

Placing the right to occupational health and safety within a human rights framework: trends and challenges for South Africa

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Abstract

This article examines the notion of occupational health and safety as a human right in South Africa. It attempts to explain why and how human rights matter from the perspective of occupational health and safety, as well as the role of the International Labour Organisation (ILO) in setting international standards in the area of occupational health and safety. It also focuses on the current trends and challenges facing the system of occupational health and safety in South Africa. Furthermore, some of the relevant international law instruments for occupational health and safety within the South African context will be revisited. In its conclusion, the article draws some important lessons from the ILO and other jurisdictions on the best practices in the area of occupational health and safety.

INTRODUCTION

The right to safe and healthy working conditions has gained prominence at the local, regional, and international levels.¹ In fact, countries around the world have recognised the importance of the human right to safe and healthy

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¹ Papisca 'Relevance of human rights in the global space of politics: how to enlarge democratic practice beyond state boundaries and build up a peaceful world order' in Koen, De Feyters *et al* *The local relevance of human rights*, Cambridge (2011) 91.

working conditions by entrenching this right in their domestic laws and policies.² For this reason, the right to occupational health and safety, viewed from the human rights perspective, enables people to claim an essential element of their existence. In the context of the right to health, the United Nations General Assembly has acknowledged that this right embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life. This extends to the underlying determinants of health, safety, healthy working conditions, and a healthy environment.³

This article attempts to explain why and how human rights in the field of occupational health and safety are significant, as well as the role of the International Labour Organisation (ILO) in setting international standards in the area of occupational health and safety. It is submitted that the international labour standards set by the ILO play a crucial role in guiding governments and policy makers in modelling and giving content to the fundamental rights of occupational health and safety in their domestic laws.

I use the notion of human rights in the context of occupational health and safety with reference to the right of individuals to live and work in an environment that is adequate for their health and safety; and not to be exposed to occupational hazards which compromise their fundamental human rights. These values are embedded in Principle 1 of the Stockholm Declaration, which states that:

Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being.⁴

² See for example the United Kingdom's Health and Safety at Work Act of 1974 <http://www.legislation.gov.uk/ukpga/1974/37/contents> (last accessed 23 August 2013), and the United States of America Occupational Safety and Health Act of 1970 https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=oshact&p_id=2743, and the Australian Federation of Employees and Industries Submission to the Inquiry into the New NSW Occupational Health and Safety Legislation [http://www.afei.org.au/files/pdf/AFEI%20Submission%20to%20Stein%20Inquiry%20181206%20Edit%20\(2\).pdf](http://www.afei.org.au/files/pdf/AFEI%20Submission%20to%20Stein%20Inquiry%20181206%20Edit%20(2).pdf) (last accessed 23 August 2013).

³ United Nations Economic and Social Council 'The right to the highest attainable standard of health: 2000/08/11.E/C.12/2000/4 (General Comment No14 (2000) <http://www.unhchr.ch/tbs/doc> (last accessed 23 August 2013).

⁴ Stockholm Declaration of the United Nations Conference on the Human Environment, 16 June 1972, UN Doc A/CONF.48/14/Rev1 at 3 (1973) (hereinafter Stockholm Declaration) at: <http://www1.umn.edu/humanrts/instreet/humanenvironment.html> (last accessed 23 August 2013).

The United Nations General Assembly has reiterated the language of the Stockholm Declaration, by asserting that all individuals are entitled to live in an environment adequate for their health and well-being.⁵ Against this background, the aims of this article are threefold. First, this article examines the status, trends, and challenges facing the system of occupational health and safety in South Africa. Secondly, it considers the role of the ILO in the context of occupational health and safety. Thirdly, it reflects on how the courts in other jurisdictions have protected the fundamental human right to occupational health and safety in the workplace. The article concludes by drawing on lessons from the ILO, most notably the best practices for promoting the culture of health and safety in the workplace.

OCCUPATIONAL HEALTH AND SAFETY: REFLECTING ON HUMAN RIGHTS INJUSTICES

The ILO estimates that there are in excess of more than 2 million occupational fatalities globally every year.⁶ The highest proportion of these deaths is caused by work-related cancer, circulatory and cerebrovascular diseases, and some communicable diseases.⁷ Furthermore, according to the ILO, an average of 6 000 people die every day as a result of work-related accidents or diseases, totalling more than 2,2 million work-related deaths a year. Of these, about 350 000 deaths are from workplace accidents and more than 1,7 million are from work-related diseases.⁸

Ladou⁹ notes that small-scale industries in developing countries lack appropriate occupational health regulations and control measures. He further asserts that it is commonly found that small-scale enterprises do not provide basic occupational health services and other primary medical care. Moreover, small factories and mines are located in the middle of or near

⁵ Resolution adopted by the United Nations General Assembly at its 45 session/94, 68th Plenary Meeting, 14 December 1990 at: <http://www.un.org/depts/dhl/resguide/r45.htm> (last accessed 23 August 2013).

⁶ ILO, Facts on safety at work http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_067574.pdf (last accessed 23 August 2013).

⁷ Truelsen, Begg, and Mathers 'The global burden of cerebrovascular disease' http://www.who.int/healthinfo/statistics/bod_cerebrovascularstroke.pdf (last accessed 23 August 2013).

⁸ ILO n 6 above.

⁹ Ladou 'International occupational health' (2003) 206 *International Journal of Hygiene and Environmental Health* 1–3.

residential areas, which means that the activities of these enterprises threaten the health of workers, families, and the adjacent community.

