

# Social Protection for Self-Employed Informal Workers in Sub-Saharan Africa: A rights-based assessment of the impact of the COVID-19 crisis



By Pamhidzai Bamu, Laura Alfery, Rutendo Mudarikwa and Theodore Kamwimbi

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### Acknowledgements

We would like to thank the Friedrich Ebert Stiftung Office in Zambia for their generous support in producing this research through the Rights Based Social Protection in Africa Project.

**Publication date: February 2022**

**ISBN number:** 978-92-95122-00-0

**Please cite this publication as:** Bamu, Pamhidzai, Laura Alfers, Rutendo Mudarikwa and Theodore Kamwimbi. 2022. Social Protection for Self-Employed Informal Workers in Sub-Saharan Africa: A rights-based assessment of the impact of the COVID-19 crisis. WIEGO Resource Document No. 24. Manchester, UK: WIEGO.

Published by Women in Informal Employment: Globalizing and Organizing (WIEGO) A Charitable Company Limited by Guarantee – Company N°. 6273538, Registered Charity N°. 1143510

**WIEGO Limited**  
521 Royal Exchange  
Manchester, M2 7EN  
United Kingdom  
[www.wiego.org](http://www.wiego.org)

**Series editor:** Caroline Skinner  
**Copy editor:** Bronwen Muller  
**Layout:** Julian Luckham  
**Cover Photograph:** Street vendors in Durban  
Photo Credit: Jonathan Torgovnik

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## Abbreviations

ACHPR	African Charter on Human and Peoples' Rights	MSMEs	Micro, Small and Medium Enterprises
ACRWC	African Charter on the Rights and Welfare of the Child	MUFIS	Malawian Union for the Informal Sector
ASAL	Arid and semi-arid regions [lands]	NCC	National Command Council
AU	African Union	NEDLAC	National Economic Development and Labour Council
BBC	British Broadcasting Corporation	NHIS	National Health Insurance Scheme
CAP	Coronavirus Alleviation Programme	NSPP	National Social Protection Policy
CBHI	Community-Based Health Insurance	NSSF	National Social Security Fund
CEACR	Committee of Experts on the Application of Conventions and Recommendations	PPE	Personal protective equipment
CEACR	Committee of Experts on the Application of Conventions and Recommendations	RFW	Rwandan Franc
CEDAW	Convention on the Elimination of Discrimination Against Women	SADC	Southern African Development Community
CESCR	Committee on Economic, Social and Cultural Rights	SADSAWU	South African Domestic Service and Allied Workers Union
CNSS	National Social Security Fund	SASSA	South African Social Security Authority
CNTS	Confédération Nationale des Travailleurs du Sénégal (National Federation of Workers of Senegal)	SEAS	Self-Employed Assistance Scheme
COID	Compensation for Occupational Injuries and Diseases [Act]	SMEs	Small and Medium Enterprises
COVID-19	Coronavirus disease	SRD	Social Relief of Distress
CRC	Convention on the Rights of the Child	SSNIT	Social Security National Insurance Trust
CSG	Child Support Grant	SYNATREIN	Syndicat National des travailleuse·eur·s de l'Économie Informelle, Sénégal (National Union of Informal Economy Workers, Street and Market Vendors)
CSS	Caisse de Sécurité Sociale	TERS	Temporary Employer/Employee Relief Scheme
CUPPIS	Central Union for Private, Public and Informal Sectors	TIN	Taxpayer Identification Number
EIG	Emergency Income Grant	TREP	Township and Rural Enterprise Programme
ERP	Economic Recovery Plan	UDHR	Universal Declaration of Human Rights
GAMA	Greater Accra Markets Association	UIF	Unemployment Insurance Fund
GDP	Gross Domestic Product	UN	United Nations
GHC	Ghanaian Cedi	UNDP	United Nations Development Programme
HCDS	High Council for Social Dialogue	UNTA	União Nacional dos Trabalhadores de Angola (National Union of Angolan Workers)
ICESCR	International Covenant on Economic, Social and Cultural Rights	USA	United States of America
ILO	International Labour Organization	USSD	Unstructured Supplementary Service Data
ILO CEACR	ILO Committee of Experts on the Application of Conventions and Recommendations	VUP	Vision 2020 Umurenge Programme
ITUC-Africa	African Regional Organisation of the International Trade Union Confederation	WIEGO	Women in Informal Employment: Globalizing and Organizing
LLC	Liberian Labour Congress		
MOU	Memorandum of Understanding		



The rights-based approach to social protection implies that governments bear a duty to realize the right and are accountable for the actions they take towards this. Our overall assessment is that the surveyed African countries have not gone far enough to comply with their duty to extend social protection to self-employed workers, who account for a large proportion of the labour force in most countries.

Shortcomings include the fact that constitutional commitments in many countries are not comprehensive enough to recognize the full ambit of the right to social protection. Contributory schemes only cover a limited range of benefits and few countries have adapted the modalities of their schemes to suit the needs of self-employed workers. Moreover, non-contributory social protection is embedded in policy rather than law and often excludes informal workers through eligibility criteria. There is limited provision for social dialogue in decision making through participation in governance structures for social protection.

During 2020, several COVID-19 relief measures leveraged existing social-protection programmes in the surveyed countries. The overwhelming majority of those that reached self-employed informal workers leveraged social-assistance programmes rather than social-insurance programmes, highlighting the low level of coverage of the self-employed through contributory schemes.

In Anglophone countries, relief measures provided for during 2020 were not codified in law, but relied on policy as expressed in press statements and addresses by Presidents or Ministers, cabinet decisions, circulars by ministers, or in response programmes and relief and recovery plans. This sits in contrast to the vast amount of legislation generated to regulate lockdowns.

Informal workers' organizations were largely excluded from national COVID-19 response decision-making structures, but they were able to influence governments by direct engagement, pressure tactics, and through trade unions. Trade unions seemed better able to articulate informal workers' social-protection and relief needs than informal workers themselves, which suggests that social protection is still far removed from the lived realities of many informal workers.

South Africa's *Mahlangu* decision and the COVID-19 court cases in four countries (Malawi, South Africa, Uganda, Zimbabwe) point to the potential for litigation as a means of enforcing the right to social protection. It is possible for workers to litigate on social insurance to challenge the exclusion of self-employed workers and/or to demand adaptive measures to make it possible for them to participate in schemes. With social assistance, it may be possible to challenge the court's eligibility criteria and call for universal social protection. We have pointed out the limitations arising in the context of socio-economic rights, particularly in relation to non-contributory forms of social protection. Notably, the challenges relating to the Francophone countries' legal systems means that public interest litigation seems to be less viable in these countries.

In addition to litigation in their national courts, informal workers' organizations can consider approaching the Committee on Economic Social and Cultural Rights to file complaints against their governments if they have ratified the Convention. It may also be possible for an African organization (of lawyers/workers' organizations) to approach the African Court of Human and Peoples' Rights for an advisory non-binding opinion declaring that social-protection laws that exclude or do not adequately cover self-employed workers are incompatible with the rights in the existing binding instruments.

## Introduction

Informal workers make up a large proportion of the “missing middle” in social protection – those who are not considered vulnerable enough to benefit from social assistance measures and often excluded from employment-linked social protection. During the COVID-19 crisis, this gap in social protection coverage was highlighted more than ever when governments realized the difficulty of imposing public health restrictions on populations without access to income replacement. The resulting relief programmes – often building on existing social protection systems – involved an unprecedented focus on extension to informal workers (Gentilini et al, 2020).

This paper analyzes the extent to which rights-based social protection (i.e. social protection rooted in law and other statutory instruments) exists for self-employed informal workers in sub-Saharan Africa. It draws on data collected across 39 countries, which were selected to provide a balance of different legal systems (Anglophone and Francophone) and sub-regions (West Africa, Southern Africa and East Africa). Country selection was also based on an understanding that they had made some progress towards building social protection systems more generally. As such, the report may provide an overly optimistic view of social protection in the region. Our analysis covered the following 39 countries:

- *Anglophone*: Botswana, Eritrea, Eswatini, The Gambia, Ghana, Kenya, Lesotho, Liberia, Malawi, Mauritius, Namibia, Nigeria, Seychelles, Sierra Leone, South Africa, South Sudan, Uganda, Zambia, Zimbabwe (n=19);
- *Francophone*: Benin, Burkina Faso, Burundi, Cameroon, Central African Republic, Chad, Congo-Brazzaville, Democratic Republic of the Congo (DRC), Djibouti, Equatorial Guinea, Gabon, Guinea, Ivory Coast, Madagascar, Mali, Niger, Rwanda, Senegal and Togo (n=19).

This report focuses on *self-employed* informal workers for two main reasons. Firstly, self-employment is the dominant form of employment in the region, making up 72 per cent of informal employment (Bonnet et al, 2019). Women in particular are concentrated in informal self-employment, with 77 per cent of women in informal employment working either as own-account workers<sup>1</sup> (52 per cent) or as contributing family workers (25 per cent) (Bonnet et al, 2019). Secondly, self-employment – particularly amongst poorer workers – poses a significant challenge to existing social protection frameworks based on an employer-employee relationship. Understanding the extent to which self-employed informal workers are covered by rights-based social protection therefore provides a barometer for measuring the extent to which legal frameworks are suited to the reality of work on the continent.

The second part of this report focuses on COVID-19 relief responses in 2020, providing an overview of the extent to which these measures reached self-employed informal workers. It reflects on where and how law and other statutory instruments were used in the extension of protective measures, and discusses potential implications for the

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<sup>1</sup> Own-account workers are self-employed workers who do not employ others.

extension of rights-based social protection in the future. This report also provides an overview of the case law that arose during this period, thinking through what this may mean for future court challenges related to the provision of social protection.

We concluded that the surveyed countries have not gone far enough to comply with their duty under international law to extend social protection to self-employed workers, who account for a large proportion of the labour force. There was little impetus from the 2020 COVID-19 crisis for this situation to change. Self-employed informal workers fell between the cracks because the eligibility criteria for relief efforts were either aimed at paid employees in formal companies or at small entrepreneurs. Only a few countries such as Mauritius, South Africa and Togo, introduced targeted measures for self-employed workers and some qualified for broad social assistance and relief. A key finding of the analysis of COVID-19 interventions at this time is that while restrictive and punitive measures were codified in law, those relating to relief and protection were not. Moreover, there were few statutory provisions made for the direct inclusion of informal workers in the governance of relief efforts.

### **Notes on methodology and legal sources**

The focus of our analysis was the legislation and judicial documents concerning social protection of self-employed workers prior to the pandemic and those passed between March and October 2020. Legislation comprises both primary and secondary legislation, which are also known as original and delegated legislation respectively. Primary legislation is enacted by the national or state/provincial legislature. Their authority to legislate is derived from the constitution (written or unwritten) of the country.

Secondary legislation refers to laws (including regulations and executive orders) passed by authorities or members of the executive (President/Prime Minister or Minister) in terms of a mandate from original legislation. For example, an Act of Parliament may authorize the Minister of Health to issue regulations or make an order on public hygiene during a pandemic. Original legislation may mandate state or local authorities to pass laws or regulations. For example, a national law (passed in terms of the constitution) may mandate state or local authorities to regulate street vending within their jurisdiction. We also surveyed judicial documents, which primarily include copies of court judgements and orders.

In addition, we analyzed a range of non-legal government documents such as policies, programmes and plans issued by the executive (e.g. Minister) and administrative functionaries (bureaucrats, e.g. Director or Permanent Secretary) within government departments.<sup>2</sup> We further relied on communication within government departments, progress reports of relevant committees, and official government press releases and briefings. These documents were not necessarily binding in themselves, but either

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<sup>2</sup> Notably, the names of non-binding documents (e.g. guidelines) in some countries were similar to those of some forms of secondary legislation in other countries, which led to some confusion as to which documents were binding laws and which were not. Ultimately, the test was whether or not they were mandated by primary legislation with the intention that they would be binding secondary laws.

signalled that legislation had been or would soon be passed, or indicated governments' policy intentions or commitments.

We further collected and analyzed relevant secondary literature, including committee reports, press briefings, news reports, submissions by worker and civil society organizations, research studies and reports, websites and Internet resources. The secondary literature helped to fill in the gaps where law or policy documents were unavailable online.<sup>3</sup> Secondary sources also provided insights into the situation and realities of self-employed workers.

Our priority was to identify and analyze legal and policy provisions targeted at self-employed workers. Noting that self-employed workers were also covered by laws applicable to other categories and/or the general population, we also analyzed the implications of generally applicable social protection and COVID-19 laws and policies on self-employed workers. Our analysis broadly considers and gives an overview of the legal interventions in the 39 selected countries. Our in-depth analysis of the legal innovations highlights the situation in countries that exemplify good-practice models for the extension of social protection to self-employed workers.

## **Rights-based Social Protection: International, Regional and Constitutional Norms**

There is a long history of the recognition of social protection as a human right dating from the adoption of the Universal Declaration of Human Rights (UDHR) in 1948. The rights-based approach to social protection presupposes that rights are claims that imply duties on the state to respect, protect and fulfill the right (ILO CEACR, 2011). This implies that there are effective accountability and enforcement mechanisms to guarantee that every individual effectively obtains the benefits of [their] rights (ILO CEACR, 2011). For example, rights must be justiciable in that courts can protect and uphold them (ILO CEACR, 2011). International Labour Organization (ILO) instruments have traditionally viewed social protection not as an individual right, but as a social institution regulated by a distinct legal framework (ILO CEACR, 2011). These instruments require the state to secure social protection benefits for those who are entitled to them (ILO CEACR, 2011).

In recent years there has been a cross-pollination of approaches among the ILO and the international human rights treaty bodies. The ILO has recognized social security as “a basic human right and a fundamental means for creating social cohesion”, while the United Nations (UN) Committee on Economic, Social and Cultural Rights (CESCR) is moving towards the state social responsibility approach of the ILO (ILO CEACR, 2011). This suggests a growing complementarity between these two approaches (ILO CEACR, 2011).

This section outlines the legal framework for the recognition of the right to social protection. It provides an overview of the major international and regional norms

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<sup>3</sup> The challenge was that these did not provide complete information, such as the reference to the empowering provision, indication of the legal status of the document, or the identity of the authority that passed it.

underpinning the right to social protection, with specific reference to self-employed informal workers. It further outlines how African countries have incorporated the right to social protection in their national constitutions. It ends with a brief explanation of how the right to social protection can be enforced against governments at international, regional and national levels. The discussion provides the necessary background and context for the analysis that follows.

### **United Nations instruments**

Several UN human rights instruments provide for the right to social protection, most notably the UDHR, which forms part of customary law and is binding on African countries (Treves, 2006).<sup>4</sup> In addition, most of the selected countries have ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of Discrimination Against Women (CEDAW), and the Convention on the Rights of the Child (CRC), thereby creating positive obligations on these countries. All the selected countries have ratified the CRC and CEDAW, and only Botswana and South Sudan have not ratified the ICESCR.

The UDHR and the ICESCR guarantee everyone's right to social security, including social insurance in the event of risks that prevent them from working, material support to maintain an adequate standard of living, and medical care and other social services.

The international instruments also require states parties to take special measures to prohibit and eliminate discrimination against women in relation to social security, to promote women's access to social protection, and to address women's specific social protection needs. CEDAW calls on states parties to provide maternity benefits and child-care services for all working mothers<sup>5</sup> and to provide free maternity services and food during pregnancy and lactation for those in need.<sup>6</sup>

The CRC guarantees the right of children to the highest attainable standard of health and to health care facilities.<sup>7</sup> It requires states parties to ensure that no child is deprived of access to health care services.<sup>8</sup> The CRC requires member states to, amongst other things, ensure access to pre- and post-natal care.<sup>9</sup> Every child also has the right to benefit from social security, including social insurance.<sup>10</sup> In addition, every child has the right to an adequate standard of living for their full development, which requires state parties to provide children in need with material support including food, clothing and shelter.<sup>11</sup>

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<sup>4</sup> Customary law comprises two elements: the practice of states and states' acceptance that the practice is binding on them.

<sup>5</sup> Art 11(2)(b) and (c) of CEDAW

<sup>6</sup> Art 12(2) of CEDAW

<sup>7</sup> Art 24(1) of CRC

<sup>8</sup> Art 24(1) of CRC

<sup>9</sup> Art 24(2)(d) of CRC

<sup>10</sup> Art 26(1) of CRC

<sup>11</sup> Art 27(1) and (3) of CRC



The ICESCR requires states parties to ensure that everyone enjoys the right to social protection without discrimination on grounds including race, colour, sex, language, religion, and national and/or social origin.<sup>12</sup> In terms of the CESCR, states parties must “give special attention to those individuals and groups who traditionally face difficulties in exercising this right”, including women, workers inadequately protected by social security, and persons working in the informal economy.<sup>13</sup>

The CESCR has also indicated that states have an obligation to ensure that social security systems cover workers who are inadequately protected by social security, and specifically mentions self-employed workers.<sup>14</sup> The CESCR has interpreted the ICESCR to require states parties to adapt occupation-based social security schemes so that self-employed workers enjoy conditions equivalent to those of comparable paid employees. The CESCR further notes that, where such occupation-based schemes do not provide self-employed workers with adequate coverage, states parties should adopt complementary measures to address the gaps.

### **International Labour Organization instruments**

The Social Security (Minimum Standards) Convention, 1952 (No. 102) has long been hailed for embodying the internationally accepted definition of social security. It recognizes nine social contingencies: medical care, sickness, unemployment, old age, employment injury, family responsibility, maternity, invalidity, and survivorship. Article 2 obliges ratifying states to accept as minimum the protection of three of the nine contingencies and at least one of those three branches must cover long-term contingency or unemployment (ILO, 2019). Only six out of the 39 selected African countries (Benin, Chad, the DRC, Niger, Senegal, and Togo) have ratified Convention 102 and it therefore does not impose legal obligations on the majority of the selected countries. Nevertheless, the workers and governments can use the Convention to provide guidance on the provision of social protection.

ILO Recommendations are not binding on member states, but they provide guidance on the design, regulation and implementation of the right to social protection for the self-employed. They set the minimum standards and guidelines that states may follow in fulfilling the right to social protection. Two ILO Recommendations are most instructive on the extension of social protection to informal workers.

The adoption of the ILO Recommendation concerning Social Protection Floors, 2012 (No. 202) marked a new phase in ILO social protection standard-setting, which has been described as the era of universal social security coverage and comprehensive systems (ILO, 2019). The preamble to the Recommendation reaffirms the right to social protection as a human right and is “an economic and social necessity for development and progress”.

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<sup>12</sup> Art 2(2) of ICESCR

<sup>13</sup> General Comment 19 Paras 31, 34

<sup>14</sup> General Comment 19 Para 33

Recommendation 202 establishes a minimum floor of social protection wherein all people/workers in need have access to essential health care and basic income security throughout the life cycle.<sup>15</sup> It provides that member states should formulate and implement national social extension strategies aimed at progressively building and maintaining comprehensive social-protection systems.

The Recommendation requires member states to identify gaps in and barriers to social protection, and to ensure support for disadvantaged groups and people with special needs.<sup>16</sup> It recognizes that social protection is an important tool to support the transition from informal to formal employment; recommends that member states should apply the principle of social inclusion, including persons in the informal economy; and specifies that these social extension strategies should apply to informal as well as formal workers.<sup>17</sup>

The ILO also adopted the Recommendation concerning the Transition from the Informal to the Formal Economy, 2015 (No. 204), which exhorts states to facilitate the transition from the informal to the formal economy through integrated policy frameworks to promote the establishment of social protection floors and the extension of social security coverage.<sup>18</sup> It exhorts member states to extend social security, maternity protection, decent working conditions, and a minimum wage to all workers in the informal economy.<sup>19</sup> It also encourages member states to tailor social protection interventions according to the needs and circumstances of different categories of informal workers.

