

LABOUR RIGHTS UNDER ZIMBABWE'S NEW CONSTITUTION: THE RIGHT TO BE PAID A FAIR AND REASONABLE WAGE

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INTRODUCTION

A fundamental change introduced under s 65 (1) of the new Constitution of Zimbabwe² is the enshrinement of the right of employees to be paid a fair and reasonable wage. It reads:

65 Labour rights

- (1) Every person has the right to fair and safe labour practices and standards and to be paid a fair and reasonable wage.

This provision marks a milestone in the labour law regime of Zimbabwe. It brings Zimbabwean law in closer conformity with relevant regional and international instruments.

Although the philosophical basis of the Labour Act³ is pluralist, with the Act providing that its "purpose is to advance social justice and democracy in the workplace,"⁴ the regime covering wages has been decidedly unitarist. Hitherto neither statutes nor common law had prescribed the quantum of wages payable to employees. This, despite perhaps one of the most rallying demands of labour in the last two decades being the demand for a Poverty Datum Line-linked living wage. This is understandable, when one considers that by 2011, nearly 93 per cent of formal sector employees were earning wages less than the Total Consumption Poverty Line (TCPL), the generally accepted measurement of poverty.⁵ Thus, for most workers, a living wage remains a mirage. They are mired in dire and debilitating poverty.

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 2. Introduced by Constitution of Zimbabwe Amendment (No. 20) Act 2013 (1/2013).
 3. [Chapter 28:01].
 4. Section 2A (1) of the Act.
 5. *ZimStat 2011 Labour Force Survey* (Zimstat, Harare, 2012) 53.

The demand for a living wage, not surprisingly, has found echo in popular musical hits such as *Chinyemu* by Leonard Dembo and *Mugove* by Leonard Zhakata. Indeed, for a nation largely turned Christian, a demand with Biblical foundations.⁶

The conflicts over a living wage, became particularly intense in the post-dollarisation era after March 2009. On the one hand, labour felt it deserved a dividend for the immense sacrifices it made in the preceding period of economic collapse and hyper-inflation running into billions, which virtually wiped out wages. Employers on the other hand argue for wage restraints to ensure sustainable economic recovery. Unreasonable wage increments will kill the goose that lays the golden eggs, they argue.

This conflict spilled into the courts where differing positions emerged. One line of cases, starting from the premises of the interests of the business, took the approach that increments above the prevailing inflation rate, were grossly unreasonable and against public policy as in the *Tel-One (Pvt) Ltd v Communications & Allied Services Workers Union of Zimbabwe* decision.⁷ The other line, started off from the premises of the workers' right to a living wage, and rejected the approach that saw such increments as unreasonable per se, as in *City of Harare v Harare Municipal Workers Union*.⁸

The new Constitution radically changed the situation by, for the first time in Zimbabwean constitutional history, explicitly providing for the right to "a fair and reasonable wage." In this essay we dissect the implications of this new constitutional right on the law of remuneration, in the context of international human rights and labour law and contrasting philosophical and jurisprudential worldviews.

6. "Masters, give unto your servants that which is just and equal; knowing that you also have a Master in Heaven." "Colossians 4 vs 1" in *Holy Bible*, King James version (Christian Art Publishers, 2012). Similar values are stated in "James 5 vs 4" in *Holy Bible* King (2012) "Behold, the hire of the labourers which have reaped down your fields, which is of you kept back by fraud crieth: and the cries of them which have reaped are entered into the ears of the Lord of Sabbath."

7. 2007 (2) ZLR 262 (H); and *Chamber of Mines v Associated Mineworkers Union of Zimbabwe* LC/H/250/2012.

8. 2006 (1) ZLR 491 (H).

THE LEGAL FRAMEWORK BEFORE ACT NO. 20 OF 2013

Prior to the new constitutional dispensation the principal methods for the determination of wages were under common law and relevant labour statutes.

Under the common law, the amount of wages to be paid is in terms of the agreement made by the parties under the contract of employment.⁹ What the employer pays for is the availability of the employee's services and not the value of the product of the actual work done by the employee.¹⁰ Increments are at the discretion of the employer.¹¹ Considerations of equity, fairness or reasonableness do not enter into the picture *per se*. Renowned author RH Christie puts it thus:¹²

The starting point of the common law is that the courts will not interfere with a contract on the ground that it is unreasonable. In **Burger v Central African Railways** 1903 TS 571 Innes CJ said that:

'Our law does not recognize the right of a court to release a contracting party from the consequences of an agreement duly entered into him merely because that agreement appears to be unreasonable.'

What is paramount is what the parties themselves see as reasonable as reflected in the terms of their contract of employment. The main responsibility of the courts is to enforce this contractual will of the parties and not seek to second-guess adult free persons.¹³ The emphasis is on the market as the principal and most fair manner of determining a reasonable wage. Hepple B captures it well:

The freedom of the employer and worker from the interference of the state in the labour market, the freedom of the contracting

9. *National Railways of Zimbabwe v National Railways Contributory Fund* 1985 (1) ZLR 16 (S); *Gladstone v Thornton's Garage* 1929 TPD 116; A Rycroft and B Jordaan *A Guide to South African Labour Law* 2nd ed (Juta, 1992) 67.

10. *Commercial Careers College (1980) (Pvt) Ltd v Jarvis* 1989 (1) ZLR 344; *Belmore v Minister of Finance* 1948 (2) SA 852 (SR).

11. *Chiremba (duly authorized Chairman of Workers Committee) and Ors v RBZ* 2000 (2) ZLR 370 (S); *Chubb Union Zimbabwe (Pvt) Ltd v Chubb Union Workers Committee* S 01/01. Also: *Nare v National Foods Ltd* LRT/MT/38/02.

12. R H Christie *The Law of Contract in South Africa* 5th ed (LexisNexis, 2009) 14.

13. As put by INNES CJ in *Wells v South African Alumenite Company* 1927 AD 69 at 73: "No doubt the condition is hard and onerous; but if people sign conditions they must, in the absence of fraud, be held to them. Public policy so demands.

parties and the freedom of private will to determine the content of the contract.¹⁴

The legal philosophy underpinning common law is clearly utilitarian and reflected in the theory of labour relations of unitarism. The individual parties, meeting in the free market, are the ones who know what is best for themselves. Allowing such individual parties maximum contractual freedom will derive not only maximum benefit for the parties but society at large.¹⁵ Unitarism is a theory that places a premium on the unity of interests and goals between labour and capital in the employment relationship, but within a framework in which capital enjoys undoubted superior status.¹⁶ Conflict is unnatural and dysfunctional.

