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## DISORDERS IN DEVELOPING COUNTRIES' LEGAL AND REGULATORY FRAMEWORKS ON PROTECTION OF WORKERS' HEALTH AND SAFETY

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*In addition, and as serious, is that deeply embedded in the conceptual approach of most mainstream regulatory mechanisms is a reliance on easily identifiable employers for the enforcement of OHS. This leads to the exclusion of many workers who are in disguised or concealed or objectively ambiguous employment relationships. Even for those nations that do in theory protect all workers, regardless of size of enterprise, this conceptual approach leads to failure to satisfactorily protect the health and safety of those in quasi informally such as piece-rate workers or sub-contracted wage workers.<sup>1</sup>*

### ABSTRACT

*Protecting workers from hazardous working conditions is a century old agenda. Of latest, the agenda has gained momentum because of an increase of workplace fatalities, injuries and diseases. Such an increase is global and the victims are none but the workers and their dependants. Laws and regulatory bodies are in place in many developing countries without so much help. The protection of Workers' Health and Safety [(WHS) also Occupational Health and Safety (OHS)] in most of these countries is far from materialising. According to literature, the latter is significantly a result of serious disorders within legal and regulatory frameworks of these countries. The study identified wrong approaches to WHS protection; multiplicity of laws and regulatory bodies, scope and coverage of the working population; non-inclusion of critical workers' rights; dominance of flexibility clauses and insufficient enforcement measures as amongst the critical disorders calling for urgent legal reform. The paper suggests ways forward in an attempt to seek reliefs to the toiling members of the working class.*

**Keywords:** Disorders, Developing Countries, Legal and Regulatory Framework(s), Protection, Workers' Rights and Standards, Workers' Health and Safety, Hazardous Working Conditions

**Paper type:** Research paper

**Type of Review:** Peer Review

### 1. INTRODUCTION

Precarious working conditions and hazards have continued to endanger workers health and safety, all over the world. The experience is worse especially in the International Labour Organisation's (ILO's) proclaimed most dangerous occupations i.e. agriculture, mining (particularly unregulated mining), and construction. Workers in many other sectors, particularly in the informal economy, have continued to encounter multiple occupational health hazards and safety issues. The present is still dim. The future is predicted to be more lethal with dangers to be born out of advancements in science and technology. The present work discusses disorders common in developing countries legal and regulatory frameworks on the protection of workers health and safety. The discussion is preceded by a brief

overview of occupational health hazards and associated human and economic losses as well as an analysis of the model form of legal and regulatory framework for WHS protection. In the latter, the Authors analyses forms of protection and respective limitations.

The discussion on the disorders focus on approaches to WHS protection; dynamism in the laws; coverage of the working population; workers' rights; the standards in the text of the legislation as well as enforcement of WHS legislation. There are also instances regarding disorders attached to curative legislation i.e. workers' compensation legislation. The present discussion is built on the Authors' review of literature particularly from Africa, Asia, Caribbean and largely contributed by an ongoing doctrinal research project focusing on the Indian and Tanzanian WHS legal and regulatory regime.

## **2. OCCUPATIONAL HEALTH HAZARDS AND HUMAN AND ECONOMIC LOSSES**

The World Bank estimates that the global entire workforce is closer to 3.5 billion.<sup>2</sup> According to the ILO about 42% of the entire global workforce is in vulnerable forms of employment.<sup>3</sup> Figures are high in developing countries. About 76% of workers in the developing countries are in vulnerable forms of employment.<sup>4</sup> According to the ILO, workers in vulnerable employment includes own account workers and family contributing workers who are less likely to have formal arrangements and more likely to lack decent working conditions.

One of the major characteristic of these workers is the prevalence of difficult working conditions undermining their fundamental rights.<sup>5</sup> These workers are highly exposed to OHS menaces. The ILO reports high workers' fatalities, injuries and diseases. In 2013 the ILO estimated fatality rate of 2.3 million workers per year with 360 million workers injured and 160 million contracting occupational diseases.<sup>6</sup> In 2017, the estimates rose to 2.78 fatalities (86% a result of diseases and 13% a result of accidents).<sup>7</sup> At the epicenter of the fatalities, injuries and diseases are hazardous working conditions.

*Agriculture, construction, mining and manufacturing* sectors, for instance, have recorded high rates of fatalities, injuries and diseases.<sup>8</sup> Carried out mostly in the informal economy, *agriculture* has recorded high rates of injuries, almost double to other sectors.<sup>9</sup> On the other hand, *construction* is an occupation that comprises of a very small percentage of the overall workforce yet with non fatal injuries and illnesses that exceeds many other industries.<sup>10</sup> The working conditions in these sectors as well as in many other occupations are hazardous. Socio economic necessities have forced many workers to 'accept' such conditions.

As a result, they are exposed to and encounter, numerous physical, chemical, biological, ergonomical and psychosocial threats.<sup>11</sup> The threats have been responsible for most workers' fatalities, injuries and diseases which have grossly affected them/ their dependants. The impacts have not only been human but also economic. It is estimated that lost work days globally represent almost 4% of the world's Gross Domestic Product (GDP) and in some countries, this rises to 6% or more.<sup>12</sup>

Apart from economic cost, there is an intangible cost, not fully recognised in these figures, of the immeasurable human suffering caused by occupational accidents and work-related diseases.<sup>13</sup> The situation is not so well with the sidelined informal economy. In the latter, and as earlier highlighted, the level of workers' vulnerability is high leading to high rates of health and safety sufferings. Poverty, lack of access to health care, insufficient access to information and knowledge on risk management, prevention and coping mechanisms, exclusion from labour laws partially or in full, weakness or non-existence of labour inspection system and illiteracy are some factors explaining why the workers in the informal economy are highly vulnerable. The present is still dim with only 5% to 10% of the workers in developing countries having access to adequate occupational health services.<sup>14</sup> The future is unpredictable and worrisome mostly because of new threats brought by more lethal technologies resulting from advancements in science and technology as well as the negative impacts brought by globalisation.

