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EXTENSION OF SOCIAL INSURANCE TO ALL
WORKERS**

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I hereby declare that I have read and understood the regulations governing the submission of Master of Laws dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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Loness Khembo

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DEDICATION

To my dear son Yuki Michael Micongwe, for whom my desire for his better future made me sacrifice a whole year away from him while he was only a year old.

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ACRONYMS

ADMARC	Agriculture Development Marketing Corporation
C 102	International Labour Organisation Convention No 102 of 1952
CC	Civil Cause
CEDAW	Convention on the Elimination of all forms of Discrimination Against Women
CFSC	Centre for Social Concern

CRC	Convention on the Rights of the Child
CTS	Cash Transfers
DFID	Department For International Development
ELS	SADC Employment and Labour Sector
GOM	Government of Malawi
ICESCR	International Covenant on Economic Social and Cultural Rights
FISP	Farm Input Subsidy Programme
ILO	International Labour Organisation
IRC	industrial Relations Court
MGDS 1	Malawi Growth and Development Strategy 1
MDGS 11	Malawi Development Goals and Strategy 11
NSO	National Statistical Office
PWPS	Public Works Programmes
SADC	Southern Africa Development Community
UDHR	Universal Declaration on Human Rights

CHAPTER 1

INTRODUCTION

- **Introduction**

The International Labour Organization (ILO) launched a decent work country programme in Malawi for the period 2011 -2016. The idea of the decent work policy first came into play at the 87th session of the International Labour Conference during the address of the director general of the ILO. It has now been accepted globally as an instrument for improving people's lives. Its main objective is to improve lives of workers both in their workplaces and homes by creating and providing jobs of acceptable quality in terms of both respect for workers' rights and reasonable earnings. Thus, decent work is work which is productive, guarantees workers' rights, generates adequate income and provides adequate social protection. Workers in this instance have been defined to include both workers in the formal and informal sector.

This decent work is to be achieved through decent work agenda comprising of four key pillars; full employment, worker's rights, social dialogue and social protection. All these pillars have to co-exist for decent work to be realised. The underlying feature in decent work is the availability of sustainable jobs for everyone who needs work. In these jobs, worker's rights should be recognized and respected. In addition, workers should be able to organize themselves and voice their concerns without any unnecessary restrictions. Finally, workers should be protected from vulnerability and any work related risks that may occur to them.

However, the ILO decent work priorities differ from country to country depending on the particular needs of the country. In Malawi, the ILO has identified three priority areas namely; 1) creation of more and better employment; 2) enhancing and extending the coverage of social protection; and 3) improving service delivery among stakeholders. To achieve this, the ILO has stressed that much attention will be given to the informal economy, rural areas and the

agricultural sector. This study is concerned with the second priority area of enhancing and extending social protection in Malawi.

Social security is defined by the ILO as the protection of workers against the effects of loss of full or partial earning capacity due to economic and social risks. Social security is a matter of great importance under the ILO since it is provided for in its constitution, and more than 31 conventions and 23 recommendations. The main one of these, is the ILO convention 102 of 1952 (C 102). This convention provides minimum standards of social security and highlights nine classes of risks on which social security benefits should be paid. These are; medical care, sickness, unemployment, old age, employment injury, family, maternity, invalidity and survivors benefits. Malawi is yet to ratify this convention, but as a member of ILO is still obliged to provide its workers with social security pursuant to the ILO constitution.

Social security is also provided for under various Southern Africa Development Community (SADC) instruments to which Malawi is a member. Article 10 of the Charter of Fundamental Social Rights in the SADC, 2003, requires member states to create an enabling environment for every worker to have adequate social protection and receive adequate social security benefits regardless of the type of employment. This corresponds with the ILO definition of work. The SADC Code on Social Security (Code) further provides comprehensive provisions on social security. Although not binding, the Code provides member states with strategic directions and guidelines in the development and improvement of social security schemes. It expands on the ILO C 102 list of social risks to include other risks that are specific to the SADC region.

Nevertheless, the Code specifically requires member states to maintain their social security systems at a satisfactory level at least to those required by ILO C 102.

Social security has further been enshrined in several other major United Nations instruments like the Universal Declaration on Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC) and the Convention on the Elimination of all forms of Discrimination against Women (CEDAW). All these conventions recognize social security as a fundamental human right and advocate for universal provision of the same. They urge member states to use their available resources to provide for social security to all citizens. The CEDAW in addition, prohibits discrimination of women in the provision of social security. Malawi has ratified all these conventions as such she is under obligation to provide social security to all her citizens.

Despite all these international obligations, regrettably, the Constitution of the Republic of Malawi does not expressly provide for the right to social security. Neither is there a national social security legislation in place. This raises a question as to why the Malawi government does not want to commit itself to providing universal social security to its citizens? The only logical conclusion is that it cannot afford to do it. Malawi is one of the poorest countries ranked 171 of 187 in 2011 in the world ranking. The economy is largely dominated by subsistence farming and dependent on external aid. With half of her population identified as poor, Malawi clearly, cannot afford to provide universal social security benefits to all her citizens. At least, not in the foreseeable future. Be that as it may, Malawi has a few domestic labour related legislations providing for some elements of social security largely premised on ILO C 102. These are; the

Pension Act, Employment Act, Workers Compensation Act as well as the Occupational Safety, Health and Welfare Act. These legislations provide for benefits for different social risks and further provide conditions on which one can be eligible to access these social security benefits.

Having a labour focus, most of these legislations require that, the beneficiary must be an employee. The term employee is defined in most of these legislations in a way that restricts social security benefits mostly to those in the formal sector. Further, some statutes also provide strict percentages of employer- employee contributions thereby alienating those in the informal sector whose wages, as it shall be seen in later paragraphs, are very low and irregular compared to those in the formal sector. Some legislations provide specific salary thresholds as a pre-qualification for social security entitlement which may not be met by most workers in the informal sector. Even for those employees captured by the said legislations, the law goes further to provide time frames one can work before they can become entitled to social security benefits and in so doing narrowing the beneficiary coverage even further. What this means is that not only do the labour laws exclude most of workers in the informal sector but also some of the so called employees in the formal sector who do not meet some thresholds stipulated in the legislations.

The passing of the Pensions Act in 2011 was a huge step towards provision of universal social security in Malawi. The Act does not only provide for employees, but also the self- employed which constitute a large portion of the Malawi labour force as shall be illustrated later in this chapter. It is high time the other legislation take the same step bearing in mind the labour force distribution in the country.

Further, as already stated, these statutes are premised on the ILO C 102, which has itself been criticized for providing a closed list of risks that does not take into account the practical realities of Africa. Even worse is the fact that the Malawian statutes do not cover all the risks as provided by C 102. Thus, not only do these statutes provide for limited beneficiary coverage, but also provide insufficient risk benefits.

In a bid to improve social security coverage and administration, recently, Malawi launched the National Social Support Policy in March, 2013. The policy has been formulated to coordinate the 'social assistance' programmes. Its main objective is to reduce poverty and vulnerability. Consequently, it targets the poor and the vulnerable as such eligibility is dependent on one's means. Although this is a welcome development, its sustainability is uncertain as Malawi on her own does not have adequate resources to fund these programmes and therefore relies on donor funding. This is tricky as donor funding has proved unreliable in the past leading to failure of some similar programmes. Further, due to inadequacy of resources, the programmes cannot cover all the poor people deserving of assistance. The past programmes failed to cover even half of the deserving population. Thus, the policy, as good as it seems may not achieve its intended purpose. It is therefore unfortunate that the policy is only focussing on social assistance which is but one of the many forms of social security, ignoring all other forms including social insurance which is the prevalent and more reliable form of social security in Malawi. The policy therefore falls short of providing comprehensive guidelines on the provision of social security in Malawi.

With all these challenges, this study argues that, in her current economic form, the only way Malawi can ensure adequate social security coverage to her citizens is to extend the scope and coverage of social security benefits provided by the labour legislations to all workers as they are more reliable and less burdensome on the poor state. This is premised on the fact that most Malawians work, but only a few are employees as shall be seen later in this chapter. This will reduce the burden on the state of providing social security to all her citizens as most will be covered by social insurance.

It is against this background that this study analyses the Malawian pieces of legislation on social security with the aim of identifying the gaps that are affecting social security coverage to Malawian workers. In doing so, these legislations will be examined against the relevant international conventions specifically the ILO C 102 and the SADC Code. The study will also focus on how best to improve social security benefits coverage in Malawi and making it more relevant to Malawians.

To understand Malawi's workers' social security situation better, a quick look at the labour market situation is very necessary.

- **Labour Market in Malawi**

- 1.1.1 Employment, unemployment and underemployment**

As of 2013, 79.6 percent (5.5 million) of those between the ages of 15 to 64 years were employed. Thus, unemployment was rated at 20.4 percent. It should be noted however that the term employment in the 2013 labour force survey; Key Findings Report, does not differentiate between work and employment. The term employee has been loosely used to mean everyone who worked during one week reference period of the survey. This is misleading as employment by its very nature connotes remuneration whether in cash or in kind. It also signifies an employer-employee relationship. On the contrary, in Malawi, 61.9 percent of the labour force consists of the self-employed and contributing family members. While only 38 percent is in wage employment. Further, there is high underemployment in Malawi rated at 26.8 percent. This is because a majority of Malawians are in Agriculture industry whose labour demand varies greatly over the year.

1.1.2 Formal and informal sector

Of the 79.6 percent employed persons, 88.7 percent are in the informal sector while the remaining 11.3 percent are the formal sector. The informal workers have been defined as those whose work is not regulated by the national labour legislations and are without the provision for social security. They are often unskilled, self-employed and usually work in very dangerous conditions. They mostly comprise of vulnerable groups of the society like women and children. The Labour force survey for example, notes that 93.6 per cent of women are in the informal sector as compared to 83.6 per cent of men. In addition, their levels of income are low and irregular. With 64.1 per cent of the labour force in Agriculture, where demand is affected by the seasons, there is clearly irregular flow of income. The opposite is true for formal employment. From these definitions and statistics, it is evident that the majority of Malawian workers are in

the informal sector and have no provision for social security. Malawi is thus lacking in the area of decent work.

1.1.3 Wages

Another aspect of the Malawi labour market which affects the provision of social security is the issue of wages. This is because the most reliable form of social security in Malawi is in form of social insurance depending on employer-employee contribution. Further, eligibility to certain types of social security benefits is dependent on whether an employee's salary exceeds a certain salary threshold. Besides, the amount of benefits one receives will in some instances depend on their salary.

Wages in Malawi are low by international standards. The minimum wage has just been raised to K 550 per day, about MK15,000 (32 USD) per month. Section 55 of the Employment Act makes it an offence to pay employees below minimum wage. However, minimum wage being a statutory requirement, is only applicable to employees in the formal sector whose employment is governed by the labour laws leaving the majority in the informal sector unprotected from earning below minimum wage. Moreover, as of October, 2014, the minimum cost of basic needs basket in the cities was averaging at K100,000.00. (\$180) per month. Thus, the minimum wage is very inadequate to sustain a decent living in the cities let alone make savings and contribute to social insurance schemes.

