# Extending Sustainable Social Security Coverage in Kenya: A Review of Legal and Regulatory Framework

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***Abstract***

*Social security is a fundamental human right. This paper explores the level of social security coverage in Kenya with a focus on old age social security. It finds that the level of social security coverage in Kenya is low but there has been recent policy, legal and regulatory reforms seek to increase this level.*

## 1. Introduction

The term "social security" was first officially used in the title of the United States Legislation – the Social Security Act of 1935.[2] The Act initiated a system to meet the risks of old age, death, disability and unemployment.[3] It appeared again in an Act passed in New Zealand in 1938, which brought together a number of existing and new social security benefits such as general medical and hospital services and maternity care, and cash benefits during sickness.[4] The International Labour Organisation (ILO) was quick to adopt the term, impressed by its value as a simple and arresting expression of one of the deepest and most widespread aspirations of people around the world. [5] Social

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[2]The Act established a permanent national old-age pension system through employer and employee contributions.

[3]Almon F. Rockwell, 'The New Zealand Social Security Act' (May 1939) *https://www.ssa.gov/policy/docs/ssb/v2n5/v2n5p3.pdf* accessed 6 October 2021.

[4]*Ibid*.

[5]Ailsa McKay, *The Future of Social Security Policy, in Women, work and a Citizens' Basic Income,* (Taylor & Francis Group, 2005)

security was also incorporated as a human right in the Universal Declaration of Human Rights in 1948.[6]

Similarly, the Constitution of Kenya 2010 provides for social security as an economic and social right. Article 43(1) (e) of the Constitution provides that "every person has a right to social security". It further provides that "the state shall provide appropriate social security to persons who are unable to support themselves and their dependants.[7]

World over the concept of social security is defined and interpreted in very diverse ways.[8] In some countries, the law defines the concept of social security while others do not define it but at least they state which arrangements in terms of national law belong to the realm of social security law. This definition often the case in countries aiming at assembling all legislation relating to social security into one code or law book.[9] Nevertheless, many countries like Kenya do not have a legal definition of social security. One would expect international law to provide solace in this respect; yet even there a definition of social security is lacking.[10]

Supra-national or international legal instruments all describe their own material scope of application; either by describing the content of the desired social security schemes or by enumerating (the names of) the intended schemes of national law, or even by combining both techniques. The description of the material scope of application is what the ILO Social Security (Minimum Standards) Convention, 1952 (No. 102), has adopted.[11] However,

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[6]See Article 22: "Everyone, as a member of society, has the right to social security". Article 25: "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, (…) and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."

[7]Article 43(2).

[8]Danny Pieters, *Social Security: An Introduction to the Basic Principles*, Kluwer Law International BV, The Netherlands.

[9]*Ibid*.

[10]*Ibid*.

[11]*Ibid*.

it does not describe the content of social security either but rather the content of the intended schemes. The International Labour Organisation defines the term "social security" as: [12]

> "…the protection which society provides for its members, through a series of public measures, against the economic and social distress that otherwise would be caused by the stoppage or substantial reduction of earnings resulting from sickness, maternity, employment injury, unemployment, invalidity, old age and death; the provision of medical care; and the provision of subsidies for families with children.

In this spectrum, the term 'social security' implies an ideological goal of ensuring and maintaining the protection of all citizens from economic insecurity and recognizing the importance of the desire of all citizens to be secure in the knowledge that such public protection exists.[13] Effective social security systems guarantee income security and health protection, thereby contributing to the prevention and reduction of poverty and inequality, and the promotion of social inclusion and human dignity.[14] This can be through provision of benefits, in cash or in kind, aimed at ensuring access to medical care and health services as well as income security throughout the life cycle, particularly in the event of illness, maternity, unemployment, employment injury, family responsibilities, invalidity, loss of the family breadwinner, as well as during retirement and old age.[15] The pictorial below is an illustration of an effective social security system, which is from cradle to the grave cover.

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[12] International Labour Organisation, 'Facts on Social Security', <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_067588.pdf>. accessed on 13 July 2021.

[13] Dr. Marcin Wujczyk, *The Constitutionalisation of Social Security Rights as the Way to a Social Justice State in the Right to Social Security in the Constitutions of the World: broadening the moral and legal space for social justice.* ILO Global Study, Volume 1: Europe at page 1 to 6 https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_518153.pdf.

[14] International Labour Organisation, 'International Labour Standards on Social Security', https://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/social-security/lang--en/index.htm

[15] *Ibid*.