In South Africa, the number of deaths in the informal and formal sectors is very high. Approximately 2,3 million work related deaths occur each year, with 650 000 of them resulting from hazardous substances in the workplace.¹⁰ This situation presents the ILO with an opportunity to act on an international level to establish acceptable standards of best practices and benchmarks aimed at protecting workers against occupational injuries and diseases in the workplace.

The ILO tripartite structure of worker, employer, and government is well suited to initiate and facilitate far-reaching programmes to realise the ILO's Global Strategy on Occupational Safety and Health. The implication of this tripartite structure is that governments, employers and workers are represented, and their delegates can vote at the International Labour Conference. This conference is important because it drafts and adopts international labour standards. At this stage, it is important to reflect on the concept of a human-rights approach to occupational health and safety.

A HUMAN-RIGHTS APPROACH TO OCCUPATIONAL HEALTH AND SAFETY

The nature of occupational health and safety as a human right has been extensively canvassed in the literature need not be repeated.¹¹ An analysis of South African experience, which is critical to an understanding of what a human rights approach can contribute to occupational health and safety, reveals a number of crucial factors.

First, it is important to recognise, evaluate, and control hazards arising in the workplace that could impair the health and well-being of workers. This means that policy-makers need to spend as much time contemplating and

¹⁰ ILO, Promoting safe and healthy jobs: the ILO global programme on safety, health and the environment (Safe work) at: http://www.ilo.org/global/publications/magazines-and-journals/world-of-work-magazine/articles/WCMS_099050/lang--en/index.htm (last accessed 23 August 2013).

¹¹ Barten *et al* 'Contextualising workers' health and safety in urban settings: the need for a global perspective and an integrated approach' (2008) 32 *Habitat International* 224–233; Brown 'Protecting workers' health and safety in the globalizing economy through international trade treaties' (2005) 11 *International Journal of Occupational and Environmental Health* 207–209.

developing occupational health policies, as they do in developing elaborate and potentially impressive commitments to eradicating occupational disease. Secondly, it should be recognised that the safety and health of workers is a fundamental human right to be ensured through a defined system of rights, measured against the backdrop of global statistics on work-related mortality, illness, and injury.¹²

More recently, the ILO's introductory report delivered in Istanbul estimates that 2,3 million people die each year from work-related illnesses and injuries.¹³ The ILO noted that there was progress in the area of traumatic work-related accidents, but the overall estimate of 2,3 million has remained unchanged for over a decade.¹⁴ Thirdly, national governments are required to ensure that the right to occupational health and safety is protected.

Alli asserts¹⁵ that the ILO has reaffirmed the importance of protecting occupational health and safety by stating that:

- Work should take place in a safe and healthy working environment.
- Conditions of work should be consistent with the workers' well-being and human dignity.
- Work should offer real possibilities for personal achievement, self-fulfilment and self-service to society.

It is increasingly recognised that the protection of life and health at work is a fundamental right of workers – in other words, decent work implies safe work.¹⁶ The right to safety and health at work is protected at the national and international levels. At the national level, South African law places an

¹² Hilgert 'The future of workplace health and safety as a fundamental human right' (2013) 34 *Comparative Labor Law and Policy Journal* 716–718.

¹³ Istanbul Declaration on Safety and Health at Work signed at Istanbul on September 11, 2011 at: <http://www.ilo.org/safework/documents/publication/pdf> (last accessed 23 August 2013).

¹⁴ Hilgert *supra*.

¹⁵ Alli 'Fundamental principles of occupational health and safety' (2008) ILO 17–19 http://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@publ/documents/publication/wcms_093550.pdf (last accessed 23 August 2013).

¹⁶ The concept of decent work speaks to a situation in which decency is maintained regardless of the type of work in which the person is engaged. See Fields 'Decent work and development policies' (2003) 142(2) *International Labour Review* 1; ILO 'Towards decent work: social protection in health for all workers and their families: conceptual framework for the extension of social protection in health' Working paper, International Labour Office, Geneva, (2002) 3 available at: http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---secsoc/documents/publication/wcms_secsoc_7562.pdf (last accessed 23 August 2013).

obligation upon every employer to ensure a healthy and safe working environment for workers.¹⁷ This obligation finds its origins in the Constitution of South Africa.

In particular, the Constitution provides everyone with the right to an environment that is not harmful to their health or well-being.¹⁸ Furthermore, this right is supplemented in section 8 of the Occupational Health and Safety Act¹⁹ which imposes a general duty on every employer to provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risk to the health of his or her employees.²⁰

In addition, there are various pieces of legislation which regulate occupational injury and disease in South Africa. For example, there is the Compensation for Occupational Injuries and Diseases Act (COIDA),²¹ which deals with the aftermath of the occupational injury or disease suffered by an employee while on duty. This legislation also provides compensation for occupational injuries and diseases. It is important to note that the legislature has proposed far-reaching amendments to COIDA. These amendments propose that provision for the rehabilitation and reintegration of disabled persons in the workplace, and arrangements for their early return to work is included in the legislation.²² Furthermore, the proposed amendments provide for an obligation on the part of the employer not to dismiss a disabled employee within a 12 month period on the basis of incapacity.²³

¹⁷ For further reading on the duty of the employer to provide a safe working environment see s 8 of the Occupational Health and Safety Amendment Act 181 of 1993; Tshoose 'Employer's duty to provide a safe working environment: a South African perspective' (2011a) 6(3) *Journal of International Commercial Law and Technology* (JICLT) 166–171.

