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# The Protection and Promotion of the Psychosocial Health of Workers in South Africa and Nigeria: The Potential and Limitations of Occupational Health and Safety Regulation and Corporate Social Responsibility

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**Abstract.** The International Labour Organization's 2016 Safety and Health at Work Day focused on risks to workers' psychosocial health. The evolving nature of work, increased global economic competition, precarious work, instant communications and technological advancements all impact workers' psychosocial health. It is imperative that management practices, occupational health and safety (OHS) regulation and corporate social responsibility ("CSR") initiatives, which aim to regulate OHS, address psychosocial risks. This paper will explore the OHS regulatory regimes, as well as the CSR frameworks, of South Africa and Nigeria. We will consider how CSR's focus on the business case and ethical case for promoting workers' health can complement the self-regulation and other enforcement mechanisms provided for in occupational health and safety laws.

**Keywords:** *Psychosocial Health, Work Stress, Occupational Health and Safety, Corporate Social Responsibility, South Africa, Nigeria.*

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## 1. Introduction

Occupational health and safety (OHS) as a matter of public concern traditionally comes into focus when there are major disasters. This dimension is in tension with some of the central purposes of occupational health and safety regulation, which relate to the prevention of occupational accidents and diseases.<sup>2</sup> Regulatory mechanisms that are in place to achieve these purposes are mostly based on risk assessments and control measures that have to be constantly assessed and re-assessed. It therefore requires a positive health and safety culture and consciousness within organisations. One of the biggest challenges is therefore to mainstream health and safety into micro-processes at the organisational level and to find regulatory measures that best address that challenge.

Another related challenge for occupational health and safety is that the changing nature of work has meant that occupational health and safety concerns have, and are still, undergoing changes. One of these changes is the increased prevalence of, and emphasis on, what we can broadly term psychosocial conditions workers experience. Risk assessments therefore have to be developed to include psychosocial risks that hitherto have not been assessed. That requires the involvement of disciplines and professionals that have not been traditionally associated with OHS regulation.

### 1.1 Psychosocial Risks and Hazards

In 1984, the International Labour Organization (ILO) defined psychosocial hazards or potential hazards in terms of “interactions between and among work environment, job content, organizational conditions and workers’ capacities, needs, culture, personal extra-job considerations that may, through perceptions and experience, influence health, work performance and job satisfaction”.<sup>3</sup> That same organisation devoted its 2016 World Day for Safety and Health at Work to workplace stress and emphasised that addressing this challenge will require collective efforts.<sup>4</sup>

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<sup>2</sup> International Labour Organization (ILO) Framework for Occupational Safety and Health Convention 187 of 2006

<sup>3</sup> ILO. *Workplace Stress: A Collective Challenge*, [http://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---safework/documents/publication/wcms\\_466547.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---safework/documents/publication/wcms_466547.pdf), 2016

<sup>4</sup> Ibid.

The changing nature of work, increased global economic competition, precarious work, instant communications and technological changes all impact on workers' psychosocial health.<sup>5</sup> The ILO has focused on three components of psychosocial health, namely stress, psychological and physical violence, and economic stressors.<sup>6</sup> This paper is limited to a discussion of the first of these three aspects, although interrelationships between these aspects ought not to be ignored.

Stress, in its ordinary meaning, can refer to both positive and negative stimuli. However, in the OSH context, it is viewed as the harmful physical and emotional responses people have when work demands exceed a worker's capacity to cope.<sup>7</sup> In many instances, legal and employee wellness perspectives on stress focus on individuals' abilities to manage the stressors they experience. While that is one component of an holistic response, work content and work context also play an important role and must be managed so as not to cause psychosocial harm to workers.<sup>8</sup>

There may be various reasons for the focus on individuals' capacities to withstand work stress. Firstly, in jurisdictions where dispute resolution is largely adversarial, litigation tends to individualise cases, as the issues between litigants are often ventilated at the micro-level. The focus is on the individual litigants' actions and inactions.

Secondly, in political, social and commercial cultures steeped in individualism, the emphasis has often been on workers controlling their bodies and their responses to stimuli of whatever nature. The bedrock of this culture is a conception of the body as a "compliant instrument of the limitless will".<sup>9</sup> As Miceli argues: "[T]he reality is that no human body or mind (regardless of disability) is a 'compliant instrument of the limitless will,' despite the rhetoric of liberal individualism predicating that all citizens are meant to be economically self-sufficient and independent in thought and action. This ideology is premised on the belief that people

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<sup>5</sup> ILO. *Trainer's Guide: SOLVE: Integrating Health Promotion into Workplace OSH Policies*, [http://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---safework/documents/instructionalmaterial/wcms\\_178397.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---safework/documents/instructionalmaterial/wcms_178397.pdf), 2012

<sup>6</sup> Ibid.

<sup>7</sup> European Agency for Safety and Health at Work. *Psychosocial Risks and Stress at Work*, <https://osha.europa.eu/en/themes/psychosocial-risks-and-stress>, 2016

<sup>8</sup> ILO. *Workplace Stress: A Collective Challenge*, *op. cit.*

<sup>9</sup> R. Garland Thomson, *Extraordinary Bodies: Figuring Physical Disability in American Culture and Literature*, New York: Columbia University Press, 1997. She notes (at 26) that even within emancipatory movements that emphasise other identity categories, for example some feminist movements, assumptions are made based on "the liberal ideology of autonomy and independence", which may undermine some disabled women's struggles.

can do whatever they want to do (such as climbing Mount Everest or being a star basketball player) as long as they put their minds to or will themselves to accomplishing the task at hand. Furthermore, the rhetoric employed by this ideology intentionally renders any disability as a character flaw as espoused by the failure of one's limitless will to make his or her body and/ or mind a compliant instrument.”<sup>10</sup>

The third reason why responses to occupational stress may be disjointed is that more work can be done to integrate the management of stressors that impact on workers' stress levels, at both macro and micro levels. Economic policies and choices, the nature of the regulatory regime for occupational health and safety and the implementation of corporate governance principles and practices all play a role in creating labour structures that are or may be hazardous to workers' psychosocial health. This article limits itself to a critique of OHS regulatory regimes, as well as the role of corporate social responsibility (CSR) in promoting OHS in South Africa and Nigeria.

### ***1.2. Relevant Features of the South African and Nigerian OHS Landscape***

South Africa and Nigeria are the two countries on the African continent with the largest economies.<sup>11</sup> While both countries rely heavily on commodity exports, more than 95% of Nigeria's foreign income comes from oil exports, while only 65% of South Africa's foreign income comes from exports across a wider range of commodities.<sup>12</sup> As a result, the South African economy generates more income through manufacturing and service industries.<sup>13</sup>

A different dimension is that the Nigerian economy potentially has a much larger workforce due to the fact that Nigeria's population is

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<sup>10</sup> M.G. Miceli, *The Disavowal of the Body as a Source of Inquiry in Critical Disability Studies: The Return of Impairment?*, *Critical Disability Discourse/ Discours Critique dans le Champ du Handicap*, 2010, 2-14

<sup>11</sup> J. Rossouw. *South Africa is Africa's Largest Economy (Again). But What Does it Mean?*, <http://mg.co.za/article/2016-08-15-south-africa-is-africas-largest-economy-again-but-what-does-it-mean>, 2016

<sup>12</sup> Calleo. *Nigeria v South Africa: Africa's Biggest Economies Are Very Different*, <http://calleo.co.za/nigeria-vs-south-africa-africas-biggest-economies-are-very-different/>, 2016

<sup>13</sup> Ibid.

estimated to be at approximately 182.2 million people,<sup>14</sup> while the corresponding figure for South Africa is only 55 million.<sup>15</sup> Both countries over the past few years have faced the challenge of jobless growth and high unemployment rates.<sup>16</sup>

