

# Minimum wages: a legal analysis with reference to examples from developing countries

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## **ABSTRACT**

Historically, the issue of minimum wages has been, and continues to be, a very controversial matter. As shown in literature, minimum wages hold the potential to particularly be of value to emerging or developing markets such as the BRICS countries. The potential value of minimum wages is based on the fact that minimum wage policies and strategies may assist in addressing challenges regarding inequality, poverty and unemployment. This is even more evident in developing countries because these countries experience such challenges more profoundly. Whether or not this potential value of minimum wages is actualised remains an open question.

In this study the different minimum wage policies, in terms of legislative, statutory and other measures used within comparable selected developing countries, were investigated to identify the possible merits or limits thereof. A broad approach was followed by firstly identifying international measures that regulate wages, and more specifically minimum wages. It was then narrowed to the analysis of specific practices, in particular South Africa, by establishing how international measures are given effect through national law, legislation and other measures. The merits and limits in terms of diverging minimum wage policies and practices of developing countries were analysed based on the following criteria:

1. Determination of the minimum wage;
2. Coverage of the minimum wage;
3. The role of supplementary social measures;
4. Adjustments of the minimum wage;
5. Monitoring compliance of the minimum wage; and
6. Enforcement and consequences of non-compliance.

Most developing countries have minimum wage policies, but ample opportunity exists for development and improvement of legal provisions with specific reference to the above-mentioned criteria.

The International Labour Organisation (ILO) has a central role in terms of establishing a "satisfactory standard of living" through the use of wages, and specifically minimum wages. The idea of a satisfactory standard of living is contained within the living wage and decent work principle. The ILO establishes its principles through the use of conventions and recommendations. The ratification of such measures is crucial in driving and developing countries towards the decent work principle. As such, ratification should be strongly encouraged, particularly in South Africa where ratification of ILO measures regarding wages, and specifically minimum wages, is insufficient.

As with numerous other emerging countries South Africa's main challenges include inequality, unemployment and poverty. Minimum wage policies, if effectively utilised through the use of the aforementioned criteria, have an undeniable influence in addressing these challenges. The notion of a South African national minimum wage is supported because of the potential influence it might have on influencing the last mentioned challenges. By addressing these challenges South Africa is promoting our constitutional values.

Are these challenges the results of a deeper underlying problem, or do these challenges have a more autonomous origin? These challenges arguably arise to a great extent due to the underlying problem of labour supply exceeding the labour market demand by far. Although minimum wage policies will assist in partially limiting the negative consequences of these challenges it makes sense to address the underlying elements that give rise to these challenges. The oversupply of labour due to insufficient economic growth will therefore need to be addressed.

Various methods can be identified as possible solutions to the oversupply of labour. Creating economic growth will stimulate the demand for labour and result in job creation which could address the oversupply of labour. Unfortunately, most developing countries find sufficient economic growth difficult to attain in a sustainable manner. Alternatively, the supply of labour should be decreased. The Chinese one child policy is an example of this method. This Policy holds definite benefits in terms of national economic growth, but due to ethical and discriminatory reasons the one child policy may be difficult to rationalise. A greater investment in education is recommended as an alternative to such a policy. According to literature more educated people have been recorded as having

fewer children, which could ultimately serve to address the oversupply of labour in the labour market.

**Key Words:** Minimum wages; Developing countries; South Africa; Brazil; Inequality as well as poverty and unemployment; ILO; Emerging countries.



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## **LIST OF ABBREVIATIONS**

<b>BCEA</b>	Basic Conditions of Employment Act 75 of 1997
<b>BRICS</b>	Brazil, Russia, India, China and South Africa
<b>CLT</b>	Consolidation of Labor Laws
<b>DIEESE</b>	The Inter-Union Department of Statistics and Socioeconomic Studies
<b>DPRU</b>	The Development Policy Research Unit
<b>ECC</b>	Employment Conditions Commission
<b>EEA</b>	Employment Equity Act 55 of 1998
<b>EU</b>	European Union
<b>FMF</b>	Free Market Foundation
<b>GDP</b>	Gross Domestic Product
<b>IEC</b>	Independent Expert Commissions
<b>ILJ</b>	Industrial Law Journal
<b>ILO</b>	International Labour Organisation
<b>IPCSIT</b>	International Proceedings of Computer Science and Information Technology
<b>ISSA</b>	International Social Security Association
<b>LRA</b>	Labour Relations Act 66 of 1995
<b>NEDLAC</b>	National Economic Development and Labour Council
<b>OECD</b>	The Organisation for Economic Cooperation and Development

<b>RIT</b>	The Labour Inspection Regulation of 1965
<b>SASSA</b>	South African Social Security Agency
<b>SIT</b>	Labour Inspection Secretariat
<b>UIA</b>	Unemployment Insurance Act 63 of 2001
<b>UNCTAD</b>	United Nations Conference on Trade and Development

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# CHAPTER 1: THEORETICAL BACKGROUND

## 1.1 Background

The issue of wages is central to the world of employment.<sup>1</sup> Wages, as such, refer to the cost employers pay to get work done and, thus, the monetary reward workers receive for work performed.<sup>2</sup> According to the South African *Labour Relations Act* (LRA) remuneration refers to any payment in money or in kind, or both in money and in kind, made or owing to any person, including the State.

Conflict arises where, on the one hand, employers want to pay wages which are as low as possible to increase profitability, and on the other hand, workers want the highest possible wages which constitute their main source of income and provide a better standard of living for themselves and their families. An unequal equation exists between economic profitability and quality of life. For a corporate entity, wages payable firstly represents an expense, and to a limited extent an investment in future earnings, whilst for a worker, wages provide security and determines his or her quality of life.

Some sort of middle ground between these opposite departure points in terms of wages payable need to be established, where the employer would be profitable whilst the employee would be able to uphold a "satisfactory standard of living to them and their families".<sup>4</sup> The idea of a satisfactory standard of living generated from wages are contained within the living wage and decent work principle,<sup>5</sup> that stems from what the ILO describes as the need for social justice in our global economy:<sup>6</sup>

In addition to adequate earnings, decent work also assumes access to rights associated to labour and to social protection and when combined with increases in productivity and

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<sup>1</sup> ILO 2016 <http://ilo.org/global/topics/wages>.

<sup>2</sup> ILO 2016 <http://ilo.org/global/topics/wages>.

<sup>3</sup> Section 213 of the *Labour Relations Act* 66 of 1995 (LRA). The *Basic Conditions of Employment Act* (BCEA) defines it as "any payment in money or in kind, or both in money and in kind, made or owing to any person in return for that person working for any other person, including the State, and remunerate has a corresponding meaning" and deals with remuneration in s1.

<sup>4</sup> Anker *Estimating a Living Wage* 1.

<sup>5</sup> Anker *Estimating a Living Wage* 1.

<sup>6</sup> ILO date unknown <http://ilo.org/global/standards/introduction-to-international-labour-standard/need-for-social-justice>.

equality of opportunity and treatment in work, has the potential of exponentially reducing extreme poverty and hunger by ensuring more and more evenly distributed income.<sup>7</sup>

The importance of a living wage is indicated by the ILO in its Constitutional preamble stating that "peace and harmony in the world requires the provisions of an adequate living wage".<sup>8</sup> According to the ILO a living wage should at least satisfy basic needs of workers.<sup>9</sup> According to the *Minimum Wage-Fixing Machinery Recommendation no. 30*<sup>10</sup> a living wage should be determined while considering the country and the specific time period involved. Inequality is often problematic for many countries and especially for developing countries. Inequality has a close relation to unemployment and poverty.<sup>11</sup>

Some level of income inequality is to be expected in any country and it is seen as a natural occurrence which can either be used as incentive for individuals to find work, or to work harder and pursue education.<sup>12</sup> High income inequality may, however, present social problems in the sense that it can lead to negative perceptions and feelings in society regarding opportunities and fairness. In turn, that may have a negative effect on social cohesion and unity within a society.<sup>13</sup> With high levels of inequality the individual effort can be discouraged and it may encourage a viewpoint that "economic advantage is more likely inherited than earned".<sup>14</sup> This type of inequality can also impact negatively on an economic standpoint by reducing the durability and pace of economic growth as well as increasing potential political instability.<sup>15</sup>

As a result of the risks associated with high income inequality, some countries have adopted and implemented a minimum wage policy to act as a minimum floor for wages,<sup>16</sup> to protect the workers at the lower end of the wage distribution scale.<sup>17</sup> High levels of wage inequality exist particularly in developing countries where a significant majority of households are living in societies where income is less equally distributed than in their developed counterparts.<sup>18</sup> Because of the high levels of income inequality,

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7 ILO 2013 <http://ilo.org/brasilia/publicacoes/WCMS>.

8 ILO 1974 <http://ilo.org>.

9 ILO 2006 <http://ilo.org/ilolex>.

10 *The Minimum Wage Fixing Machinery Recommendation 1928 no.30*.

11 Chibba and Luiz 2011 *Economic Papers* 307.

12 ILO 2015 <http://ilo.org/global/publications>.

13 ILO 2015 <http://ilo.org/global/publications>.

14 ILO 2015 <http://ilo.org/global/publications>.

15 ILO 2015 <http://ilo.org/global/publications>.

16 ILO 2016 <http://ilo.org/global/topics/wages>.

17 ILO 2008 <http://ilo.org>.

18 United Nations Development Programme 2014 <http://undp.org>.

minimum wage policy can play an important role in decreasing inequality, and even more so in emerging or developing countries than in their developed counterparts:<sup>19</sup>

The consequences of the minimum wage are of particular concern for these countries, which face greater challenges in improving the conditions of low income workers and promoting wage employment.<sup>20</sup>

Because of the pronounced potential effect that minimum wage might have on developing countries this analysis will focus on selected practices in mainly developing countries. The five largest developing or emerging economies form part of the BRICS association with Brazil, Russia, India, China and South Africa as member countries.<sup>21</sup> The original association, known as BRIC, was conceived in 2001 by Goldman Sachs as part of economic modelling in an attempt to "forecast global economic trends over the next half century".<sup>22</sup> In 2010, South Africa joined the group to form BRICS.<sup>23</sup> The growth potential of these countries is considerable and it is expected that the economic worth of the BRICS countries could be far greater under certain conditions than that of its G6 counterparts.<sup>24</sup> This is significant when noting that Germany, France, Italy, Japan, UK and the US form part of the G6 countries. These countries are all developed and have well-established economies with great international influence and degree.<sup>25</sup>

Countries differ in numerous ways and the level of economic development is an example thereof. The United Nations classifies countries in three broad groupings, namely: developed countries, transitional countries and developing countries.<sup>26</sup> Transitional countries often have characteristics that can place them in more than one of the groupings.<sup>27</sup>

Developed countries can also be recognised as first world countries as they can be self-sufficient.<sup>28</sup> According to Sanford, some characteristics of developed countries include: a high standard of living and education, high Gross Domestic Product (GDP), an

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<sup>19</sup> Saget *Is the Minimum Wage an Effective Tool?* 5.

<sup>20</sup> Belman and Wolfson *What does the Minimum Wage do in Developing Countries?*1.

<sup>21</sup> The Telegraph 2014 <http://telegraph.co.uk>.

<sup>22</sup> BRICS 2016 <http://brics.co.za>.

<sup>23</sup> BRICS 2016 <http://brics.co.za>.

<sup>24</sup> Shaik and Narain 2011 *IPCSIT* 283.

<sup>25</sup> Shaik and Narain 2011 *IPCSIT* 283.

<sup>26</sup> United Nations 2012 <http://www.un.org>.

<sup>27</sup> United Nations 2012 <http://www.un.org>.

<sup>28</sup> Nations Online date unknown <http://nationsonline.org>.

efficient health care system,<sup>29</sup> sufficient and effective transportation and communications network, better housing conditions as well as living conditions and an established infrastructure regarding industrial development and technological advancement.<sup>30</sup>

Developing countries may also be regarded as third world countries.<sup>31</sup> These countries are typically experiencing the initial levels of industrial development, as well as a low per capita income. Developing countries mostly rely on the support of developed nations to establish industry across various sectors.<sup>32</sup> Some common characteristics of developing nations include: a low GDP, a poor education system with a high illiteracy rate,<sup>33</sup> a lack of a well-established transportation, communications and medical systems, unsustainable government departments, an unequal distribution of income, poor housing and living conditions and a high unemployment rate accompanied with a high birth rate.<sup>34</sup>

As is evident above, various differences exist between developed and developing countries. This is no different with regard to the monetary value of average or real wages.<sup>35</sup> A substantial difference, specifically with regard to minimum wages, is evident between developed and developing countries with average wages being considerably lower in developing countries as compared to developed countries.<sup>36</sup>

These differences are also evident horizontally (when comparing various developing countries with one another) between developing countries themselves. For example, on average, minimum wages are set much higher in China as compared to India while both are considered developing countries.<sup>37</sup> The vast differences in approach in terms of minimum wage policies between countries are at the core of the differentiation between the respective minimum wages. More consideration has been given to wages, and

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<sup>29</sup> Nielsen 2011 <http://imf.org>.

<sup>30</sup> Sanford *Developing Countries* 9.

<sup>31</sup> Nations Online date unknown <http://nationsonline.org>.

<sup>32</sup> Nations Online date unknown <http://nationsonline.org>.

<sup>33</sup> Nielsen 2011 <http://imf.org>.

<sup>34</sup> Sanford *Developing Countries* 9.

<sup>35</sup> ILO 2015 <http://ilo.org/global/publications>.

<sup>36</sup> ILO 2015 <http://ilo.org/global/publications>.

<sup>37</sup> SBP 2014 <http://rebosa.co.za>.

specifically minimum wages, in developing countries because of its assumed value in strategies to reduce poverty and inequality.<sup>38</sup>

It is therefore appropriate to focus on practices in selected countries that represent the emerging or developing nations, in determining how minimum wage policies vest within these countries in terms of legislative and other policy measures. This can be done by identifying broader international obligations ratified by the respective countries regarding minimum wages and then narrowing the discussion to national-specific measures or policies used, where applicable. Thereafter, possible merits or limits of the minimum wage policies and practices can be identified and discussed as based on the following criteria (that will be further discussed later in Chapter Two, to give the reader insight as to the importance and relevance of the criteria, as well as the perspective of the author):

- (a) determination of the minimum wage
- (b) coverage of the minimum wage, for example: national, sectoral or geographical minimum wage
- (c) the role of supplementary social measures, for example; social grants
- (d) adjustments of the minimum wage
- (e) monitoring compliance of the minimum wage
- (f) enforcement and consequences of non-compliance

Based on these criteria possible commonalities in terms of problems experienced or benefits realised can be identified. These commonalities could prove useful for other developing countries, including South Africa, in developing its own minimum wage policies and practices.

This study will therefore attempt to identify the international authority and measures responsible for determining an international standard regarding wages and specifically minimum wages. Furthermore, different examples of legislative frameworks concerning minimum wage will be identified and the minimum wage policies of selected developing countries will be discussed with reference to identified criteria. The effects of minimum

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<sup>38</sup> ILO 2015 <http://ilo.org/global/publications>.

wage policy will be considered in different contexts and sectoral determinations, in particular in the domestic worker sector, will also be discussed. The notion of a South African national minimum wage will then be deliberated with a brief consideration of the current national minimum wage proposal. Essentially the question arises whether or not minimum wage is the best manner to address the problems of inequality, poverty and unemployment and possible solutions are deliberated.

To summarise, this research sets out to evaluate (having regard of clearly identified criteria) minimum wage policies in various emerging countries in order to identify challenges and achievements, which might provide commonalities between countries and the opportunity to learn from each other. With the aforementioned deliberation as backdrop, the ultimate goal of this study is to provide recommendations to South Africa and other emerging countries regarding minimum wage policies.

Although developing countries share a number of characteristics there are also vast differences between the countries in terms of economic position, legal system and social environment that should be taken into account when considering wages, and specifically minimum wages.

## ***1.2 Methodology***

A critical review of both international and national literature provides a platform to reflect on, and evaluate, minimum wage policies and practices within certain developing countries. A critical review allows for the identification and analysis of the different legislative measures available and used to implement minimum wages.

International legislation as well as soft law relating to wages and specifically minimum wages are identified and reviewed, thus determining which of these international measures are ratified and implemented within the selected developing countries. The national measures used within developing countries are determined in terms of wage regulation, and specifically minimum wages.

Furthermore, the differences and similarities between the minimum wage policies and the possible benefits and limits thereof are explored. The socio-economic effects of these policies are emphasised in an attempt to grasp the potential influence and

consequences of such policies on the population of the country, in order to establish best practice.

Primary sources are predominantly used but where unavailable various secondary sources are used to ensure validity of the findings. Professional translation is utilised in instances where sources, especially primary sources, are of foreign origin.

### **1.3 Introduction**

Wages are a central aspect of work and is a profound incentive for people to work.<sup>39</sup> Wages refer to the most common earnings of people.<sup>40</sup> Consequently, people's livelihood and standard of living depend on the level at which wages are determined, and when and how wages are adjusted.<sup>41</sup>

Wages is a major component of overall consumption and a key factor in the economic performance of countries.<sup>42</sup> The enormous expansion of the labour force participating directly and indirectly in the international exchange of goods and services, and the rising interdependence of low, middle and high income countries, has squarely placed wages at the middle of the debate regarding globalisation.<sup>43</sup> A general trend is that wages have grown at a substantially slower pace than GDP per capita.<sup>44</sup> The majority of countries have demonstrated a decline in the share of national income that goes to wages, suggesting a lag between the growth in productivity and the growth in wages.<sup>45</sup> This implies that wages didn't increase in correlation with the increased productivity or income over time. Most countries also display an increase in wage inequality, with top wages tending to increase much faster than those of the large majority of lower income wage earners.<sup>46</sup>

In the global sphere we see more and more countries moving towards some sort of minimum wage principle. The effects of the 2007 financial crisis emphasised once again

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<sup>39</sup> ILO 2008 <http://ilo.org>.

<sup>40</sup> ILO 2008 <http://ilo.org>.

<sup>41</sup> ILO 2008 <http://ilo.org>.

<sup>42</sup> ILO 2008 <http://ilo.org>.

<sup>43</sup> ILO 2008 <http://ilo.org>.

<sup>44</sup> ILO 2008 <http://ilo.org>.

<sup>45</sup> ILO 2008 <http://ilo.org>.

<sup>46</sup> ILO 2008 <http://ilo.org>.

the vulnerability of workers, especially that of low income workers, who are more susceptible to fluctuations in wages.<sup>47</sup>

The notion of minimum wage can be defined as the lowest amount of remuneration an employer is required to pay the wage earner for work performed during a specific time period that cannot be reduced by collective agreement or an individual contract.<sup>48</sup> The amount is usually calculated on an hourly basis at an hourly rate and may differ across different economic sectors and regions, and even with regard to the age of the worker.

Minimum wages are set by governments and are commonly established by legislation. Legislation acts as means of price control, ensuring that employers in the formal sector, in which minimum wages apply, adhere to remunerating their workers no less than the prescribed minimum wage.<sup>49</sup> The aim of such measures is to reduce poverty and inequality.<sup>50</sup> Any compensation, which is less than the specified minimum wage could be unlawful and subject to certain penalties being imposed on the employer.

Governments use minimum wage laws in an effort to ensure a basic quality (standard) of life for all citizens within their borders.<sup>51</sup> From a South African perspective all rights enshrined in the Bill of Rights are rights bestowed upon "all people in our country".<sup>52</sup> All people, ranging from citizens to non-citizens within the borders of South Africa, are entitled to all rights in the Bill of Rights, including the right to fair labour practices.<sup>53</sup>

The ILO *Minimum Wage Fixing Convention no. 131*<sup>54</sup> states in Article 1 that each member state that ratified Convention No131:

Undertakes to establish a system of minimum wages which covers all groups of wage earners whose terms of employment are such that coverage would be appropriate.

The rights of any state that do not ratify such a system may be limited to citizens and legalised documented migrants only, depending on how the status of the individual is interpreted by the State.

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<sup>47</sup> ILO 2008 <http://ilo.org>.

<sup>48</sup> ILO 2016 <http://ilo.org/global/topics/wages/minimum-wages/definition>.

<sup>49</sup> Vitez 2015 <http://smallbusiness.chron.com>.

<sup>50</sup> ILO 2015 <http://ilo.org/global/publications>.

<sup>51</sup> Vitez 2015 <http://smallbusiness.chron.com>.

<sup>52</sup> Section 7 (1) of *The Constitution of the Republic of South Africa, 1996*.

<sup>53</sup> Section 23 (1) of *The Constitution of the Republic of South Africa, 1996*.

<sup>54</sup> *The Minimum Wage Fixing Convention 1970 no.131*.

Minimum wage laws attempt to improve an individual's quality of life in the lower economic income brackets.<sup>55</sup> The principle behind the concept is to seek an increased level of economic equality, rather than copious amounts of underpaid workers.<sup>56</sup> Minimum wage policies can thus be implemented in an attempt to narrow the wage gap between those workers at the top end of the pay scale and those workers at the very bottom of the pay scale.

The issue of minimum wage has been very controversial in political spheres. It has, however, not been received well by all economists, especially those who point out various possible dangers. Lawyers also have different perspectives on minimum wages with regards to social justice, freedom of contract and the right to fair labour practices.

Countries differ in their approach to both wages and minimum wages, which makes for some interesting comparison.

#### ***1.4 Arguments in support of versus arguments against the implementation of minimum wage***

##### *1.4.1 Arguments in support of the implementation of minimum wage*

A key function of the minimum wage policies is to protect workers at the lower end of the pay scale.<sup>57</sup> The minimum wage seeks to protect and uplift groupings such as women, undeclared and migrant workers, rural workers and uneducated workers that may be categorised as vulnerable workers because of their position in society and the labour market.<sup>58</sup>

Vulnerable workers often share characteristics such as "lower productivity, weak bargaining power, certain employment barriers (such as family care responsibilities) and are often paid less".<sup>59</sup> Soares<sup>60</sup> refers to this grouping of individuals as "the losers in the wage negotiation" and that the minimum wage has a more pronounced impact on them.

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<sup>55</sup> Eyraud and Saget *The Fundamentals* 40.

<sup>56</sup> Eyraud and Saget *The Fundamentals* 40.

<sup>57</sup> Margolis 2014 <http://www.wol.iza.org>.

<sup>58</sup> Soares *O impacto* 12.

<sup>59</sup> OECD 2015 <http://www.oecd.org/Focus-on-Minimum-Wages>.

<sup>60</sup> Soares *O impacto* 12.

An effective minimum wage may attract new workers that were not working before the introduction of the minimum wage.<sup>61</sup> The introduction of a minimum wage may make it worthwhile for new workers to enter the labour market as the minimum wage may represent an increased income.<sup>62</sup>

The minimum wage can also be instated as a valuable tool in combatting poverty because minimum wage constitutes a minimum floor for wages.<sup>63</sup> Workers are thus ensured of a decent wage that has the potential to meet their basic needs.

Minimum wage can act as an important measure in reducing wage inequality. Thus, the minimum wage reduces to some extent the vast differences that may exist in some countries between high versus low pay scale workers.

In South Africa the *Employment Equity Act* <sup>64</sup> states that every designated employer must submit an income differential statement on the remuneration and benefits received in each occupational category and level of that employer's workforce. If disproportionate income differentials are reflected in such statements then measures need be followed<sup>65</sup> to redress the issue and comply with sectoral determinations.<sup>66</sup>

As previously mentioned, wage inequality is to be expected in most economies, but various negative effects are evident from excessively high wage inequalities.

Minimum wage therefore assists in reducing inequality that may exist in the spheres of vulnerable workers, such as women or minority groups.<sup>67</sup>

The minimum wage furthermore also plays an important role in terms of geographical equality.<sup>68</sup> It is accepted that workers of urban regions generally earn higher wages than those working in rural regions. The minimum wage can assist in bringing more equality among workers of different geographical regions and areas within a country.<sup>69</sup>

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<sup>61</sup> Margolis 2014 <http://www.wol.iza.org>.

<sup>62</sup> Margolis 2014 <http://www.wol.iza.org>.

<sup>63</sup> De Melo et al 2012 *International Journal of Labour Research* 38.

<sup>64</sup> Section 27 (1) of the *Employment Equity Act* 55 of 1998 (EEA).

<sup>65</sup> Section 27 (2) EEA.

<sup>66</sup> Section 27 (3) (b) EEA.

<sup>67</sup> De Melo et al 2012 *International Journal of Labour Research* 38.

<sup>68</sup> De Melo et al 2012 *International Journal of Labour Research* 40.

<sup>69</sup> De Melo et al 2012 *International Journal of Labour Research* 40.

The minimum wage influences the income of the workers who are paid least. According to the lighthouse effect, also known as the ripple effect, the influence of the minimum wage applies across a broader spectrum than the traditional application thereof.<sup>70</sup> Self-employed workers, various enterprises, as well as parts of the informal sector are believed to use the minimum wage as a guideline in determining wages. Although minimum wages are applicable in the formal economy, it may have a positive influence on the informal economy as well since it may serve as a national benchmark for wages or minimum wages.<sup>71</sup>

Minimum wage policies create a floor, or prescribed legal minimum, to be paid to the lower pay spectrum of workers. Therefore, workers cannot be legally contracted for any amount less than the predetermined prescribed minimum wage. The implication is that employers are more inclined to keep the workers they have, and invest in them because of the fact that alternative cheaper workers cannot be legally obtained.<sup>72</sup>

Minimum wage can have an important role to play in terms of reducing staff turnover.<sup>73</sup> Employers invest in employees through costly developing and training programs, which in turn increases the productivity of these workers and, ultimately, the employer. Because of the financial implications of investing in new employees through development and training programs employers are more inclined to keep the current employees, resulting in a significant reduction in staff turnover.

Minimum wage policies may result in increased cost to employers in terms of workers and labour. This may lead to employers exploring new possibilities with regard to increasing productivity,<sup>74</sup> a major contributing factor to economic growth. It is possible that employers might extend working hours of workers in order to increase productivity.<sup>75</sup> This is in contrast to the argument that a minimum wage might reduce the working hours of workers because of the increased monetary value of a minimum wage.

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<sup>70</sup> ILO 2009 <http://ilo.org/americas/publicaciones>.

<sup>71</sup> Eyraud and Saget *The Fundamentals* 46.

<sup>72</sup> De Melo et al 2012 *International Journal of Labour Research* 39.

<sup>73</sup> De Melo et al 2012 *International Journal of Labour Research* 40.

<sup>74</sup> Belman and Wolfson *What does the Minimum Wage do in Developing Countries?* 118.

<sup>75</sup> Bhorat, Kanbur and Stanwix 2012 <http://dpru.uct.ac.za/wp-12149-estimating-impact-minimum-wages-employment-wages-and-non-wage-benefits-case-agriculture>.

Finally, an effective minimum wage may assist in establishing a "stable wage floor"<sup>76</sup> which may "attract foreign investment, as multinationals desire information and stability before investing".<sup>77</sup>

#### *1.4.2 Arguments against the implementation of minimum wage*

Arguments against the implementation of minimum wage are primarily rooted in the fact that the minimum wage is counterproductive because of the unemployment it creates as a result of the increase in wages.<sup>78</sup> Moreover, loss of employment in the formal economy and an increase in copious amounts of workers in the arguably less regulated informal economy are major concerns.<sup>79</sup> Copious amounts of additional workers in the informal economy could further depress wages in this part of the economy.<sup>80</sup>

Minimum wage, in practice, is regarded as production cost.<sup>81</sup> From this perspective the negative effects of employment in regards to increases of the minimum wage are evident.<sup>82</sup> Minimum wages, or increases in the minimum wage, can also result in employers looking at alternative cost saving measures besides laying off workers. For example, measures such as reduced working hours may also prove to be counterproductive. Some economists also point out possible intrusion of the free market principle, which has particular consequences in terms of international competitiveness.<sup>83</sup>

Because of the fact that wages are set in a minimum wage policy it is argued that the performance of the employee might be discouraged, resulting in a loss of productivity. This argument is based on the assumption that the employee knows that he cannot be remunerated below a certain legally specified minimum and as such the worker decreases his productivity.

Because of the increased organisational costs that a minimum wage might represent, employers might be inclined to limit or stop development and training programs because

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<sup>76</sup> Margolis 2014 <http://www.wol.iza.org>.

<sup>77</sup> Margolis 2014 <http://www.wol.iza.org>.

<sup>78</sup> Wilson 2012 <http://downsizinggovernment.org/labor/negative-effects-minimum-wage-laws>.

<sup>79</sup> De Freitas Barbosa & others 2011 <http://justjobsnetwork.org>.

<sup>80</sup> Saget *Is the Minimum Wage an Effective Tool* 6.

<sup>81</sup> Eyraud and Saget *The Fundamentals* 48.

<sup>82</sup> Eyraud and Saget *The Fundamentals* 48.

<sup>83</sup> Smith 2016 <http://fin24.com>.

of the associated cost implication. Thus affecting the productivity of those undeveloped and untrained workers.<sup>84</sup>

It can also be argued that minimum wage promotes illegal or undeclared hiring.<sup>85</sup> This implies that workers are hired without adhering to the minimum wage or its associated protective regulations. In turn, these workers are in a less favourable position because of the minimum wage.

The effectiveness of a minimum wage policy as an income distribution policy is also questioned by some. The minimum wage is limited to workers or employees who are actually remunerated. In countries like South Africa there is a high percentage of unemployment, which effectively implies that the unemployed are automatically excluded from the potential benefits associated with a minimum wage.<sup>86</sup>

It is also argued that a minimum wage or an increase of the minimum wage may increase inflation,<sup>87</sup> thus potentially neutralising the effect of the minimum wage.

There are concerns that increases in the minimum wage may be a source of inflation in both the developed and developing economies.<sup>88</sup>

It sometimes happens that wages in kind can be used as a source of exploitation.<sup>89</sup> Practically this takes place when some employers deduct the cost of food and lodging from salaries, particularly in cases where those workers rely on a minimum wage and are vulnerable and poor.<sup>90</sup> Countries that have legislative provisions in this regard are on the lower end of the scale and many of those legislative provisions would need to be clarified. Such legislative provisions should be monitored more closely to ensure compliance.<sup>91</sup>

According to Section 1 of the *Basic Conditions of Employment Act*<sup>92</sup> (BCEA) remuneration is payment (in money or kind or both) made to an individual in return for

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<sup>84</sup> Wilson 2012 <http://downsizinggovernment.org/labor/negative-effects-minimum-wage-laws>.

<sup>85</sup> De Melo et al 2012 *International Journal of Labour Research* 41.

<sup>86</sup> Eyraud and Saget *The Fundamentals* 46. Unemployment Benefits in South Africa are calculated in terms of Section 13 of the *Unemployment Insurance Act* 63 of 2001 and is not linked to minimum wage.

<sup>87</sup> De Melo et al 2012 *International Journal of Labour Research* 40.

<sup>88</sup> Belman & Wolfson 2016 *What does minimum wage do in developing countries?* 22.

<sup>89</sup> Eyraud and Saget *The fundamentals* 46.

<sup>90</sup> Eyraud and Saget *The fundamentals* 46.

<sup>91</sup> Eyraud and Saget *The fundamentals* 46.

<sup>92</sup> Basic Conditions of Employment Act 75 of 1997 as amended 2013.

work done. The Minister of Labour may determine by means of publication in the Government Gazette, which payments (whether in kind or in money) form part of the employees' remuneration.<sup>93</sup> Deductions from employees' salaries are specified in Section 34 of the *BCEA*<sup>94</sup> and is accordingly allowed for in instances where the employee gives written consent for deductions from his salary for any amount due and also where deductions are required or permitted by law, arbitration award, court order or collective agreement.<sup>95</sup>

It is often suggested that an increase of the minimum wage should be curbed in order to ensure that there is no increase in the unemployment rate as it, in turn, could result in the minimum wage being meaningless.<sup>96</sup>

### **1.5 Conclusion**

It is evident that the minimum wage as a policy developed from the recognition of certain problems in society such as inequality, unemployment and poverty. These problems are not country exclusive, but rather globalised problems that various countries face in various degrees. Therefore, it could prove useful for countries to share experiences and learn from these experiences. As is evident from the aforementioned discussion minimum wage is associated with various favourable and unfavourable elements.

It may prove useful to establish in the following chapter whether any international legal measures exist regarding wage and minimum wages and if so how are they ratified or adopted by the respective countries. This might assist in establishing the international position regarding minimum wage policies.

The criteria considered in this study regarding minimum wage policies will be further discussed as to provide a better understanding in terms of the importance thereof, the various methods or approaches thereof as well as to identify the international perspective regarding those criteria.

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<sup>93</sup> Section 35 (5) of the *BCEA*.

<sup>94</sup> Basic Conditions of Employment Act 75 of 1997 as amended 2013.

<sup>95</sup> Section 34 (1) *BCEA*.

<sup>96</sup> Eyraud and Saget *The fundamentals* 48.

## **CHAPTER 2: International measures regarding wage, and specifically minimum wage**

The International Labour Organisation (ILO) was established in 1919 to set a international standard for labour practices because of the inequality and injustice that then existed and still persists in the labour market.<sup>97</sup> The ILO sets the standard for labour practices through conventions and recommendations that are drawn up and adopted by workers, employers and governments represented in the ILO.<sup>98</sup> Conventions, if ratified, are legally binding, whilst recommendations are non-binding guidelines used in coherence with conventions so as to provide more specific guidelines in relation to conventions.<sup>99</sup> The combination of conventions and recommendations of the ILO asserts guidelines for an international labour code. It is important to note, however, that the *ILO Constitution* states in section 19 (8) that if the ratified convention or adopted recommendation has less favourable conditions (in respect to workers) than the "law, award, custom or agreement," of the particular country, then the more favourable provisions would have effect.

### ***2.1 The process of ratifying conventions and adopting recommendations***

ILO conventions and recommendations are brought to existence through the facilitation of the International Labour Conference. Within one year (or 18 months if exceptional conditions exist) new conventions or recommendations need to be presented to the competent authority tasked with ratifying legislation.<sup>100</sup> If the convention is approved such notice need to be given to the Director General of the ILO and action to adopt the provisions of the convention need to be taken.<sup>101</sup> Consultation between various stakeholders must be facilitated and any conflict that may arise between a convention and the country's internal laws needs to be eliminated.

In terms of consultation it is essential to explain the *Tripartite Consultation Recommendation 1976, No. 152*. This recommendation states that both workers and

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<sup>97</sup> ILO date unknown <http://ilo.org/global/standards/introduction-to-international-labour-standard/need-for-social-justice>.

<sup>98</sup> ILO date unknown <http://ilo.org>.

<sup>99</sup> ILO date unknown <http://ilo.org>.

<sup>100</sup> Article 19 Section 5 (b) *International Labour Organisation Constitution*.

<sup>101</sup> Article 19 Section 5 (d) *International Labour Organisation Constitution*.

employers should be ruminated in the implementation and preparation of legislation before giving effect to conventions and recommendations. The Director General of the ILO needs to be informed of the action taken to effect a recommendation.<sup>102</sup>

Non-ratification of a convention places no obligation on the country in terms of the specific convention, except to report to the Director General of the ILO on the consideration given to such convention through "legislation, administrative action, collective agreement or otherwise".<sup>103</sup> The report must include reasons or difficulties that prevent the ratification of the particular convention in that specific country.<sup>104</sup> It is important to note that even though a convention may not be ratified by a particular state, the convention still has a role to play in effecting the legislation in correlation with the values and principles of the convention.

In terms of recommendations, the recommendation has to be brought to the attention of the competent authority tasked with legislative functions. Besides having this responsibility the member country would have to report to the Director General of the ILO at certain intervals regarding the extent to which the recommendation has been given effect in the member country.<sup>105</sup>

## ***2.2 Supervisory role of the ILO***

Enforcement is done by means of two mechanisms: firstly, the reporting mechanism and secondly, the complaints mechanism.

### *2.2.1 Compliance through reporting*

Once a convention is ratified the country has to report annually to the International Labour Office regarding the application of the ratified convention.<sup>106</sup> The same is applicable in terms of non-ratified conventions which have to be reported at regular intervals. Finally, member countries also need to report on recommendations indicating:

The position of the law and practice in their country in regard to the matters dealt with in the recommendation, showing the extent to which effect has been given or is proposed to be

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<sup>102</sup> Article 19 Section 6 (c) *International Labour Organisation Constitution*.