This free market based conception underlies the decision in *Tel-One (Pvt) Ltd v Communications & Allied Services Workers Union of Zimbabwe, supra*. In such case, the arbitrator had awarded a 266% wage increment across the board. The employer made an application to the High Court to set aside the award on the ground that it was in violation of Zimbabwe's public policy.¹⁷ It argued that it was grossly unreasonable as it would result in over 130% of its overall income going to wages. In setting aside the award, HUNGWE J, at 266A-C, ruled:

There is no doubt in my mind that the spirit of collective bargaining between employer and employee is to arrive by consensus or, if that fails, by arbitration, at what a fair wage is. The idea is to preserve the employer-employee relationship. The employee makes his labour available for a fair fee. The

'If there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider - that you are not lightly to interfere with this freedom of contract.' (per JESSEL M.R. in *Printing and Numerical Registering Co. v Sampson* [1875]LR 19 Eq. 462 at 465)." See also: R Epstein, "In defence of the contract at will" 51 *Chi. L. Rev.* (1984) 947; A Rycroft and B Jordaan *op cite* 10 - 17.

14. B Hepple (ed) *The making of labour law in Europe* (Mansell, 1986).

15. J S Mill, "On Liberty" in *John Stuart Mill: A Selection of His Works* J M Robson (ed) (Macmillan, 1966) 13 - 19.

16. M Finnemore *Introduction to Labour Relations in South Africa* 10th (ed) (LexisNexis) 2009) 6.

17. Under art 34 (2) (b) (ii) of the Arbitration Act [Chapter 7:15].

employer engages the employee on acceptable terms and conditions. The employer employs his resources to ensure that the goose that lays the eggs for their mutual benefit continues to do so. Society expects these mutually beneficial outcomes. The economy thrives and so does the community generally and its members in particular. An award that plunges the apple-cart over the cliff in my view could not be said to be in the best interest of the general good of Zimbabwe...

The court proceeded to place at the pinnacle of considerations to be made when determining whether a wage increment was reasonable, the ability of the employer to pay:

In all work situations salaries and wages are limited by an employer's ability to pay. The courts and indeed all tribunals delegated with decisions of a financial nature would be failing in their duty if they were to will-nilly give awards whose effect would be to drive corporations into insolvency thereby destroying the economic fabric of the nation. Such awards would defeat the very purpose they are meant to serve. As such they are liable to be set aside as being in conflict with the public policy of Zimbabwe...

The Labour Court went further in *Chamber of Mines v Associated Mineworkers Union of Zimbabwe*.¹⁸ In that case the trade union had made a demand of 55% wages increment whilst the employer offered 5%, roughly the prevailing inflation rate. The Labour Court set aside the 20% increment by the arbitrator, as being outrageous. The court observed:

Thus it is high time the labour advocacy institutions migrate from the hang-over of the hyper-inflationary environment to the current multi-currency stable environment. This will ensure sustainability of the workers' welfare and also ensure economic development... The inflation level obtaining in the country is at about 5% which should provide an essential guide for salary negotiations...

Whilst workers should be remunerated fairly, I do not believe it is reasonable to do so at the expense of the sustainability of the companies which pay them... I am satisfied that the Chamber has justified the setting aside of the arbitral award. Whilst it is necessary to raise the workers' salaries, the raise should be in tandem with the inflationary levels, production levels, and other

¹⁸. LC/H/ 250/2012.

costs. I am satisfied that a blanket raise by 20% is outrageous. A 5 % raise meets the justice of the case.

In neither of the above cases did the court seek to balance or place in context the economic factor of the employer's business interest with the other factors that are accepted under appropriate international labour standards.¹⁹ These factors include economic - social factors such as productivity, standards of living in the country and the average wages in the country as well as the needs of the worker and their family and the specified purposes of the Labour Act.

Given that Zimbabwe has ratified some of the important ILO instruments on wage-fixing, these should have been of high persuasive authority to the courts in determining what a grossly unreasonable wage increment was.²⁰ It would have required a contextual and balanced approach, weighing the factors based on the interests of the business such as ability to pay and profitability and those in favour of the needs of the worker and their family such as the bread basket and PDL. In doing so the courts would have been guided by the fact that the specified objective of the Labour Act is to advance social justice in the workplace and that Zimbabwe has ratified regional and international instruments that provide for the employee's right to

^{19.} Zimbabwe has ratified important ILO conventions dealing with wages including: ILO 026 Convention: Minimum Wage Fixing Machinery (Manufacturing, Commerce, Domestic Sectors) (1928); ILO 099 Convention: Minimum Wage Fixing Machinery (Agriculture) (1951). There are also other relevant ILO instruments, which Zimbabwe has not ratified such as: ILO 131 Convention: Minimum Wage-Fixing (1970); ILO 135 Recommendation: Minimum Wage Fixing Recommendation (1970).

^{20.} The Long Title of the Labour Act stipulates that one of the objectives of the Act is "*to give effect to the international obligations of the Republic of Zimbabwe as a member state of the international Labour Organisation*" The Labour Court has in other instances, correctly in our view, used relevant ILO conventions to help interpret provisions of the Labour Act as was done in: *Mavisa v Clan Transport* LC/H/199/2009 applying ILO 135 Convention: Workers Representatives Convention (1971); ILO 087 Convention: Freedom of Association and Protection of the Right to Organise (1948) to help interpret the provisions of s 14B (C) and s 29 (4a) of the Act; and *Chamwaita v Charhons (Pvt) Ltd* LC/H/215/2009 applying provisions of the Termination of Employment Convention, 1982 (C 158). Generally on the appropriateness of using principles under relevant international treaties - see section 15B of the Interpretation Act [*Chapter 1:01*] and *Kachingwe, Chibebe and ZLHR v Minister of Home Affairs and Commissioner of Police* 2005 (2) ZLR 12 (S) and *S v Moyo & Ors* 2008 (2) ZLR 338 (H) at 341E-F

“just and favourable remuneration.”²¹ In any case the courts should have been bound by the principle that the grounds on which an arbitral award can be set aside for contravention of public policy in particular unreasonableness, are of a very limited nature.²² The courts were clearly guided by a unitarist approach to labour relations yet one which is inconsistent with the specified objectives of the Act. This was obviously in tandem with the dominant ideological thrust during the Government of National Unity, which tended to emphasize free-market values. This was aptly captured in the 2010 Budget Statement of the then Minister of Finance, *T Biti*, wherein he stated:²³

The review of the role of arbitrators in awarding wage adjustments that bear no relationship to the competitiveness of most industries and indeed the entire economy, is unavoidable. Failure to nip in the bud unsustainable wage awards will be swiftly punished in the global village as our products price themselves out of the market, both locally and in the export markets.

REGULATION OF WAGES UNDER THE LABOUR ACT AND PUBLIC SERVICE ACT

The regulation of wages under statutes had not gone too far beyond the common law. In the public sector wages and related benefits were set by the Public Service Commission with the concurrence of the minister responsible for finance.²⁴ The Commission was required to consult the recognized public sector associations and organizations before setting the terms and conditions including remuneration, but failure to consult or to reach agreement with the associations did not invalidate any wage regulations so made.²⁵ The Public Service Act does not provide for the right of employees to “a fair and reasonable wage” but only provides public sector employees to an enforceable

21. Article 23 (3) Universal Declaration of Rights; art. 14 (b) Charter of Fundamental Social Rights in SADC.

22. Discussed in detail, *infra* 7.

23. Cited in: 25 *Labour Relations Information Service* 3 (June - August 2012) 2. The Finance Minister repeated the same sentiments in the November 2011 Budget Statement stating: “Stakeholder submissions by industry as well as the labour movement acknowledge rising incidences of wage demands divorced from productivity by workers unions and arbitration awards that fail to take into account affordability at company levels.”

