

OBLIGATORY ESSAY

ON

**THE MINIMUM WAGE AND HUMAN RIGHTS; THE COMPATIBILITY OF
ZAMBIA'S MINIMUM WAGE AND INTERNATIONAL HUMAN RIGHTS
STANDARDS**

By

JOHN PHIRI

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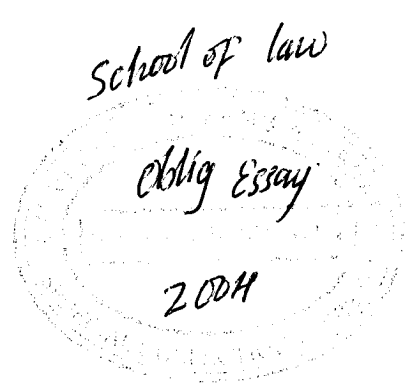
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I recommend that the directed research prepared under my supervision

By


JOHN PHIRI

Entitled

**THE MINIMUM WAGE AND HUMAN RIGHTS; THE COMPATIBILITY OF ZAMBIA'S
MINIMUM WAGE WITH INTERNATIONAL HUMAN RIGHTS STANDARDS**

Be accepted for examination. I have checked it carefully and I am satisfied that it fulfils the requirement relating to format as laid down in the governing regulations governing directed researches.

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Supervisor.....

Judge K. Chanda (rtd)

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CHAPTER ONE

1.0 Introduction

This Chapter tries to answer the question 'what are minimum wages?' It also tries to find justification for their existence. Accordingly, it examines the concept of minimum wages itself, their historical background, rationale and finally, the criteria that is used when fixing minimum wages.

1.1 The Concept of Minimum Wages

The word 'wages' denotes a payment given to workers of a lower class for work or services rendered. Thus, Grove, J., defined the word in the following terms "[t]hough this word might be said to include payment for any services, yet in general, the word 'salary' is used for payment of services of a higher class, and 'wages' is confined to the earnings

labourers and artisans.”¹ Therefore, any money or salary paid or payable to any Clerk or servant, labourer or workman² is a wage.

The concept of a minimum wage does not possess a meaning that is divorced from, but rather imports into the above, the notion of a basic floor of wages which acts as a ‘safety net’, protecting workers against unduly low wages.

It is important to note that the term ‘minimum wages’ is used in a number of ways throughout the world. However, in this study, it is used to denote legally enforceable lower limits to wages fixed by a process invoking the authority of the State. To this extent, wage limits that only have the force of a recommendation or those fixed in collective agreements, or lowest rates fixed in public sector wage and salary scales are not dealt with.³

¹ Gordon V. Jennings 51 L.J.Q.B. at 417, cited in James, S.J., Stroud’s Judicial Directory, Vol. 5 S-Z (1994: London, Sweet & Maxwell)

² Saunders, J.B., Mozley and Whiteley’s Law Dictionary 7th Edition (1962: London, Butterworths) Pg. 384

³ Starr, G., Minimum Wage Fixing (1993: Geneva, ILO) vii

1.2 The Historical Evolution of Minimum Wage Regulations

The practice of minimum wage regulation is generally considered to have first developed in New Zealand around the turn of the century. A number of factors saw this development. Initially, it was used as part of the procedure for the prevention and settlement of industrial disputes.⁴

Under the New Zealand Industrial Conciliation and Arbitration Act of 1894, the Court of Arbitration was empowered to settle industrial disputes by issuing awards fixing minimum wages that could be made binding for all workers in the industry in the district where the dispute had taken place.⁵

On the other hand, however, minimum wage fixing was used, on experimental basis, to eliminate 'sweating' - the payment of exceptionally low wages. With variations, the system of fixing minimum wages soon spread to Australia and eventually, to the rest of the world. For instance, consequent upon a careful study of the Australian systems, the British Parliament adopted minimum wage legislation in 1909 with

⁴ Ibid, at 1

⁵ Ibid

the aim of abolishing 'sweating'. As an inevitable consequence, most of Britain's colonies adopted minimum wage legislation as well.

In the United States, the major thrust of minimum wage laws towards the protection of vulnerable categories of workers; viz; females and minors. "In 1912 and 1913 nine States adopted such minimum wage laws, and by the end of 1923 the number had grown to 17".⁶

Numerous other countries also took out this early experiment with minimum wages. "Thus in Sri Lanka (then Ceylon) the minimum wages (Indian Labour) Ordinance of 1927 was passed in order to regulate the wages of Indian workers introduced minimum wage laws soon after the first world war in order to prevent abuses in the hiring of indigenous workers under forced labour arrangements."⁷

The two world wars, especially the second, gave tremendous impetus to the development of minimum wage fixing. Towards the end of the economic depression of the 1930s more and more countries began to adopt minimum wage legislation and extending wage protection to

⁶ Ibid at 2

⁷ Ibid

large numbers of workers.⁸ This more or less followed a systematic pattern with industrialised countries setting the pace.