In addition, the majority of workers are on unpaid work. Out of the total labour force, only 38 percent of the workers both in the formal and informal sectors receive salary or wages. One

would think that all the 38 percent salaried workers are eligible to social security benefits but that is not the case. Some workers especially in the informal sector are even paid below the minimum wage and may not fall within the K10,000.00, salary threshold required for pension. Furthermore, some do not meet other qualifications in terms length of service required for one to be eligible to social security benefits due to the seasonality of employment in Malawi as stated above. Besides, most of those in the informal sector may not be eligible because their employers may not be willing to make employer contributions and most of these businesses being unregistered, it is very difficult to compel them to comply with the law.

1.2 Problem Statement

Social security is a fundamental human right which should be available to everyone. It is also one of the most important components of decent work. It is a priority under the Decent Work Agenda for Africa as well as the ILO decent work country programme for Malawi, to extend social security coverage. However, in Malawi, like in most developing countries, social security is mainly in form of social insurance and is regulated by the labour legislations. In Malawi, therefore, it mostly applies to the 11.3 percent in the formal sector sidelining the majority of the workers in informal sector. Worse still, it does not cover all the formally employed. Thus, unless coverage is extended to the informal sector and the excluded formal sector employees or another form of social protection is introduced to cover for the informal sector, most Malawian workers will continue to be sidelined contrary to the international conventions advocating for universal provision of social security, the decent work agenda for Africa policy and the decent work Malawi country programme. This study therefore investigates the inadequacies of the Malawi labour legislation on social security and searches for ways in which to improve social security coverage as well as ways to make social security more relevant to Malawian workers.

1.3 Research Questions

This research will respond to a number of issues, the first one being; do the Malawian labour legislations on social security adequately provide social security benefits to Malawian workers? Furthermore, can social insurance be a solution to inadequacies of social security in Malawi? Coverage will be considered in terms of both number of workers covered as well as the risks covered.

Specifically, this research will address two questions; do the Malawi labour legislations in their current form provide social security to adequate number of workers? Do the current labour legislations cover all the risks that Malawian workers face that affect their earning capacity?

The study will go further to consider how best social security can be extended to majority of workers in Malawi. Indirectly, this study will also be addressing the question whether the Malawian legislations on social security are in line with international standards.

1.4 Research Aims and Objectives

This study aims at investigating the gaps in the labour legislations that directly or indirectly affect social security coverage to Malawian workers. The study will then attempt to find ways of extending social security coverage in Malawi especially to the informal sector. In so doing, the study will help to enhance social security coverage in Malawi, consequently enhancing the realisation of decent work. The following are the specific objectives of the study;-

- To provide a better understanding of social security from the international perspective;

- To provide a detailed analysis on the social security coverage situation in Malawi;
- To expose the inadequacies of Malawian labour law legislations in providing social security to the Malawian workers;
- Suggest ways to extend coverage of social security to Malawian workers in the informal economy and
- Suggest ways to make social security benefits more relevant to the Malawian workers.

1.5 Significance of the Study

This study hopes to contribute to the realisation of decent work in Malawi by exposing the social security coverage deficit in Malawi. The study will also provide a good and clear understanding of the importance of social security to the policy makers and legislators, in so doing, persuading them to extend the social security coverage to all the workers in Malawi so as to enhance its coverage. The study will then go further to suggest ways to extend social security to the informal sector and the excluded formal sector employees. A comparative analysis of Malawi's labour laws on social security to the international instruments will not only expose the inadequacies of the Malawian legal framework but also suggest reform in the laws. At the very least, the study will broaden literature on social security in Malawi.

1.6 Methodology

This study largely involves analysing the Malawi labour laws on social security mentioned above. These will be measured against various international and regional instruments on the same subject. Where necessary, decided cases will be used to provide clarification for the

Malawian position on social security. Further, the study will benefit a lot from books, journal articles and other publications relevant to the subject. Of particular importance, will be publications of the ILO on decent work and social security as they provide relevant authority on the subject. This is because decent work is actually the ILO initiative while social security is but one of the component of decent work. Most of these materials will be obtained through internet.

- **Delimitation of the Study**

This study is focused on the Malawian labour law statutes as a means of providing social security to Malawian workers. It investigates the effectiveness of the legislations in providing social security to Malawian workers in terms of worker coverage and adequacy of the social security benefits. Gathering data on policy and institutional framework posed a challenge as the government officials were not forthcoming with information and most information is not properly documented hence this study is restricted to legal framework. However, in giving solutions, suggestions on policy formulations and policy changes in as far as they will help to expand the ambit of the labour legislations to cover more workers will be provided.

It was difficult to get detailed recent information on Employment in Malawi. The Labour Force Survey, 2013 is still not yet available on line nor is it available for dispatch. The only document available is the Labour Force Survey Report, 2013; Key Findings which is just a summary of the survey. Using the old surveys seems very inappropriate when there is a new survey on the subject.

- **Research Outline**

Chapter 1

Apart from this chapter which has introduced the research topic, given the background and rationale for this research, the research will further contain four other chapters as follows;-

Chapter 2

Chapter two will discuss the concept of social security, providing its definition, relevance and different forms of social security.

Chapter 3

Chapter three will proceed to discuss the international and regional perspectives on social security. Specifically, the chapter will go at length to analyse the C 102, discussing the risks it covers as well as the beneficiary coverage it anticipates. Regionally, the SADC Code on Social Security will also be discussed in greater detail.

Chapter 4

Chapter four discusses the Malawian labour legislations on social security. These statutes include;- the Pensions Act No. 6 of 2011, the Employment Act No. 6 of 2000, the Workers Compensation Act No 7 of 2000 and the Occupational Health, Safety and Welfare Act No. 21 of 1997. This chapter will critically analyse these four legislations in terms of both beneficiary coverage as well as the risks they cover with reference to international standards. This is the chapter which will address the inadequacies of these legislations in covering for the vast majority of Malawian workers in the informal sector.

Chapter 5

Chapter five will provide recommendations on the extension of social security to all Malawian workers and ways in which social security can be relevant to most Malawian workers. This chapter will also conclude the study.

CHAPTER 2

CONCEPTUAL FRAMEWORK

2.0 Introduction

Having identified the problems associated with social security in Malawi and how the labour market situation affects social security coverage on workers. This chapter goes in depth to discuss the concept of social security. It gives the definition, content, relevance and forms of social security.

2.1 Social Security definition

Social security is one of the fundamental human rights provided for under Article 22 of the (UDHR). The said provision recognises the right of every person to social security and obliges member states and the international community to put appropriate measures within their means for enjoyment of the right to social security. Although the UDHR is a mere declaration with no binding force, Malawi incorporated the UDHR in her 1966 constitution hence she is obliged to provide for social security pursuant to s 211 of the Malawi constitution. The right has also been enshrined in several other international instruments which Malawi has ratified. The ILO has taken particular interest in the subject that it provides for social security in its constitution and in more than 31 conventions and 23 recommendations.

However, none of these international instruments or any author has as of yet provided a universally acceptable definition of social security. Most definitions are a reflection of society's specific needs, social economic conditions, values and priorities. Consequently, it changes with the country's developmental changes rendering a universally acceptable definition un-attainable. One thing in common is that countries view social security as a tool for protecting individuals against vulnerability brought by livelihood shocks. Social security therefore connotes the means and programmes countries have devised in order to contain these livelihood risks. There is a difference, however, in the kinds of risks covered by social security programmes as countries are affected by different livelihood risks differently. Countries have also differed in the administration of these social security programmes, whether it is the responsibility of the state or private actors or both. Due to lack of funds, most developing countries Malawi included have to a large extent left this in the hands of employers and other private insurance companies. This is what has resulted in the exclusion of the unemployed and most of those working in the informal

sector. Due to these differences and similarities, there are three approaches to defining social security; by using a list of risks, by reference to degree of states' involvement and in terms of its aims. Whichever approach is chosen a broader definition is advisable.

Having a labour law focus, this study adopts the ILO definition by defining social security as;-

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

Thus, social security is the protection of workers' standards of living which they have secured for themselves and their families through their employments against the effects of any risks that would affect their earning capacity. This approach has however received numerous criticisms from around the world especially from Africa. These criticisms equally apply to Malawi.

Firstly, as noted in the previous chapter, 88.7 per cent of Malawi labour force is engaged in the informal sector and 61.9 per cent are self- employed, yet the ILO definition focuses mainly on those employed in the formal sector. This explains the poor social security coverage in Malawi. The definition is therefore ideal for countries with high formal employment, but not Malawi. Otherwise, of what relevance is social security in Malawi if it only covers 11.3 per cent of the entire labour force? It is high time this definition changed, the ILO itself having alluded to the prevalence of the informal sector jobs.

On this same point, critics have questioned the channelling of social security through employment. To them, social security is a fundamental basic human right which should not be dependent on employment. Accordingly, every citizen should be entitled to some modest monthly income from taxes. As a basic right, it is a basis upon which other rights like food, health, education and life itself can be realised. The critics argue that channelling social security through employment is attaching conditions to the realisation of the right and forcing people to work in a particular type of employment. They find this as discriminatory against those who are not in formal employment and advocate for equal recognition of all forms of work.

They have consequently advocated for removal of social security from the sphere of labour law. They believe that workers should be paid for the work they do and decide what to do with their money other than some payments being made in terms of fringe benefits. They find fringe benefits more expensive than the cost of labour itself and find no reason for employers to compensate employees who work for them for wages. It does not make sense that employers should bear responsibility for employees' future life which has nothing to do with the work they did.

They question the idea of not taxing fringe benefits and have viewed it as a government way of subsidising social security for very few citizens. This has been used as a mode of avoiding tax by most employers who offer more fringe benefits to employees than actual salary. They argue that tax from these benefits would enable governments to provide universal social security to all citizens or at least a larger section of the society.

In addition, because these social security benefits are costly on the employers, they may hinder investments which in turn may affect job creation thereby contributing to exclusion of many from social security coverage further. It should also be noted that women are usually more vulnerable than men and may therefore be costly to employ than men. Consequently, this may discourage employers from employing women. Besides only 6.4 per cent of women are in formal employment in Malawi as compared to 16.2 percentage of men.

Secondly, the definition confines social security benefits to a closed list of risks which excludes some of the common risks faced by African countries. In Malawi, for example, some districts get hit by floods almost every year. The country also experiences famine almost every year. There was also a disastrous earthquake in December 2011, in Karonga, in the Northern part of Malawi which resulted in the inhabitant workers losing their valuable assets and leaving them homeless. The country is currently experiencing climate change which has resulted in inconsistent weather pattern affecting crop yields. All these are common risks in Malawi yet are not covered in the ILO list of social risk protected by C 102. The definition is therefore of limited relevance to Malawi. When hit by these risks, the government has had to deal with the situation on ad hoc basis. Often, the assistance is not enough as families will have lost everything in the floods. In addition, the list is silent on issues of HIV-Aids which are very prevalent in Africa especially Malawi, yet, the most affected by HIV-Aids are the most active participants in the labour market.

Thirdly, the definition emphasizes on compensating the victims of the risks rather than preventing risks. Africa, and Malawi in particular, are frequently hit by natural disasters risks

like floods, droughts and famines, which, if properly planned for can be better managed. For social security to be meaningful and useful to Malawians, it needs to focus on limiting the risks thereby protecting people from sliding into poverty rather than compensating them for being poor. In the same vein, it is prudent to combat and prevent unemployment than to compensate workers for its loss. This is more empowering and less inconveniencing to the insured than waiting for the risks to occur and giving out hand outs every time a disaster strikes.