¹⁸ Section 24(a) of the Republic of South Africa Constitution, 1996 (hereafter referred to as the Constitution).

¹⁹ Occupational Health and Safety Act 85 of 1993 (hereafter referred to as OHSA).

²⁰ Basson *Essential labour law* (5ed 2009) 384–385; For further reading in this regard, see Tshoose 'Justice delayed is justice denied: protecting miners against occupational injuries and diseases: comments on *Mankayi v AngloGold Ashanti Ltd*' (2011b) 14 *Potchefstroom Electronic Journal (PER)* 7.

²¹ Compensation for Occupational Injuries and Diseases Act 130 of 1993 (hereafter referred to as COIDA).

²² Draft amendments to the COIDA general notice No. 252 to 254 of Government Gazette 35163 dated 23 March 2012. It is important to note that the COIDA Act No. 130 of 1993 is now proposed to be named the Compensation for Occupational Injuries and Disease Rehabilitation and Reintegration Act <http://www.sabinetlaw.co.za/labour/articles/coida-regulations-comment-invited-draft-amendments> (last accessed 23 August 2013).

²³ *Ibid.*

Similarly, the employer is also obliged to establish a policy on rehabilitation and reintegration of a disabled or injured employee into the workplace.²⁴ Failure to do so can result in an administrative fine. Furthermore, the proposed amendments also allow for the appointment of an inspector, the functions of such persons, the points of entry into the workplace, and the power to question employers and conduct inspections. The inspectors can issue compliance orders, which must stipulate the maximum fine that can be imposed on the employer for failure to comply with the order.

Furthermore, other legislation which regulates occupational health and safety includes the Occupational Health and Safety Act (mentioned above), and the Mine Health and Safety Act,²⁵ while the most important legislation that regulates compensation for employees' injuries and diseases (and even death) suffered or contracted at work is the COIDA. The Occupational Diseases in Mines and Works Act,²⁶ mandates reporting of and the payment of certain benefits to mine workers who develop specified occupational lung diseases, as well as the payment of benefits to dependants of workers who die from such diseases. In as far as the enforcement of the MHSA is concerned, an inspector who has reason to believe that any occurrence, practice or condition at a mine endangers or may endanger the health or safety of any person at the mine, may issue an instruction necessary to protect the health or safety of any persons at the mine.²⁷ This includes an instruction that the operations at the mine or a part of the mine be halted.²⁸ According to Coles, it is important that the inspector's power is not exercised in an arbitrary manner.²⁹ She asserts that there must be objective facts which justify the exercise of these powers.

The MHSA applies to mines and works, while the OHSA applies to other industries but does not apply to employers and workplaces to which the MHSA and certain matters covered by the Merchant Shipping Act apply. The COIDA came into effect on 1 March 1994. The purpose of the Act is to

²⁴ *Ibid.*

²⁵ Mine Health and Safety Act 29 of 1996 as amended (hereafter referred to as MHSA).

²⁶ Occupational Diseases in Mines and Works Act 78 of 1973 (hereafter referred to as ODIMWA).

²⁷ Section 54(a) of the MHSA; Le Roux 'Powers of the inspectorate to close a working place' (2011) 11 *The Journal of the Southern African Institute of Mining and Metallurgy* 542–544.

²⁸ Section 54(1)(a) of the MHSA.

²⁹ Coles 'Closure orders in terms of the Mine Health and Safety Act' <http://www.polity.org.za> (last accessed 23 August 2013).

provide compensation for losses arising from occupational injuries and diseases at the workplace. The Act applies to all employers and to casual and full-time employees who fall ill or are injured, disabled, or killed as a result of a workplace accident or workplace-related disease.

COIDA specifically excludes³⁰ workers who are disabled for less than three days, domestic workers, individuals undergoing military training, members of the South African National Defence Force, the South African Police Service, and workers guilty of wilful misconduct (unless the nature of the injury is serious, or they are killed), as well as anyone employed outside South Africa for twelve or more consecutive months, and for temporary work assignments in South Africa.

COIDA provides a system of no-fault compensation for employees injured in accidents arising out of and in the course of their employment, or who contract occupational diseases at the workplace. This means that employees or their dependants are compensated, regardless of whether their injury or illness was caused by their own negligence, their employer's negligence, or that of any other person.³¹

COIDA lists the more common diseases. If an employee contracts a disease that is not listed, he or she must prove that the disease is related to his work in order to receive compensation. The Act further provides for the payment of medical aid for disabled employees from the private medical profession at tariff rates.³²

³⁰ McGregor *et al Labour Law Rules* (2012) 99–102.

³¹ Chapter 12 of the report of the Committee of Inquiry into a comprehensive system of social security, see Department of Social Development Committee of Inquiry into a comprehensive system of social security for South Africa Transforming the Present – Protecting the Future Draft Consolidated Report Pretoria 2002 <http://www.sarpn.org/CountryPovertyPapers/SouthAfrica/march2002/report/chapter12.pdf>, 113–114 (last accessed 23 August 2013).

³² See the Tariffs for Medical Service Providers GN 300, GG 37571, dated 24 April 2014, which provides tariffs in cases of compensation for occupational injuries and diseases at: <http://www.polity.org.za/article/monthly-sustainability-legislation-regulation-and-parliamentary-update-april-2014-2014-05-08> (last accessed 23 August 2013).

