



LEG

SOCIAL PROTECTION
FLOORS LEGAL
FRAMEWORK

SUMMARY DOCUMENT



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GLOSSARY

Categorical benefit schemes, cover all residents belonging to a certain category, are also often referred to as “universal” categorical benefits schemes (such as “universal” old-age pensions” covering all elderly men and women above a certain age threshold).

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 elderly: social protection measures, including social insurance, social assistance, cash and in-kind transfers, among others, that enable elderly people 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 elderly people).

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: 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.

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INTRODUCTION

This module deals with the core question of how a country can set up a legal framework that provides for social benefits 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 for the definition of the content of the right to social security. It includes a set of specific provisions to guarantee rights to income security to vulnerable groups, such as women and people with disability.

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 calls social protection floors nationally defined sets of basic social security guarantees which secure protection aimed at preventing or alleviating poverty, vulnerability and social exclusion (par 2). The need to provide for strong legal frameworks that clearly lay out entitlements, rights and obligations is provided for in Recommendation No. 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). 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. The ICESCR does not, however, explicitly mention of the principle of non-discrimination to protect people with disability. The right of people with disability to social protection is however codified in other conventions, such as the Convention on the Rights of Persons with Disabilities (Article 28). 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.



Editorial Note

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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 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.

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

Box 1: Human rights 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.¹

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 for a life in health and dignity” (See Social Protection Floors Recommendation No. 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.

WHY A RIGHTS-BASED FRAMEWORK FOR SOCIAL PROTECTION IS IMPORTANT

2.1. OBJECTIVES

Upon completion of this part 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 2012 Recommendation 202 on National Floors of Social Protection and Convention 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 Africa 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 mandate to provide social assistance benefits by:

- Meeting international obligations
- Implementation of a constitutional right
- 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, institutions may provide social benefits unduly and inconsistently; this includes rules such as the requirement for regular life proofs and the uniform application of rules across sub-national levels.

When social security rights of very vulnerable groups are recognised in constitutions and enshrined in laws, this can create political legitimacy, 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 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
- 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 public in general
 - 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
 - accessibility of procedures, to people with disability and other groups
 - languages spoken (eg. accessible communication formats for people with certain disabilities)
 - non-discrimination by front-line staff
 - “non-shame proof” management practices
 - ensuring the 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
 - ensuring 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 legislation that will protect the rights and entitlements of social assistance recipients.

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. 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 Convention No. 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 an adequate standard of living.

Box 1: Human rights approach to social security

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

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. The Covenant makes **specific references to women's rights, including to equal pay (article 7) and paid maternity leave (article 10), but no references to the rights of people with disability.** Unlike the Declaration, ratifying states party to the Covenant have to ensure they are complying with their obligations stemming therefrom. Almost all African countries² 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); and
- d) 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).

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), the Convention on the Rights of Persons with Disabilities (Article 28), and Convention on the Rights of a Child (Article 26). 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.

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 more on Section 4.2 Fiscal constraints). 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 2012 recommendation 202 on national floors of social protection

In 2012 the ILO adopted Recommendation 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.

Box 2: National Floors of Social Protection: ILO Recommendation 202 of 2012

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



Importantly, Recommendation 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)

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 course – see Box 4.

Box 3: The ILO legal frameworks of relevance for women and girls

The ILO SPF Recommendation No. 202 covers several basic social security guarantees of significance to women and girls throughout the lifecycle. 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.

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 to be 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.

2.3.3. Regional standards

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 AU instruments.

The Social Policy Framework for Africa of 2008³ 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)). It also includes measures to support the inclusion of people with disability in employment and social protection.



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 disabled (paras 10.1, 11.1 and 14.1).

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.

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'.⁴ However, in other cases, such as in South Africa⁵ and Zimbabwe,⁶ 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. This is significant as national constitutions have been used to hold governments accountable for 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.⁷

Some countries' constitutional provisions furnish non-binding authority by defining the guiding principles of state action, without creating obligations of 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,⁸
- 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.

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, to organize the social security system or to protect families or vulnerable groups, however, they 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".

