



 **LEGAL
FRAMEWORK**



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The editors of the TRANSFORM curriculum series are Luca Pellerano, Luis Frota, and Nuno Cunha. Participants to workshops in Kenya, Zambia, and Tanzania provided useful comments and inputs. The content of this manual does not reflect the official position of the different organizations supporting the TRANSFORM initiative.

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For further information, you can contact the TRANSFORM initiative at

transform_socialprotection@ilo.Org or visit www.transformmsp.org

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CONTENTS



CONTENTS	II	4. PROTECTION OF INDIVIDUAL ENTITLEMENTS AND PROTECTION AGAINST MISUSE OF PERSONAL INFORMATION IN SOCIAL ASSISTANCE	37
GLOSSARY	III		
LIST OF ABBREVIATIONS	IV		
1. INTRODUCTION	1	4.1. Objectives	37
2. WHY A RIGHTS-BASED FRAMEWORK FOR SOCIAL PROTECTION IS IMPORTANT	6	4.2. Right to complain and appeal	37
2.1 Objectives	6	4.2.1 The claim process	38
2.2 Rationale	6	4.2.2 The right to judicial appeal	39
2.3 International and regional standards	8	4.2.3 Appeal tribunals	39
2.3.1 International standards: general	8	4.3 Principle of due process	39
2.3.2 International standards: ilo social protection floors recommendation, 2012 (no. 202)	10	4.4 Privacy and the protection of the confidentiality of private information	40
2.3.4 Application of international and regional standards in national legal systems	15	4.5 Principles for protecting clients' rights in accessing social protection services	42
2.4 Constitutional protection and the role of courts	15	4.6 Take away lessons	45
2.5 Fiscal constraints and a rights-based approach	17	5. PRINCIPLES OF ACCOUNTABILITY IN NATIONAL SOCIAL ASSISTANCE LAWS	46
2.6 Take-away lessons	23	5.1 Objectives	46
3. CONSTRUCTING A NATIONAL LEGAL BASIS FOR SOCIAL ASSISTANCE	24	5.2 Accountability institutions	46
3.1 Objectives	24	5.3 Compliance and enforcement	47
3.2 Developing the legal framework	24	5.4 Support from legal clinics and other social activists	48
3.3 Establishing the main parameters by law	25	5.5 Take-away lessons	50
3.3.1 Recipient identification	25	6. BIBLIOGRAPHY	51
3.3.2 Social assistance for non-citizens?	27		
3.3.3 Qualifying conditions for a benefit	27		
3.4 Funding and institutional arrangements	31		
3.4.1 Funding arrangements	31		
3.4.2 Institutional arrangements	31		
3.5 Domestic laws, public consultations and social mobilization	32		
3.6 Research and analysis for regulatory reform	35		
3.7 Take-away lessons	36		



GLOSSARY

Categorical benefit schemes, cover all residents belonging to a certain category (e.g. people with disability, older adults aged above a defined age threshold), are also often referred to as “universal” categorical benefits schemes.

Conditional cash transfer: a special form of social assistance scheme which provides cash to families subject to the condition that they fulfil specific behavioural requirements. These conditions oblige individuals to satisfy some action associated with human development goals. This may include that parents must ensure their children attend school regularly or that they utilize basic preventative nutrition and health care services, such as vaccination programmes or maternal and post-natal check-ups.

Human rights-based approach to social security identifies rights holders and their entitlements and corresponding duty bearers and their obligations, and works towards strengthening the capacities of rights holders to make their claims and of duty bearers to meet their obligations.

Income security for children: social protection measures, including social insurance, social assistance, cash and in-kind transfers, among others, that ensure access to nutrition, education, care, and other necessary goods and services for children for their well-being and development.

Income security for older adults: social protection measures, including social insurance, social assistance, cash and in-kind transfers, among others, that enable older adults to maintain a basic quality of life after the retirement age.

Income security for working age: social protection measures, including social insurance, social assistance, cash and in-kind transfers, among others, that enable all people in active age groups and their dependents to maintain a basic quality of life if they are unable to earn sufficient income, especially due to sickness, injury, unemployment, maternity, disability, death of the breadwinner, and to increase their employability.

Legal framework. Encompasses all national laws and other decrees or secondary legislations and regulations.

National social protection laws. They refer here to either framework laws encompassing social insurance, social assistance and social services, or specific national social assistance laws. In line with international standards and principles, certain main parameters of social security schemes should be in the law and not in a decree or other secondary legislation.

Progressive realization In terms of the right to social security, means that States parties have an obligation to take appropriate measures to the maximum of their available resources towards the full realization of the right to social security.

Social assistance: the provision of social security benefits financed from the general revenue of the government rather than by individual contributions, with benefits adjusted to the person’s needs. Many social assistance programmes are targeted at those individuals and households living under a defined threshold of income or assets. Social assistance programmes can focus on a specific risk (for example, disability or on particularly vulnerable groups (for example, poor older adults).

Social insurance: the provision of social security benefits financed by contributions, which are normally shared between employers and workers with, perhaps, government participation in the form of a supplementary contribution or other subsidy from the general revenue.

Social security/social protection: the protection which society provides for its members, through a series of public measures, against the economic and social distress that otherwise will be caused by the stoppage or substantial reduction of earnings resulting from sickness, maternity, employment injury, unemployment, invalidity, old age, and death, and also including the provision of medical care and provision of subsidies for families and children.

Universal benefit schemes are **non-contributory** transfer schemes, which **cover all residents**, and provide benefits for all, whether working or not and irrespective of income. Often the only condition attached to the receipt of the benefit is that the person must be a long-term resident or a citizen of the country.

LIST OF ABBREVIATIONS

ADM	Administration and Delivery Systems
AIDS	Acquired Immunodeficiency Syndrome
AU	Africa Union
C. 102	ILO Social Security (Minimum Standards) Convention, 1952 (No. 102)
CBM	Citizen-Based Monitoring
CBO	Community-Based Organizations
CESCR	Committee on Economic, Social and Cultural Rights
CONEVAL	National Council for the Evaluation of Social Development Policies
COO	Coordination
CSOs	Civil Society Organisations
DSD	Department of Social Development
FIN	Financing and Financial Management
GOV	Governance, Institutions and Organizational Structure
HIV	Human Immunodeficiency Virus
IDA	International Disability Alliance
ILO	International Labour Organisation
ITSAA	Tribunal for Social Assistance Appeals
M&E	Monitoring and Evaluation
MIS	Management Information System
NGO	Non-Governmental Organization
OPDS	Organizations of Persons with Disability
ISPFR	ILO Social Protection Floors Recommendation, 2012 (No. 202)
S&I	Selection and Identification
SADC	Southern Africa Development Community
SASSA	South African Social Security Agency
UNICEF	United Nations
UNICEF	United Nations Convention of the Rights of Persons with Disability
WFP	World Food Programme
TASAF	Tanzania Social Action Fund
UNCPRD	United Nations Convention on the Rights of Persons with Disabilities

1

INTRODUCTION

This module deals with the core question of how a country can set up a legal framework that provides for non-contributory social protection, or social benefits,¹ paid from general government revenue.

ILO Convention No.102 (1952) sets a framework of basic social security principles on which any social security system should be based to encourage the development of broad social security schemes. The ILO Social Security (Minimum Standards) Convention, 1952 (No. 102) provides detailed guidance regarding the definition of the content of the right to social security. Set against the developments of social protection in Europe immediately after world war two, which included the acknowledgement of social security as a right, it included broad tax-funded social security provisions (ex. National Health Service funded by taxes, and State funded pensions²). Therefore C102 guides both contributory and non-contributory schemes.

The ILO Convention No.102 also includes important provisions to ensure rights to income security are guaranteed to specific vulnerable groups, including women and people with disability, across the lifecycle. For example, articles 46-52 in the Convention specify the obligation of states to secure the provision of maternity benefits to women, including maternity medical benefits, while articles 53-58 guarantee the provision of “invalidity” benefits to people with disability.

Box 1: European Code on Social Security: from social insurance to social assistance entitlement

“When the Code was written in the early 1950s, social assistance covered the risk of poverty, it was typically financed from general taxation and was considered a discretionary benefit. In other words, the state was totally free to decide if and how much benefit should be paid. Social insurance at this time was considered as a subjective right because, among other things, employees had contributed to its costs. This meant that it had to be paid to any claimant who satisfied the list of set conditions.

The Code was designed to cover only social insurance and not social assistance. However, since the 1950s, attitudes towards social assistance have changed dramatically, especially since the entry into force of the European Social Charter that now makes entitlement to social assistance a subjective right. The Code covers schemes that base entitlement to a benefit provided that the claimant’s need is linked to one of the contingencies, for example the claimant is facing poverty because of unemployment or old age. The Code does not cover schemes that are only concerned with whether a person is poor and thus unconcerned whether the poverty stems from one of the recognized social contingencies.”

Source: Nickless, J. *European Code of Social Security, Short Guide, May 2002, p.7*

1 Throughout this document we will use the words social security and social protection interchangeably. See the Glossary

2 Broad tax funded social protection is also referred to as “Beveridgean’ social security as opposed to contributory “Bismarckian” social security.





In practice, C. 102 fell short in terms of its requirements for universal protection, requiring for example only 20% of residents to be covered. In 2012, the ILO adopted Recommendation 202 on National Floors of Social Protection. The basic social security guarantees constituting national social protection floors, according to the **ILO Social Protection Floors Recommendation, 2012 (No. 202)** can be considered as reflecting the minimum core content of the right to social security envisaged in other international and regional standards today (see below). The Recommendation refers to social protection floors as nationally defined sets of basic social security guarantees which secure protection aimed at preventing or alleviating poverty, vulnerability and social exclusion (paragraph 2). In this framework, “schemes providing such benefits may include universal benefit schemes, social insurance schemes, social assistance schemes, negative income tax schemes, public employment schemes and employment support schemes”. Universal benefit schemes, social assistance schemes or a combination of social insurance with subsidies paid from government general revenue play a key role in guaranteeing rights to social security, especially for poor women and people with disability who are over-represented among groups that typically lack access to contributory schemes (see definitions in glossary). The need to provide for strong legal frameworks that clearly lay out entitlements, rights and obligations is provided for in R.202 (paras 3b and 7).

The right to social security is explicitly articulated in Article 9 of the **International Covenant on Economic, Social and Cultural Rights (ICESCR)**. The Committee on Economic, Social and Cultural Rights (CESCR), which monitors the implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR), has progressively developed the content of the right to social security. The 2008 General Comment 19 asserts its interdependent and indivisible nature and outlines the need for sustainable social security systems enshrined in law, as well as obliging states to provide adequate and accessible services in a non-discriminatory manner. According to Article 3 of the Covenant, states are obliged to ensure that women and men can equally enjoy rights to adequate work, social security and an adequate standard of living without discrimination. However, there is no explicit mention of the principle of non-discrimination to protect people with disability within the ICESCR, including in Article 2 which lists groups to which States must ensure nondiscrimination. The Optional Protocol to the ICESCR, which entered into force in 2013, establishes the competence of the CESCR to receive complaints in case of violations of rights enshrined in the Covenant, including violations of the right to social security, right to adequate standards of health and labour rights.³

Other important conventions that emphasize the right to social security for vulnerable groups and serve as monitoring and reporting legal tools include the Convention on the Elimination of all Forms of Discrimination (Article 11), Convention on the Rights of Persons with Disabilities (Article 28), and Convention on the Rights of a Child (Article 26).

At the regional level, Article 1 (b) of the **Code on Social Security of the SADC (2007)** describes social assistance as a “form of social security that provides assistance in cash or in kind to persons who lack the means to support themselves and their dependents. The objective of social assistance is to alleviate poverty through, amongst other things, the provision of minimum income support. Normally, the recipients are those who are not covered by any other form of social security”. Art. 1 (b) further indicates that “social assistance can be means-tested and is funded from government revenues”. Art. 1 (a) of the Code on Social Security of the SADC (2007) considers, separately, social allowances as “universal payments made to persons in designated categories who are exposed to exceptional need (such as children, older persons, people with disability), designed to assist them in the realization of their full potential. Social allowances are financed from government revenue and are not means-tested.

They are paid to all persons falling within the designated categories, regardless of their socio-economic position.” The focus of social assistance and social allowances is on the extension of protection to the poor and vulnerable or designated categories through allocations made from the state budget. Article 6 of the Code on Social Security of the SADC calls for the creation of an enabling environment to ensure equal opportunities for both women and men in access to employment, working conditions, remuneration, social protection, and measures to reconcile family and work obligations.

³ M Olivier (2003) “Developing an integrated and inclusive framework for social protection in SADC: a rights-based perspective” in M Olivier and E Kalula (eds) *Developing an integrated and inclusive framework for social protection in SADC* (CICLASS, Institute for Development and Labour Law, UCT & FES, 2003) 21-70 at 34.



Article 14 in turn focuses on the rights of people with disability, calling on States to: create environments that enable access to social security for all people with disability, guarantee equality of access and coverage in social security, promote the social and economic inclusion of people with disability such as through rehabilitation, vocational training and accessible services and work environments, and ensure disability-related needs (e.g. for assistive devices) and circumstances are covered in social protection instruments.

“A society had to attempt to ensure that the basic necessities of life were accessible to all if it was to be a society in which human dignity, freedom and equality were foundational. The right of access to social security, including social assistance, for those unable to support themselves and their dependants was entrenched because society in the RSA valued human beings and wanted to ensure that people were afforded their basic needs.”^{3b}

Some countries in Southern Africa have established a legal framework for the provision of social assistance (taken generally to encompass social allowances). However, it has also been found that in many SADC countries the general picture is that social assistance (as well as related services and facilities) lacks a formal statutory basis. Not only does this add to the fragmentation of social protection, at least from a legal perspective, but it also has the following effects:³

- There is no statutory compulsion on the part of governments to take action in this area, and there is an inability on the part of courts to monitor government action in the absence of clear legal objectives, standards and provisions.
- Individuals and communities in need of protection are exposed to arbitrary and discretionary selection, decision-making, and change of rules, particularly in times of crises when vulnerable people are at greater risk and the need for assistance is most felt. This affects women and persons with disability disproportionately since they are at a greater risk of exclusion from contributory social security benefits and rely particularly on small-scale and targeted social assistance schemes.
- There is less incentive and pressure, to effectively implement assistance to vulnerable groups in need of protection, as prioritized nationally by broad national social dialogue.

And yet, the exponential growth and proven importance of social assistance programmes require a clear and solid basis cemented in law to allow harmonized, consistent and trusted delivery of services at scale. Especially during the last two decades, social assistance schemes, including universal, conditional and unconditional non-contributory programmes have been introduced or expanded on a comprehensive scale in Africa, Asia and Latin America. Three examples embedded in law include:

- **Brazil:** The 1988 Constitution of Brazil recognises the right to social protection, and Law 10.836/2004 stipulates the right to a basic income in order to obtain food, education and health care. The Bolsa Familia scheme was launched in 2003 with the objectives of reducing poverty and inequality by providing a minimum level of income for extremely poor families.

As one of the largest non-contributory social transfer schemes in the world, it covered 50 million people in 2015.⁴

- **South Africa:** The Social Assistance Act (Act 13 – 2004) charges the national government with the responsibility of social security grants. The social assistance grant system, targeting certain categories of poor people in need of income support, has grown rapidly since the middle of the 1990s, currently covering about 17 million recipients (i.e. about one-third of the South African population).
- **Nepal:** The Social Security Act 2075 (approved in 2018) incorporates gender and social inclusion issues through the targeting of specific categorical groups, including single and elderly women, and people with disability.

3b Quotation from the South African Constitutional Court case of *Khosa and Others v The Minister of Social Development and Others; Mahlaule and Others v The Minister of Social Development and Others* 2004 (6) BCLR 569 (CC) par 52

4 ILO Social security and the rule of law (2011) 123 (par 297); ILO World Social Protection Report 2014-2015 (2014) 26; <http://www.social-protection.org/gimi/gess/ShowWiki.action?id=3044>





The impact of many of these schemes has been extensive. The income protection they have provided, especially when implemented in coordination with social services, has significantly contributed to reducing poverty, having more secure pregnancies, decreasing malnutrition, increasing school attendance, enabling some recipients to engage in entrepreneurial activities, and improving health outcomes, including the promotion of adherence to ARV treatment for HIV and the reduction of child labour.⁵ Moreover, the indirect or distributional role of these schemes has been considerable, as the income received through non-contributory arrangements has been instrumental in supporting many family members. But the impact on poverty, inequality and broader social outcomes, could be greater if schemes provided more predictable and significant levels of benefits on a greater scale, according to national circumstances, as recommended by R. 202, as well as targeted to the needs of marginalised groups (e.g. women, people with disability, ethnic minorities).

Whilst ILO R. 202 (2012) establishes that basic social security guarantees should be established by law and that National laws and regulations should specify the range, qualifying conditions, and levels of the benefits giving effect to these guarantees, it also recognizes that there is no single way of constructing the elements of the legal framework providing for social assistance. Each country should determine the type, nature, level and progressive universal reach by categories of need and social risk, according to national circumstances. In particular, the form of a national regulation, its legal status and content, and its implementing modalities will vary from country to country. However, much can be learned from international and regional standards and from the experience of other countries with respect to:

- The role that constitutional guarantees play in ensuring a balanced and evolving system of social security rights
- How courts and tribunals are sensitive to human rights considerations, pronounce themselves on social assistance matters, and keep governments and social assistance institutions accountable and responsive to collective and individual concerns, particularly those of the most vulnerable
- Effective administration, streamlined service delivery and provision of quality services to clients informed by the transparent implementation of clear principles embedded in framework legislation, including those of effective availability and accessibility of services
- The involvement of social partners and civil society institutions, that help social assistance institutions be accepted, fit and adapt continuously to national circumstances and therefore ensure their continuing public legitimacy
- Adequate internal monitoring, external checks by general audits and other legal enforcement institutions, that increase the integrity, credibility and trustworthiness of the institutions
- The resolution of disputes and complaints of clients regarding the social assistance system that enhances the equity and consistency of social assistance provisions

A strong legal framework is a vehicle to uphold human rights principles in governance, administration and social protection service delivery.