<sup>103</sup> Article 19 Section 5 (e) *International Labour Organisation Constitution*.

<sup>104</sup> Article 19 Section 5 (e) *International Labour Organisation Constitution*.

<sup>105</sup> Article 19 Section 6 (d) *International Labour Organisation Constitution*.

<sup>106</sup> Article 22 *International Labour Organisation Constitution*.

given, to the provisions of the recommendation and such modification of these provisions as it has been found or may be found necessary to make in adopting or applying them.<sup>107</sup>

The Governing Body of the ILO will determine the frequency of intervals between reports. ILO conventions are not automatically binding to all member countries. Conventions first need to be ratified by the respective countries. As mentioned in chapter 2.1 the onus is on the specific country to present the convention and recommendation to the relevant competent authority within the country responsible for implementation of the conventions and recommendations. The competent authority in this context refers to the authorities responsible for legislative decisions.

### *2.2.2 Compliance through complaints*

Complaints can either be lodged at the ILO against the state by workers or employers organisations,<sup>108</sup> or a complaint can be filed by one state against another state.<sup>109</sup>

In the event of receiving such a complaint, the Governing Body of the ILO may communicate the complaint to the particular member country in question. The said country should then respond by furnishing a statement regarding the complaint.<sup>110</sup> Alternatively, the Governing Body of the ILO may mandate a commission of inquiry to give due consideration to the complaint and furnish a report on the complaint received, following an investigation.<sup>111</sup>

After the completion of the investigation the commission may make certain recommendations within the report with regards to the non-compliance.<sup>112</sup> The ILO member country against whom the complaint has been lodged will have to "inform the Director General of the ILO whether or not it accepts the recommendations contained in the report of the commission; and if not, whether it proposes to refer the complaint to the International Court of Justice".<sup>113</sup>

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<sup>107</sup> Article 19 (6) (d) *International Labour Organisation Constitution*.

<sup>108</sup> Article 24 *International Labour Organisation Constitution*.

<sup>109</sup> Article 26 *International Labour Organisation Constitution*.

<sup>110</sup> Article 24 *International Labour Organisation Constitution*.

<sup>111</sup> Article 26 (3) *International Labour Organisation Constitution*.

<sup>112</sup> Article 28 *International Labour Organisation Constitution*.

<sup>113</sup> Article 29 (2) *International Labour Organisation Constitution*.

The decision of the International Court of Justice would be final<sup>114</sup> and the Court may "affirm, vary or reverse any of the findings or recommendations of the Commission of Inquiry".<sup>115</sup> If the defaulting member country fails to comply with either the Commission of Inquiry recommendations or the decision of the International Court of Justice, then the Governing Body may make certain recommendations to the International Labour Conference as to "such action as it may deem wise and expedient to secure compliance therewith".<sup>116</sup>

The last-mentioned statement allows the ILO broad authority in dealing with instances of non-compliance. As such the utilisation of economic measures may be used to affect compliance to ratified conventions.<sup>117</sup> However such measures are rarely utilised by the ILO which indicates an:<sup>118</sup>

...unwillingness of the ILO membership to punish miscreants, even when the country in question is a small, poor, isolated one whose violations are egregious and well documented.

Last mentioned statement is reason for concern as it renders the ILO as the "proverbial toothless tiger".<sup>119</sup>

### **2.3 Conventions and recommendations**

As mentioned in the introduction of chapter 2 conventions and recommendations of the ILO are utilised in establishing an international standard pertaining to labour. The ILO has determined eight fundamental conventions as core standards or "fundamental principles and rights at work".<sup>120</sup> The injustice and inequality in the labour market is a result of significant economic growth associated with globalisation and is of great concern to all countries. In 1919 it was recognised by the founders of the ILO that the "global economy needed clear rules in order to ensure that economic progress would go

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<sup>114</sup> Article 31 *International Labour Organisation Constitution*.

<sup>115</sup> Article 32 *International Labour Organisation Constitution*.

<sup>116</sup> Article 33 *International Labour Organisation Constitution*.

<sup>117</sup> Elliot and Freeman *Peterson Institute for International Economics* 103; Before the amendment of the ILO Constitution in 1946, Article 33 made specific provision for the utilisation of economic measures in dealing with non-compliance.

<sup>118</sup> Elliot and Freeman *Peterson Institute for International* 106.

<sup>119</sup> Elliot and Freeman *Peterson Institute for International* 102.

<sup>120</sup> ILO date unknown <http://ilo.org>.

hand in hand with social justice, prosperity and peace for all".<sup>121</sup> Conventions and recommendations are utilised in an attempt to achieve social justice.

These ILO conventions are of consideration to wages and specifically minimum wages;

- (i) *The Minimum Wage Fixing Convention no 26*:<sup>122</sup> This is an instrument with interim status. This convention aims to "create or maintain the machinery whereby minimum wage rates and wages can be fixed for workers in certain trades where no arrangements exist for the effective regulation of wages by collective agreement or otherwise and where wages are exceptionally low".<sup>123</sup>
- (ii) *The Labour Inspection Convention no. 81*:<sup>124</sup> This convention is included in the discussion because of the fact that labour inspectors are commonly used to ensure the protection of workers' rights, including the compliance to minimum wage. This convention consists of various comprehensive elements associated with labour inspection. Included are the functions of labour inspections,<sup>125</sup> the control of an inspection system under a central authority,<sup>126</sup> the number of labour inspectors required,<sup>127</sup> the rights of labour inspectors,<sup>128</sup> to name but a few of the elements dealt with in the convention.
- (iii) *The Labour Inspection (Agriculture) Convention no.129*:<sup>129</sup> This convention may show similarities to Convention No. 81, with the fundamental difference being the focus of labour inspection in the agricultural sector, more specifically the focus on "cultivation, animal husbandry (including livestock production and care), forestry, horticulture, the primary processing of

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<sup>121</sup> ILO date unknown <http://ilo.org/global/standards/introduction-to-international-labour-standard/need-for-social-justice>.

<sup>122</sup> *The Minimum Wage Fixing Convention 1928 no 26.*

<sup>123</sup> Article 1 (1) *The Minimum Wage Fixing Convention 1928 no 26.*

<sup>124</sup> *The Labour Inspection Convention 1947 no. 81.*

<sup>125</sup> Article 3 *The Labour Inspection Convention 1947 no. 81.*

<sup>126</sup> Article 4 *The Labour Inspection Convention 1947 no. 81.*

<sup>127</sup> Article 10 *The Labour Inspection Convention 1947 no. 81.*

<sup>128</sup> Article 12 *The Labour Inspection Convention 1947 no. 81.*

<sup>129</sup> *The Labour Inspection (Agriculture) Convention 1969 no.129.*

agricultural products by the operator of the holding or any form of agriculture activity".<sup>130</sup>

- (iv) *The Protection of Wages Convention no.95*:<sup>131</sup> This convention, when ratified, applies to all persons (i.e. wider than the traditional notion of employees) to whom wages are paid, to ensure that wages are paid and utilised in such a manner as to protect the recipient thereof.
- (v) *The Minimum Wage Fixing Machinery (Agriculture) Convention no.99*:<sup>132</sup> The undertaking of this convention holds that adequate machinery must be created or maintained whereby minimum wage rates of wages can be fixed for workers employed in agricultural undertakings and related occupations.
- (vi) *The Equal Remuneration Convention no.100*:<sup>133</sup> This convention is classified as a fundamental convention and forms part of eight other fundamental conventions. This convention sets out the principle of equal remuneration for men and women workers for work of equal value and it can be adopted through legislation, collective bargaining or any other system or combination thereof to determine wages.
- (vii) *The Minimum Wage Fixing Convention no.131*:<sup>134</sup> This convention protects wage earners against unduly low wages and pays special regard to the needs of developing countries.
- (viii) *The Labour Administration Convention no.150*:<sup>135</sup> This convention deals with the administration of the national labour policy. Included is the delegation of labour administration activities and the effective operation of labour administration within regions. Provision is made for the consultation of the labour policy between various interested parties and the review thereof. Specific focus is awarded to coordination between various interest bearing parties to assist in determining a national labour policy.

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<sup>130</sup> Article 1 *The Labour Inspection (Agriculture) Convention 1969 no.129*.

<sup>131</sup> *The Protection of Wages Convention 1949 no.95*.

<sup>132</sup> *The Minimum Wage Fixing Machinery (Agriculture) Convention 1951 no.99*.

<sup>133</sup> *The Equal Remuneration Convention 1951 no.100*.

<sup>134</sup> *The Minimum Wage Fixing Convention 1970 no.131*.

<sup>135</sup> *The Labour Administration Convention 1978 no.150*.

The following ILO recommendations are relevant to wages, and specifically minimum wages, and provide specific guidelines in terms of practical considerations over conventions:

- (i) *The Labour Inspection Recommendation no. 81:*<sup>136</sup> The recommendation is included in the list of recommendations as per fact that labour inspectors are responsible for the compliance to legislation with regards to wages, and specifically minimum wages. Emphasis is placed on collaboration between employers and workers with regard to safety and health. Labour inspectors are also excluded from acting as arbitrators or conciliators in labour disputes. The recommendation lists elements that need to be supplied with the annual reports compiled by each labour inspector.
- (ii) *The Labour Clauses (Public Contracts) Recommendation no. 84:*<sup>137</sup> The recommendation determines that private employers receiving subsidies or operating a public utility should apply similar provisions as "those of the labour clauses in public contracts".<sup>138</sup> Labour clauses in public contracts should include: wages for all categories of wages,<sup>139</sup> the "manner in which hours of work are to be regulated"<sup>140</sup> and "holiday and sick leave provisions".<sup>141</sup> The essence of this recommendation is to protect the rights of the wage earner through the provision therefore in contract.
- (iii) *The Protection of Wages Recommendation no. 85:*<sup>142</sup> This convention states that deductions from wages should be limited and should only be instituted under certain conditions whilst being fair and reasonable towards the employee at all instances. Provision is also made for the periodic payments of wages to the employee in a timeous manner. Provision is made for the worker to be made aware of certain basic wage conditions of his/her employment such as: rate, method and periodicity of wages. Workers are entitled to wage statements containing certain basic information and employers have a duty to maintain

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<sup>136</sup> *The Labour Inspection Recommendation 1947 no. 81.*

<sup>137</sup> *The Labour Clauses (Public Contracts) Recommendation 1949 no. 84.*

<sup>138</sup> Article 1 *The Labour Clauses (Public Contracts) Recommendation 1949 no. 84.*

<sup>139</sup> Article 2 (a) *The Labour Clauses (Public Contracts) Recommendation 1949 no. 84.*

<sup>140</sup> Article 2 (b) *The Labour Clauses (Public Contracts) Recommendation 1949 no. 84.*

<sup>141</sup> Article 2 (c) *The Labour Clauses (Public Contracts) Recommendation 1949 no. 84.*

<sup>142</sup> *The Protection of Wages Recommendation 1949 no. 85.*

records of workers. Lastly the recommendation encourages the association of bodies/committees representing the workers.

- (iv) *The Minimum Wage Fixing Recommendation no.135*:<sup>143</sup> The purpose of minimum wage fixing should be to provide social protection in terms of the "minimum permissible levels of wages".<sup>144</sup> Certain criteria are provided for determining minimum wage levels. The non-coverage of workers by a minimum wage system should be limited. Coverage of a minimum wage can either be instituted as a single minimum wage or as various minimum wages implemented for different groups. Additional guidelines are provided in the various *Minimum Wage Fixing Machinery*.<sup>145</sup> Sections 11 to 13 address issues related to the adjustment of minimum wages whilst minimum wage enforcement measures are provided for in Section 14.<sup>146</sup>
- (v) *The Minimum Wage Fixing Machinery Recommendation no.30*:<sup>147</sup> This recommendation is an instrument with interim status. The recommendation provides "general principles which, as present practice and experience show, produce the most satisfactory results".<sup>148</sup> Minimum wage fixing methods, referred to as machinery, should allow for investigation into the relevant conditions as well as for consultation with effected parties. "A suitable standard of living"<sup>149</sup> should be maintained when determining a minimum wage. A review of minimum wage should be provided for.<sup>150</sup> To ensure compliance to the minimum wage countries should make workers and employers aware of the specific minimum wages applicable,<sup>151</sup> and monitor them to ensure that the correct rates are being paid by means of labour inspectors.<sup>152</sup> Provision should be made for certain penalties in the event of non-compliance to the minimum wage and measures must be instituted for preventing non-compliance. It is recommended that the minimum wage rates be displayed by employers at the work premises, as to promote

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<sup>143</sup> *The Minimum Wage Fixing Recommendation 1970 no.135.*

<sup>144</sup> Section I (2) *The Minimum Wage Fixing Recommendation 1970 no.135.*

<sup>145</sup> *The Minimum Wage Fixing Machinery Recommendation 1928 no.30.*

<sup>146</sup> *The Minimum Wage Fixing Recommendation 1970 no.135.*

<sup>147</sup> *The Minimum Wage Fixing Machinery Recommendation 1928 no.30.*

<sup>148</sup> Part A *The Minimum Wage Fixing Machinery Recommendation 1928 no.30.*

<sup>149</sup> III *The Minimum Wage Fixing Machinery Recommendation 1928 no.30.*

<sup>150</sup> III *The Minimum Wage Fixing Machinery Recommendation 1928 no.30.*

<sup>151</sup> IV (1) *The Minimum Wage Fixing Machinery Recommendation 1928 no.30.*

<sup>152</sup> IV (2) *The Minimum Wage Fixing Machinery Recommendation 1928 no.30.*

awareness thereof. Inspectors should be utilised in sufficient numbers as to effectively determine compliance among employers. Workers should be able to recover due minimum wages in appropriate measures. Women should receive equal remuneration to men in terms of the work done.<sup>153</sup>

- (vi) *The Minimum Wage Fixing Machinery (Agriculture) Recommendation 1951, No.89*.<sup>154</sup> This recommendation is an instrument with interim status. The recommendation correlates with *The Minimum Wage Fixing Machinery Recommendation 1928, No.30*, with specific reference to agriculture.

#### **2.4 International court decisions**

An example of where ILO conventions were used in giving judgement in matters regarding wages, and specifically minimum wages, was in the 2009 case of *Worokuy Esaie v. Clinique des Genêts*<sup>155</sup> in Burkina Faso. The employee claimed remuneration for a specified amount, but was unable to prove that such remuneration was agreed to between the employee and the employer. The court held that in the absence of an agreed remuneration rate the employee was still entitled to the relevant minimum wage. The court applied *The Minimum Wage Fixing Convention no 26* <sup>156</sup> article 4 (2) which states that a worker who has been paid wages at less than the rates applicable to them would be entitled to recover, by judicial proceedings, the amount by which he has been underpaid.

The court then held that the employee was entitled to the difference between the remuneration he actually received and the specified remuneration as established through the minimum wage policy for the time period that he was employed by the employer.

Another example where ILO conventions were used in giving judgement occurred in the *Zongo v. Owner of the Bataille du Rail Mobil Garage*<sup>157</sup> case, also in Burkina Faso. A summary of the facts are that three employees were dismissed without notice and without reason. The matter was referred to labour inspection, but no settlement could be

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<sup>153</sup> Part B *The Minimum Wage Fixing Machinery Recommendation 1928 no.30*.

<sup>154</sup> *The Minimum Wage Fixing Machinery (Agriculture) Recommendation 1951 no.89*.

<sup>155</sup> *Worokuy Esaie v Clinique des Genêts* 2009 08 of 8 January 2009.

<sup>156</sup> *The Minimum Wage Fixing Convention 1928 no 26*.

<sup>157</sup> *Zongo v Owner of the Bataille du Rail Mobil garage* 2003 90 of 17 June 2003.

reached. Ultimately, the matter was referred to the labour court where the court decided that the employment loss of the employees was unlawful. Furthermore, the employees claimed "outstanding wages because of failure to respect fixed minimum wages for their job category".<sup>158</sup> The wages paid to the employees were below the specified minimum wage rate. *The Minimum Wage Fixing Convention no 26*<sup>159</sup> in article 3 (3) determines that:

Minimum wage rates of wages which have been fixed shall be binding on the employers and the workers concerned; they are not to be lowered by them, neither by individual agreement or, except with the authorisation of the competent authority, by collective agreement.

*The Minimum Wage Fixing Convention no.131*<sup>160</sup> provides that "minimum wages shall have the force of law and shall not be subject to abatement".<sup>161</sup> Burkina Faso ratified both Conventions No. 26 and No. 131. The court held that fixed minimum wage rates had to be adhered to. The judgement held that the three employees were entitled to the amount of which they had been underpaid. According to *Minimum Wage Fixing Convention no 26*<sup>162</sup> article 4, the actual remuneration received would have to be deducted from the determined minimum wage and the difference paid to the employees with due consideration for the time period they had been employed by the employer.

## **2.5 Relevant criteria for this analysis**

The aforementioned international instruments will be discussed in relation to the criteria as stipulated below.

First, the minimum wage policies of the developing countries may be analysed in terms of the relevant criteria. Such criteria represent a policy choice made by any particular country and is used to give effect to and thus implement minimum wage.

### **2.5.1.1 Determination of the minimum wage**

The determination of a minimum wage refers to the monetary level at which minimum wage is set.

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<sup>158</sup> *Zongo v Owner of the Bataille du Rail Mobil garage* 2003 90 of 17 June 2003.

<sup>159</sup> *The Minimum Wage Fixing Convention 1928 no 26.*

<sup>160</sup> *The Minimum Wage Fixing Convention 1970 no.131.*

<sup>161</sup> Article 2 *The Minimum Wage Fixing Convention 1970 no.131.*

<sup>162</sup> *The Minimum Wage Fixing Convention 1928 no 26.*

This issue is central to policy makers, both those in countries which do not have a minimum wage but are considering its implementation, and in countries which already have a minimum wage and make a choice about changing its level.<sup>163</sup>

Not only does the initial determination of a minimum wage serve as a "starting point for future adjustments, but it can also serve as the reference point for other tax and transfer system parameters, such as social assistance benefits or payroll taxes".<sup>164</sup> Brazil serves as an example of a country where there is correlation between the minimum wage and the social assistance benefits, but this notion will be discussed further under 3.2.3.

The *Minimum Wage Fixing Convention No.131*<sup>165</sup> determines that workers and employer organisations as well as experts in the field should form part of the minimum wage fixing/determination process. Article 3<sup>166</sup> states that the following elements should be taken into account in minimum wage determination:

- (i) the needs of workers;
- (ii) acknowledging the general wages in the country;
- (iii) living costs;
- (iv) social security benefits and
- (v) the relative living standards.

Article 3 (b)<sup>167</sup> lists economic elements to be taken into account;

- (i) the requirements for economic development;
- (ii) productivity levels and
- (iii) the desirability of attaining and maintaining a high level of employment.

Noteworthy from the above mentioned elements is that both worker and economic needs are to be taken into account in determining a minimum wage.

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<sup>163</sup> Belman and Wolfson *What does the Minimum Wage do in Developing Countries?* 23.

<sup>164</sup> Kristensen and Cunningham 2006 <http://hdl.handle.net/10986/8337>.

<sup>165</sup> *The Minimum Wage Fixing Convention 1970 no.131*.

<sup>166</sup> *The Minimum Wage Fixing Convention 1970 no.131*.

<sup>167</sup> *The Minimum Wage Fixing Convention 1970 no.131*.

Article 4<sup>168</sup> states that provision should be made for the fixing/determination and adjustment of minimum wages, as may be necessary from time to time. Article 5<sup>169</sup> determines that measures be taken to ensure the effective realisation of minimum wage policies. Last mentioned article refers to enforcement of minimum wage policies to ensure compliance thereto.

*The Minimum Wage Fixing Recommendation no.135*<sup>170</sup> Section 6, contains the numerous Minimum Wage Fixing Machinery which can be used in specifying the fixing of minimum wages, based on:

- (a) statute;
- (b) "decisions of the competent authority, with or without formal provision for taking account of recommendations from other bodies";<sup>171</sup>
- (c) "decisions of wages boards or council";<sup>172</sup>
- (d) "industrial or labour courts or tribunals"<sup>173</sup> and
- (e) terms of collective agreements binding by law.

In the process of fixing or determining minimum wages there are usually numerous role players and it's not limited to stakeholders such as the trade unions, employers organisations and the government.<sup>174</sup> *The Minimum Wage Fixing Machinery Recommendation no.30*<sup>175</sup> states in Part II that the economic conditions should be investigated in conjunction with active consultation with various interested parties, to provide accurate information for the determination of appropriate minimum wages. The minimum wage policy should be accepted and endorsed by the public. This emphasises the importance of thorough consultation between the various parties and stakeholders.<sup>176</sup>

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<sup>168</sup> *The Minimum Wage Fixing Convention 1970 no.131.*

<sup>169</sup> *The Minimum Wage Fixing Convention 1970 no.131.*

<sup>170</sup> *The Minimum Wage Fixing Recommendation 1970 no.135.*

<sup>171</sup> Section 6 (b) *The Minimum Wage Fixing Recommendation 1970 no.135.*

<sup>172</sup> Section 6 (c) *The Minimum Wage Fixing Recommendation 1970 no.135.*

<sup>173</sup> Section 6 (d) *The Minimum Wage Fixing Recommendation 1970 no.135.*

<sup>174</sup> Eyraud and Saget *The fundamentals* 24.

<sup>175</sup> *The Minimum Wage Fixing Machinery Recommendation 1928 no.30.*

<sup>176</sup> Margolis 2014 <http://www.wol.iza.org>.

*The Minimum Wage Fixing Recommendation no.135*<sup>177</sup> (IV) emphasises the role of consultation in the minimum wage fixing process with specific reference to:

- (a) the criteria used in minimum wage determination;
- (b) the rate of minimum wages;
- (c) the adjustments of minimum wages;
- (d) problems in the enforcement of legislation with reference to minimum wage and
- (e) the "collection of data and carrying out of studies"<sup>178</sup> that provide information useful in the minimum wage fixing process.

Institutions or bodies are often tasked with the gathering of reliable information which can then be utilised in determining or setting of a minimum wage.

In the South African context, the Employment Conditions Commission (ECC) plays a prominent role in this regard. It is important that institutions or bodies like the ECC make "well-reasoned decisions on the level of the minimum wage and when to adjust it".<sup>179</sup> Academia or other specialists with expertise in the field should also be consulted when making such determinations.<sup>180</sup> In South Africa the National Economic Development and Labour Council (NEDLAC) is also an institution tasked to consider "all proposed labour legislation".<sup>181</sup> NEDLAC will be expected to play a prominent role regarding the current discussion about the South African national minimum wage.

Stakeholders all represent different interests and between them they have to find a middle ground in terms of determining a specific minimum wage. Minimum wage that is set too high might result in non-compliance or job losses.<sup>182</sup> If the minimum wage is set too low it might render such measures meaningless.<sup>183</sup> The transparent and legitimate

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<sup>177</sup> *The Minimum Wage Fixing Recommendation 1970 no.135.*

<sup>178</sup> Part IV (7) (e) *The Minimum Wage Fixing Recommendation 1970 no.135.*

<sup>179</sup> Margolis 2014 <http://www.wol.iza.org>.

<sup>180</sup> Margolis 2014 <http://www.wol.iza.org>.

<sup>181</sup> Section 2.2 *NEDLAC Founding Declaration.*

<sup>182</sup> Rani *et al* 2013 *International Labour Review* 396.

<sup>183</sup> Rani *et al* 2013 *International Labour Review* 396.

determination of the minimum wage plays a significant role in the achieved compliance thereto and may be seen as the first step in achieving compliance.<sup>184</sup>

Predominantly two methods are used in determining the minimum wage and will be discussed in the following paragraphs: Firstly, by identifying the basic needs of workers and then determining a minimum wage as to attain such basic needs. Secondly by determining the minimum wage in accordance with the lowest or average wages.

The *Minimum Wage-Fixing Machinery Recommendation no. 30*<sup>185</sup> recommends that minimum wage fixing mechanisms (machinery) should take into account a minimum wage that can "maintain a suitable standard of living". One method used in determining the minimum wage rate is by covering the basic needs of workers.<sup>186</sup> The success of this method is reliant on an accurate determination of the basic living costs, which can be problematic due to the scarcity of living cost statistics in many developing countries.<sup>187</sup> Another possible problematic issue is the fact that the basic living costs vary from region to region, with urban areas tending to be more expensive than rural areas.<sup>188</sup>

Whether or not the worker should be considered as the sole wage earner for the household and the question about the descendants can be problematic issues considering the fact that different countries have different norms regarding extended families and family size.<sup>189</sup>

When determining a minimum wage rate, it could be helpful for countries to determine factors such as the number of descendants in a household and the number of working individuals within a household. The minimum wage can then be adjusted accordingly. For example: if it is established that the average household in a specific country has four descendants and only one working individual earning a minimum wage, then the minimum wage earnings of the only working individual would to a great extent have to sustain the entire household. In such circumstances the minimum wage would have to be determined higher as to sustain the household. A decreased minimum wage could

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<sup>184</sup> Benassi *The implementation of minimum wage: challenges and creative solutions* 28.

<sup>185</sup> Part III *The Minimum Wage Fixing Machinery Recommendation 1928 no.30*.

<sup>186</sup> Eyraud and Saget *The fundamentals* 24.

<sup>187</sup> Eyraud and Saget *The fundamentals* 24.

<sup>188</sup> Eyraud and Saget *The fundamentals* 24.

<sup>189</sup> Eyraud and Saget *The fundamentals* 24.

be utilised in circumstances with less descendants and more individuals working and earning a minimum wage.

A further method in determining a minimum wage rate is by taking wage statistics into consideration and determining the minimum wage rate on the lowest and average wage rates.<sup>190</sup> This method is useful in terms of its simplistic nature, but it is based on the assumption that the wages paid cover the basic needs of the workers and their dependents, as well as the fact that the relevant statistics are readily available, regularly updated and trustworthy.<sup>191</sup>

Eyraud and Saget<sup>192</sup> state that it is best to use a combination of the two methods, which suggests that the statistics should be used as a basic indication regarding the needs of workers, from which point bargaining can proceed.

#### 2.5.1.2 Criteria used for minimum wage determination

*The Minimum Wage Fixing Recommendation no. 135* <sup>193</sup> recommends that the following criteria among others should be considered in determining minimum wages:

- (a) the needs of workers and their families;
- (b) the general level of wages in the country;
- (c) the cost of living and changes therein;
- (d) social security benefits;
- (e) the relative living standards of other social groups and
- (f) economic factors including the requirements of economic development, levels of productivity and the desirability of attaining and maintaining a high level of employment.

Some of the most common criteria used in the determination of minimum wage rates include: inflation (to protect the purchasing power of workers), the cost of living, the

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<sup>190</sup> Eyraud and Saget *The fundamentals* 24.

<sup>191</sup> Eyraud and Saget *The fundamentals* 24.

<sup>192</sup> Eyraud and Saget *The fundamentals* 24.

<sup>193</sup> Part II *The Minimum Wage Fixing Recommendation 1970 no.135*.

general economic conditions, current wage levels, workers' needs, productivity, the employment rate, and the capacity of enterprises to pay the proposed wages as well as available security benefits. It is, however, important to note that countries differ widely in terms of meeting the relevant criteria and application and implementation thereof. France serves as a good example to demonstrate how the rise in inflation automatically triggers an adjustment in minimum wages.<sup>194</sup> Some other countries, however, tend to follow a more flexible approach where no criteria is set by legislation.<sup>195</sup>

The emphasis and focus each country places on any of the criteria is subject to the economic and political climate at any given point in time, and this may result in either a stricter or more flexible use of any one of the criteria.<sup>196</sup>

Minimum wage determination is done through criteria as determined by legal instruments unique to the specific country. Eyraud and Saget<sup>197</sup> state that a "predominance of economic factors in minimum wage fixing" exists. This is an interesting view, considering the fact that the main role of a minimum wage is to provide social protection.<sup>198</sup>

Economic factors are important in minimum wage determination because of the fact that wages in general, and more specifically minimum wages, can be regarded as both a cost and a revenue.<sup>199</sup> In simple terms: minimum wage is a cost because it is the compensation employers pay to employees in exchange for work done. Minimum wage is also a revenue because minimum wage increases the amount of money employees have, which in turn means that those employees are more likely to spend that money, resulting in increased revenue to employers.

As regarded from an economic point of view the minimum wage can impact on three macro-economic variables, namely: inflation, employment and demand.<sup>200</sup>

An increase in the minimum wage will stimulate overall demand in two ways: firstly, directly, by raising the lowest of wages and secondly, indirectly, by increasing the

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<sup>194</sup> Eyraud and Saget *The fundamentals* 30.

<sup>195</sup> Eyraud and Saget *The fundamentals* 30.

<sup>196</sup> Eyraud and Saget *The fundamentals* 40.

<sup>197</sup> Eyraud and Saget *The fundamentals* 47.

<sup>198</sup> Eyraud and Saget *The fundamentals* 47.

<sup>199</sup> Eyraud and Saget *The fundamentals* 47.

<sup>200</sup> Eyraud and Saget *The fundamentals* 47.

payroll as a result of the domino effect (also known as the ripple or lighthouse effect<sup>201</sup>) it has on the wage hierarchy as a whole.<sup>202</sup>

Demand is an economic principle that describes the willingness to obtain or purchase certain goods. If a worker receives an increased minimum wage the said worker would then be inclined to purchase more goods and products because of the increased financial means now available to the worker.

Increased remuneration correlates with increased consumption of goods and services.<sup>203</sup> Increased consumption is significant because consumption is normally the largest GDP component. GDP is a crucial indicator of economic growth and activity in a country.<sup>204</sup> This may possibly have a positive influence on growth and employment figures which are dependent on there being no inflationary increases which may neutralise the effect of a higher minimum wage.<sup>205</sup> Eyraud and Saget<sup>206</sup> use the example of France in 1968, where there was a substantial hike in minimum wages following strikes and hence resulted in substantial growth.

The rise was made in direct response to massive wage claims by the workers, but the positive effect that it could have on demand made it far easier for the Government to accept and for the economy to absorb.<sup>207</sup>

### 2.5.2 Coverage of the minimum wage

According to *The Minimum Wage Fixing Recommendation no.135* <sup>208</sup> minimum wages can either be instituted by a "single minimum wage of general application" or by fixing various minimum wages in accordance with different regions. A total of:

61% of countries with a minimum wage have opted for a single minimum wage, 21% have sector or occupational minimum wages that are set by the government or a tripartite body (government, employers and employees), 8% do not have an explicit statutory procedure,

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<sup>201</sup> ILO 2009 <http://ilo.org/americas/publicaciones>.

<sup>202</sup> Eyraud and Saget *The fundamentals* 47. The domino effect is also known as the "ripple" effect. It refers to the way in which minimum wages indirectly influence the quantum of other wages besides minimum wages (in the wage hierarchy) positively.

<sup>203</sup> Piana 2001 <http://economicswebinstitute.org/consumption>.

<sup>204</sup> Piana 2001 <http://economicswebinstitute.org/grossdomesticproduct>.

<sup>205</sup> Eyraud and Saget *The fundamentals* 46.

<sup>206</sup> Eyraud and Saget *The fundamentals* 47.

<sup>207</sup> Eyraud and Saget *The fundamentals* 47.

<sup>208</sup> Part III(5) *The Minimum Wage Fixing Recommendation 1970 no.135*.

but set sector or occupational minimum wages through collective bargaining, and 11% use a combination of these systems.<sup>209</sup>

A single minimum wage may be set on a national level covering all workers within the country. One of the benefits of this method is its simplicity as there is only one uniform minimum wage to implement nationally. Thus, this method assists in the uncomplicated enforcement and management of a minimum wage.<sup>210</sup> From the perspective of workers information may be more accessible, and from the perspective of compliance it may be easier to enforce.

Furthermore, minimum wage can also be determined on a sub-national level. Accordingly, minimum wage is determined at different levels pertaining to the demographical area or region.

The United States of America is an example of a country that utilises both a national federal minimum wage, as well as various sub-national minimum wages as determined by the respective states.<sup>211</sup> Research indicates that minimum wage in urban areas tend to be higher than the minimum wage in rural areas. The reason for the differentiation between various levels of minimum wage may be attributed to the difference in living costs between "cities, states and regions".<sup>212</sup> Such differentiation may cater for individualistic needs that particular states or regions may have and the minimum wage may therefore have a more desirable impact as a result of the differentiated minimum wage level.

*The Minimum Wage Fixing Recommendation no. 135* <sup>213</sup> recommends that:

- (a) a single minimum wage should not be "incompatible with the fixing of different rates of minimum wages in different regions" and
- (b) a single minimum wage should not "impair the effects of decisions, past or future, fixing minimum wages higher than the general minimum of a particular group".

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<sup>209</sup> Margolis 2014 <http://www.wol.iza.org>; Adds to more than 100 because the percentages are rounded up.

<sup>210</sup> Margolis 2014 <http://www.wol.iza.org>.

<sup>211</sup> Belman and Wolfson *What does the Minimum Wage do in Developing Countries?*9.

<sup>212</sup> Belman and Wolfson *What does the Minimum Wage do in Developing Countries?*8.

<sup>213</sup> Part III (5) (2) *The Minimum Wage Fixing Recommendation 1970 no. 135*.

Minimum wage may be set according to specific economic sectors, each having its own predetermined minimum wage. The size of the enterprise may also determine the specific application of minimum wage.<sup>214</sup> Small enterprises may be allowed decreased minimum wages compared to larger enterprises, or may even be exempt from minimum wage.<sup>215</sup>

The time and duration of an employee's employment may also be a factor to influence coverage. An employee who had been employed for longer may be covered by an increased minimum wage, as compared to the minimum wage of an employee with a shorter employment history and, thus, less experience.

Specific categories or groups of workers may intentionally be excluded in the coverage of a minimum wage.<sup>216</sup> In addition to the above there may be coverage for specific groups such as youths or apprentices, or minimum wage may be determined in accordance with the workers' experience, qualifications, or marital and family status.<sup>217</sup> The use of a lower minimum wage for the youth may especially prove helpful to countries experiencing increased numbers of younger workers entering the labour market and who are often without experience or education. Employers could be hesitant to employ and invest in such workers, and a lower minimum wage could prove helpful in providing opportunities for such youths to enter the labour market.

At a lower minimum wage rate employers may be more inclined to accept the lack of experience and training associated with younger workers and employ such workers more readily. The employer can then invest in the employee by means of training and development programs, because at a lower minimum wage rate employers can justify such investment in younger employees:

A lower, but well enforced minimum (wage) for youth can help maintain minimum pay standards, while compensating for specific barriers that young people face when entering the labour market.<sup>218</sup>

The differentiation in wage levels between youth and senior workers should be carefully managed as to avoid significant differences between their respective minimum wages.

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<sup>214</sup> Belman and Wolfson *What does the Minimum Wage do in Developing Countries?*6.

<sup>215</sup> Whittaker *The Fair Labor Standards Act* 16.

<sup>216</sup> Margolis 2014 <http://www.wol.iza.org>.

<sup>217</sup> OECD date unknown <http://www.oecd.org/employment>.

<sup>218</sup> OECD 2015 <http://www.oecd.org/Focus-on-Minimum-Wages>.

Significant differences in the level of minimum wage may present substantial year to year increases in labour costs for employers and may have an adverse effect on businesses. It is therefore recommended that minimum wage be increased with age, but duly in several small steps<sup>219</sup> as to "avoid large jumps in labour costs from one year to the next. This will also help lower the risk of employers hiring and firing employees based on decisions primarily based on age and seniority".<sup>220</sup>

The Government of the United Kingdom acknowledges the fact that the minimum wage rate should correlate with different levels of employment. A decreased minimum wage rate results in higher employment levels, whilst an increased minimum wage rate results in lower employment levels.

Because of the link between the minimum wage and employment the Government of the United Kingdom introduced a reduced minimum wage rate for young people.<sup>221</sup> This measure ensured that its Youth Unemployment Reduction Policy remained unaffected.<sup>222</sup>

It argued that young workers who have just completed their studies "lack professional experience and are less productive; consequently, businesses need to invest in training them in order to make them more productive".<sup>223</sup>

Some other countries which also make use of reduced minimum wage rates in various practical and legislative ways include the Republic of Korea, the United States, France and Guinea-Bissau.<sup>224</sup> This measure may be classified by some as being discriminatory against young people. Some countries, including Paraguay, are opting for more of an anti-discriminatory approach of equal pay for equal work.<sup>225</sup> Eyraud and Saget<sup>226</sup> argue that the possible discriminatory nature of such an approach may in some countries be justified for practical and policy considerations.