1.3 The Rationale for Minimum Wages

The existence of categories of workers who, due to their particular characteristics, are in an extremely weak bargaining position on the labour market, necessitated the creation of regulations, binding on all the parties to, as far as possible, create fair and reasonable standards of remuneration.

Indeed, vulnerability, on the part of the workers, renders all drives at establishing fair standards of wages through collective bargaining impossible. This is because collective bargaining presupposes the existence of parties who, somewhat, possess equal bargaining strengths. Unfavourable, or more precisely, exploitative and abusive labour agreements are inevitable in a scenario of unequal bargaining strengths. Necessarily, unless the Government intervenes to set the minimum wages, workers are left at the mercy of employers. The latter's quest and drive at maximising profits normally would reign supreme as opposed to the upholding of the human rights of the workers.

⁸ Ibid at 91

On the whole, the rationale for fixing minimum wages lies in the fact that the government should step in to protect vulnerable categories of employees – those who are not in the position of achieving favourable results through collective bargaining.

1.4 The Criteria for Fixing Minimum Wages

“Defining meaningful criteria to guide the fixing of rates has turned out to be one of the most troublesome aspects of the administration of minimum wage programmes”.⁹ However, it is notoriously difficult to lay down criteria of general application that are precise. As such, most legal texts are couched in abstract terms.

On the whole, however, most of these legal texts tend to fall into two categories. On the one hand, in some, the relevant provisions are limited to stipulating simply that minimum wages shall be sufficient to meet basic needs without into further detail. For example, the 1941 Costa Rican Constitution declares that every worker is entitled to a minimum wage that will ensure his well-being and dignified existence.¹⁰

On the other hand, what are considered to be basic needs are defined

⁹ Ibid at 91

¹⁰ Ibid Section 57b (LS 1970 – Iraq 1) at 93

briefly. "Thus in Iraq the Labour Code states that wages must be sufficient to ensure for the worker a decent human standard of living satisfying his basic requirements as regards food, clothing and housing.¹¹ In Mexico, both the constitution and the Federal Labour Act stipulate that the minimum wage shall be sufficient to meet the normal requirements of a head of a family of a material, social and cultural order and to meet the obligatory educational requirements of his children. Sometimes, however, legislation is completely silent on the issue of criteria. Examples of such legislation are found in Kenya, Tanzania and India.

Notwithstanding the above, some specific criteria have been formulated and these can be said to be variants of the following four basic concepts:

- (i) the needs of workers;
- (ii) comparable wages and incomes;
- (iii) capacity to pay; and
- (iv) the requirement economic development.

The requirement to meet the needs of the workers is sometimes expressed in terms of the 'living wage', and this is sometimes taken to be

¹¹ Ibid. p. 101

the principle objective and criterion for minimum wage fixing in some countries. This criterion is said to thrust upon employers the moral imperative of paying workers wages that are capable of meeting their basic needs, inevitably, this entails a constant exercise of monitoring the purchasing power of wages. It is argued that wages should be able to meet all the basic needs of workers and this, oftenly, is expressed in terms of the 'food basket'.

The criterion of 'comparable wages and incomes' is said to be the dominant consideration in decision-making as compared to other criteria. Here, the aim is to fix minimum wages according to the ascertained existing pattern of wages and incomes. There are several reasons for the above. However, "[a] more practical reason for the prominence of the concept of comparable wages and incomes is that it is less abstract and more directly measurable than the other criteria commonly used."¹² The other justification is that, according to neo-classical economic theory, one of the conditions for optimal economic efficiency is that all the factors of production receive payment equal to their opportunity cost; i.e. the highest income that could be earned elsewhere.

¹² Ibid

1.5 Conclusion

The most important aspect of chapter one is the one that brings out the fact that Minimum Wages have a Human Rights origin. Minimum Wages were aimed at eliminating inhuman treatment in the place of work. More specifically, they were aimed at eliminating the paying of exceptionally low wages, which in turn, denied workers a decent livelihood. The rapid spread of Minimum Wage fixing throughout the world therefore shows the importance attached to Human Rights.

CHAPETR TWO

2.0 Introduction

The general thrust of chapter one was to give a general overview of the concept of minimum wages. However, it has also been shown that the concept is universal and that its roots lie deep in human rights concerns. The present chapter takes the argument further. It firstly, examines international standards of both human rights and minimum wages. Secondly, it attempts to marry the above standards and lastly, provides an outline of Zambia's minimum wage laws.

2.1 International Human Rights Standards

There are three broad categories of human rights. These include civil and political rights economic, social, cultural rights and group rights. These groups are also known as the first, second and third generations of human rights respectively.

While there are numerous human rights texts, it is the international bill of human rights, which embodies the most widely accepted international standards. The international Bill of Human Rights is made up of three major documents. Of these, the universal Declaration was the

first to be adopted by the United Nations General Assembly in 1948. It was followed by the International Covenant on Civil and political rights (with its Optional Protocol) and the International Covenant on Economic, Social and Cultural Rights. These were all adopted by the “ General Assembly in 1966 and entered into force in 1976.”¹⁵

Unlike the UDHR, which was not a treaty, the latter two Covenants are treaties and therefore, have the force of law. Nevertheless, unless ratified, they have no such effect in municipal law.

