



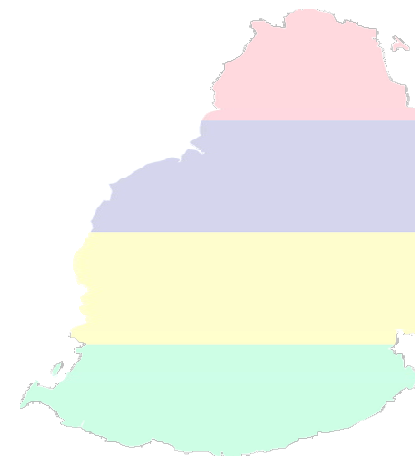
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Social Assistance National Legal Frameworks in Africa: Constitutional and Statutory Perspectives

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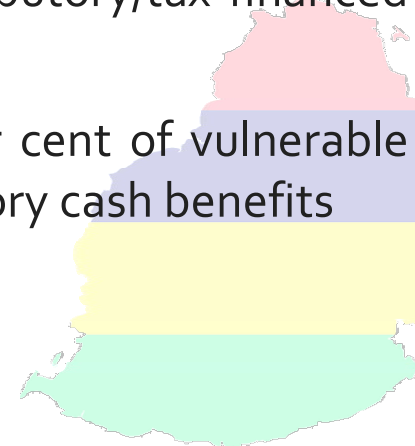
Overview

- Background
- Value of a legal framework
- Essence of a rights-based approach
- African constitutions – various dimensions
- Courts and the constitutional protection of social assistance: the South African case study
- Laws and other legal instruments
- Conclusions: Key characteristics of social assistance legal frameworks and reforms



Background

- Last two decades: Comprehensive introduction and expansion of SP policies, strategies and programmes – and to some extent, SP legal frameworks – in Africa
- Extensive direct and indirect impact of SP initiatives – to support family members, reduce poverty, increase school attendance, improve health outcomes, and enable entrepreneurial activities
- And yet, many remain excluded from SP coverage
 - Primarily as a result of the formal employment connection of most contributory programmes and the category-based and targeted nature of non-contributory/tax-financed programmes
 - According to the recent ILO World SP Report 2017-2019, only 9.5 per cent of vulnerable populations (less than one in 10 persons) in Africa receive non-contributory cash benefits



Background

- To some, but limited extent, a clear and solid basis cemented in law in a range of African countries
 - Angola: Social Protection Act, 2004
 - Mozambique: Social Protection Law, 2007
 - South Africa: Social Assistance Act, 2004
- In fact, the development of social assistance rights-based frameworks is becoming more common in Africa, with several SADC countries setting the example
- And yet, the majority of social assistance programmes are still discretionary rather than rights-based



Value of a legal framework

- A clear and legal mandate to provide social assistance benefits
- Gives expression to the principle that social protection is a human right
- Gives beneficiaries, namely poor and vulnerable people, clarity regarding:
 - the specific benefits that may be available to them;
 - the criteria they have to meet in order to qualify for such benefits;
 - the procedures that need to be followed in order to access these benefits;
 - a constant mandate to access public funds for social assistance programmes; and
 - 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



