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The Influence of Policy and Legal Frameworks on the Development of National Social Protection Systems

Markus Kaltenborn, Abdul-Gafaru Abdulai, Keetie Roelen and Sarah Hague

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Summary

Social protection in low and lower middle-income countries is slowly but steadily becoming more systematised. Policy and legal frameworks are widely considered to be crucial for the creation of social protection systems. National policies and strategies can help to institutionalise social protection while legal frameworks can formalise the rights base for social protection. But exactly how important are such frameworks? And what role do they play? This paper aims to shed light on the role of policy and legal frameworks in the establishment of social protection systems. It examines the extent to which frameworks influence the creation of systems (top-down process), whether emerging systems inform the development of frameworks (bottom-up process), or whether a more non-linear process is at work. It does so by building on secondary academic and policy literature and drawing on case study material, most notably in Ghana.

Findings suggest that the role of policy and legal frameworks in the development of social protection systems is inherently context-specific and mostly occurs as an iterative rather than linear and sequenced process. Policy frameworks can act as a catalyst towards building social protection systems but do not offer a guarantee for success, with issues plaguing the development of such frameworks likely to also undermine the process of systems-building itself. As such the process appears of greater importance than the outcome itself. Both international and constitutional law can provide important legal guidelines for the development and implementation of social protection systems, notably in countries where social protection rights are constitutionally guaranteed and where the courts claim an “activist” role. Governments that decide to formulate social protection conform the so-called “rights-based approach to social protection” will opt for a statutory (or other legal) framework which does not only ensure the permanence, predictability and transparency of their social protection programmes, but also enables rights-holders to enforce their entitlements to social protection benefits.

Ghana’s social protection policies and interventions are driven by a rights-based approach, generally framed through a bottom-up approach. The Ghanaian case study also draws attention to the critical role of politics in shaping the emergence of a social protection system. This suggests that a fuller understanding of the influence of legal and policy frameworks on social protection systems may require taking into account the specific political context within which such frameworks are embedded.

Keywords: Social policy, social protection, legal frameworks, strategies.

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Acronyms

ASEAN	Association of Southeast Asian Nations
AU	African Union
CARD	Council for Agricultural and Rural Development
CDCF	Cambodia Development Cooperation Forum
DoPDMA	Department of Poverty and Disaster Management Affairs
DPSP	Directive Principles of State Policy
GPRS I	Ghana Poverty Reduction Strategy
GPRS II	Growth and Poverty Reduction Strategy
GSFP	Ghana School Feeding Programme
GSGDA	Ghana Shared Growth and Development Agenda
HIPC	Heavily Indebted Poor Countries
ICESCR	International Covenant on Economic Social and Cultural Rights
ILO	International Labour Organisation
LEAP	Livelihood Empowerment Against Poverty
M&E	Monitoring and Evaluation
MDG	Millennium Development Goal
MIS	Management Information System
NDC	National Democratic Congress
NGO	Non-Governmental Organisation
NHIS	National Health Insurance Scheme
NPP	New Patriotic Party
NSPS	National Social Protection Strategy
PAMSCAD	Programme of Action to Mitigate the Social Costs of Adjustment
PSIA	Poverty and Social Impact Assessment
RHVP	Regional Hunger and Vulnerability Programme
SAP	Structural Adjustment Programmes
SPF	Social Protection Floor
SPU	Social Protection Unit
VUP	Vision 2020 Umurenge Programme

1 Introduction

Social protection systems, defined as a set of public and private actions which address income and poverty shocks as well as social vulnerability (UNICEF, 2012), are a social, economic and political necessity for countries to reduce poverty and inequality, foster inclusive and sustainable economic growth, as well as strengthen social cohesion. Programmes, such as cash or in-kind transfers, have been shown to have significant transformative impacts for individuals, households and entire countries. Social protection systems vary not only in their breadth and make-up — that is, they may comprise of large-scale social insurance and social assistance schemes covering both those in and outside of the formal sector or consist of narrowly targeted schemes providing support to the poorest and most marginalised — but they also vary widely in their path to development. National social protection policy and legislative frameworks constitute two core elements of social protection systems and their development. However, in helping us to understand the different pathways to system development it is important to explore whether such frameworks are usually the catalyst to systems development or whether conversely ad hoc programmes are more likely to provide impetus for bottom-up systems development.

In this paper, we aim to examine the various paths that countries have taken in developing their social protection systems, with a primary focus on the interplay between policy and legal frameworks. The paper explores the extent to which social protection policies and legal frameworks play a role and are necessary in the evolution of a national social protection system, with a particular focus on non-contributory systems. A case study is also presented comprising the experience of Ghana in developing its social protection framework and examining the country's gradual shift towards a rights-based approach to social protection.

Three interrelated questions are addressed: (1) To what extent are social protection systems influenced by policies or legal frameworks (top-down) and to what extent do individual “stand alone” programmes influence the development of policies and legal frameworks for social protection (bottom-up)? (2) What has been the experience of various developing countries that have successfully established and implemented national social protection systems? What are the key driving factors? (3) Where does Ghana fall on the spectrum?

The remainder of this paper is organised as follows: Sections 2 and 3 describe the policy and legal frameworks accompanying the development of social protection schemes; Section 4 examines the influence of policies and legal frameworks on the development of social protection systems; Section 5 explores the development of Ghana's social protection system, paying particular attention to the influence of the country's policy and legal frameworks in these processes. Section 6 concludes.

2 Policy frameworks

The incorporation of social protection into policy frameworks is crucial for its systemisation and long-term sustainability (European Commission 2015). Formulating a national social protection strategy of policy and integrating these into national development strategies can be an important step to policy change and breaking silos across fragmented sectors (Carroll 2011). Robalino *et al.* (2012) argue that the formulation of national policies can be considered the most strategic form of engagement in building social protection systems, incorporating a common vision for social protection and building coherence between individual programmes, financing and administration modalities. The need for coherence is crucial for making social protection systems effective and ensuring that no one falls through the cracks. At present, many systems are challenged by fragmentation, limiting their impact on poverty and inequality (World Bank and UNICEF 2013). This section discusses common

steps in developing national social protection policies and strategies, and then highlights the key defining features of such documents.

It should be noted that throughout the paper we refer to policy and strategy frameworks in a conflated manner. Policies can be said to refer to ‘a statement of principles guiding the government’s operations and decision-making’ with clear rules and principles guiding action towards general objectives and outcomes (World Bank, 2012) while strategies are ‘the bridge between policy or high-order goals on the one hand and tactics or concrete actions on the other’ with a clear plan to successfully achieve overall goals or objectives (*ibid.*). In practice, this distinction is rarely applied in the literature on policy and strategy documents on social protection, or indeed across such documents. Documents may be called ‘strategies’ – such as in Bangladesh, Ghana and Lesotho – or ‘policies’ – such as in Ethiopia and Kenya – or even both – such as in the case of Liberia’s National Social Protection Policy and Strategy. A review of these documents suggests that their components and the process leading up to their formulation is very similar. Due to the lack of differentiation, we will refer to both policy and strategy documents under a single heading. This use of terminology is in line with a recent review of social safety nets by the World Bank, in which no distinction is made between social protection policies or strategies but uses the terms interchangeably (World Bank, 2015).

2.1 The policy context of social protection programmes: an overview of national policy and strategy frameworks for social protection

Social protection policy and strategy frameworks are now widespread. In a recent World Bank survey, 77 out of 136 low- and middle-income countries (57 per cent) were found to have a social protection policy or strategy in place while another 31 countries (23 per cent) were in the process of planning the formulation of such a document. Approved policies and strategies were more common in higher income countries, while many strategies were under development in 2014 in sub-Saharan Africa, as indicated in Table 2.1.

Table 2.1 Social protection policies/strategies by country income group and region

	<u>Status</u>			Total
	Active	Planned	Not reported	
Income group				
Low-income	16	16	3	35
Middle-income	61	15	25	101
Region				
East Asia and Pacific	7	4	9	20
Europe and Central Asia	17	2	4	23
Latin America and the Caribbean	17	4	7	28
Middle East and North Africa	7	1	1	9
South Asia	2	5	1	8
Sub-Saharan Africa	27	15	6	48
Total	77	31	28	136

Source: Adapted from World Bank 2015.

The development of social protection strategies and policies started to gain real momentum in the 2000s, in part when governments started seeing the value of social protection as part of development and poverty reduction policies (World Bank 2015). Social protection strategies can take different forms. They can be (1) components of a poverty reduction plan or development framework, (2) comprehensive social protection strategies, or (3) limited social safety net policies (World Bank 2015). While many strategies may have started as components of wider plans or frameworks, the majority of approved and planned frameworks can be considered comprehensive social protection strategies that stand on their own (*ibid.*).

Countries with a social protection strategy or policy in place or that are in the process of formulating such frameworks can be seen to embark on this process following the convergence of top-down and bottom-up interests in building social protection systems.

A number of global and regional frameworks and initiatives can be identified as driving and underpinning many social protection policies. In Sub-Saharan Africa, the Livingstone Call for Action in 2006 and the subsequent Yaoundé Declaration in 2007 urged governments to include social protection in their national development plans and budgets. While a meeting in Windhoek in 2008 led to the Social Policy Framework for Africa, encouraging countries to develop context-specific strategies that provide a minimum package to citizens (Garcia and Moore 2012). In the Asia and Pacific region, the signing of the Declaration of Colombo in 2011 and the Declaration on strengthening social protection by the leaders of the Association of Southeast Asian Nations (ASEAN) in October 2013 provided important impetus for the development of national strategies (UNDG 2014). Internationally, the Social Protection Floor (SPF) has been driving the call for progressive realisation of a minimum package of social protection in every country (World Bank and UNICEF 2013), and forms the foundation of strategy formulation in many countries.

At the same time, the implementation of multiple individual programmes and its concurrent lack of coordination and often piecemeal approach to the overarching objectives of reducing poverty and vulnerability, led to the recognition that an overall strategy or policy is required to overcome fragmentation and build a coherent system. World Bank and UNICEF (2013) consider the lack of a national framework or strategy to be one of the main reasons for fragmented social protection systems, undermining their efficiency, effectiveness and impact on poverty inequality. Indeed, Liberia's national strategy clearly states that it aims to 'reduce fragmentation and increase coordination of interventions, [...] move towards a comprehensive packaging of social protection interventions as capacity and resources allow' (Government of Liberia 2013: 11–12).

The role of donors and civil society in raising the demand for and accountability of social protection programmes and systems has been central in some countries to catalyse or direct the initiation of policy and strategy formulation. In Ghana, UNICEF set up a social protection technical assistance unit which was able to offer the demand-led support the Government lacked to enable the process to get off the ground rapidly. In Burundi, experiences with Concern's Graduation Model programme help to inform discussions about opportunities for social protection and individual programmes in the country. That said, no strong consensus appears to exist over the strength of such a role or whether it is always positive or negative. Lack of coordination between donors and international organisations as well as those organisations' efforts to push their own agendas can represent key challenges in developing national models for social protection. In Nepal this was considered a main obstacle to moving the social protection agenda forward (Roelen and Karki Chettri, 2016). In reference to Malawi, Freeland (2013) points out that agencies' refusal to engage with the government's priority of agricultural input subsidies and persistence in pursuing their own policy agendas caused the process of drafting a national social support policy to grind to a halt.

2.2 The process of policy and strategy formulation

A review of literature regarding social protection policy formulation and selection of country strategies allows for the decomposition of the process of developing national social protection strategy and policy documents. We identify five broad, though not necessarily linear, steps: (1) undertaking a situation analysis and needs assessment; (2) establishing a coordinating body; (3) exploring policy options; (4) reaching consensus; (5) obtaining political approval.

