REGIONAL INTEGRATION AND THE DUALISM OF ECONOMIC AND SOCIAL POLICY: THE DILEMMA FOR FOREIGN DIRECT INVESTMENT AND TRADE OVER OCCUPATIONAL HEALTH AND SAFETY; A POLICY RE-ALIGNMENT FOR THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY [SADC]

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Volume I of II

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<td>AGOA</td>
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<td>Acquired Immune Deficiency Syndrome</td>
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<td>BC</td>
<td>Before Christ</td>
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<td>The Economic Community of Central African States</td>
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<td>PTA</td>
<td>Preferential Trade Area</td>
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<td>RIDDOR</td>
<td>Reporting of Injuries, Diseases &amp; Dangerous Occurrences Regulations</td>
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<td>Regional Indicative strategic Development Plan</td>
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<td>Universal Declaration of Human Rights</td>
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<td>The United Nations</td>
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<td>UNESCO</td>
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<td>United Nations Children’s Education Fund</td>
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<td>UNRISD</td>
<td>United Nations Research Institute for Social Development</td>
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<td>USA</td>
<td>United States of America</td>
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<td>WCA</td>
<td>Workers Compensation Act</td>
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<td>World Health Organisation</td>
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<td>World Intellectual Property Organisation</td>
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<td>WLR</td>
<td>Weekly Law Reports</td>
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<td>WRMSD</td>
<td>Work Related Musculoskeletal Disorders</td>
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<td>WTO</td>
<td>World Trade Organisation</td>
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DEDICATION

To Kwima Rhoda Nkowani for patience and understanding.

To Tawonga Sarah Nkowani for managing to be born at this most trying moment of my life. You are an angel sent from heaven!

To friends and family for support and encouragement
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A complete list of those on whose shoulders I stood throughout the course of research and preparation of this thesis would be too long to fit within the space available. However special mention should be made but not necessarily in order of importance.

First and foremost I would like to thank my grand parents, Zolomphi Petros Nkowani (Sr) (who never lived to see the fruits of his sweat) and Egnala Nyalongwe for sending me to school to learn how to read and write and for telling me never to lose the ability to tell ‘right from wrong’. My late Grand father’s parting words were ‘Charo nchisani usange ukuchita makora’ (Good behaviour gains social acceptance). Such inspiration and wisdom never departed from my face and has been a lamp to my feet. I owe him a huge personal debt of gratitude.

My parents and family for support and encouragement over the time of preparation of this thesis. My mum always with a smile never failed to chip in one or two inspirational bible verses and made a heavy load lighter and bearable. My daughters Kwima and Tawonga have been a constant source of strength and the reason for being. Their patience, understanding and accommodation are beyond words.
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My sister Selah for taking off her coat of a sister and putting on a maternal one and her unfailing provision of love, care and attention which she gave anytime she was called upon. The list would be incomplete without the mention of Mary Mzaza for support and encouragement and Owen Mkandawire for the fraternal help rendered.

In the course of my research I have had unlimited access to literature at the Malawi Embassy in London. Particular mention is made of His Excellency Bright Msaka, Malawi’s High Commissioner to the United Kingdom (at the time) who was always willing to take time off his busy schedule for a chat over some of the ideas that follow. I am grateful to him. Worth of particular mention for kindesses over and beyond the call of friendship are: Ralph Kasambala, Towera Luhanga and Grace Mangwiza for acting as sounding boards on which the ideas that follow were bounced again and again, Rev. Dr. Augustine Msopole of CCAP
and Apostle S.S Ndovi of Living Waters Church for pastoral encouragements. The Living Waters church International in Manchester for the pastoral care.

The study was made possible by the generous funding provided by the University of Salford through the European Law Research Centre (ELRC). I acknowledge this with gratitude.

Last but by no means least, I thank my supervisor Professor Frank. B Wright of the European Law Research Centre for his helpful suggestions. I also wish to thank all those that helped one way or the other but cannot be individually mentioned for lack of space, may the good Lord continue to bless you to be of service to others.
Preliminary Note

The present study was carried out at the peak of reforms in the Southern African Development Community and Africa as a whole. Right in the middle of the study (2002) the Organisation of African unity (OAU) was transformed into the African Union (AU). This was not a mere cosmetic change of name. Significantly it is a rebirth of African nationhood in a global village as a powerhouse with its own bargaining powers in international economic relations. Contemplated changes in the Constitutive Act of the AU fundamentally affected issues the study set out to investigate.

AU policy changes streamlined and unified social and economic policy, albeit reactive in nature to global socio-economic and political dynamics. The implication for this inquiry was that there had to be a change of approach from investigating social policy in as far as it relates to occupational health and safety, trade and investment, to assessing how the same forms part of a continental blue print for a social and economic agenda.

The substance of the study was not affected but its approach had to take such developments if the study was to retain its relevance.
At community level the milestone for occupational health and safety the SADC Charter of Fundamental Social Rights (SCFSR) was passed coinciding with the completion of the restructuring of SADC, six weeks (23rd August 2003) before the final draft was completed. The author tried as much as is humanly possible to take such changes into account.

As will be appreciated a cut off date had to be set and in this case it was 30th April 2004. Changes and/or developments beyond this date may not have been taken into account unless it was felt they fundamentally affected the thesis in which case comments have been offered. It will be appreciated that it is impossible in a dynamic environment like SADC to capture every development. However due diligence was exercised to check and verify data or information.

The reliability of conclusions and/or comments made upon the finding of the research have been subjected to a rigorous process of social enquiry obtaining in social research and the author can safely submit that they are reliable and offer a sound platform and direction for further debate and research on issues raised.

The law in this thesis is stated as it stood at 30th October 2004.
CHAPTER EIGHT

Occupational Health and Safety Regulation, the case of Malawi

Introduction

In 1997 Malawi passed the Occupational Safety, Health and Welfare Act (Occupational Health and Safety Act)\textsuperscript{926} superseding the Factories Act as a framework legislation for the regulation of occupational health and safety in the country. Its passage was a culmination of several factors including pressure from trade unions that had just been given a new lease of life following the country’s transition to democratic governance in 1994 that encouraged popular participation in economic management\textsuperscript{927}.

The occupational Safety, Health and Welfare Act (Occupational Health and Safety Act) is crafted along the lines of ILO recommendation R.124 to ILO C.155 and follows the framework of ILO Convention C.155 on Occupational health and Safety. Occupational Health and Safety Act represents a wholesale reform in Health and Safety regulation in Malawi and since its passage a substantial body of pre-

\textsuperscript{926} Act No.21 of 1997 of the Laws of Malawi

existing law such as the factories Act\textsuperscript{928} has either been repealed, or revoked or subjected to review, amendment or qualified\textsuperscript{929}.

Changes in the law introduced by the Act are designed to alter domestic perceptions on occupational health and safety and its impact on social and economic development of the country.

One area likely to be influenced is the way trade and investment policy is to be conceived in future. The requirement in S.17 for employers to request information from manufacturers or designers on products to be used in workplaces and the introduction and strengthening of tripartism and bipartism in the world of work suggests that trade and investment policies are to be scrutinised for social sustainability. As the Act is not addressed to government alone, it means that the society as a whole can be involved in ensuring that the social side of the trade agenda is not played down.

Increased involvement of labour in market regulation is a shift from free trade ideologies to free and fair trade ideologies. The state has to balance potentially competing but essentially complimentary claims

\textsuperscript{928} Repealed by S.96 (1) of Occupational Health and SafetyW Act
\textsuperscript{929} Regulations made under the factories Act were saved by s.96 (2) of the Act but have been subject of progressive amendments or qualification
i.e. trade and investment attraction on the one hand and occupational heath and safety on the other.\footnote{See Sect. 17 of the Act.}

The Occupational Health and Safety Act represent a shift away from old systems of looking to the type of workplace or premises in which the accident occurred in order to establish which if any statutory provisions applied\footnote{Hamilton Mingole vs. Lujeri Tea Estate Civil cause No.882 of 1992, judgement delivered at the principal registry of the High Court of Malawi, Blantyre in open court on 28th May 2001 (unreported), see also Stage Coach (Mw) Ltd vs. Lynot Chisanga, Malawi supreme Court of Appeal [MSCA Civil appeal No.22 of 1999].}. The Act concentrates on combating specific categories of risk\footnote{See Part VI of the Act, Sects. 51-65} as opposed to premises in which that risk occurred. The Act is important for extending the scope of coverage and application extending protection to more people than was possible under the Factories Act\footnote{Sect. 4 as read with Sect. 5 of the Act}.

Finally the Act promotes a spirit of reconciliation and the use of Alternative Dispute Resolution (ADR) mechanisms in the resolution of labour disputes. This is conducive to businesses confidence as most businesses do not like litigating in public courts where confidential business information could find its way into the public domain which can at times be damaging. Malawi as does the rest of SADC need this
assurance if it is to improve its pull factors for attracting potential investors and retaining present ones\textsuperscript{934}.

The Factories Act was applicable only to premises where more than five people were employed. In contrast the Occupational Health and Safety Act apply to every workplace unless otherwise provided. The definition of a workplace is wider than a premise under the Factories Act. A workplace is defined as any premise in which or within the close or cartilage or precincts of which one or more persons employed\textsuperscript{935}. The numerical scope of application of the Act means that a wide range of undertakings are brought under the purview of the Act which was not this was not possible under the Factories Act.

The Act and its regulations\textsuperscript{936} are of particular significance because of their domestic and international origin. The domestic origins stems from the fact that it was a result of lobbying by trade unions and civil society organisation for better regulation of industrial relations (which

\textsuperscript{934} See Ralph Kasambala, The Legal Regime for Foreign Direct Investment in Malawi, 2000, UNIMA Students Law Journal, 41.

\textsuperscript{935} Ibid, Sect 3 (1)

\textsuperscript{936} As of the time of writing the regulation made under the factories Act were saved under Sect.96 of the Occupational Health and Safety Act and are applicable as if made under the Occupational Health and Safety Act
resulted in the Labour Relations Act\textsuperscript{937} and occupational health and safety (Resulted in Occupational Health and Safety Act\textsuperscript{938}).

Unlike the UK 1992 Health and Safety Regulations\textsuperscript{939} there is a peculiar feature of the missing link, viz, a regional dimension. In the case of Malawi domestic legislation developed ahead of regional legislation. Somewhere some one got the formula the wrong way round.

The chapter suggests that for Malawi to comply with the requirements for occupational health and safety requirements espoused in the SADC Social Charter, it must adopt regulations to the Act to implement Health and safety provisions of the Charter. Also its trade and investment policy must be conducted in line with the underlying philosophy of Occupational Health and Safety Act, i.e. balancing of social and economic policy.

In this chapter we seek to link domestic policy on occupational health and safety to regional social policy and evaluate how much or lack of it has influenced developments in member states.

\textsuperscript{937} Act.16 of 1996
\textsuperscript{938} Act No.21 of 1997
This will be done in the context of Malawi that serves as our case study. It had been thought that for the sake of those that are not familiar with Malawi a brief history and its socio-economic background would be useful.

**A point of Departure**

In 1859, David Livingstone\(^{940}\), a Scots explorer, visited Lake Malawi and drew European attention to the effects of slave trade in the area. In 1873 two Presbyterian missionary societies, the Free Church of Scotland and the Church of Scotland established bases in the region\(^{941}\).

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\(^{940}\) Livingstone, David, 1813–73, Scottish missionary and explorer in Africa. From 1841 to 1852, while a medical missionary for the London Missionary Society in what is now Botswana crossed the Kalahari Desert and reached (1849) Lake Ngami. He discovered the Zambezi River in 1851. Hoping to abolish the slave trade by opening Africa to Christian commerce and missionary stations, he travelled (1853) to Luanda on the west coast. Following the Zambezi River, he discovered Victoria Falls (1855) and reached the east coast at Quelimane, Portuguese East Africa, in 1856. His Missionary Travels (1857) in South Africa is an account of that journey. Appointed British consul at Quelimane, he was given command of an expedition (1857–63) to explore the Zambezi region. He returned to England (1864) and wrote with his brother Charles the Zambezi and Its Tributaries (1865). In 1866, Livingstone returned to Africa to seek the source of the Nile. He discovered lakes Mweru and Bangweula and in 1871 reached the Lualaba tributary of the Congo River. Sickness compelled his return to Ujiji on Lake Tanganyika, where Henry. Moton Stanley found him in 1871. Unable to persuade Livingstone to leave, Stanley joined him on a journey (1871–72) to the north end of Lake Tanganyika. In 1873, Livingstone died in the village of Chief Chitambo. African followers carried his body to the coast; it was sent to England and buried in Westminster Abbey. Livingstone’s last journals were edited by Horace Waller (1874). See biographies by J. Simmons (1955, repr. 1962), G. MArticleelli (1970), T. Jeal (1973), and O. Ransford (1978).

\(^{941}\) Blantyre Mission, now Blantyre Synod and Livingstone Synod respectively.
Missionary activity, the threat of Portuguese annexation, and the influence of Cecil Rhodes\textsuperscript{942} led Britain to send a consul in 1883 and to proclaim the Shire Highlands Protectorate in 1889. In 1891 the British Central African Protectorate (known from 1907 until 1964 as Nyasaland), which included most of present-day Malawi, was established.

During the 1890s, British forces ended the slave trade in the protectorate. At the same time, Europeans established coffee-growing estates in the Shire region, worked by Africans. In 1915 a small-scale revolt against British rule led by John Chilembwe of Providence

\textsuperscript{942} Rhodes, Cecil John, 1853–1902 British imperialist and business magnate. A trip in 1875 through the rich territories of Transvaal and Bechuanaland apparently helped to inspire Rhodes with the dream of British rule over all southern Africa; later he spoke of British dominion “from the Cape to Cairo.” In 1881, Rhodes entered the Parliament of Cape Colony, in which he held a seat for the remainder of his life. In Parliament he stressed the policy of containing the northward expansion of the Transvaal Republic, and in 1885, largely at his persuasion, Great Britain established a protectorate over Bechuanaland [now Botswana]. Rhodes became the prime minister, and virtual dictator, of Cape Colony in 1890. He was responsible for educational reforms and for restricting the franchise to literate persons (thereby reducing the African vote). His personal and business sympathies with the Uitlanders in the Transvaal, who were mostly British and the victims of discrimination, brought him to conspire for the overthrow of the government of Paul Kruger. The result was the Jameson Raid. Although Rhodes did not approve the timing of the raid, he was so clearly implicated that he was forced to resign as prime minister in 1896. In 1897 a committee of the British House of Commons pronounced him guilty of grave breaches of duty as prime minister and as administrator of the British South Africa Company. Thereafter he devoted himself primarily to the development of the country that was called Rhodesia (since 1980, Zimbabwe) in his honour. See biographies by J. G. LockHart and C. M. Woodhouse (1963), J. Marlowe (1974), and R. Rotberg (1988).
Industrial Missions (P.I.M) was easily suppressed, but it was an inspiration to other Africans intent on ending foreign domination.

In 1944 the protectorate’s first political movement, the moderate Nyasaland African Congress, was formed under the leadership of Revi Ziliro Mumba, and in 1949 the government admitted the first Africans to the legislative council. In 1953 the Federation of Rhodesia and Nyasaland (linking Nyasaland, Northern Rhodesia (Zambia), and Southern Rhodesia (Zimbabwe) was formed, over the strong opposition of Nyasaland’s African population, who feared that the more aggressively white-oriented policies of Southern Rhodesia would eventually be applied to them.

In the mid-1950s the congress, headed by Henry Masauko Chipembere and Kanyama Chiume, became more radical. In 1958, Dr. Hastings Kamuzu Banda became the leader of the movement, which was

943 Revi Ziliro Mumba
944 Op.cit post
renamed the Malawi Congress Party (MCP) in 1959. Banda organized protests against British rule that led to the declaration of a state of emergency in 1959–60. The Federation of Rhodesia and Nyasaland was ended in 1963, and on July 6, 1964, Nyasaland became independent as Malawi.  

Banda led the country in the era of independence, first as prime minister and, after Malawi became a republic in 1966, as president; he was made president for life in 1971. He quickly alienated other leaders by governing autocratically, by allowing Europeans to retain considerable influence within the country, and by refusing to oppose white-minority rule in South Africa under his policy of contact and dialogue. Arguing that the country's economic well being depended on friendly relations with the white-run government in South Africa, Banda established diplomatic ties between Malawi and South Africa in 1967.

In 1970, Prime Minister B. J. Vorster of South Africa visited Malawi, and in 1971 Banda became the first head of an independent black African nation to visit South Africa. This relationship drew heavy public criticism. Nonetheless, Malawi enjoyed considerable economic prosperity in the

946 See Pachai The Political History of Malawi. Supra.

947 Banda believed that it was possible to bring about change in South Africa through constructive engagement.
1970s, attributable in large part to foreign investment the bulk of which came from Southern African Corporations and or their subsidiaries.  

**Institutional Infrastructure**

Colonial administration left most countries ill equipped to face challenges of newly independent states and Malawi is no exception. Malawi inherited a low-skilled labour force and extremely divided labour markets in which highly paid skills and resources had to be sourced from abroad. Infrastructure had to be developed from scratch with very little available resources.

Unlike Zimbabwe that formed part of the federation of Rhodesia and Nyasaland (now Malawi) very little had been invested in Malawi during colonial rule. To the contrast Malawi has been used as a labour

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950 A short-lived African Federation, comprising the self-governing colony of Southern Rhodesia (Zimbabwe) and the British protectorates of Northern Rhodesia (Zambia) and Nyasaland (Malawi). In the 1920s and 1930s Europeans in both Rhodesias had pressed for union, but Britain had rejected the proposal because of its responsibilities towards Africans in Northern Rhodesia and Nyasaland. In 1953 the Conservative government in Britain allowed economic arguments to prevail, and a federal constitution was devised by which the federal government handled external affairs, defense, currency, inter-colonial relations, and federal taxes. Riots and demonstrations by African nationalists followed (1960-61), and in 1962 Britain accepted in principle Nyasaland's right to secede. A meeting of the four concerned governments at the Victoria Falls Conference agreed to dissolve the Federation.
reservoir for the British in other colonies such as Zimbabwe and South Africa\textsuperscript{951}.

Like most countries south of the Sahara Malawi, accorded high priority to promoting import substitution in the post-colonial period. It also had a standard post colonial development economic strategy aimed at modernising agriculture, increase export of primary agriculture products\textsuperscript{952}, attract foreign funds for industrial and infrastructure investments. Further the strategy aimed at accelerated training of Africans to take over management and decision-making positions and improve and expand the provision of health service\textsuperscript{953}.

One negative effect of this policy is that massive investment went into tertiary education at the expense of primary and secondary education. There has been a concentration of illiteracy at the bottom of the pyramid and an enormous skill gap. As the older generation reaches retirement ages the skill/knowledge gap tends to widen. For this reason government has at times been forced to either to re-engage retired personnel or out source the know-how/skill or in

\textsuperscript{951} Ibid p.13
\textsuperscript{952} See the 2002 June Budget statement for Malawi, post.
extreme cases do with mediocrity. Implications for occupational health and safety of this scenario as with other sectors of the economy are devastating.

The government's policy response had been the introduction of free primary school education.

However, government policy suffers serious setbacks such as declining retention rates in schools. One of the reasons for this is poverty that is forcing children to seek employment, exacerbating the problem of child labour and perpetuating the vicious cycle of poverty and deprivation with implications for occupational health and safety.

The passing of the Employment Act in 2000 regulating among other things the employment of children is a policy response to a persistent problem of child labour, especially in agricultural engagements and


957 Act No.6 of 200

958 Part IV of the Act. See ss.21-24

959 The Act does not define who a child is, but in S.21 it prohibits the employment of any person below the age of fourteen years. The Children and Young Persons Act of Malawi in S.3 provides that a child is anyone under the age of fourteen years. The Occuapational
informal sectors in the country. Prior to the Employment Act 2000 there existed a legal framework for the protection of children from economic exploitation. For instance, section 23 of the constitution of Malawi outlines the rights of the child. It states that children should be protected from economic exploitation or any treatment, work or punishment that is likely to be hazardous, interfere with their education or harmful to their physical, mental, spiritual or social development.

Section 21 of the Employment Act 2000 prohibits the employment of children under the age of 14 years in any public or private agricultural, industrial or non-industrial undertaking, except for work done in homes.

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Health and Safety Act (1997) uses the word young person instead of child. This is defined in Sect. 2 (1) as any person under the apparent age of eighteen years. The significance of the word apparent is that in a country like Malawi with a high numbers of illiteracy and innumeracy it is hard to ascertain the precise age of some children, especially those that have been orphaned. Insisting on numerical precision would create problems for the enforcement of the Act. The word apparent introduces discretions on the part of regulating authority to rely on their judgement to make an intelligent guess of the child's age. More guidance can be found from other instruments such as the ILO convention C138 Minimum Age Convention, 1973 Ratified by Malawi on 19:11:1999. The minimum age specified in pursuance of paragraph 1 of Article 2 should not be less than the age of completion of compulsory schooling and, in any case, shall not be less than 15 years. Notwithstanding the provisions of paragraph 3 of Article 2, a Member whose economy and educational facilities are insufficiently developed may, after consultation with the organisations of employers and workers concerned, where such exist, initially specify a minimum age of 14 years. Malawi's case falls into this exception. At the time of ratifying the convention Malawi the specified the age of 14 years. Equally important is C182, concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour that Malawi ratified on 19:11:1999. Article 2 of the convention defines a child as a person below the age of 18 years.

that do not attract a wage, vocational technical, institutional or other training or other training institutions supervised by public authority.

Section 22 prohibits the employment of children between the ages of 14 and 18 years in many occupation or activity that is likely to be harmful to the health, safety, education, morals or development of the child or prejudicial to its attendance at school or any other vocational or training programme. The children Act administered by the ministry of Gender, Youths and Community Services protects children from all forms of abuse. Malawi is also a signatory to the UN convention on the Rights of the Child and ILO conventions No.138 (Minimum Age Convention) and Convention 182 (Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour)\textsuperscript{961}. Despite this child labour is still a problem in Malawi as is the case elsewhere on the sub-continent\textsuperscript{962}.

In terms of occupational health and safety child labour make them more prone to suffer accidents and ill-health on account of their inability to follow or understand health and safety requirements. In employment terms they provide cheap labour and hence are likely to be favoured by some employers that are bent on maximising their

\textsuperscript{961} Op.cit n.19

\textsuperscript{962} The ILO estimates that there are over 12 million that is one in very five between the ages of 5 and 14 years engaged in economic activities. Of these 48 Million live in Su-Saharan Africa and mostly working in the Agricultural sector ILO (2002)
profit margins irrespective of fundamental norms such as child labour of. Their vulnerability is the raison d'être for social and economic policies that offer protection against economic exploitation in whatever form and occupational health and safety regulation is one such device that is used\textsuperscript{963}.

Increased liberalisation of the economy entails increased involvement in labour market regulation and management of private economic actors, a fact that calls for re-aligning social and economic policies aimed at raising improving living and working conditions.

However unless regulatory guidelines are supported by institutions and mechanisms that ensure effective realisation of their ideals, there is a high risk of regulations becoming symbolic and of no use. The involvement of civil society organisation such as Trade Unions, the media, and NGOs would make a difference.

The child labour problem in the case of Malawi has supranational dimensions. Migrant child labour as are all aspects of labour market that transcends national borders points to a need for a supranational approach\textsuperscript{964}, is being organised at SADC level under the employment

\textsuperscript{963} Prohibition of the employment of children and the requirement of minimum ages for employment in health and safety and related legislations are designed to achieve this goal.

\textsuperscript{964} See our discussion in chapters (Chap. V &VI), Supra
and Labour sector through the creation of policy instruments such as the social charter, the code of practice on the employment of women and children. The success of this however depends on the linkages that exists between national and regional civil society organisations in the region.

Where as under the African Union there exists institutional mechanism such as the Social and Economic Council comprising exclusively of civil society organisations to providing policy input on social and economic issues, the same can not be said of SADC.

As indicated the significance of this is that it creates a continental forum through which Civil Society Organisations are able to network. This process need to filter down to regional set-ups and eventually its effect would be reflected in domestic Civil Society Organisations as they use the knowledge and skills gained in these forums and apply them to domestic circumstances.

The approach should be down - top and not top-down in terms of implementation. Policy formulation can be made at regional level but implementation will need local inputs, put the other way, in terms of we can say that whereas regulation is should be centralised implementation need to be devolved.
This is this missing link in SADC and its effects is that Civil Society Organisations in member states such as Malawi are left without a philosophy around which to organise themselves. These are reflections of an economic policy that has developed independent of a social policy and is merely trying to fit into a social agenda as a reaction to dynamics in the global economy.

The manufacturing base of SADC remains weak with agriculture especially subsistence farming remaining an important pillar for people's survival.

**Membership Aspects**

Malawi has a dual membership of COMESA and SADC. Though both COMESA and SADC have economic integration as their prime goals, their origins are different and so has been their organising principles. COMESA sought regional integration via market integration while SADC learning from experience of past failed market integration on the continent such as the East African Economic Community on account of diversity of economic development of member states sought

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development as the route\textsuperscript{966}. Through the integration of regional economies deeper integration of the region would be achieved. The formula would facilitate deeper economic corporation and integration on a balance of equity and mutual benefit\textsuperscript{967} thereby ensuring harmonious, balanced and equitable development of the region\textsuperscript{968}.

In international law terms SADC includes one developed country (South Africa), six developing countries (Botswana, Mauritius, Namibia, Seychelles, Swaziland and Zimbabwe) and seven least developed countries (Angola, Congo DR, Lesotho, Malawi, Mozambique, Tanzania and Zambia)\textsuperscript{969}. This diversity of membership compounds the classification of SADC as an arrangement for developing countries. The implications are that the organisation may not be entitled to the special dispensation and derogations from trade law disciplines accorded to least developed countries and some developing countries in international economic law\textsuperscript{970}.

\textsuperscript{966} For a distinction between market integration and economic integration see our discussion in Chapter V.

\textsuperscript{967} SADC 'Towards the Southern African Development Community, a declaration by heads of state and government of Southern African states, in SADC Declaration Treaty and Protocol of the SADC, 5.

\textsuperscript{968} Preamble to the SADC Treaty Clause 4

\textsuperscript{969} The classification for international law purposes follows the UN system, based on computation of Human Development Indices

Industrial Relations

Prior to 1994 when Malawi emerged from one party state rule of Dr. Banda to embrace multiparty governance modelled on western notions of democracy. Prior to this, trade union activities were severely restricted with a view keeping labour costs low and under control. The government of the day may have thought that this would make Malawi an attractive foreign investment destination. In the short term perhaps could be true but in the long term the policy has been a disaster. The myopic policy conception failed to realise that cheap labour contributes to low productivity and a squandering of human resource971.

As a member of the International community Malawi should measure its socio-economic policies against international benchmarks such as conventions on occupational health and safety and international covenants on human rights.

Labour standards help develop national human resource, improve the possibility of attracting foreign direct investment, and improve the chances of economic growth972. India is a good example of how

971 "Workers in an integrating world": The World Bank's World Development Report 1995,
972 Generally see the UK Commission on Africa Work Programme on Policy and Possible implications for Action, Paper, of May 2004
improved or developed human resource can be an investment pull factor. Some companies in the United Kingdom are relocating call centres to destinations like India (e.g. HSBC Bank) and south-east Asia. However the down side of the equation is that retention of cheap labour practices maintains the nation in a cycle of poverty, which relies on low costs and low productivity for maintaining income. The comparative advantage argument is proving be devoid of ethical and moral content in the absence of mitigating factors of adverse social consequences, such as effective regulation and promotion of health and safety.

What was previously perceived, as comparative advantage in labour can not in the face of economic globalisation and the political economy of labour market be without a rider. Whereas under one party state rule governments could set wage ceilings or stifle trade.

973 See also the DFID Southern Africa Strategy Paper 2002 p.2 Malawi together with Lesotho, Mozambique, Tanzania, Zambia and Zimbabwe is classified as a low-income country with a large section of the population living below the international poverty line of $1 per day.


union activities in favour of employers, in today’s labour market that
dream is turning into a nightmare. There is strength of feeling and
international opinion in favour social progress and economic growth
are as two sides of the same coin, catching many developing
countries like Malawi between a rock and a hard place.

General Developments

Since 1994 when Malawi embraced a democratic system of
government there has been a significant amount of developments of
relevance to the present discussion. More important has been the
creation of the Law Commission as an independent institution under
Chapter XII of the Constitution with powers to review and make
recommendations relating to the repeal and amendment of laws.

