



**A CRITICAL ANALYSIS OF CHILD LABOUR  
PROTECTIVE LAWS IN SOUTHERN AFRICA: A  
CASE STUDY OF MALAWI, SOUTH AFRICA  
AND ZIMBABWE.**

**BY**

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# DECLARATION

I Tinashe Madziwa, do hereby declare, certify and affirm that this research is my own work and that to the best of my knowledge, has not been submitted nor is it currently being considered either in whole or in part, in fulfilment of the requirements of a Masters of Law Degree at any other institution of learning. The ideas used herein have been taken from different scholars, but have been presented in a manner that has not been taken from other literature hence it is deemed original. I assume personal responsibility to the correctness of facts contained herein and to the presentation thereof. Where someone's work has been used (whether from a printed source, the internet or any other source) due acknowledgment has been given and reference made according to the requirements of the Faculty of Law

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## **DEDICATION**

This research is dedicated to  
my late parents-

**Elisha T. and Sandra M. Madziwa**

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*Ndinokutendai*

# ABBREVIATIONS

## Entities

ILO	International Labour Organisation
IPEC	International Programme on the Elimination of Child Labour
MDGs	Millennium Development Goals
SNAP	Support the National Action Plan to combat child labour in Malawi.
UN	United Nations
UNICEF	United Nations Children's Fund

## Legal instruments

ACRWC	African Charter on the Rights and Welfare of the Child
BCEA	Basic Conditions of Employment Act
ICESCR	International Convention on Economic, Social and Cultural Rights
LRA	Labour Relations Act
OUA	Organization of African Unity
UDHR	Universal Declaration of Human Rights
UNCRC	Convention on the Rights of the Child

## STATUTORY AND OTHER INSTRUMENTS

### Legislation

#### Malawi

Child Care, Protection and Justice Act 22 of 2010  
Constitution of Malawi Act 38 of 1998  
Education Act Chapter 30.01 of 1962  
Education Act, 2013.  
Employment Act Chapter 55:01 of 2000

#### South Africa

Basic Conditions and Employment Act 75 of 1997  
Basic Conditions of Employment Amendment Act, 2013  
Constitution of South Africa Act 108 of 1996  
Children's Act 38 of 2005.  
South African Schools Act 84 of 1996.  
The children's Amendment Act 41 of 2007

#### Zimbabwe

Children's Protection and Adoption Amendment Act 23 of 2001  
Constitution of Zimbabwe Act 20 of 2013  
Children's Act 5 [Cap 5:06] of 2001.  
Education Act [Cap 25:04] of 1996.

Labour Relations Regulations of 1997 Statutory Instrument 72 of 1997.  
Labour Act (Chapter 28:01).

### **International Instruments**

African Charter on the Rights and Welfare of the Child OAU Doc. CAB/LEG/24.9/49.  
Adopted in 1990 and entered into force on 29 November 1999

Convention concerning Minimum Age for Admission to Employment (C 138). Adopted on 16 June 1973 and entered into force on 19 June 1976, Recommendation 146 concerning Minimum Age for Admission to Employment, 1973 adopted on 26 June 1973.

Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (C 182). Adopted on 17 June 1999 and entered into force on 19 November 2000. Recommendation 190 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour adopted on 17 June 1999

Convention concerning Labour Inspection in Industry and Commerce (C 81) (Entry into force: 07 Apr 1950) Adoption: Geneva, 30th ILC session (11 Jul 1947).

Convention concerning Labour Inspection in Agriculture (129) (Entry into force: 19 Jan 1972) Adoption: Geneva, 53rd ILC session (25 Jun 1969).

Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49. Adopted on 20 November 1989 and entered into force on 2 September 1990.

International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc.A/6316 993U.N.T.S. 3. Adopted on 16 December 1966 and entered into force on 3 January 1976.

### **Short names for international instruments**

African Children's Charter: Organization of African Unity (OAU), African Charter on the Rights and Welfare of the Child.

Convention No.138: Convention concerning Minimum Age for Admission to Employment (C 138).

Convention No. 182: Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (C 182).

Labour Inspection (Industry and Commerce) Convention: Convention concerning Labour Inspection in Industry Commerce, 1947 (C 81).

Labour Inspection (Agriculture) Convention: Convention concerning Labour Inspection in Agriculture (129).

# ABSTRACT

In many countries, mainly African, child labour is a major problem compromising future generations and undermining human capital. It is estimated that over 28.4 per cent of all children between the ages of five and 14 years are involved in child labour activities in sub-Saharan Africa. It is an accepted fact that despite legislation, in most countries in Africa the problem of child labour still persists.

In this study, a critical analysis of the legislation regulating child labour in Southern Africa will be undertaken, with the focus being on Malawi, South Africa and Zimbabwe. This research aims at establishing why child labour is a continuing problem in these countries despite laws that have been enacted to prevent it. Malawi, South Africa and Zimbabwe were specifically chosen for similarities in their colonial history which has influenced their political, cultural, legal and socio-economic patterns.

As is common in the promulgation of laws, lacunae emerge; therefore attention was given to areas that have been overlooked by government. Weaknesses and gaps in these legislation were identified as the reason for the legislation being ineffective when combating or reducing child labour.

Therefore, the main purpose of this study was to investigate whether the continued prevalence of child labour is due to oversight or the result of a wrong approach by different governments when legislation was drafted. For legislation to be implemented effectively it should be drafted correctly and appropriately; failure to do so results in legislation not achieving its purpose. Where gaps have been identified, realistic recommendations were made on how to correct these problems to make the law work more effectively to combat child labour in Southern Africa.

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# CHAPTER 1

## INTRODUCTION AND CONTEXT OF THE RESEARCH

### 1.1 Background

"...To enable families living in poverty to survive, a quarter of a billion children aged 14 and under, both in and out of school, now work, often in hazardous or unhealthy conditions."<sup>1</sup>

Child labour is a universal problem which affects almost every continent across the globe.<sup>2</sup> Child labour is described in Article 32(1) of the United Nations Convention on the Rights of the Child<sup>3</sup>(hereafter UNCRC) as, ~~any form of~~ work performed by a child that is likely to interfere with his or her education, or to be harmful to their health or physical, mental, spiritual, moral or social development".<sup>4</sup> It is a phenomenon that deprives children of their childhood and a prospective future.<sup>5</sup> Musandirire states that, ~~child labour is done by any~~ working child who is under the age specified by the law".<sup>6</sup> It is a human rights violation which violates a number of fundamental constitutional rights;<sup>7</sup> one of which is the right to human dignity.<sup>8</sup>The dignity of a child is compromised when employers treat them in an inhumane manner.<sup>9</sup> The Constitution of the Republic of South Africa, Act 108 of 1996

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<sup>1</sup>Former United Nations Secretary-General Kofi Annan in the Millennium Report 2000 available at [www.un.org](http://www.un.org), (accessed 13 April 2014).

<sup>2</sup>L.Eldring...et al *Child Labour in the Tobacco Growing Sector in Africa* (2000) *Report prepared for the IUF/ITGA/BAT Conference on the elimination of child labour, Nairobi*, page 7 available at <http://www.fafu.no/pub/rapp/654/654.pdf> (accessed on 10 April 2014).

<sup>3</sup>UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, 3, available at: <http://www.refworld.org/docid/3ae6b38f0.html> (accessed on 10 July 2014)

<sup>4</sup>J Rea *Child Labour* (2008) 7 available at <http://www.developmenteducation.ie/media/documents/Concern%20Child%20Labour%20Resource.pdf>(accessed on 10 October 2014).

<sup>5</sup>Eldring (note 2 above) 7.

<sup>6</sup>S.Musandirire *The Nature and Extent of child labour in Zimbabwe: A case study of Goromonzi District Farms in Zimbabwe* (LLM thesis, University of Fort Hare, 2010) 8 available at <http://ufh.netd.ac.za/bitstream/10353/266/1/Musandirirethesis.pdf>, (accessed on 21 June 2014).

<sup>7</sup>R.K.E Varghese *Child Labour law: an Overview* (1998) 126.

<sup>8</sup>Section 10 of the Constitution of the Republic of South Africa Act 108 of 1996.

<sup>9</sup>E C Lubaale *A human rights – Based approach to child labour in Africa: Challenges and Prospects in South Africa*. (LLM Dissertation) University of Venda, Limpopo 2011) 42 available at <http://repository.up.ac.za/handle/2263/18624>(accessed on 03 October 2014).

(hereafter 1996 Constitution) provides children with the right to be protected from maltreatment, neglect and exploitative labour practices.<sup>10</sup>

Child labour is found in a number of sectors, such as large commercial farms,<sup>11</sup> small peasant farms, domestic services, prostitution, gold-panning jobs, and small scale industries of the informal sector.<sup>12</sup> The distribution of child labour is high in marginalised communities facing various socio-economic problems.<sup>13</sup> Some of the socio-economic problems influencing child labour are a high rate of unemployment, poor education facilities<sup>14</sup>, poverty<sup>15</sup>, cultural factors<sup>16</sup> and the lack of law enforcement agencies,<sup>17</sup> as well as the HIV/AIDS pandemic<sup>18</sup> and a high rate of corruption.<sup>19</sup> Hence, child labour is the result of various social-economic problems.<sup>20</sup> It is a significant phenomenon which affects the development of a nation.<sup>21</sup>

Child labour is a persistent problem experienced all over the world, especially in developing African countries.<sup>22</sup> According to Musandirire, “accurate statistics on child labour are elusive”,<sup>23</sup> however, Sub-Saharan Africa has recorded the highest incidences of child labour.<sup>24</sup> It is estimated that over 28.4 per cent of all children between the ages of five and 14 years are involved in child labour activities in Sub-Saharan Africa.<sup>25</sup> The statistics reflect that

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<sup>10</sup> Section 28 (1) (d), (e) and (f) of the 1996 Constitution.

<sup>11</sup>Eldring (note 2 above) 21.

<sup>12</sup>Ibid 87.

<sup>13</sup>Ibid.

<sup>14</sup> ILO, Development National and International Trade Union Strategies to combat child labour (Project INT/96/MO6/NOR) Trade Union and Child labour : Booklet 2; Union Policies and Action Plans to combat child labour (2000) 11 available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_dialogue/---actrav/documents/publication/wcms\\_116635.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---actrav/documents/publication/wcms_116635.pdf) (accessed on 13 November 2014).

<sup>15</sup>Ibid.

<sup>16</sup>K .Basu \_Child Labour: Cause, Consequence, and Cure, with Remarks on International Labour Standards’ (1999) *Journal of Economic Literature* 1083, 1090.

<sup>17</sup>Rea (note 4 above) 7.

<sup>18</sup>Note 14 above, 11.

<sup>19</sup>F Siddiqi and HA Patrinos \_Child Labour Issues, causes and interventions’: *Human Capital Development and Operations Policy Works Paper- HCOWP56*, 4 available at [http://siteresources.worldbank.org/EDUCATION/Resources/278200-1099079877269/547664-1099079934475/547667-1135281552767/Child\\_Labor\\_issues.pdf](http://siteresources.worldbank.org/EDUCATION/Resources/278200-1099079877269/547664-1099079934475/547667-1135281552767/Child_Labor_issues.pdf)(accessed on 15 April 2014).

<sup>20</sup>Eldring (note 2 above) 7.

<sup>21</sup> J Mukherjee \_Child Labour, Education, participation and Economic growth in Sub-Saharan Africa: An Empirical Study’ (2008) 24(1)*Institute of African Studies Research Review* 53, 54.

<sup>22</sup>Eldring (note 2 above) 7.

<sup>23</sup>Musandirire (note 6 above) 1.

<sup>24</sup> ‘Marking progress against child labour’ available at <http://www.ilo.org/informationresources/wcms/221513/lang---en/index.htm> (accessed on 15 May 2014).

<sup>25</sup>Ibid.

one in every four children is involved in child labour in this region.<sup>26</sup> This ratio clearly indicates how the growth and development of African countries can be compromised by the use of child labour. Moreover, it is estimated by the United Nations Children's Emergency Fund that 246 million children are employed as child labourers and about 185 million of these children are employed in dangerous environments like dam construction sites, quarries, or working with hazardous tools and insecticides.<sup>27</sup> The 2010 International Labour Organisation (hereafter ILO) report states that boys are more involved in child labour than girls,<sup>28</sup> with boys accounting for 54 per cent, and girls 46 per cent of all child labourers globally.<sup>29</sup>

The agricultural sector and domestic services are sectors in which child labour is prevalent in Africa.<sup>30</sup> Most child labourers are found on tobacco growing farms, which are believed to employ more child labourers than any other cash-crop in the world.<sup>31</sup> The main reason for the high incidence of child labour in the agricultural sector is government's failure to implement the minimum age requirements for child education and employment in this sector.<sup>32</sup> In relation to domestic services, the exact extent of child exploitation in this sector is unknown due to its private nature.<sup>33</sup> In this sector, children either work as domestic workers or perform household chores that can be harmful to their bodies.<sup>34</sup> Furthermore, the ILO has recently reported that amongst all children who are abused as domestic workers around the world, 61.7 per cent of these children are girls.<sup>35</sup> Most employers prefer child labourers because child labour is cheap and child workers do not complain as much as adult employees.<sup>36</sup> In addition, child labourers are not in a position to form legal trade unions to advocate for better

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<sup>26</sup>R Mavunga *\_A Critical Assessment of the Minimum Age Convention 138 of 1973 and the Worst Forms of Child Labour Convention 182 of 1999\_* (2013) 16(5) *Potchefstroom Electronic Law Journal* 121,123.

<sup>27</sup>*\_Child protection from violence, exploitation and abuse-Child labour\_* available at <http://www.unicef.org/protection/index-childlabour.html> (accessed on 15 April 2014).

<sup>28</sup>Mavunga (note 26 above) 123.

<sup>29</sup>*Ibid.*

<sup>30</sup>P Elshof, *\_The Tobacco Growing Sector. A Profile Prepared for the IUF. Amsterdam\_* (1995): *Food World Research & Consultancy* available at [asianfoodworker.net/tnc/financializing-foodTNCs](http://asianfoodworker.net/tnc/financializing-foodTNCs) (accessed on 12 April 2014).

<sup>31</sup>*Ibid.*

<sup>32</sup>Note 14 above; 4.

<sup>33</sup>T C Nhenga *\_Application of the international Prohibition on child labour in an African context: Lesotho, Zimbabwe and South Africa\_* (PhD Thesis) University of Cape Town, Cape Town 2008) 3 available at [http://uctscholar.uct.ac.za/PDF/4810\\_Nhenga\\_TC.pdf](http://uctscholar.uct.ac.za/PDF/4810_Nhenga_TC.pdf) (accessed on 17 May 2014).

<sup>34</sup>United States Department of Labor *\_Findings on the Worst Forms of Child Labor – South Africa\_* (2012) 1 available at: [http://www.dol.gov/ilab/reports/child-labor/south\\_africa.htm](http://www.dol.gov/ilab/reports/child-labor/south_africa.htm) (accessed 3 September 2014).

<sup>35</sup>Note 27 above.

<sup>36</sup>Ethical Trading Initiative *\_Child Labour\_* available at <http://www.ethicaltrade.org/in-action/issues/child-labour> (accessed on 15 May 2014).

working conditions.<sup>37</sup> Therefore, child labour can either be done deliberately or unintentional, but in either case it is the wellbeing of the child which is compromised.<sup>38</sup>

In an effort to combat child labour, the ILO adopted two conventions prohibiting child labour: the Minimum Age Convention of 1973<sup>39</sup> and the Worst Forms of Child Labour Convention of 1999.<sup>40</sup> In addition, the African Union adopted the African Charter on the Rights and Welfare of the Child,<sup>41</sup> which also advocates for the elimination of child labour. After the passing of these conventions, many African countries ratified them and they became the basis of country's commitment for eradicating child labour. This commitment became apparent when many African countries enacted their own laws and regulations to combat child labour and protect children.<sup>42</sup> Mavunga contends that, "such legislation however, mostly covers formal labour relationships; those children working in the informal economy do not often benefit from legal protection".<sup>43</sup> Despite the introduction of various laws sanctioning child labour, the situation still remains unchanged.

## 1.2 Statement of purpose

Child labour is a major problem, compromising future generations and undermining human capital around the world, mostly in African countries.<sup>44</sup> It is an accepted fact that despite legislation being implemented in most countries in Africa, the problem of child labour still persists.

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<sup>37</sup> R. Loewenson 'Child labour in Zimbabwe and the rights of children' (1991), 6 (1) *Journal of social development in Africa* 19, 21.

<sup>38</sup> 'Global march against child labour in Zimbabwe' (2007) 3 available at [www.zimbabwesituation.com/GMACL.doc](http://www.zimbabwesituation.com/GMACL.doc) (accessed on 15 May 2014).

<sup>39</sup> International Labour Organization (ILO), Minimum Age Convention, C138, 26 June 1973, C138, available at: <http://www.refworld.org/docid/421216a34.html> (accessed on 10 July 2014) (hereafter referred to as the Convention No.138).

<sup>40</sup> International Labour Organization (ILO), Worst Forms of Child Labour Convention, C182, 17 June 1999, C182, available at: <http://www.refworld.org/docid/3ddb6e0c4.html> (accessed on 20 July 2014) (hereafter referred to as the Convention No. 182).

<sup>41</sup> Organization of African Unity (OAU), African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990), available at: <http://www.refworld.org/docid/3ae6b38c18.html> (accessed on 10 July 2014) (hereafter referred to as the African Children's Charter).

<sup>42</sup> Mavunga (note 26 above) 124.

<sup>43</sup> Ibid 123.

<sup>44</sup> R. Rena. 'The child labour in developing countries: A challenge' (2008)3(1) *Industrial Journal of Management and Social Sciences* 1, 2.

In this study, a critical analysis will be undertaken of the legislation regulating child labour in Southern Africa, with the focus being on Malawi, South Africa and Zimbabwe. These countries were specifically chosen for the similarities in their colonial history, which has influenced their political, cultural, legal and socio-economic patterns. Given that the laws in the countries under study were enacted to reduce child labour, this research aims to establish the reason for the persisting problem. As it is common in the event of promulgation of laws that lacunae emerge, attention will be given to areas that could have been overlooked by the governments. Further analysis of these laws will be conducted to establish weaknesses or gaps which may be the reason why the legislation cannot effectively combat or reduce child labour.

Therefore, the main purpose of this study is to investigate whether the continued prevalence of child labour is due to an oversight or the result of a wrong approach by different governments when the legislation was drafted. For legislation to be implemented effectively, it should be drafted correctly and appropriately, and the failure to do so will result in the legislation not achieving its purpose. In the case where gaps are identified, realistic recommendations will be made on how these problems could be corrected, or how governments should tackle certain provisions to make these laws work effectively in combating child labour in Southern Africa.

### **1.3 Rationale for the study**

Child labour is a form of child abuse and child exploitation.<sup>45</sup> It is a violation of the child's right to human dignity and the right to freedom of association.<sup>46</sup> These rights are preserved in many international human rights' conventions,<sup>47</sup> as well as in state constitutions all over the world, including that of South Africa.<sup>48</sup> Child labour has had a negative effect on the well-

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<sup>45</sup>M Kabasiita *Combating child labour in Uganda: Challenges and prospects from a development perspective* 2009, Case study: *Kisenyi Slum, Kampala District* (Masters of Arts in Development Studies thesis) University of South Africa, 2009) 8 available at [http://uir.unisa.ac.za/bitstream/handle/10500/4670/dissertation\\_kabasiita\\_m.pdf?sequence=1](http://uir.unisa.ac.za/bitstream/handle/10500/4670/dissertation_kabasiita_m.pdf?sequence=1) (accessed on 17 April 2014).

<sup>46</sup>South Asia in Action: Preventing and responding to child trafficking. Analysis of Anti-Trafficking initiatives in the region available at [http://www.unicef-irc.org/publications/pdf/ii\\_ct\\_southasia\\_analysis.pdf](http://www.unicef-irc.org/publications/pdf/ii_ct_southasia_analysis.pdf) (accessed on 23 May 2014).