1. *Undertaking a situation analysis and needs assessment.* Before embarking on the process of formulating a strategy or policy, countries will need to take stock and answer key questions, such as what kind of programmes are already available and who is in need and not yet currently reached by existing programmes (UNDG 2014). For example, after the acknowledgement that poverty in Cambodia remained widespread, leaving many people vulnerable and excluded, the first step towards the development of the social protection strategy was a scoping and mapping exercise to assess the state of the safety nets and the risks of leaving people vulnerable to food and economic crises (Royal Government of Cambodia 2011). Similarly, in the Philippines, an assessment of its social welfare and protection programmes, vis-à-vis progress made in poverty reduction, was undertaken before embarking on the process of drafting a national strategy (Villar 2013). Undertaking such analysis helps to identify and articulate the problem that a social protection system is to address (European Commission 2015), providing clear guidance to the development of the national strategy or policy.
2. *Establishing a coordinating body.* The establishment of a coordinating body is a second vital step. ADB (2001) suggests that a coordinating body should include ‘government, external funding agencies and civil society groups’, while World Bank (2015) points out that the diversity of agencies involved should reflect the scope of the strategy and its sectors (e.g. social protection, education, health) included. UNDG (2014) emphasises the importance of a participatory process for formulating strategies and the need to include all stakeholders that are working towards effective implementation of social protection, including social security organisations, workers’ and employers’ representatives, and Non-Governmental Organisations (NGOs). In practice, many such institutional groups – such as inter-ministerial committees that drive decision-making – include predominantly Government representatives.

Leadership of a coordinating body can sit with different ministries or government departments, such as the ministry directly responsible for the implementation of social protection (such as the Ministry of Social Affairs) or a cross-sectoral department (such as in the Office of the President) (World Bank 2015). External partners are often instrumental in establishing and facilitating the creation of a coordinating body. The UNDG in the Asia and Pacific region, for example, considers this to be a specific role for the UN (UNDG 2014).

3. *Exploring policy options.* The exploration of policy options in terms of their design and implementation represents the substantive element of the process and pertains to the actual formulation of the strategy or policy. The development of policy options is based on a combination of analysis and politics in a bid to come to viable and acceptable options (European Commission 2015). A consideration of the evidence on social protection, both regarding programmes that are already in place and lessons from programme design implementation elsewhere can inform important decisions about design and implementation of individual programmes and their combination into an overall policy. At the same time, it is widely recognised that policy formulation is more than a technocratic exercise and heavily value-laden decisions, such as those related

to targeting transfers to certain groups or whether to impose behavioural conditions on beneficiaries, are likely to be more strongly driven by political considerations.

4. *Reaching consensus:* The technical work on policy options is followed by efforts to reach consensus on the proposed options by high-level policy makers, often through public endorsement. In Cambodia, findings and recommendations were presented during a National Forum on Food Security and Nutrition under the theme of Social Safety Nets in 2009, with the Prime Minister endorsing social safety nets for the vulnerable as a principle strategy for mitigation and protection against negative impacts of the global economic crisis (Royal Government of Cambodia 2011). In other cases, high-level consultation is a more continuous process. In Myanmar, workshops and forum meetings were organised throughout the process (Republic of the Union of Myanmar 2014).
5. *Obtaining political approval:* A key step in the process pertains to political buy-in and approval, usually by cabinet and parliament, both at the outset and to approve framework adoption. Often initial political engagement comes about following the recognition of the political value of such programmes (in the run-up to elections for example). The process of gaining sufficiently broad political support is often time-consuming and may delay the advancement or finalisation of a strategy (sometimes by as much as two years). In Cambodia, a newly developed national social protection policy was endorsed by the 3rd Cambodia Development Cooperation Forum (CDCF) in June 2010, adopted by the government in March 2011 and officially launched in December 2011 (Royal Government of Cambodia 2011, UNDG 2014).

2.3 Defining features of policy and strategy frameworks

Social protection strategies often hold a similar set of components, which can be divided into (1) background and context, (2) vision and mandate, (3) programmes and interventions, (4) institutional arrangements, (5) financing, and (6) accountability. The exact order and emphasis may differ. The third draft of the Bangladesh national strategy, for example, includes extensive sections that discuss the country's state of affairs with respect to poverty and vulnerability, existing programmes and policies as well as international evidence of impact of social protection (General Economics Division 2014). The Jamaica national strategy is more internally focused and includes a general overview of social protection and its history before embedding social protection in Jamaica in the national development plan (Planning Institute of Jamaica 2014). A brief summary of the key features of social protection policy frameworks is outlined below.

1. *Background and context:* Social protection strategy documents often commence with setting the scene. This includes a discussion of the country's situation with respect to poverty and vulnerability, the current state of affairs with respect to social protection and national and international evidence of social protection. The introductory chapter of Rwanda's national social protection strategy, for example, discusses poverty and inequality levels for different groups in society before grounding the rationale for social protection in the objective of poverty reduction (MINALOC 2011a). Cambodia's national strategy introduces the country's legal and political commitments to social protection before presenting a poverty and vulnerability profile and the existing arrangements for addressing them (Royal Government of Cambodia 2011).
2. *Vision for and mandate of social protection:* The definition of a vision or mandate pertains to the overall goal and objectives of social protection and its underpinning values. For example, should it serve as a basic safety net for the most vulnerable and marginalised, or should it act as a rights-based mechanism aiming to protect everyone from living in or falling into poverty? A discussion of the vision and mandate is often

preceded by a framework of social protection that includes a definition and overall approach. Popular frameworks include the life-cycle approach (see for example Bangladesh, Jamaica, Lesotho, Myanmar, Nepal), the transformative social protection framework (see for example Myanmar), and more recently also the Social Protection Floor (see for example Jamaica in the box below, or Myanmar). Frameworks and approaches are often combined rather than used in a mutually exclusive manner.

Box 2.1 Goal and objectives of Jamaica Social Protection Strategy

Jamaica Social Protection Strategy

The **Goal** of the Strategy is to engender Effective Social Protection — a major Outcome of the Vision 2030 Jamaica — through a streamlined and collective interpretation of social protection, which will guide the approaches to be used, priorities for resource allocation, and practical interventions.

The following are the **objectives** of the Strategy:

1. To enhance the prospects for economic and social development of Jamaica through a structured approach to the provision of social protection interventions.
2. To provide the conceptual underpinning that will guide legislative and policy frameworks, resource mobilization, programming and service delivery, for social protection in the country.
3. To unite and orient the efforts of public and private actors and stakeholders in creating responsive programmes and initiatives for social protection, through the various types of interventions.
4. To ensure that vulnerable or disadvantaged population groups or individuals have recourse to a safety net, facilitating access to basic income security and social services.

(Planning Institute of Jamaica 2014)

3. *Social protection programmes:* After having defined the overall mandate, the policy formulation process considers the appropriate choice of programmes or instruments to achieve it (Robalino *et al.* 2012). Social protection strategy documents often engage with such discussions by building on the background dialogue around social protection programmes already in place and reflecting on how these programmes can be extended, consolidated, abolished, and/or complemented by new programmes. The Myanmar strategy, for example, discusses flagship programmes across stages of the life-cycle, some of which are already in place (such as civil service pension schemes) and others to be developed (such as a cash allowance for children aged 3–15 years) (Republic of the Union of Myanmar 2014). The Rwanda strategy is largely framed around four large cash transfer programmes already in place and considers how these can be improved and extended (MINALOC 2011a). The Lesotho strategy includes an implementation plan detailing the expansion of programmes by year from 2014/15 to 2018/19.
4. *Institutional arrangements and roles and responsibilities:* Social protection strategies invariably dedicate a separate chapter or section on institutional arrangements, focusing on roles and responsibilities in offering leadership, coordination, implementation and delivery of programmes. The Cambodia strategy indicates that the Council for Agricultural and Rural Development (CARD) has the mandate to act as the focal point for the development, implementation, monitoring and evaluation of the

national social protection strategy and that they will be tasked with setting up a secretariat for undertaking these activities (Royal Government of Cambodia 2011). The Jamaica strategy proposes a two-tier system dividing responsibility between central and local levels, with the Ministry of Labour and Social Security handling the island-wide cash transfers and parish-based facilities such as social services to be handled locally (Planning Institute of Jamaica 2014). Another element that is often considered as part of implementation pertains to capacity building, and the Rwanda and Philippines strategies explicitly discuss the need for training.

5. *Accountability mechanisms:* Many strategies include discussions of accountability mechanisms, including monitoring and evaluation (M&E). These can either be embedded in the section on implementation - such in the Lesotho strategy - or be included as a separate section. The Rwanda strategy dedicates a separate section to M&E, making reference to the establishment of a Management Information System (MIS) and impact evaluation plans for the overall system and includes a log frame for regulator monitoring (MINALOC 2011a). The Jamaica strategy presents a list of outcome indicators that are deemed relevant for gaining insight into the extent to which elements of the social protection floor are achieved but offers less detail about how M&E should be undertaken.
6. *Financing of social protection:* The fact that financing of social protection is often a contentious topic might be a reason for both including and excluding the issue from national strategies. Some strategies – such as the Bangladesh and Jamaica strategies – include elaborate discussions on how the costs of individual programmes and the system as a whole will be financed through a combination of taxes and employee and employer contributions (General Economics Division 2014, Planning Institute of Jamaica 2014). The Lesotho strategy includes findings from an elaborate micro-simulation model that considers the potential effect of different social protection systems on poverty and their associated costs (Freeland and Khondker 2015). By contrast, the Cambodia strategy indicates that the costing exercise is still to be undertaken (Royal Government of Cambodia 2011).

3 Legal frameworks

In this section we review the existing legal context of social protection systems and programmes and briefly define the key features of such legal frameworks within both the constitution, and statutory and non-legal instruments.

3.1 The legal context of social protection systems: An overview of regulatory levels and legal instruments relevant for social protection reforms

An important starting point for exploring the legal contexts of social protection systems is to understand and differentiate between various levels of legal regulation. Social legislation and non-legislative regulations, which specify legal provisions, are situated within a broader legal framework, consisting of constitutional and international legal provisions. At the national level (constitutional law), constitutional order stipulates who is ultimately responsible for the development and implementation of social protection systems. In federally organised countries, social legislation may fall within the competence of the individual states, or it may be regulated at the federal level. Similarly, in decentralised systems there may be different roles for national and local governments. The Constitution also provides information about the procedures that are relevant to the legislation and about the competences of the government to provide legal regulations below the statutory level. Additionally, the extent to which laws and other regulations can be controlled by Constitutional Courts or Supreme Courts is specified in national Constitutions. Last but not least, constitutional law also

contains important information about the conceptual orientation of the social protection policy of a country: Both the Bill of Rights as well as other provisions in national Constitutions may give rise to conditions that must be observed by authorities in designing social protection systems (see in detail section 2.2.2 a).

Important legal guidelines for social policies are also provided under international law. Specific requirements for the minimum level of social services that a government must provide to its citizens can be derived from international human rights standards. The right to social security, one of the basic social human rights, is included in the Universal Declaration of Human Rights, and – as binding treaty law – in the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹ In contrast to other social rights which are listed in the Covenant, the provision on the right to social security in Art. 9 of the Covenant is rather brief ('The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.'), but further guidance on the contents of this obligation is provided by General Comment No. 19² which has been worked out by the Committee on Economic, Social and Cultural Rights, the UN body monitoring the Covenant. The General Comments of this Committee do not contain legally binding rules of international law, but are of essential relevance for the interpretation and concrete definition of scope and content of social rights. General Comment No. 19 highlights that the Covenant suggests a broad interpretation of the term 'social security' which may potentially cover:

contributory or insurance-based schemes, such as social insurance, non-contributory schemes, such as universal or targeted social assistance schemes as well as other forms of social security, including privately run schemes, self-help measures and community-based or mutual schemes.
(para. 4, 5).