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<sup>219</sup> OECD 2015 <http://www.oecd.org/Focus-on-Minimum-Wages>.

<sup>220</sup> OECD 2015 <http://www.oecd.org/Focus-on-Minimum-Wages>.

<sup>221</sup> Eyraud and Saget *the Fundamentals* 48.

<sup>222</sup> Eyraud and Saget *the Fundamentals* 48.

<sup>223</sup> Eyraud and Saget *the Fundamentals* 49.

<sup>224</sup> Eyraud and Saget *the Fundamentals* 49.

<sup>225</sup> Eyraud and Saget *the Fundamentals* 49.

<sup>226</sup> Eyraud and Saget *the Fundamentals* 49.

Coverage, however, may be undertaken through a combination of the aforementioned methods<sup>227</sup> although simplicity will be sacrificed in terms of the implementation and compliance thereof. "Complicated systems make enforcement and management of the minimum wage difficult".<sup>228</sup>

### *2.5.3 The role of supplementary social measures*

Various social measures are often used in conjunction with the minimum wage to maximise its effect.<sup>229</sup> The Organisation for Economic Cooperation and Development (OECD) states that "the impact of statutory minimum wages on employment and the earnings and income distribution will also depend on their interactions with the tax and benefit system".<sup>230</sup>

Minimum wage raises the gross earnings received for work done in low paying positions, whilst social measures or benefits aim to "top up" income received for low paying work.<sup>231</sup> The combination of these two measures have the potential to greatly affect income inequality even for households with only one member employed in a low paid job.<sup>232</sup>

Whilst the minimum wage is paid for by employers, social assistance benefit policies are paid for by the State through general revenue, and thus leads to an increase in public expenditure for the State. Further possible drawbacks to social benefits/measures may include the scope for fraud and corruption or administrative errors/wrongdoing.<sup>233</sup>

Minimum wage and supplementary social measures can be complimentary to each other, in the sense that they are more successful together than individually. However, the OECD warns that the two respective systems are complex and "designing the appropriate policy mix will depend on the individual country circumstances",<sup>234</sup> as well as particular family circumstances.<sup>235</sup> Luxemburg provides for a good example where:

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<sup>227</sup> OECD date unknown <http://www.oecd.org/employment>.

<sup>228</sup> Margolis 2014 <http://www.wol.iza.org>.

<sup>229</sup> OECD date unknown <http://www.oecd.org/employment>.

<sup>230</sup> OECD date unknown <http://www.oecd.org/employment>.

<sup>231</sup> OECD date unknown <http://www.oecd.org/employment>.

<sup>232</sup> OECD date unknown <http://www.oecd.org/employment>.

<sup>233</sup> OECD date unknown <http://www.oecd.org/employment>.

<sup>234</sup> OECD date unknown <http://www.oecd.org/employment>.

<sup>235</sup> OECD 2015 <http://www.oecd.org/Focus-on-Minimum-Wages>.

A minimum wage increase could actually make a single parent worse off, as benefit reductions and higher social contributions would outweigh the wage increase.<sup>236</sup>

Minimum wage and supplementary social measures should therefore be considered carefully as to benefit the workers or recipients thereof.

The United Kingdom is a country, albeit developed, in which a variety of measures are used in a collaborated effort to combat poverty. It argued that:

There should be no contradiction between the level of the minimum wage and the system that provides the subsidies enabling the destitute to live, be they wage earners or not.<sup>237</sup>

#### *2.5.4 Adjustment of minimum wage*

The effects of inflation may result in the price of normal goods to increase over time. It is especially the price of basic goods that is of importance as the minimum wage is often determined to enable those workers on the low end of the pay spectrum to acquire such goods in order to fulfil their basic needs. An increase in the cost of these basis goods may result in the minimum wage losing its purchasing power and thus not having its intended effect.

It is therefore key to a successful minimum wage policy to have an efficient adjustment policy of the minimum wage on a regular basis to account for the effects of inflation and a changing economic environment.

Minimum wage policies represent an intervention in the labour market.<sup>238</sup> The influence or consequences of such intervention is determined by the conditions and context of the labour market.<sup>239</sup> Because the labour market is not stagnant but ever-changing, the interventions in relation to the labour market context need to be reviewed and adjusted accordingly to still be relevant and current within the context to which it applies.<sup>240</sup>

An effective minimum wage adjustment policy should promote transparency in the adjustment of minimum wages. Transparency is important as the labour market must

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<sup>236</sup> OECD 2015 <http://www.oecd.org/Focus-on-Minimum-Wages>.

<sup>237</sup> Eyraud and Saget *The fundamentals* 45.

<sup>238</sup> OECD 2015 <http://www.oecd.org/Focus-on-Minimum-Wages>.

<sup>239</sup> OECD 2015 <http://www.oecd.org/Focus-on-Minimum-Wages>.

<sup>240</sup> OECD 2015 <http://www.oecd.org/Focus-on-Minimum-Wages>.

be able to recognise how minimum wage adjustments are calculated, and important stakeholders need to be acknowledged in the adjustment process.<sup>241</sup>

It is recommended that countries institute and utilise independent expert commissions (IEC) with the main focus of making recommendations in terms of just and effective minimum wage adjustments.<sup>242</sup> In making such recommendations the IEC should consider a wide scope of economic and social factors, including consideration of the stakeholders (trade unions, workers and employers).<sup>243</sup> Transparency is important:

Public consultations and a requirement to publish recommendations promote minimum wage adjustments that are transparent and predictable.<sup>244</sup>

Governments should institute schedules for reviewing and adjusting minimum wages.<sup>245</sup> Schedules for regular minimum wage review and adjustments ensure that the minimum wage stays current and in line with changing market conditions.<sup>246</sup> A lack of transparency and predetermined prescribed schedules for reviewing the minimum wage may result in political considerations, as well as public pressure, to become the main driving factors in the adjustment of minimum wages.<sup>247</sup> Consequent "adjustments are likely to be unpredictable and may also not be well aligned with prevailing labour market conditions".<sup>248</sup>

The lack of guidelines in terms of scheduled adjustments of the minimum wage may result in trade unions applying pressure on authorities in order to enforce change.<sup>249</sup> Such pressure may result in strike action and social unrest,<sup>250</sup> which is not beneficial to economic growth.

*The Minimum Wage Fixing Recommendation no. 135*,<sup>251</sup> states that minimum wage should be adjusted as required, with the necessary consideration of economic conditions and changes in the cost of living. To stay up to date with current market conditions it is advisable that a review "be carried out on minimum wage rates in relation

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<sup>241</sup> OECD 2015 <http://www.oecd.org/Focus-on-Minimum-Wages>.

<sup>242</sup> OECD 2015 <http://www.oecd.org/Focus-on-Minimum-Wages>.

<sup>243</sup> OECD 2015 <http://www.oecd.org/Focus-on-Minimum-Wages>.

<sup>244</sup> OECD 2015 <http://www.oecd.org/Focus-on-Minimum-Wages>.

<sup>245</sup> OECD 2015 <http://www.oecd.org/Focus-on-Minimum-Wages>.

<sup>246</sup> OECD 2015 <http://www.oecd.org/Focus-on-Minimum-Wages>.

<sup>247</sup> OECD 2015 <http://www.oecd.org/Focus-on-Minimum-Wages>.

<sup>248</sup> OECD 2015 <http://www.oecd.org/Focus-on-Minimum-Wages>.

<sup>249</sup> Margolis 2014 <http://www.wol.iza.org>.

<sup>250</sup> Margolis 2014 <http://www.wol.iza.org>.

<sup>251</sup> Part V (11) *The Minimum Wage Fixing Recommendation 1970 no. 135*.

to the cost of living and other economic conditions".<sup>252</sup> This might be done in frequent intervals or when such a review is deemed appropriate. Adjustments should be made in accordance with periodic surveys (of which the frequency would be predetermined by national conditions).<sup>253</sup> Current national economic conditions, with specific reference to the following elements should be taken into account with consideration of the resources available:<sup>254</sup>

- (a) income per head;
- (b) productivity and employment and
- (c) unemployment and underemployment.

The *Minimum Wage-Fixing Machinery Recommendation no. 30* states that:<sup>255</sup>

Provision should be made for the review of the minimum rates of wages fixed by the wage-fixing bodies when this is desired by the workers or employers who are members of such bodies.

#### 2.5.5 Monitoring compliance

The *Minimum Wage Fixing Recommendation no. 135* recommends the following measures in terms of enforcement of minimum wages:<sup>256</sup>

- (a) minimum wage provisions need to be publicised taking into consideration different languages and illiterate people;
- (b) labour inspectors should be adequately trained to effectively carry out their duties;
- (c) non-compliance with minimum wage provisions should be met by sufficient penalties;
- (d) workers need to actualise their rights in terms of minimum wage by means which are easily accessible and simplified

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<sup>252</sup> Part V (12) *The Minimum Wage Fixing Recommendation 1970 no. 135.*

<sup>253</sup> Part V (13) *The Minimum Wage Fixing Recommendation 1970 no. 135.*

<sup>254</sup> Part V (13)(1) *The Minimum Wage Fixing Recommendation 1970 no. 135.*

<sup>255</sup> Part III *The Minimum Wage-Fixing Machinery Recommendation 1928 no. 30.*

<sup>256</sup> Part VI *The Minimum Wage Fixing Recommendation 1970 no. 135.*

- (e) workers need to be protected against abuse through the functionality of "employers and workers organisations" and
- (f) workers need to be adequately protected against victimisation.

*The Labour Inspection Convention no. 81* states in Article 1 that: "each member of the ILO for which this convention is in force shall maintain a system of labour inspection in industrial workplaces".<sup>257</sup> The aforementioned convention stipulates the following functions of a labour inspection system:<sup>258</sup>

- (a) "the enforcement of legal provisions relating to conditions of work and the protecting of workers while engaged in their work, such as provisions relating to hours, wages, safety, health and welfare, the employment of children and young persons, and other connected matters, in so far as such provisions are enforceable by labour inspectors",<sup>259</sup> and
- (b) Labour inspectors should inform and advise both employers and employees in matters related to optimum compliance with provisions of law
- (c) Labour inspectors need to report abuse or wrongdoing not stipulated in legal provisions.

It is critical to have an effective labour administration system, not only for good governance purposes and for economic development, but also in terms of actualising the decent work principle and the associated values thereof.<sup>260</sup>

The effectiveness of a minimum wage policy depends not only upon the coverage of its legal provisions, but also on the degree of compliance therewith.<sup>261</sup>

Compliance might be avoided if the enforcement of a policy is weak and if the penalty for non-compliance is not deemed to be serious.<sup>262</sup> The degree of compliance from the people it is aimed at, determines the effectiveness of any policy. Non-compliance could

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<sup>257</sup> Part I Article 1 *The Labour Inspection Convention 1947 no. 81*.

<sup>258</sup> Part I Article 3 (1) *The Labour Inspection Convention 1947 no. 81*.

<sup>259</sup> Part I Article 3 (1) (a) *The Labour Inspection Convention 1947 no. 81*.

<sup>260</sup> ILO 2010 <http://ilo.org/labadmin/info/pubs/WCMS>.

<sup>261</sup> Rani *et al* 2013 *International Labour Review* 387.

<sup>262</sup> Ghosheh 2012 [http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh\\_wage\\_legislation\\_2003.pdf](http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh_wage_legislation_2003.pdf).

seriously affect the success of the policy by having "negative social consequences"<sup>263</sup> for workers and their families. Non-compliant employers may also have an advantage over compliant employers in the form of "an illegitimate cost advantage".<sup>264</sup>

There may be concern over compliance of minimum wage in the informal economy.<sup>265</sup> However literature suggests that enhanced compliance in the formal sector will positively influence compliance in the informal economy.<sup>266</sup> This is important as this is the part of the economy where various vulnerable groups are employed.<sup>267</sup>

Enforcement through the use of labour inspectors originated in Europe as a result of "a social push towards the state regulation of economic forces and the protection of exploited sections of the population".<sup>268</sup> Enforcement through labour inspectors evolved and developed over a century into a well-established and effective system of professionals in more industrialised or developed countries.<sup>269</sup> Labour inspectors are at the forefront of wage related cases and "derive their authority from labour codes or national laws".<sup>270</sup> In many developing countries enforcement models are not as well developed and established as in their developed counterparts. But given time this position might change.

According to literature compliance is actualised through three main approaches which will be discussed briefly.<sup>271</sup>

#### 1. The method of persuasion.<sup>272</sup>

This entails that stakeholders should be persuaded to change their views or norms to correlate with what is being promulgated to them.<sup>273</sup> This can be actualised through joining stakeholders in the process of setting a minimum wage. Typical stakeholder

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<sup>263</sup> Rani *et al* 2013 *International Labour Review* 398.

<sup>264</sup> Rani *et al* 2013 *International Labour Review* 398.

<sup>265</sup> Rani *et al* 2013 *International Labour Review* 392.

<sup>266</sup> Rani *et al* 2013 *International Labour Review* 401.

<sup>267</sup> Rani *et al* 2013 *International Labour Review* 403.

<sup>268</sup> Ghosheh 2012 [http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh\\_wage\\_legislation\\_2003.pdf](http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh_wage_legislation_2003.pdf).

<sup>269</sup> Ghosheh 2012 [http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh\\_wage\\_legislation\\_2003.pdf](http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh_wage_legislation_2003.pdf).

<sup>270</sup> Ghosheh 2012 [http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh\\_wage\\_legislation\\_2003.pdf](http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh_wage_legislation_2003.pdf).

<sup>271</sup> Benassi *The implementation of minimum wage: challenges and creative solutions* 8.

<sup>272</sup> Benassi *The implementation of minimum wage: challenges and creative solutions* 8.

<sup>273</sup> Benassi *The implementation of minimum wage: challenges and creative solutions* 8.

would include both employers and employee representatives. It is of crucial importance to involve these parties because they would, to a great extent, be responsible for the successful implementation of, and compliance with, the minimum wage.<sup>274</sup>

When the minimum wage is imposed by the government without consultation with the main stakeholders, it is likely to be devalued by the public and subject to additional public scrutiny and media attention.<sup>275</sup>

A persuasive approach should form the basis of any strategy aiming at establishing compliance. Persuasion in this context is regarded as a preventative measure which is much cheaper than "setting up monitoring and sanctioning mechanisms".<sup>276</sup>

## 2. The management approach

According to this approach rule or legislative ambiguity and a lack of capacity are major contributing factors and reasons for non-compliance.<sup>277</sup> Strong emphasis is put on creating awareness, and assisting and educating the employer regarding the rules and legislation.<sup>278</sup>

Literature suggests that systems be put in place to deal with disputes among parties.<sup>279</sup> This may assist in providing clarity regarding certain issues and establishing a better understanding of the relevant rules.<sup>280</sup> In the United Kingdom various information campaigns were facilitated in an attempt to further knowledge and awareness of the minimum wage.<sup>281</sup> In the United Kingdom these campaigns were specifically directed at sectors that are most at risk for non-compliance.<sup>282</sup> Across the broader spectrum technical assistance needs to be accessible and available to those in need thereof.<sup>283</sup>

The management approach requires monitoring for two reasons: firstly, it allows for detection of a lack of capacity to implement a minimum wage.<sup>284</sup> Secondly,

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<sup>274</sup> Benassi *The implementation of minimum wage: challenges and creative solutions* 12.

<sup>275</sup> Margolis 2014 <http://www.wol.iza.org>.

<sup>276</sup> Benassi *The implementation of minimum wage: challenges and creative solutions* 8.

<sup>277</sup> Benassi *The implementation of minimum wage: challenges and creative solutions* 8.

<sup>278</sup> Benassi *The implementation of minimum wage: challenges and creative solutions* 8.

<sup>279</sup> Benassi *The implementation of minimum wage: challenges and creative solutions* 8.

<sup>280</sup> Benassi *The implementation of minimum wage: challenges and creative solutions* 8.

<sup>281</sup> Benassi *The implementation of minimum wage: challenges and creative solutions* 12.

<sup>282</sup> Benassi *The implementation of minimum wage: challenges and creative solutions* 12.

<sup>283</sup> Benassi *The implementation of minimum wage: challenges and creative solutions* 8.

<sup>284</sup> Benassi *The implementation of minimum wage: challenges and creative solutions* 8.

transparency is ensured, which in turn, makes it possible for the public to put social pressure on employers who are not compliant.<sup>285</sup>

### 3. The enforcement approach

According to this approach the main reason for non-compliance is the economic benefit associated with non-compliance or the financial benefit attained by not paying workers the predetermined minimum wage.<sup>286</sup> According to the enforcement theory implementing measures such as monitoring and sanctioning can aid in achieving compliance.<sup>287</sup>

Monitoring is an effective tool because it allows for detection of non-compliance, and also provides for the availability of information regarding non-compliance. In turn, the latter could prove to be helpful in making decisions regarding sanctions against non-compliance.<sup>288</sup> Monitoring is usually actualised through the use of inspectors. The *Minimum Wage-Fixing Machinery Recommendation no. 30* recommends that there be "official supervision of the rates actually being paid".<sup>289</sup> This convention states that there should be a sufficient number of inspectors:

To make investigations among the employers and workers concerned with a view to ascertaining whether the minimum rates in force are in fact being paid and taking such steps as may be authorised to deal with infringements of the rates.<sup>290</sup>

*The Labour Inspection Convention no. 81* states that the number of inspectors should be determined in accordance with:<sup>291</sup>

- (a) the "importance of the duties" with specific reference to:
  - (i) "the number, nature, size and situation of the workplaces liable to inspection";
  - (ii) the number and classes of workers employed in such workplaces; and
  - (iii) the "number and complexity of the legal provisions to be enforced";

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<sup>285</sup> Benassi *The implementation of minimum wage: challenges and creative solutions* 8.

<sup>286</sup> Benassi *The implementation of minimum wage: challenges and creative solutions* 8.

<sup>287</sup> Benassi *The implementation of minimum wage: challenges and creative solutions* 8.

<sup>288</sup> Benassi *The implementation of minimum wage: challenges and creative solutions* 8.

<sup>289</sup> Part IV (b) *The Minimum Wage-Fixing Machinery Recommendation 1928 no. 30*.

<sup>290</sup> Part IV (2) *The Minimum Wage-Fixing Machinery Recommendation 1928 no. 30*.

<sup>291</sup> Part I Article 10 *The Labour Inspection Convention 1947 no. 81*.

(b) the "practical means placed at the disposal of the inspectors"; and

(c) the practical conditions under which inspections can be done and still be effective.

It is evident that the number of inspectors is country- and circumstance-specific and dependent on the aforementioned factors. The number of inspectors would have to be tailored to serve each country, its unique circumstances and its economic position. In accordance with *The Labour Inspection Convention no. 81*<sup>292</sup> labour inspectors should be able to inspect any work premises at any time without prior notice in order to determine compliance with legal provisions.

According to *The Labour Inspection Convention no. 81* it is important for labour inspectors to be independent so as not to be influenced by "changes in government and improper external influences".<sup>293</sup> Labour inspectors' main priority should be to ensure compliance with legal provisions and issuing the necessary measures to assure compliance. Any bias or external influence may infringe on this priority which will ultimately be to the disadvantage of workers.

The recruitment of quality candidate labour inspectors is also of importance to ensure optimum functioning of such inspectors in the market place. According to *The Labour Inspection Convention no. 81* the particulars pertaining to the recruitment of labour inspectors may be prescribed by national law or regulation,<sup>294</sup> whereas "the means of ascertaining such qualifications shall be determined by competent authority".<sup>295</sup> Adequate training is crucial in enabling labour inspectors to perform their duties. *The Labour Inspection Convention no. 81* gives a framework for the recruitment and optimisation of labour inspectors, but it is the responsibility of the individual states to adopt measures to give effect to the provisions of the convention.

Labour inspectors are often underpaid, which makes them vulnerable to corruption. An additional problem with labour inspectors is that governments often do not provide adequate financing, which burdens the functioning and efficiency of labour

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<sup>292</sup> Part I Article 12 *The Labour Inspection Convention 1947 no. 81*.

<sup>293</sup> Part I Article 6 *The Labour Inspection Convention 1947 no. 81*.

<sup>294</sup> Part I Article 7 (1) *The Labour Inspection Convention 1947 no. 81*.

<sup>295</sup> Part I Article 7 (2) *The Labour Inspection Convention 1947 no. 81*.

inspectors.<sup>296</sup> The ILO reports that labour inspectors are often "understaffed, underequipped and inadequately trained".<sup>297</sup>

Despite various limitations labour inspectors can improve their efficiency by focusing on the sectors that are considered as being at the highest risk for non-compliance. In developing countries the focus should be on vulnerable and marginalised groups, especially in the informal economy.<sup>298</sup>

Limited resources mean that the means available must be used strategically to ensure optimal utilisation as well as the most effective enforcement of wage payment legislation possible.<sup>299</sup>

This strategy is used in the United Kingdom and is called prioritisation. It ensures that limited resources are utilised in the most effective way.<sup>300</sup> In the United States labour inspectors focus mainly on complaints received by workers either through the workers themselves to government agencies or through representative unions.<sup>301</sup> Sanctioning is an equally important strategy as it increases the cost of non-compliance and therefore provides as a strong incentive to comply.<sup>302</sup>

An additional aspect that should not be overlooked is the importance of empowering workers to demand and actualise the rights they are entitled to.<sup>303</sup> This can only be done if workers are made aware of their rights. Furthermore, workers should be protected to such an extent as to feel free to demand these rights without fear or prejudice.<sup>304</sup>

*The Minimum Wage-Fixing Machinery Recommendation no 30* states that workers need to be made aware of the minimum rates which may be actualised through the visible display of minimum wage rates.<sup>305</sup> In Trinidad and Tobago it is specifically provided by law that workers who complained may not be affected in terms of their employment.<sup>306</sup>

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<sup>296</sup> Benassi *The implementation of minimum wage: challenges and creative solutions* 14.

<sup>297</sup> Benassi *The implementation of minimum wage: challenges and creative solutions* 14.

<sup>298</sup> Rani *et al* 2013 *International Labour Review* 404.

<sup>299</sup> Ghosheh 2012 [http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh\\_wage\\_legislation\\_2003.pdf](http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh_wage_legislation_2003.pdf).

<sup>300</sup> Benassi *The implementation of minimum wage: challenges and creative solutions* 15.

<sup>301</sup> Benassi *The implementation of minimum wage: challenges and creative solutions* 15.

<sup>302</sup> Benassi *The implementation of minimum wage: challenges and creative solutions* 8.

<sup>303</sup> Benassi *The implementation of minimum wage: challenges and creative solutions* 9.

<sup>304</sup> Benassi *The implementation of minimum wage: challenges and creative solutions* 15.

<sup>305</sup> Part IV (1) *The Minimum Wage-Fixing Machinery Recommendation 1928 no 30*.

<sup>306</sup> Benassi *The implementation of minimum wage: challenges and creative solutions* 17.

This law thus aims at prohibiting "employers retaliation", which allows for workers to actualise their rights without putting their jobs at risk.<sup>307</sup>

Workers can demand their rights individually or collectively through, for example, trade unions.<sup>308</sup> Trade unions have an important role to fulfil in ensuring that workers' rights are pursued and protected. Additionally these unions are responsible for reporting any non-compliance.<sup>309</sup>

Literature suggests that the aforementioned approaches are not individually exclusive, but in fact complementary to each other and should therefore be used in conjunction with other approaches.<sup>310</sup>

### *2.5.6 Enforcement and consequences of non-compliance*

The law has to provide for compensation in terms of any underpayment or non-compliance with the minimum wage. Employers need to compensate workers for any difference in the wages paid and the actual minimum wage. This is indicated under the heading of international court cases as discussed in chapter 2.4 This aforementioned compensation should be based on fairness towards the worker. It is thus not limited by time constraints and provides for the worker to be reimbursed in terms of the loss of purchasing power due to inflation.<sup>311</sup> Adjustment in relation to inflation is important because inflation might be higher in developing countries, as is particularly true for Africa.<sup>312</sup>

It is of great importance to reduce the waiting time for compensation as extended periods before compensation, and complex bureaucratic systems to attain compensation, may result in workers feeling discouraged to claim compensation.<sup>313</sup> It is important to keep in mind that "pay issues have profound consequences for workers, as they may struggle to provide for their needs and those of their families".<sup>314</sup> It would thus

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<sup>307</sup> Benassi *The implementation of minimum wage: challenges and creative solutions* 17.

<sup>308</sup> Benassi *The implementation of minimum wage: challenges and creative solutions* 9.

<sup>309</sup> Ghosheh 2012 [http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh\\_wage\\_legislation\\_2003.pdf](http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh_wage_legislation_2003.pdf).

<sup>310</sup> Benassi *The Implementation of Minimum Wage: Challenges and Creative Solutions* 9.

<sup>311</sup> Benassi *The Implementation of Minimum Wage: Challenges and Creative Solutions* 16.

<sup>312</sup> Ghosheh 2012 *Wage Protection Legislation in Africa* 43.

<sup>313</sup> Benassi *The implementation of minimum wage: challenges and creative solutions* 9.

<sup>314</sup> Ghosheh 2012 [http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh\\_wage\\_legislation\\_2003.pdf](http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh_wage_legislation_2003.pdf).

be beneficial to workers if compensation is paid fully and in a timeous manner. Councils can also be of assistance in settling any disputes over compensation by means of arbitration.<sup>315</sup> Switzerland is a country where arbitration councils are used in certain employment sectors.<sup>316</sup>

Legal sanctions may also take on the form of pecuniary fines.<sup>317</sup> Fines are generally paid by the transgressor to the "judicial authorities and can be used to pay for government functions such as labour inspection".<sup>318</sup> The cost of non-compliance should always outweigh the benefits.<sup>319</sup> Therefore, severe fines are crucial "to the effectiveness of the enforcement system, because only consistent losses represent a deterrent to non-compliance for employers".<sup>320</sup>

*The Minimum Wage-Fixing Machinery Recommendation no.30* recommends penalties for non-compliance of minimum wages, as well as for the implementation of measures for preventing non-compliance or infringements.<sup>321</sup> *The Labour Inspection Convention no. 81* stipulates that adequate penalties should be provided for by laws and regulations with regard to non-compliance of legal provisions, as well for events where labour inspectors are obstructed during the performance of their duties.<sup>322</sup>

Imprisonment may also be used as a measure to burden offenders and countries such as India, Israel and the United States have already implemented this strategy.<sup>323</sup>

Furthermore, sanctions in dealing with non-compliance with minimum wage policies may need to increase in severity. This would apply in cases where there are repeat offenders.<sup>324</sup> Therefore, it is recommended that the sanctions be adopted in accordance with each individual situation and increase if due cause exists.<sup>325</sup>

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<sup>315</sup> Benassi *The implementation of minimum wage: challenges and creative solutions* 16.

<sup>316</sup> Benassi *The implementation of minimum wage: challenges and creative solutions* 16.

<sup>317</sup> Benassi *The implementation of minimum wage: challenges and creative solutions* 17.

<sup>318</sup> Ghosheh 2012 [http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh\\_wage\\_legislation\\_2003.pdf](http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh_wage_legislation_2003.pdf).

<sup>319</sup> Benassi *The implementation of minimum wage: challenges and creative solutions* 17.

<sup>320</sup> Benassi *The implementation of minimum wage: challenges and creative solutions* 17.

<sup>321</sup> Part IV (c) *The Minimum Wage-Fixing Machinery Recommendation 1928 no.30*.

<sup>322</sup> Article 18 *The Labour Inspection Convention 1947 no. 81*.

<sup>323</sup> Benassi *The implementation of minimum wage: challenges and creative solutions* 17.

<sup>324</sup> Benassi *The implementation of minimum wage: challenges and creative solutions* 17.

<sup>325</sup> Benassi *The implementation of minimum wage: challenges and creative solutions* 17.

Boycott and naming and shaming campaigns are not traditional sanctions that are specified and enforced by law, but they are cheap and effective.<sup>326</sup> Naming and shaming campaigns entail publicly identifying the employers or companies that are not in compliance with minimum wage legislation.<sup>327</sup> This may result in serious damage to the reputation of a company or employer, and often results in financial losses.<sup>328</sup> Public pressure is thus used to enforce compliance.

Ghosheh<sup>329</sup> states that the effects of naming and shaming are twofold: firstly, it acts as a deterrent measure to anyone that might contemplate non-compliance and secondly, naming and shaming might limit the amount of non-compliance incidents inspectors need to investigate.<sup>330</sup> This is a very useful, practical measure considering the fact that developing countries have limited resources.

## **2.6 Conclusion**

It is evident that the ILO has a significant and central role to play in establishing international labour standards. This is no different in the establishment of certain international standards regarding wage and specifically minimum wage. The ILO utilises conventions and recommendations to establish an international standard. As such conventions and recommendations have a significant impact on the application of minimum wage policies and strategies within countries. In order to further promote the decent work principle internationally, the ratification of conventions and adoption of recommendations by countries should be strongly encouraged.

As discussed in chapter 2.2, the ILO has a supervisory role to play in ensuring that ratified conventions are realised within countries. Historically the ILO has shown to be hesitant in terms of punishing countries considered to be non-compliant in terms of ratified conventions. There may be various reasons associated with this but the ILO should be wary of captivating a culture where non-compliance is tolerated. A more

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<sup>326</sup> Benassi *The implementation of minimum wage: challenges and creative solutions* 18.

<sup>327</sup> Benassi *The implementation of minimum wage: challenges and creative solutions* 18.

<sup>328</sup> Benassi *The implementation of minimum wage: challenges and creative solutions* 18.

<sup>329</sup> Ghosheh 2012 [http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh\\_wage\\_legislation\\_2003.pdf](http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh_wage_legislation_2003.pdf).

<sup>330</sup> Ghosheh 2012 [http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh\\_wage\\_legislation\\_2003.pdf](http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh_wage_legislation_2003.pdf).

authoritative ILO position is required to truly promote and conceptualise the decent work principle within countries.

The criteria analysed are all crucial elements of a minimum wage system. As such all the criteria should be carefully considered in deliberation with international legal provisions. As is indicated in this chapter sufficient international instruments in the form of conventions and recommendations exist regarding wages and specifically minimum wages. Countries should actively promote the provisions of these instruments in their respective countries. In doing so the decent work principle will be advanced ensuring a more dignified and protected labour market.

To grasp the potential influence of international measures on developing countries the next chapter will be identifying the degree to which developing countries have ratified the international measures regarding wages and specifically minimum wages.

The application of legal provisions will be considered in Brazil due to its prominent position globally in terms of its minimum wage policy. The application of minimum wage in South Africa will also be considered which might prove useful considering the current debate regarding the institution of a national minimum wage.

## **CHAPTER 3: THE APPLICATION OF MINIMUM WAGE POLICIES THROUGH INTERNATIONAL, FOREIGN AND NATIONAL MEASURES**

### ***3.1 Application of international measures in developing countries***

As discussed in the introduction to chapter 2 the ILO plays a predominant role in establishing labour standards and practices on an international scale through the use of measures such as conventions and recommendations.

The various conventions and recommendations regarding wages, and specifically minimum wages, are discussed in chapter 2.3. To establish the extent to which these measures, and specifically conventions, find application in developing countries it is useful to illustrate the ratified conventions in some developing countries.

Table 1.1 Convention table indicates the ratification of ILO conventions with reference to wages, and more specifically minimum wages, in some developing countries.

<b>ILO Convention No:</b>	<b>26</b>	<b>81</b>	<b>95</b>	<b>129</b>	<b>99</b>	<b>100</b>	<b>131</b>	<b>150</b>
<b>BRAZIL</b>	X	X	X		X	X	X	
<b>RUSSIA</b>		X	X			X		X
<b>INDIA</b>	X	X				X		
<b>MEXICO</b>	X		X		X	X	X	X
<b>COSTA- RICA</b>	X	X	X	X	X	X	X	X
<b>TURKEY</b>	X	X	X		X	X		

<b>ILO Convention No:</b>	<b>26</b>	<b>81</b>	<b>95</b>	<b>129</b>	<b>99</b>	<b>100</b>	<b>131</b>	<b>150</b>
<b>SOUTH-AFRICA</b>	X	X				X		
<b>BOTSWANA</b>			X			X		
<b>NAMIBIA</b>						X		X
<b>MOZAMBIQUE</b>		X				X		
<b>ZIMBABWE</b>	X	X		X	X	X		X

Compiled by the author based on data from NORMLEX, October 2016

With reference to Table 1 it is interesting to note that Costa Rica has ratified all the conventions regarding wages, and specifically minimum wages. Brazil and Mexico also ratified a high number of conventions in this regard, whilst India, South Africa, Botswana, Namibia and Mozambique have ratified a limited number of conventions regarding wages, and specifically minimum wages. Noteworthy is the fact that South Africa and the neighbouring Southern African countries have limited ratified ILO conventions. Last mentioned countries still have ample development potential regarding the ratification of international instruments. Interestingly Zimbabwe has ratified numerous of these ILO conventions regarding wages and specifically minimum wages especially when compared with other Southern African countries. Considering the current socio economic climate of Zimbabwe it must be contemplated whether or not the ratified ILO conventions truly take effect in the Zimbabwean labour market. It is unlikely that effective institutionalisation of the ILO conventions are effected within the Zimbabwean labour market. This emphasises the importance of enforcing ratified ILO Instruments. Without effective enforcement of ratified instruments those instruments will be limited to paper and as such not benefit the global labour market. The ILO should further develop strategies and measures to actively force compliance to ratified conventions. This argument is also discussed in chapter 2.2.

### *3.1.1 International instruments*

The role of the ILO in providing international measures in the form of conventions and recommendations must firstly be acknowledged in this study on minimum wage as it forms the basis for the majority of national provisions and legislation with regards to labour.

The decent work principle is important to all countries in ensuring dignity in work for all workers. In the majority of developing countries some still have a long way to go before really conceptualising the decent work principle.

To further the decent work principle, (discussed in 1.1) countries should be encouraged to ratify more international instruments and then actively pursue the provisions as contained therein. In theory ratification of international instruments compel countries to develop and grow towards the actualisation of the decent work principle by issuing legislation and other measures.

As is evident in Table 1 numerous countries, including South Africa, ratify a small number of ILO conventions. These countries should strongly consider the ratification of additional international instruments and the effective application thereof. Doing so might result in the establishment of a more acceptable labour standard. Blaupain<sup>331</sup> emphasises the issue by stating that "an increased amount of research shows that the failure to apply labour standards is damaging to national development".

When standards national and international are not applied, workers do not have the basic tools they need to defend themselves, and States do not have adequate tools to ensure the balanced distribution of the benefits of development.<sup>332</sup>

Accordingly, countries need to be strongly encouraged, and even pressured, into ratifying more international obligations. "The Power of ILO Machinery (conventions and recommendations) is also only moral, relying on persuasion, drawing upon the attention of public opinion and the influence this may have on the governments concerned".<sup>333</sup> Therefore compliance to international labour standards cannot be guaranteed.<sup>334</sup>

In terms of achieving better compliance to international labour standards and promoting the decent work principle it must be recommended that the ILO act with more efficient enforcement measures. This argument is also averted to in chapter 2.2. A possible and

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<sup>331</sup> Blanpain 2007 *Tilburg LR* 17.

<sup>332</sup> Blanpain 2007 *Tilburg LR* 17.

<sup>333</sup> Blanpain 2007 *Tilburg LR* 127.

<sup>334</sup> Blanpain 2007 *Tilburg LR* 29.

practical measure could require restricting or banning trade between ILO member countries and the non-compliant country. Such measures are necessary in giving the ILO a more authoritative position in terms of ensuring that certain minimum standards are upheld.

Furthermore, from an international perspective, countries should learn from each other. Developing countries should collaborate with other countries which share characteristics. Doing so could prove to be highly beneficial. Global challenges, rather than challenges that are country-exclusive in nature, pose the greatest problem related to the decent work principle. Therefore, if countries could work together in dealing with the challenges in a unified, collaborated effort, it may be beneficial to all parties involved.