### **3. LEGAL AND REGULATORY FRAMEWORKS ON THE PROTECTION OF WORKERS' HEALTH AND SAFETY**

The protection of WHS is guaranteed by both international and national legal frameworks. It is the ILO that does much work at the international level. It is estimated that closer to 80% of the ILO work on international treaties is on the protection of WHS.<sup>15</sup> The ILO, among other things, formulates occupational health standards, referred to as the International Labour Standards (ILS) which are to be applied by its member states.<sup>16</sup> The ILO Member States have obligations both from the ILS and other multiple international treaties which they are part to, to formulate policies and laws and take other measures, practical and administrative, to protect workers from all dangers and risks posed by their works.

Convention C155, Convention C187 and Convention C161 are evidential in this case. Inter-alia, the conventions require the formulation of WHS policy framework and the adoption of the measures (preventative and curative) including provision of occupational health services by member states. The obligations are also derived from multiple human rights instruments including the International Covenant on Economic, Social and Cultural Rights, 1966 which recognises WHS as a fundamental workers' right and calls for measures by member states to ensure its realisation.<sup>17</sup>

For many other reasons and out of these obligations most nations formulated policies and enacted legislation on WHS and have, since then, endeavoured to take required practical measures. WHS protection at the national level has taken almost similar paths. The legal and regulatory frameworks are designed in such a way that there are laws and institutions in form of ministries, departments and or agencies to cater for the regulation and promotion of such issues. These latter, whatever designation and nomenclature, they are creatures of legislation.

#### **3.1 Constitutions and the Protection of Workers' Health, Safety and Lives**

For some nations, workers' health and safety protection is a constitutional agenda. It is recognised and enshrined in the constitutions. The constitutions have provisions imposing certain obligations to be undertaken by the State, employers and other key actors in the name of protecting workers lives particularly from hazardous working conditions. For instance, the Constitution of India directs State(s) departments and agencies to take aboard matters pertaining to health, safety and welfare of workers in all development measures that they take including policy formulation, adoption of laws and setting up of administrative bodies.<sup>18</sup> The obligations are most common in the Directive Principles of State Policy. Even though unenforceable, the principles provide a roadmap under which relevant measures would take place.

Similarly, in some countries' constitutions workers' health and safety protection features in form of a fundamental guarantee. The Constitution of Kenya, for instance, takes aboard WHS right under the fundamental rights of workers recognising at least the workers' rights to reasonable, safe and healthy working conditions.<sup>19</sup> WHS is also a fundamental workers' right in Brazil and Argentina.<sup>20</sup> Though it does not capture the right as it is in international instruments, the Constitution of Vietnam recognises workers right to safe working conditions.<sup>21</sup> For countries where WHS is not part of the bills of right, protection is sought through everyone's right to life. In India WHS right is an integral facet of right to life protection.<sup>22</sup> However, there are many other countries with no/limited constitutional protections on WHS including Trinidad and Tobago, South Africa, Tanzania, Uganda, Indonesia and Thailand.

#### **3.2 Workers' Health and Safety Protection: The Preventative and Curative Legislation**

As earlier stated, WHS legislation are in place in most developing countries catering for WHS protection and promotion. The legislation are of preventive and curative nature. Preventive legislation set out measures to prevent risks while curative legislation provides relief to injured and sick workers and compensation to dependants of deceased workers. They (curative legislation) also provide other grants and medical reliefs including rehabilitation. The Factories Ordinances or Factory Acts represents/(ed) the core preventive legislation.

Of latest, however, and because of among others, the issues surrounding scope and coverage, the nomenclature has changed for some countries. Economic diversification necessitated the changes. Occupational Health and Safety Acts or Workers Health and Safety Acts are now in place. There are, however, other national legislation providing for

preventive measures for the general working population and others for the specific sectors of economy. These legislation provide for the protection of workers and persons other than workers, who might be affected by workers' acts/omissions.

Principally, the prevention of workplace menaces is through a number of legislative mechanisms. It starts with the imposition of obligations and the setting up of standards to be observed by employers and other key actors including manufacturers, factory owners, suppliers etc. Multiple obligations and standards are imposed on health, safety and welfare of workers. The obligations require the taking of certain measures and the standard to the taking of such measures prohibits certain employment practices which are or might be of danger to workers. They revolve around use of machinery and other equipment (for instance, duty to provide protective gears, duty to provide safe plants, supervision of plants, duty to train operators, duty to maintain machinery and equipment); processing, handling, using, transporting of chemical and hazardous work,<sup>23</sup> provision of medical care and medical facilities as well as the provision of welfare measures including water and sanitation. Breach of any of the duties is considered as an offence and sanctions are in place including payment of fine, imprisonment or both. These provisions are almost similar under the Tanzanian, Kenyan, Ugandan and Indian WHS legislation.<sup>24</sup> And the similarity is largely a result of the ILO's international labour standards and programmes on WHS.