<sup>47</sup>United Nations General Assembly 'Resolution 1386 session 14 Declaration of the Rights of the Child on 20 November 1959' available at [http://www.undemocracy.com/a-res-1386\(Xiv\)](http://www.undemocracy.com/a-res-1386(Xiv)) (accessed 14 April 2014).

<sup>48</sup>Chapter two (bill of rights) in the 1996 Constitution.

being of vulnerable children in most developing countries. For instance, it affects the development of a child both physically and socially, it compromises education opportunities<sup>49</sup> and it increases the exposure of children to sexual abuse resulting in high levels of HIV/AIDS infections.<sup>50</sup> The child labour problem also extends to practices such as trading or trafficking of young people, introducing them to prostitution, pornography, and early abusive marriages.<sup>51</sup> Child labour in Southern Africa also denies children the opportunity to break out of the cruel cycle of poverty and despair into which they are often born.<sup>52</sup> Therefore, the study of child labour and its regulation is of great significance for the African continent. Furthermore, the study will develop new approaches on how protective laws on child labour can effectively control or abolish child labour to enable greater development in Africa.

## 1.4 Research questions

–Not knowing a question is to forfeit the answer.”<sup>53</sup> The following is a list of questions to be considered in this research:

- 1.4.1 What are the relevant laws enacted in Malawi, South Africa and Zimbabwe prohibiting child labour?
- 1.4.2 Are there any short-comings or gaps in the laws, making it difficult for child labour to be controlled in these countries?
- 1.4.3 How are these gaps affecting the control of child labour in Southern Africa?
- 1.4.4 What recommendations can be made to government regarding child labour protective laws for these laws to effectively combat child labour?

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<sup>49</sup>Rea (note 4 above) 7.

<sup>50</sup>Note 34 above

<sup>51</sup>Ibid.

<sup>52</sup>Kabasiita (note 45 above) 8.

<sup>53</sup>V Mhangu *Positive discrimination in South African employment law: has affirmative action overstayed its welcome?* (LLM thesis) University of Kwazulu Natal, Durban, 2013) 8 available at [http://researchspace.ukzn.ac.za/xmlui/handle/10413/8401/browse?rpp=20&order=ASC&sort\\_by=1&etal=-1&type=title&starts\\_with=I](http://researchspace.ukzn.ac.za/xmlui/handle/10413/8401/browse?rpp=20&order=ASC&sort_by=1&etal=-1&type=title&starts_with=I) (accessed on 17 September 2014).

## 1.5 Research methodology

The methodology used in this study was that of desktop approach. Desktop research is a research method which mainly focuses on gathering and analysing existing information already available in the public domain; published in books, journals and the internet.<sup>54</sup> Because this dissertation is concentrated on the analysis of secondary sources, no human participants were involved. Literature in the form of textbooks and journal articles were used to offer broader definitions, as well as scholarly views on child labour in Southern Africa. Law reports were used to articulate the legal standing and arguments interpreted by courts to ascertain the current legal position of the courts on the notion of child labour. Newspaper articles as well as online discussions were also used to provide common and recent incidences of child labour. In addition, various Department of Labour<sup>55</sup> websites were consulted to assess the role of labour inspectors in addressing the child labour problem in South Africa.

Legislation and regulations dealing with child labour in Malawi, South Africa and Zimbabwe were also used to outline the recent and current positions of these three countries.

## 1.6 Theoretical framework

This dissertation will take the perspective of critical analysis of child labour protective laws. The research focuses on positive law as opposed to natural law. Positive law is often described as human made laws which give particular rights to people, or conversely takes them away.<sup>56</sup> Natural law on the other hand assumes<sup>56</sup> that all of our rights come from God and are not conferred on people by an act of legislation.<sup>57</sup> French philosopher, Jean-Jacques Rousseau, supported the positive law theory because he believed that this theory gives people

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<sup>54</sup>D Wallace & S Wallace *Business Studies* (2001) 62.

<sup>55</sup> Department of Labour (hereafter referred as DoL).

<sup>56</sup> JA Donald 'Natural law and the National Rights' available at <http://jim.com/rights.html> (accessed on 15 May 2014).

<sup>57</sup>Ibid.

freedom from internal obstacles and that positive law is a source of social justice which advocates for equality through regulations.<sup>58</sup>

Due to the fact that child labour is regulated by various child labour protective laws, this study is concerned with the law, its interpretation and its enforcement. The underlying assumptions of positive law assisted in analysing current laws on child labour in relation to the practices of different states.

## **1.7 Research outline**

This research comprises of five chapters. This chapter has provided the context for the research by considering a brief historical background of child labour. It has outlined the purpose and rationale of the study. The three African countries on which the dissertation is focused are Malawi, South Africa and Zimbabwe. Chapter two consists of a review of the literature on child labour, both regionally and internationally.

Chapter three identifies the factors in which child labour is rooted. The chapter also provides an overview of International Labour Conventions and other international instruments on which child labour finds expression. The review of the legal framework serves as a basis on which child labour can be analysed.

Chapter four provides the core discussion of the dissertation. An analysis of child labour protective legislations in Malawi, South Africa and Zimbabwe is conducted. An analysis into the existence of potential gaps in the legislation was undertaken to determine reasons for the difficulty in regulating child labour.

Chapter five proposes alternative remedies to child labour and then sums up the findings of the entire dissertation. The chapter allows for realistic recommendations on how to fill the gaps in the legislation in an effort to improve the control of child labour in various African countries.

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<sup>58</sup> E N Zalta ...et al 'Enlightenment' (2010) *Stanford Encyclopedia of Philosophy* available at <http://plato.stanford.edu/entries/enlightenment/#toc> (accessed on 15 May 2014).



## CHAPTER 2

### LITERATURE REVIEW

#### 2.1 Introduction

In this chapter, the literature on child labour is reviewed. The chapter focuses on the nature and scope of child labour both regionally and internationally, providing an evaluation of what various authors have said on the subject. In addition, the study will focus on the nature and incidence of child labour in each of the three countries under study, paying special attention to the categories of child labour, as well as causes, consequences, laws and regulations that prohibit child labour in each country.

#### 2.2 Definition of a child

In order to understand clearly what constitutes child labour, the term ‘child’ needs to be defined. According to Harder,<sup>59</sup> there is a problem in defining a ‘child’ and the age restrictions that apply to the definition. He notes that the tension is mainly between the official international and national laws, and actual reality, which he describes as the “living laws”.<sup>60</sup> Thus a definition of the term ‘child’ is based on numerous factors, including race, body structure and the religious and cultural beliefs of different societies.<sup>61</sup> Accordingly, one has to perform a particular task or ritual in order to graduate from childhood regardless of age. A common example of such a cultural practice is circumcision, which is practised in the Xhosa culture when a male child goes through a circumcision ritual in order to pass from childhood to adulthood.<sup>62</sup> Nhenga is of the view that these cultural beliefs make it difficult to implement the law to protect the interests of the child.<sup>63</sup>

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<sup>59</sup>M Haider ‘Recognizing Complexity, Embracing Diversity: Working children in Bangladesh’ (2008) 28(1) *South Asia Research*, 49, 50-51.

<sup>60</sup>Ibid 50-51.

<sup>61</sup>Ibid.

<sup>62</sup>W Ncube *Law, Culture, Tradition and Children’s Rights in Eastern and Southern Africa* (1998) 207.

<sup>63</sup>Nhenga (note 33 above) 14.

Despite the fact that different societies consider various factors in defining the term ‘child’, international instruments generally use the ‘age system’ to define a ‘child’. The UNCRC describes a child as anyone who is under the age of eighteen unless national regulations say otherwise.<sup>64</sup> Member states to this Convention, including Malawi, South Africa and Zimbabwe, have adopted the 18 years requirement in some of their domestic laws. Therefore, in order to understand what constitutes child labour, a ‘child’ is any person who is under the age of 18, regardless of their psychological and physical development.

### 2.2.1 Definition of child labour

Due to its complicated manifestation, ‘child labour’ does not have a collective established definition.<sup>65</sup> According to Weston, the definition of child labour is determined by various factors including its purpose, the community and history of a particular society.<sup>66</sup> The ILO is an organisation which controls and prohibits child labour around the world. There are a number of international conventions regarding child labour. In terms of the international conventions, the child labour definition is determined by the following factors: the kind of work, duration of work, and conditions in which the work is performed.<sup>67</sup> Convention No. 138 prohibits the employment of a child under the age of 15.<sup>68</sup> The Convention sets the age restriction at 15 years because it is the expected age for one to complete compulsory education.<sup>69</sup> The ILO –often describes (child labour) as work that deprives children of their childhood, their potential and their dignity.”<sup>70</sup> It is also classified as work that affects the child’s schooling activities, thus significantly impeding the development of the child and the nation at large.<sup>71</sup>

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<sup>64</sup> Article 1 of the UNCRC.

<sup>65</sup> A. Tifow *Modelling the key determinants of child labour in Somalia* (Masters of Science in Social Statistics thesis, University of Nairobi, 2014) 2 available at [http://erepository.uonbi.ac.ke/bitstream/handle/11295/72970/Tifow\\_%20Modelling%20the%20key%20determinants%20of%20child%20labour%20in%20Somalia?sequence=1](http://erepository.uonbi.ac.ke/bitstream/handle/11295/72970/Tifow_%20Modelling%20the%20key%20determinants%20of%20child%20labour%20in%20Somalia?sequence=1) (accessed on 16 September 2014).

<sup>66</sup> B H Weston (ed), *Child Labour and Human Rights: Making Children Matter*, (2005).

<sup>67</sup> Article 2(3) of Convention No.138.

<sup>68</sup> Ibid.

<sup>69</sup> United Nations ‘World Day against Child Labour 12 June’ available at <http://www.un.org/en/events/childlabourday/background.shtml> (accessed on 28 August 2014)

<sup>70</sup> Nhenga (note 33 above) 14.

<sup>71</sup> Ibid.

Child labour is also described as work that affects the physical, psychological,<sup>72</sup> mental and moral wellbeing of a child.<sup>73</sup> One grey area in the ILO definition is its failure to include domestic labour or household work which is not meant to generate income.<sup>74</sup> This weakness has a negative impact on many children in the rural areas, who in most instances perform dangerous household chores. In addition, it offers no legal protection to girls who perform most of the household chores, rather than boys.

Child labour is divided into three main categories.<sup>75</sup> These categories include: “work within the family; work within the family but outside the home; and work performed outside the family”.<sup>76</sup> Work within the family can be described as unremunerated work performed by children at home.<sup>77</sup> Domestic chores and subsistence farming are examples of this type of child labour.<sup>78</sup> Despite being unremunerated, work within the family contributes significantly to maintaining the upkeep of the family.<sup>79</sup> Children can also work for remuneration, within the family but outside the home involving a variety of work.<sup>80</sup> High incidences of child labour are found in this category. The following sectors fall under this category of income: agriculture, domestic services, self-employment<sup>81</sup> and informal employment.<sup>82</sup> Children performing in this category are forced to drop out of school and work to sustain the family due to the economic hardship existing in most African countries.<sup>83</sup>

The last category of child labour is described as work performed by children outside the family environment. Children who are employed in this sector often work in commercial industries, plantations and industrial areas.<sup>84</sup> Most child labour practices prohibited in the

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<sup>72</sup>Musandirire (note 6 above) 86.

<sup>73</sup>V.N Mazvidziwa, ‘Child Labour or Child Work? Whither Policy’ (2006) 22 *Institute of African Studies Research Review* 23, 24.

<sup>74</sup>Nhenga (note 33 above) 14.

<sup>75</sup> ‘Types of child labour’, available at <http://www.tnchildlabour.tn.gov.in/forms.htm> (accessed on 13 September 2014).

<sup>76</sup>Nhenga (note 33 above) 5.

<sup>77</sup>Ibid.

<sup>78</sup>Note 75 above.

<sup>79</sup>Nhenga (note 33 above) 5.

<sup>80</sup>Note 75 above.

<sup>81</sup>Note 14 above; 9.

<sup>82</sup>Nhenga (note 33 above) 5.

<sup>83</sup>HM Njoloma Paper for the National Conference in Eliminating Child Labour in Malawi: *Child labour in Malawi’s Agriculture Sector- the Social- Economic and HIV/AIDS Impact nexus* (2013) 5 available at [http://www.eclt.org/wpcontent/uploads/2013/07/Child\\_Labour\\_in\\_Malawi\\_Agricultural\\_Sector\\_SocioEconomic\\_and\\_HIVAIDS\\_Impact\\_nexus.pdf](http://www.eclt.org/wpcontent/uploads/2013/07/Child_Labour_in_Malawi_Agricultural_Sector_SocioEconomic_and_HIVAIDS_Impact_nexus.pdf)(accessed on 05 September 2014).

<sup>84</sup>Nhenga (note 33 above) 5.

Worst Forms of Child Labour Convention are found in this category. Examples of these dangerous and harmful practices are child prostitution, child pornography, mining and child soldiering.<sup>85</sup> Nhenga contends that, despite being the most dangerous category of child labour, children working in this category are often paid too little to contribute to the family.<sup>86</sup>

## 2.2.2 Understanding child labour at an international level

The child labour phenomenon is not confined to a national context. It is also an international problem affecting the development of the world both economically and socially.<sup>87</sup> The ILO has estimated that approximately 168 million children are involved in child labour globally.<sup>88</sup> This means that child labourers constitute 11 per cent of the total global child population.<sup>89</sup> Sub Saharan Africa has the highest proportion of child labourers around the world,<sup>90</sup> and statistics indicate that for every five children in this region one of them is exploited through child labour.<sup>91</sup> The agricultural sector occupies 70 per cent of all child labourers around the globe.<sup>92</sup> According to ILO reports, children employed in the agricultural industry work in more dangerous conditions compared to any other employment sector.<sup>93</sup> Thus in general, legislation that regulates child labour in various countries should pay special attention to its elimination in the agricultural sector.<sup>94</sup> However, child protective laws should be able to regulate child labour in all areas of work or employment; this includes child labour in the informal sector.<sup>95</sup>

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<sup>85</sup>Note 75 above.

<sup>86</sup>Nhenga (note 33 above) 5.

<sup>87</sup>International Labour Office *Making Progress against Child Labour: Global estimates and trends 2000-2012*(2013)7 available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---ipec/documents/publication/wcms\\_221513.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---ipec/documents/publication/wcms_221513.pdf) (accessed on 02 September 2014).

<sup>88</sup>Ibid 3.

<sup>89</sup>It is estimated that 59 million children in the Sub-Saharan Africa are involved in child labour. 59 million is approximately over 21 per cent of the child population in the globe. Available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---ipec/documents/publication/wcms\\_221513.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---ipec/documents/publication/wcms_221513.pdf) (accessed on 02 September 2014).

<sup>90</sup>‘Child Labor: What fruits does it bear for the African continent?’ available at <http://quarphixfoundation.wordpress.com/2014/05/27/child-labor-in-africa/> (accessed on 17 September 2014).

<sup>91</sup>Ibid.

<sup>92</sup>Note 87 above; 7.

<sup>93</sup>Note 87 above; 39.

<sup>94</sup>Ibid.

<sup>95</sup>Ibid.

International conventions regard child labour as a gross human rights' violation.<sup>96</sup> This assertion appears to be correct taking into consideration various children's rights that are violated by child labour. Some of the rights violated by child labour include: the right to education; the right to human dignity; the right to equal treatment; and the right not to be subjected to slavery, servitude or forced labour.<sup>97</sup> Doek contends that in order to eradicate child labour, states should promote all rights, and no right should be considered absolute.<sup>98</sup> This then suggests that to effectively eliminate the child labour problem, a comprehensive legal framework needs to be adopted incorporating all human rights' principles and standards. Various international instruments have been enacted to regulate child labour globally. These include the UNCRC,<sup>99</sup> Convention No. 138,<sup>100</sup> Convention No. 182,<sup>101</sup> and the African Children's Charter.<sup>102</sup> These four instruments have a common theme regarding child labour: they all prohibit work that has a negative impact on the social, mental, moral and physical development of a child.<sup>103</sup> Furthermore, in terms of the above mentioned instruments, education is globally perceived as a weapon to fight against all forms of child exploitation, especially child labour.<sup>104</sup>

With regard to the international child labour legal framework, Convention No. 138 is the prime ILO convention regulating child labour.<sup>105</sup> Convention No.182, despite being the latest instrument to be introduced does not contain any significant changes in the regulation and prohibition of child labour. The only notable difference between the Minimum Age Convention and the Worst Forms of Child Labour Convention is that the latter instrument

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<sup>96</sup> 'The Global Human Rights Regime' 19 June 2013 available at <http://www.cfr.org/human-rights/global-human-rights-regime/p27450> (accessed on 17 September 2014).

<sup>97</sup> B Mpfariseni 'Children's Rights and Protection against Child Labour in South Africa' (2012) 10 *Common Youth and Development* 1, 3.

<sup>98</sup> J E Doek *The CRC and the elimination of economic exploitation of children* (2002) 4.

<sup>99</sup> Note 3 above.

<sup>100</sup> Note 39 above.

<sup>101</sup> Note 40 above.

<sup>102</sup> Note 41 above.

<sup>103</sup> Nhenga (note 33 above) 36.

<sup>104</sup> G Brown *Child labour and Educational disadvantage – Breaking the link, building opportunity* available at [http://educationenvoy.org/wp-content/uploads/2013/10/child\\_labour\\_and\\_education\\_UK.pdf](http://educationenvoy.org/wp-content/uploads/2013/10/child_labour_and_education_UK.pdf) (2013) 35, 67 (accessed on 17 September 2014).

<sup>105</sup> Nhenga (note 33 above) 36.

affords member states with more detailed and tangible requirements to be met in order to effectively prohibit child labour.<sup>106</sup>

One notable weakness with the international child labour legal framework is the misperception regarding the ‘child labour’ definition. Both ILO conventions define child labour according to the minimum age of employment, and also in terms of children working in formal employment.<sup>107</sup> However, according to the UNCRC, child labour is determined not by the work performed by the child but rather by the impact of the particular work on the child.<sup>108</sup> In addition, the UNCRC prohibits any form of work which affects the wellbeing of the child, regardless of the environment where the work is performed.

Furthermore, the main theme regarding child labour in the African Children’s Charter is the prohibition of child labour in the economic sector.<sup>109</sup> Therefore, in the international legal framework, vagueness in the definition of child labour makes it difficult for member states to use national legislation to prohibit child labour.

Thus, child labour at an international level is prohibited by conventions that have established various standards of child labour and shaped a legal framework for the monitoring and regulation of these standards. However, the successful attainment of a child labour free society remains dependent upon the means and ability of each country and region, its social and economic structures and its level of development.

Child labour practices and regulations in Southern Africa will be discussed in the following section.

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<sup>106</sup>K Hanson and A Vandaele ‘Working Children and International Labour Law: A Critical Analysis’ (2003) 11 *International Journal of Children’s Rts*, 73, 116.

<sup>107</sup>Nhenga (note 33 above) 39.

<sup>108</sup>Nhenga (note 33 above) 39.

<sup>109</sup>The African Children’s Charter also prohibits child labour in regard to the same elements provided for in the UNCRC.

## 2.3 Child labour in Southern Africa

Among other continents, Africa has recorded the highest incidence of child labour.<sup>110</sup> In 2012, 26.2% of children between the ages of 5 and 14 were reported to be involved in economic child labour activities in sub Saharan Africa.<sup>111</sup> The highest proportion of child employment is found in the agricultural sector in Africa,<sup>112</sup> where an average of 56-72 million children is employed.<sup>113</sup> Agriculture involves hazardous working conditions for under-aged children as it is associated with the use of dangerous chemicals and insecticides.<sup>114</sup> The employment of children in the agriculture sector is an issue of concern in countries like Malawi, South Africa and Zimbabwe where children perform work in tobacco, tea and grape plantations.<sup>115</sup> Despite legislation and regulations promulgated to prohibit the practice, the number of child labourers continues to increase.