OCCUPATIONAL HEALTH AND SAFETY: TRENDS AND CHALLENGES

Injuries and fatalities sustained by workers in the workplace

In South Africa, mining contributes significantly to the economy.³³ The number of injuries sustained by workers at mines in 2011 stood at 711, compared to 1 126 during the same period in 2010.³⁴ In recent times, there has been a rapid increase in the number of fatalities in the mining industry.³⁵ Hermanus³⁶ asserts that the accident and ill-health record of the mining sector compares poorly to that of other economic sectors such as manufacturing, construction, and rail, leading to the mining sector's reputation as the most hazardous industrial sector. The other concern relates to the challenges faced by females in the mining industry. Zungu³⁷ asserts that compared to their male counterparts, females in mining have unique health and safety needs due to their anatomical and psychological makeup. A further challenge faced by females in the mining sector is the lack of necessary skills associated with working in a mine.³⁸ This is because most women who join the mines have previously worked as domestic workers or casual and general workers in the retail and food industries.³⁹ In addition, according to the study conducted by Zungu,⁴⁰ most women were dissatisfied with the type and style of personal protective equipment (PPE) provided for female workers. The author notes that 99,8 per cent of female workers are

³³ Baxter 'The role of the South African mining industry in South Africa's growth and development plans', presentation to a Harmony sponsored Investor Forum, 25 March 2013 at: www.bullion.org.za/.../CoM%20presentation%20Role%20of%20the%20 (last accessed 23 August 2013).

³⁴ Mardon 'Number of mine injuries decrease, but fatalities increase with more than 20% – Solidarity' (11 May 2011) Media statement at: <http://www.solidaritylegalservices.co.za/number-of-mine-injuries-decrease-but-fatalities-increase-with-more-than-20-%E2%80%93-solidarity> (last accessed 23 August 2013).

³⁵ EVRAZ Plc. Annual Report 2012, 8–54. EVRAZ Plc. is a global, vertically-integrated, steel, mining and vanadium business with operations in the Russian Federation, Ukraine, the Czech Republic Italy, the USA, Canada and South Africa at: <http://www.evraz.com/upload/iblock/d60/EVRAZ%20Annual%20Report%202012%20web.pdf> (last accessed 23 August 2013).

³⁶ Hermanus 'Occupational health and safety in mining: status, new developments, and concerns' (2007) 107 *The Journal of The Southern African Institute of Mining and Metallurgy* 531.

³⁷ Zungu 'Occupational health and safety challenges reported by women in selected South African gold and platinum mines' (2012) 18(5) *Occupational Health Southern Africa* 6–13.

³⁸ *Id* at 8 (emphasis added).

³⁹ Nuwayhid 'Occupational health research in developing countries: a partner of social justice' (2004) 94(11) *American Journal of Public Health* 1918–1919.

⁴⁰ Zungu n 37 above.

exposed to unhygienic conditions and lack of access to adequate sanitary facilities while working underground.⁴¹ These challenges clearly indicate the need to protect females working in mines against occupational health and safety risks by addressing issues that are unique to them.

The ILO notes that psychological factors, such as stress, harassment, and violence at work, have a marked impact on workers' health.⁴² According to the ILO, increased stress at work might lead to depressive and alcohol and drug-related disorders. This increases the need for psychological hazards to be properly addressed and for appropriate preventive measures to be implemented.⁴³

Globalisation and new occupational injuries and diseases

The advent of globalisation has brought with it new and sophisticated occupational diseases. According to the European Agency for Safety and Health at Work,⁴⁴ new and emerging risks relating to the use of technology, for example, the safety and health implications of nanotechnology, factors causing psychological illness, such as work-related stress and other mental disorders, exposure to non-ionizing radiation, as well as age and gender related risks, have far-reaching implications for occupational health and safety.

The enforcement of occupational health and safety legislation in South Africa leaves much to be desired. First, the penalties for breach of occupational health and safety laws have been set at absurdly low levels.⁴⁵ Secondly, the criminal sanctions for breach of occupational health and safety legislation are rarely invoked – this is in tandem with the non-enforcement of occupational health and safety laws in the informal sector.⁴⁶

⁴¹ Zungu n 37 above at 8–12.

⁴² ILO, Introductory report: global trends and challenges on occupational safety and health, XIX world congress on safety and health at work, Istanbul Turkey, 11–15 September 2011, 8 at: http://www.ilo.org/safework/info/publications/WCMS_162662/lang--en/index.htm (last accessed 23 August 2013).

⁴³ *Ibid.*

⁴⁴ European agency for safety and health at work 'New and emerging risks in occupational safety and health' (2009) <http://ohsa.europa.eu/en/publications/pdf> (last accessed 23 August 2013).

⁴⁵ Loewenson 'Globalization and occupational health: a perspective from Southern Africa' (2001) 79 (9) *Bulletin of the World Health Organization* 865–866.

⁴⁶ Findley & Gorski 'OHS Disparities in developing countries' (2005) *Professional Safety* 24–30 <http://www.asse.org/professionalsafety/pastissues/050/04/010405as.pdf> (last accessed 23 August 2013).