The civil and Political rights enumerated in the ICCPR are more elaborate than in the UDHR. Whereas the latter in most respects, merely states the rights, the former goes further to provide more detail and thereby elucidating the given rights.

The most fundamental right protected by this Covenant is the right to life. Article 6(1) states that “ [e]very human has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”¹⁶ Other notable rights range from the not to be subjected to torture, or to cruel, inhuman or degrading treatment or punishment, the

¹⁵ Quinn, F., Human Rights and You, (1999, Warsaw: ODIHR) 16

¹⁶ ICCPR

right not to be held in slavery or servitude, to freedom of thought conscience and religion freedom of expression association assembly, etc.

The Covenant instructs each member state to undertake “ the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.”¹⁷ Each state party further undertakes to ensure that any person, whose rights or freedoms have been violated, gets an effective remedy regardless of whether the violation is at the instance of someone acting in an official capacity.¹⁸

Again, as is the case with the ICCPR the list of economic, social and cultural rights in the ICESCR, is more detailed and longer than in the UDHR. Under part III of the ICESCR, specific substantive rights are enumerated. Article 7 recognises the right of every one to the enjoyment of just and favourable conditions of work, ensuring fair wages and a decent living for the workers and their families, inter alia. Article 11 calls for the “ right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and to the continuous

¹⁷ Ibid., Article 2(2)

¹⁸ Ibid., Article 2(3)

improvement of living conditions.” The right of everyone to the highest attainable standard of physical and mental health is given by article 12(1). Article 13 provides for the right of everyone to education.

A novel provision of this Covenant is that its applicability is gradual. “ Each state party agrees to take stapes, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieve progressively the full realization of the rights recognized in the present convent.”¹⁹

However this gradualist approach does not entail the indefinite postponement of the Covenant’s implementation. Member states are prodded to take stapes towards the full realization of the relevant rights within a reasonably short time after the Covenants entry into force.²⁰The stapes are required to be deliberate, concrete and targeted as clearly as possible at meeting the obligations recognized in the Covenant.²¹

¹⁹ Opcit., at 19 citing article 2(1) of the ICESCR

²⁰ Report of the committee on Economic Social and Cultural Rights Fifth session. UN Doc. E/1991/ 23. E/C. 12/1990/ 8 at 83 (1991), quoted in Quinn at 19

²¹ General Comment No. 3 (1990) Committee on Economic, Social and Cultural Rights, paragraph 2

It has been strongly argued that the above sets rights are “ universal, indivisible, and interdependent and interrelated.”²² The achievement of one set of rights, inevitably, depends on the achievement of the other. For instance, it has been asserted that “democracy, stability and peace cannot long survive in conditions of chronic poverty, dispossession and neglect.”²³ Civil and Political rights cannot be enjoyed to the fullest unless Economic, Social and Cultural rights are realized to the greatest extent possible. President Roosevelt, in his ‘Four Freedoms’ speech echoed the above when he stated thus:

We have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence, ‘necessitous men are not freemen’. People who are hungry and out of a job are the stuff of which dictatorships are made²⁴

The preamble to the ICESCR expressly acknowledges the equal importance of both sets of rights. It states that

In accordance with the Universal Declaration ..., the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights as well as his civil and political rights.

²² Steiner, H., and Philip Alston, International Human Rights in Context, (1995, Oxford : Oxford University Press) 267

²³ Ibid.

²⁴ Robertson, B. Economic, Social and Cultural Rights : Time for a re-appraisal (1997, Wellington : Newzealand Business Roundtable) 2

Therefore, as the two sets can neither logically nor practically be separated in entirely watertight compartments, it suffices to only analyse them s negative, requiring restraint and, positive, which require delivery of services on the part of the government.

2.2 International Labour Standards Vis a Vis The Minimum Wage

International standards governing minimum wages are set out in various International Labour Organisation conventions and Recommendations. The conventions have binding power, are open to ratification by ILO members and require to be applied not only in law, but also in practice. Conversely, Recommendations are not open to ratification. They only supplement Conventions and lay down general or technical guidelines to be applied at national level.

Specific conventions include the following; the Minimum Wage-Fixing Machinery Convention 26 (1928), Convention 99 (1951), concerning Wage Fixing in Agriculture and the Minimum Wage Fixing Convention with special reference to developing countries, 131 (1970). On the other hand, there are recommendations for each of the above Conventions.²⁵

²⁵ These include; Recommendation 30 of 1925, No. 89 of 1951 and No. 135 of 1970.

