

Title: Social assistance national legal frameworks in Africa: constitutional and statutory perspectives*

Suggested Congress sub-theme: Social security and protection in Africa

1. Overview and background

This chapter¹ reflects on different dimensions of the legal framework pertaining to social assistance in Africa. The introductory part makes some remarks about the understanding of what a rights-based approach to social assistance implies. This is followed by a reflection on the value of a legal framework for social assistance. In this regard, emphasis is placed on the role of African constitutions, as well as laws and other legal instruments. The penultimate part contains a reflection on accountability mechanisms, including among others the role of supervisory institutions, governmental and parliamentary oversight, the developing area of social accountability, and the importance of well-developed complaint and appeal mechanisms. Some conclusions are drawn in the final part.

Especially during the last two decades, social assistance schemes, as is the case with universal, conditional and unconditional non-contributory programmes, have been introduced or expanded on a comprehensive scale in Africa. The impact of many of these programmes has been extensive. The income protection they have provided has significantly contributed to reducing poverty, increasing school attendance, improving health outcomes, reducing child labour and enabling some beneficiaries to engage in entrepreneurial activities.² Moreover, the

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¹ While recognising that there are different approaches as to what is understood under social assistance, for purposes of this contribution the emphasis is on *tax-funded* social assistance programmes.

² ILO (2011: 85 (par 202)); see also World Bank (2014: 3), which has this to say: "South Africa uses its fiscal instruments very effectively, achieving the largest reductions in poverty and inequality of the 12 middle-income

indirect or distributional role of these schemes has been remarkable, as the income received through non-contributory arrangements has been instrumental in supporting many family members.

Overall, a limited proportion of the vulnerable population in Africa is covered by social assistance. A recent ILO publication indicates that despite greater efforts to invest in non-contributory cash benefits, only 9.5 per cent of vulnerable populations (less than one in 10 persons) in Africa receive them (ILO, 2017: 119, 129, 172).³

For reasons explored in the next paragraphs, the exponential growth and proven importance of social assistance programmes in Africa have at times been accompanied by a clear and solid basis cemented in law. There is a developing trend indicating that several African countries have embarked on this route. Examples include Angola (*Social Protection Act, 2004*), Ghana (*Social Protection Bill, 2008*), Kenya (*Social Assistance Act, 2013*), Mozambique (*Social Protection Law, 2007*) and South Africa (*Social Assistance Act, 2004*). It is also true that constitutional frameworks in Africa often serve as the basis for the adoption of social protection/assistance programmes and even laws – as explained in par 3 below.

2. A rights-based approach to social assistance

The recognition of social security (also in the form of social assistance) as a human right and its incorporation in international and African legal instruments is discussed in some detail

countries. As a result of South Africa's fiscal system, some 3.6 million people are lifted out of poverty, measured as those living on less than \$2.50 a day (in purchasing power parity dollars). The rate of extreme poverty is cut by half. The share of the population living on \$1.25 a day or less falls from 34.4 percent to 16.5 percent, reflecting the impact of cash transfers and free basic services net of taxes."

³ The global estimate is 25%. These percentages are calculated with reference to an indicator, which reflects the proportion of the vulnerable population, defined as all children and adults without social insurance coverage receiving non-contributory benefits, including social assistance (ILO, 2017: 172). "Vulnerable persons" are defined as children, adults not covered by contributory provision and persons above retirement age not receiving contributory benefits (ILO, 2017: 129).

below. Here it is important to note that this is closely associated with what has become known as a rights-based approach to social security (and therefore also social assistance). The notion of a rights-based approach has been described in different ways by authors. In essence, in relation to social security (and social assistance) this approach implies that (Fombad, 2013: 6; Piron, 2004: 3-4) –

- 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;⁴
- 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
- there is a deliberate focus on mechanisms to keep those who design and deliver social security accountable and to involve those affected by and benefitting from social security interventions.

Support for this rights-based approach to social security and social assistance can be found in a number of important international and African treaties and conventions, as well as in several national constitutions and laws of African countries, as indicated in paragraph 1 above and explained in paragraphs 3, 4 and 5 below. At the national level, this is increasingly apparent from individual entitlements to social assistance, at times linked to constitutional obligations on states to provide social assistance, the emphasis on a minimum level of support and the

⁴ In this regard, a range of human rights principles can be used to justify the right to social security (see the discussion below) and as a basis to enforce social security. Access to justice naturally flows from the requirement that citizens should be able/enabled to claim and enforce their entitlement.

focus on vulnerable groups, as well as developing accountability, oversight, complaints and appeals frameworks.

It is, therefore, clear that the development of social assistance rights-based programmes is becoming more common in Africa, also in aid-dependent countries (Sabates-Wheeler, Abdulai, Wilmink, de Groot & Spadafora (2017): 9). In fact, it has been remarked that there is a "consistent and increasing trend in sub-Saharan African countries of establishing social protection policies and drafting social protection bills as a means of institutionalizing successful pilot social protection interventions." (*ibid* 13).