24. Section 19 (1) as read with s 8 (1) of the Public Service Act [*Chapter 16:01*].

25. See section 20 (1) and (2) of the Public Service Act as read with s 73 (2) Constitution of Zimbabwe 1979 (SI 1979/1600 of the United Kingdom).

right to remuneration.²⁶ The only major modification to common law is the requirement that salaries be fixed to by reference to, “academic, professional or technical qualifications or the attributes necessary for the efficient and effective execution of the tasks attached to the post.”²⁷

The above provision is important in so far as it limits the arbitrary discretion of the employer to differentiate between wages of employees in different grades as would otherwise be allowed under the common law. Nonetheless, it does not advance the employee’s cause for a fair and reasonable wage.

The employment relationship in the private sector is generally covered by the provisions of the Labour Act [*Chapter 28:01*]. The situation was only marginally different from that under common law. The Act does not specifically provide for a right to “a fair and reasonable wage,” whether as a fundamental right, a specified fair labour practice or under its mandatory minimum wages regime.

Under Part 2, the Act provides for various fundamental rights of employees, including the right to fair labour standards. Section 6 (1) creates a fundamental duty of the employer to pay the prescribed remuneration, but the section does not expressly provide for a fair labour standard of fair and reasonable wages. It merely compels the employer not to pay a wage which is lower than that specified by law or agreement:

No employer shall pay any employee a wage which is lower than that to (sic) fair labour standard specified for such employee by law or by agreement.

Mandatory minimum wages may be set in terms of sections 17 and 20 of the Act. Under section 17 (3) as read with section 17 (1) the Minister of Labour may, after consultation with the Wages Advisory Council, make regulations providing for, inter alia:

17 (3) (a) the rights of employees, including minimum wages, benefits, social security, retirement, and superannuation benefits and other benefits of employment;

^{26.} Section 22, Public Service Act.

^{27.} Section 20 (2) Public Service Regulation 2000 (SI 1/2000).

Section 20 further provides, *inter alia*, that:

20(1) The Minister may, by statutory instrument -

- (a) In respect of any class of employees in any undertaking or industry -
 - (i) specify the minimum wage and benefits in respect of such grade of employees;
 - (ii) require employers to grant or negotiate increments on annual income of such minimum amount or percentage as he may specify; and prohibit the payment of less than such specified minimum wage and benefits or increments to such class of employees;
- (b) ...
- (c) ...
- (d) give such other directions or make such other provision as he may deem necessary or desirable to ensure the payment of a minimum wage or benefits to any class of employees;
- (e) provide for exemptions from paragraphs (a), (b), (c) and (d).

Where a minimum wage notice is issued in terms of these provisions every contract of employment or collective bargaining agreement has to be modified or adapted to the extent necessary to bring it into conformity with the minimum wages regulations.²⁸ However, it is again noted that there are no specific minimum standards by which the Minister sets the minimum wages, including that the minimum wages be “fair and reasonable wage” or guarantee the employees “a decent standard of living.”

Another platform for regulation of wages under the Labour Act relates to statutory collective bargaining agreements made in terms of Part VIII and Part V of the Act. These may be industry-wide agreements made under a National Employment Council or a workplace agreement made under a Works Council. However, as with the ministerial wage regulations, there are also no prescribed minimum standards by which the agreements must adhere.²⁹ Thus the parties are free to negotiate

²⁸. Section 17 (3) of the Act.

²⁹. See the bargaining agenda set in s 74 (3) of the Act which includes: “*Érates of remuneration and minimum wages for different grades and types of occupation...*”

what they deem fit as a fair or reasonable wage. The parties though, do not have absolute freedom. Firstly, reflecting the state corporatist origins of the Act, the Minister of Labour has residual power to direct the renegotiation of an agreement which the Minister feels has become:

- (a) inconsistent with this Act or any other enactment or -
- (b)
- (c) unreasonable or unfair, having regard to the respective rights of the parties.³⁰

The Act does not define the phrase “unreasonable or unfair.” The discretion is left with the Minister. It may be argued though that the Minister may generally be guided by the objects of the Act specified in section 2A (1). The later though, can only take the argument so far, because neither s 2A (1) nor the Act in general provides for an explicit fair labour standard of a right to a fair and reasonable wage.

Secondly, a party aggrieved by an award made under compulsory arbitration can appeal to the Labour Court on a question of law,³¹ or if made through voluntary arbitration, make an application to the High Court to set it aside as being, *inter alia*, in contravention of the public policy of Zimbabwe.³² It has been held that an appropriate ground on which an award may be held to be in contravention of the public policy of Zimbabwe, is where the award is deemed grossly unreasonable.³³ But the courts have generally held that the ground of “unreasonableness” is of very limited use in such applications or appeals and the party who seeks to establish this bears “a formidable onus”³⁴ to show that the award made is “so outrageous in defiance of common sense and logic.”³⁵ This is why the bar set in *Chamber of Mines v Associated Mineworkers Union of Zimbabwe, supra*, of using the inflation rate as the essential basis of judging reasonability or

³⁰. Section 81 (1).

³¹. Section 98 (10). See *Chamber of Mines v Associated Mineworkers Union of Zimbabwe, supra n. 7*.

³². Article 34 (2) (b) (ii), Arbitration Act [Chapter 7:15]. *Tel-One (Pvt) Ltd v Communications & Allied Services Workers Union of Zimbabwe* 2007 (2) ZLR 262 (H).

³³. *Tel-One (Pvt) Ltd v Communications & Allied Services Workers Union of Zimbabwe* *ibid*; and *Chamber of Mines v Associated Mineworkers Union of Zimbabwe, op cite n 7*.

³⁴. *Cargo Carriers (Pvt) Ltd v Zambezi & Ors* 1996 (1) ZLR 613 (S).

³⁵. *Chinyange v Jagers Wholesalers* SC 24/03; *Beazley NO v Kabel & Anor* SC/22/03; *ZESA v Maposa* 1999 (2) ZLR 452 (S).

otherwise of an award without regard to the specified objectives of the Labour Act and considering all other relevant factors such as the needs of the worker, was too low and inconsistent with case authority.

From the above it becomes clear that the Labour Act does not compel the employer to pay "a fair and reasonable wage," let alone a living wage. At most s 2A(1), may be used as an interpretation tool to determine what is a fair and reasonable wage in relation to minimum wages notices decreed by the Minister, or directions by the Minister for renegotiations of collective bargaining agreements or in relation to wage awards made by arbitrators.³⁶ However, the absence of an explicit inclusion in the Act of the employees' right to a fair and reasonable wage whether as a fundamental right of employees or as a fair labour standard, makes the potential use of s 2A (1) as a basis for such right tenuous and unlikely. This is moreso in view of the already declared skepticism of the Supreme Court on the generalized use of this section.³⁷

RIGHT TO FAIR AND REASONABLE WAGE AND APPROPRIATE INTERPRETATION MODEL

The preceding survey of the legal framework prevailing prior to Act No. 20/2013 shows that Zimbabwean law did not provide for a fair and reasonable wage or a living wage. Not surprisingly the demand for the right to a fair and reasonable wage or a living wage was one of the primary demands of workers and trade unions in relation not only to labour law reform but constitutional reform as well.