976 The Industrial Relations Court Act [Act No.16 of 1996] of Malawi defines a Trade Union in
S.2(c) as any combination of persons, the principal purposes of which are the representation
and promotion of employees’ interests and the regulation of relations between employers and
employees. It also includes a federation of trade unions, but excludes employers’
organisations. See also Clement Ng‘ong’ola [1994] ‘Employment and Industrial relations law in
Malawi’ Southern African Labour Monographs, Labour Law Unit, University of Cape Town,
p.22

977 Bob Deacon Tracking the Global Social Policy Discourse: from Safety Nets to
Universalism, paper presented at the 9th International Congress of Basic Income European
Network, Geneva September 12th-14th p.13

978 UN Secretary-General Kofi Annan in his report to the Millennium Summit stated that “... in
recent decades an imbalance has emerged between successful efforts to craft strong and
well-enforced rules facilitating the expansion of global markets while support for equally valid
social objectives, be they labour standards, the environment, human rights or poverty
reduction, have lagged behind”.

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The process of law reform has resulted in amendments as well as passing of new sets of economic and social legislation. The list include for our purpose the occupational Health Safety and Welfare Act 1997\textsuperscript{979}, The Workers Compensation Act, 2000\textsuperscript{980}, the Environmental Management Act, 1996\textsuperscript{981}, The Public Enterprise (Privatisation) Act, 1996\textsuperscript{982}, The Employment Act, 1999\textsuperscript{983} and The Labour Relations Act, 1996\textsuperscript{984}. Though not an exhaustive list, it indicates the extent of legislative activity of relevance to occupational health and safety\textsuperscript{985} at domestic level.

The legislative agenda is indicative of shifting political thinking vis-à-vis social protection in a liberalised global economy. Whereas in the past it was thought that economic success would consequently bring about social progress through improved living and working standards, it is now accepted that, this is not a rule of the thumb and a pro-active social

\textsuperscript{979} Act No.21 of 1997. This Act make provision for the regulation of the conditions of employment in workplaces as regards the safety, health and welfare of persons employed therein, for the inspection of certain plant and machinery and the prevention and regulation of accidents occurring to persons employed or authorized to go into workplaces and for matters connected with or incidental thereto. For a definition of a workplace see S.3 of the Act

\textsuperscript{980} Act No.7 of 2000
\textsuperscript{981} Act No.23 of 1996
\textsuperscript{982} Act No.7 of 1996
\textsuperscript{983} Act No.6 of 2000
\textsuperscript{984} Act No.16 of 1996
\textsuperscript{985} These are discussed in detail below in as much as they relate to issues under discussion
policy can mitigate cost externality\textsuperscript{986} of trade and investment. Improved living and working standards are pre-conditions for positive economic performance\textsuperscript{987} which is essential for regional integration.

Other factors responsible for this change include pressure from local civil society organisations and trade unions besides that from international organisations such as the ILO and development aid donors. The passing of the Social Charter, codes of practice on chemical use, on Employment of women and children and HIV/AIDS and employment in the region are equally illustrative of changing attitude towards social protection.

Internationally the adoption of ILO Convention\textsuperscript{184} and the adoption of P.155 (Protocol to the Convention on occupational health and safety) and various ILO programmes such as Safe work Programmes\textsuperscript{989},

\textsuperscript{986} Economic gains are wasted often times through the cost of ill health and occupational injuries. This cost is both to the firm, the individual and society and the state.


\textsuperscript{988} Safety and Health in Agriculture Convention, 2001 (No. 184) Date of entry into force: 20.9.2003. As of 12th November 2002 there were only two ratifications, all of which are from Eastern Europe. This could be as a result of their desire to join the EU and such states are actively putting their houses in order in line with the requirements for entry into the EU. These were Republic of Moldova [20.9.2002] and Slovakia [14.6.2002] Source:

\textsuperscript{989} See www.ilo.org/safework
indicates that global economic policy is against labour exploitation and in favour of simultaneous social and economic progress\textsuperscript{990}.

Malawi has ratified a total of 23 Conventions, 16 of which in 1965 upon independence, 2 in 1966, one in 1971 and nothing after the four registered in 1986. A large number of the 1965/66 ratifications relate to instruments classed by the Governing Body's (GB) Working Party on the Revision of Standards, as to be abrogated or shelved. Malawi has ratified all eight core Conventions of the ILO\textsuperscript{991}.

Whether the same have translated into action on the ground remains to be seen and forms part of the debate. What is clear is that there is a shift towards the provision for occupational health and safety. This is indicated by the number of labour related legislation and like instruments that have been concluded, reviewed or qualified since 1994.

\textsuperscript{990} See also c155 occupational safety and health convention, 1981, C161 occupational health Services Convention, 1985 and C170 Chemicals Convention, 1990
\textsuperscript{991} Freedom of Association and Protection of the Right to Organise Convention, 1948 (Convention No. 87), Right to Organise and Collective Bargaining Convention, 1949 (Convention No. 98), Forced Labour Convention, 1930 (Convention No. 29), Abolition of Forced Labour Convention, 1957 (Convention No. 105), Minimum Age Convention, 1973 (Convention No. 138), Worst Forms of Child Labour Convention, 1999 (Convention No. 182), Equal Remuneration Convention, 1951 (Convention No. 100), Discrimination (Employment and Occupation) Convention, 1958 (Convention No. 111)
Conspicuous by their absence on the list of conventions Malawi has ratified are conventions 155, (occupational Safety and Health) and convention 161 on occupational Safety and Health services and the recent ILO convention on occupational health and safety in agriculture.

Government officials in the ministry of Labour in Malawi say that conventions C.155 and C.161 have been ratified but according to ILO records as of 23rd July, 2004 this does not seem to be the case. The adoption of the social charter incorporating such conventions provides an alternative route for the incorporation of international standards into domestic law.

Since these developments have been preceded by the adoption of Occupational Health and Safety Act, 1997 the way forward should for Malawi is by adopting subsidiary legislation to the Framework Act that implement standards demanded by the charter or international conventions992.

992 Under Article 5 of the social charter member states are enjoined to establish a priority list of ILO Conventions that should include Conventions on abolition of forced labour (Nos. 29 and 105), freedom of association and collective bargaining (Nos. 87 and 98), elimination of discrimination in employment (Nos. 100 and 111), minimum age of entry into employment (No. 138) and other relevant instruments. It can be submitted that conventions C.155 (Occupational Health and Safety), C.161 (occupational Health and Safety Services) and C.184 (Occupational Health and Safety in agriculture) are such other relevant conventions.
Legislative Developments

Malawi as is the whole of SADC is a society in transition where far-ranging legal and policy reforms are in progress. Many changes in the country's political, social and economic life are taking place simultaneously. The overhaul of the legal system reflects the magnitude and the depth of policy and institutional change contemplated. Since the 1994 the repeal of pre-transition legislation coupled with the revision and passage of new social legislation has been a priority.

It is for this reason that the constitution provides for a law commission with the task of carrying out such a review and revision. The constitution

993 The setting up of the Law commission, established under Article132 of the 1994 Constitution with the express intention of reviewing and making recommendations relating to the repeal and amendment of the country's laws sets the pace for legal reforms in the country.

994 Economically things seem to have taken a negative plunge. The economic well being of the people generally has gone down prompting a mass exodus on the economically active population to other countries where their skills and labour are well remunerated. Hard hit are the health and education sectors with academics, nursed and Doctors crossing borders. The Impact on this on the health and education and the quality of services offered by these sectors has been seriously affected. Crime, economic mismanagement, corruption over and above the problem of HIV/AIDS, hanger (Man-induced) are turning the promises of democracy into nightmares. However civil liberties have greatly improved and so are the basic human rights. However their realisation in real terms has been a problem on a account of abject poverty, low literacy and numeracy rates, gender imbalances in gainful employment.
contains a bill of rights in Chapter IV. The bill of rights in material terms reproduces the basic human rights contained in the United Nation's Universal Declaration of Human Rights (UDHR).

The provision of a bill of rights is a departure from the old constitution, that only recognised the sanctity of human rights contained in the UDHR. The courts in the country pronounced on it as part of Malawi's domestic law in cases such as Rep v. Chakufwa Chihana. The effect of the new constitutional approach is not just to remove uncertainty surrounding the applicability of the UN bill of rights in Malawian domestic courts but also to 'bring rights home'. It is up to government in consultation with its social parterners to devise its delivery mechanisms.

Article 13 of the constitution (1994) constitute health, safety and clean environment are rights thereby creating a constitutional threshed for occupational health and safety.

The scenario is similar across the region, the human right base for occupational health and safety rooted in constitutional arrangements

996 See Article 3 of the Republican Constitution (1966)
997 Misc. Case No. 1 of 1993
998 Article 13 (d) (ii) as read with Article 31 of the Constitution
reinforces the case for an occupational health and safety agenda in the region. However the drive for Foreign Direct Investment as a vehicle for economic reconstruction, following the scaling down of development donor aid is making hard for some states in the region to see occupational health and safety policy as apart of wider trade and economic policy. This stems from the unfounded fear that it might take away the comparative advantage they have in relation to labour.

The inter-state competition in the region in absence of a coherent and coordinated competition policy has the potential states raising down or not enforcing labour policies in a bid to attract and retains present investors.

The scenario points to a policy failure at regional level where despite treaty provision for harmonisation of occupational health and safety

1000 The South African constitution (Act 108 of 1996) contains a Bill of Rights, which includes a clause 24 on the environment, which also speaks to occupational health and safety. This clause entitles everyone. To an environment that is not harmful to their heath or well being" and "for the benefit of present and future generations requires that legislative and other measures are established that prevent pollution and ecological degradation, promote conservation and sustainable development. This Constitution was drafted in terms of Chapter 5 of the interim Constitution (Act 200 of 1993) and was first adopted by the Constitutional Assembly on 8 May 1996. In terms of a judgement of the Constitutional Court delivered on 6 September 1996, the text was referred back to the Constitutional Assembly for reconsideration. The text was accordingly amended to comply with the Constitutional Principles contained in Schedule 4 of the interim Constitution. It was signed into law on 10 December 1996.
and cooperation on strategic issues such as occupational health and safety. No tangible progress towards has been demonstrated. One explanation is lack of performance targets, the other is lack of cooperation, let alone internal hostilities among key players in the region.

SADC is a region of mixed blessings. It has economic potential, but is also beset by conflict in which member states have found themselves fighting on opposite sides. In such an atmosphere it is hard to envisage trust and unless there is trust, the old go it alone policies or their shadow will continue to obscure the region's progress towards achieving its goals and objectives. The absence of a functional consensus partly explains the inability of the region to handle conflict, which has hijacked its economic and social agenda. One possible source of conflict is social injustice. Unless this is accepted as a potential cause of conflict, SADC has a hard road to walk.

1001 Article 5 of the treaty as amended. These include achievement, amongst other things of development and economic growth; complementarity between national and regional strategies and programmes; harmonisation of political and socio-economic policies and plans and policies aimed at the progressive elimination of obstacles to the free movement of capital and labour, goods and services and of the peoples of the Member States. SADC also has a collective duty to improve economic management and performance through regional co-operation and reduce economic imbalances.

1002 It took the UN to send a stabilisation force into the Democratic Republic of Congo (the name is misleading, this country is the most undemocratic among SADC states. It has never held democratic election. Leadership has always been through the barrel of a gun and has passed from father to son)
The current restricting and adoption of social legislation such as the declaration on gender and the social charter are indications that there is such an acceptance in the region. These introduce occupational health and safety issues and take to new levels. However as we will see their content and substance is still at an early stage of evolution.

The new statutes emphasise human rights, a commitment to equity and the principle of inclusion. Similarly these values inform initiatives to re-organise public institutions. Since 1993 when Malawi embraced multi-party democracy social and economic legislation has come under spotlight from civil society, trade union. Government also has taken steps to bring them in line with prevailing social economic trends in the region as well as internationally.

The period 1994 to 2001 has seen the passing of the occupational Health safety and welfare Act, in 1997, the Labour relations Act, regulating industrial relations, The Employment Act and the Environmental Management Act. All these acts are pertinent to occupational health and safety. The adoption of the SADC Charter is a major step towards the creation of occupational health and safety in the region among other things. However as stated earlier institutional

1003 Act No.21 of 1997 of the Laws of Malawi
1004 Act No.16 of 1996
1005 Act No.6 of 2000
weaknesses pose serious challenges for the region. How SADC tackles them will determine the progress in the area.

The occupational safety, health and Welfare Act, 1997 like a majority of health and safety legislation the region draws heavily on concepts such as enabling legislation, goal setting (as opposed to prescriptive legislation), on, internal/external responsibility systems, health and safety management systems, risk management and the "hierarchy of controls" (for the control of occupational hazards) and stakeholder participation.

While the promulgation of the occupational safety, Health and Welfare Act, 1997 in the case of Malawi and the SADC charter of fundamental rights are significant, both are the result of a piecemeal process. Other elements of the occupational health and safety system are affected but remain intact, often as separate entities subordinated to the strategic and organisational imperatives of different government departments. Consequently changes to the system as a whole are dependent on the support of several departments and their willingness to accept structural and organisational change.

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1007 See the South African occupational health and safetyA and the MHSA
Prospects for further reform also hinge on conditions in the wider political environment. Commitment to justice, equity and the eradication of poverty is the basis of the tri-partite alliance between the government, employers and employees or their representatives. It also at the root of debates and differences over macro-economic, labour market policy and trade policy.

In while there is consensus about the need for justice, equity and economic development, that benefits Southern African society as a whole, and these principles and values are explicitly expressed in policy and legislation, the development of practical strategies, which balance ostensibly competing and contradictory goals, presents considerable challenges.

The legal reforms currently underway are slow and are fast being overtaken by social economic development in a dynamic global economic order. The judiciary is less radical, adversely affecting the development of case law, the only hope of a rapid adjustment to evolving global jurisprudence. Lack of expertise in relevant areas of legal practice is part of the reason for such a scenario.

For instance since the coming into force of the occupational health and safety and welfare act in 1997, the High court of Malawi as of June 2002 had not ruled on any case, in fact no case had been brought
under the Occupational Safety, Health and Welfare Act, 1997. One case [Hamilton Mingole vs. Lujeri Tea Estate]\textsuperscript{1008} that mentioned in passing elements of the occupational safety, health and Welfare Act, 1997\textsuperscript{1009} was based primarily on negligence and only in the alternative was pleaded under a subsidiary legislation to the Factories act\textsuperscript{1010}.

The principal legislation itself was repealed by s.96 (1) of the occupational safety and welfare act [Occupational Health and Safetyman]. However the subsidiary legislation made hereunder was saved by s.96 (2) to the extent that the same or part of it was not inconsistent with Occupational Health and Safetyman. This legislation was not only saved but became part of Occupational Health and Safety according to s.96 (2)(a). The relevance and importance of this development to the case was that it brought principles of Occupational Health and safety into application. However the judge makes no mention of this fact. In his search for applicable principles he wonders away from the act to common law principles of negligence.

\textsuperscript{1008} Civil cause No.882 of 1992, judgement delivered at the principal registry of the High Court of Malawi, Blantyre in open court on 28th May 2001 (unreported), see also Stage Coach (Mw) Ltd vs. Lnyot Chisanga, Malawi supreme Court of Appeal [MSCA Civil appeal No.22 of 1999]

\textsuperscript{1009} See the purpose section of the Act.

\textsuperscript{1010} S.28 of the Factories (electricity) Regulations made under s. 57 of the Factories Act.
The difference between common law principles and those of health and safety legislation is that whereas in negligence liability is based on the test of a reasonable man\textsuperscript{1011}, in health and safety its reasonable practicability\textsuperscript{1012}. This is an artificial device primarily to establish [or not] liability for accidents, which have occurred either in civil or criminal law. It imports economic considerations as part of the mechanism for the allocation of costs of accidents\textsuperscript{1013} and preventive measures in society\textsuperscript{1014}.

\textsuperscript{1011} Anns v Merton Borough Council [1978] AC 728 and Caparo Industries PLC v Dickman [1990] 2 AC 605. The law of negligence will condemn as negligent any act or omission which falls short of a standard to be expected of "the reasonable man". The application of this test by the courts depends on the type of case. In instance in a clinical negligence action the standard was defined in a famous 1957 case, Bolam v. Friern Hospital Management Committee. This set out what is often called "the Bolam test" which will be used when a judge is considering whether or not a doctor has been negligent. The same test would apply to other staff such as nurses and midwives.

The case held that a doctor is not in breach of the duty of care "if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular Article". The practical effect of the test is that a judge will hear evidence from experts in the appropriate speciality and must decide whether the actions of the doctor/midwife/nurse etc. were proper.


\textsuperscript{1013} See our discussion of costs in Chapter One, ante

Traditionally interpreted, Reasonably practicable is a narrower term than 'physically possible'. It implies as said that a computation must be made in which the quantum of risk is placed in one scale and the sacrifice, whether in money, time or trouble, involved in the measures necessary to avert the risk is placed in the other, and that if it is shown that there is a gross disproportion between them, the risk being insignificant in relation to the sacrifice, the person upon whom the duty is laid discharges the burden of proving that compliance was not reasonably practicable\textsuperscript{1015}. This computation falls to be made at a point of time anterior to the happening of the incident complained of\textsuperscript{1016}.

In this formulation reasonable foresee ability is not the test as would be in the negligence at common law\textsuperscript{1017}. This is illustrated by Neil v Greater Glasgow Health Board (1996 SLT 1260), where it was held that if an employer does not know, and has no reason to be aware of a risk, it might not be reasonably practicable to take precaution against it\textsuperscript{1018}. By extension it follows that reliance upon the advice or expertise of others, even if reasonable is largely irrelevant to the issue of

\textsuperscript{1015} Edward v National Coal Board [1949] 1 All ER 743 at 747
\textsuperscript{1017} CarmArticlehenshire County Council v Lewis [1955] AC 549 per. Lord Reid at 564-565, cf his dicta in Morris v West Hartlepool Steam Navigation Co Ltd [1956] AC 552
\textsuperscript{1018} McLean v Remploy 1994 SLT 687n, OH
compliance. In the above case Justice Mkandawire in considering the scope of an employer's duty restricts himself to the duty owed at common law. He referred to an old case of Speed vs. Thomas swift and Company Ltd (1943) KB 557.

To say the least this was a wasted opportunity on the part of the court to espouse on the new law on occupational health and safety. Two things could possibly explain this. Firstly the Judges unfamiliarity with the new law and or secondly the Judge just did not want to consider the act as it was not in issue. If this is the case, then he was a adopting a conservative approach as opposed to a purposeful approach that would aid in the evolution of the law.

Finally the attitude of the lawyers, it seems no one sort to refer to the occupational health and safety Act. As said earlier, damages were the deciding factor. A classic example of the attitude of the legal profession is shown in the case of A.J. Pieters vs. Stancom Aviation Services Ltd and Stancom Tobacco Company (Mw) Ltd, matter No. IRC 11 of 2001 (unreported) the issue that fell for determination at this stage was the jurisdiction of the labour relations a court Counsel

1019 LockHart v Kevin Oliphant 1993 SLT 179, HC
1020 An electronic copy of the ruling is available at http://www.sdnp.org.mw
1021 Created under Article.110 (2) of the Constitution and constituted under S.63 of the Labour relations Act (No.16 of 1996).
on both sides addressed the court on various points notably the issue of whether the applicant’s claim was one relating to employment or rectification of a contract.

It was the view of counsel for the respondents that the applicant sought rectification of a contract and that this has nothing to do with labour dispute or employment. According to counsel for the respondents this court had no jurisdiction to rectify a contract or to grant a remedy of rectification.

The applicant’s counsel on the other hand, averred that the dispute borders on termination of contract of employment and seeks remedies in form of salary and gratuity benefits. Counsel for the respondents submission were a deliberate misconstruction of law with the hope of taking the matter a way from the court and litigate in the High Court where it could get bonged down in technicalities. The Judge rightly contradicted him.

The significance of this case is that counsel for the respondent was a senior counsel, the equivalent of QC in England and Wales and such conservative attitudes are largely account for the under-development of case law and the unpopularity of the court among legal practitioners.

In Hamilton Mingole vs. Lujeri Tea Estate the Judge spends more time on damages than on exposition of the law. It would have been
different had counsel assisted the court by arguing the case on the basis of principles enunciated in the new Act. One logical conclusion that can in fairness be drawn is that a culture of compensation as opposed to prevention in this area is still strong. There is need for a departure from this point. This goes against the spirit of occupational health and safety at Work Act, which though contemplates compensation, advocates prevention first as the guiding principle.

The concept of risk is introduced in the Occupational Health and safety without definition and it is left to the courts to give effect to it. This is a crucial element of the equation and it would have been better if clarity was provided as has done the UK's Health and safety at work Act 1974 in section 3 as referring to 'the possibility of danger 'rather than actual danger. This broad formulation provides a wide scope for precautionary and preventive measures. Commenting on the concept of risk Steyn LJ at p. 882 of the report in R v Board of Trustees of the Science Museum [1993] ICR 876 was of the view that it is the possibility of danger which must be weighted against the possible precautions.

1023 See also the Judgement of Lord Morton in Paris v Stepney Borough Council [1951] AC 367. The point was made earlier by Lord Macmillan in Read v Lyons [1947] AC 156 at 173.
The court's silence on the issue was and is not in the best interest of the
development of the law in this regard. This perhaps raises the need for
judicial officers to adopt an attitude of pioneering the sell out of new
laws so that an active body of jurisprudence is maintained. Hamilton
Mingole vs. Luieri Tea Estate is a wasted opportunity However the fact
that there is such a development is a positive development, all it needs
is an aggressive court to develop the local jurisprudence on
occupational health and safety.

This is not the only concern. Despite the passing of the Labour Relations
Act (LRA) in 1996 and the subsequent setting up of the Industrial
Relations Court as of June 2002 there was still no precedent of
rulings or judgments of the court and very little activity seem to be
taking place on the Act as evidenced by absence of case brought
before the court under the Occupational Health and safety.

Unlike the South African Labour Relations Act, which was passed a year
before the Malawian Act was passed, it appears little or no effort is
made to bring the law in line social economic realities of the mush
dynamic sector to which the legislations belong. Between its passage

1024 Established under Section 110 (2) of the Malawi Republic Constitution, the Industrial
Relations Court has got original jurisdiction over Labour disputes and matters relating to
employment. Section 64 of the Labour Relations Act provides that the Industrial Relations
Court has original jurisdiction to hear and determine all labour disputes and disputes assigned
to it under Act or any other written law.
in 1995 and the year 2002 the South Africa Act had been amended five times\textsuperscript{1025}, an encouraging indication of the activities taking place.

The above could rightly be attributed largely to a combined awareness and aggression of both the court and the legal profession. The qualification of judicial officers makes it possible their contribution to the jurisprudence building, which cannot be said of Malawi and other SADC member states, as we will see. Two things could possibly explain the status quo.

Firstly the attitude of the legal profession is towards litigating in High court where damages are higher reflecting a culture of compensation as opposed to prevention, which is what the Act seeks to promote. This understanding runs through all major health and safety instruments that have a direct and significant bearing on health and social policy in Malawi such as the Charter of fundamental social rights in SADC (art.14)\textsuperscript{1026}, ILO convention on Occupational Health and Safety in agriculture [art.4] \textsuperscript{1027}, The European social charter (revised) [art.12] \textsuperscript{1028}

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\textsuperscript{1026} www.sadc.int/employment
\textsuperscript{1027} Op.cit
\textsuperscript{1028} Council of Europe, Strasbourg, 3.V.1996.
\end{flushleft}
Lack of human resource adequately qualified on the part of both the profession and the court to undertake litigation under the act. The attitude problems is reflected in the government's own attitude evidenced by the junior level of judicial officers at the court. For instance as of June 2002 the court's registrar had no legal qualifications but could hear cases as if he has such qualifications. One wonders if the legally qualified judges are not familiar with the act whether it would be fair on lay judicial officers to expect them to make any meaningful contributions to the local jurisprudence on occupational health and safety.

Malawi's Problem is compounded by the fact that the enabling Act [The Labour Relation Act] does not lay down minimum requirements for judicial officers such as judges. The South African Labour Relations Act\textsuperscript{1029} in contrast sets out the following minimum requirements to ensure that justice is done both to the development of the law as well as the aspirations of the act which is to advance economic development, social justice, labour peace and the democratisation of the workplace\textsuperscript{1030}.

\textsuperscript{1030} See preamble to the Act at http://www.labour.gov.za/docs/legislation/lra/act95-066.html#ch1
To be a president or deputy president of the labour court one must be judges of the Supreme Court; and must have knowledge, experience and expertise in labour law. It is also possible to appoint acting Judges of the court, which are persons not holding judicial positions provided they are persons who have been in the legal practice of law for a cumulative period of at least 10 years before appointment; and have knowledge, experience and expertise in labour law.

Apparent is the fact that the act contemplates the involvement of the market and business in the process of industrial justice. These practitioners represent the market and business sector. The importance of this that it widens the pool from which resources in terms of skill and expertise can be drawn. This would be a good example not just for Malawi but also SADC as a region.

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1031 S. 153. (2) of Labour Act as read with s.105 of the South African Constitution
1032 Ibid
Legislative Developments of Relevance to Occupational Health and Safety

Occupational health and safety is not a new phenomenon for Malawi, let alone occupational health and safety law and regulation. The question has been whether it has been fully understood and if so whether there has been a coherent policy formulation and implementation?

The second question is how developments have in the wider context such as SADC affected occupational health and safety policy and regulation in Malawi? To answer this question it is necessary to look at the progressive development of occupational health and safety regulation and sources of occupational health and safety law in Malawi.

Primarily the source of health and safety in Malawi can be traced to the constitution of Malawi 1991. The constitution embodies the national political and socio-economic aspirations. It is also the benchmark for all legislation, policy and administrative action. Any act of government or any law that is inconsistent with its provisions is to the

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1033 It's interesting to see that between 18th May 1994 which is according to Article 212 of the constitution is the date from which it provisionally went into force, during which period it was permissible for Parliament to either amend or repeal it entirely, subject to standard constitutional restrictions contained in Article 196.

1034 Article 5.
extent of such inconsistency invalid\(^{1035}\). It requires the state\(^{1036}\) to actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving a sensible balance between creation and distribution of wealth through the nurturing of a market economy and long term investment in health, education, economic and social development programmes\(^{1037}\).

The above goals are dependent for their attainment on internal and external dynamics of how sovereignty is exercised. The central factor is the rule of law\(^{1038}\) and good governance\(^{1039}\).

The other factor is the external relations and its effects on its internal policies. Its membership of regional and international organisations has an impact on internal policies. This is true in every sphere of its socio-economic relation. Its trade and investment policies have to conform to World Trade Organisation law and its labour policies must be line with its assumed responsibility under ILO conventions and relevant principles of international law. These provide a valuable source of law and

\(^{1035}\) Article 10, see also how the Courts have approached this in local cases

\(^{1036}\) Unlike in the case of the United Kingdom, the distinction between the state and government is not clear. The head of state in Malawi is also the head of government in contrast to the United Kingdom where the head of state is the monarch while government is headed de facto by the prime minister who in turn reports to the monarch

\(^{1037}\) Article 13 (n)

\(^{1038}\) Article 13 (k) of the Constitution of Malawi

\(^{1039}\) Ibid, Article 13 (o)
policy guidance and direction that is shaping occupational health and safety law in Malawi.

The constitution further enjoins relevant organs of the state to take into account where applicable current norms of public international law and comparable foreign case law\textsuperscript{1040}. The importance of this requirement is that the formula not only encompasses international law, but also foreign case law. Its value is that it introduces a measure of flexibility and adaptability which case law offers that would otherwise be hard to contemplate under legislative channels (which is often times rigid, bureaucratic and slow). The crucial factor is whether local institutions exist to take such developments aboard and adapt the changes to the law emanating from principles espoused in foreign case law to fit local or national circumstances. The legal profession and the judiciary have a fundamental role to play in this. The attitude of both the courts and the profession in the case of Malawi does not inspire much hope\textsuperscript{1041}.

The reluctance of courts to incorporate foreign law may have more to do with lack of expertise, resources constraints or work load that not

\textsuperscript{1040} Article.11(c) of the constitution
\textsuperscript{1041} See Hamilton Mingole vs. Lujeri Tea Estate cf A.J. Pieters vs. Stancom Aviation Services Ltd and Stancom Tobacco Company (Mw) Ltd, Matter No. IRC 11 of 2001 (unreported)
allow time for proper research and investigation of issues involved. It could also be to do with sovereignty.

National Courts have traditionally been reluctant to share jurisdiction, let alone take lectures from foreign or international (including regional) courts. Lawyers too are sometimes sceptical of legal reforms for fear of undermining local legal cultures. Academics from industrialised countries often dismiss these views as a symptom of naive nationalism. Whether or not this assessment is correct, what is relevant is to bear in mind that honest and competent officials as well as responsible citizens in recipient countries genuinely believe that external legal influence is either part of an alien political agenda or pose a serious threat to their legal culture and national identity.

