

# **NATIONAL LEGISLATION, POLICY AND STRATEGY ON CHILD LABOUR IN MALAWI- IDENTIFYING THE GAPS**

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Paper for the National Conference in Eliminating Child labour in Agriculture

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## **Abstract**

When Malawi became a democratic state in early 1990's it adopted a more liberal constitution with a comprehensive Bill of Rights which includes protective rights for children. Almost two decades later however the problem of child labour still persists notwithstanding a number of legislative and policy interventions that have taken place to deal with the problem which shows that there must be something missing in these interventions in relation to the actual causes of child labour. The purpose of this paper is to critically analyse the relevant legislation and policy in place and identify the gaps therein as they relate to the causes of child labour. The key legislation to be reflected upon include the constitution, the Employment Act and the Education Act. In terms of policy the paper will consider the National Code of Conduct on Child Labour and the Malawi Growth and Development Strategy. The gaps identified will form the basis of recommendation which will set in motion comprehensive legislative amendment and policy review by the Malawi Government as one way of showing political will towards eliminating child labour in the country.

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## 1.0 Introduction

The problem of child labour continues to attract much discussion all over the world. In Malawi, notwithstanding that child labor has been an issue for some time, real consciousness to the problem only came to the fore in or around the 1990's when the country attained democracy and adopted a liberal constitution containing a comprehensive Bill of Rights in May 1995. Malawi became a member of the International Labour Organization (ILO) in 1964 immediately after independence and ratified the two fundamental conventions, namely Convention 138 (Minimum Age for Admission to Employment and Work) and Convention 182 (Worst Forms of Child Labour) in 1999. The new Constitution and the two conventions have over time informed and shaped Malawi's national legislation, policies, strategies, programmes and actions in the fight against child labour in a very significant way. To this day however child labour persists and shows little sign of becoming history. According to the Multiple Cluster Indicator Survey of 2006, there was a child labour prevalence of 29-37% amongst children aged between 5 and 17 with 53.5% of these being in agriculture. Unrelenting poverty, poor enforcement of child labour related laws, the lack of compulsion of primary education topped by a lack of sufficient education opportunities and deep set cultural traditions are the main causes of child labour in Malawi. On the other hand child labour, apart from its known physical and psychological effects on child laborers, also poses a great risk to Malawi's economy which is agribased: as a result of wide-spread public conscience abroad of the negative effects of child labour, many customers abroad do not accept crops or products which have been

produced with the use of child labour. Therefore the export of tobacco is under threat if there is a doubt that it may have been produced with the use of child labour. Any interventions be they legislation or policy should therefore always bear in mind the factors that contribute to child labour.

This paper examines and reflects on legislation, national strategies and policy documents addressing and influencing child labour in Malawi including the causes thereof. The idea is to suggest future legislative courses of action which will ensure a clear, unequivocal and comprehensive legal framework in support of the progressive elimination of child labour.

## **2.0 LEGISLATION**

### ***2.1 The Constitution of Malawi***

In terms of child labour, section 23(4), provides that children are entitled to protection from economic exploitation, any treatment, work or punishment that is, or is likely to be, hazardous or interfere with their education or to be harmful to their health or to their physical, mental, spiritual or social development. It also defines children as any person below the age of 16, which is not in accordance with ILO Convention No. 182, under which a child is defined as any person under the age of 18.

Section 22 provides that persons are free to enter into marriage from the age of 18. Between the ages of 15 and 18 a parent' or a guardian's approval is necessary. A marriage for persons under the age of 15 is discouraged by the State though not prohibited. As a result, very young parents, who are legally children themselves, find themselves in the need to work in order to support their family, but at the same time in the condition of being child labourers because they are below the legal age to do work or perform hazardous work.

Recently the Malawi Government proposed an amendment to the constitution extending the age of marriage to 16. The amendment was passed by the National Assembly but has not yet received the Head of State's assent as there was a public outcry that the age should have been higher. It should be pointed out that at that time the ruling party had a majority in parliament: therefore, regardless of how bad the proposed law was, it would still pass as most Members of Parliament were afraid for political expediency to oppose the amendment regardless of the fact that their constituents were of different views. Accordingly this amendment shouldn't have passed in the first place. The amendment remains ineffectual to date but remains a perfect example of how parliamentary majority can be abused for political gains at the expense of the vulnerable people.

