more of contributions, occupational activity or residence.<sup>531</sup> This five year period can be extended depending on the age of the breadwinner.<sup>532</sup> The CoE allows each European state the possibility to increase the minimum period of five years in order to obtain this benefit.

The amount of this benefit depends on the composition of the family of the deceased breadwinner. The Code of 1964 establishes an amount of 40% of the wage of the breadwinner when the family is composed of a widow and two children.<sup>533</sup> The Code of 2009 provides 50% of the wage of the breadwinner in cases when the family only includes a spouse, 65% when the family is composed of a spouse and two children, or 20% when the family only comprises one child.<sup>534</sup> This payment continues until the replacement by invalidity or old-age pension.<sup>535</sup>

The benefit can be withheld, withdrawn or suspended in two specific situations: first when the surviving spouse cohabits with another person, or the spouse is involved in a gainful activity;<sup>536</sup> second in cases where the surviving spouse overcomes his/her disability or has no more than one dependent child.<sup>537</sup>

Finally, it is important to mention that the CoE does not establish separate conditions for surviving children to obtain the survivor benefit. Spouses are the only ones who need to comply with some requirements to access this benefit, and based on spousal entitlement children are also beneficiaries. However, neither code addresses the situation of orphans who are engaged in satisfactory studies after the prescribed age by which they are no longer considered minors. Finally, the CoE suggests that states consider the possibility of requiring employers to give priority to surviving spouses to replace breadwinners in their jobs if the spouse is qualified.<sup>538</sup>

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<sup>528</sup> Revised European Code of Social Security of 2009, *supra note* 411, art. 64.3.

<sup>529</sup> *Id.*, art. 66.

<sup>530</sup> European Code of Social Security of 1964, *supra note* 410, art. 63.1.a

<sup>531</sup> Revised European Code of Social Security of 2009, *supra note* 411, arts 66.6 and 67.1.

<sup>532</sup> *Id.*, art. 67.2.

<sup>533</sup> European Code of Social Security of 1964, *supra note* 410, part III - schedule to part X (periodical payments to standard beneficiaries)

<sup>534</sup> Revised European Code of Social Security of 2009, *supra note* 411, part III - schedule to part X (periodical payments to standard beneficiaries)

<sup>535</sup> Explanatory Report to the European Code of Social Security of 1990, *supra note* 417, para. 452.

<sup>536</sup> Revised European Code of Social Security of 2009, *supra note* 411, art. 74. i and j.

<sup>537</sup> Explanatory Report to the European Code of Social Security of 1990, *supra note* 417, para. 453.

<sup>538</sup> Revised European Code of Social Security of 2009, *supra note* 411, art. 66.4.

- *European Standards in Social Security*

One of the differences between the Inter-American and the European Systems of Human Rights is the development of regional standards about social security issues. The European Court of Human Rights (ECtHR), which is a tribunal created by the Council of Europe with the aim to ensure the observance of the state parties to the provisions established in the European Convention on Human Rights,<sup>539</sup> has judged many cases related to social security, establishing important standards for the development of social security in the context of real life situations.

While the European Social Charter is not justiciable before the ECtHR, the right to social security has been analyzed under the rights contained in the European Convention on Human Rights, such as the right to life, property and non-discrimination.

The next section discusses the jurisprudence of the ECtHR regarding the right to life, property, and non-discrimination as applied to issues relating to social security. Due to the volume of judgments regarding social security, only the most important cases will be analyzed.

*a. Right to Life.*

The right to life is established in article 2 of the European Convention on Human Rights.<sup>540</sup> This right comprises not only an abstention by states from actions that could cause death, but also implies a duty to establish measures to protect persons from any cause that can breach the right to life.<sup>541</sup>

The ECtHR has considered social security issues implicating the right to life in cases that involve the denial of medical care in work-related accidents. The ECtHR has ruled that the right to life is breached when a state has failed to protect individuals against threats to public health caused by inadequate provision of health services for individuals involved in industrial accidents.<sup>542</sup> Additionally, the ECtHR noted that medical centers and hospitals need to be in good condition, otherwise the right to life could be breached.<sup>543</sup>

The failure to properly investigate the death of employees caused by work-related accidents also breaches the right to life in cases where the interests, agents or organs of a state are involved. The ECtHR underlines that an official and effective investigation is necessary to determine the causes

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<sup>539</sup> Council of Europe. *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, 4 November 1950, art. 19.

<sup>540</sup> *Id.*, art. 2.

<sup>541</sup> European Court of Human Rights, *Case of McCann v. United Kingdom*, Application No. 18984/91, Judgments of 27 September 1995, series A 334, paras. 146-150; *Case of L.C.B v. United Kingdom*, Application No. 23413/94, Judgment of 9 June 1998, 9 June 1998, paras 36-37.

<sup>542</sup> European Court of Human Rights, *Case of Cyprus v. Turkey*, Application No. 25781/94, Judgment of 10 May 2001, para. 219; *Case of Oneryildiz v. Turkey*, Application No. 48939/99, Judgment of 30 November 2004, paras 97-101.

<sup>543</sup> European Court of Human Rights. *Case of Erikson v. Italy*, Application No. 37900/97, First Decision of Admissibility of 26 October 1999; *Case of Calvelli and Ciglio v. Italy*, Application No. 32967/96, Judgment of 17 January 2002, paras. 49, 51 and 53.

of diseases, and that this burden should not fall only to the relatives.<sup>544</sup> The ECtHR has not yet addressed the responsibility of states when the failure of adequate supervision over private companies by an “organs of a state” causes on employee’s death due to an industrial accident.

**b. Right to Protection of Property.**

*b.1. General rules*

The right to protection of property is recognized in Protocol I of the European Convention of Human Rights:

*Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*

*The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws, as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.*<sup>545</sup>

Some confusion could be generated between the distinction of the terms “possessions” and “property”. Nevertheless, the ECtHR has clarified that the term possessions is used as synonymous with property.<sup>546</sup>

The right to property comprises three elements. First is the peaceful enjoyment of the property; second is the protection against the deprivation of possession; and finally the control of the use of property.<sup>547</sup> The right to property as defined by these three elements must be respected and protected by states.

The ECtHR recognizes that the right to property includes the contributory and non-contributory benefits earned under a social security system. To generate that right, each person needs to comply with the qualification criteria established by the local legislation of their country.<sup>548</sup> However, when the payment of a social security benefit is based solely on the discretion of states without establishing any qualification prerequisites that benefit is outside the protection of Protocol 1.<sup>549</sup> Thus, to come with the protection of the right to property, social security benefits must be regulated by law, and be lawfully earned after compliance with the local requirements established by law.

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<sup>544</sup> European Court of Human Rights. *Case of Pereira Henriques v. Belgium*, Application No. 60255/00, Judgment of 9 May 2006, para. 55.

<sup>545</sup> Council of Europe. *Protocol I of the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 20 March 1952, art. 1.

<sup>546</sup> European Court of Human Rights. *Case of James and others v. United Kingdom*, Application No. 8793/79, Judgment of 21 February 1986, Series A No. 98, para. 146.

<sup>547</sup> *Id.*, paras. 107 and 114.

<sup>548</sup> European Court of Human Rights. *Case of Salesi v. Italy*, Application No. 13023/87, Judgment of 23 February 1993, Series A No. 257, para 24.

<sup>549</sup> European Court of Human Rights. *Case of Luczak v. Poland*, Application No. 77782/01, Decision of Admissibility of 27 March 2007, part 3



The ECtHR has also recognized that the enforceability of social security benefits is covered by the protection offered under the Protocol 1.<sup>550</sup> This principle covers cases where the individual has qualified for a social security benefit but is not paid because of discrimination<sup>551</sup> based on, for example, nationality or gender.<sup>552</sup>

### *b.2. Calculation of Pensions and Benefits*

The ECtHR has consistently held that “*the right to an old-age or any social benefit in a particular amount*” is not guaranteed.<sup>553</sup> The European Commission on Human Rights (which was subsequently eliminated) clarified that point and established that Protocol 1 does not guarantee a person, who has contributed to a social security system, the right to obtain a pension in a particular amount.<sup>554</sup> The economic or political situation of each country can be taken into account in allowing countries to reduce the amount of pensions or benefits. Nevertheless, that reduction cannot affect the reasons for which the benefit was established;<sup>555</sup> for instance, the monetary amount received under the maternity benefit cannot be a reduced by an amount that impedes women employees from receiving medical assistance during pregnancy, confinement and its consequences.

To carry out a legitimate reduction, the ECtHR requires that such reduction pass a test that assesses the proportionality and necessity of the need for a reduction and the legitimacy of the law that establishes that reduction.<sup>556</sup> The reduction should be based on reasonable criteria, and a reduction cannot totally eliminate benefits previously earned,<sup>557</sup> or impose on employees an individual and excessive burden.<sup>558</sup>

Finally, a reduction of a pension or benefit could be based on reasons of social justice aimed at certain political benefits or well known “financial privileges”.<sup>559</sup> The ECtHR noted that normally these benefits were granted in military governments in favor of established groups of public servants.<sup>560</sup> In this sense, the ECtHR allows the reduction of abusive excess amounts but requires

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<sup>550</sup> European Court of Human Rights. *Case of Vasilyev v. Russia*, Application No. 66543/01, Judgment of 12 April 2006, para. 38

<sup>551</sup> European Court of Human Rights. *Case of Stec and Others v. the United Kingdom*. Applications nos. 65731/01 and 65900/01, Judgment of 12 April 2006, para. 58.

<sup>552</sup> European Court of Human Rights. *Case of Gaygusuz v. Austria*, Application No. 17371/90, Judgment of 16 September 1996, paras. 42 and 43; *Case of Koua Poirrez v. France*, Application No. 40892/98, Judgment of 30 September 2003, para. 40.

<sup>553</sup> European Court of Human Rights. *Case of Aunola v. Finland*, Application No. 30517/96, Decision of Admissibility of 15 March 2001; *Case of Vasilyev v. Russia*, *supra note* 550.

<sup>554</sup> European Court of Human Rights. *Case of Mulles v. Austria*, Application No. 5849/72, Decision of Admissibility of 1 October 1975.

<sup>555</sup> *Id.*

<sup>556</sup> European Court of Human Rights. *Case of Kjartan Asmundsson v. Iceland*, Application No. 60669/00, Judgment of 12 October 2004, para. 35.

<sup>557</sup> *Id.*

<sup>558</sup> European Court of Human Rights. *Case of Goudswaard-Van der Lans v. Netherlands*, Application No. 75255/01, Decision of Admissibility 22 September 2005.

<sup>559</sup> European Court of Human Rights. *Case of Schwengel v. Germany*, Application No. 52442/99, Decision of Admissibility of 2 March 2000 (only available in French)

<sup>560</sup> European Court of Human Rights. *Case of Jankovic v. Croatia*, Application No. 29865/96, 16 November 2004, ECHR 2000-X.

states to ensure the beneficiary retains all their rights to obtain an ordinary pension without privileges.<sup>561</sup>

*b.3. Limitation in case of imprisonment.*

It is also possible to establish some limitations to providing a benefit for reasons of public interest. However, such limits need to comply with certain conditions, such as ensuring that dependents who are eligible to otherwise receive a benefit are not deprived of their benefit.<sup>562</sup>

In the case of prisoners, prior to its elimination the European Commission established that a pension or benefit can be suspended until that person is released. However, suspension does not allow the termination of the benefit, as the amount normally paid to the pensioner now covers personal maintenance during his time in prison.<sup>563</sup> At the same time, the Commission emphasized that the familial benefits should be continued to protect the spouse or children of the beneficiary in prison.<sup>564</sup>

*c. No Discrimination.*

The prohibition of discrimination is regulated both in the European Convention on Human Rights and in Protocol No. 12 for the Protection of Human Rights and Fundamental Freedoms.

