Globalization and Social Justice: The Right to Minimum Wage

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Abstract

The weakening of mechanisms for international cooperation within the context of the right to minimum wage can be explained by the increasing power of new players, the transnational corporations on the one hand, and the waning of the power of the state, on the other hand. These processes of globalization produce various challenges to the modern welfare state, such as the ability to attain minimum wage. This right is vital particularly to weakened workers that would otherwise be remunerated at a very low wage, which could likely lead to poverty. This right poses, however, numerous challenges, in particular the ability of international labor law to define it across borders. The article describes three models for defining this right: the existential deficiency model, the welfare model, and the comfort model and analyzes the various forms regulating the right to minimum wage in international regulations, state regulations, and codes of conduct of transnational corporations examining the ramifications of globalization within the context of labor rights. Moreover, the article suggests changes to international labor law, required to ensure that it functions as an effective instrument in protecting labor rights and proposes establishing regional parliaments—a supra-governmental body—composed of states and a broad array of interested private parties in its activities to establish fundamental principles relating to various areas of life, such as the basic rights of workers, taxation principles, and principles for protecting the environment. These regional bodies would decide which of the various models used for shaping the right to minimum wage should be adopted as a fundamental principle.

KEYWORDS: minimum wage, social justice, labor rights, regional parliaments, globalization process, labor law

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INTRODUCTION

The growing strength of the transnational corporations partly account for the weakening of mechanisms for international cooperation vis-à-vis the right to minimum wage. While the power of private bodies, particularly of transnational corporations constantly rises, the power of the state constantly wanes; these accelerated processes of globalization cause various challenges to the economic protection of the worker and her family, in particular to the right to minimum wage. Due to its unique characteristics and its direct effect on the welfare of workers, the right to minimum wage is analyzed below as an appropriate microcosm to examine the manner international labor law addresses challenges of globalization.

Indeed, minimum wage was particularly damaged by the forces of globalization, and what is commonly known as “the race to the bottom.” The growing strength of new players in the economic arena, transnational corporations, explain the increase in economic competition over capital, and weakening of the mechanisms for international cooperation within the context of the right to minimum wage. These players are not identified with a particular state since their operations are dispersed around different branches throughout the world, largely as the result of technological developments, particularly the development of transport and communications. The increasing mobility of these players requires states to compete over investors, leading to a race to the bottom of labor standards. This is not necessarily expressed in the reduction of the nominal rate of the right to minimum wage, but rather in the absence of proper, acceptable updates in the wage in order to protect its realistic value over time and by difficulties to enforce state regulations.2

This race to the bottom, and the constant threat of capital migrating to competing states, resulted in the transformation of the right to minimum wage

1 Weakness of state law is a function of territorial limitations and conditions of globalization; particularly within the context of the rights of workers employed by transnational corporations, a phenomenon requiring supra-national regulation. The state legal system, based on the territorial applicability of its laws, cannot easily and effectively direct behavior in a global and non-territorial arena. There is a growing discrepancy between the character of the state legal system (territorial) and the structure of the global arena (supra-territorial). This growing discrepancy underlines the contention that the strength of state laws is constantly waning. The Internet provides an example of this incongruity. Activities on the Internet take place in a supra-territorial arena that cannot be regulated by state law with territorial characteristics. Moreover, the reality created on the Internet in absence of external restraints also makes it more difficult for the state to direct behavior within its own borders. See, A. C. Lu v. Janet Reno Civil Action No. 96-96.3 (1996).
that meets the interests of commercial corporations, reflecting the need of states to reduce the minimum wage as one of the bargaining chips employed in international competition. The strength of transnational corporations and the weakness of states are evident in this process. Cooperation among states has also become increasingly difficult, which requires a broad level of agreement among individual nations. Such agreement has not been consolidated and many countries are opposed to any increase in minimum wage in their territory due to a variety of reasons, whether because of the significant financial burden this would impose on the government (as an employer) or because of the fear of capital fleeing to a competitor state. The lack of such agreement is one of the reasons for the neglect of the protection of the right to minimum wage in international law, as I demonstrate below.

The phenomenon of transnational corporations is not unique to modern times, but their number, as well as their economic and political strength is indeed exclusive in this era. With that said, I believe it is too early to eulogize the state. As this Article shows, despite its weakness, the state still plays an important function in regulating the right to minimum wage, and provides the best standard for its protection. This is underlined by the analysis conducted below of three key legal arrangements on the international level, all three providing deficient protection of this right—particularly when minimum wage is defined by endorsing a model above the bare minimum model. In what follows I embrace such a model (the social welfare model) and, after examining the protection minimum wage (under this broad definition) is given today, both internationally and on state level, I propose an institutional arrangement to strengthen regional cooperation between states, which also involves interested private parties in its activities. I suggest that regional cooperation, as detailed below, is the best path forward in improving workers’ rights, and in particular, the right to minimum wage.

The Article proceeds as follows. Section I describes three models that define the right to minimum wage: The existential deficiency model, the welfare

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3 Corporations do not claim to create independent norms. On the contrary, ethical codes prepared by commercial corporations that include references to minimum wage generally confine themselves to adopting state standards and as such the balance of power actually favors the state rather than the commercial corporations. However, I do not believe that this initial conclusion constitutes the last conclusion. The weakness of the protection afforded by the state explains the willingness of the transnational corporations to rely on norms it creates. Reliance on protection afforded by the state does not impose a substantial burden on corporations, since this level of protection is already adjusted to meet their economic interests; at the same time, it allows them to create an image as law-abiding bodies. In this situation, the reliance of commercial corporations on state protection reflects utilitarian motives, and does not reflect weakness on the part of the commercial corporations or strength in terms of the protection afforded by the state.
model, and the comfort model. Section II analyzes the regulation of the right in international regulation, state regulation, and transnational corporations’ codes of conduct according to the models discussed in Section I. Section III analyzes ramifications of globalization within the context of labor rights; more specifically it discusses changes required to ensure labor law functions as an effective instrument to protect labor rights such as the establishment of regional parliaments.

I. THREE MODELS OF THE RIGHT TO MINIMUM WAGE

The foundation of the right to minimum wage is a worker’s entitlement to basic economic rights as means for attaining social justice. Indeed, this right plays a particularly vital role in workers’ lives and particularly to the weakened groups of workers that would otherwise receive low wages and possibly deteriorate to poverty. This is especially true for workers located in developing countries, lacking social employment benefits, and to whom salary is paramount in determining the resources available to the worker and her or his family for living.

The right to minimum wage is complicated by the variety of goals it attempts to meet, and the spectrum of rationales associated with determining its rate. In addition to protecting weakened workers, it is also an instrument for directing economic policies and attaining national objectives. These goals and rationales are not necessarily reconciled one with the other. For example, the rationale of mitigating poverty by providing better employment opportunities can actually bring about the reduction of minimum wage even to a rate lower than the goal of “defending the welfare of the worker” dictates. Due to the multiple goals of the right to minimum wage, this Article concentrates on only one goal: attaining material resources to protect the satisfactory existence of the worker and her family.

Minimum wage fulfills different functions in various labor markets.4 This Article endorses the position that the goal of minimum wage is to ensure that the employee and his family enjoy a basic means of existence and ostensibly requires the definition of “basic needs” or a “basket of needs.” Efforts to define this concept have encountered theoretical and practical difficulties on a policy level,5 specifically the lack of an accepted objective and criterion for defining these needs.

Gerald Starr illustrates the complexity of this task by attempting to define the need for food. While no one denies that food indeed constitutes a basic need, it remains unclear whether this right merely refers to the right not to experience hunger or further implies the right to diverse nutrition and to what extent, if any, should

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5 Id.
social and cultural aspects be taken into account. Should minimum wage only meet the needs of the individual employee or should it also cover the needs of her family; what size family, and do both partners in the family need to be employed? These difficulties are exacerbated further when minimum wage aims at ensuring non-existential needs when social and cultural aspects play a more significant role. Indeed, any attempt to develop a universal model for defining the right to minimum wage would encounter these obstacles, as well as the need to address economic, political, and cultural differences across borders.

Developing a universal model of the right to minimum wage is, however, of utmost importance, as it provides a normative touchstone for the evaluation of the existing regulatory arrangements. The difficulty in shaping a uniform model may be overcome by recognizing the hybrid nature of the right to a minimum wage, i.e., the combination of a substantive and absolute dimension of the right, with a quantitative and relative dimension. The substantive dimension refers to abstract, absolute, and universal components of the right and includes for example housing, food, culture, and so forth. The concrete manifestations of these components, including their quantification, may vary from one society to another, and in this sense they are relative. This is the quantitative dimension. The hybrid character of this right permits sensitivity to local restrictions and constraints (the quantitative dimension) while limiting the risk of cultural relativism (the substantive dimension). The decision of the committee established to implement the provisions of the International Covenant on Economic, Social and Cultural Rights (ICESCR) addressed a similar context and proves that this is not an impossible task. The committee to date has defined the meaning of the right to adequate housing in accordance with the ICESCR as the right to live in security, peace, and dignity. This interpretation goes beyond the restrictive understanding of the right to shelter: legal security of tenure, availability of services, materials, facilities and infrastructure, affordability, habitability, accessibility, location, and cultural adequacy. While adequacy is partly determined

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6 This issue raises a series of questions: Does the right to food imply a need for diverse nutrition; if so, what is the minimum desirable level of diversity; does it account for the nutritional needs of different individuals; and can such variables be integrated in the definition of the right without it becoming unmanageable?