Value of a legal framework

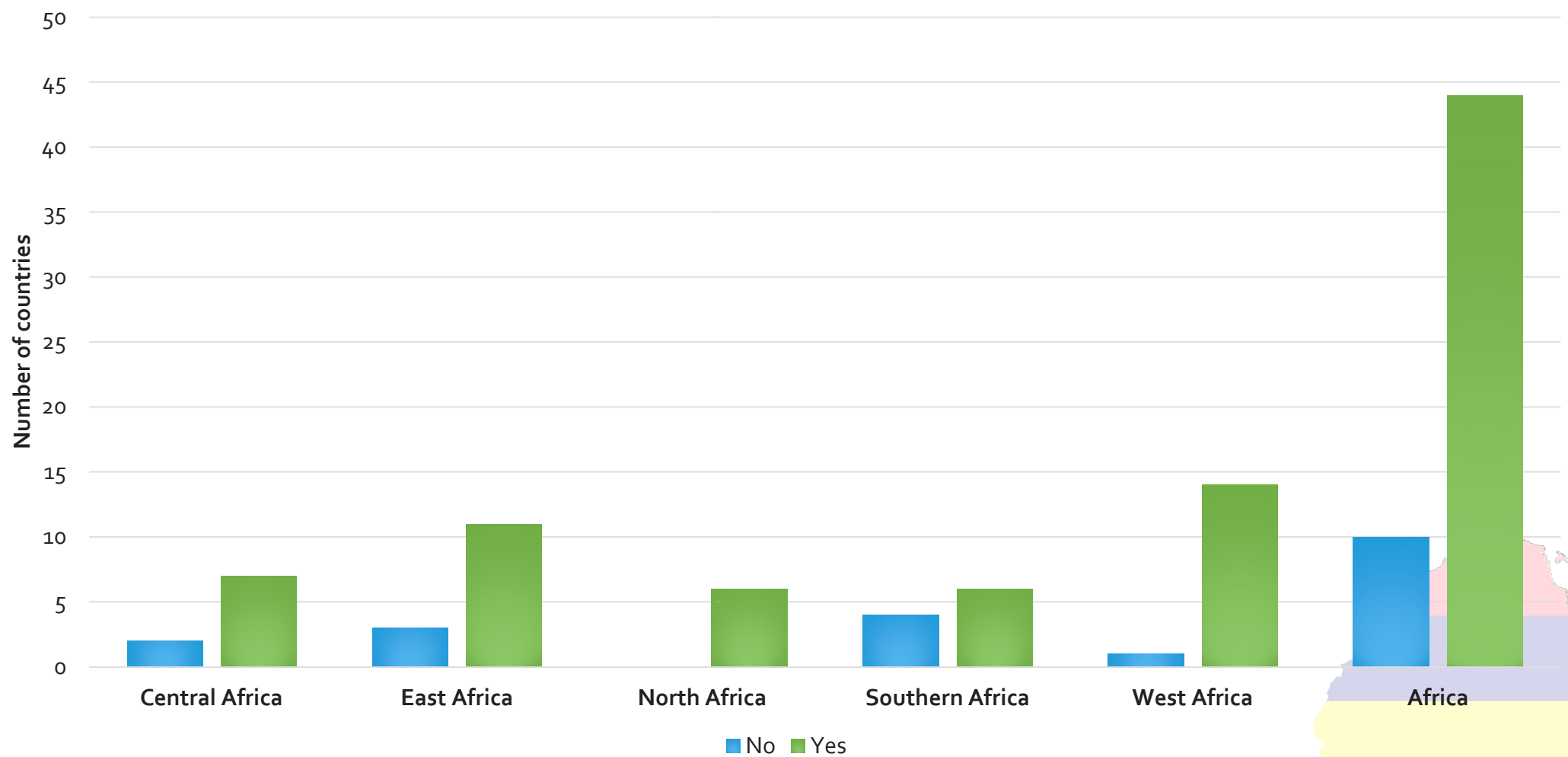
- "Many governments recognize the importance of anchoring social security programmes in a sound framework of national legislation, thereby clarifying individuals' rights and obligations, enhancing the predictability and adequacy of benefits, strengthening institutional capacities, promoting transparency and accountability, providing safeguards against corruption and establishing a more stable and regular funding base." (ILO (2017): 5)
- "[T]he codification of social rights is the indispensable foundation for any social protection system. The individual's right to protection against risks must be the object of appropriate legislation and mechanisms are needed to ensure effective application of this protective legal framework." (Pino & Confalonieri (2014): 136; see also 132)

Essence of a rights-based approach

- Social security should be considered as a right and entitlement and not just a matter of charity; citizens should therefore be able/enabled to claim and enforce their entitlement to social security;
- There is an obligation on states to recognise, guarantee and protect social security;
- Certain core obligations and minimum standards may be expected in assessing the compliance with the obligation to provide social security, in particular in relation to vulnerable groups; and
- Those who design and deliver social security should be kept accountable and involve those affected by and benefitting from social security interventions