Sub-Saharan Africa is one of the most affected regions having an average of 36% of children between the ages of 5 and 14 involved in child labour. Domestic work is one of the employment sectors with the highest proportion of child labour in this region.<sup>116</sup> This form of child labour mostly affects young girls under the age of 16, in countries like Kenya and Zimbabwe.<sup>117</sup> Very few of these African<sup>118</sup> countries have managed to enact legislation to regulate child labour in the domestic sector.<sup>119</sup> The failure to regulate this employment sector exposes young girls to unacceptable exploitation, which includes sexual and physical abuse, and being deprived of their right to education.<sup>120</sup> Hence, child labour has created a challenge

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<sup>110</sup>Note 87 above.

<sup>111</sup>Y Diallo ...et al 'Global Child Labour trends 2008 to 2012' *International Labour Office* available at <http://www.ilo.org/ipainfo/product/> (accessed on 15 September 2014).

<sup>112</sup>'Child labour in Agriculture' available at <http://www.hrw.org/legacy/background/crp/back0610.htm> (Accessed on 20 August 2014).

<sup>113</sup>Note 90 above.

<sup>114</sup>Note 122 above.

<sup>115</sup>United States Department of Labor's Bureau of International Labor Affairs *2012 Finding on the worst Forms of the Child Labor in South Africa* (2012) 1 available at [http://www.dol.gov/ilab/reports/child-labor/south\\_africa.htm](http://www.dol.gov/ilab/reports/child-labor/south_africa.htm), (accessed on 21 June 2014).

<sup>116</sup>Nhenga (note 33 above) 3.

<sup>117</sup>UNICEF Eastern and Southern Africa 'Fast Facts on Children: Child labour and Commercial Sexual exploitation' available at [http://www.unicef.org/esaro/facts\\_on\\_children\\_5783.html](http://www.unicef.org/esaro/facts_on_children_5783.html) (accessed on 29 August 2014).

<sup>118</sup>Ibid.

<sup>119</sup>W Msukwa *Legislation and Child labour Policy in Malawi: Paper for the national Conference in Eliminating child labour in Agriculture* available at [http://www.eclt.org/wp-content/uploads/2013/07/Legislation\\_and\\_Child\\_Labour\\_Policy\\_in\\_Malawi.pdf](http://www.eclt.org/wp-content/uploads/2013/07/Legislation_and_Child_Labour_Policy_in_Malawi.pdf) (2013) 4 (accessed on 17 September 2014).

<sup>120</sup>UNICEF (note 117 above).

in the achievement of the Millennium Development Goals (hereafter referred to as MDGs) in most Southern African countries.<sup>121</sup>

### 2.3.1 The Conflict between the ‘child labour’ concept and the African culture

The challenges Southern African countries face in implementing the international child labour conventions is the fact that the instruments were drafted in terms of a Western perception of childhood.<sup>122</sup> According to the Western perception, childhood is determined by the age of the child. This perception has failed to consider the socio-economic, political and traditional ideals of each community,<sup>123</sup> such as the African perception of childhood which is determined by the traditional ideals of a particular society.<sup>124</sup> Most cultural practices in Southern Africa have traditional beliefs regarding childhood.<sup>125</sup> These practices to a large extent affect the child’s social, traditional and economic participation in the community.<sup>126</sup>

According to Jankanish, a child performing work in the African context is regarded as fulfilling his cultural obligations as part of human development.<sup>127</sup> Jankanish contends that not all work done by children is harmful to them; many children at a young age help with chores at home or on family farms.<sup>128</sup> He further explains that this helps build the child’s self-esteem.<sup>129</sup> This view is also supported by Loewenson, who describes the performance of household chores an important stage in a person’s life, which prepares a child for adulthood.<sup>130</sup> This philosophy is called ‘education with production’, which means children are learning through work.<sup>131</sup> An example of ‘education with production’ could be that of children working in cotton or tobacco farms where the conditions are unbearable and harmful

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<sup>121</sup>Global March Against Child Labour ‘Child Labour and Millennium Development Goals’ available at <http://www.globalmarch.org/campaign/child-labour-and-millennium-development-goals>(accessed on 29 August 2014).

<sup>122</sup>Article 1 of the UNCRC.

<sup>123</sup>Nhenga (note 33 above) 14.

<sup>124</sup>Nhenga (note 33 above) 198.

<sup>125</sup>Ncube (note 62, above) 207.

<sup>126</sup>Nhenga (note 33 above) 201.

<sup>127</sup>M Jankanish *International Children’s Rights Monitor: A New ILO Convention to Eliminate the Worst Forms of Child Labour* (1999) 5.

<sup>128</sup>*Ibid.*

<sup>129</sup>*Ibid.*

<sup>130</sup>Loewenson (note 37 above) 20.

<sup>131</sup>*Ibid.*



to their health, in the name of teaching them to be responsible in the future. ‘Education with production’ is a clear act of human rights’ violation, as it deprives a young child of the right to dignity.

The regulation of child labour in Southern African will continue to be problematic if the cultural issues surrounding child work are not resolved. In addition, by comparing traditional ideals, international instruments, and African beliefs one can argue that what is considered as child labour by the international conventions is regarded as general household responsibilities in the African culture. Hence, there is a need to balance cultural rights with the rights and interests of the child.

Child labour is a concept that conflicts with African culture and traditional beliefs.<sup>132</sup> The right to culture and religion have been incorporated into the constitution of numerous African states, illustrating that this contributes significantly to the development of the child.<sup>133</sup> This makes it difficult to prevent children from engaging in cultural activities like cattle herding.<sup>134</sup> Nhenga states that, “while there is international consensus on concern for children, Western and African traditional societies differ on how a child’s welfare may be secured.”<sup>135</sup> The concept of constitutional democracy advocates for equal treatment of human beings regardless of race, age and gender, therefore the laws that regulate child labour must balance the rights in the constitution, particularly the right to culture and the right to human dignity of children. In addition, those who advocate for the right to one’s culture should take into consideration the generational changes affecting the development of the continent. It is difficult to allow culture to override the constitutional rights of a child and destroy their future development. Thus, it can be argued that culture and tradition must be limited when it comes to the rights and development of a child. Not only is it important to deal with the conflict in the understanding of child labour as described above, it is also necessary to analyse other reasons for the high incidences of child labour in Southern Africa.

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<sup>132</sup>Nhenga (note 33 above) 241.

<sup>133</sup>Ibid.

<sup>134</sup>Ibid.

<sup>135</sup>Ibid.

### 2.3.2 Profit maximisation concept

Most employers in developing countries prefer to use cheap labour to maximise their profits. This is done by employing children. In most instances, employers hire child labourers because children are more submissive than adults and the wages paid to child labourers are much less than those paid to adult workers.<sup>136</sup>

LeBeau is of the view that the only way employers can limit expenses and maximise profits in the labour industries, particularly in developing countries, is through the violation of child labour protective laws.<sup>137</sup> This study agrees with this view however profit maximisation and a country's economic development cannot be pursued at the expense of a child's wellbeing. African governments tolerate child labour in areas that boost the country's economy, even though the practice is illegal.<sup>138</sup> Therefore, the ignorance in economic development shown by African states will have consequences for development as the children's future and wellbeing would have been destroyed.

### 2.3.3 HIV/AIDS epidemic

The child labour problem has worsened in Southern Africa due to HIV/AIDS.<sup>139</sup> The pandemic has orphaned close to 15.1 million children in sub-Saharan Africa.<sup>140</sup> Statistics indicate that children in South Africa and Zimbabwe are particularly affected by this disease as they form 63 and 74 per cent respectively of AIDS orphans.<sup>141</sup> Nhenga states that "the death of parents and guardians inevitably results in the loss of adult economic support and supervision."<sup>142</sup> Therefore, children are left with no other choice but to leave school to take

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<sup>136</sup> Child labour rages on in Malawi' *News from Africa online* last updated on 04 January 2014, available at [http://www.newsfromafrica.org/newsfromafrica/articles/art\\_522.html](http://www.newsfromafrica.org/newsfromafrica/articles/art_522.html) (Accessed on 01 September 2014).

<sup>137</sup> D LeBeau ... et al 'Towards the Elimination of the Worst Forms of Child Labour in Namibia', 2004. (University of Namibia, Multi-Disciplinary Research and Consultancy Centre (MRCC), Gender Training and Research Programme (GTRP)).

<sup>138</sup> B Mason 'Tobacco companies profit from child labour in Malawi' *World Socialist Web Site Online* 3 June 2010 available at <http://www.wsws.org/en/articles/2010/06/mala-j03.html> (accessed on 18 September 2014).

<sup>139</sup> Nhenga (note 33 above) 4.

<sup>140</sup> UNICEF *Towards an AIDS-Free Generation – Children and AIDS: Sixth Stock taking Report* (2013) available at <http://www.avert.org/children-orphaned-hiv-and-aids.htm#sthash.c10GvPuo.dpuf> (accessed on 12 September 2014).

<sup>141</sup> Ibid.

<sup>142</sup> Nhenga (note 33 above) 7.

care of all household needs, thus becoming primary breadwinners in the family.<sup>143</sup> The research agrees with Musandirire's view that "measures to control the spread of AIDS are also important in reducing the number of children who have to survive by selling their labour services in the market."<sup>144</sup> Thus, effective HIV and AIDS policy interventions must be adopted in Africa to assist the child labour legal framework in the fight against this problem.

### 2.3.4 Education

Lack of an adequate educational system in developing countries is also a factor which has contributed to the growth of child labour in Southern Africa. According to Basu, education plays a vital role in the development of a child.<sup>145</sup> Due to the high rate of poverty and unemployment in most African countries, most poor families cannot afford to send their children to school. Instead children from poor backgrounds have no choice but to leave school and help their parents.<sup>146</sup>

In most rural communities where most families both live and work on tenant farms, young children are expected to help their parents with work on the farm.<sup>147</sup> In addition, rural communities view education as having a low priority in terms of the development of a child.<sup>148</sup> Consequently, children drop out of school in order to support their parents. For the child labour problem to be addressed in Africa, the law should limit some cultural practices and beliefs that are detrimental to the child's future development. The need to protect a child as a vulnerable member of society outweighs the cultural rights of the society. The interests of a child are of paramount importance in matters dealing with the future development of a

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<sup>143</sup>Nhenga(note 33 above) 4.

<sup>144</sup>Musandirire(note 6 above) 108.

<sup>145</sup>K Basu \_Child Labour: Cause, Consequence, and Cure, with remarks on International Labour Standards' (1999)37 (3) *Journal of Economic Literature*, 1083, 1094.

<sup>146</sup>P Njagu \_Zimbabwe: Girls Dropping out of School Numbers on the Rise' *In the News National* 12 December 2013 available at <http://www.zimeye.org/zimbabwe-girls-dropping-out-of-school-numbers-on-the-rise/> (accessed on 21 August 2014).

<sup>147</sup>K Palitza \_Child labour: the tobacco industry's smoking gun' *The Guardian* 14 September 2011, available at <http://www.theguardian.com/global-development/2011/sep/14/malawi-child-labour-tobacco-industry>(accessed on 28 July 2014).

<sup>148</sup>Department for International Development and The RT Hon Justine Greening MP *Policy: Making sure children in developing countries get a good education* (Updated 11 October 2013) available at <https://www.gov.uk/government/policies/making-sure-children-in-developing-countries-get-a-good-education>(accessed on 17 September 2014).

child.<sup>149</sup> Therefore, customary practices, particularly those that affect the child's right to receive basic education are allowed to dominate resulting in the interests of the child, the future of children and ultimately the nation as a whole being destroyed.

Education should be made compulsory up to a certain age, probably the minimum age laid down in the conventions.<sup>150</sup> In South Africa education is compulsory until a child has completed grade nine,<sup>151</sup> it is however necessary for government to ensure that education is accessible to all, especially in rural areas. Further the schools in rural areas are far and therefore difficult to access.<sup>152</sup> Moreover, the education system in rural areas is poor and disorganised to the extent that often parents do not see the benefit of sending their children to school.<sup>153</sup>

The current study seeks to explain how governments can make education compulsory and how education up to the minimum age can be added as a provision in legislation regulating child labour in Southern Africa. These two elements have to work hand in hand for child labour to be controlled; the education system cannot work alone, neither can legislation. This research will discuss the need for governments to consider combining these two important elements in order to reduce child labour in Africa.

### **2.3.5 Labour inspectors**

Because of their involvement in labour legislation,<sup>154</sup> labour inspectors play an important role in the enforcement of labour legislation.<sup>155</sup> However, it seems that in some countries the labour inspector's role in combating child labour is not effective because either there are too few inspectors or the inspectors are corrupt, willing to accept bribes from employers practicing child labour.<sup>156</sup> Child labour legislation does not give inspectors power to perform

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<sup>149</sup> 'Understanding Children's Rights to Protection' available at <http://www.humanium.org/en/fundamental-rights/protection/> (accessed on 16 September 2014).

<sup>150</sup> Article 2(3) of Convention No. 138.

<sup>151</sup> South African schools Act 84 of 1996.

<sup>152</sup> D Norman and B Brett 'Educational Aspirations, Child Labour Imperatives and Structural Inequality in South Africa Agricultural Sector: research article' (2008) 26 *Perspectives in Education* 29, 32.

<sup>153</sup> Note 115 above; 4.

<sup>154</sup> International Labour Organisation *Combating child labour: A handbook for labour Inspectors* (2002) 13.

<sup>155</sup> *Ibid* 10.

<sup>156</sup> *Ibid* 27.

their duties effectively. Under section 9 of the Employment Act 6 of 2000,<sup>157</sup> labour inspectors in Malawi are restricted to conducting inspections of homes only with the consent of the employer or householder, or by appointment.<sup>158</sup> This weakness may be used as a loophole by child labour employers by not allowing inspectors to enter their premises. This limitation to the powers of the inspectors is another aspect which this research seeks to address. Child legislation should make these powers broader and more effective so that inspectors can perform their work in a healthy environment as others are threatened with dangerous weapons by child employers.<sup>159</sup> Increased powers for the labour inspectors will help in the reduction of child labour.

Loewenson<sup>160</sup> is of the view that the effective enforcement and implementation of various child labour protective laws is limited by factors such as ambiguity of the law or poorly drafted laws<sup>161</sup> and lack of clear child labour policies which results in communities not being aware of the consequences of the problem.<sup>162</sup> Therefore, it is of paramount importance for different governments, particularly in African society to improve upon or enact appropriate legal frameworks that will safeguard the interests of children. Moreover, an efficient monitoring process, which will be discussed in chapter 4 and 5 of this study, will be required for the appropriate legislation to effectively eliminate child labour.

### **2.3.6 Child labour legal framework**

Bourdillon contends that banning child labour through legislation does not necessarily benefit working children.<sup>163</sup> He is of the view that children need protection within the work environment not from working. Instead the child protective laws should be able to protect child employees from the harm which comes from employment, not to remove them from the employment.<sup>164</sup> He further explains that, child workers require legal protection to obtain better working conditions such as better salaries, work normal hours that do not disturb their

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<sup>157</sup>Section 9(1) of the Employment Act 6 of 2000.

<sup>158</sup>Section 9(1) a-c of the Employment Act 6 of 2000.

<sup>159</sup>International Labour Organisation (note 154 above) 13.

<sup>160</sup>Loewenson (note 37 above) 19.

<sup>161</sup>Loewenson (note 37 above) 27.

<sup>162</sup>Loewenson (note 37 above) 30.

<sup>163</sup>M. Bourdillon, 'Children and work: A Review of current Literature and Debates' (2006) 37 *Development and Change* 1201, 1222.

<sup>164</sup>Mazvidziwa (note 73 above) 26.

schooling and security from unfair dismissal.<sup>165</sup> Bourdillon's argument advocates for child labour, only if it is regulated through legislation in order to protect the interests of children. This argument is only viable if there is an efficient method of implementing the law. If the enforcement of the law is poor, the employers will continue to abuse vulnerable child employees. Rather ban child labour to protect vulnerable children than promote the abuse of young children by ignorant employers. Thus, the current study shows that the issue of child labour is difficult to handle in Africa. This is due to the impractical application of the child labour protective laws. The law in theory can eradicate child labour but the practical application of the law, is a challenge which can, to a greater extent, affect the wellbeing of children in Africa.

According to ILO, good child labour legislation contributes significantly to the fight against child labour.<sup>166</sup> This legislation must conform to the international child labour conventions.<sup>167</sup> As discussed above, it is difficult to eliminate child labour through legislation alone, social and economic policy interventions must also be adopted to tackle this problem.<sup>168</sup> Adequate national child labour legislation makes the implementation of these policies attainable. In order for it to contribute significantly in the elimination of child labour, good child labour law must be able to provide the following factors: a clear definition of child labour;<sup>169</sup> rights and duties of all parties involved in the child labour fight; the rights of children;<sup>170</sup> sanctions and enforcement of the Act; and various procedures that should be followed in enforcing the Act.<sup>171</sup> Therefore, unambiguous national child labour legislation is of paramount importance in combating child labour.

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<sup>165</sup>Bourdillon (note 163 above) 1221-1222.

<sup>166</sup>International Labour Organisation *Joining forces against child labour. Inter-agency report for The Hague Global Child Labour Conference of 2010* (2010) 75 available at [http://www.un.org/ar/events/childlabourday/pdf/Hague\\_Report.pdf](http://www.un.org/ar/events/childlabourday/pdf/Hague_Report.pdf)(accessed on 16 October 2014).

<sup>167</sup>Ibid.

<sup>168</sup>Ibid.

<sup>169</sup>Ibid.

<sup>170</sup>P Bharadwaj& L K. Lakdawala *Perverse consequences of well-intentioned regulation: Evidence from India's Child Labor Ban* (2013) 8 available at [http://economics.stanford.edu/files/Bharadwaj10\\_16.pdf](http://economics.stanford.edu/files/Bharadwaj10_16.pdf)(accessed on 15 October 2015).

<sup>171</sup>Ibid.

Lubaale argues that adopting legislation is not sufficient to eliminate child labour in Africa.<sup>172</sup> He further explains that child labour should rather be addressed as a human rights‘ violation.<sup>173</sup> This research agrees in part with Lubaale’s assertion. It is not disputed that child labour is a human rights‘ violation which impairs the dignity of young children. However, the research argues that the reason why child labour protective laws are insufficient to eliminate child labour is not that this problem is not handled as a human rights‘ violation, but because the legal framework that regulates child labour in Africa is not adequately drafted. Most child labour protective laws in Africa have gaps and loopholes, causing them to be too weak and vague.

In order to fully understand the literature and prevalence of child labour in Southern Africa, the following section provides a discussion on the nature and scope of child labour in the three countries under study in this research.

## **2.4 The nature and scope of child labour in:**

### **2.4.1 Malawi**

–Malawi became a part of the International Labour Organisation in 1964.”<sup>174</sup> In an effort to eliminate child labour, Malawi ratified in 1999 the two major conventions on child labour; Convention No. 138<sup>175</sup> and Convention No. 182.<sup>176</sup> After the ratification of the two conventions, the government drafted child labour protective laws, policies and social programmes with the aim of eliminating child labour.<sup>177</sup> The key legislation that regulates child labour in Malawi is the Employment Act, Cap 55:01 enacted in 2000,<sup>178</sup> and the Constitution of the Republic of Malawi, Act 38 of 1998 (Constitution of Malawi).<sup>179</sup> The

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<sup>172</sup>Lubaale (note 9 above) 42.

<sup>173</sup>Lubaale (note 9 above) 42.

<sup>174</sup>Msukwa (note 119 above) 3.

<sup>175</sup>Note 39 above.

<sup>176</sup>Note 40 above.