Further exploration and discussion in this chapter will focus on Brazil and South Africa to determine how minimum wage policies vest in these countries through implementation of international, national and other legal measures. Brazil will be discussed due to its reputable position among developing countries regarding its minimum wage policies and strategies.<sup>335</sup> Literature suggests that the positive results in the Brazilian economy are rooted in its minimum wage system and a deeper look into its minimum wage system could therefore prove valuable.

South Africa is yet to institute a national minimum wage, although debate regarding the subject is alive and well. To grasp the contemplation of a national South African minimum wage, an understanding of the minimum wage system in its current form is key and will be further explored in chapter 3.3.<sup>336</sup> It may also be argued that the South African minimum wage system has not, as of yet, attained the same levels of success as compared to Brazil's minimum wage system.

## **3.2 Brazil**

### *3.2.1 Brazil: Introduction*

International developments in labour laws along with the International Labour Organisation has influenced Brazil to codify various laws to protect the rights of workers.

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<sup>335</sup> The Brazilian economy is currently in a recession partly due to the decrease of the prices of Brazilian commodities, which the economy is largely dependent of. The recession has dampened economic growth and increased inflation that resulted in various problems such as increased unemployment, inequality and poverty. Despite the problems facing the country minimum wage policies have influenced and continues to assist in dealing with the problems facing the country. See BBC 2016 <http://www.bbc.com/news/world-latin-america-35810578>.

<sup>336</sup> Recently a proposal was made by the national minimum wage panel regarding recommendations, policy and implementation in terms of a South African national minimum wage.

Brazil joined the ILO in 1919 and has gone on to ratify 96 of 189 conventions.<sup>337</sup> In addition 7 out of 8 fundamental conventions have been ratified.<sup>338</sup> Another 3 out of 4 governance conventions and 86 out of 177 technical conventions have been ratified.<sup>339</sup> Noteworthy is the fact that Brazil is the BRICS country that has ratified the most ILO conventions relating to wages, and specifically minimum wages.

The following ILO conventions have been ratified by Brazil relevant to wages and specifically minimum wages;

- (a) The Equal Remuneration Convention 1951 no. 100
- (b) The Minimum Wage Fixing Convention 1928 no. 26
- (c) The Labour Inspection Convention 1947 no. 81
- (d) The Protection of Wages Convention 1949 no. 95
- (e) The Minimum Wage Fixing Machinery (Agriculture) Convention 1951 no.99 and
- (f) The Minimum Wage Fixing Convention 1970 no.131.

Brazil adopted a minimum wage policy in 1940<sup>340</sup> and the minimum wage is known as the *Salário Mínimo*. In 2006 stakeholders and government agreed to annual adjustments of the minimum wage "based on the rate of inflation and growth of GDP per capita"<sup>341</sup> which helped the Brazilian economy in various regards. Before 2006 it may be argued that there was a lack of political will to use and fully utilise minimum wage as a tool to help various aspects of the economy.<sup>342</sup>

The labour market in Brazil comprises of both formal and informal workers. Formal workers (registered workers) have labour cards, i.e. *carteira de trabalho*, or are workers that contribute to the social security fund. Informal workers (unregistered workers) do not contribute to the social security fund or do not have written contracts. <sup>343</sup>

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<sup>337</sup> ILO date unknown <http://ILO.org/gateway>.

<sup>338</sup> ILO date unknown <http://ILO.org/gateway>.

<sup>339</sup> ILO date unknown <http://ILO.org/gateway>.

<sup>340</sup> ILO 2009 <http://ilo.org/americas/publicaciones>.

<sup>341</sup> ILO 2009 <http://ilo.org/americas/publicaciones>.

<sup>342</sup> ILO 2009 <http://ilo.org/americas/publicaciones>.

<sup>343</sup> Saget *Wage Fixing* 4.

According to the ILO informal employment is:

All remunerative work (i.e. both self-employment and wage employment), that is not registered, regulated or protected by existing legal or regulatory frameworks, as well as non-remunerative work undertaken in an income producing enterprise. Informal workers do not have secure employment contracts, workers benefits, social protection or workers representation.<sup>344</sup>

According to statistics, 61% of family incomes in Brazil are generated from labour.<sup>345</sup> This indicates that the minimum wage, if effectively determined, has the potential to influence a large portion of the population.<sup>346</sup>

### 3.2.2 Brazilian Law and Legislation

The *Brazilian Constitution* was adopted in 1988 and ensures the right to a national minimum wage.<sup>347</sup> Various rights of urban and rural workers are set out in Article 7 of the *Constitution*<sup>348</sup> with the objective to improve social conditions. Brazil utilises a national minimum wage as well as various sub-national minimum wages determined by each respective region.

Article 7 (IV) of the *Brazilian Constitution*<sup>349</sup> states that urban and rural workers alike have the right to a national minimum wage that is determined by law. The national minimum wage must have the capacity to satisfy the worker and his/her household's basic living needs, and must be adjusted to maintain purchasing power.<sup>350</sup> The basic living needs are set out as follows:<sup>351</sup>

- (a) housing;
- (b) nourishment;
- (c) education;
- (d) health;
- (e) leisure;

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<sup>344</sup> ILO date unknown <http://www.ilo.org/thesaurus/default.asp>.

<sup>345</sup> ILO 2013 <http://ilo.org/brasilia/publicacoes/WCMS>.

<sup>346</sup> ILO 2013 <http://ilo.org/brasilia/publicacoes/WCMS>.

<sup>347</sup> Chapter II Article 7 *The Constitution of Brazil* 1988.

<sup>348</sup> *The Constitution of Brazil* 1988.

<sup>349</sup> *The Constitution of Brazil* 1988.

<sup>350</sup> Chapter II Article 7 IV *The Constitution of Brazil* 1988.

<sup>351</sup> Chapter II Article 7 IV *The Constitution of Brazil* 1988.

- (f) clothing;
- (g) hygiene;
- (h) transportation and
- (i) social security.

Provision is made for the “periodic adjustments to maintain its (minimum wage) purchasing power”.<sup>352</sup>

These basic needs form the basis for the value of the national minimum wage which is then used in determining various values in terms of social security benefits and social assistance. The national minimum wage can therefore be considered central to various other economic measures of the Brazilian economy.

Article 7 (V) of the *Brazilian Constitution*<sup>353</sup> provides for a "salary floor in proportion to the extent and complexity of the work".<sup>354</sup> Wages and salaries are irreducible with exception to where it is provided for in terms of a collective agreement.<sup>355</sup> Those workers that receive variable compensation are also given the right not to receive a salary or wage below the determined minimum wage.<sup>356</sup>

Section 1 of Article 76 of the *Consolidation of Labor Laws 1943* (CLT) defines minimum wage as the minimum remuneration paid by the employer to all workers, including rural workers, without distinction of sex or geographical area.<sup>357</sup> The sub-national minimum wage is determined for each region based on the normal or basic needs for housing, food, clothing, hygiene and transportation.<sup>358</sup> Section 2 of the CLT divides the country into twenty-two different regions.<sup>359</sup> Each region has a predetermined minimum wage based on the differences of the costs of living as determined by the economic conditions of that region.<sup>360</sup> Therefore, in addition to the national minimum wage, the federal district

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<sup>352</sup> Chapter II Article 7 IV *The Constitution of Brazil* 1988.

<sup>353</sup> *The Constitution of Brazil* 1988.

<sup>354</sup> Chapter II Article 7 V *The Constitution of Brazil* 1988.

<sup>355</sup> Chapter II Article 7 VI *The Constitution of Brazil* 1988.

<sup>356</sup> Chapter II Article 7 VII *The Constitution of Brazil* 1988.

<sup>357</sup> Chapter III Section 1 Article 76 *Consolidation of Labor Laws* 1943.

<sup>358</sup> Chapter III Section 1 Article 76 *Consolidation of Labor Laws* 1943.

<sup>359</sup> Chapter III Section 2 Article 84 *Consolidation of Labor Laws* 1943.

<sup>360</sup> Chapter III Section II Article 86 *Consolidation of Labor Laws* 1943.

and the Brazilian States may determine higher minimum wages in their respective states or districts.<sup>361</sup>

The *CLT* is a comprehensive labour legislative measure. This legislation deals with a wide scope of labour principles such as working hours,<sup>362</sup> annual leave,<sup>363</sup> collective agreements,<sup>364</sup> together with legislation governing specific sectors of work,<sup>365</sup> to name but a few. Minimum wage is considered in Chapter III of the *CLT*. It is important to point out that collective agreements may also be used in establishing working conditions within the employment relationship.<sup>366</sup>

Not only does the minimum wage determine the minimum earnings of formal worker's, but also the wages of workers in the informal sector often correlate with the minimum wage (as mentioned in chapter 1.4.1). This is called the lighthouse effect, also known as the ripple effect".<sup>367</sup> This ripple effect is demonstrated by the even faster decline of wage inequality among unregistered wage earnings (among informal sector workers) in the period 2005 to 2011".<sup>368</sup>

In the informal sector employers and employees often, use the minimum wage as a starting point or benchmark for wage negotiations.<sup>369</sup> Minimum wage is therefore often used as a reference to determine other wages.

### 3.2.3 *The role of supplementary social measures*

The *Brazilian Constitution* makes provision for social protection through the following articles:

Rights in relation to social security benefits are described in Section III (Article 201) of the *Brazilian Constitution* and includes:

- (a) coverage of the events of illness, disability, death and advanced age;

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<sup>361</sup> Chapter II Article 7 IV *The Constitution of Brazil* 1988.

<sup>362</sup> Chapter II Section 1 *Consolidation of Labor Laws* 1943.

<sup>363</sup> Chapter IV Section 1 *Consolidation of Labor Laws* 1943.

<sup>364</sup> Chapter III Title VI *Consolidation of Labor Laws* 1943.

<sup>365</sup> Title III Special Rules of Work Protection Chapter 1 Of Special Provisions on Duration and Working Conditions *Consolidation of Labor Laws* 1943.

<sup>366</sup> Chapter III Title VI Article 611 *Consolidation of Labor Laws* 1943.

<sup>367</sup> ILO 2009 <http://ilo.org/americas/publicaciones>.

<sup>368</sup> De Freitas Barbosa et al 2011 <http://justjobsnetwork.org>.

<sup>369</sup> ILO 2009 <http://ilo.org/americas/publicaciones>.

- (b) maternity protection, especially for pregnant women;
- (c) protection for the involuntarily unemployed;
- (d) family allowance and confinement aid for dependents of insured persons with low incomes and
- (e) a pension for the death of an insured man or women, for the spouse or companion, and dependents, obeying the provision.

Social assistance is “provided to those who need it, regardless of contributions to social security”.<sup>370</sup> Social assistance is provided for in Section IV (Article 203) of the *Brazilian Constitution*<sup>371</sup> and has the following objectives:

- (a) protection of the family, maternity, childhood, adolescence and old age;
- (b) support of needy children and adolescents;
- (c) promotion of integration into the labour force;
- (d) training and rehabilitation of the handicapped and promotion of their integration into the community and the
- (e) guarantee of a monthly benefit of one minimum wage to the handicapped and elderly who prove that they are without means to provide for their own support or having it provided by their family, as provided by law.

Based on the aforementioned provisions it can be gathered that social protection measures are well established in Brazilian law. It is also evident that social protection has a broad application to those individuals who might be particularly vulnerable and thus in need of such provisions. The relationship between minimum wages and social security benefits in Brazil is particularly interesting and will be reflected upon later in this study.

There is a very close relationship between minimum wages and social security benefits which results in the minimum wage functioning as a social floor.<sup>372</sup> An example of this is

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<sup>370</sup> Article 203 *The Constitution of Brazil* 1988.

<sup>371</sup> *The Constitution of Brazil* 1988.

the adjustment of social or retirement benefits of the elderly in correlation with any increase that occurs in the minimum wage.<sup>373</sup> This ensures that the purchasing power of the elderly relying on pensions from the State is maintained.<sup>374</sup> Eyraud and Saget suggests that:

When the minimum wage plays this basic role it is both fair (the most at-risk pensioners must be assured that the purchasing power or their retirement benefits will not be eroded) and straightforward (a single instrument adjusts an entire section of the social security system).<sup>375</sup>

The minimum wage is the basis or benchmark for pension benefits,<sup>376</sup> as well as for the "handicapped and elderly who prove that they are without the means to provide their own support"<sup>377</sup> and who are without family to support them.

Furthermore, the right to unemployment insurance, as stated in the *Constitution*,<sup>378</sup> is also based on the *Minimum Wage Act no 7998/1990*.

The Brazilian government uses two main measures regarding social benefits: The *Bolsa familia* programme, and unemployment insurance. The *Bolsa familia* program is an;

...innovative programme towards incentivising the poor through small cash transfers to keep children in school and to participate in preventative health care visits and vaccination.<sup>379</sup>

Consequently, the value of the minimum wage itself is not limited to the actual monetary compensation it brings directly, but it also plays a pivotal role within the country's social and security policies.<sup>380</sup> This gives the minimum wage in Brazil significant potential to have a positive impact on poverty and to reduce existing inequality.

The fact that it (minimum wage) determines the floor for pension, welfare, and unemployment insurance benefits derives from a view that the minimum wage is the minimum necessary value for the vital needs of a family.<sup>381</sup>

On the other hand, the correlation between minimum wage and social protection measures hold the risk of a greatly increased social security cost to the State which results in compromising flexibility to a degree. This was specifically evident in Brazil

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<sup>372</sup> Eyraud and Saget *The fundamentals* 42.

<sup>373</sup> Eyraud and Saget *The fundamentals* 42.

<sup>374</sup> Eyraud and Saget *The fundamentals* 42.

<sup>375</sup> Eyraud and Saget *The fundamentals* 42.

<sup>376</sup> VIII The Social Order Section III Article 201 minute 12 *The Constitution of Brazil* 1988.

<sup>377</sup> VIII The Social Order Section III Article 203 V *The Constitution of Brazil* 1988.

<sup>378</sup> *The Constitution of Brazil* 1988.

<sup>379</sup> SBP 2014 <http://rebosa.co.za> also see ISSA 2013 <http://www.issa.int/BRICS>.

<sup>380</sup> De Melo et al 2012 *International Journal of Labour Research* 32.

<sup>381</sup> De Melo 2015 *Global Labour Journal* 286.

during the 1980s and 1990s.<sup>382</sup> During this period there was a massive government financial shortage due to the payment of pensions and other benefits that resulted in a decrease of the real value of the minimum wage.<sup>383</sup> The link between minimum wages and social security benefits in Brazil specifically includes: pensions, unemployment benefits, disability benefits, and special or other payments. However, there is no identified link between minimum wages and maternity benefits.<sup>384</sup>

Because of the fact that the Brazilian minimum wage is connected to various other social policies, the increase of the minimum wage has a significant effect on State expenditure.<sup>385</sup> This influence will have to be carefully monitored to ensure the long term success and continuation of the program.<sup>386</sup>

### *3.2.4 Adjustments*

The *Brazilian Constitution*<sup>387</sup> also ensures that purchasing power is retained despite inflation or other factors through the periodic adjustment of the national minimum wage.<sup>388</sup> The setting of an efficient minimum wage and the effective adjustment thereof stimulates economic activity by increasing the purchasing power of the lower scale income sectors.<sup>389</sup>

The Inter-union Department of Statistics and Socio-economic Studies (DIEESE) was created by the Brazilian union movement and is responsible for research, education and counselling activities.<sup>390</sup> Research conducted by DIEESE assists the federal government in determining the remuneration needed to cover the basic needs of workers.

The recovery of the purchasing power of minimum wage was formally institutionalised into law, Act No. n.12382 in 2011, (federal decree 2011),<sup>391</sup> but it had been an official,

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<sup>382</sup> Eyraud and Saget *The fundamentals* 42.

<sup>383</sup> Eyraud and Saget *The fundamentals* 42.

<sup>384</sup> Eyraud and Saget *The fundamentals* 44.

<sup>385</sup> De Melo et al 2012 *International Journal of Labour Research* 42.

<sup>386</sup> De Melo et al 2012 *International Journal of Labour Research* 42.

<sup>387</sup> *The Constitution of Brazil* 1988.

<sup>388</sup> Article 7 IV *The Constitution of Brazil* 1988.

<sup>389</sup> De Melo et al 2012 *International Journal of Labour Research* 33.

<sup>390</sup> De Melo et al 2012 *International Journal of Labour Research* 27.

<sup>391</sup> ILO 2013 <http://ilo.org/brasil/publicacoes/WCMS> 364.

non-legislated policy from as early as 2005.<sup>392</sup> Accordingly, losses as a result of inflation of the subsequent year are covered by means of annual readjustments.<sup>393</sup> The readjustments are based on the GDP variation of the previous two years and the national index of consumer prices.<sup>394</sup>

This formula establishes a predictable policy tool for the pro-cyclical increase of the minimum wage, which not only compensates for inflationary losses, but also reflects output growth.<sup>395</sup>

In Brazil the following criteria are used in determining the minimum wage: the level of social security benefits, the needs of workers and their families, inflation and the cost of living.<sup>396</sup>

The increase of the real minimum wage, together with better social benefit coverage and an increase in the value of social benefits, has resulted in a reduction of income inequality. The positive effects of the minimum wage in the Brazilian context is illustrated in the fact that the minimum wage constitutes the floor for social benefit initiatives like pensions, thus promoting equity and contributing even beyond the labour market.<sup>397</sup>

In the Brazilian case study there has been a successful reduction of inequality due to the minimum wage policy. However, it should be noted that the minimum wage policy in the Brazilian context does not function in isolation, but rather in coherence with other measures such as social security policies.

### *3.2.5 Monitoring compliance*

Labour inspectors are used for monitoring minimum wage compliance in Brazil.<sup>398</sup> As mentioned previously, Brazil has ratified *The Labour Inspection Convention no. 81*<sup>399</sup> regarding labour inspection. However *The Labour Inspection (Agriculture) Convention*

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<sup>392</sup> De Freitas Barbosa et al 2011 <http://justjobsnetwork.org> 10.

<sup>393</sup> ILO 2013 <http://ilo.org/brasil/publicacoes/WCMS>

<sup>394</sup> ILO 2013 <http://ilo.org/brasil/publicacoes/WCMS>

<sup>395</sup> ILO 2013 <http://ilo.org/brasil/publicacoes/WCMS>.

<sup>396</sup> Eyraud and Saget *The fundamentals* 34.

<sup>397</sup> De Melo et al 2012 *International Journal of Labour Research* 37.

<sup>398</sup> Benassi *The implementation of minimum wage: challenges and creative solutions* 14.

<sup>399</sup> *The Labour Inspection Convention 1947 no. 81.*

No. 129<sup>400</sup> has not been ratified by the Brazilian government, although "national legislation already ensures inspection in agriculture".<sup>401</sup>

Brazil utilises the following national legislative measures in terms of labour inspection: *The Constitution of Brazil* 1988 affirms responsibility on the Brazilian government to organise labour inspection in the labour market.

The Consolidation of Labour Laws (CLT) "unifies labour legislation in Brazil".<sup>402</sup>

The "organisational structure and the obligations and prerogatives of labour inspectors"<sup>403</sup> are contained in the *Labour Inspection Regulation* (RIT) of 1965.

The Ministry of Labour and Employment is the specific part of the Brazilian government responsible for labour inspection.<sup>404</sup> Within the Ministry of Labour and Employment, the labour inspection secretariat (SIT) exists with its main responsibilities being the regulation and coordination of the various labour inspection branches that are situated across Brazil.<sup>405</sup> SIT is further divided into two inspection departments; one being the department of labour inspection which is also responsible for ensuring compliance to minimum wage policies and the other being the department of health and safety at work, responsible for ensuring compliance to legislative standards regarding health and safety in the workplace.<sup>406</sup>

Literature suggests that political and government influence might have influenced the independency of labour inspectors up to 1950.<sup>407</sup> It was only after 1950 that the Brazilian government instituted efforts to increase independence from government by "organising a professional corps of labour inspectors".<sup>408</sup>

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<sup>400</sup> *The Labour Inspection (Agriculture) Convention 1969 no. 129.*

<sup>401</sup> ILO date unknown <http://ilo.org/labadmin/info/WCMS> 7.

<sup>402</sup> ILO 2010 <http://oitbrazil.org.br>>decent work.

<sup>403</sup> ILO 2010 <http://oitbrazil.org.br>>decent work.

<sup>404</sup> ILO date unknown

[http://ilo.org/gateway/faces/home/polareas/labadmandinspec?locale=EN&countryCode=BRA&track=null&policyId=13&\\_adf.ctrl-state=juhnhd58g](http://ilo.org/gateway/faces/home/polareas/labadmandinspec?locale=EN&countryCode=BRA&track=null&policyId=13&_adf.ctrl-state=juhnhd58g).

<sup>405</sup> ILO date unknown

[http://ilo.org/gateway/faces/home/polareas/labadmandinspec?locale=EN&countryCode=BRA&track=null&policyId=13&\\_adf.ctrl-state=juhnhd58g](http://ilo.org/gateway/faces/home/polareas/labadmandinspec?locale=EN&countryCode=BRA&track=null&policyId=13&_adf.ctrl-state=juhnhd58g).

<sup>406</sup> ILO date unknown

[http://ilo.org/gateway/faces/home/polareas/labadmandinspec?locale=EN&countryCode=BRA&track=null&policyId=13&\\_adf.ctrl-state=juhnhd58g](http://ilo.org/gateway/faces/home/polareas/labadmandinspec?locale=EN&countryCode=BRA&track=null&policyId=13&_adf.ctrl-state=juhnhd58g).

<sup>407</sup> ILO 2010 <http://oitbrazil.org.br>.

<sup>408</sup> ILO 2010 <http://oitbrazil.org.br>.

The professional nature of the Brazilian Inspectorate is as a result of labour inspectors in Brazil being subject to a selection process that entails the successful completion of a public examination.<sup>409</sup> Additionally, prospective labour inspectors need to be of a Brazilian nationality, need to be in possession of political rights, and remain up to date with military and electoral obligations.<sup>410</sup> They must have completed a university degree, be at least eighteen years of age, and enjoy physical and mental health.<sup>411</sup>

Labour inspection is well established in Brazil through various legislative measures which makes provision for the effective functioning thereof. A predetermined recruitment process ensures the selection of quality and well-qualified personnel capable of "improving labour conditions and ensuring decent work in Brazil."<sup>412</sup> As previously mentioned, the Brazilian labour inspection places great emphasis on capacity building and training to fully actualise the potential of its labour inspectors. Therefore, the Brazilian inspectorate, is "renowned for its quality and technical capacity".<sup>413</sup> Once inspectors are appointed into the position they are developed and trained to enhance their skillset.

Brazil utilises an:

National system of capacity building that aims to train and improve the labour inspector, through the implementation of specific courses, including basic training for the newly recruited and specialization.<sup>414</sup>

Inspectors are not simply employed and left to their own devices, but are rather constantly trained and developed to better their individual and managerial skills.<sup>415</sup>

According to the specific criteria relating to the selection process and the value placed on development and training of labour inspectors, it can be inferred that labour inspection is seen as an important and specialised occupation by the Brazilian government. Good candidates are sourced through the selection process and labour inspectors are encouraged to constantly better and develop themselves through the capacity building programs that are already in place.

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<sup>409</sup> ILO date unknown <http://ilo.org/labadmin/info/WCMS>.

<sup>410</sup> ILO date unknown <http://ilo.org/labadmin/info/WCMS>.

<sup>411</sup> ILO date unknown [http://ilo.org/labadmin/info/WCMS\\_114935](http://ilo.org/labadmin/info/WCMS_114935).

<sup>412</sup> ILO 2010 <http://oitbrazil.org.br>.

<sup>413</sup> ILO 2010 <http://oitbrazil.org.br>.

<sup>414</sup> ILO (date unknown) [http://ilo.org/labadmin/info/WCMS\\_114935](http://ilo.org/labadmin/info/WCMS_114935) .

<sup>415</sup> ILO (date unknown) <http://ilo.org/labadmin/info/WCMS> 5.

In the Brazilian context the role of unions should also be acknowledged in monitoring compliance to legal provisions such as minimum wage. The role of unions in administering workers' rights, in creating awareness of the rights of workers and in increasing the power and influence of unions and workers is noteworthy in the Brazilian labour market.<sup>416</sup> Unions may play a significant role in ensuring that labour provisions are complied with and thus assisting labour inspectors in the monitoring process.

The Brazilian monitoring model is often times considered as an example of a reasonably effective example of monitoring compliance to legal provisions but it is not without flaws as will be indicated. Labour inspectors are often underpaid and thus at risk for corruption, one of the main challenges faced by labour inspectors.<sup>417</sup> The Brazilian government recognises various potential challenges associated with labour inspectors and corruption. As a preventive measure, inspectors are assigned to a specific region where inspections are circumscribed and for a limited time period only (usually up to twelve months).<sup>418</sup> This measure prevents the establishment of unhealthy relationships between the inspector and employers.<sup>419</sup> After recognising the potential risk of corruption the Brazilian government decided to remunerate labour inspectors more generously. The increased remuneration of labour inspectors assists in inspectors theoretically having no need to engage in corrupt activities.<sup>420</sup>

Labour inspectors have the right to freely inspect work premises without prior notice, in order to determine work conditions and compliance with law.<sup>421</sup>

It is important, however, to note that the role of labour inspectors is not only limited to identification and issuing of non-compliance measures. Labour inspectors also have a significant role to play in providing guidance through information and advising both employers and employees.<sup>422</sup> These tasks can be regarded as preventative measures aiming at assisting in the prohibition of possible future non-compliance.<sup>423</sup>

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<sup>416</sup> De Freitas Barbosa & others 2011 <http://justjobsnetwork.org>.

<sup>417</sup> ILO Benassi *The Implementation of Minimum Wage: Challenges and Creative Solutions* 14.

<sup>418</sup> ILO Benassi *The Implementation of Minimum Wage: Challenges and Creative Solutions* 14.

<sup>419</sup> ILO Benassi *The Implementation of Minimum Wage: Challenges and Creative Solutions* 14.

<sup>420</sup> ILO Benassi *The Implementation of Minimum Wage: Challenges and Creative Solutions* 14.

<sup>421</sup> ILO (date unknown) <http://ilo.org/labadmin/info/WCMS>.

<sup>422</sup> ILO (date unknown) <http://ilo.org/labadmin/info/WCMS>.

<sup>423</sup> ILO (date unknown) <http://ilo.org/labadmin/info/WCMS>.

The minimum wage is enforced through the Brazilian labour justice system. In accordance with this system complaints regarding non-compliance are reviewed and fines issued to non-compliant employers, as well as ordering compensation to workers when deemed necessary.<sup>424</sup>

### *3.2.6 Enforcement and consequences of non-compliance*

As mentioned in chapter 3.2.5 labour inspectors often take on preventative, non-confrontational roles as to guide the relevant parties into compliance with the law. Should this method not be of use the labour inspectors will usually describe the non-compliance through the use of an "infraction arraignment", stipulating all the factors that are not complied with.<sup>425</sup> The employer then has the opportunity to respond to the allegations made in the "infraction arraignment".<sup>426</sup> However, "If the defence does not succeed, a legally stipulated fine is applied to the offense".<sup>427</sup>

Furthermore, the Brazilian government uses naming-and-shaming and boycott strategies to pressure violators of minimum wage into compliance.<sup>428</sup> Companies are blacklisted if found to be practicing or employing slave labour.<sup>429</sup> Violators are monitored for two years thereafter, and if the violation has not been repeated and all due compensation and fines had been duly paid then these companies may be removed from the blacklist.<sup>430</sup>

### *3.2.7 Effect of Minimum Wage in Brazil*

Contrary to the viewpoint that a minimum wage will negatively affect employment in the formal sector and result in job losses in that sector along with growth in the (low paying wage) informal sector, the Brazilian context indicates that employment increased in the formal sector whilst the informal sector experienced slower employment growth but also at higher wage levels.<sup>431</sup> The minimum wage policy in Brazil has led to a decrease in unemployment with more workers entering the labour market, and an increase in formal

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<sup>424</sup> De Freitas Barbosa & others 2011 <http://justjobsnetwork.org>.

<sup>425</sup> ILO (date unknown) <http://ilo.org/labadmin/info/WCMS>.

<sup>426</sup> ILO (date unknown) <http://ilo.org/labadmin/info/WCMS>.

<sup>427</sup> ILO (date unknown) <http://ilo.org/labadmin/info/WCMS>.

<sup>428</sup> Benassi *The Implementation of Minimum Wage: Challenges and Creative Solutions* 18.

<sup>429</sup> Benassi *The Implementation of Minimum Wage: Challenges and Creative Solutions* 18.

<sup>430</sup> Benassi *The Implementation of Minimum Wage: Challenges and Creative Solutions* 18.

<sup>431</sup> De Freitas Barbosa & others 2011 <http://justjobsnetwork.org>.

employment, which, despite caution over the effects of the minimum wage on inflation, remained stable.<sup>432</sup>

Furthermore, the minimum wage did not promote illegal or undeclared hiring.<sup>433</sup> In contrast, the gap between wages of informal (unregistered workers) and formal sectors (registered workers) was narrowed.<sup>434</sup>

Literature suggests that the minimum wage policy also contributed in reducing inequality between sexes and between different races.<sup>435</sup> The Brazilian minimum wage assisted the vulnerable or disadvantaged groups in the labour market, such as young uneducated workers, senior citizens, women and black workers, which are often not represented by unions or in positions with little bargaining power.<sup>436</sup>

The minimum wage assisted in attaining a more equal income distribution within the labour market which, in turn, resulted in a decrease in inequality.<sup>437</sup>

Another positive indication regarding the Brazilian minimum wage is the increased level of wage equality between various economic sectors and regions of Brazil.<sup>438</sup> Although the gap between certain sectors may still remain high as a result of the industrialisation in the mid-1900s there is indication that inequality between sectors have decreased.<sup>439</sup> Furthermore, the Brazilian government highlighted the importance of a minimum wage policy to stimulate domestic consumption, particularly in difficult economic times where a minimum wage policy could assist in reducing the effects of recession and assist in recovery in the aftermath.<sup>440</sup> Because of the interconnectedness of other social benefits to the minimum wage, increases in the minimum wage may have a profound impact on the economy and specifically on domestic consumption.<sup>441</sup> This could prove very valuable in terms of economic growth.

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<sup>432</sup> De Melo et al 2012 *International Journal of Labour Research* 41.

<sup>433</sup> De Melo et al 2012 *International Journal of Labour Research* 41.

<sup>434</sup> De Freitas Barbosa & others 2011 <http://justjobsnetwork.org> 16.

<sup>435</sup> ILO 2009 <http://ilo.org/americas/publicaciones>.

<sup>436</sup> ILO 2009 <http://ilo.org/americas/publicaciones>.

<sup>437</sup> ILO 2009 <http://ilo.org/americas/publicaciones>.

<sup>438</sup> De Freitas Barbosa & others 2011 <http://justjobsnetwork.org>.

<sup>439</sup> De Freitas Barbosa & others 2011 <http://justjobsnetwork.org>.

<sup>440</sup> ILO 2009 <http://ilo.org/americas/publicaciones>.

<sup>441</sup> ILO 2009 <http://ilo.org/americas/publicaciones>.

Despite the Brazilian minimum wage policy and strategy having value in the Brazilian context there are still a degree of non-compliance that exists. Literature suggests that employers who do not comply with the minimum wage and workers who do not expect to be paid the minimum wage are either not well informed, or access to relevant information is lacking.<sup>442</sup>

In order to address this problem, improved awareness needs to be raised regarding minimum wage among employers as well as workers.<sup>443</sup> Campaigns and/or seminars may be utilised to increase awareness among employers and workers and the focus should shift to sectors most at risk for non-compliance.<sup>444</sup> Sectors at risk for non-compliance would typically be sectors employing undocumented migrant workers.<sup>445</sup>

Another possible solution might be to simplify the minimum wage policy through reducing the number of minimum wage rates.<sup>446</sup> A simplified minimum wage policy with a limited number of minimum wage rates might be easier to create awareness of which could increase compliance to minimum wage rates.

Brazil can be classified as a country with an active minimum wage policy which has benefitted the Brazilian economy. For continued success and economic improvement, the Brazilian government will have to stay active and address issues such as socio economic concerns and stagnant productivity. Therefore, De Freitas, Barbosa and others suggest that:

Collective bargaining, higher investment in social policies- such as health, training, education, housing and basic infrastructure and tax reform must become central elements of a new strategy to reduce inequality and improve the living conditions of the workers at the bottom of the social pyramid.<sup>447</sup>

### **3.3 South Africa**

#### *3.3.1 South Africa: Introduction*

South Africa has ratified 27 out of 189 ILO conventions. Additionally, 8 out of 8 fundamental conventions have been ratified, 2 out of 4 governance conventions and a

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<sup>442</sup> Benassi *The Implementation of Minimum Wage: Challenges and Creative Solutions* 36.

<sup>443</sup> Benassi *The Implementation of Minimum Wage: Challenges and Creative Solutions* 36.

<sup>444</sup> Benassi *The Implementation of Minimum Wage: Challenges and Creative Solutions* 13.

<sup>445</sup> Benassi *The Implementation of Minimum Wage: Challenges and Creative Solutions* 25.

<sup>446</sup> Benassi *The Implementation of Minimum Wage: Challenges and Creative Solutions* 36.

<sup>447</sup> De Freitas Barbosa et al 2011 <http://justjobsnetwork.org>.

further 17 out of 177 technical conventions have been ratified. Compared to other "middle-income countries" the number of ratified conventions in South Africa are very limited.<sup>448</sup>

The following international conventions have been ratified regarding wages and specifically minimum wages:

- (a) The Equal Remuneration Convention 1951, No. 100
- (b) The Minimum Wage Fixing Convention 1928, No. 26
- (c) The Labour Inspection Convention 1947, No. 81.

The South African labour market consists of the formal and informal sectors. Workers in the formal sector work for businesses that are registered, whilst workers working in the informal sector work for those businesses not registered, i.e. businesses that are typically small in nature and often not operating from a fixed business premise.<sup>449</sup> The informal sector may be broadly defined as a concept or "units engaged in the production of goods or services with the primary objective of generating employment and incomes to the persons concerned".<sup>450</sup> The operation is generally done on a small scale and the labour relationship is mostly casual "rather than a contractual arrangement with formal guarantees".<sup>451</sup>

Predominantly wages are set by employers where there are no recognised trade unions.<sup>452</sup> Recognised trade unions are unions that are registered according to certain provisions in the *LRA*.<sup>453</sup> South Africa currently utilises minimum wages through collective bargaining and sectoral determinations. Collective bargaining is used to determine wages in instances where there are recognised trade unions.

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<sup>448</sup> ILO 2010 <http://ilo.org/labadmin/info/pubs/WCMS>.

<sup>449</sup> *Same Wage Fixing* 4.

<sup>450</sup> Section 5 (1) Resolution Concerning Statistics of Employment in the Informal Sector, adopted by the Fifteenth International Conference of Labour Statisticians (1993).

<sup>451</sup> Section 5 (1) Resolution Concerning Statistics of Employment in the Informal Sector, adopted by the Fifteenth International Conference of Labour Statisticians (1993).

<sup>452</sup> SBP 2014 <http://rebosa.co.za>.

<sup>453</sup> Chapter VI *LRA*.

Collective bargaining is a "written agreement concerning terms and conditions of employment or any other matter of mutual interest".<sup>454</sup> Such an agreement is concluded between the registered union (representing its members) and the employer. Various subjects may be bargained, such as hours of work, leave, service benefits and wages.<sup>455</sup>

South Africa currently has minimum wages for certain sectors of the economy called sectoral determinations. Minimum wages are determined for vulnerable sectors of the economy and is established as sectoral determinations. The effects of sectoral determinations will be discussed in further detail in chapter 3.3.8.

### 3.3.2 South African Law and minimum wage

The *Constitution of the Republic of South Africa, 1996* is the most important source of law and supreme in South Africa. All subsequent legislation needs to promote and protect the values as reflected therein. Section 9 (2)<sup>456</sup> states that everyone has the right to equality which includes the right "to promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken".