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by social, economic, cultural, climatic, ecological, and other factors, the committee identified certain universal aspects of the right.

An attempt to create a universal model of the right to minimum wage should rest on one of the following three theoretical substantive models: the existential deficiency model, the welfare model, and the comfort model.

Existential Deficiency (the narrow model): The right to minimum wage is limited to meeting only the physical needs for survival: food, water, shelter, clothing, heating, etc.

Social Welfare (the intermediate model): This model builds on the existential deficiency model, but also contains economic advancement; social and political welfare; access to: the media, public transport, justice systems, health and education services; and the ability to participate in family life and social, cultural, and political domains.

Comfort Model (the broad model): This model includes all the needs detailed in the existential model and the social welfare model but adds needs that enhance the comfort of existence: i.e., tourism, private transport, self-realization, etc. This model constitutes a utopian aspiration and, as such, is not manifested in practical terms within the Article’s analysis.

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9 I address here the substantive dimension of the right, as the quantitative dimension is relative and would be adapted to the circumstances of the particular society, time and place.

10 This division into the different models is reminiscent of Alderfer’s theory of needs, an elaboration of Maslow’s theory of needs, which argues that the collection of human needs may be divided into three groups: (1) Existence needs—food, shelter, clothing, etc.; (2) relatedness needs—needs reflecting contact with others—the need for friendship, acceptance by others, affirmation, understanding, the desire to influence others, and so on; and (3) growth needs—the need to develop personal skills, to create and manifest personal abilities, etc. Alderfer sought to explain the process of motivation of each group of needs through a cycle of frustration, leading to regression when a particular need remains unmet. In a state of frustration the relative importance of other needs that can be met increases. Alderfer’s contribution is in providing a flexible and level-headed perspective of the needs that apply, including their interrelationship. See Avraham Maslow, Motivation and Personality (1954); Alderfer Clayton, Existence, Relatedness and Growth: Human Needs in Organizational Setting (1972).

11 The Israeli Supreme Court sitting as the High Court of Justice (HCJ) used phrases such as “existential lack” in its judgment determining the constitutionality of the law that in effect decreased rates of social security payments and made the conditions for receiving them more difficult. The HCJ rejected the petition claiming that the decrease did not harm the constitutional right to dignity. This conclusion necessitated the development of an interpretative model of the constitutional right to dignity in relation to social rights in general and specifically to the right to fundamental subsistence. The Court adopted the narrow interpretive model that it termed the “scarcity of existential lack” model. See HCJ 366/03 The Organization for Peace and Social Justice v. The Finance Minister [Dec. 12, 2005] (unpublished).
II. THE SOCIAL WELFARE MODEL

A. METHODOLOGICAL ASPECTS

I believe that the social welfare model most adequately defines the right to a minimum wage and that a worker’s wages should express the riches and complexity of the human existence as an intellectual and social creature including basic emotional and spiritual needs. Minimum wage is also one of the instruments used to protect financial independence, a fundamental political-economic component and necessary for interaction in public-political life. This synergy is especially important considering that workers’ ability to advance their interests depends to a large extent on group participation, which in turn depends on their capability to publicly deliberate and crystallize their needs within an active public forum.

In addition to the specific definition of the needs in each model, the level of implementation of each model should be considered and may vary widely. At its highest level it reflects the satisfaction of all the needs relevant for each member of the nuclear family. Implementation at its lowest level is manifested by partial satisfaction of the needs and/or their satisfaction with regard to the employee and not his family.

My commitment to the notion that each person, by virtue of their membership in the human race, is entitled to enjoy core human experiences, guides my understanding of the needs and interests that should be included in the social welfare model. Accordingly, the model focuses on the core of human experience and not on the broader periphery of needs, which may vary from one individual to another. This of course immediately raises the question, what are the components of the basic human existential experience; are these components universal and unchanging or do they vary from one society to another, from one period to another, and so forth? Any attempt to determine the components of the basic human existential experience demands an interdisciplinary examination combining both empirical and normative standards. Empirical research is needed to explore how is the basic experience of human existence perceived in practice among individuals (through psychological studies), among societies (through anthropological and sociological studies), within political entities (through legal documents such as constitutions and laws), and within international entities (through international documents such as conventions and international customs). Normative research, primarily through philosophical

12 While a full clarification of this commitment lies beyond the purview of this Article, I do address this notion in general terms below, contending that each species has a basic existential experience characteristic of that species and one the basic experiences of the human race should be taken into account in determining the scope of the right of minimum wage.
inquiry, provides a normative yardstick for determining how to distinguish between core and periphery of the human existential experience. A key approach in this field is the capabilities approach, developed by Amartya Sen$^{13}$ and Martha Nussbaum.$^{14}$ It details capabilities that every person should minimally enjoy, and was one of the antecedents for the creation of the UN’s Human Development Index.$^{15}$

While there may be a correlation between the normative dimensions of the basic experience of human existence and the empirical dimensions of this experience, an overlap does not necessarily occur. It is equally possible to identify an existing tension between the empirical and normative dimensions deriving from a defect in the factual dimension and implying that the de facto perception of the basic experience of human existence is defective, or from an over-indulgence in the normative dimension. It cannot be determined on a priori basis which dimension takes precedence in the event of such tension. The central question, and one that may not easily be answered, is which dimension is lacking and which is surfeit. In developed nations the border between the welfare model and the comfort model is somewhat blurred; while in the developing nations it is the border between the welfare model and the existential lack model that is blurred. Given the presence of these gray areas, dialogue in a structured and systemic manner is particularly important in determining the minimum wage rate and much can be learned by referring to the existing dialogue regarding the placement of the poverty line.

Experts in the field have disagreed about the definition of the poverty line. Some experts claim that the line should be drawn using definitive terms (i.e., the provision of basic needs) while others claim relative terms (i.e., measuring the status of the individual in relation to others living in the same society). There are multiple approaches including an integrated approach, which includes principles from both the definitive and relative approaches.$^{16}$ This dialogue is very different than the preferable dialogue vis-à-vis minimum wage, which should place a greater emphasis on the social welfare theory. Participation of the poor within society’s economic growth needs to be greater within the definition of minimum wage. Thus,

$^{13}$Amartya Sen, Development as Freedom (1999).

$^{14}$Martha Nussbaum, Women and Human Development: The Capabilities Approach (2000). The current human functional capabilities: life, bodily health, bodily integrity, science imagination and thought, emotions, practical reason, affiliation, other species, play and control over ones environment—political and material (id. 78-80).


the insight of the methodology gained and developed for the index in order can assist in creating a desirable model for minimum wage.

**B. ECONOMIC, GLOBAL, AND MORAL ASPECTS**

It is noteworthy that acceptance of the social welfare model may raise the cost of labor, due to the increase in minimum wage, which may in turn lead to a reduction in the number of employees (assuming that the employer has restricted resources) and to unemployment. In the global era this claim is particularly relevant to the fair division of economic opportunities globally and is evident in the claim of developing countries that developed countries support minimum wage rights due to protectionism and according to a hidden agenda, i.e., combating rising unemployment in developed nations due to the flow of capital to developing nations. According to this argument, combating unemployment is an effort to reduce the relative advantage of the developing nations, which is due, *inter alia*, to the lax protection of workers’ rights.

The classic approach argues that any increase in the minimum wage causes unemployment. However, other approaches question this conclusion, focusing on the inherent problems due to the large number of variables involved, and depend heavily on the character the specific market. In 1998, the OECD published a comprehensive comparative survey examining the impact of minimum wage on employment and poverty and included an extensive survey of the theoretical and empirical research relating to the impact of the minimum wage regime on employment and unemployment, noting the disagreement among researchers regarding the impact of the minimum wage on unemployment.

In 2001, the International Labor Organization (ILO) published a position paper deliberating on the effect of minimum wage, in which it stated that in perfect market conditions (i.e., full information, workforce homogeneity, mobility, multiple employees and employers) a negative impact of minimum wage increase on

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17 See the discussion *infra* note 51 regarding the attempts to include the protection of workers’ rights in GATT agreements.