In 1999, the ILO adopted the Decent Work Agenda, which restated the ILO's mission in light of the changes in the social and economic environment: "[T]he primary goal of the ILO today is to promote opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and human dignity." The Decent Work Agenda encompasses four strategic objectives or pillars: opportunities for work, rights at work, social dialogue, and social protection (ILO, 1999). It embraces all work, "whether organized or not, and wherever work might occur, whether in the formal or the informal economy, whether at home, in the community..." and therefore covers self-employed workers.

Since the adoption of the Decent Work Agenda, ILO member states have adopted and implemented decent work country programmes outlining their priorities and activities in promoting the four pillars. Several countries have incorporated the four pillars into their labour and social protection laws and policies. The UN's 2030 Agenda for Sustainable Development also includes the four pillars.<sup>20</sup> By 2030, UN member states should implement nationally appropriate social-protection systems and measures for all, including social protection floors, and achieve substantial coverage of the poor

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<sup>15</sup> Recommendation 202 Para 5

<sup>16</sup> Recommendation 202 Paras 14(b), 16

<sup>17</sup> Recommendation 202 Para 15

<sup>18</sup> Recommendation 204 Paras 10, 11

<sup>19</sup> Recommendation 204 Para 18

<sup>20</sup> Sustainable Development Goals 2030, accessible at <https://sdgs.un.org/goals>

and vulnerable.<sup>21</sup> Given the widespread incorporation of the decent work pillars, and recognition that the promotion of decent work is the ILO's primary goal, one could argue that the Decent Work Agenda is part of customary international law. This would mean that member states are obliged to ensure that self-employed workers enjoy comprehensive social protection.

### **African regional instruments**

The African Charter on Human and Peoples' Rights (ACHPR) of 1981, ratified by 54 out of the 55 African Union (AU) member states,<sup>22</sup> specifies a number of rights that refer implicitly to social protection, including the right to food, health and protection of the family, and the protection of the aged and the disabled.<sup>23</sup> Under Article 18, the ACHPR provides that "the State shall have the duty to assist the family". This duty extends to vulnerable groups such as older persons and persons with disability, who are said to "have a right to special measures of protection in keeping with their physical or moral needs".<sup>24</sup>

The African Charter on the Rights and Welfare of the Child (ACRWC) of 1990 was ratified by 47 out of 55 AU member countries. Article 14 of the ACRWC guarantees the right of every child to "the best attainable state of physical, mental and spiritual health", which requires states to take measures:

14(2)(b) to ensure the provision of necessary medical assistance and health care to all children, with emphasis on the development of primary health care;

(c) to ensure the provision of adequate nutrition and safe drinking water;

(d) to combat disease and malnutrition within the framework of primary health care through the application of appropriate technology;

(e) to ensure appropriate health care for expectant and nursing mothers...

The ACRWC further grants children who are permanently or temporarily deprived of their family environment for any reason the right to special protection and assistance.<sup>25</sup> Arguably, this right includes the right to social protection, which may be interpreted to include informal workers' children who are under the age of 18.

The Protocol to the ACHPR on the Rights of Women in Africa (2003), which has been ratified by 42 out of 55 African Union member countries, requires states parties to "establish a system of protection and social insurance for women working in the informal sector and sensitize them to adhere to it".<sup>26</sup> The Protocol further requires states parties

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<sup>21</sup> Sustainable Development Goals 2030. This is one of the main targets under Sustainable Development Goal 1.3, which aims to end poverty in all its forms everywhere.

<sup>22</sup> Morocco is the exception.

<sup>23</sup> ACHPR Para 81

<sup>24</sup> Art 18 of ACHPR

<sup>25</sup> Art 25(1) of ACRWC

<sup>26</sup> Art 13(f) of the Protocol

to provide adequate, affordable and accessible health services – including information, education and communication programmes – to women, especially those in rural areas.<sup>27</sup> Under the Protocol, states parties are also required to establish and strengthen existing pre-natal, delivery and post-natal health and nutritional services for women during pregnancy and while they are breast-feeding.<sup>28</sup> Arguably, these provisions pertaining to women’s health and reproductive rights are applicable to all women, including those working in the informal economy.

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The challenge with the existing AU instruments is that they deal with a limited range of social-protection issues or particular groups of people, whereas instruments that focus on social protection and cover a comprehensive range of issues are not ratifiable and cannot be binding on member states. It is therefore significant that the AU is in the process of adopting a Protocol on Social Protection.

The adoption of the Protocol would mean that the AU would have a single binding instrument that addresses a broad range of social-protection issues. The Draft Protocol provides for the right to social protection that is available, accessible, adequate, affordable and transparent. The right applies to everyone in Africa, including all workers. It calls for states parties to establish a minimum social-protection package and commit to taking certain actions to ensure that informal workers have access to social protection through the following measures:

- Inclusion in and adaptation of general schemes;
- Adaption of contribution modalities, qualifying criteria and benefits;
- Systems for women in the informal economy, including maternity and health protection;
- Representation of informal workers’ organizations in discussions;
- Access to markets, progressive formalization, and the protection of informal workers’ income.

### **Constitutional guarantees of the right to social protection**

National constitutions should be the starting point for implementing international and regional obligations relating the right to social protection at a national level. The entrenchment of the right to social protection in a constitution represents a constitutional democracy’s commitment to a rights-based approach to social protection. It is not only indicative of national aspirations, but also imposes legally binding obligations upon the state.

Our analysis revealed three approaches to incorporating the right to social protection in constitutions. First, some countries have expressly guaranteed the right to social protection (often referred to as social security). Second, some countries do not expressly

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<sup>27</sup> Art 14(2)(a) of the Protocol

<sup>28</sup> Art 14(2)(b) of the Protocol



guarantee the right to social protection, but do guarantee other rights that are closely related to social protection. Third, these rights may be guaranteed for everyone, for certain vulnerable groups, or for a combination of both. Some examples of these three dimensions are provided below.

South Africa expressly guarantees the right to social protection. Section 27 of the Constitution of the Republic of South Africa (Act 108 of 1996) guarantees everyone's right to have access to health care services, sufficient food and water, and social security, including social assistance if they are unable to support themselves. The Constitution further enjoins the state to take reasonable and other measures, within its available resources, to achieve the progressive realization of these basic human rights. The Constitutional Court of South Africa has played a critical role in interpreting, promoting and protecting the right to social protection.<sup>29</sup>

Similarly, the Constitution of Kenya (2010) contains a comprehensive Bill of Rights. Article 43 guarantees the "right for every person ... to social security and binds the State to provide appropriate social security to persons who are unable to support themselves and their dependents". Several Francophone countries have enshrined the right to social protection in their national constitutions. The constitutional provisions refer to a variety of terms – social protection, social assistance, social security, or social welfare – often used interchangeably. "Social security" is the term most commonly used, particularly in the constitutions of Burkina Faso,<sup>30</sup> Djibouti,<sup>31</sup> and Senegal,<sup>32</sup> with Togo's constitution using the term "social protection",<sup>33</sup> and Rwanda's constitution referring to "social welfare".<sup>34</sup>

Turning to the second approach, the Constitution of Ghana 1992 does not explicitly provide for social protection, but the right is implicit in provisions that require the government to provide support to every person and for specified groups. For example, Article 36(1) provides that "The state shall take all necessary action to ensure that the national economy is managed in such a manner as to maximize the rate of economic development and to secure maximum welfare, freedom, and happiness of every person in Ghana and to provide adequate means of livelihood and suitable employment and public assistance to the needy".

The Malawian Constitutional Court's decision in *Kathumba and Others v President of Malawi and Others*<sup>35</sup> illustrates how the right to social protection can be read-in to a

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<sup>29</sup> See *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC) (the TAC case); *Khosa v Minister of Social Development*; *Mahlaule v Minister of Social Development* 2004 (6) SA 505 (CC).

<sup>30</sup> Art 18 of Burkina Faso's Constitution of 1991

<sup>31</sup> Art 56 of Djibouti's Constitution of 1992

<sup>32</sup> Art 67 of Senegal's Constitution of 2001

<sup>33</sup> Art 31 of Togo's Constitution of 1992

<sup>34</sup> Art 10(5) of Rwanda's Constitution of 2003

<sup>35</sup> Constitutional Ref. 1/2020 accessed at <https://malawilii.org/mw/judgment/high-court-general-division/2020/29>

Constitution that does not expressly provide for it. The Court found that the Constitution implicitly provided for the right to social security in the right to life (section 16) and the right to a livelihood (section 29). Quoting the Indian judgement of *Olga Tellis v Bombay Municipal Corporation*,<sup>36</sup> the Court found that the right to life is rendered meaningless in the absence of means of subsistence, which are necessary to live. It found that these rights should be read with the principles mandating the government to promote the welfare and development of the people of Malawi (section 13).

Some constitutions guarantee certain rights for specific “vulnerable groups”, including children, women, older persons, and persons with disability who need social protection or social assistance (UNDP, 2019). For instance, the Constitution of Burkina Faso mentions protection of maternity and of the child, and assistance for the elderly and persons with disability.<sup>37</sup> Similarly, Togo’s Constitution grants all children the right to the same social protection.<sup>38</sup> Recent figures show that “women or families, older persons, children or youth and persons with disabilities are prioritized or targeted for social protection coverage in most African constitutions” (UNDP, 2019). The same vulnerable categories are prioritized in most national social-protection policies and strategies, while others include liberation struggle veterans, minorities, or the unemployed (UNDP, 2019).

Ghana’s Constitution also provides for social protection for specific vulnerable groups. The Constitution requires the state to enact appropriate laws to govern, amongst other things, “the protection and promotion of all other basic human rights and freedoms, including the right of the disabled, the aged, the children and other vulnerable groups in development processes”. Namibia is another country that exemplifies the third approach to guaranteeing the right to social protection. Section 95 of the Constitution of Namibia 1990 enjoins the state to actively promote the welfare of the people through the enactment of legislation to ensure equality of women, provide state support for children, and support the elderly, the unemployed and the disabled.

### **Implementing and enforcing the right to social protection**

In principle, the rights enshrined in regional and international agreements that states have ratified require governments to account to the supervisory bodies on the measures they are taking to give effect to their obligations. In addition, non-ratified conventions and soft-law international and regional instruments may either form binding customary law as a result of widespread recognition and practice, or they may be persuasive sources of law when interpreting and applying constitutional rights or national legislation. Courts can invoke ratified conventions, other binding instruments or non-binding instruments requiring states to take specified actions to realize rights or to invalidate laws or government actions that violate protected rights.

National constitutions provide the highest guarantee of the protection of the right to social protection by the State (ILO CEACR, 2019). According to the ILO CEACR (2019),

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<sup>36</sup> 1986 AIR 180, 1985 SCR Suppl. (2) 51

<sup>37</sup> Art 18 of Burkina Faso’s Constitution of 1991

<sup>38</sup> Art 31 of Togo’s Constitution of 1992

“Constitutional provisions play a fundamental role in introducing the principles of [social protection] into legislation and in fostering their implementation in practice. They provide the most sustainable basis for the protection of social security and social protection rights, and the right to dignity, through institutional, legal and judicial mechanisms.”

In order to implement their constitutional obligations, countries must pass laws that regulate the scope of the rights, how they are realized, and how they can be enforced (ILO CEACR, 2019). Most constitutions of African countries mandate the legislature to adopt appropriate legislation to regulate social protection and social assistance, and governments to implement social protection policies and programmes (UNDP, 2019). For instance, the constitutions of Senegal<sup>39</sup> and Djibouti<sup>40</sup> provide that the law shall determine the fundamental principles of social security. This suggests that constitutions also envisage legislation as the primary tool for implementing the rights enshrined in them.

### **Box 1: The importance of a legal framework in recognizing the right to social protection**

Various international instruments require states to pass legislation as a way of giving effect to the right to social protection.<sup>41</sup> According to the ILO’s CEACR (2011), laws “provide a potentially ... effective and powerful approach to implementing this right”. The Committee further emphasizes the important functions that a clear and coherent legal framework that is effectively implemented plays in guaranteeing the right to social protection as follows. It:

- i) allows for more effective supervision by the state as it generally requires public monitoring of the financial sustainability of schemes and, in some cases, allocation of the necessary resources from the state budget;
- ii) ensures the continuity of rights and entitlements over time, and contributes to the predictability and sustainability of the social security system;
- iii) promotes the accountability of the institutions responsible for its governance and prevents arbitrary governance;
- iv) facilitates the progressive formulation of overarching aims and objectives for the social security system, and the development of linkages between its various components, e.g. contributory and non-contributory schemes.

Some countries have enacted legislation to give effect to their international, regional and/or constitutional obligations to extend the right to social protection to vulnerable workers. In some cases, the law’s preamble expressly references these obligations. For example, the preamble of Rwanda’s Act No. 29/2017 of 29 June 2017 to establish a long-term savings scheme for self-employed and informal-sector workers indicates that it was enacted to give effect to the provisions of the ICESCR, which Rwanda has ratified.

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<sup>39</sup> Art 67 of Senegal’s Constitution of 2001

<sup>40</sup> Art 56 of Djibouti’s Constitution of 1992

<sup>41</sup> For example, Article 2(1) of the ICESCR gives states the freedom to adopt appropriate measures to implement the Covenant, but provides that these “shall includ[e] particularly the adoption of legislative measures”; Articles 2 and 3 of CEDAW require member states “to take legislative and other measures” and to “take all appropriate measures, including legislation” to give effect to their obligations in terms of CEDAW.

By ratifying international and regional instruments, countries subject themselves to the various processes of supervisory bodies that monitor and promote their implementation. States must periodically submit reports on their progress towards implementing UN and ILO instruments.<sup>42</sup> They are required to respond to the supervisory bodies' requests for further information, consider observations on their progress, and follow recommendations. International and regional organizations also have complaint or judicial mechanisms for affected persons or interested parties to lodge complaints or file court cases against states for violating certain rights.

The supervisory bodies typically declare the rights and obligations of the parties, and indicate what the state must do to fulfil its obligations. Some supervisory bodies in the ILO system may make recommendations to guide member states to comply with their obligations, and the ILO may provide technical assistance to support the government. The decisions of international and regional courts are binding on the parties. However, international and regional bodies cannot impose sanctions on member states, which means that their compliance is largely a function of political will.

At the national level, parties can approach the court for an order requiring member states to give effect to the rights they have committed to by ratifying international or regional instruments, or by including them in their constitutions. This means that individuals or organizations can approach the courts for a remedy against the government for violating these rights or failing to give effect to them. The courts can declare that laws or government conduct that violate rights are invalid. They can also order governments to take certain measures where they have failed to comply with the obligations related to those rights. Many decisions about the violation of human rights draw on international and regional instruments, as well as constitutional rights. Box 2 explains how South Africa's Constitutional Court interpreted the right to social protection in a case involving a domestic worker.

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<sup>42</sup> The Human Rights Committee or the relevant treaty body in the case of the UN, and the CEACR in the case of the ILO.



## Box 2: Enforcing the right to social protection at national level

The case of *Mahlangu and South African Domestic Service and Allied Workers Union (SADSAWU) v Minister of Labour and Others*<sup>43</sup> arose after a domestic worker drowned in a swimming pool, resulting in her family's loss of financial support. Mahlangu's daughter had failed to claim compensation in terms of the Compensation for Occupational Injuries and Diseases (COID) Act of 1993 because section 1(xix)(v) prohibited domestic workers from registering with the Compensation Fund. With support from SADSAWU, she applied to the courts for an order striking down this provision.

Drawing on international and regional human rights instruments – including the ICESCR, CEDAW, the Charter of Fundamental Social Rights in SADC, and South Africa's Constitution – the Constitutional Court held that the denial of domestic worker access to this benefit violated their rights to social protection, equality and dignity. The Court held that the exclusion of domestic workers was irrational and could not be justified in an open and democratic society. The Court's order was applied retrospectively, meaning that section 1(xix)(v) of the COID Act was invalid from the time the Constitution came into force. This means that domestic workers or their families can potentially claim benefits for occupational injuries and diseases arising at any time after the Constitution's effective date in 1993.

The application of obligations in relation to social insurance is relatively uncontroversial as it is unlikely to be perceived as imposing direct financial obligations on the government. International and regional instruments often place limitations on obligations in relation to socio-economic rights, whose fulfilment impose financial obligations on states in terms of social assistance and social services. Human rights instruments often call for the progressive realization of these rights or provide that states should fulfil the rights within the limits of available resources. At the national level, constitutions contain similar limitations on economic and social rights. This means that, in some cases, governments may argue that they have inadequate resources, or that they have long-term plans to gradually increase the benefits or broaden their coverage.

While acknowledging the significant financial implications of realizing the right to social security, the CESCR has emphasized that states cannot invoke the limited availability of resources to avoid their responsibilities. The CESCR (2008):

... notes that the fundamental importance of social security for human dignity and the legal recognition of this right by states parties mean that the right should be given appropriate priority in law and policy. States parties should develop a national strategy for the full implementation of the right to social security, and should allocate adequate fiscal and other resources at the national level. If necessary, they should avail themselves of international cooperation and technical assistance.

In addition, some national constitutions establish principles that courts may apply if the state claims that it does not have the resources to fulfil economic and social rights. The Kenyan Constitution, for example, places the onus on the state to demonstrate that resources are unavailable, and calls on states to prioritize the widest possible enjoyment of the right under the prevailing circumstances, including the vulnerability of particular groups or individuals.

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<sup>43</sup> (CCT306/19) [2020] ZACC 24, accessed at <http://www.saflii.org/za/cases/ZACC/2020/24.html> on 1 January 2021

## Are African Countries Meeting their International and Regional Obligations to Provide Social Protection?

This section considers the extent to which African countries are meeting their international and regional obligations to provide social protection, with an emphasis on provision for self-employed informal workers. It also offers an overview of the legal innovations that have taken place to better include this group of workers, particularly with respect to contributory social protection.

Table 1 clearly shows the gaps in provision for self-employed workers in the Anglophone countries surveyed. No country provides the protection of a sickness benefit, although longer term illness may, in some cases, be covered by a disability benefit. For example, in South Africa a disability grant is extended to those with HIV/AIDS whose CD4 blood count falls below a minimum defined level.

Provision of maternity benefits is another distinct gap, with 9 out of the 19 countries surveyed making (or intending to make) provision for a maternity benefit for self-employed workers. Only 2 out of the 19 countries make provision for a maternity benefit rooted in law. In the countries surveyed, maternity benefits take the form of health fee waivers or other health care-related benefits for pregnant and lactating women (Malawi, South Africa and South Sudan), means-tested food transfers (Botswana), and in Gambia self-employed women who have contributed are able to claim 6 months maternity leave with compensation from the social insurance scheme. In Namibia there are proposals to institute a universal maternity grant that would cover 1 month prenatal and 3 months postnatal.

More common provisions that potentially provide coverage to the self-employed are related to child benefits (16 out of 19 countries), old age benefits (17 out of 19 countries), unemployment benefits (15 out of 19 countries) and health care (13 out of 19 countries). Child benefits take the form of school feeding schemes (e.g. Botswana, Gambia, Ghana, Lesotho, Liberia, Malawi, Zambia), cash and in-kind support for orphans and vulnerable children (e.g. Eswatini, Kenya, Lesotho, Liberia, Nigeria, Zimbabwe). Mauritius has a universal child support grant, South Africa has an affluence-tested child support grant, and Namibia has a means-tested child disability and maintenance grant. Some countries also provide children with free health care (e.g. Ghana, Rwanda, Sierra Leone). However, these provisions are rooted in law in only 5 countries. Moreover, all of these provisions fall under social-assistance programmes and are not designed specifically to support self-employed workers, and may exclude them through specified targeting criteria.