Box 2: Definition – human rights-based approach to social security

A human rights-based approach to social security identifies rights holders and their entitlements and corresponding duty bearers and their obligations, and works towards strengthening the capacities of rights holders to make their claims and of duty bearers to meet their obligations.

Source: socialprotection.org

⁵ ILO (2011) Social security and the rule of law 85 (par 202). The recent World Bank (6th) South African Economic Update Report (2014) has this to say: "South Africa uses its fiscal instruments very effectively, achieving the largest reductions in poverty and inequality of the 12 middle-income countries. As a result of South Africa's fiscal system, some 3.6 million people are lifted out of poverty, measured as those living on less than \$2.50 a day (in purchasing power parity dollars). The rate of extreme poverty is cut by half. The share of the population living on \$1.25 a day or less falls from 34.4 percent to 16.5 percent, reflecting the impact of cash transfers and free basic services net of taxes." (p 3)

Table 1: The principles of a rights-based approach to social protection and what they entail

PRINCIPLES	WHAT THEY ENTAIL
Universality of Protection	According to R.202, and ILO Declaration of Philadelphia, social security guarantees should ensure at a minimum that, over the life cycle, all in need of protection have access to essential health care and to basic income security which together secure effective access to goods and services defined as necessary at the national level.
Dignity and Autonomy	Social security responds to the special needs of disadvantaged persons in a manner that promotes dignity (notably in access to benefits and service delivery) and minimizes stigmatization of those receiving social security benefits by, for example, embedding anti-stigma measures.
Equality and Nondiscrimination	Under international human rights law, States are expected to eliminate direct and indirect discrimination in law and practice – on the grounds of race, colour, sex, age, language, religion, political or other opinions, national or social origin, culture, minority status, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation, and civil, political, social or another status – when it has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to social security.
Inclusion of Vulnerable Groups	States give special attention to those persons who belong to the most disadvantaged and marginalized groups in society. This entails guaranteeing non-discriminatory treatment as well as adopting proactive measures to enable those suffering from structural discrimination (for example, ethnic minorities, people with disability or indigenous people) to enjoy their rights.
Gender Perspective	Substantive equality requires states to transform unequal power relations between women and men and ensure that all human beings can develop and make choices without the limitations set by stereotypes, rigid gender roles and prejudices. Affirmative measures are required to address barriers and obstacles that prevent women from enjoying and claiming their rights even in cases where the legislation guarantees “equal opportunities”.

Source: socialprotection.org

One important aspect of a rights-based approach is respect for the inherent dignity of all. **Respecting the dignity of those who receive State social security benefits implies that all actors within the social security system must avoid stigmatization and prejudice.** “Obstacles, insecurity and structural factors frequently render it impossible for certain disadvantaged groups to claim their rights and to fulfil their potential independently. The state must explicitly design policies that are ‘shame proof’ and respond to special needs in a manner that promotes dignity. This also implies that minimum essential levels of social protection be set in a manner that allows a life in health and dignity”⁶ (R. 202, para 8).

These issues are discussed in the next sections. Broad recommendations are provided to assist with the development of a legal framework, in particular national social protection laws.

⁶ <http://socialprotection-humanrights.org/framework/principles/dignity-and-autonomy/>



2

WHY A RIGHTS-BASED FRAMEWORK FOR SOCIAL PROTECTION IS IMPORTANT

2.1 OBJECTIVES

Upon completion of this section of the module, you should be able to:

- Describe the purposes fulfilled by a legal social protection framework including social assistance
- Understand why international and regional standards play a prominent role in determining the scope and content of social assistance
- Reflect on the main international instruments, including ILO's R. 202 and C. 102 concerning social security minimum standards, that set universal standards and benchmarks for the provision of social assistance
- Explain the framework for the extension of social assistance, provided for by the African Union (AU) and Southern Africa Development Community (SADC) instruments
- Understand how international and regional standards on social assistance give effect to national legal systems
- Discuss the role of national constitutions with regard to social protection and in particular social assistance and the role of courts in the protection of the right to social protection
- Describe the measures that countries have adopted to provide social assistance despite fiscal constraints with particular emphasis on developing countries

2.2 RATIONALE

A legal framework for social assistance fulfils important purposes which give the State a clear and legal **general mandate** to provide social assistance benefits:

- Meeting international obligations
- Implementation of constitutional rights
- Providing normative content to that right: availability of services, clearly defined, effective and adequate protection from social risks and contingencies
- Defining the various roles and responsibilities of all those involved in implementing the programmes at different levels of government, i.e. rights and obligations of all concerned parties
- Guaranteeing and improving the correct functioning of the scheme. In the absence of the existence and systematic application of administrative rules – this includes rules such as the requirement for regular life proofs and the uniform application of rules across sub-national levels – institutions may provide social benefits unduly and inconsistently



When social security rights of very vulnerable groups are recognised in constitutions and enshrined in laws, this can create political legitimacy and build societal momentum and public action to ensure that their rights can be enjoyed in practice. A social protection law encompassing social assistance should also give expression to the principle that social protection **is an individual human right**:

- Safeguarding human rights principles of dignity, inclusion, and accessibility of benefits
- Guaranteeing equal treatment, including gender equality, disability inclusion and non-discrimination
- Protecting privacy and increasing trust and confidence in the State

Furthermore, specifically, such a legal framework gives **poor and vulnerable people clarity** regarding:

- The specific benefits that may be available to them
- Accessibility of the benefits
- Individual rights and obligations
- The criteria they have to meet to qualify for such benefits
- Mechanisms to ensure transparency and access to information, non-costly procedures that need to be followed to access these benefits
- Complaints and appeal mechanisms available to them, should they be dissatisfied by a decision of the relevant institution in charge of paying social assistance benefits
- Participation channels for recipients

Such a legal framework should also deal with other important **aspects of administration**, such as:

- The simple and transparent identification and selection of recipients
- Education and awareness of administrators, staff and the general public
- Strengthening of institutional capacities, i.e. The establishment, functions and powers of the institution responsible for paying benefits
- Safeguarding the predictability and adequacy of benefits
- Promoting human rights approaches in management, i.e.
 - In the use of technology including biometric data
 - Equity in access for disadvantaged groups
 - Accessibility of procedures for people with different disabilities
 - Languages spoken (including accessible communication formats for people with certain disabilities)
 - Non-discrimination by front-line staff
 - “Non-shame proof” management practices
 - Ensuring privacy of data in data exchange and communication
- Ensuring **transparency and accountability in financial matters**:
 - Open procurement rules
 - Integrity of benefit payment systems
 - Safeguards against corruption
 - Appropriate fiduciary risk management for the prevention and avoidance of fraud, errors, maladministration
 - Establishing a **stable and regular funding base**: clarifying funding sources and public financial management processes for funding that guarantee the sustainability of the scheme





It is therefore **advisable, as a rule, to adopt legislations that will protect the rights and entitlements of social assistance recipients.**

It has been debated whether such national legal frameworks should apply from the start of establishing social protection schemes. One view contends that pilot schemes aim precisely at defining the design parameters before anchoring the national social protection scheme into Law. But the result is often that pilots tend to last and multiply in different shapes and forms without solid legal foundations and accountability frameworks. Another view argues that the key defining nature and principles underpinning social assistance provision ought to be determined from the onset as part of the law, and implementation can be progressively done within the boundaries of those parameters. The latter needs to be defined ex-ante based on national evidence-based dialogue including sound costing.

In reality, some designs of social assistance benefits lend themselves better to human rights approaches, particularly ensuring the justiciability of rights, than others (see MODULE S&I So, a national dialogue and policy decisions on principles and approaches need to inform what pilots are suitable and adapted in the first place (decisions cannot be based only on the technical assessment and evaluation of “what works best”). Therefore, a stance that is consistent with a human rights approach is that as soon as possible, a legal foundation is necessary to lay out a full vision for what the system of complete rights must look like, even if schemes are implemented gradually to allow for a learning phase. Laws and regulations can be subject to improvements and further specifications as countries learn and progress.

Having said that, it can be argued that laws and institutions can fail if they do not generate sufficient credible commitment from national stakeholders; therefore evidence-based and inclusive national social dialogue is critical to ensure ownership, more equitable outcomes and effective implementation of the laws.⁷

2.3 INTERNATIONAL AND REGIONAL STANDARDS

2.3.1 International standards: general

International and regional standards play a prominent role in determining the scope and content of social assistance. Countries that are party to these instruments should adhere to them. In addition, standards can serve as benchmarks, which countries can use to establish, develop and improve their social assistance systems. These standards are also an expression of the fact that access to social protection, including social assistance is a human right. The 1944 Philadelphia Declaration (i.e. the Declaration concerning the aims and purposes of the ILO, included as an annex to the Constitution of the ILO) calls for the ‘extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care.’⁸

The challenges in this regard include the fact that:

- 73% per cent of the global population currently lack adequate access to formal social security and among these, 20 per cent live in extreme poverty and the majority of unprotected people are women. Only 33.5% of people with severe disabilities have access to a disability benefit (ILO, 2021). This coverage varies significantly by region, from nearly 100% in Eastern Europe to 6.7% in sub-Saharan Africa (ILO, 2021)
- Informal work is widespread in developing countries – particularly amongst women and people with disability – and there is an inadequate range and quality of social protection benefits available in many countries, amidst persistent levels of poverty.⁹

⁷ World Bank Report 2017 Governance and Laws and ISPA Tool on Social Dialogue based Social Protection Assessment.

⁸ See section III(f) of the Declaration.

⁹ See ILO Social Security and the Rule of Law (General Survey concerning social security instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization) par 300; M Cichon and K Hagemeyer “Social Security for All: Investing in Global and Economic Development. A Consultation” Issues in Social Protection Series, Discussion Paper 16, ILO Social Security Department 2006.



States must not only respect and protect rights to social security but also fulfil rights by adopting appropriate measures. For example, when individuals cannot realise their right to social security through the existing contributory systems, which is typically the case for poor women and people with disability, then the states have to establish non-contributory social assistance schemes to ensure that everyone can be protected. For example, women and people with disability are overrepresented in informal employment (as domestic workers, own-account workers etc.) (Mizunoya & Mitra, 2013; UNDESA, 2019) and generally deprived of social protection. Informal sector workers are often excluded from social protection benefits, such as parental and sick leave benefits, pensions, health insurance and workers' compensation.

Concrete measures are needed to extend social protection to informal workers to enhance their enjoyment of basic labour rights through adequate legislation. For example, the ILO Maternity Protection Convention 2000 (No. 183) provides comprehensive guidance to member States in providing maternity protection to all women during pregnancy and lactation, irrespective of their employment status, through a mixture of compulsory social insurance and public funds (Addati, Behrendt and Wagenhauser, 2016).

Women who do not qualify for contributory benefits should be entitled to non-contributory cash transfers to ensure a suitable standard of living (see Box 6). Nonetheless, a lack of legal coverage and effective implementation remains a major challenge for women to realize these rights in practice (Ibid). In 1944 the ILO also adopted two non-binding instruments aimed at fostering the national provision of minimum support in the areas of income security and medical care. **These were Income Security Recommendation 67 and Medical Care Recommendation 69.** It can be noted that both of these Recommendations paved the way for the adoption of C.102, ILO's landmark Social Security Convention.

The UN Universal Declaration of Human Rights of 1948 is globally regarded as a leading instrument in the human rights area. Articles 22 and 25 of the Declaration emphasize the right of every person to social security and to an adequate standard of living.

Box 3: Universal Declaration of Human Rights, 1948

Article 22

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Article 25

1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Source: Universal Declaration of Human Rights, 1948

Other UN instruments confirm in broad terms the approach indicated above. The **UN International Covenant on Economic, Social and Cultural Rights (ICESCR)** of 1966 is the most widely endorsed international instrument in this regard and most importantly is legally binding to countries who have ratified it. Unlike the Declaration, ratifying states party to the Covenant have to ensure they are complying with their obligations stemming therefrom. The Covenant makes specific references to women's rights, including equal pay (article 7) and paid maternity leave (article 10), but no references to the rights of people with disability.





Box 4: Online Resources

Visit ohcr.org provides a single window to access existing recommendations by international body treaties by country.

The hashtag #ESCRLitigation provides information on Twitter about ongoing litigation resulting from infringements to the International Covenant on Economic and Social Rights

Source: *Universal Declaration of Human Rights, 1948*

Almost all African countries,¹⁰ including most SADC countries, have ratified the Covenant. By adopting this instrument, states recognize:

- a. The right of everyone to social security (including social insurance) (article 9)
- b. That the widest possible protection and assistance should be accorded to the family, including special protection in relation to pregnant women, and special measures of protection and assistance on behalf of all children and young persons without any discrimination (article 10)
- c. The right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions (article 11)

The right of everyone to the enjoyment of the highest attainable standard of physical and mental health (article 12).

In interpreting article 9 on the right to social security, the UN Economic and Social Council, in its General Comment No. 19 on the right to social security, indicates that this article requires that measures used to provide social security benefits be guaranteed to all people, including those who are unemployed. In almost all States party to the ICESCR, non-contributory schemes will be required since it is unlikely that every person can be adequately covered through an insurance-based system (par 4(b) of the Comment).

The Committee on Economic, Social and Cultural Rights (CESCR) recognizes that some aspects of respecting, protecting and fulfilling economic, social and cultural rights may require financial resources that are not always immediately available to all States, and allows for "progressive realization", meaning the rights may be realized gradually (see Section 2.5).

The right to social protection for specific groups may also be covered in other international legal frameworks and policies. For example, the United Nations Convention on the Rights of Persons with Disabilities codifies the rights of people with disability to access social protection without discrimination based on disability and for coverage of disability-related expenses. The ILO and International Disability Alliance (IDA) led Joint Statement towards inclusive social protection systems supporting the full and effective participation of people with disability also calls for legal frameworks underpinning social protection to guarantee non-discrimination on the grounds of disability and obligations for the provision of reasonable accommodations and responsiveness to disability-related needs.

In this way, the human rights framework seeks to distinguish between an inability and an unwillingness to meet the agreed responsibilities.

2.3.2 International standards: ILO Social Protection Floors Recommendation, 2012 (No. 202)

In 2012 the ILO adopted R. 202 on National Floors of Social Protection which provides guidance on establishing comprehensive social protection systems and completes the existing international social security normative framework. The Recommendation defines social protection floors as nationally defined sets of basic social security guarantees that secure protection aimed at preventing or alleviating poverty, vulnerability and social exclusion (par 2).

As quickly as possible and following national circumstances, ILO Member States are called upon to maintain or establish social protection floors comprising basic social protection guarantees. The guarantees should ensure, at a minimum, that, over the life cycle, all in need have access to essential healthcare and to basic income security which, together, secure effective access to goods and services defined as necessary at the national level (par 4).

¹⁰ Except Botswana, Mozambique and South Sudan as of January 1st 2017. See ohchr.org



The elements of a social protection floor should be provided to at least all residents and children (par 6).

Box 5: National Social Protection Floors

National social protection floors should comprise at least the following basic social security guarantees, which could among others be achieved via social assistance schemes (paras 5 and 9(3)):

- a. access to a nationally defined set of goods and services, constituting essential health care, including maternity care, that meets the criteria of availability, accessibility, acceptability and quality;
- b. basic income security for children, at least at a nationally defined minimum level, providing access to nutrition, education, care and any other necessary goods and services;
- c. basic income security, at least at a nationally defined minimum level, for persons in active age who are unable to earn sufficient income, in particular in cases of sickness, unemployment, maternity and disability; and
- d. basic income security, at least at a nationally defined minimum level, for older persons.

Source: ILO Social Protection Floors Recommendation, 2012 (No. 202)

Importantly, R. 202 states that basic social security guarantees need to be established by law (par 7). It stipulates that:

- National laws and regulations should specify the range, qualifying conditions, and levels of the benefits giving effect to these guarantees.
- Impartial, transparent, effective, simple, rapid, accessible and inexpensive complaints and appeal procedures should also be specified.
- Access to complaints and appeal procedures should be free of charge to the applicant.
- Lastly, systems should be in place to enhance compliance with national legal frameworks (par 7)

ILO R. 202 recognizes the responsibility of States in developing national legal frameworks but speaks to the following principles:

- a. universality of protection, based on social solidarity;
- b. entitlement to benefits prescribed by national law;
- c. adequacy and predictability of benefits;
- d. non-discrimination, gender equality and responsiveness to special needs;
- e. social inclusion, including of persons in the informal economy;
- f. respect for the rights and dignity of people covered by the social security guarantees;
- g. progressive realization, including by setting targets and time frames;
- h. solidarity in financing while seeking to achieve an optimal balance between the responsibilities and interests of those who finance and benefit from social security schemes;
- i. consideration of the diversity of methods and approaches, including financing mechanisms and delivery systems;
- j. transparent, accountable and sound financial management and administration;
- k. financial, fiscal and economic sustainability with due regard to social justice and equity;
- l. coherence with social, economic and employment policies;
- m. coherence across institutions responsible for the delivery of social protection;
- n. high-quality public services that enhance the delivery of social security systems;
- o. efficiency and accessibility of complaint and appeal procedures;





- p. regular monitoring of implementation, and periodic evaluation;
- q. full respect for collective bargaining and freedom of association for all workers; and
- r. tripartite participation with representative organizations of employers and workers, as well as consultation with other relevant and representative organizations of persons concerned.