19 See *infra* 23.


unemployment is expected. When the market is imperfect, however, it is difficult to predict its impact due to a multitude of dependant variables, including the flexibility of the labor demand curve, the rate of increase in the minimum wage, and the flexibility of salaries in other sectors.\footnote{Stephen Bazen, \textit{Minimum Wage and Law-Wage Employment, in Labour Market Inequalities: Problems and Policies of Law-Wage Employment in International Perspective} 122 (Stephen Bazen et al. eds., 2000).} Card and Krueger’s famous research on New Jersey’s Fast Food shows that a rise in minimum wage may even lead to a rise in employment.\footnote{David Card & Alan Krueger, \textit{Myth and Measurement: The New Economics of the Minimum Wage} (1995).} This argument against higher minimum wage rates, when considered in light of empirical research, is far from being conclusive.

A reduction in employment caused by an increase in minimum wage can be justified in moral terms: Work is not just a commodity, and accordingly should not be examined only in economic terms. A purely economic view ignores the inherent human dimension of work and its importance in realizing political rights accrued from citizenship. According to this argument, the moral remedy is not by erosion of the labor rights and worker dignity but by developing social security principles that protect the workers from the unemployment economical risk. Greater unemployment may also be justified in utilitarian terms. Determining a minimum wage rate and, in particular, the establishment of a minimum wage in developing nations, at a lower level than that required for decent existence leads to the emergence of a \textit{maquiladora} economy marked by the creation of jobs at very low wages, which cannot establish employment infrastructures to develop and provide additional jobs.\footnote{Leslie Sklair \textit{Assembling for Development: The Maquiladora Industry in Mexico and the United States} (1993).} Striving to lead to the development of labor infrastructures, in long term, will contribute to reduce unemployment rate and can justify an increase in minimum wage, even at the “cost” of a rise in unemployment in the short term.

\section*{C. The Global Arrangements}

Does the existence of minimum wage to reduce business opportunities? A minimum wage universal model—such as the social welfare model—may cause an increase in minimum wage in developing nations. Additionally, it is reasonable to assume that the adoption of the welfare model requires an increase in minimum wage in developed nations as well;\footnote{This assumption rests on the research of the International Workers Association according to which the majority of countries, particularly developed countries, do not give any meaning to the needs of the worker and his family in deciding minimum wage. \textit{See} the text adjacent to footnote 88.} accordingly, the relative financial advantage
of conducting business in developing nations will be maintained, and possibly even reinforced.

Additionally, there is a significant difference between the rate of minimum wage in developed countries and that of developing countries. Minimum wage in developed countries is higher—as much as ten times than that in developing countries.26 According to a 1999 study, minimum wage for textile workers in China ranged between 12 to 39 U.S. dollars per month, while the minimum wage for textile workers in the U.S. during that same period was 850 U.S. dollars per month,27 obviously a distinct range exists between these two rates, and even if the rate of the Chinese workers was raised tenfold this would not realistically influence the relative advantage of China over the U.S. Thus, raising the rate of minimum wage in developing countries, then, does not eliminate the relative advantage of developed countries.

Having examined, albeit briefly, various models for substantiating the right to a minimum wage, I turn to examining the various institutional arrangements that embody the current body of global law as it relates to minimum wage, and discuss which model of the right to minimum wage enjoys legal protection under each arrangement.

III. THE LEVELS OF LEGAL PROTECTION OF THE RIGHT TO MINIMUM WAGE

A. INTERNATIONALLY

It is impossible to identify substantial protection of the right to minimum wage on an international level. Protection afforded to this right, if any, is shallow and vague; moreover, it is generally impossible to ascertain on which of the various models the right to minimum wage is based. I examine below the UN, the ILO, and the World Trade Organization (WTO), all key institutions in protecting labor and employment law and demonstrate that the protection afforded to the right to a minimum wage by the various UN institutions, including the ILO, over the years has been eroded. Other international institutions (particularly the WTO) show a clear and consistent tendency not to grant protection to workers’ rights in general, and to minimum wage, absent in the ILO core labor rights, in particular.

27 Chan, supra note 2.
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I. The UN

The right to minimum wage was first formalized in the Universal Declaration on Human Rights in 1948\textsuperscript{28} (UDHR). The relatively broad definition of minimum wage in the UDHR rose from the painful scars of WWII. Article 23(3) of the UDHR describes the wage as “just and favorable remuneration ensuring for himself and his family an existence worthy of human dignity…” and implies a model that extends beyond the mere satisfaction of existential needs. The abstract nature of the UDHR, however, makes it unclear which model is embedded therein, and whether it refers to the entitlement to enjoy core human experience or to broader model. Similarly, the International Covenant of Economic, Social and Cultural Rights (ICESCR) signed in 1966, included the right to minimum wage as part of the right to “just and favourable working conditions”\textsuperscript{29} to ensure a “decent living” for the worker and their family. The use of the term “decent living,” against the background of the ICESCR provisions leans to the social welfare model that extends beyond the existential deficiency model\textsuperscript{30} and continues the conceptual approach established in the UDHR.

In 1999, however, the introduction of the Global Compact marked the erosion of the UN’s commitment to protecting obligatory economic rights, including the right to a minimum wage. Speaking at the World Economic Forum, UN Secretary Kofu Annan proposed nine principles for global businesses seeking to embody “universal principles in the field of human rights, labor relations, and the environment;”\textsuperscript{31} but did not include the right to minimum wage. The UN seemly continued to declare its commitment to a right to minimum wage and underlined the connection between minimum wage and human dignity. However, this commitment was confined to the


\textsuperscript{30} See the text relating to the expert committees adjacent to supra note 8.

\textsuperscript{31} UN Secretary-General Proposed Global Compact on Human Rights, Labour, Environment, in Address to World Economic Forum in Davos, Feb. 1, 1999.
declarative level and did not translate into clear guidelines; thus severely impairing the effectiveness of the protection.

Indeed, rather than intensifying efforts to transform the declarative commitment into practical action, toward the end of the 1990s the UN, similar to the ILO, narrowed the scope of protected core principles, presumably in hope that focusing on a smaller group of rights would lead to more effective enforcement. This resulted in severe damage to the protection of the right to minimum wage, as even the declarative commitment to this right was abandoned.

2. ILO

The ILO, which operates under the auspices of the UN has the strongest commitment to protecting workers’ rights on the international level. Accordingly, its assessment and declaration of what is the desirable level of protection afforded to workers is of particular importance. By consolidating the right to minimum wage, the ILO has refrained from explicitly defining which approach of this right is worthy of protection and thus indirectly supports the choice of the existential deficiency lack model. Over the years the ILO has repeatedly eroded this right to the point that it has completely withered under conditions of globalization. This erosion reflects the international community’s fundamental change of values.

The right to a minimum wage is formalized in three ILO conventions: The first, introduced in 1928, is general in nature (the First Convention); the second prepared in 1951, focuses on establishing minimum wage in the agricultural sector (the Second Convention), and the third was introduced in 1971, and emphasized the establishment of minimum wage in the developing nations (the Third Convention). The first two conventions did not determine standards of minimum wage and, accordingly, are not analyzed in this Article. Only the Third Convention discusses the manner of determining minimum wage and therefore is discussed below.

Each convention was preceded with a recommendation complementing the convention, explaining the manner it is to be interpreted and addressing the creation of a minimum wage rate. The First and Second Recommendations reflect an
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approach that views fulfilling workers’ needs as an ultimate goal, but refrains from defining which model of the right to a minimum wage—the existential deficiency or welfare model—form their understanding of the right. In practice, these recommendations grant individual states leeway in choosing the model. However, within these recommendations, signs of deterioration in the degree of protection afforded are visible.

First, the status of workers’ needs has eroded in comparison to other considerations. While the First Recommendation grants senior status to workers’ needs, the Second Recommendation expands the list of considerations to be taken into account apart from these needs: e.g., the cost of living and the fair cost of services. Inclusion of these considerations causes concern. The low standard of living in developing countries is perpetuated by their inclusion. Accordingly, minimum wage does not necessarily aim to promote social welfare but rather to support a status quo standard that is not necessarily desirable.

Second, the erosion of the standard applied to quantifying minimum wage: The linkage between minimum wage and the prevailing wage effectively implies a preference to the existing situation. A community seeking social justice cannot permit depriving minimum wage of its normative character. This is especially true in developing nations, where detaching minimum wage from its normative dimension is fairly common.

The First Recommendation acknowledges flaws in the labor market and thus establishes that the comparative wage is for similar professions having adequate unions, which have concluded effective agreements and leaves room for the

For the purpose of determining the minimum rates of wages to be fixed, the wage-fixing body should in any case take account of the necessity of enabling the workers concerned to maintain a suitable standard of living. For this purpose regard should primarily be had to the rates of wages being paid for similar work in trades where the workers are adequately organised and have concluded effective collective agreements, or, if no such standard of reference is available in the circumstances, to the general level of wages prevailing in the country or in the particular locality.