The interminable debate in the United Kingdom between the Eurosceptics and pro-Europeans - a debate that cuts across political class and generations - is a helpful reminder that concern about foreign legal imposition and control is not only an infantile disorder affecting 'young nations' (Faundez J. 2000) p.9.

1043 Nora V. Demleitner, Combating Legal Ethnocentrism: Comparative Law Sets Boundaries 31 Ariz. St. L. J. 737 (1999), See also, Ibid, P. 9
Whatever the merits of this in the case of Malawi as is for other SADC states the overriding factor is lack of expertise in relevant areas fundamentally on the part of the profession and secondly the bench. In as far as the profession is concerned liberal attitudes accompanied by further and continuing training is part of the solution. For the bench, the key lies in the selection and appointment process. Appointments made on the basis of legal scholarship and experience as opposed to political rewards is key.

The legislative instrument for the regulation and management of occupational health and safety in Malawi is the occupational safety, health and welfare Act, 1997. It is complimented by other Acts such as the Employment Act, the Environmental Management Act, the labour relation Act and the Children's Act to name a few. Chapter IV of the constitution contains a bill of rights, which include the core labour rights. Of interest is Article 31 (1) that talks of fair and safe labour practices. According to this provision everyone has a right to fair and safe labour practices and to fair remuneration.

1044 Act No.21 of 1997
1045 SS. 36-49 of Act No.6 of 2000 of the Laws of Malawi
1046 Act No.6 of 1996
1047 Act. No 16 of 1996
1048 Op.cit
The importance of this development is that it enables third parties to take action against employers for acts or omissions carried out in the course of work or work-related processes. This would arise for instance where the management of waste and industrial products threatens the environment. This is possible under article 13(d) of Occupational Health and Safety Act as read with articles 5 of Environmental Management Act (EMA) and art.46 (2) of the constitution.

Articles 10 and 11 of the constitution contain important formula through which to trace sources of occupational health and safety law in Malawi. These articles deal with application and interpretation of the constitution respectively. Article 10 (2) states that in the application and formulation of common law and customary law the relevant organs of the states, (of which the judiciary is one), should have due regard to constitutional principles contained in Chapter III thereof. In the interpretation of the constitution where applicable a court of law is expected have regard to current norms of public international law and comparable foreign case law.

1049. Act No. 23 of 1996 of the Laws of Malawi. This act makes provision for the protection and management of the environment and the conservation and sustainable utilisation of natural resources and matters connected therewith and incidental thereto.

1050. Although Article 13 establishes constitutional principles of national policy, which are directory, courts are allowed to have regard to them in the interpretation and application of the constitutional provisions.
Talking of public international law\textsuperscript{1051} it would be Important to bear in mind that what was being contemplated was among other things, treaty law\textsuperscript{1052}. This includes multilateral or bilateral trade and investment treaties such as the Generalised System of Preferences (GSP), to which Malawi is a party or those to which Malawi is not privy but they have acquired the force of customary international law\textsuperscript{1053}.

Article 5 of the SADC social charter makes explicit reference to ILO conventions and calls upon member states to establish a priority list of the conventions and the need for regional mechanism to assist members comply with say the ILO reporting system\textsuperscript{1054}. In retrospect Malawi has had laws on occupational health and safety as far back as 1965. The colonial link traces back to earlier legislative interventions by the united Kingdom in pursuance of the cause of health and safety dating back to the Health and Morals of Apprentices Act 1802.

\textsuperscript{1051} Sources of International Law include, General theories, statute of the international court of Justice as set out in Article 38, treaties, custom (Nicaragua vs. United States) (merits) ICJ Rep.1986 14, general principles of law, Judicial decisions and the writings of publicists, Resolutions of international organisation such as the (United Nations Security council) among others. See North see Continental Shelf Cases (Federal Republic of Germany vs. Denmark, FRG vs. the Netherlands) ICJ Rep 1969 3 ICJ.


\textsuperscript{1054} See ILO Protocol 155 to C.155 (Occupational Health and Safety)
This Act was designed to protect young children working in cotton and woollens mills and other factories where more than twenty persons were employed. At that time it was the custom to put four children in a bed during the day and four more during at night while the day occupants were working\(^{1055}\).

It was this type of abuse at which this Act was aimed. Other pieces of legislation were passed in the ensuing years, but the real breakthrough came in 1833 when the Factories was passed. It is this Act that was applied to all colonial territories and introduced health and safety legislation in territories like Malawi by the Nyasaland order in council 1902. Its application and carried on in post independence Malawi under the banner of statutes of general application\(^{1056}\) and the statutory re-enactment of the Factories Act in 1965\(^{1057}\).

The principal legislation was the Factories Act, cap.55:07 of the laws of Malawi\(^{1058}\). The pertinent parts were, part IV, sections 13-20[Health] part V sections 21-45 [safety], Part VI, sections 47-53[Welfare] and Part VII, special provisions and regulations for Health, safety and welfare.


\(^{1056}\) General Interpretation Act, Cap of the Laws of Malawi, s. 3

\(^{1057}\) cap. 55:07 of the laws of Malawi

\(^{1058}\) The Factory Act has since been repealed by s.96 of Occupational Health and safety which has replaced it.
This is not the only piece of legislation that introduced health and safety law in Malawi. Some pre-independence laws continued their application in post Independence Malawi. Malawi’s own laws have gradually replaced them. As can be expected of most former colonies such laws were essentially not home grown, rather a mere renaming of former master’s laws as their own.

As a result of legal imperialism new problems arise with regard to understanding, application and further legal development. Colonial infrastructures were removed and have replaced by local ones unmatched in every respect.

In Malawi the conflict between the judiciary and the executive arising from conflicting notions of justice and due process of law led to the creation of a dual court systems. There was the high court system on the one hand and the traditional court system presided over mainly by traditional on the other hand. At the centre of the conflict were rules of evidence. It was an a front to local notions of justice to let accused person off the hook merely on technicalities.

Clearly there was a misunderstanding of western concepts of rule of law or due process. It was not surprising that the enabling act of
traditional courts contained a provision requiring substantial justice to be done without undue regard to technicalities\textsuperscript{1059}.

In the infamous Chilobwe murders\textsuperscript{1060} a number of prosecutions collapsed. Dr. Banda reacted by creating a parallel court system known as the Traditional court systems where rules of procedure and evidence were based on local notion of justice and evidence [No smoke without fire] convictions were generally guaranteed for those accused of cases such as treason, sedition and those with political overtones\textsuperscript{1061}.

\textsuperscript{1059}Infra n.1035
\textsuperscript{1060}These were politically motivated murders allegedly instigated by those opposed to Banda's rule and designed to create fear and discontent in the city of Blantyre. Notoriously affected was a small township of Chilobwe.
\textsuperscript{1061}See the Case of Rep vs. Orton, Vera and Fumbani Chirwa. Criminal case No. 1of 1982(Unreported). The accused, a family was abducted in Zambia by secret police and charged with treason. The matter was brought in the traditional court sitting at the then Namibia Traditional Court. The first and second were lawyers, in fact the first was first African Attorney General and was a QC. The third accused was their son. The court acquitted the third accused but convicted the two. In the course of the judgement the judges make repeated mention that there is no smoke without fire, implying that once you have been charged with an offence it means you in some way connected to the crime. The evidential importance of this is that it alters the standard of proof from beyond reasonable doubt to one of a mere accusation. The burden of proof also shifts to the accused to prove his or her own innocence. With such rules of procedure convictions were assured. The philosophy seems to have been not fair trial rather to conviction by public trial. These courts were abolished in 1994 when the political system changed form One party state to multiparty democracy been and are now part of the High court system as subordinate courts. The first accused died in prison while the second was pardoned by Dr. Banda and is now a member f commission of the African commission of human rights.
The above illustrates the difficulties newly independent states faced in understanding and embracing western notion(s) of justice and its rules. It is not surprising that to date these laws remain largely symbolic.

The other source of occupational health and safety law for Malawi is the recent SADC social charter. As indicated in charter VI, the charter seeks to facilitate through close and active consultations among social partners\textsuperscript{1062}, the harmonisation of regulations relating to health and safety standards at work places across the region\textsuperscript{1063}. The lead article for occupational health and safety is Art.12 of the Charter\textsuperscript{1064}.

By the Central Africa Order in Council of 11 August 1902, Statutes of General application in England were also applicable in Malawi. The effect of this was that the English Heath and Safety laws once established to be of general application were applicable to Malawi.

A part from statutory enactments occupational health and safety law has largely been introduced and maintained in Malawi through the medium of English common law\textsuperscript{1065}. Enforcement had been mainly

\textsuperscript{1062} Government, representative organisations of employers and representative organisations of workers. See Article.1 of the Charter

\textsuperscript{1063} Article.2 (1) (f) of the Charter

\textsuperscript{1064} A fuller discussion of the provision is offered in chapter VI, supra.

\textsuperscript{1065} See Hamilton Mingole vs. Luijeri Tea Estate and Stage Coach (Mw) Ltd vs. Lynot Chisanga, Malawi supreme Court of Appeal [MSCA Civil appeal No.22 of 1999]
through an action for damages for personal injuries in negligence. For some time this has been the trend and outlook.

Malawi’s problem in the past has not has been a lack of law in this area, rather, it has been too much law with no clear lead administrative and enforcement structures. This fragmentation has led to duplication of efforts, a waste of resources, lack of consultation and coordination of occupation health and safety programmes. This is not a uniquely a Malawian problem as the Robens report found the same problem in relation to the United Kingdom1066.

The legislative response to the above problem has been the passing of the occupational Safety, Health and Welfare Act [Occupational Health and Safety Act 1997]. The Act unifies the law and streamline administrative structures1067 and encourages coordination between different government departments and other sectors of the economy in matters of occupational health and safety1068. For instance under s.17 of the act an employer can request any person who designs, manufacture, imports or supplies any article for use at a work place to make sure that the articles are safe and without risks to health when

1067 See Part IX of the Act, ss. 72-73
1068 S.13 (4)(a) of the Act
used properly. The employer can also arrange for testing of such articles before use. Finally there are channels for information exchange between, manufacturers, designers and end users of such products with the aim of minimising risks to health and safety. 

Unlike in the United Kingdom where the Health and Safety executives can bring prosecutions in Malawi, it is only the state the Ministry of justice can only institute such prosecutions. This brings into picture the ministry of justice and constitutional affairs. The act contemplates networking among the various government ministries involved. Whether in practice this is the case remains to be seen.

So far there is a healthy working relationship among the various state departments vis-à-vis law enforcement and related matters. The only problem is resource constraint both financial and social as well as skill limitations. This would be compensated by the regional structures within SADC,

The changing dynamics of global economic and social relations have exposed the failures of law as it stood to adequately and comprehensively respond to the challenges that go with the changing times in the field of occupational health and safety. This has impelled a rethink of philosophy of health and safety both at domestic as well as

1069 S.17 (1) (c)
Several factors have been brought to bear on this. One such factor is the global nature of the problem and the sizes of resources and expertise required to deal with it.

Secondly the integration programme of SADC means that SADC is becoming a single market and unless factors of production such as health and safety standards across the region are harmonised, prices of similar commodities will greatly vary making integration, which would normally entail free movement of people and goods problematic.

Uncoordinated efforts at regional level would hamper programmes at that level to implement regional programmes aimed at improving living and working conditions for workers, the environment and the region as a whole. Its for this reason then that the Charter calls upon member states to create an enabling environment for every worker in the region to enjoy a right to health and safety at work, a healthy and safe environment that sustains human development.

The development of Occupational Health and Safety Act cannot be traced back to the social charter as framework policy guidance since it was passed neither before the charter, nor to discrete initiatives of the Employment and Labour sector such as the code on the safe use of

1070 See developments at SADC and ILO. Cf EU position
1071 Article.12 of the charter. cf Article.31 of the constitution of Malawi
chemicals, and code of practice on HIV/AIDS and Employment. This so because they all came into existence at the same time (1997). So the most likely influence has been domestic and international pressures. On the domestic from the wave of political reforms that took place from 1993 onwards created necessary conditions for trade union and civil society involvement in policy formulation. Trade Unions became vocal and begun to demand better working and living conditions for employees.

Thirdly Malawi has signed up to a number of ILO conventions with a direct bearing on occupational health and safety and their respective recommendations. Its time that it started to implement and translate the same into domestic policy, which finds expression in law. In Malawi this is done under the law reform programme overseen by the department of the law commissioner.

Fourthly the changing political climate, which has made it possible for the active operation of civil society. The press for picks up and reports court cases thereby shaping public opinion on matters of health and safety and industrial relations. Trade unions have been lobbying the government on a number of issues in the labour market. The increased tripartite consultations in matters of labour have all worked to produce a sudden rethink of the law in the area.
Fifthly the former factory's Act having been a carbon copy of the English Factories Act meant that developments in England in the law were to have an effect on the factories Act in Malawi. Indeed the Occupational Health and safety of Malawi is in material terms very similar to the British Health and safety at work. Act 1974\textsuperscript{1072}.

The occupational Safety, Health and Welfare Act 1997

The Malawi occupational health and safety Act is based on the philosophy of active accident prevention\textsuperscript{1073}, rather than the traditional role of law of tort in largely reacting to accidents that have occurred, by concentrating on the awarding of compensation\textsuperscript{1074}. Practical application of this philosophy includes comprehensive coverage of workplaces and processes\textsuperscript{1075}, comprehensive duties in employers\textsuperscript{1076} and self-employed\textsuperscript{1077}, self regulation, joint regulation,

\textsuperscript{1073} See the Purpose clause to the Act
\textsuperscript{1075} See Sect.4 and Sect.5 of the Act
\textsuperscript{1076} Sect.13
\textsuperscript{1077} Sect.14
duties on employees\textsuperscript{1078}, enforcement agencies\textsuperscript{1079} and powers and
criminal sanctions\textsuperscript{1080}.

One of the criticism of the Robens report in relation to the UK health
and safety law was of the vast complexity of existing system which
had grown up piecemeal with the result that certain types of
workplaces were well covered but certain areas were left uncovered
in specific reactive legislation.

This is true for Malawi as well. Prior to the Occupational Health and
Safety Act it was possible to trace the law on health and safety to
many legislative instruments all developed in reaction to accidents and
occurrences in associated sectors. The largest had been the chemical
industry as show by table 2 below. At the time of passing the
Occupational Health and Safety Act there were about 11 acts each
developed for a specific sector and administered by different ministry
or body. There was little if any coordination among the various
enforcement ministries or bodies involved. This led to duplication of
efforts and waste of time and resources. Lack of a lead ministry meant
policy coherence, monitoring was problematic. The legislation itself
was industry and geographic specific and as such was irrelevant to

\textsuperscript{1078} Sect. 18
\textsuperscript{1079} Sect. 72
\textsuperscript{1080} Sect. 85

432
some sectors.

Table 4

<table>
<thead>
<tr>
<th>Legal Instrument [Type, Reference, Year]</th>
<th>Responsible Ministries or Bodies</th>
<th>Chemical Use</th>
<th>Objective of Legislation</th>
<th>Relevant Articles/Provisions</th>
<th>Enforcement Ranking</th>
</tr>
</thead>
<tbody>
<tr>
<td>Environmental Management Act, 1996</td>
<td>Ministry of Forestry, Fisheries and Environmental Affairs</td>
<td>General</td>
<td>Protection and Management of Environment</td>
<td>Part VII, Sec. 37, 38, 39, 40, 41</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Part VIII, Sec. 42, 43, 44</td>
<td></td>
</tr>
<tr>
<td>Occupational Safety, Health and Welfare Act, 1997</td>
<td>Ministry of Labour and Vocational Training</td>
<td>Industrial Chemicals</td>
<td>Regulate and control use, handling and processing of chemicals in the workplace</td>
<td>Part VII, Sec. 66, 67, 68</td>
<td>2</td>
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<td></td>
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<tr>
<td>Pharmacy and Poisons Act, Amended 1982</td>
<td>Pharmacy and Poisons Board</td>
<td>Pharmaceuticals and poisonous drugs, Cosmetics, Detergents and Household Pesticides</td>
<td>Control of the profession of pharmacy and the trade in drugs and poisons</td>
<td>Part III, Sec. 20, 21, 22, 23</td>
<td>2</td>
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<tr>
<td>Dangerous Drugs Act, Amended 1982</td>
<td></td>
<td>Dangerous drugs</td>
<td>Control the importation, production, possession, sale, distribution, and use of dangerous drugs.</td>
<td>Part III, Sec. 11, 12</td>
<td>2</td>
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<td></td>
<td></td>
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<td>Part VI, Sec. 13, 12</td>
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<tr>
<td>Explosive Act, Department</td>
<td></td>
<td>Explosives</td>
<td>Regulate and control use, handling and processing of explosive materials</td>
<td>Part II, 1</td>
<td></td>
</tr>
<tr>
<td>Year</td>
<td>Act</td>
<td>Ministry</td>
<td>Section(s)</td>
<td>Summary of Control of Chemicals</td>
<td></td>
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<tr>
<td>1968</td>
<td>Fisheries Act, 1974</td>
<td>Ministry of Forestry, Fisheries and Environmental Affairs</td>
<td>Sect. 6, 7, 8</td>
<td>To prohibit acquisition, manufacture, sale and use of explosives.</td>
<td></td>
</tr>
<tr>
<td>1968</td>
<td>Customs and Excise Act, 1968</td>
<td>Ministry of Finance</td>
<td>Part VI, 2, 35, 36, 37</td>
<td>Administration, management and control of customs and excise, the imposition and collection of customs duty</td>
<td></td>
</tr>
<tr>
<td>1967</td>
<td>Control of Animal Diseases Act, 1967</td>
<td>Department of Animal Health and Industry</td>
<td>Sect. 3</td>
<td>Control of animal diseases</td>
<td></td>
</tr>
<tr>
<td>1997</td>
<td>Fertilizers, Farm Feeds and Fertilizers Act, 1997</td>
<td>Ministry of Agriculture and Irrigation</td>
<td>Sect. 3 (a), (b), (c), (d)</td>
<td>Control of fertilizers and feeds</td>
<td></td>
</tr>
<tr>
<td>1973</td>
<td>Pesticides Bill, Farm Feeds and Remedies Act, 1973</td>
<td>Ministry of Agriculture and Irrigation</td>
<td>Sect 10(1)</td>
<td>Mandatory registration of pesticides to control, import, manufacture and sell</td>
<td></td>
</tr>
<tr>
<td>1974</td>
<td>Malawi Bureau of Standards Act, 1974</td>
<td>Ministry of Commerce and Industry</td>
<td>Sect 1</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Effective (1), Fair (2), Weak (3)
workplaces\textsuperscript{1081}, employers\textsuperscript{1082} and employees and extends to many self-employed persons and also to others such as manufacturers, designers and importers of articles to be used at work\textsuperscript{1083}.

Sections 14-15 of the Occupational Health and Safety Act place general duties on persons otherwise in control of premises and designers, manufacturers, importers or suppliers of articles for use at. These duties are owed not just to employees, but also to others who may be affected by work activities. They are cast in terms of reasonable practicability for the most part\textsuperscript{1084}. This duty covers the main traditional areas covered by common law duty of employer to employee, namely safe plant, systems of work, storage and transport of substance, training and supervision, place of work, access and working environment.

**Civil Society**

An equally important element in this process is the civil society, a concept of mixed blessing that will look at in detail later. In an era of global social accountability what corporations fear most is not the fear of law suits, rather it is ‘bad press’. The public relations race is fiercely raging on and the civil society is at the centre. This presents a powerful tool for enforcing health and health safety. However the nature and

\textsuperscript{1081} Sect.5
\textsuperscript{1082} Sect.13
\textsuperscript{1083} Sect.17
\textsuperscript{1084} Sect.15(2)
global locations as well as the relationships the corporations have with the civil society has a bearing on the efficacy. Few credible organisation and institutions exist to take the democratic debate, order and agenda forward thereby creating a democratic deficit. The media, both print and electronic is largely government controlled, most Nongovernmental Organisations (NGOs) are either government or opposition managed.

**Economic Performance**

Agriculture forms the backbone of the economy in Malawi since colonial times. Malawi is not endowed with mineral wealth. From independence, agriculture was to and has remained a big and prosperous income source. From 1967 to 1977, GDP grew by 6% and

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1085 Vide David Walters The Role of Worker representation in health and Safety in Agriculture in Western Europe; Center for industrial safety and Health, London (2001)
1086 Thomas G Weiss defines NGO in 'international NGOs, Global Governance, and Social Policy in the UN System' published at www.gapp.org as referring to a non-profit, voluntary, formal, non-violent, non-political organisation whose objective is to promote development and social change. Private organisations (or corporations) that seek to make profit are excluded, as are organised crime, insurgents, churches in their strictly religious functions, the media and political parties-together with NGOs these other non state actors constitute what is usually called 'civil society' or the intermediary institutions between the individual and the apparatus of government. See p.5 of the Article.
1087 See the debate post
1088 Agriculture includes soil preparation, seed planting, crop harvesting, gardening, horticulture, viticulture, apiculture (bee-raising), dairying, poultry, and ranching. Generally, laws grouped under the heading "agricultural law" relate to the production of the fruits of these activities as they are carried out in a commercial setting.
GDP per capita by 3% leading to high growth rates and very low unemployment levels (ILO).

Growth in Malawi has been export led and agricultural estate driven. At independence, Malawi inherited a dualistic agricultural system compromising a large-scale estate farming sector and an underdeveloped smallholder farming. Agriculture accounted for an average of 37 percent of the GDP during the period 1981 to 1991. Agriculture in the 90s accounted for 90 percent of exports and approximately three-quarters of total employment. The main products for exports consist of tobacco, tea and sugar. The importance Malawi attaches to agriculture needs no emphasis.

Social Issues.

In spite of the government's policy on social protection for tenants (1994), relatively little has been done in order to develop and implement social security and labour standards. Recently as a follow up to the poverty alleviation programme (PAP) launched on 25th August 1994, the Malawi government has launched the poverty alleviation programme.

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1090 Things might be on the road to improvement with the adoption of the SADC charter on fundamental social rights, which in Article 10 calls upon member states to provide social security.
1091 See Kennedy, "Reaching the Unreached; Challenges for the 21st century, Poverty alleviation: a way forward, 1996 22nd WEDC Conference. See generally Government, Draft
reduction strategy programme (PRSP) as a step toward the safeguarding social development and sustainability. It is now understood that economic development in itself cannot bring about social progress, as had been the understanding in the post independence years.1092

The 1998 Integrated Household Survey (IHS) reveals that 65.3% of Malawians or approximately 6.3 million people are poor1093. Within this figure, about 28.7 percent are extremely poor. The 1998 Integrated Household Survey has also revealed that the level of income inequality in Malawi is high. The richest 20 percent of the population consume 46.3 percent while the poorest 20 percent consume only 6.3 percent of total goods and services. The key causes of poverty include limited access to land1094, low education, poor health status, limited off-farm employment and lack of access to credit.

1092 Paul Kishindo 'Malawi's social development policies: a historical Review in Sustainable social and Human development I Malawi: Towards poverty alleviation? (1997) Edited by Wycliffe Chilowa; Bwalo, University of Malawi Centre for Social Research Issue 1 pp.11-19
1093 "Facing our realities and living within our means in the fight against poverty" 2002/2003 Budget statement delivered in the Malawi national assembly, new state house, Lilongwe by minister of finance and economic planning Friday Jumbe on Friday, 28th JUNE, 2002
1094 See also the DFID 'Better livelihoods for the poor people, the role of Land Policy, a consultation document; November 2002 at www.dfid.gov.uk
Malawi has some of the worst social indicators, such as infant mortality and illiteracy rates, in Africa and in the world. The overall low economic growth since 1977 with a simultaneous high growth rate of population and of the labour force are some of the reasons for the high poverty levels. Low average income in Malawi is one dimension of misery.

It is in recognition of widespread poverty that government embarked on developing the Malawi Poverty Reduction Strategy Paper (MPRSP) whose overall goal is to achieve “sustainable poverty reduction through empowerment of the poor”\(^{1095}\). While southern Africa in general demonstrated positive growth rates in the 90s, poverty is worsening and the wealth gap is getting larger. Real wages decreased in Tanzania by 17 per cent annually in the 80s, in Zambia by between 5 and 10 percent each year and in Malawi by 7.5 percent every year\(^{1096}\).

Agriculture has been chosen because it is the highest common denominator for SADC states. SADC economy is predominantly agro-based. Though some countries such as South Africa, Zambia, and Zimbabwe mining industries, a majority of member state’s economy is dominated by the production of primary agricultural goods. This offers

\(^{1095}\) Poverty Reduction Strategy Papers (PRSP) describe a country’s macroeconomic, structural and social policies and programs to promote growth and reduce poverty, as well as associated external financing needs. PRSPs are prepared by governments through a participatory process involving civil society and development partners, including the World Bank and the International Monetary Fund (IMF).

\(^{1096}\) ibid
a central platform on which to advance a common approach to common issues across the region.

The other reason is that the commonality of occupational health and safety make is easy to reach a regional consensus around issues at the centre of the regional debate. Such a consensus forms a blue print on which to build consensus in areas that may not be a matter of great concern to other members. This invariably takes into account local dynamics obtaining in each state such as politics, history and socio-economic and cultural makeup of the region. This approach draws on the political thinking underlying SADC, which was to find common areas of common concern on which to cooperate in finding solutions necessary to foster regional development and integration on the basis of balance, equity and mutual benefit.\footnote{Para (iii) of the preamble as read with Articles 5 (b) and 21 (1) of the treaty.}
Conclusion

New wine, Old wineskins\textsuperscript{1098}

As noted in foregoing discussion the milestone for occupational Health and Safety regulation in Malawi is the Occupational Health and Safety Act. It is a regulatory blueprint for occupational health and safety.

Occupational Health and Safety Act responds to shortcomings inherent in the Factories Act that it has superceded. Whereas the Factories Act's prime aim was regulation, the Occupational Health and Safety Act on the other hand aims to offer leadership by providing a conceptual framework for the management and regulation of occupational health and safety. A two tier approach is envisaged i.e. leadership by the Act and regulation by instruments made there under.

\textsuperscript{1098} This is a concept borrowed from the wine industry where traditionally skins were used to store wine. The advantage of storing wine in skins was that skins could expand and accommodate pressure generated by fermentation. The trade mark of wine skins was its adaptability. In the gospel of Mathew 9 vs. 17 Jesus is on record as having used it to refer to the mixing of old and new ideas and the danger of doing so. In the present context it is used to refer to the Occupational Health and Safety Act (New wine) that adopts regulations made under the very act it repeals (Old skins). Just as old skins could not cope with the new wine, so the old regulation do not capture all the issues that would arise in a modern dynamic workplace. The advantage of regulation over parent legislation is its flexibility in that it does not require to go through the entire legislative process, so could be easier to adapt it to changes in the workplace more easily. Under the present scenario does not seem to be case.
The sad thing is that as of the time of writing this thesis no new regulations had been made let alone proposed and according to officials from the Law commission and ministry of Labour and Vocational training, there were no immediate plans for adoption of such regulations. Budgetary constraints were one of the reasons while work load on the part of the commission or the ministry of Justice (Responsible for drafting) is a possible reason. What we are left with is a partial solution to a perennial problem of workplace health and safety regulation.

Regulations under the Factories were designed to mirror the parent Act’s philosophy, which leaned more in favour of compensation which is in stack contrast to Occupational Health and Safety Act that emphases prevention.

The way forward is for government in consultation with its social partners to undertake a comprehensive review regulations relating to occupational health and safety so as to align them to the philosophy of the Occupational Health and Safety Act. Just as old skins can not cope with pressures of new wine, so can not such regulations.

The above problem would have been otherwise had there been policy guidance and direction form SADC in the past. From our discussion it is clear that health and safety and social policy in member states lack a
regional dimension. Member states seem to be a head in terms of policy formulation. This unilateralism has been responsible for a mushrooming of health and safety legislations (often of varying ambit) in the region making harmonization difficult and complex.

The problem is compounded by member states’ lack of resources to re-open occupational health and safety debates aimed at fine tuning domestic policy into regional parameters. A way of attempting a solution to the problem is for SADC to encourage the pooling together of resources in areas such as Occupational health and safety training, monitoring and promotion in the region.

In as far as strategic direction and development of community jurisprudence on health and safety is concerned, the role of SADC court is central. The court would offer judicial guidance to state courts on interpretation of relevant instruments and their application. This would assist in domestic debates on issues of health and safety and enhance social dialogue in the region. It is imperative for the legal profession and the judiciary to play a leading role in the espousing domestic health and safety policy, goals and aims as expressed in relevant legislation and regulations and ensuring that they conform to regional and international thresholds.