Nigeria passed a Labour, Safety, Health and Welfare (LSHW) Bill in 2012, but this legislation is still awaiting presidential assent.<sup>17</sup> In the meantime, the Factories Act<sup>18</sup> is still the primary piece of legislation that governs occupational health and safety in the country. In South Africa, on the other hand, the Occupational Health and Safety Act<sup>19</sup> was passed in 1993. At the moment, a new Occupational Health and Safety Bill is going through the legislative process, but has not yet been passed.<sup>20</sup>

When we consider psychosocial conditions in occupational settings, one of the important variables will be the state of development of psychology within a jurisdiction, with particular emphasis on industrial and organisational psychology. The field of psychology in Nigeria is relatively new,<sup>21</sup> and, as will be discussed below, faces various challenges but holds positive prospects too. In South Africa, psychology has developed over a longer period of time, but has been exclusionary.<sup>22</sup> In both Nigeria and South Africa, the application of psychology in relation to local people, cultures and circumstances has been troubled.<sup>23</sup> As a result, capacity development for the undertaking of theoretical and applied research on occupational stress within the specific contexts of these countries is a central challenge.

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<sup>14</sup> Trading Economics. *Nigeria Population*, <http://www.tradingeconomics.com/nigeria/population>, 2016a

<sup>15</sup> Trading Economics. *South Africa Population*, <http://www.tradingeconomics.com/south-africa/population>, 2016b

<sup>16</sup> I. Onuba. *Nigeria's Unemployment Rate Rises to 13,3% - NBS*, <http://punchng.com/nigerias-unemployment-rate-rises-13-3-nbs/>, 2016; Statistics South Africa. *Quarterly Labour Force Survey Quarter 2*, <http://www.statssa.gov.za/publications/P0211/P02112ndQuarter2016.pdf>, 2016

<sup>17</sup> U. Abubakar, *Structural and Implementation Issues around the New Nigerian Labour, Safety, Health and Welfare Bill (2012): Lessons from UK, USA, Australia and China*, *Transactions of the VSB – Technical University of Ostrava*, 11/1, 2016, 61-71

<sup>18</sup> 1958, 1987 & CAP.126 L.F.N.1990, CAP. F1 L.F.N.2004

<sup>19</sup> Act 85 of 1993

<sup>20</sup> ParlyReportSA. *New Legislation Ahead*, <http://parlyreportsa.co.za/tag/nedlac/>, 2014

<sup>21</sup> P. Mefoh, *Challenges and Prospects of Psychology in Nigeria*, *European Journal of Social Sciences*, 42/1, 2014, 57-64

<sup>22</sup> C. De La Rey and J. Ipser, *The Call for Relevance: South African Psychology Ten Years into Democracy*, *South African Journal of Psychology*, 34/4, 2004, 544-552

<sup>23</sup> Mefoh *op. cit.*; De La Rey and Ipser *op. cit.*

### 1.3 Corporate Social Responsibility

Corporate social responsibility (CSR) can be defined broadly as “a vision of business accountability to a wide range of stakeholders, besides shareholders and investors”.<sup>24</sup> It concerns environmental protection, the health and wellbeing of employees and the interests of community and civil society in general.<sup>25</sup> Many commentators have noted that the practice and understanding of CSR is socio-culturally framed.<sup>26</sup> It is therefore important that we consider the understanding and application of CSR within specified contexts.

In both Nigeria and South Africa, CSR is voluntary. Many of the multinational corporations operating in the oil and gas industries in Nigeria have devised and implemented CSR initiatives to fill major gaps in governmental regulation.<sup>27</sup> However, the emphasis has traditionally been on the effects of these companies’ activities on the communities within which they operate. Less emphasis is placed on socially responsible labour relations and even less on socially responsible products and processes.<sup>28</sup>

In South Africa, the King Report on Corporate Governance in 1994 was the first in the world to require companies to consider the impact of their activities on ‘stakeholders’ beyond shareholders and investors.<sup>29</sup> Currently in its third edition, which was adopted in 2009, it is a voluntary Code that applies to all entities incorporated in and resident in South Africa, whether such entities are public, private or non-profit.<sup>30</sup> Compliance with the Code is mandatory for companies listed on the Johannesburg Stock Exchange (JSE), but other entities are not obligated to comply and face no sanctions for non-compliance.<sup>31</sup> The fourth edition of the Code will be launched on

<sup>24</sup> International Institute for Sustainable Development. *Corporate Social Responsibility (CSR)*, <http://www.iisd.org/business/issues/sr.aspx>, 2016

<sup>25</sup> Ibid.

<sup>26</sup> A. Helg. *Corporate Social Responsibility from a Nigerian Perspective*, <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.523.9621&rep=rep1&type=pdf>, 2007

<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

<sup>29</sup> Institute of Directors in Southern Africa. *Executive Summary of the King Report 2002*, <http://corporatcompliance.org/Portals/1/PDF/Resources/International/KingCommitteeCorporateGovernanceExecutiveSummary2002.pdf>, 2002

<sup>30</sup> R. Cassim, ‘Corporate Governance’, in Farouk Cassim (ed.), *The Law of Business Structures*, Cape Town: Juta and Co., 2012, 271-282

<sup>31</sup> Ibid.

1 November 2016. In what follows, the focus will be on the latest edition of the King Code (King IV).

### **1.4 Structure of the Paper**

This paper presents a critique of the current frameworks for occupational health and safety in South Africa and Nigeria insofar as these relate to the management of workplace stress. The leitmotif underlying this critique is that an individualised approach to health promotion is inadequate, as it omits attention to the structural features of work itself that impact adversely on workers' psychosocial health.<sup>32</sup> It is then argued that CSR initiatives may be used to shore up some of the shortcomings in monitoring and enforcement that are apparent in both countries' OHS frameworks

The next two sections of the paper engage with the OHS frameworks in South Africa and Nigeria, respectively. Particular emphasis is placed on whether these frameworks deal with psychosocial risks and, if so, how this is done. Part four then considers the challenges faced by both countries in monitoring and enforcing OHS in general, and in managing psychosocial risks and hazards in particular. The fifth section considers the elements of CSR in these jurisdictions, respectively, that may supplement the gaps in OHS governance frameworks, as set out in part four.

## **2. OHS in South Africa**

Occupational health and safety is not very high on the policy agenda in South Africa.<sup>33</sup> Neither is mental health.<sup>34</sup> It is therefore unsurprising that occupational mental health seems to be languishing in the policy backwaters. This lack of status is at odds with statistics on the adverse effects suffered by employers, employees, affected communities and the

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<sup>32</sup> ILO. *Trainer's Guide: SOLVE: Integrating Health Promotion into Workplace OSH Policies*, *op. cit.*

<sup>33</sup> A draft National Occupational Health and Safety Policy, <http://www.kznhealth.gov.za/occhealth/policy2.pdf>, was distributed in 2003 and stated that it was the first time that a policy of this nature for all sectors of the South African economy was developed. To date, this policy has not been finalised.

