

# Extending social protection by anchoring rights in law



International  
Labour  
Office

## South Africa

*The South African social protection system is one of the most comprehensive within the region. Its statutory and effective coverage rates are above the region's average and comparable or even beyond those of other BRICS countries. The comprehensive nature of the system lies in contributory and non-contributory cash and in-kind legal guarantees which form the country's national social protection floor; these can be attributed to national political commitment to curb poverty, effective institutions and delivery systems, sound fiscal basis and adequate funding. The system relies on three pillars: social assistance, mandatory social insurance and voluntary private insurance. The Constitution, characterised by its broad ranging social and economic rights including the entrenched right to social security, has played a key role in the development of the social security system.*



### Main lessons learned

- South Africa's experience shows that the Constitution, when it is given effect through the implementation of a strong legal framework, can play a pivotal role in establishing a comprehensive social protection system.
- South Africa's experience also shows that in line with international social security standards and a significant extension of social protection legal and effective coverage can be achieved through a mix of social assistance and contributory social protection schemes that are anchored in a solid legal framework.
- This mix of schemes, and in particular the introduction of rights-based social assistance programmes, have contributed to the effective and sustainable reduction of poverty and income inequality in this country.
- Finally South Africa's experience shows that International Social Security Standards can provide a useful framework for the development and reform of national social security systems.

### International social security legal framework

ILO's normative framework provides guidance to countries for realising the human right to social security. It is composed of a rich body of standards including ILO's landmark Social Security (Minimum Standards) Convention, 1952 (No. 102), and the Social Protection Floors Recommendation, 2012 (No. 202). These standards guide the development of comprehensive national social protection systems following a lifecycle approach.

Evidence shows that the law can serve to clarify individual rights and obligations, enhance the predictability and adequacy of benefits, strengthen institutional capacities, promote transparency and accountability, provide safeguards against corruption and establish a stable and regular funding base.

This note presents a successful country experience of extending Social Protection by anchoring the right to social security in law.

## 1. The right to Social Protection in the South African Constitution

South Africa has embraced a rights-based approach to social security. This flows from the provisions of the Constitution to the laws and implementing regulations that make up the social security legal framework.

The South African Bill of Rights (Chapter 2 of the Constitution, No. 108 of 1996) guarantees everyone's right to "have access to health care services, including reproductive health care; sufficient food and water", as well as the right to social security, including appropriate social assistance (Article 27). In addition, "no one may be refused emergency medical treatment". The Constitution further requires the State to take reasonable measures, including legislative, within available resources, to achieve the progressive realisation of each of these rights.

The constitutional right to social protection is given effect through the implementation of a legal framework that guarantees coverage of the population against the risks faced throughout the life cycle, both through social assistance programmes and contributory schemes. This legal framework also guarantees people's protection against poverty, vulnerability and social exclusion.

## 2. Legal Architecture of the South African Social Protection System

### A. Access to Health Care

Access to health care is granted either through the public health system, funded through the budget (general taxes) or through contributory medical schemes, which cover employees in the public or private sectors. The National Health Insurance Act No. 61 of 2003 makes explicit reference to the right to health enshrined in the Bill of Rights. It establishes the national health system and the provision of health services "including reproductive health care and emergency medical treatment, basic nutrition and basic health care services for children".

The public health system provides free primary health care (emergency, reproductive, immunization, family planning, tuberculosis treatment, sexually

transmitted diseases, etc.) to all residents, whether national or non-national including refugees and asylum seekers thanks to jurisprudence emanating from the Constitutional Court. Other medical services require cost-sharing for households above an earnings threshold as set by the Ministry in an approved Uniform Patient Fee Schedule. Those earning less than the threshold are either fully or partially subsidized or receive free medical care services. In addition, pregnant mothers, the disabled, pensioners and the indigent have access to free health services. The public health system is however under-resourced (both in terms of financial and human resources) in particular relative to the size of the population that it serves.

Contributory medical schemes provide access to private health care facilities to 7 million people or 14 per cent of the population. Membership in these medical schemes and hospital care plans is however not statutorily mandated although it is frequently a condition of employment. The Medical Schemes Act 131 of 1998 provides a minimum package of benefits and regulates such contributory medical schemes.

The country spends far more than other middle-income countries on health care (8.5% of GDP in 2014). However, health outcomes have been comparatively low, primarily because of inequities between the public and private sector. Discussion over the possibility to introduce a comprehensive national health insurance (NHI) to provide all South Africans, irrespective of their employment status, equitable access to affordable and quality healthcare are currently on-going.

### B. Social Protection for Children and Families

Income security for families with children is mainly provided by several tax-financed programmes.

The Social Assistance Act 13 of 2004 provides, among others, for Child Support Grants, Care Dependency Grants and Foster Care Grants. South African citizens, permanent residents (i.e. a person who is lawfully and permanently resident in the Republic of South Africa), and refugees (i.e. a person referred to in Section 1 of the Refugee Act, 1998) are covered by this scheme. The Child Support Grant is a means-

tested non-contributory cash transfer targeted at children 0 to 18 years of age. The grant is provided to the primary care giver of a child, up to a maximum of six children. It currently reaches more than 11 million children (out of a population of 19 million children) and is recognized as one of South Africa's most effective poverty reduction programmes.