Finally it has become apparent in the foregoing discussion that the
main problem for Malawi as is true of most SADC states is not lack of law in the area, rather it's too much law with no clear lead department for coordination and implementation. For instance table 4 shows an extensive list of existing legal instruments that address the management of chemicals alone in Malawi. Various ministries and departments are involved. Fragmentation leads to duplication and under utilization of resources. It has also not been possible in the past to develop a coherent policy for better management and regulation of occupational health and safety. The Occupational Health and Safety Act unifies and streamlines the regulatory framework but like its predecessor, has serious limitations, in terms of human and financial resources.

The gap between social and economic structures that could support a balanced health and safety regime in the country is indicative of lack of symmetry between social and economic policy in the past. The scenario is largely the same across the region despite structural and institutional changes taking places in SADC. The trickle-down effect of regional policy changes is not effective. there is a missing link, i.e. a regional dimension of social dialogue input and implementation from Civil Society Organizations.

1099 Infra,p.375-376
CHAPTER NINE

Agriculture and occupational health and safety, a view from within

Introduction

In this chapter we set out to examine occupational health and safety implications of SADC's integration agenda. The focus will be on Malawi's agricultural sector. Methods used in the inquiry included a survey employing a questionnaire technique and personal contact and dialogue. The study was undertaken between April and June 2002. The survey was conducted on tea and tobacco plantations in Malawi.

The survey findings were astonishing in that though the enterprises were different and located about 400 miles apart their health and safety dilemmas and challenges were strikingly similar. The study concludes, despite the passing of Occupational Health and Safety Act for instance in the case of Malawi, Health and safety are still in a sorry state. The same can be said of the Social charter Art. 12 (Health and safety). It is not enough to have legislation on Health and safety or a social policy; there is need for a programme of management and implementation of the same involving a cross-section of stakeholders.
Preliminary Issues

Agriculture is one of the most hazardous sectors in both developing and industrialized countries. It is ranked as one of the three most hazardous industries together with mining and construction. According to ILO estimates for 1997, out of a total of 330,000 fatal workplace accidents worldwide, there were some 170,000 casualties among agricultural workers. The increasing use of machinery and pesticides and other agrochemicals has aggravated the risks.

In several countries, the fatal accident rate in agriculture is double the average for all other industries. Machinery such as tractors and harvesters cause the highest frequency and fatality rates of injury. Exposure to pesticides and other agrochemicals constitute major occupational hazards, which may result in poisoning and death and, in certain cases, work-related cancer and reproductive impairments.

Due to inadequate and heterogeneous recording and notification systems, official data on the incidence of occupational accidents and diseases are imprecise and notoriously underestimated in all sectors of

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1100 Vide www.ilo.org/safe work
1101 See the executive forward to the SADC conduct on the safe use of Chemicals in SADC, supra, Chapter seven
1102 Check ILO statistics
the economy. In the case of the agricultural sector under-reporting is even more evident. Under reporting is partially explained by the difficulties involved in the diagnosis of occupational and work-related diseases and in establishing the employment status of agricultural workers (self-employed, piece-rate, full-time or part-time work, seasonal, temporary and migrant workers, etc.).

Compared to workers in other sectors, agricultural workers are under-protected. They suffer markedly higher rates of accidents and fatal injuries than other workers, with very few resources available for compensation. In many countries, agricultural workers are excluded from any employment injury benefit or insurance scheme. Self-employed farmers are rarely covered by any recording and notification system and only have access to social security benefits if

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1103 See the preamble to ILO the Protocol of 2002 to the occupational Safety and Health Convention, 1981. See also Convention 184 on occupational health and a safety in agriculture.
1104 See the code of practice on recording and notification of occupational accidents and diseases, 1996, and the code of practice on safety and health in forestry work, 1998.
1105 Generally see Article 4 as read with 11 of the occupational Safety and Health Convention, 1981.
1106 Agriculture tends to be omitted from the occupational safety and health legislation in many countries; however, in certain cases, acts contain limited reference to the sector. In other countries, general labour laws apply to agriculture along with other industries (for example, Malawi, Mexico and Spain). In certain countries, there are no safety and health laws applicable to the agricultural sector at all. The general labour laws of a number of countries exclude agricultural workers completely or partially, such as: Cambodia, Ghana, Jordan, Morocco, Nepal, Sierra Leone, Sudan, Turkey, Yemen and Zaire
1107 For instance, S.2 (1) (a) of Workers’ Compensation Act, Cap 55:03 of the Laws of Malawi.
they contribute individually to voluntary insurance schemes.

The most vulnerable groups are workers in family subsistence agriculture, daily labourers in plantations, seasonal and migrant workers, women workers and child labourers. Temporary workers are especially vulnerable. They are more exposed to occupational hazards than other agricultural workers, and are lower paid. In addition, migrant workers may encounter language and cultural difficulties at work and in their daily lives.

One of the difficulties in dealing with agriculture is that it is a complex and heterogeneous sector. It involves a number of specific situations, which vary from country to country and between developed and developing countries- from highly mechanised agriculture in plantations to traditional methods in small-scale subsistence agriculture.

Agricultural work is carried out in a rural environment where there is no clear-cut distinction between working and living conditions. As agricultural work is carried out in the countryside, it is subject to the health hazards of a rural environment as well as those inherent in the specific work processes involved.
Most agricultural work is carried out in the open air and consequently agricultural workers are dependent on weather changes to perform their tasks. This factor not only undermines the efficiency of the operations, but also influences working conditions, making them difficult and dangerous (e.g. a rainstorm while harvesting, gusts of wind when pesticides are being applied, etc.).

In developing countries, a large number of rural people live below the poverty line. Socio-economic, cultural and environmental factors also influence the working and living conditions of farmers and agricultural workers. The environment in which rural people work and live, their standard of living and their nutrition are as important to their health as the services available to them.

Most agricultural workers in developing countries have poor housing conditions and an inadequate diet, and are exposed to both general and occupational diseases. They may live in extremely primitive conditions, usually dispersed in remote areas where roads are non-existent or inadequate and transportation is difficult.

Agricultural workers are dependent on the general standards of public health services in rural areas where the provision of health care, adequate water supply and sanitation systems are generally

1108 See Chapter six, supra
insufficient. The low standards of hygiene in living quarters affect not only smallholdings, but also the large enterprises, which provide housing for temporary workers and for migrant workers.

Rural communities often lack education and information on the health hazards they may face. Traditional health approaches have few effective mechanisms to reach rural communities. There are also environmental implications arising from the degradation of natural resources and local and global environmental changes. Environmental pollution causes occupational and general health risks to workers, their families and the communities, as it also has an adverse effect on the ecosystem. Hence the problems faced by agricultural workers are interwoven and complex.

It is against this background that an inquiry into the impact of globalization on occupational health and safety in SADC was carried out. As stated in chapter two the method used involved a case study and a questionnaire. In this discussion we well reflect on those results and try and draw conclusions that could support the case for the mutuality of economic and a social policy in SADC’s integration programme.
Definition

In relation to occupational health and safety regulation in agriculture the greatest challenge is to find a definition of agriculture that comprehensively covers all sectors and workers involved in the industry\(^{1109}\). In our case the starting point is Article.1 of ILO convention 184. It defines agriculture as referring to agricultural and forestry activities carried out in agricultural undertakings including crop production, forestry activities, animal husbandry and insect raising, the primary processing of agricultural and animal products by or on behalf of the operator of the undertaking as well as the use and maintenance of machinery, equipment, appliances, tools, and agricultural installations, including any process, storage, operation or transportation in an agricultural undertaking, which are directly related to agricultural production\(^{1110}\)

A definition is important as it sets out the parameters of the field and limits who is and who does the law or decree not protect. This has significant bearings on overall management of health and safety legislation or regulation. At a policy level there is a desire to come up

\(^{1109}\) The following ILO instruments refer to "agriculture" without defining the term: the Right of Association (Agriculture) Convention, 1921 (No. 11); the Night Work of Children and Young Persons (Agriculture) Recommendation, 1921 (No. 14), and the Rural Workers' Organisations Convention, 1975 (No. 141) and its accompanying Recommendation (No. 149).

\(^{1110}\) Article.1, C184 Safety and Health in Agriculture Convention, 2001
with a definition that caters for the social goals of health and safety regulation, one that does not leave some workers without legal protection due to undefined legal status. A snapshot of definitions may illustrate this point succinctly.

In New Zealand, section 2 of the Health and Safety in Employment Regulations (1995) includes the following definition of "agricultural work":

Agricultural work: means work on any farm, being work directly related to the operation of the farm; and includes: horticultural work; and shearing work; and includes cooking for any person carrying out any agricultural work; but does not include any work on any marine or freshwater farm.

In the Labour Code of the United Arab Emirates, the following definition of "agricultural work" is included:

Agricultural work: Work involving the ploughing and cultivation of the soil, the harvesting of crops of any kind and the breeding of cattle, poultry, silkworms, bees, etc.

The Malaysian child labour legislation defines an "agricultural undertaking" as:

   any work in which any person is employed under a contract of service for the purposes of agriculture or horticulture, the tending of domestic animals and poultry or the collection of the produce of any plants or trees, but does not include any work performed in a forest.

In Chile, the Labour Code (1994) excludes forestry a worker other than those employed at temporary sawmills from its definition of "agricultural work".
In Section 1140.4 (a) of the Californian Agricultural Labour Relations Act (1975), "agriculture" includes:

- farming in all its branches, and, among other things, includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities, the raising of livestock, bees, fur bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market and delivery to storage or to market or to carriers for transportation to market.

A relevant definition is also included in the United States Federal Migrant and Seasonal Agricultural Worker Protection Act (1983). Section 3 of the Act defines an "agricultural employer" as:

- a person who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed or nursery, or who produces or conditions seed . . .

Brazilian legislation contains the following definition of "rural employer":

- A physical person, whether an owner or not, of a rural enterprise or a piece of land, who carries out, with the contribution of employees in a permanent fashion, directly or through
intermediaries, agricultural tasks defined as crop production, shepherding, horticulture or rural industry including the extension of primary production, both plant or animal products.

It is apparent from the above that there is not one clear and consistent approach in defining agriculture and as said this might be attributed to the fact that the various national instruments reproduced largely serve different policy purposes. The definitions employed must be considered within the context of their use - an aspect that is normally taken into account in the drafting of ILO instruments. On the basis of the review of the above definition in national legislations, it is possible to draw some tentative conclusions. "Agriculture" includes the cultivation and harvesting of crops, generally includes the breeding of animals and shepherding, horticultural activities, and generally excludes forestry work unless it is incidental to farming, such as isolated tree-felling and windbreaks.

In 1962, at its Fourth Session, the joint ILO/WHO Committee on occupational health discussed occupational health problems in agriculture and developed two relevant definitions to assist the Committee in its work; these are still valid in the context of ILO's activities.

The Committee agreed that agriculture should mean:
all forms of activities connected with growing, harvesting and primary
processing of all types of crops, with the breeding, raising and caring
for animals, and with tending gardens and nurseries.

It also settled upon a definition of *agricultural worker*: as any person
engaged either permanently or temporarily, irrespective of his legal
status, in activities related to agriculture as defined above.

This was expanded in convention (No.129) and its accompanying
Recommendation (No. 133), 1969 which deals with labour Inspection in
Agriculture where it is stated in Article 1 (1) of that the term "agricultural
undertaking" means:

Undertakings and parts of undertakings engaged in cultivation,
animal husbandry including livestock production and care,
forestry, horticulture, the primary processing of agricultural
products by the operator of the holding or any other form of
agricultural activity.

Articles 1 (2) and (3) authorize the competent authority to define the
line which separates agriculture from industry and commerce. This
definition will be noted includes forestry in its scope of agricultural
undertaking. Hopefully this is indicative of a realisation of negative
environmental impact as a result of some agricultural activities, there
was a move towards compulsory growing of trees, as is the case in the
tobacco industry, which uses a lot of firewood as fuel for some of its
In this vein forestry is not just a remote self-standing activity but also engages with mainstream agricultural activities. The work force used is the same and to exclude it from the definition of an agricultural undertaking would be to make their legal status uncertain which would affect their insurance and other compensatory claims.

The above could possibly lead courts to speculate on the true intention of any law formulated on the basis of such narrow formulation. This is not to say that courts engage in wild speculations, the contrary are the case. Faced with a case like the one at hand any court properly directing itself on matters of fact and law would adopt a purposive approach which seek to give effect to purpose that the law was intended to serve as opposed to a legalistic one which would treat the law and give effect to what it says without or with restricted flexibility. But why engage in all this legal gymnastics when life could be made easier by simply including that magic word ‘forestry’ in the definition of agriculture?

How ever the ILO Committee of Experts on the Application of Conventions and Recommendations, in its 1985 General Survey, deliberated on the meaning of the expression "agricultural undertaking" in Convention No.129. The Committee considered that
the strict meaning of the expression included only "the direct exploitation of vegetable and animal resources, but those certain national laws defined the term so as to include primary processing of products by the operator.

This conclusion was most unfortunate in that it in effect narrowed down the category of those that would be protected under the relevant conventions. With the changing nature of employment styles and complexity of agriculture, in that almost every sector of human engagement is represented it would be better for worker protection to have a definition that would be capable of wide interpretation. Of course this would unacceptable to employers who would see it as virtually stripping them of protection.

Power politics sets in here. States want to woo these employers as that means job creation and transfer of technology. They also bring in revenue in form of taxes. Employers as investors look for comparative advantage and economic security. No investor wants to live under an ever-present fear of litigation. The more this threat is kept to a minimum the better. Workers and their unions want increased social and legal

security. In this unholy trinity it is possible for states and investors to compromise and restrict this broad opening up of the door. This could be a possible explanation of the trend just mentioned above.

Indeed on 21st June 200 at its 89th session the ILO approved for the first time a convention on safety and health in agriculture\textsuperscript{1112}. This convention further restricts the definition of agriculture and expressly excludes forestry, subsistence farming and any industrial processes that use agricultural products from the scope of agriculture. This is cause for concern. The least that could be said is that corporate profit is clearly being put before public welfare in form of health and safety.

The dilemma confronting states is enormous i.e. investment retention

\textsuperscript{1112} Delegates at the 89\textsuperscript{th} Conference of the International Labour Organisation in June gave overwhelming approval to the first labour standard on agricultural safety and health ever by a vote of 402 for, 2 against with 41 abstentions. See www.ilo.org/agric the new International Convention on Health and Safety in Agriculture will enter into force once ratified by two ILO member States. A Recommendation on Health and Safety in Agriculture was also adopted by a vote of 418 for, 0 against with 33 abstentions.

The new Convention and Recommendation on Safety and Health in Agriculture are the first comprehensive international standards on safety and health in this sector and propose a universal framework on which national policies can be developed.

Together with mining and construction, agriculture is one of the three most hazardous industries both in developing and industrialized countries. It is estimated that about half of the world's 1.2 million occupational fatalities occur in agriculture.

The Convention is accompanied by a Recommendation, which provides for a progressive extension of the protection afforded by the Convention to self-employed farmers. The Recommendation also sets out specific internationally agreed provisions designed to serve as guidelines as to how the national policy on health and safety in agriculture should be implemented.
and attraction or worker protection. The invisible hand of Transnational Corporations preys on labour and only the World Trade Organisation has the muscle to stop it. However as we saw in chapter four, the World Trade Organisation is dragging its feet. The Good news is that there are avenues within the World Trade Organisation through which such issues can be addressed.

Of interest in this formulation is the exclusion of subsistence farming from the meaning of agriculture. An assumption [wrong in my view] being made here is that agricultural occupational hazards only exist in large and medium-scale farms and therefore health and safety regulation and management should thus be limited. This is a disregard of the fact it is possible on family farms to find casual, daily labourers.

Due to its unregulated nature and low education levels involved health and safety risks from the same agents on commercial farms such as machinery and agrochemical are higher than on capital intensive farms. Victims in this area are left without legal redress. Law should reflect the social-economic realities of societies in which it exists or else it loses it meaning and efficacy.

**Groups at Risk**

Traditionally epidemiological analysis views risk as a function of exposure to hazardous conditions or substances, but this can be
supplemented by social science approaches in which risk is the result of social position, pressures, and incentives. As a generality, one can say that the most dangerous jobs are the ones lowest in the economic hierarchy: precarious employment, informal employment, work in small and medium enterprises (SME's), and work performed by groups subject to discrimination and marginalisation

Precarious Employment

There has been a steady expansion in recent years of work that does not conform to the traditional model of a permanent, full-time relationship between the worker and the enterprise at which the worker works. Non-standard work consists of the various alternatives, individually and in combination: temporary employment, leased employment, "self-employment" (where the nominally self-employed worker works at the location and under the direction of another enterprise), part-time employment, and multiple employments. In addition, outsourcing can lead to employment relationships that are essentially nonstandard in the above sense, even when the worker and the subcontractor have a formally standard relationship. The term "precarious" or "contingent" employment has been applied to nonstandard work that has the effect of attenuating the employment relationship: reducing its expected duration, increasing its uncertainty, or undermining the claims that workers and employers can make on

1113. www.ilo.org/safework/agriculture

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one another by virtue of the employment relationship itself\textsuperscript{1114}. Part-time work does not fall into this category, but it can have similar effects insofar as it reduces the degree of commitment entailed in employment.

Literature documenting the spread of precarious employment in the developed countries has become enormous; for recent evidence, see Quinlan (1999), Kalleberg et al. (1997), and Estevão and Lach (1999), among others. Why this trend has occurred is beyond the scope of the paper, but proposed causes include changes in technology, increased international competition, new patterns of consumer demand, and changes in government policy\textsuperscript{1115}.

In the last few years evidence has begun to accumulate indicating that work, which is precarious in employment terms, is likely to be physically precarious as well. As Quinlan (1999) shows, every form of precarious employment has been linked to increased risk, and studies are often able to show the specific mechanisms involved. Outsourced and contract workers receive less training and have less awareness of their rights; in some instances they do not even know who their

\textsuperscript{1114} Young, David \textit{Employment protection legislation: its economic impact and the case for reform.} (European Economy. Economic Papers, 186) Brussels: EC. 2003, 22 p

employer actually is. Pressure to maximize output and minimize time, which makes precarious workers attractive to some employers, also leads them to cut corners and take greater risks\textsuperscript{1116}.

Accident rates are systematically higher for such groups, including the self-employed. Moreover, safety and health problems often go unrecognized in the case of leased and outsourced workers because accident data are not categorized by the industry or establishment in which the accidents actually occur. (Blank et al., 1995) Workers employed by temporary health services had more reported injuries and lost work days than a matched sample of regular workers in the same risk classifications, using data from Washington State (US); deficiencies in training are suspected\textsuperscript{1117}. Similar results for the U.S. are surveyed in NAS/NRC (1998), along with evidence that racial and ethnic minorities, migrants, and workers with less education are also at greater risk.

One of the more worrisome characteristics of precarious employment is that these workers have little input into their work conditions\textsuperscript{1118}. For instance, reports that non-permanent workers have less knowledge about their work environment; 30\% feel constrained by their status to refuse work environment deficiencies, while 41\% said it was more

\textsuperscript{1116} Salminen, 1995
\textsuperscript{1117} Foley, 1998
\textsuperscript{1118} Aronsson (1999),
difficult for their voice to be heard. Quinlan and Mayhew (2000) find that precarious workers are far less likely to be represented on health and safety committees.

**Informal Employment**

It is in the nature of informal employment that we will have poor information about it. For the most part, this type of work is concentrated in developing countries and is common in the agriculture industry, although there are signs of a re-emergence of informal production in the industrialized world\(^ {1119}\). In all probability, workers in the informal sector are at high risk relative to their industry and occupation. This is due to the small scale of enterprise (see the following section), the intensely competitive nature of both labor and product markets, and the general absence of public Occupational Health and Safety monitoring, enforcement, or supportive services. It is also attributable to the widespread poverty among informal workers themselves, since poor background health conditions and unsanitary living conditions which are also often working conditions) are risk factors as well\(^ {1120}\).

It would be valuable to have more information on occupational injury

\(^{1119}\) Branigin, 1997

\(^{1120}\) Forastieri, 1999
and illness rates, but credible numbers are virtually nonexistent\textsuperscript{1121}. One intriguing study from China, however, has recently been published and casts a light on this critical issue\textsuperscript{1122}. Five years of occupational accident data were presented for a sample of town and village enterprises (TVE's) in Shunde City, a rapidly growing industrial region. TVE's vary enormously, from joint ventures with multinational corporations to essentially informal enterprises financed off the books and organized through family or other personal connections. The legality of TVE's is generally undeveloped, and this was particularly the case during the period under investigation\textsuperscript{1123}. In particular, there is no Occupational Health and Safety legislation governing the TVE sector in China. Overall data is presented in Table 1.

### Table 4

Major Injury and Fatality rates per 100,000 Workers in Shunde City, China

<table>
<thead>
<tr>
<th>Year</th>
<th>Major Injury</th>
<th>Fatalities</th>
</tr>
</thead>
<tbody>
<tr>
<td>1989</td>
<td>56</td>
<td>29</td>
</tr>
<tr>
<td>1990</td>
<td>51</td>
<td>25</td>
</tr>
<tr>
<td>1991</td>
<td>175</td>
<td>18</td>
</tr>
</tbody>
</table>

\textsuperscript{1121} Loewenson, 1999  
\textsuperscript{1122} Yu et al., 1999  
\textsuperscript{1123} Weitzman and Xu, 1994
Sample: 392 enterprises, employment = 116,577

A major injury is defined in this study as one which results in at least 105 lost work days; given the virtual absence of social insurance available to injured workers, these would indeed be major impairments. The numbers are remarkable, and they show worsening trend though the study period. Adding together the two totals for 1993, for instance, yields a rate of catastrophic injury of 0.3% per worker-year. If this rate were to continue through a worker's 30-year career, and if we assume that these accidents are randomly distributed (each year’s distribution is independent), this person would face a more than 1-in-12 chance of such an event.

**Small and Medium Enterprises**

Logically, one would expect greater occupational safety and health problems at SME's. There are several reasons for this. First, many Occupational Health and Safety interventions have a substantial overhead cost, and the smaller the firm, the smaller the revenue base
over which these costs can be distributed. Second, the level of expertise is frequently lower at SME's. Third, the SME environment is generally more competitive and finance is more difficult to obtain, leading to shorter time horizons (lower investment in general) and fewer expenditures on what may be perceived as "nonessential" items.

Nevertheless, for many years it was thought that the relationship between firm size and workplace risk was an inverted U-shape: lower risk among the smallest and largest firms, higher risk for those in the middle. Today this is seen as an artifact of data collection: small firms are less likely to keep accident records, but tend to have even higher incidence rates than medium-size enterprises\textsuperscript{1124}. Thus, there is now a generally accepted view that size and risk are inversely correlated at all levels of scale.

It should be borne in mind that not all workers have an equal likelihood of ending up in employment categories surveyed above. Both women and children are, for different reasons, disproportionately represented in precarious employment and SME's in particular. In the case of women, little is currently known about their comparative health status, due to problems in data collection (especially concerning diseases and chronic pain) and the longstanding orientation of the

Occupational Health and Safety field toward problems primarily experienced by men\textsuperscript{1125}.

Concerning children, a major study was undertaken by the U.S. National Academy of Sciences\textsuperscript{1126} it found that, while children are not generally more susceptible to risk physiologically, they are more susceptible socially and psychologically, and the consequences of a major accident or illness, of course, can be more devastating. Considering the restrictions on the employment of minors in the U.S., measured rates of occupational injury are high, and fatalities are a problem particularly in agriculture. One of the reasons cited for the Occupational Health and Safety problems of young workers is their concentration in precarious, part-time, and small-establishment employment.

Overall, it seems to be the case that all groups that have lower socioeconomic status have, on average, more dangerous working conditions. Thus, based on the U.S. experience, racial and ethnic minorities have higher accident rates\textsuperscript{1127} as do immigrants\textsuperscript{1128} and workers with less formal education\textsuperscript{1129}. Indeed, the ultimate test of this

\textsuperscript{1125} Messing, 1999
\textsuperscript{1126} NAS/NRC, 1998.
\textsuperscript{1127} Loomis et al., 1997; Robinson, 1989,
\textsuperscript{1128} Bollini and Siem, 1995,
\textsuperscript{1129} National Center for Health Statistics, 1993.
relationship is probably income itself, and here the evidence suggests that low income is associated with higher risk\textsuperscript{1130} even, for most workers, when other factors affecting wages are controlled for\textsuperscript{1131}. Taken together, these studies point to profound equity problems in the distribution of risk: those who suffer the most from poor working conditions are also the most likely to bear other social and economic costs.

Certain forms of employment appear to be more dangerous, and certain groups find themselves congregated in them. The kinds of jobs created and the distribution of those jobs are both economic phenomena; they stem from the choices, rational or otherwise, that enterprises, workers, and governments make in their pursuit of economic goals. In particular, the global trend towards more informal or precarious employment suggests that fundamental economic forces are at work. These forms of employment present an obstacle to the improvement of Occupational Health and Safety conditions and exacerbate the unequal exposure to those conditions within society. These effects should be taken into consideration when employment policies are weighed.

\textsuperscript{1130} Robinson, 1988,
\textsuperscript{1131} Dorman and Hagstrom, 1998.
Child Labour

Children make up a significant and growing proportion of the agricultural workforce\textsuperscript{1132} in both developing and industrialized countries\textsuperscript{1133}. In addition to general provisions requiring employers to provide a safe working environment, it is common for labour codes to regulate child labour and the work of pregnant or nursing women to protect their safety and health\textsuperscript{1134}. In many countries, there is a prohibition to engage children below 14 years of age. Children in age groups ranging from 14-16 to 18 years are prohibited from performing certain hazardous work including night work, and work at heights.

Of particular relevance to agriculture are provisions that prohibit young people from performing work involving exposure to chemicals such as

\textsuperscript{1132} According to the ILO as of June 2004 there were 246 million child laborers world wide and of this 70\% were in the Agricultural sector. See ILO Facts on Child Labour (2004) at http://www.ilo.org/public/english/bureau/inf/download/child/childday04.pdf

\textsuperscript{1133} In the framework of the Minimum Age Convention, 1973 (No.138) and the Worst Forms of Child Labour Convention, 1999 (No 182), the ILO recognizes three categories of child labour that must be abolished: All work done by children under the minimum legal age for that type of work, as defined by national legislation in accordance with international standards; Work that endangers the health, safety and morals of a child, either because of the nature of the work or because of the conditions under which it is performed and Unconditional worst forms of child labour, defined as slavery, trafficking, bonded labour, forced recruitment into armed conflict, prostitution, pornography or illegal activities such as the sale and trafficking of drugs.

fertilizers and pesticides, and work involving the lifting of heavy loads or radiation\textsuperscript{1135}. (For example, Sweden)\textsuperscript{1136}. In the laws of many countries, there are also prohibitions on young people performing specified activities\textsuperscript{1137}. A case in point is Paraguay, where children under the age of 18 years are prohibited from driving tractors, harvesters or other hazardous agricultural machinery\textsuperscript{1138}.

In practice, the restrictions on child labour that are found in the laws of many countries are often limited or non-applicable to the agricultural sector. In some cases, this is due to the exclusion of agriculture from labour codes under which child labour is regulated. For example, the law in the Dominican Republic excludes agricultural undertakings from those provisions of the Labour Code that regulate child labour and working hours.

A recent study of child labour legislation in 157 ILO member States

\textsuperscript{1135} Occupational Diseases Regulations (Amendment) Regulations, 2000 (No. 57 of 2000). Amending the Occupational Diseases Regulations to include provisions concerning halogen derivatives of hydrocarbons of the aliphatic series, anthrax, and pathological manifestations due to x-rays, radium or other radioactive substances.


\textsuperscript{1137} Employment of Women, Young Persons and Children Act (No. 22 of 1939) [as amended to 1963]. Laws of Malawi, Cap. 55:04. The Act Forbids employment of children under 12 years of age, restricts employment of young workers, and prohibits underground and night work for women.

\textsuperscript{1138} Elimination of child labour, protection of children and young persons, Gaceta Oficial, 2001-06-04, núm. 105 available at http://www.ilo.org/dyn/natlex/natlex
found that "in just over 40 countries agricultural work is permitted at any age\textsuperscript{1139}. Many countries permit "light agricultural work" or "light harvesting work" at ages as young as 12 years with the general stipulation that the work must not interfere with the child's education. Nevertheless, family enterprises and subsistence agriculture are outside the scope of legislation and a large proportion of children may be found in many cases from five years of age upwards-helping their parents or playing in the field while work is undertaken\textsuperscript{1140}

All member States that have ratified the Minimum Age Convention, 1973 (No. 138), are required to specify a minimum age for entry to employment. The 59 member States that have ratified the Convention specify minimum ages ranging from 14 to 16 years. Articles 3 and 4 of the Convention enable member States to exclude from its application "limited categories of employment or work" other than work which "by its nature or the circumstances in which it is carried out is likely to jeopardize the health, safety or morals of young persons". Convention No. 138 is applicable to "plantations and other agricultural undertakings mainly producing for commercial purposes" but it specifically excludes "family and small-scale holdings producing for local consumption and not regularly employing hired workers."


