



FACULTY OF LAW
Lund University

YEN BAO NGUYEN

Legal Aspects of Remuneration Standards For Workers

Living wage: International law, experience and the case of
Vietnam

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Abstract.

The right to a living wage is the right to living a life of dignity with a condition deemed acceptable by the society which adherents to everyone who works. Analysing the international law system, where right to a living wage is deeply rooted, it has not explicitly regulated and become an obstacle for its full realisation, despite being an ultimate goal of international labour standard on wages. What is living wage and its difference with minimum wage? and how does the international legal system offer its protection on the matter? Within both hard law and soft law instruments, the obligations to respect and protect the right to fair and adequate living wage shall be examined for all stakeholders. In addition, a case of Vietnam shall highlight the complexity of living wage demand in the national context of a developing country. The thesis shall be elaborate on such initiatives, arguing that living wage is the next level of development after a minimum wage.

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Abbreviations.

C100	ILO Equal Remuneration Convention no.100
C131	ILO Minimum Wage Fixing Convention no.131
C95	ILO Protection of Wages Convention no.95
CSR	Corporate Social Responsibility
FDI	Foreign Direct Investment.
ICCPR	the International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Culture Rights
IDSD	The Investor-State Dispute Settlement
ILO	International Labour Organisation
LWF	The Living Wage Foundation (UK)
MNE	the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy
MOLISA	The Ministry of Labour, Invalid and Social Affairs.
NCPs	National Contact Points
NWC	The National Wages Council
OECD	The Organisation for Economic Cooperation and Development
TPP	The Trans - Pacific Partnership Agreement
UDHR	The Universal Declaration on Human Rights
UN	The United Nations
VCCI	The Vietnam Chamber of Commerce and Industry
VGCL	The Vietnam General Confederation of Labour

Chapter 1. Introduction

1.1. Introduction.

The right to a living wage, is an emerging topic which is relatively new to the labour standards discussion. However, the issue of whether the employer should pay his or her employees an adequate amount of remuneration to ensure their living has been raised and discussed occasionally, for instance, Marc Rugani drew attention to the topic in relation to the, as early as 1930, critique upon the failure of an employer to pay his employees a living wage despite the profit and increasing in venue over the year.¹

An examination of different sources of international law shows that there are traces of agreement between States on the issue of living wage. It is not only in International Labour Law, which is mostly governed by the International Labour Organisation but also in other UN documents such as the United Nations (UN) Charter and the International Economic Culture and Social Rights Covenant (IECSCR). Under international law, the right to a living wage is seemingly the ultimate objective due to the fact that the objective of wages, as regulated, is to contribute to “a decent living to workers and their family”.

In its Constitution, the International Labour Organisation (ILO) has recognized the urgent necessity for promoting labour rights to countries, including the right to an adequate living wage. This goal is also in line with the objective which is laid down in the UN Charter and the ICESCR. However, it is noteworthy that at the moment in the international labour standards, neither the minimum wage nor the living wage have been recognised as fundamental labour standards. The race for the realisation of a minimum wage, which also plays a role in the introduction of living wage, has been long and difficult, due to the nature of labour relations which requires the least intervention from the State while needing its protection for the vulnerable groups (normally workers) against the potential abuse of power from the other groups (often be employers).

On the other hand, on the business side, a living wage raised a discussion on whether it would have negative impacts on the economy, which has been met with hesitation as well as support. Although, the question is whether and to what extent the right to a living wage actually falls under the responsibilities of the enterprise, the responsibilities being the contribution to the society as a whole and the social group that they are affecting through the companies’ operating policy.

This thesis aims to elaborate on the legal basis for a living wage primarily in the international legal system, particularly human rights and labour standards, regarding

¹Marc V. Rugani (2015), ““*whose justice? which rationality?*” in catholic debates on a living wage: John A. Ryan’s canons of distributive justice as locus of contested traditions of enquiry”, The Catholic Social Science Review 20 (2015), p.39-52, (p.39)

wages. It is to answer whether there is sufficient international law to protect a right to a living wage and rather if there should be a law to protect living wage and to what extent these law should stretch to. The thesis is not going to touch upon either how living wage should be implemented or living wage's calculating formulation should be. Although, to support the necessity of living wage, an assessment on the impact of living wage will be made.