3. AU (2008) *Social Policy Framework for Africa* (CAMSD/EXP/4(I) 4. Art 144 of the Constitution of Namibia.4. Art 144 of the Constitution of Namibia.

5. Sect 231(4) of the South African Constitution (1996). 6. Sect 111B(1)(b) of the Zimbabwean Constitution (1980).

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

7. 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.

8. 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.



- 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.⁹ The Constitution of South Africa 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. 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)).

Several countries have adopted constitutions that include explicit state commitments to women's and girls' rights to social security. For example, in Kenya, the Federation of Women Lawyers (FIDA) worked to secure an increase in maternity leave under the Employment Act of 2007, and the incorporation of such provision in the 2010 Constitution (Domingo et al., 2016). In Nepal, the rights to social security for widowed women, ethnic minorities, people with disability, Dalits, older persons and other vulnerable groups are enshrined in the 2018 Social Security Act 2075 and the 2015 Nepali Constitution. Globally, 52 countries have explicitly guaranteed the right to equality or non-discrimination for people with disability in their constitutions, including 20 from sub-Saharan Africa (World Policy Centre, 2017).

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. Concerning non-citizens, 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. Nevertheless, in contexts where social protection is grounded in constitutional or legal frameworks (such as India, Colombia, Kenya, Brazil and South Africa), judicial activism and courts can be used to hold states accountable for their commitments to women and people with disability.

Box 4: The ILO legal frameworks of relevance for women and girls

The ILO SPF Recommendation No. 202 covers several basic social security guarantees of significance to women and girls throughout the lifecycle. 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.

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 to be 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.

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

Box 5: 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.¹⁰ Similarly, in the seminal case of *Khosa v Minister of Social Development*,¹¹ 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.

Source: Adapted from Tessier et al, 2013.

A repository of legal cases in different countries can be found in the online base document version of this file:

2.5. FISCAL CONSTRAINTS AND A RIGHTS-BASED APPROACH

Responding to the social protection needs of the population requires a sufficient level of resources. Legal work can be accompanied by the production of financial feasibility studies. 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 2011.¹²

Recommendation 202's point of departure, based on studies from ILO, UNICEF, and the World Bank is that poor countries can 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).¹³

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

- sustainable and gradual allocations to social assistance can be determined based on prioritization and sound financial planning
- 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.

ILO's 2012 Recommendation 202 on National Floors of Social Protection deals specifically with the issue of financing social assistance.

10. ILO Social security and the rule of law par 291. 11. 2004 6 BCLR 569 (CC).

11. 2004 6 BCLR 569 (CC).

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

13. 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.



Box 6: Financing social assistance measures

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 Recommendation 202 of 2012 on National Floors of Social Protection, paras 11-12

ILO Social Protection Floors Recommendation 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).

General Comment No. 19: The right to social security (Art. 9 of the CESCRC 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. For example, to cushion the negative effects of the gradual abolishment of energy and food subsidies on the vulnerable groups in the MENA region, governments were 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) (Centre for Inclusive Policy, 2018).

Art. 9 of the CESCRC 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."¹⁴

14. <http://www.refworld.org/docid/47b17b5b39c.html>

2.6. TAKEAWAYS

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 beneficiaries, 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 to an adequate standard of living. Other conventions, such as the UN Convention on the Rights of Persons with Disabilities, reinforce the rights of people with disability and other marginalised groups 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, including specific provisions for the most vulnerable groups 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.

CONSTRUCTING A NATIONAL LEGAL BASIS FOR SOCIAL ASSISTANCE

3.1. OBJECTIVES

Upon completion of this part 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 beneficiaries
- 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, for example, 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 and national strategy that is determined through a participatory approach. It follows institutional and financial feasibility studies as well as a needs assessment.
- 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. Civil society organizations and community groups, representing the interests and voices of disadvantaged groups, such as women, people with disability, and ethnic minorities need to be involved in consultations and the drafting process. Finally, last but not least, the process involves the important work of education 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

It is important for the legal framework to clearly identify who are the intended recipients of benefits – the “right-holders”. 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. However, a definition of eligibility needs to be reviewed periodically to ensure it does not inadvertently lead to exclusion from benefits and discrimination. For example, the definitions of disability for receipt of the Disability Grants in Namibia and South Africa include stipulations that recipients are incapable of work because of their disability, which are not recommended or in line with the UNCRPD. Countries such as Nepal, the Maldives and Vietnam do not include incapacity to work requirements in defining disability for Disability Grant eligibility to avoid a situation where people with disability are forced to choose between a low, but stable source of income through social assistance or seek employment.