Finally, the definition does not cover all strands of social security although it does cover social insurance, social assistance and employer assistance which are the relevant strands in labour law as shall be seen below.

While this study agrees with these critics that social security is a fundamental right to be enjoyed by everyone and that its enjoyment should not be conditional upon employment, this study is also mindful of the fact that social security is a social economic right which has to be realised progressively depending on the state's available resources. As stated in chapter one, Malawi is one of the poorest countries in the world. Much as it is desirable to provide universal social security to all 15 million citizens, she cannot afford and sustain it. However, people still have to survive and there has to be an immediate means of providing social security. This study argues that the extension of employment related social security to all workers is the best and only viable alternative Malawi has to ensure reasonable coverage of social security to her citizens in the meantime. This argument takes into consideration that 5.5 million Malawians work as such if the employment related social security is extended to all workers and their families, a lot of Malawian citizens will be covered leaving the government with a duty to provide for the

remaining few as it endeavours to gradually move towards attaining universal social security coverage. This may be viewed by others as delegation of state's responsibility which is arguably true as such this is to be a medium term measure to enable the government to work towards state's funded universal social security programmes.

2.2 Content of the Right to Social Security

The right has been held to contain four components namely; adequacy of benefits, coverage of all risks, affordability of contributions and non- discrimination in guaranteeing the right. In essence, social security requires that adequate benefits should be provided to all deserving citizens to enable them maintain a decent life and that any exclusion from social security should be on justifiable grounds. Further, these benefits should not only cover the risks articulated under ILO C 102 as presented in the above definition, but also all other risks outside the ILO C 102 that hinder the realisation of economic, social and cultural rights. In addition, in terms of social insurance, employee's contributions should take into account individual family income and expenditures so as not to cause hardship and make it un- affordable. All pieces of legislation on social security should therefore contain these elements if they are to be considered adequate in the provision of social security.

2.3 Importance of Social Security in Labour Law

Social security can boost productivity in the workplace. A happy and secure employee would work very hard knowing he/she and his/her family is secure in the event anything happens to him or her. They will always feel valued and appreciated by their employers and will be happy with the work they are doing. Again, once a worker is assured of his/her health safety by way of

health insurance schemes or occupational health safety measures, he/she will work hard and with confidence. This will in turn boost production at the workplace. Malawi needs to take this into serious consideration as Malawian workers were found to producing less compared to workers from neighbouring countries.

Further, social security in terms of adequate pension benefits, a good gratuity, severance pay and adequate unemployment benefits packages would also help reduce corporate fraud and theft thereby increasing not only production in enterprises, but also profits and growth. Employees will feel secure about their future once they leave the workplace and will find little or no need at all to steal from their employers.

As the production grows, the profits margin will widen leading to the growth of the enterprises. The obvious result will be creation of more jobs. Social security then becomes a key to transition from informal economy to formal economy. At the same time, there would be an improvement in wages and working conditions in general. This is the most important function of social security as 'a decent job is the best form of social security'.

In addition to improving working conditions, social security may simplify restructuring of enterprises. Social security will take care of most of the costs associated with restructuring which have the effect of scaring investors. This in turn will create industrial stability and encourage investors resulting in the creation of employment opportunities. Employees on the other hand will accept the change more easily knowing they have enough to sustain them from their pension, severance pay and or unemployment benefits. Clearly, social security smoothens the adjustments processes for both the employer and the employee.

Most importantly, social security will contribute to realisation of decent work. As stated in chapter one, it is one of the four strategic objectives of decent work. Hence without social security, there can be no decent work. As it has been noted above, social security also has the huge impact on job creation which is not only the one of the four pillars of decent work but the most important pillar because without it, the rest of the pillars will not come into play.

2.4 Forms/ Strands of social Security

Social Security may take various forms but not all of them are relevant to labour law as per the ILO definition. The section below discusses the various forms of social security with particular emphasis on social assistance, social insurance and employer's assistance which are related to labour law.

2.4.1 Social Assistance

It is also known as social welfare. Just as social security, it has no precise universal definition. Its aim is to provide a decent acceptable livelihood to all citizens in a country by providing material and financial assistance to the poor. It is often subject to means testing although sometimes it is universal. In Malawi, the universal social assistance would include the universal free primary education in all public schools and the free medical services in all public hospitals. On the other hand, an example of the means tested social assistance is the farm inputs subsidy programme afforded only to the poor. It is usually regulated by legislation and financed by the state. On the contrary, Malawi does not have a piece of legislation regulating social assistance programmes. These programmes are currently being regulated by the social support policy. Under this policy,

the government with support from development partners is running a number of programmes as discussed below;-

2.4.1.1 Farm input Subsidy Programmes (FISP)

This programme is designed to deal with food insecurities. Here, the government subsidise farm inputs for selected poor smallholder farmers. During the 2012/2013 season, only 1.5 million households were shortlisted out of 4.4 million registered farm households. This is very little considering that 61.4 per cent of the Malawi labour force is involved in Agriculture and that over 50 per cent of the 15 million Malawians is poor. Moreover, the most poor who may not even have the subsidised amounts may fail to benefit from the programme. Thus, beneficiary coverage is very poor.

2.4.1.2 Public Works Programmes (PWPS)

This programme focuses on the moderately poor and extremely poor who are able to work but lack opportunity. People are offered piece works in return for monetary pay or food items. This is to reduce food insecurities among the poor and to encourage investments. The beneficiaries are paid K300 per day which is less than minimum wage. Looking at the cost of basic necessities in the Malawian cities, this amount is too low for one to survive let alone to save and acquire assets.

2.4.1.3 Cash Transfers (CTS)

It involves provision of monthly allowances to the ultra-poor who are incapable of engaging in any productive work. These consist of the elderly, children, orphans, the chronically ill, the

disabled and all other children staying with adults who cannot work. The aim is to help these people access the basic essential goods and services thereby eliminating extreme poverty. 250,000 households are required to benefit from this program but currently, only 150,534 households are benefiting. This again shows that the beneficiary coverage is very poor.

2.4.1.4 Village Savings Loans

The government also runs village savings loans programme. Here, beneficiaries are trained on how to budget their money and make savings. The beneficiaries are also advised to form groups in which they can be contributing money into a revolving fund where they can be lending each other and repay at a small interest. This targets the beneficiaries of public works programmes.

Much as these programmes are beneficial to Malawians, the beneficiary coverage is very poor and their sustainability is uncertain. There is too much reliance on donors. In the 2012-2013, annual national budget, the government only allocated MK7.3 million towards social assistance programmes. Further, in 2013-2014 budget, only MK 9.2 million was allocated. This is too little to cover all these programmes. To make matters worse, not all this money was released to the administrators, for example, during third and fourth quarter of 2012-2013 financial year, 3.7 million was approved but only MK200,000.00 was released. Again during the first and second quarter of 2013-2014 financial year, 4.8 million was approved yet only MK600,000.00 was released. This shows either lack of commitment on the part of government or lack of funds. This is the reason this study is advocating for extension of employment related social security schemes to all workers so as to ease the burden on the state.

2.4.2 Social Insurance

As the name suggests, it takes a form of insurance. It only applies to the employer-employee relationship. It is a form of contract where an employee or employer or both make periodical contributions which will entitle the employee to some benefits at the occurrence of some future event which is uncertain as to whether it will occur and when it will occur. It is generally compulsory and is regulated by legislation. In Malawi, the pensions Act, 2011, provides the best example. Chapter 4 will discuss this in greater detail.

2.4.3 Employer Assistance

This is an assistance provided by employers to their employees in respect of certain contingencies. It is considered as part of social insurance by many authors but unlike social insurance, where employees may in most circumstances be required to contribute, here it is the sole responsibility of the employer. The assistance may be regulated by legislation, contract of employment or collective agreement concluded between employer or employer organization and trade unions although this is not common in Malawi owing to the weak nature of trade unionism. In Malawi, for example, the Employment Act provides for paid maternity leave and paid sick leave. While the Employment Amendment Act provides for compulsory severance pay to retrenched employees and gratuity to those exempted from pension. In terms of contracts of employments, very few formal private sector employees provide medical aid schemes to their employees. For the purpose of this study, social insurance includes employer assistance.

2.4.4 Other Forms of Social Security

Other forms of social insurance include; social relief, social compensation, social upliftment, and private savings insurance.

2.5 Conclusion

Social security is a fundamental human right provided for under s 22 of the UDHR. It has no specific definition as it is dependent on the developmental situation of a particular country. It carries different forms, social assistance, social insurance and employer assistance among others. Malawi runs different social assistance programmes under the social support policy but their sustainability is uncertain due to lack of funds and commitment on the part of government as well irregular donor support. The social insurance schemes, are the more reliable forms of social security in Malawi, as such Malawi can improve social security coverage by extending social insurance schemes to all Malawian workers. This can help increase productivity of workers and hence the economy of the country.

CHAPTER 3

INTERNATIONAL LEGAL FRAMEWORK

3.0 Introduction

It has been confirmed in Chapter 2 that Malawi cannot afford nor sustain social assistance programmes, consequently, it has been submitted that extension of social insurance to all workers is the only viable option in the meantime. Now the question is whether the labour legislations regulating social insurance are suitable to adequately provide social security to Malawian workers? The present chapter discusses and analyses the current international and regional legal framework on the subject with the view of assessing the Malawian provisions against international standards. Main emphasis will be placed on the ILO C 102 and the SADC

Code as they provide detailed guidelines and minimum standards for the provision of social security. It is important however to note that Malawi has not yet ratified C 102 while the SADC Code on Social Security is a non-binding document. Nevertheless, these two provide guidance on state's responsibility on social security and are thus benchmarks against which Malawi must be assessed. Before going into details on the contents of the conventions, this study would like to consider the relevance of international law to this study.

3.1 Importance of International Law

International law, both treaty law and customary international law are sources of law in Malawi. S 211 of the constitution of the Republic of Malawi stipulates ways in which international instruments become the part of laws of Malawi. Firstly, they have to be ratified and domesticated by an Act of parliament. However, those that were ratified before the 1994 constitution came into force, need not be domesticated as the previous constitution did not have that requirement. This brings us to the second point that those treaties that were ratified before the current constitution and were binding on Malawi continue to have that binding force unless otherwise provided by an Act of parliament. Some of the conventions ratified before the commencement of the current constitution which contain social security provisions are; ICESCR, CRC and the CEDAW. Finally, customary international law is binding if it is not inconsistent with the laws of Malawi. Malawi is thus bound by different treaties that fall within these three categories.

Further, courts are obliged to consider current public international law and comparable foreign case law in interpreting the provisions of the constitution. The constitution of the Republic of

Malawi does not contain any express provisions on social security right but makes provision for some social security related rights which inadvertently imply provision of social security. Hence, the courts are obliged to have recourse to international law providing for social security to help them interpret these provisions properly. The international labour conventions have specifically been held to be applicable in the industrial courts of Malawi. However, this pertains only to those instruments that have been ratified by Malawi.

Malawi has ratified various international instruments containing social Security provisions. It is however yet to ratify the regional instruments. While the international instruments provide universal standards on social security as well as the yardstick for assessing both the regional framework and national legislations, the regional instruments are more realistic to the needs, challenges and situation of the countries in that region as they take into considerations the social economic conditions of that particular region. Hence, the discussion of both international and regional instruments.