1.2. Methodology.

To give an assessment on the right to a living wage under international law, the thesis plans to use the standard legal analysis method. By examining the existing international legal instruments, it is necessary to give an assessment on two areas which are the hard law and soft law on a living wage. These two branches, which contribute to the questions on the legal aids available for supporting the right to a living wage, are the State Obligations under international law to fulfil the obligation regarding wage regulation and the business' role in providing a living wage as a part of its Corporate Social Responsibilities.

The study will also use comparative methodology when examining the relationship between minimum wage and living wage, thereupon, differentiate those two concepts in order to clear the confusion on living wage being a high level minimum wage which States claimed to be unaffordable.

The thesis will also take a closer look at Vietnam's legislation and developing plans as a case study of a developing country. It is intended to examine whether the right to living wage would be an urgent need that a growing economy should consider promoting or adopting.

1.3. Limitation and the scope of the study.

Due to the wide range that the living wage topic can cover, the scope of this study will only deliberate on the legal aspects that protect workers' right to a living wage. Neither the calculation methodology nor the implementation of a living wage law would be discussed.

Also, the thesis would not elaborate on the detail of how much the productivity rate or any other benefit of the living wage would increase. However, as the examination goes on, some of the argument for, and against, living wage shall be mentioned. Such arguments shall be used to further support the idea of living wage and why the international and national legislation should aim for a living wage.

The study expects to, implicitly, give an evaluation of whether living wage could be a scheme that developing countries should take on and what difficulties they would be expected to face. However, in the national legal analysis, bearing in mind that the national

wage regulation and wage developing policies are often complicated. Hence, the thesis shall only elaborate on the wage conditions, policy of workers in general, not into depth with specific type of workers. The full enforcement mechanism will also not be touched upon in detail.

1.4. Thesis proposition.

Chapter 1 will be the introduction to the thesis' objectives, research methodology.

Chapter 2 will, firstly, give a brief history of living wage development by reviewing literatures from Scholars' perspective to Activists in order to bring out the original ideas behind the right to a living wage which is discussed widely in industrialised countries today. Secondly, from many stand points, a discussion on the definition and the elements which constitute to living wage will also be elaborated upon. These two parts have close relationship to each other and are expected to bring the deeper understanding on the complexity of the concept.

Thirdly, the relationship between Minimum wage and Living wage will be examined and distinguished, since Minimum wage is the concept that was established instead of Living wage even though International law generally aims for a living wage.

And lastly, intending to promote the right to a living wage, the study will also give a brief review on the impacts of living wage (advantages and disadvantages). The results which will be used was taken from various reports on living wage movement and analysis from economists on the enforcement of living wage law in countries where living wage movement is the most active.

Chapter 3 will examine whether, under international law, a State has any obligations in consideration of adopting a living wage law or at least promoting the idea of an enforceable living wage regulation.

This Chapter will, first, define the concept of wage regulation and the importance of having it in a national legal order and, second, elaborate on the responsibility of a State to fulfil its obligation to improve wage regulation in accordance with international law as the whole not just separate individual instruments. This means, it is not only international labour law that national wage regulation need to take up but also instruments in which labour income would also be of concern (for instance, the CRC).

Generally, a wage regulation that fits the nation's situation and as close as possible to a living wage is a goal that a State should care about in its legal order. Although, such a goal is not the maximum level States can do to ensure a better living standard and a decent wage for its population.

In Chapter 4, there will be a discussion on living wage in soft law. In this chapter, living wage will be discussed as to find out whether it is a Corporate Social Responsibility (CSR) that businesses should take into account. Despite having only the status of a recommendation, this Chapter discusses the inclination of committing themselves to living wage movement by big Corporate following the international framework on CSR.

The Chapter 5 will examine the Vietnamese legal system on remuneration. It aims to give an insight on how wage regulations in a developing country works. This case study will also touch upon how the Vietnamese legal system is lagging behind regarding the protection of wages. Included in the Chapter is the definition of wages under the Vietnamese labour code and how much Vietnamese law offers its support to a better wage.