Convention 26(1928) was aimed at making countries which ratified it “to undertake to create or maintain machinery whereby minimum rates of wages can be fixed for workers employed in certain of the trades or parts of the trades (and in particular in home working trades) in which no arrangements exist for the effective regulation of wages by collective agreement or otherwise and wages are exceptionally low.”²⁶ The Convention also creates an obligation on the part of government to consult, where possible, the groups of the affected workers on the Wage-Fixing Machinery to apply.²⁷

Furthermore, by the provisions of Article 4(1), States are required to ensure that employees are informed of the minimum rates in force. It is also a requirement that employees are not paid below the established rates. Most importantly, workers, in the event of being underpaid, are entitled to recover the amount by which they been underpaid by judicial and other proceedings.²⁸

Convention 99 of 1951 was specifically meant for workers in agricultural and related occupations. Most of the provisions of this Convention are substantially the same as those of the preceding one.

²⁶ The Minimum Wages-Fixing Convention, 1928 article 1

²⁷ Ibid., Article 3 and 3

²⁸ Ibid., Article 4(2)

Lastly, Convention 131 of 1970 makes special reference to developing countries. Under this Convention, it is stipulated that the elements to be taken into consideration in determining the level of minimum wages shall, so far as possible, include the needs of workers and their families. The general level of wages in the country, the cost of living and the living standards of other social groups are some of the factors that have to be taken into consideration as well.²⁹

Further, the Convention encourages member states to create flexible machinery for fixing minimum wages and encourages the consultation and participation of both employer's organizations and employees or their representatives in determining the suitable criteria for fixing minimum wages.

Each of the above conventions has corresponding Recommendations as aforementioned.

²⁹ Ibid., Article 3(a) and (b)

2.3 The Connection Between Human Rights And The Minimum Wage

That wages determine the standard of living of a given class of people or society is beyond dispute. This therefore entails that minimum wages are responsible for setting the basic floor of the standard of living.

Moreover, Article 25 of the UDHR states that “ Everyone has the right to a standard of living adequate for health and well being of himself and his family, including food, clothing, housing and medical care ...”

Article 7 of the ICESCR has it that everyone who works has a right to the enjoyment of just and favourable conditions of work which ensure remuneration which provides all workers as a minimum, with fair wages and a decent living for themselves and their families. The yardstick for a fair wage is its ability to sustain a decent livelihood for the worker.³⁰

The above provisions make a very lucid connection between human rights and the minimum wage. It is a human right to earn a fair and decent wage.

³⁰ UDHR Article 23

2.4 Zambia's Laws On The Minimum Wage

In Zambia, the principal piece of legislation that governs issues of the minimum wage is the Minimum Wages and Conditions of Employment Act, chapter 267 of the laws of Zambia. According to the preamble, the Act repeals and replaces the Minimum Wages, Wages Councils and Conditions of Employment Act; makes provision for regulating minimum wage levels and conditions of employment; and provides for matters connected with or incidental to the foregoing.

Section 3(1) empowers the Minister to prescribe by statutory order rates of wages to be paid to workers by hour, day, week or month. He is also empowered to fix rates for any work done in excess of or outside the normal hours of work or the normal working days or for any piece work or allowances for any food and housing and any other matter which in the opinion of the is necessary or expedient to prescribe.

In all the above, the discretion of the minister is supposed to be guided by considerations of whether or not adequate provision exists for the

effective regulation of minimum wages or the minimum conditions of employment for any group of workers.³¹

This aspect makes the system of regulating minimum wages in Zambia very flexible. The minister may, from time to time, make orders by statutory instrument that specify the minimum wages and conditions of employment. It appears that the aim of this is to make the said conditions abreast with the social and economic scenario of the country at any given time.

Further, section 4 imposes a duty on employers of protected³² workers to, inter alia, compile and maintain records of all wages and allowances paid and any benefits given. Breach of this duty, exposes the employer to penal sanctions.³³

More importantly, however, Section 5 empowers "the Labour Commissioner to, or any labour office authorized on that behalf by the Labour Commissioner" to order the production for examination any

³¹ The Minimum Wages and conditions of Employment Act, Section 3(1)

³² According to Section 2, a 'protected worker' is a worker to whom a statutory Order made under the Act is applicable

³³ Upon conviction, the employer is subject to a fine or an imprisonment term not exceeding 6 months or both. See s. 4(2) (3) (4) (5) of the Act

record required under Section 4, interrogate any protected worker, employer or agent of an employer of a protected worker etc.³⁴

Furthermore, the Commissioner is tasked with assisting protected workers in the recovery of wages. If an employer fails to comply with any statutory order, under the Act, the Commissioner can institute civil proceedings on behalf of the protected worker to recover the sum by which the latter has been under paid.³⁵ This appears to be one of the most important functions of the Commissioner in so far as the minimum wage is concerned.

Obstructing the Commissioner from performing his duties is an offence, which exposes the offending party to a fine upon conviction.

Finally, the Constitution, in the Directive Principles of State Policy, also makes mention of the fact that the State shall recognize the right of every person to fair labour practices. However, this does not make direct reference to minimum wages.