In most countries old-age benefits cover the self-employed through a combination of contributory and non-contributory schemes, with 11 countries including legal provisions for this benefit. Social (non-contributory) pensions exist in 11 out of the 19 surveyed countries (Botswana, Eswatini, Kenya, Lesotho, Liberia, Mauritius, Namibia, Seychelles, South Africa, Uganda, Zambia), and in 11 of the countries self-employed workers may contribute on a voluntary basis to private or social pension funds (Botswana, Eswatini, Ghana, Kenya, Liberia, Malawi, Mauritius, Namibia, Seychelles, South Sudan, Zambia).

All unemployment benefits that may cover self-employed informal workers are provided through social assistance, not social insurance. Therefore while they may theoretically



*Domestic worker Anna Nkobele works full-time in the home of her employer in Johannesburg, South Africa. For her domestic service, Anna is paid 3,100 rand—the minimum wage set by the government’s labour regulations. Because she is now over 60, she also receives a small monthly amount as a government pension. Photo credit: Jonathan Torgovnik/Getty Images Reportage*

cover self-employed workers, they may also exclude many workers through targeting criteria. Moreover, these benefits are rooted in law in only 5 countries. Several countries surveyed have public works programmes in place (Botswana, Liberia, Kenya, Malawi, Nigeria, South Africa), while 6 countries have cash grants that target those without a visible means of support (Eswatini, Gambia, Kenya, Malawi, Mauritius, South Sudan). In 3 countries provision is made for support for enterprise development or agricultural inputs (Lesotho, Nigeria, South Sudan).

In several countries provision for health care is made through universal access to (at least) primary health care services (Botswana, Eritrea, Malawi, Mauritius, Namibia, Seychelles, South Africa). Other countries have made provision for social health-insurance schemes to cover self-employed workers (Ghana, Kenya, South Sudan, Zambia), or community-based health-insurance schemes (Nigeria, Uganda). However, only 6 countries make provision for health care in law.

**Table 1: Coverage of self-employed workers against selected R202 and R204 provisions (Anglophone)<sup>44</sup>**

Key **X** = Legislation **X** = Policy

**X** = Legislation + Policy

Country	Health <sup>45</sup>	Sickness	Unemployment	Maternity <sup>46</sup>	Disability	Old Age	Child Benefit <sup>47</sup>
Botswana	X		X	X	X		X
Eritrea	X						
Eswatini			X		X		X
Gambia			X	X	X	X	X
Ghana	X		X	X	X	X	X
Kenya	X		X		X	X	X
Lesotho			X		X	X	X
Liberia			X		X	X	
Malawi	X		X	X	X	X	X
Mauritius	X		X		X	X	
Namibia	X		X	X	X	X	X
Nigeria	X		X	X		X	X
Seychelles			X		X	X	X
Sierra Leone				X	X	X	X
South Africa	X		X	X	X	X	X
South Sudan	X		X	X	X	X	
Uganda	X		X			X	
Zambia	X					X	X
Zimbabwe					X		X
<b>Total countries</b>	<b>13</b>	<b>0</b>	<b>15</b>	<b>9</b>	<b>15</b>	<b>17</b>	<b>16</b>
<b>At least part law</b>	<b>6</b>	<b>0</b>	<b>5</b>	<b>2</b>	<b>10</b>	<b>11</b>	<b>6</b>

<sup>44</sup> Only national-level schemes included and covers provisions through social insurance, assistance and services. It excludes provisions that may allow coverage for only some types of self-employed workers.

<sup>45</sup> This includes either schemes that offer universally free access to health care, or the presence of social or community-based health-insurance schemes that offer financial protection.

<sup>46</sup> This includes cash and in-kind benefits, as well as access to maternal health care.

<sup>47</sup> This excludes provisions for free primary education, and cash and in-kind transfers.



In Francophone countries the right to social protection is enshrined in national constitutions, but this has only been translated into laws, policies and programmes relatively recently. As can be seen in Table 2, an increasing number of laws have been passed, recognizing social protection as a right (UNDP, 2019). Whereas social protection in Anglophone countries is covered by a mixture of laws, policies and programmes, in Francophone countries the majority of social-protection benefits are rooted in law. Furthermore, in most Francophone countries, specific provision is made for the inclusion of defined groups of self-employed workers in three main categories: self-employed workers in services (including trade), self-employed workers in farming, and self-employed workers in crafts. Since many of these sectors are highly informal, they do include informal self-employed workers. In Burkina Faso for instance, “self-employed workers in the artisanal, industrial, commercial, liberal, agro-sylvo-pastoral groups and those in the informal economy” fall under the social protection laws, which specifically list these categories.<sup>48</sup> Similarly, in Djibouti, self-employed workers defined as those carrying out a self-employed professional activity of a craft, trade, industrial or liberal nature in an independent manner are covered by social protection laws.<sup>49</sup>

Unlike Anglophone countries, Francophone countries show a marked uniformity in which social-protection benefits are incorporated into law. Similar to Anglophone countries, the major gaps in Francophone countries are coverage for sickness (only 5 out of 19 countries make provision for this) and maternity (only 6 out of 19 countries make provision for this). Moreover, provision for sickness is made through social insurance (compensation for worker injury and occupational disease) and is only applicable to certain categories of self-employed workers. In all the countries with maternity benefits, this was provided through health care fee waivers for pregnant and lactating women. Unlike Anglophone countries, child benefits are less common, with only 6 countries making provision for this. In all countries surveyed, child benefits were provided through social assistance-linked child-welfare programmes for particularly vulnerable children, and therefore likely to exclude the majority of self-employed informal workers and their families.

The most common provision in Francophone countries is the right to health care, which refers to free primary health care for certain categories of people. Again, this is not specifically targeted at self-employed informal workers, and may in fact exclude many. There are 10 countries that have provisions for an unemployment benefit, although as with sickness benefits this is covered through social insurance and is only applicable to certain categories of self-employed workers. The exception here is Rwanda, which has a public works programme in place. The situation is similar for disability and old-age benefits.

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<sup>48</sup> Arts 1–7 of Order 2008-002/MTSS/SG/DGPS of 10 March 2008 relating to the terms of membership and settlement and payment of benefits as part of the voluntary insurance scheme.

<sup>49</sup> Act No. 199/AN/13/6th L of 20 February 2013 supplementing Act No. 212/AN/07/5th L of 20 February 2013 establishing the CNSS and extending health-care benefits to self-employed workers.

**Table 2: Coverage of self-employed workers against selected R202 and R204 provisions (Francophone)<sup>50</sup>**

Country	Health Care <sup>51</sup>	Sickness	Unemployment	Maternity <sup>52</sup>	Disability	Old Age	Child Benefit <sup>53</sup>
Benin	X						
Burkina Faso	X		X		X	X	
Burundi	X		X				
Cameroon	X				X	X	
CAR	X		X		X	X	X
Chad	X		X				
DRC	X		X		X	X	X
Congo-Brazzaville	X				X	X	
Djibouti	X	X	X	X			
Equatorial Guinea	X	X	X	X	X	X	X
Gabon	X	X	X	X	X	X	
Guinea	X						
Ivory Coast	X		X				
Madagascar	X						
Mali	X	X		X	X	X	X
Niger	X						
Rwanda	X		X	X		X	X
Senegal	X				X	X	
Togo		X		X	X	X	X
<b>Total (all law)</b>	<b>18</b>	<b>5</b>	<b>10</b>	<b>6</b>	<b>10</b>	<b>11</b>	<b>6</b>

<sup>50</sup> Only national-level schemes were included and covers provisions through social insurance, assistance and services.

<sup>51</sup> This includes either schemes that offer universally free access to health care, or the presence of social or community-based health-insurance schemes that offer financial protection.

<sup>52</sup> This includes cash and in-kind benefits, as well as access to maternal health care.

<sup>53</sup> This excludes provisions for free primary education, and includes provisions for child care services, and cash and in-kind transfers.

## Including self-employed workers into social protection: Legal innovations

### Contributory social protection

In relation to contributory social protection, several legal innovations to promote the inclusion of self-employed informal workers were present in the reviewed legal frameworks.

#### *Express inclusion in the scope of the laws and inclusion in contributory schemes that cover paid employees*

In the Anglophone countries surveyed, self-employed workers were expressly included in existing social or community-based insurance schemes on a voluntary basis in: Gambia, Ghana, Kenya, Liberia, Malawi, Mauritius, Namibia, Nigeria, Rwanda, Seychelles, Sierra Leone, South Sudan, Uganda, and Zambia (14 out of 19 countries surveyed). However, this says little about whether the schemes have been adapted for the specific conditions of informality (e.g. reducing contribution value, flexibility of contributions, and outreach to the self-employed). These schemes may, through their design, effectively exclude self-employed informal workers.

Kenya offers a good-practice example of how law can provide for the inclusion of self-employed workers in social insurance by outlining areas requiring regulation to facilitate such inclusion. The responsible Cabinet Secretary is accountable for making regulations in relation to these issues. This arguably establishes a clear framework for inclusion, while providing some flexibility in the regulation of detailed measures to facilitate inclusion.

#### **Box 3: Kenya's inclusion of self-employed workers in the National Social Security Fund (NSSF)**

Section 4(e) of the National Social Security Fund Act of 2013 provides that one of the Fund's objectives is to include self-employed workers to enable them and their families to access social protection. Section 26 of the Act empowers the responsible Cabinet Secretary to make regulations in relation to:

(a) the voluntary registration of persons who are self-employed;

...

(d) the review and adaptation of any provision of this Act for purposes of accommodation of circumstances peculiar to self-employed contributors;

(e) the time and manner of payment of self-employed contributions;

(f) the representation, in whatever manner or form possible, of an organization representing self-employed persons on the Board;

(g) the collection and the recovery or furnishing of details in relation to self-employment contributions;

(h) the waiving of interest due on arrears of self-employment contributions.

The Kenyan NSSF has operationalized these legal provisions by establishing the *Haba Haba* programme, in partnership with private companies and the mobile operator Safaricom, which targets informal workers, including street vendors and informal transport workers. The platform makes it easy and convenient for self-employed workers to register with the NSSF using their mobile phones and the Unstructured Supplementary Service Data (USSD) code \*300#. Self-employed workers can use it to pay their contributions, check their statements, track claims, and make contributions towards their NSSF housing plans. The platform provides ease and convenience in participating in a contributory scheme, without people having to leave their workplace

or complete complicated forms. Furthermore, it does not require a smart phone or data and offers local language options, making it easily accessible.

In the majority of Francophone countries (17 out of 19 countries surveyed) certain categories of self-employed workers may be included in existing social security schemes (mainly covering workers' compensation, unemployment, and sick leave). In 13 out of the 20 Francophone countries surveyed, self-employed workers were explicitly included in the provisions for old age coverage. However, for both of the above, it is not clear to what extent this would enable self-employed workers in informal employment to join such schemes.

#### **Box 4: Example of inclusion: Burkina Faso CNSS**

In Burkina Faso, social security legislation extends social insurance coverage to some categories of informal economy workers, notably self-employed workers,<sup>54</sup> domestic workers and some occupational groups (ILO, 2012).

The law extended social security to self-employed workers falling under six groups of lines of business that are managed by the National Social Security Fund (CNSS), namely craft, industrial, commercial, liberal, agro-sylvo-pastoral and informal economy groups, which are not subject to a mandatory social security scheme.<sup>55</sup>

In Djibouti, a law was passed in 2013<sup>56</sup> that aims to extend health-care coverage to the self-employed person,<sup>57</sup> who is defined as any individual who engages in a non-salaried professional activity of a craft, commercial, industrial or liberal nature in an independent manner.<sup>58</sup> Under Article 7 of this Act, self-employed persons are entitled to the same benefits as current members of the CNSS.<sup>59</sup>

#### ***Special schemes for the self-employed***

In Ghana, self-employed workers have integrated into the legal framework of the National Pensions Act 2008, and have been incorporated into specific voluntarily funded and privately managed provident fund and personal pension schemes, referred to as the "third tier".

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<sup>54</sup> In that case, coverage of life-cycle risks (e.g. old age, maternity) is more frequent than coverage for occupational risk (e.g. unemployment, work injury).

<sup>55</sup> Art 4 of Act No. 015-2006 of 11 May 2006 governing the social security system applicable to wage earners and assimilated workers in Burkina Faso; Arts 1 and 2 of Order 2008-002/MTSS/SG/DGPS of 10 March 2008 relating to the terms of membership and settlement and payment of benefits as part of the voluntary insurance scheme.

<sup>56</sup> Act No. 199/AN/13/6th L of 20 February 2013, supplementing Act No. 212/AN/07/5th L of 20 February 2013 establishing the National Social Security Fund (CNSS) and extending health-care benefits to self-employed workers.

<sup>57</sup> Art 1

<sup>58</sup> Art 3

<sup>59</sup> As set out in Article 10 of Act No. 212/AN/07/5th L of 20 February 2013 establishing the CNSS

In terms of Act No. 29/2017 of 29 June 2017,<sup>60</sup> Rwanda established the long-term savings scheme on a contribution basis given voluntarily by opening a savings account with a scheme administrator.<sup>61</sup> The law allows all Rwandans and foreign residents to join the scheme, which provides for old age, death and disability benefits.<sup>62</sup> Most importantly, the beneficiaries of long-term savings accounts include, inter alia, self-employed persons and workers operating in the informal sector who wish to open such an account.<sup>63</sup> Pursuant to this Act and on 14 December 2018, the Rwandan government launched *Ejo Heza*, which aims specifically to bring into the pension and savings net informal workers who were previously excluded because formal pension arrangements are restricted largely to salaried public and private sector employees (Chemuoni, 2018; Anonymous, 2019).

In Kenya, the Jua Kali Association, which represents informal sector workers nationally, partnered with the Kenya Commercial Bank to establish the Mbao Pension Plan in 2009. This is a voluntary private pension fund specifically targeting self-employed workers in the informal sector. Although it is a private scheme, the Mbao Pension Plan is established in terms of and must operate in compliance with the Retirement Benefits Act of 2007, which regulates all pension schemes in the country. Importantly, the Plan was established after extensive deliberation between the Jua Kali Association, the Retirement Benefits Authority, and other retirement benefits stakeholders (Odundo and Ouma, 2018). While this has been a commendable initiative, it is unclear whether it has been overtaken by the NSSF's subsequent inclusion of self-employed workers.

### **Contribution adaptations**

Significantly, Kenya has introduced an innovation in the calculation of contributions by the self-employed. Although the self-employed make the full contribution to the insurance scheme, the NSSF Act provides for a minimum contribution as well as minimum aggregate contributions in a year of a stipulated amount.<sup>64</sup> It further enables the responsible Cabinet Secretary to issue regulations that allow for flexibility in the timing of the contributions.<sup>65</sup> This means, for example, that a self-employed worker whose income fluctuates over time can make payments during busy periods. This innovation in the legislative framework allows self-employed workers whose income fluctuates to participate in social insurance schemes.<sup>66</sup>

Senegal is implementing extension schemes that are self-financed through member participants' flat-rate contributions in the absence of any specific remuneration factor such as wages – the classical basis for the assessment of contributions (Fall, 2002).

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<sup>60</sup> See Art 1 of Act No. 29/2017 of 29 June 2017 establishing the long-term savings scheme and determining its organization.

<sup>61</sup> Art 3

<sup>62</sup> Art 4

<sup>63</sup> Art 6 and Art 9

<sup>64</sup> Section 23 of the National Social Security Fund Act

<sup>65</sup> Section 26(e) of the National Social Security Fund Act

<sup>66</sup> The *Boda Boda* social insurance scheme allows for payment on a daily basis.





*Adja Mame Seyni Paye Diop has spent the past 24 years working as an iron and metal waste picker at the Mbeubeuss dumpsite in Dakar, Senegal. Like many other workers at this dumpsite, the COVID-19 pandemic has drastically affected her work and earnings. Photo credit: Marta Moreiras*

In the Social Security Fund (Caisse de Sécurité Sociale) the flat-rate contribution has been calculated on the basis of the ceiling in effect for the general scheme, with the rates being the same as for the general scheme. There is an option for daily collection of contributions (Fall, 2002). While this option may provide flexibility for self-employed workers, the failure to adapt contribution rates for these workers may render the contributions prohibitive for many.

The Rwandan *Ejo Heza* scheme is a defined contribution rather than a defined benefit scheme, which allows contributors to receive benefits linked to the amount they have contributed. In terms of Article 7 of the Act that established the scheme, members shall pay contributions based on their capacity, which makes contributions more flexible (Alfers, 2021). Contributions can be made at any time and any amount can be saved.

Another important adaptation relates to the waiver of penalties for voluntary members of insurance schemes, many of whom are self-employed. Kenya's NSSF Act<sup>67</sup> provides that the Cabinet Secretary can issue regulations that waive penalties for voluntary members.

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<sup>67</sup> Section 26(h) of the NSSF Act

### **Payment methods**

In terms of section 23(1)(c) of Kenya's NSSF Act, voluntary members (the majority of whom are self-employed) may pay their contributions directly to a designated Fund office, by mobile money, or by any other electronic transfer specified by the Board. Mobile money is the most widely used form of banking amongst low-income groups in Kenya. In addition, the reference to "any other electronic transfer specified by the Board" provides flexibility for the NSSF Board to designate other payment methods that are or may become popular amongst self-employed workers. The NSSF has operationalized this through the *Haba Haba* platform, which allows users to pay their contributions using the USSD Code \*300#. This makes it convenient and affordable for informal workers to make their contributions without having to leave their workplace.

### **Government co-contributions and incentives/subsidies**

The Government of Mauritius makes a co-contribution to self-employed workers' contributions towards the pension scheme. This is based on a contributory ration, which is currently pegged at the government paying MUR50 (USD1.24) for every MUR100 (USD2.47) paid by the self-employed. Co-contribution by the government ensures state buy-in and support to the self-employed. However, this commitment is made through the country's national pensions' policy, as opposed to legislation, making it more difficult to enforce the commitment should the government fail to make the necessary contributions. In addition, there are debates as to whether matching co-contributions can significantly impact coverage rates of the social insurance schemes (Alfers, 2021).

In Rwanda, Community-Based Health Insurance (CBHI) contributions are scaled-up based on the sliding scale of the *Ubudehe* system – an adaptation of a six-tiered indigenous system in which communities collectively decide on who requires additional support and assistance (also known as community-based targeting) (Alfers, 2021). Those who fall into *Ubudehe* categories 1 and 2 (approximately 17 per cent of the population) have their premiums fully subsidized by the Government; those who fall into categories 3 and 4 are part-subsidized; and those who fall into the upper categories do not receive state assistance (Urban et al, 2016).