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 Recommendation 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).

Recommendation 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 SPFs, the Recommendation recognizes that this definition needs to conform with each country’s international obligations, including those under relevant legally binding human rights instruments such as the International Covenant of Economic, Social and Cultural Rights of 1966.



3.3.3. Qualifying conditions

In accordance with human rights standards, complying with the principle of non-discrimination means that all eligibility criteria must be objective, reasonable, and transparent.¹⁵ The law should establish the conditions the recipients should meet to qualify for a benefit. These differ according to 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, for somebody to qualify for a disability-targeted programme, the applicant will need a verification of their disability, which may involve submitting medical documentation and/or undergoing a functional assessment. 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 every 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 conversely may exclude people above certain thresholds (affluence 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. Such Poverty targeting is not a simple technical endeavour. Two common poverty targeting methods are based on community targeting and 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. For example, 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. They can also apply complex and opaque eligibility assessments that prevent marginalised groups from ‘scrutinizing the targeting process, claiming their entitlements, and holding administrators of the programmes accountable for mistakes or errors’.

Other countries invariably 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.”¹⁶ Since women are typically responsible for the fulfilment of programme conditions, they can contribute to reinforcing traditional gender roles, hamper women’s participation in the labour market and exacerbate women’s time poverty (Cookson, 2019). The absence of utilization of public social and health services may be due to inaccessibility, poor quality, lack of trust, and opportunity costs. See Module on Administration for more discussion (ADM).

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. 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.

15. <http://socialprotection-humanrights.org/key-issues/universality-of-protection-and-effective-access/eligibility-criteria-and-entitlement-conditions-including-conditionalities/>

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

Box 7: 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 update of the amount payable is required.

Source: ILO (2014) Social Protection Floor Assessment Namibia.

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 in kind”. Essentially, a social security perspective would advocate, according to national determination, prioritization of contingencies and social risks across the life cycle:

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:

- a) 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;
- b) 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 review regularly 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 Recommendation 202:

- i. 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
- ii. in regard to 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.

For example, under the UNCRPD and the Code on Social Security of the SADC, people with disability should be ensured equal access to the same social protection measures as people without disability, as well as to disability-specific social protection measures. This means they should be provided with income security if they are living in poverty, as well as receive support for disability-related costs, such as rehabilitation, healthcare, assistive devices and support services. 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 to (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 to access nutrition, education, care amongst other necessities.



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 the state-provided benefits each time the yearly budget is developed. Some social assistance laws refer to funding in broad or general terms.

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

Social assistance governance and management:

National social assistance legal frameworks should provide an institutional structure for this scheme. 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.

Also relevant is the political internal organization (e.g. federal/provincial jurisdiction, degree of decentralization, etc).

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. Decentralised service delivery, can assist people to realise easily their rights to benefits. On the other hand, the centralisation 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 to undergo an often lengthy assessment process.

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."¹⁷

3.1. DOMESTIC LAWS, PUBLIC CONSULTATIONS AND SOCIAL MOBILIZATION

Evidence has shown that engaging with social partners (i.e. union and employer bodies) 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 social partners is to encourage the development of position papers on social protection floors. Conversely, non-traditional partners can participate in more traditional social security matters. Organisations of Persons with Disabilities (OPDs) and formal and informal groups representing women's rights should be involved in the design and monitoring of both mainstream and disability and gender-targeted social protection according to commitments in the UNCRPD and as recommended by the ILO and IDA Joint Statement.

