

Legislation and Child Labour Policy in Malawi

Paper for the National Conference in Eliminating
Child labour in Agriculture

Wafwile Msukwa, Chief Labour Officer, Ministry of Labour, Malawi

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1.0 Introduction

Malawi became a member of the International Labour Organisation (ILO) in 1964 immediately after independence. To date the country has ratified a total of 29 international labour conventions, including the two core conventions on child labour, namely convention 138 (Minimum Age) and convention 182 (Worst Forms of Child Labour). The two conventions were ratified in 1999 and since then, they have informed and shaped our national legislation, policies, strategies, and programmes and actions on the fight against child labour in a very significant way.

The Employment Act, Cap 55:01 enacted in 2000, is the main piece of legislation addressing the problem of child labour in Malawi. As expected, the Act has incorporated key articles of the two conventions. We have other pieces of legislation that aim to protect children from exploitation, abuse and neglect. The major ones include the Constitution of the Republic of Malawi and the Child Care, Protection and Justice Act, No. 22 of 2010. Malawi is also working on legislation governing tenancy labour and another one on trafficking in persons. Once passed into law, the two should enhance the protection of children even in relation to work and employment. Furthermore, Malawi is a signatory to the United Nations Convention on the Rights of the Child and the Organisation of African Unity Charter on the Rights and Welfare of the African Child, among others.

Currently, Malawi does not have a policy on Child Labour (a draft has been prepared and is due to be submitted to the Office of the President and Cabinet for approval). There is however a National Code of Conduct on Child Labour adopted by the tripartite constituents in 2004. In the absence of a policy, the Code helps to fill that gap. There are also other policies focusing 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.

This paper, however, focuses on the Employment Act which is the specific law addressing child labour in Malawi. It will examine the extent to which the Act addresses child labour in the context of the two international labour conventions cited above as well as in the context of the local circumstances. Measures suggested for addressing the shortfalls or challenges, if any, will be given. Some time will also be devoted to the Child Care, Protection and Justice Act since it has a number of provisions that complement child labour provisions in the Employment Act. Finally, there will be a brief examination

of the National Code of Conduct on Child Labour to demonstrate the importance of 'soft law' in aiding the fight against child labour.

2.0 LEGISLATION

2.1 *The Employment Act*

a. *Scope*

- The preamble to the Act provides that this is “**An Act to establish, reinforce and regulate minimum standards of employment.....**”
- Section 3 defines employee as “**a person who offers his services under acontract of employment or a person who performs work or services for another person for remuneration or reward.....**”

➤ **Challenge**

Convention 138 includes work for no pay or reward but this appears to fall outside the scope of the Act yet many children are involved in such work especially in the homes of parents or guardians. This limitation is typical where responses to child labour are placed within the general labour legislation i.e. legal interventions are applicable only to persons defined as 'employees' or persons in an 'employment relationship'.

➤ **Possible solution**

Use other legislation to cover unremunerated work

b. *Age for Employment*

- In terms of section 22, the minimum age for entry to employment is 18 years although for light work (section 21) it is 14 years. This is in line with convention 138.

➤ **Challenge**

-Education in Malawi is free but not compulsory and the dropout rate even at Primary School level is quite high. 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).

Comment [s1]: C138 requires a minimum age for entry into employment of 15, but there is a derogation available to countries with insufficiently developed economies and education systems to ratify the Convention initially stating an age of 14. Malawi ratified Convention 138 in 1999, making use of this derogation. Both Conventions 138 and 182 prohibit hazardous work and other worst forms of child labour for children under 18. Both permit full-time non-hazardous work for children above the general minimum age. According to C138, light work which does not interfere with education may be performed by a child of 13 years in a country which has a general minimum age of 15; and by a child of 12 years in a country which has initially ratified the Convention giving a general minimum age of 14. The general minimum age for work should not be lower than the age of completion of compulsory schooling.