\textsuperscript{1140} [http://www.ilo.org/public/english/standards/relm/ilc/88/rep-vi-1.htm#2.31.]
This has been carried out into the new ILO convention on occupational health and safety in agriculture. We will consider how can best SADC countries coming from a poor legislative background in this area design and enforce the law that offers protection to children within the context of occupational health and safety in agriculture where children are massively employed.

**Women workers in agriculture**

It is very common for labour codes and safety and health laws to make special provision for women workers, particularly when they are pregnant or nursing. In most legislation, pregnant and nursing women are protected against certain hazardous work, such as that involving the lifting of heavy loads or exposure to hazardous chemicals and ionising radiations\textsuperscript{1141}.

Employers may be required to transfer women from work that is hazardous in this respect to other work not involving such safety and health risks. However, these provisions are of general application and do not specify agricultural work. Often the coverage is provided by separate legislation. In some countries only permanent agricultural workers are covered. Agricultural women workers are specifically

\textsuperscript{1141} Op.cit n.1109
covered in some countries\textsuperscript{1142}. However, in many countries agricultural workers are not covered or specifically excluded from maternity protection regulations. These include Bolivia, Dominica, El Salvador, Lesotho, Peru, Philippines, Saudi Arabia, Sudan, Swaziland, Syrian Arab Republic, Turkey and Yemen\textsuperscript{1143}.

The vast majority of countries provide paid maternity leave by law and many offer health benefits and employment safeguards; however, the gap between law and practice remains wide. Those most likely to be disadvantaged include, among others, agricultural workers who are often excluded from such benefits. Nevertheless, there is a growing awareness of the impact of the working environment on reproductive health and of the negative outcomes to pregnancy associated with maternal exposure to hazardous substances, such as pesticides.

\textsuperscript{1142} In the following countries: Angola, Bahrain, Belize, Cambodia, Czech Republic, Egypt, Ghana, Guinea-Bissau, Islamic Republic of Iran, Italy, Lebanon, Greece, Hungary and Madagascar. In India, Nepal, Pakistan and Sri Lanka agricultural workers employed in plantations are covered.

\textsuperscript{1143} "http://www.ilo.org/public/english/standards/relm/ilc/ilc88/rep-vi-1.htm" \\ "2.35."
CHAPTER TEN

Case Study

Introduction

The principal legislation for the regulation of occupational health and safety in Malawi is the occupational Safety, Health and Welfare Act (occupational health and safety Act) 1144(The Act). Unlike its predecessor, the Factories Act, it is an enabling legislation for the regulation of workplace conditions of employment vis-à-vis, safety1145, health1146 and welfare1147. The Act is modelled on ILO Convention 155 on occupational health and safety1148 as read with protocol P155 to the Convention and its accompanying recommendation1149. The Act also embodies the spirit of convention ILO’s C.161 on occupational health and safety services1150.

1144 Act No.21 of 1997 of the Laws of Malawi
1145 Sects 35-49
1146 Sects 51-65
1147 Sects 22-34
1148 occupational Safety and Health Convention, 1981
1149 R.164. See www.Ilo.org
1150 C.161 (Health Services) is also a policy instrument although the policy provision is not as developed as in C.155. The Convention deals comprehensively with the provision of occupational health services and commits ratifying States to progressively develop occupational health services for all workers. The Convention provides for the status, organisation and conditions of operation for health services. The functions of these services are to include surveillance of the working environment, surveillance of workers’ health, information, education, training and advice and first aid, treatment and health programmes. Further guidance is given in the supplementing R.171 (Health Services). Practical guidance on technical and ethical guidelines for worker’s health surveillance is provided in a Code of Practice on that subject of 1998. The CoP (Workers Data) is also relevant in this area.
In as far as agriculture is concerned the pertinent regulatory instrument is the ILO Safety and Health in Agriculture Convention, (2001) 1151(C.184), C.184 (Agriculture) provides that a ratifying state is to formulate, carry out and periodically review a coherent national policy on Occupational Health and Safety in agriculture1152. Subsistence farming, industrial processes those use agricultural products as raw material and the related services as well as the industrial exploitation of forests are excluded from the scope of the Convention1153.

The prescribed preventive and protective measures contain employer1154 responsibilities and workers rights1155 and duties1156 as well as specific measures for machinery and ergonomics, handling and transport of material1157, sound management of chemicals1158, animal handling, protection against biological risks1159 and agricultural installations1160. There are also provisions concerning young workers and hazardous work1161, temporary and seasonal workers1162, women

\[1151\text{Convention concerning Safety and Health in Agriculture (Note: Date of coming into force: 20:09:2003.) [C.184]}
\[1152\text{Ibid, Article.4 (1)}
\[1153\text{Article.2}
\[1154\text{Op.cit, Article. 6 (1)}
\[1155\text{Op.cit. Article.8 (1)(a),(b)and (c )}
\[1156\text{Op.cit Article. (8) (2)}
\[1157\text{Article.11}
\[1158\text{Op.cit. Article.12}
\[1159\text{Ibid. Article.14}
\[1160\text{Op.cit Article.15}
\[1161\text{Ibid, Article.16}
workers\textsuperscript{1163}, welfare and accommodation facilities\textsuperscript{1164}, working time arrangements\textsuperscript{1165} and coverage against occupational injuries and diseases\textsuperscript{1166}.

In addition to elaborating on some of these points, R.192 (Agriculture) contains measures for Occupational Health and Safety surveillance, risk assessment, and self-employed farmers. It also provides that measures prescribed to give effect to the provisions of C.184 concerning the sound management of chemicals in agriculture should be taken in "the light of the principles of the [C.170 (Chemicals)] and other relevant international technical standards". C.129 supplemented by R.133 (Inspection – Agriculture) provides for the establishment of labour inspection for the agricultural industry and sets out rules for the organization and functioning of the system.

C.184 (Agriculture) includes a general provision for members to ensure that an adequate and appropriate labour inspection system is in place and adds that certain inspection functions may be delegated to the regional or local level, appropriate government services, public institutions, or private institutions under government control.

\textsuperscript{1162} Op.cit. Article.17
\textsuperscript{1163} Ibid. Article.18
\textsuperscript{1164} Op.cit. Article.19
\textsuperscript{1165} Op.cit. Article.20
\textsuperscript{1166} Ibid Article.21
It is unfortunate that at the time of writing the thesis, convention C.184 was not yet in force. However it is hoped that its adoption and ratification by member states (especially those of SADC region) will herald a new dawn for the regulation of health and safety in the agricultural sector. At the time of the inquiry the SADC social Charter\(^{1167}\) had not yet come into effect. However at the time of writing it had been adopted. In discussing the findings reference will be made to the said charter.

The questionnaire was designed on the basis of the Act and the aim of the exercise was to see to what extent the philosophy of health and safety in the Act had translated into regulation and management of the same at enterprise level. It was also hoped to see how trade and investment is impacting on the same so as to illustrate the mutuality (or lack of it) of social and economic policy in SADC's integration programme.

**Preface to the Inquiry**

As stated elsewhere\(^{1168}\) the inquiry was conducted on two establishments i.e. tea and Tobacco plantations\(^{1169}\). Tobacco

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\(^{1167}\) [www.sadc.int](http://www.sadc.int)

\(^{1168}\) Vide Chapter Two, Supra
production has been and still is the subject of considerable controversies internationally\textsuperscript{1170}. Tobacco consumption has decreased in industrialised countries as a result amongst others of tobacco control measures and health campaigns. While the developing world is becoming increasingly affected by smoking the power of vulnerable groups\textsuperscript{1171} to challenge the power of the enterprises has been

\textsuperscript{1169} For legal reasons an undertaking was made not to name them and it was on this basis that cooperation was granted and in keeping with that none of them will be individually identified here.

\textsuperscript{1170} See R. van der Merwe, The Economics of Tobacco Control in South Africa, 1998), Smoking Kills – UK White Paper Policy document December 1998. This White Paper is the prime statement of government policy to tackle tobacco use in Britain. Saving Lives: Our Healthier Nation, Policy document July 1999. The document recognises smoking to be a major contributor to prevalence of the disease and hence sets out targets for improving prevention, which include reducing tobacco use in disadvantaged groups. See also the EU Council Recommendation of 2\textsuperscript{nd} December, 2002: This is a non-binding policy statement from the Council to the member states of the EU, covering issues that are not regulated at EU level, including retailing, vending machines, passive smoking, indirect advertising and disclosure of marketing budgets. It may be used for forming EU positions in international negotiations. The German delegation voted against the proposed recommendation Council Recommendation on the prevention of smoking and on initiatives to improve tobacco control, Saving Lives: Our Healthier Nation sets out a broad strategy for improving health and tackling health inequalities. It also sets out targets for the reduction of cancer and coronary health inequalities. It also sets out targets for the reduction of cancer and coronary heart disease and stroke by 2010. Vide WHO Framework Convention on Tobacco Control at http://www.who.int/tobacco

\textsuperscript{1171} The Malawi, weekly Chronicle of 6 November 2000, carried a story (from the Pan-African News Agency) that Malawi’s main foreign exchange earners — tobacco and tea — risked international trade sanctions, due to the industries’ use of child labour on the vast estates, despite protests from trade unions. The PANA report quoted the International Labour Organisation (ILO) and the Malawi Congress of Trade Union (MCTU) as saying estate owners of the two crops, violated the United Nations Declaration on Children’s Rights, through the use of child labour in the production of tea and tobacco. According to the MCTU: Malawi has one of the most serious child labour records in the world. Its major exports — tobacco and tea — are major exploiters of children. A study by the MCTU in collaboration with the ILO to
significantly reduced. The international industry is increasingly controlled by a small number of state monopolies and multinational enterprises1172.

Malawi’s export earner number one is tobacco followed by tea. An inquiry into these two industries was a fitting exercise. It provided a stop-shop for an inquiry into the role played by economic actors and its impact on regulation on the one hand and the social implications for health and safety and its effect on I SADC as a regional integration organization and the progress it makes in the direction of functional integration1173.

determine the magnitude of the problem, found that the problem of child labour in the country’s main agriculture sector is rampant. The study also found that most children working on estates were heavily exploited and worked in hostile conditions, including long hours. Sophie Chitenje, the then MCTU’s Child Labour Committee Member, attributes the problem of child labour in Malawi to chronic poverty among many Malawian households. The MCTU therefore recommends that Malawi should enact laws that bar employers from employing any person below the age of 16. The Government has admitted the high magnitude of the problem of child labour. The UN Convention of Child Labour bars the employment of Children under the age of 18. See http://ospiti.peacelink.it/anb-bia/nr406/e05.html. Last visited 15th February, 2004


1173 A regional integration organization means an organization that is composed of several sovereign states, and to which its Member States have transferred competence over a range of matters, including the authority to make decisions binding on its Member States in respect of those matters; See Article.1 (b) of the WHO Framework Convention on Tobacco Control, supra
Background to the Inquiry

While factors such as long-term unemployment as well as economic deprivation are viewed as expressions of social exclusion in the west, other factors need to be studied closer in the third world. In the case of sub-Saharan Africa millions of people are engaged in subsistence activities, surviving on exchange economies and small pieces of land. Liberal economic policies advocated by architects of the market economy such as the Brentwood institutions has led to the down sizing of the presence of the state in the market place and increased private participation in the economy and economic management.

This has regulatory implications. For instance participants' i.e. multinational enterprises are increasingly becoming powerful and able to shop- around for investment destinations. In this process states are equally fiercely trying to out-compete each other in offering the most favourable investment climate through regulatory or tax concessions or creation of Export processing Zones (EPZs)\textsuperscript{1174}. In the absence of proper institutional mechanisms the social case for globalization may dangerously be subordinated to the economic case, as has been the case for SADC in the past\textsuperscript{1175}. The said scenario is particularly true and visible in an agro-based economy such as that of the SADC, and Malawi in particular. In this scenario little information about the identity,

\textsuperscript{1174} Lawrence Tshuma, (2000), supra.
\textsuperscript{1175} See our discussion on social policy in SADC, Chapter
numbers and conditions of vulnerable groups, health and safety problems and other social problems associated with the process is known. In the wider context of integration such issues need be addressed on a continuing basis. However lack of information on the actual level, causes and consequences of social exclusion created by the labour market seriously affect policy formulation and implementation.

In the case of Malawi there is little information about vulnerable groups in the Malawi labour market. In key policy areas such as child labour, tea or tobacco labourers, women workers or marginal groups, there is hardly any documentation. While development strategies and research have generally focused on poverty at large, little attention has been given to the distribution, dynamics and characteristics of the labour market as a determinant of living and working conditions. The same can be said of SADC generally.

Lack of information becomes a barrier policy-making and strategic restructuring. To business, it becomes a hindrance to investments and

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growth. To unions it is a barrier to mobilizing, recruitment and strategic direction. To government it is a stumbling block to further restructuring and development. It is in this vein that it was decided to undertake an empirical study of the agricultural sector.

Modalities

Sampling and conducting interviews in a sector under continuous change, with no reliable records of total ‘population’ or groups employed is a difficult exercise. The author has done his utmost to make the maximum of the survey in such conditions.

The author drew a random sample of burley tobacco estates from a register supplied by the Tobacco association of Malawi (TAMA)\textsuperscript{1179} one estate owned by Press Corporation Ltd in the north of the country was chosen. The sample process was repeated in relation to tea estates from a list of estates supplies by the Tea Authority of Malawi (TAM) and a Tea estate in the South of the country.

Thereafter a random sample of tenants and laborers at the estates visited. However the existing registers of estates and tenants suffer from several problems in terms of duplicates and being out dated. On this basis any generalizations from the result we present should be treated with care as they only present a general view.

\textsuperscript{1179} http://www.tobaccoreaf.org
The interviews with tenants and wage labourers took place during the harvesting time of tobacco and picking of tea (May-June 2002) in order to cover their working conditions, remuneration etc. Due to the time factor and peoples' limited memory of their activities such an approach may have some weaknesses. This was borne in mind throughout the exercise and care and attention was diligently applied so that the findings do stand-up to an objective test of credibility.

**Housekeeping Matters**

Working on tobacco and tea estates in Malawi seems to be a mixed blessing. On the one hand, people are desperate to maintain a means of survival for themselves and their households. On the other hand, it easily becomes a cycle of misery growing harder by each year. Many smallholders also seem to have been pushed into casual labour or tenancy due to problems of surviving on their smallholdings alone.

Most of the tenants interviewed were recruited after they came to the estates seeking employment. Only 29 per cent were directly recruited by estate owners in their villages. Most of the tenants were previously estate labourers or tenants before joining the estate.

Contrary to expectations, it is the wage labourer who is mostly recruited directly by the estate. About 44 per cent reported being
recruited directly by the estate owner as opposed to 38 per cent who came seeking employment. This may indicate a tendency of estate owners and managers increasingly preferring more flexible labour to adjust to the ups and downs of the various seasons.

Employment patterns obtaining in the estate sector raises problems of internal migration with serious consequences for children who have to keep on changing schools, perpetrating a circle of illiteracy and poverty in the process. As tenants are brought from far and wide they are constantly learning new languages and values, which disadvantages them in organising themselves. On this account their participation in a trade union or decision-making process is limited.

The mobile nature of migrant workers renders monitoring of work or work-related diseases with long incubation periods difficult. Also tracing them for compensation payment becomes a problem. The answer would lie in record keeping on the part of employers, whether this is the case remains to be seen.

The importance of a trade union for workers need no emphasis. Trade union activities can be conducive to higher efficiency and productivity. At the plant level, unions provide workers with a collective

\[1^{180} \text{www.ilo.org/safework} \]
voice for collective bargaining\textsuperscript{1181}. By balancing power relations between workers and management, unions limit employer behaviour that is arbitrary, exploitative, or retaliatory.

By establishing grievance and arbitration procedures, unions reduce turnover and promote stability in the work force - conditions which, when combined with overall improvements in industrial relations, enhance workers' productivity\textsuperscript{1182}.

Most tenants work without contracts, written or oral. This it was found, to be in violation of S.27 of the Employment Act that requires every employer to give to every employee a written statement of particulars of employment. According to an earlier study\textsuperscript{1183} 18 per cent of tenants on a tobacco estate and wage labourers reported to have signed a written contract with the estate owner. Among those that did not sign a written contract, 42 per cent were orally promised certain things pertaining to the remuneration and payment system\textsuperscript{1184}.

\textsuperscript{1181} Collective bargaining is defined as the continuous relationship between an employer and a designated labour organisation representing a specific unit of employees for the purpose of negotiating written terms of employment. See Michael R and Christina Heavrin (2001) Labour relations, Collective Bargaining (6th Edition) prentice hall New Jersey 07458 p.90

\textsuperscript{1182} "Workers in an integrating world" World Development Report 1995


\textsuperscript{1184} Ibid p.51
Tenants that had either signed a written contract or had orally been promised certain things were further asked as to what the contract or oral agreement/promises covered. About 19 per cent of tenants said the issue of selling price of their produced tobacco was covered in the contract. About 20 per cent said that their contracts also covered the length of time they were expected to work. The data indicate that the issue mostly covered in the contracts is credit deductions.

About 50 per cent reported that their contracts covered deductions for credit mainly maize. This is not surprising if one keeps in mind that estate owners "make money" by inflating prices of those goods and services provided to the tenant. It appears that whether you take or not, deductions are automatically done. This means that whether one has enough food or not the tenant is forced to incur the extra interest charge.

Also note that the estate owner has been much more thorough in making agreements about the deductions than the prize of tobacco, leaving it to him/herself to set this at the end of the season. Although contracts are silent, tenants learn with time the boundaries of their tenancy. They are rarely given independence to make decisions regarding their work schedule or tobacco production. About 48 per cent reported that no activity could be done independently.
The independence some tenants enjoy relates to non-crucial activities like clearing the field and making ridge the field and making ridges (31 per cent.) or renovation of sheds and barns (33 per cent). Close to 90 per cent of both tenants and wage laborers report that management and supervisors have never asked for their advice.

Findings

The starting point for the inquiry was to test the understanding of the concept of health and safety among the interviewees. Of the combined 200 participants 83% had no idea what this mens. 5% thought it was about wearing protective clothes while 12% could not make up their minds as to what it was really about. Asked as to who they though was responsible for ensuring their health and safety at work 72% were of the view that such responsibility lied with their employers. 10% said it was the responsibility of employers and employees/ workers. 18% did not know. Under the Occupational Health and Safety Act responsibility for occupational health and safety falls on employees\textsuperscript{1185}, employers\textsuperscript{1186}, manufacturers\textsuperscript{1187}, the self-employed\textsuperscript{1188}, persons in control of workplaces\textsuperscript{1189}. The imposition of the duty follows

\textsuperscript{1185} Sect. 18
\textsuperscript{1186} Sect. 13 (1)
\textsuperscript{1187} Sect. 17
\textsuperscript{1188} Sect. 14
\textsuperscript{1189} Sects 15-16
principles obtaining at common law. Two main areas of civil liability at common law are tort and contract. A tort is a civil wrong.

The rule at common law is that everyone owes a duty of care to everyone else to take reasonable care so as not to cause him or her foreseeable injury. In Donoghue v. Stevenson (1932) AC562 Lord Atkin put it this way:

You must take reasonable care to avoid acts or omissions, which you reasonably foresee, would be likely to injure your neighbour, i.e. persons who are so closely and directly affected by your act so that you ought reasonably to have them in contemplating being so affected.

Thus where an employee suffers injury or disease at work or work-related, he may be in a position to sue the employer within the tort of negligence or breach of a statutory duty such as the occupational health and safety Act. The relevance of this rule is that the scope of those protected is wider than could possibly be constructed under statute. It gives standing to third parties unaffected by an employer–employee relationship to seek redress for health and safety or environmental wrongs.

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1190 The body of case law that is universally or commonly applied as a result of judgements of the courts. Each judgement contains the Judge's enunciation of the facts, a statement of the law applying to the case and their ratio decidendi (legal reasoning) for the finding that has been arrived at.

1191 Negligence can be defined loosely as careless conduct injuring another See Lochgelly Iron & Coal Co Ltd v M'Mullan [1934] AC 1
An employer’s duties at common law were identified in general terms by the House of Lords in *Wilson & Clyde Coal Co., Ltd v English* (1938) AC57 2 AER 628. The common law requires that all employers provide and maintain a safe place of work with safe means of access and egress, safe appliances and equipment and plant for doing the work, a safe system for doing the work and competent and safety-conscious personnel. However, these duties are ordinarily qualified by the reasonable practicality test. Usually the dusty is qualified at two levels, i.e., reasonably practicable and so far as is reasonably practicable.

As asked whether their respective organizations had health and safety policies, 98% did not know what this was all about. Nowhere on the premises did we see any abstract policy statement on health and safety for the organization. This is notwithstanding the existence of trade unions of some sort. Sect.13 (3) as read with Sect.69 (c) of the Act, enjoin employers to prepare and display a policy statement on safety and health at the workplace. The study shows that sects.13 (3) and Sect.69(c) are honoured more in breach than in compliance.

1192 See our discussion the concept in Chapter VII, infra... See *Edwards v. National Coal Board* [1949] 1 AER 743 cf *Latimer v. AEC Ltd* [1952] 2 AER 449 (the practicability of precautions and unreasonable precautions.

Related to this was the fact that there was very little literature on health and safety translated into local languages. Sec.69 of the Act requires to be posted in a conspicuous place in every workplace\textsuperscript{1194} a prescribed abstract of the Act\textsuperscript{1195}, printed copies of any regulations made under part VII (Notification and investigation of accidents\textsuperscript{1196}, dangerous occurrences\textsuperscript{1197} and industrial diseases\textsuperscript{1198}) or prescribed abstracts of such regulations\textsuperscript{1199}.

The complex mix of the agricultural workforce and its mobile nature exacerbates the problem. A majority of the workers move from one estate to another each growing season. In this set-up it is difficult to provide literature in local languages that would meet the strict requirement of the law.

A solution to the above problem would be to use a national language. In Malawi the national language is Chichewa while the official language is English. Low literacy and innumeracy levels among agricultural workers severely limit their participation in the information 'superstore' as well as in union activities\textsuperscript{1200}. This places an additional

\begin{itemize}
  \item \textsuperscript{1194} For a definition of a workplace, see Sect. 3 of the Act
  \item \textsuperscript{1195} Sect.69 (a) of the Act
  \item \textsuperscript{1196} Ibid, Sect.66
  \item \textsuperscript{1197} Op.cit, Sect.67
  \item \textsuperscript{1198} Sect.68
  \item \textsuperscript{1199} Sect.69 (b)
  \item \textsuperscript{1200} The Monograph on union in SMEs
\end{itemize}
burden on stakeholders for civic education. However resource constraints are a source of anxiety. **1201**

It became clear that accidents on the estates are a daily occurrence. However official records and data are hardly available. Where it is, it is grossly understated for public relations purposes. **1202**

The workers said that when accidents happened, they would first report to their friends, relations or the line managers. The only problem that was noted that some did not know who their line manager was. They knew pretty well the 'big boss' but not their line manager or one that was responsible for health and safety issues.

Malawi’s emergency number for the police and ambulance is 333. 94% of those interviewed knew the existence of this number. 70% of those that knew it said that there was no point in knowing it because either one cannot afford a mobile phone or there were no telephones on the farms as they were out of the Posts and Telecom’s grid. Even where they were the ‘333’ service is more out-of order than otherwise. **1203**

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**1201** See the discussion on Malawi, Chapter Seven, supra

**1202** It is for this reason that the ILO thought of passing Protocol P. 155 to C.155 so as to improve the global recording and notification of work-related accidents or illnesses that could portrays a fair picture of the extent and magnitude of the problem which will assist in policy formulation and business forecast.

**1203** This shows that health and safety is a factor of so many variables, technological factors such as telecommunication have a significant role to play and government policy need to
After the accident had been reported and transmitted to the Director of occupational Safety, Health and Welfare\textsuperscript{1204} then depending on its seriousness, they could be given an off duty leaving. In case where the union has been involved they could be a reimbursement for hospital transport if it needed to be treated at a major clinic. This could only be done if the patient had been referred by the establishment’s clinic.

Bearing in mind that this is a rural enterprise, the work force is subjected to a rural a rural health service. Like any rural health services it is sub-standard in comparison to the urban health services reflecting health care policy bias towards urban health care.

Injuries and medical care are not covered by most contracts for agricultural workers. Yet injuries are frequent in agricultural productions such as tobacco, tea and sugar just like many other heavy-duty sectors of the economy. For example, in this survey\textsuperscript{41} percent respondents interviewed in relation to tobacco reported that they had injuries in the previous season, which led to absenteeism for many of the injured. About 69 per cent were absent for days while 19 per cent were absent have such implication in mind. From the look of things this doesn't seem to be the case. (Subject to a cost-and benefit analysis) Mobile radio communication systems such as two-way radios would make a difference and governments with under developed telecommunications networks should be encouraged to think along this way, in as far as health and safety is concerned for out of reach-destinations

\textsuperscript{1204} Appointed under sect.72 (1) of the Act.
for weeks. This means that their spouses and children were "forced"\textsuperscript{1205} to work extra hard to cover for the injured tenants.

It became apparent during interviews that medical examinations are not a common feature of the employment process on these establishments. This could be explained by the fact that the Act in sect.34 makes it optional and exceptional\textsuperscript{1206}.

Where the director of occupational health and safety is of the opinion that the nature of any process, activity or occupation in a workplace or on a structural work is such as to make it necessary in the interest of health and safety for any person employed therein to be examined by a medical practitioner, he may direct that such person be examined before engagement and at such intervals thereafter as he might direct\textsuperscript{1207}.

Further if a medical practitioner is of the opinion that any person so examined is suffering from the effects of any dangerous substance contracted as a result of his/her employment in a workplace or whilst

\textsuperscript{1205} S.3 of the Employment Act, Act No.6 of 2000 of the Laws of Malawi defines forced labour as 'any work or service exacted from a person under the threat of any penalty and or is not offered voluntarily, but does not include that work or service offered as a legitimate national service a such as compulsory military service etc. By this definition, child labour offered to cover for the injured tenants, as it is not voluntarily given, qualifies as forced labour and so is that of spouses. This if granted is in contravention of S.4 (1) of the said employment Act.

\textsuperscript{1206} Sect.34 (1)

\textsuperscript{1207} Sect.34 (1)
engaged on a structural work to report the same to the director.\textsuperscript{1208}

The only problem is that the discretionary nature of the obligation makes it less effective as the director's decision could be subjected to political and economic considerations and pressures. He might deliberately pay a blind eye, unless there is a vigilant trade union, which is not the case as we found out.

Secondly even all other things being equal bureaucratic delays may be a dis-incentive to organizations enterprises involved that might prefer speed and efficiency to bureaucratic delays. Lack of human resources means that a lot is missed out. Finally a pre-engagement medical screening is hard bearing in mind numbers of seasonal and part time workers involved.

There seems to be a worrying lack of training or induction for health and safety of the workers when they first report for duties. They are told how to do the job and not health and safety issues. Sect.65 of the Act requires every worker in a workplace to be adequately and suitably informed of potential health hazards to which he may be exposed\textsuperscript{1209} and to be instructed and trained in measures available for prevention and control and protection against health hazards at the

\textsuperscript{1208} Sect.34 (3)
\textsuperscript{1209} Sect. 65 (1) (a)
workplace\textsuperscript{1210}.

Language is one problem and illiteracy is another reason. Asked as to whether where a health and a safety induction is done, that a same is done in languages and in manners that take into account their illiteracy and innumeracy levels 87\% of those that said that had been inducted said ‘NO’.

Tenants in Malawi have low, if any, education and have hence limited options in other parts of the labour market. Yet, their ability to survive in the estate sector is also limited by not having the means to calculate, read and write that could make them better able to negotiate their terms.

A watered-down version of training is given to those handling machinery such as plant and vehicle drivers and operators. However this too does not prepare them to confront health and safety challenges. It is mainly to ‘get things done’.

One of the problems that were noted is the disproportionate number of women and children to that of men on these establishments. Of most concern is the fact the children were most school-going age. This is a very worrying scenario. What it means a poverty and illiteracy cycle is perpetuated through this process. Even those the government has

\textsuperscript{1210} Ibid, Sect.65 (1) (b)
introduced free primary school education in Malawi it will make no meaningful difference.

What matters are not the number of children registering for school at the start of an academic year rather it is the retention rate. Household poverty is forcing children to take to wage labour and in the process lose out on their future

**Industrial Relations**

Only about 5 per cent reported to having had conflicts with management. They were further asked what the conflict was about and what they did to sort out the issue. About half (53 per cent) were unwilling to give details as to what the conflicts had been about.