Moreover, the Comment specifies the branches of social protection included in Art. 9 of the ICESCR. Accordingly, the following categories are covered: health care, old age, unemployment and employment injury, family and child support, paid maternity leave, income support to persons with disabilities as well as benefits to survivors and orphans. States are obliged

to adopt the necessary measures, including the implementation of a social security scheme, directed towards the full realization of the right to social security.
(General Comment No. 19 para. 47).

The law of the International Labour Organization (ILO) is another important source of international law on social protection. The most important treaty document that has been

¹ 993 UNTS 3 (https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en). Moreover, the right to social security is also included in Article 11 (1) e, 14 (2) c Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1249 UNTS 13, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en), Art. 26 Convention on the Rights of the Child (CRC, 1577 UNTS 3; https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en), Art. 27 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW, 2220 UNTS 3; https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&lang=en) and in Art. 28 (2) Convention on the Rights of Persons with Disabilities (CRPD, 2515 UNTS 3; https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en). On the regional and sub-regional level see furthermore Art. 9 Additional Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights (OAS Treaty Series No. 69; www.oas.org/juridico/english/treaties/a-52.html), Art. 30 Arab Charter on Human Rights (International Human Rights Reports 12 [2005], p. 893), Art. 13 f Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (www.achpr.org/files/instruments/women-protocol/achpr_instr_proto_women_eng.pdf) and – however on a soft law level – Art. 27 (1), 30 ASEAN Human Rights Declaration in 2012 (www.asean.org/storage/images/ASEAN_RTK_2014/6_AHRD_Booklet.pdf).

² General Comment No. 19 on the right to social security (Article 9) of 4.2.2008, E/C.12/GC/19, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f19&Lang=en.

provided by the ILO in this sector is the Social Security (Minimal Standards) Convention No. 102 of 1952.³ It covers all relevant social risks (illness, unemployment, age, work accidents and occupational diseases, etc.), but the contracting parties commit themselves to guarantee social protection only to a certain proportion of the population. However, because the obligations arising from ratification of the Convention are quite extensive, only a small number of States – so far 53 countries, among them the industrialised nations in particular – have as yet agreed to undergo related monitoring. Therefore, in recent years, the ILO has shifted its attention towards the further development of social security issues at the *soft law* level (in particular declarations and recommendations, which do not have legally binding force) as well as addressing increasingly special problems that low- and middle-income countries face in this context. This approach addresses the problem that the vast majority of the working population in this part of the world belong to the informal sector of the economy and is therefore not covered by conventional social security systems. Subsequent to this policy reorientation by the ILO, the International Labour Conference in 2012 adopted the *Social Protection Floors Recommendation*⁴ which underscores access to primary health care and sets minimum standards on income security for all citizens, while requesting governments to continuously raise basic coverage up to the level specified by existing ILO agreements. This recommendation has received almost unanimous support from the Member States of ILO.

3.2 Defining features of legal frameworks

Numerous low- and middle-income countries have incorporated social rights into their constitutions and, in doing so, have taken a first step to fulfilling their international commitments. Besides the rights to health, food and to education, the right to social protection is explicitly mentioned in a considerable number of constitutions. The wording varies in scope and level of detail (ILO, 2011, para. 236 et seq.): Some provisions are quite concise and do not contain more than simply the statement that every person or citizen has the right to social security (or that the right to social security is guaranteed).⁵

More detailed versions of the legal title have been incorporated into other constitutions, particularly in Central and South American countries (ILO, 2011, para. 238): For instance, Art. 19 (18) of the Constitution of Chile ‘assures to all persons ... (t)he right to social security’, stating that ‘(t)he action of the State will be directed to guarantee the access of all the inhabitants to uniform basic benefits whether granted by public or private institutions’. The provision also contains procedural requirements and supervisory rules. Precise provisions about the structure and functioning of the social protection system are also provided for in the Constitutions of Bolivia,⁶ Brazil,⁷ Colombia,⁸ Ecuador⁹ and Mexico¹⁰. In quite a lot of countries there are, moreover, special constitutional provisions that refer to protection against specific social risks (e.g. illness, unemployment) or target specific categories of the population (children, youth, women, families, the elderly and persons with disabilities).¹¹ Other constitutions do not explicitly mention the right to social security but refer to the international human rights obligations into which the government has entered. In

3 210 UNTS 131; www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::p12100_instrument_id:312247. For the following see Kaltenborn (2015), p.10; Kaltenborn (2017), p. 243.

4 Recommendation concerning National Floors of Social Protection (SPF Recommendation), Recommendation 102, www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:3065524:NO; see also Cichon (2013).

5 See e.g. Art. 18 Constitution of Burkina Faso (1991, rev. 2012); Art. 22 Constitution of Haiti 1987 (rev. 2012); Art. 16 Constitution of Mali (1992).

6 Art. 45 Constitution of Bolivia (2009).

7 Art. 6, 193-195, 201-204, 227 Constitution of Brazil (1988, rev. 2014).

8 Art. 48 Constitution of Colombia (1991, rev. 2013).

9 Art. 34, 66, 367-374 Constitution of Ecuador (2008, rev. 2011).

10 Art. 123 (A. XXIX., B. XI.) Constitution of Mexico (1917, rev. 2015).

11 For an overview of the different constitutional provisions see ILO (2011), para. 246 et seq.

Argentina, the main Human Rights treaties – among them the ICESCR – ‘stand on the same level as the Constitution... and must be understood as complementary of the rights and guarantees recognized therein’.¹² Similar, though more general, provisions on the relevance of international law for the interpretation of the constitution are laid down in several African constitutions (e.g. in Cameroon,¹³ Chad,¹⁴ Ethiopia,¹⁵ Guinea,¹⁶ Ghana,¹⁷ Malawi,¹⁸ Namibia,¹⁹ Rwanda,²⁰ Senegal,²¹ Sudan²² and Togo²³).

In some countries one can find provisions that classify social protection as a constitutional objective, directive or guiding principle of state policy, either in addition to the individual right of citizens to social security or social assistance²⁴ or as sole provision on social protection issues.²⁵ It is not unusual for such constitutions to also include an indication that this objective is subject to the availability of the necessary financial resources. In Zimbabwe, Art. 30 of the Constitution stipulates that ‘(t)he State must take all practical measures, within the limits of the resources available to it, to provide social security and social care to those who are in need’.²⁶ Some Constitutions impose a duty on the State to realise the right to social security, but do not include a corresponding individual right which could be enforced before the courts. The Constitution of Tanzania²⁷ is a good example for such an approach: On the one hand, according to Art. 11 (1), ‘(t)he state authority shall make appropriate provisions for the realization of a person’s right to... social welfare at times of old age, sickness or disability and in other cases of incapacity’ and as stipulated in Art. 7(2), it is ‘the duty and responsibility of the Government, all its organs and all persons or authorities exercising executive, legislative or judicial functions to take cognizance of, observe and apply’ this provision. On the other hand, Art. 7 (2) states that the provisions of this part of the Constitution are ‘not enforceable by any court. No court shall be competent to determine the question whether or not any action or omission by any person or any court, or any law or judgment complies with the provisions of this Part of this Chapter.’

¹² Art. 75 (22) Constitution of Argentina (1853, reinst. 1983, rev. 1994).

¹³ Art. 45 Constitution of Cameroon (1972, rev. 2008).

¹⁴ Art. 221 Constitution of Chad (1996, rev. 2005).

¹⁵ Art. 9 (4) Constitution of Ethiopia (1994).

¹⁶ Preamble of the Constitution of Guinea (2010).

¹⁷ Art. 37 (3) Constitution of Ghana (1992, rev. 1996).

¹⁸ Art. 211 Constitution of Malawi (1994, rev. 1999).

¹⁹ Art. 144 Constitution of Namibia (1990, rev. 2010).

²⁰ Art. 190 Constitution of Rwanda 2003 (rev. 2010).

²¹ Art. 98 Constitution of Senegal (2001, rev. 2009).

²² Art. 27 (3) Constitution of Sudan (2005).

²³ Art. 50 Constitution of Togo (1992, rev. 2007). For more examples see the detailed list in ILO (2011), para. 267.

²⁴ This is an approach which can be found in quite a lot of low- and middle-income countries; examples are Art. 36, 75 Constitution of Cambodia (1993, rev. 2008); Art. 14, 45 Constitution of China (1982, rev. 2004), Art. 48, 366 Constitution of Colombia (1991, rev. 2013), Art. 17 Constitution of Egypt (2014) Art. 45, 50 Constitution of El Salvador (1983, rev. 2003), Art. 123, 142-145 Constitution of Honduras (1982, rev. 2013), Art. 34 (2), 28 H (3) Constitution of Indonesia (1945, reinst. 1959, rev. 2002), Art. 43 (1e, 3) Constitution of Kenya (2010), Art. 1, 123 (A. XXIX., B. XI.) Constitution of Mexico (1917, rev. 2015), Art. 34 (2), 38 (5), 40 (3), 41, 42 (2), 43 and 51 i [2] Constitution of Nepal (2015), Art. 61, 82 (7), 105 (2) Constitution of Nicaragua (1987, rev. 2005), Art. 113 Constitution of Panama (1972, rev. 2004), Art. 27 (1c, 2) Constitution of South Africa (1996, rev. 2012), Art. 80, 86 Constitution of the Venezuela (1999, rev. 2009), Art. 34 and 59 (2) Constitution of Vietnam (1992, rev. 2013), Art. 30, 82 Constitution of Zimbabwe (2013).

²⁵ See e.g. Art. 48, 49 Constitution of Cuba (1976, rev. 2002), Art. 215 (1), 216 (5) Constitution of Gambia (1996, rev. 2004), Art. 36 (1, 10), 37 (6) Constitution of Ghana (1992, rev. 1996); Art. 41 Constitution of India (1949, rev. 2014), Art. 31 Constitution of Morocco (2011), Art. 95 Constitution of Namibia (1990, rev. 2010), Art. 38 (c, d) Constitution of Pakistan (1973, reinst. 2002, rev. 2015), Art. II (9), Art. XIII (11), Art. XV (4) Constitution of the Philippines (1987), Art. 27 (9) Constitution of Sri Lanka (1978, rev. 2010), Art. 60 (5) Constitution of Swaziland (2005), Section XIV (b) Constitution of Uganda (1995, rev. 2005), Art. 11 (1) Constitution of Tanzania 1977 (rev. 2005).

²⁶ Similar provisions can be found in Art. 14 Constitution of China (1982, rev. 2004), Art. 21 (2) Constitution of Eritrea (1997), Art. 90 (1) Constitution of Ethiopia (1994), Art. 1 (8) Constitution of Gabon (1991, rev. 1997), Art. 41 Constitution of India (1949, rev. 2014) and in Art. 27 (1c) Constitution of South Africa (1996, rev. 2012).

²⁷ 1977, rev. 2005.

Such constitutional guarantees provide an important basis for key actors to push for the development of social protection systems. Constitutional mandates can be used by government when dealing with Parliament or with civil society actors, as they provide powerful grounds for argument when initiating new programmes or keeping certain reform processes on track. Conversely, Parliament can also cite these constitutional guarantees in demanding action from the government. The establishment of the right to social security in the Constitution is, however, even more important for the right-holders (and potential claimants). They can – often with the assistance of NGOs, trade unions, or the media – invoke their constitutionally guaranteed rights in cases where those are not sufficiently met by the government and administrative authorities. Thus, constitutionally guaranteed social protection rights may provide an important basis for argument in negotiations on the redesign of certain programmes, as well as in complaints about a lack of implementation of these programmes.