And yet, as has also been noted, "... many governments are apprehensive of the fiscal costs and potential legal challenges that are associated with rights-based approaches. While ... explains the recent proliferation of social protection programmes throughout Africa, the ... overwhelming majority of these programmes have been discretionary rather than rights-based." (Devereux (2017): 12, 30) As noted in a 2013 study assessing social protection programmes in sub-Saharan Africa, undertaken for the European Commission, social assistance schemes or programmes often lack a proper legal mandate (Olivier, Adrianarison & McLaughlin (2013): 31).

Currently, therefore, despite recent advances made in many African countries, social assistance programmes in Africa often still lack a rights-based framework. This is true also of some of the most comprehensive social assistance, including public work programmes, in Africa, such as Ethiopia's Productive Safety Net Programme (PSNP) and (still, at this stage) Ghana's Livelihoods Empowerment Against Poverty Programme (LEAP) (see Devereux (2017): 22 and

Sabates-Wheeler *et al* (2017): 28-38).⁵ Also, as indicated in the World Social Protection Report 2017-2019, social assistance mechanisms are targeted to individuals living in extreme poverty and the most vulnerable, yet often exclude a significant share of those who are targeted by the programme. In addition, in many cases, "... such programmes for the poor are short-term, often in the form of pilot programmes for limited geographic areas, and *lack a stable legal and financial foundation, which negatively affects their ability to provide predictable and transparent benefits to persons who need them most and leads to significant coverage gaps.* Still, they play an important role in improving the situation of those benefiting from them." (ILO (2017): 4) (emphasis added)

3. Social assistance anchored in national legal frameworks

The 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)

Later in this paragraph we reflect on the steps some African countries have taken to develop a national legal basis for the provision of social assistance, and the impact that has had on bringing certainty and, as the South African case in particular shows, strengthening the supervisory role of the courts.

⁵ Noting that a new social protection bill (not yet adopted) has been developed.

A legal framework for social assistance fulfils important purposes. Not only does it give the State a clear and legal mandate to provide social assistance benefits, but it also gives expression to the principle that social protection is a human right – an issue discussed below in relation to both constitutional protection of and international standards in relation to social protection and, more specifically, social assistance. Furthermore, such a legal framework 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.

In fact, as has been noted, "[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)⁶

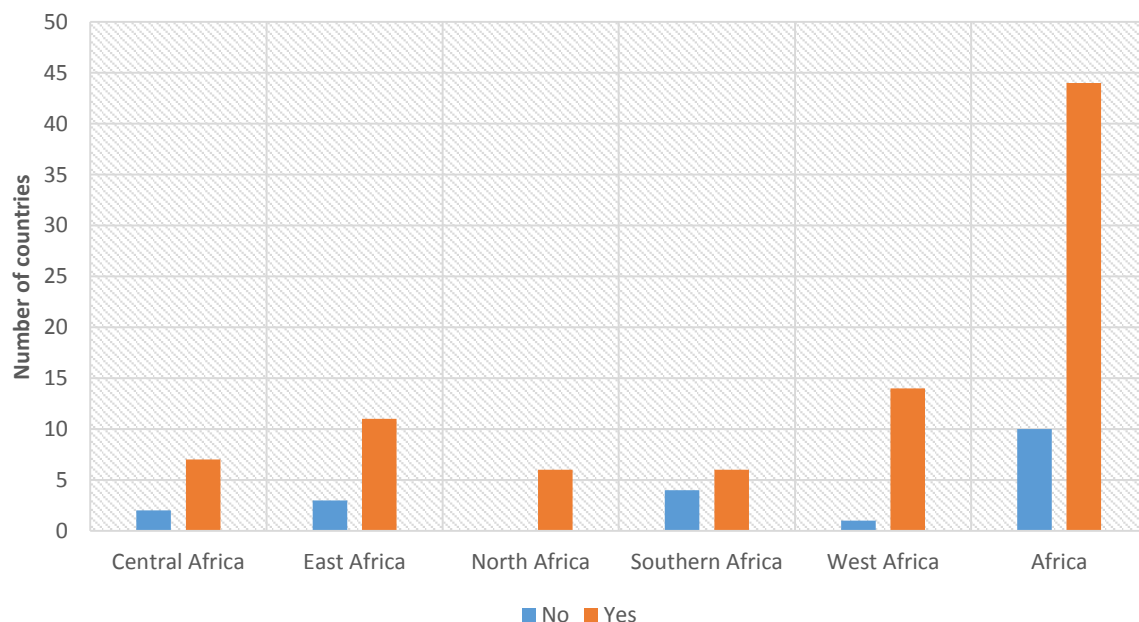
African national legal frameworks provide in different ways for social assistance, mainly through overarching constitutional provisions and the adoption of national laws. This is set out below in more detail.