The few that opened up indicated that the major area of conflict was over payment other areas of conflict mentioned were workload and working conditions. Only a small minority (3 per cent) had the conflict sorted out by a trade union, 20 per cent seek help from either estate owner or elder brother of estate owner and 8 per cent had the matter sorted out with fellow workers at the estate. More than half (58 per cent), just stayed and had nowhere to go for assistance, or did not know where to turn.
Whether it is to defend their interests at work or living conditions, tenants generally do not often belong to any group or organisation. Almost half the tenants (47 per cent) are not members of any group. The most popular groups for tenants are the religious groups and political parties. It was not established whether they are active participants in these groups. The rate of unionisation among tenants is very low (5 per cent).

Those that are not union members cited non-existence of a union at the estate as the main reason for their lack of organisation. Less than 1 percent cited estate management intimidation as a reason. In other words, a tenant is pre-occupied with tobacco growing or picking tea with the hope of making enough money one season to set him free. All other activities are secondary. This dream keeps them stuck at an estate or keeps them hopping from one estate to another.

Relatively few reported that they are worried about loosing their job. This may be explained by the fact that the interviews took place in the middle part of the season. Tobacco workers know that there may be relatively little chance of their loosing their employment in the middle of the season.

The large majority of tenants (77 per cent) also express the view that the estate owner will probably let their wives and children finish off the
work for them if anything should happen to them. Wage labourers are far less confident in this respect, while 54 per cent still express that they think this is the case.

As noted elsewhere the common form of employment on the estates is seasonal. This indicates the changing nature of employment patterns associated with the liberalisation of the global economy. Flexibility is the trademark of the global economy and the Just-in time employment is preferred to permanent engagements. The effect for employers is that it cuts down labour costs as such employees have little or any benefits to claim on employers on the basis of the contract. Indeed in some cases where they have been out-sourced employees may not know their employer is.

It was found that on the estates involved estates owners could easily pass on unwanted workers to other estates without any consultation. As far as they were concerned they were still working for the initial employer. They were completely unaware of what had happened. In such cases they cannot be expected to have an input into to their working and living conditions. On the tea estate there were more refectories for both men and women.

However there weren’t much of differences indicating that ergonometrics is not part of the health and safety game. The case of
the Tobacco estate was different. There was little one could point as
facilities for men and women, let alone baby changing facilities. Of the
two tea estates seemed better organised in terms of welfare than
tobacco estates. This could possibly be due trade union organisation
and literacy levels among them, not to mention of management
attitude towards. In fact the head of health and safety at the Tea
Association of Malawi head office in Blantyre is a retired Director of
occupational Health and a safety.

This shows that given the right man power there is hope for health and
safety. Critical in this is management attitude towards Health and
safety. On account of their employment status maternity leave is not a
common feature of the employment pact of estates workers

One on the problem for estates workers is lack of organization. Though
there were trade unions, workers were least interested in them. Most
popular organization were religious and political parties. Indeed
political change in Malawi was a result of the Catholic Church
speaking out against human right abuses in the country. Malawians
trust religious leaders more than politicians. The same is said of union
leaders who some workers think serve employers' interests more than
workers' interests.
Concluding Remarks

The finding of the enquiry is fascinating in that they lay bare the disturbing reality of policy window dressing vis-à-vis occupational health and safety regulation in Malawi. In the broader context Malawi is only a microcosm of SADC's political economy. The problems obtaining in Malawi are not unique to Malawi, rather are a shared if not a common denominator of institutional shortcomings of the region's social-economic policy.

The lesson for the SADC in its effort to re-align its economic policy with social progress of the region in line with the ideals spelt out in the founding treaty is simple. No amount, breadth or latitude of social and economic reforms can in the absence of institutional mechanisms and political will for implementation to bring about desired results. The passage of the occupational health, Safety and welfare Act of Malawi raised hope, especially in the minds of proponents of labour market reforms for better industrial relations, improved working and living working conditions. Well the celebration was perhaps premature.

The inquiry shows that tripartite structures are de facto non-existent or where they do, they are a big joke in that labour often times suffers from chronic capacity limitations that disadvantage them in social dialogue.
Lack of effective organisation among the labour force, gives employers a free-lane where breaches of minimum thresholds of social standards such as health and safety go unnoticed or not remedied effectively. However popularity of political and religious organisations among the workers indicates that there is room for civil society involvement in the management of economic affairs in Malawi which experience could be used as a base for regionally based strategies for civil society participation. This is a viable source of policy dialogue that is yet to be tapped on. In this scenario trade unions, especially national as well as regional, have an immerge role to play in proving guidance and leadership in industrial relations that would contribute towards promotion and protection of health and safety at enterprise level and beyond.

The inquiry also reveals a critical lack of a safety culture among stakeholders. This is particularly worrying in view of increased liberalisation of the global economy and diminished bargaining positions of states as they strive to out-compete each other in the attraction and retention of present and potential investors.

Increased mobility of global capital is increases bargaining positions of investors and weakens that of host states necessitating a third-way approach, in the management of economic affairs involving trade
unions and civil society organisations. It is safe to submit in view of these findings that social and economic policy are but two sides of the same coin and a synthesis of the two is necessary if functional integration is to be achieved in SADC.

One of the distinguishing characteristics of agricultural work is that it is carried out in isolated workplaces in an essentially rural environment. There is a generally low standard of health and medical services in rural areas, reflected in the progressive deterioration of health status of workers with the greater distance from urban centres. Population drift to urban centres results in a concentration of services for those who work and live in large urban areas to the detriment of health services for those in the rural sector.

With economic development, health resources are often devoted to improvement of hospitals and surgical procedures rather than to primary health care. Small rural health centres cannot offer the same services as their large urban counterparts, and in any case their very remoteness makes it difficult for rural communities to have access to essential services. In these circumstances, effective diagnosis and treatment of chronic illness from exposure to pesticides becomes problematic and any acute poisoning as much a matter of death as of life. Because of the general lack of health services and the poor

situation of those that do exist it is especially important to minimise risks at the source by judicious choice of less toxic pesticides
CHAPTER ELEVEN

Conclusion

Introduction

This chapter is a culmination of lessons learnt in preceding chapters.\textsuperscript{1212} It draws conclusions from the discussion within the parameters of the thesis or questionnaires posed by this inquiry. Only those conclusions that are relevant to the thesis are considered here.

Enemy at the Gate

The political history of SADC is fascinating and so is the story of its organizing philosophy. If one could be asked to name one thing that colonialism had done to sub-Saharan Africa generally and SADC in particular, it wouldn’t be a wrong answer to say that it provided a common enemy that united an inconceivably un unitable region. Colonialism gave the continent a sense of common purpose, heritage, shared frustrations and aspirations. The desire to break loose from foreign rule gave way to an intensification of pan-Africanism especially by Africans in diaspora that identified colonialism as a common enemy. This was an external enemy that had to be stopped at the ‘gates’. The philosophy of the African charter establishing the OAU was to fight colonialism and full emancipation of the continent.\textsuperscript{1213}

\textsuperscript{1212} Every chapter contains a conclusion of its own. It is the overall picture built by these conclusions that form the basis of conclusions and discussions that follow in this chapter.

\textsuperscript{1213} Op.cit. Article 2 (a) (C) & (d) cf Article 3(a) of the AU constitutive Act.
The obsession with the enemy at the gates has been responsible for the continent's lack of forecast in the aftermath of political liberation, it was soon to find out it was to fight another long drawn out liberation war. This time not political, rather an economic liberation war. Africa including SADC has had the right manpower but wrong weapons (if any at all) in its arsenal. Its policies were only outward looking. A quick-fit solution in the form of economic policies that were hoped to generate social progress as a by-product proved myopic a recipe for social stagnation in the region. To say the least this policy conception was a wrong prescription to a degenerative disease (poverty, internal conflict and social exclusion). A reactive social policy assembled in the 1980s in response to past policy deficit if anything is a mirage of SADC's political economy.

The adoption of the Abuja treaty, the subsequent creation of NEPAD and re-organisation of SADC are some of the signs or symptoms of past policy crisis. Later developments such as the retreat to a social agenda and increased prominence of occupational

1214 This New Partnership for Africa’s Development is a pledge by African leaders, based on a common vision and a firm and shared conviction, that they have a pressing duty to eradicate poverty and to place their countries, both individually and collectively, on a path of sustainable growth and development, and at the same time to participate actively in the world economy and body politic. The Programme is anchored on the determination of Africans to extricate themselves and the continent from the malaise of underdevelopment and exclusion in a globalizing world

1215 Op.cit Chapter
health and safety in member states’ domestic legislative programmes indicate that post-independence policies aimed at the region’s accelerated economic growth and social progresses have proved unsatisfactory. The transformation of the OAU and the subsequent restructuring of SADC are attempts at remedying policy vacuum for a socio-economic policy that would bring about economic growth while creating conditions for social progress and limiting negative social effects of a liberalized regional economy. This attempt is beset by factors obtaining in the wider political environment.

Changing global dynamics such as the end of the cold war meant that African’s strategic importance began to diminish in the late 1980’s and golden handshakes are not anymore a guaranteed source of the regions economic reconstruction. A market economy in which labour standards such as occupational health and safety have a pivotal role to play has been the preferred model. Structural Adjustments Programmes (SAPs) supported by the World Bank and International Monetary Fund (IMF) underpinned the importance of market economy as a panacea for Africa’s socio-economic problems. At the center

\[1216\] See End of Year Media Briefing on Regional Developments by SADC Executive Secretary Prega Ramsamy at [www.sadc.int](http://www.sadc.int)

\[1217\] SAPs are built on the fundamental condition that debtor countries have to repay their debt in hard currency. This leads to a policy of ‘exports at all costs’ because exports are the only way for ‘developing’ countries to obtain such currencies. A first feature of SAPs is therefore a switch in production from what local people eat, wear or use towards goods that can be sold in the industrialised countries. Since the 1980s dozens of countries have followed these
of these programmes has been economic liberalisation in which trade and investment are portrayed as realistic avenues for economic reconstruction.

Querre, does it mean that a privatized economy is more efficient than one that is not? Assuming the answer to this question is yes, does it follow that private economic actors are more efficient than bureaucrats. The *de facto* re-nationalization of Rail track in the United Kingdom suggests otherwise\(^{1218}\).

The re-constitution of the OAU into the AU is an adjustment in this direction\(^ {1219}\). This is equally true at regional level as shown by the breadth and depth of SADC restructuring. Mounting levels of poverty, economic stagnation point to the fact that the enemy is no longer at the gates, rather is now within and one frontier on which to wage the war is labour. Initially regional set ups subordinated labour to trade and investment as a result of which labour suffered with negative spill over effects to society and the environment requiring a re-conceptualisation of the enemy primarily as not at the gates rather within.

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\(^{1219}\) See also the discussion in chapter seven, supra.
The situation could have been different in our view if trade and investment in the past was linked to labour. Though it was going to be hard to again consensus around the linkage issue within the World Trade Organization, its consideration would have provided the needed impetus for the linkage lobby. Lack of international consensus around the issue has led member states to take unilateral action to link labour with trade and investment under the various Generalized System of Preferences\textsuperscript{1220} (GSPs). GSPs were initially authorized under

\textsuperscript{1220} As is stated in resolution 21(ii) taken at the UNCTAD II conference in New Delhi in 1968, "the objectives of the generalized, non-reciprocal, non-discriminatory system of preferences in favour of the developing countries, including special measures in favour of the least advanced among the developing countries, is to increase their export earnings, promote their industrialization and to accelerate their rates of economic growth." Under GSP schemes of preference-giving counties, selected products originating in developing countries are granted reduced or zero tariff rates over the MFN rates. The least developed countries (LDCs) receive special and preferential treatment for a wider coverage of products and deeper tariff cuts.

The idea of granting developing countries preferential tariff rates in the markets of industrialized countries was originally presented by Raúl Prebisch, the first Secretary-General of UNCTAD, at the first UNCTAD conference in 1964. The GSP was adopted at UNCTAD II in New Delhi in 1968. In 1971, the GATT Contracting Parties approved a waiver to Article I of the Agreement for 10 years in order to authorize the GSP scheme. Later, the Contracting Parties decided to adopt the 1979 Enabling Clause, Decision of the Contracting Parties of 28 November 1979 (26S/203) titled "Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries", creating a permanent waiver to the most-favoured-nation clause to allow preference-giving countries to grant preferential tariff treatment under their respective GSP schemes. There are currently 16 national GSP schemes notified to the UNCTAD secretariat. The following countries grant GSP schemes: Australia, Belarus, Bulgaria, Canada, the Czech Republic, the European Union, Hungary, Japan, New Zealand, Norway, Poland, the Russian Federation, the Slovak Republic, Switzerland, Turkey and the United States of America.
GATT 47 as a conditional waiver to national treatment\textsuperscript{1221} and most favored nation treatment\textsuperscript{1222} (Art. I) provision of GATT. They formed part of the special and differential treatment allowed under the Tokyo round of negotiations and further entrenched under the Uruguay round\textsuperscript{1223}.

\textsuperscript{1221} The national treatment principle condemns discrimination between foreign and national goods or services and service suppliers or between foreign and national holders of intellectual property rights. GATT 1994 and the TRIPS Agreement provide for national treatment as one of the main commitments of World Trade Organisation Members. Imported goods, once duties have been paid, must be given the same treatment as like domestic products in relation to any charges, taxes, or administrative or other regulations (GATT Article 3). With regard to the protection of intellectual property rights, and subject to exceptions in existing international conventions, Members of World Trade Organisation are committed to grant to nationals or other Members treatment no less favourable than that accorded to their own nationals (Article III). GATS, however, due to the special nature of trade in services, deals with national treatment under its Part III, Specific Commitments, (Article XVII), where national treatment becomes a negotiated concession and may be subject to conditions or qualifications that Members have inscribed in their schedules on specific commitments in trade in services. For a discussion see Aaditya Mattoo National Treatment in the GATS: Corner stone or Pandora's Box? Research and Analysis: Working Papers Number: TISD-96-002 available at http://www.wto.org

\textsuperscript{1222} The most-favoured-nation clause has been the pillar of the system since the inception of the GATT in 1947. The Contracting Parties to the GATT 1947 were bound to grant to the products of other contracting parties treatment no less favourable than that accorded to products of any other country. Members of the World Trade Organisation have entered into similar commitments, under the GATT 1994 (Article I) for trade in goods, under the GATS (Article II) in relation to treatment of service suppliers and trade in services, and under the TRIPS Agreement (Article 4) in regard to the protection of intellectual property.

\textsuperscript{1223} See GATT 1994 (Articles XXXVI-XXXVIII); Agriculture; Textiles and Clothing; the GATS; and the Enabling Clause. These provisions all consist of actions to be taken by Members in order to increase the trade opportunities available to developing countries.
Special and differential treatment is a concept that enables exports of developing countries to be given preferential access to markets of developed countries, but they need not fully reciprocate any such concessions they receive. This principle was first widely discussed during the Kennedy Round, leading to the adoption of Part IV of GATT, which obliged developed countries to pursue trade policies that take into account the development needs of developing countries.

The contracting parties to the General Agreement on Tariffs and Trade decided on 21 May 1963 to arrange for a trade conference to convene on 4 May 1964.

Negotiations at the conference that opened at Geneva on that date and concluded on 30 June 1967, included negotiations, pursuant to Article XXVIII bis and other relevant provisions of the General Agreement, between contracting parties and between contracting parties and the European Economic Community, on tariffs and on non-tariff barriers with respect to both industrial and agricultural

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1224 The universe of special and differential treatment consists of 145 provisions spread across the different Multilateral Agreements on Trade in Goods; the General Agreement on Trade in Services; The Agreement on Trade-Related Aspects of Intellectual Property; the Understanding on Rules and Procedures Governing the Settlement of Disputes; and various Ministerial Decisions. Of the 145 provisions, 107 were adopted at the conclusion of the Uruguay Round, and 22 apply to least-developed country Members only.

1225 The Kennedy Round negotiations (1964-67) produced an agreement, also known as a code, on multilateral rules for anti-dumping.

1226 http://www.asycuda.org/cuglossa.asp?term=Special+and+Differential+Treatment

1227 Article 1 of the Final Act.
products, negotiations, pursuant to paragraph 6 of Article XXIV of the General Agreement between the governments of the member States of the European Coal and Steel Community and other contracting parties, negotiations, pursuant to Article XXXIII, directed towards the accession of governments to the General Agreement.

As a result of these negotiations the following instruments were prepared: Geneva (1967) Protocol to the General Agreement on Tariffs and Trade, Agreement relation principally to Chemicals, supplementary to the Geneva (1967) Protocol to the General Agreement on Tariffs and Trade, Memorandum of Agreement on Basic Elements for the Negotiation of a World Grains Arrangement and Agreement on implementation of Article VI of the General Agreement on Tariffs and Trade among others.

The Tokyo Declaration subsequently proclaimed that exports of developing countries should receive particular benefits consistent with their trade, financial and development needs.

Among proposals considered during the Tokyo Round negotiations for
accomplishing this were: compensatory tariff reductions for exports of developing countries to offset any reductions in their margins of preference that might result from Tokyo Round tariff cuts, advance implementation of Tokyo Round tariff cuts affecting developing country exports, substantial reduction of elimination of tariff escalation, special provisions for developing country exports in any new codes of conduct covering non-tariff barriers, assurance that any new multilateral safeguard system would contain special provisions for developing country exports and the principle that developed countries would expect less than full reciprocity for trade concessions granted to developing countries.

The Framework Agreement concluded at the end of the Tokyo Round provides a legal basis for special and differential treatment in favor of exports from developing countries, and some of the codes of conduct negotiated in the Tokyo Round provided for such treatment. Under the Uruguay Round agreement, developing countries are given much longer than developed countries for phasing in trade liberalization measures in several areas including agriculture, intellectual property and investment. The Uruguay Round also strengthened pre-existing GATT rules regarding dumping\footnote{Under U.S. law, sales of merchandise exported to the United States at "less than fair value," when such sales materially injure or threaten material injury to producers of like merchandise in the United States. The determination that sales have been made at less than fair value involves a comparison of "normal value" — the price at which the merchandise is} and subsidization\footnote{Under U.S. law, sales of merchandise exported to the United States at "less than fair value," when such sales materially injure or threaten material injury to producers of like merchandise in the United States. The determination that sales have been made at less than fair value involves a comparison of "normal value" — the price at which the merchandise is} and developing
countries were given a longer timetable for coming into compliance with these rules.

As indicated in chapter four, GSPs such as the one the USA has under its Trade Act of 2002 conditioned market accesses for products from beneficiary countries on their taking steps to implement internationally recognized labour standard\textsuperscript{1238}. What is meant by the expression sold within the exporting country or to third countries (or a "constructed value") — and the "U.S. price" — the price at which the merchandise is sold in the U.S. market. A statutory cost-of-production provision requires that dumping determinations ignore sales in the home market of the exporting country or in third-country markets that are made below cost — that is, at prices that are too low to permit recovery of all costs within a reasonable period of time in the normal course of trade. Dumping is recognized by the World Trade Organisation rules as a potentially unfair trade practice that can disrupt markets and injure producers of competitive products in the importing country. In the World Trade Organisation Agreement on Implementation of Article VI of GATT 1994, World Trade Organisation members created more detailed rules governing their ability to take action against imports sold at an unfairly discounted export price. Members agreed to establish procedures for termination under certain conditions of antidumping duty orders after five years (which resulted in a corresponding change in U.S. law) and to raise the de minimis rule (the lowest rate at which a dumping margin can be determined) to 2 percent (U.S. law, which had previously defined it at 0.5 percent, was modified accordingly

\textsuperscript{1237} An economic benefit granted by a government to domestic producers of goods or services, often to strengthen their competitive position. The subsidy may be direct (a cash grant) or indirect (low-interest export credits guaranteed by a government agency, for example). The Illustrative List of export subsidies, an annex to the World Trade Organisation Agreement on Subsidies and Countervailing Measures, enumerates certain practices that, under certain circumstances, constitute countervailable export subsidies within the terms of the agreement. These include direct subsidies to a firm or industry contingent upon export performance, currency retention schemes, or other practices that involve a bonus, preferential internal transport and freight charges on export shipments, remission of direct taxes specifically related to exports, provision of services or goods on preferential terms for use in the production of exported goods, and export credit guarantees.

\textsuperscript{1238} The U.S. Generalized System of Preferences (GSP) program grants duty-free treatment to specified products imported from more than 140 designated developing countries and
internationally recognized standards is undefined but has commonly been understood to refer to the core labour standards. The same condition was laid down under the Lomé convention between the European Union and the ACP countries.

The unilateral determination of what constitute a violation of international labour standards could be a factor contributing to the stifling of a coherent policy on trade and labour and subsequent poor protection for workers and communities in general in most capital importing countries. A possible criticism for the unilateral approach to the enforcement of labour standards such as occupational health and safety in the present global political climate is that it can easily be subjected or subordinated to foreign policy considerations such as the war on terror in which a case it may vary from case to case and there could be no consistency in how the measures intended to safeguard the same are to be applied. It would be different if this link was acknowledged at a multilateral level and in our view the World Trade Organization is the right forum for such a scheme.

territories. The program began in 1976, when the United States joined 19 other industrialized countries in granting tariff preferences to promote the economic growth of developing countries through trade expansion. The Trade Act of 2002, which most recently reauthorized the U.S. GSP program, extended the program through calendar year 2006.

1239 Chapter 4, Supra. Pp101-110
In the area of investment and labour crucial is the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy\textsuperscript{1241} and OECD Guidelines on Employment and industrial Relations, part of the general OECD Guidelines on Multinational Enterprises\textsuperscript{1242}. Principal differences in the general approaches of the codes concern their respective addresses. The OECD Guidelines are jointly addressed by member countries to multinational enterprises operating in their territories\textsuperscript{1243} while the ILO Declaration is addressed to governments, employers and workers' organisations in both home and host states and to MNEs themselves\textsuperscript{1244}. On the other hand both codes share much in common. First, they are both voluntary in nature\textsuperscript{1245}. Secondly both instruments are addressed to MNEs and National enterprises. They aim to reflect good practice for all without

\textsuperscript{1241}Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva, November 1977), as amended at its 279th Session (Geneva, November 2000). See also Annex: List of international labour Conventions and Recommendations referred to in the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva, November 1977), as amended at its 279th Session (Geneva, November 2000). The MNE Declaration promotes partnerships and cooperation between business, labour and governments that maximize the positive contributions that investment by multinational enterprises can make to economic and social progress and help solve difficulties to which such investment may give rise. The MNE Declaration is the only instrument in the area of corporate social responsibility that is based on universal principles and standards

\textsuperscript{1242}The OECD Declaration and Decisions on International Investment and Multinational Enterprises, 1991 Review (Paris, 1992) at pp. 106-7

\textsuperscript{1243}Ibid, Introduction, para. 6

\textsuperscript{1244}Op. cit n. 5 , para. 4


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discriminating as to nationality\textsuperscript{1246}. Third both codes envisage the primacy of national law\textsuperscript{1247}. Thus the ILO declaration declares:

\begin{quote}
All parties concerned should respect the sovereign rights of states, obey the national laws and regulations, give due consideration to local practices and respect relevant international standards
\end{quote}

The primacy of national law is reinforced by the requirement that the ILO dispute procedure cannot be used to determine issues arising out of national law\textsuperscript{1248}. Similarly the OECD employment Guidelines begin by stating that:

\begin{quote}
Enterprises should respect the standards contained within the framework of law, regulations and prevailing labour relations and employment practices in each of the countries in which they operate.
\end{quote}

The reference to national law severely weakens the effectiveness of both codes. The codes preserve the right of each state to determine the nature, scope and effect of its labour laws. In this case the codes can do nothing to prevent competition between states over the reduction of labour standards as a means of reducing the cost of investment in their respective territories. Furthermore they do not

\textsuperscript{1246} ILO Declaration, para.11; OECD Guideline Introduction para.6.

\textsuperscript{1247} ILO Declaration para.8.

\textsuperscript{1248} See our discussion on the ILO enforcement in Chapter 5.
address the problem of conflicting labour standards that may arise as a result of international operations of MNEs\textsuperscript{1249}. Increased militancy of trade unions and civil society is forcing a retreat of global public policy vis-à-vis labour issues. This is illustrated by the stand of the Jeans manufacturing Company, Levi-Strauss on workers rights in host countries where it seeks to operate\textsuperscript{1250}. Recently this company has adopted strict ethical guidelines covering the terms of engagement that its overseas sub-contractors have to meet in order to obtain business from the company. Terms and Conditions for Levi-Strauss cover areas like environmental requirements, \textit{health and safety} (emphasis supplied) and employment practices. It will not sub-contract to companies that employ children or prison labour, working hours must not exceed sixty hours and wages must at least meet local requirements. On this account it has since withdrawn form Burma and refused to invest in China\textsuperscript{1251}.

However the decision not to invest in China is likely to change with the admissions of China into the World Trade Organization and its potential for a tiger economy. The Levi's case illustrates two points, namely that there is a case for linking, trade and investment with labour. Secondly it illustrates the fact of management culture on ethical issues. This avenue can be a useful tool in promoting corporate social

\textsuperscript{1249} See generally, Morgensten and Knapp, \textit{Multinational enterprises and the extraterritorial application of labour law} 27 ICLQ769 (1978).
accountability at all levels of economic engagement.

Following the SADC restructuring process, the definition and relations with non-state actors has changed. The previous reference in the SADC treaty with regard to involvement and cooperation with NGOs has been replaced by the broader term “stakeholders”, defined as “the private sector; civil society; non-governmental organisations; and workers’ and employers’ organizations”.

As part of restructuring all Member States will create SADC National Committees, which will include the aforementioned stakeholders in addition to government representatives. This new institutional arrangement is expected to allow a much more active and prominent role for non-state actors in the integration process. At regional level, SADC is, in accordance with the principle of subsidiarity, encouraging non-state actors/stakeholders to form associations with which Memoranda of Understanding (MoUs) can be signed. For instance in 2000, SADC signed a MoU with the Association of SADC Chambers of Commerce and Industry (ASCCI). This creates an opportunity for a broader public involvement in policy formulations that affect their

\[1252\] Article.23 of the Declaration and Treaty of SADC of Article.23 of consolidated text of SADC, as amended. The Social Charter refers to them as social partners. See Article.2 of the Charter
lives in the region\textsuperscript{1253}.

The passing of a social charter by SADC, though too little, too late is welcome news in as far as socio-economic policy in the region is concerned. The challenge is how SADC addresses its institutional failures and how it exploits and encourages social dialogue around issues of trade, investment and social protection. Though this is welcome development the process is likely to remain only good just on paper unless there is real or meaningful enforcement. Linking the two would in our case be the best starting point.

The above assertion should be considered in light of our finding i.e. that the replacement of donor aid with trade and investment as an alternative for economic reconstructing for developing countries has brought with it increased export of hazardous operations by TNCs to regions with lenient health and safety standards\textsuperscript{1254}. This is not a new phenomenon. The problem of attracting investment to locations on the basis of low labour and environmental standards had been an issue in multilateral negotiations other than the World Trade Organization such

\textsuperscript{1253} See Para vii of the preamble to the SADC treaty (as a mended).

as NAFTA\textsuperscript{1255}.

Though there could be no consensus within the international trading community it has become common knowledge that low labour standards do not serve any long term economic good, rather creates social problems that diminish any supposed economic gains. For instance there is evidence suggesting that safety standards at Union Carbide’s pesticide plant at Bhopal were low and may have been a major contributing factor to the catastrophe of 1984\textsuperscript{1256}. Resources spent on litigating in this case far out weigh the cost of improving safety standards. The same could be said of Cape asbestos case.\textsuperscript{1257} The lesson for SADC is that if it is realistically to turn round its socio-economic problems, there is need to rethink its approach to development and integration and move away from its current

\textsuperscript{1255} Ibid. p.469.
\textsuperscript{1257} The 4-year fight for compensation by South African asbestos miners and residents has ended in settlement agreements being signed on 13 March 2003 with both English company Cape Plc and South African company Gencor Limited. Cape Plc agreed to pay £7.5 million compensation to the 7500 members of the Group action brought in England. Gencor agreed to pay £3.2 million to those of the Group who were also exposed to asbestos from Gencor/Gefco operations in South Africa. A large number of the Cape victims worked or lived at or near Gencor/Gefco operations. Gefco took over most of Cape’s operations when it pulled out of South Africa in 1979. Gencor owned Gefco for many years. At the same time, Gencor has set up a Trust containing more than £30 million for the benefit of a much larger class of Gencor claimants that was at the time being assembled in South Africa, who are not part of the Cape Group action. The scale of the economic cost to the enterprise is staggering and the social cost to communities involved is devastating.
approach of treating social policy, *de facto* as a by product of economic policy, to one that sees social and economic policy as two sides of the same coin, friction-free and complimentary to each other.