The courts fulfil a particularly special function in countries that guarantee the right to social protection as an individual right – in this context, the ILO speaks of a ‘new distribution of responsibilities between the executive, the legislative and the judicial authorities’ (ILO, 2011, para. 236). Constitutionally guaranteed social rights are important for socio-political decisions of nationwide significance especially in those cases where they are the basis for pioneering Constitutional Court or Supreme Court rulings. In this respect, the judicial culture of several Latin American countries²⁸, as well as of India and South Africa, provide a lot of illustrative examples: The National Food Security Act 2013 in India, for instance, which forms the main legislative basis for the provision of basic food entitlements for children, pregnant women and poor households in the country, can be traced back to the famous Right to Food case which the Supreme Court decided in 2001.²⁹ In South Africa – to give another example for a country with so called ‘activist tribunals’ (Bonilla Maldonado 2013) in social rights protection – most notably the decisions of the Constitutional Court with regard to the right to health and the right to housing have gained prominence³⁰, but there are also other important judgements which have influenced the social protection system of the country. The Khosa case, for instance, has been the background for new legislation on the access to social assistance for non-citizens in South Africa who are nevertheless permanent residents. The Constitutional Court found the old legislation by which non-citizen residents are excluded from the benefits to be inconsistent with Art. 27 (1) of the Constitution, which affirms the right of all persons to have access to social security and assistance, and with Art. 9 (3), which prohibits unfair discrimination by the State organs.³¹ In other cases the Court’s decisions contributed to an improvement of the general administration of the country’s social assistance programme.³²

Specific laws that fall under the category of ‘social protection’ or ‘social security’ can be found in nearly every state, worldwide.³³ However, the level of regulation in this area varies greatly. While both high-income countries and also some low- and middle-income countries have all sectors of social security covered by a differentiated set of rules, there are still several states where only a small percentage of the population (often state employees) enjoy a legally guaranteed social security provision. Many countries have systems in place that provide

²⁸ For examples drawn from case law from Constitutional Courts in Latin America see ILO (2011), para. 274 et seq.

²⁹ *People’s Union of Civil Liberties (PUCL) v. Union of India & Others* WP (Civil) No. 196/2001.

³⁰ See e.g. *Minister of Health and others v. Treatment Action Campaign and others* from 5.7.2002, Case CCT 8/02, 2002 (10 BCLR 1033 (CC)); *Government of the Republic of South Africa and others v. Irene Grootboom and others* from 4.10.2000 Case CCT 11/00, 2001 (1) SA 46 (CC).

³¹ *Khosa and others v. Minister of Social Development and others, Mahlaule and another v. Minister of Social Development*, 2004 (6) SA 505 (CC); see also Sloth-Nielsen (2004), Mpedi (2005).

³² See Berger (2008), pp. 51 et seq., 82 referring to *Mashavsha v. President of the Republic of South Africa and Others*, 2004 (12) BCLR 1243 (CC).

³³ For some examples of recent social security legislation in the Global South see the contributions in Dann and Kaltenborn (2014).

pensions based on contributions and are usually regulated by law. It must be noted, however, that in low- and middle-income countries the scope of coverage is usually limited to selected groups of workers in the rather small, formal economy (ILO, 2012, para. 22). Such old age protection systems are often based on statutory provisions. To a more limited extent, some low- and middle-income countries also offer social health services on a statutory basis. Examples which have gained prominence in recent discussions on universal health coverage are the health insurance laws of Ghana³⁴, Thailand³⁵, India³⁶, and China³⁷. When it comes to social assistance, however, far fewer legal regulations exist; notable exceptions are the social assistance laws of South Africa³⁸, Chile³⁹ and Brazil⁴⁰. Some countries moreover have created a general legal structure for the field of social protection as a whole which can be considered as a kind of framework legislation. These statutes particularly serve to coordinate the different programmes and areas of social protection.

4 How policies and laws influence social protection systems

We turn now to assess how both social protection policies and legal frameworks influence the development of social protection systems.

4.1 The role of social protection policies and strategies in building social protection systems

The role of policy and strategy documents can be seen to harmonise and catalyse bottom-up and top-down interests in building social protection systems, rather than to instigate the process of systems-building itself. In many countries, initial interest in social protection was sparked by domestic crises and a search for solutions to mitigate the outcomes of such crises and/or act as a preventive mechanism for future crises. They spark initial political interest for experimenting with individual (pilot) programmes and experiences with such programmes galvanise momentum for the expansion of social protection, subsequently leading to the acknowledgement that a national strategy can be a helpful guide in creating a coherent system. In Indonesia, the establishment of safety net programmes was sparked by the Asian Financial Crisis while in Bangladesh social protection was originally developed as an emergency response to food and famine crises (World Bank and UNICEF 2013; General Economics Division 2014). In many countries in Sub-Saharan Africa, the HIV/AIDS epidemic galvanized support for the development of cash transfer programmes (Garcia and Moore 2012).

As result of this initial momentum and political will in such cases, the development of individual programmes precedes the development of an overall strategy. In Lesotho, social assistance programmes such as the Old Age Pension were established prior to the development of a national social protection policy or strategy (Granvik 2015). Lesotho also established a separate ministry tasked with the administration and implementation of social

³⁴ *National Health Insurance Act 2003 (Act 650), 2012 (Act 852).*

³⁵ *National Health Insurance Act (B.E. 2545) (2002).*

³⁶ Particular mention should be made of the *Rashtriya Swasthya Bima Yojana (RSBY)* which is a health insurance scheme for the Below Poverty Line families based on the *Unorganized Workers Social Security Act (2008)*.

³⁷ Basic Medical Insurance based on ch. 3 of the *Social Insurance Law of the People's Republic of China (2010)*.

³⁸ *Social Assistance Act (No. 13 of 2004).*

³⁹ *Law establishing a Social Protection System in charge of serving families in extreme poverty ("Chile Solidario", Law No. 19.949 of 2004).*

⁴⁰ *Organic Law of Social Assistance (LOAS, Law No. 8742/1993) and the Programme Bolsa Familia, based on Law No. 10836/2004 and Decree 5209/2004.*

protection – Ministry of Social Development – in 2012, which was well before the launch of their national social protection strategy in 2015 (Freeland and Khondker 2015). In Rwanda, the cabinet officially approved and began to implement the Vision 2020 Umurenge Programme (VUP) in 2009 in a bid to accelerate the process of poverty reduction and strengthen the social protection system (Garcia and Moore 2012), yet the National Social Protection Strategy itself was approved by cabinet in 2011 (MINALOC 2011b). Similarly in Cambodia, some degree of social safety net planning was already in place prior to the national strategy that was approved in 2011 (Royal Government of Cambodia) but the development of a national strategy was only instigated after recognition during the 2nd Cambodia Development Cooperation Forum (CDCF) that too little progress had been made regarding overall poverty reduction (UNDG 2014).

Rather than the development of policy and strategy documents leading to the development of social protection systems, the increasing levels of fragmentation and lack of coordination as a result of expanding sets of social policy interventions gave rise to the need for greater harmonisation. The development of policy and strategy documents are considered tantamount to establishing such harmonisation and forging synergies (European Commission 2015). In Myanmar, the development of a social protection policy, and its embeddedness in the wider poverty reduction strategy, was considered crucial for the creation of a more holistic system linking existing social assistance and social insurance schemes across ministries (Nishino and Koehler, 2011). In Nepal, the fact that the National Framework for Social Protection that was drafted in 2011 had still not been finalised and institutionalised in 2016 was considered a barrier to overcoming fragmentation and lack of coordination (Roelen and Karki Chettri, 2016). Indeed, the ability to refer to overarching objectives, frameworks and policy interventions in a politically adopted document provides legitimacy and basis for common understanding underpinning choices for the way forward.

It follows that the development of policy and strategy documents is not one step in a sequenced linear process towards building social protection systems but rather that the two processes occur alongside each other in an overlapping and interactive manner. By extension, the process of developing policy and strategy documents may be considered as important or possibly even more important in the building of systems than the outcome document itself. The overlapping and iterative efforts allow for cross-fertilisation and crystallisation of ideas and important creation of commitment and ownership across all stakeholders involved.

Equally, the challenges observed during the formulation of policy and strategy documents reflect issues that affect the process of systems-building itself and may continue to have an effect after the policy and strategy documents are in place. Issues include lack of coordination and dialogue, weak vertical and horizontal coordination and low capacities of lead agencies (World Bank and UNICEF 2013). Chinsinga (2007) points out how the lack of capacity in Malawi's Social Protection Unit (SPU) in the Department of Poverty and Disaster Management Affairs (DoPDMA) led to outsourcing the development of the social protection strategy as well as technical development of the main cash transfer scheme. Such lack of capacity – particularly in contexts with low national ownership and competing agendas – at the time of formulating the policy or strategy may be emblematic of the success in systems-building overall. Cambodia is a case in point: notwithstanding the high levels of support and engagement of national and international partners in the development of its social protection strategy, the efforts towards a more comprehensive system appear to have fallen flat. While for many countries it is too early to draw conclusions about the establishment of social protection systems, experiences suggest that the development of policies and strategies is an important component towards systems-building but by no means a measure of success.

4.2 The influence of social protection legislation on social protection systems

As mentioned above, many low- and middle-income countries have incorporated a legal framework, i.e. statutory provisions and non-legislative regulations which form the legal basis of particular branches of social protection. These provisions mostly go beyond providing a list of services and the criteria that allow a person to qualify for the individual services. These provisions often also include organisational guidelines for the institutions responsible for the implementation of social protection programmes. Both the management structure and the competences of the various implementation and supervisory authorities are set out in detail. Oftentimes, rules regarding the financing of social benefits are also added to the law. Furthermore, complaint mechanisms and dispute settlement procedures – which are of particular relevance to the beneficiaries – are specified by law.

Such legislation, of course, shapes (or is able to shape) the concrete design of the social protection systems in many different ways. But to understand how social protection legislation influences social protection systems in general, it is worth looking closer at the reasons why countries decide to set up a legal framework for their social protection system. In fact, legislation is needed if a country wants to implement a system which is consistent with the concept of the so-called *Rights Based Approach* (RBA) – an approach that tries to link poverty reduction programs with social rights.⁴¹ A key demand of the RBA is to offer and implement social rights-based programmes on a statutory basis. The need for such legislative measures is particularly relevant in the case of the right to social security. Sepúlveda and Nyst (2012: 26 et seq.) provide a concise summary of the importance of social protection legislation from a human rights perspective:

A core aspect of the human rights approach is that social protection programmes must be enshrined and defined in national legal frameworks, and supported by a national strategy and plan of action. The most successful experiences of social protection systems are those grounded in legal instruments that create an entitlement to social protection benefits, ensure the permanence of these initiatives, and give rights holders the legal ability to invoke their rights. The success of systems in countries such as Brazil and South Africa is due in part to the existence of specific legal provisions ensuring the individual's right to social protection and defining the standards which regulate the involvement of all stakeholders... In the absence of a well-established legal framework, programmes are more vulnerable to political manipulation, and the long-term involvement of State authorities in all stages of the programme cannot be guaranteed.