The 2017 law that established the *Ejo Heza* scheme provides that the relevant Minister may issue an order to establish incentives for the savings scheme and provide for its administration.<sup>68</sup> In 2019, the Minister of Finance and Economic Planning passed a Ministerial Order that provides for government co-contributions, which serve as incentives for members to save up to specified targets.<sup>69</sup> Based on lessons learned from the CBHI, these incentives are associated with *Ubudehe* categories (Alfers, 2021). For instance, a category 1 or 2 member who saves at least RWF15,000 (USD16) in a year is eligible to receive a co-contribution from the government equal to 100 per cent of their savings.<sup>70</sup> Category 3 members are eligible to receive a 50 per cent co-contribution from

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<sup>68</sup> Art 28 of Law No. 29/2017 of 26/06/2017

<sup>69</sup> Ministerial Order No. 001/19/10/TC of 14 January 2019 determining Other Incentives for the Long-term Savings Schemes and Terms for their Administration

<sup>70</sup> Art 4(1) of Ministerial Order No. 001/19/10/TC of 14 January 2019

the state if they can save RWF18,000 (USD19) in a year.<sup>71</sup> The co-contributions are paid into the member's account. In addition, first, second, third and fourth category members who have saved up stipulated amounts within 12 months are eligible for special life- and funeral-insurance benefits subsidized by the government.<sup>72</sup> It is worth noting that the co-contributions are only made for the first 36 months after the establishment of the scheme (Alfers, 2021), and there is no provision for government co-contributions in the long-term.

### ***Long-term savings and short-term access***

An innovative mechanism to expand social insurance to the self-employed and domestic workers needs to take into account the distinct characteristics of the workers and their needs, especially the need for long-term insurance as well as access to short-term withdrawals. Ghana and Kenya offer flexibility in terms of access to benefits. Ghana's National Pensions Act 2008 provides for two types of savings by the self-employed (voluntary contribution) and domestic workers (mandatory contribution): the personal savings account and the retirement account. Workers can withdraw from their personal savings account at any time subject to the rules and regulations set out by the trust managing the account.

In addition, Article 9 of Rwanda's Law No.26/2017 allows members to withdraw part of their long-term savings to acquire a house or pay for education or use as a guarantee for a loan. According to a Ministerial Order that establishes the modalities for the payment of *Ejo Heza* benefits, members can withdraw 40 per cent of their savings and related interest for housing or education, or may give 40 per cent of their savings as collateral to acquire bank loans.<sup>73</sup>

In Kenya, the NSSF makes provision for self-employed workers to withdraw benefits under specific pension schemes. For example, informal workers registered under the Haba Haba scheme, can withdraw 50% of their contributions after consistently contributing for a minimum of five years.<sup>74</sup> However, this decision is made at the Fund's operational level and is not regulated by the NSSF Act.

While withdrawals from pension and/or provident benefits provide workers with short-term relief, these can have an adverse effect on current and future savings. In turn, withdrawals can have an adverse effect on households' future savings, which workers will require in old age. Moreover, such withdrawals may attract additional income tax.<sup>75</sup> The Ghanaian model, which allows for contributions to a separate short-term savings account, seems to strike a balance between the protection of future income and access to funds in the short term. There are proposals in Kenya to establish a Micro-Pension scheme that

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<sup>71</sup> Art 4(2) of Ministerial Order No.001/19/10/TC of 14 January 2019

<sup>72</sup> Art 4(3) of Ministerial Order No.001/19/10/TC of 14 January 2019

<sup>73</sup> Arts 6 and 7 of Ministerial Order No 001/18/10/TC OF 5 December 2018 determining the modalities of granting long-term schemes benefits

<sup>74</sup> *Haba Haba* NSSF, <https://www.nssf.or.ke/haba-haba-na-nssf>

<sup>75</sup> See section 8(5) of the Income Tax Act CAP.470 of 2010, Kenya

would combine long-term savings and short-term withdrawals. This scheme would be open to all previously excluded informal-sector workers (Parliament of Kenya, 2021).

In Rwanda, the Ministerial Order on benefits provides three safeguards against the depletion of savings. First, it requires that a member must have at least RWF4 million (USD4,067) remaining in the account after withdrawing a lump sum or giving part of their savings as loan security.<sup>76</sup> Second, a member can only withdraw a lump sum once in five years, which arguably allows for the replenishment of their savings.<sup>77</sup> Third, a member cannot withdraw a lump sum alongside a loan security.<sup>78</sup>

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The above discussion demonstrates how legislation can be used to introduce adaptations, including adapted contributions and payment methods, to allow self-employed workers to participate in social-insurance schemes. These adaptations can either be introduced in the context of extending existing schemes to cover self-employed workers (integration) or creating special schemes that are exclusively for self-employed workers (stand-alone schemes).

While the Ghana and Kenya stand-alone schemes provide an avenue to customize social protection for workers in the informal sector, there are concerns about their viability. First, these schemes are essentially reliant on private savings, so they are not strictly social-insurance models. Social insurance implies there would be some redistributive element in the financing of the schemes, as observed in schemes that incorporate workers in the formal sector, for example Ghana's NHIS. However, in the Ghana and Kenya pension examples, informal workers' benefits are funded by their own savings and the interest on those savings. There is no redistribution from the formal sector and there are no co-contributions from the state.

In Kenya, the model of integrating self-employed workers into the NSSF strikes a balance by allowing for redistribution from the formal sector, while allowing for customization. The NSSF Act makes the inclusion of self-employed workers one of its objectives, and mandates the relevant Cabinet Secretary to adapt the Fund's rules and procedures to accommodate such workers. This law commits the government to adapt the details of the scheme and provides a basic framework for what needs to be done, while allowing the Cabinet Secretary (in consultation with a representative Board) the flexibility to adapt the rules as needed. Importantly, the NSSF Act provides for the inclusion of self-employed worker representatives on the board that makes the decisions about pension funds.

### ***Inclusion in social-security funds' governing structures***

One of the factors that prevents the meaningful extension of social insurance to self-employed workers is the limited understanding of their needs and circumstances amongst

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<sup>76</sup> Arts 6 and 7 of the Ministerial Order

<sup>77</sup> Art 6 of the Ministerial Order

<sup>78</sup> Art 6 of the Ministerial Order



the governing bodies of social-security funds. This is because self-employed workers are often excluded from the funds' governing bodies. Section 26(f) of Kenya's NSSF Act seeks to address this by empowering the responsible Cabinet Secretary to make regulations about the representation of an organization representing self-employed persons on the Board. The NSSF Act regulations have not operationalized this provision, and the composition of the Board is currently restricted to government, employers, trade unions and professionals. Self-employed workers' organizations can therefore demand that the Cabinet Minister issue regulations to enable their representation.

### **Social assistance**

Many of the forms of social protection that may provide coverage to self-employed informal workers are found within non-contributory social-assistance programmes, which predominate particularly in Anglophone countries.

Social-assistance programmes are rooted in both law and policy in sub-Saharan Africa. In most Anglophone countries, social assistance is embedded in policy and legislation does not play a role in its regulation. Other countries have either wholly or partially embedded their social-assistance in laws, meaning that social assistance is provided for in law only, or a combination of law and policy. The laws that we identified fall into three categories:

- Dedicated welfare or social-assistance laws;
- Legislation that covers both social insurance (contributory schemes) and social assistance (non-contributory schemes);
- Legislation that focuses on particular social groups and includes social assistance for them.



Table 3 outlines how laws are used to provide for social assistance in Anglophone African countries

**Table 3: Laws providing for social assistance in Anglophone African countries**

Laws	Countries
No laws	Botswana, Eritrea, Eswatini, The Gambia, Ghana, Malawi, Nigeria, South Sudan, Uganda, Zambia
Dedicated social-welfare or social-assistance laws	Kenya Social Assistance Act 2013 South Africa Social Assistance Act 2004 Mauritius National Social Aid Act 1983 Seychelles Agency for Social Protection Act 2011 Zimbabwe's Social Welfare Assistance Act 1988  Note: These Acts provide for one benefit or a range of social benefits.
Inclusion in legislation that covers both contributory schemes and non-contributory benefits	Lesotho's Old Age Pensions Act 2005 (old-age benefit) Liberia's National Social Security Corporation Act 2017 (old-age assistance, pension, disability benefit) Mauritius National Pensions Act 1976 (orphan's pension, old-age pension, invalidity pension, widow's pension, carer's allowance) Namibia's National Pensions Act 1992 (old-age pensions; invalidity benefits) Seychelles Social Security Act 2010
Inclusion in legislation that targets particular groups	Liberia's Children's Law 2011 (for children requiring special care) Namibia's Child Care and Protection Act 2015 (foster-parent grant, child disability grant, maintenance grant) Sierra Leone Persons with Disabilities Act 2011 (free medical care) Zimbabwe War Victims' Compensation Act 1980 (compensation for war victims)

Several Francophone countries have provided for some social assistance programmes through legislation, although this largely targets specific vulnerable groups of people, including children and people with disabilities. Table 4 outlines the countries that have legislation providing for social-assistance programmes for certain categories of people. Three countries – the DRC (Social Protection Support Programme), Equatorial Guinea (Short- to Medium-term Social Measures), and Niger (social safety net for the vulnerable and the poor) – provide for general income support for vulnerable or poor beneficiaries. Two countries (Burundi and Madagascar) have Acts that provide donor-funded cash transfers to extremely poor households.<sup>79</sup> Djibouti appears to be the only country that has legislation that establishes social-assistance programmes and a Social Welfare Agency, which are likely to cover a range of benefits, as is the case in Kenya, Mauritius, the Seychelles and South Africa.

<sup>79</sup> The Acts relate to agreements signed by the relevant governments and the International Development Association.

**Table 4: Laws providing for social assistance for specific groups in Francophone African countries**

Group	Countries
Mothers, and children below the age of 5 (maternity and health services)	Benin, Burkina Faso
Children	Benin, Burkina Faso, Chad, DRC
People living with disabilities (health care and material support)	Benin, Burundi, Central African Republic, Chad, Djibouti, Senegal
People living with HIV/AIDS (free medical care and other material support)	Benin, Burundi, Cameroon, Central African Republic, Chad, Congo-Brazzaville, Djibouti, Guinea
Child survivors of violence/trafficking	DRC, Gabon, Madagascar, Togo
Survivors of gender-based violence	Benin, Burkina Faso, DRC, Rwanda, Senegal
The elderly	Burkina Faso

Our analysis of the legislation of countries whose social-assistance programmes are embedded in law identified the following roles that the law plays in providing for social assistance:

- *Outlining the nature of the available benefits and stipulating the eligibility criteria.* For example, South Africa’s Social Assistance Act of 2004 provides for several benefits, including the old-age grant, disability grant and child-care grant, and stipulates the eligibility criteria for each one. Zimbabwe’s Social Welfare Assistance Act of 1988 provides for cash and in-kind assistance for people who are indigent or destitute.<sup>80</sup> The assistance is available to persons who are over the age of 60, people with disabilities, invalids, or dependents of indigent people.
- *Outlining the process of application and the factors to guide the consideration of applications.* Most laws require applicants to apply in writing on a prescribed form. The Seychelles Agency for Social Protection Act<sup>81</sup> requires the Agency to communicate its decision in writing, while the Zimbabwe’s Social Welfare Assistance Act<sup>82</sup> requires the Welfare Office to respond within a reasonable time.
- *Establishing institutional structures to regulate social assistance and allowing different stakeholders to participate in decision making.* The Seychelles Agency for Social Protection Act established a board to manage the Agency’s affairs.<sup>83</sup> The board comprises representatives of government, business, and civil-society organizations.
- *Establishing complaints mechanisms for aggrieved applicants or beneficiaries.* The Seychelles Agency for Social Protection Act<sup>84</sup> and South Africa’s Social Assistance

<sup>80</sup> Sections 3 and 5 of the Social Welfare Assistance Act

<sup>81</sup> Section 14 of the Agency for Social Protection Act

<sup>82</sup> Section 4 of the Social Welfare Assistance Act

<sup>83</sup> Sections 6–9 of the Agency for Social Protection Act

<sup>84</sup> Sections 24–26

Act<sup>85</sup> provides for aggrieved applicants and beneficiaries to appeal against a decision to a review panel and an independent tribunal respectively. Section 10 of Zimbabwe's Social Welfare Assistance Act allows an applicant or beneficiary to approach the Minister responsible for welfare to appeal against the Welfare Office's decision.

- *Protection of social grants.* The South African Social Assistance Act<sup>86</sup> and Zimbabwe's Social Welfare Assistance Act<sup>87</sup> prohibit the transfer, cession, pledge or execution of rights to a social-assistance grant in order to ensure that a beneficiary receives the full benefit before any person can exercise any rights or enforce any claim against the beneficiary.

Social-assistance programmes have the advantage of bypassing any criteria for an employment relationship and are usually aimed at poorer citizens, which is why they may theoretically provide coverage for poorer self-employed informal workers.

The issue is that, in reality, many self-employed informal workers are unlikely to qualify for social assistance on the grounds that they do not meet the eligibility criteria. This is particularly so for means-tested programmes where informal workers are not “poor or vulnerable enough” to qualify for benefits. For example, out of the 14 Anglophone countries where unemployment benefits are available, 9 specify explicitly that these programmes are targeted at “vulnerable”, “poor” or “ultra-poor” individuals or households, or (as is the case in South Sudan) will cover only certain categories of self-employed workers.

There are exceptions to this general rule. For example, analyses conducted in South Africa during the COVID-19 crisis showed that the means-tested Child Support Grant (CSG) reached many households in which informal workers resided (Bassier et al, 2020). However, the threshold in South Africa is set at a relatively generous level, and could be considered an example of “affluence testing”, where the relatively well-off are excluded and everyone else is included, rather than means testing where only the poor or very poor are included.

Universal social pensions are also effective at reaching informal workers. In Durban, South Africa, research found that significantly more older workers (over the age of 60) had received COVID-19 crisis-related cash benefits than younger workers (Alfers, Galvani, et al, 2021). In large part this was because the social pension reaches many informal workers and was therefore an effective mechanism for the delivery of crisis relief.

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The extent to which African countries have lived up to their obligations differs in relation to contributory and non-contributory forms of social protection. In terms of contributory social protection, Francophone countries have a longer history and a more

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<sup>85</sup> Section 18

<sup>86</sup> Section 20

<sup>87</sup> Section 9

widespread tradition of including self-employed workers in social-insurance schemes than Anglophone countries. In both Anglophone and Francophone countries, coverage is largely limited to a few benefits, with old age being the most widely covered and a few countries including workers' compensation (Francophone countries) and disability benefits. This means that self-employed workers remain vulnerable in the face of most contingencies, including maternity, sickness, and unemployment, even in countries whose social-insurance schemes extend beyond paid employees.

Extending contributory protections to self-employed workers requires more than expressly including them in schemes that have traditionally served paid employees or establishing special schemes for them. It requires that the laws outline concrete measures and mechanisms to enable self-employed workers to meaningfully participate in social-insurance schemes. These include adaptations to registration procedures, contributions, and payment methods, as well as benefits such as short-term access to funds. Despite the fact that self-employed workers have been included in contributory schemes for a fair amount of time in some countries (especially Francophone countries), these legal innovations are a more recent development and have been registered in only a few countries. From our analysis, Ghana, Kenya and Rwanda appear to have the most extensive provisions to accommodate self-employed workers. It must however be noted that, to the extent that Rwanda's and Ghana's schemes focus on the private savings of workers in the informal sector and do not allow for long-term co-contributions from the government, they are not strictly social-insurance schemes.

The meaningful participation of self-employed workers also requires that they be included in the governance and decision-making structures (e.g. boards) of national social-insurance agencies. Our analysis shows that few of the countries have institutionalized social dialogue by including social partners (i.e. worker and employer organizations) in the governance structures of social-insurance agencies. Where these structures include social partners, workers' participation is largely limited to trade unions that organize in the formal economy. Only Kenya, through its NSSF Act provides for the inclusion of informal workers' organizations on the NSSF Board.

Notably, two of the countries (Kenya and Rwanda) that have gone the furthest towards including self-employed workers in contributory social protection envisage that this will be realized through a combination of original or primary laws – Acts of Parliament on the one hand, and delegated or subordinate laws, including regulations, directives and decrees of the executive, on the other. In principle, this allows for primary laws that establish commitment towards and provide for a broad framework for inclusion, while allowing for the detailed modalities of inclusion to be addressed through secondary laws that can be adapted and amended according to changing circumstances and needs. For example, Kenya allows for regulations to determine contribution payment methods, while Rwandan law allows for regulations to outline the modalities of withdrawal of funds for specified uses. While there appears to be merit in adopting this approach, there is a danger that in the absence of appropriate safeguards and provision for meaningful stakeholder participation, the executive may issue regulations that are out of touch with the realities of workers.

When it comes to non-contributory forms of social protection, our analysis shows that the majority of schemes and programmes in the surveyed countries are embedded in

policy rather than law. In most countries that have laws to regulate social assistance and social services, the laws only relate to specific groups (e.g. children and the elderly), or to a specific form/area of protection (e.g. health care or access to food). Very few countries have laws that cover different groups and different forms of social protection in a comprehensive manner (e.g. South Africa's Social Assistance Act).

There are several dangers of leaving social assistance and social services outside of the law. One relates to the process of adopting policies, which may not necessarily require transparent and inclusive processes that allow stakeholders to influence the policy content. Another challenge is the lack of clear rights and the inability to enforce the beneficiaries' claims against the state. Additionally, there is the absence of clear oversight and accountability mechanisms, including the establishment of a board that is representative of the stakeholders, and appropriate complaint mechanisms. Our analysis shows that most social-assistance and social-service programmes in the selected countries, whether embedded in law or in policy, are not designed with the needs of self-employed workers in mind.

## **Social Protection, Self-Employed Informal Workers and the COVID-19 Crisis**

In 2020, the COVID-19 crisis prompted an unprecedented expansion of relief efforts, many of which were built on existing social-protection systems. By early 2021, the World Bank estimated that over 3,000 relief programmes had been instituted globally (Gentilini et al, 2020). The provision of temporary relief measures should not be confused with longer term social protection. Understanding what happened during the crisis may expand the limits of what is considered possible by governments and wider society. For example, the fact that informal workers were often (at least in theory) included as beneficiaries of relief measures has opened up a necessary conversation on how better to include these workers in longer term social-protection schemes.

The following section provides an overview of relief measures and an analysis of the extent to which they built on legal entitlements to social protection. It also looks at the case law that developed during 2020, concluding with a wider reflection on the ways in which law was used during the crisis and what this may mean for the future of rights-based social protection in the region.

As seen in Table 5, across the countries surveyed for this study, the most common relief intervention came in the form of cash benefits, followed by food benefits, and "other" in-kind benefits including water, electricity and rent subsidies. The following section provides further details on these measures, particularly focusing on relief efforts that are either built on or may have implications for the development of social-protection systems.



**Table 5: Forms of COVID-19 social relief in SSA including coverage of informal workers<sup>88</sup>**

Form of relief	Anglophone countries (no. out of 19 surveyed countries)	Francophone countries (no. out of 19 surveyed countries)
Social insurance adaptations	2	1
Income subsidy	2	0
Cash benefit	13	10
Food relief	10	10
Health benefits	2	5
Loans/Business support <sup>89</sup>	3	1
Other in-kind <sup>90</sup>	11	8

### Relief measures and social protection

Very few interventions attempted to reach self-employed informal workers by building relief measures off contributory social-protection schemes. Although there are increasing efforts from African governments to extend contributory social-protection schemes to self-employed informal workers, this is likely a reflection of the fact that many of these schemes have low coverage rates, particularly amongst more vulnerable self-employed workers.

An exception to this was Kenya's NSSF, which includes legal provisions to allow for an early drawdown of savings. In terms of section 45, a member of the Provident Fund shall be entitled to a lump-sum withdrawal benefit equal to the member's Provident Fund Credit at the date of the withdrawal, if at the time of claiming the benefit the member was no longer in self-employment. During 2020, the NSSF recorded an increase in requests for advance payments on pension benefits. It predicted that by January 2021, it would have paid out KES 1.2 billion.