This was aptly captured in the National Constitution Assembly Draft Constitution.³⁸

This demand is manifest in s 65 (1) of the new Constitution. Although this section is clearly inspired by s 28 (1) of the NCA Draft Constitution

³⁶. By reliance on s 2A (2) of the Act providing that the Act " ... shall be construed in such manner as best ensures the attainment of its purpose referred to in subsection (1)."

³⁷. In *United Bottlers v Kaduya* 2006 (2) ZLR 150 (S) at 155B-C, CHIDYAUSSIKU CJ observed in relation to s 2A says "The section is not a wholesale amendment of the common law. The common law can only be ousted by an explicit provision of the Labour Act."

³⁸. Section 28 (1), NCA Draft Constitution (2001), s 28 (1) providing: "Every worker has the right to fair and safe labour practices and standards and to be paid at least a living wage consistent with the poverty datum line." See generally, M Gwisai *The Zimbabwe COPAC Draft Constitution and what it means for Working People and Democracy* (ZLC, 2012) 54.

but not going as far as the later in providing for a living wage consistent with the poverty datum line, the enshrinement of the right to a fair and reasonable is still of profound significance. It has provided what has so far been the critical missing link in the legal framework, and which allowed the common law and unitarist based approach to reign with impunity.

For the first time in Zimbabwean labour history, statute law now provides for the regulation of wages based on normative values of fairness and reasonableness, something which is alien to common law and was omitted in the statutory framework. This is even done at the highest possible level, namely as an enshrined fundamental right under the Declaration of Rights. What had been missing as a directly specified fair labour standard in the purposes of the Labour Act under s 2A (1) is now provided for, but now as a constitutional right.

THE TEST FOR “A FAIR AND REASONABLE WAGE” UNDER INTERNATIONAL LAW

Although the Constitution does not directly define the phrase “a fair and reasonable wage,” it provides clear guidelines to be used in interpreting the phrase. In the first instance in interpreting the Declaration of Rights, one is required to give full effect to rights provided in the Constitution and to promote the values that underlie a democratic society based on inter alia justice and human dignity.³⁹ This is strengthened by s 46 (2) of the Constitution which requires that when any court or tribunal is interpreting an enactment and when developing the common law, it must promote and be guided by the spirit and objectives of the Declaration of Rights.⁴⁰

Critically further, the courts and tribunals are required to “take into account international law and all treaties and conventions to which Zimbabwe is a party.”⁴¹ Of particular further importance are the provisions of s 327 (6) of the Constitution. This provides:

When interpreting legislation, every court and tribunal must adopt any reasonable interpretation that is consistent with any international convention, treaty or agreement which is binding on Zimbabwe, in preference to an alternative interpretation inconsistent with that convention, treaty or agreement.

^{39.} Section 46 (1) (a) (b) of the Constitution.

^{40.} Which is also reinforced in s 176 of the Constitution.

^{41.} Section 46 (1) (c) of the Constitution.

The phrase “*a fair and reasonable wage*” is in fact derived from international law instruments, most of which Zimbabwe has ratified. These must provide guidance on how it is interpreted by virtue of s 46 and s 327 (6) of the Constitution.

Firstly art. 14 (b) of the Charter of Fundamental Social Rights in SADC 2003, provides:

- (b) Workers are (to be) provided with fair opportunities to receive wages, which provide for a decent standard of living; ... (emphasis added).

Zimbabwe is also party to the Universal Declaration of Human Rights 1948, whose art.23 (3) provides:

Everyone who works has the right to just and favourable remuneration ensuring for himself and herself existence worthy of human dignity...

Zimbabwe has also ratified the International Covenant of Economic, Social and Cultural Rights 1966 whose article 11 (1) provides:

Everyone has a right to a standard of living adequate for the health and well-being of himself or herself and his or her family including food, clothing, housing, medical care and necessary social services...

The International Labour Organisation has several instruments dealing with minimum-wage fixing.⁴² Perhaps the most relevant are ILO 131 Convention: Minimum Wage-Fixing (1970) and ILO 135 Recommendation: Minimum Wage-Fixing (1970). In terms of article 1 of ILO R135, one of the key factors to be considered in wage fixing is the need to “... *to overcome poverty and to ensure the satisfaction of the needs of all workers and their families...*”

In terms of the specific elements to be considered when determining an appropriate minimum wage that realizes the above purposes, article 3 of ILO C131 states these as, subject to national practice and conditions:...⁴³

^{42.} See for instance: ILO 026 Convention: Minimum Wage-Fixing Machinery; ILO 030 Recommendation: Minimum Wage - Fixing Machinery; ILO 099 Convention: Minimum Wage-Fixing Machinery (Agriculture) (1951).

^{43.} ZimStat, “Appendix: Summary of International Labour Organisation (ILO) position on Poverty Datum Line in relation to wages and salaries” (ZimStat, 2013).

- (a) The needs of workers and their families, taking into account the general level of wages in the country, the cost of living, social security benefits, and the relative living standards of other social groups;
- (b) Economic factors, including the requirements of economic development, levels of productivity and the desirability of attaining and maintaining a high level of employment.

Therefore under ILO instruments the decided bias in the fixing of minimum wages is the “human factor”, that is the needs of the worker and their family to live a poverty-free life but this done within prevailing “national practice and conditions” including economic and social considerations.

The influence on the above ILO conventions is a pluralist conception, at the centre of which is poverty reduction and collective bargaining as key factors. The instruments provide for two broad considerations to be made, encompassing both worker friendly and employer friendly factors, but with the specified fundamental purpose being poverty reduction and ensuring the satisfaction of the needs of the worker and their family. This frame-work allows flexibility in the determination of what is fair and reasonable wage, taking into account the concrete realities in each given country, with effective collective bargaining providing the yard-stick of what is appropriate national practice. The underlying theoretical basis is pluralism, especially the adversarial version. This has been defined as a theory of labour relations in which employers accept the inevitability and need for collective regulation of the employment relationship, in particular through collective bargaining.⁴⁴

Following on the above international instruments, the concept of a just or fair remuneration has had major influence in recent constitutional reform on the continent and globally including, Kenya,⁴⁵ Malawi⁴⁶ and Mozambique.⁴⁷ Perhaps the fullest expression is to be found in article 91 of the Constitution of Venezuela, which provides:

^{44.} M Finnemore *op cite* 144-145.

^{45.} The Constitution of Kenya, 2010 provides in s 41 (2) (a): “(1) Every person has the right to fair labour practices. (2) Every worker has the right - (a) to fair remuneration.”

^{46.} See s 31 (1), Constitution of Malawi, providing: “31 (1) Every person shall have the right to fair and safe labour practices and to fair remuneration.”