In an effort to achieve the programmes' desired effects in the area of poverty reduction, the sustainability and duration of social protection systems must be a main focus. As such, it is principally recommended to give programmes incorporated into law priority over programmes that operate without a legal basis. This is important primarily in times of political change. Certain social protection systems might not be as politically valuable to a new government as it was to the previous one. If the beneficiaries, however, are able to identify actors who bear responsibilities in allocating the entitlement that they receive, it can, at least to a certain degree, be ensured that political changes should not jeopardise the existence of such a social protection system. Therefore legal frameworks can help in

guaranteeing that the social protection programme will outlast the political cycle and will not be manipulated for political purposes.
(Sepúlveda and Nyst, 2012: 27)

⁴¹ See on the RBA to Development UNDG, 2003; UNICEF 2012, pp. 18, 32; Gready and Ensor (2005); Hickey and Mitlin (2009); with a special focus on social protection Piron (2004); Ceccini and Martínez (2012); Sepúlveda and Nyst (2012); Kaltenborn (2013).

There are a number of additional arguments in favour of a policy based on fundamental rights principles, which integrates basic social services into a statutory framework. When people have access to instruments and mechanisms of a social security system that enable them to assert their claims to the authorities and to act against arbitrary discrimination in the provision of services, a sense of legal awareness is created⁴², propagating the idea of a “social consensus” on the goal of social security for all’ (ILO, 2011, para. 164). Furthermore, a law passed in the regular parliamentary procedure would most likely provide a guarantee against unjustified discrimination in the design and implementation of the benefit plans. By presenting bills to the public, discussing it thoroughly in civil society (including the media), and then debating it in Parliament in detail, it can be ensured that the legitimate interests of the relevant social groups or parties will not be overlooked. While a legislative procedure cannot guarantee that discrimination in the design of a policy does not occur, this procedure can, however, increase transparency in political decisions such as the design of new social protection programmes.

One should also not underestimate the coordinating power that stems from the legal design of policies (Ackson, 2009, pp. 65 et seq.). The lack of coordination between different authorities that are commissioned with the implementation of the various social protection programmes not only leads to inefficiencies and higher costs, but also reduces transparency; and thus, complicates beneficiaries’ access to programmes. Coordination is especially important where state-run programmes include the involvement of donors. Here, a ‘framework legislation’, which complements the sector-specific social legislation by formulating common principles, procedures and fields of competence for the whole area of social protection in a country, can contribute to a clear allocation of administrative responsibilities and to an optimal performance of the services.

Another argument that speaks for a legal framework is the fact that statutory provisions on social protection contribute to better predictability and transparency of the benefits (Basset *et al.* 2012). In its report on ‘Social protection floors for social justice and a fair globalization’ the ILO has stated, that

... in many countries, governments implement programmes on a discretionary basis, or provide ad hoc benefits not anchored in national legislation. Also, non-governmental actors who do not act under contract with or on behalf of the Government or a social security institution, sometimes provide <certain benefits or services. While these measures may have important poverty alleviation effects for the population benefiting from them, they do not meet the criteria of providing a minimum level of social protection in the sense of providing transparent, predictable, regular and certain entitlements with clear eligibility criteria and guaranteed levels of benefits. (ILO 2012, para. 79)

Finally, it should be mentioned that an effective, corruption-free implementation of social protection programmes requires that governments also have instruments at their disposal to enforce the relevant provisions. The promotion of compliance with social security rules can therefore best be achieved by establishing an appropriate legal framework where penalties and other enforcing measures are clearly defined.

This is, however, only one part of the discussion why legal frameworks matter. While there are a lot of arguments in favour of establishing legal guarantees to social protection, it is important to be aware also of the problematic aspects of such an approach. If governments wish to avoid committing themselves to a long term-involvement in a social protection policy, the fact that legislation allows for enforceable and potentially costly claims – claims that can

⁴² On the importance of legal empowerment strategies in low- and middle-income countries see, generally, Sengupta (2008) and Cissé (2013).

also be made in times when the state budget is under pressure and actually would not include sufficient margins for adequate social benefits – is one factor that keeps governments from establishing a legal framework for such claims. There are also pragmatic reasons which can induce governments not to formulate statutory claims but preferring a – legally noncommittal – programme approach. Legal processes can be complex and protracted, and often involve an element of uncertainty.⁴³ At the beginning of a legislative procedure it is not guaranteed that all points of governmental interest make it into the law. It might be difficult, for example, to enact social laws which aim at targeting people in a specific region (geographical targeting), as members of parliament from other parts of the country could possibly be opposed to it; such targeting methods which are sometimes used in cash-transfer programmes may be more conveniently implemented on a non-legal level. The constitutional framework in which social policy is embedded often allows for more leeway in deciding for or against a proposed legislation than in other policy fields. In some countries, only the ‘general rules’ or ‘fundamental principles’ pertaining to the right to social security are required to be established under a legal framework (see below 3.3); therefore in these countries individual social protection programmes can also be initiated without the involvement of the parliament.

A further point which is relevant in this regard is the question what can be realistically expected from a legal framework. Actually this brief overview of the advantages and disadvantages of a legal framework for social protection programmes should not distract from the fact that the mere adoption of a legal norm does not necessarily lead to a change in social reality. Constitutional provisions, statutes and other legal rules have to be implemented, otherwise they will not become effective – this is, however, by no means self-evident. Implementation gaps can be found in many legal fields, and it is important to stress that this is by far not a phenomenon which is limited to the legal systems of low- and middle-income countries. On the contrary, one can also identify many implementation and enforcement deficits in western countries (e.g. in tax law and environmental law, just to give two particularly important examples). With regard to social protection it is useful to differentiate between constitutional and statutory rules. If a social right, such as the right to social security, is enshrined as a basic right in the constitution of a country, this does not lead automatically to an improvement of the social situation of the right-holders. Much depends on whether the constitutional structure, the socio-economic background and the country’s political culture provide a supportive environment for the realisation of such a right. If, for instance, the constitution includes control mechanisms or other procedures for stakeholders – such as opposition parties, civil society groups or even for the citizens concerned – allowing them to refer to this social right, there is a chance such provisions would generate concrete political activities (new programmes, legislation etc.). But there is no doubt that in specific country contexts, especially those which are characterised by weak governance structures and adverse economic conditions, the constitutional appeal might have a very limited impact.

The situation is different when legislative measures aiming at the establishment of country-wide social protection programmes have already been taken. Here, too, implementation deficits can occur, but as the government has already decided to adopt a legal framework it may be reasonably assumed that there exists also a political will to put the respective statutory and sub-statutory provisions into practice. Therefore, on the one hand, it is highly unlikely, that such a legal framework has no practical effect at all, but on the other hand, it also would be naïve to assume that – as a general rule – the legal provisions will be immediately and entirely implemented. The extent of implementation deficits vary not only from one country to another, but also from one sector to another. Moreover, a multitude of

⁴³ Additional problems arise when legislation is designed and implemented arbitrarily (“without either stating their reasons or engaging stakeholder participation”, Seidman and Seidman 2008: 97). It can, however, be assumed, that the arbitrary use of legislative power is not one of the most typical characteristics of social protection legislation. Further problems regarding lawmaking in low- and middle-income countries are summarized by Otto *et al.* (2008: 55).

determinants have to be considered when identifying the concrete sources of implementation gaps (CIPE and Global Integrity 2012, pp. 14 et seq.): They range from political factors (e.g. state bureaucracy; unclear or overlapping responsibilities; lack of legitimacy and quality of the laws; divergent political priorities and interests on the state and the local level) through economic reasons (lack or inadequate allocation of resources) to social and cultural aspects (e.g. conflicting informal power structures at the local level; cultural practices as, for instance, the unequal treatment of men and women; corruption; deficiencies with regard to the education and qualification of the civil servants). All these determinants are not only relevant for the implementation of law in general, but also specifically for the implementation of legal provisions on social protection.

4.3 Interaction and key drivers between programmes, policy and legislation

Taking a closer look at the relationship between social protection policy and social protection law, one may ask whether there must first exist the relevant policy or law. There is no clear-cut answer. This section explored the interaction between the different elements.

4.3.1 Policy, legislation and their 'soft' power

International covenants and declarations such as the *Social Protection Floor Recommendation* offer guidance to both the development of policies and legislative frameworks. As discussed above, international frameworks have proven important in galvanising momentum around the need for social protection systems and the role for national policies and legislation in underpinning those systems. But stipulations for the need of national strategies or legislation are soft and non-binding. Although governments are required to establish a legal framework for social protection, this issue is regarded as a mere soft law obligation under international law: The General Comment on the Right to Social Security recommends that social protection systems should be 'established under domestic law' (para. 11). A similar approach has been pursued by the authors of the Social Protection Floors Recommendation, which states that

(b)asic social security guarantees should be established by law. National laws and regulations should specify the range, qualifying conditions and levels of the benefits giving effect to these guarantees. Impartial, transparent, effective, simple, rapid, accessible and inexpensive complaint and appeal procedures should also be specified. Access to complaint and appeal procedures should be free of charge to the applicant. Systems should be in place that enhance compliance with national legal frameworks. (para. 7)

Even if this obligation is accepted, social protection programmes often take shape first as donor-funded pilot programmes, while the development and establishment of the relevant legislation follows later. The principle of 'progressive realisation', a principle firmly rooted in international human rights law (Art. 2 [1] ICESCR)⁴⁴, allows for such a gradual process.

At national level, the law may likewise stipulate specific requirements that individual areas of social protection must be established in legal frameworks. In some countries, such an obligation has been explicitly included in the Constitution, often, however, merely regarding the 'general rules' or 'fundamental principles' of the right to social security.⁴⁵ One can find

⁴⁴ For a detailed analysis see Sepúlveda (2003), pp. 174 et seq.

⁴⁵ This may lead one to ask whether the obligation of forming these statutory guidelines can also stem from other parts of the Constitution (such as in Germany where the constitutional requirement of the specific enactment of a statute is part of the "Rechtsstaatsprinzip" [rule of law]). In order to gain insight on this question, further examination of the constitutions of the countries of interest would be required.

such provisions particularly in francophone African countries⁴⁶ as well as in Latin America⁴⁷. All of these provisions do not, however, form any concrete solution on how a social protection system – be it single programmes, with or without a social protection policy – should be established. In particular, the constitutional provisions do not reveal whether statutory provisions must be based on an overall political strategy and/or on the experience from previous pilot programmes.

By the same token, national strategies or policies may indicate that social protection provisions are to be enshrined in law if countries are to move towards sustainable and coherent systems. Lesotho's national strategy, for example, lists the enactment of necessary social security legislation and the drafting of a National Social Protection Act as next steps for advancing social protection. While indicative of commitment, the references to law and legislation are not specific nor binding to ensure that governments move forward with these processes.

4.3.2 Policy and legislation can trigger policy reform towards social protection systems

There are positive examples, however, of how the legal system – first and foremost the Constitution – and policy dialogue through strategies can deliberately trigger policy reform towards a more coherent social protection system. South Africa is a case in point. One of the main goals of the South African National Developmental Social Welfare Strategy as laid down in the White Paper for Social Welfare of 1997 is to realise the relevant objectives of the Constitution of the Republic of South Africa (Government of South Africa 1997, ch. 2 para. 7 e). As is stipulated in ch. 2 para. 13:

(s)ocial welfare services and programmes will be based on respect for human rights and fundamental freedoms as articulated in the Constitution of the Republic of South Africa.

Against the background of the Apartheid-system the state actors particularly have to focus – in accordance with their constitutional obligations – on the elimination of discriminatory practices in the social welfare system (ch. 2 para. 28). With respect to new social protection legislation, the White Paper highlights the role of law as impetus into policy:

Legislation will be determined by a comprehensive welfare policy. Therefore, legislation will be the end-product of, and not the initial impetus for, policy formulation. The values base and policy direction of each piece of legislation will also be clearly apparent in all Acts.