⁶ Pino & Confalonieri (2014): 136 further remark that protective legislation also addresses power imbalances which create or maintain vulnerability for individuals or marginalized groups, mainly through anti-discriminatory measures.

African constitutions

National constitutions play an important role in providing for social protection and social assistance in particular. It is evident that the vast majority of African constitutions generally provide for social protection, as appears from Figure 1 below.⁷ The terminology used is not uniform – the reference in constitutions could be to social protection, or alternatively social security or (social) welfare, to mention some of the key concepts used.

Figure 1: Social Protection in the Constitution

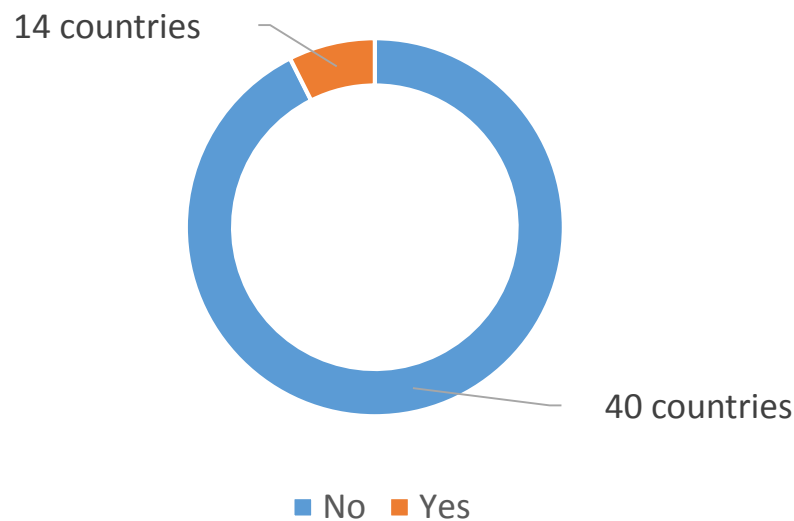


Notions of social assistance specifically, and welfare protection more broadly, are explicitly incorporated in many African constitutions.⁸

⁷ Based on the author's analysis.

⁸ Based on the author's analysis.

Figure 2: Social Assistance and Welfare Anchored in African Constitutions



Examples of how African constitutions have incorporated social protection, social security and (social) welfare include:

- The revised Constitution (2009) of Comores contains a general guarantee of the "right to social security and social protection." (Article 31)
- Article 8 of the Gabonese Constitution of 1991 stipulates that the State, "according to its possibilities, guarantees to all, notably to the child, the mother, the handicapped, to aged workers and to the elderly, the protection of health, social security, a preserved natural environment, rest and leisure." Similarly, in Article 70 of the 2010 Constitution of Cape Verde, provision is made that "... everyone shall have the right to social security for his or her protection in unemployment, illness, disability, old age, orphanhood, widow(er)hood and in all situations of lack or decrease in his or her means of subsistence or in his or her capacity to work."
- According to Article 8 of the revised Constitution (2008) of Sierra Leone, "the health, safety and welfare of all persons in employment are safeguarded ..."; Article 95 of the revised Namibian Constitution (2010) imposes an obligation on the State to actively promote and maintain the welfare of the people.

The specific guarantee of *social assistance* is indicated – either directly or indirectly – in a number of (mostly) recent African constitutions, and is often accompanied by specific social assistance laws, which give effect to the constitutional guarantee (e.g., *Social Assistance Act, 2013* (Kenya); *Social Assistance Act, 2004* (South Africa)). Article 38 of the Tunisian Constitution (2014) stipulates that the state shall guarantee the right to social assistance in accordance with the law, in addition to a guarantee of preventative health care and treatment, as well as free health care for those without means and those with limited income. Article 43 of the Kenyan Constitution (2010) provides that every person has the right to social security,⁹ and specifies this to include what would typically be covered by social assistance measures: "The State shall provide appropriate social security to persons who are unable to support themselves and their dependants." (Constitution of Kenya (2010): Article 43(3)).¹⁰ The South African Constitution (1996) in turn makes it clear that everyone has the right to have access to social security, "including, *if they are unable to support themselves and their dependants, appropriate social assistance*" (emphasis added; Constitution of South Africa (1996): Article 27(1)(c)).

The emphasis on social security and in particular social assistance must be seen against the background of a desire, and consensus, to align constitutions to basic human rights principles. In fact, a large number of African constitutions recognise that social security (including social assistance) constitutes a *human right*, irrespective of whether these constitutional provisions are directly enforceable (an issue discussed below). Examples include the constitutions of Angola, Burundi, Cape Verde, Eritrea, Ethiopia, Ghana, Guinea, Kenya, Malawi, Morocco,

⁹ Constitution of Kenya (2010), Article 43(1), which extends this to include the right of every person to the highest attainable standard of health.