It is against this backdrop that Section 2 of the paper will discuss some key social security terms. Part 3 will review the social security cover status in Kenya. Part 4 will discuss the National Social Security Fund, the challenges it faced as the Country's comprehensive social security scheme and its reform agenda. Part 5 will review the salient features of the National Social Security Fund Act, 2013. Part 6 concludes.

## 2.0. Social Security Terms

Some of the key terms used when discussing social security and which will be used in this paper include:

- **Social protection** – are policies and actions, including legislative measures, that enhance the capacity and opportunities for the poor and vulnerable in society to improve and sustain their lives, livelihoods, and welfare.[16] They also enable income-earners and their dependants to maintain a reasonable level of income through decent work, which

[16]Ministry of State for Planning, National Development and Vision 2030, *Kenya Social Protection Sector Review, Executive Report*, June 2012 https://openknowledge.worldbank.org/bitstream/handle/10986/16974/837710WP0P12150Box0382105B00PUBLIC0.pdf?sequence=1&isAllowed=y.

ensures they get access to affordable healthcare, social security, and social assistance. [17]

- **Social Insurance –** is based on the principle that benefits are a form of return of contributions paid whilst in paid work.[18] Individuals insure themselves against loss of income, either temporary or permanent. The basis of entitlement is past contribution records, that is evidence of paid social security contributions by both employer and employee and benefits can either be on a flat rate and uniform or salary related. Social or national insurance implies a pooling of risks and avoids the problems of adverse selection. Workers are protected against contingencies such as old age, sickness, or unemployment, which might interrupt their incomes.[19]

- **Social Assistance Scheme –** grant benefits to people needing them.[20] They are geared towards poverty alleviation benefits in cash and kind for citizens and residents in special need. They are funded from taxes and are paid as a right when the prescribed conditions of need are met.[21] Examples include education bursaries, school feeding programmes, fee waivers in public health facilities, Orphans and Vulnerable Children's (OVC) programme, older persons cash transfer and youth enterprise fund, among others.

- **Pension Scheme –** in a pension scheme on retirement a member has access to a third of their funds as a lump-sum and the balance of two thirds is used to buy an annuity or transferred into an income

[17]*Ibid*.
[18]McKay, *Supra* note 4.
[19]*Ibid*.
[20]*Ibid*. See also ILO/Wouter van Ginneken Extending social security: Policies for developing countries. ESS Paper No. 13. Geneva, International Labour Office, 2003; *Kenya Social Protection Sector Review, Executive Report*, June 2012.
[21]*Ibid*.

drawdown.[22] An annuity is an arrangement where an insurance company enters into a contract to pay a set amount of money in regular intervals, usually monthly, to the annuitant or its beneficiary.[23] An Income Drawdown is a fund that provides individuals and members of a retirement benefits scheme an option to access their retirement benefits as a regular income through an investment fund upon retirement rather than taking up an annuity or taking their benefits as a lump sum.[24]

- **Provident Fund -** in a provident fund the total retirement benefit is payable as a cash lump sum so the retiree accesses all their funds at a go.[25]

- **Defined benefit (or final salary) scheme -** in a defined benefit (DB) pension scheme an employee's pension depends on his or her salary at or near retirement.[26] The amount of benefit is therefore determined according to a formula (e.g. the benefit formula which applies under the current Kenyan scheme is for a retirement pension of 1/480ths of pensionable emoluments for each month of pensionable service). The pension benefit is guaranteed by the sponsoring employer and not dependent on the level of contributions or performance of investments (if any). [27]

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[22]Retirement Benefit Authority, *The Pension Survey 2019 Examining the Social and Economic Factors Affecting the Life of Occupational Schemes' Retirees,* November 2020 https://www.rba.go.ke/download/the-pensioner-survey-2019/.
[23]*Ibid*.
[24]Retirement Benefits Authority, *Prudential Guidelines Number RBA 002*, August 2012, *https://www.rba.go.ke/download/prudential-guidelines-number-rba-002_income-drawdown_17-august-2012_final/*
[25]Retirement Benefit Authority, *Supra* note 21.
[26]The National Treasury and Planning, *Public Service Superannuation Scheme Handbook,* October 2020 https://www.treasury.go.ke/wp-content/uploads/2021/03/Public-Service-Superannuation-Scheme-HandBook.pdf
[27]*Ibid*.