3.2 International Instruments

3.2.1 Universal Declaration on Human Rights (UDHR)

Malawi incorporated the UDHR in the 1966 constitution; as such it is binding on Malawi. The convention advises member states to provide social security to every citizen corresponding to their resources. The declaration specifically mentions medical care, food, clothing, housing, unemployment, sickness, disability, widowhood and old age as contingencies deserving entitlement. Malawi's failure to provide universal social security to her citizens is therefore a violation of her international obligations.

3.2.2 The Convention on the Rights of the Child (CRC)

This convention deals with rights of children in general. Even so, it contains social security rights in some of its articles. Article 26 specifically commits states to provide social security to all children. The article further obliges state members to ensure full realization of the right in accordance with the states' national laws. There are also various other articles providing for social security related rights. Article 4 obliges states to implement the Convention on the Rights of the Child to the best of their capability using available resources. The ratification of this treaty obliges Malawi to provide social security to all children.

3.2.3 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

CEDAW is concerned with the welfare of women. Article 11 condemns the discrimination of women in social security benefits. The Article recognizes the peculiar circumstances women find themselves in by prohibiting the withholding of benefits due to pregnancy. Generally, the Article calls for equal provision of benefits between male and female employees. The Convention takes particular interest in rural women and urges states to provide them with social security benefits through social assistance measures. All in all, the convention calls for affirmative action to ensure equality between men and women in the provision of social security benefits. Upon ratifying the treaty, Malawi became duty bound to protect women and provide all women with social security.

3.2.4 The International Convention on Economic, Social and Cultural Rights (ICESCR)

Article 9 of the convention compels member states to recognize every individual's right to social security. This provision has been interpreted to cover all risks beyond person's control that results in loss of subsistence and the death of the bread winner who was entitled to social security and pension. It therefore, obliges member states to guarantee the vulnerable, for example, orphans with social security benefits and the elderly with no means of sustaining themselves, with non- contributory old age benefits or any assistance through national legislation. By virtue of ratifying this convention, Malawi has yet again an obligation to provide social security to every citizen.

3.2.5 The International Labour Organisation (ILO)

As stated in chapter 1 and 2, social security is a very important subject under ILO. So far the ILO has adopted 31 Conventions and 23 Recommendations in this area. Out of the 31 conventions, 8 of them are up to date. The most important one of these is the ILO C 102 which provides minimum standards for member states to fulfil in the field of social security. Owing to its social economic nature, most countries in Africa, Malawi inclusive, have not yet ratified the convention. Nevertheless, it has been used as a bench mark in many social security instruments in the SADC region. Malawi too has based most of her social security provisions on this Convention. It is therefore imperative to analyse this convention so as to determine its feasibility in the SADC region as well as use it as a yardstick for Malawian legislations providing for social security.

3.2.5.1 C 102

The convention provides for a list of nine contingencies. It sets out minimum standards for each contingency in terms of level of benefits, percentage of population to be covered, conditions for entitlement to the benefits and duration of payments of the benefits. In addition, the convention also provides for the type of benefits that should be conferred to beneficiaries.

It is a flexible convention as it allows states to choose at least 3 out of the 9 contingencies in order to be eligible to ratify the convention. C 102 further provides for temporary exemptions for some provisions thereby allowing states gradual extension of coverage. States are also allowed to choose what part of the population to protect either at least 50 per cent of employees or at least 20 per cent of economically active population or at least 20 per cent of all residents, as such there is no requirement for universal coverage of social security. The following section discusses the specific contingencies covered by the convention.

3.2.5.1.1 Medical Care

Under this branch, states are obliged to provide medical care to prevent or cure the condition which includes pregnancy or morbid condition. As stated above, states are allowed to choose to provide for at least 50 per cent of employees and their families, not less than 20 per cent of economically active people and their families or at least 50 per cent of all residents. Where the country has registered an exemption according to Article 3, it can choose to cover at least 50 per cent of employees employed in companies with more than 20 employees. Article 10 goes further to give detailed range of benefits to be accorded to beneficiaries in morbid condition and pregnancies. However, the beneficiary or his/her guardian may in some circumstances be required to share the costs. In normal circumstances, these benefits are to be rendered through-

out the contingency apart from morbid condition where it is limited to 26 weeks, 13 weeks where there is an exemption. However, one has to complete a qualifying period in order to qualify for coverage. This study argues that the beneficiary coverage percentage is too low considering the employment situation in Malawi. It applies only 11.3 per cent of the labour force is formally employed while 88.7 per cent is in the informal sector. Besides, Malawi can be in harmony with this convention even if it provides for only 50 per cent of the employees which would constitute only 6.65 per cent of the total labour force. In the era of high informality like we are in today, this convention leads to exclusion of the masses from the coverage of social security. Worse is even the 20 per cent requirement for the economically active. Further, the qualifying period may also lead to exclusion of other employees who have not completed the period. Thus, social security as contemplated under C 102 is inadequate for a country like Malawi. In the C 102, the minimum benefit a beneficiary is supposed to get is 45 per cent of earnings. This is very much on the lower side considering the needs that come with this contingency.

3.2.5.1.2 Sickness benefits

This contingency deals with inability to work due to sickness which eventually results in suspension of earnings as per the laws of a particular member state. It provides the same minimum percentages of categories of the population to be covered as in Medical Care above. The payments are to be made periodically although there is a distinction in the calculation of benefits for employees and economically active people from mere residents. Just as in medical care above, there is a qualifying period to be completed before one can be a beneficiary. In Malawi, this is reflected in the wording of s 46 of the Employment Act which requires that one has to work for at least a year before they can be considered for paid sick leave. This is very

discriminatory and unfair considering that some other people may be excluded. Besides, no-one plans sickness. It is submitted that sickness benefits should be universal. Besides many times, employees spend years without getting sick. One also wonders how this condition is supposed to apply in case of non-employees and mere residents. The duration of the benefits is also as in medical care above. The level of benefits is 45 per cent of one's salary as well. This is also insufficient in this case as there is a lot required when one is sick as in medical care above.

3.2.5.1.3 Unemployment Benefits

It caters for those who are unable to find employment and those whose earnings have been suspended due to loss of employment. This contingency only protects employees and residents. States are also allowed to impose a time frame for one to be un-employed in order to qualify as a beneficiary. However, states have been asked to take into account the seasonal workers in determining these timeframes so as not to exclude them since during some periods, they may be un-employed. This is the first time the term worker has been used in this convention, it has always been employee. This is unfortunate considering that only a small portion of the labour force is classified as employees. Further, the qualification period is very hard to prove as such evidence is very hard to compile in a country like Malawi where there are no proper records of citizens. One may secure another job and lie that they are jobless. Unless there are strong investigative measures, this can be prone to abuse. It is understandable that the convention is trying to curb abuse but the time duration is not realistic for Malawi. These benefits are to be paid throughout the contingency, but may be limited to 13 weeks in a year for employees and 26 weeks for residents. Consideration may also be given to the length of period of contribution in

case of a contributory scheme as well as the benefits previously received in that 1 year period. These as well are entitled to a minimum of 45 per cent of wages of unskilled worker.

3.2.5.1.4 Old- Age - Benefits

It ensures survival of the elderly. It leaves the responsibility of determining the age of retirement to individual countries depending on the ability of old people to work. The minimum beneficially coverage is as in medical care and sickness benefits above. However, the benefits may not be payable where the old person is involved in a gainful economic activity. Further, the benefits may be reduced where the beneficiary earns more than a prescribed amount set by national laws. Payment of benefits is periodical and benefits are to be calculated on the same basis as in the other contingencies above. It provides for a qualifying period of 30 years of employment or of contribution to the scheme or 20 years of residence. The convention provides for reduced benefit where the above minimum qualification periods have not been met. The benefits are to be provided throughout the old age for as long as they have no means of survival. It is submitted that all the elderly with no means of survival should be provided with these benefits other than allowing for minimum percentages of the population as in this convention. A universal coverage is therefore advisable. The minimum level of benefits for this group is 40 per cent of earnings.

3.2.5.1.5 Employment injury Benefits

This is protection from effects of injuries and diseases resulting from employment where these have resulted in loss of earning capacity as well as death of bread winner. Unlike the rest of contingencies, this only covers employees in which case it stipulates a minimum of 50 per cent of prescribed employees or 50 per cent of those employed in companies with more than 20

employees where there is an exemption. Article 34 gives a long list of benefits of what the convention considers to be medical care in time of work injury. In case of handicapped employees, the convention obliges states to provide vocational rehabilitation services. Where there is total incapacity or death of a bread winner, the convention prescribes periodical monetary compensation calculated according to Articles 65 and 66. However, the compensation should correspond to the loss suffered. Where necessary the payment may be in form of a lump sum. The benefits are to last the contingency period. It is unfortunate that this contingency only provides for employees in the formal sector yet it is those who work in the informal sector that are very prone to risk as they usually work under harsh conditions. The level of benefits here are dependent on the extent of injury.

3.2.5.1.6 Family Benefits

This is particularly designed to provide maintenance to children of beneficiaries. It provides minimum beneficiary coverage as in the health and sickness above. It aims at providing basic necessities of life to children of beneficiaries who have worked for at least three months or have been contributing for three months or have been resident for 12 months. Article 44 provides for calculation of benefits which is the product of 3 per cent salary of an ordinary male person and the number of children for employees. 1.5 per cent of the said salary and number of children for residents. Here as well the benefits are to be paid throughout the contingency period. Again, this should have been universal as according to CRS above, all children are entitled to social security. This contingency is therefore inconsistent with the CRC.

3.2.5.1.7 Maternity benefits

This covers for pregnancy and all related consequences which result in the suspension of earnings. It covers a minimum of 50 per cent of female employees, wives of employed men or 20 per cent of economically active women as well as wives of the economically active men. Where a member state has registered an exemption, not less than 50 per cent of female employees who work in the companies with more than 20 employees and wives of male employees too. Article 49 lays down the medical care to be rendered which includes pre-natal, post natal and hospitalisation. States are obliged to encourage women to avail themselves for general health services. The benefits shall be periodical, calculated in accordance with Article 65 and 66. Just as the rest, one needs to complete some period before they can qualify for these benefits. The population coverage here is poor and irrational, what would be the basis of selecting the 50 per cent of employed women and not the rest? Further, what happens to those women in the informal sector?

3.2.5.1.8 Invalidity benefits

It targets those who exhaust sickness benefits but remain unable to work. Similar minimum percentage of coverage as provided in health and sickness are stipulated. Payments of benefits are periodical bearing the same distinction in the calculation of benefits between workers and mere residents as in medical care and sickness benefits. To be eligible for benefits, one has to be in employment or make contributions for 15 years or be a resident for at least 10 years. Nevertheless, where all economically active persons are included, three years of consistent prescribed yearly average contribution will suffice. Reduced benefits are also offered where one has failed to qualify for the 15years qualifying period and failed to make prescribed average

contributions where all economically active persons are protected. The benefits are payable throughout or up until old age benefits are payable.

3.2.5.1.9 Survivors' Benefits

This covers loss suffered by the widow and children of a deceased bread winner. In respect of the widow, her right to benefit is dependent on her inability to support herself. Thus, may not be available if the beneficiary is involved in a productive activity. The amount may also be reduced where beneficiaries are involved in a productive activity which enables them to earn more than a prescribed amount. All the other conditions are same as in the invalidity above.