Similarly, the effects of globalisation on occupational health and safety are tremendous. For example, workers engaged in export processing zones (EPZs) are constantly exposed to high levels of machine-related accidents, dust, noise, poor ventilation, and exposure to toxic chemicals. Job stress levels are also high, which increases the level of risk.⁴⁷ It has been reported that accidents, stress and intense exposure to common hazards arise from unrealistic production quotas, productivity incentives, and inadequate control with regard to overtime.⁴⁸ These factors increase the existing pressure on highly stressful work, resulting in cardiovascular and psychological disorders. This stress can affect the reproductive health of women working in EPZs, leading to miscarriages, problems with pregnancies, and poor foetal health.⁴⁹

Other problems facing the system of occupational health and safety include job insecurity, contingent work arrangements.⁵⁰ Often, migrant workers are excluded from the ambit of social security protection in South Africa.⁵¹ In addition, migrant workers are frequently engaged in ‘3D jobs’ (that is jobs that are associated with conditions that are *dirty*, *dangerous*, and *demeaning*). There is increasing evidence that they bear a disparate burden of occupational fatalities, injuries and illnesses, when compared to non-migrant workers.⁵² It is submitted that migration raises the challenge of providing migrant workers with the same occupational health and safety standards as national and local workers.

⁴⁷ Loewenson n 45 above at 863–865.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ Lund & Marriot ‘Occupational health and safety and the poorest’ (2011) Research Report of the School of Development Studies, University of Kwa-Zulu Natal 13 <http://www.sds.ukzn.ac.za/files/RR%2088%20Lund.pdf> (last accessed 23 August 2013).

⁵¹ Posel *et al* ‘Labour migration and households: a reconsideration of the effects of social pension on labour supply in South Africa’ (2006) 23 *Economic Modelling* 836–850; Avato *et al* ‘Social security regimes, global estimates, and good practices: the status of social protection for international migrants’ (2008) 38 *World Development* 455–464; Hemson & Cox ‘Mamdani and the politics of migrant labour in South Africa: Durban dockworkers and the difference that geography makes’ (2008) 27 *Political Geography* 194–210.

⁵² Shenker ‘A global perspective of migration and occupational health’ (2010) 53 *American Journal of Industrial Medicine* 329–337.

The use of criminal sanctions for occupational injuries and fatalities in other jurisdictions

In South Africa, the criminal sanctions for breach of occupational health and safety legislation are rarely invoked. However, legislation on occupational health and safety does impose fines and imprisonment in respect of non-compliance with occupational health and safety laws. It can be said that the use of criminal law sanctions in the area of occupational health and safety might bring undesired results – for example, this might impact negatively on the scope of potential liability for many safety professionals. First, the use of criminal sanctions opens a relatively new avenue of potential liability for safety professionals. Secondly, the use of criminal sanctions can be a viable means for the government to penalise corporate officials in situations involving fatalities or serious injuries.⁵³

In the rest of the world, criminal sanctions for workplace fatalities are frequently applied. For example, in the United States, the institution of criminal charges under the Occupational Health and Safety Act and state criminal codes, is a trend that began in the 1990s.⁵⁴ Using the individual state's codes, state and local prosecutors are taking an active role in workplace safety and health through the enforcement of state criminal sanctions against employers for occupational deaths and injuries.

The courts in the United States have held that employers who knowingly expose their workers to dangerous conditions leading to injury or even death, can be held criminally responsible for the results of their actions.⁵⁵ The use of criminal code enforcement in incidents involving workplace injuries and fatalities by state prosecutors in the US, has greatly expanded the potential liability of corporate officers who wilfully neglect their safety and health

⁵³ For further reading on corporate criminal liability, see Farisani 'Corporate criminal liability for deaths, injury and illness: is South Africa's mining sector ready for change' (2012a) *Speculum Juris*, 1–18 available at: <http://www.speculumjuris.co.za/files/pdf/SJ0912.pdf> (last accessed 23 August 2013); Farisani 'The regulation of corporate criminal liability in South Africa: a close look ...' (2006b) *Obiter* 263–276.

⁵⁴ Schneid *Legal liabilities in safety and loss prevention: a practical guide* (2ed 2011)133–141.

⁵⁵ See *People v O'Neil* (Film Recovery Sys) Nos 83 C 11091 & 84 C 5064 (Cir Ct Cook Cty June 14, 1985), rev'd 194 Ill.App.3d 79, 550 NE 2d 1090 (1990); *People v Chicago Magnet Wire Corp* 126 Ill.2d 356, 129 Ill Dec 517, 57 USLW 2460, 534 NE 2d 962 (1989); Moberg *et al* *Employers Who Create Hazardous Workplace Could Face More Than Just Regulatory Fines, They Could be Charged with Murder*, 14 1986 Student Law 36.

duties and responsibilities in as far as the Occupational Health and Safety Act is concerned.⁵⁶

Similarly, in the United Kingdom, magistrates' courts have jurisdiction to hear cases involving the violation of occupational health and safety laws. Section 24 of the Police and Criminal Evidence Act of 1984 provides a police officer with a power of arrest in respect of all offences. The proceedings against individuals who have breached health and safety legislation⁵⁷ are normally instituted by an inspector or the Director of Public Prosecutions.⁵⁸ In addition, the Environmental Agency is also, under some circumstances, a competent enforcement authority. In terms of section 39 (1) of the UK's Health and Safety Act, inspectors have *locus standi* to prosecute cases in the magistrates' court, and also, since they are involved in investigating the offence, they can instruct a solicitor to conduct the prosecution. In cases where there is a violation of health and safety legislation, the normal court procedure will follow. For example, such proceedings will normally commence with an arrest, charge, and bail in the magistrates' court.⁵⁹

In South Africa, inspectors have no powers to institute a criminal case for the violation of occupational health and safety legislation. Rather, their powers are limited to entering a mine at any time without warrant or notice for the purpose of monitoring and ensuring compliance with the MHSA. He or she may also enter any other place after obtaining the necessary warrant. Furthermore, the inspector may bring into and use on the mine or place, any vehicles, equipment and material required for the performance of any function in terms of the MHSA. The employer and employees must provide the inspector with any facility that he or she reasonably requires.⁶⁰

Niskanen⁶¹ asserts that the effectiveness of occupational health and safety enforcement requires that the regulators know what effective compliance

⁵⁶ *O'Neil and Chicago Magnet* n 55 above.