Box 6: The ILO legal frameworks of relevance for women and girls

The ILO SPF Recommendation No. 202 holds significant promise for closing coverage gaps in social protection for women, both with regard to access to health care and income security throughout the life cycle. Women also benefit disproportionately from social transfers given their large-scale exclusion from contributory social security. For example, access to non-contributory pensions can enhance women's income security in old age, while increasing cash transfers to families with children (eg. child or family allowances) can promote investments in girls education, as well as provide a source of autonomous income for mothers as well as women's economic activity. Schemes that guarantee basic income security, such as employment guarantee schemes, provide critical security for women in active age who are unable to earn sufficient income, in particular in cases of sickness, unemployment, maternity and disability. Women are also most effectively reached through universal schemes offered to all citizens or residents. In many countries across sub-Saharan Africa, social transfer systems face serious drawbacks, including insufficient coverage, low benefit levels and institutional fragmentation.

The ILO Maternity Protection Convention (No.183) sets out a comprehensive framework to guide member States in providing adequate maternity protection at national level to women, including those in informal work. Mothers are entitled to maternity leave of not less than 14 weeks provided through compulsory social insurance or public funds under national law or other modalities. Women who do not qualify for such benefits should be entitled to adequate benefits out of social assistance funds. Countries in sub-Saharan Africa that have ratified the Convention include Senegal, Niger, Mauritius, Mali, Djibouti, Burkina Faso and Benin.

Source: Adapted from Tessier et al, 2013.

The **African Union** puts human rights on the African agenda. This is evident in the explicit recognition of human rights, the promotion of social economic and cultural development and gender equality in the following instruments:

- Specialized technical committees on labour and social affairs
- African Committee of Experts on the Rights and Welfare of the Child
- African Charter on Human and Peoples' Rights
- African Charter on the Rights and Welfare of the Child (ACRWC)
- Protocol to the Charter on Human and People's Rights on the Rights of Women in Africa (Women's rights protocol)
- African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention)
- African Youth Charter
- Ouagadougou Declaration and Plan of Action (2004)
- Livingstone and Yaounde Calls for Action (2006)
- The Social Protection Plan for the Informal Economy and Rural Workers – SPIREWORK (2011-2015)
- The Addis Ababa Agenda for Action
- The Protocol to the African Charter on Human and People's Rights on the Rights of Persons with Disabilities in Africa



Box 7: Online Resource

You can access to up to date legal cases on African Union and SADC treaties on human rights, including to social security: visit ihrda.org

The **Social Policy Framework for Africa** of 2008¹¹ sets out a vision for African societies based on social solidarity, equity and freedom from discrimination and poverty. It argues for the extension of social protection through measures such as publicly financed, non-contributory cash transfers (par 31).

The Framework notes that there is an emerging consensus that a minimum package of essential social protection should cover: essential health care, and benefits for children, informal workers, the unemployed, older persons and people with disability. This minimum package provides the platform for broadening and extending social protection as more fiscal space is created (par 32). The Framework further remarks that a minimum package can have a significant impact on poverty alleviation, the improvement of living standards, the reduction of inequalities and the promotion of economic growth (par 33).

Work is underway on the development of an **AU Protocol on the Rights of Citizens to Social Protection and Social security, and a Social Agenda 2063**.

In the context of the **Southern Africa Development Community (SADC)**, the Protocol on Employment and Labour (2014) enjoins each State Party to aim at developing an integrated and comprehensive social protection system which ensures meaningful coverage of all through social protection programmes, including social assistance (art 11(3)(a)).

Box 8: Progressively attaining goals of protection in accordance with international and regional standards in SADC countries

According to article 11(2) of the SADC Protocol on Employment and Labour, every Member State shall establish, maintain and progressively raise its system of social security to a level consistent with international and regional instruments, by ratifying and implementing ILO Social Security (Minimum Standards) Convention 1952 (No. 102) and implementing the ILO National Floors of Social Protection R.202, the Charter of Fundamental Social Rights in SADC and the SADC Code on Social Security.

Source: *SADC Protocol on Employment and Labour*

The Protocol specifically provides that:

- Persons who have been unable to either enter or re-enter the labour market and have no means of subsistence shall be entitled to receive sufficient resources and social assistance (art 11(1)(b))¹²
- Every worker who has reached retirement age but is not entitled to a pension or does not have other means of subsistence shall be eligible to receive adequate social assistance to cater specifically for basic needs including medical care (art 14(b))¹³
- Ideally, social assistance support should also be available to workers who have become unemployed and who are not covered by compulsory social insurance (art 15(i))
- Appropriate and adequate social security protection should be extended to informal and rural workers, among others, through universal schemes and social assistance measures (art 20(1)(e))
- Measures should be taken to support the inclusion of people with disability in employment, including reinforcing the protection of rights covered in the UNCRPD, provision of disability-related goods and services, addressing discrimination of disability and access to employment protections and employment benefits (art 14 (1-4))

11 AU (2008) Social Policy Framework for Africa (CAMSD/EXP/4(I))





Finally, the 2007 **Code on Social Security in the SADC** provides that everyone in SADC who has insufficient means of subsistence to support themselves and their dependents should be entitled to social assistance, in accordance with the level of socio-economic development of the particular Member State (par 5.1). The right to social assistance is specifically extended to those in need who are old, unemployed/dependent on survival activities or have a disability (paras 10.1, 11.1 and 14.1).

Box 9: Regional legal and human rights standards of relevance for women and people with disability

Protocol to the African Charter on Human and People's rights of women in Africa includes the following legal provisions of significance to women:

- Article 13 on Economic and Social Welfare Rights: Parties shall adopt and enforce legislative and other measures to guarantee women equal opportunities in access to employment and other economic opportunities. They shall also establish a system of protection and social insurance for women working in the informal sector and sensitise them to adhere to it.
- Article 22 on Special Protection of Elderly Women: Parties shall provide protection to elderly women and take specific measures commensurate with their physical, economic and social needs as well as their access to employment and professional training.
- Article 23 on Special Protection of Women with Disabilities: Parties shall ensure the protection of women with disabilities and take specific measures commensurate with their physical, economic and social needs to facilitate their access to employment, professional and vocational training as well as their participation in decision-making.

Article 14 of the Code on Social Security of the SADC concerns disability. It states:

14.1 Member States are encouraged to create an enabling environment that would ensure that persons with disabilities, irrespective of the origin and nature of their disabilities or incapacities, are entitled to social security. In particular, Member States are encouraged to ensure that persons with disabilities benefit from social safety net mechanisms.

14.2 Member States should ensure that social security instruments guarantee equality of access and coverage to persons with disabilities.

14.3 Member States should promote the social and professional integration of persons with disabilities, through measures such as rehabilitation, vocational training, accessibility and mobility, means of transport and housing and the appropriate organisation of work and the working environment.

14.4 Member States should ensure that the special needs (including the need for assistive devices) and circumstances of persons with disabilities are provided for in national social insurance and social assistance instruments.

Section 2.2.12 of the African Union Social Policy Framework for Africa (2008) covers disability. The Framework notes that a social policy must be concerned with the redistributive effects of economic policy, protect people from the vagaries of the market and the changing circumstances of age, illness and disability, enhance the productive potential of members of society, and reconcile the burden of reproduction with that of other social tasks. The Framework also notes that "Member States are encouraged to choose the coverage extension strategy and combination of tools most appropriate to their circumstances. There is an emerging consensus that a minimum package of essential social protection should cover: essential health care, and benefits for children, informal workers, the unemployed, older persons and persons with disabilities. This minimum package provides the platform for broadening and extending social protection as more fiscal space is created."

12 This provision echoes par 10(2) of the Charter of Fundamental Social Rights in the SADC (the "Social Charter") of 2003.

13 For a similar provision, see par 8(b) of the Social Charter.



2.3.4 Application of International and Regional Standards in National Legal Systems

National legal systems use different methods to give effect to international and regional standards. Sometimes, constitutions provide for relatively uncomplicated mechanisms for the application of international law.¹⁴ For example, the Constitution of **Namibia** foresees the direct application of international and regional standards by stipulating that, unless otherwise provided for, 'the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia'.¹⁵ However, in other cases, such as **South Africa**¹⁶ and **Zimbabwe**,¹⁷ statutory incorporation of the relevant international standards is, as a rule, required before the (ratified) international agreement becomes law in the country concerned. In cases where statutory incorporation is required, it is indeed necessary to adopt legislation that will give effect to these standards.

2.4 CONSTITUTIONAL PROTECTION AND THE ROLE OF COURTS

National constitutions play an increasingly important role in providing social security and social assistance.¹⁸ This is significant as national constitutions have been used to hold governments accountable to granting human rights protection in the area of social protection. Of course, the potential impact of a constitution containing provisions for social protection differs from system to system. It will depend on the status accorded to these rights by the constitution and on the powers and ability of the courts to enforce these rights.¹⁹ Constitutions provide for the right to social security and to social assistance in different ways.

Although several national constitutions do not refer specifically to "social security", the great **majority contain provisions that recognize the need for one or more forms of social protection**. The means of social protection most commonly referred to in national constitutions throughout the world include social security, social insurance, social assistance and support, and social services. These means are often provided for in the context of protection against specific social risks or life situations, such as motherhood, fatherhood, childhood or old age, and with respect to specific categories of the population, such as children and young persons, families with children, the elderly, and people with disability. Health insurance and the provision of healthcare are often dealt with separately from protection against other social risks. Other means of protection may include the concepts of income security, minimum income, social pensions, and the minimum subsistence level.²⁰

Some countries' constitutional provisions furnish **non-binding authority** by defining the guiding principles of state action, without creating obligations for the State and even fewer individual rights.

- The Constitution of Japan only refers to social security in article 25(2), which provides that: "In all spheres of life, the State shall use its endeavours for the promotion and extension of social welfare and security, and of public health." Similarly, based on the constitutional requirement to provide public assistance,²¹
- In 1995, the Government of India included the National Social Assistance Programme in the Central Budget. Guidelines aimed at facilitating the implementation of this programme were issued by both the central and state governments but they did not give effect to specific national legislation.
- Non-binding references to social protection or welfare rights are contained in the constitutions of Namibia and **Swaziland**.

14 A note on monist and dualism models in determining the application of international treaties in national laws. The monist view generally asserts that international law prevails over domestic law thus making international law directly incorporated into domestic law once it becomes binding. According to the dualist approach, in order for a part of international law to become binding domestically, it must be transposed into domestic law, or otherwise it will have no legal effect. Visit oxfordjournals.org

15 Art 144 of the Constitution of Namibia.

16 Sect 231(4) of the South African Constitution (1996).

17 Sect 111B(1)(b) of the Zimbabwean Constitution (1980).

18 General Survey concerning social security instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization, 2011 available on ilo.org

19 ILO Social security and the rule of law paras 234-235; M Olivier "Social security: Framework" in LAWSA (The Law of South Africa) - Labour Law and Social Security Law Vol 13, Part 2 (LexisNexis, Durban, 2012) par 150.

20 General Survey concerning social security instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization, 2011 available online on ilo.org

21 Article 41 of the Constitution of India directs the State to provide public assistance to its citizens in case of unemployment, old age, sickness and disablement and in other cases of undeserved want within the limit of its economic capacity and development.





Provisions creating state obligations in respect of social security are of two main types:

- In some cases, social security (meant, in this context, to encompass social assistance) is treated as a **duty directly imposed upon the State**. These provisions affirm a duty of the State to take action, for example, to ensure the social security or health of citizens, organize the social security system or protect families or vulnerable groups. However, these provisions do not create individual entitlements. One example of this approach is found in article 34 of the Constitution of **Saudi Arabia**: “The State guarantees the rights of the citizen and his family in cases of emergency, illness and disability, and in old age; it supports the system of social security and encourages institutions and individuals to contribute in acts of charity.” The Constitution of **Ghana** (1996) Art 37, (6) (b) requires the State to provide “social assistance to the aged such as will enable them to maintain a decent standard of living”.
- Some affirm an **individual right to social security** social protection, social assistance or health. Article 43 of the Constitution of **Kenya** (2010) recognizes the right of every person to social security and that the State shall provide appropriate social security to persons who are unable to support themselves and their dependents.²² It confers an individual right to social security and imposes a duty on the State to fulfil the rights, but it nevertheless qualifies the duty by only requiring the State to progressively realize the right within its available resources.

The most comprehensive constitutional protection of social security and social assistance in Southern Africa undoubtedly comes from **South Africa**. In the chapter dealing with the Bill of Rights, the South African Constitution grants everyone certain fundamental rights and expects the State to respect, protect, promote and fulfil those rights (section 7(2)). The Constitution grants to everyone ‘[t]he right to have access to social security, including, if they are unable to support themselves and their dependents, appropriate social assistance’ (section 27(1)(c)), and **obliges the State to implement appropriate measures**: ‘The state must take reasonable legislative and other measures, within its available resources, to achieve the **progressive realization** of each of these rights’ (section 27(2)).

There are a number of countries that have adopted constitutions that include explicit state commitments to women’s rights to social security and gender equality, as described in Box 10.

Box 10: Enshrining gender equality and disability inclusion in constitutions

In Kenya, women legislators worked together across parties, in alliance with the Federation of Women Lawyers (FIDA), and in collaboration with the emerging gender machinery, to secure substantive gains for women and girls in the 2010 Constitution (Domingo et al., 2016). The review of labour laws was conducted to push for an increase in maternity leave under the Employment Act of 2007.

The 2015 Constitution of Nepal includes affirmative action to address historical disadvantage and a ban on sex or caste/ethnicity-based discrimination through special provisions for social security. In particular, the Right to Equality and the rights of particular groups, such as women, ethnic minorities, people with disabilities, Dalits, older persons and other vulnerable groups to social security are enshrined in the Social Security Act 2075 adopted in 2018.

Globally, 52 countries have an explicit guaranteed right for equality or non-discrimination for persons with disabilities in their constitution, including 20 from sub-Saharan Africa (World Policy Centre, 2017). Only 13 countries have a guaranteed, explicit constitutional right to work for adults with disabilities, and only two countries’ constitutions (Fiji, the United Kingdom) guarantee the provision of reasonable accommodations at work. It should be noted that these rights may be covered in other laws and policies, however, they are more subject to change than constitutions.

Source: worldpolicycenter.org



Many constitutions recognize the right to health for all persons, while the right to social security, social protection and social assistance is often reserved for citizens. Under certain constitutions, on-nationals may be entitled to medical care paid out of public funds, but not to social security benefits. One example is the Constitution of **Slovenia**:

- Article 50 on the right to social security: Citizens have the right to social security, including the right to a pension, under conditions provided by law.
- Article 51 on the right to health care: Everyone has the right to health care under conditions provided by law

The ILO Committee of the Application of Standards (CEACR) acknowledged that extending the right to social security, including the right to medical care, to non-citizens is a key challenge for many societies today. With regard to noncitizens, even where they are in an irregular status on the territory of another State, such as undocumented workers, they should have access to basic benefits and particularly to emergency medical care. Similarly, even legal migrant workers may not be offered the same protections as citizens, for example, workers' compensation or social insurance.

Box 11: The role of courts in protecting social security as a human right

Courts play an important role in giving effect to constitutional rights related to social protection, including social assistance. The Indian Supreme Court, for example, recognized in various judgments the right to social security and healthcare, as indirect rights derived from the right to life contained in article 21 of the Indian Constitution.²³ Similarly, in the seminal case of *Khosa v Minister of Social Development*,²⁴ the South African Constitutional Court held that a statutory provision which excluded non South African permanent residents and their children from access to social assistance was unconstitutional: the provision infringed their constitutional rights to human dignity, equality and access to appropriate social assistance.

In contexts where social protection is grounded in constitutional or legal frameworks (such as India, Colombia, Brazil and South Africa), judicial activism and courts can be used to hold states accountable on their commitments. Rights-based legal framings also create opportunities for women, ethnic minorities and people with disabilities to exercise voice and agency. For example, the judicial activism in the Indian Supreme Court has made some constitutional principles (directive principles) justiciable in relation to social welfare issues, including education, the right to food and healthcare.

Source: socialprotection.org / socialprotection-humanrights.org

A repository of legal cases in different countries can be found online: <http://socialprotection-humanrights.org/legaldepository/legal-cases/>

2.5 FISCAL CONSTRAINTS AND A RIGHTS-BASED APPROACH

Responding to the social protection needs of the population requires a sufficient level of resources. It is a major contention of human rights approaches that "the principle of progressive realization cannot be used as an excuse to justify sustained levels of chronic or extreme poverty, but rather endows States with an **immediate minimum core** obligation to ensure the satisfaction of, at the very least, **minimum essential levels** of all economic, social, and cultural rights."²⁵ (See also MODULE FIN for a discussion on Social Protection financing).