<sup>177</sup>ILO Special Multimedia Report: Child labour in Malawi available at <http://www.ilo.org/global/about-the-ilo/multimedia/features/malawi/lang--en/index.htm> (accessed on 16 September 2014).

<sup>178</sup>Employment Act, Cap 55:01 enacted in 2000.

<sup>179</sup>The Constitution of the Republic of Malawi Act 38 of 1998.

Child Care, Protection and Justice Act, No. 22 of 2010<sup>180</sup> and both the Education Act Chapter 30.01 of 1962 and the Education Act, 2013<sup>181</sup> are of significance in matters dealing with child labour.

Malawi can be identified as one of the poorest nations in Africa, and probably the world.<sup>182</sup> Despite being poor, the country is regarded as one of the best five tobacco producers in the world, mainly because of the availability of cheap labour and the lack of legislation to control activities.<sup>183</sup> Child labourers in Malawi are mostly employed in both tea and tobacco plantations.<sup>184</sup> In addition, children as young as five years help their parents harvest tobacco in tobacco estates, which is a risk to their health.<sup>185</sup> Malawi has an estimated 80000 children working on tobacco farms with most of these children being prone to tobacco related diseases such as green tobacco sickness and nicotine poisoning.<sup>186</sup>

The poor economic state of affairs in Malawi is the main reason why child labour is dominant. Due to their poor circumstances, parents are forced to send their under aged children to earn money for the family's upkeep.<sup>187</sup> Furthermore, unsatisfactory social services and poor legislation and enforcement also prevent an effective control of child labour in Malawi.<sup>188</sup> However, children working as domestic workers, and who have reached the legal working age in Malawi, are obliged to be employed under contract, in what is known as the ILO program called Support the National Action Plan to combat child labour in Malawi (SNAP).<sup>189</sup> This contract system helps the government monitor child labour in private environments. However, there is need for legislation to formalise this contract system in order for the law to fully protect domestic workers.

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<sup>180</sup>The Child Care, Protection and Justice Act, No. 22 of 2010.

<sup>181</sup> 'Malawi Parliament Passes Education Bill' *All Africa* 31 October 2013 available at <http://allafrica.com/stories/201311010769.html> (Accessed on 04 September 2014).

<sup>182</sup> ILO *Special Multimedia Report, Child Labour in Malawi* available at <http://www.ilo.org/global/about-the-ilo/multimedia/features/malawi/lang--en/index.htm> (accessed on 28 July 2014).

<sup>183</sup>Note 147 above.

<sup>184</sup>Eldring (note 2 above) 21.

<sup>185</sup>Note 147 above.

<sup>186</sup>Ibid.

<sup>187</sup>Ibid.

<sup>188</sup>United States Department of Labor's Bureau of International Labor Affairs *2012 Finding on the worst Forms of the Child Labor in Malawi* (2012) 2, 3-5 available at [http://www.dol.gov/ilab/reports/child-labor/south\\_africa.htm](http://www.dol.gov/ilab/reports/child-labor/south_africa.htm), (accessed on 8 September 2014).

<sup>189</sup>ILO World Day against Child labour: Malawi: Findings Solutions for Child Domestic workers' Issued on 12 June 2013 available at [http://www.ilo.org/global/about-the-ilo/multimedia/video/video-news-releases/WCMS\\_215822/lang--en/index.htm](http://www.ilo.org/global/about-the-ilo/multimedia/video/video-news-releases/WCMS_215822/lang--en/index.htm) (accessed on 14 October 2014).



## 2.4.2 South Africa

The child labour problem in South Africa is the result of the socio-economic, traditional and developmental circumstances of the country.<sup>190</sup> It is reported that around 36 percent of children between the ages of 5 and 17 are working.<sup>191</sup> Most children work in both the agricultural sector and domestic services.<sup>192</sup> In South Africa, the agricultural sector, as in any other country, is the largest employer of children.<sup>193</sup> Reports indicate that vulnerable children in South Africa are hired in the agricultural sector to harvest fruit, like mangos, grapes and bananas.<sup>194</sup> Children working in these employment sectors, usually perform their work in private homes which makes them prone to sexual and physical abuse.<sup>195</sup>

Some scholars link child labour in South Africa to the apartheid system.<sup>196</sup> It is described as a racial problem, whereby only black children are employed by white employees to work in harsh conditions for a low income.<sup>197</sup> As indicated above, most black and coloured children are reported to be working in plantations or factories belonging to white people.<sup>198</sup> This is clear evidence that the issue of equality is far from being achieved in South Africa. If this human rights' violation is not addressed, and the errors of the apartheid system are not addressed, the future opportunities for black children will be destroyed.<sup>199</sup>

Child labour in South Africa is mainly regulated by the Basic Conditions of Employment Act 75 of 1997(BCEA),<sup>200</sup> which sets out the same principles as the ILO Conventions.<sup>201</sup> The Children's Amendment Act 41 of 2007,<sup>202</sup> under section 141 forbids any form of child

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<sup>190</sup>Nhenga (note 33 above) 3.

<sup>191</sup>Nhenga (note 33 above) 3.

<sup>192</sup>Nhenga (note 33 above) 3.

<sup>193</sup>Note 34 above; 1.

<sup>194</sup>Ibid.

<sup>195</sup>Ibid.

<sup>196</sup>D Norman and B Brett (note 152 above) 33.

<sup>197</sup> Ibid.

<sup>198</sup>Note 34 above;1

<sup>199</sup>.D Norman and B Brett (note 152 above) 33.

<sup>200</sup>Basic Conditions of Employment Act 75 of 1997.

<sup>201</sup>Nhenga(note 33 above) 60.

<sup>202</sup>The Children's Amendment Act 41 of 2007.

exploitation, including child labour. The Constitution<sup>203</sup> also prohibits child labour by providing rights in the bill of rights that safe guard the interests of children. Furthermore, since child labour is closely linked to education, ~~the~~ South African Schools Act of 1996 makes school compulsory for children aged between 7 and 15.”<sup>204</sup> However, the child labour protection system lacks skilled personnel to effectively monitor and implement these laws.<sup>205</sup>

### 2.4.3 Zimbabwe

Child labour is described as a territorial crisis in Zimbabwe.<sup>206</sup> It is dominant in various sectors including commercial and communal farming, small scale mining, fishing, domestic work and the informal employment sector.<sup>207</sup> The majority of children in Zimbabwe are involved in street vending, such as selling food and second hand clothes,<sup>208</sup> shoe cleaning,<sup>209</sup> and street begging.<sup>210</sup> They also work in the transport industry where they work as either bus conductors or loaders.<sup>211</sup> In addition, children in rural areas are involved in cattle herding.<sup>212</sup> According to the cultural beliefs in this country, it is the duty of small children to herd the family cattle.<sup>213</sup> The belief does not consider the negative impact it has on the rights and interests of the child which are provided for in the Constitution. Cattle herding is a dangerous activity, resulting in children either suffering from animal borne diseases, or getting injured by animals or being exposed to sexual abuse.<sup>214</sup> Thus, this suggests that child labour in Zimbabwe is dominant in disadvantaged communities with less knowledge of protective laws for child labour.

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<sup>203</sup>1996 Constitution.

<sup>204</sup>Nhenga (note 33 above) 61.

<sup>205</sup>Note 34 above; 3.

<sup>206</sup>‘Zimbabwe: child labour on the rise’ *IRIN Humanitarian news and analysis* 24 February 2012 available at <http://www.irinnews.org/report/94939/zimbabwe-child-labour-on-the-rise>(accessed on 17 September 2014).

<sup>207</sup>B Grimsrud and L J Stokke *Child labour in Africa: Poverty or Institutional failures: The cases of Egypt and Zimbabwe* 7 available at <http://www.fao.no/pub/rapp/233/233.pdf> ( accessed on 03 September 2014)

<sup>208</sup>United States Department of Labor’s Bureau of International Labor Affairs *2012 Finding on the worst Forms of the Child Labor in Zimbabwe* (2012) 1available at [http://www.dol.gov/ilab/reports/child-labor/south\\_africa.htm](http://www.dol.gov/ilab/reports/child-labor/south_africa.htm), (accessed on 21 June 2014).

<sup>209</sup>Note 14 above; 9.

<sup>210</sup>Note 14 above; 9.

<sup>211</sup>Note 14 above; 9.

<sup>212</sup>Note 208 above; 1.

<sup>213</sup>Ibid.

<sup>214</sup>Ibid.

The economic crisis has led to an increase in child labour in this country.<sup>215</sup> The crisis in Zimbabwe is characterised by high rates of inflation and unemployment and severe shortages of food.<sup>216</sup> Due to the high rates of inflation, the majority of parents cannot afford to send their children to school, resulting in children, mostly girls, dropping out of school to seek employment to sustain their family.<sup>217</sup> Little has been done by the government to provide free education for children. Despite having a Constitution advocating the right to free and compulsory education, marginalised countries like Zimbabwe find it difficult to provide resources for a quality education for every child.<sup>218</sup> Consequently, depriving children of their constitutional right, suggests the government's unwillingness to promote sustainable human development.

Due to lack of evidence and insufficient records, the exact extent of child labour is unknown in Zimbabwe,<sup>219</sup> nor is there information on child labour victims or child labour offenders, or on how they are punished.<sup>220</sup> This lack of evidence illustrates the reluctance of the country to protect the interests of children. Moreover, reports indicate that child protective laws in Zimbabwe are ineffectively enforced by labour inspectors who lack the knowledge and resources to eradicate the problem.<sup>221</sup>

Zimbabwe has enacted child labour protective legislation in accordance with the Conventions, the main ones being the Labour Act (*Chapter 28:01*)<sup>222</sup> and the Constitution of Zimbabwe Amendment Act 20 of 2013 (constitution of Zimbabwe),<sup>223</sup> which prohibits forced labour and regulates the employment of children in Zimbabwe. In addition, Zimbabwe has introduced various legislation to support the Labour Act in the fight against child labour and child exploitation. These include the Children's Protection and Adoption Amendment Act 23 of 2001<sup>224</sup> which prohibits young children from engaging in hazardous work and the

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<sup>215</sup>Note 208 above; 1.

<sup>216</sup>*Ibid.*

<sup>217</sup>P Njagu (Note 146 above).

<sup>218</sup>M Weiner 'Child labour in developing countries: The Indian case - Articles 28a, 32 and 36 of the UN Convention on the Rights of the Child' (1994) 2 *International Journal of Children's Rights* 121.

<sup>219</sup>Note 208 above 1.

<sup>220</sup>*Ibid* 3.

<sup>221</sup>Note 208 above 3.

<sup>222</sup>Labour Act (*Chapter 28:01*).

<sup>223</sup>The Constitution of Zimbabwe Amendment Act 20 of 2013.

<sup>224</sup>Children's Protection and Adoption Amendment Act 23 of 2001.

Education Act (Chapter 25:04) of 1996<sup>225</sup> which makes primary schooling in Zimbabwe compulsory but not free.

Through the implementation of the UN Development Assistance Framework (2012 -2015)<sup>226</sup> the Zimbabwean government has employed various methods to eliminate child labour. These methods include improvements of both the education and social security systems and poverty reduction.<sup>227</sup> Despite the government's efforts in implementing the above mentioned programs, the elimination of child labour in Zimbabwe is still far from being achieved.

## **2.5 Conclusion**

In conclusion, research shows that child labour as a form of exploitation has a negative impact on the rights of children. This dissertation proposes that a new way of achieving the objective of stopping child labour should be devised in order to correct this violation of human rights. From the plethora of writing on the subject of child labour, a discernible pattern emerges. Child labour is a result of various socio-economic factors affecting different communities, and if these factors are not addressed child labour will continue to be practised. Another consistent argument from the writers is that in order to stop child labour in Africa, education should be made available to every child and should be made compulsory. However, very little has been written on child labour protective laws, specifically on how they have failed to control the growth of child labour in Africa. Therefore, the purpose of this dissertation is to critically analyse the child labour protective laws to determine whether such laws were correctly drafted in order to effectively serve their purpose of combating child labour.

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<sup>225</sup>Education Act (Chapter 25:04) of 1996.

<sup>226</sup>Note 208 above 3.

<sup>227</sup>Ibid.

## CHAPTER 3

# REVIEW OF INTERNATIONAL LABOUR ORGANISATION CONVENTIONS AND OTHER INSTRUMENTS ON CHILD LABOUR

### 3.1 Introduction

Section 39 of the Constitution<sup>228</sup> provides that any court of law or a tribunal, given a mandate to interpret the bill of rights “must take into consideration international law and may consider foreign law”.<sup>229</sup> The right of children not to be economically exploited is a right which is provided in most international conventions that regulate child labour. Malawi, South Africa and Zimbabwe are signatories to four international instruments that regulate child labour. These instruments provide a legal framework within which child protective legislation can be interpreted, assessed and understood.<sup>230</sup> The commitment by member states to eliminate child labour is derived from these international instruments. Thus, before analysing child labour protective legislation, it must be established whether these states are fully committed to the mandates given by these instruments. To place both the regional and international conventions in perspective, this chapter will provide an overview of the ILO Conventions and other instruments on which child labour finds expression.

### 3.2 Regulation of Child Labour at an International Level

#### 3.2.1 The Convention on the Rights of the Child

The UNCRC is the first international convention to afford rights to children. The UNCRC calls for the protection of the basic human rights of children ensuring both their full

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<sup>228</sup>1996 Constitution.

<sup>229</sup>M.Budeli ‘Children’s rights and protection against child labour in South Africa’ (2012)10 *Commonwealth Youth and Development* 1, 5.

<sup>230</sup>*S v Makwanyane & Another*, 1995 (6) BCLR 665 (CC); 1995 (3) SA 391 (CC), paragraphs 34–35.

development and participation in society. Mower describes the UNCRC as an important instrument because it is the Convention which pioneered the rights of children.<sup>231</sup>

The Convention protects the rights of children around the world by setting values and moral standards that countries must observe,<sup>232</sup> and it provides children with a variety of rights that assists them in developing to their full potential. These include protection from exploitation, hunger, ill-treatment or abuse.<sup>233</sup> One of the most significant tasks which the convention has undertaken is to encourage countries to improve their education systems by making primary education obligatory and accessible to all children.<sup>234</sup> In addition, the UNCRC discourages the treatment of children as assets or objects of charity for society to exploit, but rather as human beings who deserve equal treatment.<sup>235</sup>

Article 32 (1) of the UNCRC states that:

–State parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual and moral development.”<sup>236</sup>

Children have a right to be protected from all forms of economic abuse; from participating in work which is harmful to their development and depriving them of their education. However, even with the adoption of this right in Article 32, child labour and child slavery still exist in African countries.<sup>237</sup> Article 32(b) of the UNCRC specifically deals with the issue of penalties or sanctions for offenders who contravene the provisions of this Article. With regard to sanctions the Convention calls for reasonable and effective penalties which will assist in the implementation of the instrument. These sanctions also act as guidelines to ratifying states when enacting their own child labour protective laws.

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<sup>231</sup>A.G Mower Jr. *The Convention on the Rights of the Child, International Law Support for Children* (1997) 1.

<sup>232</sup>Ibid.

<sup>233</sup>‘Protecting children’s rights’ available [http://www.unicef.org/crc/index\\_protecting.html](http://www.unicef.org/crc/index_protecting.html). (accessed on 27 May 2014).

<sup>234</sup>Article 28 (1) (a) of the UNCRC.

<sup>235</sup>Note 233 above.

<sup>236</sup>Article 32 (1) of the UNCRC.

<sup>237</sup>International Labour Office, ‘InFocus Programme on Promoting the Declaration on Fundamental Principles and Rights of Work’ available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/--declaration/documents/publication/wcms\\_decl\\_fs\\_37\\_en.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/--declaration/documents/publication/wcms_decl_fs_37_en.pdf). (Accessed on 21 July 2014).

In terms of Article 39 of the UNCRC, every child has a right to be protected from all forms of abuse, either sexual or social.<sup>238</sup> In relation to social exploitation, this Article protects children from domestic labour. Domestic labour is defined as unpaid house-work performed in private family households or communities.<sup>239</sup> There are various interpretations regarding the degree of work a child should do at home. Loewenson is of the opinion that communities believe that children have a responsibility to help their parents with all domestic chores regardless of the degree of work.<sup>240</sup> This view is in contrast with the underlying principle established in Article 39, which states that child domestic labour which is legal and acceptable, is work which does not harm the wellbeing of the child or disturb their education; with more emphasis being placed on education as it is the key to the success and development of a child.<sup>241</sup> In an effort to protect the interests of children this Article requires ratifying states to take effective measures in promoting the physical and mental recovery of children who have experienced social exploitation, paying special attention to restoring the dignity of the child.<sup>242</sup>

### **3.2.2 The Minimum Age for Admission to Employment Convention No 138 and Recommendation 146, 1973**

The Minimum Age for Admission to Employment Convention is a fundamental instrument which regulates child labour. Its main purpose is to provide a safeguard against child exploitation in the labour market. This Convention prohibits child labour in all economic activities, whether or not the child works for a wage.<sup>243</sup> It also requires ratifying states to establish national laws and other social programmes to successfully abolish child labour within that specific country.<sup>244</sup> The main objective of the ILO in establishing this convention is to extend the minimum age requirement to a level consistent with the mental and physical development of young people.<sup>245</sup> In addition, Myers<sup>246</sup> contends that this Convention was

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<sup>238</sup> R. de Silva-de-Alwis *Legislative reform on child domestic labour: A gender analysis*. (2008)32.

<sup>239</sup> 'Domestic Labour debate', available at [www.dhcm.inkrit.org//domest6240210839](http://www.dhcm.inkrit.org//domest6240210839). (Accessed on 14 July 2014).

<sup>240</sup> Loewenson (note 37 above) 19.

<sup>241</sup> International Labour Organization 'Tackling child labour through education in African, Caribbean and the Pacific (ACP) States (TACKLE)', available <http://www.ilo.org/ipecc/projects/global/tackle/lang--en/index.htm>, (accessed on 29 July 2014).

<sup>242</sup> Article 39 of the UNCRC.

<sup>243</sup> International Labour Organisation (note 154 above) 8.

<sup>244</sup> *Ibid.*

<sup>245</sup> *Ibid.*

adopted to give assurance to adult employees that child workers will not undermine either their jobs or revenues.<sup>247</sup>

Article 1 of this Convention outlines that ratifying states should:<sup>248</sup>

—Undertake to pursue national policy designed to ensure the effective abolition of child labour and to raise progressively the minimum age for admission to work to a level consistent with the fullest physical and mental development of young persons.<sup>249</sup>

Article 1 outlines the main purpose of the Convention which is to encourage ratifying States to enact laws that will abolish child labour. However, the instrument has failed to provide a specific definition to what child labour is.<sup>250</sup> According to Mavunga:<sup>251</sup>

—Smolin<sup>252</sup> argues that the Convention has an abolitionist approach to child labour, but unfortunately does not define the evil that needs to be abolished.<sup>253</sup>

This loophole makes it difficult for states to draft child labour protective laws in the absence of clear guidelines on what practices to prohibit.<sup>254</sup> Faced with this dilemma, member states are forced to develop their own definition of child labour, mainly influenced by their own social, political and economic factors.<sup>255</sup> This gap therefore, has a negative effect on the motioning or implementation of the Convention<sup>256</sup>, thus making it impossible for child labour to be totally eliminated.<sup>257</sup>

One aspect worth mentioning is that it is a flexible instrument which allows for improvements by member states. This applies specifically to developing countries with underdeveloped education and economic systems, allowing a lower age requirement for

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<sup>246</sup> W Myers ‘The Right Rights? Child labour in a Globalising world’ 2001 *Ann Am Acad Polit Soc* 38, 46.

<sup>247</sup> Mavunga (note 26 above) 125.

<sup>248</sup> Article 1 of Convention No. 138.

<sup>249</sup> *Ibid.*

<sup>250</sup> Mavunga (note 26 above) 125.

<sup>251</sup> *Ibid* 126.