¹⁷ General Survey concerning social security instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization, 2011 available online http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconfi/documents/meetingdocument/wcms_152602.pdf

ILO Recommendation 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(r); see also par 8(d)). 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.

Box 8: 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.'

Public consultation supposes that states take initiative for social policy reform. But social movements may also be at the origin of social policy reforms. 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 many settings including Nepal, Ghana and across Europe.

3.5. 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 a 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 to provide evidence on disability or gender-specific issues to ensure that laws and their enforcement are responsive to the needs of key marginalized groups. 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 Social Protection Floors Recommendation 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).



3.6 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 every 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 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. Particular efforts are required to guarantee participation and include the voices of the most disadvantaged and marginalized groups.
- 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.
- 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 AGAINST
MISUSE OF PERSONAL
INFORMATION IN SOCIAL
ASSISTANCE



4.1. OBJECTIVES

Upon completion of this part 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 client's 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 Convention No. 102 and Recommendation No. 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.

In some countries, the normal courts of law are used. In others, special social security or social assistance tribunals are established, yet some others use arrangements which exist under the labour law.

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 International Labour Organisation (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.

Article 70(1) of ILO Convention 102 of 1952¹⁸ emphasises the right of appeal in case of refusal of the benefit or complaint as to its quality or quantity.

Worldwide there are several examples of well-developed social security internal dispute resolution systems operating within public social assistance scheme environments. This is, with some exceptions, 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.

18. ILO (1952) Convention 102 Social Security (Minimum Standards) Convention.

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.¹⁹ 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.

4.3. 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: Decisions to be notified to claimants, 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 the application of inclusive language, adapted communication formats and delivering information through the most appropriate formats and channels to ensure older persons, ethnic minorities, people with disability, and women who lack access to public domains, can access it.
5. Rapid responses: As with all other aspects of benefits procedures, the appeals system must work 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 a 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.

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

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.²⁰

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.

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.

According to ILO Recommendation 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 9: Protection of private information – South African Social Security Agency

'Subject to the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), and the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000), no person may disclose any information submitted in connection with any application or instruction for or in respect of a grant, payment, benefit or assistance made available by the Agency, unless he or she is ordered to do so by a court of law or unless the person who made such application consents thereto in writing.'

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

20. 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.

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 or radio), attention to special needs. 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. 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.

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. An applicant should have the right to be informed of the outcome of the application and his/her right to have the decision reconsidered. In order to avoid delays and continued hardship on the part of an applicant, the law should ideally stipulate the time period 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.

Fourth, it is part of a social assistance administration's responsibility to ensure that benefits are paid to legitimate beneficiaries and are not open to abuse by those entrusted with social assistance administration and by recipients. 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 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).



Box 10: 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 beneficiaries 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: South African Social Security Agency Act 9 of 2004, section 16(1).

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.
- A social assistance law may also impose obligations on officials of the social assistance administration to: enhance gender-responsive and inclusive service delivery, ensure that benefits are paid to legitimate beneficiaries (and are not open to abuse), provide dedicated customer care, and make information about programmes and obligations accessible to the clients.
- Social assistance clients should be granted access to adequate complaints and appeal mechanisms and support for using these to lodge complaints. 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 the availability of services, correct information on the service process, administrative requirements, respect for human dignity in the service interface, and ensuring recipient compliance with rules.

PRINCIPLES OF ACCOUNTABILITY IN NATIONAL SOCIAL ASSISTANCE LAWS

5.1. OBJECTIVES

Upon completion of this part 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

This section identifies the main provisions/ principles that a legal framework should establish to ensure accountability. Countries use a variety of mechanisms to ensure accountability by social protection administrations. Implications for social assistance coverage and service delivery.

5.3. COMPLIANCE & 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.

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.

5.4. SUPPORT FROM LEGAL CLINICS AND OTHER SOCIAL ACTIVISTS

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. 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."²¹

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.

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. 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. Therefore, legal literacy efforts need to accompany the introduction and enforcement of legal measures, to enable clients to realise their rights effectively. 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).



5.5 TAKE AWAY LESSONS

- 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

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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:

www.transformsp.org

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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