Legal commitments made in constitutions or laws for the **sustainable funding** of social assistance need to be informed by evidence and national social dialogue. Such commitments are made by stakeholders according to the laws of the country (parliament, social dialogue). They need to take informed decisions based on evidence, which include needs assessment, institutional feasibility studies and social policy costing and planning. Uruguay has used such a process for the creation of a National Care System in 2011, as discussed in Box 12.

22 http://www.icla.up.ac.za/images/constitutions/kenya_constitution.pdf





For example, costing studies in the **Philippines** helped reduce the anxiety of members of parliament and officials of ministries of finance concerning the amount of budget allocations needed to implement the Law on Social pensions after its adoption in 2011.²⁶

Box 11: The role of courts in protecting social security as a human right

Starting in 2007, the government engaged in extensive civil society consultations, including women's rights advocates in order to redesign its social protection with a care agenda. The ensuing National Care System is explicitly framed around gender equality and the human rights of caregivers, both paid and unpaid, as well as care receivers, including children, older people and people with disabilities. The combined actions of women's organizations, female legislators and feminist academics have been central in placing care on the public and political agenda in Uruguay in the mid 2000s. Together, they forged a common understanding of care from the point of view of gender equality and human rights, collected data, analysed existing policy frameworks and identified coverage gaps.

The results of two time-use surveys conducted by the National Statistical Institute, the National Women's Agency, and UN Women, provided powerful evidence on the unequal distribution of unpaid care and domestic work between women and men. In 2008, the Red de Género y Familia organized roundtable discussions in order to bring government officials, civil society organizations and care service providers together to discuss these issues. The sessions brought the insufficient and fragmented nature of existing care services to the fore, giving rise to the idea of an integrated national care system. In defining the new system in 2014, the government organized 22 debates across the country to ensure broad participation by including women's organizations, pensioners, caregivers and their families, programme administrators, service providers and regional and local authorities.

The Cabinet approved the ensuing proposal for the National Care System in 2011. The proposal is ambitious and explicitly rights-based, with reference to international and regional conventions and agreements. It is universal, starting with the most disadvantaged and foreseeing the progressive expansion of benefits and services. Caregivers, both paid and unpaid, were identified as a key target group for government support alongside three groups of care receivers: preschool children, the elderly and people with disabilities. Measures have been proposed to improve the working conditions and wages of paid care workers and increasing support for unpaid family caregivers. There is also a commitment to promote a more equal sharing of care responsibilities between women and men, including through awareness raising campaigns as well as special incentives for hiring male care service staff.

Source: UN Women report, 2016.

R. 202's point of departure, based on studies from ILO, UNICEF, and World Bank is that poor countries are able to afford a **core set of nationally defined social security guarantees** that secure protection aimed at preventing or alleviating poverty, vulnerability and social exclusion to those who are not protected, at any level of social and economic development, and, then, progressively to provide higher levels of protection.

The AU Social Policy Framework of 2008 remarks that a minimum package of essential social protection is affordable, even in low-income countries, within existing resources, if properly managed (par 33).²⁷

While the establishment and maintenance of social assistance programmes are in principle affordable, even for poorer countries²⁸, these programmes nevertheless face **competing priorities for allocations** from the country's finances. Seekings (2016, p. 24)²⁹ showed that there is a **"feasibility gap"** between the technical feasibility of social protection guarantees and their **political and social acceptance**: "The political ceiling on reforms is far lower than the ceiling suggested in technical studies of fiscal space." These have to do with competing normative views and political rewards; bridging that gap is the role of national dialogue and public engagements.

²⁵ Sepulveda and Nyst (2012), Human rights approaches to social protection, Ministry of Foreign affairs of Finland, p. 20

²⁶ Sevilla A (2017) PPT on Social Pension in Philippines, Coalition of Services of the Elderly, Webinar on Fiscal Space offered by Platform Socialprotection.org accessed 26.01.2017

²⁷ For similar remarks by the Asian Development Bank (ADB) and the ILO, see ADB Social Protection for Older Persons: Social Pensions in Asia (2012) 151 and ILO World Social Protection Report 2014-2015 (2014) 149-150.



In fact, national dialogue is an instrument that generates political acceptance for social reforms which are never to be taken for granted, even after approval of a Law. The dialogue between parliament and social partners and representatives of the people concerned helps in the negotiation of the acceptable balance between normative views regarding the protection of priority social circumstances, risks and eligible categories of people, benefit amounts, (...) and fiscal implications (see Section 3.5).

For example, R. 202 gives a role to national dialogue in determining the appropriate reference levels for benefit amounts and their systematic review. National regulations could institute such regular consultation processes, by the government or with the help of external agencies. These levels are to be nationally defined, as either the monetary value of a set of necessary goods and services, national poverty lines, income thresholds for social assistance or other comparable thresholds established by national law or practice, which may take into account regional differences. Each country develops its own approach (see the example of The Philippines' reform of old age pensions and Mexico Coneval later in this module).

In general, the guarantee of constitutionally or legally enshrined principles of sustainability of social benefits schemes requires:

- anticipation and articulation of resources with long-term financial requirements (in view of demographic, macroeconomic trends, etc.)
- avoidance of year-to-year risks of non or under-funding through multi-year programming and commitments
- avoidance of retrogression during times of crisis
- possibility if needed to address additional needed support (for example through contingency funds), at the occurrence of shocks
- adequate financial risk management that ensures continued adequacy, regularity and predictability of benefits and minimizes fraud and mismanagement

Sustainable and gradual allocations to social assistance can be determined based on prioritization and sound financial planning. Recent country case studies show the use of reallocation of revenue to support social assistance programmes.

Brazil, for example, introduced cuts in its civil service pension scheme to enable the financing of its redistributive social assistance schemes.³⁰ In the case of **Indonesia**, the flagship cash transfer was greatly funded by the removal of energy state subsidies. Some countries have established sovereign wealth funds, financed through mineral extraction revenue, and used these funds to support social protection programmes including child benefits – for example, the Human Development Fund of **Mongolia**.³¹ **Lesotho's** government has also been successful in creating fiscal space by increasing tax and non-tax revenue.

To do this, it enhanced its tax collection, among other strategies. This has allowed the government to (gradually) take over the Child Grants Programme payments from the EU as well as the support given by the World Food Programme (WFP) to the primary school feeding programme. In addition, Lesotho's government undertook a fiscal reprioritization a few years ago to finance the introduction of a universal Old Age Pension (OAP). The OAP is largely funded from SACU (Southern African Customs Union) revenues received by Lesotho.³²

30 ADB Social Protection for Older Persons: Social Pensions in Asia (2012) 30.

31 UNDP Mongolia Human Development Report 2011 23.

32 M Olivier Lesotho Case Study: Report submitted to the European Commission (2013) 11, 13, 18-19.





Box 11: The role of courts in protecting social security as a human right

1. Members should consider using a variety of different methods to mobilize the necessary resources to ensure financial, fiscal and economic sustainability of national social protection floors, taking into account the contributory capacities of different population groups. Such methods may include, individually or in combination, effective enforcement of tax and contribution obligations, reprioritizing expenditure, or a broader and sufficiently progressive revenue base.
2. In applying such methods, Members should consider the need to implement measures to prevent fraud, tax evasion and non-payment of contributions. National social protection floors should be financed by national resources. Members whose economic and fiscal capacities are insufficient to implement the guarantees may seek international cooperation and support that complement their own efforts.

Source: ILO Social Protection Floors Recommendation, 2012 (No. 202) paras 11-12

Progressive step-by-step and systematic implementation of social assistance schemes is a suitable human rights approach. This implies that the legal framework must be developed in a way that tentatively describes full rights³³ but also a roadmap that allows a country to provide social assistance benefits to be expanded over time. It implies that there **should be a movement towards extending the protection, both material and personal scope**, as resources become available or by creating fiscal space. For example, in 26 countries a mix of government and employer contributions are used to fund maternity leave.

Box 14: Example - Lesotho National Social Protection Strategy.

The NSPS sets out a comprehensive integrated set of core schemes to address risks throughout the life-cycle, as follows:

1. a universal infant grant, phased in over four years, to all pregnant women and mothers with children under 2, linked to a range of complementary health and nutrition interventions;
2. a scaled-up, but still poverty-targeted, child grant, phased progressively to all extremely poor households with children (approximately 30% of households);
3. first steps towards the implementation of a national seasonal employment guarantee scheme to offer public works to the working age poor who need it, and establishment of a basic set of social security benefits for those in the formal sector;
4. a continuation of the universal old age pension, though with a reduced age of eligibility, integrated with a mandated contributory pension for all those in formal employment and a voluntary top-up pension for those who wish to make additional savings for their old age;
5. a disability grant, phased in over four years, to all those with severe disabilities;
6. a reformed discretionary public assistance grant to vulnerable households requiring short-term, reactive, temporary support, estimated at the current level of approximately 0.5% of the population.

The NSPS recommends (p.28) Lesotho's rights-based social protection framework to be "grounded in a national legislative framework... As with the draft National Social Security Act, a National Social Protection Act for Lesotho should establish the necessary regulations – specifying, for example, the range, qualifying conditions and levels of benefits – to give legislative effect to the programme guarantees. Systems should be in place to ensure compliance with the national legal framework." Currently only the universal old age pension and a child grant are being implemented. A monitoring mechanism is providing valuable information on progressive implementation.

Source: Government of the Kingdom of Lesotho National Social Protection Strategy accessed socialprotection.org

³³ Example the National Social Protection Strategy of Lesotho envisages protection along the life cycle.



Several international and regional instruments also acknowledge the need for the progressive implementation of social assistance measures. As noted above, these include the ICESCR, ILO R. 202 of 2012, the Code on Social Security in the SADC, and the new SADC Protocol on Employment and Labour.

ILO R. 202 reiterates the commitment to universal protection but recognizes that this objective may be reached progressively, giving priority to the implementation of nationally defined social protection floors as a starting point for those countries that do not have a minimum level of social security guarantees (para 13, 1a).

Some developing countries that have comprehensive social assistance programmes in place have initially introduced more modest frameworks, often involving new benefit designs under zero-balanced budget reforms before expanding them. Thus, for example, in the case of **South Africa** where a more modest level of child benefits compared to the one afforded under the Apartheid system, was introduced but expanded to a higher number of people. This can be achieved through constitutional provisions – such as article 27(2) of the South African Constitution – which envisages the progressive attainment of extended coverage, national policies or strategies, and measures appropriately backed by national regulations.

Box 15: Evolving frameworks for social assistance provision

In South Africa, the reach of child grants has been constantly extended to reach more children in need of support by expanding the age threshold for eligibility for the grant.

Some countries in Southern Africa introduced old-age (social) pensions starting with high eligibility age, expanding the reach of these and other social assistance programmes gradually. This has been the case with social pensions and later with the child care/support grants paid in Lesotho.

Some countries such as Mauritius, initially introduced a targeted old-age benefit meant to benefit only those who were actually poor but later made these programmes universal.

Source: Authors

General Comment No. 19: The right to social security (Art. 9 of the CESCR Covenant) explains that States should implement social security schemes to the **maximum available resources** and that where there are restrictions these should also be proportionate and in particular take **into consideration certain vulnerable groups** to ensure the latter are protected even in light of fiscal constraints. In particular, retrogression cannot be applied without explanation and probing of the protection of the most vulnerable.

Art. 9 of the CESCR Covenant states that “While the Covenant provides for progressive realization and acknowledges the constraints owing to the limits of available resources, the Covenant also imposes on States parties various obligations which are of **immediate effect**: States parties have immediate obligations in relation to the right to social security, such as the guarantee that the right will be exercised **without discrimination of any kind** (article 2, paragraph 2), ensuring the equal rights of men and women (article 3), and the **obligation to take steps** (article 2, paragraph 1) towards the full realization of articles 11, paragraph 1, and 12. Such steps must be **deliberate, concrete and targeted** towards the full realization of the right to social security”.³⁴

Progressive realization is qualified by the expectations that:

1. **Progressive realization is realistic but demanding:** A government should demonstrate that it is using all resources available to do so. Input from civil society and the public is critical for ensuring that decisions reflect public priorities and people’s greatest needs. For example, in the 2000s the **South African** government claimed not to have enough resources to fund the prevention of mother-to-child transmission of HIV. The South African Civil Society group – Treatment Action Campaign pointed out that the government was systematically underspending an important portion of its health budget. South Africa’s High Court concurred ruling that resources were evidently available and had to be used to safeguard the right to life and the right to health of children.





2. **Governments are obliged to continuously improve conditions** that are fundamental to the realization of ESC rights. Resources allocated must increase proportionally to the overall budget, and the realization of rights has to be demonstrated by appropriate outcome indicators; the actual right (to nutrition, to schooling, etc.) must be realized progressively, not only more money being spent.
3. **Retrogressive measures may not be taken intentionally:** Social spending cuts need to be explained and probed to ensure that they are not undermining the achievement of rights that have previously been achieved or unduly affect certain groups. For example, people with disability have been disproportionately affected by austerity measures that led to the erosion of support services in Europe after the 2008 financial crisis (Centre for Inclusive Policy, 2018). Likewise, to cushion the negative effects of the gradual abolishment of energy and food subsidies on the vulnerable groups in the MENA region, governments have been forced to introduce, and/or progressively expand and reform targeted social protection schemes, such as cash transfers (eg. Takaful and Karama cash transfer programmes in Egypt, National Poverty Targeting Program in Lebanon) or health insurance schemes (eg. Régime d'Assistance Médicale in Morocco and Assistance Médicale Gratuite in Tunisia).
4. **Protective measures during times of crises,** within fiscal responsibility. Even in crises, governments must evaluate all options and ensure maximum resources are used to protect and not diminish the enjoyment of rights that are absolutely necessary to provide significant protection to those most at risk.
5. **Other obligations of immediate effect relating to non-discrimination** and minimum levels of enjoyment of human rights are required to maintain inherent human dignity.

Box 16: Progressive realisation of rights in South Africa

In South Africa, progressive realization has been interpreted in such a way that rationing access to full realization of rights must be subject to measures that are rational (explicit), reasonable (cost efficient, moderate compared to goals) and defensible (in legal and respect human rights, ethics, etc.).¹

This implies that:

- Step 1: the complete right must be specified (for example benefit for all children - under 15 or 18)
- Step 2: a formal and explicit policy framework must exist to give right to the complete right
- Step 3: the status of the right must be officially reported on (for example only children under 5 are covered initially)
- Step 4: a formal reporting system is implemented to track performance of achievements

Source: Alex van den Heever (2012) *Social protection floor in South Africa*, ILO Paper for Department of Social Development of South Africa

2.6 TAKE-AWAY LESSONS

- A social assistance legal framework including a law provides the government with a legal mandate to provide social assistance benefits and gives expression to the principle that social protection is a human right.
- A social assistance law should deal with several important aspects, including: the identification of recipients, nature and level of benefits, entitlement to benefits, qualifying conditions, the establishment, functions and powers of the institution responsible for paying benefits, the sources of funding for social assistance, enforcement, and the avoidance of fraud.
- The UN Universal Declaration of Human Rights of 1948 and the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966 emphasize the right of every person to social security and an adequate standard of living. The UN Convention on Rights of Persons with Disabilities then specifically codifies the rights of people with disability to social protection.
- In 2012 the ILO adopted Recommendation 202 on National Floors of Social Protection. It provides guidance for establishing and maintaining comprehensive social security systems, etc.
- The African Union's Social Policy Framework of 2008 argues for the extension of social protection through measures such as publicly financed, non-contributory cash transfers. The AU Protocol on the rights of citizens to social protection and social security, and Social Agenda 2063 strengthen the human rights anchor of social protection in Africa.
- The Southern Africa Development Community (SADC) recently adopted a Protocol on Employment and Labour (2014) which enjoins each State Party to develop a social protection system, ensuring coverage for all – including through social assistance.
- National constitutions play an increasingly important role in providing for social security and social assistance in particular, with a strong role for national courts and possible litigation which helps redress individual cases and improve gradually the interpretation and application of the rights based legal and institutional social security system.
- A minimum package of essential social protection is affordable, even in low-income countries, within existing resources. There are also several options available to governments for maintaining and expanding fiscal space for social assistance.
- In line with the idea that a country's context and fiscal ability may change, a social assistance law should envisage the progressive realisation of extended coverage in line with international, regional and even national instruments.

3

CONSTRUCTING A NATIONAL LEGAL BASIS FOR SOCIAL ASSISTANCE

3.1 OBJECTIVES

Upon completion of this section of the module, you should be able to:

- Reflect the place of the legal framework for social assistance within the broader social security and social protection system of a country
- Consider the importance of a legal framework for achieving national policy objectives and priorities
- Describe the key elements that should be comprised in the social assistance legal framework and are necessary for granting and extending social assistance benefits
- Reflect on the different modalities employed by countries to determine the range of social assistance recipients
- Explain the range and kind of social assistance benefits countries may provide through the legal system and the role that national policy objectives play in this regard
- Describe how social assistance legislation deals with (i) funding arrangements for social assistance, and (ii) policy-setting and implementation in the area of social assistance
- Reflect on the role of dialogue with social partners at the national level as part of the process of developing social assistance policy and considering the passing of social assistance legislation
- Assess the importance of research, analysis and the regular review of social assistance systems as regards the dynamic provision of social assistance

3.2 DEVELOPING THE LEGAL FRAMEWORK

For the reasons discussed earlier in this module, nowadays, countries tend to adopt a legislative framework for social assistance. Ideally, this should be contained in a national law, which provides the basis for more detailed regulation by the relevant lead minister. This is the approach adopted by, Kenya and South Africa in their social assistance laws (of 2010 and 2004, respectively).