Chapter 6 is the concluding chapter. It shall give an overview of the whole thesis as well as deliver tentative recommendations regarding the right to a living wage in international law as well as in national legal systems. By analysing Vietnam's minimum wage regulations and policy, one can observe that living wage is not a spontaneous call which suddenly arise from nowhere, it is a demand of development.

Chapter 2. The road to a living wage.

2.1. The concept of a living wage.

2.1.1. History Background.

In the 21st century, the discussion regarding wages is getting more and more heated due to the shift in understanding the value of labour. Since the Late Middle Ages when slavery was decreasing and reaching its trend of abolition, the concept of labour has been evolving beyond absolute exploitation where the value of labour was determined only by how it served a lord or master or by a rigid class system. Labour has been perceived to be more closely to human development and dignity. The concept of labour has become a social identity that concerns people in many aspect of life as stated in sumptuary law as St. Thomas Aquinas has described “work” in a different view. His four folds of labour included the essential needs for foods, against idleness and greed which is rooting for all evilness and nurture generosity and chastity.² Hence, labour in his explanation is neither for mere surviving nor only economic benefit but is for the necessity of being human. Many scholars described this as the necessity for one’s life subsistence.³ Accordingly, in its Constitution the ILO emphasised the role of Labour, it is not “*a commodity*”⁴ and it is human right.

Bearing in mind the meaning of labour in the sense of providing those who work the necessity to be deprived from potential downfall for idleness, one who give his or her performance should be able to receive the minimum benefit that fulfils his needs at subsistence level. In spite of having many other working conditions in place, the dominant concern that all workers care about the most is the issue of wages. Though wages is not the centre issue of labour, it is the most obvious means to fulfil an important objective of work and also the first consideration that the majority of workers take into account upon choosing a job.

² St. Thomas Aquinas, “*Summa Theologica (Complete)*”, published by the library of Alexandria, 1485. In his work, St. Thomas expressed his view for “work” as quoted below:

First and principally to obtain food; wherefore it was said to the first man (Gen. 3:19): "In the sweat of thy face shalt thou eat bread" and it is written (Ps. 127:2): "For thou shalt eat the labors of thy hands." Secondly, it is directed to the removal of idleness whence arise many evils; hence it is written (Sirach 33:28-9): "Send" thy slave "to work, that he be not idle, for idleness hath taught much evU." Thirdly, it is directed to the curbing of concupiscence, inasmuch as it is a means of afflicting the body; hence it is written (2 Cor. 6:5-6): "In labors, in watchings, in fastings, in chastity." Fourthly, it is directed to almsgiving.

³ Michael Uebel And Kellie Robertson, “*Conceptualizing labour in the Middle Ages*”, Michael Uebel And Kellie Robertson (Ed.) in “*The Middle Ages at Work*”, Palgrave, New York, 2004, p.1-15, (p.4)

⁴ ILO, “*Declaration concerning the Aims and Purposes of the International Labour Organisation*”, 26th session, Philadelphia, 10 May 1944.

Consequently, wage levels, fixing and protection have been issues widely addressed. Therein, one of the important terms regarding wages, minimum wage, is widely accepted and, in one way or another, finds its place in national regulations or in general wage standards negotiation by Trade Unions. Differentiated from minimum wage, there is a term which is fairly new has been entering the wage discussions, living wage, with equal important value.

Theoretically, living wage was conceptualized by many scholars even further before the living wage movement started making its move through campaigns across the US and the UK in around the 1990s. Arguably, the idea of paying workers an amount of remuneration that sufficiently support their life as worthy as “living” rather than mere surviving has incubated as early as the shift in understanding “labour”. It is because the general understanding of living wage is closely related to the objective to sustain workers’ life with the basic necessities of labour.

Allegedly, the first living wage campaign was launched in the United States as early as the 1990s by the *collaborative community initiatives* as the tension in combatting poverty was rising among workers and their family, as the result, as many as 140 municipalities adopted some type of living wage ordinances which was rewarding though the understanding of living wage concept was not thorough.⁵ The movement quickly spread out among industrialized countries such as the UK, the US, Canada and Australia. In the UK, the first move was made by the *London Citizens* in 2001 which followed by a train of successful living wage campaigns in 2005⁶ and finally lead to the discussion of adopting national living wage standard in 2015.