Section 25 states that all persons are entitled to education; that primary education shall consist of at least five years of education. Primary education is however not compulsory in Malawi. This makes it difficult to enforce child protection from exploitative work if society is not clearly told that any activity which prevents children from the obligation to study is a serious crime.

Section 41 generally provides for access to justice and legal remedies. In particular section 41 (3) provides that ' every person shall have the right for an effective remedy by a court of law or tribunal for acts violating the rights and freedoms granted to him by this constitution or any other law.'

## ***2.2 The Employment Act, Cap 55:02, Enacted In 2000***

Section 21 provides that "*No person under the age of fourteen shall be employed or work in any public or private **agricultural, industrial or non-***

*industrial undertaking or any branch thereof. This will not apply to work done in homes, vocational technical schools or other training institutions.*” It is quite clear that paid work in agriculture for those under age of 14 is forbidden. However, this section does not prohibit children from doing the banned work or at under the age of 14 if they work at home or where there is no employment contract or labour relationship, for example children working in self employment, including in the commercial agriculture sector. It is clear that this loophole could be subject to abuse in cases of family farms and self employment. ILO Convention 138 covers all types of employment or work, whether there is a contract of employment or not. There is need to amend section 21 of the Employment Act to bring it in conformity with Article 3(1) of ILO Convention No. 138.

Section 22 provides that no person between the age of fourteen and eighteen years shall work or be employed in any occupation or activity that is likely to be harmful to the health, safety, education, morals or development of such a person, or prejudicial to his attendance at school or any other vocational or training programme. This provision poses a number of challenges. The first one is that there is no provision for clear and appropriate regulation of the hours and conditions of employment, making it difficult to make controls in this sense. The second is that the lack of clarity on the term “homes” makes it impossible to persecute parents and guardians in case children worked or, even worse, performed hazardous tasks in family farms or inside the house. Actually child labour is exacerbated by traditional and cultural beliefs that children have to work for them to be properly integrated in society.

As an additional point on the matter of age, the Employment Act, Section 23, obliges every employer to keep a register of any person below the age of 18

years employed by or working for him. The challenge again is posed by the lack of robust legal system of proof of age. Although there is now in place the National Registration Act, it being a new law it is yet to be seen how it will operate on the ground suffice to say that the remoteness of most work places especially farms from registration points and the requirement of payment of prescribed fee for late registration of births has the potential of discouraging most people from registering themselves. In terms of Governmental monitoring and inspection activities, The Employment Act provides for general labour inspections in section 9. These are an important means for enforcing labour legislation. However a labour officer shall not enter the private home of an employer except with the consent of the employer or under the authority of a warrant issued by a magistrate, thus leaving a margin of lack of control for domestic workers. This is nonsensical provision because by the time one obtains the warrant or consent the wrong would have been corrected or hidden. There is need to balance the right to protection for the kids and the right to privacy.

In terms of sanctions, the Employment Act, under section 24, punishes violations of child labour provisions with fine of K 20,000 and five years of imprisonment. While the fine is rather low, there is no record of anyone having been imprisoned for five years. Moreover despite the fact that the court being referred to in the Act is the Industrial Relations Court, child labour cases continue being handled by magistrates with no expertise in employment cases let alone child labour. This has also contributed in non-development of jurisprudence which would have gone a long way in shaping better legislation and strategies on child labour in this country. Both the Industrial Relations Court and Magistrate courts are not courts of record. But the fact is that the Industrial Relations Court is better resourced with its own series of labour law reports and is manned by well trained and professional personnel with strong legal background and who have undergone

various trainings on the same at international level. Of bigger concern is the fact that there is the miscarriage of justice being committed in the magistrates' court as a result of this state of affairs. A typical example of this would be the 2009 case of the **State v Ali** et al Criminal Case No 129 of 2008 which involved the employing of two young boys of 13 years of age to clean a septic tank without protective clothing. The magistrate who handled this matter was a professional magistrate. As expected much focus was placed on the criminal aspect of the offence and not the compensatory aspect to the extent that only K50,000 (\$190) was paid out to the two boys whilst the large chunk was to be paid out to government in fines. If the matter had been handled by the Industrial Relations Court a much better penalty and compensations reflective of the seriousness of the offence and the resultant injury on the two boys would have been meted out.

