

# 2

## WHY A RIGHTS-BASED FRAMEWORK FOR SOCIAL PROTECTION IS IMPORTANT

### 2.1 OBJECTIVES

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

- Describe the purposes fulfilled by a legal social protection framework including social assistance
- Understand why international and regional standards play a prominent role in determining the scope and content of social assistance
- Reflect on the main international instruments, including ILO's R. 202 and C. 102 concerning social security minimum standards, that set universal standards and benchmarks for the provision of social assistance
- Explain the framework for the extension of social assistance, provided for by 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 regards 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 for social assistance despite fiscal constraints with particular emphasis on developing countries

### 2.2 RATIONALE

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

- Meeting international obligations;
- Implementation of constitutional right;
- Providing normative content to that right: availability of services, clearly defined, effective and adequate protection from social risks and contingencies;



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- 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 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.

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, 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 obligation;
- the criteria they have to meet in order to qualify for such benefits;
- mechanisms to ensure transparency and access to information, non-costly procedures that need to be followed in order 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 beneficiaries.

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

- the simple and transparent identification and selection of beneficiaries;
- education and awareness of administrators, staff and 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 disadvantaged groups
  - languages spoken
  - non-discrimination by front line staff
  - “non-shame proof” management practices
  - ensuring privacy of data in data exchange and communication

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- ensuring **transparency and accountability in financial matters**:
  - open procurement rules and
  - integrity of benefit payment systems
  - safeguards against corruption
  - appropriate fiduciary risk management for the prevention and avoidance of fraud, errors, maladministration
- establishing a **stable and regular funding base**: clarifying funding sources and public financial management processes for funding that guarantee the sustainability of the scheme

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

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

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

Having said that, it can be argued that laws and institutions can fail if they do not generate sufficient credible commitment from national stakeholders; therefore evidence based and inclusive national social dialogue is critical to ensure ownership, more equitable outcomes and effective implementation of the laws.<sup>8</sup>

## 2.3 INTERNATIONAL AND REGIONAL STANDARDS

### 2.3.1 International standards: general

International and regional standards play a prominent role in determining the scope and content of social assistance. Countries that are party to these instruments have an obligation to adhere to them. In addition, standards can serve as benchmarks, which countries can use to establish, develop and improve their social assistance systems. These standards are also an expression of the fact that access to social protection, including social assistance is a human right. The 1944 Philadelphia Declaration (i.e. the Declaration concerning the aims and purposes of the ILO, included as an annex to the Constitution of the ILO) calls for the ‘extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care.’<sup>9</sup>

<sup>8</sup> World Bank Report 2017 Governance and Laws and ISPA Tool on Social Dialogue based Social Protection Assessment.

<sup>9</sup> See section III(f) of the Declaration.