^{47.} Article 89 (1) of the Constitution of Mozambique provides: “Labour shall be protected and dignified ... the State shall promote the just distribution of the proceeds of labour.”

Every worker has the right to a salary sufficient to enable him or her to live with dignity and cover basic material, social and intellectual needs for himself or herself and his or her family. The payment for equal salary for equal work is guaranteed, and the share of the profits of a business enterprise to which workers are entitled shall be determined... The State guarantees workers in both the public and private sector a vital minimum salary which shall be adjusted each year, taking as one of the references the cost of a basic market.

The Australian case of *Ex Parte H.V. McKay* 1907 provides perhaps the most elaborate statement of the test for a "fair and reasonable wage." In that case the court had to determine what was meant by the phrase "fair and reasonable wages" in an enactment which provided duty exemption for Australian manufacturers paying such wages. The court held:

The provision for fair and reasonable remuneration is obviously designed for the benefit of the employees in the industry; and it must be meant to secure to them something which they cannot get by the ordinary system of individual bargaining with employers. The standard of 'fair and reasonable' must, therefore, be something else; and I cannot think of any other standard appropriate than the normal needs of the average employee, regarded as a human being living in a civilized community...

The court went on to state that whilst there is need to balance the different factors, the "first and dominant factor" in ascertaining a "fair and reasonable" wage for an unskilled employee are the "normal needs of the average employee, regarded as a human being living in a civilized community." And that a wage cannot be regarded as fair and reasonable, " *if it does not carry a wage sufficient to insure the workman food, shelter, clothing, frugal comfort, provision for evil days, etc as well as reward for the special skill of an artisan if he is one.*"

The Court stated that the standard is an objective one, which is not dependant on the profitability of the business, but rather the needs of the employee:

... the remuneration of the employee is not made to depend on the profits of the employer. If the profits are nil, the fair and reasonable remuneration must be paid; and if the profits are 100 per cent, it must be paid. There is far more ground for the

view that, under this section, the fair and reasonable remuneration has to be paid before profits are ascertained - that it stands on the same level as the cost of the raw material of the manufacture.

The same conclusion was reached in the American case of **Morehead v New York ex rel. Tiplado**.⁴⁸ Dealing with a similar provision the Industrial Court of Kenya held that:⁴⁹

The terms fair and reasonable are to be interpreted in the context of the standards at a particular work place, the national labour standards and with due regard to international labour standards.

The concept of “a fair and reasonable wage” therefore encapsulates the concept of the bread-basket or a living wage that ensures a dignified or decent standard of living, as the starting and primary point. The most scientific method of measuring standards of living is the Poverty Datum Line (PDL). The PDL is a general measurement of standards of living and poverty. It represents “the cost of a given standard of living that must be attained if a person is deemed not to be poor.”⁵⁰

To measure standards of living, two measures are generally used, namely the Food Poverty Line (FPL) and the Total Consumption Poverty Line (TCPL). The FPL “represents the minimum consumption expenditure necessary to ensure that each individual can, (if all expenditures were devoted to food), consume a minimum food basket representing 2 100 kilo calories.” An individual whose total consumption expenditure does not exceed the food poverty line is deemed to be very poor.

On the other hand the TCPL is derived “by computing the non-food consumption expenditure of poor households whose consumption expenditure is just equal to the FPL. This amount is added to the FPL.”⁵¹ An individual whose total consumption expenditure does not exceed the total consumption poverty line is deemed to be poor.

Therefore the human factor, in particular the need to prevent poverty is the key determinant of a ‘fair and reasonable wage.’ This generally

⁴⁸. 298 US. 587 (1936).

⁴⁹. *VMK v CUEA* [2013] KLR in interpreting s 41 (2) (a), Constitution of Kenya, 2010, which provides: “Every worker has the right - (a) to fair remuneration”

⁵⁰. ZimStat (2012) 53.

⁵¹. *ibid.*

would be PDL-Linked. This is the ‘first and dominant factor.’” Employers who seek to pay less than this wage, therefore have the onus to establish compelling reasons why this should be so, by for instance reference to the other factors such as economic and financial. But the burden is onerous and heavy because of the primacy of the human factor. Where incapacity is raised, there must be full financial disclosure by the employer. In *Ex Parte H.V. McKay, supra*, it was held that there is no general obligation on an employer to give full financial disclosure on its finances, but only if the employer is paying a fair and reasonable wage, otherwise it would have such duty.

The above conception of a “fair wage” is also aptly captured in the Marxist theory of labour relations as expressed by F. Engels. According to him a fair wage is one consistent with what he terms the Law of Wages, namely:⁵²

Now what does political economy call a fair day’s wages and a fair day’s work? Simply the rate of wages and the length and intensity of a day’s work which are determined by competition of employer and employed in the open market. And what are they, when thus determined? A fair day’s wages, under normal conditions, is the sum required to procure to the labourer the means of existence necessary, according to the standard of life in his station and country, to keep himself in working order and to propagate his race. The actual rate of wages, with the fluctuations of trade, may be sometimes below this rate; but, under fair conditions that rate ought to be the average of all oscillations.

IMPLICATIONS OF INTERNATIONAL LAW ON ZIMBABWEAN LAW

The thrust of the above on the position in Zimbabwean law is profound. By virtue of sections 46 and 327 (6) of the Constitution, the phrase “fair and reasonable wage” in s 65 (1) must therefore be interpreted consistent with the above international law instruments which Zimbabwe has ratified and which give primacy to the human factor.

In other words, by enshrinement of the right to a fair and reasonable wage in the Declaration of Rights there is a nod towards minimum wages being at least those that provide adequate food, clothing, shelter, healthcare, education of children, frugal comfort and social security taking into account the general standard of living and cost of living in the country by reference to the PDL.

⁵². F Engels, “A Fair Day’s Wages for a Fair Day’s Work,” *The Labour Standard* 7 May 1881 in *Inqaba ya Basebenzi* 2 (Aug-Oct 1983) 7.

The above means the approach followed in the *Chamber of Mines* case, *supra*, is decidedly no longer good or binding authority under the new constitutional dispensation. Such decision, which was based on the sole consideration of the inflation rate and interests of the business, cannot clearly stand in view of s 65 (1) of the new Constitution. In terms of the later, considerations of fairness require balancing both the business factors and the human factor but with first priority being given to the human factor.

ONUS AND EVIDENTIARY BURDEN

The above interpretation means that s 65 (1) of the Constitution has now set a general standard of remuneration by which all employees should be paid, but like all general rules, exceptions are applicable in appropriate circumstances. The onus though, lying on the party seeking to resile from the general rule to show compelling reasons why it should not.

This means in effect that the Constitution shifts the onus to the party who says it cannot comply with such standard to provide adequate reasons why it cannot. This means that where an employer seeks to pay less than a PDL-linked wage, the employer has the onus to prove compelling reasons why this should be so. If the employer pleads financial incapacity to pay fair wages, then it follows that the onus shifts to the employer to establish this and generally the burden is high because this is a justiciable right provided in the Declaration of Rights.