³⁴ Op cit, section 5 (1) (a) and (c)

³⁵ Ibid., s.6

2.5 Conclusion

There are numerous international standards on both the minimum wage and Human Rights. All these are spread out in numerous instruments and open for ratification by any country. Zambia has ratified most of these and has thereby undertaken to conform the local legislation as much as possible to international standards. In this vain, there is local legislation that deals with both standard standards aforementioned

CHAPTER THREE

3.0 Introduction

Whereas the previous Chapters are to a larger extent concerned with both International and local standards in terms of legislation, this Chapter intends to provide an analysis of the compatibility of the aforementioned standards. An exposition of the major impediments to establishing equitable minimum wage standards locally will also be examined. Going hand in hand with the latter, are possible solutions. The above is to be further understood against a background where the country has ratified most if not all of the international Conventions outlined in the second chapter. By ratifying the said agreements Zambia has undertaken to ensure that the local laws conform to the standards stipulated in the Covenants. This being the case, the present Chapter investigates the extent to which the local laws conform to international standards.

3.1 The Effectiveness of Zambia's Laws in Keeping up with International Standards.

As has been shown in chapter two (2), Zambia's laws and regulations governing issues of the minimum wage are very flexible. The minimum wages and conditions of Employment Act, which is the major piece of legislation in this area, confer upon the Minister of Labour wide discretionary powers.

If the Minister is of opinion that no adequate provision exists for the effective regulation of minimum wages... for any group of workers he may, by statutory order, prescribe – (a) rates of wages to be paid to workers by the hour, day, week or month.³⁶

Therefore, from time to time and depending on the socio-economic conditions prevailing in the country, the Minister may adjust the minimum wage to fit or suit the needs of the worker. This makes the Act a very useful tool. However, implicit in the above, is that there should be a constant and active exercise of assessing the economic and social conditions prevailing in the country. It is only by so doing that the Minister will be able to equip himself with information necessary for the fixing of wages that correlate with the economic and social conditions of the country. This has been stressed by Convention 131.

³⁶ Section 3

Unfortunately however, there has hardly ever been any sign of correlation between the minimum wages and the economic scenario in the country. Evidence shows that Zambian minimum wages have almost always been far way below the desired and acceptable standards.

The Minimum Wages and Conditions of Employment (General) Order, 1997 (Statutory Instrument No. 19 of 1997)³⁷. It is stated that general workers, cleaners, handymen, employees engaged as drivers are entitled to K62, 000 per month and finally, Clerks or Receptionists are entitled to K80, 000 per month.³⁸ In the subsequent order, made in 2002³⁹ K400, K98, 000 and K135,000 is stipulated for the above respective categories of employees. A fourth category is introduced in this order. This comprises Typists. Here the workers are entitled to K200, 000 per month.

In sharp contrast, the cost of the food basket in 1997 and 2002 was K197,700 and K823,500, respectively. This discrepancy is a general trend. Ultimately, this entails that the Zambian minimum wage is not sufficient to meet the basic necessities or needs of life.

³⁷ This Statutory Instrument was made pursuant to Section 3 of the Minimum Wages and Conditions of Employment Act.

³⁸ The schedule; Paragraph 4 (1) of the Minimum Wages and Conditions of Employment (General) Order, 1997.

³⁹ The food basket is one of the tools used to measure the purchasing power of wages. It is an assessment of the cost of basic needs necessary for survival.

It has to be noted “wages are among the major factors in the economic and social life of any community”⁴⁰. Workers and their families depend almost entirely on wages to provide themselves with food, clothing, housing and all the other necessities of life.

Expenditure patterns for a huge part of the population in Zambia reveal that it has a very limited choice. Their earnings cannot allow them to be flexible in spending on human and other household necessities. Therefore, about 63 to 75 percent of the monthly income goes to food expenses. This does not imply that households have adequate food. Rather, it means that out of the meagre incomes people earn, a huge proportion goes to food.⁴¹

Needless to say, the above scenario entails that workers are denied most of the human rights enumerated under the CESC. Fundamentally, however, the right to life is compromised. As has been shown, the Zambian Minimum Wage does not allow one to have access to the resources needed for a decent standard of living. Such as health care,

⁴⁰ Wages: A worker's Education Manual (1992 General: ILO)

⁴¹ Jusuit Centre for Theological Reflection Fourth Quarter Bulletin No. 46 (2000, Lusaka, JCTR)

clean water, education etc. It can be argued that the latter form the core of the right to life.

More to it, the application of the Order raises a lot of questions. Section 2 states that the Order does not apply to employees of the Government of the Republic of Zambia; engaged in domestic service; of District Councils; and in occupations where wages and conditions of employment are regulated through the process of collective bargaining under the Industrial and Labour Relations Act. The latter is justified, as the fixing of minimum wages and collective bargaining can be said to be mutually exclusive. In the former respect, however, the exclusion of the said categories of workers is totally inconsistent with the notion of the minimum wage.

Essentially, the minimum wage should form the most basic floor of wages. Inherent in this is that the minimum wage should cover all vulnerable categories of employees. The exclusion of some categories of workers is difficult to understand appears to have no justification. Moreover, the above provision only works to expose the excluded workers to abuse and exploitation. This is a clear violation of human rights.