<sup>34</sup> C. Draper, C. Lund, S. Kleintjes, M. Funk, M. Omar, A.J. Flisher and Mental Health and Poverty Project Research Programme Consortium, *Mental Health Policy in South Africa: Development Process and Content*, *Health Policy and Planning*, 24, 2009, 342-356

economy as a result of occupationally acquired mental harm.<sup>35</sup> This is not a South African phenomenon – it is a worldwide trend particularly prevalent in low- and middle-income countries.<sup>36</sup>

There are various factors that may lead to the avoidance of, rather than engagement with, occupational psychosocial health issues by governments, employers and workers: the fear of escalating labour costs, workplace cultures that cause psychosocial harm,<sup>37</sup> ignorance and the daunting prospect of acknowledging our psychological fragility and the impact it has on all our relationships – at work, at home and in our communities. The result has been the stigmatisation and marginalisation of people experiencing psychosocial health concerns at all levels of the employment process – recruitment and selection, work practices, compensation for occupationally-induced mental harm, as well as reintegration into employment after incapacity due to their psychosocial health conditions.<sup>38</sup>

South Africa ratified the ILO's Occupational Safety and Health Convention 155 of 1981 in February 2003. That Convention emphasises

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<sup>35</sup> The Draft National Occupational Health and Safety Policy cited a 1997 study conducted for the Department of Labour that estimated the cost of workplace accidents and diseases to be at R17 billion, which was 3.5 % of the national Gross Domestic Product (GDP). It also stated that costs to employers “include property damage, lost production time, lost skills as well as the cost of engaging and retraining replacements”.

<sup>36</sup> S. Saxena, G. Thornicroft, M. Knapp and H. Whiteford, *Resources for Mental Health: Scarcity, Inequity, and Inefficiency*, *Lancet*, 370, 2007, 878-889; O. Gureje and A. Alem, *Mental Health Policy Development in Africa*, *Bulletin of the World Health Organization*, 78/4, 2000, 475-482; M.A. Omar, A.T. Green, P.K. Bird, T. Mirzoev, A.J. Flisher, F. Kigozi, C. Lund, J. Mwanza, A.L. Ofori-Atta and Mental Health and Poverty Research Programme Consortium (MHaPP), *Mental Health Policy Process: A Comparative Study of Ghana, South Africa, Uganda and Zambia*, *International Journal of Mental Health Systems*, 4, 2010, 24-34

<sup>37</sup> See M.J. Schabracq and C.L. Cooper, *The Changing Nature of Work and Stress*, *Journal of Managerial Psychology*, 15/3, 2000, 227-241, who argue that insufficient control over our working lives can result in two ways: Firstly, our everyday working lives can just be underdeveloped, leading to qualitative ‘underload’ that offers very few challenges, opportunities and rewards, which then makes it difficult for us to summon the mental resources to concentrate on tasks at hand. This situation can give rise to serious stress and health complaints. Secondly, persons or events may interfere with our daily work routines, and even self-image, to varying degrees, for example, changes in our jobs, new educational demands that make our current educational qualifications obsolete, conflict with colleagues and lack of attention and approval from our managers. These events can adversely affect our individual well-being and health, as well as organisational processes.

<sup>38</sup> World Health Organization, *Resource Book on Mental Health, Human Rights and Legislation*, Geneva: World Health Organization, 2005

prevention as the cornerstone of occupational health and safety.<sup>39</sup> South Africa's Occupational Health and Safety Act (OHSA) was enacted approximately ten years before South Africa ratified the Convention and four years before the Constitution came into effect. As a result, some of the Act's provisions are arguably outdated and in need of improvement. The two primary pieces of framework legislation for OHS are the OHSA and the Mine Health and Safety Act.<sup>40</sup> Other legislation protects workers indirectly against working environments that are detrimental to their health and safety. The Basic Conditions of Employment Act,<sup>41</sup> for example, regulates, inter alia, working hours, leave, meal intervals, night work and overtime. The Employment Equity Act<sup>42</sup> and the Promotion of Equality and the Prevention of Unfair Discrimination Act<sup>43</sup> prohibit unfair discrimination and seek to affirm those who have been disadvantaged. The Labour Relations Act<sup>44</sup> proscribes unfair labour practices and unfair dismissals, including on the basis of disability.

### *2.1 Application of the OHSA*

The OHSA applies to all employment activities and where machinery is used, except when exclusions are specified, such as activities conducted in, and persons present in, mining areas or any works as defined in the Minerals Act 50 of 1991 and specified ships that are regulated by the Merchant Shipping Act 57 of 1951.<sup>45</sup> The aviation industry is covered by OHSA, but aviation accidents are investigated in terms of the Civil Aviation Act 13 of 2009.<sup>46</sup>

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<sup>39</sup> Article 4(2) of the Convention provides that the aim of the National Occupational Safety and Health Policy "shall be to prevent accidents and injury to health arising out of, linked with or occurring in the course of work, by minimising, so far as is reasonably practicable, the causes of hazards inherent in the working environment".

<sup>40</sup> Act 29 of 1996

<sup>41</sup> Act 75 of 1997

<sup>42</sup> Act 55 of 1998

<sup>43</sup> Act 4 of 2000

<sup>44</sup> Act 66 of 1995

<sup>45</sup> Section 1(3) of the OHSA

<sup>46</sup> See Chapter 4 of the Civil Aviation Act 13 of 2009

## *2.2 Duties of Employers and Employees in terms of the OHSA*

The OHSA contains the rights and duties of employers and employees in respect of health and safety. Employers have the duty to ensure that their employees have, as far as is reasonably practicable, a safe and healthy working environment.<sup>47</sup> Apart from this general duty, employers also have to comply with specific duties that relate to the creation and maintenance of safe systems and objects of work, as well as risk assessments and precautionary measures that are indicated by such risk assessments. Each of these is discussed in more detail below and the application of these duties to psychosocial risks and hazards is considered.

### *2.2.1 Safe Systems and Objects of Work*

Employers must, as far as is reasonably practicable, create safe systems of work and provide plant and machinery that do not pose undue risks to health.<sup>48</sup> This duty also applies when substances or articles are produced, processed, used, handled, stored or transported.<sup>49</sup> Employers must prevent workers from doing any work, from coming into contact with hazardous substances or articles, or from operating plant or machinery unless the necessary or prescribed precautionary measures have been taken.<sup>50</sup> Similarly, employers must ensure that work is performed or that plant or machinery is operated under the supervision of someone who is trained to understand the associated risks of the activity concerned and who has the authority to take precautionary measures.<sup>51</sup>

Employees must be equipped with information, instructions and training, and must be informed of what their scope of authority is.<sup>52</sup> Section 13(1) of the Act expands on employers' general duty by requiring that employers ensure that employees are conversant with the risks to their health attached to work that they have to do, articles of substances to which they are exposed or plant and machinery they have to operate.

When reference is made in the Act to safe systems of work, this includes the creation and maintenance of control measures to deal with psychosocial hazards. These hazards may relate to one or a combination

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<sup>47</sup> Section 8(1)

<sup>48</sup> Section 8(2)(a)

<sup>49</sup> Section 8(2)(c)

<sup>50</sup> Section 8(2)(f)

<sup>51</sup> Section 8(2)(i)

<sup>52</sup> Section 8(2)(j)

of the following: work content; workload and the pace of work; working hours; participation in, and control of, work activities; career development; status and remuneration; organisational roles; organisational cultures; interpersonal relationships and work-life balance.<sup>53</sup>

It is notable that the control measures required to address many of these hazards need to be designed and implemented in an integrated fashion and require the cooperative involvement of the operations, human resources and finance components of organisations. It implicates leadership and stakeholder relations within the organisations and requires day-to-day, medium and long-term planning and execution.

### ***2.2.2 Risk Assessments and Precautionary Measures***

The OHSA obligates employers to avoid risk. Only if it is not reasonably practicable to avoid risks, must they be mitigated. Employers have to conduct risk assessments and take precautionary measures where necessary.<sup>54</sup> They must eliminate or mitigate hazards or potential hazards before they resort to protective equipment.<sup>55</sup> This section of the Act refers to “protective equipment”, which appears to exclude psychosocial hazards from its ambit. It would therefore have been preferable for reference to be made to “protective measures”, which is a more inclusive term.