Recommendation Concerning the Application of Minimum Wage Fixing Machinery in Agriculture, June 28, 1951, I.L.O R89. Section 1 of the Recommendations states:

1. For the purpose of determining minimum rates of wages to be fixed it is desirable that the wage fixing body should in any case take account of the necessity of enabling the workers concerned to maintain a suitable standard of living.

2. Among the factors which should be taken into consideration in the fixing of minimum wage rates are the following: the cost of living, fair and reasonable value of services rendered, wages paid for similar or comparable work under collective bargaining agreements in agriculture, and the general level of wages for work of a comparable skill in other industries in the area where the workers are sufficiently organized.
advancement of social justice despite references to the prevailing wages. However, and importantly, this depends on the presence of effective unionization. Without effective unionization, the problem of comparing prevailing wages prevails. Hence, workers in developing nations that lack a significant tradition of unionization are exposed to the inherent dangers of market forces, despite the fact that precisely these workers require protection the most.

The Second Recommendation compares minimum wage to wages paid for similar or comparable work under collective bargaining agreements in agriculture and the general level of wages for work of a comparable skill in other industries in the area where the workers are sufficiently organized. The standard embodied in this recommendation is inferior to the First Recommendation, since the comparison is to wages established in agriculture through a collective agreement, regardless of the extent of effectiveness of unionization. Another consideration is the general level of wages for work of a comparable skill in other industries in the area where the workers are sufficiently organized, but even here, the definition in the Second Recommendation (“sufficiently organized”) is more flexible than the conditions in the First Recommendation. This erosion reflects a slight retreat from the aspiration to neutralize market failures inherent in the relative criterion of the prevailing wage.

As noted above, The Third Convention, which relates specifically to workers in the developing nations, is the only one that includes explicit references to minimum wage. The convention states:

The element to be taken into consideration in determining the level of minimum wage shall, as far as possible and appropriate in relation to national practice and condition, include:

(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 standard of other groups.
(b) economic factors, including requirements of economic development, levels of productivity and the desirability of attaining and maintaining a high level of employment.36

This convention retreats from the position reflected in the first two recommendations. The Third Convention states that in determining minimum wage social needs and economic factors must be considered. The Convention seemingly creates a dichotomy between financial and social considerations; however is this

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dichotomy always correct? At times the two do not have a contradictory existence rather a completing relationship between obligations to economic development and between obligations to social equity. Studies show a positive influence on equality of growth as well as the opposite. There is no definitive answer to the question, whether the obligation to divide resources in an equal manner enhances or detains the rate of development. Hence there is not necessarily a tension between the social and the economical considerations, although such a tension is possible.

Assuming that raising minimum wage and thus reducing social gaps decreases the “total pie” does not mean that it is preferable to increase wealth and exacerbate social gaps. A conflict of interests exists between the wealthier segments of society, which benefit from increasing wealth, if wealth is not evenly distributed between the different segments of society. This tension, between economic and distributive considerations, is of course affected by the social and political outlook of the observer. Some support the increase of overall wealth at all costs; while this is a legitimate view, it is not unavoidable.

Actually when tension between considerations exists, clarification of the relative weight of the two types of considerations is important precisely due to its political nature. The blend of social and economic considerations is not in itself improper, provided that the proportionate weight of these different types of considerations has been properly structured. An examination of the convention’s text shows the balance between the two considerations is vague and unstructured. The ILO has not proposed an ideological alternative for the “total pie” thesis and, accordingly indirectly contributes to the reinforcement of this quasi-monopolistic position. A more cautious phrasing, manifesting the complexity of the considerations involved, on the one hand, and structuring the desirable balance between economic and social considerations, on the other hand, may encourage critical analysis during the balancing of these considerations. The problem does not entirely lie, however, in the imbalance existing between workers’ needs and economic considerations, but also in the structure of the consideration of workers’ needs that are to be accounted for. Here, too, the question of the quality of the protected model—existential deficiency versus social welfare—remains vague, as was true with the two recommendations. Moreover, abandoning the wages of unionized workers and a benchmark for prevailing wages demonstrates that the Convention retreated from any attempt to neutralize the inherent failure in the labor market, i.e., the weakness of the unorganized worker. Thus, it perpetuates failures in the job market rather than an attempt to cope with the distortions it produces.

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The Declaration on Fundamental Principles and Rights at Work\(^\text{38}\) (the ILO Declaration or the Declaration) hammered the “final nail into the coffin” of the right to minimum wage. Discussions held at the 1996 WTO in Singapore formed the background to the ILO declaration in 1998\(^\text{39}\) and ended with a declared commitment to define core labor principles.\(^\text{40}\) The ILO Declaration defines four core labor standards\(^\text{41}\): freedom of unionization and the right to engage in collective bargaining; the rejection of all forms of forced labor; the effective rejection of child labor; and the elimination of discrimination in employment.\(^\text{42}\) Minimum wage is conspicuously absent. The recognized rights focus on procedural rather than substantive justice and do not ensure fair conditions of employment.\(^\text{43}\) The Declaration marks a watershed in the ILO’s approach toward the normative status of workers’ rights; prior to the Declaration, the prevailing approach was that all rights recognized by the ILO have the same normative weight. Yet, Section two of the Declaration indicates the superior status of the listed rights, and the Declaration also binds countries that have not signed the conventions.

The Declaration has been criticized and justifiably so.\(^\text{44}\) The tacit assumption it embodies is that the protection of freedom of labor, the right to equality, and the


\(^{39}\) At the WTO discussions, U.S. President Bill Clinton attempted to establish a working party to examine the protection of workers’ rights in the context of trade agreements. The developing nations strongly opposed such a move, which they considered an attempt to erode their relative advantage. They argued that the mandate of the WTO is to regular labor issues relating to trade and claimed that the protection of workers’ rights deviates from this mandate.


\(^{41}\) The declared criterion for the selection of the fundamental principles is the development of a broad consensus within and beyond the ILO regarding the fundamental character of these rights. In order to prove this broad consensus, the ILO website provides details of several countries that have joined the conventions enshrining the fundamental principles. Thus, for example, 149 countries joined the Forced Labor Convention, June 10, 1930 (No. 29); 132 countries joined the Abolition of Forced Labor Convention, June 25, 1957 (No. 105); 122 countries joined the Freedom of Association and Protection of the Right to Organise Convention, June 17, 1948 (No. 87); 138 countries joined the Right to Organise and Collective Bargaining Convention, June 8, 1949 (No. 98); 137 countries joined the Equal Remuneration Convention, June 6, 1951 (No. 100); 128 countries joined the Discrimination (Employment and Occupation) Convention, June 4, 1958 (No. 111); and 61 countries joined the Minimum Age Convention, June 6, 1973 (No. 138).

\(^{42}\) See ILO Declaration of Fundamental Principles and Rights at Work, supra note 38, at sect. 2.

\(^{43}\) Philip Alston, Core Labour Standards and the Transformation of the International Labour Rights Regime, in SOCIAL ISSUES, GLOBALISATION AND INTERNATIONAL INSTITUTIONS 1, 41-42 (Virginia Leary & Daniel Warner eds., 2006).

\(^{44}\) Id. Cf. Brian Langille, Core Labour Rights—The True Story, in SOCIAL ISSUES, GLOBALISATION AND INTERNATIONAL INSTITUTIONS 89 (Virginia Leary & Daniel Warner eds., 2006).
right to engage in collective bargaining guarantee the improvement of substantive rights enjoyed by workers in developing nations. This assumption is not necessarily true. Broader fundamental principles, including substantive rights, are more consonant with the actual conditions created by globalization. As a general rule, processes of globalization create “a race to the bottom,” in labor standards, and strong and expansive mechanisms to secure substantive justice are greatly needed.

Additionally, collective bargaining, which once provided an effective tool for securing substantive justice, is still essentially implemented on a territorially basis. Accordingly, it is ill-suited to the global level and becomes increasingly ineffective. Under such conditions, it is not acceptable to confine the definition of rights to the principles of procedural justice alone; it is also important to formalize principles of substantive justice, such as the right to a minimum wage. \(^{45}\) Defining the right to minimum wage as one of the fundamental principles would have been a preferable starting point for engaging in collective bargaining from the workers’ perspective.