In paragraph 20 of *Fraser v Children's Court, Pretoria North*<sup>457</sup> it was stated that:

The guarantee of equality lies at the very heart of the Constitution. It permeates and defines the very ethos upon which the Constitution is premised.

Minimum wage has an important function in terms of striving towards a more equitable and just society as reflected in the *Constitution*.<sup>458</sup>

Section 10 of the *Constitution*<sup>459</sup> states that everyone has the right to inherent dignity as well as the right to have their dignity respected and protected. In paragraph 28 of the *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and*

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<sup>454</sup> Section 1 BCEA 75 of 1997. Section 213 of the *Labour Relations Act* 66 Of 1995: "Collective agreement means a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand and, on the other hand, one or more employers, one or more registered employers organisations or one or more employers and one or more registered employers organisations".

<sup>455</sup> Grogan *Workplace law* 413.

<sup>456</sup> *The Constitution of the Republic of South Africa, 1996*.

<sup>457</sup> *Fraser v Children's Court, Pretoria North* 1997 (2) SA 261 (CC).

<sup>458</sup> *The Constitution of the Republic of South Africa, 1996*.

<sup>459</sup> *The Constitution of the Republic of South Africa, 1996*.

*Others*<sup>460</sup> it was stated that "the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society". It can thus be argued that receiving a wage which allows for the satisfaction of basic human needs is crucial to fulfilling this right. A minimum wage that meets the basic human needs of workers promotes the inherent dignity of that worker by providing a decent wage.

Section 23 of the *Constitution*<sup>461</sup> protects the right of all individuals with regard to fair labour practices. In the *South African National Defence Force Union v Minister of Defence*<sup>462</sup> the court found certain provisions of the *Defence Act* of 1957 to be unconstitutional. The unconstitutionality derived from the fact that workers of the defence force were prohibited from joining trade unions and engaging in protests. Such action was not in line with the right to fair labour practices. Labour matters in general should therefore not lose sight of the right to fair labour practices. A minimum wage policy as such may be used to achieve fair wages for workers, thus promoting fair labour practices and the decent work principle.

Everyone has the right to have access to social security (even if they are unable to support themselves and their dependents), and appropriate social assistance according to section 27 (c) of the *South African Constitution*.<sup>463</sup>

Furthermore, according to Section 27 (2); "the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation"<sup>464</sup> of this right. Accordingly, a minimum wage may be seen as providing assistance in achieving this right.

### 3.3.3 Legislation and Minimum Wage

Labour legislation in South Africa is of particular importance as it supersedes employment contracts. Therefore, statutory protection to employees cannot be terminated or refused through an employment contract unless it is allowed for by law

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<sup>460</sup> *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (3) BCLR 280 (C).

<sup>461</sup> *The Constitution of the Republic of South Africa*, 1996.

<sup>462</sup> *South African National Defence Force Union v Minister of Defence* 1999 (3) BCLR 321 (T).

<sup>463</sup> *The Constitution of the Republic of South Africa*, 1996.

<sup>464</sup> *The Constitution of the Republic of South Africa*, 1996.

and to the prescribed extent thereof.<sup>465</sup> The *BCEA* as amended, exists to give effect to section 23(1) of the *Constitution*.<sup>466</sup> The *BCEA* establishes “conditions of employment regarded by the legislature as fundamental”.<sup>467</sup> A further objective of the *BCEA* is to effect the South African ratified ILO conventions.<sup>468</sup>

In South Africa no national minimum wage exists as of yet, but discussions are underway between various parties. A commission has been appointed by government to give consideration as such. The notion of a South African minimum wage is further discussed in chapter 3.3.10.

As previously mentioned in chapter 3.3.1 South Africa implements minimum wages through the use of sectoral determinations. According to section 51 (1) of the *BCEA*, sectoral determination means that the Minister of Labour "establishes basic conditions of employment for employees in a sector or area". This includes the minimum rates of remuneration<sup>469</sup> and the adjustment of minimum rates of remuneration.<sup>470</sup> The provisions of sectoral determinations can either apply to all, or some, of the employers and employees in the specific area (region) or sector<sup>471</sup> and also varies in accordance with the specific occupation in question.

It is of further importance to note that employees and employers are not subject to sectoral determinations in instances where collective agreements have been reached.<sup>472</sup> Members of the National Intelligence Agency, the South African Secret Service, the South African National Academy of Intelligence and unpaid volunteer workers serving a charitable purpose are exempt from the working of sectoral determinations.<sup>473</sup> The following sectors are currently covered by sectoral determinations:<sup>474</sup>

(a) Contract cleaning;

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<sup>465</sup> ILO 2010 <http://ilo.org/labadmin/info/pubs/WCMS>.

<sup>466</sup> Section 2 (a) *BCEA*.

<sup>467</sup> Grogan *Workplace law* 7.

<sup>468</sup> Section 2 (b) *BCEA*.

<sup>469</sup> Section 55 (4) (a) *BCEA*.

<sup>470</sup> Section 55 (4) (b) *BCEA*.

<sup>471</sup> Section 55 (5) *BCEA*.

<sup>472</sup> Section 55 (7) (a) *BCEA*.

<sup>473</sup> Section 3 (1) *BCEA*.

<sup>474</sup> Du Toit et al *Labour Relations Law: a comprehensive guide* 635.

- (b) Civil engineering;
- (c) Learnerships;
- (d) Private security sector;
- (e) Domestic worker;
- (f) Wholesale and retail sector;
- (g) Children in the performance of advertising, artistic and cultural activities;
- (h) Taxi sector;
- (i) Forestry sector;
- (j) Farm worker sector and
- (k) Hospitality sector.

Sectoral determinations are set for eleven different sectors as referred to above. The prescribed minimum wage not only varies by sector "but also in some cases by occupation and location".<sup>475</sup> The effect of such differentiation is that there are 120 different types of minimum wage rates within the eleven different sectoral determinations in South Africa.<sup>476</sup> As a result minimum wages are more complicated than a single unified minimum wage which makes accessibility of information and knowledge crucial.

### 3.3.3.1 Determining sectoral determinations

Before the Minister of Labour can make sectoral determinations he has to give instruction to the Director-General of Labour to investigate conditions of employment in the specified area or sector.<sup>477</sup> As such a notice must be placed in the Government Gazette which invites written representations by the public, regarding the item being investigated.<sup>478</sup>

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<sup>475</sup> Bhorat 2014 <http://wol.iza.org/articles/compliance-with-minimum-wage-laws-in-developing-countries>.

<sup>476</sup> National Minimum Wage Panel Report 2016 53.

<sup>477</sup> Section 52 (1) BCEA. See also *Du Toit et al Labour Relations Law: A Comprehensive Guide* 635.

<sup>478</sup> Section 52 (3) BCEA.

In terms of the investigation, the Director General may question any person which could provide relevant information.<sup>479</sup> Additionally, information, documents, objects and/or books may be requested, within a reasonable period, from any employer or employee in the field being investigated.<sup>480</sup> Any persons to whom aforementioned questions are directed may not refuse to answer relevant questions to which they are legally obliged to answer.<sup>481</sup>

After considering all representation and completing the investigation, a report needs to be compiled by the Director General of Labour<sup>482</sup> and sent to the Employment Conditions Commission (ECC).<sup>483</sup> The functions and establishment of the ECC are described in section 59 of the *BCEA* and includes advising the Minister of Labour on sectoral determinations.<sup>484</sup>

After the ECC has received the report, as compiled by the Director General, the ECC must consider the following criteria when advising the Minister of Labour regarding sectoral determinations. These are then the criteria which influence the determination of sectoral determinations and is held in section 54(3) of the *BCEA*:

- (a) the report as prepared by the Director General of Labour;
- (b) the ability of employers to carry on their businesses successfully;
- (c) the operation of small, medium, micro enterprises or new enterprises;
- (d) the cost of living;
- (e) the alleviation of poverty;
- (f) the conditions of employment;
- (g) wage differentials and inequality;
- (h) the likely impact of any proposed condition of employment on current employment or the creation of employment;

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<sup>479</sup> Section 53 (1) (a) *BCEA*. See also *Du Toit et al Labour Relations Law: A Comprehensive Guide* 656.

<sup>480</sup> Section 53 (1) (b) *BCEA*.

<sup>481</sup> Section 53 (2) *BCEA*. See also *Du Toit et al Labour Relations Law: A Comprehensive Guide* 636.

<sup>482</sup> Section 54 (1) *BCEA*. See also *Du Toit et al Labour Relations Law: A Comprehensive Guide* 636.

<sup>483</sup> Section 54 (2) *BCEA*.

<sup>484</sup> Section 59 (2) (a) *BCEA*. See also *Du Toit et al Labour Relations Law: A Comprehensive Guide* 595.

- (i) the possible impact of any proposed conditions of employment on the health, safety or welfare of employees and
- (j) any other relevant information made available to the commission.

After consideration of all the aforementioned criteria the commission must compile a written report with advice and recommendations regarding "matters which should be included in a sectoral determination"<sup>485</sup> for the specific sector under investigation. This report should be issued to the Minister of Labour.<sup>486</sup> Ideally, such a report by the commission must be of a unanimous nature,<sup>487</sup> but in the event that a unanimous report is not possible, the relevant different views are to be reflected in the report.<sup>488</sup>

After considering the advice of the ECC the Minister of Labour may make sectoral determinations.<sup>489</sup> The Minister may also refer the advice given to him in the report back to the ECC for reconsideration of certain matters.<sup>490</sup> Subsequent sectoral determinations may then be instituted by the Minister.<sup>491</sup>

In terms of readdressing some of the wage disproportionality that is evident in the South African labour market the so-called "income differential statements" need to be discussed. As briefly mentioned in 1.4.1 the *Employment Equity Act, 1998 (EEA)* determines in section 27 that specified employers are required to supply "income differential statements" to the Department of Labour.<sup>492</sup> The income differential statement indicates disproportionality in the distribution of wages and benefits through the hierarchy of the company. Employers are expected to rectify such disparity by<sup>493</sup> actively pursuing collective bargaining,<sup>494</sup> complying with sectoral determinations,<sup>495</sup> applying norms and standards as set by the Employment Conditions Commission

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<sup>485</sup> Section 54 (4) *BCEA*.

<sup>486</sup> Section 62 (1) *BCEA*. See also *Du Toit et al Labour Relations Law: A Comprehensive Guide* 595.

<sup>487</sup> Section 62 (3) *BCEA*.

<sup>488</sup> Section 62 (3) *BCEA*.

<sup>489</sup> Section 55 (1) *BCEA*.

<sup>490</sup> Section 55 (2) *BCEA*. See also *Du Toit et al Labour Relations Law: A Comprehensive Guide* 636.

<sup>491</sup> Section 55 (3) *BCEA*.

<sup>492</sup> Section 27(1) of the *Employment Equity Act 55 of 1998 (EEA)*. See also *Du Toit et al Labour Relations Law: A Comprehensive Guide* 709.

<sup>493</sup> Section 27(2) *EEA*. See also *Du Toit et al Labour Relations Law: A Comprehensive Guide* 709.

<sup>494</sup> Section 27(3) (a) *EEA*. See also *Du Toit et al Labour Relations Law: A Comprehensive Guide* 709.

<sup>495</sup> Section 27(3) (b) *EEA*.

(ECC),<sup>496</sup> utilising measures contained in skills development legislation<sup>497</sup> and employing possible other measures appropriate to the circumstances.<sup>498</sup>

NEDLAC has an important role to play, which extends not only to the current discussion of the South African national minimum wage, but to more expansive labour matters. The council has to "promote the goals of economic growth, participation in economic decision-making and social equity".<sup>499</sup> Strong emphasis is placed on consensus-based agreements in social and economic policy.<sup>500</sup> The strong emphasis on consensus implies that relevant stakeholders and the general public should be included in decision-making processes.

Other functions of NEDLAC are to "promote the formulation of coordinated policy on social and economic matters"<sup>501</sup> and to engage in research with the aim of assisting development. A national minimum wage or minimum wage should therefore be in correlation with other policies (such as social assistance policies) or measures to assist in achieving social and economic goals.

NEDLAC has to consider all proposed legislation and amendments of policy in relation to the labour market. This underlines the importance of NEDLAC and the function it is obliged to fulfil in the South African context. Unfortunately, NEDLAC in its current capacity does not fulfil the roles it has been tasked with.

In September 2012 the Democratic Alliance's shadow Minister of Finance, Tim Harris, stated that NEDLAC failed to achieve 63% of its objectives in the party's own annual report.<sup>502</sup> Harris also suggested that those figures might not be accurate as an "independent auditor found that a total of 73% of the measures that allowed the council to monitor its performance did not exist".<sup>503</sup> Harris went on to describe NEDLAC as "a place where policy goes to die".<sup>504</sup> NEDLAC's current position is described in the following statement;

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<sup>496</sup> Section 27(3) (c) *EEA*.

<sup>497</sup> Section 27(3) (d) *EEA*.

<sup>498</sup> Section 27(3) (e) *EEA*.

<sup>499</sup> Section 5(1) (a) *NEDLAC Act*.

<sup>500</sup> Section 5(1) (b) *NEDLAC Act*.

<sup>501</sup> Section 5(1) (e) *NEDLAC Act*.

<sup>502</sup> Nhlabathi 2012 <http://sowetanlive.co.za>.

<sup>503</sup> Nhlabathi 2012 <http://sowetanlive.co.za>.

<sup>504</sup> Nhlabathi 2012 <http://sowetanlive.co.za>.

NEDLAC is now considered as having failed to aggregate the state and societal actors' interests, promote democracy, and develop the socio-economic conditions of the country. The interests of labour, particularly, have not been met, and the corporatist institution has gradually lost ground.<sup>505</sup>

### 3.3.3.2 Youth wages

As discussed in chapter 2.5.2 it may prove constructive for South Africa and other developing countries to institute a decreased minimum wage for the youth. This is because of the fact that developing countries are often characterised as having a high number of younger workers in the labour market.

At the time of conducting this research Statistics South Africa (STATSSA) estimated that one third of the entire South African population of 55.9 million are under the age of fifteen.<sup>506</sup>

As mentioned in chapter 2.5.2 employers may be hesitant to employ the youth due to various reasons, but a decreased minimum wage rate may prompt employers to consider employing more youth, even at more increased numbers. A decreased minimum wage rate may also contribute to an increased investment in workers in terms of training and development.

### 3.3.4 Adjustments

In section 55 (4) (b) of the *BCEA* it is stated that:

A sectoral determination may, in respect to the sector and area concerned, provide for the adjustment of remuneration by way of minimum rates or minimum increases.

No specific provision has been made in the *BCEA* in terms of specific methods and periods for the review and adjustments of sectoral determinations. Nonetheless, "it has become practice that uprating's (increases) are mostly calculated three to four years in advance and normally fixed for one year".<sup>507</sup> It is through reporting of the ECC, to the Minister of Labour, that adjustments are made with reference to the specific sectors and areas.

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<sup>505</sup> Kim and van der Westhuizen 2015 *Africa Spectrum* 91.

<sup>506</sup> STATSSA 2016 <http://www.statssa.gov.za/?p=8176>.

<sup>507</sup> SBP 2014 <http://rebosa.co.za>.

The ECC utilises the official inflation rate in determining adjustments of sectoral determinations for the three-year period, although adjustments are usually determined at:

One or two percentage points above this rate (inflation) in recognition of the fact that all sectors covered by such determinations currently have very low levels of earnings that should be increased over time.<sup>508</sup>

It is interesting to note that the inflation rate has been more significant for poorer individuals "than the average inflation rate for the country as a whole".<sup>509</sup> The importance of effective adjustment of sectoral determination by government is therefore emphasised, with specific reference to the poor.

The same criteria as set out in section 54 (3) of the *BCEA*, as previously mentioned in chapter 3.3.3.1 are used in determining sectoral determinations as well as in making adjustments with regard to sectoral determinations. According to these criteria the ECC then advises the Minister of Labour regarding sectoral minimum wage adjustments.

### 3.3.5 Monitoring compliance

In South Africa, labour inspectors are used for monitoring compliance with minimum wages. Accordingly, labour inspectors have the authority to enter any workplace at any reasonable time without warrant or notice<sup>510</sup> and to question any person regarding any employment law matter.<sup>511</sup> Labour inspectors are therefore responsible for the enforcement of all employment laws "for which the Department of Labour is responsible".<sup>512</sup>

Labour inspection in South Africa generally consists of;

Visiting workplaces, reviewing information on worker contracts, hours of work, salaries and overtime pay, as well as interviewing a sample of workers.<sup>513</sup>

Labour inspectors have a right to use discretion on whether to utilise a written undertaking or a compliance order to secure compliance.<sup>514</sup> A written undertaking may

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<sup>508</sup> Budlender 2010 <http://www.case.org.za/~caseorg/images/docs/domestic%20workers.pdf>.

<sup>509</sup> Budlender 2010 <http://www.case.org.za/~caseorg/images/docs/domestic%20workers.pdf>.

<sup>510</sup> Section 65 (1) (a) *BCEA*; See also *Du Toit et al Labour Relations Law: A Comprehensive Guide* 640.

<sup>511</sup> Section 66 (1) (a) *BCEA*.

<sup>512</sup> *Du Toit et al Labour Relations Law: a comprehensive guide* 639.

<sup>513</sup> Bhorat, Kanbur and Stanwix 2012 <http://dpru.uct.ac.za/wp-12149-estimating-impact-minimum-wages-employment-wages-and-non-wage-benefits-case-agriculture>.

<sup>514</sup> *Du Toit et al Labour Relations Law: a comprehensive guide* 639.

be required from the employer if there are reasonable grounds to believe that provisions of the act have not been complied with.<sup>515</sup> Accordingly, if an amount is owed to the employee it can be secured in this manner.<sup>516</sup>

Another measure labour inspectors may utilise is to issue a compliance order to the employer in the event that the inspector believes, on reasonable grounds, that there has been non-compliance with the act.<sup>517</sup> A compliance order is a more collaborative measure used between the labour inspector and the employer to affect compliance. A compliance order is generally preferred above more severe measures against non-compliance. As a result it is believed that “criminalisation did not encourage compliance with employment standards”.<sup>518</sup>

Thereafter the employer must comply with the order within the time specified in the order. Failure to comply (or object) can result in the compliance order being made an order of court.<sup>519</sup> Alternatively, the employer can object to such compliance order by writing to the Director General of Labour within twenty-one days after receipt of such order.<sup>520</sup> The Director General may review such order if the written objection is filed and can either confirm, modify or cancel the order.<sup>521</sup>

If the employer is still not satisfied with the order as such then the employer may appeal within twenty-one days to the labour court.<sup>522</sup> It is important to follow the procedure as determined in the *BCEA* in instances of dispute or objections to orders given by labour inspectors. As was confirmed in *Ephraim v Bull Brand Foods (Pty) Ltd* [2010] 31 *ILJ* 951 the administrative process as described in the *BCEA* should generally be followed before the Labour Courts are approached.

Some literature suggests that South Africa has sufficient labour regulation through the use of collective bargaining and sectoral determinations.<sup>523</sup> However, the challenge in South Africa is encountered in terms of "compliance with existing regulation".<sup>524</sup> In 2007

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<sup>515</sup> Section 68 (1) *BCEA*. See also *Du Toit et al Labour Relations Law: A Comprehensive Guide* 641.

<sup>516</sup> Section 68 (2) *BCEA*. See also *Du Toit et al Labour Relations Law: A Comprehensive Guide* 641.

<sup>517</sup> Section 69 (1) *BCEA*. See also *Du Toit et al Labour Relations Law: A Comprehensive Guide* 641.

<sup>518</sup> *Du Toit et al Labour Relations Law: a comprehensive guide* 639.

<sup>519</sup> Section 73 (1) *BCEA*. See also *Du Toit et al Labour Relations Law: A Comprehensive Guide* 643.

<sup>520</sup> Section 71 (1) *BCEA*.

<sup>521</sup> Section 71 (3) (c) *BCEA*.

<sup>522</sup> Section 72 (1) *BCEA*. See also *Du Toit et al Labour Relations Law: A Comprehensive Guide* 638.

<sup>523</sup> SBP 2014 <http://rebosa.co.za>.

<sup>524</sup> SBP 2014 <http://rebosa.co.za>.

some 44% of workers under sectoral determinations received remuneration below the prescribed minimum wage.<sup>525</sup> In 2014 it was estimated that less than half of the South African workforce received wages in accordance with the legal minimum.<sup>526</sup> It therefore appears as if the non-compliance towards minimum wage rates are escalating which is reason for concern and drastic immediate action needs to be taken in this regard.

Some of the shortcomings of the South African enforcement model include:

- (a) that labour inspectors do not apply uniform procedures because of the lack of operating manuals and procedures;<sup>527</sup>
- (b) that there are high levels of staff turnover due to inspectors abandoning the profession for better earnings elsewhere;<sup>528</sup>
- (c) a lack of efficient communication regarding legislation applicable to employers and employees;<sup>529</sup>
- (d) the lack of a "structured relationship with the Department of Justice and Constitutional Development to ensure speedy and successful prosecution of cases"<sup>530</sup> and lastly
- (e) poor case reporting that has resulted in bad case management as well as unreliable data.<sup>531</sup>

In 2013 the total number of labour inspectors in South Africa were 1366, which is an inadequate number considering the wide range of responsibilities they are tasked with.<sup>532</sup> These inspectors are responsible for ensuring compliance with the *BCEA*, sectoral determinations, the *Occupational Health and Safety Act* and the *EEA*.<sup>533</sup>

The limited number of labour inspectors, together with the wide range of responsibilities, may very well contribute to pressure in the profession and result in high staff turnover as

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<sup>525</sup> SBP 2014 <http://rebosa.co.za>.

<sup>526</sup> Borat 2014 <http://wol.iza.org/articles/compliance-with-minimum-wage-laws-in-developing-countries>.

<sup>527</sup> SBP 2014 <http://rebosa.co.za>.

<sup>528</sup> SBP 2014 <http://rebosa.co.za>.

<sup>529</sup> SBP 2014 <http://rebosa.co.za>.

<sup>530</sup> SBP 2014 <http://rebosa.co.za>.

<sup>531</sup> SBP 2014 <http://rebosa.co.za>.

<sup>532</sup> Du Toit et al *Labour Relations Law: a comprehensive guide* 64.

<sup>533</sup> Du Toit et al *Labour Relations Law: a comprehensive guide* 64.

mentioned above. The labour inspection profession might be considered undesirable due to the elevated responsibilities and the associated pressure. The obvious drawback to an inadequate number of inspectors is that compliance is compromised.<sup>534</sup>

Monitoring through labour inspectors face numerous challenges in South Africa of which the recruitment and retention of qualified staff are among the main challenges. Only 40% of labour inspectors have university degrees, which may be reason for concern considering the importance and challenging nature of the profession,<sup>535</sup> not to mention the broad discretion of labour inspectors in ensuring compliance.

A further problem is the fact that there are no standardised criteria for the selection of inspectors.<sup>536</sup> Labour inspection is a specialised profession requiring a certain skill set and certain character traits, which therefore requires standardised criteria for the selection process.

Additionally, there is no integrated unit tasked to identify needs in terms of training and then delivering appropriate training programmes to inspectors.<sup>537</sup> Moreover,

Low salaries and the absence of career prospects lead to a high turnover of inspectors to other ministries better remunerated and the private sector.<sup>538</sup>

### *3.3.6 Enforcement and consequences of non-compliance*

Labour Courts have the authority to make a compliance order an order of the court,<sup>539</sup> or to verify the order<sup>540</sup> or any part thereof. Furthermore, the Labour Court also has the authority to order specific performance, award damages or an award of compensation,<sup>541</sup> as well as issuing a fine in accordance with Schedule 2 of the *BCEA*.<sup>542</sup> If an order of court is “wilfully and mala fide”<sup>543</sup> disobeyed, then such party will be acting in contempt of court and be subjected to certain consequences such as

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<sup>534</sup> Du Toit et al *Labour Relations Law: a comprehensive guide* 64.

<sup>535</sup> ILO date unknown [http://www.ilo.org/labadmin/info/WCMS\\_150917](http://www.ilo.org/labadmin/info/WCMS_150917).

<sup>536</sup> ILO date unknown [http://www.ilo.org/labadmin/info/WCMS\\_150917](http://www.ilo.org/labadmin/info/WCMS_150917).

<sup>537</sup> ILO date unknown [http://www.ilo.org/labadmin/info/WCMS\\_150917](http://www.ilo.org/labadmin/info/WCMS_150917).

<sup>538</sup> ILO date unknown [http://www.ilo.org/labadmin/info/WCMS\\_150917](http://www.ilo.org/labadmin/info/WCMS_150917).

<sup>539</sup> Section 77 A (a) *BCEA*; See also *Du Toit et al Labour Relations Law: A Comprehensive Guide* 645.

<sup>540</sup> Section 77 A (c) *BCEA*; See also *Du Toit et al Labour Relations Law: A Comprehensive Guide* 645.

<sup>541</sup> Section 77 A (e) *BCEA*; See also *Du Toit et al Labour Relations Law: A Comprehensive Guide* 640.

<sup>542</sup> Section 77 A (f) *BCEA*; See also *Du Toit et al Labour Relations Law: A Comprehensive Guide* 645.

<sup>543</sup> Grogan *Workplace Law* 504.

incarceration or a fine.<sup>544</sup> The courts do not hesitate to utilise these consequences in instances of contempt of court even against state officials.<sup>545</sup>

Employees who complain about rights not being realised are always going to face the risk of discrimination or retaliation by the employer. Therefore sections 78 to 81 of the *BCEA* reinforces the rights of employees, and clearly sets the procedure<sup>546</sup> to follow in instances of discrimination or violation of these rights. Employees are thus legally protected against discrimination related to such circumstances.

### 3.3.7 *The role of supplementary social measures*

In *Government of RSA and Others v Grootboom and Others*<sup>547</sup> the Constitutional Court acknowledges the fact that large numbers of people are “living in deplorable conditions throughout the country”. The Court places an obligation on the State to act in a positive manner as to improve the living conditions of those people by providing:

Access to housing, health-care, sufficient food and water, and social security to those unable to support themselves and their dependents.<sup>548</sup>

The State therefore has an obligation to implement social protection measures as to elevate the living conditions of those who desperately need it. According to the South African Social Security Agency (SASSA) fact sheet issue 7 of 31 July 2016<sup>549</sup> the total number of social grants were 17,071,162 on 31 July 2016. Furthermore, the fact sheet indicates an increase in the number of social grants as from December 2015 to July 2016.<sup>550</sup>

It is therefore evident that South Africa has a large number of welfare recipients in comparison to the population total of 55,91 million people.<sup>551</sup> This places a significant burden on State resources to support a substantial number of people.

SASSA is responsible for the administration of social security services in South Africa. SASSA is mandated to “ensure the provision of comprehensive social security services

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<sup>544</sup> Section 13.2(c) *Practice Manual of the Labour Court of South Africa*.

<sup>545</sup> Grogan *Workplace Law* 505.

<sup>546</sup> Section 80 *BCEA*; Also see *Du Toit et al Labour Relations Law: A Comprehensive Guide* 126, 188.

<sup>547</sup> *Government of RSA and Others v Grootboom and Others* 2001 (1) SA 46 (CC) par 93.

<sup>548</sup> *Government of RSA and Others v Grootboom and Others* 2001 (1) SA 46 (CC) par 93.

<sup>549</sup> SASSA 2016 <http://www.sassa.gov.za/knowledge-centre>.

<sup>550</sup> SASSA 2016 <http://www.sassa.gov.za/knowledge-centre>.

<sup>551</sup> STATSSA 2016 <http://www.statssa.gov.za/?p=8176>.

against vulnerability and poverty within the constitutional legislative framework”.<sup>552</sup> The *South African Social Security Agency Act 9 of 2004* section 3 establishes SASSA with the objective to be the:

...sole agent that will ensure the efficient and effective management, administration and payment of social assistance, serve as an agent for the prospective administration and payment of social security and render services relating to such payments.

The *Social Assistance Act 13 of 2004* (*Social Assistance Act*) is the national legislative provision for various grants. Section 4 of the *Social Assistance Act* makes provision for the following grants:

- (i) Child support grant;
- (ii) Care dependency grant;
- (iii) Foster child grant;
- (iv) Disability grant;
- (v) Older persons grant;
- (vi) War veterans grant and
- (vii) Grant in aid.

The *Unemployment Insurance Act 63 of 2001* (UIA) makes provision for an unemployment insurance fund with employees and employers as contributors thereto. Its purpose is to "alleviate the harmful and social effects of unemployment"<sup>553</sup> by providing benefits to employees who become unemployed. According to section 13 of the UIA unemployment benefits are calculated on the basis of one day's benefit for every six days of completed employment, with a maximum of 238 days benefit.<sup>554</sup> Under Chapter 3 of the UIA provision is made for the following benefits to be claimed:

- (a) unemployment benefits;
- (b) illness benefits;

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<sup>552</sup> SASSA Date unknown <http://www.sassa.gov.za/index.php/about-us/our-mandate>.

<sup>553</sup> Section 2 of the *Unemployment Insurance Act NO.63 of 2001* hereafter referred to as UIA.

<sup>554</sup> Section 13 (3) of the UIA.

- (c) maternity benefits;
- (d) adoption benefits and
- (e) dependent benefits.

There is no link between minimum wage and unemployment benefits. In chapter 4.3 supplementary social protection measures among developing countries will be further discussed.

As is evident from the discussion above, South Africa has made ample provision in terms of supplementary social protection measures. The fact that so many people are dependent on these measures is, however, a major concern.

### *3.3.8 Effect of sectoral determinations*

It is important in the South African context, and specifically with the current debate surrounding a national minimum wage, to reflect on the effects of sectoral determinations in the labour market. Consideration of the effect of sectoral determinations could provide possible indications as to the consequence of a national minimum wage as is presently being deliberated.

Literature suggests that the effects of sectoral determinations were different across the various instances where they apply.<sup>555</sup>

The retail and wholesaling as well as the private security sectors experienced an increase in employment after the introduction of a minimum wage.<sup>556</sup>

Domestic workers experienced “an insignificant initial decline, after which it increased to new highs”.<sup>557</sup>

The forestry sector showed a decline in employment after the introduction of a minimum wage, but to such a limited extent that it might be considered insignificant.<sup>558</sup>

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<sup>555</sup> Bhorat and Mayet 2013 <http://www.econ3x3.org/article/impact-sectoral-minimum-wage-laws-south-africa>.

<sup>556</sup> Bhorat and Mayet 2013 <http://www.econ3x3.org/article/impact-sectoral-minimum-wage-laws-south-africa>.

<sup>557</sup> Bhorat and Mayet 2013 <http://www.econ3x3.org/article/impact-sectoral-minimum-wage-laws-south-africa>.

The taxi sector experienced a decline in employment.<sup>559</sup> However, the decline was present before the introduction of minimum wages, which makes it troublesome to determine whether or not the introduction of a minimum wage contributed to employment decline in this sector.<sup>560</sup> As such this sector is excluded from this analysis.

The agricultural sector experienced a significant decline in employment as a result of the introduction of a minimum wage. It is estimated that the probability of employment in the agricultural sector fell by as much as 9% after the introduction of minimum wages.<sup>561</sup>

Bhorat, Kanbur and Stanwix<sup>562</sup> highlights various factors that may also have resulted in employment loss in the agricultural sector. Wages represent a large part of the expenditure experienced in the agricultural sector because employers generally employ numerous workers.<sup>563</sup> Any increases in wages would therefore have a substantial influence on the financial status of employers in the agricultural sector.

If one compares the domestic sector in this regard it is evident that wages represent a substantial lower expenditure to the employer.<sup>564</sup> As such, increases in wages in the domestic sector might be accommodated by the employer. Furthermore, literature suggests that the agricultural sector was overemployed and unproductive before the introduction of minimum wages.<sup>565</sup>

Other sectors such as the domestic sector may not have been overemployed and unproductive to the same extent as that of the agriculture sector.<sup>566</sup> Minimum wages compelled employers to "employ fewer, skilled workers".<sup>567</sup>

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<sup>558</sup> Bhorat and Mayet 2013 <http://www.econ3x3.org/article/impact-sectoral-minimum-wage-laws-south-africa>.

<sup>559</sup> Bhorat and Mayet 2013 <http://www.econ3x3.org/article/impact-sectoral-minimum-wage-laws-south-africa>.

<sup>560</sup> Bhorat and Mayet 2013 <http://www.econ3x3.org/article/impact-sectoral-minimum-wage-laws-south-africa>.

<sup>561</sup> Bhorat, Kanbur and Stanwix 2012 <http://dpru.uct.ac.za/wp-12149-estimating-impact-minimum-wages-employment-wages-and-non-wage-benefits-case-agriculture>.

<sup>562</sup> Bhorat, Kanbur and Stanwix 2012 <http://dpru.uct.ac.za/wp-12149-estimating-impact-minimum-wages-employment-wages-and-non-wage-benefits-case-agriculture>.

<sup>563</sup> Bhorat, Kanbur and Stanwix 2012 <http://dpru.uct.ac.za/wp-12149-estimating-impact-minimum-wages-employment-wages-and-non-wage-benefits-case-agriculture>.

<sup>564</sup> Bhorat, Kanbur and Stanwix 2012 <http://dpru.uct.ac.za/wp-12149-estimating-impact-minimum-wages-employment-wages-and-non-wage-benefits-case-agriculture>.

<sup>565</sup> Bhorat, Kanbur and Stanwix 2012 <http://dpru.uct.ac.za/wp-12149-estimating-impact-minimum-wages-employment-wages-and-non-wage-benefits-case-agriculture>.

<sup>566</sup> Bhorat, Kanbur and Stanwix 2012 <http://dpru.uct.ac.za/wp-12149-estimating-impact-minimum-wages-employment-wages-and-non-wage-benefits-case-agriculture>.

At around the time of the introduction of agricultural minimum wages there were "political economy fears among many white farmers"<sup>568</sup> which may have resulted in the employment loss of many farm workers.

In recent years, farmers experienced various environmental challenges such as drought. These challenges influence the financial circumstances of farmers, which endangers the employment of workers.

A final factor that may have contributed to employment loss in the agricultural sector is the technological advancement that this sector has experienced, which consequently led to a loss of employment.<sup>569</sup> Considering these factors it is difficult to determine with absolute certainty the effect or impact the minimum wage had on the agricultural sector, but it may be a contributing factor in the employment losses experienced.

The introduction of minimum wages generally had no negative effect on employment across all five sectors examined except for affecting employment in the agricultural sector.<sup>570</sup> Bhorat, Kanbur and Stanwix emphasise that:

Due to the specific characteristics of the South African agricultural sector the results found here may not apply to other sectors, time periods or countries.<sup>571</sup>

Minimum wages did have an effect on the usual amount of hours worked by employees over a predetermined period of time.<sup>572</sup> It is suspected that employers elected to cut working hours of employees "to afford, or counter, higher hourly wages".<sup>573</sup> The reduction of hours could have limited the gains achieved through the increase of wages as a result of minimum wages. However, in most of the sectors the increase of hourly wages (as a result of minimum wage introduction) "was sufficient to outweigh any

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<sup>567</sup> Bhorat, Kanbur and Stanwix 2012 <http://dpru.uct.ac.za/wp-12149-estimating-impact-minimum-wages-employment-wages-and-non-wage-benefits-case-agriculture>.

<sup>568</sup> Bhorat, Kanbur and Stanwix 2012 <http://dpru.uct.ac.za/wp-12149-estimating-impact-minimum-wages-employment-wages-and-non-wage-benefits-case-agriculture>.

<sup>569</sup> Bhorat, Kanbur and Stanwix 2012 <http://dpru.uct.ac.za/wp-12149-estimating-impact-minimum-wages-employment-wages-and-non-wage-benefits-case-agriculture>.

<sup>570</sup> Bhorat and Mayet 2013 <http://www.econ3x3.org/article/impact-sectoral-minimum-wage-laws-south-africa>.

<sup>571</sup> Bhorat, Kanbur and Stanwix 2012 <http://dpru.uct.ac.za/wp-12149-estimating-impact-minimum-wages-employment-wages-and-non-wage-benefits-case-agriculture>.

<sup>572</sup> Bhorat and Mayet 2013 <http://www.econ3x3.org/article/impact-sectoral-minimum-wage-laws-south-africa>.