The above scheme requires employers to first identify workplace hazards. They must then assess the risks these hazards pose to health and safety and finally, they must take steps to either eliminate the hazards altogether, or to at least mitigate the risks posed by these hazards.<sup>56</sup> In addressing psychosocial hazards, the assistance of industrial and organisational psychologists would be helpful. Training of workplace health and safety representatives and members of workplace health and safety committees on psychosocial hazards and risks would also be beneficial. It therefore requires technical capacity and that resources be made available for capacity building in this area.

The OHSA requires employees to take reasonable care for their own health, as well as the health of other persons who may be affected by their

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<sup>53</sup> ILO. *Trainer's Guide: SOLVE: Integrating Health Promotion into Workplace OSH Policies*, *op. cit.*

<sup>54</sup> Section 8(2)(d)

<sup>55</sup> Section 8(2)(b)

<sup>56</sup> P. Benjamin, *Commentary on the Occupational Health and Safety Act*, Cape Town: Juta and Co., 2009

conduct.<sup>57</sup> This duty may be in tension with the employee's legal duty to follow lawful and reasonable instructions given by their employers.<sup>58</sup> While there is no obligation to comply with unlawful instructions, employees may be hesitant to refuse to comply with an employer's instructions, especially if it is not clear whether the said instruction is unlawful. This hesitancy may be exacerbated in instances of workplace stress, where stressors often work cumulatively to cause harm. Furthermore, in competitive organisational cultures where empathetic leadership is absent, employees may not feel comfortable to admit that they cannot cope with the demands of their jobs, regardless of how unrealistic and harmful to their health such demands may be.

Employees must comply with health and safety rules and instructions issued by their employers and must also assist their employers to comply with their employer duties.<sup>59</sup> There is therefore a mechanism within the OHS Act that provides for mutual accountability between employers and employees. The Act seeks to mediate employees' subordinate relationship to their employers through health and safety representatives and, in larger workplaces, health and safety committees. It is, however, debatable whether those mechanisms are sufficiently representative of workers.

Employees also have a duty to report in two situations. The first is when any unsafe or unhealthy situation comes to their attention.<sup>60</sup> The second duty is imposed on employees who are involved in incidents that have or may have affected their health.<sup>61</sup> For these measures to operate effectively, a few interrelated aspects require attention. Employees will need to have knowledge of psychosocial hazards and their attendant risks. In addition, organisational systems, leadership and practices must be receptive and responsive to such reports.

Employers are prohibited from victimising employees who report matters related to the Act to the Minister of Labour or other functionaries, or who comply with the Act, or who give evidence in court on matters related to the Act.<sup>62</sup> Again, knowledge and appreciation of psychosocial hazards and risks by employers, as well as organisational cultures that seek to prevent victimisation and in which there are adverse consequences for victimising behavior, will be integral to the effective enforcement of this

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<sup>57</sup> Section 14(1)(a)

<sup>58</sup> See J. Grogan, *Workplace Law*, Cape Town: Juta and Co., 2014

<sup>59</sup> Section 14(1)(b) and (c)

<sup>60</sup> Section 14(1)(d)

<sup>61</sup> Section 14 (1)(e)

<sup>62</sup> Section 26(1)

prohibition. Employees may be severely prejudiced if accountability is only ex post facto through adversarial processes, particularly if such employees have to manage their psychosocial conditions while engaging in these processes.

### 2.3 Standards of Care

The standard required of employers to comply with the general duties in the OHS Act is to do what is “reasonably practicable”, the lowest standard in a continuum.<sup>63</sup> This phrase appears throughout the Act and in most of the regulations. It is defined to mean “practicable having regard to –

1. the severity and scope of the hazard or risk concerned;
2. the state of knowledge reasonably available concerning the hazard or risk and of any means of removing or mitigating that hazard or risk;
3. the availability and suitability of means to remove or mitigate that hazard or risk; and
4. the cost of removing or mitigating that hazard or risk in relation to the benefits derived therefrom”.<sup>64</sup>

Several features of psychosocial hazards and risks cause the likelihood that risks may either not be appreciated at all, or their severity and scope may be underestimated. Workplace stress does not only cause psychosocial harm such as burnout, depression or anxiety, but may also have severe physiological consequences, such as cardiovascular disease. Stress can also precipitate or compound addictions and fuel violence, which may have occupational as well as broader social and economic consequences.

Workplace stress is also qualitatively different from, for example, exposure to dangerous substances. In the latter instance, the control measures may seem to have less of an impact on operations and may be more commonly regarded as necessary. In the case of psychosocial hazards and risks, on the other hand, the often delayed onset of serious harm, the tendency for workers not to disclose psychosocial difficulties, the failure to link ‘physiological’ ill health to workplace stress, the stigma

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<sup>63</sup> P. Hughes and E. Ferrett, *International Health and Safety at Work*; New York: Routledge, 2013. The most stringent level is an absolute duty, which is often imposed where the risk to health and safety is so high that injury or illness will result unless safety precautions are taken. The intermediate level of duty is to what is ‘practicable’, in which case the duty bearer must take measures that are technically possible or feasible, regardless of the cost, inconvenience or difficulty.

<sup>64</sup> Section 1(1)

attached to mental ill health and the prejudice that people who experience psychosocial distress are ‘simply lazy’ or ‘looking for attention’, may lead to risk assessments where costs are inflated and benefits are undervalued.

## ***2.4 Enforcement of the OHSA***

The OHSA is enforced primarily through ‘self-regulation’ by organisations to which the legislation applies.<sup>65</sup> This approach is premised on the acknowledgement that employers and workers will have to take primary responsibility for preventing workplace accidents and occupational illness. The main mechanisms through which this must be done are through health and safety representatives and health and safety committees at the workplace level.

In general terms, these representatives’ duties include the evaluation of existing health and safety measures,<sup>66</sup> as well as identifying potential hazards and major incidents in the workplace.<sup>67</sup> More specific duties include working with employers to investigate incidents, investigating complaints by employees about the latter’s health and safety at work, making representations regarding health and safety to employers or inspectors, inspecting the workplace at such intervals as agreed upon with employers, liaising with inspectors and attending meetings of their workplaces’ health and safety committees.<sup>68</sup>

Employers have a duty to inform health and safety representatives in advance of any inspections, investigation or formal inquiries by an inspector.<sup>69</sup> Similarly, they must inform any health and safety representative, as soon as is reasonably practicable, of incidents that happened in the part of the workplace for which such representative is responsible.<sup>70</sup>

Apart from information, employers have to provide facilities, assistance and training that may reasonably be required by health and safety representatives and which have been agreed upon.<sup>71</sup> It is not clear who has to be party to this agreement with employers. Such an agreement may not be essential, as a labour inspector may direct employers to provide

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<sup>65</sup> Benjamin *op. cit.*

<sup>66</sup> Section 18(1)(a)

<sup>67</sup> Section 18(1)(b)

<sup>68</sup> Section 18(1)(c)-(j)

<sup>69</sup> Section 13(2)(b)

<sup>70</sup> Section 13(2)(c)

<sup>71</sup> Section 18(3)

training that, in the inspector's view, is necessary for the health and safety representatives to function effectively.<sup>72</sup>

If health and safety representatives have extensive duties of investigation and inspection, it follows that they have extensive training needs. This would be so especially in respect of psychosocial hazards and risks, which have not traditionally formed part of the OHS framework. However, the Act is silent on the content of the training to be provided and who would be appropriate training providers.

Furthermore, since a health and safety representative is appointed for a particular workplace or part thereof, it is conceivable that every such person would require a wide array of skills to comply with his or her statutory duties. Not only does this increase the training needs of health and safety representatives, but it also means that the functions are onerous and workers may be reluctant to make themselves available. While no civil liability can be imposed on health and safety representatives who fail to comply with their statutory duties, many employees may still not want to risk taking on difficult and important health and safety functions that could affect the health and safety of their colleagues, as well as their work relationships. The nature of psychosocial hazards and risks, which may require changes to work content and work context, may make it even less attractive for health and safety representatives to risk antagonising management and other colleagues.