(see Government of South Africa 1997, chapter 5 para. 10)

Kenya is another example of how policy and legal frameworks can support the establishment of a social protection system, with a constitutional amendment triggering policy reform. Kenya first developed its social strategy on the basis of several small individual and pilot programmes, subsequently examined programme outcomes and then established a single policy under a legal framework. This process was given an additional boost by the revision of the Constitution that took place during the establishment of the social policy.

⁴⁶ See for instance Art. 122 (8) Constitution of Algeria (1989, rev. 2008): „The Parliament shall legislate on ... (g)eneral rules relating to the right to work, social security, and the exercise of the right to establish trade unions; similar provisions can be found in Art. 26 (2a) Constitution of Cameroon (1972, rev. 2008), Art. 121 Constitution of Chad (1996, rev. 2005), Art. 122 (14) Constitution of the Democratic Republic of the Congo (2005, rev. 2011), Art. 111 Constitution of the Republic of the Congo (2001), Art. 76 (n) Constitution of Equatorial Guinea (1991, rev. 1995), Art. 47 Constitution of Gabon (1991, rev. 1997), Art. 72 Constitution of Guinea (2010), Art. 70 Constitution of Mali (1992), Art. 57 Constitution of Mauritania (1991, rev. 2012), Art. 72 Constitution of Morocco (2011), Art. 100 Niger (2010), Art. 67 Constitution of Senegal (2001, rev. 2009).

⁴⁷ Art. 14bis (3) Constitution of Argentina 1853 (reinst. 1983, rev. 1994), Art. 48, 53 Constitution of Colombia (1991, rev. 2013), Art. 45, 50 Constitution of El Salvador (1983, rev. 2003), Art. 86 Constitution of the Venezuela (1999, rev. 2009).

4.3.3 Social protection system development: an iterative process

There are examples of policy reforms that are based or induced by (constitutional) law. Equally there are examples of low- and middle-income countries that have developed and implemented individual social programmes or even an overarching social protection strategy without having yet recognised the need for these programmes to operate on a statutory basis. If a government wishes to restructure its social protection system as a whole, it appears useful – as the South African experience demonstrates – to first establish an overall policy strategy before determining the legal basis for the social protection programmes and then starting the implementation process (policy to legislation to programmes). However, this intermediate step is not always necessarily needed, as individual programmes can also be developed directly from the general strategy.

The analysis in this paper makes it evident that there is no single manner in which social protection systems are or should be developed. The role of the legislation and policies pertaining to individual programmes or systems as a whole varies across the globe. There are examples for both processes, whereby constitutional amendments and legal reforms have promoted policy development, and where policy developments have promoted legislation drafting. Similarly, uncertain is the sequence of legislation and individual programmes or projects. There is much to suggest that it is useful to test a concept through (regional) pilot programmes, before expanding nationally and integrating it as a part of the social policy and legal system of a country. This is particularly evident in countries that have had the experience of starting a number of individual programmes which require a great deal of coordination and collaboration in order to reach their optimal performance. Looking at Mexico as an example, one can see that the experiences which have been gathered from ambitious and successful social assistance programmes can have quite a considerable impact on the overall social protection legislation of a country. Whether a legal regulation should be at the beginning of a reform process, or whether legislators should only get involved after the establishment of smaller, independent programmes and projects, depends on a number of factors that are largely outside the domain of the law. So, in both policy cycle-relationships which have to be assessed in this context – policy/legislation and programme/legislation – the decisive factor for the appropriate sequence appears to be the internal political and socio-economic conditions under which a reform process is to be carried out.

Finally, politics of social protection and the role of political factors in shaping social protection should not be overlooked (Hickey 2008). Schüring and Lawson-McDowall (2011), for example, consider the role of institutions, discourse, public opinion and political will in explaining Zambia's sluggish progress towards expanding social protection. Granvik (2015) discusses the influential role of the Prime Minister as well as the pivotal role played by the Regional Hunger and Vulnerability Programme (RHVP) in building momentum around social protection in Lesotho. In reference to the development of social protection systems in Southern Africa, Devereux (2010: 3) argues that sustained systems require political commitment that is 'driven from below – by citizens and civil society – as much as from above – by governments and their international development partners'. At the end of the day, the establishment, financing and sustainability of social protection is a political decision that requires the support of policy makers and the public (European Commission 2015) with many actors shaping the debate and agenda.

5 The influence of legal and policy frameworks in shaping social protection in Ghana

This section provides a case study of the policy and legal frameworks for Ghana's social protection system. It starts by highlighting the legal frameworks that provide a basis for justifying social protection policies and programmes in Ghana, paying particular attention to the provisions of the 1992 Constitution. Next, a brief history of social protection is provided before turning to track the evolution of Ghana's social protection system to its present state. Throughout the case study, attempts are made to highlight the ways in which legal and policy frameworks interact in shaping the evolution of a comprehensive social protection system in Ghana. However, the overall evidence shows that a fuller understanding of social protection in Ghana will require going beyond the roles of legal and policy frameworks to an exploration of the crucial roles of politics.

5.1 Context and key features of Ghanaian legal frameworks

Ghana transitioned from decades of political instability in the immediate post-independence era to a decade of a stable quasi-military experiment (1982-1992) during which the country's development landscape was characterised by substantial human rights abuses. It transitioned to multiparty democracy in 1992 with the inauguration of the Fourth Republican Constitution. In light of the human rights violations that characterised various past military regimes, one key feature of the 1992 Constitution relates to its strong emphasis on human rights protection. Chapter Five of the Constitution is dedicated to the protection and promotion of a wide-range of rights (Republic of Ghana, 1992). The Constitution mandates the state to enact appropriate laws to ensure the 'protection and promotion of all ... basic human rights and freedoms, including the rights of the disabled, the aged, children and other vulnerable groups in development processes'⁴⁸. Several similar provisions are evident in the Constitution, including the need for the State to 'endeavour to secure and protect a social order founded on the ideals and principles of freedom, equality and justice'.⁴⁹

Ghana's social protection policies and interventions are moving toward a rights-based approach to development, with social protection increasingly being viewed within official government circles as 'a right of every citizen' (Government of Ghana, 2007: 10). The approach to Ghana's social protection programmes is influenced by a range of international and regional legal instruments and the provisions of the 1992 Constitution. Ghana is a signatory to, and has ratified almost all, the relevant Conventions, Treaties and Protocols of the United Nations and the African Union (AU) for social protection, including the Universal Declaration of Human Rights, the United Nations Conventions on the Rights of the Child and Persons with Disabilities, the African Union Social Policy Framework (2003), the Livingstone Declaration (2006), the Ouagadougou Declaration and Plan of Action (2004, 2008) and the AU Heads of State Common Agenda for Action Post-2015 (Government of Ghana, 2015). To an extent, these international and regional agreements impose some tacit obligation on the state to pursue social protection programmes⁵⁰, particularly as the 1992 Constitution require that the state 'be guided by international human rights instruments which recognize and apply

⁴⁸ See Article 37 (2b) of the Constitution.

⁴⁹ See Article 37 (1) of the Constitution.

⁵⁰ The recently developed National Protection Policy draws attention to the country's commitments towards the pursuit of comprehensive social protection programmes, noting further that it is within "the context of [such] international and national commitments to social protection that there is an urgent need to streamline coordination and delivery" (Republic of Ghana, 2015: 1).

particular categories of basic human rights to development processes' (Republic of Ghana, 1992).

At the national level, the Directive Principles of State Policy enshrined in the 1992 Constitution enjoin the State to pursue the establishment of 'a just and free society' via the creation of equal opportunities for all citizens.⁵¹ Among others, these Principles mandate the State to 'promote just and reasonable access by all citizens to public facilities and services'⁵², 'provide adequate means of livelihood and suitable employment and public assistance to the needy'⁵³, as well as 'provide social assistance to the aged such as will enable them to maintain a decent standard of living'.⁵⁴

The Constitution advocates not only equality in opportunities, but also equality in outcomes. The State is not only required to 'afford equality of economic opportunity to all citizens', but must also 'take all necessary steps to ensure the full integration of women into the mainstream of economic development of Ghana'⁵⁵. Article 24 sets the framework for decent work, social insurance, health and safety, and welfare in employment, development of creative potentials and contributory schemes for economic security, while Article 25 provides for equal educational opportunities, declaring that 'basic education shall be free, compulsory and available to all'.

In sum, several provisions in Ghana's Constitution creates obligations for the State to provide social protection for the population. The Constitution advocates a system of social and economic organisation that promotes equality, freedom, and justice in ways that provide grounds for citizens to maximize their welfare over time⁵⁶. It is important to note, however, that these numerous constitutional provisions enjoining the state to pursue social protection objectives are not accompanied by similar provisions that empower individuals to seek the enforcement of these rights in the courts. This is in part because of the non-binding nature of the Directive Principles of State Policy (DPSP), which as the constitution itself states, are meant to 'guide' state institutions in the formulation and implementation of public policies.⁵⁷ To this extent, there is limited window for enforcing citizens' rights related to social protection. This is especially compounded in cases where legal provisions are explicit in stating that interventions are 'subject to availability of resources' (Art. 38(3)). Such qualifications, while justified within the context of resource constraints, may enable state institutions to shirk their responsibility towards the protection of the poorest, especially in cases where there is little political incentive for implementing specific social protection programmes.

A related weakness of Ghana's so-called rights-based approach to social protection is the absence of legal backing to most existing individual social protection programmes. In a recent comprehensive review of Ghana's social protection system, the ILO (2014) concludes that with the notable exception of the National Health Insurance Act 2003 (Act 650) and the National Pensions Act, 2008 (Act 766), neither the numerous individual social protection programmes nor the institutional framework for social protection are anchored in law. Consequently, nearly all of Ghana's social protection interventions tend to be 'based on

⁵¹ Article 34 (1).

⁵² Article 35 (3).

⁵³ Article 36(1).

⁵⁴ Article 37 (6b).

⁵⁵ Article 36 (6).

⁵⁶ Beyond these constitutional provisions, there are several pieces of legislation that provide detailed and specific guide to pursuing social protection objectives. Among these specific legislations are Persons with Disability Act, 2006 (Act 715), The National Health Insurance Act, 2003 (Act 650) and the Amended Act 852 (of 2012); The Children's Act (Act 560) of 1998, and the Mental Health Act, 2012 (Act 846).

⁵⁷ The non-binding nature of the of the DPSP was brought to fore in the case of *New Patriotic Party v Attorney-General* regarding the use of state funds in the celebration of the 31st December coup (Boafo-Arthur, 2007).

somewhat volatile budget statements that have to be renegotiated for each fiscal period, even if they draw their legitimacy from obligations arising from international human rights instruments and from Ghana's Constitution' (ILO, 2014: 67).

5.2 The influence of the 1992 constitution on social protection in Ghana

There is some evidence to point to the influence of the egalitarian principles embedded in the 1992 Constitution on social protection programmes and policies in Ghana. Perhaps the most glaring influence of the constitution on policies aimed at protecting the vulnerable relates to the targeting approaches of most social protection programmes. Consistent with the constitutional requirement of ensuring equal opportunities for all, most social protection programmes in Ghana aspire to be universal in coverage or at least espouse universalistic aspirations. For example, the capitation grant and free exercise books programmes aim to reach all children attending public schools, while exemptions under the NHIS are supposed to cover all children under the age of 18, all older persons above 70, and all pregnant women irrespective of socio-economic status. At the level of policy development, the influence of the constitution on Ghana's social protection programmes is evident, with the recently approved National Social Protection Policy stating explicitly that it 'takes direction from the Directive Principles of State Policy in the Fourth Republican Constitution' (Government of Ghana, 2015: 16).