The European Convention of Human Rights establishes in article 14 that:

*The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status (emphasis added.)<sup>565</sup>*

For its part, article 1 of Protocol 12 contains a broader prohibition on discrimination:

- 1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*
- 2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1. (Emphasis added)<sup>566</sup>*

The ECtHR, analyzing article 14 of the European Convention on Human Rights, has been clear that this right does not prohibit European states from treating differently some groups in order to correct inequalities.<sup>567</sup> Nevertheless, a different treatment to be legitimate needs to establish

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<sup>561</sup> *Id.*

<sup>562</sup> European Court of Human Rights. *Case of Srajbner and Clarke v. United Kingdom*, Application No. 27004/95 and 27011/95, Decision of Admissibility 23 October 1997.

<sup>563</sup> *Id.*

<sup>564</sup> *Id.*

<sup>565</sup> Council of Europe. European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 539, art. 14

<sup>566</sup> Council of Europe. *Protocol No. 12 to the European Convention on Human Rights and Fundamental Freedoms on the Prohibition of Discrimination*, 4 November 2000.

<sup>567</sup> European Court of Human Rights. *Case of Stec and Others v. the United Kingdom*, *supra* note 551, para. 51.

objective and reasonable justifications which are proportional to achieving the aims.<sup>568</sup> Thus, in order to correct inequalities in issues regarding social security benefits, states have a wide margin of appreciation when the justification is based on general measures of economic or social strategy.<sup>569</sup>

*a. Nationality and Residence*

The ECtHR has noted that “very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the grounds of nationality as compatible with the Convention.”<sup>570</sup>

*b. Export of Benefits*

Prior to its elimination, the former European Commission of Human Rights dealt with situations where the payment of social security benefits to national citizens, now residents in a foreign state, is the responsibility of the home state.<sup>571</sup> In this situation, the Commission was clear that a proportional reduction of the payment of social security benefits does not imply a violation of the Conventional rules,<sup>572</sup> particularly where the living conditions in another country are less expensive than in the home state. Requiring the same pension amount or benefits to national citizens living outside the home state can create disadvantages for national citizens living within the home state.<sup>573</sup>

*c. Gender*

The ECtHR has acknowledged that inequalities between men and women within the CoE member states continue being a problem that is incompatible with the European Convention on Human Rights.<sup>574</sup>

Initially, the ECtHR ruled that payment of a lower pension to a widower than a widow was a reasonable and objective difference in treatment, even though in the instant case the widower earned less money than his wife and the widower gave up his work to care for her.<sup>575</sup> The decision in that case, decided in 1995, was based primarily on the prevailing social attitudes at that time.<sup>576</sup>

Subsequently, the ECtHR revised its view and ruled that paying a woman a lesser amount in pension benefits cannot be justified on the “prevailing social attitudes at that time” because it does

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<sup>568</sup> *Id.*

<sup>569</sup> European Court of Human Rights. *Case of James and Others v. United Kingdom*, Application No. 8793/79, Judgment of 21 February 1986, paras. 44 and 45.

<sup>570</sup> European Court of Human Rights. *Case of Gaygusuz v. Austria*, Application No. 17371/90, Judgment of 16 September 1996, para. 42

<sup>571</sup> European Court of Human Rights, *Case of J.W. and E.W v. United Kingdom*, Application No. 9776/82, Decision of Admissibility 03 October 1983.

<sup>572</sup> *Id.*

<sup>573</sup> *Id.*

<sup>574</sup> European Court of Human Rights. *Case of Schuler-Zraggen v Switzerland*, Application No. 14518/89, Judgment of 24 June 1993, para. 64.

<sup>575</sup> European Court of Human Rights. *Case of Willis v. United Kingdom*, Application No. 36042/97, Judgment of 11 June 2002, paras 40-42.

<sup>576</sup> European Court of Human Rights. *Case of Wessels-Bergervoet v. Netherlands*, Application No. 34462/97, Judgment of 4 June 2002, para. 44

not constitute a reasonable and objective justification.<sup>577</sup> However, the burden of proof is on victims who must demonstrate “very strong reasons” for the illegitimacy of unequal treatment.<sup>578</sup>

Finally, the ECtHR has dealt with issues of indirect discrimination. Indirect discrimination is present where “a general policy or measure has disproportionately prejudicial effects on a particular group”.<sup>579</sup> To prove a case of indirect discrimination, the ECtHR has established that the presentation of indisputable statistics which show that a law is more favorable to men than women constitutes a clear *prima facie* case.<sup>580</sup> The burden of proof that a law does not produce indirect inequality of treatment is then placed on each state. In its defense, the state should explain that that measure was established after careful consideration of its necessity, and was based on a reasonable and objective justification.<sup>581</sup>

In conclusion, the CoE has developed technical and legal standards to regulate social security benefits. While the two codes of social security could cause confusion in their application, it is important to clarify that both are independent treaties. Both contain the same benefits and regulations, but the Code of 2009 prohibits discrimination between men and women that was allowed in the Code of 1964, extended the number of employees protected under each benefit of social security, and increased some benefits.

The jurisprudence of the ECtHR highlights the main problems presented by the members of the CoE regarding the protection of the right to social security. The ECtHR has addressed this right in many cases based on the right to non-discrimination, property, and life. In the majority of cases, the general principle is that the right to social security is not absolute. For reasons of social wellbeing, economic stability or to resolve abuses in the system states can impose some restrictions on the provision of some benefits. Such restrictions, however, must be prescribed by law, reasonable, proportional and for a legitimate aim.

Finally, it is important when considering the right to social security to analyze both technical standards provided by the CoE Codes of social security and the legal standards established by the ECtHR in the interpretation of the Conventional norms of human rights.

The next section of this analysis, will observe how a specific country member of the CoE, Spain, regulates the right to social security.

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<sup>577</sup> *Id.*

<sup>578</sup> *Id.*, para. 49.

<sup>579</sup> European Court of Human Rights. *Case of Hoogendijk v. Netherlands*, Application No. 58641/00, Decision of Admissibility 6 January 2005, (2005).

<sup>580</sup> European Court of Human Rights. *Case of Jordan v. United Kingdom*, Application No. 24746/94, Judgment of 4 May 2001, para. 154.

<sup>581</sup> *Id.*, para. 103.

## 2. Spain and its system of Social Security

### a. Spain and the Council of Europe

Spain became a member of the Council of Europe in November of 1977.<sup>582</sup> Spain ratified the Code of Social Security of 1964 in March of 1994,<sup>583</sup> subject to some reservations regarding sections VII and X, which deal with family and survivors benefits.<sup>584</sup> Spain has not ratified the new code of social security of 2009, so it is only obligated to comply with the rules established by the Code of 1964. While this study is focused on the CoE standards of social security, it is relevant to note that Spain has been a member of the European Union since January 1986.<sup>585</sup> Therefore, Spain is required to harmonize its national social security systems in line with European Union regulations.<sup>586</sup> This harmonization is particularly important for employees who work in two or more member states of the European Union.<sup>587</sup>

### b. Local Legislation on Social Security

The Constitution of Spain of 1978 regulates the right to social security in article 41. That article establishes that social security is guaranteed to every citizen and that Spain is responsible for providing sufficient social benefits and assistance in situations of necessity and unemployment.<sup>588</sup> Furthermore the Constitution specifically recognizes to right of prisoners to receive benefits derived from the social security system.<sup>589</sup>

The General Law of Social Security was enacted in June, 1994, which for more than 24 years regulated the technical and legal standards of the social security system.<sup>590</sup> In 2014 the King of Spain, Felipe VI, by Law No. 20/2014 delegated to the government the ability to amend some legal instruments, including amending and revising some provisions established in the General Law of Social Security,<sup>591</sup> among others.

The Organic Law No. 4/2000 regulates the rights and freedoms of foreigners in Spain and their social integration.<sup>592</sup> That law establishes that foreign residents in Spain have the right to access

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<sup>582</sup> See <http://www.coe.int/en/web/portal/spain>

<sup>583</sup> See [http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/048/signatures?p\\_auth=BQbZWTUn](http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/048/signatures?p_auth=BQbZWTUn)

<sup>584</sup> See [http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/048/declarations?p\\_auth=Ak7oMR3Q&coeconventions\\_WAR\\_coeconventionsportlet\\_enVigu\\_eur=false&coeconventions\\_WAR\\_coeconventionsportlet\\_searchBy=state&coeconventions\\_WAR\\_coeconvention\\_sportlet\\_codePays=SPA&coeconventions\\_WAR\\_coeconventionsportlet\\_codeNature=10](http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/048/declarations?p_auth=Ak7oMR3Q&coeconventions_WAR_coeconventionsportlet_enVigu_eur=false&coeconventions_WAR_coeconventionsportlet_searchBy=state&coeconventions_WAR_coeconvention_sportlet_codePays=SPA&coeconventions_WAR_coeconventionsportlet_codeNature=10)

<sup>585</sup> See [https://europa.eu/european-union/about-eu/countries/member-countries\\_en](https://europa.eu/european-union/about-eu/countries/member-countries_en)

<sup>586</sup> ILO, Coordination of Social Security Systems in the European Union. *An explanatory report on EC Regulation No 883/2004 and its Implementing Regulation No. 987/2009*, p. 1

<sup>587</sup> See: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2009R0987:20130108:ES:HTML>

<sup>588</sup> Spanish Legislation. Political Constitution of Spain, published in the Boletín Oficial del Estado (BOE). 27 December 1978, art. 41.

<sup>589</sup> *Id.*, art. 25.2.

<sup>590</sup> Spanish Legislation. Royal Legislative Decree No. 1/1994, *Aprobación del Texto Refundido de la Ley General de la Seguridad Social*, 20 June 1994.

<sup>591</sup> Spanish legislation. Law No. 20/2014, *Se delega en el Gobierno la potestad de dictar diversos textos refundidos, en virtud de lo establecido en el artículo 82 y siguientes de la Constitución Española*, enacted by the King of Spain Felipe VI., 29 October 2014 art. 1.c. Available at [https://www.boe.es/diario\\_boe/txt.php?id=BOE-A-2014-11064](https://www.boe.es/diario_boe/txt.php?id=BOE-A-2014-11064)

<sup>592</sup> Spanish Legislation. Organic Law No. 4/2000, *Se regulan los derechos y libertades de los extranjeros en España y su integración social (Preceptos sobre seguridad social)*, 11 January 2000. Available at [http://www.seg-social.es/Internet\\_1/Normativa/index.htm?dDocName=063387&C1=1001&C2=2001](http://www.seg-social.es/Internet_1/Normativa/index.htm?dDocName=063387&C1=1001&C2=2001)

social security<sup>593</sup> and to obtain the same benefits as a Spanish citizen.<sup>594</sup> Likewise, non-nationals who are residents must have access to the basic social security services.<sup>595</sup>

Law No. 40/2007 establishes the duty of the Ministry of Work and Social Affairs to evaluate periodically the general system of social security. This supervision should be carried out annually before April 30.<sup>596</sup>

Finally, as a result of the delegation given by King Felipe VI, the regulations on social security were unified. Therefore, the Real Legislative-Decree No. 8/2015, enacted in 2015, is the current law that regulates the social security system in Spain.<sup>597</sup>

This unified law of social security creates both a contributory and non-contributory system, and is guided by the principles of universality, unity, solidarity and equality.<sup>598</sup> For the purpose of this study, the present section addresses only the contributory system in Spain.