Justice demands equals to be treated equally. "Injustice arises when equals are treated unequally".⁴² If there is to be any differential treatment then the same must be based on relevant differences⁴³. The latter has got to do with the capacity of an individual such as sanity or insanity. Clearly, the aforementioned provisions of the order are discriminatory and not compatible with international human rights standards.

3.2 Enforcement of Economic Social and Cultural Rights in Zambia

The enforcement of Economic, Social and Cultural Rights has a direct and inevitable bearing on issues of the minimum wage. Unless due regard is given to the former, workers will continue to get unfair and unreasonable minimum wages – which is a violation of their rights to a decent and human existence.

It has to be noted that though the Minimum wages and Conditions of Employment Act empowers the Labour Commissioner to institute civil proceedings on behalf of the protected workers for the recovery of wages⁴⁴, this does not address the human rights aspect of the latter. The

⁴²Ibid

⁴³ Ibid

⁴⁴ Section 6

Commissioner cannot do anything to ensure that workers get wages, which correlate, with the economic and social conditions prevailing in the country. His duty merely consists in seeing to it that the worker(s) on whose behalf he acts gets what is due to him however little and inhuman it might be. The law does not address the economic, social and cultural rights of the workers. In view of the above, it is imperative to have a legal system that gives a fair audience to economic, social and cultural rights.

In Zambia, the Constitution does not expressly provide for the protection of economic, social and cultural rights. The Bill of Rights, as found under Part III of the Constitution, only provides for the protection of Civil and Political rights. Prima facie, this entails that one would find it extremely difficult to seek redress of the violation of his or her economic, social and cultural rights in the Zambian courts.

Be it as it may, the Directive Principles of State Policy found under part IX of the Constitution, constitute a very serious and further obstacle to the enforcement of the above rights in Zambia. According to Article 110 (i), the DPSP are meant to guide the organs of the government (Executive, Legislature and the Judiciary) in the development of national

policies, implementation of national policies; making and enactment of laws; and application of the Constitution and any other law.

The Constitution provides two situations under which the state may observe the application of the DPSP. State resources must be able to sustain their application and if the general welfare of the public so unavoidably demands⁴⁵. In the latter respect, it is Cabinet that has to determine the 'welfare of the public'. However, the criteria of doing so are unknown. In the former respect likewise, it is very difficult for the public to know the status of the state resources. Given this scenario, it would be difficult for one to bring an action against the state in respect of economic, social and cultural rights and hope to succeed as the state may always claim that resources do not permit. Besides, subjecting rights to the 'general welfare of the public' may effectively preclude individuals from making successful claims.

Article 112 enumerates the DPSP. Inter alia, it is stated that the state shall endeavour to create conditions under which all citizens shall be able to secure adequate means of livelihood and opportunity to obtain employment; the state shall endeavour to provide clean and safe water, adequate medical and health facilities and decent shelter for all persons,

⁴⁵ Article 110 (2)

and take measures to constantly improve such facilities and amenities; the state shall recognise the right of every person to fair labour practices and safe and healthy working conditions.

Notably, Article III states that:

The Directive Principles of State Policy set out in this part shall not be justifiable and shall not thereby, by themselves, despite being referred to as rights in certain instances, be legally enforceable in any Court, Tribunal or Administrative Institution or Entity.

The non-justiciability of the DPSP inevitably implies that human rights abuses that arise from unfair minimum wages cannot be litigated and enforceable in the Zambian Courts. Primarily, this was meant to protect the State against what may be called 'floodgates of claims.' The fear here is that once economic social and cultural rights are made justiciable, the courts would be overwhelmed with suits against the government for abrogating the rights. The government has limited financial resources. It cannot meet all the financial obligations that would arise from such litigation. Besides, the Judiciary does not seem to have the capacity to handle such an enormous task. Nevertheless, it is to be noted that as well as the State, these rights have to be enforced against private parties. The DPSP, therefore, seem to encourage abuse of human rights, as the other perpetrators may hide under the 'non-justifiability umbrella'

which is primarily meant to protect the state. Moreover, the state itself is supposed to be an example in upholding human rights.

On the whole, the above seems to defeat the essence of human rights. For a right in one person implies a correlative duty in others not to breach it. Taking away the duty, as the case is in the *Zambian Constitution*, is tantamount to taking away the right. In other words, it seems pointless to give something, which is not capable of being given.

3.2.1 Lessons from the Indian Experience

The *Zambian Constitution* is remarkably similar to that of India. The most principal features of note are the similar Bill of Rights and the Directive Principles of State Policy.

However, in India, it has been held that the DPSP are the 'conscience' and the core of the Constitution. These principles are the goals to be achieved by Part III of the Constitution. They are intended to ensure "distributive justice" for removal of inequalities and disabilities and to achieve a fair division of wealth amongst the members of the society⁴⁶.