<sup>573</sup> Bhorat and Mayet 2013 <http://www.econ3x3.org/article/impact-sectoral-minimum-wage-laws-south-africa>.

reductions in hours worked".<sup>574</sup> As a result of the introduction of minimum wages, workers were better off.<sup>575</sup>

It should be noted that the effects of the minimum wage were limited as formerly non-compliance to minimum wage was high: "This could have diluted any negative reaction of employers to the minimum wage".<sup>576</sup>

### 3.3.9 A Consideration of domestic workers in South Africa

In order to gain a better understanding of sectoral determinations in South Africa it might prove useful and insightful to give specific consideration to the sectoral determination of domestic workers. Considering sectoral determinations of the domestic sector could provide a better understanding of the application of minimum wage in South Africa, albeit on a smaller sector-specific scale.

Reflecting on the sectoral determinations of the domestic sector could also provide possible insights into the workings of a national minimum wage as there are nearly one million workers working in the domestic sector.<sup>577</sup> This group of workers consists mainly of black women.<sup>578</sup> It is globally accepted that domestic work is "undervalued and poorly regulated".<sup>579</sup> Therefore, although these workers may be employed they may very well not be subject to the provisions associated with the decent work principle.<sup>580</sup>

According to section 1 of the *BCEA* a domestic worker is defined as

An employee who performs domestic work in the home of his or her employer and includes: a gardener, a person employed by a household as driver of a motor vehicle and a person who takes care of children, the aged, the sick, the frail or the disabled, but does not include a farm worker.

Domestic workers on farms are excluded by this definition as they are included in the definition for sectoral determination of agricultural workers.

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<sup>574</sup> Bhorat and Mayet 2013 <http://www.econ3x3.org/article/impact-sectoral-minimum-wage-laws-south-africa>.

<sup>575</sup> Bhorat and Mayet 2013 <http://www.econ3x3.org/article/impact-sectoral-minimum-wage-laws-south-africa>.

<sup>576</sup> Bhorat and Mayet 2013 <http://www.econ3x3.org/article/impact-sectoral-minimum-wage-laws-south-africa>.

<sup>577</sup> Budlender 2010 <http://www.case.org.za/~caseorg/images/docs/domestic%20workers.pdf>.

<sup>578</sup> Budlender 2010 <http://www.case.org.za/~caseorg/images/docs/domestic%20workers.pdf>.

<sup>579</sup> Budlender 2010 <http://www.case.org.za/~caseorg/images/docs/domestic%20workers.pdf>.

<sup>580</sup> Budlender 2010 <http://www.case.org.za/~caseorg/images/docs/domestic%20workers.pdf>.

Historically, domestic workers in South Africa were in a less favourable position than domestic workers in other countries due to the lack of applicability of labour legislation on domestic workers and the unjust system of Apartheid, which further restricted the rights of the occupation.<sup>581</sup> Against the aforementioned backdrop it is clear that the domestic worker occupation had to gain substantial headway to reach the level of protection as expected according to the decent work principle.

Substantial progress has been made in terms of establishing legal provisions to protect the basic rights of domestic workers.<sup>582</sup> Domestic workers currently enjoy protection under the *Labour Relations Act*, the *BCEA*, *Unemployment Insurance Act*, *EEA* and minimum wage coverage in terms of the sectoral determinations.

Domestic workers are seen as a vulnerable group as they are not adequately organised to provide for minimum wage determination through collective bargaining.<sup>583</sup> Therefore minimum wages are determined by sectoral determinations of which the first thereof came into effect September 1<sup>st</sup> 2002, with reference to domestic workers.<sup>584</sup> As mentioned domestic workers experienced an increase of real hourly wages to such an extent as to surpass the possible reduction of working hours associated with an increased wage.<sup>585</sup>

Sectoral determinations for domestic workers are divided into two respective groupings: in accordance with the geographical area, and the average yearly household income. Area A refers to those areas with a yearly average household income which exceeds a specified amount.<sup>586</sup> Area B refers to those geographical areas where the yearly average household income is less than a certain amount.<sup>587</sup>

Further differentiation is also made between workers working more than 27 hours per week and workers working less than 27 hours per week. According to the sectoral determination increases applicable from 1 December 2015 to 30 November 2016 the hourly minimum for more than 27 hours work per week is R11.44 in area A and R10.23

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<sup>581</sup> Budlender 2010 <http://www.case.org.za/~caseorg/images/docs/domestic%20workers.pdf>.

<sup>582</sup> Budlender 2010 <http://www.case.org.za/~caseorg/images/docs/domestic%20workers.pdf>.

<sup>583</sup> Budlender 2010 <http://www.case.org.za/~caseorg/images/docs/domestic%20workers.pdf>.

<sup>584</sup> Budlender 2010 <http://www.case.org.za/~caseorg/images/docs/domestic%20workers.pdf>.

<sup>585</sup> Bhorat and Mayet 2013 <http://www.econ3x3.org/article/impact-sectoral-minimum-wage-laws-south-africa>.

<sup>586</sup> Budlender 2010 <http://www.case.org.za/~caseorg/images/docs/domestic%20workers.pdf>; In 2010 these specified amounts were R27000.

<sup>587</sup> Budlender 2010 <http://www.case.org.za/~caseorg/images/docs/domestic%20workers.pdf>.

in Area B. The hourly minimum rates for workers working less than 27 hours per week are R13.39 in area A and R12.07 in area B.

As stated in chapter 3.3.3.1 sectoral determinations are adjusted upon recommendation of the ECC for periods of three to four years in advance and bears strong correlation to the official inflation rate.

Sectoral determination establishes the minimum wage per hour worked instead of determining the minimum wage per month. This determination is rooted in the fact that "many domestic workers are not employed on a full time basis".<sup>588</sup> This allows domestic workers to "work for different employers on different days".<sup>589</sup> Hourly minimum wages assist in reducing, or even avoiding, the effects of employment loss.<sup>590</sup> Hourly determination therefore assists in upholding employment where it might not be otherwise possible as a result of the introduction of minimum wage.<sup>591</sup> Employers may reduce the amount of working hours and still keep the employment. In instances of a monthly minimum it might prove difficult to sustain the employment as a result of a minimum wage.

Despite the protection of the aforementioned provisions "many workers do not even enjoy the basic low level of protection that is, in theory, provided by these laws"<sup>592</sup> as enforcement is difficult in a situation where most domestic workers are the only employee in a workplace that is the employer's private home.<sup>593</sup> Compliance and enforcement is hindered due to the fact that the relationship between worker and employer is very unbalanced in terms of power and puts the employee in a more vulnerable position.<sup>594</sup>

### *3.3.10 South African national minimum wage?*

A South African national minimum wage has been contemplated since the 1930s with various stakeholders driving the notion of a national minimum wage governing all

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<sup>588</sup> Budlender 2010 <http://www.case.org.za/~caseorg/images/docs/domestic%20workers.pdf>.

<sup>589</sup> Budlender 2010 <http://www.case.org.za/~caseorg/images/docs/domestic%20workers.pdf>.

<sup>590</sup> Budlender 2010 <http://www.case.org.za/~caseorg/images/docs/domestic%20workers.pdf>.

<sup>591</sup> Budlender 2010 <http://www.case.org.za/~caseorg/images/docs/domestic%20workers.pdf>.

<sup>592</sup> Budlender 2010 <http://www.case.org.za/~caseorg/images/docs/domestic%20workers.pdf>.

<sup>593</sup> Budlender 2010 <http://www.case.org.za/~caseorg/images/docs/domestic%20workers.pdf>.

<sup>594</sup> Budlender 2010 <http://www.case.org.za/~caseorg/images/docs/domestic%20workers.pdf>.

sectors in South Africa.<sup>595</sup> It was at the 2014 State of the Nation address that the president pointed to unemployment, inequality and poverty as major challenges facing South Africa and the possibility of utilising minimum wages in addressing some of these challenges.<sup>596</sup>

At the time of the conduction of this paper 26.6% of South African citizens were unemployed.<sup>597</sup> Furthermore, South Africa demonstrates the greatest discrepancies and inequalities regarding income distribution in the world.<sup>598</sup>

According to data collected by Statistics South Africa (STATSSA) the percentage of people living below the food poverty line makes for 20,2% of the population in 2004.<sup>599</sup> This figure has increased to 51% of the population living below the poverty line in 2016.<sup>600</sup>

Deputy president Cyril Ramaphosa announced a panel to investigate a South African national minimum wage and had the following to say to News 24 regarding the positives of a national minimum wage:

Today our level of inequality is the worst in the world. But this could be turned around and minimum wage could lead to the injection of growth in our economy. If people have more money in their pockets they become better consumers. This could fuel the manufacturing and demand for goods and services. We should not only look at a minimum wage from a negative perspective.<sup>601</sup>

Smith interviewed Ian Strauss, a consultant for the United Nations Conference on Trade and Development (UNCTAD), and pointed out that the global economy suffers from a lack of demand which can partly be attributed to inequality.<sup>602</sup> Most households at the lower spectrum of the pay scale simply do not have "enough money to buy the goods and services that allow the economy to tick over".<sup>603</sup> Theoretically a national minimum wage could stimulate consumption in providing more money to the lower spectrum of workers.

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<sup>595</sup> ILO 2015 <http://ilo.org/addisababa>.

<sup>596</sup> ILO 2015 <http://ilo.org/addisababa>.

<sup>597</sup> STATSSA 2016 <http://www.statssa.gov.za/?p=8176>.

<sup>598</sup> ILO 2015 <http://ilo.org/addisababa>.

<sup>599</sup> STATSSA 2014 <http://www.statssa.gov.za/?p=2591>

<sup>600</sup> National Minimum Wage Panel Report 2016.

<sup>601</sup> Smith 2016 <http://fin24.com>; Smith is a journalist that interviewed Strauss on behalf of Fin24.

<sup>602</sup> Smith 2016 <http://fin24.com>.

<sup>603</sup> Smith 2016 <http://fin24.com>.

A national minimum wage can increase the South African labour share, and if used in conjunction with complementary measures such as social welfare policies and investments in public infrastructure, it has the potential to stimulate growth in the South African economy.<sup>604</sup>

Strauss views the reduction of poverty and inequality as the primary benefits of a South African national minimum wage.<sup>605</sup> Cosatu supports the notion of a national minimum wage if determined relatively high. Isaacs and Fine<sup>606</sup> are also of the opinion that a national minimum wage should be determined relatively high and that wages should never be the main factor influencing employment levels. They argue that the efficiency and productivity, or level of output, are the predominant factors that influence employment levels, which in turn is "predominantly determined by the level of investment."<sup>607</sup> Isaacs and Fine argue that a national minimum wage should be utilised as part of a:

...well-designed restructuring policy package that stimulates investment and productivity and otherwise supports the growth of employment in the relevant sectors, thereby establishing a high wage growth path for the economy.<sup>608</sup>

This approach does not solely focus on the labour market and a national minimum wage in isolation. Instead, it utilises integrated policies in the economy to increase investment, and consequently output, that will drive the demand for labour.<sup>609</sup> This approach is aimed at long-term realisation.

Seekings and Natrass<sup>610</sup> also support the implementation of a South African national minimum wage, but on the condition that it should not be determined too high as to effect employment loss. The national minimum wage can then be used as a minimum

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<sup>604</sup> Smith 2016 <http://fin24.com>.

<sup>605</sup> Smith 2016 <http://fin24.com>.

<sup>606</sup> Isaacs and Fine 2015 <http://www.econ3x3.org/article/national-minimum-wage-debate-looking-beyond-narrow-focus-labour-markets>.

<sup>607</sup> Isaacs and Fine 2015 <http://www.econ3x3.org/article/national-minimum-wage-debate-looking-beyond-narrow-focus-labour-markets>.

<sup>608</sup> Isaacs and Fine 2015 <http://www.econ3x3.org/article/national-minimum-wage-debate-looking-beyond-narrow-focus-labour-markets>.

<sup>609</sup> Isaacs and Fine 2015 <http://www.econ3x3.org/article/national-minimum-wage-debate-looking-beyond-narrow-focus-labour-markets>.

<sup>610</sup> Seekings and Natrass 2015 <http://www.econ3x3.org/article/what-issue-minimum-wage-debate>.

floor for wages in conjunction with increased minimum wages for specific sectors where higher wages would not result in unemployment.<sup>611</sup>

This differentiated approach may prove valuable in protecting all workers against unduly low wages by determining a national minimum whilst yet limiting the possible negative consequence of a higher minimum wage rate with reference to the loss of employment. Furthermore, sectors that have high productivity, and where an increased minimum wage will not have such adverse effect on the loss of employment, may still allow for increased minimum wage.

In contrast, the Free Market Foundation (FMF) has a less optimistic view regarding a national minimum wage. The foundation is of the viewpoint that a national minimum wage will hamper, rather than stimulate, job creation in South Africa.<sup>612</sup>

The Director of the FMF, Eustace Davie, states:

Instead of considering national minimum wages intended to raise the wages of people who already have jobs, government should be giving its full attention to creating conditions that will lead to an increase in the demand for labour.<sup>613</sup>

Davie states that the labour market places numerous obligations on employers in terms of minimum wages, the minimum conditions of employment and other statutory requirements that results in a higher cost to employers in terms of labour cost.<sup>614</sup> This effectively leads to the economic production value being exceeded by the costs employers have to pay in terms of wages and in complying with legislation.<sup>615</sup> This may result in the unemployed staying permanently unemployed as no new jobs are being created.<sup>616</sup> Furthermore, the most affected and vulnerable labour sector will consist of unskilled, inexperienced youth because of the inability of employers to remunerate their entire workforce the arbitrary predetermined minimum wage.<sup>617</sup>

It is clear that there are contrasting viewpoints regarding the use of a national minimum wage in the South African context and the consequence of such national minimum wage may just be speculated at best. The high inequality, unemployment and poverty

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<sup>611</sup> Seekings and Nattrass 2015 <http://www.econ3x3.org/article/what-issue-minimum-wage-debate>.

<sup>612</sup> Smith 2016 <http://fin24.com>; Smith interviewed Davie.

<sup>613</sup> Smith 2016 <http://fin24.com>.

<sup>614</sup> Smith 2016 <http://fin24.com>.

<sup>615</sup> Smith 2016 <http://fin24.com>.

<sup>616</sup> Smith 2016 <http://fin24.com>.

<sup>617</sup> Smith 2016 <http://fin24.com>.

statistics in South Africa suggest that the implementation of drastic measures such as a national minimum wage is required to assist in dealing with these problematic issues.

In *S v Makwanyane*<sup>618</sup> the *South African Constitution*<sup>619</sup> is described as a “bridge between the past and the future”, between suffering, injustice and “a future founded in human rights”. It is acknowledged that this case does not refer specifically to labour law, but the values and principles outlined may be of great value to other aspects of the law, including labour law.

The minimum wage principle may be seen as assisting the *Constitution*<sup>620</sup> in bridging the gap (as mentioned in the previous paragraph) between an unjust and unequal society versus a more equal, justifiable and dignified society based on human rights. The author therefore, in principle, supports the notion of a South African national minimum wage although certain aspects should be given specific consideration as discussed below.

It is the author’s view that Seekings and Nattrass’s differentialised minimum wage approach may prove useful in the South African context by providing a single national minimum wage to establish a legal floor for wages and thus ensuring that basic needs are met for the most vulnerable. Various sectoral minimum wages may be utilised, at a suitable institutional pace, to allow for higher minimum wage determination in certain sectors where it can be attained without having severe negative effects on employment.

The higher minimum wages, as referred to earlier, must be introduced and implemented gradually in the applicable sectors, from where such determinations may progressively increase as to provide these sectors opportunity to adapt. As discussed in chapter 3.3.5 compliance with existing minimum wage law is an extremely troublesome issue in South Africa and the author fears that a minimum wage rate that is set too high might worsen an already problematic situation even further by elevating non-compliance.

It is important to grow and develop a differentialised minimum wage system over time and not to overcomplicate the minimum wage system or policy with too many differentiated minimum wage rates. Differentialised minimum wages should only be

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<sup>618</sup> *S v Makwanyane* 1995 (6) BCLR 793 (CC) par 223.

<sup>619</sup> *The Constitution of the Republic of South Africa*, 1996.

<sup>620</sup> *The Constitution of the Republic of South Africa*, 1996.

considered if the capacity and resources exist to implement and enforce such minimum wages effectively. Adding various differentialised minimum wages, if compliance is not sufficient, will render such minimum wages useless and only bound to paper, not to practice.

This gradual transition and development of differentialised minimum wages might ease the transition progress in terms of the labour market and economy while adapting to such policy, and hence assist in economic stability. The more elevated minimum wages in certain sectors will result in workers having more money available in those sectors. This will result in the stimulation of consumption of workers in those sectors which, in turn, enhances economic growth.

Last mentioned is the premise for Isaacs and Fine's approach. Isaacs and Fine's approach in terms of elevated minimum wages to stimulate investment and productivity will thus be utilised, not on a national minimum wage premise, but rather in specific sectors where it can be applied without resulting in elevated unemployment.

Although a national minimum wage might aid in bringing relief in terms of excessive inequality, poverty and unemployment, it is an assistive and reactive measure at best. In order to address the root of the problem the possible causes of inequality, poverty and unemployment in South Africa need to be identified and addressed first.

Although various factors contribute to elevated inequality, unemployment and poverty in various degrees, and on various levels, the predominant factor might be the oversupply of labour in the labour market. This results in unemployment as many workers are unable to find employment due to the labour demand not having the capacity to absorb the labour supply.

#### 3.3.10.1 Current proposal by the National Minimum Wage Panel

The National Minimum Wage Panel delivered a report with recommendations on policy and implementation of a South African national minimum wage. The panel proposed a hourly wage of R20 per hour or approximately R3500 per month.<sup>621</sup> The Panel recommends that the national minimum wage be legislated as soon as 2017.<sup>622</sup> From

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<sup>621</sup> National Minimum Wage Panel Report 2016 9.

<sup>622</sup> National Minimum Wage Panel Report 2016 10.

then a two-year transitional period will be allowed for all stakeholders in the labour market to adjust to such national minimum wage with exceptions for a longer adjustment period for small businesses, farm and domestic workers.<sup>623</sup> Such transitional period will be accompanied with planned education and awareness of the minimum wage to attain compliance without punitive measures.<sup>624</sup> Punitive measures for non-compliance will take effect from 2019.<sup>625</sup>

The national minimum wage panel recommends that the institution of a national minimum wage should be complimented by collective bargaining in that collective bargaining should be utilised to establish minimum wages above the national minimum wage.

### *3.3.11 Addressing the underlying problem*

South Africa, as many other developing countries, has three main challenges, namely: unemployment, inequality and poverty. All three challenges have an adverse impact on economic growth.<sup>626</sup> As mentioned in 1.1, literature suggests that these three challenges are interconnected.<sup>627</sup> Various measures, such as legislative and structural provisions, are either intended or have already been implemented to counteract these challenges. According to the author it should be deliberated whether or not the aforementioned challenges are the result of a deeper underlying problem or if those challenges stem from a more autonomous origin. Most would agree that the challenges are more likely a result of a deeper underlying problem which gives rise to unemployment, inequality and poverty.

In *Soobramoney v Minister of Health, Kwazulu-Natal*<sup>628</sup> (*Soobramoney*) the South African Constitutional Court stated in paragraph 8:

We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the *Constitution* was adopted and a commitment to address them, and to transform our society into one in which there will be

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<sup>623</sup> National Minimum Wage Panel Report 2016 10.

<sup>624</sup> National Minimum Wage Panel Report 2016 10.

<sup>625</sup> National Minimum Wage Panel Report 2016 10.

<sup>626</sup> SBP 2014 <http://rebosa.co.za>; Also confirmed in Du Toit et al *Labour Relations Law: a comprehensive guide* 69.

<sup>627</sup> Chibba and Luiz 2011 *Economic Papers* 307.

<sup>628</sup> *Soobramoney v Minister of Health, Kwazulu-Natal* 1997 12 BCLR 1696 (CC).

human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions exist that aspiration will have a hollow ring.

Although the *Soobramoney* case does not refer to labour law per se, the principles and values as discussed therein are applicable to other parts of the law, including labour law. The aforementioned statement emphasises both the urgency and the importance of addressing certain challenges.

The spirit of the *Constitution*<sup>629</sup> requires of all South Africans to work towards the values and principles as reflected therein. Accordingly, the problems facing South Africa should be identified and actively dealt with at the root of each of the problems, and a symptomatic approach should be avoided.

At the current rate 1.1 million youths enter the South African labour market each year.<sup>630</sup> Every year around 300 000 jobs are available to workers entering the labour market. This includes 200 000 new formal jobs and 100 000 jobs made available through retirement.<sup>631</sup> Accordingly, there would be some 800 000 youths that will be "unemployed, informally employed or welfare dependents"<sup>632</sup> each year. As stated above in 3.3.11 unemployment, inequality and poverty are interrelated. The oversupply of labour in the labour market results in unemployment. Unemployed individuals are more likely to be poor because they do not have a regular working income. The larger the pool of poor unemployed workers the more elevated the gap becomes between the rich at the top of the socio-economic hierarchy and the poor on the bottom end of the socio economic hierarchy.

Chibba and Luiz state that the South African labour market has an "increasing inability"<sup>633</sup> to "create opportunities for those who are relatively unskilled,"<sup>634</sup> such as youths. Furthermore, 40% of the population is between the ages of fifteen and thirty-four.<sup>635</sup> The age group between fifteen and thirty-four years is "also the fastest growing group at 1.27% per year".<sup>636</sup> "The problem is therefore set to worsen further in the

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<sup>629</sup> *The Constitution of the Republic of South Africa*, 1996.

<sup>630</sup> Helen Suzman Foundation 2012 <http://hsf.org.za>.

<sup>631</sup> Helen Suzman Foundation 2012 <http://hsf.org.za>.

<sup>632</sup> Helen Suzman Foundation 2012 <http://hsf.org.za>.

<sup>633</sup> Chibba and Luiz 2011 *Economic Papers* 311.

<sup>634</sup> Chibba and Luiz 2011 *Economic Papers* 311.

<sup>635</sup> Helen Suzman Foundation 2012 <http://hsf.org.za>.

<sup>636</sup> Helen Suzman Foundation 2012 <http://hsf.org.za>.

foreseeable future".<sup>637</sup> This means the labour supply outweighs the labour demand. Simply put, the number of youths entering the labour market far exceeds the South African economy's capacity to provide adequate employment opportunities, which in turn results in various challenges of which unemployment, inequality and poverty (among others) can be identified.

It is not to say that the oversupply of labour in the labour market is the only factor contributing to the current challenges faced regarding unemployment, inequality and poverty. But according to the author it is a prominent factor.

The oversupply of labour in the labour market can be dealt with in two predominant ways. Firstly, it can be dealt with by creating an increased demand for labour in the labour market. This can be actualised by stimulating economic growth, which will result in an increased demand for labour in the labour market. The current reality is that the average long-term annual growth rate of the South African economy is around 3,5%, which is not enough to absorb the current growth in workers entering the labour market.<sup>638</sup> Around 6% to 7% annual economic growth is required to create sufficient employment opportunities to curb the annual growth in the labour market.<sup>639</sup> Unfortunately, at present South Africa "does not possess the capacity to produce this level of growth in a sustainable manner".<sup>640</sup> If the first approach of increasing the demand for labour cannot be realised then the second approach needs to be considered.

The second approach holds that the supply of labour in the labour market should be decreased. The oversupply of workers may be the result of high fertility rates. Accordingly, the population is growing to such an extent that the economy and specifically the labour market, cannot accommodate the number of employment seekers. Developing countries tend to have higher fertility rates than their developed counterparts.<sup>641</sup> The total South African fertility rate has decreased since 1996 to the level of 2.67 children per women in 2011, but this figure is still above the replacement

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<sup>637</sup> Helen Suzman Foundation 2012 <http://hsf.org.za>.

<sup>638</sup> Helen Suzman Foundation 2012 <http://hsf.org.za>.

<sup>639</sup> Helen Suzman Foundation 2012 <http://hsf.org.za>.

<sup>640</sup> Chibba and Luiz 2011 *Economic Papers* 309.

<sup>641</sup> Earth Policy Institute 2011 <http://earth-policy.org>.

rate.<sup>642</sup> This simply holds that the population is still growing. In developing countries high fertility rates may result in poverty being more difficult to reduce.<sup>643</sup>

Poverty, in turn, increases the likelihood of having many children, trapping families and countries in a vicious cycle.<sup>644</sup>

Countries with a high population growth can achieve the so-called "demographic bonus" when population growth is decreased within a short period of time.<sup>645</sup> The "demographic bonus" is "the economic and social rewards that come from a smaller number of young dependents relative to the number of working adults".<sup>646</sup> The ideal fertility rate would be where a replacement level fertility rate is achieved. Simply stated: the fertility rate should be at such a rate as to account and replace the mortality rate levels.<sup>647</sup>

Although controversial, the "one child policy" of the Chinese has to be discussed because literature suggests various benefits to this policy, and such measures could be used to possibly address the oversupply of labour in the labour market. Although the one child policy will be discussed, it is doubtful if such an approach would ever be considered in the South African context as the best method in dealing with the oversupply of labour.

Historically, the so-called one child policy as implemented in China, aimed to reduce family size.<sup>648</sup> The Chinese government recognised the negative economic consequences of the vast increase in the population growth in the 1970s. This prompted the Chinese government to develop specific policies such as the one child policy.<sup>649</sup> Accordingly, families were encouraged to have one child per family, but this number was adapted to 1.5 children per family in 1984.<sup>650</sup> The policy is encouraged through

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<sup>642</sup> STATSSA 2011 <http://www.statssa.gov.za/report-03-01-63>.

<sup>643</sup> Earth Policy Institute 2011 <http://earth-policy.org>.

<sup>644</sup> Earth Policy Institute 2011 <http://earth-policy.org>.

<sup>645</sup> Earth Policy Institute 2011 <http://earth-policy.org>.

<sup>646</sup> Earth Policy Institute 2011 <http://earth-policy.org>.

<sup>647</sup> Earth Policy Institute 2011 <http://earth-policy.org>; More industrialised developed countries are close to the replacement rate at 2 children per women, whilst developing countries are well above the fertility rate of 4 children per women.

<sup>648</sup> Jiang, Li and Feldman 2013 *Asian Journal of Social Science* 1.

<sup>649</sup> Jiang, Li and Feldman 2013 *Asian Journal of Social Science* 2.

<sup>650</sup> Jiang, Li and Feldman 2013 *Asian Journal of Social Science* 33.

various incentives and penalties implemented by the Chinese government.<sup>651</sup> The result was an increased per capita GDP, which increased economic growth in China.<sup>652</sup>

Low fertility can effectively change the investment model of human capital: it can improve the development and quality of human capital.<sup>653</sup>

The development and quality of human capital is of specific importance in the South African context and many emerging countries where the majority of the human capital in the labour markets consist of unskilled workers, resulting in low productivity. Low fertility rates will assist in increasing the quality of workers with regards to skills and productivity, important factors in terms of economic growth. A low fertility rate will furthermore contribute to a decline in the individual's dependency on the state for support in the form of social welfare and other measures. Fewer people equals a decreased burden on the state.

The decrease in the number of child births in China resulted in "relieving pressures on resources of local communities, of the nation, as well as on the environment".<sup>654</sup> The one child policy has also "relieved some of the pressure on people's livelihood, on education, on job hunting and on medical care, and in turn, saved the nation and families the resources that would have had to be expended on education".<sup>655</sup>

Maintaining the low birth rate improves the "quality" of the population".<sup>656</sup> Policies such as the one child policy or related policies with the aim of decreasing fertility rates are by no means without flaws.

Arguably the most pronounced flaws of such a system would be its discriminatory nature together with the ethical considerations.<sup>657</sup> Citizens are subject to differentiation between those that abide with the one child policy and those that do not abide with the policy. Those citizens who adhere to the policy are in a more favourable position in terms of benefits received, than those citizens who do not adhere to the policy. On the long term the labour market could face possible labour shortages because of the

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<sup>651</sup> Jiang, Li and Feldman 2013 *Asian Journal of Social Science* 32.

<sup>652</sup> Jiang, Li and Feldman 2013 *Asian Journal of Social Science* 33.

<sup>653</sup> Jiang, Li and Feldman 2013 *Asian Journal of Social Science* 11.

<sup>654</sup> Jiang, Li and Feldman 2013 *Asian Journal of Social Science* 10.

<sup>655</sup> Jiang, Li and Feldman 2013 *Asian Journal of Social Science* 11.

<sup>656</sup> Jiang, Li and Feldman 2013 *Asian Journal of Social Science* 8.

<sup>657</sup> Jiang, Li and Feldman 2013 *Asian Journal of Social Science* 33.

decreased number of workers which may dampen economic growth.<sup>658</sup> Furthermore decreased fertility rates will (over time in the longer term) result in the aging of the population and will place an increased burden on the state in terms of social measures and social welfare.<sup>659</sup>

The aforementioned method may be considered by developing countries in an effort to address the labour supply surplus that often exists in these countries. In the South African context, it is doubtful if such a policy will ever be considered because of the fact that the *South African Constitution*<sup>660</sup> allows everyone the right to equality. Section 9 of the *Constitution*<sup>661</sup> specifically states that everyone has equal rights in terms of the law and that unfair discrimination against anyone, whether directly or indirectly, is not to be tolerated. Section 12(2) (a)<sup>662</sup> gives everyone the right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction. The *South African Constitution* provides for the limitation of rights in terms of Section 36,<sup>663</sup> which could perhaps allow for consideration of such policy, but it is unlikely considering the factors listed in section 36<sup>664</sup> which would justify such limitation of rights.

Alternatively, South Africa and other developing countries may consider adequate and quality education as an instrument to reduce poverty and decrease population growth.

Countries in which more children are enrolled in school even at primary level tend to have strikingly lower fertility rates.<sup>665</sup>

The literature shows the importance of education, especially to females "who are empowered through education"<sup>666</sup> and "tend to have fewer children later".<sup>667</sup> STATSSA<sup>668</sup> specifically mentions that more educated women tend to have fewer children when compared with women with limited or no education at all. Therefore, to

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<sup>658</sup> Jiang, Li and Feldman 2013 *Asian Journal of Social Science* 15.

<sup>659</sup> Jiang, Li and Feldman 2013 *Asian Journal of Social Science* 17.

<sup>660</sup> *The Constitution of the Republic of South Africa*, 1996.

<sup>661</sup> *The Constitution of the Republic of South Africa*, 1996.

<sup>662</sup> *The Constitution of the Republic of South Africa*, 1996.

<sup>663</sup> *The Constitution of the Republic of South Africa*, 1996.

<sup>664</sup> *The Constitution of the Republic of South Africa*, 1996.

<sup>665</sup> Earth Policy Institute 2011 <http://earth-policy.org>.

<sup>666</sup> Earth Policy Institute 2011 <http://earth-policy.org>.

<sup>667</sup> Earth Policy Institute 2011 <http://earth-policy.org>.

<sup>668</sup> STATSSA 2011 <http://www.statssa.gov.za/report-03-01-63>; Interestingly STATSSA elaborates further in the report that the provinces in South Africa with the highest fertility rates are Limpopo, Mpumalanga, KwaZulu Natal and the Eastern Cape which may be due to the low educational level, the lower socio economic status of women and limited employment opportunities which are evident in these provinces.

influence fertility rates by means of education primary, secondary and higher education would have to be further developed to increase the number of educational attendees and the effectivity of education.<sup>669</sup>

Education not only holds potential to influence fertility rates but also has potential to reach further beneficial results to women in that;

If and when they become mothers, they tend to be healthier and raise healthier children, who then also stay in school longer.<sup>670</sup>

More educated women tend to have a better awareness in terms of the benefits associated with having children later on in life.<sup>671</sup> Healthier mothers and children are important to the state as it lessens the burden on the state in terms of welfare and social support measures.<sup>672</sup> Because of the influence of education females may earn more money through placement in better jobs. That in turn helps these women to support their families and the communities they form part of.<sup>673</sup> Economic growth may then be stimulated<sup>674</sup> by increasing access and the quality of education that is being offered.

Education may also assist in narrowing the wage gap by offering more skilled workers that might be able to work for better remuneration.

The importance of education is summed up in the following statement:

Extending educational opportunities to all the world's children can clearly reap vast rewards in lower population growth, which in turn brings greater stability, prosperity and environmental sustainability.<sup>675</sup>

Education should focus on progressive awareness in terms of important matters such as financial planning, family planning, contraception, basic health care and hygiene as well as the law and individual rights. Progressive awareness could prove valuable to countries, especially developing countries, as it is proactive in nature and could prove more beneficial than reactive measures. Reactive measures could often be more costly than proactive measures and place more strain on State resources. State resources are

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<sup>669</sup> STATSSA 2011 <http://www.statssa.gov.za/report-03-01-63>.

<sup>670</sup> Earth Policy Institute 2011 <http://earth-policy.org>.

<sup>671</sup> STATSSA 2011 <http://www.statssa.gov.za/report-03-01-63>.

<sup>672</sup> Earth Policy Institute 2011 <http://earth-policy.org>.

<sup>673</sup> Earth Policy Institute 2011 <http://earth-policy.org>.

<sup>674</sup> Earth Policy Institute 2011 <http://earth-policy.org>.

<sup>675</sup> Earth Policy Institute 2011 <http://earth-policy.org>.

often times limited in developing countries, emphasising the need for proactive measures.

### **3.4 Conclusion**

It is evident from 3.1 that developing countries have ratified international measures regarding wages and specifically minimum wages in various levels. Some countries such as Costa Rica have ample ratified international provisions whilst other countries have much more limited international provisions such as South Africa and various other Southern African countries.

These countries and other developing countries should be encouraged to ratify additional conventions in order to promote the decent work principle further. The value of international measures firstly depends on the number of countries that accept or ratify these measures and secondly to what extent these measures are actively realised in these countries. In this last mentioned point Zimbabwe can be used as an example of a country with ample ratified international measures but the realisation of those measures are questionable considering the current socio economic climate of Zimbabwe.

The previous mentioned scenario emphasises the importance of empowering the ILO to better enforce compliance in terms of ratified conventions. Without such effective enforcement the ILO measures would be limited to paper only and would make no significant difference in the global labour market.

Brazil has various legal provisions regarding wages and specifically minimum wages. As mentioned the Brazilian minimum wage policy has had various beneficial effects on the Brazilian economy. As such other countries should consider the approach that the Brazilian government took in terms of the criteria as discussed in this paper.

Minimum wage is determined according to the so called hybrid system. This system is recommended as it is believed to offer optimised coverage in terms of the minimum wage nationally whilst still allowing increased minimum wages in certain sectors of the labour market.

The minimum wage policy of Brazil represents a fine balancing act between offering sufficient minimum wage rates whilst not having a redundancy of minimum wage rates

which might result in an overcomplicated minimum wage system that may affect non-compliance.

Supplementary social measures are related to the minimum wage which enhances the possible beneficial effect that a minimum wage policy might have. Adjustment of the minimum wage is done in such a manner as to retain purchasing power and affirm stability and eliminate uncertainty.

Despite a certain degree of non-compliance that still prevails among certain vulnerable groups the Brazilian enforcement model is one to take note of. Labour inspectors are tasked with ensuring compliance with minimum wage provisions and through the use of various measures such as standardised operating procedures, the recruitment of quality personnel and continued development and training, ensure the successful functioning of the Brazilian enforcement model.

South Africa has limited ratified ILO conventions and as such, should strongly consider various other international instruments regarding wages and specifically minimum wages in order to promote the decent work principle. Such conventions should be actively adopted into national legislation.

Various legal provisions exist for the South African minimum wage policy which arguably allows for sufficient determination of minimum wages after thorough investigation into various elements of the labour market and after sufficient consultation with the various stakeholders.

Although legal provision is made for the adjustment of minimum wages there is no legal provision in legislation regarding the period and the method of adjusting minimum wages. The period and adjustment process is only contained within sectoral determinations.

There is currently no collaboration between minimum wages and supplementary social measures, which may limit the positive result that these policies might have.

The South African enforcement model mandated with ensuring compliance is insufficient in its current form. Legal provisions have to be effectively enforced, in order to assure the realisation of legal provisions. It is recommended that the labour inspection profession be more professionalised.

It has to be recognised that South Africa has serious challenges regarding unemployment, inequality and poverty, as such drastic measures such as a South African national minimum wage is supported.