-Difficulty of ascertaining age in the absence of compulsory national registration of births coupled with low literacy levels (registration of all citizens is under way following the establishment of the National Registration Bureau under the Office of the President and Cabinet)

➤ **Possible solution**

- Move towards making education compulsory
- Introduction of compulsory national registration of births.
- Intensify poverty reduction measures

c. Exemptions

- Minimum age does not apply to work done in the home – section 21(2).

➤ **Challenge**

Children in the domestic setting doing work (e.g. helping parents or guardians with household chores) are not covered.

- Weekly rest does not apply to undertakings in which only members of the employer's family who do not earn wages work –section 36(5)

➤ **Challenge**

-Many children staying with parents or guardians fall in this category and therefore do not enjoy the protection of the law

➤ **Possible solution**

- Cover unremunerated work in other legislation.
 - Explore the possibility of ratifying convention on Decent Work for Domestic Workers or at least incorporating relevant provisions of the convention in the Employment Act
 - Domestic Violence Act, 2006 could do well to incorporate appropriate aspects of child labour
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- Minimum age does not apply to vocational technical schools or other training institutions – section 21(2).

➤ **Challenge**

There are no guidelines so far for institutions with a high potential of admitting under age children e.g. vocational schools that train vulnerable children or rehabilitation centres for young offenders (a case in point is Mpemba Juvenile Reformatory Centre which takes in juveniles aged below 15 years).

d. Hazardous work

- The Act provides for the development of subsidiary legislation on hazardous work – section 22. The list of hazardous work has just been gazetted. It has helped to address the absence of specific provisions on child labour in the Occupational Safety, Health and Welfare Act, 1997

e. Trafficking of children for labour exploitation

- Cases of children who are victims of trafficking abound although statistics on the same are hard to come by (this is due to the clandestine nature of the activity).

➤ **Challenge**

The Act does not address this subject matter. However, the matter cannot be properly addressed under the labour legislation since cases of trafficking usually involve a chain and not just the ‘employer’ of a trafficked child.

➤ **Possible solution**

Cover under separate legislation (Fortunately, The Child Care, Protection and Justice Act does cover but the problem is for those aged between 16 and 18 years. There is need, however, to standardize age and make it compatible with the internationally agreed . In this way, the laws will be mutually reinforcing.

.The draft Bill on trafficking in persons has covered all ages and so will be more useful.

f. **Register of young persons**

- Section 23 obliges every employer to keep a register of young persons

➤ **Challenge**

Ascertaining age

➤ **Possible solution**

Introduction of compulsory national registration of births

g. **Labour inspections**

- General labour inspections are provided for in section 9. These are an important means for enforcing labour legislation.

➤ **Challenge**

Restrictions on inspection of homes (section 9) – no inspection “except with the consent of the **employer** or under authority of a warrant issued by a magistrate” (emphasis supplied). The section appears to cover only the home of the **employer**, reinforcing the exclusion of work.

h. **Penalties for violations**

The Act has criminalized violations of child labour provisions – section 24. This is in line with child labour conventions.

➤ **Challenge**

A fine of K20, 000.00 appears to be on the lower side.

➤ **Possible solution**

Make the penalty stiffer: apply the Fines Conversion Act to maintain the value of the penalty.

2.2 The Child Care, Protection and Justice Act, 2010

The Act addresses a number of issues that have a bearing on child labour elimination efforts. These are highlighted below:-