¹⁰ Similarly, Article 17 of the 2014 Egyptian Constitution stipulates that "[A]ll citizens who have no access to the social security system have the right to social security to ensure a decent life, if they are unable to support themselves and their families in the event of incapacity to work, old age or unemployment."

Seychelles, South Africa, Swaziland, Togo, Uganda and Zambia.¹¹ Often, as is the case with Kenya, Tunisia and South Africa, the most recent constitutional texts clearly situate the fundamental right to social assistance among the range of key social rights. This suggests the state's prioritisation of and commitment to ensuring a socially acceptable (minimum) level of protection, and upholding the rule of law, usually during a time of constitutional and political reform (Abdelkefi (2011); Carter Center (2014): 86; Ndegwa *et al* (2012: 130-131). As has been noted by the South African Constitutional Court:

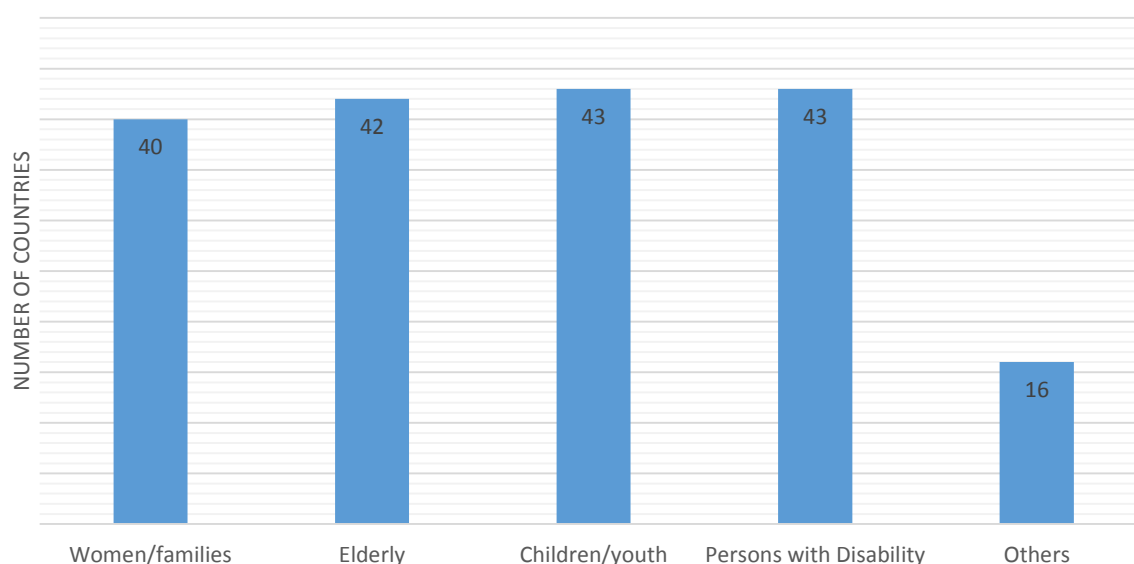
"A society had to attempt to ensure that the basic necessities of life were accessible to all if it was to be a society in which human dignity, freedom and equality were foundational. The right of access to social security, including social assistance, for those unable to support themselves and their dependants was entrenched because society in the RSA valued human beings and wanted to ensure that people were afforded their basic needs." Quotation from the South African Constitutional Court case of *Khosa and Others v The Minister of Social Development and Others; Mahlaule and Others v The Minister of Social Development and Others* 2004 (6) BCLR 569 (CC) par 52

African constitutions often emphasise that *vulnerable* groups are meant to be the beneficiaries of social protection/security/assistance measures, as appears from some of the examples indicated above. Also, Article 8 of the 1991 Constitution of Burkina Faso mentions protection of maternity and of the child, and assistance to the elderly or the disabled. According to Article 77 of the Angolan Constitution (2010), the state shall promote and guarantee "the measures

¹¹ Author's own analysis. This is corroborated by the overview of Fombad (2013) of the constitutional framework of the right to social security and evidence from West Africa: see Pino & Confalonieri (2014: 137). At times this follows from the location of rights to social protection/security/assistance within the framework of "economic, social and cultural rights" embedded in the Constitution; at times this is linked to specific (fundamental) rights, including the right to "development".

needed to ensure the universal right to medical and health care, as well as the right to child care and maternity care, care in illness, disability, old age and in situations in which they are unable to work ..." Figure 3 gives a more detailed picture of *prioritised/targeted groups* covered in African constitutions, with specific reference to women and/or family protection; the elderly; children and/or the youth; persons with disabilities; and other vulnerable categories specifically provided for, given the context of the country concerned (e.g., liberation struggle veterans, minorities, or the unemployed more generally).