**Accounts Still Unsettled**

An understanding of how corporate actors such as films and TNCs respond to regulation is crucial to the configuration and formulation of enforcement strategies for occupational health and safety at all levels of economic engagement. Since occupational health and safety regulation is a form of social regulation of the market, it is crucial for policy makers to come up with social policies that compliment the region’s economic endeavors.

The need for effective regulation of labour standards such as health and safety becomes imperative if one bears in mind that the primary motivation of every investor is to make profit. Left to their own volition and in the face of changing corporate cultures that favour downsizing of films and radical cost cutting measures, labour welfare issues are likely to be pushed to the margins. Unless a social agenda is part of the deal between the state and all economic actors, as rational economic actors investors may not be keen on a social

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programme that runs in the opposite direction to cost cutting measures. In other words, in view of investors' free and wide choice to shop around for investment destinations with lower regulatory/compliance costs, it is upon host states to scale up efforts that ensure protection of labour and the workforce while still making themselves economically attractive as investment destinations.

A holistic approach involving civil society and social partners is recommended. In the discussion one notes SADC's teething problems such as weak linkages among civil society players and social partners, relevant skill and knowledge limitations on the part of stakeholders as some of the problems SADC has to surmount. It is however encouraging that the ILO has programs of technical support that includes training, advisory and basic capacity building in labour market issues in the region.

Despite an apparent choice of trade and investment as its chosen means for economic reconstruction SADC displays lack of a policy acknowledgment both at formulation or implementation levels of the pivotal role health and safety standards play in this and overall integration process. Health and safety have been seen as an unimportant or a Cinderella body of law or regulation to be resorted as

a last measure or when a major industrial or occupational disaster has struck.

The view arises from lack of an understanding of the external costs of poor or under investment in health and safety on the one hand and regulation and management of the same on the other. The enormous toll occupational injuries or accidents is having on productivity, efficiency remains hidden and does not form part of the public debate (if any at all is available) on such issues. One reason for this is poor reporting and recording of work-related injuries and diseases¹²⁶⁰ in the region.

The solution to this problem would be for SADC to encourage research to labour market issues such as health and safety. This would give some indication as to the economic and well as social cost of under-investment in such issues. Unless this fact is known or appreciated any policy formulation hoped to address the problem would be a mere academic enterprise only satisfying the demands of international stakeholders and labour movement.

**Regulatory Parameters**

The story unfolding in the preceding chapters is one of a spider-web of factors ranging from economic, social as well as technological that

¹²⁶⁰ Op.cit., Chapter seven
have combined to produce the present state of occupational health and safety in the SADC region. Economic factors include trade and investment and the consequent desire by members to offer competitive investment climate.

Changing commercial practices that emphasize productivity, cost cutting and profit maximization results in downsizing of workforce. This weakens bargaining powers of workers, as firms are likely to relocate if there is a deadlock with labour over working and living conditions. In such a climate meaningful tripartite social dialogue is the obvious casualty. The weakening of the nation state as well as its reduced presence in the marketplace challenges traditional approaches to market regulation in a scenario like this point to a need for multifaceted approach involving control and command as well as non-control and command approaches to market regulation. At the helm of this are two multilateral organisations that represent two strands of the arguments for and against the linkage of trade and foreign direct investment on the one hand and labour on the other, i.e. the World Trade Organisation and the ILO.

A conceptualisation of the combined involvement of the two requires the linkage of trade and investment with labour. The advantage of this is that enforcement mechanisms of the two will compliment each other

and in the long-term displace criticisms of the global trading system as not people-oriented. It will also send a message that free trade has to be fair and socially sustainable. The current World Trade Organization position on the issue as noted leaves a lot to be desired. Equally so is the ILO's enforcement record.

A third dimension to the regulatory problem is the need for the involvement of civil society organisations. Present day reality is that corporations are beginning to be sensitive to the way they are perceived.\textsuperscript{1262} Fear of a bad press acts as a negative incentive that has potential for producing positive results in as far as social responsibility is concerned hence the increased relevance of linking trade, investment and labour.

The Levi's case displaces the assertion by the anti-linkage lobby that social issues should not be mixed with trade and investment. They advance the view that it would open a pandora box of protection measures disguised as social concerns.\textsuperscript{1263} This has no basis in the present reality where various stakeholders involved exercise extra vigilance.

The debate of classifying labour rights as human rights is a desperate

\textsuperscript{1262} See the Levi's case, supra, p.376  
\textsuperscript{1263} See our discussion in Chapter Four, ante
attempt to circumvented obstacles that global economic theory of free-market economy creates. It is pre-emptive, in that it is hard for anyone to argue against a case for improved labour standards based on human rights. The weakness of this approach lies in its creation of a hierarchy of rights. The core labour rights are a classification of cross-cutting issues. The rights contained in the list generally speaking are either civil or political rights. The two considered most important, on the list i.e. freedom of association and the right to collective bargaining are basic human rights recognized by major human rights instruments. However the right to health and safety is considered not so important. This is wrong in our view as the enjoyment of all the other rights is dependent on good health and safe living and working environments. In view of current knowledge of the social cost of poor health and safety it is time to upgrade health and safety to a core labour right and given the prominence the other rights have been given.

An examination of SADC treaty indicates that though social concerns such as living and working conditions of people of the region are among its prime concerns, however there has not been in the last twelve years of its existence clear policy guidelines and mechanisms that could assist the realisation of the same. The misplaced emphasis on economic growth and development relegated social development of the region. One notable outcome of this policy vacuum has been

1264 See our discussion on the content of labour rights in Chapter III, supra
labour exploitation, poverty levels spiraling out of control and illiteracy and innumeracy levels of unparalleled dimensions. In such conditions it is inconceivable how a functional integration for the region can be achieved.

SADC's understanding of integration seems to have been that it is economic. This was and is wrong. There is a difference between regional integration and economic integration. The later refers to the integration of regional economies via the convergence of macro and micro-economic policies. The former is broader and encompasses economic and social integration. Social integration requires the reduction with the ultimate aim of total eradication of social and human development problems such as poverty, poor health status and gender imbalances among others.

SADC is a wash with such problems. To correct the situation the region needs polices that go to the core of the problem i.e. an appreciation of the dualism and/or mutuality of social and economic policies and its relevance to regional integration and sustainable development\textsuperscript{1265}.

**Social Policy**

In preceding chapters, we had an opportunity to look at the development of social policy in SADC. In chapters six and seven we

\textsuperscript{1265} See Article.5 (1) (a) of the treaty of SADC
concluded that the treaty of SADC could be regarded as a policy statement on social issues affecting its economic agenda. However the reality on the ground had been that social policy had been treated as a Cinderella body of regulatory pronouncements.

SADC's social policy before the social charter displayed a number of distinctive characteristics for instance treaty provisions were physically scattered and diffuse, and are not located in a single chapter or title. They are not organized conceptually around a single statement of what is regional social policy along the definition of integration. In that context, there has always been an unresolved tension between economic and social programmes within its policy framework i.e. Facilitating intra-SADC trade and investment and pursing agreed policy goals, which are focused on ensuring an increased level of social justice.

Further these provisions lack 'identity'. Unlike treaty provisions on which SADC is constructed, the social provisions in the charter cannot lay claim to an obvious consistency. Finally, they are weak on normative

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1266 Article.5 (2) (c), creation of appropriate institutions and mechanisms for the mobilisation of requisite resources for the implementation of programmes and operations of SADC and its institutions.

1267 See Article.5 (1) (a), such as promoting sustainable and equitable economic growth and socio-economic development that will ensure poverty alleviation with the ultimate objective of its eradication, enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration

1268 See Article 5A of the treaty.
content in that no enforceable social right which individuals could rely upon is guaranteed under the treaty.

The adoption of a social charter by SADC in August 2003 though too late too little is a welcome development. However the charter has its own shortcomings. Policy incoherence and deconcentration of the relevant treaty provisions remain a problem for instance provisions of social security\(^{1269}\) and living and working conditions\(^{1270}\) closely linked to health and safety\(^{1271}\) are physically disjointed.

A perusal of the charter reveals a shocking extent of external involvement in the making of the charter. In essence, it is not a truly home grown document. However as a blue print for social policy it a good starting point. The task for SADC is to localize the principles and ideals it enshrines. One route is through dialogue between the community court and state courts\(^{1272}\), which would consequently assist in the creation of community jurisprudence on social and economic issues addressed by the treaty and its subsidiary instruments. This would also help the process of harmonisation of economic and social policies in the region. Present dimensions of SADC’s social and human problems to say the least, are manifestations of past policy misconceptions.

\(^{1269}\) Article.10
\(^{1270}\) Article.11
\(^{1271}\) Article12
\(^{1272}\) The SADC court is discussed in Chapter six, pp 180-183.
An opportunity for SADC to right its past wrongs dawned in the late 1980's with the wind of democratic reforms weeping through the region. A right policy conception would have been the proper take off-point. Domestically there seems to be a trend in the region towards occupational health and safety legislation in the region attributable largely to civil society and trade union activities following democratization of most regimes in the region. For instance most there have been reviews of social legislations and Health and safety legislations have replaced post-independence Factories Acts in countries like Malawi\textsuperscript{1273} and South Africa\textsuperscript{1274}.

The adoption of the social charter provides a framework for coordinating social policy vis-à-vis health and safety in the region. The challenge for SADC is to assist member states fine-tunes their social policy and occupational health and safety legislation into community parameters of legislation and regulation.

The above immediately runs into the region’s perennial problem of resources and skills constraints. A solution to would be to seek external technical support in areas of need from organizations such as the ILO.

\textsuperscript{1273} The Occupational Health and Safety Act of Malawi was passed in 1997, three years after transition from one party -state to multiparty governance.

\textsuperscript{1274} The South African occupational health and Safety Act was passed in 1996, two years after emerging from apartheid rule into democratic governance.
World Trade Organization or other multilateral organizations such as the EU.

**Governance Issues**

SADC’s investment flows related to natural resource endowments are not sufficient for ensuring the growth and development of an economy. Investment capital seeks markets where returns are competitive with acceptable levels of risk. Economies that have low levels of inflation, positive real rates of interest and a convertible exchange rate have the basic prerequisites for attracting foreign investment. In addition, a stable business environment where contract law can be enforced is important.

Civil unrest and rapid changes in policies act as major disincentives for investors. The conflict in Zimbabwe is not helping the case for SADC economic recovery or investment attraction. Political factors are of great importance to an investor especially when dealing with developing and newly liberalized countries in particular those of sub-Saharan Africa such as Malawi. Regardless of potential economic benefits that Foreign Direct Investment in a nation presents, an investor may decide that potential risks outweigh probable benefits, especially if the investment is at a great risk of
being nationalized or expropriated\textsuperscript{1275}. An investor places great
weight on the political ideology and political stability that is found in
the foreign nation\textsuperscript{1276}.

Of importance to an investor are the experiences of other foreign
investors in that nation, the nation's practice with regard to payments
for expropriation, and the general attitude of the elite and powerful
towards foreign investment. While an investor, in many cases, has the
ability to obtain political risk insurance, the investor contemplating an
Foreign Direct Investment is usually seeking a sound, secure and long-
term investment and would prefer not to resort to compensation
provided by political risk insurance. Investors will normally have
increased motivation to invest in a market where the political situation
and the political attitude of the host country are positive. If SADC wants
to improve its pull factors for investment, it must strengthen its hold on
the application of the rule of law\textsuperscript{1277} and conflict resolution in the
region.

SADC has an important potential for the promotion of respect for
human rights, fundamental freedoms and principles of democracy and

\textsuperscript{1275} Political developments in Zimbabwe have negatively backfired on the economy and its
resonances are felt across the region.

\textsuperscript{1276} George. T: \textit{Foreign Direct Investment in Developing and newly Liberalized Nations}: 4

\textsuperscript{1277} Article 4 (c) of the treaty as amended.
it has, as a fundamental principle, a commitment to build, consolidate and strengthen democratic institutions founded on accountability, transparency, good governance and the rule of law. These objectives can only be achieved through the consolidation of democratic governance, mainstreaming of gender in the process of community building through regional integration and establishment of a sustainable and effective mechanism for conflict prevention.

Window on Occupational Health and Safety Regulation

One of the issues that come for consideration in SADC’s approach to development i.e. from donor aid to trade and investment is in relation to market regulation. Crucial is the regulation and management of economic entities such as multinational enterprises (MNEs). An MNE can be defined as any corporation that owns in whole or part, control and manages income generating assets in more than one country.\(^\text{1278}\) This definition distinguishes between an enterprise that engages in direct investment which gives the enterprise not only a financial stake in the foreign venture but also managerial control and one that engages in portfolio investment which gives the investing enterprise only a financial stake in the foreign venture without managerial control.

By contrast the UN has moved a way from this formula towards a distinction between multinational corporations (MNCs) and Transnational Corporations (TNCs). In their report the UN Group of Eminent Persons adopted the simple definition of MNCs as enterprises which own or control production or service facilities outside the country in which they are based. Such enterprises are not always incorporated or private, they can also be co-operatives or state owned entities.

Linking trade and investment with labour enables systematic study and analysis of the nexus that exists between economic policy and social consequences of global economic policy. This would assist in devising measures that would negate harmful social consequences of current global economic policy.

It is clear from our discussion that a semblance of a health and safety policy in the region is being put together under the auspices of the Employment and labour sector. The Social charter provides a policy framework for occupational health and safety regulation and management in the region. Specific instruments such as the code on the safe use of chemicals, code of practice on HIV/AIDS and Employment, Code of Practice on the employment of youth and a women are aimed at improving occupational safety, health and welfare in the region.
However their piecemeal development suggests that there was no policy coherence in the past. Each Instrument developed independent of the other. This development was reactionary in that it was in response to incidents in certain sectors of the economy or society such as death and poisoning resulting from unsafe use of chemicals in the region, or critical levels of HIV/AIDS.

The above suggests that occupational health and safety in the past has been Plan 'B' for SADC when in fact, ought to be Plan 'A'. This is fortified by the fact that the cumulative effects of occupational disease and accidents are making perceived economic gains and the process of integration illusory1279.

The problem had been compounded by lack of an organizing philosophy for occupational health and safety and how this relates to the economic agenda the region has embarked on. Increased trade and investment flows in the absence of a social policy that encouraged corporate social responsibility to say the least is a dis-service to the organisation's prime goals as spelt out in art.5 of the treaty.

The adoption of the social charter on 26th August 2003 by the summit provides the missing link, i.e. a framework for occupational health and safety regulation in the region. The task of carrying this forward falls on the Human and Social Development Directorate under the new the Regional Indicative Strategic Development plan (RISDP). What need to be done is for the directorate to give police guidance to member states of civil society organizations on occupational health and safety.

As the situation stands at present civil society’s role in SADC’s activities despite there being avenues in the treaty for their involvement, institutionalizing the same is slow and patchy. These need to improve if the policy goals laid out in article 12 of the charter are to be of any value.

On the positive side developments in occupational health and safety at SADC level are indicative of a realisation of the central role occupational health and safety has in trade and investment and ultimate social and economic integration of the region. The challenge is how to exploit these in ways that deliver development, decent work and improved working and living standards in the region.

\[1280\] In Article.5 (2) (b) of the SADC treaty in order to achieve its objectives set out in paragraph 1 of this Article, encourage the people of the Region and their institutions to take initiatives to develop economic, social and cultural ties across the Region, and to participate fully in the implementation of its programmes and projects.
Until the signing of the SADC charter on 26\textsuperscript{th} August 2003\textsuperscript{1281} there had never been a coherent policy at a community level providing for an effective supranational response to supranational social demands of globalisation and its economic agenda. The result had been a mushrooming of domestic regulatory responses of varying degrees of sophistication and effectiveness in the region.

It is interesting that SADC’s executive secretary in his pre-summit press briefing in commenting on the Charter said that key provisions of the draft charter\textsuperscript{1282} include freedom of association and collective bargaining\textsuperscript{1283}, freedom of movements\textsuperscript{1284}, equal treatment of men and women\textsuperscript{1285} as well as improvement of working and living conditions\textsuperscript{1286}(emphasis added).

\textsuperscript{1281} Para.39 of 2003 SADC Summit Final Communiqué. The Summit of Heads of State and Government of the Southern African Development Community (SADC), met in Dar es Salaam, Tanzania on 25 -2 6 August, and among other things Summit signed the SADC Charter on Fundamental Social Rights, which among other things, calls for creation of a conducive environment to facilitate closer and active consultations among social partners and in a spirit conducive to harmonious labour relations. www.sadc.int, see also SADC Leaders to sign Social Rights Charter at www.allafrica.com and Munetsi Madakufamba SADC Leaders approve mutual defence pact, charter on social rights, Southern African News at www.sardc.net/SADCsummit4.htm

\textsuperscript{1282} The charter was later adopted without amendments and the order of Articles has not changed

\textsuperscript{1283} Article.4

\textsuperscript{1284} Article.3. Though this right is not contained in its own Article it s part of the universal civil and human right covered by Article.3 of the charter.

\textsuperscript{1285} Article.6

\textsuperscript{1286} Article.11
Conspicuous by its absence on the list of key provisions was Art.12, which is the lead article for health and safety. The silence might either have been deliberate rate or unintentional. Whatever the case may be it displays some attitudes towards health and safety among policy makers in SADC. However, the fact art.12 is now a blue print of the issue is encouraging.

Whereas in the EU issues of occupational health and safety are high on government agendas and there is no shortage of public support for such policies as evidenced by the call in some EU countries such as the United Kingdom for the strengthening of corporate killing laws and trial, SADC as a region has a different set of priories. Their priority according to one official at the secretariat speaking off the record is HIV/Aids and Food insecurity. For this reason the optimism has to be a

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1287 Should senior managers in companies be held personally accountable for actions taken by the company, which lead to the accidental loss of human life? Moves are well advanced in the UK to make this possibility into a reality. The current position covers corporate manslaughter. The existing laws have been criticised in recent years for being an ineffective sanction against criminal negligence, due to the requirement to prove that an individual who "is considered to embody the company" is found guilty. There is no established definition for what this might mean, so in each case the courts are required to identify the presence of the company's directing mind and will. In May 2000, the Government published draft proposals to create a new offence of corporate killing, plus three new offences to cover individuals who cause death by recklessness or gross carelessness. The consultation session for these proposals has passed, and the Government is now considering its final proposals. See BBC News, Wednesday, 20 March, 2002, 14:54 GMT 'Corporate killing' law demanded' at www.news.bbc.co.uk

1287 See our discussion on the content of labour rights, supra.
measured one. However an economic policy that takes cognisance of this fact will compliment the deficit in terms of result and contribution towards working and living standards in the region.

Politically, liberal economic policies the region has embarked on will lack social legitimacy, unless they can be seen to be capable of translating into improved living and working standards of the people of the region through poverty reduction, improved living and working conditions. The global statistics (of which developing countries like those of SADC are the worst affected) for occupational health and safety is scary1288. SADC needs to realise that occupational health and

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1288 In a booklet issued for the world day entitled "Safety in numbers" the ILO reviews current knowledge about the toll of workplace illness, injury and death which, it says, costs some $1,250,000 million US dollars ($1.25 trillion) in annual losses in global gross domestic product (GDP). The ILO said its estimate was based on a calculation that accidents and work-related illnesses cost some 4 per cent of annual GDP. In addition, the report says that costs borne by society due in part to work-related accidents and diseases include early retirements caused by disability which, on average, shorten working life by about five years; absenteeism that varies from 2 to 10 per cent, depending on sector and type of work; unemployment that may stem from impairment of working capacity due to illness and affects an average of one-third of all unemployed people; and poverty at home caused by the partial or full loss of income, especially among women workers. The report also cited ILO data showing that some 5,000 job-related deaths occur each day, or some 2 million each year. In addition, the report notes that workers suffer approximately 270 million occupational accidents - of which 355,000 are fatal - and 160 million occupational diseases each year, including some 12,000 child labourers who die from work-related causes. The booklet also highlights the impact of poor health and safety on a company's bottom line and provides information on how workers and employers can work hand-in-hand to create a "safety culture" to improve workplace occupational safety and health. See International events to mark World Day for Safety and Health at Work Thursday 24 April 2003 (ILO/03/18). Safety in numbers: Pointers for a global safety culture at work, International Labour Office, Geneva, 2003. ISBN 92-2-113741-4.
safety are politically deliverable and economically sustainable. The onus is on SADC to offer policy guidance and governments in the region to implement the policy.

The moral case for occupational health and safety in the region needs no emphasis. Occupational health and safety issues are also human rights issues\(^{1289}\) and as discussed elsewhere is human rights are economically efficient. Labour in the region has suffered from political repression in the past such that the need for human rights for the region needs no emphasis. Industrial democracy and human rights are an economic good\(^{1290}\). The above are important factors that cannot be left out in the region's integration equation.

SADC has never had a self-standing social policy. What it has had was an economically driven social policy premised on the wrong assumption that economic growth in member states would naturally translate into social progress.

The political origin of the organisation partially explains the policy option. Its origin in the Front Line States (FLS) means that its structures were initially designed for the task that it stood for, i.e. Liberation from

\(^{1289}\) See our discussion on the content of labour rights, post.

\(^{1290}\) M.Olivier and E.Kalula *Beyond Labour Market Regulation: Social Protection and Future of Labour Law in Southern Africa*, Rand Afrikaans and Cape Town, University, South Africa
Colonial rule. The political case at the time out weighted the economic and social case. After independence, the policy changed to economic and social development of the region. However structures and institutions were not adapted to take on new agendas and so was the mindset of the leadership of the day.

In post independence Africa leaders took upon themselves to think for the population they presided over. Some had the arrogance to call that style of their leadership, the African version of democracy, whatever that meant it was a receipt for their own disaster and fall from glory, either through the barrel of a gun\textsuperscript{1291} or the ballot box in later years\textsuperscript{1292}.

The generation of leaders that ushered in independence presiding over illiteracy and innumeracy rates of unparalled dimensions and consequently adopted paternalistic approaches and attitudes to development. They convinced themselves that the uninstructed minds could never engage with the instructed in a meaningful social and economic debate on issues affecting their lives.

\textsuperscript{1291} Ghana's Kwame Nkrumah was overthrown and so was Zaire's Mabuto

\textsuperscript{1292} Malawi's Dr. Banda lost in multi-party general election of 1994. A year before that Zambia's Kenneth Kaunda lost in similar elections
The result of this was that participation and dialogue on issues of public concern such as labour stagnated and social democracy only existed in name. In such an atmosphere social issues were always treated as peripheral to political and economic goal. However the 1990s saw a wave of political change and with it, the advent of participatory democracy. Since then there has been intense trade unionisation and civil society activity, which explains the sudden emergence of labour and social issues on the regional agenda as well as on the domestic front. The problem is one of implementation.

Developments in sectors of international commerce such as chemical and pesticides present us with some explanation for the linking occupational health and safety with international trade and investment. The creation of 'the international right to know' in the form of the Prior Informed Consent\textsuperscript{1293} points to an international jurisprudence in favour of social regulation of global economic activities\textsuperscript{1294}. This is also an indication of the center-stage occupational health safety and environmental issues ought to be occupying in a global economy warranting the linking of trade investment and labour

\textsuperscript{1293} See the proceedings of the Conference of Plenipotentiaries on the Convention on the Prior Informed Consent Procedure for Certain Hazardous chemicals and Pesticides in International Trade, Rotterdam, 10-11 September 1998

as an aspect of good practice of international economic relations.

Developments on the continent of importance to occupational and social policy development include the reorganization of the Organisation of African Unity (OAU) into the African Union (AU). The fusing of the African charter and the Abuja treaty into the Constitutive Act of the AU has the effect of streamlining continental social and economic policy that would enable the Union to give clear and better policy guideline to member states without potential duplication.

Relevant to our discussion is the creation of the Economic and Social Council comprising exclusively of civil society organizations (Civil Society Organizations) appointed from each member state. The entrenched role of civil society into policy formulation may create a culture of participatory industrial democracy that would have a multiplier effect among member states. If this happens it would compliment the apparent lack of civil society entrenchment in regional set ups like SADC.

Further under the constitutive Act economic and social policy are to be developed in tandem. This treatment of the two as merely two side of the same coin offers the first line of defense against corporate abuse. It should then be possible to develop economic policies that promote social progress. For this to be replicated into Regional
Economic Communities (RECs) that are building blocs of the African Economic Community (AEC) there is need for linkages between the AU and RECs.
CHAPTER TWELVE
The Way Forward

Introduction

Having considered questions posed at the beginning of the inquiry and coming to the conclusions set out in the previous chapter, this chapter proceeds to make suggestions on the way forward.

The principal task of the inquiry was to investigate the role of occupational health and safety in SADC’s regional integration programme. A consideration of the dualism of social and economic policy and possible dilemmas of trade and investment attraction and retention over occupational health and safety was undertaken and conclusions drawn.

In winding up the discussion we will be considering possible areas for improving the regulations and management of trade, investment and labour issues within the context of SADC’s integration programme and ways of achieving such improvements
Policy Conception

Regional integration is both social and economic and it is important that policy makers have this at the back of their minds\textsuperscript{1295}. The history of SADC indicates that integration was primarily conceived as economic with the social sides as a by-product. This was clearly wrong. Functional regional integration requires social as well as economic integration\textsuperscript{1296}. On the social side, occupational health and safety have a fundamental role to play through its effects on living and working conditions\textsuperscript{1297}.

A policy benchmark that incorporates this will ensure that health and safety is not subordinated to trade and investment attraction or retention\textsuperscript{1298}. This would give social legitimation to SADC’s programmes and objectives\textsuperscript{1299} that would in the process facilitate implementation at state level, as local opposition would be kept to a minimum. This is more crucial at this formative stage than would be at any stage in the community’s development.

SADC’s obsession with its economic agenda is further evidenced by the passing of its trade protocol on 24\textsuperscript{th} August 1996 driven by the

\begin{itemize}
  \item[1295] This realisation is now reflected in the amended Article.5 (1) (a) of the SADC treaty
  \item[1296] Op.cit Para.iii of the preamble to Trade protocol
  \item[1297] cf the Single European Act. This Act fundamentally identifies the need to eliminate technical barriers to trade, one of which was the varying legal standards for health and safety requirements throughout the community
  \item[1298] Department of Trade and Industry (UK), The Single Market: The Facts (1990)
  \item[1299] Laid down in Article.5 of the Treaty
\end{itemize}
recognition that the development of trade and investment is essential to the economic integration of the Community\textsuperscript{1300}. The protocol stresses the need for trade and investment as variable avenues for economic integration but does not link this to a wider integration programme.

In its reference to chapter IV, article 28 of the Abuja Treaty calling for the establishment of regional and sub-regional economic groupings as building blocs of the African Economic Community, the protocol acknowledges the objectives of the Abuja treaty\textsuperscript{1301} i.e. the promotion of economic, social and cultural development and the integration of African economies in order to increase economic self-reliance and promote an endogenous and self-sustained development\textsuperscript{1302}. The other objective of the Abuja treaty relevant to our discussion was the promotion of member state’s co-operation in fields of human endeavour in order to raise the standards of living in member states, and maintain and enhance economic stability, progress, development and the economic integration of the Continent\textsuperscript{1303}.

What is apparent in the above formula is the hope by stakeholders that social and economic progress would happen in tandem. There is a realisation and expression of the acknowledged role of dualism of

\textsuperscript{1300} Vide Para.iii of the preamble
\textsuperscript{1301} Now superseded by the Constitutive Act of the African Union
\textsuperscript{1302} Article 4 (1) (a) the Abuja Treaty
\textsuperscript{1303} Ibid, Article 4 (1) (c)
social and economic policy and its role in continental integration. The reference to sustainable-development\textsuperscript{1304} and raised standards of living\textsuperscript{1305} along side the desire to achieve economic self-sufficiency attests to this submission. The use of the term sustainable economic growth indicates a desire to achieve economic growth that takes in account instead of compromising social consideration of the region.

The concept of sustainable development originates from the 1987 World Commission on Environment and Development Report (Brutland Report) entitled. The report defined sustainable development as development that seeks to merge economic benefits of development with efforts to enhance social and environmental attributes of the community\textsuperscript{1306}.

However the SADC Trade protocol plays down the social side and proceeds as if social progress will invariably happen as a result of assumed economic progress\textsuperscript{1307}. In this formula the role of occupational health and safety is blurred. Health and safety is only raised in the context of sanitary and Phytosanitary measures (SPS)\textsuperscript{1308}. These are measures applied to protect human or animal life from risks.

\textsuperscript{1304} See Para ix of the preamble as read with Article.5 (1) (a) of the Treaty as amended
\textsuperscript{1305} Ibid
\textsuperscript{1306} The term sustainability is an emerging concept that may help guide development towards some long-term solutions. It is sometimes described as a way of living responsibly today, so that life will proceed in such a manner that allows our children, grandchildren and all future generations to live in a clean and healthy environment.
\textsuperscript{1307} See the preamble to the SADC Trade Protocol
\textsuperscript{1308} Article.16 of the protocol
arising from additives, contaminants, toxins, or disease-causing organisms in their food; to protect human life from plant- or animal-carried diseases; to protect animal or plant life from pests, diseases, or disease-causing organisms; and to prevent or limit other damage to a country from the entry, establishment, or spread of pests.