Apart from imposing of duties and setting up of standards, WHS legislation are to protect workers by encompassing provisions regarding their rights. The rights, particularly their exercise, not only protect them from exposure to workplace menaces, but also guarantee their continued service with the employer. A number of rights, including the *right to information, right to raise an alarm, right to refuse or decline work in case of imminent dangers* and the *freedom from retaliation for raising an alarm or refusing work* are meant to protect workers from work related hazards.

Besides, WHS legislation protects workers through health and safety audit, inspection, investigation and or inquiry. The legislation imposes obligations to regulatory authorities to conduct audit, inspection, investigation and or inquiry as part of their law enforcement obligations. The regulatory authorities are also tasked by WHS legislation to undertake WHS promotion. The authorities are thus engaged with the dissemination of information as well as providing training to the workers on various WHS aspects. Through the means highlighted above, level of compliance by various actors may be established and where there are violations, required actions may be imposed including sanctions and penalties prescribed by these legislation.

Workers compensation statutes represents the curative regime on WHS. Principles in these legislation have evolved with time from 1880's when for the first time occupational accident insurance was established in Otto von Bismarck's Germany. To date, workers' compensation legislation are in place in most developing countries. Most recognise workers' compensation as a right for both occupational diseases and injuries.

These legislation generally caters for the regulation of payment of compensation for occupational fatalities, diseases and injuries.<sup>25</sup> In case of a fatal case, payment is made to dependants. Some go beyond by protecting the compensation payable to workers or their dependants, as the case may be, by proscribing its attachment, ceding, pledging or setting off. Workers compensation laws offers various benefits to the workers including but not limited to incapacity benefits, medical treatments benefits, rehabilitation grants, care taker benefits, dependants grants (where an employee dies) and funeral grants.

The benefits, in most cases, are moneys contributed to the Funds (in other jurisdictions, like India, 'corporations' are preferred) by employers. The latter, i.e. the Funds/corporations, are established by workers' compensation legislation or, as the case may be, a separate legislation. They cater for the regulation of compensation payment. However, it is important to note that there are limitations regarding the right to compensation. Rules of limitation are applicable in claims. The duration varies from one country to the other. There are also limitations posed by these legislation regarding suits against employers. A claim of compensation bars a claimant from instituting a case against an employer on inter-alia, the grounds of negligence, breach of statute or common law obligation.

For instance, South African and Indian compensation laws bars claims of compensation where the common law right to sue is preferred.<sup>26</sup> In other words, the bar extinguishes employees' right to sue for occupational injury/disease. The latter limitation has been questioned in the courts of law in some countries including South Africa<sup>27</sup> and Argentina. In the latter, the bars were held to be unconstitutional.<sup>28</sup> The scope of compensation is also limited, only with reference to the statutory list of occupational diseases.

### **3.3 The Place of WHS under Workplace Health and Safety Policies**

National policies on WHS express government commitments towards the elimination of hazardous works and ultimately workers' injuries, diseases and fatalities. They contain statements on identified issues affecting and generally regarding WHS; government objectives towards redress; the strategies to be applied; roles of key actors and monitoring and evaluation plans. They are not by themselves enforceable instruments but very key in providing the roadmap towards zero risk work environment. WHS is not only a policy agenda under WHS policy but also Public Health and other sectoral policies. It is a crucial component of public health as well as sectoral policies such as mineral/mines and construction policies.

## **4. WHS PROTECTION: THE LEGAL AND REGULATORY DISORDERS**

The discussion on the legal and regulatory disorders is vital at this juncture and justified by several reasons. Pertinent is the apparent failure by most developing nations' legal and regulatory frameworks to address workplace health and safety hazards. The continued human and economic sufferings and which keeps on piling up (statistics, even though inaccurate, suggests so) connotes such failure. The discussion, on the other hand, is justified by seriousness of the present threats and the worries on the place of WHS in the future of work. The present is filled with an increasing threat on the survival of the working class, one posed by the impacts of technological advancements and globalisation.

The discussion is a need of the hour for the threat is alarming now than before. Handling the present is vital as effective protection will offer ample time to prepare for the future, which is expected to come with more challenging complexities and dangers to WHS. Our study on WHS protection, particularly the legal regimes of most Commonwealth countries have led us to a more profound study on WHS legal and regulatory disorders amongst developing nations in order to communicate them for proper and needful actions.

The disorders are not featuring uniformly in all countries but appear in most of them. As earlier stated, the discussion focuses on the legal and regulatory set up and approaches to WHS protection; dynamism in the laws; coverage of the working population; non-inclusion of critical workers' rights; dominance of flexibility clauses as well as issues pertaining to non and insufficient enforcement. It also encompasses a discussion on specific disorders attached to curative legislation, that is, workers' compensation legislation.

### **4.1 Multiplicity in Legislation & Regulatory Frameworks**

Most Developing Countries have scattered WHS legislation and/or institutions. They lack unified/harmonised legislation. Their legal and institutional frameworks involve multiple legislation and regulatory bodies. For what the Authors sense as good reasons, legislators encompassed WHS provisions in a number of legislation. However good the intents were, they contribute to the present disorders. WHS protection is not only through factories' legislation or OHS legislation, but also in legislation addressing public health and specific sectors of the economy. These legislation operate in isolation of each other causing theoretical and practical problems in attempts to eliminate occupational health hazards. And because of the multiplicity, WHS legal and regulatory framework is fragmented among various government departments.