This is a very gender insensitive contingency as nothing is being said about the earnings or contributions of a working deceased woman. It assumes that only men are bread winners when women can also be bread winners. This can raise confusion on the death of a female bread winner. Nonetheless, most countries including Malawi have rectified this problem by providing for both.

The convention also makes specific provisions for non- nationals to be treated equally as nationals although where the benefits are fully funded from tax, states are allowed to make exemptions.

The ILO C 102, poses several challenges. Its focus on employees and not on workers in general is worrisome and contrary to the norm where many people are workers but only a few are employees. The convention is therefore inappropriate for countries like Malawi. Further it tends

to be too flexible. Much as it tends to provide only for the minimum standards but the set minimums are too low. Take for example, in Malawi where only 11.3 per cent of the labour force constitute employees, Malawi would be fulfilling her obligations under C 102 if she covers only 50 per cent of employees (5.65%) of the entire labour force. The options given are therefore inadequate and hopeless. It is even worse that the convention sets extra conditions in form of qualifying periods for the prescribed beneficiaries to qualify for the benefits limiting coverage even further.

Allowing states to choose only 3 out of the 9 contingences is very unfortunate as all the contingences stipulated are very important in their own way and should not be dispensed with. There is a possibility that a member state can chose contingences relating to the same aspect. Consider Iceland for example, It accepted part V on old age, VII on family benefits and IX on invalidity benefits which all relate to social support. It refrained from committing itself to all health related contingences which are very important. Similarly, another country can chose only to elect the healthy related contingences ignoring the social support contingences aimed at maintaining a decent living.

The amount of benefits provided for in some contingencies like sickness benefits, health benefits and maternity benefits are not adequate as people need and spend a lot when faced with these problems. The 45 per cent of one's salary can never be enough.

Finally, the convention does not also cover other contingences peculiar to Africa like natural disasters, and conflicts in its list of contingencies.

3.3 Regional Instruments

3.3.1 The Declaration and Treaty of SADC

Regionally, Malawi is a member of Southern Africa Development Community (SADC). The organization was founded on The Declaration and Treaty of SADC. Its main goals are; to promote economic and social development in the member states as well as promoting regional integration among member states in areas of development. It has among its many objectives; poverty alleviation; development; economic growth and enhancement of the quality of life of people of southern Africa more specifically the socially disadvantaged as well as combating fatal diseases including HIV Aids.

In the field of employment, the region established the SADC Employment and Labour Sector (ELS) in August 2005, to deal with all labour related issues. It focuses on; the advancement and creation of consistent social security systems in the region; advancement of health and safety standards as well as protection of vulnerable people.

The African Charter has however been criticised for lacking “strong incentives” for the enhancement of social protection.

Other prominent instruments within SADC that address social security issues include; the Charter of Fundamental Social Rights in the SADC (the Social Charter) and the SADC Code on Social Security. Malawi is yet to ratify the Social Charter while the SADC Code is a non-binding

document. Nonetheless, these instruments unlike the international instruments are contextual to the Southern African Countries' needs. These treaties take into account common issues in the SADC region, for example, poverty, low economic growth rate, high un-employment, high underemployment, increase in informal sector employment, high inflation rates, and uneven (unequal) income distribution amongst others. These instruments therefore set minimum standards at regional level that correspond to the specific needs of the region. As such, although they are not binding on Malawi, this study still finds it necessary to discuss them.

3.3.2 The Charter of Fundamental Social Rights in the SADC (charter)

It is mainly concerned with workers' rights. It adopts the objectives of the SADC Treaty under Article 5 of poverty alleviation and social economic development. Amongst its objective are; promotion and establishment of harmonised social security systems in the region and establishment of harmonised healthy and safety standards. Article 10 specifically provides for social protection for workers. The charter further urges member states to provide an enabling environment to ensure that those in employment receive adequate social security benefits. Regarding the unemployed, member states are obliged to provide those who are unable to penetrate the labour market and with no means of sustaining themselves with social assistance. The charter further demands equality between working men and women in social security benefits. Article 8 on the other hand, deals with the elderly. Retired workers are to benefit from social insurance schemes. While those not entitled to pension benefits and have no means of sustaining themselves are to be provided with enough resources for their basic needs by the state. Under article 12, the charter provides for work health and safety and specifically provides for compensation for work related illness or injury. The charter also provides for the incorporation

of the disabled in the workplace and warns against youth exploitation. Finally, the charter encourages states to ratify and implement ILO instruments which although not specifically mentioned include C102 on Minimum standards on social security.

The charter has been commended for meeting the basic needs for people in the SADC region. It covers for both the employed and unemployed. Unlike the ILO conventions it uses the word worker not employees thereby covering for those in the informal sector and the self- employed. It protects all the vulnerable people, the elderly, youth, disabled and women.

3.3.3 Code on Social Security (Code)

It is the most comprehensive instrument on social security in the region. It provides strategic directions and guidelines to member states on the development and improvement of social security schemes along with contents of social security legislations to improve social welfare of the people of SADC. It does provide minimum standards specifically aligned to the SADC region circumstances. It is a tailor made C 102 of the region.

It defines social security as both public and private measures or a mixture of both intended to protect people against income insecurities caused by unemployment, employment injury, maternity, sickness, invalidity, old age and death. The code cites social insurance, social assistance and social allowance as components of social security. The code harnesses the African culture of solidarity and redistribution by placing the responsibility of providing social security on everyone with the state bearing the ultimate responsibility. It thus capitalizes on the African spirit of sharing (ubunthu), by encouraging people to support each other. It also allows member

states some flexibility by allowing them to move gradually towards the attainment of the prescribed standards. It further acknowledges that SADC member states are at different levels of development thereby allowing states which can afford to move faster than others do so, so that their experiences can be used as an example by the ones lagging behind.

Unlike C 102, the code specifically provides for the right to social security to every- one in the region under Article 4.1 and advises states to adopt and maintain social security systems that are in line with the code and Article 10 of the SADC Social Charter. Above all, the code urges states to adopt social security systems that are at the very least equal to ILO C 102 and aim at progressively raising the standards including universal coverage according to the realities and developmental level of a particular country.

In addition, states are instructed to provide those who cannot sustain themselves and their families with social assistance as can be afforded by a member state. Recognizing that states cannot do this alone, the Code encourages them to create a conducive environment for provision of social services and further to encourage individuals, civil society organisations, non-state actors and other non-governmental organisations to participate in social security systems in order to establish and maintain such services. Social allowance is also recommended to those who can afford social insurance in order to help eligible beneficiaries to realize the maximum potential.

To ease the burden of providing social assistance and allowance, members are instructed to establish and expand social insurance coverage to all who can afford and all working class

including the informal sector. Members are further instructed to adopt legislation to ensure smooth and proper management of social security.

Over and above, the Code provides for specific contingencies as provided in the ILO 102 with an African perspective and adds some contingencies that are specific to the SADC region. This responds to the criticisms advanced on the ILO on definition of social security as provided in chapter 2. It provides for the entire population not merely percentage of employees and residents as provided in the C102. Below is a discussion on the contingencies provided by the Code.

3.3.3.1 Health Benefits

The Code provides for adequate health care for everyone and encourages members to develop feasible public medical schemes. Where it is not possible to create public medical schemes, it calls upon states to promote and regulate private health insurance. The code appeals for free medical services to the poor and slightly cheaper health schemes for those who cannot afford the expensive ones but can afford to make a little contribution. Where necessary, cash benefits are to be provided in cases of sickness and invalidity. Article 7.8 specifically calls on states to deal with HIV Aids pandemic. While article 7.9, seeks to promote occupational health and safety in member states.

This is a departure from ILO C102 as the Code carters for universal coverage and specifically for HIV Aids which is absent in the ILO C 102. It also encourages establishment of medical schemes. This is a good development considering poverty levels and HIV prevalence in the region, Malawi in particular.

3.3.3.2 Maternity Benefits

Women are protected from dismissal due to maternity and are afforded protection as in ILO C 183. States are asked to ensure a conducive working environment for pregnant women. Unlike C102, it provides 14 weeks maternity leave with cash benefits of two thirds (66%) of one's income. It also provides for paternity leave to encourage shared responsibility on raising children.

3.3.3.3 Death and Survivor Benefits

States are to ensure that social insurance schemes should provide for death benefits which should include death grants and survivors benefits. It includes legal beneficiaries and factual beneficiaries in the list of beneficiaries. This recognizes the importance of African extended families and kinsman ship which is absent in the ILO C102.

3.3.3.4 Retirement Benefits

States are requested to ensure universal coverage of retirements benefits through all three recognized brands of social security to safeguard human dignity and prevent destitution among the elderly. Other than that, the Code also encourages provision of home based care for the elderly. It therefore advocates for mandatory pension schemes and encourages aggregation of contributions and benefits in case of switching jobs both nationally and internationally within the

SADC region. To avoid abuse of pension funds and ensure sustainability of beneficiaries, it provides for periodical payments of pension funds.

3.3.3.5 Unemployment and Underemployment Benefits

Recognising the high unemployment and under-employment in the region the Code urges states to develop policies that will result in creation of productive employment and income generating activities. For those currently unemployed and underemployed that are failing to sustain themselves and their families, states are advised to provide them with social assistance. It also recognises the importance and prevalence of the informal social security systems amongst the unemployed and the underemployed and calls for integration of the informal systems into the formal systems. On top of that, the Code also guards against arbitrary loss of employment and appeals for adequate protection against loss of employment. Where job losses are inevitable, the Code calls for adequate protection in terms of terminal benefits and salary. Article 10 in general, aims at preventing and eradicating poverty which is widespread in the region, through creation of employment and safeguarding it. This is not emphasised in ILO C102.

3.3.3.6 Occupational Injuries

The Code advocates for compulsory universal coverage schemes through either public or private schemes or both combined. The schemes are to cover all the occupational diseases and illness as provided in the ILO Convention on Health. In case of a medical care, it should be both adequate and appropriate. According to the Code, the schemes should aim at rehabilitation and re-integration of the beneficiary. Unlike C102, the code specifically mentions prevention as a goal for the schemes not merely compensation.

3.3.3.7 Special Social Contingencies (Collective Risks)

The most distinctive feature of the Code from ILO C102, is the protection from collective risks. Here the code is mindful of the special realities of Africa specifically the SADC region and provides for protection against collective risks such as political conflict and natural disasters. It further calls for special interventionist approach to disaster designed to prevent disasters, relieve, reconstruct and rehabilitate victims. States are also urged to ensure fairness in distribution of social security benefits.

3.3.3.8 Other Vulnerable Groups

The Code specifically protects the vulnerable groups in African societies like women, the disabled and children. It provides for equality between men and women in accessing social security benefits which includes non-discriminatory legislation. Other than that, it calls for affirmative action and schemes that takes into account women's needs. Similarly, states are called upon to create favourable environment to ensure that the disabled benefit from social security systems. Specifically, states are urged to adopt legislations and establish institutions that will guarantee access to social security which suits their specific needs. With respect to children, the Code encourages states to respect children's' rights as enshrined in the CRC and curb child abuse in accordance with ILO conventions. Owing to high labour migration, the code encourages free movement among member states. It further provides for equality in the participation of social security schemes and benefits between lawfully employed migrants and citizens. On the other hand, illegal immigrants are to be accorded protection in accordance with national laws.

Article 17.4, entitles refugees to social protection according to regional and International human rights instruments.