Prof. Alston stated that the prevalence given the four values detailed in the ILO Declaration weakened the status of other values. \(^{46}\) Moreover he noted that the values in the Declaration were defined in general terms similar to the manner principles are defined, as opposed to the specific definition given to rights. \(^{47}\) Realistically, the Declaration’s structure is a deviation from the previous ILO method of enforcement, and allows an easy diversion from implementing workers’ rights. All these criticisms were indeed realized with regard to the right of minimum wage. The exclusion of the right to minimum wage from the Declaration did negatively affected the status of this right. Indeed, Prof. Alston’s criticism is reinforced in light of the Declaration’s effect. As demonstrated below, this declaration has enabled employers to refrain from protecting the right to minimum wage by including it within their ethical codes in a vague manner that offers no advantage over domestic legislation. The ILO Declaration has even influenced the protection of the right to minimum wage granted by other bodies; for example, the UN 1999 Declaration on Universal Principles, which followed the ILO Declaration, refrained from protecting this right. \(^{48}\)

Yet even before the creation of the Declaration the situation was not optimal. According to Langille, Alston’s position supported approximately 200 heaped conventions and a methodology that was flawed. \(^{49}\) This Article finds certain support

\(^{45}\) Larry Di Matteo et al., *The Doha Declaration and Beyond: Giving a Voice to Non Trade Concerns Within the WTO Trade Regime*, 36 VAND. J. TRANSNATIONAL L. 95, 124 (2003).


\(^{47}\) *Id.* at 42-45.

\(^{48}\) *Id.* at 52-71.

\(^{49}\) Langille, *supra* note 45, at 89.
in Langille’s comments, particularly his criticism of the lack of enforcement of these rights. However, looking at the right to minimum wage, this Article contends that the Declaration added another shortcoming to the already existing ones found in the ILO’s conventions and recommendations of this right.

Rhetorically, however, the ILO has not abandoned the position that attaches importance to minimum wage. In 1999, the ILO published a report on the subject of “Decent Work,” offering a redefinition of the organization’s objectives. One of its stated objectives is protecting workers’ rights, including the right to fair wage. However, this document does not make any tangible and substantive contribution to protecting the right to a minimum wage. Once again, the discussion of this right is general and vague in nature, and which normative model for the protection of minimum wage is to be protected is not discussed. At best, the document is a declaration of intentions and its contribution in terms of the right to a minimum wage is minimal.50

In sum, the ILO has not made a sufficient contribution to promoting the right to a minimum wage, and has eroded this right to the point of almost complete elimination.

3. THE WTO

The GATT Agreements (GATT)—signed in the aftermath of the Second World War—was based on the belief that economic cooperation is instrumental in increasing social welfare as a condition for lasting peace. GATT and the subsequent trade agreements include merely one explicit reference to conditions of work: work by prisoners. Article 20(5) of GATT permits a state to restrict the import of products manufactured by prisoners. Over the years a number of attempts have been made to link freedom of trade with the labor conditions in which the product was manufactured. I argue that the failure of these attempts constitutes the most convincing evidence of the values of the international community, then and now, preferring trade over social justice.51

Following World War II, the U.S. and Britain attempted to link trade with labor: In the U.S. unions had gained considerable power, while in Britain the Labour Party had just won the elections. Under the influence of these circles, discourse included subjects such as social policy and employment. Decent working conditions, and particularly decent wages, were perceived as an instrument for increasing

productivity. However, the Eastern bloc countries thwarted the establishment of the International Trade Organization (ITO), and the U.S. House of Representatives also objected to its establishment, as they saw ITO as a grave threat to national sovereignty and to the right of states to create economic policies, particularly trade policies.\textsuperscript{52}

In 1952 with Japan applying to join these agreements, the U.S. led a second attempt to include a commitment to protect workers’ rights in GATT. Japan’s efforts to achieve economic growth following World War II led to inexpensively priced Japanese products, which were mainly due to poor working conditions, including poor wages.\textsuperscript{53} The U.S. argued that including a commitment to protecting workers’ rights would make it easier to vote in favor of Japan’s membership; assumedly this was true for Britain as well. This attempt was also unsuccessful, but despite this failure, the process as a whole was not without benefit. In order to appease those who opposed its affiliation, Japan undertook to maintain standards established by the ILO\textsuperscript{54} and the decision making process itself served as an instrument for promoting workers’ rights in Japan.

In 1996 during the Singapore Conference, the U.S. again attempted to advance the protection of workers’ rights by advocating the formation of a working group to examine the relationship between trade and work conditions. This attempt failed after developing countries, fearing that such a commitment would weaken their relative advantage brought about by low wages, argued that the protection of workers’ rights exceeds the mandate bestowed on the WTO. The closing declaration of the Singapore Conference recognized the ILO as the institution authorized to determine proper labor standards and was one of the factors leading to the ILO’s Declaration in 1998. In 1999, the U.S. attempted to include a commitment to the protection of workers’ rights by initiating a new round of talks in the WTO; it has been argued that its insistence contributed (alongside the activity of civil society organizations) to the WTO’s failure in Seattle.\textsuperscript{55}

It is not a coincidence that GATT does not include explicit protection for workers’ rights, including the right to a minimum wage. Opposition to such

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{52}] As noted, this institutional lack was the main reason for the establishment of the World Trade Organization in 1994.
\item[\textsuperscript{53}] Wages in Japan during this period were approximately 90 percent lower than in the United States—a similar gap to the current gulf between wages in the United States and in Mexico.
\item[\textsuperscript{54}] During the period 1953-1956, when Japan’s application to join GATT was being considered, Japan ratified ten ILO conventions. Over the decade following its admission, just two conventions were ratified.
\end{itemize}
\end{footnotesize}
components emerged during the formation of GATT by both the U.S. and the Eastern bloc countries and continues to this day due to the opposition by the developing nations. The consistent political and legal opposition to the inclusion of an explicit clause protecting workers’ rights emphasizes that, at least for the present, Article 20 of GATT does not infer protection of minimum wage.56

B. PRIVATE REGULATION THROUGH CODES OF CONDUCT

In recent years, Corporate Social Responsibility (CSR) has gained salience across the globe. CSR entails the notion that corporations should not just aim to create revenue for stock holders and investors but to also advance social and environmental issues.57 One of the tools for shaping CSR is the creation of a voluntary ethical code entailing the corporation’s obligations toward its employees, the environment, and society at large. The use of ethical codes has grown over the past years, particularly by international corporations active in developing countries58.

Does the use of ethical codes succeed in causing substantive improvements to employment conditions or is it just lip service? Some claim that the codes are based on free market ideology and as such do not have the strength to make covetable changes.59 Contradictorily, others claim that regardless of their effect, their importance should not be negated.60 The codes’ contribute by creating a dialogue that creates an expectation to the establishment of international norms that embody corporate social responsibility. This, in turn, will lead to substantive changes.61

58 Harry Arthurs, Private Ordering and Workers’ Rights in the Global Economy: Corporate Codes of Conduct as a Regime of Labour Market Regulation, in LABOUR LAW IN AN ERA OF GLOBALIZATION: TRANSFORMATIVETE PRACTICES AND POSSIBILITIES 471 (Joanne Conaghan, Richard Micheal Fischl, & Karl Klare eds., 2002).
60 The phenomenon itself has been empirically examined and discussed in detail elsewhere see Peer Zumbansen, The Parallel World of Corporate Governance and Labor Law, 13 IND. J. GLOBAL LEGAL STUD. 261 (2006).
61 I do not support this claim: Globalization occurs at a rapid pace, whereas the shaping of corporate social responsibility is long and staged. The imbalance between the pace of both processes—and this is the current and the expected situation—strengthens corporations, as opposed to tempering their strength.
This Article suggests that corporate ethical codes do not evoke real change and are effectively lip service and is deduced from the minimum protection afforded to the right to minimum wage within ethical codes analyzed below. Most ethical codes include references to workers’ rights, but not to the right to a minimum wage. If the right is mentioned, the vast majority of codes confine themselves to observing the host country’s laws. Only a minority of the codes reflect a higher (or lower) level of commitment to state laws. Brevity prevents reviewing the format of all existing codes, but allows for the presentation of one code that embodies the highest level of commitment encountered relative to the state standard: the code of the Dayton Hudson Corporation. This code establishes that suppliers will be selected according to their commitment to meet employees’ needs, provided they are feasible and appropriate in terms of policy practice. It further reflects a broader commitment to the right to minimum wage—meeting the employee’s needs. However, from the standpoint of the social welfare model, this commitment is inadequate: First, the code does not specify what are the employee’s needs, and accordingly might define these needs minimalistically. Second, the commitment is not absolute—the phrase “feasible and appropriate” in terms of policy practice—allows for exceptions to the rule. This qualification negates the (already limited) force of the code and legitimizes the perpetuation of the existing reality as the desirable situation.

Ethical codes do not possess the strength to create a substantive and material change needed. First, workers or their representatives did not have a hand in the creation of the ethical codes, and thus, these codes will likely not include material regulations to monitor the employer’s conduct. The unilaterally ability to determine which rights to include within the framework of the code and to what magnitude to protect them remains in the hands of the corporations. This power, compared with public law, is not bound by substantive restrictions (in the form of basic rights) or procedural regulation (associated with the decision making process).