The contributory system ensures benefits to any person employed in ordinary work, which includes persons with disabilities, persons involved in unhealthy or risky activities,<sup>599</sup> apprentices,<sup>600</sup> and residents that engage in any labor activity.<sup>601</sup>

To obtain a benefit, employees or apprentices must make monthly contributions to the system.<sup>602</sup> The Real-Legislative-Decree No. 8/2015 does not establish a maximum or minimum amount of contributions; this amount is established each year by the government of Spain.<sup>603</sup>

The benefits earned under the contributory system are inalienable. Therefore, any contrary provision allowing for the deprivation of this right should be overturned.<sup>604</sup>

While the law prohibits the accumulation of more than one pension or benefit insured under the social security system, some exceptions are allowed.<sup>605</sup> In the case of accumulation, the beneficiary decides which pension or benefit he/she wants to receive.<sup>606</sup>

The Spanish System of Social Security provides benefits for temporary incapacity, maternity, paternity, risk during pregnancy and breastfeeding, care of minors with cancer or other serious illnesses, permanent incapacity, injuries, retirement pension, survival, and familial protection.

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<sup>593</sup> *Id.*, art. 10.

<sup>594</sup> *Id.*, art. 14.1 and 2.

<sup>595</sup> *Id.*, art. 14.3.

<sup>596</sup> Spanish Legislation. Law No. 40/2007, *Medidas en Materia de Seguridad Social*. 4 December 2007.

<sup>597</sup> Spanish Legislation. Royal Legislative Decree No. 8/2015, *Se aprueba el texto refundido de la Ley General de la Seguridad Social*. 30 October 2015.

<sup>598</sup> *Id.*, art. 2.

<sup>599</sup> *Id.*, art. 13.

<sup>600</sup> *Id.*, art. 249

<sup>601</sup> *Id.*, art. 7.1.a.

<sup>602</sup> *Id.*, art. 246

<sup>603</sup> *Id.*, art. 148.

<sup>604</sup> *Id.*, art. 3.

<sup>605</sup> *Id.*, art. 163.1

<sup>606</sup> *Id.*

### *b.1. Temporary Incapacity*

This benefit covers the temporary incapacity to work caused either by non-work or work-related diseases and accidents.<sup>607</sup>

To qualify for this benefit, employees must contribute for minimum periods. In case of common diseases, the minimum period is 180 days of contributions within the last five years before diagnosis.<sup>608</sup> In case of work-related accident or disease, employers cannot require any specific period of contributions.<sup>609</sup>

The General Law of Social Security does not establish the percentage of the monetary benefit that employees can receive.<sup>610</sup> The benefit in cases of work-related accident or occupational disease should be paid the next day after the incapacity occurs.<sup>611</sup> In cases of non-work accidents or diseases, the benefit should be paid beginning the fourth day after the incapacity.<sup>612</sup>

The maximum duration of payment is 365 days in cases of non-work or work-related accidents; however, it may be extended for 180 days.<sup>613</sup> In cases of occupational diseases, an employee can receive this benefit while the medical assessment is being made to determine if the disease is caused by the occupation, which assessment is envisioned to take no more than 6 months. This period can be extended by an additional 6 months where there is difficulty in diagnosing the cause.<sup>614</sup>

Once the maximum period for payment ends, the National Institute of Social Security assesses whether the employee continues to suffer a temporary incapacity or whether the incapacity has become permanent.<sup>615</sup> This evaluation can be appealed by the employee;<sup>616</sup> however, the period of time to appeal is not established in the General Law of Social Security.

This benefit can be lost or suspended if an employee has committed fraud in securing the benefit or once an employee becomes gainfully employed.<sup>617</sup>

The benefit ends after the maximum time of 545 days of temporary incapacity, or when the employee recovers the capacity for work.<sup>618</sup> The payment can also be stopped due to negligence for failing to attend scheduled medical examinations, or failing to cooperate with other measures established by the National Institute of Social Security.<sup>619</sup> Lastly the benefit payment ends once the person qualifies for a retirement pension or is deceased.<sup>620</sup>

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<sup>607</sup> *Id.*, art. 169.1.a.

<sup>608</sup> *Id.*, art. 172.

<sup>609</sup> *Id.*

<sup>610</sup> *Id.*, art. 171.

<sup>611</sup> *Id.*, art. 173.

<sup>612</sup> *Id.*

<sup>613</sup> *Id.*, art. 169.

<sup>614</sup> *Id.*

<sup>615</sup> *Id.*, art. 170.

<sup>616</sup> *Id.*

<sup>617</sup> *Id.* art. 175.

<sup>618</sup> *Id.* art. 174.

<sup>619</sup> *Id.*

<sup>620</sup> *Id.*

## *b.2. Permanent Incapacity*

This benefit is derived from a previous temporary incapacity,<sup>621</sup> and covers the permanent reduction or invalidity of an employee to work.<sup>622</sup>

The General Law of Social Security recognizes three levels of permanent incapacity: partial permanent incapacity, total permanent incapacity, and absolute permanent incapacity. The differences between each of these three categories can be determined according to the percentage of permanent reduction of an employee's work capacity.<sup>623</sup> The partial permanent incapacity is determined when the ability to work is reduced permanently to 33 %.<sup>624</sup> As its name suggests, total permanent incapacity occurs when there is a total inability to engage in the basic activities for a specific type of work.<sup>625</sup> Absolute permanent incapacity results from inability to perform any work activity in any profession.<sup>626</sup>

Depending on the level of permanent incapacity, Spain requires that beneficiaries comply with a minimum period of contributions.

- In cases of partial permanent incapacity, the minimum period of contribution is 800 days within the last 10 years before of the last day of temporary incapacity.<sup>627</sup>
- In cases of total permanent incapacity, the benefit can be generated in two circumstances:
  - If the employee is less than 31 years old, the minimum days of contribution required is one-third of the period of time which elapsed between the date when the employee reached 16 years of age until the day when the incapacity occurred.<sup>628</sup>
  - If the employee is 31 years old, the minimum days of contribution are one-quarter the period of time which elapsed between the dates when the employee reached 20 years of age until the day when the incapacity occurred, with a minimum of at least 5 years of contributions.<sup>629</sup>
- In case of absolute permanent incapacity, an employee who is 31 years old and has 15 years of contributions is qualified to receive the benefit.<sup>630</sup>

Once the employee has qualified, he is entitled to receive:

- In cases of partial permanent incapacity, a one-time lump sum payment.<sup>631</sup>
- In cases of total permanent incapacity, a lifetime pension. If the incapacity was generated by a work-related accident or occupational disease, the lifetime pension can be replaced by a lump sum if the employee is less than 60 years old. In cases where the

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<sup>621</sup> *Id.*, art. 193.

<sup>622</sup> *Id.*

<sup>623</sup> *Id.*, art. 194.1

<sup>624</sup> *Id.*, art. 194.3

<sup>625</sup> *Id.*, art. 194.4

<sup>626</sup> *Id.*, art. 194.5

<sup>627</sup> *Id.*, art. 195.2

<sup>628</sup> *Id.*, art. 195.2 and 3.

<sup>629</sup> *Id.*, art. 195.2 and 3.

<sup>630</sup> *Id.*, art. 195.4.

<sup>631</sup> *Id.*, art. 193.



- incapacity is caused by a common disease, the lifetime pension is no less than 55 % of the previous earnings of the employee.<sup>632</sup>
- In case of absolute permanent incapacity, a lifetime pension and a cash benefit are paid. The cash benefit is for the purpose of paying a third person responsible for the care of the employee.<sup>633</sup>

Finally, once an employee reaches 67 years of age, the pension of permanent incapacity is replaced by a retirement pension.<sup>634</sup> However, if the permanent invalidity benefit amount exceeds the pension amount, the invalidity benefit will continue to the exclusion of the pension payment.<sup>635</sup>

### *b.3. Non-disabling permanent injuries*

This benefit is granted to employees who have suffered permanent injuries, mutilations or deformities due to a work-related activity. Employees are guaranteed a one-time lump sum,<sup>636</sup> which is paid once employees obtain a medical discharge.<sup>637</sup>

This benefit is different than the benefit for permanent incapacity.<sup>638</sup> Permanent incapacity benefits cover the impossibility to engage in work-activity, whereas this benefit is paid to a person who has not lost the capacity to work, but still suffers a permanent injury.

### *b.4. Maternity*

Maternity benefits protect women employees for the loss of earnings derived from natural pregnancy, adoption or family placement.<sup>639</sup> Spain regulates this benefit within two systems, the general system, which covers women employees who have complied with payment for a minimum period of contributions;<sup>640</sup> and an additional system, which covers women not employed who have not made contributions for a minimum period.<sup>641</sup> This paper will focus on the general system.

The general system establishes three categories of beneficiaries:

- Women employees under 21 years old at the moment of childbirth or adoption. In this case, it is not necessary to comply with a minimum period of contributions.<sup>642</sup>
- Women employees at least 21 years old but under 26 years of age at the moment of childbirth or adoption. Under this situation, the employee must make contributions for at least 90 days within the last seven years before the suspension of work activities.<sup>643</sup>

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<sup>632</sup> *Id.*

<sup>633</sup> *Id.*

<sup>634</sup> *Id.*, art. 200.4

<sup>635</sup> *Id.*

<sup>636</sup> *Id.*, art. 201.

<sup>637</sup> *Id.*, art. 202.

<sup>638</sup> *Id.*, art. 203.

<sup>639</sup> *Id.*, art. 177.

<sup>640</sup> *Id.*

<sup>641</sup> *Id.*, art. 181.

<sup>642</sup> *Id.*, art. 178.

<sup>643</sup> *Id.*

- Women employees 26 years or older at the moment of childbirth or adoption are required to have 180 days of contribution within the last seven years before the suspension of work activities.<sup>644</sup>

The General Law of Social Security requires that, for the birth of the first child, 112 days of the maternity leave must be counted as qualifying periods for other social security benefits; for the second child, 126 days must be counted. This acknowledgment is very important for the calculation of the retirement and permanent invalidity pension.<sup>645</sup>

Once a woman qualifies she is entitled to a cash payment equivalent to 100 % of her previous earnings for the last month before childbirth or adoption.<sup>646</sup> The law does not make provision for any additional benefit to cover the expenses for medical care.

The maternity benefit can be suspended or extinguished if the recipient engages in fraud in obtaining the benefit.<sup>647</sup>

Finally, the General Law of Social Security includes benefits to cover risks incurred during childbirth and natural breastfeeding. These benefits, while connected to the fact of maternity, are in addition to the general maternity benefit. The General Law of Social Security regulates the benefits as follows:

- Risk during childbirth and natural breastfeeding

These benefits cover the period when women employees are unable to work due to their pregnancy status. Additionally, when a woman is able to work but requires an accommodation to avoid any possible risk during childbirth or natural breastfeeding, the employer is required to provide suitable alternative work.<sup>648</sup>

The payment under these benefits is 100 % of previous earnings.<sup>649</sup> Both benefits start the day of suspension of work until the day the employee is provided with an accommodation where possible.<sup>650</sup> However, the payment of the risk during childbirth benefit is terminated once the maternity benefit is activated;<sup>651</sup> and in the case of risk during the natural breastfeeding benefit, once the child reaches nine months.<sup>652</sup>

#### *b.5. Paternity*

The General Law of Social Security also provides for a paternity benefit. This benefit contributes to undermining cultural biases that women are solely responsible for the care of a newborn.

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<sup>644</sup> *Id.*

<sup>645</sup> *Id.*, art. 235.

<sup>646</sup> *Id.*, art. 179.