The study carried out by Nkuba & Nkanda points out various administrative limitations on OHS laws of the low and middle income countries most of which are developing countries. The limitations encompass issues with the legal structure, fragmentation, enforcement and contradictions. To the authors, the limitations may adversely impinge on

their effective implementation by responsible regulatory authorities.<sup>29</sup> Lack of coordination and coordinated efforts retards WHS protection and promotion.

With regard to regulatory bodies' multiplicity, there are multiple bodies responsible for factories, mining, construction, agriculture and other sectoral workplaces regulation. Ministries responsible for labour/employment, ministries responsible for public health, ministerial departments handling specific occupations and specialised government agencies for OHS are worth mentioning. They are creatures of factories/ WHS or specific legislation. The roles of most of these institutions overlap.<sup>30</sup> The multiplicity affects the promotion, protection and implementation of WHS legislation and programmes in many ways. Jurisdictional claims are at the heart of the problems caused by the multiplicity. Efficiency is also uncertain for the multiple existing regulators. Examples are multiple.

In China, lack of harmonized legislation and unified supervision has resulted into conflicts of regulatory departments' function and poor coordination. For instance, regulation of occupational hazard programme declaration was promulgated by the Ministry of Health in 2002. This regulation required enterprises to report their possible occupational hazard to health administrative department. In 2009 the State Administration of Work Safety promulgated the regulation of workplace's occupational hazard declaration which reiterates the duty of an enterprise to report occupational hazards to work safety administrative department. These two regulations comprised the same substance.<sup>31</sup>

In India, the problem is manifested in many ways. One of the challenges is with the 'Federal' nature of the Indian State. The Indian Directorate General Factory Advice Services and Labour Institutes (DGFASLI) which is also responsible for the enforcement of WHS for dock workers, enforce their rules only in major ports leaving others outside its scope and speaking for itself that the enforcement is by multiple regulators, at the Central and State levels. The problem is also portrayed by the scattered nature of WHS regulators. In Mines, for instance, it is the Directorate General for Mines Safety (DGMS), an authority under the Ministry of Labour which is responsible for mines WHS regulation. In construction, it is the Labour Commissioners who have mandate.

In Tanzania, even though the Occupational Health and Safety Act 2003 apply to factories and all other workplaces, yet, it is not the only law in place catering for WHS protection. The Public Health Act, 2009, the Mining Act, 2010 and other specific legislation catering for specific articles and hazards for the dangerous occupations are in place. These legislation provides for separate OHS regime (institutional) creating difficulties in implementation.

There is the Occupational Safety and Health Authority (OSHA) and other ministerial departments including those for mining and agriculture sectors. Most vividly, inspections by OSHA encountered jurisdictional claim setbacks from inspectors in the sectors. There have been claims of authority and mandate making OSHA's work difficult as it is meant to be the overall regulator. Moreover, there are instances where the working relationship between the Ministry responsible for Health and the Ministry responsible for Labour and Employment is puzzling. The two are, at times, addressing occupational health and safety independently of each other.<sup>32</sup>

One facet of the disorder, as pointed out earlier, is the absence of the link between occupational and public health systems. The ILO has, on its recent publication on Centennial experience on WHS protection, acknowledged the continued existence of the gap between WHS and public health.<sup>33</sup> According to the ILO, even though the two have almost similar functions in the protection of WHS, they, at the moment exist in isolation of each other in most countries, leading to duplicity in functions and utilisation of countries' resources.

#### **4.2 Outdated Legislation and Non Dynamism in WHS Principles and Standards Adoption**

The WHS frameworks for most developing countries have not kept at pace with time and changes that have taken place. Most of them are outdated and old fashioned. The latter status is because of most developing countries' legislation failure to address / take on board new threats to occupational health and safety, the ones posed by day to day advancement in science and technology as well as globalisation. Factories/WHS legislation are old in most

countries without recent amendments to capture recent hazards to occupational hazards including mental stress, unregulated biological, chemical and nano substances, advanced plants and machinery as well as new employment relationships which departs from the traditional definition forming part of the old legislation.

Most of WHS laws were enacted three to five decades ago when threats were less compared to the present. They have remained static allowing the workers exposure to hazardous working conditions. The problem is known by most nations. The Tanzanian National Policy on Workplace Health and Safety, 2009 and the Indian National Policy on Safety, Health and Environment at Workplace 2009, for instance, acknowledge under Items 1.6 and 1.3, respectively the problem of outdated WHS legislation. These policies recognise WHS threats aforementioned and set forth various objectives including the changing of legislation which is contemplated not only to address them but also to align the national WHS framework with the international standards.<sup>34</sup>

Some studies have reported the non dynamism in the legal and regulatory frameworks as amongst the ailments in the protection of WHS. Sardana points out that India has remained static in its legislative approach.<sup>35</sup> Same is the case in the Caribbean where presence of outdated legislation and regulation is reported.<sup>36</sup> Of the six countries, only Trinidad and Tobago had OSH regulations that were up to date (being updated within the preceding five years).<sup>37</sup>

In Uganda, for instance, WHS legislation is reported as outdated and not corresponding to the current needs.<sup>38</sup> Scholarly writings points at the laws failure to address the dangers posed by globalisation and the advancements in science and technology.<sup>39</sup> Lucchini & London points out that globalisation has promoted the introduction of new market systems in many countries with the weakest capacities to create and enforce a regulatory system to protect workers and consumers.<sup>40</sup> An example is made with reference to Tanzania regarding unregulated pesticide distribution.