Second, little variety exists between the different codes regarding the right to minimum wage. Most of the codes rely on state legislation, and not on factors such as the financial abilities of the specific company, the parallel conditions in the host country, or the specific needs of the workers in the company.66

If ethical codes had defined the company’s obligations in addition to the hosting state’s regulations, under certain circumstances, workers would have an impetus to move between employers within the state’s boundaries. The current situation clearly shows that ethical codes neither balance the strength of the employers nor empower the worker.

Third, the codes do not intend to create significant changes in the division of profits between employees and employers. Rather, the code guards the division of profits encompassed in the state’s minimum wage laws and protects the status quo; this emphasizes the fact that the companies’ obligations to social justice are strictly lip service.67

Fourth, the corporations’ self-affirmed obligation to the right to minimum wage has never been conclusive, and no clear obligation to a specific concept of the right to minimum wage can be discerned. Without such an obligation, the normative value of the ethical codes is little.

Fifth, even the modest presumption that such codes assist in better enforcement of legal obligations is questionable.68 In reality workers are unaware of the codes contents, the codes do not have protective mechanisms and enforcing them is very difficult.69 Until this day, few efforts were made at enforcing obligations

66 A worker employed under difficult conditions in company A will find himself working under very similar conditions in company B. Some claim that the singular standard as stated by the codes (and an obligation to abide state legislation) creates varying results in different countries as well as dissimilar minimum wage rates. However this claim is excessive. Differences between states do not benefit the weakened worker rooted in one specific state—usually without the ability to emigrate due to various restrictions associated with immigration laws. From the perspective of this weakened worker, the ethical code of company A and of company B brings about a similar result, the execution of state legislation. More so, even if the worker was able to emigrate from one country to another, there would be no great material difference in the worker’s wages paid by company A or B since he will be paid the same wages determined by the legislation of the country to which he emigrated.


69 Lena Ayoub, Nike Just Does It—and Why the United State Shouldn’t: The United States’ International Obligation to Hold MNCs Accountable for Their Labor Rights Violations Abroad, 11 DEPAUL BUS. L. J. 395 (1999); see also Bloomfield, supra note 59.
found in the ethical codes. One such instance is the *Doe v. Wal-Mart* petition, which claimed that Walmart’s suppliers did not comply with standards in Walmart’s ethical code. However, this petition was rejected.70

Indeed, vast empirical research has concluded that ethical codes did not bring about substantial changes in protecting workers’ rights.71 The hope that private law could replace state law is therefore premature. The majority of codes incorporate state legislation, and as the recent financial crisis demonstrates, the state is still the social framework necessary to guard human rights. In other words, the codes demonstrate that state processes, despite the flaws presented herein, are necessary to define the rights of individuals in the era of globalization. In spite of weakening state law there is no reason to encourage privatization of the state law; instead state law needs to be effective within the conditions of globalization as well. This conclusion underlines the importance of the following analysis of the existing structure of the right to minimum wage on a state level.

C. Regulation of the Right to Minimum Wage at the State Level

The practice of minimum wage first developed in New Zealand in 1896 and spread eight years later to Australia; it subsequently became an almost global phenomenon. Countries lacking a regime to protect minimum wage may be counted on one hand. However, on the state level, as in the fields examined above, a distinction exists between law in the books and the effective protection of this right. I examine the quality of state regulation from three aspects: constitutional, the legislation, and the effective protection of the right.

Almost fifty countries have granted constitutional status to an employee’s right to earn a wage72. With the exception of a few Latin American countries,

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constitutional commitment to protecting the right to minimum wage is low. Constitutions generally adopted vague terminology and briefly note the responsibility to establish minimum wage or promote a decent or just wage. A stricter commitment, though still general in nature, is found in countries whose constitutions include the protection of wages enabling a dignified existence. An encouraging finding is that constitutional protection is also found in new and revised constitutions and underlines the global recognition of the importance of the right to a minimum wage in modern times. Moreover, some of the developing nations that have formalized the constitutional right to minimum wage (Brazil,73 Peru,74 Mexico,75 Namibia,76 India77) have provided relatively broad constitutional protection including a generous array of needs.78

But constitutional protection does not afford sufficient guarantee of the forceful practical protection of the right to minimum wage. In most countries the level of constitutional protection is not particularly high. Only a few constitutions, mainly those from developing countries, explicitly note that the welfare model is the desirable model for protection of this right. In remaining constitutions, the commitment is vague and general and the specific model used is not clear. Further,

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73 Brazil Constitution, sect. 7 (1988).
75 Constitution of Mexico, sect. 123(Aa)(6) (1917).
77 Constitution of India, sect. 43 (1950).
78 See, e.g., Brazil’s Constitution, supra note 73, sect. 7:
The following are rights of city and rural workers:

iv(4) a minimum wage nationwide, established by law, capable of satisfying the basic living needs of the workers and those of their families with housing, food, education, health, leisure, clothing, hygiene, transportation and social security with periodical adjustment to maintain its purchasing power, it is being forbidden to bind it for any purpose.
even a significant constitutional commitment does not necessarily translate into appropriate legislation and policy.\textsuperscript{79} This discrepancy suggests that in these legal systems, constitutions have a purely declarative value and present a Utopian society. Accordingly, in order to evaluate the quality of the state arrangement, it is necessary to examine the regulation of rights in legal structures.

A comparative survey prepared by the ILO shows that almost 60\% of these 100 countries survived recognized the needs of employees and their families when determining minimum wage.\textsuperscript{80} However, a close look at these findings reveals that a significant portion of these countries are in the developing world and particularly in Latin America. The survey itself noted that in most of these countries, there is no legal model describing or listing the employee’s needs to be accounted for. The Philippines and India have the most detailed structure of employees’ needs.\textsuperscript{81} However, in both of these countries legal commitment and actual enforcement do not meet. In the Philippines, however, eleven considerations, one of which is the needs of the employee and their family guide the proceedings of the committee that determines minimum wage.\textsuperscript{82} Philippine law does not define which model of minimum wage is afforded protection. The Philippine Department of Labor and Employment however, supplements the law and defined the living wage as follows:

The amount of family income needed to provide for the family’s food and non-food expenditures with sufficient allowance for saving/investment for social security so as to enable the family to live and maintain a decent standard of human existence beyond her subsistence level, taking into account all of the family’s physiological, social and other needs.\textsuperscript{83}

The Department of Labor and Employment divided the components of minimum wage into three categories: nutrition, non-nutrition, and miscellaneous. Non-nutrition includes transportation, education, and medical expenses. The miscellaneous category accounts for ten percent of the income and includes


\textsuperscript{81} See The information is based on an official Philippine website: www.chanrobles.com/minimumwagefixingrules.html. See the considerations are presented on the website of the Indian Ministry of Labour and Employment: www.labour.nic.in/wagecell/welcome.html.

\textsuperscript{82} Id.

\textsuperscript{83} The information is based on data included in a study by the American Department of Labor relating to the Philippines, available at www.dol.gov/ilab/media/reports/oeia/wagestudy/FS-Philippines.htm.
savings, taxes, property, and the consumption of other durable commodities. These provisions show a clear adoption of the social welfare model, including protection of non-existent needs.

The second encouraging example is India, in which the obligation to pay minimum wage applies only to relatively large enterprises, i.e., ones employing over 1,000 workers and limits the legal protection afforded to workers in small and medium-sized places of work. The law does not specify the considerations and needs that should be taken into account in determining minimum wage, but the relevant committee guides its proceedings according to the following standards:

(i) 3 consumption units for one earner.
(ii) Minimum food requirement of 2700 calories per average Indian adult.
(iii) Clothing requirement of 72 yards per annum per family.
(iv) Rent corresponding to the minimum area provided for under Government’s Industrial Housing Scheme.
(v) Fuel, lighting and other miscellaneous items of expenditure to constitute 20% of the total Minimum Wage.
(vi) Children education, medical requirement, minimum recreation including festivals/ceremonies and provision for old age, marriage etc. should further constitute total 25% of the total minimum wage.
(vii) Local conditions and other factors influencing the wage rate.

These examples prove the feasibility of structuring a social welfare model to protect the right to minimum wage. Moreover, as shown below, this detailed structure may ensure, to some extent, that concrete levels of minimum wage are appropriate.

D. ENFORCEMENT OF THE RIGHT IN PRACTICE

Three key issues influence the scope of the actual protection granted to the right to minimum wage. First, to what extent does minimum wage actually meet the needs of the employee and her family. Second, to what degree is minimum wage complied with and enforced. Third, how do the accelerated development of Export Processing Zones (EPZs) influence the practical protection granted to the right to a minimum wage. I address these issues in turn.