- **Defined Contribution –** in contrast with the defined benefit scheme in a defined contribution scheme like the NSSF, the level of contributions are pre-determined and are invested in separate accounts for each employee.[28] On retirement, the member's accumulated fund comprises of the contributions and the returns from investment of the contributions. Therefore, the level of benefit ultimately bears no direct relationship to an employee's salary near retirement. There is no guarantee of the level of pension at retirement.[29]

- **Income smoothing –** is where individuals' income are shifted over a lifetime by cutting down on present consumption to increase future consumption.[30] The expected value of benefits depends on the value of contributions one makes. There is a link between benefits a person receives and the contributions they make.[31]

- **Redistribution/social solidarity –** emphasis is placed on shifting income across groups. The expected lifetime benefits by one group is greater than its lifetime contributions as compared to another group.[32]

- **Social Protection Floor -** The idea of the social protection floor is based on the principle that social security is a fundamental human right and everyone is entitled to social security and a standard of living adequate for the health and well-being of themselves and their

[28]Sundeep Raichura, Social Security Principles and Trends, Presentation to NSSF on 30 June 2011.
[29] E. Philip Davis, *Pension Funds, Retirement-Income Security and Capital Markets, An international Perspective*, (Oxford University Press., New York 2004).
[30]Raichura, supra note 27.
[31]*Ibid*.
[32]International Social Security Association , Africa: Strategic approaches to improve social security Developments and Trends 2014, available at https://ww1.issa.int/sites/default/files/documents/publications/2-DT-Africa-2014-24507.pdf

families.[33] It is part of a two dimensional strategy which incorporates a basic set of social guarantees applicable to everyone (the horizontal dimension), and further provides for the gradual implementation of higher standards (the vertical dimension), as a country's growth and financial capacity may permit over time.[34] The basic guarantees include, on the one hand, basic income security in the form of cash or in kind, such as pensions for the aged and the disabled, child benefits, income support benefits and/or employment guarantees and services for the unemployed or those with inadequate incomes. The other elements of the basic guarantees include universal access to essential social services in health, water and sanitation, food security, housing, and others as defined by national priorities. It is important to emphasize the assertion that the social protection floor is not prescriptive of a universal standard but allows for flexibility in its determination based on national priorities, needs and resources.[35]

- **Pillars/Tiers –** The ILO and world bank came up with a multi-tier or multi-pillar conceptual framework for social security.[36] The zero tier refers to non-contributory, cash transfers financed by the state through taxes such as the cash transfer programme for orphans and vulnerable children, and the older persons cash transfer. The first tier is the more traditional social insurance model with mandated and compulsory contributions such as the NSSF contributions typically aimed at insuring against the income risks associated with old age, disability and death. These programs are publicly administered. In contrast, the

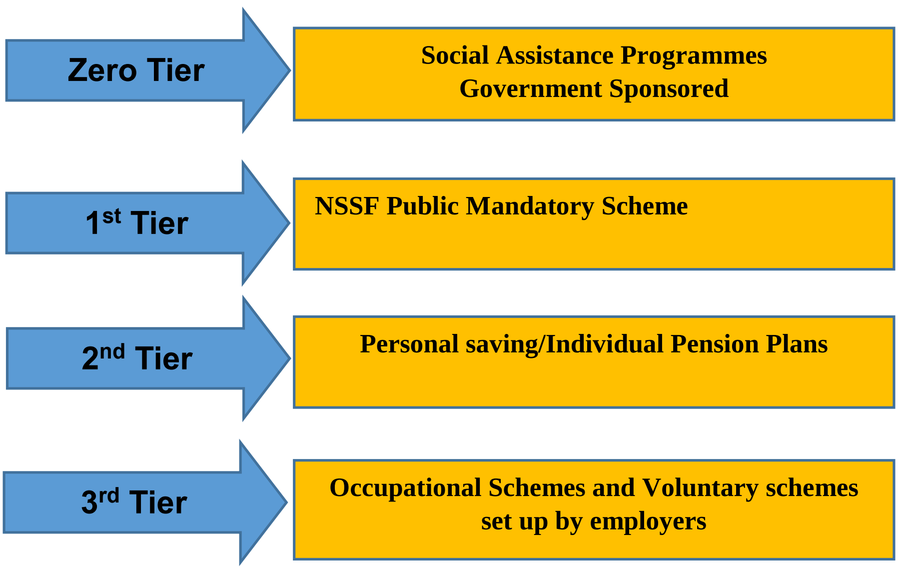
[33] Nathaniel S.B. Wellington, ISSA, Regional Social Security Forum for Africa , The role of social security institutions in extending coverage to vulnerable groups in Africa available at *https://ww1.issa.int/system/files/documents/events/2Wellington-8628.pdf.*

[34] *Ibid*.

[35]*Ibid*.