Based on evidence from the application of minimum wages in the sectoral determinations, the negative impact in terms of employment loss have generally been limited. Although sectoral determinations are operational in a smaller scale there is no indication that the implementation of a national minimum wage might be different. A national minimum wage might also increase the coverage in terms of the number of people covered by a minimum wage.

Minimum wage policies (if effectively utilised) might alleviate various challenges such as unemployment, inequality and poverty. These challenges are to a great extent the result of the oversupply of labour in the labour market. The oversupply of labour is apparent in South Africa and various other countries. It is therefore recommended that the oversupply of labour in the labour market be reduced.

## **CHAPTER 4: COMPARING EXAMPLES OF VARIOUS MINIMUM WAGE POLICIES WITHIN SELECTED DEVELOPING COUNTRIES TO IDENTIFY DIFFERENCES AND COMMONALITIES**

As is evident from chapter 3 that the number of ratified international measures regarding wages, and specifically minimum wages, vary significantly between developing countries. Some developing countries ratify only a few international instruments, whilst other countries ratify ample international instruments.

Developing countries differ in numerous ways, such as legal structure, political framework and economical degree/success. These differences, to a great extent, influence the makeup of minimum wage policies within the countries themselves. It could therefore be useful to identify various trends regarding minimum wage within various developing countries.

The criteria as stated in chapter 2.5 will now be considered within various developing countries as to identify trends in the application of minimum wage policies. Some reference will also be made to developed countries in case of a potential best practice to take cognisance of.

### ***4.1 Determination of minimum wage***

It is interesting to note that minimum wage rates are generally determined higher in developing countries as compared to more developed countries.<sup>676</sup> In more developed countries minimum wage rates are determined between 37% and 60% of the median, or average wages, for that country.<sup>677</sup> Developing countries have minimum wages determined at more than 60% of the median wages of those countries.<sup>678</sup> The higher minimum wage rates in developing countries may possibly be contributed to the higher levels of income inequality in those countries.<sup>679</sup>

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<sup>676</sup> Rani *et al* 2013 *International Labour Review* 393.

<sup>677</sup> Rani *et al* 2013 *International Labour Review* 393.

<sup>678</sup> Rani *et al* 2013 *International Labour Review* 393.

<sup>679</sup> Rani *et al* 2013 *Labour Review* 393.

According to literature South Africa and Indonesia have minimum wage rates that are higher than the median of wages in those countries.<sup>680</sup> Determining minimum wage rates above the median of wages will result in higher rates of non-compliance.<sup>681</sup> Literature suggests that high levels of compliance are associated with lower determinations of minimum wages rates, as is evident in Vietnam and Mexico.<sup>682</sup> In contrast, lower levels of compliance are associated with higher minimum wage rates, as is evident in South Africa, Turkey and the Philippines.<sup>683</sup>

Determination of the monetary value of minimum wage should be done with the aim of satisfying the basic needs of workers, among other criteria. Both Brazil (3.2.2) and South Africa (3.3.3.1) have predetermined criteria for determination of a minimum wage, which provides for consideration of all necessary factors. In Russia the subsistence minimum is used as main criteria in determining minimum wage.<sup>684</sup> In reality the subsistence minimum is more often than not more than the minimum wage.

The subsistence minimum is determined with “reference to the consumer basket and the compulsory fees and taxes”.<sup>685</sup> Over a longer term the subsistence minimum is not a “suitable criterion for minimum wage determination”<sup>686</sup> because of various reasons.

It is argued that the substantive minimum was developed in a specific time period subject to the conditions present at that time.<sup>687</sup> It may therefore not be fully up to date with the current market and economic climate. The goods as reflected in the consumer basket were decreased with 30% in the 1990s and the extent “of the consumer basket has remained almost the same up to the present day”.<sup>688</sup> This implies that the consumer basket in its present form does not reflect the basic needs of workers.

The subsistence minimum also does not include important expenses<sup>689</sup> such as “childcare costs and payments to the pension funds and other social security

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<sup>680</sup> Rani *et al* 2013 *Labour Review* 393.

<sup>681</sup> Rani *et al* 2013 *Labour Review* 393.

<sup>682</sup> Rani *et al* 2013 *Labour Review* 394.

<sup>683</sup> Rani *et al* 2013 *Labour Review* 394.

<sup>684</sup> Bolsheva *Minimum Wage Development in the Russian Federation* 22.

<sup>685</sup> Bolsheva *Minimum Wage Development in the Russian Federation* 7.

<sup>686</sup> Bolsheva *Minimum Wage Development in the Russian Federation* 22.

<sup>687</sup> Bolsheva *Minimum Wage Development in the Russian Federation* 19.

<sup>688</sup> Bolsheva *Minimum Wage Development in the Russian Federation* 22.

<sup>689</sup> Bolsheva *Minimum Wage Development in the Russian Federation* 22.

payments”.<sup>690</sup> As a result of the aforementioned factors the Russian national minimum wage “has not achieved its main aim of protecting the lowest wage earners in order to guarantee them a decent standard of living”.<sup>691</sup> Numerous writers recommend that the Russian minimum wages be determined as a percentage of average wages.<sup>692</sup>

It is important to have accurate information regarding the criteria used in determining minimum wages, which is also referred to in chapters 2.5.1.1 and 4.1. A "capacity to collect and analyse the data needed to set and adjust the minimum wage" should be available.<sup>693</sup>

DIEESE, in Brazil and NEDLAC, in South Africa, fulfils an important role in providing information and data that can be utilised in making minimum wage determinations. In Russia, The Federal State Statistics Service is mainly responsible for the delivery of data which is then utilised in negotiations between the various stakeholders.<sup>694</sup> Developing countries often face the following challenge regarding the availability of reliable and current information:

The fact that many developing countries do not conduct regular household surveys means that the minimum wage could be set without reference to relevant economic variables and thus could be inappropriate for a given labor market.<sup>695</sup>

It is therefore recommended that countries, and specifically developing countries, set up authorities with the specific mandate as to acquire information and statistics regarding the labour market. Such information is valuable in establishing the current state of the labour market and minimum wage can then be determined accordingly.<sup>696</sup> Without current information and statistics regarding the labour market it would be very difficult to establish an effective minimum wage policy.

Efficient determination of the minimum wage is essential to a successful minimum wage policy, as is consideration and deliberation with the necessary stakeholders. Brazil actively engages with various stakeholders before determining a minimum wage, which

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<sup>690</sup> Bolsheva *Minimum Wage Development in the Russian Federation* 22.

<sup>691</sup> Bolsheva *Minimum Wage Development in the Russian Federation* 21.

<sup>692</sup> Bolsheva *Minimum Wage Development in the Russian Federation* 27.

<sup>693</sup> Margolis 2014 <http://www.wol.iza.org>.

<sup>694</sup> Bolsheva *Mapping gaps and challenges in building effective wage policies in the Russian Federation* 21.

<sup>695</sup> Margolis 2014 <http://www.wol.iza.org>.

<sup>696</sup> Ghosheh 2012 [http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh\\_wage\\_legislation\\_2003.pdf](http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh_wage_legislation_2003.pdf).

holds various benefits in terms of compliance with minimum wage.<sup>697</sup> South Africa also has a legal obligation to deliberate with necessary stakeholders regarding minimum wages. In Russia, the deliberation and consultation process in determining the national and regional minimum wages are somewhat lacking due to the relatively weak defensive position of trade unions.<sup>698</sup> This results in an unequal (imbalanced) power relationship in deliberations and consultations where the government is the “main decision-making actor”<sup>699</sup> and the trade unions take an inferior position. The power differences may result in the interests of workers not being effectively heard and taken into account during decision making.

Another concerning aspect is the fact that trade unions have a very important function to fulfil in terms of “monitoring compliance with labour legislation”<sup>700</sup> (as mentioned in chapter 4.5) and the concerning weak defensive position of trade unions raises the question of whether compliance may be compromised as a result. Research concerning this aspect would make for interesting reading.

If the minimum wage rate is determined too high, then it might result in non-compliance or job losses. On the other hand, if minimum wage rates are determined too low it might render the minimum wage meaningless,<sup>701</sup> as poverty will not be reduced and consumption will not be increased,<sup>702</sup> as was the case in Russia. A balanced approach should therefore be pursued.<sup>703</sup>

#### **4.2 Coverage of minimum wage**

Minimum wage is often perceived to only apply to certain parts of the labour market of developing countries, which typically excludes informal employment and non-unionised

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<sup>697</sup> Rani *et al* 2013 *Labour Review* 396.

<sup>698</sup> Bolsheva *Minimum Wage Development in the Russian Federation* 20; According to p20 paragraph 2 the defensive position of trade unions occurs due to the lack of organised industrial action (strikes).

<sup>699</sup> Bolsheva *Minimum Wage Development in the Russian Federation* 25.

<sup>700</sup> Bolsheva *Minimum Wage Development in the Russian Federation* 15.

<sup>701</sup> Rani *et al* 2013 *Labour Review* 395.

<sup>702</sup> Rani *et al* 2013 *Labour Review* 395.

<sup>703</sup> Rani *et al* 2013 *Labour Review* 395.

employment.<sup>704</sup> Contrary to this perception minimum wage often applies to the informal labour market in developing countries.<sup>705</sup>

India utilises a statutory minimum wage specifically aimed at low skilled, and thus vulnerable, workers "mostly employed in the informal economy".<sup>706</sup>

According to literature, the minimum wage policy of Brazil has generated positive results in the Brazilian economy.<sup>707</sup> In terms of minimum wage coverage Brazil implements a minimum wage on two levels: national and regional (sub-national). Accordingly, all workers who are not covered by the regional minimum wage will be covered by the national minimum wage which ensures the coverage and protection of all workers under a minimum wage policy. The Brazilian minimum wage policy is "easily implemented and administered", due to its simplistic nature.<sup>708</sup> Costa Rica utilises a similar minimum wage policy that provides for a national minimum wage, thus establishing a national wage floor or minimum,<sup>709</sup> whilst still allowing "high productivity industries to set higher minimum wages"<sup>710</sup> through the use of occupational and sectoral minimum wages. Such implementation of minimum wage policy is known as a "hybrid" system.<sup>711</sup>

Mexico also has full coverage of its minimum wage for all its workers through the use of a general minimum wage complemented by specific minimum wages for specific occupations.<sup>712</sup>

Russia is another example of a developing country utilising a national minimum wage in collaboration with regional minimum wages.<sup>713</sup>

In India the minimum wage rates are determined by two parts or elements of government: Firstly the central government of India that determines some 45 different wage rates for various sectors including: agriculture, mining, the oil industry and state

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<sup>704</sup> Rani *et al* 2013 *Labour Review* 383.

<sup>705</sup> Rani *et al* 2013 *Labour Review* 383.

<sup>706</sup> Rani *et al* 2013 *Labour Review* 383.

<sup>707</sup> SBP 2014 <http://rebosa.co.za>.

<sup>708</sup> Rani *et al* 2013 *Labour Review* 396.

<sup>709</sup> Rani *et al* 2013 *Labour Review* 387.

<sup>710</sup> Rani *et al* 2013 *Labour Review* 387.

<sup>711</sup> Rani *et al* 2013 *Labour Review* 387.

<sup>712</sup> Rani *et al* 2013 *Labour Review* 387.

<sup>713</sup> Bolsheva *Minimum Wage Development in the Russian Federation* 25.

owned corporations, and, secondly, the state governments that determine minimum wage rates for some 1679 different categories of work within the respective states.<sup>714</sup>

Such complex systems hold the advantage that individual sector characteristics are accounted for in the determination of minimum wage rates.<sup>715</sup> The disadvantage of such complex minimum wage policies with various rates are that the administration thereof is "very costly and difficult"<sup>716</sup> and creating awareness of the various provisions of such policies can be challenging.<sup>717</sup>

There is evidence to suggest that the rate of compliance with minimum wage policies is higher in countries implementing "simple, economy-wide"<sup>718</sup> minimum wage policies as compared to the compliance with more complex minimum wage policies. Compliance decreases with the addition of multiple minimum wage rates.<sup>719</sup>

South Africa currently only utilises minimum wage through the use of sectoral determinations and determinations reached through collective bargaining.<sup>720</sup> Sectoral determinations are focused on vulnerable groups, usually in the informal labour market whilst collective agreements are utilised in sectors with union representation.<sup>721</sup>

Therefore, the current minimum wage policy in South Africa only applies to certain groups of workers<sup>722</sup> and the same can be said for the Indian minimum wage policy which excludes "large proportions of workers in urban areas in India and rural areas in South Africa" from coverage that a minimum wage policy can offer.<sup>723</sup>

Peru excludes domestic workers from its universal coverage of minimum wage which "results in a substantial proportion of female workers, disadvantaged groups and workers in the informal sector not being covered".<sup>724</sup> Any situation where workers or any group of workers are excluded from the coverage of a minimum wage should be avoided. This can be done by implementing the so called the "hybrid" system.

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<sup>714</sup> Rani *et al* 2013 *Labour Review* 386.

<sup>715</sup> Rani *et al* 2013 *Labour Review* 386.

<sup>716</sup> Rani *et al* 2013 *Labour Review* 386.

<sup>717</sup> Rani *et al* 2013 *Labour Review* 386.

<sup>718</sup> Rani *et al* 2013 *Labour Review* 397.

<sup>719</sup> Rani *et al* 2013 *Labour Review* 397.

<sup>720</sup> Rani *et al* 2013 *Labour Review* 383.

<sup>721</sup> Rani *et al* 2013 *Labour Review* 383.

<sup>722</sup> Rani *et al* 2013 *Labour Review* 386.

<sup>723</sup> Rani *et al* 2013 *Labour Review* 387.

<sup>724</sup> Rani *et al* 2013 *Labour Review* 387.

According to a “hybrid” system all workers should be covered by a universal or national minimum wage and such wage should only be complemented by subnational or economic specific minimum wages. The universal or national minimum wage determines a minimum national floor of wages applicable to all wage earners, whilst a sub-national complementary minimum wage makes provision for higher minimum wages in sectors of the labour market that allow such increases in minimum wage.

It is recommended that countries start off with a basic universal or national minimum wage which can be complemented by further sub-national minimum wages, but only to the extent and complexity which can be effectively managed and enforced by the particular country. A multifaceted complex minimum wage policy consisting of various rates will be hard to enforce, and compliance will not be at its optimum level.

Other developing countries that also utilise a universal approach "for all workers, irrespective of the sector or status of the enterprises that employ them"<sup>725</sup> include Costa Rica, Mexico, Turkey, Mali, Vietnam and the Philippines.<sup>726</sup>

### **4.3 The role of supplementary social measures**

It is important to note that "not all workers are wage earners".<sup>727</sup> This is particularly true in developing countries where a large number of informal workers are self-employed or involved in unpaid family work.<sup>728</sup> The limited number of wage earners in developing countries thus limits the positive influence that a minimum wage policy might have. It is therefore recommended that social protection measures be used to complement the minimum wage policy in order to broaden the scope of their efforts to reduce poverty and inequality and to improve welfare.<sup>729</sup>

As discussed in chapter 3.2.3 minimum wage has a central role in the Brazilian economy due to the fact that it is utilised as the floor value for social benefits like pensions. The Brazilian minimum wage policy is thus not utilised in isolation to other

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<sup>725</sup> Rani *et al* 2013 *Labour Review* 383.

<sup>726</sup> Rani *et al* 2013 *Labour Review* 386.

<sup>727</sup> Rani *et al* 2013 *Labour Review* 383.

<sup>728</sup> Rani *et al* 2013 *Labour Review* 383.

<sup>729</sup> Rani *et al* 2013 *Labour Review* 383.

policies, but rather in collaboration with social security measures. Such integrated measures have shown that poverty can be reduced.<sup>730</sup>

The significance of the Brazilian *Bolsa familia* programme is worth noting. This programme rewards families for aspects such as the children attending school regularly and for having regular medical check-ups at medical institutions.<sup>731</sup> Additionally, Brazil also provides access to health care to its citizens, as well as cash transfer benefits in the following instances:<sup>732</sup>

- (a) illness, disability, death and old age;
- (b) maternity;
- (c) involuntary unemployment and
- (d) allowance and confinement for dependents of low income.

Russia provides a public health care system where primary health care with entire population coverage is provided.<sup>733</sup> A comprehensive pension system that offers various types of pensions has been adopted.<sup>734</sup> In Russia there is no link between minimum wages and pensions, however, both sick leave and maternity leave payments are linked to minimum wage for workers that have worked for less than six months.<sup>735</sup> Employment injury is also covered for both permanent and temporary workers “due to employment injury or occupational disease”.<sup>736</sup>

India’s social policies are, to a great extent, strongly influenced by colonialism. Various laws are utilised to offer specific social benefits. A problematic aspect in India and many developing countries is the fact that statutory provisions (regarding social security) often do not offer coverage to the informal sector, where workers are represented in large numbers.<sup>737</sup> *The Employee State Insurance Act* <sup>738</sup> applies to organisations with ten or

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<sup>730</sup> Chibba and Luiz 2011 *Economic Papers* 310.

<sup>731</sup> ISSA 2013 <http://www.issa.int/BRICS>.

<sup>732</sup> ISSA 2013 <http://www.issa.int/BRICS>.

<sup>733</sup> ISSA 2013 <http://www.issa.int/BRICS>.

<sup>734</sup> ISSA 2013 <http://www.issa.int/BRICS>.

<sup>735</sup> Bolsheva *Minimum Wage Development in the Russian Federation* 26.

<sup>736</sup> ISSA 2013 <http://www.issa.int/BRICS>.

<sup>737</sup> ISSA 2013 <http://www.issa.int/BRICS>.

<sup>738</sup> *The Employees State Insurance Act* 34 of 1948.

more workers. Medical care is offered to the workers and their families together with benefits with regard to sickness, maternity, disability and death.<sup>739</sup>

*The Employees Provident Funds Miscellaneous Provisions Act*<sup>740</sup> provides for benefits associated with retirement in specific sectors and instances.<sup>741</sup> *The Workmen's Compensation Act*<sup>742</sup> applies to specific occupations and offers benefits in terms of disability and for the dependents in the instance of death.<sup>743</sup> *The Maternity Benefit Act*<sup>744</sup> ensures protection of mothers through various provisions such as 12 weeks' worth of wages during maternity. *The Payment of Gratuity Act*<sup>745</sup> is interesting due to the fact that it provides for fifteen days' benefit (gratuity) for every year of employment completed after an initial period of five years.<sup>746</sup> India recognizes the importance of supplementary social measures which may be inferred from the ample legislative measures it utilises.

With the various aforementioned social protection measures in mind it is evident that developing countries generally recognize the importance of supplementary social protective measures in providing relief to problems such as poverty.

In the South African context (as discussed in chapter 3.3.7), the minimum wage bears no collaborative link with social protection measures. This limits the reach and application of the minimum wage to some degree.

South Africa is largely dependent on social grants to provide relief from poverty. The expenditure on social grants equals more than 4% of the South African GDP, which places South Africa as one of the developing countries with the highest expenditure on social protection measures.<sup>747</sup>

The social grants program has had a positive impact on poverty in South Africa on the short term, but there are various concerns relating to its long term impact.<sup>748</sup> These

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<sup>739</sup> ISSA 2013 <http://www.issa.int/BRICS>.

<sup>740</sup> *The Employees Provident Funds Miscellaneous Provisions Act* 19 of 1952.

<sup>741</sup> ISSA 2013 <http://www.issa.int/BRICS>.

<sup>742</sup> *The Workmen's Compensation Act* 8 of 1923.

<sup>743</sup> ISSA 2013 <http://www.issa.int/BRICS>.

<sup>744</sup> *The Maternity Benefit Act* 53 of 1961.

<sup>745</sup> *The Payment of Gratuity Act* 39 of 1972.

<sup>746</sup> ISSA 2013 <http://www.issa.int/BRICS>.

<sup>747</sup> Chibba and Luiz 2011 *Economic Papers* 309.

<sup>748</sup> Chibba and Luiz 2011 *Economic Papers* 309.

concerns may also be applicable to other developing countries. There are concerns about “its long term (financial) sustainability and the possibility that a culture of welfare dependency is being fostered”.<sup>749</sup>

A further concern is that the South African social grant system does not deal with the underlying causes of poverty.<sup>750</sup> Additionally, the current social grant system, to a great extent, functions in isolation. There is no integrated comprehensive antipoverty strategy<sup>751</sup> as can be observed in Brazil.

#### **4.4 Adjustments of minimum wage**

The effective and frequent adjustment of minimum wages is crucial in a successful minimum wage policy. Countries should therefore not neglect this aspect.

Brazilian legislation makes provision for periodic annual adjustments of minimum wage, as well as a prescribed method of adjusting the minimum wage. Stability and assurance are promoted among the stakeholders within Brazil as they know what to expect. Scheduled adjustments of the minimum wage hold a further benefit in that employers are granted an opportunity “to plan and time investments accordingly”.<sup>752</sup>

In South Africa, minimum wage adjustments are not prescribed by legislation. However, it is common practice to make adjustments for three to four years in advance, while adjustments are fixed for one year.

In Russia the “Russian Tripartite Committee recommends national minimum wage adjustments, which are then to be fixed by federal law”.<sup>753</sup> There is no requirement in Russia regarding the frequency of minimum wage adjustments.<sup>754</sup> The lack of scheduled adjustment of the minimum wage may hold the risk that the public and trade unions may exert pressure to achieve more regular adjustments.<sup>755</sup> Such pressure may

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<sup>749</sup> Chibba and Luiz 2011 *Economic Papers* 309.

<sup>750</sup> Chibba and Luiz 2011 *Economic Papers* 309.

<sup>751</sup> Chibba and Luiz 2011 *Economic Papers* 309.

<sup>752</sup> Margolis 2014 <http://www.wol.iza.org>.

<sup>753</sup> Bolsheva *Minimum Wage Development in the Russian Federation* 25.

<sup>754</sup> Bolsheva *Minimum Wage Development in the Russian Federation* 25.

<sup>755</sup> Margolis 2014 <http://www.wol.iza.org>.

result in social unrest and strike action, as was the case in the Philippines and Hong Kong and could be detrimental for economic growth.<sup>756</sup>

Scheduled adjustments of the minimum wage is paramount for the reasons provided above, but scheduled adjustment "should not be so rigid as to prevent adjustments in response to crises,"<sup>757</sup> as happened in Chile between 1998 and 2000.<sup>758</sup>

#### **4.5 Monitoring compliance**

Literature suggests that in many instances, and particularly in developing countries, the absence of legal provisions regarding minimum wages as such is not the problem, but rather the institutional execution of such legal provisions. Enforcement of minimum wage is a problematic issue for numerous developing countries such as Russia, China, India and Brazil.<sup>759</sup>

Accordingly; "Many developing countries lack the capacity to ensure that these (enforcement) mechanisms function properly".<sup>760</sup> The ineffective functioning of enforcement mechanisms are often due to:

A lack of transparency and communication, insufficiently staffed labour inspectors, weak sanctions (consequences for non-compliance), restriction on freedom of association and/or weak trade unions, sometimes compounded by the existence of a large informal economy, with many casual wage earners deprived of effective protection.<sup>761</sup>

African countries particularly find enforcement of minimum wage policies challenging. Some of the main challenges are identified hereunder.

Ghosheh<sup>762</sup> ascribes the lack of enforcement, particularly in Africa, to the shortage of financial and personnel resources. An example of the limited resources is evident in Mozambique where no specific budget is made available to labour inspectors. This results in labour inspectors having no means of transport to fulfil their responsibilities.<sup>763</sup>

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<sup>756</sup> Margolis 2014 <http://www.wol.iza.org>.

<sup>757</sup> Margolis 2014 <http://www.wol.iza.org>.

<sup>758</sup> Margolis 2014 <http://www.wol.iza.org>.

<sup>759</sup> SBP 2014 <http://rebosa.co.za>.

<sup>760</sup> Margolis 2014 <http://www.wol.iza.org>.

<sup>761</sup> Rani *et al* 2013 *Labour Review* 382.

<sup>762</sup> Ghosheh 2012 [http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh\\_wage\\_legislation\\_2003.pdf](http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh_wage_legislation_2003.pdf).

<sup>763</sup> Ghosheh 2012 [http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh\\_wage\\_legislation\\_2003.pdf](http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh_wage_legislation_2003.pdf).

Mobility is especially important in developing countries where there are fewer labour inspectors and the labour inspectors are further in between in terms of geographical distance. Labour inspectors are often responsible for large geographical areas and travelling is made more difficult with the lack of infrastructure (roads) in these developing countries.<sup>764</sup> In Burkina Faso it was “found that the only vehicle available in a regional inspectorate was a bicycle”.<sup>765</sup> In Mauritania labour inspectors work in facilities that often lack electricity or running water, and financial inadequacy often results in the rent of facilities not getting paid.<sup>766</sup>

With resources often being limited in developing countries the question of how to reach the desired outcomes in terms of monitoring compliance with limited resources is raised.

There are a few strategies that might prove helpful in this regard and they will be discussed briefly.

The prioritisation method as discussed in chapter 2.5.5 may be utilised where there is specific focus on certain high risk priority areas. Typically, these areas will be made up of vulnerable workers such as women or minority groups. In theory the resources can then be optimised by focusing on the sectors and/or areas most at risk for non-compliance.

Shared responsibilities among various government departments is a useful method that may be utilised in sharing the workload of monitoring compliance among more individuals.<sup>767</sup> Although Great Britain is a developed country it is insightful to consider its approach of shared responsibility regarding labour matters.<sup>768</sup> The British government requires the tax authorities to deal with tax-related matters, as can be expected, but the responsibilities are more extensive as it includes employment-related matters.<sup>769</sup>

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<sup>764</sup> Ghosheh 2012 [http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh\\_wage\\_legislation\\_2003.pdf](http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh_wage_legislation_2003.pdf).

<sup>765</sup> Ghosheh 2012 [http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh\\_wage\\_legislation\\_2003.pdf](http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh_wage_legislation_2003.pdf).

<sup>766</sup> Ghosheh 2012 [http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh\\_wage\\_legislation\\_2003.pdf](http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh_wage_legislation_2003.pdf).

<sup>767</sup> Ghosheh 2012 [http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh\\_wage\\_legislation\\_2003.pdf](http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh_wage_legislation_2003.pdf).

<sup>768</sup> Ghosheh 2012 [http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh\\_wage\\_legislation\\_2003.pdf](http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh_wage_legislation_2003.pdf).

<sup>769</sup> Ghosheh 2012 [http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh\\_wage\\_legislation\\_2003.pdf](http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh_wage_legislation_2003.pdf).

Literature suggests a significant difference between the responsibilities of labour inspectors in African common law countries and other common law countries.<sup>770</sup> In African common law countries labour inspectors are responsible for all enforcement relating to labour law provisions,<sup>771</sup> whilst in other common law countries the regulation of labour matters are assigned to different agencies that share the responsibilities.<sup>772</sup> The reason for this difference might be that African countries have limited resources which forces labour inspectors to have a more general approach to responsibilities in order to be the most cost-effective.<sup>773</sup> The broad range of responsibilities that these labour inspectors are tasked with makes it critically important for labour inspectors to be "educated and have a full comprehension of the laws that they are enforcing".<sup>774</sup> The determination of recruitment criteria in acquiring individuals that are able to fulfil this function is therefore important and will be discussed later in this chapter, with reference to the Brazilian recruitment criteria

It is important in any effective enforcement system to allow individual workers and collective unions to complain or speak out against non-compliance of employers without threatening their job security.<sup>775</sup> In other words, to allow for an environment where workers feel comfortable to complain or speak out. The law needs to protect such workers.

In Tobago and Trinidad such protection is explicitly provided for by law.<sup>776</sup> Union membership should be encouraged as unions may assist in bettering compliance with labour provisions. Although Australia is a developed country it is worth noting the important role that unions play in ensuring compliance to labour laws in Australia and the efficiency with which unions can do this. Research in the Australian context has

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<sup>770</sup> Ghosheh 2012 [http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh\\_wage\\_legislation\\_2003.pdf](http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh_wage_legislation_2003.pdf).

<sup>771</sup> Ghosheh 2012 [http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh\\_wage\\_legislation\\_2003.pdf](http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh_wage_legislation_2003.pdf).

<sup>772</sup> Ghosheh 2012 [http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh\\_wage\\_legislation\\_2003.pdf](http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh_wage_legislation_2003.pdf).

<sup>773</sup> Ghosheh 2012 [http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh\\_wage\\_legislation\\_2003.pdf](http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh_wage_legislation_2003.pdf).

<sup>774</sup> Ghosheh 2012 [http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh\\_wage\\_legislation\\_2003.pdf](http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh_wage_legislation_2003.pdf).

<sup>775</sup> Benassi *The implementation of minimum wage: challenges and creative solutions* 17.

<sup>776</sup> Benassi *The implementation of minimum wage: challenges and creative solutions* 17.

proven the efficiency of unions in this regard.<sup>777</sup> In Russia, trade unions “are tasked with monitoring compliance with labour legislation”.<sup>778</sup> South Africa can particularly benefit in this regard because of the high trade union membership among workers.<sup>779</sup>

Unfortunately, trade unions have often been dealt with in a hostile manner by governments in African countries<sup>780</sup> and it may very well be the case in other developing countries. This hostile approach has a limiting effect on the power and success that unions might have in ensuring compliance with labour provisions.<sup>781</sup>

Many developed countries have limited resources in terms of human and financial capital which requires a renewed strategic way of thinking in order to still deal with labour issues relatively effectively.

Examples of countries which demonstrate high minimum wage compliance include Vietnam (95%), followed by Mexico (90%) and Brazil (80%).<sup>782</sup> In contrast, some of the lower compliance percentages are evident in South Africa (52%), Indonesia (50%) and Turkey (50%).<sup>783</sup> In Peru compliance varied according to regions, sex, ethnic group and sector. Compliance also varied according to the various urban and rural regions in Turkey, South Africa and Indonesia.<sup>784</sup> Brazil has a relatively high rate for compliance with minimum wage, but non-compliance remains a challenge among "women, in rural areas, among some ethnic groups, in agriculture and low skilled services, and in the informal sector".<sup>785</sup>

Despite enforcement being a challenging aspect per se, the way in which labour inspection is conducted in Brazil provide a good example of an effective enforcement

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<sup>777</sup> Ghosheh 2012 [http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh\\_wage\\_legislation\\_2003.pdf](http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh_wage_legislation_2003.pdf) 43.

<sup>778</sup> Bolsheva *Minimum Wage Development in the Russian Federation* 15.

<sup>779</sup> Du Toit et al *Labour Relations Law: a comprehensive guide* 70.

<sup>780</sup> Ghosheh 2012 [http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh\\_wage\\_legislation\\_2003.pdf](http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh_wage_legislation_2003.pdf).

<sup>781</sup> Ghosheh 2012 [http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh\\_wage\\_legislation\\_2003.pdf](http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh_wage_legislation_2003.pdf).

<sup>782</sup> Rani et al 2013 *Labour Review* 391.

<sup>783</sup> Rani et al 2013 *Labour Review* 391.

<sup>784</sup> Rani et al 2013 *Labour Review* 391.

<sup>785</sup> Rani et al 2013 *Labour Review* 391.

model.<sup>786</sup> It should be highlighted that enforcement is simplified to some degree due to the uncomplicated nature of the Brazilian minimum wage model.

In contrast, India and Costa Rica have more complex minimum wage models, but compliance has increased in recent times due to improved enforcement strategies.<sup>787</sup> The Brazilian government has made large investments in its enforcement model,<sup>788</sup> which indicates the commitment and political will of the Brazilian government towards fully supporting its minimum wage policy.

Brazil utilises pre-determined criteria for the recruitment of quality people that are subject to a selection process including an examination. Because of the specialist nature of labour inspection having quality personnel is crucial. Brazilian legislation also provides for the continuous development of labour inspectors to stay up to date with new developments and methods in the field.

The nature and level of specialty of the Brazilian labour inspectors are also reflected in the higher salaries paid to labour inspectors. Africa has predominantly developing countries with scarce resources where poor compensation is often offered to labour inspectors.<sup>789</sup> Higher salaries not only attract good prospective labour inspection candidates, but also reduces the likelihood of labour inspectors engaging in corrupt activities.

Corrupt activities (a major problem in developing countries) can have a negative impact on the enforcement of minimum wage policies.<sup>790</sup> One reason for concern is the fact that some:

25% of surveyed (developing country) employers consider it necessary to give gifts to get things done and the rate is as high as 50% in the Middle East and North Africa.<sup>791</sup>

Another measure used in fighting corruption and undue influence is to rotate labour inspectors in terms of various regions. Theoretically the rotation prohibits the pursuit of unhealthy business relationships. South Africa and other developing countries can learn

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<sup>786</sup> Rani *et al* 2013 *Labour Review* 396.

<sup>787</sup> Rani *et al* 2013 *Labour Review* 397.

<sup>788</sup> Rani *et al* 2013 *Labour Review* 396.

<sup>789</sup> Ghosheh 2012 [http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh\\_wage\\_legislation\\_2003.pdf](http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh_wage_legislation_2003.pdf).

<sup>790</sup> Margolis 2014 <http://www.wol.iza.org>.

<sup>791</sup> Margolis 2014 <http://www.wol.iza.org>.

a substantial amount from the Brazilian enforcement model. South Africa does not have criteria for the recruitment of quality candidates. There is also a lack of constant training and development of labour inspectors. It seems that labour inspection has not reached the level of professionalism and does not have the specialist nature of Brazilian labour inspection.

In order to comprehend why enforcement is generally more established and effective in certain developing and industrialised countries, one has to keep in mind the fact that these countries had over a century to develop and refine such enforcement models that originated in the more developed countries.<sup>792</sup>

Enforcement models, such as the use of inspectors, disseminated from developed countries globally to developing countries.<sup>793</sup> Such enforcement models have therefore not been allowed the time to develop and be established over a longer period of time in many developing countries. It may therefore be inferred that enforcement models such as labour inspection will also become more efficient and established in developing countries over time, if the political will to do so exists.

Based on the preceding discussion it is evident that satisfactory compliance depends on the effectiveness of the entire minimum wage policy. This includes the initial consultation with stakeholders, determination of the monetary level of minimum wage, effective enforcement, as well as sanctions that are adequate to deter non-compliance.

#### ***4.6 Enforcement and consequences of non-compliance***

An ineffective operating legal system may render proper enforcement through labour inspectors useless.<sup>794</sup> An example is Mexico where the labour courts are particularly hesitant to award damages in instances of non-compliance with labour law provisions.<sup>795</sup> "Even when damages are awarded, the judgements are enforced less than half of the time".<sup>796</sup> Compensation needs to be awarded to employers in instances

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<sup>792</sup> Ghosheh 2012 [http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh\\_wage\\_legislation\\_2003.pdf](http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh_wage_legislation_2003.pdf).

<sup>793</sup> Ghosheh 2012 [http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh\\_wage\\_legislation\\_2003.pdf](http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh_wage_legislation_2003.pdf).

<sup>794</sup> Margolis 2014 <http://www.wol.iza.org>.

<sup>795</sup> Margolis 2014 <http://www.wol.iza.org>.

<sup>796</sup> Margolis 2014 <http://www.wol.iza.org>.

where workers had been paid less than the minimum wage.<sup>797</sup> Ideally, such compensation would have to be adjusted to account for the loss of purchasing power due to inflation.

In Thailand an interest rate of 15% is charged on any arrears with regard to minimum wage compensation, and in the United Kingdom compensation is paid at the current minimum wage level.<sup>798</sup> South Africa makes provision for the payment of interest as determined in legislation as set out in the *BCEA*.<sup>799</sup>

It is also of importance to reduce the waiting period for compensation as extended periods before compensation, and complex bureaucratic systems to attain compensation, may result in workers feeling discouraged to claim compensation.<sup>800</sup> In the United Kingdom employers benefit from a "penalty reduction" if compensation is paid in full and quickly.<sup>801</sup>

Councils can also be of assistance in settling any disputes over compensation by means of arbitration.<sup>802</sup> Switzerland is a country where arbitration councils are used in certain employment sectors.<sup>803</sup>

Although France is a more developed, industrialised country it is of significant value to take note of the so-called "franco-latin model"<sup>804</sup> because it might be utilised with great success in developing countries. According to this model non-compliance is the result of "ignorance, inefficiency, and poverty of employers".<sup>805</sup> As a result, labour inspectors have a slightly more compassionate approach and fulfill a more instructional and advisory role without focusing strongly on punitive measures.<sup>806</sup> Punitive measures are indeed considered, but to a lesser extent, and only after collaborated efforts have failed.