Responding to the calling out for a better wage, the living wage movement has had significant achievement. For instance, in the UK, the national compulsory living wage is promised to be officially introduced in April 2016 for employees over 25-year-old. Before the point, the living wage figure which was calculated by the *Living Wage Foundation* (LWF) remains a voluntary wage level that would be paid to employees by employers who committed to the campaign.⁷ Although, it is encouraging that companies are growing toward the positive effects living wage promised. With a large number of “accredited living wage employers” registered with the LWF, living wage call, nevertheless, depends

⁵ Heidi Swarts and Ion Bogdan Vasi, “Which U.S. Cities Adopt Living Wage Ordinances?”, *Urban Affairs Review* XX(X), 2011, p.1 –32, (p.7); see also Vibrant Communities Calgary, “*Living wage factsheet*”, *Origins of a living wage*, June 2009, [Accessed on March 2016], available at: <http://www.vibrantcalgary.com/uploads/pdfs/vcc-living-wage-fact-sheet-june-2009.pdf>

⁶ Edward Oliver, “*A chronology of the London living wage campaign 2001-2009*”, Queen Mary, University of London 2007, updated in 2013, [Accessed on March 2016], available at: <http://www.geog.qmul.ac.uk/livingwage/chronology.html>

⁷ The Living Wage Foundation, “*Living Wage Rate Increases Announced as Campaigners Call for More Businesses to Go Beyond Legal Minimums*”, Oct 2015. [Accessed May, 2016], available at: <http://www.livingwage.org.uk/news/new-uk-living-wage-rate-has-been-announced>

mostly on companies' acknowledgement of living wage as their responsibility toward the society.

Although the living wage movement has been considered as advocating for a new and fairly "young" issue in the field of labour due to the fact that it is not widely recognised as an inherent right of workers yet, living wage campaigns often go rather unnoticed, focused on developed countries and are frequently mistaken with the current concept of minimum wage. Considering the role of labour, living wage might not be a new issue but rather a next state of labour development.

2.1.2. Definition.

Since its beginning, the living wage movement is moving faster and faster throughout the world especially in the UK and the US. As advocacy grows stronger on the right to a living wage, emphasis is being placed on a holistic understanding of the concept of the living wage itself. Despite all the achievements, the conceptualization of a living wage faces difficulty as campaigners often put their efforts into calculating and advocating the adoption of living wage rather than providing a more substantial definition for the issue.

Putting aside the formulation to a figure for a living wage, what exactly does a living wage mean? The issue holds great importance since its consequences could mount to difficulty for the movement to persuade as well as to introduce a sufficient result on how much a living wage should be, including the confusions on the difference between "low pay" and "in-work poverty" which, arguably, are problems that are believed to be the focal point that a living wage would affect the most.

According to the meaning of the words themselves, living wage should contain both the components "living" and "wages". So, what does "living" stand for? Societally, living means an earning that enough to sustain one's life or "an income sufficient to live on" and wages is an amount of money that one earns regularly in exchange for his performance or service.⁸ Therefore, a living wage can tentatively be understood as an amount of money given to workers for their performance that allows them to fulfil their needs in daily life.

Though, the issue is not as nearly as simple as that since it is also not clear what constitutes a sustenance level of wages that would sustain one's life and how many duties one needs to carry which would fall under "life's needs", would it stop at individual's survival needs such as eating, housing, health care, maintaining hygienic and hydrate or the list would reach out to desires that are outside the needs of individual, for instance, child's care, including child's education, and other dependants. Also, these components of living wage are often not addressed by the regular minimum wage. Minimum wage is normally

⁸ Sally Wehmeier, Colin McIntosh, Joanna Turnbull and Michael Ashby (Ed.), "*Oxford Advance Learner's Dictionary of Current English*", Oxford University Press, 7th edition, 2005

decided with special reference to a country's economic development condition. The purpose of minimum wage is to tackle “*unduly low wages*”, however, in reality, low wages is not the only reason which leads to poverty. Moreover, an individual based wages as the basis for the minimum wage could not touch upon the issue of in-work poverty. Therefore, though a living wage is not the sole solution for poverty, it would treat the issue closer to the root than the current minimum wage system.