Hilgert, having made a critical analysis of WHS legislation and globalisation anticipates the resurfacing of the problems (related to unregulated biological and chemical substances and their use), which the United States workers had faced before, in the developing countries. The anticipation is because of the high rate of unregulated shipping of the substances to these countries.<sup>41</sup>

#### **4.3 Problems with Scope and Coverage: Rivers to Cross.**

Gap in coverage is the most common disorder in most developing countries WHS legislation. The ILO estimates that about 10% of the entire global workforce is covered by WHS laws.<sup>42</sup> Fundamentally, the laws grossly lack among many other issues, coverage of agricultural workers.<sup>43</sup> In India, legislation covers only few sectors of economy leaving a huge protection gap.<sup>44</sup> The problem manifests itself in Ghana, Nigeria and Tanzania. Existing WHS legislation in these countries do not cover majority of workers including the masses in the informal economy.<sup>45</sup> The problem is apparent in both preventative and curative legislative frameworks.

The gap in coverage is manifested in many ways. It is manifested by category and or number of workers protected by a particular legislation as well as the sector to which the law applies. WHS legislation in most of these countries protects certain types of workers, sectors or institutions leaving out majority of their working populations. The laws in existence contain provisions for protection of mostly factory workers prescribing for a minimum number of workers in an establishment (i.e. the factory establishment) for the law to apply. The laws are also applied in formal employment leaving the most vulnerable workers in the informal sector in serious troubles. For instance Factories Act and the Building and Other Construction Works Act apply to establishments with minimum of 10 employees in India. Same is the case with curative legislation.<sup>46</sup>

The problem is often made serious when regulators opt for amendments to enhance and or widen up scope without the carrying out of a study or inclusion of specific principles for the protection and implementation. Factories or WHS legislation are amended to either state that they also apply to certain sector or accommodate some provisions to substantiate that it does but substantially, no much is done to systematise regulation and enforcement.

On the other hand, the problem regarding coverage is understood with most laws failure to address psychosocial hazards suffered by most workers as occupational problems.<sup>47</sup> The Authors' review of developing countries workers' compensation legislation came out with a conclusion that, the laws have kept the traditional requirements for claims of compensation leaving out compensation for psychosocial injuries.<sup>48</sup> The focus is only on traditional physical injuries which can easily be feasible or diseases which are diagnosed as occupational ones. There is reluctance by tribunals to accept cases of this nature for the reason that they are problematic as they involve too much reliance on verbal evidence and consequently hard to verify.<sup>49</sup> However, of latest mental injury claims have started to receive attention. Compensable are not all mental injuries. In South Africa claims involving a physical stimulus resulting to a mental injury are compensable under the Compensation for Occupational Injury and Diseases Act, 1993.<sup>50</sup>

The gap in coverage is also construed to include failure by WHS legislation to address new employment relationships which are complex in nature as legislation are not at pace with the changing patterns in new forms of employment relationships. They have remained static, addressing only the traditional employer-employee approach for liability to follow without updating the scope of employer-employee relationship.

#### **4.4 Flexibility Clauses in Workers' Health and Safety Legislation**

WHS legislation, particularly preventive ones, contains basic provisions on the protection of workers. Even though measures imposed by most WHS legislation, particularly duties, do not impose strict compliance by employers and other actors, the express usage of some flexible clauses in most WHS legislation is yet another serious glitch in the protection of workers from hazardous working conditions. Legislation in most of these countries places the fulfillment of certain duties and compliance to certain standards *in as far as it is practicable* or *as may reasonably be practicable*.

As earlier discussed, WHS legislation provides for health, safety and welfare measures. Such measures are required to be adequate as practicable, taken as far as possible, and so far as they are practicable. The Indian and Tanzanian WHS legislation, for instance, have similar clauses regarding provisions of measures to prevent water contamination, sanitary conveniences, measures to avoid inhalation of dust, fume or other impurity and safety on electrical installations and apparatus.<sup>51</sup> Common law countries' WHS legislation have similar provisions in this respect.<sup>52</sup> These flexible clauses, in authors' opinion, affect compliance by the employers and other key actors. They provide an avenue for evasion of obligations, particularly the fulfillment of pressing obligations.

The clauses are common in these countries as they are being adopted '*in-toto*' from the ILO framework. Mostly influenced by the institutional labour economists approach on WHS, which rests the improvement of working conditions with the improvement of markets, the clauses have remained there for long affecting the level of compliance by employers and other key actors. With the statistics on fatalities, diseases and injuries and new approaches to WHS, including the human rights approach, the clauses are at the wrong place and the wrong time.

#### **4.5 Non-Inclusion of Critical Workers' Health and Safety Rights in Legislation**

Protecting workers from occupational health hazards entails recognising, protecting and ensuring implementation of pertinent WHS rights. It is no doubt that defining the scope of WHS right has always been a difficult task. However, at present, protecting workers' health and safety right encompasses protecting, *inter alia*, workers' right to refuse work where there is imminent danger; workers right to report danger; workers' right to protection from retaliation by employer for refusing or reporting such works.<sup>53</sup>

These rights are essential in protecting workers against occupational health hazards. They also form part of the ILO International Labour Standards (ILS) and some courts have been in favour of the rights. The Tanzanian High Court (Labour Division) in *Amboni Plantation Ltd v Athuman Mbaraka & 148 others*<sup>54</sup> where it was held that refusing work does not amount to strike. The Court referring to the ILO Convention C155 reiterated that employees have the right to refuse work when they see any imminent danger posed by it and no retaliation should be allowed against them by employer.