⁴⁶ *Keshavananda Bharati V State of Kerala* (1973) 4 SCC 225

In the **Fundamental Rights Case**⁴⁷ it was also held that the Courts can look at the Directive Principles for the purpose of interpretation of the fundamental rights. The Courts will adopt that interpretation which makes the fundamental rights meaningful and efficacious. Again, the Courts have to make every attempt to reconcile the fundamental rights with the Directive Principles remembering that the reason why the Directive Principles exist is to give the Government sufficient latitude to implement them.

In **State of Madras V. Champakam Dorairajan**, it was stated that “The Directive Principles have to conform to and run subsidiary to the Chapter on fundamental rights”⁴⁸. In the fundamental rights case, (referred to above), the majority opinion reflected that the view that what is fundamental in the governance of the country cannot be less significant than what is significant in the life of the individual.

Thus, in India, the fundamental rights and the DPSP are taken to be complementary, “neither part being superior to the other”⁴⁹.

In light of the above, in the Fundamental Rights Case, it was stated that:

⁴⁷ Ibid

⁴⁸ Ibid

⁴⁹ Per Krishna J. In State of Kerala V. N. M. Thomas (1976) 2 SCC at 367

Fundamental rights have themselves no fixed content; most of them are empty vessels into which each generation must pour its content in the light of its experience. Restrictions, abridgment, curtailment and even abrogation of these rights in circumstances not visualised by the Constitution makers might become necessary; their claim to supremacy or priority is liable to be overborne at particular stages in the history of the nation by moral claims....⁵⁰

Therefore, it has been held that ESC rights are enforceable when they are projected as supplying the content of a fundamental right, but not just by themselves.⁵¹ As a result of this creative interpretation, **In Mullin V The Administrator Union Territory of Delhi**,⁵² it was held that the right to health forms part of the right to life and, therefore, directly enforceable and justiciable. In the same case, it was also stated that “The right to life includes the right to live with human dignity and all that goes with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing ... but it must, in any view of the matter, include the bare necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human self.”⁵³ In **Shanti Star Builders V Totame**⁵⁴, the Court said that “The right to life ... would take within its sweep the right to food ... and a reasonable accommodation to live in”.

⁵⁰ *Ibid*

⁵¹ *Bhat V Union of India* (1990) 3 SCC 65

⁵² (1981) 2 SCR 516

⁵³ *Ibid*, at 529

⁵⁴ ISCC 520

In **Olga Tellis V Bombay Municipal Corporation**,⁵⁵ the Court held that the right to life included the right to livelihood. Again in **Mohini Jain V State of Karnataka**,⁵⁶ it was held that the right to education is implicit in the right to life because of its inherent fundamental importance.

Notwithstanding the above, the Court acknowledged that the provision of facilities cannot be unlimited. It has to be to the extent finances permit. However, it goes without saying that the limits of economic capacity are, ordinarily speaking, matters within the subjective satisfaction of the State.

On the whole, as a result of the creativity of the Indian Courts, the expanded interpretation of the right to life has led the Court into areas where there was a crying need for social justice. These were areas where there was a direct interaction between law and poverty.⁵⁷ In reading several of these concomitant rights of dignity, living conditions, health into the ambit of the right to life, the Court overcame the difficulty of justiciability of these as economic and social rights which were hitherto, in their manifestation as DPSP, considered non-enforceable.⁵⁸

⁵⁵ (1985) 3 SCC 546

⁵⁶ (1992) 3 SCC 666

⁵⁷ Ibid

⁵⁸ www1.Umn.edu/humanrts/edumat, 16th Nov. 2004

4.2.2 Lessons from the South African Experience

South Africa has taken a very bold step. Economic, Social and Cultural rights have been incorporated into the Bill of Rights. This entails that; unlike in India and Zambia, they are directly enforceable. Therefore, in **Minister of Health and others V Treatment Action Campaign and Others**,⁵⁹ the Court held that the State is obliged to take reasonable measures progressively to eliminate or reduce severe deprivation that inflicts the society. The Courts will guarantee that the democratic processes are protected so as to ensure accountability, responsiveness and openness As the Bill of Rights indicates, their function in respect of socio-economic rights is directed towards ensuring that legislative and other measures taken by the state are reasonable. Most importantly, the State must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, its minimum obligations.⁶⁰

In the above case, the Government was sued by a group of Non-Governmental Organisations so that it could make HIV drugs available to all pregnant women in South Africa. As a matter of fact, the Court

⁵⁹ Ibid

⁶⁰ [2002] ZAXX 15 (5 July 2002)

stated that the Government was in a position to provide the said drugs. Therefore, the Government was held liable.