The employer has a duty of full disclosure. This may pertain to areas such as the overall pay-roll, in particular the distribution of salaries between the highest paid categories and the lowest paid ones, as was held required in the case of *City of Harare v Harare Municipal Workers Union*.⁵³ Additional details of this duty are provided in Sections 75 and 76 of the Labour Act. Section 75 establishes a duty to negotiate in good faith whereby all parties to the negotiation of a collective bargaining agreement are required to disclose "all information relevant to the negotiation including information contained in records, papers, books and other documents." Section 76 establishes a duty of full financial disclosure where financial incapacity is alleged. It reads:

- (1) When any party to the negotiation of a collective bargaining agreement alleges financial incapacity as a ground for his

⁵³. 2006 (1) ZLR 491 (H).

inability to agree to any terms or conditions, or to any alteration of any terms or conditions thereof, it shall be the duty of such party to make full disclosure of his financial position, duly supported by all relevant accounting papers and documents to the other party.

In terms of the above, especially where there are allegations of astronomical salaries and benefits being paid to top management, the employers would have a duty to disclose details such as housing allowances; education allowances for managers' dependants; vehicle and fuel benefits; club subscriptions and so forth. Similarly is the duty to disclose details of capital investment plans in the last few years and projections in the near future, details of the profits or otherwise made by the company; the dividend attributed to the owners or share-holders and so forth. This duty of full financial disclosure is already widely practiced in industry in relation to applications for exemptions, including with appropriate measures to protect confidentiality.

Alternatively or additionally, the employer may need to provide mitigatory measures, such as an increment for a shorter duration; subsequent cost of living adjustments; special bonuses on increased production or employee share ownership or profit-sharing schemes.

Failure to fulfill the above, means the employer would have failed to discharge the onus on it, and therefore must pay the PDL-linked living wage as was done in *City of Harare v Harare Municipal Workers Union*, *supra*, where CHITAKUNYE J upheld an award of 120% by an arbitrator and held:

The arbitrator carefully considered the interests of both parties as portrayed by the parties before him. The applicant's argument of inability to pay was well considered... The substantive effect of the award was simply to awaken the applicant to the realities of today's economy... Applicant argued that respondents should not concern themselves with what is being awarded to other employees or officers of the applicant. But surely, the respondents are entitled to point out that those categories of employees or officials are getting astronomical salaries which may in fact be eating more into the applicant's revenue than the paltry salaries and allowances the lowly paid workers are getting. The applicant appeared not to be comfortable to deal with this and appeared content to brush it aside. But surely if you have an entity that pays astronomical salaries to its top heavy management and officers but that same entity is reluctant

to pay its lowly paid workers a living wage, can such an entity sincerely cry bankruptcy if ordered to pay its lowly graded workers a meaningful salary? There was simply nothing to fault the arbitrator in arriving at the decision he gave on what was placed before him. At 494D-F

CONCRETE IMPLICATIONS ON CURRENT REVIEW OF WAGES

At this stage in Zimbabwe's history it cannot be sufficient to only consider the inflation rate, when the prevailing minimum wages are still less than half of the PDL and in fact where only 6 percent of paid employees in 2011 were receiving an income above the TCPL as shown in Table 1.⁵⁴

Table 1: Percent Paid Employees Aged 15 Years and Above Paid Cash Only or Both in Cash and in Kind by Type of Employment and Cash Received in the Month Preceding the Survey, 2011 LFCLS⁵⁵

Cash Received	Informal Employment			Formal Employment			Total		
	Male	Female	Total	Male	Female	Total	Male	Female	Total
US\$100 and below	46.3	64.0	52.5	4.9	6.3	5.3	27.7	41.5	32.2
\$101-\$200	31.9	20.1	27.8	25.2	19.7	23.6	28.9	19.9	26.0
\$201-\$300	14.5	10.5	13.1	43.6	50.1	45.5	27.6	25.9	27.1
\$301-\$400	2.9	2.7	2.8	11.6	7.9	10.5	6.8	4.7	6.1
\$401-\$500	1.6	0.8	1.3	5.0	4.1	4.8	3.1	2.1	2.8
\$501-\$1000	1.5	1.0	1.3	5.6	8.9	6.6	3.3	4.1	3.6
\$1001-\$3000	0.7	0.5	0.6	2.8	2.3	2.6	1.6	1.2	1.5
\$3001 and above	0.3	0.2	0.2	0.9	0.2	0.7	0.5	0.2	0.4
Not Stated	0.4	0.2	0.3	0.4	0.6	0.4	0.4	0.3	0.4
Total Percent	100	100	100	100	100	100	100	100	100
Total Number	712	815	538	611	100	100	100	1251	426

Nor can arguments of wage restraints hold water when employers

⁵⁴. The estimated TCPL for May 2011 was US\$497.84 for a family of five. ZimStat (2012) 53.

⁵⁵. Zimstat (2012) 123.

and senior management are paying themselves astronomical salaries way disproportionate to the starvation wages the lowest employees are receiving as was recognized in the *City of Harare* case. This was also dramatically revealed in the “Salarygate Scandal” showing the astronomical salaries being earned by top executives in state owned or state supported companies and local authorities, with the Premier Service Medical Society (PSMAS) taking top prize.⁵⁶ Further details are provided in Tables 1, 2 and 3.

Table 2: Sector Comparison of Total Monthly Cash by IPC Level⁵⁷

IPC Level	Manufac- turing	Banking	Insurance	Hospita- lity	Quasi- Govern- ment	Mining	Tele- coms
1	\$10 842	\$6 653	\$9 185	\$11 800	\$8 436	\$18 523	\$10 586
2	\$7 028	\$4 772	\$6 606	\$4 916	\$4 916	\$12 867	\$6 826
3	\$3 073	\$2 667	\$2 969	\$3 771	\$3 451	\$4 840	\$4 919
4	\$2 479	\$1 331	\$3 214	\$2 924	\$3 005	\$3 633	\$4 508
5	\$2 008	\$1 707	\$2 161	\$1 546	\$2 322	\$3 705	\$2 893
6	\$1 356	\$2 062	\$1 990	\$1 196	\$2 237	\$2 259	\$3 709
7	\$1 483	\$1 612	\$1 063	\$730	\$1 319	\$1 839	\$2 334
8	\$856	\$849	\$791	\$573	\$1 363	\$1 234	\$1 830

Table 2:(cont)

^{56.} For instance at Premier Service Medical Aid Society (PSMAS), in 2012 of the total wage bill of US\$33 413 373 - 00, almost half was paid to the top 14 managers compared to over 700 other employees. Of these the Chief Executive Officer, Mr C Dube, earned a basic monthly salary of \$230 000 - 00, (rising to \$530 000-00 with allowances), followed by the Group Finance Manager at \$200 000 - 00 a month and the Group Operations Executive at \$122 000 - 00, a month. See P Chipunza “PSMAS shock salary schedule” *The Herald* 23 January 2014 p 1. Other top earners were the 19 top executives of the City of Harare who “earned” a total of \$500 000 every month, led by the Town Clerk, Dr T Mahachi at \$37 642 - 00 a month followed by directors at \$36 999 - 00 a month. See I Ruwende “19 City Council executives gobble US\$500 000 every month” *The Herald* 28 January 2014. On the other hand the CEO of ZBC Holdings was reported to earn \$40 000-00 a month and the General Manager of NSSSA was at \$20 886.78 a month. “How they spend mega salaries” *The Herald* 5 April 2014.