This early withdrawal of long-term savings is likely to threaten the income security of workers in older age. Nevertheless, the ability of Kenyan workers to access these funds did lead to demands from workers in neighbouring Uganda to pay out benefits from its own NSSF. However, the Ugandan NSSF cannot pay out a portion of the accumulated contributions to members due to the restriction under the empowering legislation. Specifically, the NSSF Act No. 8 of 1985 does not provide for mid-term or short-term benefits. There is currently a draft NSSF bill before Parliament which aims, amongst other things, to include mid-term access to benefits.

<sup>88</sup> As announced by governments. This does not reflect actual implementation.

<sup>89</sup> Includes only those programmes which specifically included the informal sector.

<sup>90</sup> Includes rent relief and waivers on payments for basic services, fuel relief.

Social-insurance funds were also used to contribute to wider relief efforts. In Ghana, for example, the Social Security National Insurance Trust (SSNIT) provided GHC 500,000 towards COVID-19 relief efforts from its reserve funds, as did the Ghanaian National Health Insurance Agency which provided an additional GHC 250,000. The transfer of funds was made under section 40(2c&d) of the National Health Insurance Act of 2012. The Act establishes the National Health Insurance Fund, whose objectives include facilitating the provision of access to health-care services and to invest in any other facilitating programmes to promote access to health services. A further rationale for the transfer was that financial pressure on the scheme would be reduced by proactive government interventions to combat the pandemic.

The use of social-insurance reserve funds for relief efforts has been controversial. On the one hand, the availability of these funds underscores the importance of the social-protection mix (a combination of social assistance and social insurance) in building resilient social-protection systems. On the other hand, the use of reserves in this way potentially threatens the financial viability of social-insurance schemes, and may ultimately lead to a reduction in future benefits for members. In India, for example, trade unions have rallied against the use of Construction Workers Welfare Board funds to finance relief efforts, arguing that workers' own contributions should not be used to finance relief efforts because this action threatens the sustainability of the funds (Jigeesh, 2020).

More commonly seen were relief efforts that leveraged social-assistance schemes. Cash transfers, for example, were adapted to provide COVID-19 relief in three different ways: by expanding coverage, increasing benefits, and making administrative requirements simpler and more user-friendly. South Africa's response to its national lockdown measures included early payments for April 2020 social grants, and increases to the grants until October 2020. As already mentioned, the CSG was found to be well-targeted at households in which informal workers reside.

Similarly, Kenya increased the amounts paid out by existing social-assistance schemes. A total of 1,094,238 people benefited from the top-up on the existing cash-transfer schemes. The top-ups were general as well as targeted for specific social-assistance schemes. For example, *Inua Jamii* beneficiaries were targeted to receive KES 8,000 each as a once-off payment. The *Inua Jamii* is a government safety-net programme that provides cash transfers for orphans and vulnerable children, older persons, and persons with disability, as well as a hunger safety-net programme. Besides the cash top-ups to existing schemes, the Kenyan government also appropriated KES 10 billion for supporting the elderly, orphans, and other vulnerable members with cash transfers. The duration of the cash transfers varied from once-off payments to temporary payments for a limited duration, which varied from 1 to 3 months in general, and 6 months in the case of South Africa.

Besides the adoption of cash grants and increases in cash-grant payouts, some countries also introduced new cash transfers in response to the pandemic. A number of these were intended to reach self-employed informal workers who fall outside existing social-protection systems. In South Africa, the COVID-19 Social Relief of Distress grant was introduced, running on a monthly basis until April 2021. The grant paid out ZAR 350 per month for six months to people who are unemployed but not receiving any social grant

or support from the UIF. Specifically, in terms of section 6(vii)(cc), the grant was made available to South African citizens, permanent residents, and refugees impacted by the COVID-19 national disaster. This grant was one which the self-employed could benefit directly from in the event of loss of income and jobs due to lockdown measures.

Mauritius introduced a new scheme targeted at workers in the informal economy: the COVID-19 Assistance Scheme for the self-employed and MSMEs. Eligible self-employed individuals received financial support of MUR 5,100 for 1 month between 16 March 2020 and 15 April 2020. Self-employed individuals who are either in business such as hawkers, hairdressers, or casual workers like plumbers, and artists were eligible for the scheme. For the self-employed, total monthly income should not have exceeded MUR 50,000. In Namibia, the government introduced a once-off universal cash-grant. The Emergency Income Grant (EIG), a once-off payment of NAD 750 was provided by the government to each eligible individual aged 18 to 59. The scheme was meant for people in the formal and the informal sectors who would have lost their jobs and not received any other grants.

The Togolese government set up a cash-transfer scheme (Novissi), worth at least 30 per cent of the minimum wage, via mobile money for all Togolese citizens residing in the country, predominantly those in informal employment. The scheme covered Togolese citizens of at least 18 years of age residing in the country and holding a voter registration card whose income had been seriously disrupted or lost as a result of the measures taken by the government to contain the spread of COVID-19.

Besides the cash transfers, the COVID-19 pandemic prompted an increase in in-kind support. This was primarily in the form of food and the provision of personal protective clothing. In Ghana, the government made provisions for food packages and hot meals. In South Africa, the government initially introduced food parcel distribution, with 25,000 parcels distributed over 2 weeks, and a new system of vouchers was introduced for South African Social Security Authority (SASSA) grant recipients (later replaced by the SRD Grant). The government further put in place measures to prevent excessive pricing on basic food and consumer items, emergency products and services, including medical and hygiene supplies. Kenya put in place similar food distributions through the Kenya COVID-19 Emergency Response Fund funded by government and donors.

### **Other relief measures**

Relief measures that impacted on self-employed workers were also provided through other areas of state programming. Utility fee waivers for basic services like water and electricity were common. For example, in Ghana all water bills for Ghanaian residents were absorbed for 3 months, later extended for a further 3 months. An intervention more directly focused on self-employed informal workers were market-stall fee waivers seen in Mauritius, where fees were waived for 6 months. In South Africa, the Minister of Small Business Development issued a directive for the waiver of fees for extensions and new applications of food hawker licenses until the end of December 2022.<sup>91</sup>

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<sup>91</sup> This relates to cooked and perishable food.

Business support measures designed to support small and medium enterprises (SMEs) were instituted in some of the countries surveyed. However, even when such measures were put in place, many informal-sector workers were excluded by eligibility criteria and administrative processes. In Ghana, a GHC 600-million fund to support small businesses was created under the Coronavirus Alleviation Programme (CAP), but out of the approximately 800 informal-sector applicants from the Greater Accra Markets Association (GAMA), only 100 reported receiving support. The programme was not designed to be easily accessible by informal workers – there was no office to visit for assistance, the entire application process was online, and it required a taxpayer identification number (TIN), which many workers would not have (WIEGO, 2021a).

South Africa instituted the Township and Rural Enterprise Programme (TREP) providing part-grant, part-loan to small businesses in certain sectors. However, the eligibility criteria required registration with multiple state entities and included provisions which made it very difficult for informal-sector enterprises to comply (Skinner et al, 2021). It has been suggested, in the South African case (and potentially true in Ghana), that the programme was intended to promote the formalization of the informal sector through onerous registration procedures, rather than through supportive policies (Skinner et al, 2021).

Exclusion from business-support measures echoes the fact that, while governments did put in place protective measures on an unprecedented scale, many of them were not accessible to informal workers. Indeed, in general it can be argued that self-employed informal workers fell through the cracks of much of the response. On the one hand, they were not considered as workers for the income-protection measures which were largely reserved for wage workers in formal firms (for example the Temporary Employer/Employee Relief Scheme (TERS) in South Africa). They were also excluded from business-support measures, even those targeting MSMEs, and, with some exceptions discussed above, they were also not well covered by measures built on social assistance.

These facts are borne out by the data. For example, in WIEGO's COVID-19 Crisis and the Informal Economy Study of 12 cities it was found that, despite the policy rhetoric about the need to reach informal workers with relief, less than half of the informal workers surveyed had received any kind of relief (Alfers, Ishmael, et al, 2021). In Accra, Ghana, only 15 per cent of respondents reported receipt of food relief (WIEGO, 2021a). In Dakar, Senegal, only 11 per cent reported the receipt of food relief (WIEGO, 2021c), and in Durban, South Africa, even with relatively extensive social-assistance programmes in place, under 40 per cent of workers reported receiving cash support (WIEGO, 2021b).

### **Reflections on the use of law during the COVID-19 crisis**

This report has shown that law is an important tool to give effect to the right to social protection and has considered the extent to which pre-pandemic social-protection programmes and schemes are embedded in law. Recognizing that laws provide beneficiaries with stronger, more enforceable claims than policies, it is worth considering the extent to which countries used laws to extend and otherwise regulate the provision of social protection and relief during the COVID-19 crisis. This section reflects on the use of law to provide social protection and relief during the crisis, and captures some broad patterns under the following themes: the use of laws in the overall response to COVID-19; forms of social protection (contributory v. non-contributory v. relief); and

the nature of laws (original v. subordinate). The section concludes with some reflections on the role of social dialogue in decision making about COVID-19.

It is worth considering the extent to which social protection and relief were a priority for lawmakers exercising original (Parliament) and delegated (Presidents/Prime Ministers/Ministers) legislation. A comparison of the use of law in the overall response to COVID-19 that is, the use of law for social protection and relief seems to suggest that the latter was not a priority for lawmakers in Anglophone countries. Most Anglophone countries enacted large volumes of laws to respond to the crisis, the majority of which regulate the “do’s and don’ts” of lockdowns: curfews, essential services, public-transport restrictions, travel restrictions, social-distancing rules, mask mandates, and health-and-safety regulations in the workplace. Essentially, lawmakers prioritized the need to regulate and control the pandemic by imposing obligations and restrictions on citizens, businesses and employers. These were backed by fines and in some cases prison sentences for transgression, and extensive government resources including police and military personnel were immediately deployed to monitor and enforce compliance. The state’s “efficiency” played out in the widespread reports of roadblocks, checkpoints, and of arrests, detentions and fines for transgressions including failure to wear a mask or observe social distancing – all in the interest of preventing the spread of the virus and saving lives.

Anglophone countries in particular made little use of legislation to provide for social protection and relief, leaving most of these measures to be made in terms of policy expressed in press statements and addresses by Presidents or Ministers, cabinet decisions, circulars by Ministers, or in response programmes, and relief and recovery plans. Despite their aims to mitigate the economic fallout of the pandemic and save people from hunger and deprivation, relief programmes were not implemented with the same level of rigour and efficiency, and there were limited avenues for citizens to make complaints or demand the expedition of benefit payments. In many ways this reflects the more general observation that the state has historically treated self-employed informal workers as a “problem”, codifying punitive and restrictive regulation of this group while making little progress in extending to them the protective arm of the state (Chen and Carré, 2019).

To some extent, the limited use of law for (largely non-contributory) social protection and relief reflects the position of existing social-assistance programmes. These are largely embedded in programmes, strategies and plans, as opposed to legislation. While social insurance is largely embedded in law, it played a less prominent role in the response to COVID-19, with only three countries modifying the existing rules to allow workers to access benefits for risks arising from the pandemic. These patterns were similar across both Anglophone and Francophone countries.

Turning to the nature of the laws that were passed, our analysis of both Anglophone and Francophone laws shows that governments used more subordinate/delegated



legislation and less primary/original legislation<sup>92</sup> in their overall COVID-19 responses and (where applicable) in relation to their social protection and relief. Parliament has wide-ranging powers to pass laws on any matter, provided it does not conflict with the Constitution. However, its disadvantage is the complexity of the democratic law-making process where expediency is key: passing or amending an Act of Parliament typically involves long processes of consultations, deliberations and debates, which were further complicated by the imposition of COVID-19 restrictions.

The advantage of delegated legislation is that it can be passed fairly quickly as it is not subject to the same scrutiny and processes as original legislation. However, its main disadvantage lies in its strength: the absence of consultative processes makes it undemocratic. Members of the executive have free rein to determine the content of regulations and other delegated laws, provided they stay within the limits of the empowering primary laws.

While the differences outlined above suggest there was little room to pass Acts of Parliament to extend protection during the pandemic, a few examples show that political will may play a key role. During the pandemic, some countries passed or amended Acts of Parliament within a month or less. For example, in Ghana the Income Tax (Amendment) Act 2020 was passed on 18 May 2020 to remove the income tax withdrawals from pension funds, thereby increasing the sums of money workers collected. In addition, some Anglophone countries passed laws to establish COVID-19 Relief Funds. These laws established the Funds as statutory entities, illustrating how parliaments can expeditiously move to extend protection where the political will exists.

### **Social dialogue and worker involvement in decision making during the crisis**

It is important to consider the extent to which the national bodies that countries established to plan and oversee the implementation of the overall COVID-19 responses accommodated social partners, and informal workers' organizations in particular. The overwhelming majority of the 38 African countries surveyed did not expressly include informal-trader organizations in the composition of the special task forces, committees and consultative bodies they established to lead the national responses to the COVID-19 pandemic. Laws establishing relief funds hardly included social partners in the governance structures, although in some cases trade unions were included (e.g. Senegal). Some countries, including Guinea, deliberately excluded social partners from COVID-19 structures, arguing that there was "no time for social dialogue". In countries such as Lesotho and Zimbabwe, informal-trader organizations complained that the governments had not consulted or involved them in COVID-19 decision-making structures and processes.

Having failed to secure seats at the table, informal workers' organizations have gone beyond COVID-19 structures to further the interests of their constituencies, either

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<sup>92</sup> Original or primary legislation is law passed by the branch of government that has primary law-making power, namely Parliament or in some countries the Senate. Subordinate or delegated legislation comprises instruments passed by a designated office-bearer or entity that is mandated to do so under an Act of Parliament.

because they cannot access the COVID-19 structures, or to complement or reinforce their strategies within those structures. The informal workers' organizations have negotiated with governments about the COVID-19 response and, in some instances, have used pressure tactics to draw governments' attention to their demands.

South Africa is one example where informal workers' organizations have formally engaged with the government on COVID-19 matters. This happened through the country's national social dialogue structure called the National Economic Development and Labour Council (NEDLAC). NEDLAC comprises representatives of business, government and labour, as well as the community constituency, which includes a coalition of informal workers' organizations. NEDLAC established a Special Executive Council on COVID-19 in response to the President's call for collaboration, cooperation and common action (Department of Health, South Africa, 2020). The Special Executive Council has discussed a range of matters, including workplace adaptations and support for workers and companies affected by COVID-19. Although informal-trader organizations are not directly included in the National Command Council (NCC) on COVID-19, they have indirectly influenced its decisions because they are represented in a recognized social dialogue institution.

Informal workers' organizations have also approached, lobbied and negotiated with national and local governments on issues affecting them in Namibia, Sierra Leone and Zimbabwe. These engagements have focused on the modalities and rules for continued trade or return to trade, rather than social protection and relief measures.

Ironically, the expression of informal workers' need for social protection and/or relief at national level has been more strongly expressed by and through trade unions than informal workers' organizations. This situation may exist for multiple reasons. As social protection's "missing middle", most informal workers have had little experience of social-protection schemes, and so it may not feature strongly in their demands. Moreover, it is unlikely that relief efforts would provide sufficient income replacement. Under these circumstances, informal workers' organizations have tended to prioritize advocacy around the right to return to work.

Nevertheless, organizations can leverage their relationships with trade unions – who are more likely to have the ear of the government – to represent their interests in pandemic-related policy responses. To this end, the African Regional Organisation of the International Trade Union Confederation (ITUC-Africa) called on its national affiliates to raise awareness of the needs of informal workers, to help them secure a voice and representation during the pandemic, and to raise public awareness of their economic contribution (ITUC-Africa, 2020). Formal trade unions were represented in national COVID-19 task forces in countries including the Ivory Coast, Botswana, Burundi, Kenya, Liberia, Mali, and South Sudan.

Trade unions represented on national COVID-19 task forces and committees have served as a conduit for informal traders to place their issues on the agenda. The Liberian Labour Congress (LLC) successfully advocated for a COVID-19 Task Force to be established. It also advocated for the provision of material support for informal workers who were unable to work due to the lockdown, and for the establishment of a food-aid distribution committee.

In Malawi, the Malawi Union for the Informal Sector (MUFIS) is an affiliate of the Malawi Congress of Trade Unions. When the government announced an extreme lockdown in April 2020, the Congress demanded government pay informal traders an allowance to cover their basic needs under a lockdown. The Congress' demands coincided with pressure from ordinary informal traders who demonstrated against the government's lockdown announcement and a court case challenging the government's failure to provide relief to workers (including informal traders) who were unable to work during lockdown (BBC, 2020).

In Senegal, a committee established to monitor the COVID-19 Response Fund includes 1 representative from the National Federation of Workers of Senegal (CNTS). Since CNTS represents informal workers through its affiliate *Syndicat National des Travailleurs de l' Economie Informelle* (SYNATREIN), this opens the possibility that the interests of informal traders are taken into account in the allocation of the Response Fund.

A potential development in the dialogue between the Senegalese government and informal workers' associations is the ongoing negotiation of a memorandum of understanding (MOU) between the CNTS, the High Council for Social Dialogue (HCDS) and WIEGO. The overall objective of the proposed MOU is to explore the possibility of negotiations and collaboration to promote the social, economic and political capacity of informal workers. The draft MOU specifically seeks to promote the inclusion of informal workers' needs and interests in the COVID-19 recovery plan, in line with the protections in ILO Recommendation 204 concerning the Transition from the Informal to the Formal Economy.

Governments of countries such as Chad, Congo-Brazzaville, Eritrea, and Mauritius have not consulted social partners on the response to COVID-19. Trade unions in some of these countries have nevertheless supported informal workers' organizations. For example, in Chad and Rwanda, trade unions have publicly expressed concern for the neglect of informal traders' interests and, in Chad, trade unions have mobilized resources to support them. In addition, Angola's trade union federation, the National Union of Angolan Workers (UNTA), donated personal protective equipment (PPE) to workers in the informal sector (ITUC-Africa, 2020).

The trade union movement in Benin has been active in raising awareness about the virus through print and social media despite the government not engaging with social partners on the national response to COVID-19 (ITUC-Africa, 2020). Benin's Central Union for Private, Public and Informal Sectors (CUPPIS) and five union federations representing formal workers signed a charter for unity for trade union action in Benin. This coalition negotiated with the employers' association and the Chamber of Commerce and Industry. The coalition signed and presented the government with a joint memorandum demanding relief for the most affected enterprises, social-protection measures for workers, and an economic stimulus package. Joining forces with the formal workers' federations enabled CUPPIS to participate in developing a broader platform of workers' demands and provided it with an opportunity to cooperate with employers' organizations.

### Case law during the COVID-19 crisis

The lack of adequate social-protection measures for the public during COVID-19 lockdowns has been the subject of litigation in Malawi, South Africa, Uganda and

Zimbabwe. Although none of these court cases were initiated by informal-trader organizations, the applicants in all of the cases argued that informal traders would suffer in the absence of food and/or cash grants during the lockdown.

In *Kathumba and Others v President of Malawi and Others*,<sup>93</sup> human rights organizations challenged Malawi's lockdown regulations on various grounds. These included the argument that the government's failure to provide social-protection interventions to cover most Malawians violated their right to social protection. The High Court suspended the lockdown on the grounds that the government had not adequately provided for social assistance for workers (including informal traders) who would be unable to work. Two weeks after the High Court decision, the government announced that it would introduce cash handouts of about MWK35,000 (USD40) per month for 172,000 households for 4 months (BBC, 2020). It later referred the matter to the Constitutional Court for review.