Most recent major national development frameworks also justify the need for social protection for the poor often from a human rights perspective, suggesting some level of influence of the rights-based approach to social security espoused by the Fourth Republican constitution. Since 2010, Ghana's medium-term development frameworks have been the Ghana Shared Growth and Development Agenda (GSGDA). The GSGDA I was implemented from 2010 to 2013, followed by the GSGDA II from 2014-2017. The GSGDA I underscores the importance of the human right to social security, evidenced in its emphasis on the need to review the existing national social protection strategy so as to 'ensure mainstreaming of a human rights framework into development' (Government of Ghana, 2010: 95). It expresses concern about the inadequacy of specific policies aiming to deal with historically excluded and vulnerable populations, and emphasises the need for a vision of social development that is anchored on 'redistribution, social protection, and social integration' (Government of Ghana, 2010: 95). Specific policy objectives outlined include the reduction of rural and slum poverty, spatial and income inequalities, and enhancing access of the poor and vulnerable to comprehensive social protection systems and other economic opportunities (Government of Ghana, 2010: 93). All these policies are justified on the grounds of their ability 'to move Ghanaians closer to the long-term [Constitutional] aspiration of a just, free and prosperous society' (*ibid.*, p.1).

The GSGDA II also provides for social protection from a human rights perspective, evidenced in its advocacy for the establishment of a national social protection floor (Government of Ghana, 2014: 128). The idea behind the social protection floor – defined as a 'set of basic rights, services and facilities that a global citizen should enjoy' (Government of Ghana, 2012) – is to ensure that the extreme poor have access to basic social services (e.g. health, education, etc.) and cash transfers that grant them decent standards of living. The Ghanaian social protection floor, as defined in the more recent National Social Protection Policy, seeks to balance social assistance, social security and productive inclusion among vulnerable populations (Government of Ghana, 2015: 2).

5.3 Context and key features of the Ghanaian policy framework

The history of social protection in Ghana is not a systematic one that shows an evolution of policies and programmes over time. Instead, programmes have been implemented from various angles by different stakeholders and actors (Al-Hassan and Poulton, 2009). Prior to 2007, the social protection landscape was dominated by traditional family and community

arrangements, interventions by faith-based and welfare-based organisations as well as emergency relief from government agencies (Government of Ghana, 2015).

The most well-known government initiated social protection programme in the 1980s is the Programme of Action to Mitigate the Social Costs of Adjustment (PAMSCAD). PAMSCAD was conceived in 1987-88 as a safety net for those adversely affected by the Structural Adjustment Programmes (SAPs) following criticisms that the poor were adversely affected by SAPs. PAMSCAD included 23 projects grouped into five categories - employment generation; community initiative projects; help to the redeployed; basic needs for vulnerable groups, and education (World Bank, 1992). One World Bank evaluation report notes that although PAMSCAD was a serious attempt to provide help to vulnerable groups, the programme's effectiveness was undermined by several design weaknesses (World Bank, 1992). Other observers have noted the limited impact of PAMSCAD, but have attributed the problem more to underfunding and the poor targeting of limited resources (Konadu-Agyemang, 2000). For example, of a total funding commitment of \$84 million to support PAMSCAD by the international donor community for the period 1988-89, only \$15 million (or 18%) was disbursed by July 1990 (Roe and Schneider, 1992:117-8). For some, this was not wholly surprising because PAMSCAD's 'motivations were clearly political' (Hutchful, 2002:116), designed mainly to enhance the acceptability of the SAPs (*ibid.*) by, among others, providing disgruntled Ghanaians (e.g. dismissed/retrrenched civil servants) with compensation payments. Consequently, resources for the programme were spread so thinly that PAMSCAD failed to make any significant impact (Herbst 1993).

Under Vision 2020 (1996-2020), the government was to 'develop a comprehensive, sustainable and cost-effective social support system, especially for the disadvantaged and vulnerable' Al- Hassan and Poulton, 2009). However, poor coordination between the lead institutions, combined with limited budgetary allocations meant that the vision was not implemented successfully (Whitfield, 2010), and no social support system was developed within the plan period (Al- Hassan and Poulton, 2009).

Subsequently, and driven mainly by donor conditionalities associated with the Enhanced Highly Indebted Poor Country (HIPC) Initiative, Ghana developed two poverty reduction strategies, the Ghana Poverty Reduction Strategy (GPRS I: 2003-2005) and the Growth and Poverty Reduction Strategy (GPRS II: 2006-2009). These two strategies both included interventions with social protection inclinations. The GPRS I (2003-2005) in particular paid significant attention to social protection, and considered poverty reduction and the protection of the vulnerable and excluded as its main goal (GoG, 2003: 30)⁵⁸. Indeed, the implementation period of the GPRS I marked the beginning of substantial social protection reforms in Ghana, beginning with a new contributory national health insurance scheme (NHIS) in 2003. Since then, Ghana has witnessed a proliferation of social protection programmes, including the Ghana school feeding programme (GSFP, implementation started in 2005), capitation grants to all basic education schools to expand free primary education (implementation started in 2005), the Livelihood Empowerment Against Poverty (LEAP) cash transfer scheme (implementation started in 2008), the Labour Intensive Public Works Programme (implementation started in 2008), and more recently, the free school uniform and free textbooks programmes (implementation started in 2009). Although the Government's emphasis under the GPRS II (2006-2009) shifted away from poverty reduction to accelerating economic growth through wealth creation, the GPRS II also advocated the development of a national social protection framework as a way of addressing poverty and vulnerability (Government of Ghana, 2005), possibly reflecting the pressure to meet the Millennium Development Goal (MDG) targets on the halving of extreme poverty.

⁵⁸ Thus, one of the key themes of this strategy was the implementation of 'Special Programmes for the Poor and Vulnerable'.

As noted earlier, both the GSGDA I and II also highlight the importance of social protection. In particular, the GSGDA I (2010-13) highlights the need to reduce spatial and income inequalities, to intensify the implementation of the national social protection strategy and to review the overall national social protection framework (Government of Ghana, 2010: xvii). In this regard, the GSGDA notes that ‘while Ghana has a number of policies on social protection, these have not been harmonized and are not coordinated within a comprehensive guiding vision. Lack of a comprehensive vision of social development and weak institutional capacities have led to gaps in the delivery of social services and entitlements’ (*ibid.*, p. 94). The GSGDA therefore emphasises the need to ‘establish a holistic National Social Protection Framework to ensure harmonization of various schemes’ (*ibid.*, p. 110).

5.4 The evolution of Ghana’s social protection system

Although social protection policies and programmes have a long history in Ghana, as shown above, the country did not have a social protection system (nor were serious steps initiated towards the development of one) until 2007. As part of the review of GPRS I, a Poverty and Social Impact Assessment (PSIA) was conducted by the National Development Planning Commission (NDPC) in 2004, the findings of which indicated that policies and interventions had not had adequate impact on the lives of the poorest leading to growing levels of inequality (NDPC, 2004). There was then the need to redesign and coordinate social protection approaches more holistically in order to integrate the concerns of the poor and vulnerable into national development. This seems to have set the tone for the development of a more comprehensive social protection system for Ghana.

Under the leadership of the Ministry of Employment and Social Welfare, a National Social Protection Strategy (NSPS) was developed in 2007 and revised in 2012 (see Government of Ghana, 2007; 2012). The NSPS contributed to shaping the evolution of Ghana’s social protection system in three important ways.

First, for the first time, it provided a clearly-defined vision for social protection in Ghana, namely to ensure

‘an inclusive equitable society in which ordinary and extremely poor and vulnerable citizens are protected from risks and shocks and are empowered with improved capability, to overcome social, economic and cultural challenges in order to realise their rights and responsibilities and to make meaningful contributions to society’ (Government of Ghana, 2012: 20)

Second, it highlighted the need to implement a new set of programmes to address poverty and vulnerability in a more comprehensive way, and identified these programmes to include the Livelihoods Empowerment Against Poverty (LEAP)⁵⁹ and the Labour Intensive Public Works programme (Government of Ghana, 2007; 2012). Third, it underscored the need for coordination among the different institutions and actors involved in the delivery of social protection. In emphasising the importance of coordination for an effective social protection system, the NSPS noted that ‘The absence of a coordinating agency to monitor implementation of varied Social Protection programmes across institutions has resulted in a lack of cohesion and coordinated response’ (Government of Ghana, 2007: 10).

In 2013, the Government of Ghana commissioned the ILO to undertake a study as part of efforts aimed at rationalising social protection expenditures in Ghana. The study’s findings

⁵⁹ The LEAP provides cash and health insurance benefits to extremely poor households and severely disabled persons without working capacity. Specifically, LEAP targets extremely poor households with one or several elderly persons over the age of 65 who have no means of support, persons with a severe disability and orphans and vulnerable children. The latter includes children under 18 years of age who are single or double orphans, disabled, chronically ill, or whose parents’ whereabouts are unknown (Ministry of Employment and Social Welfare, 2012).

confirmed the need to streamline the social protection sector and enhance coordination, close coverage gaps and define a national social protection floor. There were indications that several programmes with positive inputs for social protection were being implemented across different sectors – health, agriculture, education and employment – but were not coordinated. Targeting and selection of beneficiaries were neither coordinated nor harmonised, making it difficult to establish the effects of social protection on the poor. The study’s recommendations included the need for: (i) clarified governance and institutional framework; (ii) a unified targeting mechanism to identify poor households; (iii) a National Social Protection Policy that will define a nationally agreed social protection basket; and (iv) an expansion of the funding and legal bases of social protection (ILO 2014).

To an extent, these recommendations seemed to have informed Government’s creation of the Ministry of Gender, Children and Social Protection in 2013, and the appointment of a key well-known human rights advocate, as its head. Subsequently in June 2014, the ministry was given cabinet approval to take a leadership role in the development of a comprehensive social protection policy, and take steps to ensure sufficient and sustainable resources for social protection. In November 2015, a National Social Protection policy for Ghana was finalised (Government of Ghana, 2015) and subsequently launched in June 2016.

5.5 Key features of the National Social Protection Policy

The National Social Protection Policy sees social protection as essentially the role of the state, defining social protection as

‘a range of actions carried out by the state and other parties in response to vulnerability and poverty which seeks to guarantee relief from destitution for those sections of the population who for reasons beyond their control are not able to provide for themselves’ (Government of Ghana 2015: 2).

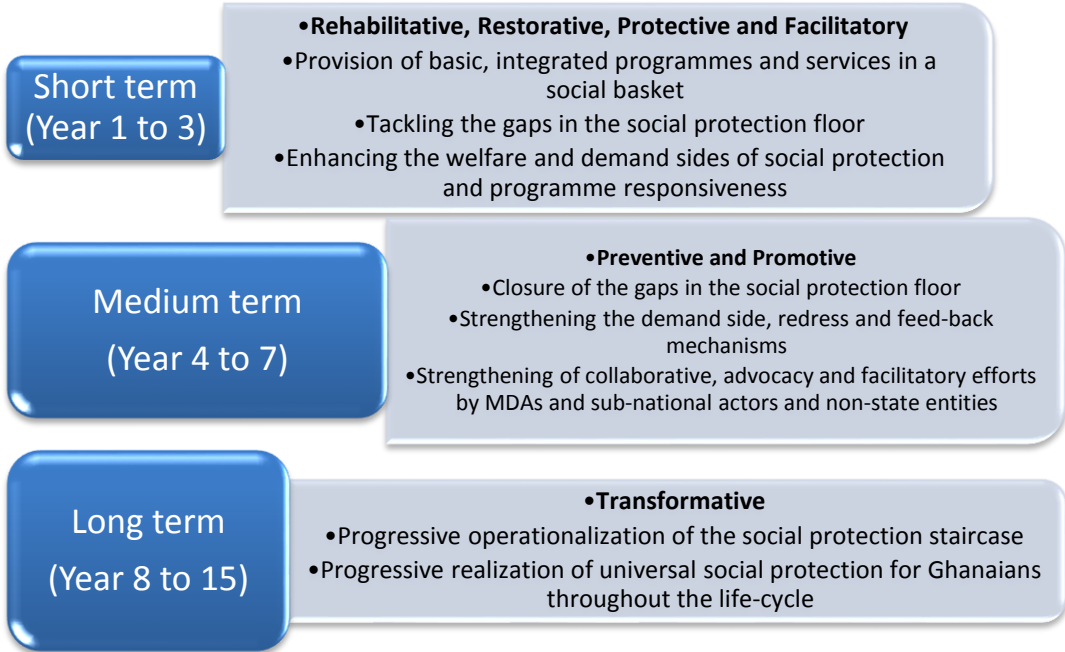
Its goal is to ‘deliver a well-coordinated, inter-sectoral social protection system enabling people to live in dignity through income support, livelihoods empowerment and improved access to systems of basic services’ (*ibid.*, p.15)⁶⁰. The policy seeks to ‘mitigate and reduce vulnerabilities for all, close the inequality gap and ensure total inclusion for all Ghanaians’ through an integrated platform of effective social assistance, social and productive inclusion, social insurance, and financial access to social services (*ibid.*).