<sup>252</sup> D Smolin ‘Strategic Choices in the International Campaign against Child Labour’ 2000 *Hum Rts Q* 942,946.

<sup>253</sup> Mavunga (note 26 above) 126.

<sup>254</sup> *Ibid* 125.

<sup>255</sup> *Ibid* 127.

<sup>256</sup> *Ibid* 126.

<sup>257</sup> *Ibid* 128.



employment in such countries.<sup>258</sup> Thus, the convention provides that the minimum age for employment of young people must not be less than 15 years, which is the standard age for completing compulsory schooling.<sup>259</sup> However, there is an exception which allows children of 14 years to be employed in underdeveloped countries.<sup>260</sup> Consequently, this age requirement approach in various countries guarantees children their right to a proper education.<sup>261</sup>

The Convention also establishes a minimum age of 18 years for hazardous work. Hazardous work is described as any form of work that is likely to harm the child physically, mentally and morally.<sup>262</sup> The 18 years requirement for hazardous work was established solely because of the circumstances in which the hazardous work is carried out, which will likely endanger the health and welfare of young persons.<sup>263</sup> The convention, however, allows an exception to the above requirement to a lower age of 16 years, if there is sufficient proof and evidence that the health and welfare of the young person is entirely protected.<sup>264</sup> Although the convention requires that the child is protected, it does not state how the child is to be protected. Member states are simply required to ensure that, the child has received proper instructions and sufficient operational training.<sup>265</sup>

Article 7 of the Convention states:<sup>266</sup>

—Member states through their national laws can permit children between the ages of 13 and 15 years of age to undertake light work. Such work should not be likely to be harmful to their health or development and should not prejudice their attendance at school, their participation in vocational orientation or training programmes.<sup>267</sup>

The convention allows children between the ages of 13 and 15 to be involved in light work provided that the work does not hinder the health, education and development of the child.<sup>268</sup> In countries where the basic minimum age is 14, the age for light work is reduced to 12 years.

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<sup>258</sup> International Labour Organisation (note 154 above) 8.

<sup>259</sup> Article 2 (3) of Convention No. 138.

<sup>260</sup> Article 2 (4) of Convention No. 138.

<sup>261</sup> N Chahda, I.S Feghall & C.J Vardy *An Insight into Child Labor among Iraq Refugees In Lebanon* (1999) 17.

<sup>262</sup> Article 9 of Convention No. 138.

<sup>263</sup> Article 3(1) of Convention No. 138.

<sup>264</sup> Article 3(3) of Convention No. 138.

<sup>265</sup> Ibid.

<sup>266</sup> Article 7 of Convention No. 138.

<sup>267</sup> Article 7(1) of Convention No. 138.

<sup>268</sup> Ibid.

However, the convention's failure to provide a standard definition of the term 'light work,' creates a misunderstanding of the concept by member states, leading to more incidences of child exploitation.<sup>269</sup> Interpretation of the phrase 'light work' will also create confusion as what one nation considers as being light work may actually be heavy work to another.<sup>270</sup> Furthermore, the Convention does not provide states with proper guidance on how to assess the concept of light work. This failure to give a clear definition can be used as an advantage by employers to exploit vulnerable children.<sup>271</sup> Child labour will not be effectively abolished until a coherent definition of the term 'light work' is provided by the International Labour Organisation, and clarity given on the conditions under which light work can be conducted.

Article 5(3) of the Convention states that:

—The provisions of the Convention shall be applicable as a minimum to the following: mining and quarrying; manufacturing; construction; electricity, gas and water; sanitary services; transport, storage and communication; and plantations and other agricultural undertakings mainly producing for commercial purposes, but excluding family and small-scale holdings producing for local consumption and not regularly employing hired workers".<sup>272</sup>

Article 5(3) provides a list of employment categories where its provisions do apply. The objective of reducing child labour cannot be achieved if the provisions of the Convention only apply to certain categories of employment, leaving other categories such as domestic services unregulated. In addition it mentions commercial agriculture,<sup>273</sup> but fails to regulate cattle herding, an aspect of domestic agriculture where most child labourers are found despite it being a dangerous activity.<sup>274</sup> Often, national legislation that is not applied comprehensively does not achieve its purpose. For child labour to be effectively controlled, it should be prohibited in all sectors of employment. Hence, there is a need to amend this Article.

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<sup>269</sup>Musandirire (note 6 above) 52.

<sup>270</sup>Ibid.

<sup>271</sup>Mavunga (note 26 above) 139.

<sup>272</sup>Article 5(3) of Convention No. 138.

<sup>273</sup>Ibid.

<sup>274</sup>Note 208 above; 1.

Furthermore, according to Article 5(3) child labour is prohibited only in the commercial sectors.<sup>275</sup> Therefore the Convention only covers economic activity through which revenue is generated, placing an exception on domestic chores such as the herding of cattle, cooking and child rearing which is often performed by children at home. Failure by the Convention to include domestic chores in the definition is another omission which can give rise to exploitation or abuse of children by their parents and community members. Cattle herding can prove to be a dangerous domestic chore to children especially boys.<sup>276</sup> The instrument's failure to regulate these domestic chores places the lives of children at risk.<sup>277</sup> Scholars argue that this Article is unreasonable because it underestimates the impairment that domestic chores have on children, mainly girls who perform most of the family chores.<sup>278</sup>

### **3.2.3 The Worst Forms of Child Labour Convention, 1999 (No. 182)**

In 1998, the International Labour Organisation adopted the Worst Forms of Child Labour Convention. The main purpose of the convention is to abolish the worst forms of child labour. Most of the countries around the world have ratified this Convention; however, ratification is only the first step, the main task is the implementation of the Convention which requires full commitment and hard work from each member state.<sup>279</sup> Worst forms of child labour can be described as any form of work or employment which is capable of endangering the health, safety and development of the child.<sup>280</sup> The convention protects all children below the age of 18<sup>281</sup> and pays specific attention to the wellbeing of the girl child.<sup>282</sup>

According to Article 1 of the convention, member states are required to establish effective methods or national programmes, laws and policies to eliminate all the worst forms of child

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<sup>275</sup> L Swepston 'Child Labour: its Regulation by ILO Standards and National Legislation' 1982 *Int'l Lab Rev* 577,584.

<sup>276</sup> 'Namibia: Child Livestock Herding in spotlight' *All Africa* 27 February 2013, available at <http://allafrica.com/stories/201302270661.html>, (accessed on 29 July 2014).

<sup>277</sup> United States Department of Labor's Bureau of International Labor Affairs 2013 *Finding on the worst Forms of the Child Labor in Zimbabwe* (2013) 1 available at <http://www.dol.gov/ilab/reports/child-labor/zimbabwe.htm>, (accessed on 21 June 2014).

<sup>278</sup> E.D Gibbons ... *et al.* 'Child labour education and the principle of non-discrimination.' (2005) 4-5.

<sup>279</sup> J Martin & D Tajgman *Eliminating the worst forms of child labour: A practical guide to ILO Convention No. 182. Handbook for parliamentarians No. 3* (2002) 5.

<sup>280</sup> *Ibid.*

<sup>281</sup> International Labour Organisation (note 154 above) 9.

<sup>282</sup> Article 7 para (2) (e) of Convention No. 182.

labour.<sup>283</sup> The International Programme on the Elimination of Child Labour (hereafter IPEC), launched in 1992, has the purpose of assisting member states to eradicate the worst forms of child labour through national programmes.<sup>284</sup> Furthermore, the IPEC conducts national campaigns to change the social and economic attitude of society towards child labour in all participating countries.<sup>285</sup>

The following four categories of child labour are considered as the worst forms of child labour and are therefore prohibited in the Worst Forms of Child Labour Convention:

- (a) —All forms of child slavery, for instance, child trafficking, debt bondage, forced or compulsory labour and recruitment of children to participate in armed conflicts.<sup>286</sup>
- (b) Exploitation of children through child prostitution or the use of children in pornographic activities and productions.<sup>287</sup>
- (c) The use of children in illicit activities, such as the manufacturing and trading of illegal drugs.<sup>288</sup>
- (d) Any form of exploitative work, which is likely to be detrimental to the health, welfare, and dignity of the child.<sup>289</sup>

Article 7 of the Convention requires member states to take reasonable measures in eliminating the worst forms of child labour.<sup>290</sup> In addition, states are encouraged to use education for eliminating child labour.<sup>291</sup> According to the Article, ratifying states are supposed to provide free basic education to all under-aged children in the society.<sup>292</sup> However, because of the economic hardship in Africa, few countries, for instance South Africa, have actually enforced the free basic education strategy and introduced the department of education feeding scheme in poor schools.<sup>293</sup>

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<sup>283</sup>International Labour Organisation (note 154 above) 9.

<sup>284</sup>J Martin & D Tajzman (note 279 above) 61.

<sup>285</sup>Ibid.

<sup>286</sup>Article 3(a) of Convention No. 182.

<sup>287</sup>Article 3 (b) of Convention No. 182.

<sup>288</sup>Article 3 (c) of Convention No. 182.

<sup>289</sup>Article 3 (d) of Convention No. 182.

<sup>290</sup>Article 7 para 1 of Convention No. 182.

<sup>291</sup>Article 7 para 2(c) of Convention No. 182.

<sup>292</sup>Article 7 para 2 (c) of Convention No. 182.

<sup>293</sup>Note 115 above; 3-4.

Education in Zimbabwe and Malawi is still not compulsory or free and this may increase the exposure of children to exploitation, mostly to hazardous activities like agriculture and fishing.<sup>294</sup> In addition, the Convention is flawed in the sense that it assumes that all member states have the resources to provide free education. This is not the case in most African countries. Due to the economic situation in Africa few countries have the financial means to provide free education. Instead, the Convention should have provided a fund to assist such countries that are financially challenged in order to achieve the elimination of child labour through education. The Convention requires ratifying states to recognise the role of labour inspectors in monitoring the implementation of the child labour protective laws.<sup>295</sup> In order to achieve the purpose of this instrument, proper and effective methods of enforcement must be introduced

However, as the Convention regulates child labour practices that are criminal in nature, for instance child pornography and drug trafficking, its implementation will be difficult as labour inspectors and other labour law enforcement agents have no power or knowledge to deal with criminal matters.<sup>296</sup> States have an obligation to impose effective punishment to child offenders, which will deter people from committing the same offence. Therefore, it is the duty of member states to ensure that labour inspectors are respected, properly trained, and given the authority to conduct their work without obstacles.<sup>297</sup>

The Worst Forms of Child Labour Convention has a number of gaps that may make it difficult for the worst forms of child labour to be eliminated. It lacks clarity in a number of areas, for instance, its failure to provide a definition for ‘child labour’, makes it difficult for member states to enact child labour protective legislation. As an international instrument, meant to guide member states, it is paramount that the Convention provides a clear and universal definition of child labour that will be used by all its members. In addition, the instrument requires member states to elect competent officers or authorities that will be responsible for the implementation of the Convention,<sup>298</sup> such as the appointment of labour inspectors. However, the Convention offers no clear guidance as to how the labour inspectors or other competent authorities should implement its provisions. Hence, the Convention’s lack

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<sup>294</sup>Note 208 above; 3.

<sup>295</sup>International Labour Organisation (note 154 above) 9.

<sup>296</sup>Mavunga (note 26 above) 148.

<sup>297</sup>International Labour Organisation (note 154 above) 9.

<sup>298</sup>Article 7 para 3 of Convention No. 182.

of uniformity in many of its provisions leave member states with no other choice but to use their own discretion in interpreting and implementing the Convention. If member states are allowed to use their own discretion without proper guidelines from the ILO, the elimination of the worst forms of child labour will be difficult to achieve.

### **3.3 Regulation of child labour at regional level**

#### **3.3.1 The African Charter on the Rights and Welfare of the Child 1990**

The African Charter on the Rights and Welfare of the Child (hereafter ACRWC) is an important instrument as it affords various rights to African children. The Charter was introduced after it was observed that the conditions, in which most African children grow up, are life-threatening due to numerous factors including socio-economic, cultural and developmental circumstances, as well as armed conflicts, exploitation and hunger.<sup>299</sup> The ACRWC in Article 2 defines a ‘child’ as any human being under the age of 18.<sup>300</sup>

Article 15 regulates the protection of children from any sort of exploitation in Africa. The article states that:

—Every child shall be protected from all forms of economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s physical, mental, spiritual, moral or social development.”<sup>301</sup>

The provisions of Article 15 are derived from Article 32 of the UNCRC. Article 15 of the Charter includes the phrase ‘all forms’ of exploitation in its provisions. Gose is of the view that the phrase offers clarity to what can be described as child exploitation.<sup>302</sup> He further explains that, the phrase ‘all forms’ of exploitation helps to expand the meaning of exploitation to include other activities that are not exploitative at face value but will

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<sup>299</sup> Organization of African Unity (OAU), African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990), available at: <http://www.refworld.org/docid/3ae6b38c18.html> (accessed on 10 July 2014).

<sup>300</sup> International Labour Organisation (note 154 above) 10.

<sup>301</sup> Article 15 Para 1 of the African Children’s Charter.

<sup>302</sup> M Gose *The African Charter on the Rights and Welfare of the Child: An assessment of the legal value of its substantive provisions by means of a direct comparison to the Convention on the Rights of the Child* (2002) 61.

eventually have a negative impact on the child.<sup>303</sup> One other aspect which is worth mentioning is the failure by the Charter to specifically prohibit work that is prone to affect the child's education like the UNCRC.<sup>304</sup> This omission by the Charter will make it difficult for child labour to be effectively controlled because affording children better education facilities is an important tool in prohibiting child labour in Africa.<sup>305</sup> In addition ratifying states are required in terms of Article 15(2) to take appropriate legislative and administrative measures in protecting the interests of children in both formal and informal sectors of employment.<sup>306</sup>

The charter recognises various rights of children, including the right to freedom of expression,<sup>307</sup> association,<sup>308</sup> thought, conscience and religion<sup>309</sup> and the right to education.<sup>310</sup> Like the Worst Forms of Child Labour Convention, the African Children's Charter calls for the protection of children against any form of abuse or immoral treatment, detrimental social and cultural practices<sup>311</sup> and all forms of sexual exploitation. Therefore, according to this charter, child labour is a gross human rights violation and should be abolished in order to protect the future of the child.<sup>312</sup>

In an effort to protect the rights of vulnerable children, the Charter established an African Committee of Experts on the Rights and Welfare of Children, which is comprised of 11 members.<sup>313</sup> The committee deals with the protection and promotion of children's rights.<sup>314</sup> In addition, the committee monitors the implementation of the provisions of this charter<sup>315</sup> and ensures the charter is interpreted in line with other ILO Conventions that deal with the protection of children.<sup>316</sup> However, the committee faces numerous challenges in terms of implementation. One of the problems which hinder the effectiveness of this committee is the failure by member states to submit progress reports on how the Charter is being implemented

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<sup>303</sup>Ibid.

<sup>304</sup>Ibid 62.

<sup>305</sup>Ibid.

<sup>306</sup>Article 15 (2) of the African Children's Charter.

<sup>307</sup>Article 7 of the African Children's Charter.

<sup>308</sup>Article 8 of the African Children's Charter.

<sup>309</sup>Article 9 of the African Children's Charter.

<sup>310</sup>Article 11 of the African Children's Charter.

<sup>311</sup>Article 21 of the African Children's Charter.

<sup>312</sup>A Lloyd 'A theoretical analysis of the reality of children's rights in Africa: An introduction to the African Charter on the Rights and Welfare of the Child' (2002) 1 *AHRLJ* 11, 11.

<sup>313</sup>Article 33 of the African Children's Charter.

<sup>314</sup>Article 42 (a) (i)-(iv) of the African Children's Charter.

<sup>315</sup>Article 42(b) of the African Children's Charter.

<sup>316</sup>Article 42(c) of the African Children's Charter.

in their respective countries. The failure by states to submit the reports clearly shows a lack of dedication in fulfilling their commitments.<sup>317</sup> In addition, the fact that methods of submitting these reports vary amongst the countries, makes it difficult for the committee to evaluate the states' progress regarding protection of the rights of children. Therefore, for the implementation of the Charter to be effectively evaluated, the committee should establish a uniform method of submitting reports for all member states. A further reason for failure is the negative attitude by member states towards the rights of children.<sup>318</sup> The problems being faced by the African states, both socially and economically make it difficult for the member states to adhere to the aims and objectives of the Charter. For instance, member states may be reluctant to appoint suitable candidates to represent them in the Committee of Experts, making the committee incompetent and unable to achieve the Charter's purpose and objectives

### **3.4 Conclusion**

The discussion above has explored the legal position of child labour, in both a regional and international context. By outlining the central theme of all the four instruments discussed with regards to the rights of children, a base has been established of the values and principles upon which the protection against child labour is built. According to the international and regional instruments, children should be protected from any form of exploitation. It is the duty of member states to establish effective legislation and national programmes to protect children from child labour. Despite a few gaps in some of the instruments which may make it difficult for child labour to be controlled, the instruments discussed in this chapter set standards which the countries under discussion must follow when enacting their own child labour laws. In summary, the commitment of ratifying states in the abolition of child labour is measured by the provisions of the international conventions. Therefore, it is against this international background of child labour that the analysis of the child labour protective laws will be conducted in the following chapter.

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<sup>317</sup>Lloyd (note 312 above) 30.

<sup>318</sup>Ibid.



## **CHAPTER 4**

# **OUTLINING GAPS IN CHILD LABOUR PROTECTIVE LAWS IN MALAWI, SOUTH AFRICA AND ZIMBABWE**

### **4.1 Introduction**

As already indicated, the purpose of this study is to critically analyse the relevant child labour protective laws in three countries in Southern Africa. The preceding chapter presented an overview of ILO Conventions and other instruments in which child labour finds expression. The chapter also articulated the values and principles upon which protection against child labour is built within the international community, and how necessary it is for member states to enact effective legislation to protect children from exploitation.

This chapter presents an analysis of various child labour protective laws in Malawi, South Africa and Zimbabwe in order to ascertain whether there are gaps in the respective laws. In addition, the chapter seeks to establish challenges that may exist with the control of child labour in Africa. Aspects to be included in the discussion are standard definition of a child, the scope of application, the inspection system, labour records or registers, penalties for child labour offenders, and the right to free and compulsory education.

### **4.2 Discussion of gaps found in various aspects provided for in legislation**

#### **4.2.1 Standard definition of a child**

Convention 182 defines a child as any human being who is under the age of 18, making this age the internationally recognised age of a child.<sup>319</sup> All member states are required to adhere to this standard definition. Thus, if child labour is to be effectively monitored all child labour protective laws, regardless of the country, should use the same definition of a child.

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<sup>319</sup> Article 2 of Convention No. 182.

In Zimbabwe, section 81 of the Constitution defines a child as any human being under the age of 18.<sup>320</sup> Section 11(4) of the Labour Act (*Chapter 28:01*) is also clear as it prohibits the employment of children under the age of 18 in hazardous work.<sup>321</sup> These legislation are in line with the convention. However, the Child Protection and Adoption Amendment Act, defines a child as someone under the age of 16.<sup>322</sup> This means that this Act does not protect children between the ages of 16 and 18, although the Labour Act (*Chapter 28:01*) offers protection against hazardous work to this age group.<sup>323</sup>

This situation is also found in Malawi's protective laws, whereby the Constitution of the Republic of Malawi defines a child as any human being under the age of 16.<sup>324</sup> This is consistent with the Child Care, Protection and Justice Act which also defines a child as someone who is under the age of 16.<sup>325</sup> However, these two acts are inconsistent with section 22 of the Employment Act, which protects a child between the age of 16 and 18 from performing hazardous tasks. As in Zimbabwe, these legislation offer no protection to children over the age of 16, who are protected by the Employment Act from hazardous work.