The shocking observation is that most legislation in developing world do not encompass these rights.<sup>55</sup> The Indian Factories Act, 1948 for instance, is limited to right to information and silent on the rest of the rights. The Tanzanian Occupational Health and Safety Act 2003, on the other hand does not expressly provide for the OHS rights of workers save as for the right to report to an inspector failure by employer to take action over an incident initially reported by him to such an employer. Critical WHS rights are outside the scope of these legislation, as it is the case in other developing countries. The immediate impact is that most workers operate in the state of fear and ignorance enhancing their vulnerability.

#### **4.6 Enforcement of WHS Legislation: A Serious Ailment**

Enforcement of legislation is one of the major problems of all time. And particularly in the era of globalisation and advancements in science and technology, enforcement has even become seriously challenging. Even though most countries legislation have set enforcement mechanisms, there is a significant failure in enforcing the provisions of these laws. The failure is attributed to many factors including, but not limited to, absence of principles and standards and rules for implementation, regulatory framework set up, flexibility clauses in the laws, problem of funding and the insufficiency of the sanctions and penalties imposed.

The absence of subsidiary rules necessary for implementation of principal WHS legislation is also noted. The severity is with WHS in *agriculture*. In most developing countries there are no WHS principles and standards for WHS enforcement in *agriculture*, the world top most employer and leading hazardous occupation. The sector is sidelined. In Tanzania, the Occupational Health and Safety Act 2003 provides for protection of agriculture workers, but there are no principles and standards on WHS in agriculture, nor are there rules made for purposes of enforcing the aforementioned protection. The gap is also noted with reference to India. A study carried out in Asia revealed, among others, issues with enforcement of WHS legislation.

The study took note of '*too often depressing news on WHS in Asia*'. It classifies Asian countries into RED, YELLOW, BLUE and GREEN countries with reference to WHS legislation and regulation. It sums up the problems of 'RED' countries laws and regulations on WHS to include non existence for some countries, existence with ambiguity, lack of serious enforcement, absence of regulatory framework and if present, they act only when a tragedy happens.<sup>56</sup> RED countries represents developing countries, with high fatalities and shortcomings in the laws, including Afghanistan, Bangladesh, Cambodia, Indonesia, Laos, Mongolia, Myanmar, Nepal, Pakistan, Philippines, Thailand, and Vietnam.<sup>57</sup>

The YELLOW countries group which is composed of China, India, Iraq, Iran, Jordan, Kazakhstan, Kyrgyzstan, Lebanon, Malaysia, Maldives, Russia, Sri Lanka, Tajikistan, Turkmenistan, Uzbekistan, and Yemen represents Developing Countries with low fatality but have shortcomings in the laws. The shortcomings include ambiguity in the rules and regulations, enforcement insisted only on multinational corporations as they are required to operate on higher standards than local ones and focus on most basic information and training, personal protective equipment and sanitation.

It is no doubt that the legal and regulatory framework has influence on implementation.<sup>58</sup> The laws in most of developing countries fragment regulatory structures affecting implementation. Regulatory bodies in place are structured in such a way that they create serious issues in enforcement mostly revolving around jurisdictional and functional overlaps.<sup>59</sup> One good example is from India where enforcement authorities under the Dangerous Machinery (Regulation) Act, 1983 and Insecticides Act 1968 are unidentified.<sup>60</sup> And as earlier pointed out, the scattered regulatory approach negatively impacts on the enforcement of WHS principles and standards.

Issues regarding sanctions and penalties in the enforcement are part of the common observed ailments. Regulatory bodies' failure to impose serious sanctions and penalties for non-compliance and violation of legislation is also noted. In most cases, the cost of sanctions is 'more acceptable to employer' than the cost of compliance. In Nigeria, for instance, the failure to report specified OHS incidents is punishable by a fine of N1000 (Nigerian Currency) equivalent

to USD 6. The purpose of sanctions, which include correction and deterrence, is defeated in a case like this.<sup>61</sup> Even though the problem emanates from the laws, the regulatory bodies have not been too active to take care of the problems. Other problems on enforcement are financial. Laws have created these bodies and mandated them to implement the functions without indicating the sources of funds. Thus, the trend has been such that regulatory bodies would enforce workers' health and safety legislation to those who can afford.

In terms of human resource capacity, insufficient staff has been reported as being part of the factors hindering effective implementation. Moreover, contributing to the problem of non-implementation is the absence of specific regulations to provide for specific standards for the enforcing of the parent legislation. Many countries parent legislation or sectoral legislation provides for enactment of regulations by relevant authority (in some countries, by a Minister) for their enforcement. Most of such regulations have not been promulgated. One of the vivid examples is the absence of WHS regulations for the construction industry in Ghana creating difficulties in enforcement.<sup>62</sup> Regulations for WHS protection the hazardous sectors including *mining* and *agriculture* are non-existent for some developing countries including India and Tanzania where regulations exist only in select occupations including *building and construction* and other OHS technical and welfare issues. As a result, occupational health hazards have continued to persecute workers in most developing countries for lack of substantial enforcement mechanisms.

#### **4.7 Other Disorders in the Approaches and Payment of Compensation**

Besides the aforementioned, various other disorders have been and are being observed. To mention a few, the approach by regulatory authorities, access to workers' compensation and knowledge issues created by language of the laws. The approach in many countries is discriminatory, as only the easily identifiable workplaces are subject to regulation. Moreover, the employees covered and who can afford to pay for the services by these regulatory bodies are prioritised. Inspection/audit/inquiry are the terms only familiar to the urban workplaces or a few rural which are financially well off.