The Constitutional Court held that it was unconstitutional to impose a lockdown without regard to the right to social security, which was implied in the right to life and the right to a livelihood. The Court noted that the government's commitment to provide less than MWK35,000 for less than 200,000 urban households was inadequate given that 89 per cent of Malawians constitute the informal workforce and that the grant was one-third of the cost of a basket of basic necessities.

After striking down the lockdown regulations,<sup>94</sup> the Court recommended measures the government should take to ensure that it complied with its constitutional and international obligations when imposing future lockdowns. It recommended that the government should be guided by cogent research on the numbers of those affected by the lockdown, and to adopt "practical and realistic social security measures [to] respond to the ensuing socioeconomic needs of the indigent ones". It recommended the government consider issues including:

- i) the impact of the lockdown on school children who depend on school feeding programmes;
- ii) the impact on the sexual and reproductive health rights of women;
- iii) the impact on general access to healthcare;
- iv) the additional burden on women's care work;
- v) the impact on child-headed households.

In *Center for Food and Adequate Living Rights v Attorney-General*,<sup>95</sup> a Ugandan human rights organization approached the High Court for an order declaring that the government had violated the right to food during lockdown. The Centre argued that the national lockdown rendered the majority of Ugandans unable to access food, including 87 per cent of the

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<sup>93</sup> Constitutional Ref. 1/2020, accessed on 1 June 2020

<sup>94</sup> The primary grounds for this order related to the finding that the Minister of Health had acted beyond his powers to regulate the pandemic.

<sup>95</sup> [2020] UGHCCD 157, accessed at <https://ulii.org/ug/judgment/hc-civil-division-uganda/2020/157> on 1 July 2020

labour force who live from hand to mouth in the informal sector. The applicant argued that the government had failed to honour its constitutional and international obligations by failing to issue guidance on access to and availability of food for the vulnerable, and failure to establish food reserves to facilitate access to food during lockdown.

The Ugandan High Court found that the government had provided a clear and adequate plan and budget for the distribution of food to vulnerable people and the people of Uganda. It also found that the government had outlined clear criteria for identifying vulnerable people who needed protection. The Court further found that, although the government did not have food reserves, it had alternative budgetary and administrative measures in place to fulfil its obligation to provide food. Accordingly, the Court dismissed the application.

In Zimbabwe, Mr Makoka brought an application against four government ministers and the President of Zimbabwe in *Makoka v Ministry of Health and Child Welfare and Others*.<sup>96</sup> Mr Makoka was a driver in the informal sector who supplemented his income as an informal trader. He had submitted his name for COVID-19 aid after hearing a radio announcement that the government was providing support for those in need during lockdown. The applicant did not receive the promised aid and approached the High Court.

The applicant argued that there were no clear and objective criteria to outline who qualified for aid, where they could claim, and the time within which the government needed to respond. He asked the Court for an order requiring the government to issue regulations providing for cash handouts, food and potable water, especially for people who are unable to move and trade (many being self-employed workers). He argued that this was necessary to give effect to the constitutional rights to life, health, and a clean environment.

The Court dismissed the application on the grounds that the government did not need to issue new regulations because the Social Welfare Assistance Act adequately provided for anyone who did not have means of subsistence to approach their local welfare office for assistance. The applicant had not proved that he had followed the Act's procedures to obtain the required assistance. The Court found that the applicant's case was not motivated by a genuine need on his part, but was rather "some form of exploratory litigation".<sup>97</sup>

In South Africa, the Scalabrini Centre approached the High Court<sup>98</sup> to challenge the exclusion of registered asylum seekers<sup>99</sup> as well as Angolan, Basotho (from Lesotho) and

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<sup>96</sup> [2020] ZWHHC 414, accessed at <https://zimlil.org/zw/judgment/harare-high-court/2020/414> on 24 July 2020

<sup>97</sup> The Court noted that the applicant: i) had not asked the court for an order compelling the Director of Social Welfare to assist him; ii) had copied most of his arguments from court papers from another case that the Court had dismissed on a technicality.

<sup>98</sup> *Scalabrini Centre of Cape Town and Trustees of the Scalabrini Centre of Cape Town v Ministry of Social Development and Others* (22808/2020) [2020] ZAGPPHC 308

<sup>99</sup> Applicants for refugee status who have been granted the right to stay in South Africa pending the determination of their application.



Zimbabwean special permit holders<sup>100</sup> from the SRD Grant. The Centre approached the Court on behalf of asylum seekers and special permit holders who had approached them for food assistance. These non-nationals had either been self-employed, running informal businesses, or employed in sectors including the hospitality sector, and were unable to work during the lockdown period. They had neither savings nor alternative sources of income, and their children had been denied access to school funding programmes.

The Court recognized the plight of asylum seekers and special permit holders, and found that it was irrational to limit access to the grant to citizens, permanent residents and refugees. The Court held that the exclusion of asylum seekers and permit holders was inconsistent with their right to equality, dignity and social assistance. The Court accordingly held that the relevant provision of the SRD Regulations was unlawful, unconstitutional and invalid, and ordered that the regulations be read to include asylum seekers and special permit holders. While this judgment expanded the scope of protection under the SRD programme, it excluded undocumented migrants, some of whom were self-employed and also suffered the negative impacts of lockdown.

The court decisions recognize that the right to social protection in all four countries – whether expressly or implicitly guaranteed by national constitutions – imposes obligations on governments to provide financial or material support to people in need, including self-employed workers. In the Malawian, Ugandan and Zimbabwean cases, the courts had to determine the existence and/or adequacy of relief programmes. The *Scalabrini Centre* case centred on the impact of the eligibility criteria on migrant workers, and based its order of invalidity on the rights to equality and dignity, and the right to social assistance in South Africa.

Although social protection has hardly featured in public interest litigation cases in African countries, the above cases and the *Mahlangu* decision highlight the potential to use rights-based social protection to secure better protection of marginalized groups, including self-employed workers in the informal economy. When it comes to social insurance, there is potential to challenge the validity of legal provisions that restrict participation to paid employees and exclude other categories of workers, including self-employed workers. In addition to relying on the right to social protection, which should be afforded to everyone, workers can argue that their exclusion from social-insurance schemes violates their fundamental rights to non-discrimination, equality before the law, and dignity. In doing so, workers would invoke the provisions in international and regional instruments including the ICESCR, the ACHPR and the Protocol to the ACHPR on the Rights of Women in Africa, alongside relevant constitutional rights and principles.

The *Kathumba* decision suggests that it may be possible to challenge laws and government initiatives to provide non-contributory assistance on the basis that they do not adequately cater to the needs of vulnerable groups. The High Court suspended the lockdown provisions on the basis that the government had not provided for relief for informal workers who would be forced to stay at home. Subsequently, the Constitutional

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<sup>100</sup> Citizens of Angola, Lesotho and Zimbabwe who were residing in South Africa and received permits to live, work and study in the country as a result of special dispensations.

Court found that the Malawian government's relief programme was inadequate to meet the needs of, amongst others, informal workers and did not clearly stipulate the eligibility criteria (Kamga, 2014).<sup>101</sup>

The possibility of litigation in relation to non-contributory forms of social protection raises different questions to that of social insurance, especially given that the main reason self-employed workers featured in the above cases was the assumption that they would have no source of income during lockdowns. Litigation outside of this context would focus on the fact that social assistance and social services often exclude self-employed workers because they are working or because their incomes surpass thresholds for eligibility, despite being economically vulnerable. This is different from the exclusion of self-employed workers from social insurance, which directly targets them because of their employment status. There may be scope to institute litigation to demand that the government re-assess and adjust its income thresholds, to extend universal benefits and/or provide for a basic income grant.

It may also be possible for self-employed workers to seek an order requiring their government to provide for adaptations of social-insurance rules to suit their specific circumstances and needs. Arguably, this may be incorporated into a court case to challenge the validity of exclusion or could form a separate challenge in a country where the law includes self-employed workers but has not provided for the practical measures to make this a reality. The workers could ask the court to order the relevant government ministry to adapt registration requirements, contributions, payment methods, and possibly provide for government or other co-contribution.

One of the challenges that arises, particularly in relation to non-contributory social protection, relates to the provisions that limit states' obligations to taking action within the limits of available resources towards progressive realization of socio-economic rights. While the CESCR has indicated that governments cannot simply rely on the absence of resources to avoid responsibility, the doctrine of separation of powers often renders courts reluctant to pronounce definitively on the choices that states make in the face of competing resources. Kenya's Constitution expresses this by prohibiting a court from interfering "with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion". It is therefore unsurprising that the courts in the *Center for Food* and *Makoka* cases found that the Ugandan and Zimbabwean governments respectively had adequate measures to support those in need and clear criteria to identify them.

It is also important to note that national courts do not typically consider the court challenges discussed above in the absence of a real case involving a person or people whose rights are potentially infringed because the government has excluded them from social protection or has failed to implement the necessary measures. This means there must be a viable case that would likely result in a conclusion that would enable

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<sup>101</sup> It must, however, be noted that this was not the basis of the decision to invalidate the lockdown regulations, which was that the relevant ministry did not have the authority to issue lockdown regulations.

the court to make a definitive ruling about the status of the existing law or the need for government to take additional measures.

It is worth noting that Francophone countries' political and legal contexts do not provide an enabling environment for the protection of strategic or public interest litigation<sup>102</sup> to enforce constitutional rights or international law obligations. Kamga (2014) argues that the political context hinders strategic litigation because it is characterized by "a weak separation of powers due to presidentialism, the timidity of constitutional judges, as well as the variance and complexity of electoral jurisdictions". The legal system is characterized by multiple challenges, including limited scope for NGOs, members of the public participating in public interest litigation in most countries, and the exclusion of "friends of the court" (*amici curiae*) to provide impartial advice to the courts based on their expertise on the subject matter of litigation. Moreover, the legal systems make it difficult to apply international law in the courts. This situation is further compounded by the lack of a culture of litigation in Francophone African countries.

## Implications for the Future of Rights-based Social Protection in Sub-Saharan Africa

This report has highlighted the importance of rights-based social protection and demonstrated that African countries have undertaken to respect, protect and promote the right to social protection by ratifying a host of international and regional human-rights instruments. Most African countries have committed to the right to social protection at national level by expressly or implicitly including the right to social protection in their constitutions. It has also shown that the Decent Work Agenda, which all ILO member states subscribe to, requires that social protection be extended to all workers regardless of their employment status.

The rights-based approach to social protection implies that governments bear a duty to realize the right and are accountable for the actions they take towards this. It also entails governments passing laws that give effect to this right. The right to social protection encompasses the duty to extend social protection to marginalized groups that have been excluded from its protective scope. The imperative to extend social protection to self-employed workers is especially significant in Africa, where paid employment accounts for less than 25 per cent of the workforce in most countries.

Our overall assessment is that the surveyed African countries have not gone far enough to comply with their duty to extend social protection to self-employed workers, who account for a large proportion of the labour force in most countries. Constitutional commitments in many countries recognize the needs of specific groups of people or specific social-protection needs (e.g. health care) and are not comprehensive enough to recognize the full ambit of the right to social protection.

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<sup>102</sup> Also known as impact legislation, it is defined as a legal action initiated in a court to enforce public interest or general interest, in which the public or a class of the community have a monetary or other interest by which their rights or liabilities are affected.

The contributory social-protection schemes of the majority of surveyed countries continue to revolve around the employment relationship, which accounts for only a small proportion of the labour force in most sub-Saharan countries. Countries that extend contributory social protection to self-employed workers only cover a limited range of benefits, leaving self-employed workers vulnerable in the face of risks such as unemployment, maternity, sickness, and occupational injuries and diseases. Moreover, very few countries have truly adapted the modalities of their schemes to suit the needs of self-employed workers.

Non-contributory social protection in the majority of countries is embedded in policy, which falls short of the principle that legislation is central for the realization of the right to social protection. In addition, few benefits are universal, with the majority entailing means testing, which often results in the exclusion of self-employed workers.

Another shortcoming relates to the limited provision for social dialogue or stakeholder engagement in decision making through participation in governance structures responsible for social protection. Contributory social-insurance schemes are often based in legislation that provides for such governance structures. However, there is limited room for the participation of social partners in these bodies, and where this is the case, workers are largely represented by trade unions. Kenya is the only country surveyed that acknowledges the need for the representation of informal workers' organizations on the NSSF Board. Non-contributory social protection is often rooted in policy and less likely to be subject to such governance mechanisms, making the participation of worker organizations in decision making even less likely.

During COVID-19, only a few countries made adaptations to social insurance. The majority of countries made provisions in relation to social assistance and broader relief measures. When it came to economic measures, informal workers fell between the cracks because the schemes were either aimed at paid employees in formal companies or at small entrepreneurs who met eligibility criteria that were beyond their reach. A few countries, including Mauritius, introduced targeted measures aimed at self-employed workers, and some self-employed qualified for broad social assistance and relief measures.

We observed that the negative arm of the state is codified, but provisions from the protective arm are not.<sup>103</sup> This must be considered in light of the fact that, prior to COVID-19, governments had made limited statutory commitments to social protection in relation to non-contributory forms of social protection such as social assistance. This underlines the need for governments to make strong statutory commitments to social protection. It is also important to strike a good balance between using primary legislation to establish the broad frameworks to establish governments' commitments and secondary legislation to outline the details to give effect to these commitments in a flexible and timely manner.

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<sup>103</sup> This is a wider trend seen within the informal economy.

Informal workers' organizations were largely excluded from national COVID-19 response structures, and they were able to influence governments through direct engagement, pressure tactics and trade unions. It is worth noting that trade unions seemed better able to articulate informal workers' social protection and relief needs than informal workers themselves, which suggests that social protection is still far removed from the lived realities of many informal workers.

The *Mahlangu* decision and the COVID-19 court cases point to the potential for litigation as a means of enforcing the right to social protection. It is possible for workers to litigate on social insurance to challenge the exclusion of self-employed workers and/or to demand adaptive measures to enable them to participate in schemes. With social assistance, it may be possible to challenge the court's eligibility criteria and call for universal social protection. We have pointed out the limitations arising in the context of socio-economic rights, particularly in relation to non-contributory forms of social protection. Notably, the challenges relating to the Francophone countries' legal systems means that public interest litigation seems to be less viable in these countries.

In addition to litigation in their national courts, informal workers' organizations could consider approaching the CESCRC to file complaints against their governments if they have ratified the Convention.

It may also be possible for an African organization (of lawyers/workers' organizations) to approach the African Court of Human and Peoples' Rights for an advisory, non-binding opinion – yet one that carries a lot of weight – declaring that social-protection laws that exclude or do not adequately cover self-employed workers are incompatible with the rights in the existing binding instruments. The Court can declare that all member states that have ratified these instruments are under an obligation to review and reform their laws in alignment with these obligations.

## Recommendations

African countries are bound by international and regional human-rights instruments that require measures to extend social protection beyond the employment relationship. Paid employment accounts only for a small fraction of employment in most sub-Saharan African countries. It is therefore critical to ensure that self-employed workers, who account for almost 60 per cent of non-agricultural workers, are adequately protected.

At the regional level, there is a clear need for a comprehensive and enforceable protocol on social protection. It is therefore imperative that steps towards the adoption of the draft African protocol on social protection be sustained and accelerated. It is also important for African countries to make constitutional commitments to social protection that encompass all of its forms and apply to everyone, making special reference to all marginalized groups, including self-employed workers. Governments should adopt comprehensive legal and policy frameworks that give effect to the right to social protection. Given that many countries' social-protection laws are still highly colonial – as evidenced by the lack of variation in the Francophone countries – it is important to ensure that social-protection frameworks are context-specific.



It is worth noting that while law is a necessary component towards the realization of the right to social protection, it is in no way sufficient, and that measures must be taken to ensure its effective implementation on the ground.

The following recommendations are made in relation to specific bodies and groups:

i) Governments

- Establish the necessary constitutional, legal and policy frameworks to realize the right and increase spending on social protection.
- Establish clear institutional frameworks with adequate governance and accountability structures to guide and oversee the activities of social-protection bodies.
- Include social partners, including informal workers' organizations, in the making of all decisions that affect informal workers.

ii) Informal workers' organizations

- In line with the motto "Nothing about us without us!", make demands to be included in relevant governance and decision-making structures.
- Demand the adoption of legislation and policies, and the establishment of adequate institutional frameworks.
- Partner with allies including trade unions and civil society organizations.
- Partner with public interest lawyers who may support possible litigation against governments.

iii) Trade unions

- Partner with informal workers' organizations and help to raise their awareness of the importance of social protection.
- Advocate for and facilitate the representation of informal workers' organizations in social dialogue on social protection.

iv) Civil society organizations

- Promote the visibility of informal workers, and support advocacy on the alignment of laws and policies with obligations to give effect to the right to social protection.

v) Researchers

- Make information about the poor coverage of vulnerable groups accessible.
- Identify country-specific gaps in laws and policies, and develop recommendations for aligning them with regional and international obligations.

## References

### Legislation

#### *Burkina Faso*

Constitution of Burkina Faso, 1991

Act No. 015-2006 of 11 May 2006 governing the social security system applicable to wage earners and assimilated workers in Burkina Faso

Order 2008-002/MTSS/SG/DGPS of 10 March 2008 relating to the terms of membership and settlement and payment of benefits as part of the voluntary insurance scheme

**Djibouti**

Constitution of Djibouti, 1992

Act No. 199/AN/13/6th L of 20 February 2013 supplementing Act No. 212/AN/07/5th L. of 20 February 2013 establishing the National Social Security Fund (CNSS) and extending health care benefits to self-employed workers

**Ghana**

Retirement Benefits Act, 2007

National Pensions Act, 2008

National Health Insurance Act, 2012

Income Tax (Amendment) Act, 2020

**Kenya**

Constitution of Kenya, 2010

Retirement Benefits Act, 2007

Income Tax Act, 2010

National Social Security Fund Act, 2013

Social Assistance Act, 2013

**Lesotho**

Old Age Pensions Act, 2005

**Liberia**

Children's Law of Liberia, 2011

National Social Security Corporation Act, 2017

**Mauritius**

National Pensions Act, 1976

National Social Aid Act, 1983

**Namibia**

Constitution of Namibia, 1990

National Pensions Act, 1992

Child Care and Protection Act, 2015

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## Appendices

### Country case studies

#### Kenya

##### 1. Introduction

Kenya has a population of 53 million people and a GDP per capita income of USD 1,455, making it a lower-middle-income country by World Bank standards (World Bank, 2021). However, around 33.6 per cent of the population still lives below the poverty line (USD 1.90 per day),<sup>104</sup> thus underscoring high levels of inequality within the country. Many of these workers operate in the informal economy, which accounts for about 83.6 per cent of total employment providing livelihoods for most urban informal-settlement dwellers (Kansiime et al, 2021). A quarter of the population lives in urban informal settlements and arid and semi-arid regions (ASALs), which make up 80 per cent of Kenya's land area.

As with many other African countries, Kenya saw the economic impacts of the COVID-19 pandemic weeks before the country's first case was confirmed. Although Kenya has recorded fewer COVID-19 infections and deaths than most developed countries, the economic impact has been devastating in a country where most workers eke out a living in the informal economy and are largely unprotected by labour and social security laws. Kenya's President issued several directives on 15 March 2020, and the government established a mitigation committee to coordinate the national COVID-19 response. The directives imposed social-distancing measures, a dusk-to-dawn curfew, and a ban on public gatherings (Barasa, 2020).