Perhaps more thought can be given to the functional division of labour amongst health and safety representatives and to the creation and/or accreditation of specific training programmes all health and safety representatives must complete before assuming their duties in terms of the Act. Representatives who take responsibility for psychosocial hazards and risks, for example, would undergo targeted and specialised training, which could possibly include conflict resolution.

### ***2.5 Health and Safety Committees***

Any workplace with two or more health and safety representatives must have at least one health and safety committee.<sup>73</sup> The employer decides on the number of members on a committee or committees, as long as all health and safety representatives are on at least one committee.<sup>74</sup>

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<sup>72</sup> Benjamin *op. cit.*

<sup>73</sup> Section 19(1)

<sup>74</sup> Section 19(2)(a) and (b)

Furthermore, employers may designate members to sit on the committee, but such members may not outnumber the health and safety representatives on that committee.<sup>75</sup>

Employers are expected to consult with these committees “with a view to initiating, developing, promoting, maintaining and reviewing” health and safety measures.<sup>76</sup> It therefore seems that these committees are to be involved in shaping workplace policies on health and safety. The health and safety committees could potentially be powerful representative forums in which worker concerns regarding health and safety can be raised. However, if one looks at the OHSAs provisions regarding the composition of these committees, it is arguable that it does not provide adequately for worker representation. It would therefore be incumbent upon employers who want to foster effective relationships with employees in respect of occupational health and safety to create mechanisms that would allow for effective and inclusive communication channels.

## 2.6 *The Inspectorate*

In addition to the health and safety representatives and committees at workplace level, the Department of Labour has an inspectorate that is mandated to ensure compliance with the OHSAs and its regulations. The inspectorate consists of a Chief Inspector and inspectors who are all appointed by the Minister of Labour.<sup>77</sup>

Inspectors, who must carry certification,<sup>78</sup> inspect workplaces and premises where machinery is operated; prohibit dangerous activities and conditions in workplaces;<sup>79</sup> and conduct investigations<sup>80</sup> or formal inquiries<sup>81</sup> into hazardous or potentially hazardous incidents in workplaces or places where machinery is used.<sup>82</sup> They have wide powers when performing their functions.<sup>83</sup> They may, without notice, and at all reasonable times, enter workplaces or premises where plant or machinery is used, or where they suspect such activities to occur. They may question

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<sup>75</sup> Section 19(2)(c)

<sup>76</sup> Section 19(1)

<sup>77</sup> Sections 27 and 28

<sup>78</sup> Section 28(3)

<sup>79</sup> Section 30(1)(a)

<sup>80</sup> Section 31

<sup>81</sup> Section 32

<sup>82</sup> For more extensive discussions of the functions and powers of the inspectorate, see Benjamin *op. cit.*

<sup>83</sup> Section 29(1)

persons on health and safety matters in the course of their inspections or investigations. Inspectors are also empowered to require persons with custody or control of relevant books, documents or records to make these available to them, and they may examine such books, documents or records and ask custodians to explain any entry therein.

The inspectorate in the Department of Labour is integrated and takes responsibility for the enforcement of a wide range of labour legislation, not just the OHSA. The National Economic and Development Council, in its draft country report to the ILO on South Africa's Decent Work Country Programme, lamented the "acute shortage of qualified labour inspectors" and the high staff turnover in the inspectorate. Apart from these challenges, the inspectorate was also reported to lack "an effective communication system and record keeping system," which severely impacted on the assessment of compliance with labour laws and which inhibited strategic planning and goal setting.

South Africa ratified the ILO Labour Inspection Convention 81 of 1947 on 20 June 2013. That Convention, in articles 6 and 7, requires the appointment of qualified labour inspectors whose conditions of service are such that such persons have stable employment and are independent. Article 9 also requires that signatories ensure technically qualified experts are associated with occupational health and safety inspections. Article 10 requires that a sufficient number of labour inspectors are appointed. South Africa therefore has work to do in increasing its compliance with this Convention.

### *2.7 Offences in Terms of the OHSA*

Non-compliance with the duties in the OHSA may lead to criminal sanctions against offenders. These offences include failure to comply with the OHSA, directions, notices or exemptions granted in terms of the Act, and a wide array of actions that may hinder inspectors in their duties.<sup>84</sup> Conviction of these offences may attract a fine of not more than R50 000, a period of imprisonment not exceeding 12 months, or both.<sup>85</sup> The Act also establishes an offence of causing persons injury or illness through negligent conduct.<sup>86</sup> The possible penalties for this offence are a fine of

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<sup>84</sup> Section 38(1)

<sup>85</sup> Section 38(1)

<sup>86</sup> Section 28(2)

not more than R100 000, imprisonment for a period not exceeding 24 months, or both.<sup>87</sup>

### 3 OHS in Nigeria

Nigeria's Factories Act was first passed in 1958 and was last amended in 2004. The Act in its original form was based on the UK Factories Act of 1937 and has not been overhauled to adjust to new socio-economic and other realities.<sup>88</sup> As mentioned above, a new Labour, Safety, Health and Welfare (LSHW) Bill has been passed by Parliament, but still awaits presidential assent. Both pieces of legislation will therefore be considered here.

#### 3.1 Application of OHS legislation

The Factories Act applies to all premises that fall within its definition of 'factories'.<sup>89</sup> Factories are defined as

“[a]ny premises in which or within which, or within the close or curtilage or precincts of which one person is, or more persons are, employed in any process for or incidental to any of the following purposes, namely-

- (a) The making of any article or of part of any article; or
- (b) The altering, repairing, ornamenting, finishing, cleaning, or washing, or the breaking up or demolition of any article; or
- (c) The adapting for sale of any article, being premises in which, [...] the work is carried on by way of trade or for the purposes of gain and to or over which the employer of the person or persons employed herein has the right of access or control; [...] and in which ten or more persons are employed”.<sup>90</sup>

Hameed argues that s 87(3) of the Factories Act extends the application of that Act to workplaces other than factories. However, other authors disagree and state that the Factories Act does not apply to the construction industry, for example.<sup>91</sup> Section 87(3) reads:

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<sup>87</sup> Section 28(2)

<sup>88</sup> T. Hameed, *The Factories Act and the Development of Occupational Health and Safety in Nigeria*, *Labour Law Review*, 7/3, 2013, 24-63

<sup>89</sup> Section 83

<sup>90</sup> Section 87(1)

<sup>91</sup> Abubakar *op. cit.*; N. Umeokafor, D. Isaac, K. Jones and B. Umeadi, *Enforcement of Occupational Safety and Health Regulations in Nigeria: An Exploration*, *European Scientific Journal*, 3, 2014 (Special Edition), 93-104

Any workplace in which, with the permission of or under agreement with the owner or occupier, ten or more persons carry on any work which would constitute the workplace a factory if the persons therein were in the employment of the owner or occupier, shall be deemed to be a factory for the purpose of this Act, and in the case of any such workplace, the provisions of this Act shall apply as if the owner or occupier of the workplace were the occupier of the factory and the persons working therein were persons employed in the factory.

In my view, all s 87(3) does is to provide for those instance where a workplace is housed in premises that belong to an owner or occupier that is not the employees' employer. This subsection is necessary because of the centrality of the premises in the definition of what constitutes a factory. The premises-based scope of application of the Factories Act is clearly outdated and does not take account of modern-day realities such as travel for work, working at clients' premises and working from home. This mode of determining the coverage of the legislation also means that large sections of the informal economy are excluded from the ambit of the Act.