The development of legislative frameworks needs to be grounded on a policy that is determined through a participatory approach. It follows institutional and financial feasibility studies as well as a needs assessment. It may be helpful to take note of the direction given by ILO R. 202 on National Floors of Social Protection in this regard, where it calls on Member States to (par 14):



Given the nature of social protection delivery, almost all countries have some level of decentralization of tasks to lower tiers of Government, either achieved through decentralization, delegation or devolution. For instance, the administration at the sub-national level is normally tasked with front-line service delivery functions, particularly those related to implementing programme registration, enrollment, monitoring and complaints management

- identify gaps in, and barriers to, protection
- set objectives reflecting national priorities

Ideally, the emphasis should be on having an overarching legal framework in place indicating where and how the different components of the system fit together, and what the role and place of social assistance is within the system.

Some attempts to do this appear in the **Mozambican** Law on Social Protection of 2007. This law makes overall provisions for the different components of the social protection system in Mozambique. Specific legal instruments have subsequently been developed to give effect to the components of the system – for example, Regulations on Basic Social Security were introduced by decree in 2009 to regulate social assistance matters.

A rigorous drafting process requires qualified staff, sufficient time and involvement of stakeholders at relevant moments, and in the final stage, iterative adjustments and discussions between ministerial staff and members of Parliamentary drafting committees. Finally, last but not least, the process involves educating and raising awareness about the law, including through information campaigns and broad social dialogue.

3.3 ESTABLISHING THE MAIN PARAMETERS BY LAW

At a minimum, the social assistance legal framework should establish key design elements including recipient identification, qualifying conditions and conditionalities, range of benefits, and levels of benefits by reference to benchmarks.

3.3.1 Recipient Identification

The legal framework needs to clearly identify the intended recipients of the benefit – the “rightsholders”. It is of course crucial to make sure that a benefit is made available only to those intended to benefit from the particular social assistance scheme or programme and this hinges on the precise definition of entitlement.

Box 16: Progressive realisation of rights in South Africa

The Independent Tribunal for Social Assistance Appeals hears social assistance appeals against the decisions of the South African Social Security Agency (SASSA). The tribunal is constituted in terms of Section 18(2)(b) of the Social Assistance Act of 2004. Members of the tribunal consist of legal practitioners, medical doctors and representatives of civil society. It acts independently from the Department of Social Development. The independent tribunal considers a SASSA decision and the reasons for SASSA to turn down the application and the appellant’s grounds of appeal. It then confirms or sets aside the SASSA decision or makes any other just decision. In 2010, SASSA received nearly 4.7 million applications for social grants. Of these, about 290,000 had been rejected, leading to some 65,000 appeals. The economic situation had driven desperate people, usually unemployed or chronically ill, to seek disability grants for which they were not qualified. The Department of Social Development has said that “In most instances, applications turned down are for disability grants when the nature or severity of the alleged disability does not satisfy the requirements, or when medical reports by the attending medical officers indicate that the applicants do not have a disability,” said the department.

Source: Alex van den Heever (2012) Social protection floor in South Africa, ILO Paper for Department of Social Development of South Africa

The law should be quite specific about the personal attributes of those who are meant to qualify: e.g., persons above or below a certain age (old age pension; child care grant), people with disability (disability benefit), etc.



Box 8: The case of the Benefits Agency in the UK

Disability grant

A person is, (...) eligible for a disability grant, if he or she:

- a. has attained the prescribed age; and
- b. is, owing to a physical or mental disability, unfit to obtain by virtue of any service, employment or profession the means needed to enable him or her to provide for his or her maintenance.

Source: *Government Gazette*

Box 9: The case of SASSA in South Africa

Old age and disability grant

1. "aged person" means any person who has attained the age of sixty years; "blind person" means any person who has been registered as a blind person under any law ... and has attained the age of 16 years;
2. "disabled person" means any person who is, owing to any physical or any mental disability, incapable to obtain from any employment or the practising of any profession or trade, or from the rendering of any service, the means needed to enable him or her to adequately provide for his or her own maintenance, and has attained the age of 16 years;
3. Subject to the provisions of this Act, any person shall be entitled to the national pension concerned if he or she satisfies the Permanent Secretary –
 - a. that he or she is an aged, blind or disabled person, as the case may be;
 - b. that at the time of his or her application for a national pension, he or she is ordinarily resident in Namibia; and
 - c. that he or she - (i) is a Namibian citizen; or (ii) has been lawfully admitted to Namibia for permanent residence and had been so resident in Namibia for a continuous period immediately preceding the date of his or her application for a national pension as may be prescribed.

Source: *Ilo.org*

It should be noted that the definitions of disability for receipt of the Disability Grants in Namibia and South Africa (Boxes 18 and 19) include stipulations that recipients are incapable of work because of their disability. These stipulations are not recommended or in line with the UNCRPD: they can trap people with disability in poverty and dependency by forcing them to choose between a low, but stable source of income versus improving their livelihoods by seeking employment. Countries such as Nepal, the Maldives and Vietnam do not include incapacity to work requirements in defining disability for Disability Grant eligibility.

In other instances where the identification is much more general such as the **Zimbabwean** Social Welfare Assistance Act of 1998 that extends social welfare assistance to "any destitute or indigent person", there is much less clarity and enforceability of such right.

In household-targeted programmes, which use proxy-means testing, for example, an individual's right to social security may be obstructed by unequal intra-household dynamics. In some contexts, women's right to social security might hinge on their presumed relationship to a male breadwinner, which risks exposing them to abuse or exclusion from these rights. Similarly, people with disability often have less control over spending decisions and may be unable or barred from using communal assets (e.g. due to lack of accessibility features and discrimination). Therefore, social protection policies and legal frameworks are most inclusive when they treat intended recipients as individual right-bearers.

Some legal systems extend temporary assistance to broader categories of people in need. This is the case with the 'social relief of distress' benefits provided for by the **South African** legislation.

3.3.2 Social Assistance for Non-citizens?

Many countries restrict social assistance benefits to citizens only. However, this may raise questions about the application of the right to equal treatment of foreign residents, which is often enshrined in the constitution of a country and protected in international and regional instruments. ILO R. 202 makes it clear that Member States should provide the basic social security guarantees defined in the Recommendation to at least all residents and all children subject to international obligations (par 6).

In **South Africa**, based on the constitutional guarantee contained in the constitution, the Constitutional Court has ruled that permanent residents and their children are entitled to social assistance benefits. Subsequent constitutional challenges in South Africa have led to the extension of this protection to refugees too. The **Namibian** National Pensions Act, 1992, stipulates that permanent residents who have been residing in Namibia for a continuous period, as prescribed, immediately preceding the date of his or her application for a national pension, will qualify for a national pension.

R. 202 endorses the principle of universal protection as the ultimate goal. It states that subject to their existing international obligations, Member States should provide basic social security guarantees to all residents, and all children (irrespective of their residence status). The definitions of the terms "residents" and "children" should correspond to those found in national laws and regulations. However, while it allows national law and practice to define who are the residents and children benefiting from the SPF, the Recommendation recognizes that this definition needs to be in conformity with each country's international obligations, including those under relevant legally binding human rights instruments such as the International Covenant on Economic, Social and Cultural Rights (ICESCR).

3.3.3 Qualifying Conditions for a Benefit

Under human rights standards, complying with the principle of non-discrimination means that all eligibility criteria must be **objective, reasonable, and transparent**.³⁵ The law should establish the conditions the recipients should meet in order to qualify for a benefit. These differ according to the benefit type and country context. Most often certain benefit types require specific proof of the existence of the situation or condition that is the rationale for providing the benefit. For example, to qualify for a disability benefit, the person must indeed have an eligible disability as defined in the legislation and may require, for example, the necessary supporting proof of medical certificates or functional assessments to this effect. Likewise, an older person must have reached the required age granting them access to a social pension. In other words, the social assistance legislation must contain clear definitions and specifically enumerate the conditions set for access to each benefit.

Of particular importance is also the question of whether the benefit is only made available to poor people/households, or universally to all persons falling within certain broad categories of the population without a means test. In the first situation, countries introduce selection or targeting criteria in either the general law or, more often, the subsequent regulations issued. These criteria may stipulate, for example, that only people earning below a certain income threshold and with few assets can benefit (means or **asset tests** or a combination), or may conversely exclude people above certain thresholds (**affluency test**) or those already receiving a (contributory) pension (**pension test**).

Selection or targeting criteria in some countries are formulated based on a **poverty line**, to be determined by the government based on several criteria which could differ according to whether a rural or urban area is in question. Access to social assistance support in India, for example, is often dependent on whether the recipient belongs to a household belonging to the so-called BPL (Below Poverty Line) list put together by the government. Such Poverty targeting is not a simple technical endeavour.

Two common poverty targeting methods are based on **community targeting** or statistical-based targeting (**proxy means targeting**). The two selection modalities represent difficulties in terms of a rights-based approach because the first is not "**shame-proof**", the second may lack full **transparency**, and both may impact **equality and the possibility** of redress. Both targeting approaches have important implications for vulnerable groups, such as women and persons with disability, when they do not pay attention to inclusive design principles.

35 Socialprotection.org



For instance, proxy means-tested schemes often do not include gender or disability as potential indicators in their poverty assessments and means-tests typically apply complex and opaque eligibility assessments that prevent poor women from ‘scrutinising the targeting process, claiming their entitlements, and holding administrators of the programmes accountable for mistakes or errors’.

Further, means-tested schemes rarely account for extra costs of disability, underestimating poverty amongst people with disability and failing to fulfil commitments in the UNCRPD and Code on Social Security of the SADC to ensure access to needed disability-related goods and services. Community-targeted interventions may contribute to stigmatization, discrimination, harassment and abuse of certain groups, and as a result, discourage them from accessing transfers even when they are entitled to them. For example, for people with disability or chronic illnesses, community targeting can lead to privacy concerns about publicly disclosing personal/health information. There can also be challenges with the participation of people with disability, or other marginalized groups if community meetings to discuss selection are not designed inclusively.

One problem of proxy means testing is also that income is assessed at the household level and not the individual level, compromising the idea of individual entitlement. In addition, assets are taken as proxies of income, however, older people may not be relatively asset poor compared to the community because they have built slightly better homes through time for example, but they may be consumption poor. See ■MODULE S&I for more discussion.

Other countries make the receipt of benefits **conditional** upon the recipient meeting certain other – often lifestyle or behaviour – requirements such as vaccination and school attendance of targeted children as is the case in various countries in Latin America. “State parties are obliged to immediately meet minimum essential levels to the rights of food, health, housing, education and social security. These are inherent human rights and not conditional on the performance of certain actions or meeting requirements.

Although these commitments can contribute to strengthening rights to education or health, they may **suggest that people living in poverty cannot make rational choices** to improve their lives, which could have the undesired consequence of reinforcing prevalent stereotypes about the poor—that they are careless and irresponsible, which is not supported by evidence. In this sense, **conditionalities run the risk of violating the right to dignity of the poor.**³⁶ Gender-blind conditions that are incorporated into conditional cash transfers can be harmful to women. Since they are typically responsible for their fulfilment, conditions can contribute to reinforcing traditional gender roles, hamper women’s participation in the labour market and exacerbate women’s time poverty (Cookson, 2019). Further, people with disability may be unable or face additional barriers to meeting conditions if, for example, health and education services are not inclusive and accessible. The absence of the use of public social and health services may be due to poor quality, poor accessibility, lack of trust, and opportunity costs. See ■MODULE ADM.

Box 20: R. 202 guidance on basic social security benefit arrangements:

1. In providing the basic social security guarantees, Members should consider different approaches with a view to implementing the most effective and efficient combination of benefits and schemes in the national context.
2. Benefits may include child and family benefits, sickness and health-care benefits, maternity benefits, disability benefits, old-age benefits, survivors’ benefits, unemployment benefits and employment guarantees, and employment injury benefits as well as any other social benefits in cash or in kind.
3. Schemes providing such benefits may include universal benefit schemes, social insurance schemes, social assistance schemes, negative income tax schemes, public employment schemes and employment support schemes.

Source: ILO Social Protection Floors Recommendation, 2012 (No. 202)

36 Socialprotection-humanrights.org

The **range of social assistance benefits and levels of these benefits** should be specified in the law. They need to reflect national circumstances, that is to say, national policy preference determined through a participatory approach with relevant stakeholders and financial resources.

As indicated before, the experience in many developing countries, including several Southern African countries, has been to introduce social assistance benefits incrementally according to the international principle of progressive entralizat. The introduction of social pensions for the elderly, for example, is often followed by other benefit types, particularly disability and child grants.

In most cases, the national law will make provisions for the specific benefit types (including for when new benefit types are to be introduced) and leave the detailed provisions to regulations – as is the case with the **South African Social Assistance Act of 2004** and the regulations corresponding to the Act.

Box 21: Introducing new benefit types

In order to maintain synergy in the system and avoid unnecessary duplication and fragmentation, it is advisable to introduce new benefit types by amending the existing framework law rather than adopting separate legislation. However, regular adjustments to the level of benefits to reflect rising living costs are ideally achieved via regulation promulgated by the relevant political head (i.e. the minister concerned). This keeps programme administrators from having to approach parliament every time an obvious updating of the amount payable is required.

Source: ILO Social Protection Floors Recommendation, 2012 (No. 202)

R. 202 recommends in its Art 9. (2) “Benefits may include child and family benefits, sickness and health-care benefits, maternity benefits, disability benefits, old-age benefits, survivors’ benefits, unemployment benefits and employment guarantees, and employment injury benefits as well as any other social benefits in cash or kind”. Essentially, a social security perspective would advocate, according to national determination, prioritization of contingencies and social risks across the life cycle as discussed in ■ MODULE S&I. The level of benefits can be specified in reference to a constitutional determination (minimum wage levels in Brazil), or to indirect standards to be attained. R. 202 for example refers to benefits such that:

- Persons in need of health care should not face hardship and an increased risk of poverty due to the financial consequences of accessing essential health care. Free prenatal and postnatal medical care for the most vulnerable should also be considered.
- Basic income security should allow life in dignity. Nationally defined minimum levels of income may correspond to the monetary value of a set of necessary goods and services, national poverty lines, income thresholds for social assistance or other comparable thresholds established by national law or practice, and may take into account regional differences.

Once set, the effective levels of benefits can be monitored, assessed, and compared to the agreed benchmarks. Legislation can specify the need and process to regularly review the level of benefits. Unfortunately, the absence of that requirement has led to a persistent fall in the real value of benefits and their purchasing power in many countries, notably in Latin America. For that, according to R. 202:

- the levels of basic social security guarantees should be regularly reviewed through a transparent procedure that is established by national laws, regulations or practice, as appropriate; and
- regarding the establishment and review of the levels of these guarantees, tripartite participation with representative organizations of employers and workers, as well as consultation with other relevant and representative organizations of persons concerned, should be ensured.



In reality, according to international standards such as R. 202, the value of guarantees need to reflect and be monitored not only in monetary – income terms but against the performance of social outcomes (nutrition, school, health). In effect, the social protection floors referred to in R 202, are in cash or in-kind provisions which are understood to be compatible and complementary for example available, accessible and quality health services and basic income security for children need to be of sufficient level and available in conjunction with necessary goods and services to allow children access to nutrition, education, care amongst other necessities.

Although it has been recognized that the provision of monetary benefits is more efficient than in kind on many occasions including in emergencies, **social assistance benefits need not be restricted to cash or monetary benefits.** Many national legal systems acknowledge the importance of various forms of non-monetary benefits as tools in poverty alleviation. For example, in Kenya and the Maldives, people with disability can apply for the in-kind provision of assistive devices. Many systems may also recognize the need to link access to social assistance benefits to other programmes aimed at support and income generation. (See also MODULE FIN). This has come to be known in the region as the “cash-plus” agenda (see also in MODULE COO).

The **Zimbabwean** Social Welfare Assistance Act, 1998, provides for a wide range of non-financial benefits such as: rehabilitation, institutional nursing, boarding or foster home care, occupational training, orthopaedic and orthotic appliances, pauper burials, the supply of food and clothing, and ‘any other assistance necessary...’ (section 5(b)).

Similarly, in **Mozambique**, the Regulations on Basic Social Security (2009) provide for benefits, in cash or kind, and for social support benefits, translating into the provision of services, programmes and projects for community development, targeting those in need in terms of housing, shelter, food and means of compensation (article 2). Primary healthcare is also included (article 10), as is the case with access to education and support services (such as school feeding schemes) (article 13). Of particular importance is the treatment in the Regulations of ‘social integration through work’ as part of basic social security. These are considered to be opportunities for the development of productive activities through which people living in absolute poverty can support themselves and their families (article 19).

Sometimes the social realities of a country would require the replacement of one benefit type with another. In **South Africa**, for example, the Child Support Grant was introduced in the 1990s, replacing the former State Maintenance Grant. Instead of focusing on single mothers and their children (as was the case under the previous programme), the Child Support Grant is available to any primary caregiver responsible for a child living in poverty. By doing so, the new grant has been able to reach a significantly larger number of children living in poor households. This required a change to the existing law.

Box 22. Coverage of disability-related extra costs through social protection benefits

Under the UNCRPD and the Code on Social Security of the SADC, people with disabilities should be ensured equal access to the same social protection measures as people without disabilities. This means they should be provided with income security if they are living in poverty, as well as access to the full range of other social protection benefits they are eligible for (e.g. pensions/old age allowances, maternity benefits). People with disabilities should also receive coverage for disability-related costs, such as for rehabilitation, healthcare, assistive devices and support services.