However, with South Africa's key child labour protective laws, the standard age is consistent. The Constitution in Section 28 (3) defines a child as someone under the age of 18, which also applies to Section 1 of the BCEA. Furthermore, the Children's Act of 2005, section 1 also defines a child as a person under the age of 18, which conforms to convention 182. This uniformity in the definition does not create difficulties in the enforcement of the laws.

Thus the main argument is the need for all child labour protective laws to be standardised and consistent with the international child labour conventions. If laws are left with different or inconsistent definitions, all aspects of child labour will be difficult to understand, more so to regulate. In addition, the age definition can be a loophole which can be used by child labour offenders to exploit children. This does not mean that the law should only protect school-going children under the age of 15, but should be able to regulate child labour up to the age of

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<sup>320</sup>2013 Constitution.

<sup>321</sup> Section 11(4) of the Labour Act (*Chapter 28:01*).

<sup>322</sup>Section 2 of the Children's Protection and Adoption Amendment Act 23 of 2001.

<sup>323</sup>Section 11(4) of the Labour Act (*Chapter 28:01*).

<sup>324</sup> Section 23(4) and (5) of the Constitution of Malawi.

<sup>325</sup>Section 2 of the Child Care, Protection and Justice Act 22 of 2010.

18. Therefore, there is a need for all laws to be consistent when it comes to the standard age of a child, and to function together in a harmonised way.

#### 4.2.2 Scope of Application

Article three of the Convention No. 138,<sup>326</sup> prohibits the exploitation of children by making them perform work which is harmful to their wellbeing and development, whether it is for economic gain or not. Child labour protective laws should be in conformity with this Article for child labour to be effectively regulated, and should be able to prohibit child labour in all areas whether in employment or in an informal private setting.

Section 11 of the Labour Act (chapter 28.01) 17 of 2002, regulates child labour in Zimbabwe. Section 11(1) states that:<sup>327</sup>

—... no employer shall employ any person in any occupation—  
(a) as an apprentice who is under the age of thirteen years;  
(b) otherwise than as an apprentice who is under the age of fifteen years.”

The above section prohibits child labour in the employment relationship by prohibiting employers from hiring children under the age of 15 to perform work.<sup>328</sup> This section does not prohibit child labour in informal work relationships, such as household work performed by children under the age of 15. This provision creates a loophole for exploitation of children because it fails to protect vulnerable children performing work in the home environment or in the informal sector. In addition, the Labour Act (chapter 28.01) prohibits forced labour in section 4A.<sup>329</sup> However, the section offers an exception by allowing forced labour only as a form of parental discipline, but offers no protection to vulnerable children who may be forced to perform dangerous activities, or work in the name of parental discipline. Furthermore, the law is ambiguous because it has failed to determine what constitutes legal parental discipline. If no legal guidelines are offered in this regard, parents will exploit this right by forcing children to engage in harmful activities for their own selfish reasons. Therefore, the failure to regulate work done by children for domestic purposes in either their home environments or

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<sup>326</sup>Article 3(1) of Convention No. 138.

<sup>327</sup>Section 11(1) (a) (b) of the Labour Act (chapter 28.01) 17 of 2002.

<sup>328</sup>Ibid.

<sup>329</sup>Section 4A (d) of the Labour Act (chapter 28.01) 17 of 2002.

communities for no economic gain creates a loophole which can lead to more cases of child exploitation.

In Malawi, Section 21(1) of the Employment Act 6 of 2000<sup>330</sup> contends that<sup>331</sup>

—...subject to subsection (2). No person under the age of fourteen shall be employed or work in any public or private agricultural, industrial or non-industrial undertaking or any branch thereof.

(2) Subsection (1) shall not apply to work done in homes, vocational technical schools or other training institutions”

This section prohibits children under the age of 14 from performing work either for economic purposes or not, in various employment sectors. However, section 21(2) clearly states that the prohibition of child labour in section (21) (1) does not apply to work done in homes.<sup>332</sup> This is in contrast with the provisions of Article 3 of Convention 138. If the law can prohibit child labour in all other areas, but fails to regulate the phenomenon in the home environment, where the incidences of child labour are high,<sup>333</sup> it then has failed to achieve its purpose.

The situation in South Africa was similar to that of Zimbabwe. Section 43 of the Basic Conditions for Employment Act<sup>334</sup> prohibits the employment of a child under the age of 15. This results in the same problem as in Zimbabwe. Because the law only prohibited child labour in an employment relationship, parents could exploit children in the home with work injurious to their health, schooling and wellbeing. However, the Basic Conditions of Employment Amendment Act, 2013<sup>335</sup> amended section 43(2) to state that:<sup>336</sup>

—...No person may require or permit a child to perform any work or provide any services –  
(a) that are inappropriate for a person of that age;  
(b) that place at risk the child’s well-being, education, physical or mental health, or spiritual, moral or social development...<sup>337</sup>

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<sup>330</sup> The Employment Act 6 of 2000 (hereafter referred to as the Employment Act).

<sup>331</sup> Section 21(1) of the Employment Act.

<sup>332</sup> Section 21(1) (2) of the Employment Act.

<sup>333</sup> E. V. Edmonds & N Pavcnik ‘Child Labour in the Global Economy’ (2005) 19 (1) *Journal of Economic Perspectives*: 199–220.

<sup>334</sup> Act 75 of 1997.

<sup>335</sup> Basic Conditions of Employment Amendment Act, 2013 came into effect on the 1st of September 2014.

<sup>336</sup> Section 43(2) of the Basic Conditions of Employment Amendment Act, 2013.

<sup>337</sup> Ibid.

This amendment however, prohibits both the employment of a child and any form of labour exploitation for non-economic purposes. The difference between this amendment and section 43 is that the amendment no longer prohibits child labour only in an employment relationship, but has extended the regulation of child labour to informal relationships. Thus this can be interpreted to apply in a domestic environment. In line with this development, in order to eradicate child labour in a domestic setting, the government of South Africa, established legal guidelines for tolerable household chores.<sup>338</sup> This development illustrates South Africa's willingness to control and eradicate child labour in order to safe guard the interests of the child. However, as it is still very new, it is not known whether the amendment will effectively assist in reducing incidences of child labour.

The main argument is for child labour to be eradicated and laws that regulate child labour are able to prohibit it in all sectors of work. It might be a challenge for African governments to regulate child labour in domestic situations because of the cultural beliefs surrounding the need for children to help with household chores in preparation for their future roles and responsibilities.<sup>339</sup> Despite the importance of these cultural values, the rights and interests of a child should be protected. High incidences of child labour are found in rural areas where children are forced by their parents or guardians to perform hazardous work.<sup>340</sup> Hence, the legislation should not ignore domestic work, household chores and informal employment relationships which are the sectors most affected by incidences of child labour.<sup>341</sup> If these activities are left unregulated, the wellbeing of young persons will be impaired to a greater extent. Thus, the laws should be able to balance the right to culture and religion, and the rights, interests, future and human dignity of a child. Therefore, there is a need for all government authorities to amend these laws in order to accommodate all types of work performed by children, in any given environment in accordance with Article 3 of the Convention.<sup>342</sup>

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<sup>338</sup>United States Department of Labor's Bureau of International Labor Affairs *2012 Finding on the worst Forms of the Child Labor in South Africa* (2012) 3 available at [http://www.dol.gov/ilab/reports/child-labor/south\\_africa.htm](http://www.dol.gov/ilab/reports/child-labor/south_africa.htm), (accessed on 27 November 2014).

<sup>339</sup>International Labour Organisation 'Child labour and domestic work' available at <http://www.ilo.org/ipec/areas/Childdomesticlabour/lang--en/index.htm> (accessed on 21 August 2014).

<sup>340</sup>E V. Edmonds & N Pavcnik (note 333 above).

<sup>341</sup>International Labour Organisation (note 339 above).

<sup>342</sup>Article 3(1) of Convention No.138.

### 4.2.3 Inspection System

Labour inspectors play a pivotal role in the enforcement of child labour protective laws.<sup>343</sup> The power of inspectors to monitor and enforce these protective laws is derived from the two International Labour Conventions<sup>344</sup> that regulate child labour.<sup>345</sup> Article 3(a) of the ILO Labour Inspection Convention, 1947 (No. 81)<sup>346</sup> institutes a link between child labour and the labour inspection system.<sup>347</sup> Article 3(a) of the Convention states that:<sup>348</sup>

—...The function of the labour inspection system is to secure the enforcement of the legal provisions relating to conditions of work and the protection of workers while engaged in their work, such as provisions relating to hours, wages, safety, health and welfare, *the employment of children and young persons*, and other concerned matters, in so far as such provisions are enforceable by labour inspectors”<sup>349</sup>

It is argued that in order for labour inspectors to execute their duties effectively they should be well trained,<sup>350</sup> possess relevant qualifications,<sup>351</sup> be granted the authority to function, and furnished with offices and transport services.<sup>352</sup> In addition, inspectors are given legal protection under article 17 when they enter the premises or workplace of the employer.<sup>353</sup> However, the protection is to a large extent inappropriate considering how dangerous and violent employers can be to inspectors who conduct inspections without prior notice.

Malawi, South Africa and Zimbabwe have incorporated the inspection system into their respective labour laws to monitor the employment relationships between employees and employers and, to control and eliminate child labour. Despite the incorporation of inspection provisions in various child labour laws, the problem persists. This is because the power of

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<sup>343</sup>International Labour Organisation (note 154 above) 3.

<sup>344</sup>Recommendation No. 146 of Convention No.138 and Recommendation No. 190 of Convention No.182.

<sup>345</sup>The International Labour Organisation Inspection (Agriculture) Convention, 1969, No. 129 regulates all agricultural activities. It acknowledges the importance of labour inspectors in the elimination of employment of child labourers.

<sup>346</sup>The ILO Labour Inspection (industry and commerce) Convention No. 81, 1947.

<sup>347</sup>International Labour Organisation (note 154 above) 11.

<sup>348</sup> Article 3(a) of the Labour Inspection (industry and commerce) Convention No. 81.

<sup>349</sup>International Labour Organisation (note 154 above) 11.

<sup>350</sup> Article 7 of the Labour Inspection (industry and commerce) Convention No.81.

<sup>351</sup>International Labour Organisation (note 154 above) 12.

<sup>352</sup>Article 11 of the Labour Inspection (industry and commerce) Convention No.81.

<sup>353</sup> Article 17 Para 1of the Labour Inspection (industry and commerce) Convention No.81.

labour inspectors is limited when enforcing labour provisions, especially in matters dealing with the employment of children.<sup>354</sup>

Malawi and South Africa have a restriction on the inspection of homes unless the employer consents to the inspection, or if the inspector gets a warrant from the magistrate to authorise the inspection. Section 65 of the BCEA is a provision in South Africa which regulates the enforcement and monitoring of the legislation through labour inspectors. Section 65(1) (a) of the BCEA<sup>355</sup> provides that:

—In order to monitor and enforce compliance with an employment law, a labour inspector may, without warrant or notice, at any reasonable time, enter...any workplace or any other place where an employer carries on business or keeps employment records, that is not a home.”

The above section gives power to labour inspectors to enter without prior notice at any workplace and section 65(2)<sup>356</sup> states that the inspector can enter a private home only with permission from authorities, or consent from the owner.

In Malawi, section 9 of the Employment Act<sup>357</sup> applies the same principles in regard to inspection as South Africa. Child labour is most common in informal sectors, for example domestic work and child prostitution, which are mostly practised in private homes.<sup>358</sup> It is difficult for inspectors to monitor such activities, because private owners are unwilling to give the required permission. Even labour inspectors are given the required permission, child labour offenders ensure that they have covered their tracks before the inspectors are allowed in.<sup>359</sup> Moreover, inspectors are required to obtain search warrants from a magistrate before

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<sup>354</sup>International Labour Organisation (note 154 above) 8.

<sup>355</sup>Section 65(1) (a) of the BCEA.

<sup>356</sup>Section 65(2) of the BCEA.

<sup>357</sup>Section 9(1) a-c of the Employment Act.

<sup>358</sup> Towards a National Child Labour Action Programme for South Africa (October 2002).

<sup>359</sup>M S Mwangonde *National legislation, Policy and strategy on child labour in Malawi- Identifying the gaps: Paper for the National conference in eliminating child labour in Agriculture* (2012) 8 available at <http://www.eclt.org/site/wp-content/uploads/2012/09/Gaps-in-National-Legislation-Paper1.pdf> (accessed on 19 September 2014).

entering the employer's premises; a process which can be both slow and inefficient,<sup>360</sup> often taking more than a week.<sup>361</sup>

Furthermore, by the time the inspector applies and receives such a warrant the offender would have already covered up all evidence of the offence, or bribed the child not to provide the inspector with correct information regarding their employment relationship.<sup>362</sup> In other cases, the child might be dismissed before the inspector gets the chance to inspect making it highly impossible to monitor or abolish child labour. For these reasons, acquiring a search warrant before entering the premises of a child labour offender is not an ineffective way of safe-guarding the interests of the child.

However, the situation in Zimbabwe is slightly different from the other two countries. In terms of section 126(1) (a) of the Labour Act (chapter 28.01),<sup>363</sup> a labour officer is allowed to enter any premises in which a person is employed. The word 'premises' refers to all work places including private homes. This section grants powers to inspectors, and if correctly enforced can monitor child labour in places such as homes and farms. Hence, for the child labour laws to be effectively enforced inspectors should be granted access to all places of work where it is reasonably believed that children are employed, including private homes. The right to privacy should take less precedence in matters concerning the interests of children; such a limitation finds justification under section 86 of the Constitution of the Republic of Zimbabwe.<sup>364</sup> It is paramount for the legislature to balance the employer's right to privacy, with the rights and interests of a child as shown by comparing labour inspection provisions in Zimbabwe and the other two countries.

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<sup>360</sup> United States of America *Trafficking in Persons (TIP) Report* (2013)13 available at <http://www.state.gov/documents/organization/210737.pdf> (accessed on 13 October 2014).

<sup>361</sup> 1995 Human Rights Report: Swaziland Available at [http://dosfan.lib.uic.edu/ERC/democracy/1995\\_hrp\\_report/95hrp\\_report\\_africa/Swaziland.html](http://dosfan.lib.uic.edu/ERC/democracy/1995_hrp_report/95hrp_report_africa/Swaziland.html) (accessed on 08 September 2014).

<sup>362</sup> United States of America *Trafficking in Persons (TIP) Report* (2013)13 (note 360 above).

<sup>363</sup> Section 126(1) of the Labour Act (chapter 28.01).

<sup>364</sup> The rights in the bill of rights can be limited in terms of section 86 of the Constitution of the Republic of Zimbabwe, if the purpose for the limitation is reasonable and justifiable in terms of the law of general application.



In general, in order for child labour to be eradicated completely, there needs to be changes made to the child labour inspection system, and for child labour monitoring system to be effective, a number of reforms need to be implemented. The degree of authority of parties participating in this monitoring should be clear.<sup>365</sup> Child labour inspectors must have the power to apprehend offenders.

In addition, labour inspectors must be properly trained to deal with child labour issues.<sup>366</sup> In order for them to protect the interests of the child, child labour inspectors should be trained differently from other inspectors in other fields.<sup>367</sup> Hence, there is a need to grant child labour inspectors the power to function and to provide proper training to conduct their work efficiently, to ensure the complete eradication of child labour.

Inspectors need to have as much power as any other law enforcement agency, for instance road traffic officers, who are given the power to issue sanctions, for example fines and to confiscate drivers' licences. Inspectors should be allowed to impound business licences, close places of work and impose fines on offenders. However, in extending the authority of labour inspectors, law makers must take into consideration the *audi alteram partem* rule. This means that before inspectors condemn or punish an accused person they should give the accused a chance to be heard. In addition, there is also the increasing need for states to hire qualified and competent inspectors that are experienced in dealing with minors. Granting inspectors the power to punish child labour law violators will also ensure prompt action compared to long court cases that may last for months before a matter is heard.<sup>368</sup>

The effectiveness of child labour inspectors can be measured by the number of reported child labour criminal matters. Child labour offenders can be tried in either the criminal court or the labour court.<sup>369</sup> According to the South African Department of Labour<sup>370</sup> (SADOL), only 11 cases of child labour violations have been recorded between April 2011 and March 2012.<sup>371</sup>

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<sup>365</sup>International Labour Organisation (note 154 above) 20.

<sup>366</sup>Ibid 41.

<sup>367</sup>Ibid.

<sup>368</sup>United States of America *Trafficking in Persons (TIP) Report* (2013)13 (note 360 above).

<sup>369</sup>Note 115 above; 3-4.

<sup>370</sup>South African Department of Labour (hereafter referred to as SADOL).

<sup>371</sup>Note 115 above; 3-4.

In Zimbabwe and Malawi the numbers of reported child labour cases are unknown.<sup>372</sup> This is because most of these violations are resolved as out of court matters.<sup>373</sup> This indicates a clear lack of enforcement of legislation on the part of inspectors. There is a need for labour courts to adjudicate child labour matters in order for the jurisprudence of law in this area to develop,<sup>374</sup> and making it possible for the court and parliament to assess both the development and effectiveness of the legal framework prohibiting child labour in a particular country.

#### 4.2.4 Labour records or registers

Article 9(3) of the Minimum Age Convention, 1973,<sup>375</sup> stipulates that:

—National laws or regulations or the competent authority shall prescribe the registers or other documents which shall be kept and made available by the employer; such registers or documents shall contain the names and ages or dates of birth, duly certified wherever possible, of persons whom he employs or who work for him and who are less than 18 years of age.”<sup>376</sup>

The Convention encourages member states to enact national laws in conformity with the provisions of Article 9(3). All states should adopt a uniform register system which should include the following information: name; age or date of birth; and certified birth certificate of a child under the age of 18. Despite the mandate given to member states by the Article, it is evident that some member states have not considered the labour registers as an important tool to help in the monitoring and controlling of child labour in the labour market.

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<sup>372</sup>United States Department of Labor’s Bureau of International Labor Affairs *2012 Finding on the worst Forms of the Child Labor in Zimbabwe* (2012) 4 available at [http://www.dol.gov/ilab/reports/child-labor/south\\_africa.htm](http://www.dol.gov/ilab/reports/child-labor/south_africa.htm), (accessed on 21 June 2014).

<sup>373</sup>United States Department of Labor’s Bureau of International Labor Affairs *2012 Finding on the worst Forms of the Child Labor in Malawi* (2012) 3 available at [http://www.dol.gov/ilab/reports/child-labor/south\\_africa.htm](http://www.dol.gov/ilab/reports/child-labor/south_africa.htm), (accessed on 8 September 2014).

<sup>374</sup>Musandirire (note 6 above) 87.

<sup>375</sup>Article 9(3) of the Convention No. 138.

<sup>376</sup>Ibid.

In Zimbabwe, section 125 of the Labour Act (chapter 28.01)<sup>377</sup> regulates the recording system kept by employers and contractors in the employment sector. The section provides that:

—Every employer upon whom any agreement, determination or regulation is binding under this Act in relation to remuneration to be paid, time to be worked or such other particulars as may be prescribed shall at all times keep, in respect of all persons employed by him, records of the remuneration paid, of the time worked and of those other particulars.<sup>378</sup>

This section requires employers to keep records in respect of all their employees. It also outlines the particular information which is to be contained in the labour records. The information includes remuneration, number of hours an employee works and “other particulars”. The phrase, “other particulars”,<sup>379</sup> creates confusion as to what other information should be contained in the register. If discretion is given to employers to interpret the phrase, the whole purpose of controlling child labour will not be accomplished. For instance, employers can interpret the phrase in a way that suits their business and will not consider the purpose of the Act. Hence, the ambiguity caused by the phrase “other particulars” can be used as a loop hole by employers to exploit children. For instance, employers may decide not to include certified birth certificates in the records knowing very well that they are exploiting under age children. Hence, the legislation’s failure to provide a clear list of information to be included in the labour records can be used as an excuse by child labour offenders for not including the birth certificate in the records. Moreover, some countries either encounter delays in the printing of birth certificates or the process is flawed to a point that a child can have two birth certificates with different information.<sup>380</sup> This has a negative impact on how the inspectors conduct their work. Therefore, the consequence of the loose wording in the legislation affects both the implementation and the monitoring of the provision. Labour inspectors will find it difficult to perform their duties effectively if employers fail to provide them with labour records or registers with sufficient information.