[36]Mark Dorfman and Robert Palacios, "World Bank Support for Pensions and Social Security, A Background Paper for the World Bank 2012–2022 Social Protection and Labor Strategy', (March 2012) <https://documents1.worldbank.org/curated/en/427291468331138312/pdf/709250NWP0P12600Box370060B00PUBLIC0.pdf>

term second tier refers to recognized modes of voluntary retirement savings, usually regulated and encouraged by the government and taking varied forms (individual retirement accounts, employer-sponsored defined benefit or defined contribution plans, etc.). Finally, the third tier captures a range of important non-pension sources of income support including family support (private intergenerational transfers), health insurance, housing subsidies and even emerging financial instruments such as reverse mortgages.[37]




The National Social Security Fund (NSSF) and National Hospital Insurance Fund currently bear the burden of the effort to make the constitutional right to social insurance for all a reality. The next section of the paper will review the social security cover status in Kenya with a focus on retirement benefits.

[37] *Ibid*.

## 3. Review of the Social Security Cover Status in Kenya

As per the last census report done by the Kenya National Bureau of Statistics (KNBS) 2019, Kenya's population stood at about 47.6 million.[38] 41% of the population is below the age 15 while 6% is above 55 years.[39] Further, data from the KNBS show that the number of people in employment as at the end of March 2021 was 17.84 million.[40] The informal sector generated 91% of new jobs in the country.[41]

It has been observed that most pension systems are designed to cater mostly for workers in the formal sector resulting in low coverage of the huge population working in the informal sector.[42] Pension coverage in Kenya increased from 19.5% in 2014 to 20.5% in 2019. However, pension coverage in the informal sector has remained low at approximately 1.3% in 2019.[43] Informal work brings with it a number of challenges: it is characterised by the absence of formal contracts, which leads to high levels of job insecurity, harsh working conditions and low pay. Importantly, informal-sector workers lack access to social security and, therefore, have very little to support them in cases of shocks, crises or even retirement.[44]

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[38] Kenya National Bureau of Statistics, *2019 Kenya Population and Housing Census: Volume III, Distribution of Population by Age, Sex and Administrative Units*, (February 2020)https://www.knbs.or.ke/?wpdmpro=2019-kenya-population-and-housing-census-volume-iii-distribution-of-population-by-age-sex-and-administrative-units.

[39] *Ibid*.

[40] Otiato Guguyu, '253,544 jobs lost amid recovery from Covid-19', *Business Daily*, (Wednesday 29 September 2021) 1.

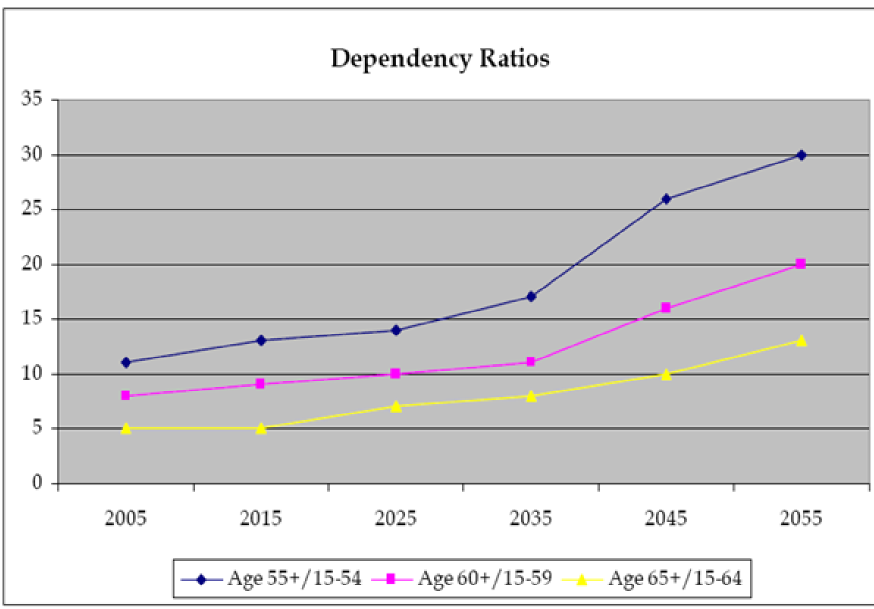
[41] Retirement Benefits Authority, 'Classification of Informal Sector Workers and Employers for Appropriate Pension targeting, report' (October 2020), *https://www.rba.go.ke/download/classification-of-informal-sector-workers-and-employers-for-appropriate-pension-targeting/.*

[42] *Ibid*.

[43] *Ibid*.