In theory, the Kenyan government's decision to institute a dusk-to-dawn curfew – as opposed to a complete lockdown – enabled formal and informal workers to work during the day. In reality, self-employed workers in the informal economy were adversely affected by curfews, which reduced their working hours and, consequently, their incomes (Moore, 2020; Helfers et al, undated). Street vendors who tried to trade after curfew were arrested, beaten, and had their goods destroyed by the police (Moore, 2020). Street-vendor operations were also negatively affected by increased commodity

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<sup>104</sup> Data from 2005, the latest year for which information was available.

prices due to supply chain disruptions and increased transport costs as a result of social-distancing requirements (Helfers et al, undated; Gikandi, 2020). Self-employed workers such as street vendors and informal couriers reported that there was lower demand for their goods and services as a result of the economic downturn (Gikandi, 2020). Moreover, bans on trade in used clothing dealt a heavy blow to street vendors who depend on this for their livelihoods (ITUC-Africa, 2020). As a result, street vendors and other self-employed workers in the informal economy reported that they were unable to meet basic expenses such as rent, and could not afford to buy enough food for themselves and their families (Gikandi, 2020).

This case study analyzes the extent to which rights-based social protection – social protection that is rooted in law and other statutory instruments – exists for self-employed informal workers in Kenya. The first part considers the state of social protection for self-employed workers before the COVID-19 pandemic. The second part considers the COVID-19 relief responses of 2020, providing an overview of the extent to which these measures reached self-employed informal workers in the country. It shows that although Kenya implemented relief measures – some building on its social-protection system – many informal workers could not access the benefits.

Kenya stands out amongst many African countries in that it has included self-employed workers in its main social-insurance fund. The advantage of such an approach is that “it allows workers to remain in the same scheme, regardless of their employment status, and provides adequate coverage in cases when workers change their employment status or combine (part-time) paid employment and self-employment” (ILO, 2019). Significantly, Kenya offers a good example of how law can provide for the inclusion of self-employed workers in social insurance by outlining the areas that need to be regulated to facilitate their inclusion. Such areas include representation of an organization representing self-employed workers on the Board of the NSSF.

## ***2. Existing social-protection infrastructure and legal innovations for self-employed workers in Kenya***

The Constitution of Kenya regulates the application of international law. Article 2(6) of the Constitution provides that “any treaty or convention ratified by Kenya shall form part of the law of Kenya under the Constitution”.<sup>105</sup> This means that any treaty Kenya ratifies automatically becomes part of Kenyan law (Kenyatta, 2020). Kenya has ratified several UN and AU instruments that provide for the right to social protection.

Kenya has ratified the ICESCR and the CRC, both of which are binding and create positive obligations on the government of Kenya. The ICESCR guarantees the right of everyone to social security, including social insurance in the event of risks that prevent them from working, material support to maintain an adequate standard of living, and medical care and other social services. Kenya has also ratified the ACHPR, the Protocol to the ACHPR on the Rights of Women in Africa (Maputo Protocol), and the African Charter on the

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<sup>105</sup> The Constitution of Kenya, 2010

Rights and Welfare of the Child. Moreover, Kenya is bound by the UDHR, which forms part of customary international law.

Kenya has a relatively established social-protection system, which is anchored in the Constitution and various policy documents. In terms of the legal framework, Article 43 guarantees all Kenyans their social, economic and cultural rights, and binds the state to provide appropriate social security to persons unable to support themselves and their dependents. This article specifically guarantees the rights: “(1)(a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care; (b) to accessible and adequate housing, and to reasonable standards of sanitation; (c) to be free from hunger, and to have adequate food of acceptable quality; (d) to clean and safe water in adequate quantities; (e) to social security; and (f) to education”. Articles 43(2) and (3) further guarantee the right not to be denied emergency medical treatment, and requires the state to provide appropriate social security to persons who are unable to support themselves and their dependents.

The fact that the constitutional rights extend to “everyone” without qualification implies that informal workers have constitutionally protected rights to health and health-care services, housing, adequate food, social security, and education. Furthermore, Article 21(5) of the Constitution seeks to prevent the state from shirking its responsibilities in relation to socio-economic rights by requiring it to demonstrate that resources are requiring the state to prioritize the widest possible enjoyment of the right having regard to the circumstances, including the vulnerability of particular groups or individuals.

Based on this legal framework, Vision 2030 of the Kenyan Government and other policy documents<sup>106</sup> recognize and place great emphasis on social protection as a tool for improving the quality of life of all Kenyans. In 2011, Kenya launched its first National Social Protection Policy (NSPP), which refers to social insurance, social assistance, and health insurance.

The NSSF Act of 2013 exemplifies how law can provide for the extension of social insurance to self-employed workers in the informal economy. It allows self-employed workers to register as voluntary members with the NSSF Provident Fund,<sup>107</sup> which provides for an age benefit, a survivor’s benefit, an invalidity benefit, and an emigration benefit. Section 26 outlines the measures that should be taken to facilitate the inclusion of self-employed workers, and empowers the responsible Cabinet Secretary to issue appropriate regulations to accommodate their needs. The Act makes the following legal innovations:

i) Self-employed members may pay their contributions directly to a designated Fund office, by mobile money, or any other electronic transfer specified by the Board.<sup>108</sup> This allows them to use the most widely used mode of transacting among unbanked low-income groups.

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<sup>106</sup> See National Policy and Action Plan on Human Rights, Sessional Paper No. 3 of 2014; Kenya National Social Protection Policy, 2011; and the National Policy on Gender and Development, 2019

<sup>107</sup> Section 18(5) of the NSSF Act

<sup>108</sup> Section 23(1)(c) of the NSSF Act

The NSSF has operationalized these legal provisions by establishing the *Haba Haba* programme in partnership with private companies. The programme allows self-employed workers to register with the NSSF on their mobile phones using a USSD code, without needing a smart phone. They can also use it to pay contributions, check their statements, and track claims. *Haba Haba* is accessible in local languages.

ii) Flexibility in relation to the contributions made by self-employed workers in the informal economy. It provides for a minimum aggregate contribution every year,<sup>109</sup> thus allowing self-employed workers with fluctuating incomes to participate and make payments at their convenience. The Cabinet Secretary can issue regulations to allow for flexibility in the timing of the contributions.<sup>110</sup>

iii) Empowering the Cabinet Secretary to make regulations allowing the representation of an organization representing self-employed persons on the Board.<sup>111</sup> This could enable decision makers to understand self-employed workers' needs and circumstances, and facilitate their meaningful inclusion. The Cabinet Secretary has not yet passed these regulations.

Providing the option of withdrawals for short-term needs is one mechanism to draw self-employed workers in the informal economy to join long-term insurance schemes. While the NSSF Act does not provide for this, it is implemented operationally through the *Haba Haba* programme. Self-employed informal workers registered under the programme can withdraw 50 per cent of their contributions after contributing consistently for at least five years (NSSF, 2020).

Kenya has several social-assistance schemes, none of which are rooted in law.<sup>112</sup> These include the *Inua Jamii* programme, which was established in 2004 and is administered by the Ministry of Labour and Social Protection. The programme consolidates three cash-transfer programmes for orphans and vulnerable children, persons with severe disability, the elderly and vulnerable households in the 4 poorest arid counties. The fact that the social-assistance schemes are limited to these specific groups implies that few self-employed workers can benefit directly from them.

Access to social services in Kenya is also regulated by policy rather than legislation. Kenya abolished user fees for primary health-care services in 2013, and five years later, the country declared universal health-care coverage a national priority, with a focus on providing all Kenyans with access to essential health care, lowering cost barriers,

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<sup>109</sup> Section 23 of the NSSF Act

<sup>110</sup> Section 26(e) of the NSSF Act

<sup>111</sup> Section 26(f) of the NSSF Act

<sup>112</sup> Although Kenya has enacted a Social Assistance Act, 2013, which establishes national social assistance measures, this has not yet been operationalized. Since 2020, Parliament has been considering the Social Assistance (Repeal) Bill 2020, which seeks to repeal the Act as it is not fully aligned with the NSPP and because certain provisions conflict with the Public Finance Management Act of 2012.



and improving the overall quality of health services.<sup>113</sup> The government and partners developed a pilot package for roll out in 4 of the country's 47 counties to October 2019. Since then, the government has been scaling the extension of the services to the remaining 43 counties.

### **3. Kenya's response to the COVID-19 pandemic**

The government of Kenya declared COVID-19 a formidable disease in terms of the Public Health Act of 1986. This is the primary law that framed most of the (secondary) laws passed by the government in response to the pandemic. Exercising the powers in terms of the Act, the Minister of Health issued rules to regulate matters such as movement restrictions, dedicated health facilities, and disinfection of contaminated areas. The Act does not provide for social protection or relief in response to health crises. The country's legal framework for disaster management is designed to respond to drought-related crises, and was inapplicable during the unprecedented health crisis (Maintains, 2021).

The government's social protection and relief response was hardly based on existing or new legislation. Unless indicated otherwise, the measures discussed below were established in terms of policy and executive decisions. The government of Kenya built on existing social-protection schemes in at least two instances. First, insurance schemes under the NSSF allowed for workers to withdraw from their long-term pension scheme. The NSSF recorded a sharp increase in requests for early withdrawals of pension and provident benefits (Kenyan Television Network, 2021). Given the pandemic's devastating impact on self-employed workers in the informal economy, it is likely that some of these applicants were self-employed workers in the informal economy. The government also committed Universal Health Coverage funds (KES1 billion/USD8.8 million) towards the recruitment of additional health workers to support the management of COVID-19.<sup>114</sup> In addition, the government set aside hospitals, ambulances and key personnel for the COVID-19 response. Arguably, some self-employed workers in the informal economy benefited from government-funded pandemic-related health care.

The Public Finance Management Act (COVID-19 Emergency Response Fund) Regulations<sup>115</sup> was one instance of the use of legislation in response to the pandemic. The Regulations established the Fund to mobilize resources to provide for health-related measures; provide relief to the most vulnerable, older and poor persons in urban informal settlements; and support MSMEs rendered vulnerable by the pandemic. While this suggests that self-employed workers in the informal economy were potential beneficiaries of the Fund, this was really dependent on the eligibility criteria applied in terms of the actual programmes and schemes that the Fund's resources were directed towards.

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<sup>113</sup> Republic of Kenya Health Sector Strategic Plan 2018–2023

<sup>114</sup> Governor's statement on guidelines to be observed within Nandi County following the global outbreak of COVID-19, 16 March 2020; Presidential address on the State interventions to cushion Kenyans against economic effects of COVID-19 pandemic, 1 April 2020

<sup>115</sup> The Public Finance Management Act (COVID-19 Emergency Response Fund) Regulations, issued on 1 April, 2021

The government established and supported several (often overlapping) cash-grant programmes during the pandemic. There was limited official information about the rules governing these programmes and their impact (Human Rights Watch, 2021). One example was the multi-agency COVID-19 cash transfer for non-*Inua Jamii* households that had members who were chronically sick, persons with disabilities, labour and casual workers (Maintains, 2021). This programme was managed by the Ministry of the Interior.

Self-employed informal workers – many of whom do not qualify for *Inua Jamii* – were among the targeted beneficiaries of the multi-agency cash grants (Human Rights Watch, 2021). The reports also indicate that the programmes did not reach the targeted number of intended beneficiaries for several reasons. These included the absence of a comprehensive registry for identifying potential beneficiaries (Maintains, 2021). The programme was marred by a lack of transparency and failure to publicize criteria for eligibility, and limited checks and balances to verify eligibility (Human Rights Watch, 2021; Maintains, 2021). This opened the door for administrators and politicians to provide benefits based on cronyism and favouritism (Human Rights Watch, 2021). Moreover, the programme failed to reach the targeted numbers of beneficiaries because of: i) unrealistic caps on the number of beneficiaries despite the overwhelming need; ii) the benefit of USD 10 per week being insufficient to maintain a decent standard of living; and iii) inconsistency of payments over time (Human Rights Watch, 2021).

The government of Kenya further introduced several economic measures to support businesses during the pandemic. Some of these measures were taken in terms of legislation such as the Tax Amendment Act. These included the reduction of the corporate tax rate from 30 to 25 per cent and reducing the turnover tax rate for MSMEs from 3 to 1 per cent. It also initiated monetary policies (e.g. a credit guarantee scheme and reduction in liquidity ratios) to enable commercial banks to make more credit available to businesses, including MSMEs.

Several reports indicate that self-employed workers in the informal sector hardly benefited from these measures because they were largely targeted at registered enterprises (Ajema et al, undated; Helfers et al, undated). The increased vulnerability of self-employed informal workers as a result of the crisis increased their risk profile, making them ineligible to access credit from commercial banks (MicroSave Consulting, 2020). One intervention that may have been helpful to self-employed workers in the informal economy – many of whom use mobile money to transact with their suppliers, service providers and customers – is fee waivers on person-to-person money transactions on mobile money transfers (Techcrunch, 2020). Alternative forms of support, such as the waiver of trading fees and the provision of water, sanitizers and PPE would have been appropriate for self-employed workers in the informal sector, especially those involved in informal trade.

#### **4. Conclusion**

Kenya has committed to promoting rights-based social protection by ratifying several international and regional instruments, and adopting a progressive constitution – all of which guarantee the right to social protection. The country has made great strides towards realizing this right in relation to social insurance. The NSSF is governed by legislation that expressly includes and has introduced some innovations to

accommodate the needs of self-employed workers. However, social assistance and social services (specifically universal health care) are currently regulated in terms of policy. The government should enact legislation to regulate these areas to enable individuals (including self-employed workers) to claim these protections as a right and to have recourse to legal remedies where they fail to access benefits. Given that the only legislation that regulates emergency relief is only applicable to drought, the government must enact legislation that provides for emergency relief in a broad range of situations that may threaten the lives and well-being of the population, including health pandemics. It will be critical for these pieces of legislation to include workers who earn below the poverty threshold and those who lose their livelihoods as a result of unforeseen events.

Besides economic measures, the country's COVID-19 response was largely established in terms of a range of policies and programmes that were not tied to legislation. A key consequence of this was the lack of a rights-based approach as the government "...failed to recognize the right to social protection for all ... and did not include mechanisms through which those left out could appeal or challenge the decision to leave them out. It further failed to appreciate the responsibility of the government to ensure the realization of these rights, especially so during the pandemic" (Human Rights Watch, 2021). Although some of the economic measures adopted were rooted in legislation, many of them failed to reach self-employed workers in the informal economy either because they were less relevant to these workers (e.g. tax concessions) or because the workers did not meet the criteria for accessing the support (e.g. business regulations). One of the reasons for the failure to adopt more relevant measures for self-employed informal-economy workers may have been the exclusion of their organizations in the discussions leading to their adoption. Noting the significance of the informal economy, which employs about 84 per cent of the working population, it is recommended that the government include informal workers in all processes leading to the adoption of laws, policies and programmes that affect them, as is the case in relation to the NSSF Board.

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## Rwanda

### 1. Introduction

Rwanda is a small, landlocked East African country with a population of about 12.5 million people in 2018 (World Bank, 2021). The World Bank classifies it as a low-income country with a gross national income per capita of USD 2,000 in 2020 (World Bank, undated). The country was in the middle of an economic boom before the pandemic and growth exceeded 10 per cent in 2019 (World Bank, 2021). This was largely driven by public investments under the auspices of the National Strategy of Transformation (World Bank, 2021). The government's focus on homegrown policies and initiatives has contributed to significant improvement in access to services and human development

indicators, including the reduction in poverty from 77 per cent in 2001 to 55 per cent in 2017 (World Bank, 2021).

After confirming the country's first case of COVID-19 in March 2020, the government of Rwanda introduced several measures to prevent the spread of COVID-19 (Office of the Prime Minister, 2020). These included nationwide lockdowns, the banning of all non-essential transport outside homes, and social-distancing measures, especially in local markets where many buy fresh produce (Bower et al, 2020; Bagnetto, 2020). Through several communiques issued by the Prime Minister, the government ordered that “vendors/traders in markets and trading centres shall operate at 50 per cent capacity, selling only food and essential items”.

The pandemic curtailed economic activities in 2020 and the country experienced its first recession since 1994 (African Development Bank, 2021). The World Bank has predicted that poverty will increase by 5.1 percentage points (more than 550,000 people) in 2021 (World Bank, 2021). Vulnerable workers in the informal economy, such as street vendors and market traders, have experienced hardship as some have had no choice but to discard unsold fresh produce (Bagnetto, 2020). Moreover, self-employed workers such as informal vendors have undoubtedly been affected by the broader socio-economic impact of the pandemic, including reduced economic activity and consumption, job losses and reduced earnings, food inflation, and an overall decline in household welfare and food security (National Bank of Rwanda, 2021; World Bank Group, 2021).

This brief provides an overview of Rwanda's framework for social protection, with a view to assessing the extent to which it covers self-employed informal workers. It further seeks to analyze the extent to which Rwanda's social protection and relief measures in response to the COVID-19 pandemic addressed the needs of informal workers. Rwanda is an interesting case study considering the country has established the CBHI scheme and the *Ejo Heza* long-term savings scheme to cover traditionally excluded groups, including self-employed informal workers (Nyandwi, 2021; Ntirenganya, 2020). The CBHI funded COVID-19 testing and treatment for its members. The country also has an elaborate policy-based social-assistance scheme, which formed the foundation of some of the country's COVID-19 interventions.

Both the CBHI and the government of Rwanda's COVID-19 response make it easier for Rwandan nationals and urban refugees, in particular self-employed informal workers affected by COVID-19 measures, to access public health-care services without discrimination (UNHCR, 2020).

## **2. The existing social-protection framework**

Rwanda has ratified international and regional instruments governing social protection, most of which promote, protect, and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons, and promote respect for inherent dignity (Ministry of Local Government, 2020). Rwanda's Constitution guarantees the right to social protection as one of the fundamental principles the state should uphold and respect. In addition, the Constitution requires “the State ... within the limits of its means and in accordance with the law ... to undertake special actions aimed at the welfare of the needy survivors of the genocide against Tutsi”. The Constitution also requires “the State ... within its means, to undertake special actions aimed at the welfare of persons



with disabilities ... the indigent, the elderly and other vulnerable groups”. Based on the principles of equality and non-discrimination enshrined in the Constitution, self-employed informal workers are arguably entitled to the right to social protection.

Rwanda has adopted laws and regulations that specifically govern the coverage of self-employed informal workers by the general social-security scheme. First, Legislative Order of 22 August 1974 concerning the organization of social security and Act No. 05/2015 of 30 March 2015 governing pension schemes allow self-employed persons to apply for voluntary pensions, provided they are not over 50 years of age. Second, Act No. 48/2015 of 23 November 2015 regulating health-insurance schemes in Rwanda allow self-employed workers to join health-insurance schemes.

Third, Rwanda’s Parliament passed Act No. 03/2015 of 2 March 2015, which consolidates and institutionalizes the decentralized CBHI schemes under the Rwanda Social Security Board. It defines CBHI as a “solidarity system in which persons [and] their families ... pay contributions for the purpose of protection and receiving medical care in case of sickness”. Although the Act does not specifically mention self-employed workers, it was designed to promote the membership of the poor and the law makes their participation possible by de-linking membership from the employment relationship. The Act introduced legal innovations to support the membership and participation of members, including self-employed informal workers: i) the subsidization of member contributions from 13 per cent of the Ministry of Health’s annual budget and contributions from all health-insurance entities in the country; ii) establishment of mobilization committees comprising community members that coordinate scheme activities at the village, cell and sector levels; and iii) making membership compulsory by imposing fines for non-membership of any person who is eligible for assistance.