In stark contrast, the LSHW Bill states that it applies to all workplaces, employees and employers except those whose OHS conditions are governed by specific international agreements or diplomatic conventions.<sup>92</sup> It also extends to self-employed persons.<sup>93</sup> However, these extensions of the scope of coverage are not altogether unproblematic. Abubakar points out that because the scope of application of the LSHW Bill is so extensive and not clearly defined, it will require large injections of resources in terms of multidisciplinary workers and increased budgets, which may not be available.<sup>94</sup> In addition, there may be conflicts with other agencies over jurisdiction in respect of OHS.<sup>95</sup>

### ***3.1 Employer's Duties***

In keeping with its origins in a craft-based economy,<sup>96</sup> the Factories Act imposes specific duties on employers in respect of the physical environment only. Duties in respect of health relate to, inter alia, cleanliness, ventilation, lighting and ablution facilities. Duties in respect of safety include those dealing with the safe use of prime movers, machinery

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<sup>92</sup> Section 3

<sup>93</sup> Section 30(3)

<sup>94</sup> Abubakar *op. cit.*

<sup>95</sup> Abubakar *op. cit.*

<sup>96</sup> Hameed *op. cit.*

and steam boilers. This part of the Act also addresses safe means of access to, and a safe, workplace, as well as safety precautions in respect of fires, explosives and other dangerous fumes and substances. Welfare duties imposed on employers include the provision of drinking water, washing facilities, first aid facilities or, alternatively, what is referred to as an ambulance room.

While the Minister is accorded the power to issue a list of occupational diseases, no specific mention is made anywhere of psychosocial hazards. The most commonly reported occupational diseases include “conjunctivitis, chronic bronchitis, dermatitis [and] musculoskeletal disorders”.<sup>97</sup>

The LSHW Bill is more amenable than the Factories Act to the inclusion of psychosocial hazards and risks within its ambit. Employer duties that may be interpreted in ways that make provision for psychosocial hazards and risks include, among others, ensuring a workplace that is safe and without risks to health,<sup>98</sup> systems of work that are safe and without risk to health<sup>99</sup> and providing training and information to employees and health and safety representatives.<sup>100</sup>

### 3.2 Enforcement of OHS

The enforcement mechanisms provided for in the Factories Act are factory inspectors and sanctions for contraventions of the Act. These are all external to the organisations to which the Factories Act applies. Inspectors are granted wide powers of inspection, search and seizure. However, consistent criticisms have pointed to the weak monitoring and enforcement of OHS in Nigeria.<sup>101</sup> By 2010, only 60 factory inspectors operated in the whole of Nigeria.<sup>102</sup> Abubakar notes that the Inspectorate

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<sup>97</sup> F. Omokhodion, *Occupational Health in Nigeria, Occupational Medicine*, 59, 2009, 201

<sup>98</sup> Section 29(a)

<sup>99</sup> Section 29(c)

<sup>100</sup> Section 29(h) and s 29(m)

<sup>101</sup> P. Okoye, J. Ezeokonkwo and F. Ezeokoli, *Building Construction Workers' Health and Safety Knowledge and Compliance on Site, Journal of Safety Engineering*, 5/1, 2016, 17-26; Umeokafor *op. cit.*; U Abubakar, *An Overview of the Occupational Safety and Health Systems of Nigeria, UK, USA, Australia and China: Nigeria Being the Reference Case Study, American Journal of Educational Research*, 3/11, 2015, 1350-1358

<sup>102</sup> B. Adeogun and C. Okafor, *Occupational Health, Safety and Environment (HSE) Trend in Nigeria, International Journal of Environmental Science, Management and Engineering Research*, 2/1, 2013, 24-29

Division seems to be grossly underfunded.<sup>103</sup> These criticisms are echoed by the ILO, which attributes this state of affairs to “defective development options, political unwillingness, inadequate funding of factory and labour inspectorates, capacity gaps in training for factory and labour inspectorates [and] inadequate funding for monitoring and evaluation”<sup>104</sup>.

The fines that can be imposed for contraventions of the Act are relatively low and employers, especially large companies, may not be deterred by these sanctions. One example is that a contravention of the Act that causes death or injury will be an offence punishable by the imposition of imprisonment of no longer than two years, a fine not exceeding N5000 (14.13 EUR, assuming that 1 NGN equals 0.0028 EUR) or a combination of imprisonment and a fine.<sup>105</sup> Another example is that failure to report an incident attracts a maximum fine of N1000,<sup>106</sup> which equals 2.83 EUR.

The LSHW Bill seeks to rectify at least some of the aforementioned deficiencies in respect of monitoring and enforcement. It provides for workplace health and safety representatives<sup>107</sup> and health and safety committees<sup>108</sup> in similar ways to the South African OHSA. It therefore foresees that employers and employees will take responsibility for health and safety policy, planning, implementation, monitoring and enforcement. The challenge is that psychosocial conditions are not specifically mentioned in the LSHW Bill, so it is only through awareness raising about, and attention to, psychosocial hazards and risks by government and within organisations that these hazards and risks will receive due attention.

In addition to health and safety representatives at workplace level, the LSHW Bill also provides for the establishment of a National Council for Occupational Safety and Health (NCOSH), which will be the primary regulatory body and enforcement agency.<sup>109</sup> The Council will be supervised by a Governing Board that will be constituted of 25 members

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<sup>103</sup> Abubakar, 2015, *op. cit.*

<sup>104</sup> Government of Nigeria and ILO. *Nigeria Decent Work Country Programme II (2015-2018)*, <http://www.ilo.org/public/english/bureau/program/dwcp/download/nigeria2015-18.pdf>, no date

<sup>105</sup> Section 71

<sup>106</sup> Abubakar, 2015, *op. cit.*

<sup>107</sup> Section 27

<sup>108</sup> Section 26

<sup>109</sup> Section 6

representing federal ministries, state governments, employers' organisations, professional bodies or civil society organisations for occupational safety and health and the Executive Secretary of the Council.<sup>110</sup> A noticeable omission is representation on the Council for workers.

A National Institute for Occupational Safety and Health (NIOSH) is provided for in order to conduct OSH research to complement the NCOSH.<sup>111</sup> The NIOSH has to identify and recommend OHS standards, regulations and policies to prevent occupational injuries and diseases.<sup>112</sup> Both organisations are mandated to undertake research and development on OHS, and to arrange for education, training and what are termed 'public enlightenment' programmes.<sup>113</sup> These mandates may be of particular importance in relation to psychosocial hazards and risks, especially in view of the fact that psychology is relatively nascent in Nigeria. It is therefore gratifying that s 96 of the Bill makes specific reference to research on psychological factors that may impact on health and safety.

The LSHW Bill also provides for more stringent penalties for non-compliance with its provisions. Employers who contravene the Bill and thereby cause death or injury will be guilty of an offence and, upon conviction, may be liable for a term of imprisonment no shorter than 3 years, a fine of not less than N5 million (14 128.80 EUR), or both such imprisonment and a fine.<sup>114</sup> Failure to report an incident will attract a term of imprisonment of not more than 3 years or a fine of not less than N1 million (2 825.75 EUR), or both such imprisonment and a fine.<sup>115</sup>

The LSHW Bill seems to be predominantly prescriptive in that it includes extensive provisions on what duty holders must do, much in the same way that the Factories Act does.<sup>116</sup> An alternative approach focuses on goal-setting, sets general targets and shifts the onus of proving compliance to duty holders.<sup>117</sup> This feature of the Bill potentially has adverse consequences, including mere box-ticking compliance as opposed to conscious compliance, disincentivising agency and responsibility on the

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<sup>110</sup> Section 7(1)

<sup>111</sup> Section 102

<sup>112</sup> Sections 102-104

<sup>113</sup> Sections 96 and 103

<sup>114</sup> Section 87

<sup>115</sup> Section 86

<sup>116</sup> Abubakar, 2016, *op. cit.*

<sup>117</sup> Abubakar, 2016, *op. cit.*

part of organisational actors and stifling innovative inputs from internal role players who may have a better appreciation of the health and safety challenges faced by particular organisations. It further fails to take advantage of the fact that goal-setting approaches tend to place less onerous burdens on regulators in respect of technical proficiency.<sup>118</sup>

#### **4 Challenges to OHS Regulations in Nigeria and South Africa**

Now that we have considered the OHS regulatory frameworks in the two respective countries, we can examine the challenges posed by a wide range of factors. All these factors are interdependent and interrelated.