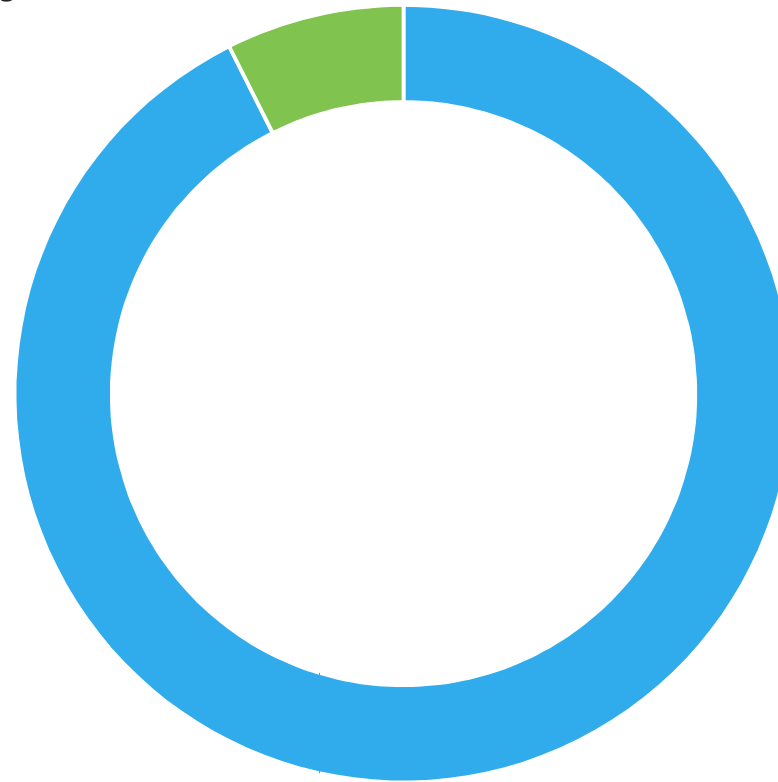


African Constitutions: Social protection in the Constitution



African Constitutions: Social assistance and welfare anchored in African Constitutions