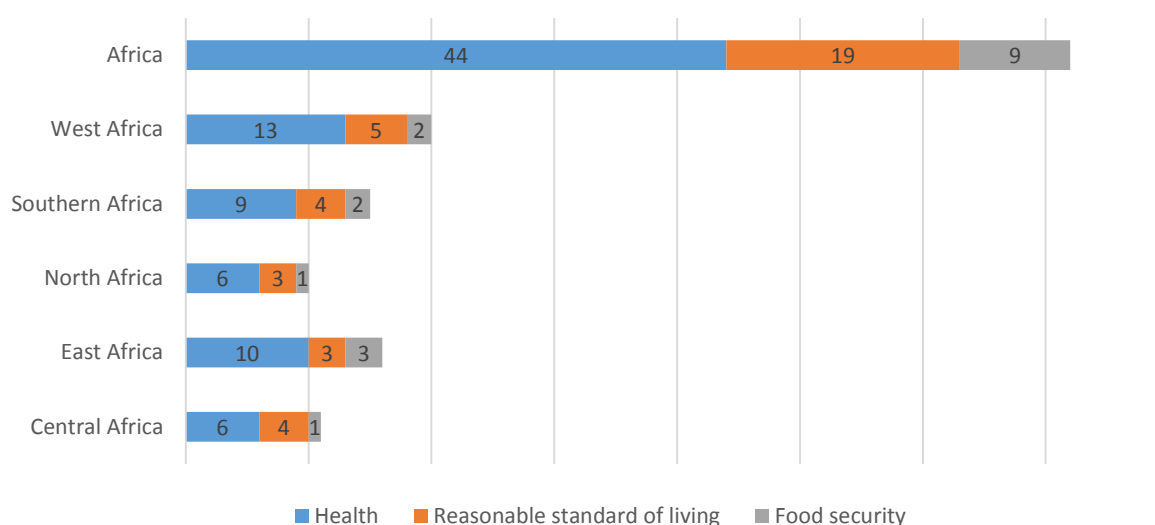
Figure 3: Prioritised Groups in terms of Social Protection in African Constitutions



African constitutions also highlight specific *objectives* to be attained through social protection interventions. Three of the objectives often mentioned are *health coverage, a reasonable standard of living, and food security*, as is indicated in Figure 4.¹²

¹² Based on the author's analysis.

Figure 4: Social Protection Objectives contained in Constitutions in Africa



National constitutions could be used to hold governments accountable to granting human rights protection in the area of social protection, including social assistance. However, the potential impact of a constitution containing such provisions differs from system to system. It will depend on the status accorded to these rights by the constitution and on whether these rights are enforceable/justiciable, (ILO (2011: paras 234-235); Olivier (2012: par 150), as discussed below. Constitutional realities in Africa vary, and may reflect different constitutional cultures, legal systems and colonial experiences. Essentially, modern constitutions in Anglophone countries have been influenced by concepts and approaches embedded in the English Westminster constitutional culture; the French Gaullist system has been copied in Francophone Africa and has to some extent influenced systems in Lusophone Africa as well (Fombad, 2013: 12).

Often, constitutions give a mandate to the legislature to adopt appropriate legislation to regulate social protection and social assistance, and to governments to implement social protection policies/programmes. Constitutions of Francophone countries in particular make this clear. For example, Article 70 of the Constitution of Mali (1992) provides that the law shall determine

the fundamental principles of social security. Modern constitutions of certain Anglophone countries do the same: the constitutions of both Kenya (Article 21(2)) and South Africa (Article 27(2)) impose an obligation on the State to take legislative and other measures to achieve the progressive realisation of the right to social security/assistance. In fact, several other African Constitutions also foresee the *progressive adoption and implementation* of social security/assistance (-related) measures, to give effect to the constitutional protection of social security/assistance, and/or the implementation of such measures within the available resources of the country concerned (e.g., Burundi, Kenya, Malawi, South Africa). This implies that while governments are expected to roll-out social assistance coverage and protection in accordance with the said constitutional right, the need for some flexibility to achieve this is acknowledged. Several considerations play a role in determining whether a constitutional guarantee of social protection/security/assistance is indeed enforceable and, if indeed enforceable, the extent to which and the way in which this is justiciable. *One of the considerations* relates to the question whether the *individual* is given an *entitlement* to such protection – which is, as indicated above, a central element of a rights-based approach. Other constitutional provisions place an emphasis on the duty of the State to take action, for example to ensure the social or health of citizens generally and/or vulnerable groups in particular (ILO, 2011: 102). Apart from the Kenyan, Tunisian and South African constitutions mentioned above, examples of the individual entitlement approach include the 2014 Constitution of Egypt ("All citizens who have no access to the social security system have the right to social security to ensure a decent life ..." – Article 17); the 2010 Constitution of Cape Verde ("Everyone shall have the right to social security ..." – Article 70); and the 1994 Constitution of Ethiopia ("Every Ethiopian national has the right to equal access to publicly funded social services" – Article 41(3)). Constitutions that focus on the *duty of the State* include 1991 Constitution of Gabon ("The State ... guarantees to all ... the protection of health, social security ..." – Article 8); the 1997 Constitution of Eritrea ("The