3.3.3.9 Families

Unlike C102, The Code offers protection to both the immediate family and the extended family no matter how dysfunctional the family is. This is very reflective of an African society where extended family is the norm.

3.4 Summary and Conclusion (Common Features in the Conventions)

3.4.1 Universality

From the analysis of all the conventions, some common features appear in all these conventions. The majority of the conventions, both international and regional, apart from C102 advances the principle of universal coverage of social security. Social security is portrayed in these conventions as a right to all without any unjustifiable discrimination.

3.4.2 Flexibility

The conventions also allow some degree of flexibility in the extension of coverage. The conventions allow for a progressive realisation of universal coverage of social security taking into account individual countries' needs and resources. This however does not give states an excuse for not providing social security.

3.4.3 Protection of the Vulnerable

Further, all conventions recognize vulnerability and protect the vulnerable groups. The conventions specifically protect women, children, the elderly, the disabled and the immigrants. In some cases, they even call for affirmative action to protect these groups.

3.4.4 Poverty Alleviation, Prevention and Maintenance of Income

The main drive behind most social security benefits has been maintenance of income and prevention of poverty. C102 is mainly geared at maintaining employees' income when incapacitated to earn income. The Code on the other hand offers assistance to the underemployed and the unemployed in order to take them out of poverty. In times of disaster, the Code offers compensation for the loss. Above all, the Code calls for measures of preventing these natural disasters and the rest of the contingencies in order to maintain income and prevent poverty.

These common features are common in almost all the conventions and should therefore be considered in drafting social security legislations.

CHAPTER 4

MALAWI'S LEGAL FRAMEWORK

4.0 Introduction

One of the ways a state demonstrates compliance with international obligations is adoption of legislation that is in conformity with international instruments on a particular subject as the state's commitment to international law can be measured by the pieces of legislation it has in place. This is because legislations are fundamental to the realization of human rights. They demonstrate a state's commitment to human rights as they lay down standards against which the state should be measured and be held accountable nationally. In the field of social security, legislation can be used to determine adequacy of coverage as it specifies the population to be covered under particular contingencies. The legislations would also provide the conditions for entitling an individual to social security benefits. This chapter therefore identifies, discusses and critically analyses Malawi's pieces of legislations on Social Security to see if they conform to international standards. The assessment will be in terms of content of the legislation, adequacy of coverage, adequacy/quantity of benefits and adequacy of contingencies.

4.1 The Constitution

Despite being obliged under international law to provide social security, the constitution of the republic of Malawi does not contain any express provision on the right to social security. Neither is there an exclusive national social security legislation. Regardless, the constitution does provide for social security related rights in some of its provisions.

First, the principles of national policy obliges the state to adopt policies and legislations that will help achieve gender equality, adequate nutrition, health, quality education, improving rural life and protecting the vulnerable. Family protection is also provided for. All these are geared at promoting and maintaining a decent livelihood which is one of the themes surrounding the provision of social security. Courts are obliged to take into account these principles when interpreting the provisions of the constitution, and all other laws as well as when evaluating the decisions of the executive. The constitution then goes further to provide for the specific social security related rights like right to education, property, economic activity, equality and right to economic development.

4.2 Other Statutes

4.2.1 The Employment Act

4.2.1.1 Health / sickness Benefits

It is the most comprehensive piece of legislation on employees' rights. It establishes the minimum standard conditions of employment. The Act provides for paid sick leave to all employees who have served for more than 12 months. Employers are obliged to provide an employee with sick leave; 4 weeks with full pay and 8 weeks with half pay per year. An employee according to the Employment Act is defined as a person who works for someone for remuneration or reward or under contract of employment who is economically dependent upon

the employer and is obliged to work for the employer resembling an employee as opposed to an independent contractor. Included are the casual workers and seasonal workers. However, this will depend on whether the seasonal worker is employed by the same employer every season. It should be noted that there is a lot of under-employment in Malawi because as stated in chapter one, working hours fluctuate with the seasonal changes. It is therefore very difficult for most Malawian agricultural employees to complete a full year with one employer except for big tobacco growers who employ the same people season after season. However, employers are not obliged to grant sick leave unless there is proof of sickness by way of a medical certificate from a registered medical practitioner stating the nature of employee's incapacity. Further, termination of employment due to ill health is unfair unless it is proven that the employee is incapacitated. The same applies for HIV and AIDS. However, there is an HIV and AIDS (prevention and Management) bill awaiting enactment which if passed shall regulate all affairs concerning workers infected with HIV in workplaces.

Civil servants are better off as they can get up to 6 months sick leave on full pay and a further six months sick leave on half pay in a year. It is however not clear whether there is a requirement of one year qualification as the same is absent from the regulations. Nevertheless, a certificate from a medical practitioner is required where a civil servant is absent for three consecutive days in order to be granted paid sick leave.

The Employment Act is clearly in line with C 102 as it provides for all employees who have completed a year of service which is far above the 50% minimum requirement stipulated by C 102. However, this limits coverage to those in the formal sector and a few informal sector workers who may fit within the definition of an employee. Besides, some of the employees may

not have completed the qualifying period of one year of service. This one year qualification, although in line with C 102 is very unreasonable as it expects employees not to get sick within the first year of service or go on unpaid leave. This may cause hardship to these newly recruited employees as no one plans on getting sick. Moreover, most employees would work for years without getting sick and the employers are the beneficiaries of that work. Just as C 102 was found inadequate in covering for most Malawian workers, so is the employment Act.

It should be noted that those in the informal sector are the ones that are involved in very risky jobs, and exposed to dangerous conditions, hence requiring this protection the most, for example, those involved in manually breaking stones in the quarry and those working in farms without any protective gear. These get very little wages to afford good medical services in case there are no better services in government hospital as usually is. Logically, these too should be afforded with sickness benefits.

Further, there is no compulsory medical aid insurance scheme in Malawi, although most big formal private employers provide some schemes to their employees. There is no public health insurance schemes nor is there a specific Act regulating the private health insurance providers. Even the Malawi government which is the largest employer does not provide medical aid insurance to its employees. This is contrary to the requirement of the SADC Code which advises member states to encourage private medical schemes as Civil servants would have constituted a huge clientele for the schemes. It should be remembered that formal private employees only constitute a very small percentage of Malawian workers yet not all of them are provided with medical aid schemes. It may be argued that this is not necessary as there is free medical services

in all public hospitals in Malawi but as stated above, there is an outcry of poor services and lack of resources in these hospitals as such most people would prefer private hospitals. Sometimes people are even requested to buy their own medication in the public hospitals.

Apart from their full salary for the first four weeks and half salary for the next 8 weeks, employees are not paid any other benefits. Although this is far and above the 45 per cent of one's income as required by ILO C 102, it is a well-known fact that when one is sick, a lot is required as such the expenses would exceed the normal expenses. There is need therefore to consider a sickness package which should depend on the extent of the illness to be certified by a certified medical doctor to avoid hardship especially in case of long sickness. If this proves too costly for employers, it should be made contributory or be subsidised by government.

4.2.1.2 Maternity Benefits

The Employment Act also provides for 8 weeks paid maternity leave to every female employee every 3 years. This maternity leave may be extended by the employer where there is continued illness of the employee. In addition to salary, employees are also entitled to any accrued benefits. It has been argued that the phrase every three years is ambiguous as it is not clear whether it means three years after the commencement of employment or from one pregnancy to another. This benefit is available to all female employees even temporary employees. This is higher than the minimum of 50% of female employees set by C 102. This however excludes the majority from the informal sector who do not fit in the definition of employees as well as the self-employed. Ngeyi Kanyongolo rightly argues that most women operate in the informal sector hence excluded from social security benefits. This leaves most women with no cover at the time

they need support most. In addition, the 8 weeks period falls short of the 12 weeks minimum requirement provided by C 102. Pregnancy related dismissals are also prohibited.

The only consolation is that the government hospitals provide for free pre natal and ante natal services to all women. The problem, however, is shortage of resources cited above. The Employment Act also does not provide for paternity leave as required by the Code. Although not provide by C 102, it will be prudent if the government could consider this requirement, even if it is for a lesser period than the one provided for maternity to encourage shared responsibility in raising children. Further, the act does not cover wives of the male employees. This is not surprising considering the benefits are only in the form of a paid holiday. It is submitted that there should be an extra package aside from salary as there is a lot required during this period thereby creating hardships among beneficiaries. Again, If this proves costly on employers, it should be a contributory fund and subsidised by the government. This fund should also cater for non- employees especially subsistence farmers who are in a worst situation as there are no wages at all yet they cannot work during this period. If need be, these workers should be asked to contribute a little depending on their available resources.

4.2.1.3 Protection of Employment

The Act also protects employees from arbitrary termination of employment. It provides that termination of employment should be based on a fair and justifiable reason, as well as, as a result of a fair procedure. The Act goes further to provide remedies for unfair dismissal which include re-instatement, re-employment and compensation. The compensation is not a substitute to pension benefits. The recently passed Employment Amendment Act provides for severance pay

to those whose termination is as a result of operational requirements and unfair dismissal by the employer. The Employment Amendment Act further provides for gratuity to those employees whose employers have been exempted by the Pension Act from providing pension to their employees. An employee becomes entitled to gratuity if he/she has worked for as short a period as 3 months. This is a very good development considering the problems associated with seasonality of work in Malawi as narrated in the previous chapters. It is also in line with the Code which emphasises on the protection of employment. The only question that remains is whether these benefits are adequate to sustain employees decent living considering there are no unemployment benefits in Malawi? The simple straight forward answer is **NO**. According to part II of the first schedule in the Employment Amendment Act, an employee is entitled to 5 per cent of the monthly salary for each completed month. It should be noted that most of the employers exempted from pensions are those who pay their employees a salary of less than MK 10,000.00 (\$20) per month. 5 per cent would therefore be less than MK500.00 (\$1) per month, MK6,000.00 (\$12) per year and K60,000.00(\$120) for 10 years. These are very little amounts to sustain an employee and his/her family in a country where there are no unemployment benefits. With the raising of minimum wage to K15,000.00, this study only hopes that every worker will be entitled to pension except for those employees whose employers have less than 6 employees. Thus, the employment Act does not provide adequate benefits to help an employee maintain a decent livelihood after leaving employment. Besides the salary of MK10,000.00 is already too low for one to make savings or make investments.

4.2.2 Workers Compensation Act

4.2.2.1 Employment Injury

The Act makes provision for compensation for injuries suffered or diseases contracted by workers in the course of their employment, or for death resulting therefrom. Unlike the Employment Act, these benefits are available to all workers not just employees. A worker has been defined as any person who works under a contract of service or apprenticeship whether under a written contract or implied contract. Specific exclusion is made for casual workers, family members and members of the armed forces. The Act establishes a contributory fund from which compensation is to be derived from. However, this fund is in reality yet to be established as such the liability of compensating injured workers is placed on individual employers. This leads to undue delays in processing beneficiary claims as employers find it difficult to raise the funds. Further, some small employers may fail to pay the adjudged amounts.