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<sup>377</sup>Section 125(1) of the Labour Act (Chapter 28.01).

<sup>378</sup>Ibid.

<sup>379</sup>Ibid.

<sup>380</sup>2 birth certificates, 2 different fathers for one child’ *Bulawayo 24 News* 17 November 2014 available <http://www.bulawayo24.com/index-id-news-sc-national-byo-57642.html#sthash.a2e4mu9K.dpuf> (accessed on 18 November 2014).

Instead, to avoid corrupt activities such as issuing fake documents by employers during inspections, the Act should provide a model register and list all the necessary information to be contained in these registers in conformity with the Convention. Therefore, in order to combat child labour in all employment sectors, particularly in commercial agriculture and to avoid unnecessary confusion for inspectors, specific information and details provided by the Convention should be contained in all labour registers for employers or personnel who deal with children.

With regards to labour records, the circumstances in South Africa are different from those in Zimbabwe.<sup>381</sup> Section 31 of the BCEA provides for employers to keep records of their employees. This section links well with the provision in Article 9(3) as it also provides a list of information which is to be contained in the labour records. However, section 31 does not apply to employees who work less than 24 hours a month,<sup>382</sup> or domestic workers,<sup>383</sup> or to an employer of less than five people.<sup>384</sup> Section 28 of the BCEA states that employers are not required to keep labour registers<sup>385</sup> for employees who work for less than 24 hours per month.

This provision is a challenge as some child labourers are employed for a few hours per month but work under dangerous conditions.<sup>386</sup> It is not the number of hours worked that matters but the kind of work a child performs even if for a few hours. It is the impact of the work on the child which the legislature should control, not the time worked.

Secondly, the exclusion of domestic workers from being recorded in labour registers is a problem because domestic work is the area where most under aged children are exploited.<sup>387</sup> However, in South Africa section 25(3) of the Sectoral Determination 13: Farm

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<sup>381</sup>Section 31(1) (a-e) of the BCEA.

<sup>382</sup>Section 28 (1) of the BCEA.

<sup>383</sup>Section 28(2) (b) of the BCEA.

<sup>384</sup>Section 28(2) (b) of the BCEA.

<sup>385</sup>Section 31 of the BCEA.

<sup>386</sup>International Labour Office *International Programme on the Elimination of Child Labour (IPEC) Child in hazardous work: what we know, what we need to do'* (2011) 3 available at [http://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@publ/documents/publication/wcms\\_155428.pdf](http://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@publ/documents/publication/wcms_155428.pdf) (accessed on 08 September 2014).

<sup>387</sup>International Labour Organisation (note 339 above).

worker sector,<sup>388</sup> requires employers to keep records containing the name, and date of birth of farm workers, including domestic farm workers, under the age of 18.<sup>389</sup> The failure to include a certified birth certificate in the labour records is a loophole which can be used to abuse children. In dealing with child labour issues, the fact that an employer has provided the child's age in the labour record is not enough to improve the monitoring of the law. In most instances, child offenders enter the child's incorrect age in order to get the government's approval to use the child. A certified birth certificate is the only document which can supplement the age entered in the document. So it is of paramount importance to have both the age of the child and a certified birth certificate to confirm the age given. The only way this sector can be monitored effectively by inspectors is through records. Hence, there is need for domestic workers' records to be kept and recorded adequately in order for the government to monitor and control incidences of child labour, abuse and exploitation. Besides, as highlighted in the literature review, the major problem regarding the inspection system is that there are very few qualified labour inspectors to conduct the inspections.<sup>390</sup>

Lastly, another irregularity demonstrated by section 28 of BECA is that the labour registers need not be kept by employers who employ less than five people. Most employers, who own small businesses or factories, usually employ a small number of children probably less than five.<sup>391</sup> But these children perform labour which is supposed to be performed by ten or more people because the employers want to maximise profits.<sup>392</sup> So if the law does not offer protection to these employees, child labour will still continue because employers will have a legal excuse not to keep records. The Ministerial Sectoral Determination No.1, Small business sector,<sup>393</sup> which regulates small businesses that employ less than 10 workers, has failed to regulate labour registers or to provide a list of information for employees under the age of 18.<sup>394</sup> Therefore, it is important for the law to protect employees by employer's

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<sup>388</sup>Basic Conditions of Employment Act No. 75 of 1997. Sectoral Determination 13: Farmworker, sector South Africa.

<sup>389</sup> Section 25(3) of the Sectoral Determination 13: Farm worker sector.

<sup>390</sup>Note 115 above; 3.

<sup>391</sup>P. Vandenberg... et al Employers and Child Labour. Guide Two: How employers can eliminate child labour (Geneva), International Labour Office, (2007) available at [http://www.ilo.org/public/english/dialogue/actemp/downloads/projects/child\\_guide2\\_en.pdf](http://www.ilo.org/public/english/dialogue/actemp/downloads/projects/child_guide2_en.pdf) (accessed on 15 November 2014).

<sup>392</sup>B Mason 'Tobacco companies profit from child labour in Malawi' *World Socialist Web Site Online* 3 June 2010 available at <http://www.wsws.org/en/articles/2010/06/mala-j03.html> (accessed on 18 September 2014).

<sup>393</sup>Basic Conditions of Employment Act No. 75 of 1997. Ministerial Determination No 1, Small Business Sector.

<sup>394</sup>Ministerial Determination No 1, Small Business Sector (item 1.1).

keeping labour registers of all employees regardless of the job type or number of employees at a particular place of work.

#### 4.2.5 Penalties

In an effort to eliminate child labour, all three countries under discussion have provided penalties for the violation of the child labour provisions as contained in their child labour protective laws. This commitment is in accordance with Article 9 of the Minimum Age Convention which requires national authorities to provide suitable sanctions or penalties for child labour offenders to ensure the successful enforcement of the Convention.<sup>395</sup> In Malawi, section 24 of the Employment Act<sup>396</sup> makes the exploitation of children as child labourers a criminal offence and imposes a fine of 20, 000.00 Kwacha<sup>397</sup> or five years imprisonment as punishment for the offence. Also, in South Africa the BCEA, under section 93,<sup>398</sup> punishes violations of child labour in section 43 and 44 with a fine or imprisonment of not less than three years. The Basic Conditions of Employment Amendment Act, 2013<sup>399</sup> proposes an increase in terms of penalties to be imposed on child labour offenders. The fine has increased from R100 to R300 for every child labourer,<sup>400</sup> and the years of imprisonment have to 6 years.<sup>401</sup> Furthermore, section 11(5) of the Labour Act<sup>402</sup> in Zimbabwe also provides punishment for any person found guilty of employing a child under the aged of 18. The sanction can either be a fine<sup>403</sup> or imprisonment for a period not exceeding two years.<sup>404</sup>

However, none of the above penalties are sufficiently stringent, taking into consideration the extent of the child labour problem in Africa. Child labour is regarded as a gross human rights violation; therefore the punishment for such violation should be sufficient to deter other child labour offenders. An example of an inadequate penalty for a child labour offence was

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<sup>395</sup> Article 9(1) of Convention No. 138.

<sup>396</sup> Section 24 of the Employment Act.

<sup>397</sup> When converted as K 20 000.00 is equivalent to 539 Rands (50 US Dollars) (Converted on 20 august 2014).

<sup>398</sup> Section 93 of the BCEA.

<sup>399</sup> The Basic Conditions of employment amendment bill, 2013.

<sup>400</sup> The Basic Conditions of employment amendment bill, 2013, Amendment of Schedule 2 of Act 75 of 1997.

<sup>401</sup> The Basic Conditions of employment amendment bill, 2013, Amendment of section 93 of Act 75 of 1997.

<sup>402</sup> Section 11(5) of the Labour Act (chapter 28.01).

<sup>403</sup> The fine must not exceed level 7 punishment provided in Criminal Penalties Amendment Act, 2001.

<sup>404</sup> Even thou the Bill have increased the penalty for the violation of the provisions in South Africa. The amount of fine proposed is still not reasonable taking into consideration the extent of exploitation children suffer in the hands of employers. However, in terms of imprisonment the law has improved showing the Country's effort in controlling child labour.

reported in a Zimbabwe newspaper.<sup>405</sup> A mother ill-treated her daughter by prohibiting the child from attending school in order to perform all the household chores. The Magistrate required the offender to only perform 210 hours of unpaid work at the Mutate Magistrate Court.<sup>406</sup> Furthermore, in Malawi, most child labour violations are reported to be resolved out of court as there are very few legal provisions that regulate this type of dispute resolution.<sup>407</sup> In most out of court settlements, offenders are advised to pay the fine for the violation. Requiring a child labour offender to pay a fine is not sufficient to dissuade future offenders from committing the same offence. Thus, these kinds of punishment will not deter offenders of child labour violations; instead the government should impose more strict and effective sanctions on offenders.

Furthermore, the imposition of a fine may not be a harsh form of punishment for a wealthy employer, as such a person can pay the money and return to their business and continue exploiting children. In this regard what the child labour offenders will be interested in is not the amount they lose by paying the fines, but rather the benefits obtained by the use of child labour. Punishment for the exploitation of children should concentrate more on the criminal aspect of the offence rather than compensation, since this amounts to a violation of the rights of the child. No amount of money is enough to compensate for a broken life. Therefore, harsh penalties, for example 10 years imprisonment, should be imposed on child labour offenders so the government can deter other child exploiters and control the increasing rate of child labour in Africa. Thus, taking both the inspection system discussed above, and the sanctioning system into consideration, better monitoring is needed to reduce the incidence of child labour in Africa.

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<sup>405</sup> Mum romps with lover as Daughter (10) watches' *NewsdzeZimbabwe Online* 19 July 2014, available at <http://www.newsdezimbabwe.co.uk/2014/07/mum-romps-with-lover-as-daughter-10.html> (accessed on 04 August 2014).

<sup>406</sup> Ibid.

<sup>407</sup> United States Department of Labor's Bureau of International Labor Affairs 2012 *Finding on the worst Forms of the Child Labor in Malawi* (2012) 3 available at [http://www.dol.gov/ilab/reports/child-labor/south\\_africa.htm](http://www.dol.gov/ilab/reports/child-labor/south_africa.htm), (accessed on 8 September 2014).

## 4.2.6 The right to free and compulsory education

The International Covenant on Economic Social and Cultural Rights (ICESCR)<sup>408</sup> regards the right to education<sup>409</sup> as a social economic right.<sup>410</sup> The Covenant provides for the right to free and compulsory primary education for every child.<sup>411</sup> According to the International Programme on the Elimination of Child Labour there is a connection between child labour and education.<sup>412</sup> A good education will prevent children from being exploited. Without good or affordable education children are left with no choice but to seek employment.<sup>413</sup> Even if children are given both opportunities to work while at the same time attending school, one of the two is bound to be affected due to the pressure or demands on both.<sup>414</sup> In most instances, working children perform very badly in school and this will demoralise them and result in their leaving school and engaging in full time employment.<sup>415</sup> Hence, education plays a significant role in the elimination of child labour.<sup>416</sup>

In order to control child labour in developing countries, particularly in Southern Africa, the right to free education should be available to all children.<sup>417</sup> This principle is derived from Article 7(2) of the Worst Forms of Child Labour<sup>418</sup> which states that:

—Each Member shall, taking into account the importance of education in eliminating child labour, take effective and time-bound measures to ... ensure access to free basic education,

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<sup>408</sup> UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: <http://www.refworld.org/docid/3ae6b36c0.html> (accessed 5 September 2014) ( here after referred to as (ICESCR).

<sup>409</sup> Article 13(1) of the ICESCR.

<sup>410</sup> EM Chiremba *A Critical appraisal of the right to primary education of the children with disabilities in Malawi* (LLM Dissertation) University of Pretoria, 2011) 17 available at [http://www.addc.org.au/documents/resources/20111030-rght-to-education-children-with-disabilities-in-malawi\\_785.pdf](http://www.addc.org.au/documents/resources/20111030-rght-to-education-children-with-disabilities-in-malawi_785.pdf) (accessed on 05 September 2014).

<sup>411</sup> Article 13(2) a of the ICESCR.

<sup>412</sup> International Programme on the Elimination of Child Labour ‘Combating Child Labour through Education’ 2004 page 4 available at <http://ilo.org/ipeinfo/product/viewProduct.do;?productId=1419> (accessed on 13 October 2014) (hereafter referred to as IPEC) .

<sup>413</sup> IPEC ‘Combating Child Labour through Education’ (2004) 4 available at <http://ilo.org/ipeinfo/product/viewProduct.do;?productId=1419> (accessed on 13 October 2014).

<sup>414</sup> Ibid.

<sup>415</sup> Ibid.

<sup>416</sup> International Labour Organisation ‘Tackling child labour through education in Africa, Caribbean and Pacific (ACP) states (TACKLE)’ available at <http://ilo.org/ipece/projects/global/tackle/lang--en/index.htm> (accessed on 21 August 2014).

<sup>417</sup> Ibid.

<sup>418</sup> Article 7(2) c of Convention 182.



and, wherever possible and appropriate, vocational training, for all children removed from the worst forms of child labour...”

The countries under study incorporated have this aspect in their respective constitutions. Section 13 of the Constitution of Malawi<sup>419</sup> provides that education should be free and compulsory for every citizen in the country. In 2013, a new Education Act was passed in Malawi,<sup>420</sup> replacing the Education Act of 1962.<sup>421</sup> In terms of this Act, primary education is to be compulsory but not free.<sup>422</sup>

Furthermore, in 2013, a new Constitution<sup>423</sup> was introduced in Zimbabwe. Section 27 of the Constitution<sup>424</sup> provides that the State should afford every child, regardless of the child’s gender, a free and compulsory basic education.<sup>425</sup> However, the Education Act (Chapter 25:04)<sup>426</sup> does not provide for free schooling in Zimbabwe.<sup>427</sup> This means that the Education Act<sup>428</sup> in Zimbabwe is in conflict with the new constitution, therefore there is a need to amend the Education Act to align it with the provisions of the new constitution in order to close all gaps that can promote child labour. Section 5 of the Act,<sup>429</sup> similar to Malawi, only provides for compulsory basic education for every child, it has however, failed to establish the exact age required for the compulsory education.<sup>430</sup>

The free primary education policy was introduced in Malawi in 1994.<sup>431</sup> This policy characterised as a political move was regarded as a failure.<sup>432</sup> Despite the introduction of the

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<sup>419</sup>Section 13(f) (ii) of the Constitution of Malawi Act.

<sup>420</sup> ‘Malawi Parliament Passes Education Bill’ *All Africa* 31 October 2013 available at <http://allafrica.com/stories/201311010769.html> (Accessed on 04 September 2014).

<sup>421</sup>Education Act Chapter 30.01 of 1962.

<sup>422</sup>Note 420 above.

<sup>423</sup>Constitution of Zimbabwe Amendment Act, 2013.

<sup>424</sup>Section 27(1) (a) of the Constitution of Zimbabwe Amendment Act, 2013.

<sup>425</sup>Ibid.

<sup>426</sup>Education Act (Chapter 25:04).

<sup>427</sup> U.S. Embassy- *Human Rights Report 2013: Zimbabwe* Available at [http://harare.usembassy.gov/human\\_rights\\_report\\_2013.html](http://harare.usembassy.gov/human_rights_report_2013.html) ( accessed at 3 September 2014)

<sup>428</sup>Section 6 of the education Act; it talks about fees but does not say anything about free education.

<sup>429</sup>Section 5 of the Education Act ( Chapter 25.04)

<sup>430</sup>Note 427 above.

<sup>431</sup>‘Free primary education backfires: Malawi’ *News from Africa On line* Last update: 4 January 2014 available at [http://www.newsfromafrica.org/newsfromafrica/articles/art\\_902.html](http://www.newsfromafrica.org/newsfromafrica/articles/art_902.html) (accessed on 04 September 2014).

<sup>432</sup>Former President Bakili Muluji introduced the free primary education system as a campaign strategy in 1994. The plan failed due to lack of proper classrooms for the children and lack of trained teachers was other factors which after the system. This resulted in poor examination results. This situation demoralised parents resulting them in forcing children, particularly girls in drooping out of school. ‘Free primary education backfires: Malawi’

free education plan, 10 per cent of school aged children are out of school in Malawi.<sup>433</sup> With the current economic situation in Malawi, a large number of citizens are unable to afford basic schooling requirements, despite the introduction of free primary education.<sup>434</sup> Faced with this situation, the only option left for parents is to force the child to leave school and work to supplement the family income.<sup>435</sup> Hence, making education compulsory does not in any way solve the child labour issue, rather it worsens the situation. Instead the Government should implement the free education law, and in addition children should be provided with uniforms, fees, food, stationery and transport. If the government provides children with these services, parents will be motivated to send their children to school rather than forcing them to work. Despite economic challenges in Malawi, the government must make an effort to prioritise social service delivery, mainly education as it has a direct influence on poverty.<sup>436</sup> Therefore, it is the duty of the government to establish legal regulations and effective social programmes that accommodate the socio-economic situation of every citizen in the enforcement of the right to free and compulsory education to decrease the vulnerability of children to abuse and exploitation.<sup>437</sup>

In Zimbabwe, the right to free and compulsory education is contained in the new constitution.<sup>438</sup> Before the new constitution, the circumstances in Zimbabwe were similar to those in Malawi. Surprisingly, as a result of economic hardship, the incidences of child labour have actually increased since the introduction of the new law,<sup>439</sup> and most children are forced to drop out of school regardless of the new constitution.<sup>440</sup> The situation in Zimbabwe clearly proves that legal provision alone is insufficient to curb child labour. Rather an amalgamation of factors such as the combination of the law and a suitable education-

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*News from Africa On line* Last update: 4 January 2014 available at [http://www.newsfromafrica.org/newsfromafrica/articles/art\\_902.html](http://www.newsfromafrica.org/newsfromafrica/articles/art_902.html) (accessed on 04 September 2014).

<sup>433</sup> UNICEF 'the situation of Women and children: Malawi.' Available at <http://www.unicef.org/malawi/children.html>: (accessed on 04 September 2014).

<sup>434</sup> 'Malawi gov't asked to expedite compulsory education bill' *Nyasa Times Online* 17 June 2013, available at <http://www.nyasatimes.com/2013/06/17/malawi-govt-asked-to-expedite-compulsory-education-bill/> (accessed on 04 September 2014).

<sup>435</sup> HM Njoloma Paper for the National Conference in Eliminating Child Labour in Malawi: Child labour in Malawi's Agriculture Sector- the Social- Economic and HIV/AIDS Impact nexus (2013) 5 available at [http://www.eclt.org/wpcontent/uploads/2013/07/Child\\_Labour\\_in\\_Malawi\\_Agricultural\\_Sector\\_SocioEconomic\\_and\\_HIVAIDS\\_Impact\\_nexus.pdf](http://www.eclt.org/wpcontent/uploads/2013/07/Child_Labour_in_Malawi_Agricultural_Sector_SocioEconomic_and_HIVAIDS_Impact_nexus.pdf) (accessed on 05 September 2014).

<sup>436</sup> Ibid 6.

<sup>437</sup> 'Malawi Parliament Passes Education Bill' *All Africa* 31 October 2013 available at <http://allafrica.com/stories/201311010769.html> (Accessed on 04 September 2014).

<sup>438</sup> Section 27(1) (a) of the Constitution of Zimbabwe Amendment (No.20) Act, 2013.

<sup>439</sup> P Njagu (note 146 above).

<sup>440</sup> Ibid.

economic policy should be considered. Considering that the law is a year old, the government of Zimbabwe has not done enough through social or economic programmes to implement this provision.