In kind provision may be most appropriate for covering some sources of disability-related costs, such as for healthcare, personal assistance and assistive devices. For example, healthcare costs vary widely amongst people with disabilities, based on the type and severity of disability, underlying health conditions and the availability, quality and cost of needed services in an individual’s area. Cash transfers are not flexible enough to cover all needed health expenses for all people with disabilities, and setting cash transfer values to a level to adequately cover costs for a majority of people with disabilities would in most instances not be politically feasible. Instead in-kind delivery such as social health insurance and assistive device provision schemes should be explored. In Turkey, the implementation of universal health insurance was associated with a 34 percentage point decrease in total disability-related extra costs (Ozdamar et al., 2020).

Source: ILO Social Protection Floors Recommendation, 2012 (No. 202)

3.4 FUNDING AND INSTITUTIONAL ARRANGEMENTS

3.4.1 Funding Arrangements

Two additional key issues usually addressed by social assistance legislation relate to, first, funding arrangements and second, the main institutional arrangements of a programme. It is important to indicate in the law the source(s) of funding, in particular funding that emanates from the State budget. This gives the government a statutory mandate to make provisions for state-provided benefits each time the yearly budget is developed. Some social assistance laws refer to funding in broad or general terms. See also MODULE FIN.

The Mozambican Regulations indicate the following sources (article 23):

- Allocations from the State Budget
- Contributions, donations, grants or subsidies from public or private entities, domestic or foreign
- Other revenues obtained by any legally permitted means

Similar provisions are contained in section 9 of the South African Social Security Agency Act, 2004. This Act further regulates the utilization of funds, the undertaking of accounting, and the requirement of a yearly audit, as well as the acquisition, holding and disposal of property (sections 9-12).

3.4.2 Institutional Arrangements

National social assistance legal frameworks should provide an institutional structure for existing schemes. Again, the scope of these frameworks varies in accordance with different perspectives on governance and management models best suited for the country context. Given the fact that social assistance benefits are mostly paid out of a country's (central) budget, it is obvious that governments will play a direct role in this area. The intensity and nature of this role and the structures set up for this purpose may differ significantly. Also relevant is the political internal organization (e.g. federal/provincial jurisdiction, degree of decentralization, etc.) See MODULE GOV for in depth discussion of governance and institutional models.

Some countries prefer strong government control. For example, in **South Africa**, the CEO of the South African Social Security Agency (SASSA) reports directly to the Minister of Social Development, who can effectively override any decision taken by the CEO through the power of direction.³⁷ Similarly, in **Mozambique**, a Coordination Council for the Basic Social Security Subsystem is responsible for the articulation of the Subsystem, comprising various Ministers as well as representatives of public and private entities 'linked to the social action area'. **Kenya**, on the other hand, has opted for a National Social Assistance Authority. The management of the Authority rests with a board to be known as the Board of Management, which comprises representatives of several public institutions (and has no private sector representation) (Social Assistance Act, 2013, sections 3-11).

As such, several matters need to be regulated, especially through the law, to ensure that an effective management structure for social assistance provisioning is in place. These include: the composition of the institutional structure overseeing the delivery of social assistance, the powers, functions, responsibilities/obligations of the person/institution responsible for the overall management, related sanctions, the appointment of staff members, and standards of ethical conduct applicable to staff members (e.g., the requirement that staff members sign a Code of Good Conduct).

Finally, concrete social assistance administration can happen at different levels. In many Southern African countries, national social assistance administration is, for a variety of reasons, centralized. Other countries may choose, if not constitutionally required to do so, to cascade administration down to the local level. In Nepal, for example, the Old-age Allowance is administered by the Ministry of Local Development at the local level, through the assistance of Village Development Committees. Meanwhile, the disability certification process required to receive the Disability Allowance in Nepal is administered at the district level, which necessitates additional travel and expenses for people with disability. Many other countries also administer disability certification processes at more central levels, given the low availability of skilled health professionals for medical assessments. The centralization of the disability certification process can be a deterrent for many people with disability, as it can involve substantial personal expenses for transport and accommodation. Social assistance laws should thus make clear at what level the service should be rendered and describe the nature of the involvement of decentralized structures.

³⁷ See the South African Social Security Agency Act, 2004, section 6.



The ILO Committee of Experts of Application of Conventions and Recommendations wrote that “the principle of the overall state responsibility guarantees that the State cannot invoke administrative decentralization in order to avoid being held accountable for bad management or lack of ensuring effective protection under national social security schemes.”³⁸

The court case “Mashava v. The President of the Republic of South Africa” was the first time the constitutional court upheld the constitutional right to social assistance in South Africa. It ruled that under prevailing circumstances then, the delivery of social assistance at the provincial level meant that some citizens got better access to their constitutional rights than others and called on the government to promptly reform the system in a manner compliant with the constitution.

The case challenged the delegation of administration of social assistance to provincial governments which resulted in persistent failures in some provinces to deliver timely and adequate social benefits. The court ruled that ‘social assistance is indeed a matter that cannot be regulated effectively by provincial legislation, or that to be performed effectively it requires to be regulated or coordinated by uniform norms and standards.’³⁹ This led to the creation, later on, of the South Africa Social Security Agency to enhance coordination and consistent and effective delivery systems.

3.5 DOMESTIC LAWS, PUBLIC CONSULTATIONS AND SOCIAL MOBILIZATION

Evidence has shown that engaging with social partners (i.e. union and employer bodies, Organisations of Persons with Disabilities) in social policy design, including the development of social assistance policy and the consideration of social assistance legislation leads to more acceptable and legitimate legal frameworks and implementation.

One form to increase participation and engagement in the broader social protection agenda by traditional social security partners is to encourage the development of position papers on social protection floors.

In **Mozambique**, CTM, the Workers Confederation produced a position paper on social protection floors. This prompted significant debate inside the organization about the need to consider the role of workers’ representatives in support of quality public services and social policies for all, and not only for formally employed women and men. The ILO and IDA-led Joint Statement provides recommendations for creating inclusive social protection systems that support the full and effective participation of people with disability. It has been endorsed by multiple UN agencies, donors, OPDs and NGOs.

Conversely, non-traditional partners can participate in more traditional social security matters. In **South Africa**, for example, this task is shared by representatives of government, trade union federations, employers’ organizations, and civil society in the four-chamber National Economic Development and Labour Council (Nedlac). Organisations of Persons with Disabilities (OPDs) should be involved in the design and monitoring of both mainstream and disability-targeted social protection according to commitments in the UNCRPD and as recommended by the ILO and IDA Joint Statement. In the United States of America, a network of alliances with unions, employers, church leaders and members of the New York State legislature built momentum for Domestic Workers Alliance’s aim of creating a Bill of Rights for domestic workers, who are predominantly women from minority groups. In 2011, the New York State Bill of Rights for Domestic Workers was passed which for the first time would provide them with the same basic rights that other workers had been entitled to for decades.

ILO R. 202 of 2012 on National Floors of Social Protection specifically advocates for tripartite participation, with representative organizations of employers and workers, as well as **consultation with other relevant and representative organizations of persons concerned** (par 3®; see also par 8(d)).

Indeed, broad public consultation, which includes a broader range of stakeholders and (intended) recipients, assists in developing a multi-pillar framework and ensuring coverage in a holistic and integrated fashion. This is important for at least the following reasons (considering the example of retirement provision):

38 General Survey concerning social security instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization, 2011 available online on ilo.org

39 Bruni, M L (2016) Reforming Social assistance system, in Alam A. e al (2016) Making it happen, World Bank Group



- Pensions involve increasingly, not only contributory components but also minimum provisions which can be state-subsidized. This together with the growing importance of state-funded social pensions implies that such a policy framework concerns all citizens as voters and as taxpayers.

Chronically poor and vulnerable people, in certain categories of the population (such as people chronically affected by severe or profound disability, domestic and migrant workers) may not be adequately represented by traditional social partners and require a specific representation of their interests to voice their needs in such policy frameworks.

A “missing middle” of elderly people who are left uncovered because they are not poor enough to be eligible for state pensions given restrictive entitlement conditions of social benefits (issues discussed by pro-poor organizations) and are not rich enough to qualify for contributory pensions (issues discussed by more traditional social partners), also justifies a broader representation of actors in national policy frameworks. Many people with disability (at any age) are often excluded from disability benefits designed to cover extra costs of disability if they live in households that do not fall below the poverty line.

As part of R. 202, ILO Member States are encouraged to regularly convene national consultations to assess progress and discuss policies for the further extension of social protection (par 20). Broader consultation fosters the understanding and buy-in of the public in general and of those directly affected by the system in particular. There are many good comparative examples of this approach.

In **South Africa**, for example, the Committee of Inquiry into a Comprehensive System for Social Security (2000-2002) consulted extensively with stakeholders, the general public and experts when it was tasked with advising the government on reforming the social security and the social assistance systems.⁴⁰ A participatory process also informed pension reform in Chile during the period 2006-2008. A multi-disciplinary and politically diverse Advisory Council was designated to respond to the concerns and queries of citizens. The Council organized regular public hearings with as many citizen representatives as possible. As a result, the new pension system in Chile strengthened the role of the State in guaranteeing social security, integrated contributory and tax funding in a single system, and increased coverage of the most vulnerable.⁴¹

Box 23: National dialogue and social assistance policy reform in Brazil

In Brazil, a national social security forum (Fórum Nacional da Previdência Social – FNPS) promoted debate among representatives of workers, pensioners, employers and the Federal Government on ways to improve and guarantee the sustainability of the new pension system and social assistance policy. This dialogue produced a National Consensus (Sintese das Atividades Desenvolvidas) with regard to the labour market, demographic transition, disability pensions, survivor pensions, rural pensions, gender issues, the management and financing of the system, and coordination between pensions and assistance benefits.’

Source: ISSA Dynamic Social Security for the Americas: Social Cohesion and Institutional Diversity – Developments and Trends (2010) 22

Public consultation supposes that states take initiative for social policy reform. But **social movements may also be at the origin of social policy reforms** as Box 23 exemplifies.

Populations concerned can also use international standards and international goals to push for domestic laws on social protection and then more importantly will use such domestic laws to push for greater financial efforts. They can build broad coalitions of citizens through constant engagements, networking, and advocacy efforts. Women’s movements and organizations for example have played a vital role in raising new or neglected issues in social protection frameworks in several countries, including Uruguay (eg. care agenda), the Philippines (eg. social security for elderly women), and Bolivia, Chile and Brazil (eg. protection for domestic workers), OPDs have pushed for more inclusive social protection for people with disability in Nepal, Ghana and across Europe.

⁴⁰ Transforming the Present. Protecting the Future – Consolidated Report (Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa, 2002)

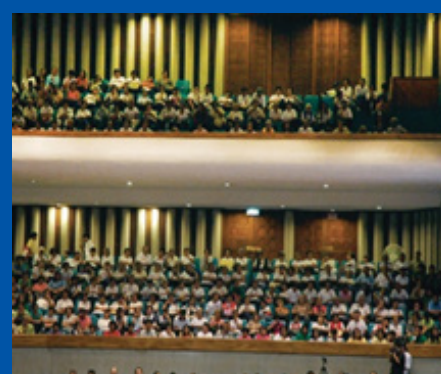
⁴¹ ISSA Dynamic Social Security for the Americas: Social Cohesion and Institutional Diversity – Developments and Trends (2010) 23.



Box 24: Example of Philippines Social Pension

The Philippine Constitution obliges the State to protect and promote the welfare of all senior citizens (7.6 million as of 2015). In 2009 a major public campaign was led by organizations including the Coalition of Services of the Elderly (COSE) and the Confederation of Older Person Associations of the Philippines (COPAP) in favour of a PhP 1500 monthly social pension. Older women have been at the forefront of these mobilizations. The organizations managed to have the proposal discussed in a bi-cameral session. But it received strong opposition from some lawmakers arguing that the government could not afford to finance such an amount. Subsequent negotiations lowered the benefit amount to PhP 500 with an added provision to review it every 2 years. Finally, further advocacy and engagements directly with the President led to the passage of the Expanded Senior Citizen's Act (Republic Act 9994) in March 2011. The Act outlined a variety of privileges and services for senior citizens (i.e. any resident citizen of the Philippines at least 60 years of age) covering a range of areas including employment, health, education and social protection. The act defines an indigent senior citizen as, "any elderly who is frail, sickly or with disability, and without pension or permanent source of income, compensation or financial assistance from his/her relatives to support his/ her basic needs, as determined by the Department of Social Welfare and Development (DSWD) in consultation with the National Coordinating and Monitoring Board."

Despite the adoption of the Law, the Ministry in charge was initially not allocated a sufficient budget to cover the estimated 1.2 million indigent Filipino senior citizens. Again through engaging other CSOs, holding several meetings with government agencies, and officials from the Ministry of Finance and showcasing Social budget alternatives with Social Budget Watch Philippines, COSE and COPAP slowly built a coalition for the effective implementation of the Law. COSE lobbied individual legislators, generated media coverage and used special occasions such as the International Day of Older Persons, to rally older people in support of the campaign. The introduction was very slow at first but accelerated over the last few years. In its first four years of implementation, the scheme was prioritized to cover indigent senior citizens aged 77 and above, with this age being lowered to 65 in 2015. It is expected that the age will be lowered further to age 60 which should allow the programme to fully comply with the law. The social mobilization also managed to increase the financial allocations in such a way that the number of recipients grew exponentially from 139,000 in 2011 to 2.8 million in 2017. Given the limits of the current social pension to reach a missing middle of elderly who are not sufficiently poor to qualify for social pensions and not rich enough to have a contributory pension, the social movement is now advocating for universal pensions. COSE has also developed the methodology for monitoring the implementation of the law and proposals for improving its delivery.



Above: The law was approved after social mobilization by representatives of elderly, who attended the discussion in the Parliament (above). It was signed after the representatives met with the President.

Source: Coalition of Services of the Elderly and Help Age, 2016, *The Philippine Social Pension at Four Years: Insights and Recommendations* and Sevilla, A (2017) *Coalition of Services of the Elderly*, Webinar socialprotection.org accessed 26.01.2017



3.6 RESEARCH AND ANALYSIS FOR REGULATORY REFORM

Constructing a social assistance system and, consequently, its legal framework needs to be informed by context-specific research and analysis. This is required, as the demographic, economic and social context of countries differs. A country's prevailing poverty profile and its fiscal capacity are but two of the critical criteria that demand proper evidence base for policy and legal design. It is only through the careful consideration of research results that priority interventions to provide appropriate social assistance to particular categories of persons in need can be designed.

In addition, the dynamic nature of societal changes and the ongoing impact of existing social assistance support make it necessary to regularly review and adjust the social assistance system and its programmes, as well as the social assistance legal framework. A disaggregated monitoring and evaluation of the implementation of laws is critical in this regard. In addition to disaggregation, focused research exploring the needs of key marginalized groups, such as women and girls, ethnic minorities, older persons and people with disability, and the responsiveness and inclusiveness of existing structures to address these needs are required to provide evidence on disability or gender-specific issues. There may be new categories of vulnerable persons who may have to be accommodated in the legal framework, or enhanced fiscal ability may enable a country to extend coverage. In either case, changes to the regulatory regime will be necessary.

ILO R. 202 of 2012 on National Floors of Social Protection advises that countries should regularly collect, compile, analyze and publish an appropriate range of social protection data, statistics and indicators, disaggregated, in particular, by gender (par 21). (see also MODULE M&E). The Sustainable Development Goals also call for disaggregation by other characteristics, including disability, older age, and unemployment status. It suggests that the levels of basic social security guarantees should be regularly reviewed through a transparent procedure that is established by national laws, regulations or practice, as appropriate (par 8(c)); see also par 19). It is a good practice to consider research not only as a technical endeavour but as a participatory process involving notable members of Parliament and broad national social dialogue.

Box 25: The Case of CONEVAL in Mexico

CONEVAL sees the production of evidence as more than just technical work, emphasizing the importance of national dialogue. According to the CONEVAL Director "We started from the basis that if we wanted a poverty indicator to be used by political actors, we could not just request a technical team to deliver a formula and then instruct the politician to 'use this methodology'. In Coneval we say, building a measurement and evaluation system is a political challenge with technical elements, not the other way around. Because if you only take into consideration the technical standpoint – which has to be there – but not the actors, that methodology may be perfect, but nobody is going to use it. There has to be a lot of dialogue".

Source: Dimensions, November 2016, Number 1, Multidimensional Poverty Peer Network (MPPN) accessed from, Dimensions

The content of the work reflects constitutional determinations. In **Mexico**, the Constitution and the Social Development Law stipulate that access to social rights is the guiding principle of the Mexican State's public policies. The Constitution underlines the importance of both income guarantees and broader social outcomes (such as attainment of health, education goals, etc.) in considering the impact of social policies. CONEVAL instituted a multidimensional poverty index to assess the impact of social benefits and public policies. The measurement was decided by the Mexican Congress. The independent assessment and its discussion in Congress assisted the government in reviewing the adequacy of benefits.⁴² Such changes may also be the result of court judgments. For example, the constitutional jurisprudence in South Africa has resulted in the extension of social assistance provisions to permanent residents and refugees. The building of adequate social economic research and legal capacity within social assistance institutions is critical to be able to adapt and integrate these new developments into law and practice ⁴³.