### **2.3      *The Child Care, Protection and Justice Act, 2010 (CCPJ Act)***

The CCPJ Act addresses a number of issues that have a bearing on the efforts to eliminate child labour. It puts together in one single law all the issues of child protection and child justice that were in various laws and policies. For the first time there is an attempt to have a definition of child which is consistent with the Convention on the Rights of the Child. Despite the fact that it does not refer to existing legislation this law seems to be providing a much better and clearer protection against child labour than the Employment Act itself. The provisions having a bearing on child labour are highlighted below:-

**(a)** Section 2: it defines 'child' as a person below the age of 16 years. This means the Act cannot be used to protect those aged between 16 and 18 years whom the Employment Act protects against hazardous work. This is in line with the Constitution but not in line with the Employment Act, and reinforces the point that consistency is needed between the various pieces of national legislation.

- (b) Section 3: it assigns to parents and guardians the duties of being responsible for the welfare of the child; for the protection of the child against violence, abuse, exploitation and for the registration of the birth of a child.
- (c) Section 4: it assigns to the child, depending on age, the responsibility of assisting parents, guardians, superiors and elders in cases of need. This poses a great weight on the shoulder of children, since this provision is very vague and does not determine at all what type of work that is appropriate for the age of the child.
- (d) Section 70: it assigns to Local Government authorities the duties of safeguarding the welfare of children and of inspecting structures, places and activities that impose potential or actual harm to children. This seems to give power to Ministry of Labour officers to inspect homes, which is not clearly allowed in the Employment Act.
- (e) Section 75: it provides that “it shall be the duty of any member of the community who has evidence that a child’s rights are being infringed to report the matter to the local authority”.
- (f) Section 79: child trafficking is an offence and the penalty is life imprisonment. Child trafficking is defined as “the recruitment, transaction, transfer, harboring or receipt of a child for the purpose of exploitation”.
- (g) Section 80: it is forbidden to subject a child to social or customary practices that is harmful to the health or general development of a child. This appears to cover the habit of making children perform agricultural activities that go beyond the description of “child work” as a way for them to learn how to be a good farmer, but it is not clear enough.
- (h) Section 82: it forbids to sell a child or to pledge the child to obtain credit, to use a child as surety for a debt, or force a child into providing labour for the income of a parent, guardian or any other person.

- (i) Section 183: A court may, on application or on its own motion, extend the application of this Act to persons that are above sixteen years of age but below twenty-one years of age. This could be applied in several cases as a measure of protection of a child from child labour.

## **2.4 The Education Act, 1964**

The right to education is provided for in section 25 of the constitution. Section 3 of the Education Act gives the Minister a duty to promote education of Malawians and development of schools. Whilst Primary education in Malawi, which lasts 8 years from age 6 to 13, is free it is not yet compulsory and the drop-out rate is quite high. When children drop out from school, even at an early age, they often have no other option than help their parents in whatever activity they are carrying out. The option of going into employment for the dropouts is high given the widespread poverty (about 40% of Malawians are living below the poverty line).

There is need for intensified civic education on the importance of education and deliberate affirmative action steps taken to encourage children to go to school. Otherwise only thinking of making school compulsory coupled with penalties may actually turn out to be counterproductive. Some of the main causes of school drop out that need interventions are that the schools are not sufficient to take in all the children, they are very often too distant from some of the villages, they are sometime dilapidated or very uncomfortable, and sometime they do not provide a sufficient level of education to retain the attention of pupils. It is equally difficult to retain teachers in the most rural areas, since many of the school do not provide accommodation for teachers. It appears from the large number of children in each class that there are not enough teachers and not enough training schools for teachers. Very few

schools are in a position to provide meals for the pupils, or other activities that would help retain them. Many of them have bad sanitary facilities which are a reason why girls do not want to attend them.

### 3.0 POLICIES AND STRATEGIES

Malawi does not have policy on child labour *per se*. Even if a draft has been prepared and submitted awaiting to be discussed by the Principal Secretaries before being submitted to the Cabinet the absence of a national policy is a serious concern, in consideration of the fact that the level of child labour, especially in agriculture which is the main economic activity of Malawi, is considered a major breach of human rights and a major hindrance to the development of Malawi. As its adoption is pending, guidance is provided by the National Code of Conduct on Child Labour adopted in 2004. It is a product of tripartite consensus and so part of 'soft law'.

The Code has taken an approach similar to that of the Child Care, Protection and Justice Act. It has apportioned responsibility to the State, the employer, organizations such as NGOs, communities, parents/guardians and the children themselves. As a product of tripartite consensus, the Code serves as a useful tool for securing the commitment of the parties - particularly the employer - in the fight against child labour. As can be seen, a code has the flexibility of going beyond purely employment issues.