##### ***4.1 Political and Economic Factors***

Both Nigeria and South Africa have large labour surpluses, which may have negative consequences for working conditions in general because many people are desperate for work and employers are aware of the leverage they hold over workers. In addition, the need to be globally competitive means that employers in developing countries face pressures to increase demands on workers who may often experience high workloads coupled with a lack of control. Pressure to establish or maintain good trade relations with economically powerful countries may have the consequence of decreasing political will to improve workers' working conditions.

Baxi frames the consequences of these concerns in terms of global constitutionalism, of which the rights of workers would be but one component:

Just when the reversal of European history indicated possibilities of transcendence, “globalization” translates the Cold War motto “Making the world safe for democracy” into “Making the world safe for foreign investors”! It seeks to transform all Third World states into the clones of Late Capitalism. If self-determination was the signature of postcolonial legality, the globalization of law calibrates the postcolonial states and law to the carnival of global capital in its myriad forms. International financial capital, lethal multinationals [...], regimes of suprastatal institutions, international and regional, all combine to escalate networks of power constituting the new global ruling class. A paradigm shift is already under way: a transition from the paradigm of universal human

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<sup>118</sup> Abubakar, 2016, *op. cit.*

rights [...] to the paradigm of trade-related, market-friendly human rights. Aggregations of global capital and technology make problematic the future of languages of human rights. This emergence of global economic constitutionalism has numerous impacts on the theory and practice of post-colonial dialectic between rule and resistance.<sup>119</sup>

Given the aforementioned economic and political pressures, it may be a challenge to convince employers and policymakers to plan and take steps to accommodate workers who may be experiencing work stress. The funding of monitoring and enforcement of OHS activities is also problematic in both Nigeria and South Africa. The inspectorates in both countries are underfunded and do not possess the appropriate resources to effectively carry out their mandate. It is therefore incumbent upon regulators to source alternative streams of funding.

#### **4.2 Technical Factors**

This category of challenges relates to the nature of psychosocial hazards and risks and how that interacts with the regulatory mechanisms for occupational health and safety in the two relevant jurisdictions. The delayed onset of the effects of workplace stress may make it difficult to prove links between the distress and work content and context.

A related challenge is that psychosocial stressors may work cumulatively and not all stressors may emanate from the workplace. In *McDonald or Cross and Another v Highlands and Islands Enterprise and Another*,<sup>120</sup> a man had committed suicide and a claim was instituted against his former employer on the basis that his suicide had been caused by work-related stress. Lord Macfadyen made the following observations regarding the link between stress and depression:

[T]he relationship between work conditions and depressive illness is potentially complex. It was not, I think, disputed that stressful working conditions can cause a person to develop a depressive illness. Conversely, I do not consider that it was seriously questioned that depressive illness can affect adversely a person's ability to cope with his work. There can develop what was referred to in evidence as a vicious

<sup>119</sup> U. Baxi, 'Postcolonial Legality', in Henry Schwartz and Sangeeta Ray (eds), *A Companion to Postcolonial Studies*, Oxford: Blackwell Publishing Ltd, 2000, 540-555

<sup>120</sup> Scottish Outer House, *Court of Session: Cross and others v Highlands and Islands Enterprise and Western Isles Local Enterprise Company*, <https://business.highbeam.com/437582/article-1G1-201611003/cross-and-others-v-highlands-and-islands-enterprise>, 2000

circle or vicious cycle in which the more depressed a person becomes, the worse he performs at work, and the more he perceives that he is performing badly at work, the worse his depression becomes. When the matter comes to be investigated once the depression is established, it is very difficult to break into the circle and identify where it began. Once circumstance in which it might be possible to do so would be if there were clear evidence that the conditions of work were such as to be objectively likely to precipitate depression.<sup>121</sup>

The control measures required to respond to workplace stress may require input from various disciplines, including occupational health professionals, industrial and organisational psychologists, cardiologists, specialists in ergonomics, information technology experts, human resources professionals, counseling psychologists and communications professionals. Coordination and integrations of these inputs may be challenging, particularly in contexts where intellectual and other resources are stretched. In a country such as South Africa, the fact that there is no research-centred body that coordinates OHS standards makes the task even more difficult. In Nigeria, at least, there is the prospect of the NCOSH and NIOSH fulfilling those functions.

A related dimension is that scarcity of technical skills may cause regulators and the regulated to compete for limited resources. This challenge has to be addressed through education and training and cooperative regulatory practices that may include the sharing of technical expertise. Where certain industries have made use of professionals who are not widely used in other sectors yet,<sup>122</sup> it may be useful to have intersectoral collaborations and exchanges of ideas and experiences in respect of the relationships between, for example, psychologists, employers and employees.

The relative newness of psychology, the delayed onset of the psychosocial and physiological effects of workplace stress and the stigma attached to psychosocial health conditions and poor monitoring and enforcement may lead to the underreporting or underappreciation of psychosocial hazards or risks. As a result, statistics on these hazards and risks are not likely to be accurate. The LSHW Bill in Nigeria, as well as the OHSA in South Africa, compels the reporting of incidents, but it is unlikely that these provisions are enforced widely and effectively. The LSHW Bill also seeks to establish an OHS database in the form of the National Information Management System, but the reporting requirements for

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<sup>121</sup> At para 48

<sup>122</sup> See Mefoh *op. cit.*, who notes that the military has been using the services of psychologists for individual as well as family counselling.

non-fatal accidents that do not cause permanent disablement allow employers to withhold information on such incidents for up to one year.<sup>123</sup>

## 5. The Potential for CSR to Complement OHS regulation

There is potential for CSR to close at least some of the gaps that exist in the OHS regulatory frameworks, as enumerated above. This potential arises out of CSR's flexibility and its applicability to internal organisational values and processes.

### 5.1 Nature of CSR in South Africa and Nigeria

The nature of CSR in South Africa and Nigeria, respectively, is very different. There is no guiding Code on CSR in Nigeria, so CSR efforts are piecemeal and companies choose what aspects of CSR to emphasise. In Nigeria, the tendency has been for employers to focus on external stakeholders through philanthropic projects.<sup>124</sup> However, the legal compliance and ethical leadership aspects of CSR have received less attention.<sup>125</sup> Both these components would be integral to the creation of organisational cultures that are receptive to adjustments that need to be made to respond to workplace stress.