Fourth, Act No. 29/2017 of 29 June 2017 established the *Ejo Heza* long-term savings scheme and pension scheme specifically for “self-employed persons working in the informal sector and workers operating in the informal sector”. The following innovative provisions enable the participation of self-employed workers in the informal economy in the scheme: i) members pay contributions based on their capacity, which makes contributions more flexible. Contributions can be made at any time, and any amount can be saved; ii) the government can make co-contributions to incentivize members to save up to specified targets during the first 36 months of the operation of the scheme; and iii) once every five years, members can withdraw 40 per cent of their long-term savings to acquire a house or pay for education or to use part of their savings as a guarantee for a loan.

Despite the laws’ innovations to address some of the challenges related to extending long-term social insurance to informal workers, there has been limited uptake of the *Ejo Heza* programme. The government of Rwanda reports that about 20 per cent of self-employed informal workers have social insurance (Ministry of Local Government, 2020) and only 11 per cent of the country’s working-age population is registered with *Ejo Heza* (World Bank Group, 2021). Its Social Protection Policy of 2020 underlines the need to improve and intensify measures to ensure that informal workers have social insurance. It is also problematic that self-employed workers continue to be excluded from other important forms of social insurance, including maternity, workers’ compensation, and unemployment insurance.

While social insurance is largely regulated by legislation, social assistance and other forms of social protection are regulated in terms of government policies and programmes. The Vision 2020 *Umurenge* Programme (VUP) aims to support the most vulnerable households through public-works programmes, direct support in the form of cash transfers to poor households, and co-responsibility cash transfers to promote nutritional services for pregnant women and young children (Government of Rwanda, 2020). The VUP also facilitates access to micro-loans for income-generating activities. The overarching policy framework is the NSPP (2020), which builds on previous policy documents, including the NSPP (2018) (Ministry of Local Government, 2020). The NSPP covers short-term social assistance to address temporary risks; social care services for people with disabilities, the elderly, women and children; and livelihood and employment support through multi-sectoral interventions (Ministry of Local Government, 2020).

The social-assistance and public-works programmes discussed above primarily target the most vulnerable households and are likely to exclude self-employed informal workers who earn an income. Self-employed informal workers are more likely to be eligible for micro-loans and for livelihood and employment support.

### **3. COVID-19 response**

Alongside preventative measures, the government implemented socio-economic measures in response to the COVID-19 pandemic. The government established these socio-economic measures in terms of programmes, policies and budget allocations as opposed to legislation. The response can be divided into three categories: i) initial measures in response to the pandemic; ii) the Economic Recovery Plan (ERP) for the period May 2020 to December 2021; and iii) various other measures.

#### **i) Initial measures in response to the pandemic**

By November 2020, the government of Rwanda provided emergency food relief to at least 35,000 hard-hit households living in Kigali and other urban centres (Republic of Rwanda, 2020a). The beneficiaries arguably included self-employed informal workers. As the pandemic progressed, the government transitioned towards providing emergency cash transfers to about 55,000 households by November 2020 in partnership with NGOs.

#### **ii) Economic Recovery Plan (ERP)**

The government of Rwanda adopted the ERP in April 2020. Our analysis considers the social protection, relief and recovery component, the economic recovery component, and additional measures falling under the plan.

The social protection, relief and recovery component was designed to assist vulnerable households affected by COVID-19, with a budget of RWF 133.6 billion (USD 141.7 million) or about 1.4 per cent of Rwanda's GDP (UNICEF Rwanda, 2020/21). The relief component sought to build on existing administrative machinery and to expand the coverage of existing social-assistance programmes – especially under the VUP – by relaxing the eligibility criteria to include newly vulnerable families (Devereaux, 2021). In addition, the government amended the CBHI scheme to eliminate the 1-month waiting period between registering and becoming eligible for medical services (Devereaux, 2021). The recovery component sought to transfer assets to households, and enable

access to financial services, business start-up toolkits and public-works programmes. It also extended health-care services to uninsured individuals.

The other component of the ERP is the Economic Recovery Fund, which aims to support businesses that have been hard-hit by the pandemic. Recognizing that COVID-19 fiscal and monetary responses do not reach the informal economy, the Fund provides subsidized loans to businesses, including informal micro-enterprises (National Bank of Rwanda, 2020). In order to protect livelihoods and stimulate household consumption, the Fund has a special micro-finance facility for the informal economy (National Bank of Rwanda, 2020). Table 1 indicates the coverage of different programmes both before and after the COVID-19 pandemic.

**Table 1: Scaling-up of social-assistance benefits in response to the pandemic**

Programme	Households (March 2020)	Households (September 2020)	Households targeted in ERP
Classic public works	157,852	158,554	191,339
Expanded public works	40,454	43,693	75,000
Direct-support cash transfer	116,240	119,025	150,000
Nutrition-sensitive direct-support cash transfer	30,000	84,599	74,021
COVID-19 emergency cash transfers	0	35,000	100,000

Table 1 shows that, with one exception, the government recorded a modest increase in the coverage of existing programmes and did not meet the ERP targets. The government exceeded its target in relation to the nutrition-sensitive direct-support programme because it extended the programme from only the most vulnerable households in *Ubudehe* category 1 to include less vulnerable beneficiaries in *Ubudehe* category 2, which may arguably have increased the number of self-employed informal-worker beneficiaries (World Bank Group, 2021).

### iii) Other measures

Initially the government funded COVID-19 testing and treatment. Later it required health-insurance schemes, including the CBHI, to cover these costs. According to the World Bank Group (2021), about 80 per cent of Rwanda's population is registered with the CBHI, which suggests a significant proportion of informal workers could access COVID-19 related services through that scheme.

The government of Rwanda subsidized water and electricity fees for vulnerable households affected by the pandemic (Republic of Rwanda, 2020a). The Ministry of Education sought to promote remote learning for vulnerable children through radio lessons, television broadcasting, and e-learning (Ministry of Education, 2020). Furthermore, the government suspended all charges for all electronic money transactions and upper limits for such transactions (Republic of Rwanda, 2020a). These measures arguably cover some self-employed informal workers and their families. Notably, in April 2020, senior government officials agreed to forfeit their April salaries to contribute to the funds needed to fight COVID-19 (IGC, 2020).

Other economic measures, which may be applicable to self-employed informal workers, include the easing of loan repayment conditions for borrowers affected by the pandemic (Republic of Rwanda, 2020b). Similar measures include exceptional restructuring of outstanding loans for borrowers facing temporary cash-flow challenges and liquidity support.

#### **4. Conclusion**

Prior to COVID-19, Rwanda had an integrated framework for social protection comprising legislation to regulate social insurance and policies, and programmes to regulate social assistance. According to the World Bank, the expansion of social assistance in the years preceding the pandemic helped to reduce poverty in Rwanda, allowing it to enter the pandemic relatively well-prepared (World Bank Group, 2021). This obscures the fact that self-employed workers in the informal economy have been excluded from social protection, largely because most insurance schemes (with the exception of pensions and health insurance) target employees and social-assistance programmes have targeted the poorest beneficiaries.

In responding to the COVID-19 pandemic, the government of Rwanda to a large extent invoked and built on policy-based social-assistance programmes. Except for the CBHI, the government hardly drew on legislation-based social insurance. The government had limited success in reaching its numerical targets for most components of the ERP. Nevertheless, the increase in direct-support beneficiaries after modifying the eligibility criteria to include the second *Ubudehe* category enabled the government to reach part of the “missing middle”, which includes informal workers.

The analysis demonstrates the need to address the marginalization of self-employed informal workers in the social-protection framework. First, the government of Rwanda should expand the range of benefits available under the *Ejo Heza* programme to include emergency benefits. It should investigate the reasons for the low uptake of the programme and take measures to increase registration. Second, the government should increase the scope of social-insurance laws that provide benefits for unemployment, maternity, and workers’ compensation. Third, the government should continue to expand the reach of social-assistance benefits to include those who fall into the “missing middle”, including self-employed informal workers. Fourth, the government should transition from policy-based social-assistance schemes towards embedding the schemes in legislation to confer rights on beneficiaries, impose obligations on the government, and establish an institutional framework for social assistance. Finally, the government should ensure that self-employed workers’ organizations are represented in institutions and structures that govern the operation of social-protection programmes.

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## Mauritius

### 1. Introduction

Mauritius is an island country in the Indian Ocean, located off the eastern coast of Africa. It is an upper-middle-income economy, with a GDP of USD12.2 billion and a per capita GDP of USD 9,630 in 2021 (International Monetary Fund, 2020). The country has an estimated population of 1.27 million inhabitants. Prior to the COVID-19 pandemic, in 2019, the ILO estimated that 20.3 per cent of the country’s employed workers were self-employed. The Mauritius “Labour Force, Employment and Unemployment” survey recorded a drop in the percentage of self-employed workers to 15.9 per cent in 2020 as they were unable to work during the lockdown period (Labour Force, Employment and Unemployment Survey, 2020).

This case study analyzes the extent to which rights-based social protection – social protection that is rooted in law and other statutory instruments – exists for self-employed informal workers in Mauritius. The first part considers the state of social protection for self-employed workers before the COVID-19 pandemic. The second part considers the COVID-19 relief responses of 2020, providing an overview of the extent to which these measures reached self-employed informal workers in the country.

Mauritius stands out amongst many African states in that it has a comprehensive universal social-protection system (Phaahla, 2014). Mauritius has elaborate social-insurance and social-assistance schemes legally covering the self-employed that are rooted in law. More specifically, Mauritius explicitly includes self-employed workers under the scope of social-insurance schemes. Significantly during the COVID-19 pandemic, Mauritius introduced a new scheme targeting workers in the informal economy, including those who are self-employed.

### 2. Legal framework for social protection in Mauritius

Mauritius is a signatory to international and regional instruments that provide for the right to social protection. As a starting point, Mauritius is a signatory to the UDHR.

Furthermore, Mauritius has ratified several treaties and conventions that are binding and impose positive obligations on it. These include ICESCR, CEDAW, and the CRC.

While Mauritius has not ratified the Social Security (Minimum Standards) Convention, 1952, it has ratified two conventions that extend social protection to informal workers: Domestic Workers Convention (No. 189) and the Violence and Harassment in the World of Work Convention (No. 190). Mauritius is also a signatory to regional human-rights treaties such as the ACHPR, the African Charter on the Rights and Welfare of the Child, and the Protocol to the ACHPR on the Rights of Women in Africa. All of these provide for the right to social protection, which extend to self-employed informal workers and impose positive obligations on the state.

Mauritius has been criticized for not fully incorporating the provisions of international conventions into its national laws (Mahadew, 2018). For example, the Constitution of Mauritius does not guarantee socio-economic rights (Committee on Economic, Social and Cultural Rights, 2010). The absence of a constitutional right has been justified on the grounds that “the perennity ... of the welfare state was guaranteed by other legislation such as the Education Act, the Social Aid Act, the National Pension Act and the provision of free health services” (National Human Rights Commission, 2002:6).

Despite the absence of constitutional guarantees in relation to social protection, Mauritius is a strong welfare state that has passed laws and regulations that relate to social protection, and protect the population against several contingencies. A key innovation in Mauritius in relation to social insurance is the express inclusion of self-employed workers under the scope of the contributory pension. The National Pensions Act of 1976 allows them to make voluntary contributions.<sup>116</sup> The Social Contribution and Social Benefits Act, 2021, which consolidates and amends social-insurance laws, allows self-employed persons to contribute towards employment injury benefits in addition to pensions.

The government contributes towards the pensions of self-employed workers in the informal economy. This is based on a rate of MUR 50 (USD 1.24) for every MUR 100 (USD 2.47) paid by the self-employed (Ministry of Social Security and National Solidarity, undated). This co-contribution from the government is intended to ensure buy-in and support to the self-employed. However, the commitment to co-contributions is made through the country’s National Pensions Policy, as opposed to legislation, making it more difficult to enforce the commitment should the government fail to make the necessary contributions. Moreover, it is easier for the government to change or abandon a policy commitment than a legislative commitment.

Mauritius stands out for having legislation that governs social assistance. Given that the social-assistance schemes are rooted in law, the legislative framework outlines the nature of the benefits available, the eligibility criteria, and the modalities of administration.<sup>117</sup> For example, the National Pension Act regulates social assistance as

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<sup>116</sup> Section 15 of the National Pension Act

<sup>117</sup> Schedule Regulation 15

well as social insurance. The Act regulates universal pensions in relation to particular life events or situations:<sup>118</sup>

- i) orphan's pension for orphans below the age of 20;
- ii) old-age pension for all persons above the age of 60;
- iii) invalidity pension for working-age persons who are temporarily disabled;
- iv) widow's pension for a widow below the age of 60 who has not remarried;
- v) a guardian's allowance for a person caring for an orphan;
- vi) a child's benefit for recipients of other benefits who have dependent children;
- vii) an inmate's allowance for inmates of charitable institutions.

These benefits are provided regardless of income level, and would therefore be applicable to informal self-employed workers.

Mauritius also has dedicated social-assistance laws, including the National Social Aid Act, which provides cash benefits where a person cannot earn a livelihood and cannot take care of their dependents. One must have been temporarily or permanently incapable of adequately earning a livelihood and have insufficient means to take care of dependents due to any physical or mental disability, sickness or accident, or sudden loss of employment that has lasted for at least six months.<sup>119</sup> By referring to "earn[ing] a livelihood" the Act covers employees and self-employed workers in the informal economy. Benefits can be claimed by the worker, their spouse or child.<sup>120</sup>

More recently, Mauritius passed the Social Integration and Empowerment Act, 2016, to promote social integration and empowerment of people living in absolute poverty. The Act provides cash grants to adults whose income falls below MUR 2,720 (USD 63) per adult or MUR 1,360 (USD 31) per child. The provisions do not disqualify applicants who are employed or self-employed. The Act establishes the Social Register of Mauritius, which records the details of all persons who live in absolute poverty.<sup>121</sup> A person whose income falls below the prescribed income threshold must enlist on the Social Register and enter into a social contract with the Ministry of Social Security and National Solidarity.<sup>122</sup> The Act does not preclude people who work from claiming benefits, provided their income does not meet the poverty threshold, meaning that self-employed informal workers who are primary breadwinners of large households may qualify for these grants.

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<sup>118</sup> Part II of the National Pensions Act, 1976

<sup>119</sup> Section 3 of the Social Aid Act

<sup>120</sup> Part 1 of the First Schedule to the Social Aid Act

<sup>121</sup> Section 4 of the Social Integration and Empowerment Act

<sup>122</sup> Sections 6 and 9 of the Social Integration and Empowerment Act

### **3. Response to COVID-19 impact on self-employed informal workers**

Most of the early measures that the government imposed from 20 March 2020 were pursuant to cabinet decisions as opposed to legislation. While the restrictions significantly impacted the informal economy, certain categories of self-employed informal workers, including those providing “scavenging and cleaning services and all vegetable, meal/fish/poultry”, could continue to operate (Prime Ministers’ Office, 2020). In theory, this allowed street vendors and waste pickers to operate during this period. However, subsequent legal measures imposed a curfew order and later a full lockdown. During this period, only essential service providers were allowed outdoors. This resulted in a loss of employment, particularly amongst informal self-employed workers (Statistics Mauritius, 2020), with a decline of 51 per cent at the height of lockdowns in May (Rangai and Suet, 2020) and a greater loss of jobs in the informal economy (89,200) compared to the formal economy (40,200) (UNDP, 2021).

As it instituted lockdown measures, Mauritius swiftly established social measures for those in need. These were adopted through policy and executive measures as opposed to legal instruments. This was a departure from the country’s general approach to social-assistance schemes, which are founded in legislation including the Social Aid Act. Nevertheless, these support measures were founded in the country’s welfare state, which is rooted in legislation.

The government and the UNDP used the database from the Social Register to identify those in need of support and provided them with food parcels. The government also extended social contracts with the Social Register – which were due to expire in June 2020 – up to December 2020 (UNDP 2020). Furthermore, households listed on the Social Register as receiving the carer’s allowance received food packs. To the extent that some of the beneficiaries of the existing schemes were self-employed workers whose incomes fell below the poverty line, they had access to benefits from the scheme.

In addition, the Ministry of Finance, Economic Planning and Development introduced two new schemes specifically for informal self-employed workers (Ministry of Finance, Economic Planning and Development, 2020). From a regulatory perspective, these interventions were initiated through ministerial communication (policy). The first was the Self-Employed Assistance Scheme (SEAS) (Government of Mauritius, 2020). The government defined self-employed workers to include those in business, including hawkers, and earning below MUR 50,000 (USD 1,154) per month. The relatively high earnings threshold meant that the scheme was not restricted to the poorest self-employed workers, allowing for a greater number of self-employed informal workers to benefit. Eligible self-employed individuals received financial support of MUR 5,100 (USD 119), initially for a month from 16 March 2020, and later until the end of June 2020. Within seven days of launching the programme, 165,000 self-employed workers had filed applications. Some 37,000 of these were rejected and a total of 128,000 beneficiaries were paid. The government of Mauritius re-introduced the scheme from March 2021 until September 2021. The second benefit was the waiver of market fees for vendors selling all categories of goods for the duration of lockdowns. The government also undertook to credit the accounts of vendors who had already paid the fees.

#### **4. Conclusion**

By ratifying several international and regional instruments, Mauritius has committed to promoting the right to social protection. Its social-protection system is founded on the philosophy of being a welfare state. Despite the absence of socio-economic rights in the Constitution, Mauritius has elaborate social-protection provisions rooted in the law that allow self-employed informal workers to join and contribute towards the national pension scheme. They are also entitled to universal pensions provided they meet the criteria (e.g. old age, widowhood), social benefits when they cannot earn a living under certain circumstances, and cash benefits if their income falls below the poverty threshold.

Although the COVID-19 response was grounded in policy as opposed to law, the existing legal framework for social assistance provided a foundation. The government built on the schemes under the Social Aid Act and the Social Integration and Empowerment Act by using the Social Registry to identify households in need, providing additional benefits (e.g. food parcels) to existing recipients, and extending the duration of temporary benefits. Recognizing the potential gaps in the coverage of the COVID-19 assistance programmes based on existing schemes, the government established the SEAS and the market fee waivers specifically for informal self-employed workers.

It is recommended that the government strengthen the entitlement to social protection by guaranteeing the right to social protection and other socio-economic rights in the Constitution. The government should also consider increasing the scope of social-assistance benefits. In addition, the government could consider increasing the income threshold for the provision of social-assistance benefits in order to expand their reach beyond the poorest of the poor. Finally, the government should amend social-assistance and social-insurance laws to provide for the representation of self-employed worker organizations in the governing or advisory structures of the relevant institutional bodies.

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### **About Friedrich-Ebert-Stiftung**

Friedrich-Ebert-Stiftung is a nonprofit German foundation that was founded in Germany in 1925, and is named after Germany's first democratically elected president, Friedrich Ebert. The Organisation opened its first representation in Zambia in the mid-sixties shortly after independence, having, Civic education, research in socio-economic matters, support of trade unions, small scale industries and democratic Organisations as some of its main areas of operation.

The work of FES in Zambia is focused on democratic statehood, political participation and social justice. FES works together with various socio-political actors – governmental, civil society and international institutions - in order to engage in the further development of the democratic standards and to promote a socially just economic and social policy. Visit [www.fes.de](http://www.fes.de)



### **About WIEGO**

Women in Informal Employment: Globalizing and Organizing (WIEGO) is a global network focused on empowering the working poor, especially women, in the informal economy to secure their livelihoods. We believe all workers should have equal economic opportunities, rights, protection and voice. WIEGO promotes change by improving statistics and expanding knowledge on the informal economy, building networks and capacity among informal worker organizations and, jointly with the networks and organizations, influencing local, national and international policies. Visit [www.wiego.org](http://www.wiego.org)