⁴² Ibidem

⁴³ Cassim, A (2015) What happens to policy when champions go away, Making Voices Count, available at <https://www.makingallvoicescount.org/blog/south-africas-social-welfare-system-happens-policy-champions-go-away/>





3.7 TAKE-AWAY LESSONS

- The legal framework should at a minimum set out the eligible people, nature and level of benefits, and eligibility criteria.
- Social assistance legislation should also specify funding arrangements and the lead policy and implementing institutions of a programme.
- The legislative framework for social assistance should fit within the country's broader social protection framework.
- Social assistance legislation is often quite specific as to the personal attributes of those who are meant to qualify for social assistance. In some cases, it contains clear definitions and specifically enumerates the conditions set for access to each benefit. In others, the law stipulates that benefits should be universally available to all persons falling within a particular category.
- In most cases, the social assistance framework law will make provisions for the specific benefit types (including for when new benefit types are to be introduced) and leave the detailed provisions to regulations.
- Social assistance benefits can be in cash or in kind. National legal systems often acknowledge the importance of various forms of non-monetary benefits as tools in poverty alleviation and the need to link social assistance benefits to each other and other programmes (ex: income generation programmes).
- Setting up a social assistance framework should involve consultation with all stakeholders: labour, business, government and civil society including OPDs.
- Social assistance needs to be informed by research and analysis. Furthermore, the dynamic nature of societal changes and the ongoing impact of existing programmes demand that review and adjustment of the social assistance system be carried out regularly. Disaggregated analyses and focused research should be used to explore the experience of and issues of concern for people with disability, older persons, ethnic minorities, women and girls, and other marginalised groups.
- This should not be only a technical matter but a participatory process involving a broad number of stakeholders including government, parliament, social dialogue organisations and representatives of the people concerned; it may result in changes in legal frameworks.

4

PROTECTION OF INDIVIDUAL ENTITLEMENTS AND PROTECTION AGAINST MISUSE OF PERSONAL INFORMATION IN SOCIAL ASSISTANCE

4.1. OBJECTIVES

Upon completion of this section of the module, you should be able to:

- Explain the claimant's right to complain and appeal
- Explain the principles that ensure due process – the impact of administrative justice requirements on the provision of social assistance
- Describe the role and importance of adequate complaints and appeal mechanisms, as well as of social accountability mechanisms, in ensuring access to justice and the protection of the rights of social assistance clients
- Evaluate how social assistance legal frameworks ensure the protection of clients' rights and the rendering of customer care and service delivery
- Discuss the modalities employed in social assistance legal frameworks to secure and protect private individual information to which social assistance administrators may have access
- Analyse cases of suspension, cancellation or termination of benefits
- Understand the role of inspections

4.2 RIGHT TO COMPLAIN AND APPEAL

As provided by international standards, including C. 102 and R. 202, the legal framework should provide for every claimant to have the right to:⁴⁴

- Request the provision of a benefit that is due according to the law
- To complain about the quality or quantity of the benefit due
- To appeal in case of its refusal
- To hold those responsible for the design, administration and implementation of the social assistance scheme accountable.

In some countries, the normal courts of law are used while in others, special social security or social assistance tribunals are established and some others use arrangements which exist under the labour law. More details can also be found within MODULE ADM and MODULE M&E.

⁴⁴ Article 70(1) of ILO Convention 102 of 1952 emphasises the right of appeal in case of refusal of the benefit or complaint as to its quality or quantity.





It is a crucial component of access to justice and the protection of the rights of social assistance clients that they have access to adequate complaints and appeal mechanisms. The comparative evidence, supported by standards and guidelines emanating from the ILO, indicates that a clear distinction has to be drawn between the two stages of resolution of social security and social assistance disputes. This implies that:

- A complaining applicant or recipient should be able to access the review procedure within the social protection institution that decided on the issue in the first place.
- Thereafter, if the applicant or recipient still feels aggrieved and the matter/dispute remains unresolved, he/she should have access to a higher-level independent appeal body.

These 'internal' and 'external' adjudication bodies should be institutionally and structurally separate and independent of each other.⁴⁵

Worldwide, there are several best practice examples of well-developed social security internal dispute resolution systems operating within public social assistance scheme environments. This is, with some exception, not generally true of SADC countries, where little provision has been made for social assistance dispute resolution except for the involvement of the general court system.⁴⁶

One of the notable exceptions, which seems to be building on international precedent, is the review and appeal system applicable to social assistance disputes in **South Africa**. Section 18 of the Social Assistance Act, 2004 essentially provides for two stages of dispute resolution:

- If the applicant or recipient disagrees with a decision made by the Agency, he or she may request, in writing, that the Agency reconsider its decision;
- If the applicant or a recipient disagrees with a reconsidered decision made by the Agency, he or she may then appeal in writing to a specially appointed appeal institution, i.e. the Independent Tribunal for Social Assistance Appeals (ITSAA).

Regarding appeal, it has to be added that a tribunal, or specialized court, is to be preferred to the general court system of a country. Tribunals or specialized courts have the advantage that they are specialist institutions, which can solve disputes expeditiously, without adherence to formal and strict legal procedures, and inexpensively, given that legal representation is usually forbidden.

In addition to the formal approach to dispute resolution, a more informal process, informed by social accountability mechanisms, was incrementally introduced in recent times. These mechanisms are elaborated upon below.⁴⁷ By primarily utilizing representative collective institutions – set up as government and/or NGO initiatives or established by local communities themselves – clients have been able to raise not only the kind of (individual) disputes provided for by the formal system described above, but also other (collective) grievances relating to service delivery, among other issues.

4.2.1 The Claim Process

The claim process generally requires

- **Social assistance legislation needs to include the formal procedure of internal review of an administrative decision.** Such a procedure enables a previous decision to be re-examined on the receipt of additional information or evidence. Sometimes the result of the review will be to change the original decision — e.g. to pay rather than refuse benefit, or to pay at a higher (or perhaps even a lower) rate. Alternatively, the result of the review may be to confirm that the original decision was indeed correct.

45 See Olivier M (2011) "Social security adjudication in the light of international standards: The need for reform in Southern Africa" – vol 3(1) International Journal of Social Security and Workers Compensation pp. 29-54 at 42; International Labour Organization [ILO], Social security and the rule of law (General Survey concerning social security instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization) (Report of the Committee of Experts on the Application of Conventions and Recommendations to the International Labour Conference, 100th Session, 2011- Report III (Part 1B)) (2011) [409]ILO Social security and the rule of law, above n 17, [434].

46 See Olivier M (2011) "Social security adjudication in the light of international standards: The need for reform in Southern Africa" – vol 3(1) International Journal of Social Security and Workers Compensation (2011) 29-54 at 43 and, generally, ILO Social security and the rule of law (2011) [409].

47 Par 5.1.

- **The review action will inevitably be followed by a further decision — to confirm, revise, or amend the original decision.** It is always necessary to formally notify the claimant (preferably in writing) of any decision taken on a claim. It therefore, follows that a decision resulting from the review of an earlier decision should also be notified to the claimant.
- **The aim is to ensure that each claim is dealt with strictly in accordance with the legislation, objectively and without fear or favour.** The review procedures should therefore help to protect a claimant from any risk of refusal of benefit on “personal grounds” or at the whim of a member of the social security institution’s staff. This is yet another important reason for ensuring that each claim results in a formal — preferably written — notification to the claimant, explaining the decision made on that claim — even where the decision is totally favourable to the claimant. It also adds to the openness and transparency of the scheme to its members.

4.2.2 The Right to Judicial Appeal

Typically, the appeals procedure will follow this pattern: on receipt of the letter of appeal (and following the reexamination of the claim referred to above), all the documents relating to the claim and the resulting decision will be passed to the clerk to the tribunal. The clerk will then be responsible for convening the tribunal. So far as possible, hearings are held locally in order to provide a greater opportunity for the appellant to attend in person. As pointed out previously, the appellant may choose to be represented and/or accompanied by “a qualified person of his own choice” and this will often be an official of the trade union or workers’ association or organization to which the appellant belongs. When the chairperson is satisfied that the tribunal has obtained all relevant information, the appellant and the social security representative will be dismissed. The tribunal will then discuss and consider all the information and reach a decision. That decision may be unanimous or by the majority and is formally notified to the appellant and the social security office in writing, by post, by the clerk to the tribunal.

4.2.3 Appeal tribunals

Further rights of appeal, to a higher authority, exist in some countries and the overall procedures will be very similar to those already described. The main difference is that generally the higher the level of appeal, the more highly qualified will be the tribunal members. Some countries also provide for an ultimate right of appeal to be heard by their highest court of law. The action following the appeal will of course depend on the decision given by the tribunal. If it is to confirm the original decision (given by the social security institution) there will be no need for further action, other than to notify the appellant (the claimant) that the tribunal has confirmed the original decision. If, however, the system provides for a further level of appeal, the appellant may decide to exercise the right to appeal to that higher level. In such a case a similar process would follow as was described for the initial appeal. It should also be noted that if the tribunal gives a decision which changes the original decision of the social security institution, that institution also has a right to appeal against the tribunal’s (revised) decision.

4.3 PRINCIPLE OF DUE PROCESS

The following principles of due process apply to administrative and judicial processes. It concerns the requirement that public institutions exercising public power and taking administrative decisions have regard to principles of just administrative action.

This implies, in broad terms, that decisions and actions taken by social assistance administrations and their officials must be **lawful, reasonable and procedurally fair**.

1. **Procedural fairness** (often referred to as natural justice requirements), in particular, implies that the social assistance institution or official making a (potentially) negative decision must give an affected person an **opportunity to present his or her case** and that the institution or official must be impartial. The **impartiality** requirement suggests that the official concerned may not have a financial or personal interest when making a social assistance decision.

Other things to be considered in the due process include:

2. **Right to be represented:** A later ILO Convention (No. 128, (1967)) requires that a claimant should have the right to be represented or assisted by a qualified person of his/her own choice, for example, by a delegate from a trade union. Although this Convention refers only to specific benefits (invalidity, old age and survivors) it is nevertheless usual to give the same rights of representation to all benefit cases.



3. **Written response:** Claimants should be notified of the decision whether favourable to the claimant or not. Most written communications which are issued to claimants — whether standard, mass-produced, printed forms, or individually prepared notifications or letters — contain information about appeal rights and the procedure for submitting an appeal. Such notifications are basic to the appeals system, for it is perhaps the only way in which claimants might learn of their right of appeal. It, therefore, follows that any form or notification, which is to be used in connection with decisions on benefit claims, should include information about appeal rights and procedures.
4. **Information awareness:** Additionally, most social security institutions provide additional publicity — posters, leaflets, advertisements, etc. — to make members of the scheme aware of their appeal rights. These communication materials need to be adapted to the specific needs of users, including using inclusive language, adapted communication formats and delivering information through the most appropriate formats and channels to ensure marginalised groups, including older persons, ethnic minorities and people with disability, can access it. See Module ADM.
5. **Rapid responses:** As with all other aspects of benefits procedures, it is important that the appeals system works efficiently and quickly. Those who claim benefits do so because they believe themselves to be entitled and will usually also be experiencing some loss or reduction of income because of the contingency which has prompted the claim. If the benefit is refused or paid at a lower rate than was expected, a member will not wish to wait several months for an appeal to be processed. Having said that, the work involved in processing an appeal, constituting the appeal body and arranging a hearing, will inevitably take several weeks, even under the most efficient system. It follows, therefore that all activities resulting from the submission of an appeal must be urgent actions.

Administrative justice protection can be embedded in the constitution of a country (for example, section 33 of the South African Constitution), the national applicable law (i.e. the common-law system of a country), and even in a separate statute.

In South Africa, for example, this legal protection is contained in the Constitution, the common law, and in a specific law dealing with just administrative action (i.e. the Promotion of Administrative Justice Act, 2000). These legal requirements have played a profound role in ensuring that social administrations respect the administrative justice entitlements of clients.

The courts have, among other stipulations, held that:⁴⁸

- a. unreasonable delays in the processing of social assistance grant applications may constitute unlawful administrative action;
- b. unilateral withdrawal or suspension of grants – without proper adherence to the administrative law principles of natural justice and to the rights which had accrued in terms of the statute – is unlawful and invalid;
- c. reasons for administrative action taken, such as the suspension or withdrawal of a social assistance grant, must be given. The reasons must be adequate: the administrator who has taken the administrative action must sufficiently substantiate the action taken. The reasons given for the administrative action must be objectively sufficient and phrased in such a way as to be understandable to the applicant; and
- d. the affected person should also be informed of his or her right to appeal

4.4 PRIVACY AND THE PROTECTION OF THE CONFIDENTIALITY OF PRIVATE INFORMATION

Social assistance laws often contain comprehensive data gathering and storage provisions, the application of which may cause potential infringements on an individual's right to privacy. Privacy provisions may relate to such events as:

- the disclosure of information by individuals and, at times, by third parties to social assistance administrations,
- the maintenance of social security databases, and
- access by social assistance administrations to data kept elsewhere by the State or other social security institutions.

The purpose of these provisions usually is to ensure that information, including financial information supplied by an applicant for benefits, is correct. The powers given to social assistance administrations may therefore be far-reaching.

The **Namibian** Social Pensions Act, 1992, stipulates that ‘... notwithstanding anything contrary in any law, any other officer,.... shall at the request of the Permanent Secretary furnish him or her with such information relating to any applicant as may be determined by the Permanent Secretary’ (section 13). Similarly, social protection laws may determine that other social protection institutions may request information held by social assistance administrations. In South Africa, for example, the commissioner of the Unemployment Insurance Fund is empowered to access any State database containing information regarding social security.⁴⁹ It is, therefore, necessary to ensure that social assistance clients enjoy sufficient protection concerning the privacy of information about them to which a social assistance administration may have access. For a more in-depth analysis see also MODULE MIS.

According to ILO R. 202 of 2012 on National Floors of Social Protection, it is expected of countries to establish a legal framework to secure and protect private individual information contained in their social security data system (par 23). The protection could be embedded in the general legal system, such as the common-law protection of privacy existing in many countries. It could also be of a constitutional nature – section 14 of the **South African** Constitution of 1996, for example, grants the right to privacy to everyone.

But for protection to be effective and evident to both officials of the social assistance administration and social assistance clients, it is advisable to explicitly include the protection of an individual’s private information in a social assistance law. Such a provision is, for example, contained in the South African Social Security Agency Act, 2004 (see sections 4(3)(c), 7(3)(g) and 16(1)).

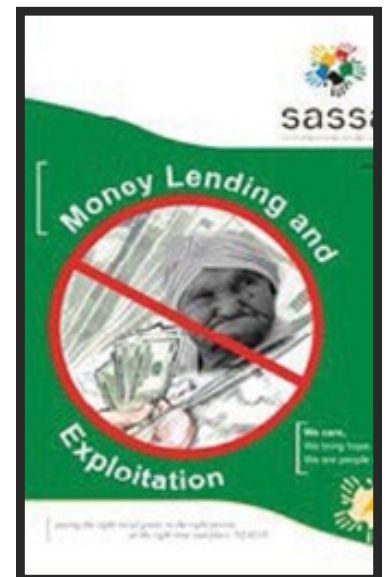
Box 26: Protection of private information – South African Social Security Agency

CONEVAL sees the production of evidence as more than just technical work, emphasizing the importance of national dialogue. According to the CONEVAL Director “We started from the basis that if we wanted a poverty indicator to be used by political actors, we could not just request a technical team to deliver a formula and then instruct the politician to ‘use this methodology’. In Coneval we say, building a measurement and evaluation system is a political challenge with technical elements, not the other way around. Because if you only take into consideration the technical standpoint – which has to be there – but not the actors, that methodology may be perfect, but nobody is going to use it. There has to be a lot of dialogue”.

Source: South African Social Security Agency Act 9 of 2004, section 16(1).

Nevertheless, vigilance must be constant and ministries must be ready to investigate and regulate on suspicion of misuse of personal data records. As an example, the payment provider of social benefits in South Africa communicated personal data from social assistance records to allow the sale of insurance products to recipients (for example funeral insurance). This has brought the need for the Department of Social Development to regulate in order to protect recipients from unlawful deductions of premiums on social benefits. Recipients – old age, people with a chronic disability, or vulnerable child carers – were not fully aware of insurance policies they had subscribed to or authorized, the payment of which was withheld from their social benefit payments directly by the cash paymaster. Beyond taking legal action, DSD also promoted a campaign to raise awareness of such practices.

Similar protection to South Africa’s personal data protection provision is contained in section 31 of the Kenyan Social Assistance Act, 2013. Much can also be learned from how other legal systems provide for the protection of private information. In the European Union, the Data Protection Directive⁵⁰ provides guidelines on the processing of personal data and the free movement of such information.



48 M Olivier “Social security: Core elements” in *LAWSA (The Law of South Africa) - Labour Law and Social Security Law Vol 13, Part 3* (LexisNexis, Durban, 2013) par 178 51 M Olivier “Social security: Framework” in *LAWSA (The Law of South Africa) - Labour Law and Social Security Law Vol 13, Part 2* (LexisNexis, Durban, 2012) par 99.

49 Unemployment Insurance Act 63 of 2001, section 57(3).

50 Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data)

Individuals who are subject to the processing of personal data have the right:

- to know that their information is in a specific database;
- to know what information is contained in it;
- to know the purpose for which such data is used;
- to the adequate protection of the information; and

to correct the information or to have personal information removed from the database and that the providers give notice of corrected information.

In the United States, section 552a(4) of the Privacy Act of 1974 stipulates that:

“Each agency that maintains a system of records shall maintain in its records only such information about individuals that is ‘relevant and necessary’ to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President.”