What is a living wage?

Campaigners and activists usually use the calculating approach to argue over the sub-components which constitute to a living wage. The approach is divided by calculation methodology from which different conclusions on living wage can be drawn out. For instance, by analysing the living wage calculating methodologies that the *Great London Authority (GLA) Economists* introduced, Chris Grover argued that by taking in-work benefit as a part of the formulation, living wage in GLA's sense should be interpreted as “*living income*”. Grover also went on and insisted that with different tax systems for different type of families, the “*living income*” would eventually leave out many people and undermined living wage.⁹

Another example would be the “*family wages*” approach which was introduced by Anker in one of his reviews for the ILO on living wage. In the review, he claimed that a living wage is the wages, in accordance with many of the ILO instruments, would allow not only workers but their family to meet the basic living standards and that a family with living wage should not live their life below the poverty line.¹⁰

However, the living wage calculation approach also met with many criticisms regarding its nature of concentration on finding out a single adequate figure without any mutual agreement on a basic understanding. Such issue was also demonstrated by Anker in the same report in which he commented that lack of definition opened a gap for companies and governments to refuse to adopt a living wage.¹¹

In a more theoretical approach to a living wage, in his “*capability*” approach, Glickman stated that living wage often was defined as “*remuneration commensurate with a worker's needs as citizens, breadwinner and consumer*”¹² along with it, he also cited the President of American Federation of Labour's speech, Mr. Samuel Gompers, which reads as follow:

⁹ Chris Grover, “*a living wage for London*”, The Policy Press, 2008, p.72-79, (p.75).

¹⁰ Richard Anker, “*estimate a living wage: a methodological review*”, International Labour Organization, 2011, p.7

¹¹ Ibid.

¹² Lawrence B. Glickman, “*A living wage: American workers and the making of consumer society*”, Cornell University, New York, 1997, p.3

Living wage should be sufficient to maintain an average sized family in a manner consistent with whatever the contemporary local civilization recognizes as indispensable to physical and mental health or as required by the rational self-respected of human being.¹³

Glickman argues that with the new view on the role of labour, wages in the post-war era should guarantee workers “*the ability to support a family, maintain self-respect and to have both the means and the leisure to participate in the civic life of the nation.*”¹⁴

Glickman is not the only one scholar who share the same idea on living wage. Despite the differences in approaching and wording the definition, there are mutual agreement that a living wage should be a mean for adequate satisfaction on nutrition, water, health care, accommodations, other essential expenses such as clothing, traveling and for taking care of their dependents, normally, children. This view was shared by John Ryan (1906)¹⁵, Glickman (1997)¹⁶, Jane Wills (2009)¹⁷, Fran Bennett (2012)¹⁸, Richard and Martha Anker (2013)¹⁹, though, through the change of time, changes have been made to alter the notion of “breadwinner” which used to be limited to only male worker.

What is other value that should be included in the “living wage” term?

It is arguable that the idea behind living wage is not only to reflect the acknowledgement on the role of labour but also to tackle poverty as in the living wage’s broad objective. To put it in a more substantive way, the target of a living wage is not only the workers at the lowest wage payment level but also to tackle in-work poverty. It is important to set the goal straight so that everyone would know what to expect while considering the value of the living wage.

In 2016, while the living wage campaigns are starting to get responses, it is crucial to take into account the contemporary principles which are already in place in defining and interpreting the term “living wage”. Whichever method of calculation the campaigners would use to present their living wage formula, while extracting elements for calculation from a conceptualized living wage, one should also keep in mind the principle of gender equality such as equal pay for work of equal value or the elimination of “male breadwinner” stereotype. So that whether it is “living income” or “family wage”, the

¹³ Samuel Gompers on a public debate in 1898

¹⁴ Lawrence B. Glickman, see *supra* note 12

¹⁵ John A. Ryan, “*A living wage: its ethnical and Economic Aspect*”, the Macmillan and Co. Ltd, London, 1912.