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<sup>797</sup> Benassi *The implementation of minimum wage: challenges and creative solutions* 16.

<sup>798</sup> Benassi *The implementation of minimum wage: challenges and creative solutions* 16.

<sup>799</sup> Schedule 2 *BCEA*.

<sup>800</sup> Benassi *The implementation of minimum wage: challenges and creative solutions* 16.

<sup>801</sup> Benassi *The implementation of minimum wage: challenges and creative solutions* 16.

<sup>802</sup> Benassi *The implementation of minimum wage: challenges and creative solutions* 16.

<sup>803</sup> Benassi *The implementation of minimum wage: challenges and creative solutions* 16.

<sup>804</sup> Ghosheh 2012 [http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh\\_wage\\_legislation\\_2003.pdf](http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh_wage_legislation_2003.pdf).

<sup>805</sup> Ghosheh 2012 [http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh\\_wage\\_legislation\\_2003.pdf](http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh_wage_legislation_2003.pdf).

<sup>806</sup> Ghosheh 2012 [http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh\\_wage\\_legislation\\_2003.pdf](http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh_wage_legislation_2003.pdf).

According to this model punitive measures might worsen the situation instead of "offering relief or resolution".<sup>807</sup> Once non-compliance is identified "the inspectors work with the employer to bring the organisation into compliance".<sup>808</sup> As discussed in chapter 3.3.5 South Africa bears similarities to the "franco-latin model" in the sense that alternative corrective measures are often used instead of criminalising non-compliance. In this model the labour inspector has a wide degree of discretion in deciding which measures to institute and under which circumstances. A strong emphasis is placed on collaboration between inspectors and employers.

Legal sanctions may also take the form of pecuniary fines.<sup>809</sup> The cost of non-compliance should always outweigh the benefits.<sup>810</sup> Severe fines are crucial "to the efficiency of the enforcement system, because only consistent losses represent a deterrent to non-compliance for employers".<sup>811</sup>

Ghosheh highlights the importance of monetary sanctions in many African countries in ensuring employer compliance when it is utilised as the predominant consequence for non-compliance with labour provisions.<sup>812</sup>

Fines can be determined by using the minimum wage and multiplying it several times, as is done in Columbia.<sup>813</sup> Alternatively, the fines can be predetermined by law and multiplied by the number of affected employees, as is done in France, Morocco and Tunisia.<sup>814</sup> Africa, Uganda and Zambia have insignificant fines whilst Namibia, Kenya and South Africa have fines that are fairly appropriate.<sup>815</sup> Russia is another developing country that makes use of pecuniary fines in the form of administrative penalties of up to

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<sup>807</sup> Ghosheh 2012 [http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh\\_wage\\_legislation\\_2003.pdf](http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh_wage_legislation_2003.pdf).

<sup>808</sup> Ghosheh 2012 [http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh\\_wage\\_legislation\\_2003.pdf](http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh_wage_legislation_2003.pdf).

<sup>809</sup> Benassi *The implementation of minimum wage: challenges and creative solutions* 17.

<sup>810</sup> Benassi *The implementation of minimum wage: challenges and creative solutions* 17.

<sup>811</sup> Benassi *The implementation of minimum wage: challenges and creative solutions* 17.

<sup>812</sup> Ghosheh 2012 [http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh\\_wage\\_legislation\\_2003.pdf](http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh_wage_legislation_2003.pdf).

<sup>813</sup> Benassi *The implementation of minimum wage: challenges and creative solutions* 17.

<sup>814</sup> Benassi *The implementation of minimum wage: challenges and creative solutions* 17.

<sup>815</sup> Ghosheh 2012 [http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh\\_wage\\_legislation\\_2003.pdf](http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh_wage_legislation_2003.pdf).

approximately \$1650.<sup>816</sup> Insignificant fines would not be effective as a prohibitive measure as to deter non-compliance to labour provisions.<sup>817</sup>

To serve as an additional deterrent, sanctions should escalate in instances of repeated non-compliance, as has been implemented in Algeria and the Dominican Republic.<sup>818</sup> If employers refuse to pay the fines issued to them, then imprisonment may follow, as is the practice in Guatemala and Venezuela.<sup>819</sup> African developing countries that make provision for imprisonment in their labour legislation for up to twelve months include Burkina Faso, Congo, Mauritania, Niger, Togo and Senegal.<sup>820</sup>

Naming and shaming campaigns may also be utilised as a measure to deter non-compliance,<sup>821</sup> as is the case in Brazil and Indonesia. Naming and shaming campaigns are particularly useful in developing countries because of the inexpensive and effective nature thereof.<sup>822</sup>

Both Brazil and South African have various measures in place to address non-compliance of minimum wage policies.

In conclusion, such measures are important in terms of deterring possible non-compliance. The consequences of non-compliance should outweigh the possible benefits achieved.

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<sup>816</sup> Bolsheva *Minimum Wage Development in the Russian Federation* 15.

<sup>817</sup> Ghosheh 2012 [http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh\\_wage\\_legislation\\_2003.pdf](http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh_wage_legislation_2003.pdf).

<sup>818</sup> Benassi *The implementation of minimum wage: challenges and creative solutions* 17.

<sup>819</sup> Benassi *The implementation of minimum wage: challenges and creative solutions* 17.

<sup>820</sup> Ghosheh 2012 [http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh\\_wage\\_legislation\\_2003.pdf](http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh_wage_legislation_2003.pdf).

<sup>821</sup> Benassi *The implementation of minimum wage: challenges and creative solutions* 17.

<sup>822</sup> Benassi *The implementation of minimum wage: challenges and creative solutions* 17.

## **CHAPTER 5: CONCLUSION**

As is evident from this paper most developing countries have minimum wage policies. This is a positive concept, however, minimum wage policies can most definitely be approved upon by utilising and developing various legal provisions with regards to minimum wages. The underlying concluding sub-chapters could provide insight in this regard.

### ***5.1 International labour organisation***

The role that the ILO plays in establishing a global labour standard is undeniable and fundamentally important in protecting the rights of vulnerable groups. There is no doubt that the ILO has made big strides in this regard, but the global labour market is far from perfect. Therefore, as discussed in 3.1.1 countries and specifically developing countries should be motivated and strongly encouraged to ratify and actively apply ILO instruments. Lastmentioned will ensure that labour standards are developed globally on a continuous basis without being stagnant. In terms of enforcement of international measures, it is recommended that the ILO develop further and better measures as to force compliance to ratified conventions. An example of this could be to restrict trade between ILO member countries and the non-compliant country. Which would theoretically put international pressure on the non-compliant country to comply with ILO measures. It is important that the ILO be more authoritative in this regard.

### ***5.2 Concluding remarks regarding the criteria considered***

Literature undoubtedly reveals the possible positive effects that an effective minimum wage policy might have. The positive influence is evident in numerous countries on various levels of economic development. Minimum wage arguably has a more significant role to play in developing countries where there are elevated levels of income inequality, poverty and unemployment in a labour market often times characterised by large numbers of unskilled workers and various vulnerable groups.

For a minimum wage to actualise, and to optimise the possible positive effects related thereto, a comprehensive and sound minimum wage policy (with consideration to the criteria as discussed below) should exist. Due consideration should be given to these criteria in promoting an effective minimum wage. The factors are as follows:

### 5.2.1 Determination of minimum wage

Determination of the minimum wage is crucial to the success of a minimum wage policy. The rate of compliance is related to the monetary level at which minimum wage rates are set.<sup>823</sup> If the minimum wage is determined too high, it may result in increased unemployment and the transfer of workers from the formal economy to the informal economy where compliance to the minimum wage is not as good as it could be.<sup>824</sup>

It is therefore obvious that an ill-determined minimum wage may result in the workers it serves to protect being worse off. The minimum wage should be determined by actively collaborating with various stakeholders which includes employers, unions, employees, the general public and other stakeholders in the labour market. Stakeholders need to have a sense of participation and belonging to the discussion.

It is also important to have a balanced power relationship between stakeholders. An unbalanced power relationship as mentioned in chapter 4.1 (with reference to Russia) might result in the interests of one party being prioritised ahead of the interests of another. Better consultation with stakeholders might result in greater acceptance of the minimum wage, which might likely lead to better compliance to the minimum wage.

When determining the monetary value of a minimum wage it is recommended that the basic needs of workers be taken into account along with the average or lowest wages in the specific country. A combination of these two approaches are recommended by Eyraud & Saget and is discussed in 2.5.1.1. A minimum wage that protects the basic needs of workers assists in upholding a dignified existence of workers as held in the decent work principle. By taking average wages or lowest wages into consideration when determining the monetary value of minimum wages assures that a minimum wage is determined realistically in terms of all wages paid in the labour market. Taking account of other wages (lowest or average wages) are important considerations as it ensures that minimum wage is determined in such a manner as to not elevate income inequality further.

The criteria used when determining the monetary value of the minimum wage are important in ensuring that the minimum wage makes a difference in regards to the basic

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<sup>823</sup> Rani *et al* 2013 *Labour Review* 392.

<sup>824</sup> Belman and Wolfson *What does the Minimum Wage do in Developing Countries?*18.

needs of workers. Basic needs of workers should be considered along with consideration of individual, sectoral and geographical differences. In determining the basic needs of workers, relevant criteria, as well as recent and reliable information and statistics pertaining to the labour market, should be available. Chapter 2.5.1.1 and 4.1 illustrates and emphasises the importance of reliable research as it is often a challenging aspect in developing countries.

DIEESE (Brazil) and NEDLAC (South Africa) are but two of the many organisations mandated with providing information and statistics pertaining to the labour market. Other developing countries should also encourage research and establish organisations or authorities with the mandate of providing reliable information in the determination of minimum wages.

Such authorities should not merely exist, but should be effectively operated as to add value to the economy in terms of the information it provides. As pointed out in chapter 3.3.3.1 there are some doubts about the efficient operation of NEDLAC in the South African context.

In determining the minimum wage, the basic needs of workers should be met to ensure a life of dignity to the vulnerable and poor. But the minimum wage should not be determined too excessive as to burden employers and result in possible unemployment. It is therefore a fine balancing act.

### *5.2.2 Coverage of minimum wage*

The fact that countries instituting a minimum wage often differ remarkably in terms of coverage of a minimum wage is evident in this paper. Some countries have simplistic coverage, whilst other countries have more complex coverage of minimum wage. In terms of coverage it is important to keep in mind that a minimum wage policy should be utilised in such a manner as to benefit as big a portion of the labour market as possible.

Brazil has an effective approach in terms of how it addresses coverage of its minimum wage, which could be considered by other developing countries, including South Africa. In Brazil a national minimum wage which covers all workers nationwide has been determined, whilst a sub-minimum wage has been implemented in terms of geographical area or region. This is known as a "hybrid system" and determines a

minimum wage floor for wages, whilst being complemented with more specific sectoral or occupational minimum wages.<sup>825</sup>

“Hybrid systems” require active efforts in making all the key parties aware of the manner in which they function, but they do increase compliance over time.<sup>826</sup> The sub- minimum wage offers more beneficial (increased) minimum wages than the national minimum wage and assures that geographical specific needs are met.

It is recommended that the “hybrid system” be implemented at a pace and rate that is appropriate to each country. Countries should start off with a basic uncomplicated minimum wage that is easily promoted and easily enforceable.

Further development of the minimum wage policy includes the introduction of various sub-minimum wages and should be managed in such a manner, and at such a pace, as to ensure effective enforcement and application.

The combination of the national and sub-minimum wage assures that all workers are covered by a minimum wage which optimises the possible positive effects that a minimum wage will have. Currently, not all workers are covered and protected by minimum wage in South Africa. The addition of a national minimum wage could solve this problem and ensure better protection of all workers.

Ultimately, better coverage of a minimum wage would benefit more people which would, in turn, pronounce the positive effects of such policy.

As pointed out in 2.5.2 and 3.3.3.2 developing countries and specifically South Africa have younger workers as a significant proportion of the labour market. Minimum wage could be a stumbling block to many of these workers in terms of acquiring employment. As incentive to employers to employ more youth workers a decreased youth minimum wage could prove beneficial in South Africa and other developing countries.

The possible negative side to utilising a minimum wage on a national and sub-national level is that developing countries with limited resources and poor minimum wage enforcement might struggle to attain compliance with such policies.<sup>827</sup> The fact that the

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<sup>825</sup> Rani *et al* 2013 *Labour Review* 402.

<sup>826</sup> Rani *et al* 2013 *Labour Review* 402.

<sup>827</sup> Margolis 2014 <http://www.wol.iza.org>.

minimum wage is differentialised makes minimum wage more complicated to a certain degree. Developing countries with limited enforcement capabilities and resources might be better off simplifying minimum wage to a standard rate applicable to all workers.<sup>828</sup>

Several countries that initially opted for complex systems of minimum wages have reduced the number of different minimum wages and simplified their systems.<sup>829</sup>

It might be easier to create awareness of such simplified methods, and enforcement might be less troublesome. The relatively high compliance to minimum wage in Brazil can be attributed to the uncomplicated minimum wage policy it utilises,<sup>830</sup> as it is “easy to implement and administer”<sup>831</sup> such policies. The fact that Brazilian workers are well organised in terms of union representation has also assisted in actively engaging the interest of workers in the minimum wage determination and implementation process.<sup>832</sup>

The rate of compliance tends to be higher in countries that have simple, economy-wide minimum wages rather than complex sectoral or occupational minimum wages.<sup>833</sup>

There is further evidence that suggests that “the level of compliance decreases as the number of minimum wages increases”.<sup>834</sup> Thus, it is recommended that developing countries with limited resources and capacity consider a simple minimum wage coverage policy and only add differentialised minimum wages if said country can effectively enforce such minimum wage as to ensure efficient compliance to that minimum wage.

### *5.2.3 The role of supplementary social measures*

Not all workers earn wages as is particularly evident in developing countries.<sup>835</sup> This limits the positive effects that a minimum wage policy might have. It may therefore be recommended that minimum wage be utilised with social protection measures in a collaborated effort to reach more people and increase the positive outcome of such

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<sup>828</sup> Margolis 2014 <http://www.wol.iza.org>.

<sup>829</sup> Margolis 2014 <http://www.wol.iza.org>.

<sup>830</sup> Rani *et al* 2013 *Labour Review* 396.

<sup>831</sup> Rani *et al* 2013 *Labour Review* 396.

<sup>832</sup> Rani *et al* 2013 *Labour Review* 396.

<sup>833</sup> Rani *et al* 2013 *Labour Review* 397.

<sup>834</sup> Rani *et al* 2013 *Labour Review* 397.

<sup>835</sup> Rani *et al* 2013 *Labour Review* 383.

policies. These policies should complement each other in striving to reach a collective goal in which reduced inequality and poverty are central.<sup>836</sup>

From this paper it might be inferred that many countries, and many developing countries in particular, do not optimally utilise supplementary measures in conjunction with a minimum wage in the best possible manner. Brazil utilises minimum wage in conjunction with social protection measures. There is a correlation between the Brazilian minimum wage and social protection measures which has proven valuable to the Brazilian economy. Collaboration with social protection measures increases the effect that the minimum wage has on the economy by affecting more people, and therefore it may be more beneficial in terms of decreasing poverty and inequality.<sup>837</sup> However the relationship and utilisation of minimum wage and supplementary social protection measures should be carefully designed as to optimally benefit the recipients thereof and not put the recipient thereof in a less favourable position as pointed out in chapter 2.5.3.

Although the social grant system in South Africa has assisted in providing relief to those in need thereof, the long term financial attainability of such system is questioned.

South Africa has a third of its population unemployed, creating a higher dependency on the government social system.<sup>838</sup>

Additionally, such a system creates a society used to handouts or as discussed in chapter 4.3, a “culture of welfare dependency”. The *Bolsa familia* programme in Brazil is an innovative program that gives incentives to enrol children in schools and have regular preventative medical check-ups. According to this program the financial benefit is leveraged to attain certain important governmental goals from those receiving the benefit. South Africa and other developing countries should learn from such a program and use the benefits as leverage to attain certain aims important to the government.

Another problem with social welfare or grants (as considered in chapter 4.3) is the fact that it does not address the causes of the problems, it merely assists in dealing with the consequences of the problem.

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<sup>836</sup> Rani *et al* 2013 *Labour Review* 383.

<sup>837</sup> SBP 2014 <http://rebosa.co.za>.

<sup>838</sup> SBP 2014 <http://rebosa.co.za>.

#### 5.2.4 Adjustments of the minimum wage

As is indicated in chapter 4.4 developing countries often do not give the due consideration to the adjustments of minimum wages. This is evident from a legal provision standpoint where there is often times no legal provision in terms of the frequency and the time periods for adjustments. Furthermore, on a more practical level minimum wages are often times merely not adjusted or adjusted out of sync with relevant and important factors.

Regular and effective adjustments of minimum wage are important to retain the purchasing power of minimum wages due to the impact of inflation. In Brazil adjustments of minimum wage are prescribed by law and are effected annually. Thus, the method of adjustment and period are stipulated within legal provisions.

South Africa states in the *BCEA*<sup>839</sup> that adjustments may be provided for in sectoral determinations, but no provision is made in the act for the method, or period, of adjustments.

It is recommended that the method and the period of adjustments be provided for within the legislative framework. This would provide reassurance and stability to workers and the labour market. The lack of provision for the adjustment method and period of minimum wages in developing countries are concerning, especially in countries with an industrialised workforce. Industrial action impacts on economic growth which is crucial to countries. Countries, particularly developing countries, should therefore strongly consider legislative provisions regarding adjustment (method and period) of minimum wages.

Regular adjustments of the minimum wage would also benefit the efficiency of such policy by ensuring that vulnerable groups benefit from the positive effects of such policy. Typically, adjustments may be correlated with the inflation rate, as well as the general economic conditions of the country.

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<sup>839</sup> Section 55 (4) (b) *BCEA*.

### 5.2.5 Monitoring compliance with the minimum wage

As is evident from this paper, enforcement and ensuring compliance with legal provisions are major concerns to countries, and to developing countries in particular. In this regard there are still ample opportunities for growth. Enforcement to ensure compliance with minimum wage policies is essential in enhancing the possible positive effect of such policies. "Without effective enforcement, rights in statutes become rights on paper only".<sup>840</sup>

The success of a minimum wage policy depends, to a large extent, on the compliance that is achieved in relation thereto.<sup>841</sup> Any policy loses its value if there is no compliance to the provisions of such policy. The more people comply with the minimum wage policy, the more likely the policy is to benefit a greater number of people.

Literature suggests that it's not the lack of minimum wage provisions that is the problem in developing countries, but rather the lack of enforcement due to limited financial and personnel resources. Effective enforcement of the provisions of said policy, combined with adequate measures to address non-compliance, are crucial in promoting compliance with any policy.

Enforcement in terms of minimum wage policies is mostly achieved through the use of labour inspectors who "derive their authority from labour codes or national laws".<sup>842</sup> Labour inspectors are at the forefront of ensuring labour compliance with standards.<sup>843</sup>

The enforcement challenge is confirmed by Borat who states that; "in most developing countries, a substantial share of workers still earn less than the legal minimum wage".<sup>844</sup> The lack of compliance can be attributed to imperfect enforcement.<sup>845</sup>

As mentioned in 3.3.5, in South Africa "under half of the workforce is estimated to receive wages below the legal minimum".<sup>846</sup> Studies also suggest relatively elevated

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<sup>840</sup> Du Toit et al *Labour Relations Law: a comprehensive guide* 639.

<sup>841</sup> Rani et al 2013 *Labour Review* 387.

<sup>842</sup> Ghosheh 2012 [http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh\\_wage\\_legislation\\_2003.pdf](http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh_wage_legislation_2003.pdf).

<sup>843</sup> Ghosheh 2012 [http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh\\_wage\\_legislation\\_2003.pdf](http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh_wage_legislation_2003.pdf).

<sup>844</sup> Borat 2014 <http://wol.iza.org/articles/compliance-with-minimum-wage-laws-in-developing-countries>.

<sup>845</sup> Borat 2014 <http://wol.iza.org/articles/compliance-with-minimum-wage-laws-in-developing-countries>.

<sup>846</sup> Borat 2014 <http://wol.iza.org/articles/compliance-with-minimum-wage-laws-in-developing-countries>.

levels of non-compliance in Brazil among certain vulnerable groups,<sup>847</sup> despite the country having a good enforcement model. Various studies have found that intensified compliance efforts, with the use of an increased number of labour inspectors, correlated with higher compliance levels.<sup>848</sup> Furthermore, studies also indicated that a higher unemployment rate correlated with increased levels of non-compliance.<sup>849</sup> This fact might be attributed to the fact that people, specifically the unemployed, are willing to accept work paying below the determined minimum wage.

The following recommendations can be made to developing countries struggling with enforcement and non-compliance:

- (a) As previously mentioned, all stakeholders and the general public should be consulted and engaged in determining a minimum wage. This might create a greater sense of understanding and acceptance of a minimum wage, which might reflect positively in terms of compliance.
- (b) The limited resources is a reality in many developing countries,<sup>850</sup> therefore it is recommended that certain sectors or regions prone to non-compliance be prioritised as to utilise the limited resources as efficiently as possible. Accordingly, specific attention should be given to these sectors that are considered most at risk for non-compliance.
- (c) In addition, a hotline can be established to enable employees to report non-compliance anonymously. This is an effective way of identifying non-compliant employers.
- (d) Another possibility to be considered in countries with limited resources is the sharing of resources between different departments of government. The United Kingdom can act as example as one department responsible for the collection of taxes is also responsible for the protection of wages.<sup>851</sup>

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<sup>847</sup> Bhorat 2014 <http://wol.iza.org/articles/compliance-with-minimum-wage-laws-in-developing-countries>.

<sup>848</sup> Bhorat 2014 <http://wol.iza.org/articles/compliance-with-minimum-wage-laws-in-developing-countries>.

<sup>849</sup> Bhorat 2014 <http://wol.iza.org/articles/compliance-with-minimum-wage-laws-in-developing-countries>.

<sup>850</sup> Ghosheh 2012 [http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh\\_wage\\_legislation\\_2003.pdf](http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh_wage_legislation_2003.pdf).

<sup>851</sup> Ghosheh 2012 [http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh\\_wage\\_legislation\\_2003.pdf](http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/01/ghosheh_wage_legislation_2003.pdf).

- (e) Workers should be encouraged to speak out against employers who do not comply with legal provisions. To encourage this, sufficient legal protection should be awarded to workers who decide to speak out. Legal protection in this regard will protect the worker against possible employer retaliation and as such, workers might be more inclined to speak out against non-compliance and demand their legal rights.
- (f) The role of trade unions in enforcement should not be underestimated. In Russia and Australia, the trade unions play a very significant role in the enforcement of labour provisions by monitoring compliance with the legal provisions and by informing the authorities in instances of non-compliance. It could therefore prove valuable to developing countries to encourage trade union membership and to establish collaborated relationships with trade unions to assist the State in attaining compliance to legal provisions.

South Africa also utilises labour inspectors for its enforcement of minimum wage policies. However, the South African approach is lacking in several aspects as mentioned in 3.3.5. The following suggestions may prove valuable to the South African enforcement model;

- (a) Uniform operating manuals should be compiled as to guide and assist labour inspectors in their daily jobs.
- (b) Strong emphasis should be put on effective communication between labour inspectors and other parties as to promote the understanding and working of legislation.
- (c) Criteria should be determined to acquire quality candidates such as the requirement of a university degree. Suitable candidates should be properly trained in reporting cases effectively that will result in more reliable data.
- (d) More effective relationships should be strived to between the labour inspectors and the department of justice to ensure effective and timely judicial proceedings.
- (e) High staff turnover could be addressed by offering better work conditions, incentives and salaries.

Despite a certain degree of non-compliance that still exists, the Brazilian labour inspection model is a good example of an effective enforcement approach. Labour inspection is seen as a professional occupation.

Developing countries should strive towards professionalising the labour inspector profession. Strict criteria should be set for prospective labor inspector candidates, e.g. a university degree.

Labour inspectors should be adequately remunerated. Theoretically this could attract better candidates and the increased remuneration could reduce staff turnover.

Once the criteria are met each candidate should be required to complete a formal exam. The end result would be that only talented, well qualified candidates are considered and appointed in the profession.

Brazilian legislation also prescribes constant development and training of its inspectors. Constant training and development are important measures in an ever-changing world and profession.

Corruption and the establishment of unhealthy relationships between labour inspectors and employers are always going to be concerns of any enforcement model. The methods utilised in Brazil may be recommended to other emerging countries in this regard. The Brazilians acknowledge the above mentioned concerns and have decided to remunerate its labour inspectors well to discourage the need for engagement in corrupt activities. Furthermore, labour inspectors are rotated between different geographical areas to theoretically prevent the unhealthy relationships from being established.

#### *5.2.6 Enforcement and consequences of non-compliance*

Effective enforcement is, to a great extent, dependent on the effective sanctions bestowed on those who do not comply with legal provisions. As stated in chapter 3.2.5, non-compliance can be deterred through the utilisation of effective enforcement measures and sanctions.

As is evident from chapter 4.6, ineffective sanctions may result in an enforcement system through the use of labour inspectors with little to no power or authority. There

are two aspects that are of particular importance in terms of sanctions in instances of non-compliance. Firstly, the judicial authority should make judgements to deter non-compliance and such authorities should not be discouraged from doing so. Secondly, once judgments have been handed down these judgements should be actively enforced. The absence of the second provision could render judicial awards meaningless. It is therefore important that these two measures function effectively.

Additionally, in terms of awards made by courts, it is recommended that provision be made for the loss of purchasing power due to inflation. This is particularly applicable in instances where compensation is awarded. Workers could be discouraged from seeking compensation due to excessive bureaucratic procedures and long waiting periods before compensation is paid. An uncomplicated procedure and shortened waiting periods are thus encouraged. In this regard the “penalty reduction” strategy utilised in the United Kingdom is recommended, where employers benefit financially by paying compensation in full and promptly (as discussed in chapter 4.6).

Escalated sanctions against repeated non-compliance could also prove useful in deterring such non-compliance. It could prove useful to set up a system of naming and shaming, where employers are found to be in non-compliance with legal provisions, specifically with regard to minimum wage. Such measures may have economic implications for non-compliant employers as they will force compliance through public pressure. The core benefits of such a measure are that it is easily administrated or managed, whilst being inexpensive.

### **5.3 A South African national minimum wage?**

A national South African minimum wage is approached with various, and quite often, contradicting views. The reality in the South African labour market is that there are large numbers of unskilled and vulnerable workers that often lack a dignified and respectful existence as provided for in the *South African Constitution*. It can be argued that the ability to work is part of human dignity. The importance of human dignity is indicated in *Minister of Home Affairs v Watchenuka*:<sup>852</sup>

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<sup>852</sup> *Minister of Home Affairs v Watchenuka* 2004 1 All SA 21 (SCA) par 26.

The inherent dignity of all people, like human life itself, is one of the foundational values of the Bill of Rights. It constitutes the basis and the inspiration for the recognition that is given to other more specific protections that are afforded by the Bill of Rights.

A national minimum wage might assist in protecting the dignity of workers by ensuring that all workers are entitled to a wage that has the ability to at least satisfy the basic needs of workers. By protecting the dignity of workers other rights awarded to individuals may also be promoted and protected. The introduction of a South African minimum wage is therefore accepted on this premise.

The persistently high average rate of 25% unemployment since the days of Apartheid testifies that poverty wages do not save workers from retrenchments.<sup>853</sup>

Accordingly, the measures implemented in the almost twenty-two-year post-Apartheid era to address the main challenges (unemployment, inequality and poverty) facing South Africa have not yet proved successful, especially not in the broader sense. It may therefore seem rational to try alternatives such as a national minimum wage in an attempt to address these challenges. A national minimum wage would advance the level of coverage that is currently supplied by sectoral determinations and minimum wage determined through collective bargaining. A national minimum wage might particularly be of value in sectors where collective bargaining is weak and trade union representation is low.<sup>854</sup>

The proportion of wage earners covered by minimum wage regulations is generally higher in countries with national minimum wages than those with industry-specific minimum wages.<sup>855</sup>

Fears regarding the possible employment loss associated with the introduction of a national minimum wage are legitimate. The introduction of a national minimum wage could result in increased costs to employers. In order to decrease costs employers may cut employment which is a major concern. The increased cost to employers (that a national minimum wage represents) may also be a positive element in that employers are forced to rethink and explore possibilities which may result in increased productivity. Increased productivity is an important aspect as it contributes to economic growth.

In terms of the concern regarding employment loss as a result of a national minimum it may prove useful to reflect on the consequences that sectoral determinations had on employment loss in South Africa. The effect of sectoral determinations on employment

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<sup>853</sup> ILO 2015 <http://www.ilo.org/addisababa>.

<sup>854</sup> Rani *et al* 2013 *Labour Review* 397.

<sup>855</sup> Rani *et al* 2013 *Labour Review* 384.

loss as discussed in 3.3.8, is reassuring in that no significant employment loss was determined in all sectors except for the agriculture sector. There may be various other contributive reasons for the employment loss in the agriculture sector which makes it difficult to determine with certainty that the employment loss in that sector was as a direct result of the sectoral determination. The Brazilian context could be further reassuring (as discussed in 3.2.7) in that Brazil had elevated unemployment, inequality and poverty which was partially relieved as a result of its minimum wage policy which consists of a national minimum wage together with various sub national minimum wages.

There may also be fears that the introduction of a national minimum wage may influence the number of hours worked negatively. The limitation or reduction of working hours might eliminate or limit the possible uplifting effect that a national minimum wage might have. Evidence as discussed in 3.3.8 is also reassuring, in that the benefit attained by sectoral determinations succeeded the negative effect that reduced working hours had. Although the sectoral determinations are applicable on a smaller scale as that of a national minimum wage the effects or results may very well be the same.

The effectiveness of a South African national minimum wage will, to a great extent, depend on the monetary level at which the national minimum wage is determined.<sup>856</sup> A national minimum wage which is set too low may be insufficient to address the main challenges of unemployment, inequality and poverty in South Africa.<sup>857</sup> On the other hand, a national minimum wage determined too high may result in job losses which might even increase the current challenges facing South Africa.<sup>858</sup> All necessary stakeholders should be consulted with, in the determination of a national minimum wage.

As discussed in chapter 3.3.10 the differentialised approach of Seekings and Natrass is recommended. According to them, a national minimum wage should be determined to act as a legal floor for minimum wages, capable of satisfying the basic needs of workers.

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<sup>856</sup> OECD 2015 <http://www.oecd.org/Focus-on-Minimum-Wages>.

<sup>857</sup> OECD 2015 <http://www.oecd.org/Focus-on-Minimum-Wages>.

<sup>858</sup> OECD 2015 <http://www.oecd.org/Focus-on-Minimum-Wages>.

Further increased sub-national minimum wages can then be determined in specific sectors where such increased minimum wages can be afforded without resulting in significant job loss. The increased sub-national minimum wage correlates in part to the approach of Isaacs and Fine in that a high minimum wage will increase productivity, investment and contribute to economic growth. Contrary to the argument of Isaacs and Fine these increased minimum wages will be limited to specific sectors instead of a national application.

As referred to in chapter 3.3.10, it is fundamental that a simplistic, uncomplicated minimum wage system should initially be utilised and only developed with the addition of various other differentialised minimum wages to the extent and at the pace that can be effectively enforced and controlled by the State or authority responsible for it. Gradual development of a differentialised minimum wage may also help the labour market in adjusting to such developments.

The introduction of a national minimum wage could present risks in terms of elevated unemployment or employment losses. These risks may be reduced by offering certain tax rebates to employers employing minimum wage employees.<sup>859</sup> It is further important to note that:

The cost of enforcement for South Africa could perhaps far outweigh the benefit of the national minimum wage in terms of establishing the appropriate structure to formulate on-going policy and minimum wage setting, as well as staffing, to ensure compliance.<sup>860</sup>

#### ***5.4 Addressing the real problem***

As discussed in chapter 3.3.11, South Africa has particularly high levels of unemployment, inequality and poverty. Many developing countries often struggle with the same problems, albeit in various degrees. There can be no doubt about the benefit of a well instituted, effective, integrated minimum wage policy or system to limit the negative implication of unemployment, inequality and poverty.

The problem is that minimum wage, although it might be helpful, does not address the root causes of unemployment, inequality and poverty.

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<sup>859</sup> OECD 2015 <http://www.oecd.org/Focus-on-Minimum-Wages>.

<sup>860</sup> SBP 2014 <http://www.rebosa.co.za>.

Minimum wage is reactive and often only of a temporary nature. The underlying problems resulting in unemployment, inequality and poverty, need to be addressed in a proactive manner. There may be several underlying problems resulting in unemployment, inequality and poverty, such as the inefficiency of government to institute policies and strategies.

As is evident from the discussion in chapter 3.3.11, the oversupply of labour in the labour market is a common problematic occurrence in many developing countries and particularly in South Africa. This problem can be dealt with in two ways: either by increasing the demand for labour, or by decreasing the supply of labour in the labour market.

The increase of the demand for labour in the labour market might be achieved through effecting sufficient economic growth. Achieving economic growth on the levels required may prove difficult to most developing countries.

The other alternative is to address the excessive labour supply. This can be done by implementing measures designed to decrease fertility rates as discussed in chapter 3.3.11. The one child policy, as applied in China, serves as a good example although there are arguably better ways to achieve decreased fertility, such as education and proper assisted family planning. The one child policy benefitted the Chinese economy in numerous ways and has led to an increased development of human capital.

This is an aspect relevant to South Africa and other developing countries where there are large numbers of low-skilled workers. Development of human capital will result in workers being more productive which will contribute to economic growth.

A decrease in the number of people will relieve the level of dependence on the State and its resources. It is important to note that policies such as the Chinese one child policy is not without its challenges. The biggest being the discriminatory nature thereof. The Chinese people who do not comply with the policy are discriminated against. However, the ethical aspect should also be considered in terms of limiting the reproductive rights of individuals through government measures. In the long term the population will start to age, leading to an increase in the dependency on the State once again.

Considering measures such as the Chinese one child policy may seem drastic to some. The reality is that innovative, drastic measures such as this policy could be considered by countries facing high levels of unemployment, inequality and poverty and are struggling to achieve increased sustainable economic growth.

The economic benefits of such a policy is undeniable, as was reflected in the Chinese case study. Such policies might prove valuable to other developing countries facing the same challenges, particularly if such policy is instituted on a medium-term basis to effect the so-called “demographic bonus” associated with it. It is recommended that such policy not be instituted over the long term or as a permanent measure. Such policy implementation should take place in correlation with the attainment of certain predetermined goals, where after implementation thereof should be stopped.

In the South African context, it is doubtful if a measure such as the Chinese one child policy will be implemented due to various provisions in the *Constitution*, as discussed in chapter 3.3.11.

A more general, and arguably more socially acceptable, alternative solution to the oversupply in the labour market may be found by focusing on education and proper assisted family planning. More educated individuals have fewer children who have children later on in their lives. This generally implies that smaller families can better provide for the children because they may be in a better position in terms of employment. Not only will this establish a decrease in the dependency on the State resources, but it will also establish a decreases in labour supply.

As mentioned in 3.3.11, unemployment, inequality and poverty are interrelated to each other. A decrease in labour supply will reduce the surplus of workers, which will result in decreasing the number of unemployed workers. By reducing unemployment, poverty could also be alleviated as the number of people not receiving remuneration would be limited. Inequality, in turn, could be alleviated by decreasing the labour supply as there would be fewer people living in the bottom end of the labour market, thus narrowing the gap between the very top and bottom of the pay scale.

Education is a progressive, positive approach or measure that can be utilised to combat unemployment, inequality and poverty together with new innovative economic growth policies. The same may arguably not be true with reference to the one child policy.

Education allows not only for a decrease in fertility rates but also plays a fundamental role in developing the worker's skills and knowledge. A well-educated worker may be more productive, promising direct benefits for the employer and, ultimately, the economy as a whole as economic growth is stimulated.

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