<sup>647</sup> *Id.*, art. 180.

<sup>648</sup> *Id.*, art. 186 and 188.

<sup>649</sup> *Id.*, art. 187 and 189.

<sup>650</sup> *Id.*, art. 187.

<sup>651</sup> *Id.*

<sup>652</sup> *Id.*, art. 189.

This benefit covers male employees for the loss of earnings due to childbirth, adoption or family placement.<sup>653</sup> The beneficiaries are required to make contributions for a minimum period of 180 days within the seven years immediately before the day that starts the suspension of work, or for 365 days of contributions throughout their period of work.<sup>654</sup> Once qualified, employees receive an economic contribution equivalent to the 100 % of their previous earnings.<sup>655</sup>

This benefit can be suspended or ended for fraudulent acts or by engaging in gainful employment during the time when the paternity benefit is received.<sup>656</sup>

#### *b.6. Care of minor child with cancer or other severe diseases*

This benefit protects natural, adoptive parents and individuals *in loco parentis* for the child, whose work time is reduced by at least 50% because they are responsible for the care of their children with cancer or other severe diseases that require lengthy hospital admission and treatment.<sup>657</sup> The medical status of the child must be confirmed by a report of the Public Health Service of Spain.<sup>658</sup>

Beneficiaries are generally required to make contributions for a minimum period in order to receive this benefit.

- Employees under 21 years old at the moment of the diagnosis of the disease of the minor child are not required to comply with a minimum period of contributions.<sup>659</sup>
- Employees between 21 years old and under 26 years old at the moment of diagnosis are required to have contributed for at least 90 days within the last seven years before the diagnosis.<sup>660</sup>
- Employees 26 years and older at the moment of the diagnosis are required to have 180 days of contribution within the last seven years before the diagnosis.<sup>661</sup>

To avoid misuse, the General Law of Social Security allows this benefit to be paid to only one natural or adoptive parent.<sup>662</sup> The payment is equivalent to 100 % of previous earnings.<sup>663</sup>

Finally, this benefit is stopped when the necessity for the direct and continuous care of the children is no longer necessary. This situation is confirmed by a report of the Public Health Service of Spain.<sup>664</sup>

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<sup>653</sup> *Id.*, art. 183.

<sup>654</sup> *Id.*, art. 184.

<sup>655</sup> *Id.*, art. 185.

<sup>656</sup> *Id.*

<sup>657</sup> *Id.*, art. 190.

<sup>658</sup> *Id.*

<sup>659</sup> *Id.*, art. 191

<sup>660</sup> *Id.*

<sup>661</sup> *Id.*

<sup>662</sup> *Id.*

<sup>663</sup> *Id.*, art. 192.1

<sup>664</sup> *Id.*

### *b.6. Retirement Pension*

Pension benefits are payable to employees who have reached the prescribed age of 67 years old, or who are 65 years old and have made contributions to the system for 38 years and 6 months.<sup>665</sup> It is possible to receive an early retirement pension once an individual has made contributions for at least of 15 years,<sup>666</sup> including for at least 2 years immediately before retirement.<sup>667</sup>

Early retirement pension can be paid in three different situations:

- Early retirement pension for workplace reasons or disability  
The prescribed age to qualify for a retirement pension can be reduced in cases where the work is extremely dangerous, involving exposure to toxic and unhealthy substances. Employees can also receive early retirement benefits if they suffer from a disability which impairs the ability to work at a 65 % level.<sup>668</sup>  
The following job categories are considered extremely dangerous: miners,<sup>669</sup> sea workers,<sup>670</sup> railway workers, artists, bullfighters, firefighters, and flight crew.<sup>671</sup> The early pension in these cases can be received at the ages of 52, 55 or 60 years,<sup>672</sup> based on the special systems of social security established for these occupations.
- Early retirement pension for reasons not attributable to work  
Early retirement pension is payable upon the cessation of business activities for reasons of business restructuring which results in the lay-off of employees.<sup>673</sup> Employees affected by such a lay-off must register with the Employment Offices and seek employment at least six months before the request for early retirement.<sup>674</sup> Additionally, employees must have contributed for 33 years.<sup>675</sup> Upon qualification, employees have the option to receive an early retirement pension four years before the age at which one is entitled to a regular pension.<sup>676</sup>
- Early retirement pension at a voluntary request of the beneficiary.  
Employees can qualify for early retirement pension if they have contributed to the system long enough to qualify for the regular retirement pension at the age of 65 years,<sup>677</sup> i.e. at least 35 years of contributions to the social security system.<sup>678</sup>

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<sup>665</sup> *Id.*, art. 202 and 205.

<sup>666</sup> *Id.*, art. 205.

<sup>667</sup> *Id.*

<sup>668</sup> *Id.*, art. 206.

<sup>669</sup> Spanish Legislation. Royal Decree No. 298/1973, *Sobre la Actualización del Régimen Especial de Seguridad Social para la Minería del Carbón, de acuerdo con la Ley 24/1972 de 21 de junio, de financiación y percencionamiento del Régimen General de la Seguridad Social*. 8 February 1973.

<sup>670</sup> Spanish Legislation. Law No. 47/2015, *Reguladora de la Protección Social de las personas trabajadoras del sector marítimo-pesquero*. 21 October 2015.

<sup>671</sup> ILO, International Labor Organization. *Jubilacion Anticipada por trabajos de naturaleza penosa, toxica, peligrosa o insalubre. Un Estudio Comparado*. First Edition, 2014, p.16. (only in Spanish)

<sup>672</sup> *Id.*

<sup>673</sup> Royal Legislative Decree No 8/2015, *supra note 597*, art. 207.

<sup>674</sup> *Id.*

<sup>675</sup> *Id.*

<sup>676</sup> *Id.*

<sup>677</sup> *Id.*, art. 208.

<sup>678</sup> *Id.*

If an employee meets the contribution requirement, she/he is eligible for a retirement pension two years before the age of a regular pension.<sup>679</sup>

The monthly benefit amount received for early retirement benefits is calculate according to two main rules:

- For the first 15 years of contribution, the employee receives 50 % of the average of his monthly contributions.<sup>680</sup>
- Based on contributions made for years 16 and thereafter, the employee receives for each additional month of contribution up to 248 months an additional percentage equivalent to 0.19 % of monthly contributions. For contributions made after 248 months, the additional percentage equivalent for each month is 0.18 %.<sup>681</sup>

In any event, the amount of a retirement pension cannot exceed 100 % of the employee's contributions.<sup>682</sup>

Finally, some circumstances can lead to the loss of the retirement pension. First, the pensioners cannot perform full-time paid work; however, pensioners who hold part-time employment have their retirement pension partially reduced.<sup>683</sup> Second, pensioners who hold elective or appointed public office have the retirement pension suspended until the conclusion of that employment.<sup>684</sup>

#### *b.7. Survivors' pensions and death grants*

This benefit protects dependents of the deceased breadwinner. It comprises death grants, widow's allowance, orphans pension and family benefits.<sup>685</sup>

The beneficiaries are the dependents of the insured employee who was receiving a pension for temporary or permanent incapacity, risk during pregnancy and natural breastfeeding, maternity, paternity, or retirement pension.<sup>686</sup>

- *Death grants*

The death of the breadwinner generates the immediate payment by Spain of a death grant which covers the funeral expenses for the breadwinner.<sup>687</sup> The beneficiaries of this grant are the spouse, children, and relatives of the breadwinner who habitually lived with him or her.<sup>688</sup>

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<sup>679</sup> *Id.*

<sup>680</sup> *Id.*, art. 210.

<sup>681</sup> *Id.*

<sup>682</sup> *Id.*

<sup>683</sup> *Id.*, art. 213.

<sup>684</sup> *Id.*

<sup>685</sup> *Id.*, art. 216.1.

<sup>686</sup> *Id.*, art. 217.

<sup>687</sup> *Id.*, art. 218.

<sup>688</sup> *Id.*

○ *Widow's allowance*

The survivor spouse has the right to claim this lifetime pension,<sup>689</sup> after verification that the breadwinner made contributions for at least 500 days within the last five years immediately before his death.<sup>690</sup>

This benefit is also available in special situations:

- Divorce or marriage annulment: The former spouse of the breadwinner can acquire a widow pension if he/she has not remarried or enter into a common-law union.<sup>691</sup>
- Widow's allowance in domestic partnerships: An unmarried partner has the right to claim a widow's allowance if his/her annual income for the last year before the death of the breadwinner is less than 50 % of the sum of the income of both the widow and the breadwinner.<sup>692</sup> The widow's allowance is also paid when the income of the unmarried partner is 1.5 % less than the minimum wage in Spain.<sup>693</sup>

Finally, the widow's pension can be cancelled when the beneficiary obtains another widow's pension or when the widow or widower remarries or enter into a domestic partnership.<sup>694</sup>

○ *Orphans pension*

The children of breadwinners have the right to receive this benefit, until they reach the age of 21 years. This age limit can be extended when children continue their education at a satisfactory level.<sup>695</sup> Spain recognizes this right without any distinction based on the child's status as natural-born or adoptive.<sup>696</sup>

○ *Family benefits*

Relatives who prove economic dependence on the breadwinner have the right to obtain a family benefit. Normally, this benefit is ensured to dependents of the breadwinner who was receiving a retirement or permanent incapacity pension.<sup>697</sup>

Persons claiming this benefit must satisfy the following requirements. First, the relative lived with the breadwinner and was economically dependent on him.<sup>698</sup> Second, the relative must be over 45 years old and be single, divorced, or widow or widower.<sup>699</sup> Thirdly, the

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<sup>689</sup> *Id.*, art. 219.

<sup>690</sup> *Id.*

<sup>691</sup> *Id.*, art. 220.

<sup>692</sup> *Id.*, art. 221.

<sup>693</sup> *Id.*

<sup>694</sup> *Id.*, art. 223

<sup>695</sup> *Id.*, art. 224

<sup>696</sup> *Id.*

<sup>697</sup> *Id.*, art. 226.

<sup>698</sup> *Id.*

<sup>699</sup> *Id.*

relative must prove that he/she was responsible for the caring for the breadwinner.<sup>700</sup> Finally, the relative must not be able to be economically independent.<sup>701</sup>

The survivor benefits are inalienable; however, the death allowance can expire.<sup>702</sup> Likewise, the only person who is not able to receive survivor benefits and death grants is a person who has been convicted of homicide.<sup>703</sup> The amount of a surviving spouse pension not received by a person who committed homicide increases the amount of the orphans' pension if there are surviving orphans.<sup>704</sup>

Finally, in cases in which the death of the employee was caused by a work-related accident, the beneficiaries of any kind of survivor benefit have the right to claim a lump sum payment,<sup>705</sup> in addition to the orphan benefit.

### *c. Comparison between the international, Council of Europe and Spanish standards of social security.*

The present section is divided into two subsections. The first one presents a graphic to identify the areas of compliance and non-compliance by Spain vis-à-vis the ILO standards of social security and the CoE standards, taking into consideration that Spain has only ratified ILO Convention No. 102 on Social Security Minimum Standards.<sup>706</sup> The second subsection analyses the strengths and the weaknesses of each benefit as provided for in the social security standards of the CoE and Spain. The result of this comparison indicates that the CoE system constitutes a stronger regime for ensuring social security than the Inter-American System of Human Rights, and that Spain's domestic law with regards to social security better accomplishes the protection of these rights than Peruvian domestic law.

#### *c.1. Graphic*

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<sup>700</sup> *Id.*

<sup>701</sup> *Id.*

<sup>702</sup> *Id.*, art. 230.