They include measures taken to protect the health of fish and wild fauna, as well as of forests and wild flora. The World Trade Organisation's Agreement on the Application of Sanitary and Phytosanitary Measures, which entered into force with the establishment of the World Trade Organization on January 1, 1995, is intended to prevent SPS measures from restricting or distorting international trade. For a fuller discussion of the application see the World Trade Organisation agreement on the application of sanitary and Phytosanitary measures\textsuperscript{1309}.

The SADC trade protocol makes the usual rider to the right of states to use SPS prohibition made in the SADC trade is that in the course of

\textsuperscript{1309} A World Trade Organisation agreement establishing a set of rules, principles, and benchmarks for World Trade Organisation members to ensure that sanitary and phytosanitary trade measures are justified and do not constitute disguised barriers to international trade. This agreement clarifies which factors a member may take into account when imposing health protection measures. Unlike the Agreement on Agriculture, the SPS Agreement does not impose any quantitative and legally binding schedules of concessions. Prior to the negotiation of the SPS Agreement, many food safety, animal, and plant health regulations fell within the scope of the 1979 Agreement on Technical Barriers to Trade (TBT), also called the Standards Code. The SPS Agreement complements the new World Trade Organisation Agreements on Agriculture and on Technical Barriers to Trade by addressing measures to protect human, animal, and plant life and health.
liberalising intra-trade safety and health should not be compromised\textsuperscript{1310}. In practice for this to be of any significance, it would require a functional and coherent competition policy, which as we saw is an absent feature in the SADC formula.

The way forward is for SADC to link social and economic policy to its wider goal of regional integration. The formula in Art.5 of the treaty envisages regional integration but the reality on the ground has been that economic integration is what has been emphasised. The treaty of SADC initially in Art.5 (1) (a) sought to achieve development and economic growth, alleviate poverty, enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration. Art. 5 has been amended and the new Art.5 (1) (a) reads:

'\text{The objectives of SADC shall be to promote sustainable and equitable economic growth and socio-economic development that will ensure poverty alleviation with the ultimate objective of its eradication, enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration}'

The change in the language employed is no semantics' accident. It is a reflection of the realisation of the dualism of economic and a social

\textsuperscript{1310} Ibid, Article.17
policy in the process of regional integration. However social programmes that would give effects to the new approach have not moved in tandem with the economic agenda. There is need to make sure that social and economic policy is equally developed and implemented. The same holds true for occupational health and safety. The social charter as a blue print for social policy is the recent policy attempt to remedy the situation. However challenges remain requiring a bottom–top involvement in policy input which would involves agencies such as civil society organisations, trade unions, media and professional bodies to name a few.

Non-Tariff Barriers to Trade

The term Non-tariff barriers (NTBs) traditionally refers to all forms of action which may be taken by, or with the authority of, the State, legislation, by-laws, the administrative practice of any public authority, injunctions or interdicts pronounced by courts, and rules promulgated by professional regulatory bodies which are capable of hindering directly or indirectly, actually or potentially, trade between the Parties.\textsuperscript{1311}

Put the other way these are government measures other than tariffs that restrict imports or that have the potential for restricting international trade, even though they may not always do so. NTBs include import monitoring systems and variable levies, as well as measures that are internationally perceived as trade restrictive, even though a trade-restricting intent or effect cannot objectively be ascribed to them.

The SADC trade protocol defines NTBs as barriers to trade other than import and export duties. Such measures have become relatively more conspicuous impediments to trade as tariffs have been reduced during the period since World War II. Art. 6 of the trade protocol enjoins member states to adopt policies and to implement measures aimed at eliminating all existing forms of NTBs and to refrain from imposing any new NTBs.

Varying health and safety standards in the region can potentially produce price distortions that would hinder the free movement of goods and services in the region. Member States now recognize that sustainable economic growth is largely dependent on trade.

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1312 Article 1 of the Protocol
1313 Article 6 (a)
1314 Article 6 (b)
1315 See our discussion in Chapter six on the need for occupational health and safety in SADC.
liberalization and outward-oriented regional integration within the framework of the World Trade Organisation, and within a stable macroeconomic environment. This encourages increased competition, enhanced technology transfers and higher rates of investment and will lead to more efficient allocation of resources.

Trade and investment are important forms of integration within SADC. The recent progress in negotiating better market access between member states is expected to encourage intra-regional trade, entailing substantial economic benefits for all member countries.

In addition to focusing on removing tariff and non-tariff barriers, attention should also focused on the market-segmenting effects of domestic regulatory policies such as health and safety, product standard regulations, national competition policies, professional licensing and certification regimes, prudential supervision requirements, and administrative procedures that are associated with the enforcement of regulations (e.g. conformity assessment procedures and customs clearance practices).

Such policies may have an effect analogous to Non-Tariff Barriers (NTBs), even though the intent may not be to discriminate against foreign suppliers. They have the potential to segment markets and
distort or reduces competition and in the process becomes a stabiling block to the programme of regional integration.

In order to maximize the benefits from market integration and increased engagement with the world economy, SADC needs to address these issues within the context of a socio-economic policy that acknowledges the link that exist between trade, investment and labour.

The recent passing of the social charter as a blue print for occupational health and safety policy in the region though too little, too late is an encouraging development. However lack of a clear strategy as to how the same would be implemented is a source of worry. The current approach of wholesale across the board implementation does not inspire a lot of expectation. The grand vision of the social charter realistically speaking is not attainable in the medium term. It simply replicates national attainments at community level\textsuperscript{1316}. If the bold pronouncements of the social charter are to be achieved in a two-tier polity, SADC will need to occupy a new social regulation space\textsuperscript{1317}.

\textsuperscript{1316} Recall that the evolution of social policy in SADC is way behind national developments. It is merely a filling-in exercise

\textsuperscript{1317} See discussion on social regulation in Chapter five
One way forward in the present scenario would be for SADC to specialise, concentrating its efforts in certain areas rather than trying to thinly spread it. Health and safety is one area that has historically been pushed to the sidelines, yet in the current global political economy is an indispensable part of the jigsaw.

Conversely, there is little justification for SADC moving to occupy a field which is already exhaustively regulated by national law such as unfair dismissal\(^\text{1318}\) or where it would provide little added value such as trade and investment\(^\text{1319}\). This process should be gradual extending to other areas within a specified time frame.

The regional indicative strategic plan contemplates a fifteen year period and in our view this would be a good time framework for a satisfactory utilisation of SADC’s limited resources and balancing of social and economic policy that would reconcile potentially competing social and economic demands of trade and investment on the one hand and health and safety i.e. protection of working and living conditions.

\(^{1318}\) Miguel Rodrigue-Pineroy Bravo-Ferrer, Individual dismissal in the Member states of the European Community: The Advantages and Difficulties of Community action, Report for the Commission of the EC, DGV, V/5767/93 EN

Towards better social governance

International discussions on the interface between globalization and social development have evolved in several fora, including at the UN Millennium Summit, and at different tempi. These discussions reflect overall support for the promotion of core labour standards and greater recognition of social development as a necessary component of sustainable development. Yet they also clearly underline the difficulty of addressing the interaction between trade and social issues in a manner that duly takes account of the concerns of all parties.

The greatest concern is that a link between trade and social issues could be abused for protectionist purposes or opens the door for increased recourse to trade sanctions. It may also be noted that there has a significant growth in recent years in private voluntary initiatives to promote the implementation of core labour standards, developed either by companies themselves or designed to support their activities. These can be seen as contributing to the improvement of social

1320 An overview of international developments and activities by international organisations is found ILO document for the November 2000 Working Party on the Social Dimensions of Globalisation: Developments in other organisations: Overview of developments in other international organisations and bodies relevant to the work of the Working Party, GB.279/WP/SDG/1.
governance and the promotion of core labour standards, alongside measures involving governments and other public actors.\textsuperscript{1321}

The 1995 World Summit for Social Development addressed the social dimension of globalization for the first time at the highest political level and thus gave full recognition to the social component of sustainable development.

In the Copenhagen Declaration on Social Development, participating countries recognized that globalization creates opportunities for sustained economic growth and development of the world economy, as well as for sharing experiences and for cross-fertilization of ideals, cultural values and aspirations. At the same time, they recognized that poverty, unemployment and social disintegration have too often accompanied the changes and adjustment processes.

The Copenhagen Declaration identified the challenge of managing the process of globalization so as to increase its benefits and mitigate its potential negative effects upon people. In the Programme of

Action[1322], governments committed themselves to “safeguarding and promoting respect for basic workers' rights, including the prohibition of forced labour and child labour, freedom of association and the right to organize and bargain collectively, equal remuneration for men and women for work of equal value, and non-discrimination unemployment, fully implementing the conventions of the International Labour Organization (ILO) in the case of States parties to those conventions, and taking into account the principles embodied in those conventions in the case of those countries that are not States parties to thus achieve truly sustained economic growth and sustainable development[1323].

Thus, the Summit identified core labour standards for the first time, and agreed on their universality by making them the responsibility of all governments, not just those that have ratified the relevant conventions.

The Copenhagen formula simply reiterates what the Treaty of SADC provides[1324] and its effect is that it gives those ideals an international stamp of approval. It is imperative then for SADC that it sets up

[1322] Paragraph 54 (b): Expansion of productive employment and reduction of unemployment, Enhanced quality of work and employment.


[1324] Article 5 of Treaty as a mended
institutions that would give efficacy to this. One such is the institution for occupational health and a safety and unreleased involvement of social partners in its programmes.

**Trade and Foreign Direct Investment**

There are many reasons why foreign direct investment (Foreign Direct Investment) has become a much-discussed topic. One is the dramatic increase in the annual global flow between 1985 and 1995, from around $60 billion to an estimated $315 billion, and the resulting rise in its relative importance as a source of investment funds for a number of countries.

Stocks of Foreign Direct Investment, in turn, have been growing and estimates suggest that the sales of foreign affiliates of multinational corporations (MNCs) exceed the value of world trade in goods and services (the latter was $6,100 billion in 1995), that intra-firm trade among MNCs accounts for about one-third of world trade, and that MNC exports to non-affiliates account for another third of world trade, with the remaining one-third accounted for by trade among national (non-MNC) firms.

The keen interest in Foreign Direct Investment is also part of a broader interest in the forces propelling the ongoing integration of the world economy, or what is popularly described as “globalization”. Together with the more or less steady rise in the world’s trade-to-GDP ratio, the increased importance of foreign-owned production and distribution facilities in most countries is cited as tangible evidence of globalisation.

Foreign direct investment is also viewed as a way of increasing the efficiency with which the world’s scarce resources are used. A recent and specific example is the perceived role of Foreign Direct Investment in efforts to stimulate economic growth in many of the world’s poorest countries.

Partly this is due to continued decline in the role of development assistance (on which these countries have traditionally relied heavily), and the resulting search for alternative sources of foreign capital. More importantly, Foreign Direct Investment, very little of which currently flows to the poorest countries, can be a source not just of badly needed capital, but also of new technology and intangibles such as organizational and managerial skills, and marketing networks.

Foreign Direct Investment can also provide stimulus to competition, innovation, savings and capital formation, and through these effects, to job creation and economic growth. Along with major reforms in
domestic policies and practices in the poorest countries, this is precisely what is needed to turn-around an otherwise pessimistic outlook.

**Social Capital**

One of the constraints to SADC’s growth and integration into the world economy is the lack of an adequate number of well-educated and skilled people who are also healthy\(^\text{1326}\). Social sector issues are primarily dealt with at national level, while regional efforts are concentrated on areas where there is a real benefit from regional cooperation. The region continues to experience a large outflow of skilled personnel to the developed world, particularly in the fields of medicine, teaching, engineering, accounting and financial management.

This has serious implication health and safety policy. The shortage of medical personnel means that it is hard for governments to provide essential medical services to rural populations where a significant number of the workforce lives and works\(^\text{1327}\). A watered-down version

\(^{1326}\) The health status of SADC region has been hard hit by the prevalence of HIV/AIDS pandemic which is affecting mainly the economically active population.

\(^{1327}\) See World Development Report 2004: *Making Services Work For Poor People*. The report says that too often, key services fail poor people - in access, in quantity, in quality. This imperils a set of development targets known as the Millennium Development Goals (MDGs) which call for a halving of the global incidence of poverty, and broad improvements in human development by 2015. The report provides powerful examples of where services do work, showing how governments and citizens can do better. There have been spectacular successes and miserable failures in the efforts by developing countries to make services work. The main difference between success and failure is the degree to which poor people
of rural health services fails to adequately respond to occupational health and safety needs of the rural workforce\textsuperscript{1328}. The way forward is for SADC to give strategic direction and guidance on rural health policy in the region that would rise up to the challenge of a liberalised global economy\textsuperscript{1329}.

Insufficient levels of education and training are impediments to growth and development. At regional level, this can be addressed through a strategy aimed at pooling together resources to produce the required skills, promotion and coordination of policies and the formulation of policies promoting the participation of the private sector.

\textsuperscript{1328} The region faces a serious social and health problem with the high incidence of HIV/AIDS and the prevalence of malaria, tuberculosis and other communicable diseases. In order to address the poor status of health in the region, SADC signed a Protocol on Health in 1999 and has since adopted a policy framework with five biennial priorities.

\textsuperscript{1329} Ronelle Burger, and Servaas van der Berg; The Stories Behind the Numbers: An Investigation of Efforts to Deliver Services to the South African Poor November 1, 2002 p.74. This report for the World Bank Group is focused specifically on the poor and aims at addressing two central questions pertaining to the poor: “What does the South African government spend on the poor?” and “How effective has pro-poor alternative service delivery models been in South Africa?” It concludes among other things that the constraint at work … is not (only) finance, but the limited real resources available to the economy. Competent teachers, nurses, doctors and community workers are scarce, as is the capacity to produce books, medical supplies, and building materials. So the growth and improved distribution of social services must be viewed as the growth and improved distribution of the inputs required for delivering these services. http://econ.worldbank.org/wdr/wdr2004/library/doc?id=28003
The foundations for SADC's development are the work of its people on farms, in mines, in factories and offices and of those toiling in the back alleys and on the street corners of the massive informal economy of the region. African employers, unions and employment and labour ministers know better than anyone does the challenges of creating opportunities for women and men to work productively and earn for themselves a decent livelihood.

Some of the barriers to a faster pace of job creation and poverty reduction lie in the unfair nature of the emerging system of rules governing international economic relations. Others are to be found inside SADC itself. Action to overcome these obstacles to development is urgently needed. Few organisations are better placed than the ILO, with its roots embedded in the world of work and its capacity to dialogue with major international institutions, to address these challenges.

At local level, the ILO, together with its tripartite constituents, has launched hundreds of community-based projects aimed at, for example, improving skills formation, developing small enterprises, extending micro insurance and micro finance, eliminating child labour.

\footnote{One area of differences between the developed world and the developing world is in relation to agricultural subsidies which developed countries are extending to farmers in their countries but developing countries are not allowed to do the same. This seriously disadvantages farmers in developing countries vis-à-vis market competition.}
and ending gender and other forms of discrimination. Very many demonstrate what can be achieved by simply giving people a chance to develop and use their capabilities.

If SADC is to realistically get on track for halving the incidence of extreme poverty in region by 2015, as called for by the United Nations Millennium Summit\textsuperscript{1331}, there is need to scale up our efforts and place programmes to promote more and better jobs at the heart of SADC’s development strategy. That calls for the integration of the ILO’s decent work country programmes with national development strategies and the mobilisation of international financial resources.

SADC as is true of the African continent has tremendous growth and development potential. Statistics on the nature and extent of poverty and inequality show, however, that the region is far from realizing its latent power of human and natural capital. Labour markets in the region are characterized by an exploding urban informal economy

\textsuperscript{1331} The Millennium Development Goals are an ambitious agenda for reducing poverty and improving lives that world leaders agreed on at the Millennium Summit in September 2000. For each goal one or more targets have been set, most for 2015, using 1990 as a benchmark: for the eradication of extreme poverty and hunger: Target for 2015: Halve the proportion of people living on less than a dollar a day and those who suffer from hunger. More than a billion people still live on less than US$1 a day: sub-Saharan Africa, Latin America and the Caribbean, and parts of Europe and Central Asia are falling short of the poverty target. ; Achieve universal primary education: Target for 2015: Ensure that all boys and girls complete primary school. See \url{http://www.undp.org/mdg/}
that coexists with a predominantly rural, agriculture-based labour force. In towns and country, women are on the lowest rungs of the job’s ladder.

The writer is convinced, as does many other organizations such as the ILO and development aid partners such as the EU that decent work for all is the core of a socially inclusive and economically dynamic regional development framework. Sustainable development is founded on productive employment. When people can find work that yields a regular income sufficient to meet the basic needs of their families that would be the time SADC could be saying it is on the way to not just reducing but eradicating poverty.

In part, this reflects the organic growth of employment in the region and is testimony to the resilience of African economies. But it also reflects the difficulty of the formal economy to create long-term sustainable employment for urban dwellers, especially newly arrived migrants to cities. From a policy perspective, this suggests that not only should policies focus on improving productivity, investment and skills development, occupational safety and wage levels in smaller enterprises, but also – and perhaps more importantly – that policies need to be put in place to improve significantly the ability of the formal economy to absorb larger numbers of the urban labour force into long-term employment. Development agencies concerned with SADC labour market issues should therefore concentrate on matters such as investment incentives, the structure of domestic production, financial markets and similar issues – all of which merit attention to ensure that the real economy is conducive to employment expansion.

Report of the Director-General: Decent work for Africa’s Development Tenth African Regional Meeting
Addis Ababa, December 2003 pp1-5

Para. ix of the preamble to the Treaty of SADC (as amended)
Ibid, Article 5(1) (a)
The Role of the SADC Tribunal

SADC is constituted as a rule-based organisation\textsuperscript{1336} that seeks to promote the rule of law and encourage good governance through democratic initiatives\textsuperscript{1337}. To this end the treaty makes provision for the establishment of a community court\textsuperscript{1338}. The court is endowed with jurisdiction over all disputes and all applications referred to it in accordance with the Treaty and the Protocol\textsuperscript{1339}.

The central roles of the court in the integration process need no emphasis. It has a pioneering role in harmonising social and economic policy through judicial interpretation and application of community legislation. The harmonisation of socio-economic policies envisaged in Art.5 (1) (a) of the treaty can only be achieved if there is universal a placation and interpretation of community legislation. The dialogue between state courts and the community is intended to assist state courts in applying community standards in domestic courts\textsuperscript{1340}.

\textsuperscript{1336} Article 3 (a) of the Treaty
\textsuperscript{1337} Article 4 (c) as read with Article 5 (c) of the treaty
\textsuperscript{1338} Ibid, Article 9(g) and Article 16 as read with Art.2 of the protocol on the tribunal and rules of procedure thereof, of 7th day of August 2000
\textsuperscript{1339} Article 14 of the Protocol
\textsuperscript{1340} Ibid, Article 16
It is worrying that at the time of writing this thesis the tribunal was not operational. Plain speaking it is not considered a priority. This is unfortunate. The way forward is for SADC to speed up the operationalisation of the court and encourage dialogue between state courts, institutions and the tribunal.

The Role of the Media

This is a precept that is deeply ingrained in democratic theory and practice. As early as the 17th century, Enlightenment theorists had argued that publicity and openness provide the best protection against tyranny and the excesses of arbitrary rule. In the early 1700s, the French political philosopher Montesquieu, raging against the secret accusations delivered by Palace courtiers to the French King, prescribed publicity as the cure for the abuse of power. English and American thinkers later in that century would agree with Montesquieu, recognizing the importance of the press in making officials aware of the public’s discontents and allowing governments to rectify their errors.\textsuperscript{1341}

In new democracies such as those of SADC, the expectation is that the media would help build a civic culture and a tradition of discussion.

and debate which was not possible during the period of authoritarian rule. Information and critical public discussion are inescapably important requirements of good public policy. Transparency guarantees (through the freedom of the press) have a clear instrumental role in preventing corruption, financial irresponsibility and underhanded dealings.\textsuperscript{1342}

Since then, the press has been widely proclaimed as the "Fourth Estate," a coequal branch of government that provides the check and balance without which governments cannot be effective.\textsuperscript{1343} For this reason, democrats through the centuries have tended to take the Enlightenment's instrumentalist view of the press. Thomas Jefferson, for all his bitterness against journalistic criticism celebrated the press, arguing that only through the exchange of information and opinion through the press would the truth emerge. Thus the famous Jeffersonian declaration:

"Were it left to me to decide whether we should have a government without newspapers or newspapers without government, I should not hesitate to prefer the latter."\textsuperscript{1344}


\textsuperscript{1344} Visit \texttt{www.unpan1.un.org}
Since the 17th century, the role of the press as a forum for public discussion and debate has been recognized. Today, despite the mass media's propensity for sleaze, sensationalism and superficiality, the notion of the media as watchdog, as guardian of the public interest, and as a conduit between governors and the governed remains deeply ingrained. Democracy requires the active participation of citizens. Ideally, the media should keep citizens engaged in the business of governance by informing, educating and mobilizing the public. In many new democracies, radio has become the medium of choice, as it is less expensive and more accessible.

FM and community radio have been effective instruments for promoting grassroots democracy by airing local issues, providing an alternative source of information to official channels, and reflecting ethnic and linguistic diversity. The Internet, too, can play such a role, because of its interactivity, relatively low costs of entry and freedom from state control.

The media can also help build peace and social consensus, without which democracy is threatened. The media can provide warring groups mechanisms for mediation, representation and voice so they can settle their differences peacefully.

The media have been able to assert their role in buttressing and deepening democracy. Investigative reporting, which in some cases has led to the ouster of presidents and the fall of corrupt governments, has made the media an effective and credible watchdog and boosted its credibility among the public. Investigative reporting has also helped accustom officials to an inquisitive press and helped build a culture of openness and disclosure that has made democratically elected governments more accountable\textsuperscript{1346}.

SADC presents us with a unique case where the literacy levels are very low which limits public access to information. The media can play a crucial filling role\textsuperscript{1347}. This can be for interest of both governments and SADC in selling its policies to citizens in member states. It can also assist the public understand their destiny within the SADC agenda better which would give social legitimacy to SADC's programmes.

\textsuperscript{1346} This is what is envisaged in para vii of the treaty preamble as read with Article.5 (1) (b) of the said Treaty.
In terms of occupational health and safety the media will have a crucial role to play in the enforcement and promotion of social standards by creating a platform for discussion and civic awareness. The case of Levis Strauss is a fitting footnote to how public relations can impact on corporate social responsibility. It is important for SADC to create a culture of press freedom, responsible journalism and an active role of the civil service organisations such as the media in its programme input\textsuperscript{1348}

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Annexes

1. SADC’ cross membership
2. Survey Questionnaire
Annex .1

COMESA Common market for East and Southern Africa

SADC Southern African Development Community

SACU Southern Africa Customs Union

EAC East African Community

IOC Intergovernmental Oceanographic Commission
IGAD is the successor organization to the Intergovernmental Authority on Drought and Development (IGADD), created in 1986 by six drought-stricken East African countries to coordinate development in the Horn of Africa. IGAD headquarters are in Djibouti. IGAD aims and objectives include promoting peace and stability in the subregion and creating mechanisms within the subregion for the prevention, management, and resolution of inter-State and intra-State conflicts through dialogue. IGAD Member States are: Djibouti, Eritrea, Ethiopia, Kenya, Somalia, Sudan, and Uganda. Eritrea became the seventh member of IGAD following its independence in 1993. Source: Fact Sheet; Bureau of African Affairs Washington, DC November 12, 2002
This is a questionnaire for Zolomphi Nkowani of Salford University in the United Kingdom, who is carrying out a research on regional integration and the dualism of economic and social policy in the SADC region and its impact on occupational health and safety. If you have time, please fill it in and send it back to: znkowani@hotmail.com or at the address below.

Please answer the following questions by highlighting the relevant selections, and in some cases, by writing in the space provided. Proceed on a separate sheet if necessary.

Biographical Data

Gender M F


Nationality ____________________________

Occupation ____________________________

Type of organization ____________________________

Tenure in current position ____________________________

Please indicate whether you agree or not with the statements below, by highlighting your response on the scale provided where applicable:
1- Strongly Disagree
2- Disagree
3- Unsure
4- Agree
5- Strongly Agree

What do you understand by health safety at work?

__________________________________________________________________________________

__________________________________________________________________________________

__________________________________________________________________________________

Who do you think has the responsibility for ensuring your occupational health and safety at your work place?

I. Employers.

II. Workers

III. The state

IV. Others (name them)

__________________________________________________________________________________

__________________________________________________________________________________

__________________________________________________________________________________

Does your organisation have a health and safety policy that you are ware of?

__________________________________________________________________________________

__________________________________________________________________________________

__________________________________________________________________________________
If your answer to the above question is yes, what is the Health and Safety policy for your organisation?

__________________________________________________________________________

__________________________________________________________________________

__________________________________________________________________________

Is this well and sufficiently published in a language familiar to a majority of the workforce including yourself?

__________________________________________________________________________

__________________________________________________________________________

__________________________________________________________________________

Have you or anyone you know had an injury or illness related to your occupation recently or in the last five years?

__________________________________________________________________________

__________________________________________________________________________

__________________________________________________________________________

If your answer to the above question is yes was this reported and if so to whom? (Do you know his/her position?)

__________________________________________________________________________

__________________________________________________________________________

__________________________________________________________________________

In the event of a report being made in relation to the said injury or illness what action did the authorities do?

__________________________________________________________________________

__________________________________________________________________________

__________________________________________________________________________
Adequate training and comprehensive instruction on safety and health and necessary guidance/supervision is provided to all workers in a manner that takes into account the level of education and differences in languages among the workers. Do you agree?  
Comment:

__________________________________________________________________________  
__________________________________________________________________________  
__________________________________________________________________________  

Does your organization’s board of directors have a director responsible for health and safety that you are aware

__________________________________________________________________________  
__________________________________________________________________________  

Do you think more corporate accountability would be achieved in the area of occupational health and safety if collective and individual responsibility was spelled out at board level?

__________________________________________________________________________  

Do you think the above would ensure that board decisions reflect your organization’s health and safety intentions and encourage active staff participation thereby ensuring the board is kept informed of, and alert to, relevant health and safety risk management issues?
What do you consider to be pressing occupational safety and health issues in your sector for the last five years, and what will be the issues for the next five years.

At the start of your employment was a medical check up carried out on you?

Do you have periodic medical check up at your work place? If your answer is yes how regular are these check-ups?

In the event that you have had a medical check-up have you had a chance to discuss the results at any point with the person or a member of the team that carried out the said check-up?
Are you aware of any emergence numbers that you could be used in the event of an accident or medical emergency?

What risks are there associated with the machinery, tools chemicals used in your daily job.

Have you had training on the handling of machinery, equipment, chemicals used on the farm? What is the frequency of these courses and who conducts them?

Is the Machinery, tools and chemicals including pesticides used on the farm are accompanied with adequate and appropriate information in relation to hazard warning signs in a language familiar to a majority the workers in your country?
If your answer to the above question is yes can this information be inspected on request?

Are there any persons younger than thirteen years old employed in your organisation?

What is the common form of employment in your organisation?

a. Permanent
b. Seasonal.

c. Causal
d. Daily paid
e. Temporary
f. Others

What is the proportion of female workers to male workers?
Are there any refectories at your work place?

How do women's' facilities defer from men's'?

Is maternity leave available in your organisation? If so which group of employees (permanent, causal, seasonal or temporary) benefit from this?

What is the minimum maternity leave in your organisation?

Is there a trade union in your organisation?

Are you a member of a trade union?
If you are, do you take part in union activities?

What is the relationship between your trade union and other trade unions in the country?

How much are your trade unions consulted on issues of the environment, occupational health and safety in your organisation. In your view how effective are these consultations and how can they be improved (upon if necessary)

Do you think your trade unions have human and financial resources needed to meaningfully engage in social dialogue on issues?
Does your organisation have other establishment either in the region or elsewhere? Do you think it offers uniform treatment to all such establishment in issues of health and safety and the environment?

Do you know if you are covered under a policy of insurance for injuries that you may suffer in the course of your employment?

Do you think the compensation that those that suffer injury in the course of employment in your organisation are given is adequate?

Do you think there is adequate civic awareness regarding employees’ right to compensation in the event of occupational injury, fatalities or work-related ill health among you fellow workers?
Generally comment on what you consider to be occupational health and safety problems faced by workers in your organisation. Proceed on a separate sheet of paper if need be.

THANK YOU

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