State shall secure, within available means, the social welfare of all citizens and particularly those disadvantaged ..." – Article 21(2)); and the revised Constitution of Senegal (2009) ("The human person is sacred. It is inviolable. The State has the obligation to respect it and protect it ..." – Article 7; see also, for similar wording, Article 11 of the 2010 Constitution of Niger). Some Constitutions contain provisions that highlight both an individual's entitlement and the duty to provide imposed on the State. Again, the Kenyan and South African constitutions reflect this approach. Also, the Ethiopian Constitution (1994) stipulates that "[T]o the extent the country's resources permit, policies shall aim to provide all Ethiopians access to ... social security... - Article 90).

A second consideration concerns the constitutional context or location, which provides for social protection/security/assistance. In many instances, reference to this is made in the Preamble of a constitution, which may assist with interpretation of the constitutional provisions but is hardly enforceable on its own (see, among others, the constitutions of Cameroon (2008 revised) and Uganda (2006)). In other cases, this is provided for in a part of the constitution that makes all matters relating to socio-economic rights non-justiciable (Fombad, 2013: 16). This is true of those constitutions that place the right to social protection/security/assistance under a section or chapter known as fundamental objectives and directive principles of State policy, stipulated to be non-enforceable. For example, the Zambian Constitution of 1996 stipulates (under the principles of State in section 7 of the Constitution) that the State will endeavour to provide social protection-related rights to its citizens subject to the availability of resources (section 112). Similarly non-binding references to social protection or welfare rights are contained in the constitutions of, for example, Lesotho, Namibia, Nigeria, Sierra Leone, Swaziland and Tanzania (Devereux, 2017: 29 and Fombad, 2013: 16, and authorities cited there).

A *third consideration* relates to the availability of an *effective judicial mechanism* to enforce the right to social protection/security/assistance, *efficient remedies* and *enhanced access* to the relevant mechanism and remedies. In most Anglophone countries, constitutions provide for courts of law to be accessed and grant flexible powers to the courts when adjudicating disputes of this nature. Again, both the Kenyan and South African constitutions grant extensive powers to the courts and, in the case of Kenya, the Constitution limits the formalities relating to proceedings to a minimum (Fombad, 2013: 17-18). Several (older) Francophone constitutions give the power to review to the alleged or actual violation of a constitutional right to a Constitutional Council, which may be composed of politicians rather than judges (Fombad, 2013: 16-17). However, more recent Francophone constitutions arrange for the establishment of a (constitutional) court with review powers. In particular, Tunisia's new Constitutional Court, provided for in the 2014 Constitution, has been labelled as "designed to be an effective guarantor of human rights, the balance of power, and constitutional supremacy." (Pickard, 2015: 5)

Effective constitutional protection and the role of courts in protecting social security/assistance as a human right: a South African case study

The South African Constitution of 1996 is often regarded as a progressive instrument for the protection of socio-economic rights, including the right to access to social security and to social assistance. The Constitution compels the State to give effect to these fundamental rights and the courts, including the Constitutional Court, have made it clear that, where and when appropriate, they will grant orders, which will force the State to ensure that these rights are properly realised. The role that the right to access to social security and to social assistance has to play as a major poverty-addressing instrument is evident. This flows from the constitutional emphasis on redressing imbalances of the past and on empowering the historically disadvantaged, the poor and the vulnerable. It follows, and this appears to be of crucial importance in informing the interpretation and application of the welfare-related rights in the Constitution, that 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*,¹³ the South African Constitutional Court held that a statutory provision which excluded 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. This and other judgments of the courts have endorsed the approach that the right to access to appropriate social assistance and other related constitutional rights imply a minimum level of support. As noted earlier in this chapter, the Constitutional 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." Taken from Olivier, M. (2018)

¹³ 2004 6 BCLR 569 (CC).

Laws and other legal instruments

Background

It has been remarked that "... 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* (2017): 13, referring to the International Labour Organization)

In paragraph 2 above it was noted that despite recent advances made in many African countries, social assistance programmes in Africa often still lack a rights-based framework – in particular in the form of an enforceable legal instrument. And yet, it was argued that the lack of a legal foundation negatively affects the ability to provide reliable and predictable benefits. A legal framework for social assistance also serves as an expression of what has been described as the "strong and symbiotic relationship between human rights and social protection" (Sepúlveda & Nyst, 2012: 25):

"Human rights create legal obligations to implement social protection systems and establish standards for the design, implementation and evaluation of such systems ... However, the success or failure of social protection systems in realising human rights rests heavily on whether such systems are established and operated according to the standards that human rights require and the obligations they impose."