- (a) States the scope of the Act as “An Act to consolidate the law relating to children by making provision for child care and protection; and child justice and for matters of social development of the child and for connected matters
- (b) Defines ‘child’ as a person below the age of 16 years – section 2 (This means the Act cannot be used to protect those aged between 16 and 18 years whom the Employment Act protects against hazardous work
- (c) Assigns to parents and guardians the duties of being responsible for the welfare of the child; the protection of the child against violence, abuse and exploitation and for the registration of the birth of a child – section 3
- (d) Assigns to the child, **depending on age**, the responsibility of assisting parents, guardians’ superiors and elders in cases of need – section 4 (who has to determine work that is appropriate for the age of the child under this Act? **Ans** Ministry of Labour)
- (e) Assigns to the local authorities the duties of inspecting structures, places and activities that impose potential or actual harm to children – section 70 (Ministry of Labour Officers could inspect homes using powers granted by this provision)
- (f) Section 75 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”.
- (g) Child trafficking has been criminalized and the penalty is life imprisonment. Child trafficking is defined as “the recruitment, transaction, transfer, harbouring or receipt of a child for the purpose of exploitation – section 79
- (h) The Act prohibits the subjection of a child to harmful cultural practices (section 80); forced marriage or betrothal (section 81); pledging of a child as security (section 82); the forcing of a child into providing labour for the income of a parent, guardian or any other person (section 82). (The challenge remains for early marriages as the young girl/boy apart from being prevented from continuing with education has to do the heavy work required for the maintenance of the family).
- (i) Sections 113 and 114 provide for diversion options (i.e. options for children diverted from prosecution) and prescribe that these should not be exploitative, harmful or hazardous to the child; should be appropriate to the age and maturity of child; should not interfere with the education of the child; and should take into account the educational level and cognitive ability of the child.
- (j) A child panel is to be established within the jurisdiction of each second grade magistrate and charged with the responsibility of devising and implementing diversion options – section 116

- (k) The Child Case Review Board of which PS for Labour is a member is responsible for facilitating the designing and implementation of rehabilitation programmes, among other duties – section 153
- (l) Reformatory Centres are subject to inspection by a team of qualified persons appointed by the Board (section 161) – Ministry of Labour is usually involved. The Centres have management rules – schedule 8 (schedule to section 159) – but unlike the requirements for diversion, the rules are rather general. In addition, the Reformatory Centre Manager may make rules for the maintenance of discipline at the centre which rules must get the prior approval of the Minister – section 176
- (m) Interestingly, the Act empowers a court on application or on its own motion to extend the application of the Act to persons over 16 years of age but below 21.

3.0 POLICIES AND OTHER FRAMEWORKS

As stated above, Malawi does not have policy on child labour *per se*. As we await its adoption, we get guidance from 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 (e.g. 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.

Malawi’s development agenda is guided by the Malawi Decent Work Country Programme(MGDS) II. This development strategy has identified child labour as one of the developmental issues that need to be addressed and through this strategy, Government has been able to provide financial support for the elimination of child labour.

The National Action Plan on Child Labour 2010 – 2015 is intended to guide well coordinated and concerted efforts in the fight against child labour. It outlines priority areas of action on which stakeholders and development partners have to focus such as “the development and improvement of the policy and legislative framework”; and “building the capacity of the education sector”

The Education Act has not had as much impact due to the fact that education in Malawi is not compulsory (but only free) as stated above. The drop out rate is rather high.

4.0 CONCLUSION

It is clear that the Employment Act, if applied in isolation, leaves glaring gaps in the protection it offers to children against economic exploitation. The situation, however, changes dramatically when the Act is considered together with the Child Care, Protection and Justice Act. Two explanations may be given here. Firstly, it shows that addressing the problem of child labour through the general labour legislation has some limitations. Secondly, it reveals that one of the ways of getting out of this predicament is to cover child labour issues which cannot otherwise be covered in the general labour legislation in other appropriate legislation. The paper has further shown that addressing the problem of child labour through diverse means e.g. a combination of laws, policies and codes of conduct/practice, can help to reduce gaps in the legislation and therefore make the fight more effective.

Indeed, given the complex nature of the problem of child labour, it may serve well to have diverse tools and strategies for addressing the problem as long as there is proper coordination of the efforts of all those concerned. For example, policies that address poverty have a great impact in reducing child labour. The enactment of legislation on tenancy labour and trafficking in persons, and the adoption of a child labour policy are therefore eagerly awaited. All this points to the political will on the part of Government to protect the vulnerable sections of our society in general and the children in particular.