The Care Dependency Grant, provides for severely disabled children under the age of 18 who are in need of special care, and the Foster Care Grant, the only non means tested grant whose purpose is to encourage families to foster children who would otherwise be placed in institutional care.

### **C. Social Protection for Women and Men of Working Age**

Income security for the working age is guaranteed through a non-contributory and contributory schemes. The non-contributory scheme provides disability grants for women and men of working age. Persons of working age may access unemployment, sickness and maternity through the social insurance scheme or in the case of employment injury through the workers compensation fund.

According to the Social Assistance Act 13 of 2004, disability grants are provided to beneficiaries aged 18-59 years who have sustained non-occupational accident or disease resulting in permanent invalidity. The benefit is considered permanent if a citizen or permanent resident is assessed as medically disabled for more than 12 months. The benefit ceiling is currently set at R1500 per month (approx. 112 USD).

Most benefits for women and men of working age are however provided under the contributory system and in particular the mandatory social insurance. Employees, including domestic workers, seasonal workers, mineworkers, formally employed agricultural workers and high-income earners are entitled to unemployment, sickness, and maternity benefits according to the Unemployment Insurance Act (UIA) of 2001 and the Unemployment Insurance Contributions Act 4 of 2002. Most atypical workers (i.e. independent contractors, dependent contractors, and the self-employed), informal economy workers and the long-term unemployed,

migrant workers and civil servants are however excluded. The Unemployment Insurance Fund has proposed legislative changes to include some categories of excluded groups including public servants, legal migrants and those in learnerships. Other changes would include the increase in benefit levels and benefit duration.

Employment Injury benefits are provided by the Workers Compensation Fund established by the Compensation for Occupational Injuries and Diseases Act of 1993 (COIDA). The current legislation is more extensive and covers all employees (and not only "workmen") for temporary disability benefits, permanent disability benefits, death benefits as well as medical expenses. Domestic workers, unemployed and those in non-standards form of work such as the informally employed, self-employed and so-called dependent contractors are nevertheless excluded. Workers in the mining industry and related works receive lump sums under the Occupational Diseases in Mines and Works Act 78 of 1973 (ODMWA). There have been calls to merge both schemes to resolve a number of inconsistencies.

It may be noted that as a rule the social security system of South Africa does not provide for the payment of death and survivors' benefits as a separate contingency. These are provided under a patchwork of legal provisions. Some may access survivor's benefits under COIDA or ODMWA where the loss of support suffered is a result of the death following an employment accident or disease. Otherwise survivor's spouses or life partners can access benefits under the UIA. Finally, the Pensions Funds Act 24 of 1956 provides survivors benefits via retirement funds in the absence of a national pension scheme.

### **D. Social Protection for Older Women and Men**

South Africa does not have a national or public retirement fund scheme. Older persons have two main sources of income: state Older Person's Grant (OPG) and private pensions. Roughly two-thirds of South Africans do not contribute to a private pension, meaning they will rely on the OPG, their own private savings or support from relatives.

The Social Assistance Act 13 of 2004 sets out the entitlement conditions for access to the state OPG which is a means-tested grant provided to eligible pensioners aged 60 and over. Currently nearly 3.2 million older persons receive this benefit (SASSA Fact Sheet 2, 2016). In April 2016 the old-age grant was equal to R1500 (approx. 112 USD) for pensioners aged 60-74 and R1520 (approx. 114 USD) for pensioners aged 75 or older. Along with other grants, the OPG is one of the most important tools for poverty reduction in the country. This is evidenced by the reduction in poverty incidence among older persons from 55.6 per cent in 2006 to 36.2 per cent in 2011.