Regarding access to workers' compensation, majorly are the challenges on coverage and claim procedures. The present workers' compensation legislation covers those in the formal employment and whose employers have capability to insure them. It leaves out indigent workers in the informal sectors (who constitute the majority of the working population) including the self-employed. For those covered, access is a reported challenge, prolonging and or putting at stake workers' right to compensation. In most countries insured workers encounter the problems of linking their diseases with their work.

Notably, discouragements by employers and stiff contest by workers' compensation funds/insurers places workers in difficult times. Generally workers' compensation issues rest on the claims, procedures and requirements attached thereof.<sup>63</sup> Compensation procedures in most national workers' compensation frameworks are too demanding (taking into consideration the immediate needs by injured or ill workers). The study by Nkuba and Nkanda concluded that compensation claims procedures are extremely long and bureaucratic in low and middle income countries.<sup>64</sup>

Finally, (in so far as this discussion is concerned), the legal and regulatory framework are not known by majority workers because of many reasons including the language which the laws are expressed (in most countries English which is a foreign language), absence or low promotion and deliberate marginalisation of workers' health and safety by responsible authorities, economically and legally.

## **5. CONCLUSION AND WAYS FORWARD**

Work is key to living and an obligation is placed to every member of the human family, who is able to work, to do so. However, this obligation does not go along with the obligation to bear the danger and hazards. Working conditions should be just and favourable to preserve and protect workers from health and safety menaces. Of latest, obtaining work with just and favourable working conditions is a myth for many.

Precarious working conditions have dominated for long and continue to threaten the health and lives of many workers in developing world. The legal and regulatory frameworks are in a serious crisis. There is an urgent need of addressing the disorders discussed above if progress is to be made. Developments or adjustments in the legal and regulatory framework, if not focused in the addressing of the issues foregone, will be a waste of national resources. The legal and regulatory framework, if properly reformed, would cater as a catalyst for WHS implementation and will 'pave a way' for the fulfillment of UN Sustainable Development Goal no 8 on Decent Work.

National authorities responsible for WHS shall direct its resources in ensuring that the laws are up to date, addressing the present threats to WHS. They should also address the regulatory overlaps ensuring that the regulatory framework is efficient and effective. Sardana, observing the problem of similar nature in India recommended for umbrella legislation and an apex institution.<sup>65</sup> The recommendation is valid for the present study. If it is invoked, it is more likely that it will address problems regarding legal and regulatory bodies' multiplicity, coverage as well as the outdated laws.

Other serious measures should be taken including doing away with the flexible clauses which subjects the taking of serious health, safety and welfare measures to employers' discretion. Developing countries authorities should also identify the sources of funds for implementation of various WHS programmes, enshrine WHS right and its critical components in legislation and enhancing penalties/sanctions for violations. In the latter, cost of violation should be higher to the cost of compliance.

#### ENDNOTES

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<sup>3</sup> ILO, *World Employment and Social Outlook*, 1 (ILO, Geneva, 2018)

<sup>4</sup> *Id*

<sup>5</sup> [https://www.ilo.org/global/about-the-ilo/newsroom/features/WCMS\\_120470/lang--en/index.htm](https://www.ilo.org/global/about-the-ilo/newsroom/features/WCMS_120470/lang--en/index.htm), accessed on 09/03/2020 at 03:12 p.m.

<sup>6</sup> ILO, *Report on Prevention of Occupational Diseases*, (ILO, 2013)

<sup>7</sup> ILO, *Report on Improving the Health and Safety of Young Workers*, (ILO, 2018)

<sup>8</sup> ILO, *Gaps in Coverage and Barriers to Ratification and Implementation*, 6 (ILO, Geneva); WHO, *Occupational Health: A Manual for Primary Health Care Workers*, 149 (WHO: CAIRO 2001)

<sup>9</sup> *Id*

<sup>10</sup> Joshi et al, *Occupational Health and Safety of Construction Workers, Using Personal Protective Equipment*, 29 (Concept Publishing Company Ltd, 2013)

<sup>11</sup> The International Labour Conference, *General Survey Concerning Occupational Safety and Health Convention, Recommendation and Protocol, Report III, Part IB*, (98<sup>th</sup> ILC Session), (ILO, Geneva); Jeffrey Hilgert, *The Future of Workplace Health and Safety as a Fundamental Right*, CLLPJ: Vol 34, 717 (2013); Jeffrey Hilgert, *A New Frontier for Industrial Relations: Workplace Health and Safety as a Human Right*, in James A Gross & Lance Compa, *Human Rights In Employment And Labour And Employment Relations: International And Domestic Perspectives*, 52 (LERA, 1<sup>st</sup> Edn, 2009)

<sup>12</sup> ILO, *Safety and Health at Work at the Heart of Future of Work: Building on 100 Years of Experience*, 1 (ILO, 2019)

<sup>13</sup> *Id*

<sup>14</sup> R.G. Lucchini & L. Leslie, *Global Occupational Health: Current Challenges and the Need for Urgent Action*, AGH, Vol. 80 251-256 (2014)

<sup>15</sup> Benjamin Alli, *Fundamental Principles of Occupational Health and Safety*, (ILO, Geneva, 2<sup>nd</sup> Edn, 2008)

<sup>16</sup> Mandate under the ILO Constitution 1919

<sup>17</sup> International Covenant on Economic, Social and Cultural Rights (UNGA 2200 A (XXI) of December 16, 1966), Article 7 and Article 2, respectively