84 http://labour.nic.in/wagecell/welcome.html.
85 Id.
86 This criterion was added following the court ruling in 1991 in Reptakos Brett and Co. v. Its Workmen, 1991 S.C.R. 129, relating to a petition presented against the narrow character of the criteria.
87 EYRAUD & SAGET, supra note 80, at 105-09.
The Right to Minimum Wage

A small number of countries, in which the social welfare model can be discerned, define minimum wage in a manner that meet the needs of the employees and their families. In 2000, the U.S. Department of Labor prepared a study examining the right to minimum wage in thirty countries in which the clothing and footwear industries are particularly prominent, are prone to the exploitation of workers, and where corporations are highly mobile as part of the globalization process. This study examined the extent to which the state’s minimum wage sufficiently provided a dignified existence for the employee and her family.\(^{88}\) Several countries could not be evaluated,\(^{89}\) but in most, the study concluded that minimum wage does not provide a proper existence.\(^{90}\) Only in a small number of countries, India is one, does the level of minimum wage meet the needs of the employee, though not of their family.\(^{91}\) The survey found that in only three countries minimum wage is sufficient for a proper standard of life for the employee and their family;\(^{92}\) the Philippines is one of these countries.

Compliance with the legal right to minimum wage varies between countries and depends on several variables.\(^{93}\) Compliance is higher in the industrialized nations, estimated at above ninety percent, than in the developing nations, estimated at approximately sixty-six percent.\(^{94}\) Moreover, the ILO study found a correlation between the relationship of minimum wage to the average wage in a given sector and the level of compliance. The lower the ratio of the minimum wage to the average wage, the higher the level of compliance. The size of the enterprise also influenced the level of compliance; larger businesses are more inclined to observe this obligation.

EPZ’s further diminish the probability of observance of the right to minimum wage. EPZs are defined as: “Delimited geographical area or an export

\(^{88}\) See www.dbol.gov/ILAB/media/reports/oiea/wagestudy/FS-Brazil.htm.

\(^{89}\) Israel, Italy, Jamaica, and Mauritius. \textit{Id.}

\(^{90}\) This determination applied to the following countries: Brazil, Cambodia, Colombia (the cost of the basic basket of needs was 2.4 times the minimum wage), Costa Rica, the Dominican Republic, El Salvador, Guatemala, Nicaragua (a survey by the Nicaraguan government showed that the minimum wage meets approximately half the basic basket of needs), Pakistan, Peru, and South Korea. It should be noted in this context that in Taiwan the minimum wage is inadequate for a dignified human existence in the metropolitan areas (but it is adequate in poor rural areas), and that in Canada and Honduras a person receiving the minimum wage lives below the poverty line.

\(^{91}\) Bangladesh, Egypt, India, Mexico, Turkey, and China (where minimum wage permits life above the poverty line).

\(^{92}\) The Philippines (assuming that both partners are working), Spain, and the United States.

\(^{93}\) \textsc{Eyraud & Saget}, \textit{supra} note 80, at 107-10.

\(^{94}\) \textit{Id.}
or an export oriented manufacturing or service enterprise located in any part of the
country, which benefits from special investment promotion incentives, including
exemptions from customs duties and preferential treatment with respect to various
fiscal and financial regulations."95 In these areas, the state suspends some of its
laws, including protective legislation relating to workers, in order to attract foreign
investors, commonly laws protecting freedom of association and the right to strike.
Minimum wage laws are not usually suspended, and even in the cases they are, it
is only partial: In place of the usual minimum wage, a different figure, generally
lower, is established for the zone. This, however, is not very encouraging, since
the fact that minimum wage laws are not suspended suggests that levels established
for the right are minimal and are not enforced, and therefore there is no need for
formal suspension of the norm. The practical protection provided for the right
to a minimum wage in these areas, compared to the relevant countries of origin,
is nevertheless injured, as the framework for collective bargaining—a protective
layer of the utmost importance in determining the level of the right and in insuring
its realization—is suspended. In addition, problems already encountered in the
countries in question (low levels of compliance, fear of filing complaints, and low
levels of enforcement) are exacerbated further in these zones, to a point that can
virtually denude the law of any practical content.

E. INTERIM CONCLUSION

At first glance, this analysis leads to the pessimistic conclusion that the protection of
minimum wage on the global level amounts to little more than rhetoric declarations.
The state aspires to protect the right to minimum wage as a basic right (evidence of
this is the provisions of various legislation), but it achieves this goal with limited
success.

The welfare social model is not widely endorsed. Regulation in or on the
basis of law does not usually relate to consideration of the needs of the employee
and their family, and even when this consideration is mentioned the requisite details
are lacking. In practice, low wages, the lack of proper enforcement, and the creation
of export protection zones noticeably detract from securing social justice through
minimum wage. Accordingly, state protection is also inadequate; perhaps due to
the fact that the state is not an objective, neutral, or different entity separate from
financial corporations. 96 The relationship between capital and government increases

95 Ana T. Romero, Export Processing Zones: Addressing the Social and Labour Issues
96 See DANIEL FARBER & PHILIP FRICKEY, LAW AND PUBLIC CHOICES: A CRITICAL INTRODUCTION
(1991) (discussing the disproportionate influence of interests groups on the legislative process).
the state’s dependence and the politically powerful on wealthy corporate owners. The state is likely not to fulfill the effective protection given to the right to minimum wage if these interests collide with financial interests of capital holders and obligates concern when drawing normative conclusions from the state’s protection.

Two factors may be noted as encouraging on the state level. First, although existing protection is inadequate, it is the best protection currently available to workers worldwide, and the only level where quantitative rates are defined. From the social welfare model point of view, these rates are certainly subject to criticism, but the mere existence of some detailed quantitative rates enables the very possibility of engaging in such a debate. The general and abstract nature of the international regulation of minimum wages prevents such reflective analysis altogether. Second, state regulation has the greatest potential to become significant since in most countries constitutional arrangements, and even detailed legislative arrangements, already exist. With better enforcement, and in democratic countries, improvement of constitutional and legislative arrangements, through the usual democratic channels, such standards could become more efficient.

However, in the distant future, the state acting as a social organization may disappear. The state is a relatively modern phenomenon, just a few centuries old, and there is no guaranty that it will continue to exist. It is precisely for this reason that I believe that it is worthwhile strengthening the state by augmenting the tools through which the state can restore or reinforce its practical capacity of governance. The regional model I present below addresses such concerns. The model of regional regimes, in a nutshell, suggests the creation of regional parliaments by a small number of countries, cooperating with private entities and with other interested parties in order to establish agreed upon, regional labor standards. The establishment of regional regimes is intended as an additional tool to complement existing international and national tools and is not intended to replace or nullify these existing arrangements. Accordingly, alongside the development of regional parliaments exists a need to enhance the efficiency of known tools and campaign for public awareness, particularly through civil society organizations to increase the effectiveness of regulation on commercial corporations; specifically, their compliance with obligations imposed within the context of the right to minimum wage.

IV. REGIONAL REGIMES

The analysis of the dire state of the right to minimum wage, indicative of labor conditions in general, leads to the proposal of establishing regional parliaments, a supra-governmental body that includes a small number of states (three to four), and involves interested private parties in its activities. This proposal aims to address both the weakness of the single state, and the increasing power of transnational corporation.
Regional parliaments can create fundamental principles relating to various areas of life, such as the basic rights of workers, taxation principles, protection of the environment, and so forth. While these principles might be relatively abstract, as required by the inherent nature of fundamental principles, they will be more detailed than the analogous regulation currently found in international law. Thus, for example, if protection is granted to the right to minimum wage, then at least it may be clear which of the various models used for shaping the right to a minimum wage was adopted. Defining the theoretical model will enable establishing common indices for quantifying these rights. Although the index or formula will be standard, the formula would apply differently to each state, as relevant data is added to the formula, thus resulting in different figures in terms of the actual level of minimum wage. This variance is legitimate and even desirable, provided it is consonant with the fundamental principles, which provide an instrument for preventing moral relativism mitigating the less positive aspects of pluralism and the provision of the decrease in the material standards of labor law.97 The principles established will have the status of a regional constitution to which both public governments and private bodies will be committed. In other words, the democratic regime’s character of each state will be restricted on the basis of these fundamental principles. States will assume both a negative obligation, to refrain from adopting laws that contradict these principles, and a positive obligation, to enact laws that advance and implement these principles.98

For pragmatic reasons, commercial corporations, civil society organizations, and trade unions should be included in these regional parliaments on a consulting basis99 to both expose corporate operations to transparent and controlled processes of consultation and to encourage commitment to the norms established. Thus,

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97 Hiroshi Takahashi, *Plurality of Cultures and Natural Law, in Pluralism & Law* 223Arend Soeteman ed., 2001 (discussing the thesis that cultural diversity is not necessarily moral relativity, and that dependence on the principles of the natural law theory can possibly prevent the decline from social diversity to moral relativity.