In this part we briefly reflect on the socio-political and historical context of developments in relation to the (legal) reform of social assistance in African countries, followed by a discussion of some of the key characteristics of the social assistance legal framework and recent reforms.

The current weak legal protection afforded to social assistance programmes (although, as indicated, there is a discernible trend towards a strengthened rights-based framework for social assistance), can largely be traced back to the colonial and legal history of and the socio-political context prevailing in African countries. Historically, emphasis was placed on developing and maintaining legal frameworks for the largely contributory social security schemes that would serve the interests of those who are formally employed. This caused the exclusion in social security terms of those who worked in the large informal sector in Africa, as well as other vulnerable categories who for various reasons had no or little access to the labour market. In addition, informal forms of social security, and the wide-spread reliance on forms of religious support (in particular, the Islamic *zakat* system) provided an alternative, even if insufficient, to State-provided assistance. Recently, in several countries some steps were taken to extend in particular contributory arrangements to the self- and informally employed (Marcus, Perezniето, Cullen & Jones, 2011: vi; Osorio & Soares (eds), 2017: 6-7; 40; Lorenzon, 2016: 12, 17-18; Devereux, 2015: 34, 48, 52-55, 119).

And yet, for several reasons there has lately been an uptake in social assistance programming in Africa. Although this is partly reflected in the increasing number of social protection policies and strategies, social assistance legal frameworks take more time to appear – although also here there have been significant developments. One of the reasons for the increased uptake relates to the greater emphasis that African constitutions place on social protection/assistance (see the discussion above). Other reasons include the growing awareness of human rights considerations, persistent high unemployment and poverty amidst slow economic growth, and political reforms, such as those following on the Arab Spring experience in North Africa. In the wake of these reforms there has been a movement away from subsidies as the main vehicle to support the poor, to the implementation of cash transfer schemes, often on a pilot basis. In

short, considerations of social inclusion, social justice and national solidarity have helped to cause a shift in the understanding of the role of the state as the final guarantor of assistance for those who are otherwise left destitute and excluded. (Lorenzon, 2016: 3-4, 10; Devereux, 2015: 35; Osorio & Soares (eds), 2017: 6) In fact, some of the considerations have found their way into some recent social assistance laws in Africa.

Key characteristics of social assistance legal frameworks and reforms

The *first* matters concerns the *phased development* of legal frameworks for social assistance in most African countries. For example, many countries in Southern Africa first introduced the legal framework for old-age (social) pensions. Disability and childcare benefits legal frameworks came only at a later stage, followed by expanding the reach of these and other social assistance programmes gradually. This has been the case with the child care/support grants paid in Lesotho and South Africa: the reach of these grants has been constantly extended to reach more children in need of support. For example, the government has increased the age threshold for eligibility for the grant.

Generally speaking, therefore, social assistance legal frameworks develop *progressively and systematically*. This reflects a country's ability to provide a particular level of social assistance benefits at any given point in time. Support for a progressive approach is often also found in African constitutions, as indicated earlier. In fact, several international and regional instruments also acknowledge the need for progressive implementation of social assistance measures. These include the ICESCR, ILO Recommendation 202 of 2012, and the 2014 SADC Protocol on Employment and Labour.

Secondly, in setting their priorities for developing a legal framework, African countries tend to look at the need and possibilities for *extending coverage* in accordance with set objectives that reflect national priorities. For example, in a country with significant poverty among the elderly and youth, the introduction of old-age and childcare benefits may be deemed necessary.¹⁴ Several African countries, in particular Francophone countries, have already introduced a legal framework for universal health coverage including the poor and vulnerable as well and not yet, or only later, non-medical forms of social assistance. Examples include the *Moroccan Law on Basic Medical Coverage, 2002*, the *Beninese Health Insurance Law, 2015*, the *Djibouti Health Insurance Law, 2014* and the *Rwandan Law on the Organisation, Operation and Management of the Health Insurance Plans, 2015*, read with the *Rwandan Law Governing the Organisation of the Community-based Health Insurance Scheme, 2015*.

It may be helpful to take note of the direction given by ILO Recommendation 202 on National Floors of Social Protection in this regard, where it calls on Member States to (par 14):

- identify gaps in, and barriers to, protection; and
- seek to close gaps in protection through appropriate and effectively coordinated schemes, whether contributory or non-contributory (or both) including through the extension of existing contributory schemes to all concerned persons with contributory capacity.