⁵⁷ United Kingdom Health and Safety Act, 1974 (HWSA).

⁵⁸ Section 39 of HWSA.

⁵⁹ For further reading on United Kingdom's health and safety cases in the Magistrates' Court, see Mathews & Ageros *Health and safety enforcement: law and practice* (3ed 2010) 206–256.

⁶⁰ Sections 29(1) & 30 of the South African Occupational Health and Safety Act 181 of 1993.

⁶¹ Niskanen 'The effects of the enforcement legislation in the Finnish occupational safety and health inspectorate' (2013) 55 *Safety Science* 135–140.

programmes and systematic occupational health and safety management approaches entail. In addition, occupational health and safety enforcement must have a comprehensive understanding of the contexts within which the organisations must operate, and how the organisation should best respond to the various enforcement measures. He further points out that in order to impose a prohibition order, the occupational health and safety inspectors must make a judgment call that the level of risk is unacceptable. This decision must be based on the inspector's expertise; it cannot simply be inferred from any regulatory requirement. This means that a decision as to whether there is immediate danger, or whether or not there is compliance with some regulation, is also a judgment on risk.

Perhaps one piece of legislation with substance when it comes to the enforcement of the law regarding occupational health and safety injuries or deaths, is the MHSAs. In terms of the MHSAs, an inspector may recommend an administrative fine if he has reason to believe that an employer has failed to comply with any provision of the MHSAs.⁶²

In short, it is submitted that despite non-compliance with the occupational health and safety legislation in South Africa, authorities are reluctant to institute criminal action against the wrongdoers. It is argued that this is partly due to the fact that inspectorate authorities lack proper knowledge and capacity in as far as the enforcement and prosecution of cases dealing with the violation of the occupational health and safety legislation are concerned.

THE ROLE OF THE INTERNATIONAL LABOUR ORGANISATION IN THE AREA OF OCCUPATIONAL HEALTH AND SAFETY

Before 1970, international law did not extend to certain fields like the mining industry and the environment. This was due to the belief that states had the sovereign right to exploit their own resources in accordance with their own policies.⁶³ With time, member states realised the value of belonging to the international community, and as a result, they decided voluntarily to associate with each other and give up portions of their absolute sovereignty. In so doing, member states fashioned international law through several mechanisms.

⁶² Section 55A of the MHSAs.

⁶³ Stockholm Declaration Principle 21.

It was only recently that South Africa was welcomed as member of the international community and to be legally bound by the obligations imposed by the relevant international treaties. Olivier⁶⁴ asserts that even in those instances where South Africa is not legally bound by obligations under a treaty, section 39(1)(b) of the Constitution compels a court, tribunal or forum, when interpreting the Bill of Rights, to consider international law.

Furthermore, section 233 of the Constitution provides that when interpreting any legislation, every court must prefer a reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law. Olivier⁶⁵ affirms that non-binding (soft law) international law, as well as binding international law (hard law), must be taken into consideration. Accordingly, soft law consists of standards that are intended to serve as guidelines to states in their conduct, but which lack the status of law.⁶⁶ In the case of *Government of the Republic of South Africa v Grootboom*,⁶⁷ the court stated the following:

The relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa, it may be directly applicable.

The protection of workers against illness, disease and injury related to the working environment, as embodied in the Preamble to the Constitution of the ILO, has been a central issue for the ILO since its creation in 1919, and continues to be so today. Occupational safety and health is a key element in achieving sustained healthy working conditions and strong preventive safety culture. In fact, quite a large number of areas of ILO activity include an occupational health and safety-related component, which includes employment, elimination of child labour,⁶⁸ the informal economy, gender mainstreaming, labour statistics, labour inspection and maritime safety, HIV/AIDS and the world of work, and international migration.

⁶⁴ Olivier *et al* *Introduction to social security* (2004) 163–164.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ 2000 11 BCLR 1169 (CC); 2001 1 SA 46 (CC) per Yacoob par 26.

⁶⁸ ILO, *Children in hazardous work ... International programme on the elimination of child labour*, International Labour Office, Geneva 2011, 3–38 at: http://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@publ/documents/publication/wcms_155428.pdf (last accessed 23 August 2013).

Safety at work plays a critical role for employers, as well as for employees and the community at large. It is within this context that South Africa has codified the rules and regulations relating to safety in the workplace.⁶⁹ By virtue of being a member of the International Labour Organisation (ILO), South Africa has declared its intention to consider hard and soft law dealing with occupational health and safety emanating from the ILO.

The impact of ILO conventions is frequently addressed with reference to the number of ratifications they have attracted.⁷⁰ It is important to note that conventions and recommendations are drawn up by the representatives of governments, employers and workers, and are adopted at the ILO's Annual Labour Conference. Once a standard is adopted, member states are required to submit it to their parliaments for consideration.⁷¹ In the case of conventions, this means consideration for ratification. If it is ratified, a convention comes into force for that member state a year after the date of ratification.⁷² Since the ILO constitution regards conventions as international treaties, the acceptance of a convention by a member state (for example, when it ratifies the treaty) requires legal validation of its adoption in law by competent authorities of that member state.⁷³ It is submitted that South Africa should endeavour to ensure that its occupational health and safety laws meet its international law obligations, as well as the ethos and aspirations of the international organisations to which it belongs.