98 The proposal to impose an obligation to adapt state law to meet international principles under the terms of international conventions is not new. For example, Article 88 of the Rome Statute of the International Criminal Court 1998, headed “Availability of procedures under national law,” establishes that: “States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part.”

99 I do not believe it would be appropriate at this stage to propose firm rules for the nature of this participation; this should be determined by the member states of the regional parliament. For a discussion of various techniques for public participation in decision-making processes, see Marianna Bolshaakova, *Public Participation in Environmental Decision Making, in Doors to Democracy—A Pan-European Assessment of Current Trends and Practices in Public Participation in Environmental Matters* 31, 31-41 (1998).
transnational corporations would cease to be “shadow policy makers,” influencing states “behind the scenes,” instead such influence would be channeled to formal, more transparent and legitimate process.\textsuperscript{100}

But which bodies that will be allowed to advise the parliament? The obligations of these bodies toward the public, i.e., to impose procedural public obligations (accountability in social aspects and internal management), substantive public obligations (subjection to the fundamental principles), and to define the manner the creation of legal norms occurs needs to be determined. Granting status to private bodies in public procedures should perhaps require these bodies assume various public obligations and commitments (respecting human rights and the principles of international law; democratic management; and transparency, relating to funding and affinity to commercial or non-governmental bodies). While a detailed criterion for regulating such participation is beyond the scope of this Article, the general criteria established by the UN to recognize NGOs fit to participate in the operations of its committees, alongside the detailed criteria established by each committee on an ad hoc basis can provide a guideline.\textsuperscript{101}

The proposed model offers several significant advantages. First, since the model is based on regional cooperation between a relatively few countries, this association may create groups of countries with common sociocultural denominators. Hence, sociocultural diversity does not present an obstacle to the common regulation of legal issues. Second, regional fundamental principles will provide a clear guideline for the identification of valid legal rules, whether public or private. Third, the proposed model maintains an infrastructure for value-based regulation through the regional fundamental principles and, accordingly, it offers the potential for the actualization of substantive values. Thus, the central question is what is the content of the fundamental principles? It is difficult to predict the answer, but the probability of acute regulation of the fundamental principles is likely since the combination of a number of states together reduces the competition between them over capital, and thus the probability of the “race to the bottom.”

\textsuperscript{100} As the commercial corporations gain strength from their supra-territorial operations, they play a de facto role as “shadow legislators” or “shadow policy makers.” The notorious “race to the bottom” results in adapting state law with regard to the minimum wage to meet the interests of these bodies. Given this reality, mechanisms currently applied behind the scenes should be exposed and conducted in a transparent manner. The processes, by which transnational corporations influence national and international policy, should be formalized and subject to public and judicial review. The practical manifestation of this proposal is the controlled participation of private bodies in the process of creating legal norms through consultative mechanisms. Participating organizations should be diverse, including both commercial corporations and civil society organizations.

Some may argue that adapting the legal system to the global arena requires the adoption of a global, rather than a regional legal system. Under the regional model, according to this claim, obstacles existing within the individual states and on the international level may ostensibly be replicated in the regional regimes; thus the proposed legal system will not address the existing problems and will, at best, replicate them in a moderated form. A response to this claim notes that establishing a system of global law, given the existing level of cultural and value-based diversity between states is remote. Heterogeneity on the global level is too great to be overcome through textual formulations. The quality of regulation of the right to a minimum wage on the international level proves this argument. The regional model can circumvent this problem, since it assumes that regional association will be applied within a smaller circle of states that share a common cultural basis. In such a situation sociocultural variance will not present an obstacle to the common regulation of legal issues. Lessons learned from the regulation of minimum wage in the European Union’s (EU) lead me to structure the proposed framework in a way that emphasizes the importance of a small number of countries involved in the process. As the EU expanded, legal regulation of the right to a minimum wage on the regional level has eroded. The relationship between the expansion of the EU and the erosion of the legal regulation may be explained by the growing level of variance between member states, which lessens the likelihood of arriving at a common denominator.

Note that the states involved in each regional parliament do not need to share a common physical border rather other common denominators that will enable dialogue among those involved in regulating issues. This, therefore, circumvents

103 In 1961, the European Social Charter (The Charter) recognized “the right of workers to a remuneration such as will give them and their families a decent standard of living” (sec 4(1)). Following this act, an attempt was made during the 1960s and 1970s to imbue this right with practical content. In 1989, the Charter formalized the right to a wage permitting a decent existence for the worker alone. A plan was prepared on the basis of this but it and its ensuing instructions, did not include any direct protection of the right to a minimum wage. The founding documents of the EU—the 298 U.N.T.S. 11 (1957) [hereinafter Treaty of Rome] and the Treaty on European Union, July 29, 1992, 1992 O.J. (C 191) 1 [hereinafter Treaty of Maastricht], did not include effective protection for workers’ rights. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C340) 1; 37 I.L.M. 56 (1998) [hereinafter The Amsterdam Treaty] established mechanisms for ensuring the regional protection of workers’ rights, but added an exclusion clause which states that “the provisions of this Article shall not apply to pay…” (id. sect. 117).
104 The probability of a country adopting a convention depends crucially upon how many other countries in its peer group, variously defined, have also adopted that convention, see Nancy
another problem: the fact that, in numerous parts of the world, states are involved in political and military conflicts with one another. Regional regulation may readily by-pass this problem by creating associations of states that are capable of cooperating fruitfully even if they lack geographical continuity.

Competition takes place between states having a similar level of development; however, the establishment of regional regimes, linking countries with a similar level of development, is meant to decrease the race to the bottom and thus has substantive value. If the regional model is successful in its limited format, the sum total of regional legal systems may lead to the emergence of a global legal system; if so, the evolutionary nature of the development of this system will contribute to its capacity to function effectively in the existing arena.

V. CONCLUSION

The analysis of the right to minimum wage in the era of globalizations demonstrates that there is little hope for rigorous, meaningful legislation and enforcement of this right unless innovative and flexible arrangements are created. Globalization is akin to a gale shaking existing social structures from side to side, as does the wind with trees in a forest. The forest with its trees and bushes is the state, which seeks to reinforce its governance over its territory by perfecting enforcement and deterrence mechanisms. The structures that attempt to remain rigid and firm may actually be the ones broken. Those who support strengthening mechanisms for state enforcement opt for rigid mechanism and may suffer the fate of the tree. Conversely, those who trace flexible solutions, despite the risk of reducing the power of the state, may, akin to the bushes, bend in the gale but manage to survive.

The key social structure that must be strengthened is the state; for all of its weaknesses, the state is preferable to other existing actors discussed throughout this Article. It is the only entity that has established quantitative values for the right to a minimum wage and adopted an abstract ideology that translated it into practical and enforceable terms. Other bodies have either declined to provide protection for this right (the WTO), or have provided general protection, but have avoided defining the


105 According to a fable I was told, in a forest filled with tall, strong trees alongside bushes and flowers, one particularly stout tree enjoyed mocking the bushes: "Look how strong and sturdy I am! With the slightest wind you bushes begin to bend from side to side." The bushes lowered their branches in shame. Suddenly a robust storm began to rage. The wind shook the branches of the trees and bushes from side to side. After the wind halted the destruction to the tree’s branches was apparent, while the supple branches of the bushes had not been damaged at all.
existential experience of those receiving minimum wage and have refused to attach a particular calculation for the rate of minimum wage (the UN and the ILO), or have relied on standards defined by the state (multinational corporations).

Globalization processes challenge the ability of the state to govern; state law and enforcement mechanisms of enforcement are limited in territorial terms. Since the root of the problem lies in structural incompatibility (state/territorial versus global/extra-territorial), the solution to the challenges of globalization cannot be to strengthen territorial mechanisms such as state mechanisms for enforcement. In fact, strengthening territorial enforcement mechanisms will only exacerbate this structural incompatibility. Minimizing structural incompatibility by creating a “united front” of several countries will offset the strength of the transnational corporations and can be developed by adopting a regional regime for formalizing guidelines for minimum wage.

My proposal may appear to weaken states’ sovereignty, since it is now required to share its powers with other states. However, this is just an illusion. Alongside other states, the state will be able to regulate supra-territorial phenomena, moving beyond its own borders, enhancing the structural compatibility between law and other phenomena requiring legal regulation. The proposal undertakes a flexible approach to borders and, accordingly, states do lose part of their sovereignty due to subordination to regional regimes. This loss of sovereignty might lead us to conclude that the state has been transformed from a sturdy tree to a bush, but this is not bad in itself. It is the flexibility of bushes that enables them to cope more effectively with challenges. When states cooperate and endorse harmonized regulation, it results in better balancing the power of states vis-à-vis transnational corporations. It follows that globalization processes could serve not only as an instrument for advancing the narrow interests of capital, but also as a catalyst for promoting the principles of social justice within the global arena.