Benefits are payable in case of death, permanent total incapacity, and permanent partial incapacity. The amounts of benefits depend on the degree of injury. For death, it is 42 times the workers monthly earnings which is payable to survivors, where there are no surviving dependents, the employer is only liable to pay medical expenses and funeral expenses. Where a worker has suffered permanent total incapacity, the compensation is equal to 54 times workers monthly earnings with extra compensation if he/she continues to depend on someone. In cases of permanent partial incapacity, the degree of incapacity determines the amount of compensation. However, the minister has the discretion to determine the maximum amounts of benefits to be paid which is relative to the earning capacity of workers. These benefits are paid as a lump sum. Apart from these compensations, an employer is also liable to contribute towards the employees medical expenses. Clearly, these are huge amounts to be paid by employers at once, the establishment of the fund is therefore advisable.

The Act does not provide for rehabilitation as required by C 102 and the Code. C 102 also provide for periodical payments in cases of death and permanent total incapacity with a lump sum only in exceptional circumstance yet the Act provides for lump sums with no option of periodical payments. It is submitted that this Act should be amended to provide for periodical payments not only to be in line with C 102 but also to avoid abuse of the money and ensure sustainability and welfare of survivors. As it is, the Act will not help to maintain income and prevent poverty which are goals of social security.

4.2.3 Occupational Health and Safety Act

This is aimed at prevention of work injuries other than compensating for injuries. The Act regulates safety, health and welfare of employers in workplaces. The Act further provides for inspection of certain plants and machinery to ensure safety of workers. This is in line with the Code which emphasizes not only on compensation but prevention as well.

4.2.4 The Pensions Act

4.2.4.1 Old Age Benefits

This Act was passed in 2011 in order to provide income security to the worker in retirement and his/her family in case of death. It establishes the national pension scheme and makes pension mandatory for all employees unless their salary is below MK 10, 000 per month. With the raising of the minimum wage, this threshold is now irrelevant. An employee has been defined in the same manner as in Employment Act. The act also gives an opportunity to the self- employed to contribute although to them it is not compulsory. There are however no clear guidelines yet as to

how much the self- employed are required to contribute and how the contributions are to be made. Under this contingency, an employer is obliged to ensure participation of all employees in the scheme. However, it is a shared responsibility between employers and employees to make contributions to the pension fund, although if both parties agree, the employer may take full responsibility. The cost of administration of the pension scheme as well as the process of remitting funds to the schemes have been left in the hands of employers. The benefits are payable periodically to the worker upon retirement or to his/her survivors upon death. The benefits may also be released to the employee who is leaving Malawi permanently. Likewise, a portion of the benefits may be released to a former employee who spends more than 6 months without securing another employment. A lump sum payment of benefits is also allowed where an employee so applies, however, the said sum may not exceed 40 per cent of the total benefits. Those not meeting the threshold are to be granted gratuity under the Employment Amendment Act.

4.2.4.2 Survivor Benefits

Upon the death of a beneficiary employee, the benefits are payable to his/her beneficiaries. If the survivor is less than 10 years, a trust fund is established for such a beneficiary and the benefits are payable upon the survivor reaching the age of 18. This corresponds well to the principle of poverty prevention and vulnerability as it guards against misuse of funds. Apart from contributing to the pension scheme, the Pensions Act obliges employers to maintain a life insurance for their employees. These benefits are to be paid to Survivors of the deceased employee. The Pensions Act is doing a great job in protecting orphans and widows and widowers.

The pensions Act has been commended for adequately protecting employees in their old age. It is consistent with international instruments in so far as it provides for all employees and the self-employed who constitute more than 50 per cent of the labour force. It also provides for periodical payments. However, although it allows self-employed to contribute, there are no clear guidelines yet as to how much they should be contributing and how such contributions are to be made, for example, it does not state what percentage of one's earnings (assuming they pay themselves salaries which some may not) a self-employed person is to contribute considering there is no employer contribution. It further does not stipulate who bears the responsibility of remitting the funds as well as who is to bear the cost of administration of the funds. Assuming the self-employed is to bear these cost on his/her own, then it would be very expensive and prohibitive. Further, just as it is compulsory for employees, it should have also been made compulsory for the self-employed.

This study advises that the administrators of the pension fund should formulate the guidelines as soon as possible. The guidelines should be very flexible to capture most of those in the informal sector. The rates of contribution should be at different levels depending on one's income and the period of remitting the funds should be flexible considering irregularity of earnings in the informal sector. Further, these terms should be published so the general public is aware of this facility and start contributing.

The Pensions Act may be a step towards the attainment of universal social security coverage but it would have been more helpful and better for Malawi, if the benefits were made universal. For

example, if the pension fund is made an investments fund, with prudent administration, it should be able to generate more profits which would cover for all old people in the country. However, not to discourage those who work and make contributions, the amount of benefits should depend on the amount of contributions such that those who do not contribute at all should receive the most basic amount while the rest should receive depending on their contributions. Certainly this would go a long way in assisting the government in providing for the old.

Moreover, the government is yet to join, its grace period having been extended to a further period of 2 years. This is a major setback considering the government is the largest employer. It is submitted that the government should set a good example by joining the fund. If the government does not have enough money to deposit into the pension fund for all its employees, then it should consider doing it in phases.

4.2.5 Unemployment, family and invalidity Benefits

Contrary to the requirements of C102, Malawi does not provide unemployment benefit. Due to financial constraints, it is doubtful that these will be introduced any time soon. Malawian statutes also do not provide for specific family benefits apart from those provided under survivor's benefits above. In addition, Malawi does not provide for invalidity benefits. When employees exhaust their paid sick leave, they go on unpaid sick leave. In most cases, if the condition persists, the employee will be retired on medical grounds and granted their retirement benefits. This is unfortunate considering pensions funds are meant to benefit those employees in their old age and the invalid employee may not be as old. With no unemployment benefits for the

unemployed, these employees risk becoming poor as a result of exhaustion of retirement benefits before their actual old age.

4.3 Conclusion

The Malawi labour legislations mainly provide for employees in the formal sector hence they are not universal. Even amongst the same employees there are some conditions that exclude some of the employees. The definition of the employee in these Acts is not wide enough to incorporate many in the informal sector. The Pensions Act as well as the Workers Compensation Act attempted to include those in the informal sector by including the self- employed and providing for workers other than employee respectively, however the Acts do not put much emphasis on these categories. These legislations therefore are not in line with the regional instruments especially the Code, although most are consistent with C 102 which requires only a minimum of 50 per cent employees' coverage but as already argued, C 102 is inadequate to provide social security to Malawians.

On issues of equality, these legislations are doing very well as women enjoy social security on equal footing with men. Although, women are provided with maternity leave while there is no paternity leave for men. However, only female employees not wives of the male employees are provided with paid maternity leave. This is understandable as there are no further benefits apart from paid leave to which wives of male employees cannot claim. The Pension Act excludes certain type of employees from pension benefits but they provided with alternatives. It is being proposed that these legislations be amended to include paternity leave as provide in the Code. The Acts should also provide for workers not just employees.

The Acts are not doing very well on protecting the vulnerable, apart from the elderly and women who are only protected through employment, the legislations do not specifically provide for children as required by the CRC. Children are only protected as dependents of an employee on condition of the death of their guardian employee. The employers compensate employees who have been disabled due to work related injury but there are no provisions for an enabling environment for disabled employees.

Further, the Acts are not doing enough to prevent poverty. In case of maternity and sickness, for example, employees are only paid their full salaries. This is very much in line with international standards but may not be enough to take care of employees as a lot is needed during these periods. Considering the conditions of public hospitals in Malawi, these Acts need to provide for compulsory medical schemes to avoid a situation where employees spend their salary on medical bills. In addition, most payments for example, survivor's benefits under the Workers Compensation Act and life insurance policy from the Pensions Act are paid as lump sums. This can lead to abuse of funds resulting in hardship for the survivors. Malawi should be commended however for protecting employees from arbitrary dismissals which assist employees to maintain their income and remain out of poverty.

Finally, the legislations do not cover all the risks as provided by C 102 let alone the Code. They fail to protect workers from floods, drought and famine which are common risks affecting workers in Malawi.

All in all, the Malawian legislation on social security are inadequate to protect all workers and do not conform fully to international standards. The legislations therefore need to be amended to conform to international standards and to include most of the workers in the informal sector. The restrictive conditions in the Act should be removed to cover all employees. There is thus need to improve the ambit of these labour legislation in order to extend these benefits to as many workers as possible.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.0 Introduction 0

The Malawian pieces of legislation on social security have proven inadequate to provide for Malawian workers and Malawians as a whole. The constitution does not specifically provide for social security despite Malawi's obligations under international law. Neither is there a national social security legislation in place. Although the labour legislations are modelled on C 102, Malawi is yet to ratify the said treaty. These legislations being labour law based mainly provide for employees who incidentally constitute 11.3 per cent of the entire labour force in Malawi. It has been noted further that these legislations through a set of preconditions, further limits the coverage of the social security to the specific types of employees that meet those qualifications.

It has been proven that most Malawians work but only few are employees. It has also been alluded to that there is high underemployment. Labour availability fluctuates as the rainy season ends making it impossible to have a continuous employment for most Agricultural workers unless they are covered by s 28 of the Employment Act. This underemployment leads to most workers being unable to fulfil the time frame qualifications set by the labour legislations.

Statistics have also shown that 88.7 per cent of Malawian workers are in the informal economy hence excluded from the application of the said labour legislation and social security. The narrow definition of an employee excludes almost everybody in the informal sector. The labour

legislations therefore exclude the majority of the labour force in the informal sector yet they are the ones who need protection the most. Thus, the legislations are less appropriate to Malawi as a country.

The social assistance that the Malawi government has tried to administer over the years has proved inconsistent, inadequate, unsustainable and therefore unreliable. Malawi does not have adequate funds to run these programmes let alone assist all deserving people. Statistics have further shown that over half of Malawian population, (over 7.5 million) is poor yet these programmes have covered not more than 3 million people. Much as these programs may be desirable, Malawi as poor as it is cannot afford extension of these social assistance programmes and sustain them. However, if labour law related schemes are extended to all workers, it may reduce the percentage of the poor requiring social assistance thereby easing the burden on the government. This is based on the principle that those with means to protect themselves and their families should be able to do so. Thus, Social assistance should supplement social insurance. That way, those in the informal sector will be protected from livelihood shocks hence not prone to poverty thereby reducing the candidates for social assistance, in so doing reducing the burden on the government. If the number of beneficiaries for social assistance is reduced, the government may increase the amounts of benefits to beneficiaries thereby improving the livelihood of the poor, consequently, reducing poverty which is the main aim of social security in Malawi.

Thus, extension of social insurance schemes to all workers is the only way at the moment that can ensure improved, sustainable, adequate social security coverage. This is because the working

population is high in Malawi. The major problem is the informality, the underemployment and the narrow definition of an employee in labour legislation.

It should be remembered that the labour legislation have also been found wanting in providing for all the risks as provided by the ILO C 102. They do not for example provide for unemployment and invalidity benefits. Further these legislations being framed from ILO C 102 do not cover for some risks that are very relevant to Malawi like floods and drought and famine as provided by the Code.

All these areas need to be addressed if social insurance can be meaningful to Malawians.

5.1 Legal Framework

5.1.1 Ratification of C 102

Ratification of C 102 should be the first step in improving social security in Malawi. This will put the state under obligation to provide social security to her citizens within the minimum provided under C 102. Further, it will create a justiciable right which Malawians can enforce.

5.1.2 Constitutionalising Social Security and Enactment of a National Social Security Legislation.

After ratification, Malawi needs to include a specific social security provision in the constitution in the bill of rights section. This will give force to the right and enable Malawians to demand and enforce the right before a court of law. The country also needs to enact a national social security legislation to provide detailed framework for social security.