The *third* observation relates to the distinct way in which *Lusophone countries' legal frameworks* provide for social assistance. Initially, an overarching or foundational legal framework is put in place, which indicates where and how the different components of the system fit together, and what the role and place of social assistance is within this system. These

¹⁴ This was the experience of South Africa and Lesotho, among other countries.

components usually cover three main categories, i.e. a contributory-based system for workers; a separate system for the self-employed; and a third system for those dependent on social assistance. Subsequently, dedicated regulatory instruments are adopted, which contain specific provisions in relation to the different components, including a separate instrument dealing with social assistance specifically. In the case of Mozambique, the *Law on Social Protection, 2007* contains the overall provisions for the different components of the social protection system. Specific legal instruments have subsequently been developed to give effect to the components of the system – for example, *Regulations on Basic Social Security* were introduced by decree in 2009 to regulate social assistance matters. The corresponding laws in Angola are the *Social Security Framework Law, 2003* and the *Basic Law on Social Protection, 2004*, and in Cape Verde the *Social Security Law, 2001* and the *Basic Social Protection Law, 2013*.

The *fourth* impression concerns the increasing focus in social assistance and related legislation in Africa on extending coverage via *universal measures*. On the one hand, these measures could be explicit universal schemes, which also cover the poor and vulnerable in the population (even if they are not contributing). Some of the universal health insurance laws in Africa are examples – such as the *Moroccan, Beninese, Djibouti and Rwandan* universal health insurance/coverage laws referred to above. On the other hand, universal coverage could be achieved via a combination of social insurance contributory arrangements and social assistance measures contained in the same law. An example is the *Gabonese Social Protection Code, 2016*. This is a general social security law, containing the classic nine ILO contingencies, which indicates how both social insurance and social assistance mechanisms have to be used to achieve universal coverage. It employs the principle of national solidarity as regards the social assistance arrangements.

As a *fifth* matter, what is particularly noticeable, is the emphasis on *vulnerable groups* entitled to protection, rather than a list of social risks or contingencies that qualify for social assistance coverage – although in some cases, both covered risks and covered vulnerable groups are mentioned (*Gabonese Social Protection Code, 2016*: Articles 24 and 25 respectively). At times these groups are formulated in broad terms; at times they are specifically indicated. Examples include the *Cape Verde Basic Social Protection Act, 2013* ("citizens in economic distress"), the *Mauritian Social Integration and Empowerment Act, 2016* ("person living in absolute poverty"), the *Zimbabwe Social Welfare Assistance Act, 2001* ("destitute/indigent persons"), the *Zimbabwe Older Persons Act, 2012* ("vulnerable older persons"), the *Nigerian Social Welfare Commission Act, 2002* ("vulnerable groups") and the *Namibian National Pensions Act, 1992* ("aged, blind and disabled persons").

In the *sixth* instance, recent social assistance laws tend to provide *more than merely monetary benefits*, but also a range of in-kind benefits and services, and often link social assistance benefits to *other objectives*, such as to support labour market integration or social inclusion. Examples include *Tunisia's Law on Social Protection Centres, 2011* ("social protection centres to take care of homeless people and children at risk"; provision of home, medical assistance, training programmes and rehabilitation that can "facilitate their integration into economic and social life"), *Algeria's Old Age Protection Law, 2010* (to assist the elderly en ensure their protection), the *Mauritian Social Integration and Empowerment Act, 2016* ("preventive, compensatory and integrative measures"; financial and non-financial support, to enhance social justice and national unity, social integration and empowerment of persons living in absolute poverty"), and *Angola's Basic Law on Social Protection, 2004* (achieving "well-being and minimum levels of livelihood and dignity").

Finally, mention should be made of the range of measures that Ghana has adopted to bolster a rights-based approach to social protection in Ghana. These include (Sabates-Wheeler *et al*, 2017: 28-38):

- Development of its first National Social Protection Strategy, and the recent launching of a national social protection policy.
- Drafting of a new Social Protection Bill.
- Incorporation of a Social Protection Floor in the social protection policy.
- Participation of beneficiaries in accountability structures – beneficiary forums, community LEAP implementation committees, and grievance mechanisms (complaints and appeals).

4. Conclusions

The AU's *Social Policy Framework* (2008: par 33(a)) urges the recognition of social security as a state obligation, with provision therefor to be made in national legislation. Simultaneously, increasingly in many African constitutions, the right to social protection generally and social assistance in particular, has come to be appreciated as a human right. This implies that, in addition to the notion of this implying a state obligation, this right accrues to individuals and can be enforced as such. These developments, alongside several other considerations discussed in this contribution, underscore the importance of adopting an appropriate legislative framework. In this way, the social assistance legal and policy framework in African countries contributes to the notion and impact of a rights-based framework for social assistance. Important achievements have been made; additional reforms will support the further unfolding of this in Africa.

African countries that place social assistance in a rights-based framework, effectively acknowledge that users of the system – e.g. applicants for and beneficiaries of social assistance transfers – are not mere passive recipients of the transfers being given to them as a matter of courtesy or grace. As such, adopting a rights-based approach is an expression of respect for human dignity and transforms users of the system into active participants (Sabates-Wheeler, Abdulai, Wilmink, de Groot & Spadafora (2017): 9-15).

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