<sup>18</sup> Constitution of India, 1950, Articles 38, 39 and 42 (to be read together)

- <sup>19</sup> The Constitution of Kenya, 2010, Chapter IV (Bill of Rights), Part II (Fundamental Rights) Article 41 (Labour Relations)
- <sup>20</sup> The Constitution of the Federative Republic of Brazil, 1988 Chapter II on Social Rights, Article 7 and *Torrillo, Attilio Amedeo and Others v. Gulf Oil Argentina S.A. and Others*, FA09000129, National Supreme Court of Justice of Argentina, Buenos Aires, Decision of 30/03/2009, respectively
- <sup>21</sup> The Constitution of Vietnam, 2013 Article 35 (2)
- <sup>22</sup> Landmark is the Supreme Court decision in *Consumer Education & Research Centre. v Union of India*, (1995) SCC (3) 42
- <sup>23</sup> In this the employer and other key actors have a number of obligations, positive and negative. Such obligations include ensuring use of chemicals is only a last resort, labelling and proper packaging duties for manufacturers
- <sup>24</sup> The Occupational Health and Safety Act, 2003 (Tanzania), The Occupational Safety and Health Act, 2007 (Kenya); The Occupational Safety and Health Act, 2006 (Uganda); and the Indian Factories Act, 1948 respectively
- <sup>25</sup> See also: N.A. Kheni, & C. Braimah, *Institutional and Regulatory Frameworks for Health and Safety Administration: Study of the Construction Industry in Ghana*, IRJES, Vol 3(2) 24-34 (2014)
- <sup>26</sup> Section 35 of Compensation for Occupational Injuries and Diseases Act, Act No. 130 of 1993, Act of Parliament (South Africa) and Section 53 and 61 of the Employees State Insurance Act, Act No. 34 of 1948, Act of Parliament (India)
- <sup>27</sup> See for Eg. South African case of *Thembekile Mankayi v AngloGold Ashanti Ltd*, 2011 (3) SA 237 (CC)
- <sup>28</sup> *Torrillo, Attilio Amedeo and Others v. Gulf Oil Argentina S.A. and Others*, FA09000129, National Supreme Court of Justice of Argentina, Buenos Aires, Decision of 30th March 2009 and *Aquino, Isacio v. Cargo Servicios Industriales S.A.*, FA04000197, National Supreme Court of Justice of Argentina, Buenos Aires, Decision of 21st September 2004
- <sup>29</sup> F. Nkuba & A. Nkanda, *Current Status and the Future of Occupational Safety and Health in Low and Middle Income Countries*, SHaW 9 365-371 (2018)
- <sup>30</sup> N.A. Kheni, & C. Braimah *supra*, note 25, at 31, the author reports the problem of multiple departments with overlapping roles leading to enforcement problems
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- <sup>32</sup> Mathias Sylvester Nkuhi, *Legal Regime for Workers' Health and Safety, Human Rights Dimension with reference to India and Tanzania*, Ph.D Thesis, University of Mysore, December 2019 at 218
- <sup>33</sup> ILO, (2019) *supra* note 12 at 60
- <sup>34</sup> *Id*
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- <sup>37</sup> *Id* at 4
- <sup>38</sup> Atusingwize, E, Musinguzi, G, Ndejjo R, *et al*, *Occupational Health and Safety Regulations and Implementation Challenges in Uganda*, AEOH, 74 (1-2) 58 -65 (2019)
- <sup>39</sup> See: ILO (2019), *supra* note 12 at 29; F. Lund & A. Marriot, *supra* note 1 at 13
- <sup>40</sup> R.G. Lucchini & L. London, *supra* note 14 at 252
- <sup>41</sup> J. Hilgert, (2009), *supra* note 11 at 51
- <sup>42</sup> F. Lund and A. Marriot *supra* note 1 at 22
- <sup>43</sup> Nkuba F & A. Nkanda, *supra* note 29
- <sup>44</sup> DGFASLI & ILO, *National Occupational Safety And Health Profile* (India) 96 (DGFASLI & ILO, 2018)
- <sup>45</sup> N.A. Kheni & C. Braimah, *supra*, note 25, at 26 (agriculture sector which employs about 60% of Ghanaians is not covered), U. Abubakar, *An Overview of the Occupational Safety and Health Systems of Nigeria, UK, USA, Australia and China: Nigeria being the Reference Case Study*, AJER 3(11), 1350-1358 (2015) (Nigerian Factories Act covers a limited number of industries); and E.J. Mrema, A.V. Ngowi, & S.H. Mamuya, *Status of Occupational Health and Safety and Related Challenges in the Expanding Economy of Tanzania*," AGH 81 (4) 538 – 547 (2015) (80% of Tanzanian workers are not covered by WHS legislation)
- <sup>46</sup> Mathias Sylvester Nkuhi, *supra*, note 32 at 168

- <sup>47</sup> See also: M. Akpınar-Elci, M. Nguyen, M. Randall, *et al. supra* note 36 at 41
- <sup>48</sup> See for instance the Employees Compensation Act, 1923 (India), The Employees State Insurance Act, 1948 (India), The Workers' Compensation Act, 2008 (Tanzania), Workers Compensation Act, 2000 (Uganda)
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- <sup>59</sup> DGFASLI & ILO, *supra* note 44 at 96
- <sup>60</sup> See also: DGFASLI & ILO, *Id*, at 98
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- <sup>65</sup> M.M.K. Sardana, *supra*, note 35 at 15