^{57.} Industrial Psychology Consultants (Pvt) Ltd (2011).

IPC Level	Manufacturing	Banking	Insurance	Hospitality	Quasi-Government	Mining	Telecoms
9	\$738	\$555	\$588	\$312	\$594	\$927	\$1 575
10	\$757	\$652	\$616	\$356	\$837	\$717	\$1 129
11	\$668	\$644	-	\$724	\$765	\$425	\$874
12	\$539	\$413	\$364	\$434	\$1 060	\$484	\$1 458
13	-	\$725	\$357	-	\$676	\$516	-
14	\$526	\$500	\$417	\$253	\$634	\$567	\$774
15-16	\$318	\$496	\$451	\$191	\$455	\$279	\$636

The above figures have in fact recently been revealed to be an understatement by the Salary-Gate Scandal.

Table 3a: Salaries and Benefits of Executives in Parastatals and Local authorities

Benefits	Comments
Fuel	250 litres to 350 litres per month for the CEO; 150 litres to 300 litres per month for Executives below the CEO
Cell phone allowance	\$250 to \$935 per month for the MD, \$100 to \$250 per month for the Executives below the MD
Medical Aid	100 per cent for all Executives (\$450)
Pension	100 per cent for all Executives (\$2 379)
Vehicle	The type of cars include Mercedes Benz, Jeep for the MD. For the positions below MD the following cars apply, Isuzu KB, Mazda BT50
School fees per term	For the CEO, some companies pay between \$1 500 and \$2 500 per child per term for two or three children. Some companies pay 100 per cent fees for Executives including University fees both locally and abroad. For line managers, some companies pay a certain percentage of total fees incurred. This percentage ranges between 50 per cent and 90 per cent of the invoice.
Housing Allowance	This ranges between \$300 and \$2 500 per month

Table 3a: (cont)

Benefits	Comments
Entertainment	Some companies are offering entertainment allowances as per Executive's request. Some companies offer a flat fee of between \$100 and \$120 per month for entertainment Lunch allowance of 441 on average Other allowances amount to 41 691 on average
Bonus	Most companies offer bonuses equivalent to monthly basic salary. However, some companies use an option of profit sharing for Executives.

Source: ZCTU 18 December 2013 *Daily News* 26

The enshrinement of the right to a fair and reasonable wage, compels the awarding of wage increments that move wages towards the PDL within the shortest possible time. By 2011 this would have meant on average net wages of at least \$400.00 taking into account a maximum 20 percent contribution by a spouse working in the informal sector. The figure would have been higher in 2013, probably in excess of \$450.00, given the increase in PDL and TCPL figures. In March 2013 the *ZimStat* PDL monthly figure was \$541, based on a family of five, whilst that of the Consumer Council of Zimbabwe, based on a family of six, was \$564.73 in June 2013.⁵⁸ Given that about 87 percent of employees in the formal sector were, in 2011, being paid less than this, it means that increments merely based on the inflation rates would never achieve a PDL-linked wage. Such increments would merely freeze the very inadequate present. It being borne in mind that despite the real increases in wages since 2009, average wages as of March 2013 remained less than 45 percent of the PDL of US\$541.00.

Section 46 (1) (b) of the Constitution states that interpretation of statutes must be such that *inter- alia*, it promotes justice and human dignity. Any interpretation that moves wages towards the PDL or a living wage cannot be said to be grossly unreasonable, even if it is above the prevailing inflation rate, for it gives the workers an income that helps them live a dignified life. If anything special reasons have to be shown by any employer wishing to pay wages less than the PDL why this should be so. Reference may also be had to section 24 of the Constitution, which states as one of the desired national objectives as "... to provide everyone with an opportunity to work in a freely chosen activity, in order to secure a decent living for themselves and their families."

⁵⁸. See *ZimStat* (2013) *supra*; Consumer Council of Zimbabwe (2013).

It is an accepted reality that workers suffered the most in the hyper-inflation years, were the purchasing value of wages for ordinary workers who were chained by practice and law to the increasingly useless local dollar, was virtually wiped out.⁵⁹ The performance of the economy improved considerably in the post-dollarisation period, and it is only fair that the benefits of such improvement be shared equitably, including through granting of PDL linked living wages. See Table 4.

Table 4: Economic overview since dollarisation

Indicator /Year	2009	2010	2011	2012	2013	2014 forecast (Dec-2013)	Revised forecast (Mar 2014 World Bank)
GDP growth rate	5.7%	5.4%	9.3%	4.4%	5.5%	5.43	3%
GDP absolute (US\$bn)	5.220	5.502	5.916	6.517	6.892	5.02	
Inflation (annual ave.0	-7-7%	4.5%	4.9%	3.9%	3.9%	-2.47	
Interest rates	30%	21- 24%	10%	10%	10%	10%	

Source: *Old Mutual Investment, December 2013 and March 2014*

TWO EARNERS ARGUMENT AND THE CHINA-FACTOR

Neither will the expressed constitutional purpose of fairness be realized by an argument that the PDL includes the income of two spouses and therefore the wage of the individual employee cannot be equivalent to that. In a situation where only 16 percent of the working population is in paid-permanent employment, and 75 per cent in “vulnerable employment” in the informal sector and communal, resettlement farming, most persons are earning a pittance.⁶⁰ Estimates show that a good 64.0% of women in paid employment in the informal sector

^{59.} Under the Exchange Control (Payment of Salaries by Exporters in Foreign Currency for Critical Skills Retention) Order 2008 (SI 127/2008) only those highly skilled employees and senior management could be paid in foreign currency on approval by the Reserve Bank of Zimbabwe, thereby protecting them from the ravages of hyper-inflation. For all other workers payment of wages in foreign currency was an illegal act. See section 4 Exchange Control Regulations 1996 (SI 109/1996), *Matsika v Jumvea & Anor* 2003 (1) ZLR 71 (H).

^{60.} ZimStat (2011) 51.

earned \$100 and below in 2011.⁶¹ This means that on average the contribution of a spouse employed in the informal sector was at most around 20 percent to the TCPL. In 2011 wages in the formal sector had to be at least a net of \$400.00 to amount to a living wage consistent with the TCPL as provided by the national authorities. However, that figure is in fact an understatement given the high levels of unemployment and cultural factors. The employee in formal employment in reality not only looks after his or her nuclei family as provided under the Western-influenced nuclei family of five used to calculate the TCPL by ZimStat, but has a very large extended family responsibility.

Therefore into the foreseeable future, the wage of the earner in formal employment will provide the bulk of the earnings of the family, and thus minimum wages should be as close as possible to the PDL.