4.5 PRINCIPLES FOR PROTECTING CLIENTS’ RIGHTS IN ACCESSING SOCIAL PROTECTION SERVICES

Clients’ rights in accessing social protection services may include the right to available customer care and service delivery (opening times, distance of services from catchment communities), respect of dignity (waiting lines in the sun, seated or standing, near ablution facilities), correct and understandable information (language, simplicity of language) in appropriate formats (written, radio, alternative communication formats for people with sensory and other disabilities), attention to special needs including those of older persons. Customer care and service delivery should include adaptations for people with disability and older persons, including ensuring offices are accessible and easy to reach, accessible information and communication and training of staff on disability and old age needs and how to provide accommodations.

Certain instances relating to the protection of clients’ rights and contained in a country’s legal framework were already mentioned above – in particular, the protection provided through administrative justice, the right to privacy, and access to justice provisions. Social assistance laws invariably make provision for other key components of client protection, and promote, facilitate and streamline easy access to and use of the social assistance system. This is achieved through a variety of means.

First, a social assistance law may typically impose **obligations on officials** of the social assistance administration to enhance service delivery and ensure dedicated customer care. (See also MODULE M&E and its discussion of Service Standards).

These obligations may include:

- A prohibition on conflicts of interest – staff members should be required to disclose a conflict of interest.
- A prohibition on the acceptance of compensation or a gift by officials – for example, section 19(1) of the South African Social Security Agency Act prohibits the unauthorized acceptance of a fee or reward by a member of staff, adviser, agent or other person employed by or acting on behalf of the Agency.
- Adherence to a code of conduct by officials and the taking of disciplinary steps against an official in the event of non-compliance.

Second, as many social assistance clients may not know their rights, or may be illiterate, innumerate or otherwise in need of support, **customer care obligations** should ideally be contained in the social assistance legal framework. Such obligations are specifically contained in South Africa’s Social Assistance Act, as discussed in Box 27.

Box 27: Example Assisting social assistance clients in South Africa:

In terms of the South African Social Assistance Act, officials of the South African Social Security Agency (SASSA) are obliged to provide concrete assistance to a person, who due to his or her age, disability or inability to read or write is unable to understand or access his or her rights or obligations in terms of the Act. Assistance must be provided in a language he/she will understand. A legal obligation is also imposed on SASSA to publish and distribute pamphlets and brochures in all official languages regarding the rights, duties, obligations, and procedures discussed in the Act.

Source: Social Assistance Act 13 of 2004 (South Africa), section 2(2) and (4).

Third, the law should make clear what the **procedure is regarding applying for, accessing and retaining** social assistance benefits, and the circumstances under which a benefit could be withdrawn, cancelled or suspended. The law and supporting regulations should indicate clearly and in detail the procedures an applicant for a benefit has to follow when applying for the benefit, and the supporting documentation required by the social assistance administration. For example, disability-targeted benefits should be clear on if and how an individual has to submit recertifications of disability status, and this information should be communicated through accessible formats. An applicant should have the right to be informed of the outcome of the application and his/her right to have the decision reconsidered. To avoid delays and continued hardship on the part of an applicant, the law should ideally stipulate the time within which a decision on the application will have to be provided to the applicant.

There should also be clarity around the **amounts to be paid, the period** for which these will be paid (especially in the case of a temporary benefit), and the **payment method**. In particular, where payments are collected from pay points, it is necessary to protect clients against abuse as well as address barriers that they may face in accessing these, due to time, cost, accessibility or distance factors. In the case of **South Africa**, for example, social assistance regulations contain strict rules regarding the management of pay points, including a prohibition on access by creditors and moneylenders and the need for certain institutions and individuals to obtain approval before they accompany the recipient and render support services. Moreover, the law and supporting regulations should clearly determine the timing and procedures applicable to a review, suspension, cancellation or termination of a social assistance benefit.

Fourth, it is part of a social assistance administration's responsibilities to ensure that benefits are **paid to legitimate recipients** and are not open to abuse by those entrusted with social assistance administration and by recipients. This risk particularly affects people who face social exclusion and discrimination in private and public life, as well as constraints on their mobility and participation in public life, as a result of disability, old age, or discriminatory social and gender norms. For example, people with disability may have their benefits managed by family members. This setup may be required for people with limited legal capacity or to overcome barriers in the administration of benefits (e.g. pay points are far and inaccessible, lack of accessible communication) or other forms of exclusion (e.g. from banking services). However, it can limit the control of recipients of disabilities over their own benefits, and in some cases lead to abuse. Administration systems should therefore try to reduce barriers preventing individual control (e.g. ensure pay points are accessible and close to individuals, assist in setting up bank accounts/mobile money in the recipients' name) and implement monitoring and safeguarding measures (e.g. complaints mechanisms to report abuse; consultations with the recipient on if and who they want as their proxy; periodic re-evaluations on the need for a proxy, particularly for children transitioning into adulthood).

Box 28: Ensuring that social assistance benefits are used appropriately

Specific protective measures should be built into social assistance legislation. For example, in order to prevent the misspending of social benefits, social assistance laws invariably provide that recipients who misspend their benefits may have the payment of their benefits terminated or a person appointed to receive and apply the benefit on their behalf. Also, benefits should not be the subject of a cession, pledge, attachment or any form of execution under a judgment or order of a court of law.

Source: Authors



Finally, however, it must be remembered that a social assistance system can only operate optimally if the clients themselves, i.e. social assistance applicants and recipients, comply with the prescribed rules. These rules typically relate to:

- Complying with all the procedures and providing the required proof to enable a client to access a social assistance benefit.
- Informing the social assistance administration should the circumstances of the client change, as this may impact the client's eligibility to receive a benefit.
- Prohibiting the furnishing of information which is false or misleading or otherwise acting fraudulently, for example, by offering a bribe or other monetary incentive to an official of the administration.
- Prohibiting abuse of the grant by a recipient and the appointment of a person to receive a benefit on behalf of the recipient and to use it for the benefit of that recipient, should abuse occur or should the recipient be unable to use the benefit appropriately

4.6 TAKE AWAY LESSONS

- Due process implies that decisions and actions taken by social assistance administrations and their officials must be lawful, reasonable and procedurally fair. Legal systems should therefore recognize the right of an affected person to administrative justice.
- It is necessary to ensure that social assistance clients enjoy sufficient protection concerning the privacy of information about them to which a social assistance administration may have access to.
- A social assistance law may also impose obligations on officials of the social assistance administration to: enhance service delivery, ensure that benefits are paid to legitimate recipients (and are not open to abuse), provide dedicated customer care, promote principles of inclusivity and accessibility, and make information about programmes and obligations accessible to the clients.
- Social assistance clients should be granted access to adequate complaints and appeal mechanisms.
- This process should follow the principles of due process.
- Privacy of information should be included in specific social assistance legislation.
- Protection of human rights in access to services involves availability and accessibility of services, correct information on the service process, administrative requirements, respect for human dignity in the service interface, and assume recipient compliance with rules.

5

PRINCIPLES OF ACCOUNTABILITY IN NATIONAL SOCIAL ASSISTANCE LAWS

5.1 OBJECTIVES

Upon completion of this section of the module, you should be able to:

- Describe various types of accountability institutions established by countries along with the provision of social security
- Reflect on and distinguish between the different compliance and enforcement mechanisms as regards social assistance policy and legal frameworks
- Understand the role of support available to social assistance clients by non-governmental actors

5.2 ACCOUNTABILITY INSTITUTIONS

As provided by international standards, including C. 102 and R. 202, the legal framework should provide for every claimant to have the right to:

- Request the provision of a benefit that is due according to the law
- To complain about the quality or quantity of the benefit due
- To appeal in case of its refusal
- To hold those responsible for the design, administration and implementation of the social assistance scheme accountable.

This section identifies what are the main provisions/principles that the legal framework should establish to ensure accountability. Accountability systems for social protection are also discussed within the MODULE M&E.

Countries use a variety of mechanisms to ensure accountability by social protection administrations. These administrations are invariably government institutions answerable to a lead minister or the relevant ministry (such as the South African Social Security Agency, which reports directly to the Minister of Social Development), or are at times part of the ministry. However, there are also examples of separate governing institutions.

The Social Assistance Act of **Kenya** (2013) established a National Social Assistance Authority with its own management board (sections 3-5), answerable to the Authority.

Other accountability mechanisms include parliamentary (portfolio) committees, ministerial committees and constitutional institutions such as supreme audit institutions (SAI). In reality, supreme audit institutions face serious limitations in many countries. "Audit reports are withheld from the public, hearings on audit findings take place behind closed doors and findings are not acted upon."⁵¹

51 International Budget (2016) How can government audits drive accountability, Blog accessed online on International Budget <https://internationalbudget.org/how-government-audits-drive-accountability/>

In **South Africa**, the Human Rights Commission and the Public Protector, both set up in terms of the South African Constitution (1996), are examples of such institutions.

Recently, however, there has been a tendency to establish social assistance accountability mechanisms outside the framework of the above, traditional institutions. These mechanisms are often referred to as **social accountability structures**. Some of these mechanisms may be initiated by the government itself to enhance citizen participation.

For example, in **South Africa**, the Department of Performance, Monitoring and Evaluation in the Presidency (DPME) has initiated a 'Framework for Strengthening Citizen-Government Partnerships for Monitoring Frontline Service Delivery', involving a Citizen- Based Monitoring (CBM) Pilot: 'This Government initiated accountability mechanism represents an effort to include citizens' experience of service delivery into their overall monitoring, evaluation and performance frameworks.'⁵²

Rwanda ranks routinely at the top of good governance indicators in Africa and is one of the least corrupt countries. The Rwanda Governance Board performs impromptu routine audits and inspections in social security organizations. It scores service delivery performance and ranks government institutions against established indicators according to a well-established scorecard.⁵³

Other such institutions are supported by non-governmental organizations, in particular advocacy organizations. However, there are also examples of informal, citizen-based institutions set up by communities. In the South African context, Pension Committees are but one example of such institutions.

Box 29: Establishing non-governmental and community structures for social accountability

'Evidence shows that social protection programmes, particularly safety nets, have established relatively robust accountability mechanisms. These include a suite of measures to ensure fiduciary control and "upwards" accountability to management and Parliamentarians. Many safety nets have also established strong systems to create "downwards" accountability to recipients and communities. For most programmes, this is translated into the widespread use of community structures to monitor implementation progress and advocate for recipient rights, among others. While this strategy appears to be effective in many ways, it has raised questions about the sustainability of programmes that depend heavily on voluntary labour at local levels.'

Source: Ministry of State for Planning, National Development and Vision 2030 Kenya Social Protection Sector Review (2012) viii-ix.

5.3 COMPLIANCE AND ENFORCEMENT

There are several mechanisms involved in **ensuring compliance and enforcement** of social assistance policy and legal frameworks. Legislation should provide for social assistance administrations to undertake **inspections** and to **act against** non-complying persons and institutions.

The use of internal review institutions has already been discussed. In addition, the role of external tribunals has also been already discussed. These specifically resolve disputes raised by social assistance clients who disagree with decisions made by the social assistance administration.

Given the potential for fraud and the large number of clients served by the **South African** social assistance system, the Social Assistance Act, 2004, provides for a special external enforcement institution, called the 'Inspectorate for Social Assistance'. The Inspectorate is an independent institution and is required by law to:⁵²

- a. conduct investigations to ensure the maintenance of the integrity of the social assistance system;
- b. execute internal financial and compliance audits;
- c. investigate fraud, corruption and other forms of financial and service mismanagement and criminal activity; and
- d. establish a complaints mechanism.

⁵² Social Assistance Act, chapter 4, section 27.



Considerable powers of investigation are given to the Inspectorate, which is supported by a regime of significant criminal sanctions.

Judicial enforcement by the courts has also been discussed. It relates essentially to the task of courts to give effect to the protection embedded in the legal framework, i.e. the constitutional, statutory and common-law domains. Examples already mentioned include administrative justice and privacy protection overseen by courts.

Sometimes the jurisprudence could have far-reaching implications for social assistance coverage and service delivery.

In South Africa, for example, it was held that, where necessary, a court will allow a class action to be brought before it in order to protect the interests of the poor and vulnerable, in particular.⁵³

5.4 SUPPORT FROM LEGAL CLINICS AND OTHER SOCIAL ACTIVISTS

Social assistance clients are, as a rule, some of the most vulnerable and marginalized members of society. While opportunities for utilizing formal and informal grievance, dispute resolution and accountability mechanisms exist, as explained above, it is clear that these categories of persons are also in need of support from other stakeholders. Indeed State Legal Aid is not available to social assistance clients in many countries. In fact, several of the (social) accountability structures referred to above have been established and/or supported by government and civil society agencies (including NGOs).

Social workers and legal aid clinics provide support to social assistance clients. Crucially, civil society organizations and legal aid clinics have been instrumental in successfully litigating for the protection of applicants and recipients.

Box 30: South Africa's Legal Resource Centre

Legal rights clinics exist in several countries in Southern Africa. One example is the Legal Resources Centre (LRC). The LRC is South Africa's largest public interest, human rights law clinic. Established in 1979, it uses law as an instrument of justice for the vulnerable and marginalised, including poor, homeless and landless people.

Source: <https://lrc.org.za/>

Box 31: Example: Civil society stakeholder support in South Africa

'Monitoring and Advocacy Organisations, such as Black Sash and SCAT, are an important civil-society initiated accountability mechanism for collective grievances. Black Sash initially started as an advice service providing casework and paralegal advice for individuals, but over time it evolved to build a network of Community Advice offices and Community Based Organisations (CBOs) in order to broaden their reach and impact. As well as supporting CBOs to provide advice, Black Sash also provides training for CBOs in local government legislation, plans and budgets, including how to monitor and hold local government to account and how to participate in community decision making structures.'

Source: A Livingstone(2014) *Accountability in social pension programmes: A baseline mapping of the Old Age Grant in South Africa* (HelpAge International, 2014) 16.

52 Social Assistance Act, chapter 4, section 27.

53 See section 38 of the South African Constitution, 1996, as well as Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuzza 2001 10 BCLR 1039 (A); 2001 4 SA 1184 (SCA) and Mashavha v President of the RSA 2004 12 BCLR 1243 (CC).

Affirmative measures, including legal literacy efforts, are particularly significant for women. Even in countries where gender-equal laws have been put in place, power inequalities between women and men as well as gender stereotypes and discriminatory social norms may prevent women from claiming their rights. For example, it is estimated that only 28 per cent of employed women worldwide, who are entitled to paid parental leave enjoy their rights in practice. Lack of awareness of their rights and social barriers may prevent such women from coming forward to pursue cases through the formal justice system. Addressing the gap in the implementation of laws requires legal literacy campaigns to raise women's awareness of their entitlements and government staff trained to increase their responsiveness to women's rights. In Brazil, for instance, in the Chapéu de Palha Mulher conditional cash transfer pilot, women are provided with a three-month course on citizenship rights to raise their awareness of their entitlements. The pilot aimed to respond to women's immediate needs while disrupting the structures that reinforce their subordination and constrain the practical enjoyment of their rights. Legal literacy and the provision of information in accessible formats is also important for people with disability (FAO, 2018).

5.5 TAKE-AWAY LESSONS

- In order to keep social protection administrations accountable, a country can use government mechanisms, parliamentary (portfolio) committees, ministerial committees, and constitutional institutions.
- Compliance and enforcement mechanisms for the protection offered in the social assistance legal framework should be provided for in legislation. These can take the form of judicial enforcement (through the country's courts) or internal review institutions and specialized tribunals.
- 'Social accountability' mechanisms that are facilitated by social workers, civil society organizations and legal aid clinics, can also be made available to social assistance clients.
- The social assistance legal framework should provide for social assistance administrations to undertake inspections and to act against non-complying persons and institutions.

6

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CURRICULUM OVERVIEW

The TRANSFORM Learning Package is organized in a modular structure, and reflects the key building blocks of a holistic & interdependent social protection system.

The TRANSFORM modules that are currently available are listed below. Other modules are under development and will be added to the curriculum.

 LEG	Legal Frameworks
 S&I	Selection & Identification
 ADM	Administration and Delivery Systems
 COO	Coordination
 GOV	Governance, Institutions & Organizational Structure
 MIS	Management Information Systems & Approaches to Data Integration
 FIN	Financing & Financial Management
 M&E	Monitoring & Evaluation

All TRANSFORM materials are available at:

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WHAT IS TRANSFORM?

TRANSFORM is an innovative learning package on the administration of national social protection floors in Africa. The prime objective of TRANSFORM is to build critical thinking and capacities of policy makers and practitioners at national and decentralized levels to improve the design, effectiveness and efficiency of social protection systems. TRANSFORM aims not only at imparting state-of-the-art knowledge that is appropriate for the challenges faced by countries in the region, but also to encourage learners to take leadership on the change and transformation of nationally defined social protection systems.

WHY TRANSFORM?

Many training curricula exist in the field of social protection and thus fundamental ideas, concepts, approaches and techniques are accessible. And yet, institutions and individuals struggle with the complexity of developing a broad, encompassing social protection system.

This complexity requires a transformational approach to teaching and knowledge sharing. It is far from enough to impart knowledge, to fill heads. It requires learners to grapple with the features of complexity, to stimulate creativity, to appreciate diversity and uniqueness, to be involved as a key element of ownership –elements which are at least as important as the factual knowledge itself. This learning package aims at just that: TRANSFORM!

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