[44] Kenya National Bureau of Statistics 2018 and 2016. See also Krystle Kabare, 'The Mbao Pension Plan: Savings for the Informal-Sector', Working Paper: October 2018,*https://www.developmentpathways.co.uk/wp-content/uploads/2018/10/Mbao.pdf*

Further, the demographic factor is of great importance to the financial equilibrium of a social security system. The implication of a growing or stagnant population for the ratio between the economically active and inactive population are obvious: this is inevitably reflected in the amount of contributions received and benefits paid.[45] As stated above, Kenya's population is largely young. By the time today's labour force market entrants retire, the proportion of the population above the age of 55 is expected to almost triple. The dependency ratio (ratio of elderly to active labour force) is also expected to increase from 12% to 30% by 2050 as depicted by the graph below:




*Source: Can we afford age old pensions by Charles Machira*

In Kenya before colonisation, an embryonic form of social security was found in the indigenous institutions. The tribe, the clan, the village and the family are the bodies, which provided and to some extent still provide for social

[45] Luke Odhiambo Musiga, 'Organizational Aspects of Social Security in Kenya', (A Thesis Submitted in Partial fulfillment of the requirements for the requirement for the Degree of Master of Arts University of Nairobi, 1973).

security in the customary environment. The security of members of the family is organised on a scale which came to be known as the extended family - or the complete family.[46]

Institute of Certified Public Accountants Kenya carried out a study (Understanding Pensions, 2018) and according to the report 47.0% of the retired population are dependent on family and relatives, 31.0% have to continue working to earn a living, 16.0% are dependent on monthly pensions and only 6.0% are financially independent.[47] The above problem is compounded by the rising old-age dependency ratios, changing family values necessitating retirees to secure their own financial support and increasing life expectancy.[48]

The social fabric of Kenya is changing. There has hitherto been a reliance on the traditional forms of old age support such as extended family and community support, social culture and even taboos.[49] However, with the impact of urbanization, the breakdown of extended families and cultural values and pandemics, these informal support systems are crumbling suggesting that lesser reliance can be placed on informal family support systems as a means of keeping the elderly out of poverty.[50]

For most people, the ability to get to the right income replacement ratio is a big challenge.[51] According to the Retirement Benefits Authority (RBA), the average income replacement ratio in the country is below 34% as compared to the ILO Convention 102 recommended minimum of at least 40% by.[52]

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[46]*Ibid*.
[47]Cytonn Investments, 'Retirement Benefits options i.e. Pension Funds vs Provident Funds' https://cytonn.com/uploads/downloads/pension-vs-provident-fund.pdf
[48]*Ibid*.
[49]Sundeep Raichura, 'Analytical Review of the Pension System in Kenya', (September 2008) https://www.oecd.org/daf/fin/private-pensions/41564693.pdf
[50]*Ibid*.
[51]An Income replacement ratio is the percentage of a worker's pre-retirement income that is paid out by a pension program after the worker retires.
[52]ILO, The Social Security (Minimum Standards) Convention, 1952 (No. 102) in its Parts V, IX, and X, and ILO Convention No 128 specify rights to social security

Some of the reasons for the low replacement ratio include the low pension coverage penetration ratio, currently at 15.0% and accessibility of pension when one changes employment hence reducing the adequacy of the pension on retirement. [53]

However, the past two decades have witnessed increasingly strong and sustained political will in support of social security coverage extension. This has been demonstrated by the inclusion of social security as one of the guaranteed socio-economic right in the Bill of Rights contained in the 2010 Constitution.[54] The adoption of a number of regional and pan-African agreements, including the 2004 Pretoria Declaration on Economic, Social and Cultural Rights in Africa, the 2008 African Union's Social Policy Framework for Africa, and the 2010 Yaounde Tripartite Declaration on the Implementation of the Social Protection Floor has given further impetus to coverage extension in the Country.[55] The adoption of the ILO Recommendation concerning National Floors of Social Protection, 2012 (No. 202), where it is widely recognized that social protection floors can make an important contribution to effectively reducing poverty and inequality and promoting decent employment and inclusive growth. Furthermore, the development and adoption of a Social Protection Policy.[56]

As the Government extended coverage of safety nets and assistance programmes through the social protection policy and others, it did not lose sight of the need to review and reform the National Social Security Fund and

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benefits at retirement (old-age pension), https://www.social-protection.org/gimi/ShowTheme.action?id=21

[53]Cytonn, *Supra* note 46.
[54]Article 43(1) (e) of the Constitution of Kenya 2010.
[55]International Social Security Association , 'Africa: Strategic approaches to improve social security Developments and Trends 2014', <https://ww1.issa.int/sites/default/files/documents/publications/2-DT-Africa-2014-24507.pdf>
[56]Ministry of Gender, Children, and Social Development, *Kenya National Social Protection Policy*, (June 2011) <https://www.socialprotection.or.ke/images/downloads/kenya-national-social-protection-policy.pdf.>