5.1.3 Amendment of Legislation

Having exposed the inadequacies and narrowness of the labour legislations, there is need to amend the legislation to eliminate the inadequacies. All the legislations have to conform to international standards especially the Code which is more relevant to the Malawian situation. This entails that s 47 of the Employment Act on paid maternity leave should be amended from 8 weeks to at least 12 weeks. All unnecessary limitations in the Acts must be removed in order to incorporate all employees. For example, the requirement of one year before being granted paid sick leave although consistent with C 102 has to be removed as it results in exclusion of other employees. These acts should strive more on achieving universal coverage than restrict coverage to the few formal sector employees. In this vain, the definition of an employee provided in the legislations has to be broadened to embrace those in the informal sector considering that the world of work is changing and informal sector is increasing. However, it has been observed that no matter how wide the definition will be, a typical employment will continue to take different shapes as some employers run away from the application of labour legislation. Fortunately for Malawi, labour legislations are not seen as a bar to investments by employers. The widening of the definition of an employee will be of limited relevance as most workers in the informal sector are self-employed subsistence farmers. The widening of the definition will therefore only go as far as incorporating a few informal sector workers.

Be that as it may, it is quite important to expand the application of the labour legislations to the informal sector. The question is now how? Nicola Smit suggests two solutions; improving and maximising the employability of informal sector workers and extending social insurance to the

informal workers. Other solutions could be enhancement of employment opportunities also known as ‘labour market activation measures,’ and broadening the definition of an employee as stated as above. These will be discussed in greater detail below.

5.2 Maximising and Improving Employability of those in the Informal Sector

This entails improving their education levels and developing their skills. There is a close link between education levels and employment in Malawi. The higher the education the higher the prospects of employment. However, there has been an outcry from investors for poor quality of education in Malawi as low skills and low level of education have been named some of the major challenges by investors. Malawi therefore needs to invest a lot in education and skills development if it has to improve employability of those in the informal sector. The trainings should be market oriented. A survey can be conducted to investigate the skills that are lacking and relevant to the labour market.

Further, the curriculum has to be revised to include courses that are more relevant to modern times. There is need to access the labour market and determine which courses are viable. Pfeiffer and Chiunda observed that there is a link between employment and the type of education and training one receives. Considering that the main source of Employment is in the Agriculture sector, training in productive farming would be appropriate for those in the informal sector. It will help to introduce simple practical agricultural courses right away from primary school not just at a tertiary level as it currently is considering only a few make it to universities. This will ensure that those who are unable to secure employment engage in productive farming. Another possible field would be in technical studies that would enable graduates to secure employment as

well as start their own workshops should they fail to secure employment. A training in business studies would also help people to start their own businesses considering the employment shortages in Malawi. This way they will also be able to employ each other in their respective businesses.

5.3 Creation of Employment

Another way of improving employability is creation of employment. This will help to incorporate those in the informal sector into formal employment hence inclusion in social insurance schemes. There is need to find ways of enhancing employment in Malawi. There are various ways that can be considered in creating employment in Malawi. Considering that Malawi is agro-based, a lot of suggestions are in the field of Agriculture.

5.3.1 Irrigation Farming

It has been observed in this study that informal economy is characterised by high underemployment due to fluctuation of labour in between the seasons. With irrigation farming, farming can be carried out all year round thereby creating an all year round employment. The government can intensify the distribution of treadle pumps to enhance irrigation farming. Again, this will improve production and improve food security. This coupled with the farm input subsidies will go a long way to improving productivity and alleviating poverty in the country. To enhance productivity further, this can be accompanied by crop diversification.

5.3.2 Markets Identification

Crop production to be helpful requires identification of markets. The Malawi government need to identify markets for these farmers so to encourage them to produce more. These markets include

both regional and international markets. Malawi can enter into regional or bilateral agreements permitting free markets between the countries. Consequently, the requirements of obtaining an export permits from the ministry of trade need to be simplified. This can lead to growth of Agro-Based businesses which can in turn employ people. That way not only will production and employment be enhanced, the workers will also have enough money to contribute to social insurance.

Another way is for government to obtain land and employ people to farm. This will not only help create employment but also reduce importing food from other countries as well as reduce famine. These crops may be kept in the silos and be sold in various Agriculture Development Marketing Corporation (ADMARC) depots or be distributed to deserving beneficiaries during famine. The surplus can be exported to other countries. With the help of irrigation, these people can be employed on full time job and be able to contribute to social insurance. This can be done by way of public works programmes but it should be on long term basis. The daily wage of K300 must also be raised to conform to the current minimum wage. The beneficiaries would then have a regular income hence being able to contribute to social insurance schemes.

Similarly, the government can intensify the current public works programmes with a better pay. However, they should be on a long term basis and the wages should be increased to encourage savings. This can enable the beneficiaries to have enough money to contribute to social insurance programmes.

5.3.3 Building of Factories

Exporting goods would work better if the goods are processed (Value adding). Government can encourage the building or where necessary help in building factories in order to process the crop products. In Malawi, there are crops that are specifically grown in certain districts. For example, there are a lot of tangerines grown in Mwanza, pineapples in Mulanje, tea in Thyolo and Mulanje, tobacco in the central region, cassava in Nkhatabay, bananas in Thyolo and cotton in Nsanje districts. Government can help to build factories in these districts that are appropriate for processing particular crops in particular districts. An example of this programme would be the one village one product introduced during the Muluzi era. These factories can employ people on full time basis thereby increasing employment hence social security coverage. Examples of such factories are the tea production factory in Mulanje.

Diversity is good for development. Government should not only concentrate on Agriculture but should also facilitate establishment of private non-agricultural based investments in rural areas. This entails helping people to access loans or creating an enabling environment for people to access loans and make investments. Government can also develop these rural areas, for example, building better roads and other infrastructures to encourage investors to invest in these areas. A good example, was the plan to build Nsanje inland port in Nsanje district by the late President Mutharika's government. A lot of people bought land in Nsanje to build warehouses, bars, restaurants and rest houses which would have created a lot of employment had the plan succeeded. These investments will help generate employment in rural areas hence incorporating in the informal economy into formal economy. There are however a number of factors that hinders investments in Malawi and unless these are addressed, encouraging investors will remain a challenge in Malawi. The following discussion focus on these impediments.

5.3.4 High Lending Interest Rates

To build factories, and establish some investments, there is need for financial capital. Malawi has been known to have high lending interest rates and harsh conditions attached to loans. Malawi needs to lower the lending rates to encourage investors. These investors will establish business and employ a lot of Malawian workers. At the end of the day, these workers will be able to contribute to social insurance. These loans should also be accessible to local Malawians to encourage local investments.

5.3.5 Registration of Companies

Another problem hindering investment in Malawi is the process of registering companies. In the past, there used to be only one office the Blantyre, the southern region, that used to register companies in the whole country but now the government has opened another office in Lilongwe, in the central region. It would also help those in the north if another office would be opened in Mzuzu to save them from travelling long distances to register companies. There is also need to sensitize people on the importance of registering companies and where they can register their companies. This can reduce informality as most people either do not know the importance of registering companies or are lazy to go and register their companies hence knowledge on registration of companies and easing access to the registration process will incorporate the informal sector into the formal sector.

5.4 Extending social insurance to the informal workers

Apart from improving employability of those in the informal sector, another way to enhance social security coverage is by extending social insurance coverage. This can be done in two ways. First, by modifying the social insurance schemes to suit the situation of those in the informal sector. Second, by designing social insurance schemes specifically for those in the informal sector.

5.5 Modification of Existing Social Insurance Schemes

Most social insurance schemes are programmed to accommodate those in the formal economy. The contribution is channelled through the employer and involves the payment of contribution from both employer and employee. This can be resolved by requiring those in the informal economy to contribute only the employee contribution or in worst case scenario pay both. The second option however may discourage contributions from the informal sector due to low salaries in the informal sector as noted in chapter one. Further, even if they are allowed to pay only the employee contribution some may not afford the stipulated employee contribution as already observed in chapter 1, incomes of those in the informal sector are irregular and low. Some self-employed informal sector workers do not even pay themselves a salary as such there would be no basis for the percentages. It would really help if they could be allowed to contribute what they can afford which will then be taken into account when calculating their benefits. It is better they be encouraged to contribute a little than not contribute at all.

In addition, there could be a problem with administration as to who and how the contributions have to be made. One way would be grouping these people in corporative societies and trade unions which can then be entrusted with the responsibility of collecting and remitting

contributions. The government can also take advantage of the village loans savings groups in the villages and use the same for purposes of administration of social insurance. Chen et al discourages however, leaving the administration of social security to the people themselves as they may find the process cumbersome and discouraging. A solution would therefore be to simplify the processes, for example having an office at every district level through district assemblies where the money can be remitted or having an account where the money can be deposited. Awareness on how to administer these programmes would also help.

5.6 Designing social insurance schemes specifically for those in the informal sector

To avoid issues raised above, another way of extending social security would be to create specific social insurance programmes befitting the situation of those in the informal sector. This is in recognition that those in the informal sector have specific needs. Thus, there is need to assess the specific needs of those in the informal economy and make sure they are addressed by the specific programmes. Some of the needs and problems already identified include, low income levels, inconsistency of income, immediate needs of those in the informal sector and some of the specific risks suffered by those in the informal sector like drought, floods and famine.

The contributions in these schemes can be lower or be scaled according to different specific incomes of particular individuals. In other words, levels of contributions should depend on one's financial capacity with a minimum level of contribution which can be afforded by all. The amount of benefits and interest accrued on the contributions should depend on the contributions one makes and the duration one has been making the contributions. The periods for contribution

should also be flexible to take care of the irregular nature of acquiring income in the informal sector.

Further, the schemes should also cover risks that are faced by those in the informal economy. This will make the schemes more relevant and attractive to those in the informal economy. Most schemes only offer future protection and offers no protection against immediate needs like famine and important family expenses like school fees for children, for example, in Malawi, first term of school session starts in January in the middle of the farming season, thus, workers have little or no funds as their savings have been spent towards buying fertilizer and farm inputs. These schemes should also cover for collective risks like floods, drought and other natural disasters as provided by the SADC Code on Social Security which are persistent in Malawi. It would also be prudent if these schemes would consider issues of extended family which is an important issue in an African setting. All in all these schemes have to be flexible and accommodating. This would act as a starting point in encouraging the informal workers to start contributing to social insurance programs as they would feel their needs are being met. From here they can see the need to contribute to a pension fund.

Above all, there is need for awareness among those in the informal sector on the importance of social protection to encourage participation.

5.7 Conclusion

In conclusion, social insurance and employer assistance can help to improve social security coverage in Malawi. Much as social assistance is desirable, Malawi cannot afford to provide social assistance to all deserving candidates. Malawi can capitalise on the high labour force

participation and spread social insurance to all workers in Malawi thereby reducing the burden of providing social security on the part of government. Social assistance should therefore be reserved strictly for those who are incapable to work and very vulnerable with no source of income at all. This will go a long way in reducing poverty in Malawi and encourage self-reliance amongst the citizens.

Malawi government therefore should embark on programmes that will maximize the employment potential given above and many more it can think of as the list above is not conclusive. Those measures will not only ensure social security coverage but also development both to individuals and the nation at large. That way Malawi will be able to fulfil its obligations under international law.

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