In South Africa, the King IV Code requires integrated reporting by organisations in the interests of achieving five broadly stated governance outcomes. These five outcomes are the creation and maintenance of an ethical culture; the strategy, implementation and performance of the organisation to create value for stakeholders and to report on such activities to stakeholders; the establishment and maintenance of adequate and effective controls by the governing body; and the building of trust, good reputation and legitimacy through managing stakeholder relationships.<sup>126</sup>

Stakeholders are both internal and external to the organisation. The Code defines 'stakeholders' as "those who are connected to the organisation by contract or otherwise and who are affected by the outcomes of business activities".<sup>127</sup> The definition goes on to explain that stakeholders affect

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<sup>123</sup> Sections 11(1) and 105, read with s 35(1)

<sup>124</sup> Helg *op. cit.*

<sup>125</sup> Helg *op. cit.*

<sup>126</sup> King IV Draft Code at 25

<sup>127</sup> King IV Draft Code at 81

organisations in that “governing bodies need to take account of and balance the legitimate and reasonable needs, interests and expectations of an organisation’s material stakeholders in its decision-making process”.<sup>128</sup> It is therefore clear that employees are a stakeholder grouping in terms of the Code. This is reinforced by the fact that King IV defines value in relation to the enhancement, diminishment or transformation of six capitals that are used and affected by the organisation in the course of its activities.<sup>129</sup> These capitals are financial, manufactured, intellectual, human, social and relational, and natural capital.<sup>130</sup> Psychosocial hazards and risks would fall within the ambit of one or more of these capitals.

## ***5.2 Features of CSR that could Help Address OHS Regulatory Challenges***

### ***5.2.1 Integrated Reporting***

The integrated nature of CSR reporting would mean that organisations would have to consider both financial performance and sustainability.<sup>131</sup> In terms of psychosocial hazards and risks, approaching OHS from a CSR perspective has the advantage of a framework that seeks to balance the interests of various stakeholders. Deeply-entrenched, profits-only approaches to governance can be confronted in relatively transparent ways that may include sound financial reasons for compliance. This is often not possible in regulatory frameworks that are command-and-control in that these impose duties and institute sanctions for non-compliance.

### ***5.2.2 Flexibility***

Since CSR is initiated and implemented by organisations themselves, organisations can be innovative in how they address psychosocial hazards and risks. This may be because employers may take more responsibility for self-initiated projects and because there are no prescriptive legislative frameworks that could inhibit creativity. It also means that organisations

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<sup>128</sup> King IV Draft Code at 81

<sup>129</sup> King IV Draft Code at 81

<sup>130</sup> King IV Draft Code at 77

<sup>131</sup> Cassim *op. cit.*

can be more responsive to their own peculiarities, which is an important aspect of controlling psychosocial risks.

### ***5.2.3 Financing***

In contexts where funding for OHS monitoring and compliance is low, governments could partner with organisations who have funds available to address psychosocial hazards and risks as part of their CSR endeavours. The mechanisms for such cooperation need to be clarified so as to minimise bribery and corruption.

Organisations could also contribute to the education and training of their own employees, health and safety representatives and even health and safety inspectors. It may be worthwhile to incentivise such contributions in order to free up resources. If inspectors, health and safety representatives undergo similar education and training, it may also assist in the fostering of positive relationships between regulators and employers. Research on psychosocial hazards and strength could also be funded by large corporations and could be similarly incentivised.

## ***5.3 Limitations of CSR's Contributions to OHS Monitoring and Regulation***

Although CSR could potentially help to address some OHS challenges, it has its limitations. These limitations could originate in the nature of CSR and in spheres beyond the control of those who design, implement and monitor CSR initiatives.

### ***5.3.1 Nature of Risk Assessments***

Even though King IV explicitly states that day-to-day, medium- and long-term risks have to be assessed, limitations in risk assessments may discount medium- to long-term risks. This would influence the assessment of psychosocial hazards and risks, which are often medium-to-long term in nature.

In addition, even employers who are willing to make adjustments to combat workplace stress may not be able to do so as a result of economic and political pressures. This would affect small, medium and micro enterprises disproportionately, because these organisations would be more concerned about their short-term survival.

### 5.3.2 Resource Limitations

Although large corporate organisations may have resources to contribute to education and training on psychosocial hazards and risks, the benefits of these funds may not always have a wide reach. Furthermore, if there is corruption and inefficiencies in the distribution and application of resources, there may not be much that organisations can do. Government is still required to play a coordinating role<sup>132</sup> and in light of the resource constraints in both Nigeria and South Africa, that may not always be possible.

One example of how governmental inefficiencies may affect CSR initiatives is that there are major concerns in Nigeria about the regulation of the psychology profession.<sup>133</sup> If government does not accredit psychologists in order to control the quality of the services provided, organisations may either be dissuaded from using the services of psychologists or they may have negative experiences with people who are offering services beyond what they should be accredited to provide. In either situation, the support to address psychosocial hazards and risks is far from optimal.

### 5.3.3 Legal Status of CSR

Corporate Social Responsibility in both Nigeria and South Africa is not legally binding. These guidelines may influence the drafting and interpretation of legislation, though.<sup>134</sup> This interrelationship with law may yield benefits for the inclusion of psychosocial hazards and risks within the OHS sphere, but it is likely to take time.

Non-legal means of enforcement could include pressure from one or a combination of trade unions, professional bodies that address psychosocial hazards, consumers or shareholders. Such intervention would still, however, require an appreciation of the nature and extent of workplace stress as well as the control measures that they can insist be

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<sup>132</sup> A. Jain, B. Puplampu and K. Amponsah-Tawiah, 'Occupational Safety and Health and Corporate Social Responsibility in Africa: An Introduction', in Aditya Jain, Bill Puplampu, Kwesi Amponsah-Tawiah and Nicholas Andreou (eds), *Occupational Safety and Health and Corporate Social Responsibility in Africa: Repositioning Corporate Social Responsibility Towards National Development*, Bedfordshire: Cranfield Press, 2012, 1-20. These authors warn that CSR is not a replacement for government responsibility.

<sup>133</sup> Mefoh *op. cit.*

<sup>134</sup> Cassim *op. cit.*

taken by employers. It also rests on the assumptions that employers are able to make adjustments to reduce workplace stress, which is not always the case.

### 5.3.4 *Reach of CSR*

In many parts of Africa the fact that CSR is not formalised leads it to be concentrated among large national and multi-national corporations.<sup>135</sup> Many Small, Medium and Micro Enterprises are therefore not viewed, and indeed do not view themselves, as having to practise CSR.<sup>136</sup> This necessarily means that any contributions made to the management of workplace stress by CSR will similarly be concentrated among big corporations.

## 6 **Concluding Remarks**

The nature of psychosocial hazards and risks and resource constraints create challenges for their inclusion into OHS regulatory frameworks and the development of effective control measures in both South Africa and Nigeria. While South Africa currently has more holistic OHS monitoring and enforcement systems in place than Nigeria, the newness and colonial development of psychology in both jurisdictions create challenges for enforcement. Furthermore, the limited resources available for OHS in general, and to address psychosocial hazards and risks in particular, inhibit the development of effective and accurate risk assessments, as well as effective monitoring and compliance with OHS legislation in both jurisdictions.

Corporate Social Responsibility in South Africa is more systematically guided than in Nigeria, which in some respects makes it easier for links to be drawn between workplace stress and CSR. The flexibility of CSR, the possible availability of resources to complement government's monitoring and enforcement efforts and the requirements of integrated reporting could potentially address some of the challenges raised. However, there are limitations on CSR's capacity to close all the gaps discussed above.

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<sup>135</sup> K. Datey-Baah and K. Amponsah-Tawiah, 'Government Policy and Institutional Framework for CSR and OSH', in Aditya Jain, Bill Ptoplampu, Kwesi Amponsah-Tawiah and Nicholas Andreou (eds), *Occupational Safety and Health and Corporate Social Responsibility in Africa: Repositioning Corporate Social Responsibility Towards National Development*, Bedfordshire: Cranfield Press, 2012, 88-99

<sup>136</sup> Ibid.

Ultimately, what is required is an integrated approach that seeks to use limited resources optimally, raises awareness and appreciation of these risks and facilitates the creation and maintenance of organisational cultures that are willing to adapt work content and work contexts to address workplace stress.

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