National Hospital Insurance Fund as these reforms would benefit the poor and vulnerable populations.[57] In the long term, they would reduce the need for social assistance as well-functioning social insurance schemes protect households from falling into poverty.[58]

The next part of the paper will focus on old age social security and more specifically the National Social Security Fund (NSSF). NSSF was established with the mandate of providing basic social security to Kenyan workers in the formal sector when they reach retirement age. Throughout the history of social security, public pension schemes have proved to be an effective instrument in ensuring income security of older persons as well as in combating poverty and social inequality.[59]

In order to assess the aspects of the current old age social security cover, the following criteria is used;[60] Adequacy – benefits are for the full breadth of the population, sufficient to prevent old age poverty and provide reliable means to smooth lifetime poverty for the vast majority of the population. Affordability – both within the financing capacity of individuals and of society, and without undue displacement of other social or economic imperatives, or untenable fiscal consequences. Sustainability – which refers to financial soundness over an appropriate time horizon under a broad set of reasonable assumptions. Robustness - capacity to withstand major shocks, such as significant shifts in economic prospects or demographic trends. [61]

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[57]Ministry of State for Planning, National Development and Vision 2030, *Supra* note 14. Currently, pending before the National Assembly is the National Hospital Insurance Fund (Amendment) Bill 2021 that proposes that NHIF and contributory universal health coverage should be mandatory for all Kenyan residents over the age of 18.

[58]*Ibid*.

[59]International Labour Organisation, 'Social protection for older persons: Policy trends and statistics 2017–19,' Social Protection Policy Papers, Paper No. 17 (2018)*https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---soc_sec/documents/publication/wcms_645692.pdf*

[60]Robert Holzmann and Richard Hinz, 'Old Age Income Security in the 21st Century' as cited by Raichura, *Supra* note 31.

[61]*Ibid*.

## 4. A Review of the National Social Security Fund, The Law and Regulation

The National Social Security Fund Act established the NSSF in 1965 with the primary objective of providing basic social security to Kenyan workers in the formal sector when they reach retirement age.[62] It sought to position it as the first pillar/tier of social security (analogous to Pillar I of the World Bank/ILO multi-pillar/tier framework).[63]

The total cumulative membership of the NSSF as per its records as at June 2021 is about 6.7 million members but the active contributing membership is about 2.7 million. The number of registered employers (cumulative) is about 229,000 while the active ones are about 82,000. NSSF covers about 53% of formal sector employees and about 10% of total recorded employment.

Though originally conceived as a comprehensive social security scheme, NSSF had failed to mature into this role and had remained stuck in its mould as a provident fund providing only lump sum benefits to its members or their beneficiaries.[64] The lump sum benefits are provided on retirement or after the age of 50, earlier invalidity, to survivors on death of a member and on permanent emigration from Kenya.[65]

There is mounting evidence that a lump sum benefit payment upon retirement tends to be poorly applied or squandered resulting in inadequate protection against poverty in old age or disability as the case may be. Benefits paid in the form of a lump sum are typically spent within the first year of retirement thereby leading to a situation where destitution rapidly sets in.[66]

More concern was the adequacy of benefits that NSSF provides. Statutory contributions to NSSF were at 10% of an employee's pay, half of which is

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[62]Chapter 258 of the Laws of Kenya – now repealed.
[63]Raichura, *Supra* note 48.
[64]Raichura, *Supra* note 27.
[65]*Ibid*.
[66]*Ibid*.

paid by the employer and half by the employee.[67] However, there is a monetary ceiling on the maximum combined contribution at Kshs 400 per month. Further, there had only been two adjustments to the statutory ceiling on contributions since the inception of NSSF - increase from Kshs 80 to Kshs 160 in 1977[68] and from Kshs 160 to 400 in 2001[69]. Therefore, the level of benefits, given the low monetary ceiling on contributions, is woefully inadequate. Given that low contribution level, what is likely to be available to sustain one in retirement after 30 years of contributions to NSSF is projected to be much lower than ones average earnings for just one year.[70]

Therefore, there is need to increase the level of contributions if there is desire to improve benefit adequacy. Increasing the current level of mandatory contributions is justified on the grounds of protecting workers from their own "myopic behaviour" and failure to save for their old age and protecting society from the moral hazard of those who do not provide for their old age because they anticipate that society will take care of them.[71]