⁶⁹ See for example s 24 of the Constitution, which provides that everyone has the right to an environment that is not harmful to their health or well-being and to have the environment protected through reasonable legislative measures.

⁷⁰ Wilson *et al* 'The ratification status of ILO Convention related to occupational health and safety and its relationship with reported occupational fatality rates' (2007) *Journal of Occupational Health* 73; Singh & Zammit 'Labour standards and the race to the bottom: rethinking globalisation and workers' rights from developmental and solidaristic perspectives' (2004) 20/1 *Oxford Review Economic Policy* 85–102.

⁷¹ See ILO, International Labour Standards, Conventions and Recommendations <http://ilo.org/global/standards> (last accessed 21 September 2013).

⁷² Closa *The politics of ratification of EU Treatises* (2013) 1–17. Closa notes that ratification is an act of confirmation of the international obligation that a state has assumed. Substantively, this means an expression of consent whereby the state assumes the rights and duties imposed by the treaty that is ratified. Procedurally, ratification denotes a public act of the state embodied in a document, which is communicated to other states in the manner prescribed by customs or the terms of the treaty.

⁷³ Wilson *et al* 'Recent trends in ILO Conventions related to occupational safety and health' (2006) 12(3) *International Journal of Occupational Safety and Ergonomics* 256–263.

ILO INSTRUMENTS PROMOTING OCCUPATIONAL HEALTH AND SAFETY

The ILO's mandate in the field of occupational safety and health dates from its very foundation. In its preamble, the ILO remarked that:

And whereas conditions of labour exist involving such injustice hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required; as, for example, by the regulation of the hours of work including the establishment of a maximum working day and week ... the protection of the worker against sickness, disease and injury arising out of his employment ...⁷⁴

There are various international instruments that have been adopted by the ILO in the area of occupational health and safety, which include, the United Nations Universal Declaration of Human Rights,⁷⁵ which provides everyone with the right to life, work, free choice of employment, just and favourable conditions of work, and protection against unemployment.⁷⁶

Similarly, the International Covenant on Economic, Social and Cultural Rights⁷⁷ recognises the right of everyone to work, and to the enjoyment of just and favourable conditions of work, which ensure, in particular, safe and healthy working conditions, the right to the highest attainable standards of physical and mental health – in particular, the improvement of all aspects of environmental and industrial hygiene, as well as the prevention, treatment and control of epidemics, endemics, *occupational and other diseases*.

Other examples of conventions and recommendations dealing with international standards that directly or indirectly address the right to a healthy environment include the Convention on the Rights of the Child, article 24 (health); Universal Declaration on Human Rights, article 25

⁷⁴ Preamble to the Constitution of the International Labour Organization (ILO Constitution, 1919).

⁷⁵ United Nations Universal Declaration of Human Rights, 1948.

⁷⁶ Vrancken asserts that the impact of the Universal Declaration on the development of human rights has been immense, that the Universal Declaration inspired the drafters of the human rights instruments, which were later adopted at the global, regional and national levels, and was used by the organs of the United Nations as a standard by which to measure the conduct of states, see Vrancken in Govindjee *et al Introduction to human rights law* (2009) 7–8.

⁷⁷ The International Covenant on Economic, Social and Cultural Rights, 1976.

(living conditions); International Covenant on Civil and Political Rights, article 6 (right to life); International Covenant on Economic, Social and Cultural Rights, article 12 (health); and Convention on the Elimination of Discrimination Against Women, article 14 (living conditions).

There is also the Occupational Safety and Health Convention,⁷⁸ which was ratified by South Africa in 2003. In terms of this Convention, each member state shall, in consultation with the representative organisations of employers and workers, formulate, implement and periodically review a coherent national policy on occupational safety, occupational health and the working environment.⁷⁹ Member states shall also identify functions and responsibilities of all stakeholders (but recognise their complementary character), review national policy at regular intervals, and ensure an adequate and appropriate system of inspection and enforcement, including adequate penalties for violations. South Africa also ratified the Safety and Health in Mines Convention on 9 June 2009.⁸⁰ This Convention recognises the entreaty to prevent any fatalities, injuries or ill health affecting workers or members of the public, or damage to the environment arising from mining operations.

In South Africa, the MHSa provides for the monitoring of conditions that will promote a culture of occupational health and safety in the mining industry and protect mine workers and other persons at mines. Nevertheless, the Act has not made specific provision for gender specifications regarding occupational health and safety conditions in the mines.

Furthermore, it is important at this point to mention other relevant conventions which have not been ratified by South Africa.⁸¹ These include, amongst others, the Labour Inspection (Agriculture) Convention,⁸² Safety and the Health in Agriculture Convention⁸³ Occupational Safety and Health Convention,⁸⁴ Occupational Health and Services Convention,⁸⁵ Safety and

⁷⁸ Occupational Safety and Health Convention No 155 of 1981.

⁷⁹ *Ibid.*

⁸⁰ Safety and Health in Mines Convention C 176 of 1995.

⁸¹ See ILO, International Labour Standards Ratification by Country at: <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB> (last accessed 21 September 2013).