<sup>703</sup> *Id.*

<sup>704</sup> Ley No. 40/2007, supra note 596, Disposición Adicional Trigésima – Víctimas de violencia de genero.

<sup>705</sup> Royal Legislative Decree No 8/2015, supra note 597, art. 216.1

<sup>706</sup> Spain has not ratified the ILO Convention No. 130 (*Medical Care and Sickness Convention*); Convention No. 128 (*Invalidity, Old-Age and Survivors*); Convention No. 121 (*Employment Injury Benefits Convention*); and Convention No. 183 (*Maternity Protection Convention*).

	International Standards	Council of Europe Standards	Compliance of Spain
<b>Medical Care</b>	Curative or Preventive Nature. (C No.102)	Curative and preventive nature	Not provided
	Cover 100 % of employees and apprentices, extended to wives and dependents. (C No. 130)	80 % of employees and apprentices covered extended to “spouses” and children (Code 2009)  50 % of employees and apprentices covered, extended to wives and children. (Code 1964)	
	Benefits: pharmaceutical supplies, general practitioner care, hospitalization, (C No. 102) dental care, and rehabilitation. (C No. 130)	Benefits: includes benefits required by international standards as well as care provided by non-medical professionals, maintenance in hospital, and transportation of the patient. (Code 2009)  Benefits: only general practitioner and specialist care, pharmaceutical supplies, and care during pregnancy. (Code 1964)	
	The benefit can be subjected to a qualification period. (C No. 130)	No qualification period. However, can require the payment of “partial contributions”, not to exceed 25 % of the cost. (Code 2009)  No qualification period (Code 1964)	
	Additional coverage, when the employee loses his/her job up to 26 weeks for prescribed diseases – tuberculosis, HIV, among other. (C Nos. 130 and 102)	Ensure the continuity of medical care in case of loss of employment. (Code 2009)  Ensure continuity of medical care in case of loss of employment for 26 weeks. (Code 1964)	
		The benefit can be withheld, withdrawn or suspended due to beneficiary misconduct.	



	<b>International Standards</b>	<b>Council of Europe Standards</b>	<b>Compliance of Spain</b>
<b>Sickness Benefit</b>	Morbid condition and suspension of earnings (C No. 102 and 130)	Granted. No covered work-related accident or illness	Not provided
	Cover 100% of employees, and apprentices, extended to wives and dependents. (C no. 130)	Cover 80 % of employees and apprentices, not extended to spouses or dependent. (Code 2009)  Cover 50 % of employees and apprentices. (Code 1964)	
	The benefit can be subjected to a qualification period.	The benefit can be subjected to a qualification period of contributions.	
	Monetary benefit received: 60 % of previous earnings, with payment beginning after first three days of contingency. (C No. 130)  Cash Benefit in cases when the employee continues to undergo curative or preventive medical care.	Monetary benefit received: 50 % to 65 % of previous earnings (Code 2009)  Monetary benefit received: 45 % previous earnings (Code 1964)	
	52 weeks of coverage. (C No. 130)	52 weeks of coverage in case of each illness; coverage can be extended for an additional 26 weeks if the illness continues.	
	Funeral Benefit in case of death. (C No. 130)	Funeral Benefit in case of death.	

International Standards		Council of Europe Standards	Compliance of Spain	
Invalidity Benefit	Temporary or Permanent Invalidity	Temporary or Permanent Invalidity.	Temporary Incapacity	Permanent Incapacity
	Cover 100 % of employees and apprentices. (C No. 128)	Cover 80 % of employees and apprentices (Code 2009) Cover 50 % of employees and apprentices (Code 1964)	Cover 100 % of employees and apprentices.	Cover 100 % of employees and apprentices.
	Monetary benefit received: 60 % of previous earnings. (Recommendation No. 131)	Monetary benefit: 50% to 65 % of previous earnings (Code 2009) Monetary benefit: 40 % of previous earnings (Code 1964)	Amount not specified. Determined annually	Lump sum (partial permanent incapacity) Cash benefit amount not specified for total and absolute permanent incapacity.
	Person with invalidity cannot earn more than one-third part of normal wage. (Recommendation No. 67)	Invalidity for work and not earning any money	Temporary incapacity for work and not earning any money.	Permanent incapacity for work and not earning any money.
	No durational limit specified.	No durational limit specified.	Maximum duration of the benefit: 545 days. In case of occupational disease: 1 year.	Payment made until individual qualifies for a retirement pension.
	Contributions: 15 years of contribution or employment. (C No.128)	Contributions: 15 years of contributions, occupational activity or residence (Code 2009)  Contributions: 10 years of contributions, occupational activity or residence (Code 1964)	Contributions:  180 days within the last five years for common diseases.  No required contribution for occupational disease or work-related accident.	Contribution:  Not required in case of work-related accident or illness.  Partial Permanent Incapacity: 800 days of contribution.

Invalidity Benefit	Temporary or Permanent Invalidity	Temporary or Permanent Invalidity	Temporary Incapacity	Permanent Incapacity
				<p>Total Permanent Incapacity:</p> <p>a. If the employee is less than 31 years old: 1/3 of the period of time which elapsed between the date when the employee reached 16 years of age until the day when the incapacity occurred.</p> <p>b. If the employee is 31 years old: one-quarter the period of time which elapsed between the dates when the employee reached 20 years of age until the day when the incapacity occurred.</p> <p>Absolute Permanent Incapacity: 15 years of contribution.</p>
	A reduced pension should be granted when the person has less than 15 years of employment or contribution. (C No. 128)	Ensure a reduced pension when the employee has less than 15 years of contributions, occupational activity or residence.	Not specified.	Not specified.
	The State shall provide a proper position to the employee to work and if that is not possible, the invalidity benefit shall be granted. (C No. 128)	Includes the provisions required by international standards as well as the provision of functional and occupational rehabilitation.	Not specified.	Not granted.
	Not specified.	The benefit is withheld, withdrawn or suspended when the individual obtains gainful employment.	The benefit can be withheld, withdrawn or suspended due to beneficiary misconduct.	Not specified.

	<b>International standards</b>	<b>Council of Europe Standards</b>	<b>Compliance of Spain</b>
<b>Old-Age Benefit</b>	Eligibility age: 65 years (men), 60 years (women) (Recommendation No. 64)  65 years (men and women) (C No. 128)	Eligibility age: 65 years old (men and women). It can be extended according to demographic, economic and social criteria. (both codes) Under prescribed conditions the age of 65 years can be reduced. (unhealthy work/incapacity for work/unemployment)	Eligibility age: 67 years old or 65 years old + 38 years and 6 months of contributions.
	Coverage: 100 % of employees and apprentices (C No. 128)	Coverage: 80 % of employees and apprentices (Code 2009) Coverage: 50 % of employees and apprentices (1964)	Coverage: 100 % of employees and apprentices.
	Contribution: 30 years of contribution or employment (C Nos. 102 and 128)	Contribution: 40 years of contributions or employment or residence. (Code 2009) Contribution: 30 years of contribution or employment, or 20 years of residence (Code 1964)	Contribution: 38 years and 6 months.
	A proportional reduction of the benefit shall be granted when a person has less than 30 years of contribution or employment. (C No. 128)	A reduced pension should be ensured when the employee or apprentice has between 15 to 40 years of contribution, employment or residence.	15 years of economic contribution as minimum. A different period of contribution can be set for miners, sea and railway workers, artists, bullfighters, firefighters and flight crew.
	Monetary benefit received: 55 % of previous earnings. (Recommendation No. 131) 45 % of previous earnings (C No. 128)	Monetary benefit received: 50 to 65 % of previous earnings (Code 2009)  40 % of previous earnings (Code 1964)	Monetary benefit received: 50 % of previous earnings (for the first 15 years of contributions) + 0.19% (for additional months after 15 years until 248 months) + 0.18% for additional months after 248 months.
	Acquired Rights	Part of the Right to Property/Possession (Acquired Rights)	Intangible rights
	Possible reduction of the amount. No test specified. (C No. 128)	Possible reduction of the amount. Test: proportionality + social wellbeing + financial situation.	Same as International standards
	Recognizes the interrelation between the right to social security with the right to work. (Committee on Economic, Social and Cultural Rights of the United Nations)	The violation of the right to social security can involve the violation of the rights of life, property or possession, and non-discrimination.	Not specified.
	Not specified.	Withheld, withdrawal or suspension of the benefit when employee involved in gainful activity.	Suspension of benefit: In case of payable work or occupying a public position.

	<b>International standards</b>	<b>Council of Europe Standards</b>	<b>Compliance of Spain</b>
<b>Survivor Benefit</b>	Dependents of the breadwinner: wives, children, stepchildren, adopted children and illegitimate children. (C No. 128)	Dependents of the breadwinner: "spouses" and children "without distinction". (Code 2009) Dependents of the breadwinner: wives and children. (Code 1964)	Dependents of the breadwinner: spouses, children and other dependent relatives.
	Coverage: 100% of employees and apprentices. (C No. 128)	Coverage: 80 % of employees and apprentices (Code 2009) 50 % of employees and apprentices (Code 1964)	Coverage: 100 % of employees and apprentices.
	Contribution: 15 years of contribution or employment. (C Nos. 102 and 128)	Contribution: 15 years of contribution, occupational activity or residence (Code 2009)  10 years of contribution, occupational activity or residence (Code 1964)	Death grants: requires no contribution  Widow's allowance: 500 days of contribution (lifetime pension)  Orphans pension: requires no contribution. (temporary pension)
	A proportional reduction of the benefit when the person has less than 15 years of contribution or employment. (C Nos. 102 and 128)	Reduced pension once employee or apprentice has complied with 5 years and under 15 years of contributions, occupational activity or residence (Code 2009) Under 10 years (Code 1964)	No standard.
	Monetary benefit received:  55% of previous earnings. (Recommendation No. 131)  45 % of previous earnings (C No. 128)	Monetary benefit: 50 % of previous earnings (only spouse); 65 % (spouse and two children); and 20 % (only children) (Code 2009) 40 % of previous earnings (widow and two children) (Code 1964)	Death grants: one-time lump sum  Widow's allowance and Orphans pension: Not specified.
	Special conditions for wives to obtain this benefit. (C No. 128)	Special conditions to wives to obtain this benefit.	In cases of divorce or annulment of marriage benefit paid to the former spouse.  This benefit is granted to unmarried partners
	Special conditions for children over 18 years old to obtain the benefit (successful and continuous studies) (Recommendation No. 67)	No standard.	Until 21 years in case of successful studies.  This benefit includes children regardless of filiation.

	<b>International standards</b>	<b>Council of Europe Standards</b>	<b>Compliance of Spain</b>
<b>Maternity Protection</b>	Coverage: 100 % of all pregnant women employees. (C No. 183)	Coverage: 100 % of women employees and apprentices (Code 2009) 50 % of women employees and apprentices (Code 1964)	Coverage: 100 % of women employees (natural pregnancy, adoption or family placement)
	Benefits: perinatal/childbirth/ postnatal care, and medical care in general. (C No. 183)	Benefits: Pre-natal, confinement and post-natal care, non-medical assistance, pharmaceutical supplies, maintenance in hospital, dental care, medical rehabilitation, transportation, and hospitalization (Code 2009) Pregnancy confinement and their consequences. (Code 1964)	Not specified
	18 weeks of coverage. (Recommendation No. 191) 14 weeks of coverage (C No. 183)	No standard	No standard
	Contribution: Not specified.	Contribution: states can require partial contribution, but not necessary.	No contribution when employee is under 21 years old. 90 days of contributions for employees between 21 to 26 years old. 180 days of contributions for employees over 26 years old.
	Monetary benefit received: 45 % of previous earnings. (C Nos. 102 and 183)	Monetary benefit received: 50% to 65% of previous earnings (Code 2009)  45 % of previous earnings (Code 1964)	Monetary benefit received: 100 % of previous earnings.
	Not specified.	Paternity leave granted, same requirements as for women employee.	Paternity is granted through an independent benefit. Minimum period of contributions: 180 days. The monetary benefit received is 100 % of previous earnings.
	In cases of illness or complications during maternity, a cash benefit could be insured for no less than 2/3 parts of previous earnings. (C No. 183)	No standard	Not specified. However, risks during childbirth and breastfeeding are covered at 100% of previous earnings independent of the benefit paid for maternity.
	Special care to women workers in hazardous work. (C No. 183 and Recommendation No. 191)	No standard	Covered (special system of social security)
	No standard	No standard	The time elapsed for maternity leave is considered as effective period of contribution for retirement and permanent invalidity pension.