¹⁶ Lawrence B. Glickman, see *supra* note 12

¹⁷ Jane Wills, “*The living wage*”, Soundings 42, 2009.

¹⁸ Fran Bennett, “*Reflections on the living wage*”, Soundings 52, 2012, p.63

¹⁹ Richard and Martha Anker, “*A Shared Approach to Estimating Living Wages: Short description of the agreed methodology*”, the ISEAL Alliance Living Wage Working Group, 2013.

living wage movement and also the equality movement would not be unnecessarily undermined.

2.2. Living wage in the context of International Law.

2.2.1. Living wage as part of International Law.

It is clear that labour issues fall under the protection of international human rights law, though, it is one inherent part of the international law itself. Therefore, labour issue carries within itself not only the obligation under the specific branch of international law but also the colour of human rights and the goal to sustainable development obligation. Hence, when examining the right to a living wage under international law, it is appropriate to thoroughly consider instruments in those respective areas.

According to the above brief depiction of the living wage movement, while accepting its progressive development through corporate's new vision and business sense, it is unsettling to examine the actual status of living wage as a labour right and human right in the international legal system. Apparently, living wage issue has been implicitly included though it has almost never been explicitly expressed as either important or fundamental. In any case, the reason for assessing wage status is that if living wage is a right which is promoted through agreement between countries, at least, the living wage call would have a foundation. The answer for the question of stakeholder responsibilities on something might be found out by examining its legal status

In the most universal level possible, living wage can be found mentioned in many UN documents. Particularly, in the 1945 UN Charter, the commitment on promoting “*higher standard of living full employment, and conditions of economic and social progress and development*” within UN's member States.²⁰ One could easily realise that the provision is fairly broad in term, responsibility to take action to improve national living standard is, nonetheless, included. It is noteworthy that the concept of living wage in the end is closely linked with raising national living standard because paying a living wage aims for lifting low-paid workers out of poverty and provide means of living for not only the person who works but also the dependents who either are legally deemed unfit for employment or are unable to do so. Even though, living wage is not the only method but it is one measurement that can be used to achieve the dream goal as giving everyone a life with prospect against poverty.

Ensuring an adequate standard of wages for workers and their family is also mentioned in other instruments as well. The *Universal Declaration on Human Rights* (UDHR) claims that “*Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and*

²⁰ UN, “*Charter of the United Nations*”, San Francisco, 24 October 1945, Art. 55

*supplemented, if necessary, by other means of social protection*²¹ along with the ICESCR which reiterates and goes further on wage issue as calling out for “(a) *Remuneration which provides all workers, as a minimum, with: (ii) A decent living for themselves and their family in accordance with the provisions of the present Covenant*”.²²

Apparently, both instruments were delivered with the idea of protecting “human dignity”. Hence, to understand the condition of wages, which provide all workers and those who fit in the concept of “family” a decent living standard, it is appropriate to think of living wage as a fundamental human right for a person. Moreover, the Committee on Economic, Social and Cultural Rights (CESCR) has further emphasised that the term “remuneration” prescribed in ICESCR should contain “*social security, health care, education and an adequate standard of living, including food, water and sanitation, housing, clothing, and additional expenses such as commuting costs*”.²³ The interpretation made by the Committee clearly indicated a living wage.

On a side note, it might be more thorough to consider the term “dependents” over “family” since it is rather unclear about what consists of a “family” to a worker. Perhaps, one could refer to the concept of “*workers with family responsibilities*” in the ILO Convention no.156 for a clearer understanding about the concept of workers and their family. The Convention provided that workers with family responsibilities are “*men and women workers with responsibilities in relation to other members of their immediate family who clearly need their care or support....*”.²⁴

In further regard to protection of the right to a living wage, the aspect of equal wages for both men and women also come into place. This principle requires no distinction between different social groups, especially between men and women, on the issue of remuneration. It was supported by the Convention no.100 of the ILO, the Equal Remuneration Convention, as well as Article 5(i) of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the Article 11(1) (d) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The principle of equal pay for work of equal value provides protection against the traditional prejudice of “male breadwinner”. This issue shall be further discussed under State Obligations.