There are also other policies touching on the welfare of children, for example the Orphans and Other Vulnerable Children (OVC) Policy, the Gender Policy (on the girl child) and the Youth Policy.

In as far as policies and strategies are concerned there is some hope in respect of the fight against child labour in the Malawi Growth and Development Strategy (2011-2016 (MGDS II)) which was adopted by the Government in April 2012. Apart from specifically making provision for child labour, the MGDS II further looks into other areas like integrated rural development, malaria and HIV/Aids management ,education, science and technology and also youth development and empowerment all of which if effectively implemented will go a long way in addressing some root causes of child labour in the country. The MGDS II has in total six thematic areas as the main focus of Government action in these years. One of the areas the Government intends to intervene is Social Support and Risk Management part of which involves supporting the vulnerable which includes child labourers. To this end the Government has put in place a number of strategies which include; Enhancing and promoting predictable transfers to the most vulnerable and the ultra-poor households; Promoting longer term, skills oriented and asset enhancing interventions; Establishing coherent and progressive social support synergies; Promoting existing livelihood activities for the poor; Promoting village savings and loans programmes; and Improving and Scaling up the Social Cash Transfer Programmes.

In as far as specific child labour issues are concerned the MGDS II makes provision for labour and employment under the theme “sustainable economic development” and the goal is to stimulate and ensure productive and decent employment for better standards of living. Some of the strategies to be employed in this include integrating child labour issues in development strategies; reviewing, harmonising and enforcing child labour legislation and promoting labour administration systems. Because the causes of child labour are numerous and complex, it is important that the strategies which the different Government departments will formulate to eliminate it should address all the root causes of child labour and deal with them in a comprehensive and collaborative way.

#### 4.0 LEGISLATION GAPS TO ADDRESS

- The amendment of the Employment Act to make much stronger provisions for child labour should be an immediate priority. This new piece of legislation should clearly address all the grey areas of the Employment Act for example on the issue of protection of children working in family homes or farms. There should be a clarification on which court should have jurisdiction over child labour cases. The continued handling of child labour cases by magistrates is resulting in miscarriage of justice and it is hindering the development of jurisprudence which may go a long way in shaping b effective legislation and policies on child labour. There should be an amendment to the existing pieces of legislation to specifically give the industrial relations court or indeed High Court special jurisdiction over child labour cases as these are competent courts that would ably interpret the law on child labour.
- It is very important to clarify that child labour shall not be permitted whether it takes place on family farms or on estates, and specific provisions for children of tenants should be made.
- Existing legislation should be amended to remove inconsistencies about the definition of a child in terms of age, the minimum age of employment, the minimum age for hazardous work and minimum age of marriage. As a matter for urgent action the minimum age for marriage in the constitution should be revised upwards to at least 18 years and any marriage below 18 years should be prohibited.
- Provision should be made for appropriate regulation of the hours and conditions of employment probably through a comprehensive piece of legislation on child labour.
- There should be special provisions for a better organized inspection service, which could be financed by the penalties of violators. The inspection service

could also be strengthened with the support of teachers who by their own role notice every day if children come to class and if they are in a condition of tiredness which is a result of work after school hours.

- Primary education should be made compulsory and a number of activities should be taken to increase the number and the quality of teachers, to improve their living conditions and to increase and improve school infrastructure.
- As the point above is a long term action, in the short term there should be intensified sensitization on the importance of education and deliberate strategies should be put in place to attract children to school and to encourage their parents to send their children to school.
- There should be a deliberate policy that will ensure that politics does not trump over development in as far as priority to enactment of relevant laws is concerned.

## **5.0 CONCLUSION**

Proper laws are required for Malawi to effectively engage in the fight against child labour. However as this paper has shown this is not totally sufficient. Laws will not ease the tension between child rights and household economic imperatives. Accordingly broader human development interventions relevant to the primary causes of child labour must play a role. This paper has highlighted the laws and policies having a bearing on child labour. However it is clear from the paper these are lacking in many aspects which is making the fight against child labour redundant. The National Multi-Stakeholder Child Labour Conference is the first step to rectifying this problem. Considering the

task ahead, a precise deadline should be assigned to ensure a timely conclusion of this major work.

## **6.0 REFERENCES**

1. The Malawi Constitution
2. The Employment Act
3. The Child Care, Protection and Justice Act
4. The Education Act
5. The National Code of Conduct on Child Labour
6. The Malawi Growth and Development Strategy