	<b>International standards</b>	<b>Council of Europe Standards</b>	<b>Compliance of Spain</b>
<b>Employment Injury</b>	Traumatic injury or disease resulting from employment. (C No. 121)	Traumatic injury or disease resulting from employment.	Injury and disease resulting from employment.
	Coverage: 100 % of employees and apprentices (C No. 131)	Coverage: 80 % of employees and apprentices, including their spouses and children (Code 2009)  Coverage: 50 % of employees and apprentices, including wives and children (Code 1964)	Coverage: 100% of employees and apprentices.  Condition: Unable to continue working. Previously received temporary incapacity benefit.
	Monetary Benefit received: 60 % of previous earnings (temporal or total incapacity), and 50 % in case when the employee responsible for the maintenance of the family died. (C No. 121)	Monetary benefit received: 50% to 65 % of previous earnings of employee with spouse and two children, in case of death of the employee 50 %. (Code 2009)  50 % of previous earnings of employee with wife and two children; in case of death of the employee 40 %. (Code 1964)	One-time lump sum payment.
	Benefits: pharmaceutical supplies, general practitioner care, hospitalization, dental care, and rehabilitation. (C No. 121)	Benefits: general and specialist care, non-medical assistance, pharmaceutical supplies, maintenance in hospital, dental care, medical rehabilitation and medical transportation. (Code 2009)  Benefits: general and specialist care, pharmaceutical supplies and dental care. (Code 1964)	Not specified.
	No required period of contribution	No required period of contribution	Not specified.
	Vocational rehabilitation shall be provided. (C No. 102)	Vocational rehabilitation, and take preventive actions.	Not specified.
	Not specified.	States should publish a detailed list of occupational diseases.	Not specified.

International standards		Council of Europe Standards	Compliance of Spain
<b>Family Benefit</b>	Not regulated.	Ensure the financial support of children of employees and apprentices. Expires when the children reach 16 years old.	Paid to dependent relatives when the breadwinner has died. Special conditions are required to receive this benefit. No payment to orphans.
		Coverage: 100 % employees and apprentices (Code 2009)	Coverage: 100% of employees and apprentices.
		Coverage: 50 % of employees and apprentices (Code 1964)	
		No qualification period.	Not specified.
		Monetary benefit received: 1.5 % of gross domestic product or 3 % of the minimum wage (2009)	Not specified.
		1.5 % of the minimum wage (1964)	
International standards		Council of Europe Standards	Compliance of Spain
<b>Care of minor child with cancer or other severe diseases</b>	Not regulated	Not regulated	Reduction of working time of progenitors/adoptive parents/child minders for the permanent care of minor children with cancer or severe diseases.
			Coverage: 100 % of employees and apprentices
			Payment: 100 % of previous earnings.
			Condition: reduction of 50 % of work time to care for minor children.
			Period of contribution:
			Not necessary when employee is under 21 years old.
			90 days of contributions when employee between 21 to 26 years old.
			180 days of contributions when employee 26 years old.



## ***C.2. Weaknesses and strengths***

This graphic shows the main weaknesses and strengths within Spanish domestic law regarding compliance with the standards established by the CoE and the ILO as well as comparing CoE and ILO standards. This section will discuss some of these compliance issues.

### **Medical Care**

#### *- Compliance*

In the case of the medical care benefit the CoE highlights the importance of the protection of curative and preventive medical care. Through the Code of 2009, the CoE expanded the benefits of medical care to include the provision of non-medical attention, the cost of the hospital stay and transportation to a hospital or health care facility.

The CoE Code of 2009 establishes that coverage for medical care should be provided in case of loss of employment. This is more generous than the requirements of ILO Convention No. 130 which only mandates medical care in exceptional situations involving cases of prescribed diseases for a maximum of 26 weeks.

#### *- Non-compliance*

ILO Recommendation No. 134 (which is non-binding) suggests that 100 % of employees and apprentices should be granted this benefit; the CoE codes of 2009 and 1964 only require coverage of this benefit to 80 % (2009) and 50 % (1964) of employees or apprentices.

While Spain has ratified Section II of the CoE Code of 1964, which establishes the medical care benefit, it has not included this benefit with the General Law of Social Security, which constitutes a breach of the CoE standard regarding medical care.

### **Sickness Benefit**

#### *- Compliance*

The CoE extends this benefit for 78 weeks, more than the 52 weeks established by ILO Convention No. 130.

#### *- Non-compliance*

ILO Convention 130 requires that 100 % of employees and apprentices should be covered by this benefit, whereas the CoE codes of 1964 and 2009 only mandate coverage for 50 % and 80 % respectively.

The Spanish General Law on Social Security does not provide a sickness benefit despite Spain having ratified Section II of the CoE Code of 1964 regarding the protection of the sickness benefit.

## **Invalidity Benefit**

### *- Compliance*

The CoE Code of 2009 provides that the amount of this benefit should be 65 % of the previous earnings of employees, which is 5 % more than the amount suggested by ILO Recommendation No. 128. This could represent an improvement in protecting individuals unable to work due to a physical incapacity; however, the CoE Code does not establish circumstances in which an employee can receive the highest percentage of 65%.

On the other hand, the CoE codes requires the employers to provide an appropriate employment position to persons with disabilities as well as requiring occupational rehabilitation, which complies with the standards suggested in the ILO Recommendation No. 67.

Finally, Spain, following ILO Recommendation No. 128, ensures this benefit to 100 % of employees and apprentices.

### *- Non-compliance*

Contrary to ILO Convention No. 128 which mandate coverage for 100 % of employees and apprentices, the CoE codes of 1964 and 2009 require this benefit for at least 50 % and 80 % of employees and apprentices respectively.

Regarding the amount of the benefit, Spain does not establish a specific percentage to be paid in case of temporary or permanent invalidity. It merely indicates that in case of partial permanent incapacity employees are paid a lump-sum amount.

The Spanish General Law of Social Security does not address the situation where the person with a disability has not met all the requirements for receiving a full benefit payment. Unlike CoE and ILO standards which provide for reduced benefit amounts. Finally, Spain does not address whether a person with a disability is guaranteed reinstatement to their original job position.

## **Old-Age Benefits**

### *- Compliance*

Spain covers 100 % of employees and apprentices for this benefit, following ILO Convention No. 128.

The CoE Code of 2009 increased the amount of the benefit to 65 % of the previous earnings which represents an increase of 5% over the percentage suggested by ILO Recommendation No. 131.

Finally, the CoE codes establish the situations when it is possible to withhold, withdraw and suspend the old-age benefit. This provision is very important to notify the beneficiaries concerning the conditions that must be met in order to maintain this benefit.

### *- Non-compliance*

The CoE Codes of 1964 and 2009 do not cover 100% of employees as ILO Convention No. 128 requires; instead the Codes mandate coverage for 50 % and 80 % of the workforce respectively.

The CoE Codes and ILO Convention No. 128 recognize this benefit for employees who attain the prescribed age of 65 years old; however, Spanish Law increases this age to 67 years old. While the Spanish law provides for the possibility to receive the benefit at a younger age, this requires an additional contribution by employees. There is no evidence available to determine whether this increase represents a necessary and proportional measure.

While the CoE Code of 2009 establishes the maximum age requirement for receipt of this benefit it allows a state to set a higher age based on demographic, economic and social criteria. However, the CoE Codes provide no standards for applying these criteria to establish a possible increase in the prescribed age. Therefore, this lack of clarity could be subject to abuse by some states.

Under ILO Convention No. 102 the period of contribution to qualify for this benefit is 30 years. The CoE Code of 2009 requires 40 years contributions. It is possible that this increase is justified by the fact that the CoE Code of 2009 increases this benefit from 50% to 65 %. However, there is no clear criterion to determine when an employee receives the 65% of the retirement pension rather than the smaller 50 %.

## **Survivor Benefit**

### *- Compliance*

One of the most important changes adopted by the CoE is the change of the word “wives” for “spouses” in the Code of 2009. In this sense, a survivor beneficiary can be the husband of female employee. However, many European countries have only adopted the Code of 1964 that maintains this difference in treatment. While Spain has not ratified the Code of 2009, its domestic law recognizes that both men and women survivors are able to receive this benefit.

This sex difference regarding eligibility for a survivor benefit contained in the 1964 Code is also found in ILO Convention No. 128. The Convention was adopted in 1967 when the concept that men were the breadwinners was all too prevalent, leading Convention No. 128 to provide survivor benefits only for the female survivor but not the male.

The CoE Code of 2009 increases the percentage of this benefit to 65 % of the previous earnings of the breadwinner where there is a surviving spouse with two children. This represents an increase of 10 % over the 55 % amount established by ILO Convention No. 128.

There are two aspects of this benefit where the Spanish General Law of Social Security exceeds CoE and ILO standards. First it recognizes as beneficiaries of the survival benefit unmarried partners. Second for purposes of benefit payments to orphans there is the possibility to continue receiving this benefit until 21 years if the orphan successfully continues superior studies. ILO Recommendation No. 68 suggests that the maximum age to ensure an orphan’s pension should be 18 years.

### *- Non-compliance*

Regarding the coverage of this benefit, ILO Convention No. 128 requires coverage for 100%, whereas the CoE Codes of 1964 and 2009 establish a lesser percentage of 50% and 80% respectively.

Unlike the ILO and CoE standards, Spain has not established any standard for the recognition of a partial benefit when the breadwinner has not completed the required period for contributions.

Finally, the CoE Codes do not regulate the orphan pensions. This could be problematic, particularly in those countries that strictly follow the CoE regional standards of social security.

## **Maternity Protection**

### *- Compliance*

One of the most important advances in maternity protection is the regulation of benefits for medical care established by the CoE Code of 2009. This includes payment for pre-natal care, confinement and post-natal care.

Another important advance is that under the CoE Codes the payment of periodic contributions to obtain this benefit is not mandated, leaving it to member states to decide if partial contribution will be required.

Spain ensures the payment of 100 % of the previous earnings of women employees, which is higher than that established in the ILO Convention No. 102 (45%) and the CoE Codes of social security (45% in the 1964 Code and 50-65 % in the 2009 Code).

Regarding additional coverage under the maternity benefit, Spain includes benefits to protect against the risks generated during childbirth and natural breastfeeding. Neither ILO Conventions nor the CoE Codes of social security, regulate these additional benefits.

Finally, the establishment of a paternity benefit by the CoE Code of 2009 and the General Law of Social Security of Spain represents an important advance for the protection of the right to social security. This benefit, which is not recognized in the ILO Conventions, allows men employees to obtain a monetary benefit of 100% of previous earnings to help in the care of a newborn.