⁸² Labour Inspection (Agriculture) Convention No129 of 1969.

⁸³ Safety and Health in Agriculture Convention No184 of 2001.

⁸⁴ Occupational Safety and Health Convention No 152 of 1981 of 1979.

⁸⁵ Occupational Health and Services Convention No161 of 1985.

Health in Construction Convention,⁸⁶ Chemicals Convention,⁸⁷ Prevention of Major Industrial Accidents Convention,⁸⁸ Social Security (Minimum Standards Convention),⁸⁹ Occupational Cancer Convention,⁹⁰ Prevention of Major Industrial Accidents Convention,⁹¹ and the Promotional Framework for Occupational Safety and Health Convention.⁹²

In order to ensure compliance with the occupational health and safety legislation, the ILO has proposed that governments should introduce financial incentives so as to encourage enterprises to take occupational health and safety more seriously.⁹³ For example, insurance institutions might introduce financial incentives for enterprises that have better occupational safety and health performance, or governments could reduce tax burdens in certain cases.

The ILO also recommends international collaboration through professional associations such as the International Commission for Occupational Health and the International Ergonomic Association,⁹⁴ as a method of sharing up-to-date knowledge and experience regarding how to promote a preventative safety and health culture. According to the ILO, education and training institutions play a key role in promoting positive attitudes towards occupational safety and health, as well as a greater understanding of risks and how they can be most effectively managed.

CONCLUSION

In light of the above discussion, it becomes clear that the work of the ILO and the development of occupational health and safety in other jurisdictions

⁸⁶ Safety and Health in Construction Convention No 167 of 1988.

⁸⁷ Chemicals Convention No 170 of 1990.

⁸⁸ Prevention of Major Industrial Accidents Convention No 174 of 1993.

⁸⁹ Social Security (Minimum Standards) Convention No102 of 1952.

⁹⁰ Occupational Cancer Convention No139 of 1974.

⁹¹ Prevention of Major Industrial Accidents Convention No174 of 1993.

⁹² Promotional Framework for Occupational Safety and Health Convention No 187 of 2006.

⁹³ European Union agency for safety and health at work 'Economic incentives to improve occupational safety and health: a review from the European perspective' (2010) at: http://osha.europa.eu/en/publications/reports/economic_incentives (last accessed 23 August 2013).

⁹⁴ Georges *et al* 'International cooperation in occupational health: the role of international organisations' in Rachael *International, governmental and non-governmental safety and health* (2011) Pickvance, Simon, Taylor, International Labor Organization, Geneva at: <http://www.ilo.org/oshenc/part-iii/resources-institutional-structural-and-legal/health/item/225-international-labour-organization> (last accessed 23 August 2013).

have had far-reaching implications for the area of occupational health and safety. Similarly, the ILO has set benchmarks for countries to improve and promote the realisation of occupational health and safety as a human right. What is left, however, is for member states, in particular South Africa, to incorporate the ILO instruments for occupational health and safety into their domestic policies. In this regard, this article has shown how the core values of occupational health and safety can be used to promote and protect the culture of safety in the workplace, and to highlight the importance of occupational health and safety as a human right.

In fact, the ILO makes it clear, first, that the right to occupational health and safety must be respected by member states, and secondly, that governments, employers, and workers are required to participate actively in securing a safe and healthy working environment through a system of defined rights, responsibilities, and duties. It is submitted that despite the fact that South Africa has ratified various ILO instruments in the area of occupational health and safety, the country still lags behind in as far as the enforcement of some of these international legal instruments.

Nevertheless, the challenges facing the system of occupational health and safety in South Africa include the need to legislate and monitor new occupational diseases and injuries associated with globalisation, improve legal coverage to include small-scale enterprises,⁹⁵ provide coverage for workers engaged in informal work, address child labour, and promote the protection of female workers in the mining industry. Lethbridge⁹⁶ notes that the most fundamental barrier is the lack of political will, which manifests itself in the low level of ratifications of ILO Conventions that address occupational health and safety.

In order to facilitate the realisation of occupational health and safety as a human right in the workplace, the ILO recommends that occupational health and safety be integrated into school curricula, tertiary curricula, and professional courses.⁹⁷ In addition, it is important to improve workers'

⁹⁵ WickKramasekara 'Implications for occupational safety and health' (2007) 17 *African Newsletter on Occupational Health and Safety* 63–64.

⁹⁶ Lethbridge 'Occupational health regulations and health workers: protection or vulnerability' (2008) Public Services International Research Unit at: <http://www.psir.org> (last accessed 23 August 2013).

⁹⁷ ILO Seoul Declaration on Safety and Health at Work at: <http://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/statemen>

participation, especially those involved in informal employment.⁹⁸ Equally, scholars have argued for changes with regard to how health and safety committees function, by including the option of imposing on employers a duty to bargain with the employees on health and safety matters, or giving them the authority to deal with health and safety issues at work, rather than simply advising management.⁹⁹

To sum up, one important conclusion from the above analysis is that the achievement of occupational health and safety requires a multidisciplinary approach, and the will on the part of the organisations to integrate occupational health and safety into their strategic planning and business decision making. Lastly, there must be a wider partnership that integrates layers of society, in order to foster the establishment of a preventative culture.

[t/wcms_095910.pdf](#) (last accessed 23 August 2013).

⁹⁸ Walters & Nichols *Workplace health and safety: international perspectives on workers representation* (2009) 109–133.

⁹⁹ *Ibid.*