In terms of sequencing and prioritisation, the policy proposes an initial phased approach over the first fifteen years and is broken down into short term, medium term, and long term (Figure 5.1). The short term strategy focuses on playing rehabilitative, restorative, protective and facilitative roles, with particular emphasis on delivering a social protection basket anchored around five key on-going flagship programmes.⁶¹

60 The long-term vision is to ensure “an all-inclusive and socially empowered society through the provision of sustainable mechanisms for the social protection of persons living in situations of extreme poverty and related vulnerability and exclusion” (p.15).

61 These are the LEAP cash transfers, the NHIS exemptions, the Labour-Intensive Public Works (LIPW) programme, the capitation grant, and the GSFP.

Figure 5.1 Focus of the three terms of the first phase of policy implementation



Source: Government of Ghana (2015: 17). Reproduced with kind permission.

The policy makes provision for financing social protection, recognises the need for the promulgation of a dedicated social protection law to anchor social protection provision, and to give legal identity to the national targeting unit (known as the Ghana National Household Registry), the LEAP programme, and the Ghana School Feeding Programme (GSFP).

In this respect, Ghana has largely followed the bottom-up approach to the development of a social protection system whereby lessons from the implementation of individual programmes take precedence over the development of policy and legal frameworks. Despite the proliferation of social protection programmes since 2003, Ghana has only recently started work on a Social Protection Bill, following on from the drafting of the national policy, to ensure that the key priority programmes (namely LEAP and GSFP) are embedded in law. However, the bill’s drafting has been hampered by limited expertise within the main Ministry responsible, and is likely to be undermined further by the recent change in government following the December 2016 elections.

5.6 Understanding Ghana’s social protection landscape: does politics matter?

The discussion above suggests that social protection in Ghana derives its legitimacy mainly from the provisions of the 1992 Constitution which enjoins the state to provide equal opportunities for all citizens. In this section, we highlight two other political factors that appear crucial, namely elite commitment to policy continuity, and electoral calculus.

5.6.1 Political commitment and policy continuity

Ghana’s successive governments have embraced and even expanded social protection initiatives inherited from their predecessors – a rather surprising development given the country’s notoriety for discontinuity in policy or project implementation following regime changes. Although the New Patriotic Party government (NPP, 2001-2008) introduced most of Ghana’s existing social protection programmes during the 2000s, none of these programmes were abandoned by the National Democratic Congress (NDC) when it won the 2008

elections. Rather, the latter not only made conscious efforts to sustain and expand these programmes, but also introduced the free school uniform and free textbook programmes. Even more importantly, the National Social Protection Strategy developed by the NPP government – although not adopted - was not entirely abandoned, but was rather used as a starting point for the drafting of the new National Social Protection Policy. Ghana's ability to scale-up its social protection programmes and develop a national social protection policy can thus not be fully understood without reference to the important policy continuities among the country's two dominant opposing political parties.

Such policy continuities have been made possible by an interparty consensus and greater elite commitment towards social protection as a way of reducing extreme poverty and vulnerability. Political commitment to the development of a coordinated and integrated social protection system has been manifested in various ways, including the creation of a dedicated Ministry of cabinet status for social protection in 2013. The creation of this Ministry was in fulfilment of the NDC government's 2012 elections manifesto in which the party pledged to

Consolidate the many social protection policies and programmes run by various Ministries ... under a *National Social Protection Agency* that will harmonize the scattered social intervention programmes to enhance delivery, effectiveness and targeting.
(NDC, 2012: 25)

5.6.2 The influence of elections

As elsewhere, electoral calculus has been central both in the adoption and implementation of social protection programmes in Ghana in at least four main ways.

First, the influence of elections on the evolution of Ghana's social protection system is evident in the fact that most recent social protection programmes have often been introduced around elections (e.g. LEAP) or are themselves the products of electoral campaign promises (e.g. NHIS).

Second, such political calculations explain why most of Ghana's major social protection programmes (notably LEAP, NHIS, GSFP, and the Capitation Grant) were introduced by a centre-right political party (i.e. the NPP) that emphasises the private sector as the engine of development (NPP, 2012). The introduction of social protection became important for the party in a context where its long-held image as an elitist party played a major role in keeping it out of power for decades.

Third, politics also explains why the NDC government embraced all the social protection initiatives inherited from the NPP. In Ghana's highly competitive electoral environment, it does not make electoral sense to any of the two dominant parties to withdraw or abolish existing social protection interventions initiated by its predecessor. This is to note that given the 'political impacts of social protection, especially its vote-winning and patronage potential' (Devereux and White, 2010: 56), discontinuity in the implementation of social protection programmes remains largely unappealing to ruling political elites.

The fourth factor relates to the (perceived) ideological differences between the NPP and NDC in which the latter professes to be a social democratic party, while the former sees itself as a market-oriented party. In this respect, by continuing and expanding the social protection interventions started by the NPP, the NDC was interested in demonstrating its greater commitment to the welfare of the poorest. This point is somewhat captured in the party's 2012 election manifesto which links its commitment to social protection to its ideological orientation:

As social democrats, the NDC believes that it is the duty of the Government to pull the marginalized, disadvantaged and the poor into the mainstream of the socio-economic order... The next NDC administration will therefore harmonize existing social safety-net initiatives into one agency, to ensure that targeting is effective and the poor and vulnerable are involved in safety-net program decision-making.
(NDC 2012: 11)

The targeting mechanisms of many social intervention programmes in Ghana cannot also be fully understood without reference to the impact of elections. Several recent studies show that most social intervention programmes in Ghana are poorly targeted – with a particular exception of LEAP – often benefiting the rich more than the poor (e.g. Wodon, 2012). One typical example is the Ghana School Feeding Programme (GSFP) which was designed as part of Ghana's efforts towards the attainment of the MDGs on hunger, poverty and primary education. In line with its stated objective of specifically targeting the poorest, the selection of beneficiary areas was to be guided by a set of needs-based criteria. Yet the actual implementation of the GSFP showed a distinct deviation from the pro-equity approach right from the beginning. In reality, the GSFP had the twin objectives of reducing poverty as well as stimulating political support for the ruling NPP (Hware, 2007). These competing objectives led to one significant contradiction regarding the design and implementation arrangements of the programme. On the one hand, although the programme was designed to focus on 'the most deprived districts' (GoG, 2006: 20), it was on the other, supposed to be a 'national' programme with its intended geographical coverage stated as public primary schools in 'all ... districts in Ghana' (*ibid.*, p.ii). Implementation of the programme started in late 2005 with 10 primary schools drawn from each of the 10 administrative regions (i.e. one school per region). After piloting the programme for about half a year, a first up-scaling was undertaken in June 2006 by extending it to two schools per district, and then subsequently to five schools per district.

Although one could explain this targeting approach in terms of the egalitarian principles of the 1992 Constitution which emphasised equality of opportunities, an alternative explanation draws attention to an electoral logic of spreading visible symbols of development largesse thinly across regions, in order to reach as many potential voters as possible (Abdulai, 2012). Moreover, Abdulai and Hickey (2016) draw attention to how increased political pressures on GSFP officials (often at election times) compelled programme managers to set aside the formal allocation criteria and selected beneficiary districts on the basis of partisan political considerations. Thus the Dutch Government, which had earlier pledged to support the GSFP at an annual budget of about 11 million Euros for four years (2007-2011), had by 2008 withdrawn its support for it on grounds of excessive politicisation.

Together, these observations draw attention to the limits of seeking to understand the influence of legal and policy frameworks on social protection systems without consideration of the wider political context within which such frameworks are embedded.

6 Conclusion

This paper set out to explore influence of, and interplay between, policy, strategy and legal frameworks on the development of social protection systems in low- and middle-income countries. Our analyses draw attention to the complexity and variety of paths that countries take in developing social protection systems.

The discussion in the paper illuminates that the role of policy, strategy and legal frameworks in the development of social protection systems is inherently context-specific and mostly occurs as an iterative, rather than linear and sequenced process. While there are strong

examples of countries in which policy frameworks and legislation have played a clear role in triggering policy reform towards social protection systems – such as South Africa and Kenya – experiences in other countries suggest that the development of national strategies, legislation and systems often overlap and occur hand-in-hand rather than in a sequenced manner. In many countries, policy and strategy frameworks can act as a catalyst towards building social protection systems but do not offer a guarantee for success, with issues plaguing the development of such frameworks likely to also undermine the process of systems-building itself. International and constitutional law can provide important legal guidelines for the development and implementation of social protection systems. In countries where social protection rights are constitutionally guaranteed and where the courts claim an ‘activist’ role which gives them to some extent a transformative power in the political process, the interpretation of the relevant constitutional provisions may have major impact on the design of strategies and new social protection systems. Yet the analysis in this paper highlights the plurality of pathways towards social protection systems, and the respective roles of policies, strategies and legislation in such pathways. The same holds with respect to the interaction between policy and legislative frameworks; there are examples of constitutional amendments and legal reforms having promoted policy development, and of policy developments having promoted legislation drafting. Similarly uncertain is the sequence of legislation and individual programmes or projects.

Although it is appropriate to categorise Ghana among countries where the development of social protection systems has not followed a linear trajectory, the Ghanaian experience closely follows the bottom-up approach, whereby lessons from the implementation of individual social protection programmes take precedence over the development of policy and legal frameworks. Thus, despite its long history of implementing social protection, Ghana has only recently started work on a Social Protection Bill aimed at embedding major existing programmes in law.

In the specific Ghanaian case, two factors seemed to have played a particularly crucial role in triggering efforts towards the development of a comprehensive social protection system. First, a coordinating body – in this case a new, lead Ministry – for the emergence of an effective social protection system was central. Second, the evolution of Ghana’s social protection system has been facilitated by the growing competitiveness of multiparty elections that contributed to sustained elite commitment and interparty consensus on the reduction of poverty and vulnerability through social protection. Such policy continuities across political regimes facilitated not only the development of the national social protection policy, but also towards a wider social protection system that can be seen underway today. The important lesson from this observation is that in multiparty democratic polities where elections are highly competitive, efforts aimed at forging inter-party consensus towards social protection should be considered critical for the emergence, functionality and sustenance of social protection systems. However, the Ghanaian case also suggests that multiparty democracy is at best a doubled-edged sword; while it can incentivise ruling political elites to initiate and sustain implementation of social protection programmes (even under financially difficult situations), electoral incentives can, and do sometimes undermine the effective targeting of such interventions.

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