All the above factors coupled with external interventions on critical investment policy decisions, which led to imprudent commitments and investments, made NSSF's public image to be badly tainted that stakeholder support was at its lowest level.[72] Negative public opinion discouraged compliance and resistance to revision of contribution rates. [73]

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[67] *Ibid*.
[68] Legal Notice Number 224 of 1976.
[69] Legal Notice Number 162 of 2001.
[70] Raichura, *Supra* note 48.
[71] *Ibid*.
[72] Naftali O. Mogere, "Recent reforms and experiences of pension schemes, The experience of the National Social Security Fund', International Social Security Association ISSA Regional Conference for Africa Lusaka, Zambia, (9-12 August 2005), ISSA/AFRICA/RC/LUSAKA/KENYA-4(a) available at https://ww1.issa.int/html/pdf/lusaka05/2mogere.pdf
[73] *Ibid*.

The stakeholders are unanimous that the NSSF has to change and reform if it is to meet the evolving social security needs of the workers.[74] The public opinion is that a reformed NSSF will have a distinct role in the welfare of the society for this and future generations.[75] From the perspectives highlighted above, the key objectives of the reform were to; improve NSSF's coverage, improve adequacy of benefits it provides, improve the type of benefits and form in which it provides them, overcome behavioural obstacles to saving, increase savings rates, and promote voluntary contributions and participation by informal sector.

Moreover, the reform of NSSF had always been on the Government's policy agenda for quite some time. The National Development plan 1997-2001 provided for "a comprehensive structural transformation of the NSSF to enable it … to offer better social security benefits to its members". The Economic Recovery Strategy for wealth and employment creation 2003-2007 explicitly provided for NSSF to be converted into an autonomous pension fund with increased coverage and range of benefits. The social pillar of Kenya Vision 2030 and the National Social Protection Policy.[76]

The upshot of the reform agenda culminated in the enactment of the NSSF Act, 2013 that converted the NSSF from a provident Fund to a pension scheme while strengthening its corporate governance.[77] The next section of the paper will dovetail into the salient features of the NSSF Act 2013.

## 5. Salient Features of the National Social Security Fund Act, 2013

As per the NSSF Act (the "Act") the principal objectives of the NSSF are to; increase overall benefit adequacy levels of the system through a phased increase in mandatory contributions, widen benefits provided, expand

[74]*Ibid*.
[75]*Ibid*.
[76]Raichura, *Supra* note 27.
[77]The National Social Security Fund Act, 2013 was assented to by His Excellency the President on 24th December 2013 with its commencement date being 10th January 2014.

coverage through appropriate policy measures and incentives, and to strengthen the institutional structures of the Fund. [78]

In order to improve adequacy of benefits, the mandatory contributions have to be increased.[79] However, to limit macro-economic implications and a negative impact on employment costs, disposal incomes the contributions were increased at modest levels and phased in over a five-year period.[80] It provides for two tiers of contributions.[81] Tier 1 contributions being mandatory contributions in respect of pensionable earnings up to the statutory minimum wage targeting basic social security benefits. Tier I contributions are mandatory for all workers. Tier 11 contributions are made in respect of pensionable earnings between the statutory minimum wage and four times national average earnings targeting a level of income replacement. Employers may opt out of making Tier II contributions to NSSF and make these contributions to another scheme that meets the scheme reference test. The reference scheme test entails fulfilling certain minimum conditions in term of the type and level of benefits provided by the alternative scheme.[82] Opting out of making Tier I contributions to NSSF is not permitted. The Act has made provision that the statutory Tier I and Tier II contributions are tax deductible and that the consequent benefits provided are also to be tax exempt.[83]

To increase social security coverage, the Act makes it compulsory for everyone in formal employment whether in public or private sector to contribute to NSSF or another scheme as stated above. The only exempt persons are those exempted from making contributions to NSSF under an

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[78]Section 4 of the NSSF Act, 2013.

[79]Section 21 and Third Schedule of the Act. The rates of contribution to the pension fund will be at 12% of pensionable earnings (basic earnings), Employers contributing 6% and Employees 6%. There is a ceiling on earnings which are pensionable and on which contributions are payable of 4 times the national average earnings for the prior year.

[80] *Ibid*.

[81] Sections 20 & 21.

[82] Section 21.