Equally unconvincing are employer arguments of competitiveness, especially the so-called China-factor, the foci must remain Zimbabwe. Comparative regional and international wage comparatives are varied. Moreover, nominal wage figures may be misleading in so far as they do not take into account varied cost of living indexes from country to country. This is why the ILO instruments place focus on "national practice and conditions" as well as "the general levels of wages in the country."⁶²

In any case, from a public policy perspective, the above employer arguments are self-defeating in the long-term. Having wages so far below the PDL, means depressed demand for the products of industry and the likely continuation of debilitating labour migration.

It is submitted that in the current scenario, section 65 (1) of the Constitution compels arbitrators and courts to grant increments above the inflation rate in order to move to "fair and reasonable wages." Whilst the actual rates of increment should take into account the specific circumstances of the given industry including, the economic and financial condition of the employers, the rate of inflation and comparative wages in other industries, the primary and dominant consideration must be the obligation to ensure that the lowest paid workers earn a wage as close as possible to the PDL, as described above. Increments for employees earning above this must be sufficient enough to reward the employees for their extra skills, including by

^{61.} *Ibid* 123.

^{62.} Article 3 ILO 131 Convention: Minimum Wage Fixing.

comparison to other industries, productivity etc as was done in the *Ex parte H.V. McKay* case, *supra*.

Evidence from the ground indicate the recognition that increments cannot be constrained solely by the rate of inflation, with increments agreed or granted by arbitrators in 2013 generally being above the inflation rate.⁶³

Where an employer is unwilling to pay a PDL-linked living wage and is also unwilling or unable to effect mitigatory and compensatory special measures, then such employer has no right to be in business, if all it can offer are wages that amount to semi-slavery. As noted by HIGGINS J, in *Ex Parte H.V. McKay, supra*, the payment of fair and reasonable wages, "*stands on the same level as the cost of the raw material of the manufacture.*" Without raw materials there can be no production or business. Even in the darkest ages of colonial primitive accumulation, there was a bar beyond which even the colonial courts were not prepared to go under. Thus for an employer who pleaded inability to pay wages because of the difficulties it was facing in its business, the court, in *R v Millin* SR 171, declared: "*No one has the right to exploit natives on a gambling venture of this kind.*"

LEGAL REFORM

The above described new constitutional regime also has significant implications on labour law reform, in particular in reference to the Labour Act and Public Service Act. These two principal labour statutes will need to be amended to bring them into conformity with the new constitutional standards.

In relation to the public sector, there is need to insert a proviso in the provisions dealing with salaries subjecting the Civil Service Commission's power to set salaries not only to the collective bargaining process but also the employees' right to a fair and reasonable wage.⁶⁴

The same would apply in relation to the Labour Act. A modest start was made under section 13 of the Labour Amendment Act, 2015,⁶⁵

^{63.} Whilst in 2013 the annual inflation rate is less than 2%, several negotiated wage increments or arbitral awards have been significantly above this, including: 10.5% in the NEC for the Commercial Sector; and 6% for the Collective Bargaining Agreement for the National Employment Council for the Printing, Packaging and Newspaper Industry, SI 69/2006 as amended.

^{64.} Such as in s 22 of the Public Service Act and s 20 (2) of the Public Service Regulations, 2000.

which expands the subjects of scope of collective bargaining under section 74 of the Act to include measures “to mitigate the cost of living.” But the general thrust of the amended section is focus are “measures to foster the viability of undertakings and high levels of employment.” More is required to ensure the Labour Act is constitutionally compliant. A starting point could be the insertion of the right to a fair and reasonable wage as a fundamental right of employees under Part 2 of the Act, possibly under section 6. Similarly the sections dealing with wage-fixing such as by the Minister under sections 17 and 20 or through collective bargaining under Parts VIII and Part V, must have amendments specifying that the minimum thresholds of wages is that which ensures the employees’ rights to a fair and reasonable wage. There can be further elaboration under both Acts of the factors to be considered as done in article 91 of the Constitution of Venezuela or in the ILO conventions and international human rights instruments with primacy given to the needs of the worker and their family to live a decent life worthy of human dignity.

CONCLUSION

The recent constitutional reform enshrining the employees’ right to a fair and reasonable remuneration is an important step forward in the march towards a fair and just society. However, even if that is achieved, it can only be the first step forward, for there can never be real social justice in work relations under a system based on wages and salaries alone, or ultimately industrial peace and political stability.

More enlightened bourgeois theories of labour relations have come around to this conclusion, in particular that of consultative pluralism and radical nationalist theories, whereby employees are entitled not only to fair wages but also a share of the company profits.⁶⁶ Examples of the later include, previously under the Zimbabwean Indigenization and Economic Empowerment legislation wherein employees may be entitled up to 28% share-ownership of indigenized foreign firms.⁶⁷

^{65.} Act No. 5 of 2015.

^{66.} M Finemore *op cite* 145.

^{67.} See the Indigenisation and Economic Empowerment Act [*Chapter 14:33*]; the Indigenisation and Economic Empowerment (General) Regulations, 2010 (SI 21/2010) as amended by the Indigenisation and Economic Empowerment (Amendment) Regulations, 2010 (No. 2) (SI 116/2010) and the Indigenisation and Economic Empowerment (General) (Amendment) Regulations, 2011 (No. 3) 2011 (SI 34/2011).

This echoes the ZCTU Model Collective Bargaining Agreement proving that the “employer shall be required to allocate at least 20% of net profit at the end of each financial year to employees as a share of profits...”⁶⁸ Similarly under the Kadoma Declaration reached by representatives of business, labour and the state, profit-sharing is declared to be one of the goals of Zimbabwean industrial relations.

Similarly South Africa has also provided for similar under its Black Economic Empowerment legislation.⁶⁹ In advanced countries, such as the UK and Australia, many large corporations have since the early 1980s, been providing for broad-based employee profit sharing schemes, with some estimates putting the figure at 62 percent of all the large public companies.

The above reflects the recognition by liberal political science that sustainable liberal democracy is not possible where workers lack corresponding social justice and democracy in the workplace. Industrial democracy is a necessary condition for political democracy.

Even more fundamental is the position of the classical Marxist theory that the wage system, even where “fair and reasonable wages” are paid, is inherently unjust and exploitative. This is because wages do not express a proportionate share of the wealth or surplus value created by the worker, but are payment for the cost of labour power as determined by the labour market.⁷⁰ As recognized by HIGGINS J in *Ex Parte H.V. McKay, supra*, the contest between labour and capital is an unequal one because the former is always under “the pressure for bread.” Or as Engels puts it, “the workman has no fair start. He is fearfully handicapped by hunger.”⁷¹

With wages at most being an amount equivalent to the average human needs of a worker and their family and not the surplus value created, it means, according to Engels, “that the produce of the labour of those who work, gets unavoidably accumulated in the hands of those that do not work, and becomes in their hands the most powerful means to enslave the very men who produced it.” In other words, the wages system is inherently exploitative against workers and in favour of the employer - capitalist class. Further that such unequal and exploitative

^{68.} Clause 43 (1) ZCTU Model CBA.

^{69.} See s 9 (1) Broad-Based Black Economic Empowerment Act No. 53/2003, whereby employee-share ownership is granted a weight of 20 points out of a 100 credits.

^{70.} Engels F, (1881) *supra*.

^{71.} *Ibid*.