²¹ UNGA, “*Universal Declaration on Human Rights*”, UNGA Res 217A (III), 1948, Art.23(3)

²² UNGA, “*International Covenant on Economic, Social and Culture Rights*” (ICESCR), UNGA 2200A (XXI), 1966, Art. 7(a)(iii)

²³ CESCR, “*General Comment No. 23 (2016) on the Right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)*”, E/C.12/GC/23, 8 March 2016, p.5

²⁴ ILO, “*Workers with Family Responsibilities Convention no.156*” (C156), Convention concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities, 67th ILC session, Geneva, entry into force 11 Aug 1983, Art.1(2)

Examining the regional Human Rights instruments, such as the *European Convention on Human Rights* (ECHR), the *American Convention on Human Rights* (ACHR), the *African Charter on Human and Peoples' Rights* (the Banjul Charter), the issue on wages, however, can hardly be found. While the Banjul Charter only mentioned right to work under certain favourable conditions of work and the principle of equal pay for equal work,²⁵ the ACHR went slightly further and referred to its own Charter of the Organization of American States about the regulation on labour where the obligation of States to cooperate and ensure “a decent living standard” for all population was laid down.²⁶ The ECHR does not at all mention any specific issues regarding labour law. Regional Human Rights instruments are important documents since they have binding effect on State parties. While considering the overall international law system for a trace of protection toward living wage, the international human rights system stands out the most due to the fact that labour and human rights are interconnected.

Therefore, it is important to examine on how International Human Rights instruments and Regional treaties offer their protection toward living wage. As mentioned above, the text of Regional Human Rights Conventions generally offers limited guarantee for issue regarding “right to work”. Although it might be necessary to at least recognise labour issue as human right in those instruments with binding effect, the matter that should be taken into account is the purpose of human rights instruments. What is it that human rights protect? The answer comes down to the respect to rights which are adherent to living being against potential exploitation and abuse of authority, promoting social equality, decent living standard and combatting poverty. It is reasonable to claim that fundamentally the term “human rights” has already included the respect for labour rights and labour issue and the regional human rights instruments implicitly offer protection for labour law, particularly living wage as one of the essential means to archive the goal to a decent living standard and poverty reduction.

The foundation to protect the right to a living wage has its root in the international law system. In the specialized branch, international labour law, the issue of wages was paid a fairly larger amount of attention. It is considered one of those matters which stand out the most along with condition of work, occupational safety and health as well as working hours. The ILO 1919 Constitution, while emphasising on the urgency of combatting against labour inequality due to the abuse of power, declared that the objectives for establishing an labour-centric organization is to, *inter alia*, promote the right to “an adequate living wage”.²⁷ This phase was changed in the 1944 Philadelphia Declaration

²⁵ Organization of African Unity (OAU), “*African Charter on Human and Peoples' Rights*” (“Banjul Charter”), 27 June 1981, CAB/LEG/67/3 rev, 1982, Art.15

²⁶ Organization of American States (OAS), “*American Convention on Human Rights*” (“Pact of San Jose”), Costa Rica, 22 November 1969, Art. 26 and Organization of American States (OAS), “*Charter of the Organization of American States*”, 30 April 1948, Art. 28, Art. 29(b) and Art. 63

²⁷ ILO, *ILO Constitution 1919*, amended in 1929, preamble and Art. 1

into “*minimum living wage*”²⁸ in which Anker observed that the change was clearly not a coincidence²⁹.

This observation can be connected to the comment of the CESCR. In its General Comment, the Committee has further clarified the notion of “*Remuneration which provides all workers, as a minimum, with...*”³⁰ in ICESCR as:

...remuneration must be sufficient to enable the worker and his or her family to enjoy other rights in the Covenant, such as social security, health care, education and an adequate standard of living, including food, water and sanitation, housing, clothing, and additional expenses such as commuting costs³¹

According to the Committee, the remuneration, which exceeds the required standards, should constitute the criteria above as well as the criteria of “fair and equal wages”. Hence, it could be concluded that the concept of living wage offers a more holistic approach over minimum wage and fair wage.