Again, in **Grootboom V Government of the Republic of South Africa and Others**,⁶¹ the Court ordered Government to provide basic sanitation services, water and building materials to the applicants because the State Housing Policy failed to make reasonable provision within available resources for the applicants who were living in intolerable conditions. Yacoob J., in the same case, while cognisant of the constraints faced by the State, stated that “The Constitution obliges the State to act positively to ameliorate these conditions.... Those in need have a corresponding right to demand that this be done”.⁶²

In **Soobramoney V Minister of Health**⁶³, however, the Court said that in the South African Constitution, the right to medical treatment does not have to be inferred from the nature of the State obligation established by the Constitution or from the right to life, which it guarantees. It is dealt with directly in section 27 and if the latter were to be continued in accordance with the appellant’s contention it would make it substantially more difficult for the State to fulfil its primary obligations

⁶¹ Ibid, at P.6, www.saflii.org/za/cases/zacc/2002/15.html

⁶² [2002] ZACC 14 (21 September 2000)

⁶³ Ibid at 5, www.saflii.org/za/cases/zacc

to provide health care services to 'everyone' within available resources, it would have also the consequence of prioritising the treatment of terminal illness over other forms of medical case. Therefore, the claim for the State to provide medical care to the applicant was dismissed as the latter failed to establish that the State was in breach of its obligations.

Soobramoney brings to the fore the fact that for the State to be liable as regards economic and social rights, the Constitution must be expressly and clearly breached.

3.3 Conclusion

Though Zambia has legislation that covers both the Minimum Wage and Human Rights, it is clear from the above that the former does not possess a sufficient content of the later. This is so notwithstanding the fact that Zambia's laws on the Minimum Wage are somewhat flexible.

A major impediment to the enforcement of economic social and cultural rights is the non - justiciability of the Directive Principles of State Policy. However, it has been demonstrated by India that even in the face of the DPSP, the aforesaid rights can still be enforceable. Of course this can only be done once the importance of the aforesaid rights is appreciated. On a more radical level, South Africa demonstrates that ESC Rights can

be incorporated into the Bill of Rights without causing the much-feared adverse effects on the resources of the state.

CHAPTER FOUR

4.0 Introduction

This last chapter sums up the essay by giving recommendations and the conclusion.

4.1 Recommendations

The onus of ensuring that human rights are enforced lies, to a far greater extent, on the government than any other body or person in the country. Accordingly, the government should take steps that give life and meaning to its obligations – both international and local.

4.1.1 The Need for Political Will

The Constitution being the supreme law of the land, should give equal weight and effect to Civil, Political and to Economic, Social and Cultural Rights. Implicit in this, is the recognition and acceptance that human rights are interdependent and indivisible.

South Africa has successfully managed to incorporate economic, social and cultural rights into the Bill of Rights. Contrary to wide spread fears, this bold step has not prejudiced the economic capacity of the government. It has worked, instead, to instil discipline and transparency in the disbursement of resources.

Political will is indispensable. The above cannot be achieved without a conscious, deliberate and purposeful effort on the part of the politicians.

4.1.2 Need for Judicial Creativity

As has been demonstrated by the Indian Judicial System, it is possible to enforce economic, social and cultural rights even in a constitutional set up which attempts to make them non-justifiable. The Zambian Judicial System can learn from its Indian counterpart so as to see the enforcement of the said rights.

4.1.3 Improving the Office of the Labour Commissioner

The above being done, legislation that deals specifically with the minimum wage should be improved. One way of doing this is by improving on the efficiency of the office of the Labour Commissioner.

This would definitely go a long way in enhancing the speed with which violations of the Minimum Wage are resolved.

Coupled with the above, should be a massive sensitisation campaign of the Office of the Labour Commissioner. This would ensure that complaints come before the said office speedily.

4.1.4 The Discretion of the Minister to Fix the Minimum Wage should be Guided

To achieve the goal of having minimum wages that correlate with the living conditions of the people, it would be important to make sure that the discretion of the Minister to fix minimum wages is guided with proper and relevant considerations. There is, therefore, need to improve legislation by making it mandatory for the Minister to make wide consultations before exercising his discretion of fixing the minimum wage.

Bodies like Trade Unions, Non-Governmental Organisations and others, which interact with society on a constant basis, can be of tremendous help in assessing or determining what would be reasonable minimum wages.

4.1.5 Minimum Wage Legislation should be all Encompassing

Minimum wages are the most basic that one should get. As such, they should cover all employees that are entitled to it. The laws should not, therefore, be discriminatory. Zambia's legislation should, therefore, be improved in this area again.

4.2 Conclusion

The enjoyment of human rights is inevitably and inextricably intertwined with the wage that one gets. The right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing and to the continuous improvement of living conditions, the right of everyone to the enjoyment of the highest attainable standards of physical and mental health and the right to education certainly cannot be realised without a decent minimum wage.

Whereas it is luring to conceive of minimum wages as being associated with economic social and cultural rights only, it would be wrong to

conclude that that is so. The entire human rights regime is affected. For instance, the right to life is compromised if due to inadequate wages, people fail to access health facilities.

Given the paramount importance of minimum wages, it is rather sad to note that Zambia's laws on the same are not standing up to reasonable expectation. Certainly, they are not compatible with International Human Rights standards. They do not provide necessary safeguards to prevent abuse in the area of the minimum wage. As a result, Zambian workers have been subjected to minimum wages that are way below the standard of living. More to it, the unfair minimum wages themselves have been inequitably applied.

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