14 countries

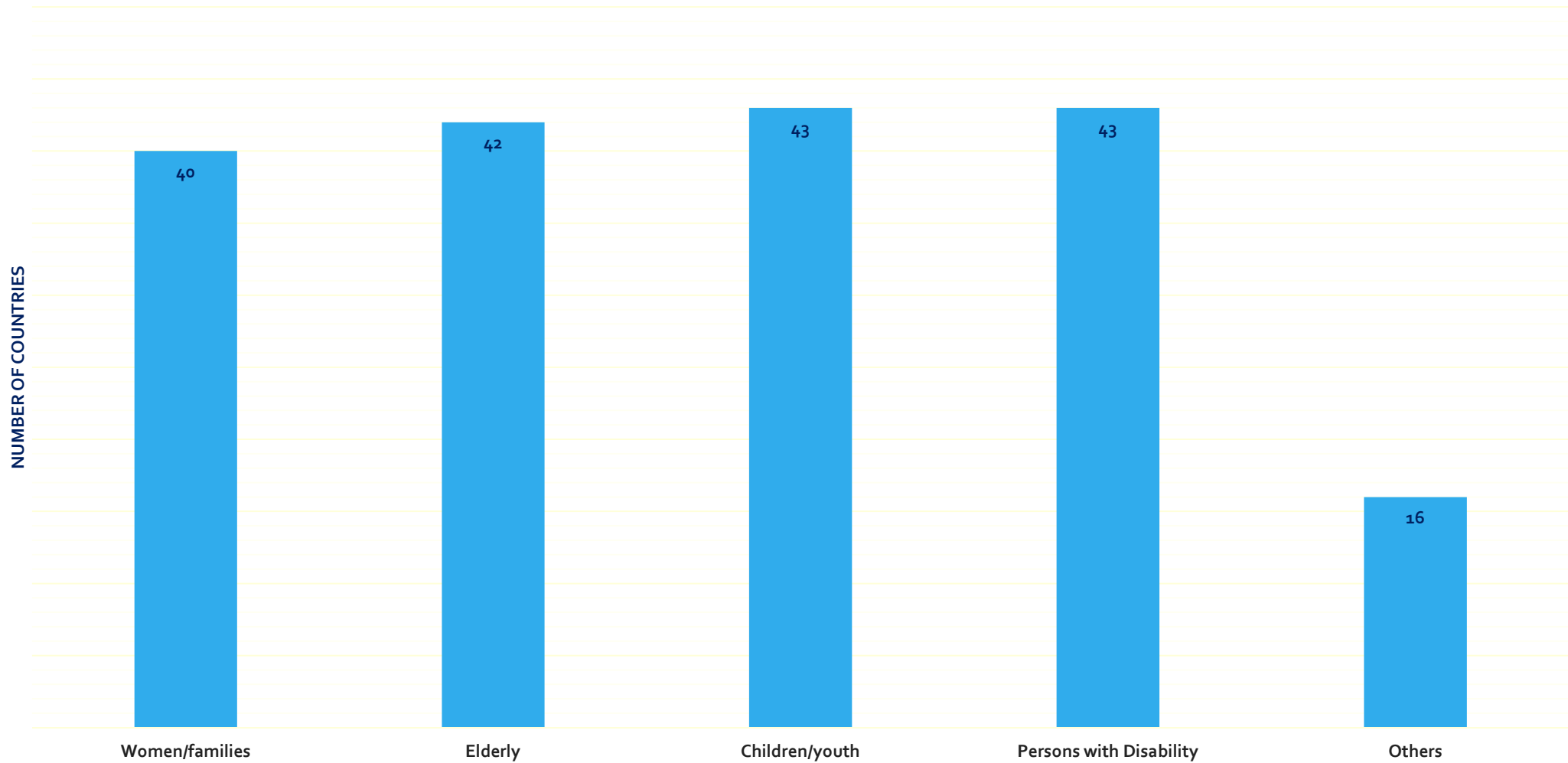


40 countries

■ No ■ Yes



African Constitutions: Prioritised groups in terms of Social Protection



African Constitutions and social assistance – different dimensions

- Impact of Constitution depends on status of relevant (fundamental) rights
 - Recognition as an individual right/entitlement – e.g., Cape Verde, Egypt, Ethiopia, Kenya, South Africa, Tunisia
 - State obligation – e.g., Gabon, Eritrea, Namibia, Niger, Senegal
 - Constitutional location
 - Preamble
 - Non-justiciable part of the constitution (e.g., “Directive principles of State policy” – see Lesotho, Namibia, Nigeria, Sierra Leone, Swaziland, Tanzania, Zambia)
 - Availability of effective judicial mechanisms, including efficient remedies and enhanced access to relevant mechanism and remedies – see Kenya, South Africa, Tunisia



Courts and the constitutional protection of social assistance: the South African case study

- The South African constitution is effectively a major poverty-addressing instrument.
- There is a specific constitutional focus on addressing the plight of the most vulnerable and desperate in society
- For example, in the seminal case of *Khosa v Minister of Social Development*, the South African Constitutional Court held that it was unconstitutional to exclude permanent residents and their children from access to social assistance: the provision infringed their constitutional rights to human dignity, equality and access to appropriate social assistance
- The court remarked that: "A society had to attempt to ensure that the basic necessities of life were accessible to all if it was to be a society in which human dignity, freedom and equality were foundational."



Laws and other legal instruments

- "... constitutional provisions are often inadequate unless they are accompanied by 'detailed national legislation ... that determines the design, administration, management, delivery, financing and monitoring arrangements of the entitlements provided by the social security system.'" (Sabates-Wheeler *et al Linking Social Rights and Active Citizenship for the Most Vulnerable: The role of rights and accountability in the 'making' and 'shaping' of social protection* (2017): 13, referring to the International Labour Organization)
- Current weak legal protection afforded to social assistance programmes can be traced back to –
 - Colonial and legal history of African/some SADC countries; and
 - Socio-political context prevailing in these countries
- Yet, national legal frameworks relating to social assistance have increasingly been adopted (see Gabon, Kenya, South Africa)



Conclusions: Key characteristics of social assistance legal frameworks and reforms

- *Phased* development of legal frameworks for social assistance
- African/SADC countries tend to look at the need and possibilities for *extending coverage* in accordance with set objectives that reflect national priorities
- Countries employ *different legal techniques* when developing legal frameworks providing for social assistance (e.g., compare: Lusophone and Anglophone countries)
- Increasing focus on extending coverage via *universal measures*
- Emphasis on *vulnerable groups* entitled to protection, rather than a list of risks or contingencies that qualify for social assistance coverage
- Tendency to provide for *more than merely monetary benefits*, but also a range of *in-kind benefits and services*, often linking social assistance benefits to *other objectives* (e.g., labour market integration)