The only education programme which assists children from marginalised backgrounds with free schooling in Zimbabwe is called the Basic Education Assistance Module (BEAM).<sup>441</sup> The programme is reported to be no longer effective in assisting children with tuition fees due to corruption and politics affecting the implementation of this programme.<sup>442</sup> There is a need for the Education Act to be aligned with the new constitutional provisions. In order for the law to be effective, the Act should determine the relevant age limit for children to benefit from free and compulsory education. The only way education can be used as a tool to eradicate child labour is by the introduction of social programmes, and by ensuring that state schools are freely accessible to all children until an acceptable age.

The South African Schools Act<sup>443</sup> makes public education free and compulsory for all children until they reach the age of 15.<sup>444</sup> In order to implement this provision the government introduced a ‘no fee’ school programme that assists poor children. According to statistics, 81 per cent of all public schools in South Africa are ‘no fee’ schools.<sup>445</sup> In addition, the education department has introduced the National School Nutrition Programme which offers meals and transport in government primary schools to less privileged children.<sup>446</sup> This programme has proved to be a success especially in the KwaZulu-Natal Province, and plans are in place to extend the programme to public secondary schools.<sup>447</sup> However, there is a need for the ‘no fee’ model to extend to secondary schools as children in secondary schools

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<sup>441</sup>The Basic Education Assistance Module (BEAM) established in 2001. Its main aim is to assist to provide school fees to orphans and vulnerable children.

<sup>442</sup> ‘Zimbabwe fails to pay fees for 750.000 desperate children’ *voice of America /Zimbabwe* 14 January 2014. available at <http://www.voazimbabwe.com/content/zimbabwe-fees-basic-education-assistance-module-beam/1829782.html> (accessed on 21 August 2014).

<sup>443</sup>South African Schools Act, 84 of 1996.

<sup>444</sup>In terms of the Act, a child with 15 years is supposed to be in grade 9.

<sup>445</sup> ‘12 million pupils at SA public schools – Angie Motshekga’ *City Press* 12 July 2014 available at <http://www.citypress.co.za/news/12-million-pupils-sa-public-schools-angie-motshekga/> (accessed on 21 August 2014).

<sup>446</sup> ‘Education Policy: School feeding scheme’ available at <http://www.etu.org.za/toolbox/docs/government/feeding.html>, (accessed on 21 August 2014).

<sup>447</sup> X Dlamini ‘MEC targets Corruption’ *The New Age Newspaper* 14 August 2014 at 6. Available at <http://www.thenewage.co.za> (accessed on 15 September 2014).

The NSNP Programme is making an impact in the KZN province with over 2.2 million children in approximately 5300 primary and secondary schools benefiting from it.

are also affected by child labour. As indicated in the literature review, despite the fact that education in South Africa is free and compulsory, the quality of education is still poor;<sup>448</sup> hence the government needs to improve the education system and to motivate parents and guardians to invest in their children's future by sending them to school. It is clear therefore, that free and compulsory education is not enough to eradicate child labour unless the government introduces both quality education and social programmes to assist in the effective implementation of the legislation.

### **4.3 Conclusion**

This chapter has critically analysed various aspects of child labour protective laws where loopholes are to be found, making it a challenge for the laws to effectively control and eliminate child labour in the three countries under study. The chapter has established that both the gaps and insufficient enforcement of the child labour protective laws have contributed significantly to the exploitation of children. In addition, a comparison on some aspects of child labour was conducted to establish the commitment of the countries under study to the elimination of child labour. Thus, this chapter has put forward ideas for the future development of better and unambiguous child labour protective laws in support of the eradication of child labour in Africa. The following chapter will provide recommendations in regard to the legal framework, regulations and social programmes to serve as a way forward in the effective control and monitoring of child labour in these three countries.

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<sup>448</sup>Note 115 above; 4.

## CHAPTER 5

### RECOMMENDATIONS AND CONCLUSION

#### 5.1 Introduction

A critical analysis was conducted of various child labour protective laws in three Southern African countries. The analysis focused on legislation from Malawi, South Africa and Zimbabwe. The research was based on an investigation as to whether gaps existed in the child labour laws, making it difficult for child labour to be eliminated in these countries.

The first chapter presented the introduction and background of the child labour problem. In addition, the statement of problem and the rationale of the study were highlighted. This was followed by chapter two which contained the literature review, and explored both ‘child’ and ‘child labour’ definitions. The chapter then moves on to discuss the nature and scope of child labour both internationally and regionally. The discussion then focuses on the nature and extent of child labour in Malawi, South Africa and Zimbabwe. The third chapter was a review of the ILO conventions and other instruments in which child labour finds expression. The fourth chapter of this research was a critical analysis of various child labour protective laws. The chapter sought to establish aspects or provisions with gaps or loopholes making it difficult to eliminate child labour in these three countries. This current chapter presents an overview of the research, suggested recommendations and conclusions based on the literature review and the analysis of the legal framework conducted in chapter four.

#### 5.2 An overview of the research

The study has established that child labour is a human rights violation and has a negative impact on the dignity of young children.<sup>449</sup> It is prevalent in developing countries, particularly African countries.<sup>450</sup> It mostly affects vulnerable children in marginalised

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<sup>449</sup>Lubaale (note 9 above) 42.

<sup>450</sup>Eldring (note 2 above) 7.

communities.<sup>451</sup> Child labourers work in harsh and unbearable conditions and are deprived of their right to education.<sup>452</sup> They generally work in hazardous environments which make them prone to various forms of ill treatment such as sexual and verbal abuse.<sup>453</sup> Furthermore, child labourers perform work which is inappropriate for their age, and are in most instances not paid their wages or earn too little for the work they would have performed.<sup>454</sup> Thus, child labour is a socio-economic problem in Africa, and hinders the national development of these countries.<sup>455</sup>

Lubaale argues that adopting legislation is not sufficient to eliminate child labour in Africa,<sup>456</sup> and that child labour should rather be addressed as a human rights violation.<sup>457</sup> This research agrees in part with Lubaale's assertion. It is not disputed that child labour is a human rights violation which impairs the dignity of young children. However, the research argues that the reason why child labour protective laws are inadequate is not that this problem is not handled as a human rights violation, but because the legal framework that regulates child labour in Africa is poorly drafted. Most child labour protective laws in Africa have gaps and loopholes, causing them to be too weak and vague. However, the study has also indicated that there are other socio-economic factors like poverty, monetary constraints, poor economy, high rate of HIV infection and increased child-headed households which contribute to the growth of child labour in Africa.

If the legal framework regulating child labour is vague in either the definition of child labour, or on how the monitoring and enforcement of the legislation is supposed to be conducted, the child labour phenomenon will not be eliminated. It is therefore, important to have strong and clear laws that prohibit child labour to avoid employers taking advantage of the gaps and loopholes in the law. As young children are the generation having the role of improving the country, if child labour is not adequately regulated, the future development of the country will be affected. Future national development will not be achieved if children are destroyed mentally, emotionally, morally, physically and academically. Nevertheless, the literature

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<sup>451</sup>Ibid 87.

<sup>452</sup>Rea (note 4 above) 7.

<sup>453</sup>Note 34 above; 1.

<sup>454</sup>Note 36 above.

<sup>455</sup>Mukherjee (note 21 above) 54.

<sup>456</sup>Lubaale (note 9 above) 42.

<sup>457</sup>Ibid.

review has shown that child labour protective laws cannot sufficiently reduce child labour unless the socio-economic problems affecting these countries are attended to. Mwangonde argues that ~~laws~~ will not ease the tension between child rights and household economic imperatives.”<sup>458</sup> Therefore, there is a need for the countries under study and Africa as a whole to eliminate child labour through strong child labour legislation to achieve the MDGs.<sup>459</sup>

The arguments provided in the research on the existing gaps in various child labour protective laws, provide a basis for suggestions on how the government should deal with child labour and child exploitation both at home and in the workplace. In light of the constitutional democracy which now exists in Africa, lawmakers must ensure that all child labour protective laws are in line with all the guarantees of the constitution. Therefore, having advanced arguments which support the elimination of child labour through a strong and effective legal framework, the following recommendations serve to provide a way forward.

## **5.3 Recommendations**

### **5.3.1 The introduction of Child Labour Act**

A single child labour prohibition legal framework for each of the countries under study, or for the region, must be adopted so that this phenomenon can be tackled holistically. The study revealed that various child labour protective laws that regulate child labour in the three countries have loopholes and some vague provisions, making it difficult for child labour to be effectively eliminated. In addition, the prohibition and regulation of child labour is not found in a single legislation but rather in different pieces of legislation. This creates confusion resulting in incorrect interpretations of some of the provisions. Furthermore, the legislation has various areas in which they contradict each other. This contradiction is either with regard to the employment age or the definition of child labour. These contradictions and vague provisions can be used by child labour offenders to exploit children.

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<sup>458</sup>Mwangonde (note 359 above) 15.

<sup>459</sup>Note 121 above.

This legal framework should comprise a universal child labour protective law, which will be in conformity with all international child labour conventions. This act will regulate all aspects of child labour, both domestic and economic child labour. Furthermore, this act should be able to distinguish between legitimate domestic work and unacceptable domestic work which a child is not supposed to perform at home. There is a need for domestic services to be clearly explained in the legislation because this is the area in which children are most exploited.<sup>460</sup> Parents and guardians take advantage of the cultural beliefs in Africa to exploit children and violate their right to dignity. It is high time the law sets limits on how far the right to culture goes in compromising the future and interests of a child. The Act should be clear and accessible so that everyone, including people in marginalised communities can access it.<sup>461</sup> Moreover, other aspects that should be emphasised in this act include the following: a definition of child labour;<sup>462</sup> the age of employment; where children are allowed to work the scope of their work needs to be explained,<sup>463</sup> inspection and monitoring systems; penalties, and enforcement of the Act. Furthermore, the national legislation against child labour should have a provision which expressly identifies a specific court which has the power and jurisdiction to adjudicate child labour matters.<sup>464</sup>

This research argues that it is easy and efficient to regulate child labour when it is prohibited and regulated by a single and universal legislation, rather than having various pieces of law dealing with the issue. Universal legislation also helps both the public and the judicial system become familiar with its provisions. If a proper legal framework is adopted, with clear definitions and provisions which prohibit child labour in all sectors, the enforcement and monitoring of the particular law will not be difficult. If this is achieved child labour will be effectively controlled and employers will no longer have a chance to use the gaps in the law to exploit and violate the rights of young children.<sup>465</sup> Therefore, the government should make an effort to design appropriate universal child labour protective legislation that promotes and protects the interests of the child in order to generate sustainable development in Africa.

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<sup>460</sup>Nhenga (note 33 above) 3.

<sup>461</sup>P Bharadwaj & L K. Lakdawala (note 170 above) 8.

<sup>462</sup>Musandirire (note 6 above) 83.

<sup>463</sup>Ibid.

<sup>464</sup>Ibid 87.

<sup>465</sup>P Bharadwaj & L K. Lakdawala (note 170 above) 8.



### 5.3.2 Sanctions and enforcement

The study revealed that the child labour protective laws in the three countries under study have failed to provide appropriate sanctions against child labour perpetrators. As outlined in the previous chapter, none of the penalties provided for in these laws are sufficiently stringent. The sanction needs to be reformed in order to eliminate this phenomenon. Since child labour is regarded as a gross human right violation, punishment for such violation should focus on the retributive and deterrent aspects of the sanction. When considering appropriate sanctions for a child labour related crime, the state should always be able to uphold numerous constitutional principles, the interests of the society and public policy.

As discussed in the above paragraph, national legislation is required to separate and prevent domestic child labour and economic child labour. The same principle should be applied in terms of sanctions. There should be different penalties for a domestic child labour offender and an economic child labour offender. The reason being that if one penalty system is used to punish offenders, this may not be sufficient to deter all offenders, for example business owners who exploit young children. Usually in economic child labour, owners of businesses exploit young children intentionally,<sup>466</sup> whereas in domestic child labour most parents and guardians exploit children unintentionally,<sup>467</sup> and so there is need for the law to develop a sanctioning system which suits each type of child labour. Therefore, it is proposed that a penalty system which separates the penalties for domestic child labour offenders and economic child labour offender be adopted.

Moreover, the law should be able to determine which circumstances qualify to be awarded a fine and which deserves a prison sentence. Not all child labour offences should be afforded a fine, since the life and future development of a child has been compromised, imprisonment would be appropriate to deter offenders. It is recommended that economic child labour offenders should be awarded a jail sentence of a minimum of 10 years imprisonment, and punishment in the form of a fine should not be given to such a violation.

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<sup>466</sup> Note 33 above; 3.

<sup>467</sup> Ibid.

The study has revealed that the absence of reported case law on child labour has made it difficult for child labour to be eliminated in Africa. This is because the exact attitude of the courts towards this problem is unknown. It is therefore recommended that child labour matters be made a labour law question and handled in labour courts rather than criminal law courts. This is because the labour courts have sufficient information and qualified personnel to deal with such matters than do criminal courts.<sup>468</sup> In addition, child labour matters should be reported and recorded in a court in order for the child labour jurisprudence and child labour policies to be developed in these countries.<sup>469</sup> Thus, if this recommendation is adopted, the elimination of child labour will be effective in all areas.

### **5.3.3 Child labour trade union**

It is recognised that child empowerment in labour matters is one of the methods that can be implemented to control child labour. Therefore, it is proposed that child labour trade unions be introduced to empower children of a legal age who are employed, to take part in determining their working conditions.<sup>470</sup> A trade union is a non-state actor which assists the government to safeguard the rights of workers. Child labour trade unions will be organisations comprised of child workers who will be allowed to participate in negotiations or policy making discussions on the conditions and regulations of child labour. In order for the government to understand the harm child labour can exert on children, it is best to get information or input from the children themselves. The formation of child labour trade unions is the only way to understand the impact this phenomenon has on children. Furthermore, child labour trade unions will assist government in exposing child labour exploitation through the trade union reports and records. This information will be useful for government to evaluate the impact of legislation and child labour policies in that particular country. This approach has been used in Brazil.<sup>471</sup> Thus, ~~in~~ Brazil, child participation (in the discussions regarding their employment conditions) is given priority because children are viewed as instruments and subjects of social change.”<sup>472</sup> The involvement of children in the decision and

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<sup>468</sup>Mwangonde (note 359 above) 9.

<sup>469</sup>Musandirire (note 6 above) 87.

<sup>470</sup>Loewenson (note 37 above) 21.

<sup>471</sup>Lubaale (note 9 above) 42.

<sup>472</sup>Ibid.

policy making processes has resulted in Brazil being labeled as one of the committed countries in the fight against child labour.<sup>473</sup>

Child labour trade unions would be important in most African countries facing economic hardship which forces people to send their children to work. In most instances, due to the economic hardship child labour legislation may be difficult to enforce. Instead children can be protected by the trade unions if the laws cannot be enforced. The recommendation is that children should be able to play a significant role in the elimination of child labour. If the state allows the introduction of legitimate child labour trade unions, child labour will be prevented and an environment which safeguards children's interests created.

### 5.3.4 Education

The study has found that there is a connection between child labour and the education system. Due to the poor education system in a country, or if a country fails to provide a free and compulsory education policy, children from marginalised families are left with no choice but to leave school and seek employment. It is of great importance for a country to have a stable education system to reduce the incidence of child labour. The following recommendation suggests how education can effectively control child labour in the countries under discussion.

It is recommended that a child labour curriculum be introduced as part of the education system to control the growth of child labour in Africa. This has been achieved for HIV/AIDS, another problem that affects the development of a human being.<sup>474</sup> Since child labour is a gross human rights violation affecting the dignity and development of children, there is a need for it to be taught in schools to help children understand this problem. If the education system incorporates child labour in its curriculum, children will be able to know their rights and duties with regard to work. The child labour topic can be introduced as part of the social sciences or life skills curriculum.<sup>475</sup> If a child labour prohibition Act is adopted and taught in schools, particularly primary schools, children will have a clear picture of what is expected of

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<sup>473</sup> Ibid.

<sup>474</sup> South Africa Dept. of Basic Education: *The department of basic education's draft integrated strategy on HIV and AIDS, 2012-2016* available at <http://www.education.gov.za/LinkClick.aspx?fileticket=S10OfnrAuLs%3D&tabid=93&mid=1722> (accessed on 15 November 2014).

<sup>475</sup> Ibid.

them in terms of performing work, and they will be aware of the causes and effects of child labour, and they will know where to report such abuses when they face them.

This recommendation is in line with the common statement which says *to be forewarned is to be forearmed*.<sup>476</sup> If children are given knowledge of child labour and of how to protect themselves from exploitation, they will have the power to report the incidences. In addition, if children are equipped with information, it will make the labour inspectors' duties easier when conducting inspections as children will be available to give evidence, knowing that they are fully protected by the law. Most children involved in child labour, lack the necessary information regarding how dangerous child labour can be to their lives. This approach can play a part in achieving an African continent where young people are able to develop into skilled employees, responsible for their own country's development. Therefore, this can only be achieved if African countries develop an education system that includes the elimination of child labour.

## 5.4 Conclusion

This research was based on the view that gaps or loopholes found in various child labour protective laws are some of the reasons why the child labour phenomenon is difficult to both eliminate and control in Africa. Therefore, the main purpose of this study was to investigate, whether the prevalence of child labour may be due to an oversight or as a result of wrong approaches by different governments when legislation was drafted. For legislation to be implemented effectively, it should be drafted correctly and appropriately, and the failure to do so will result in the legislation failing to achieve its purpose.

This research has made a contribution to the fight against child labour by emphasizing that the ultimate weapon forming the basis of this fight is good child labour law. This legislation must be in conformity with the international child labour conventions.<sup>477</sup> As indicated in the research it is difficult to eliminate child labour through legislation alone; social and economic

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<sup>476</sup> *The phrase finder* available at <http://www.phrases.org.uk/meanings/forewarned-is-forearmed.html> (accessed on 20 November 2014).

<sup>477</sup> Note 168 above; 75.

policy interventions must also be adopted to tackle this problem.<sup>478</sup> However, an adequate national child labour legislation makes the implementation of these policies attainable. A good child labour law must be able to provide the following factors in order for it to contribute significantly in the elimination of child labour: a clear definition of the child labour that needs to be eliminated;<sup>479</sup> rights and duties of all parties involved in the child labour fight; the rights of children; sanctions and enforcement of the Act and various procedures that should be followed in enforcing the Act.<sup>480</sup>

The current child labour protective laws are deficient in several aspects resulting in the elimination of child labour being redundant in these countries. It is rather recommended that efforts should be directed towards adopting a single child labour prohibition and regulation act which will be able to have the universal power to regulate child labour in all aspects.

Furthermore, education should play a significant role in the control and elimination of child labour. Nevertheless, child labour protective laws should be adopted after taking into account the country's local setting, economic and social conditions. Taking into consideration that the main purpose of the law, which is to protect and safeguard the rights and interests of young children. Furthermore, the research has pointed out that in addition to a strong child labour legal framework, effective enforcement and monitoring methods are necessary to prevent and eliminate child labour. Moreover, ongoing improvements on economic policies in the countries under study stays important in the elimination of child labour.

No country's socio-economic situation can be improved at the expense of the life of a child. Rather a country should learn from the mistakes of the past to improve its economic situation. The elimination of child labour and the safe guarding of children's rights is the first priority a state should undertake to improve its economic situation. Children are the future generation which can build and develop the nation, but if they are not given an opportunity to education and a decent life the future development of the nation is compromised. If both the child

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<sup>478</sup>Ibid.

<sup>479</sup>Ibid.

<sup>480</sup>Ibid.

labour legislation and a healthy economic system are not adopted in these countries, child labour will then become a generational curse, which is passed from one generation to another. The future of the countries under study and in Africa more widely will still remain marginalised. Therefore, eliminating child labour and protecting the interests of a child through a strong legal framework is the way in which economic development can be supported on the African continent.

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