[83] Sections 66 and 67.

international convention.[84] The Provident Fund has been retained for self-employed persons who voluntarily register to be members of NSSF and for members who want to make voluntary contributions.[85] The Pension Fund covers all employed persons employed in the formal sector who are above 18 years of age and have not attained the pensionable age. Provision has been made for members who move to other countries to have their benefits secured and exported.[86]

With the aim of ensuring sustainability and affordability of the Fund, it is a defined contribution scheme with some level of minimum benefits on death and invalidity.[87] It provides for an emigration benefit for a member who migrates to another country without any present intention of returning to reside in Kenya.[88] In the event a member dies who has paid atleast six monthly contributions preceding his death, a lump sum of Kshs. 10,000 is to be paid to the next of kin to defray funeral expenses.[89] It provides for phasing in of some benefits like maternity grant or unemployment grant as circumstances may allow.[90] It seeks to ensure better protection of members by providing benefits as pensions rather than lump sums and ensuring full preservation of benefits.[91] The expenses of the fund are not to exceed 2% of the total assets of NSSF reducing to 1.5% after five years.[92] So as not to crowd out private sector occupational schemes and plans, the Act provides for partial opt out for occupational schemes and umbrella retirement benefits schemes that meet the scheme reference test administered by the Retirement Benefits Authority.[93]

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[84] Section 29 and First Schedule on exempt persons.
[85] Section 18.
[86] Section 64.
[87] Sections 24, 38 & 40.
[88] Section 39.
[89] Section 40.
[90] Section 34 (2).
[91] Sections 20, 34, 36, 37 & 38. Preservation of benefits is to be achieved through the requirement that a pension purchased from a registered insurer should be for a minimum period of ten years.
[92] Section 50.
[93] Section 21 and Fourth Schedule.

The Act provides for strong governance measures. The Fund is governed by a Board of Trustees. The composition of the Board is on a tri-partite basis with representation from the Government, employers and workers.[94] NSSF is regulated by the Retirement Benefits Authority.[95] In compliance with the provisions of the Retirement Benefits Act, management and custody of the Fund's assets is outsourced to external fund managers and custodians.[96] The Fund is required to publish its financial statements in the print media and to hold had Annual General Meetings.[97] The Board and management are required to take into account corporate best practices in the leadership and management of the Fund. Provision has been made to strengthen and mitigate corrupt practices. [98]

The benefits payable under the Pension Fund include retirement pension, invalidity pension, survivors benefit, funeral grant and emigration benefit.[99] The retirement pension is paid to a member who has attained the pensionable age or opted for early retirement after attaining the age of 50 years.[100] The pension payable to a member is such an amount as can be purchased by his accumulated contributions with interest. A member may elect to receive part of his benefit as a lump sum so long as it does not exceed one-third of the accumulated Tier II contributions with the balance of the benefit paid as a pension.[101] A member is required to purchase a pension under their name from a registered insurer of the member's choice or be secured from the pension fund. Pension purchased is non-commutable, non-assignable and payable for life and should be paid for a guaranteed minimum period of ten years.[102] Benefits provided for under the provident fund are a replica of the benefits offered under the old NSSF Provident scheme.[103]

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[94] Section 6.
[95] Section 71.
[96] Section 49.
[97] Sections 51 & 52.
[98] Sections 10 & 54.
[99] Section 34.
[100] Section 36.
[101] Ibid.
[102] Ibid.
[103] Section 41

Lastly, full implementation of the Act has been hampered by lawsuits. Upon enactment and commencement date of the Act in 2014, five trade union organisations filed lawsuits against implementation the Act.[104] The Employment and Labour Relations Court suspended implementation of Sections 18, 19, 20 & 71 of the Act until the matter is heard and determined. Further, it directed that the old rates of Kshs. 400/= continue pending determination of the matter. NSSF has engaged the Unions in out of court negotiations, which are at an advanced stage.

## Conclusion

The paper sought to discuss the status social security in Kenya and more so, old age social security cover. Social security has a direct impact on poverty reduction, both in risk prevention and through the provision of compensation against its consequences. The impact of "shocks" due to the occurrence of a social or economic risk (such as an expensive illness, the loss of employment of the head of the family, or an accident leading to disability) has a significant adverse impact on the level of poverty of individuals and families. It finds that social security coverage rate has been characterised by low overall levels and benefit adequacy, small size of the formal economy relative to informal economy, low levels of disposal income, insufficient insurance against longevity and competing priorities.[105]

However, recent ongoing reforms are geared towards providing comprehensive social security coverage to Kenyans and their dependants against life risks and effecting income re-distribution, thereby contributing to social cohesion and national stability. The ongoing reforms of the NSSF and NHIF have demonstrated the Government's will in extending social security coverage in the Country.

[104]HCCC No. 35 of 2014 Kenya County Government Workers Union –Vs- NSSF, Cabinet Secretary, Ministry of Labour, Retirement Benefits Authority, Competition Authority : Interested Parties COTU & FKE

[105]Raichura, *Supra* note 48.

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