### *- Non-compliance*

ILO Recommendation No. 191 suggests that coverage duration for this benefit should be 18 weeks. However, neither Spain nor the CoE Codes have established a minimum period of coverage.

Spain does not specify if women employees receive medical care benefits during the perinatal, childbirth or postnatal stages. This is contrary to ILO Convention No. 183, the General Comment No. 19 of the United Nations Office of the High Commissioner for Human Rights regarding the right to social security, and the CoE codes of social security.

## **Employment injury**

### *- Compliance*

ILO Convention No. 121 and the General Law of Social Security of Spain establish that 100 % of employees and apprentices are covered for this benefit. The CoE Codes, however establish lower coverage at 80% (2009) and 50% (1964).

The CoE code of 2009 sets the amount of the benefit at 65 % of the previous earnings of employees or apprentices, which is higher than the threshold set by ILO Convention No. 121.

The CoE Code of 2009 expands the type of benefits beyond those listed in ILO Convention No. 102, to include general and special care, non-medical assistance, pharmaceutical supplies, maintenance in a hospital, dental care, medical rehabilitation, transportation and first aid in the workplace.

Finally, the CoE Codes require each European state to publish a list of occupational diseases. This provision is very important because occupational diseases are covered by the employment injury benefit.

- *Non-compliance*

Spain does not specify which medical benefits arising from a case of employment injury are covered, nor does it establish a minimum period of contributions to generate this benefit. It has also failed to establish a list of specific occupational diseases, despite the fact that these standards are required by the CoE Codes and ILO Convention No. 121.

## **Family Benefit**

- *Compliance*

This benefit is regulated by the CoE codes and the General Law of Social Security of Spain. In the case of the CoE codes, it provides additional benefits for children of employees and apprentices. Spain does not ensure this benefit to children, but it is paid to other relatives who have been responsible for the care of the breadwinner before his death.

This benefit is not recognized at the international level. The additional support given by this benefit is particularly important to cover basic necessities for children that parents may not be able to cover because of their low wages. At the same time, the acknowledgment of other relatives who were responsible for the care of the breadwinner, it is a manifestation of the application of the principle of social justice in recognizing who truly deserves the benefit.<sup>707</sup>

## **Care of minor child with cancer or other severe diseases**

An important factor in the social security system is the freedom of states to guarantee new benefits according to their social and economic situation. For example, Spain provides a benefit to care for minor children with severe diseases. Each year approximately 1,400 children are diagnosed with cancer and other severe diseases,<sup>708</sup> and their parents can be assured of a benefit to help them care for their children.

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<sup>707</sup> ILO, International Labor Organization. “*The Right to Social Security in the Constitutions of the World: Broadening the moral and legal space for social justice (Europe)*”, 2016, pages XV and XVI.

<sup>708</sup> See information only available in Spanish: <http://cancerinfantil.org/cancer-en-ninos-y-adolescentes/ninos-con-cancer-en-cifras/>

To conclude this Chapter, it is important to underline the advances made by the CoE and Spain regarding the general protection for employees, apprentices and survivors within the social security system. In particular, Spain has covered 100 % of employees and apprentices with all the benefits established in the General Law of Social Security.

Finally, the ECtHR has developed important jurisprudence to end discrimination between resident nationals and resident non-nationals in the territories of the member states of the CoE. The ECtHR has also highlighted that the right to social security is not absolute and that it can be limited. In this sense, the Court has detailed that all restrictions should be previously established by law, necessary and proportional in a democratic society. Therefore, the right to social security depends to a large extent on the economic reality of each country; however economic reality is only one factor for consideration in determining whether a restriction is appropriate – necessity and proportionality also play a role in determining whether legislative restrictions are justified.

#### **IV. CONCLUSIONS**

To reach the general conclusions of the present investigation, the following chart presents an overview comparing the international standards established by the ILO, the regional standards provided by the CoE and the Inter-American System of Human Rights, and the local regulations of Peru and Spain. A checkmark indicates that the regional standards or local regulations are in compliance with the ILO international standards and a cross indicates the non-compliance with the ILO international standards.

Benefit	International Standards	Council of Europe Standards	Compliance of Spain	Inter-American System	Compliance of Peru
Medical Care	Curative or Preventive Nature.	✓	X	X	✓
	Coverage: 100 % of employees and apprentices, extended to wives and dependents.	80 % employees, apprentices, “spouses” and children (Code 2009); 50 % (same) “wives” (Code 1964)		X	Not specified
	Benefits: pharmaceutical supplies, general practitioner care, hospitalization, dental care, and rehabilitation.	✓ + non-medical professionals, maintenance in hospital, and transportation of the patient. (Code 2009) ✓ (Code 1964)		X	✓ + prosthetic and orthopedic implements
	Can be subjected to a qualification period, but it cannot put at risk a basic level of benefits.	No qualification required but state can impose period. Optional qualification period not to exceed 25 % of the cost. (Code 2009) ✓ (Code 1964)		X	✓
	Additional coverage: 26 weeks (prescribed diseases)	Additional coverage only in case of loss of employment. (Code 2009) ✓ (Code 1964)		X	Not specified
	X	Withheld, withdrawal or suspension of benefit for misconduct of beneficiary (both codes)		X	X



Benefit	International Standards	Council of Europe Standards	Compliance of Spain	Inter-American System	Compliance of Peru	
<b>Sickness Benefit</b>	Morbid condition and suspension of earnings	✓ but no work-related accident or illness is covered.		X	Not specified	
	Coverage: 100% of employees, apprentices, wives and dependents.	80 % employees and apprentices, but no spouses or dependents. (Code 2009); 50 % (Code 1964)		X	Not specified. No apprentices	
	Optional qualification period but should be reasonable so as not to impose undue financial burden.	✓		X	Not specified	
	Monetary benefit received: 60 % of previous earnings. (no payment the three first days). Cash Benefit in cases when the employee continues to undergo curative or preventive medical care.	From 50 % to 65 % of previous earnings (Code 2009) 45 % previous earnings (Code 1964)		X	X	Not specified
	52 weeks of coverage.	52 weeks of coverage in case of each illness. It can be extended until 78 weeks within a period of three years.		X	X	Not specified
	Funeral Benefit in case of death.	✓		X	X	✓

Benefit	International Standards	Council of Europe Standards	Compliance of Spain		Inter-American System	Compliance of Peru
	Temporary or Permanent Invalidation	Temporary or Permanent Invalidation.	Temporary Incapacity	Permanent Incapacity	Temporary or Permanent Invalidation	Temporary or Permanent Invalidation
<b>Invalidation Benefit</b>	Coverage: 100 % of employees and apprentices.	Coverage: 80 % of employees and apprentices (Code 2009) Coverage: 50 % of employees and apprentices (Code 1964)	Coverage: 100 % of employees and apprentices.	Coverage: 100 % of employees and apprentices.	X	Not specified. No apprentices
	Monetary benefit received: 60 % of previous earnings.	Monetary benefit: 50% to 65 % of previous earnings (Code 2009) 40 % of previous earnings (Code 1964)	Determined annually	Lump sum (partial permanent incapacity) Cash benefit, no % specified (total/absolute permanent incapacity)	X	Minimum 50 % of previous earnings + an additional amount if there is a wife + dependent children.
	Condition: The person with an invalidity cannot earn more than one-third part of his normal wage.	Incapacity for work or earning money	Temporarily unable to work	Permanent reduction or annulment of employee's work capacity.	X	Not specified

Invalidity Benefit	International Standards	Council of Europe Standards	Compliance of Spain		Inter-American System	Compliance of Peru
	Temporary or Permanent Invalidation	Temporary or Permanent Invalidation	Temporary Incapacity	Permanent Incapacity	Temporary or Permanent Invalidation	Temporary or Permanent Invalidation
	X	X	Maximum duration of the benefit: 365 days, extended for 180 days more. In case of occupational disease: 6 months; with extension of 6 months more when needed to diagnose the disease.	Until eligible for retirement pension.	X	X
Contributions: 15 years of contribution or employment.	15 years of contributions, occupational activity or residence (Code 2009) 10 years of contributions, occupational activity or residence (Code 1964)	180 days within the last five years (common diseases) No required contribution if occupational disease or work-related accident.	Not required in case of work-related accident or illness. Partial Permanent Incapacity: 800 days of contribution.	X	15 years of contribution	

Invalidity Benefit	International Standards	Council of Europe Standards	Compliance of Spain		Inter-American System	Compliance of Peru
	Temporary or Permanent Invalidation	Temporary or Permanent Invalidation	Temporary Incapacity	Permanent Incapacity	Temporary or Permanent Invalidation	Temporary or Permanent Invalidation
				<p>Total Permanent Incapacity:</p> <p>a. If the employee is less than 31 years old: 1/3 of the period of time which elapsed between the date when the employee reached 16 years of age until the day when the incapacity occurred.</p> <p>b. If the employee is 31 years old: one-quarter the period of time which elapsed between the dates when the employee reached 20 years of age until the day when the incapacity occurred.</p> <p>Absolute Permanent Incapacity: 15 years of contribution.</p>		

Invalidity Benefit	International Standards	Council of Europe Standards	Compliance of Spain		Inter-American System	Compliance of Peru
	A reduced pension when the person has less than 15 years of employment or contribution.	15 years of contributions, occupational activity or residence.	X	X	X	✓
	The State shall provide a proper position for the employee with an invalidity to work; if that is not possible, invalidity benefit shall be granted.	√+ functional and occupational rehabilitation.	X	X	X	X
	X	Withheld, withdrawal or suspension of the benefit when person involved in gainful activity.	Negligence of the employee in cooperating with medical treatment or when employee requests retirement pension.	X	X	X

Benefit	International Standards	Council of Europe Standards	Compliance of Spain	Inter-American System	Compliance of Peru
<b>Old-Age Benefit</b>	Condition: 65 years (men), 60 years (women)	65 years old (men and women). It can be extended according to demographic, economic and social criteria. (both codes) Under prescribed conditions the age of 65 years can be reduced. (unhealthy work/incapacity for work/unemployment)	Condition: 67 years old or 65 years old + 38 years and 6 months of contributions.	X	60 years old (men), 55 years old (women)
	Coverage: 100 % of employees and apprentices	80 % of employees and apprentices (Code 2009); 50 % of employees and apprentices (1964)	✓	X	Not specified
	Contribution: 30 years of contribution or employment	40 years of contributions or employment or residence. (Code 2009); 30 years of contribution or employment, or 20 years of residence (Code 1964)	38 years and 6 months.	X	30 years of contribution (men); 25 years of contribution (women)
	A proportional reduction of the benefit shall be granted when the person has less than 30 years of contribution or employment.	Between 15 to 40 years of contribution, employment or residence.	15 years of economic contribution as minimum. Special protection for miners, sea and railway workers, artists, bullfighters, firefighters and flight crew.	X	✓

	International Standards	Council of Europe Standards	Compliance of Spain	Inter-American System	Compliance of Peru
<b>Old-Age Benefit</b>	Monetary benefit received: 55 % previous earnings.	From 50 to 65 % of previous earnings (Code 2009); 40 % (Code 1964)	50 % of previous earnings (for the first 15 years of contributions) + 0.19% (for additional months after 15 years until 248 months) + 0.18% for additional months after 248 months.	X	50 % of previous earnings
	Acquired Rights	✓ (part of the right to property/possession)	Inalienable rights	✓ (part of the right to property)	Inalienable rights
	Possible reduction of the amount. No test.	✓ + (proportionality test: + social wellbeing + financial situation)	✓	✓ (proportionality test) +	Pension + paid work exceed S/. 4050.00 (Peruvian currency)
	The Right to Work and Social Security are interrelated.	Right to life, Property and Non-discrimination.	X	✓	✓
	Not specified.	Withheld, withdrawal or suspension of the benefit when employee involved in gainful activity.	Suspension of the benefit: In case of payable work or occupying a public position.	X	X