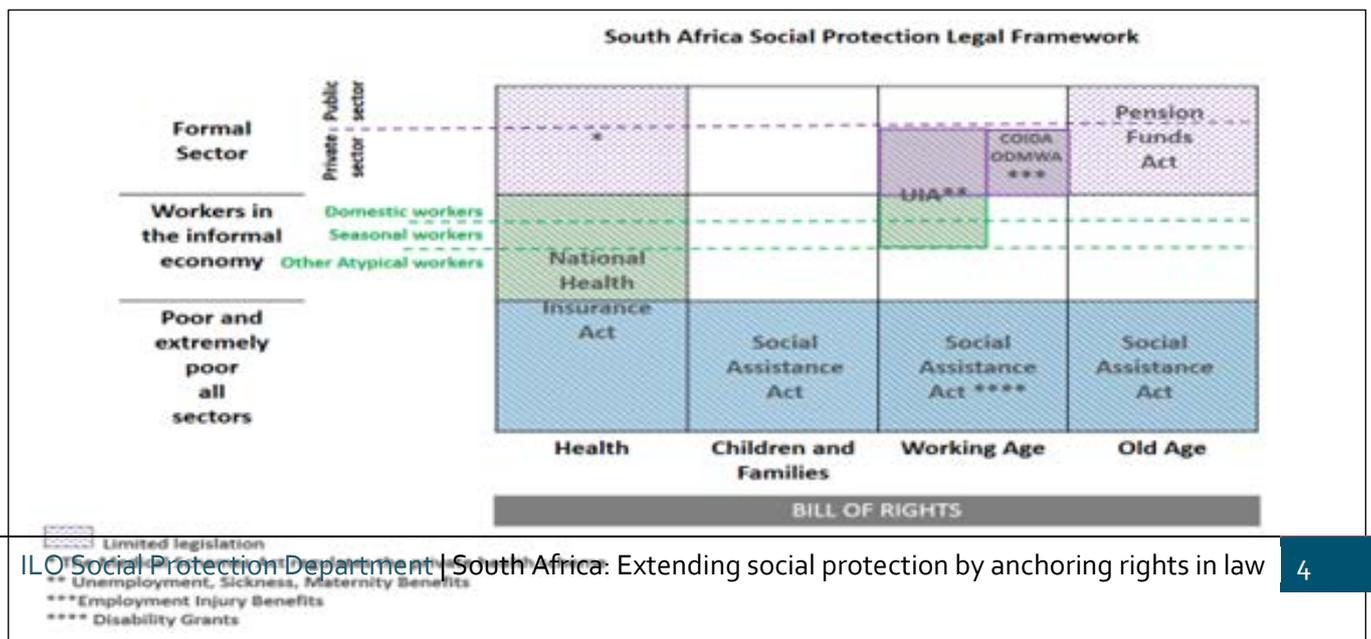
Membership in private pension funds is not statutorily mandated; however it is frequently a condition of employment. Private pension funds are primarily regulated by the Pension Funds Act 24 of 1956. The system is fragmented with close to 14,000 retirement funds. The Government has been considering a pension reform. It would include replacing the OPG with a universal basic pension that is accessible to all citizens and qualifying residents and include a mandatory contributory arrangement for the formal sector with legally guaranteed minimum benefits.

### 3. Towards a comprehensive social protection legal framework based on international social security standards

South Africa has established a comprehensive social protection system in line with a rights-based approach. The system is comprised of an extensive social assistance programme and a number of social

insurance programmes and is underpinned by an entrenched Constitutional right to social security. This right is accompanied by the obligation to take reasonable legislative measures to achieve the progressive realization of the right to social security in line with international standards. This has resulted in a strong legal framework that encompasses several laws covering all contingencies foreseen in the Social Security (Minimum Standards) Convention, 1952 (No. 102). The Constitutional Court has also played a role in developing a substantial body of jurisprudence on the obligations imposed by the provisions of the Constitution including the need to extend coverage to certain vulnerable groups.

In the field of social security, South Africa is a Party to the Unemployment Convention, 1919 (No.2), as well as to the Equality of Treatment (Accident Compensation) Convention, 1925 (No. 19). In 2013, South Africa ratified the Domestic Workers Convention, 2011 (No. 189) which requires States to ensure that domestic workers enjoy social security protection that is not less favourable than those applicable to workers generally. South Africa had not yet ratified the Social Security (Minimum Standards) Convention, 1952 (No. 102) though it has studied the possibility to do so. According to a comparative assessment undertaken by the ILO in 2014, South Africa would be in a position to ratify this landmark international standard and would be the first country to do so on the basis of its well-developed social assistance system. By ratifying Convention No. 102, South Africa would also establish itself as a model and an example for other southern African and African countries at large. Ratification would be



demonstrative of South Africa's ongoing political will to effectively implement a coherent social security system as part of national development policies that is in line with the most recent international social security standard, the Social Protection Floors Recommendation, 2012 (No. 202).

While the South African social security scheme illustrates a good example of a comprehensive system, some challenges are still to be addressed. These include overcoming administrative deficiencies in the granting of social assistance; addressing the country's high unemployment rate; and extending coverage, in particular to atypical workers including workers in the informal economy but also the long-term unemployed and structurally employed youths and adults. Despite the fact that South Africa draws a good number of migrant workers from across the continent, temporary migrants do not have access to

social assistance or UIA benefits. As such, extension should seek to fulfil the principles of "universality of protection and social inclusion" set in international standards. It can be noted that the Constitutional court succeeded in extending access of non-contributory benefits to refugees and asylum seekers. A reform process is also underway with the aim of remedying some of these shortcomings.

As part of the BRICS countries that seek to fill social protection coverage gaps and continues building its social protection system through a rights-based approach, the South African system is a good example for emulation in the development of social security systems in the region, be it for middle-income countries, countries with diversity in patterns of employment and relatively high unemployment rates and unequal distribution of income and jobs.

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## Building Social Protection Floors

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This note was produced by Maya Stern Plaza and Geneviève Binette. It was reviewed by Isabel Ortiz, Valérie Schmitt, Luis Frota and Kagisanyo Kelobang of the ILO.

The editor of the series is Isabel Ortiz, Director of the Social Protection Department, International Labour Organization (ILO).

For more information, contact: [ortizi@ilo.org](mailto:ortizi@ilo.org)



[www.social-protection.org](http://www.social-protection.org)

## INTERNATIONAL LABOUR OFFICE

4, route des Morillons  
1211 Genève 22  
Switzerland

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