Benefit	International Standards	Council of Europe Standards	Compliance of Spain	Inter-American System	Compliance of Peru
<b>Survivor Benefit</b>	Dependents of the breadwinner: wives, children, stepchildren, adopted children and illegitimate children.	Dependents of the breadwinner: "spouses" and children "without distinction". (Code 2009) Dependents of the breadwinner: wives and children. (Code 1964)	Dependents of the breadwinner: spouses, children and other dependent relatives.  This benefit comprises: death grants, widow's allowance and orphans pension.	x	✓ (widow's allowance, orphans and parental pension)
	Coverage: 100% of employees and apprentices.	Coverage: 80 % of employees and apprentices (Code 2009); 50 % of employees and apprentices (Code 1964)	✓	X	Not specified. No apprentices.
	Contribution: 15 years of contribution or employment.	Contribution: 15 years of contribution, occupational activity or residence (Code 2009) 10 years of contribution, occupational activity or residence (Code 1964)	Death grants: no contribution required. Widow's allowance: 500 days of contribution (lifetime pension) Orphans pension: no contribution required. (temporary pension)	X	No required period so long as employee was contributing at time of death.
	A proportional reduction of the benefit shall be granted when the person has less than 15 years of contribution or employment.	Reduced pension once employee or apprentice has complied with 5 years and under 15 years of contributions, occupational activity or residence (Code 2009)  Under 10 years (Code 1964)	No standard.	X	X



	International Standards	Council of Europe Standards	Compliance of Spain	Inter-American System	Compliance of Peru
<b>Survivor Benefit</b>	Monetary benefit received: 55% of previous earnings.	50 % of previous earnings (only spouse); 65 % (spouse and two children); and 20 % (only children) (Code 2009) 40 % of previous earnings (widow and two children) (Code 1964)	Death grants: one-time lump sum Widow's allowance and orphans pension: Not specified.	X	50 % of the retirement or invalidity pension (widow's benefit); 40 % (orphans and parental pension)
	Special conditions for wives to obtain this benefit (minimum duration of marriage and age)	✓	In cases of divorce or annulment of marriage this benefit is paid to former spouse. This benefit is granted to unmarried partners	X	✓
	Special conditions to children over 18 years old to obtain the benefit (successful and continuous studies)	X	Until 21 years in case of successful studies. This benefit includes children regardless of filiation.	X	✓

Benefit	International Standards	Council of Europe Standards	Compliance of Spain	Inter-American System	Compliance of Peru
<b>Maternity Protection</b>	Coverage: 100 % of all pregnant women employee.	Coverage: 100 % of women employees and apprentices (Code 2009) 50 % of women employees and apprentices (Code 1964)	Coverage: 100 % of women employees (natural pregnancy, adoption or family placement)	X	Not specified
	Benefits: perinatal/childbirth/postnatal care, and medical care in general.	Pre-natal, confinement and post-natal care, non-medical assistance, pharmaceutical supplies, maintenance in hospital, dental care, medical rehabilitation, transportation, and hospitalization (Code 2009) Pregnancy confinement and consequences. (Code 1964)	Not specified.	X	Not specified
	18 weeks of coverage	X	X	X	98 days
	X	Contribution: states can require partial contribution, but not necessary.	Not necessary when employee is under 21 years old. 90 days of contributions when employee between 21 to 26 years old. 180 days of contributions when employee of 26 years old.	X	X

	International Standards	Council of Europe Standards	Compliance of Spain	Inter-American System	Compliance of Peru
<b>Maternity Protection</b>	Monetary benefit received: 45 % of previous earnings.	From 50% to 65% of previous earnings (Code 2009); 45% (Code 1964)	100 % of previous earnings.	X	Not specified
	X	Paternity leave granted, same requirements as women employees.	Paternity is granted through an independent benefit. Minimum period of contributions: 180 days. The monetary benefit received is 100 % of previous earnings.	X	X
	Cash benefit could be insured In cases of illness or complications during the maternity, at no less than 2/3 parts of previous earnings.	X	Coverage for the risks during childbirth and breastfeeding (100% of previous earnings; this payment is independent of the benefit paid for maternity)	X	X
	Special care to women workers in hazardous works.	Not specified	✓	X	Not specified
	X	X	The time elapsed for maternity leave considered as effective period of contribution for retirement and permanent invalidity pension.	X	X

Benefit	International Standards	Council of Europe Standards	Compliance of Spain	Inter-American System	Compliance of Peru
<b>Employment Injury</b>	Traumatic injury or disease resulting from employment.	✓	Injuries or diseases resulting from employment.	X	Complimentary insurance for hazardous employment.
	Coverage: 100 % of employees and apprentices	Coverage: 80 % of employees and apprentices, including their spouses and children (Code 2009) 50% of employees and apprentices, including wives and children (Code 1964)	✓ + Condition: Unable to continue working, and previously received temporary incapacity benefit.	X	X
	Monetary Benefit received: 60 % of previous earning; 50 % in case when the employee responsible for the maintenance of family has died.	Monetary benefit received: 50% to 65 % of previous earnings of employee with spouse and two children; in case of death of the employee 50 %. (Code 2009) 50 % of previous earnings of employee with wife and two children; in case of death of the employee 40 %. (Code 1964)	One-time lump sum	X	Depends on the insurance policy. No amount specified.
	Benefits: pharmaceutical supplies, general practitioner care, hospitalization, dental care, and rehabilitation.	Benefits: general and specialist care, non-medical assistance, pharmaceutical supplies, maintenance in hospital, dental care, medical rehabilitation, and transportation. (Code 2009) Benefits: general and specialist care, pharmaceutical supplies and dental care. (Code 1964)	Not specified.	X	Not specified
	No required period of contribution	✓	Not specified.	X	X
	Vocational rehabilitation shall be provided.	Vocational rehabilitation + preventive actions.	X	X	Depends on the insurance policy
	X	States should publish a detailed list of occupational diseases.	Not specified	X	✓

Benefit	International Standards	Council of Europe Standards	Compliance of Spain	Inter-American System	Compliance of Peru
Family Benefit	X	Ensure the financial support of children of employees and apprentices; expires when the children reach 16 years old.	Ensure dependent relatives when the breadwinner has died. Special conditions are required to receive this benefit. No payment to children.	X	X
		Coverage: 100 % employees and apprentices (Code 2009) Coverage: 50 % of employees and apprentices (Code 1964).	Coverage: 100% of employees and apprentices.	X	X
		No qualification period.	Not specified.	X	X
		Monetary benefit received: 1.5 % of gross domestic product or 3 % of the minimum wage (2009) 1.5 % of the minimum wage (1964)	Not specified.	X	X

Benefit	International Standards	Council of Europe Standards	Compliance of Spain	Inter-American System	Compliance of Peru
Care of minor child with cancer or other severe diseases	X	X	Reduction of working time of progenitors/adoptive parents/child minders for the permanent care of minor children with cancer or severe diseases.	X	X
			Coverage: 100 % of employees and apprentices.	X	X
			Payment: 100 % of previous earnings.	X	X
			Condition: reduction of 50 % of work time to care for minor children.	X	X
			Period of contribution: Not necessary when employee is under 21 years old. 90 days of contributions for employee between 21 to 26 years old. 180 days of contributions for employee of 26 years old.	X	X

After presenting this graphic, the present work reaches the following conclusions:

### ***General conclusions***

- a. The right to social security can be analyzed through the lens of civil and political rights, even though it is generally categorized as an economic, social and cultural right. Some of the civil rights which are implicated in the right to social security are the right to life, property, judicial protection, and the principle of non-discrimination.
- b. States which are parties to the ILO conventions on social security and any other international or regional binding instrument must guarantee full compliance with the obligations established by these instruments. But states should also consider increasing the coverage of the benefits offered as well as the types of benefits. To achieve this goal, comparative experiences of regional systems or particular countries can help to create a better understanding of the necessary components for a solid scheme of social security.
- c. States have the responsibility to construct a solid system of social security through strong, clear and detailed legislation. This legislation needs to provide protections for employees in the private and public sector. The failure to enact proper legislation can result in states failing their duty to protect, respect and fulfill the right to social security. This failure can also be present when current legislation is not properly enforced.
- d. National systems of social security can be complemented with bilateral or multilateral treaties that increase the protection provided and enhance cooperation between states to protect the social security benefits of nationals and non-nationals legally resident in country. The adoption of agreements is necessary to ensure the continuity of social security benefits when employees work in more than one country.
- e. The right to social security is not absolute. However, before establishing a limitation or reduction of a social security benefit, states need to ensure that the measure was previously established by law, necessary in a democratic society, and seeks the social wellbeing of the society. The majority of justifiable limitations adopted by states are based on economic reasons or to correct abuses of the social security system for political reasons.
- f. Despite that Spain has not regulated the Medical Care and Sickness benefits according to its international and regional duties, Spain has established a more efficient social security system than Peru. Although both countries have only ratified ILO Convention No. 102 (and in the case Peru ILO Convention No. 183 which will enter into force in May of 2017), Spain has developed a more protectionist model of social security system that covers the majority of regulations and recommendations contained in the ILO social security conventions and the CoE Codes. Therefore, Peru must work toward ensuring a strong social security system with special emphasis on the protection of benefits for employment injury, maternity and sickness, which are less regulated under the current Peruvian system than old-age, invalidity and survivor's benefits.

### *Specific conclusions about social security benefits*

- a. All employees and apprentices should be covered under the social security system. This standard is clearly set by the ILO conventions and Spain has complied. Peru, however, has not clearly set forth in its regulations the coverage standard.
- b. The benefits of social security must be ensured without any discrimination. One of the biggest challenges in this area is the continuing discrimination between men and women. It is pivotal to adopt inclusive language in the regulation of social security systems. One example is the necessity to change the word “wives” for “spouses” through all the ILO Conventions; another is the strengthening of paternity benefits. Likewise, children, who are beneficiaries of social security benefits should be protected without consideration of their parental filiation.
- c. Conditions for acquiring benefits can be based on different criteria, including a period of monetary contributions, periods of effective work, age, or residence. States have the freedom to determine which conditions are necessary to acquire the benefit; however, the conditions need to be clear and specific.
- d. The monetary benefit received can be provided by periodic payment or by one-time lump-sum. The method of payment needs to be clearly outlined by law to prevent or avoid illegal or irregular increments or reductions of the monetary benefit.
- e. Partial compliance with the requirements to obtain a benefit should ensure the right to acquire a reduced monetary benefit. This reflects the principle of social justice in the distribution of benefits.
- f. The duration of the coverage of the benefit needs to be established by law, particularly with regard to non-lifetime benefits.
- g. Employees who are involved in unhealthy or risky work activities should be specially protected. That protection includes the reduction of the pre-conditions for acquiring benefits and the provision of special complementary services for rehabilitation and medical attention.
- h. The social security benefits specified by international or regional instruments are not exclusive. Each state has the possibility to create new benefits according to their social reality and the necessity to protect employees, apprentices and other beneficiaries. Such benefits include the paternity benefit, the family benefit, the benefit for children with cancer or other severe diseases, and risks during childbirth and breastfeeding.
- i. Finally, States need to ensure that loss of work days due to pregnancy, sickness, or temporary incapacity are counted as an effective period for qualifying for lifetime pensions. Compliance with this general standard is evidence of the application of the principle of social justice, in the sense that the involuntary loss of working days should not affect the generation of any benefit under a social security system.