The Committee of Experts acknowledged the purpose which was laid down in the ILO Constitution, as to ensure everyone the right to a living wage. It offered an interpretation for term “*an adequate living wage*”:

While there is no universally accepted definition of a living wage, the idea behind it is that workers and their family should at least be able to lead a simple but decent life considered acceptable by society, in light of its level of economic development. They should be able to live above the poverty line and participate in social and cultural life... which takes into account both the subsistence needs of workers and their family, such as food and housing, as well as social and cultural needs, such as education and leisure³²

Furthermore, the ILO also adopted Convention no.131 (C131) and several other conventions on minimum wage issue. In which, State parties to the conventions should take steps in adopting minimum wage and the purpose of having such standard is the demand for “*protection for wage earners against unduly low wages*”.³³ Such objective seems to be very close to one of the two living wage’s primary targets, the low-paid workers. According to the Article 3 of the Minimum wage fixing Convention, C131,

²⁸ ILO Philadelphia Declaration, see *supra* note 4, part III(d)

²⁹ Richard Anker, see *supra* note 10

³⁰ ICESCR, see *supra* note 22

³¹ CESCR, see *supra* note 23

³² Committee of Expert, “*General Survey of the reports on the Minimum Wage Fixing Convention, 1970 (No. 131), and the Minimum Wage Fixing Recommendation, 1970 (No. 135)*”, Report III (Part 1B), published in International Labour Office, “*Minimum wage systems*”, International Labour Conference, ILC.103/III/1B, 103rd Session, 2014, para.52-53

³³ ILO, *Minimum Wage Fixing Convention no.131 (C131)*, 54th ILC session, Geneva, 1970, Preamble

when considering the figure for a minimum wage, a State should take into account these elements:

Article 3. The elements to be taken into consideration in determining the level of minimum wages shall, so far as possible and appropriate in relation to national practice and conditions, include--

(a) The needs of workers and their family, taking into account the general level of wages in the country, the cost of living, social security benefits, and the relative living standards of other social groups;

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

Even though the C131 focuses on minimum wage issue, one can recognise the dominant element of living wage in the requirement for considering the subsistent needs of workers and their family. This element was also included in the section 3(a) Part III Recommendation no.135, Minimum Wage Fixing Recommendation, a recommendation supplementing C131. At the time of adoption, the C131 was put under pressure to improve global minimum wage machinery and gather more support from member States. Perhaps, the dilemma is that it is difficult for international law to impose strict conditions to Countries without reference to their capacity but it could not ignore its own purpose of sustaining humanity either. Thus, the clause was considered to be a social consideration within minimum wage fixing so that international minimum wage law could embrace the balance between State's situation and the social responsibility which a Country needs to fulfil and develop.³⁴

This social consideration element was also mentioned in the Convention no. 95, the Protection of Wages Convention (C95). In the provision regarding impartial payment for workers, the Convention urge to include a "fair and reasonable" estimation for workers' and their family' needs.³⁵

2. In cases in which partial payment of wages in the form of allowances in kind is authorised, appropriate measures shall be taken to ensure that—

(a) Such allowances are appropriate for the personal use and benefit of the worker and his family; and

(b) The value attributed to such allowances is fair and reasonable

³⁴ International Labour Office, "*Minimum wage fixing machinery and related problems, with special reference to developing countries*", International Labour Conference, Report V(1), 54th session, Geneva, 1970, p.14.

³⁵ ILO, *Protection of Wages Convention* No. 95, Convention concerning the Protection of Wages (C95), 32nd ILC session, Geneva, 01 Jul 1949, Art.4(2)

The preparatory document for C95³⁶ as well as the recommendation no.85's³⁷ offered no interpretation for such clause. Although, it is arguable to be an implication for the same requirement for a minimum wage to take that factor into its consideration.

Besides the Minimum Wage Conventions, the ILO pushed a step forward and adopted the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (the MNE Declaration) as a guideline for not only State members but also Transnational Businesses who voluntarily accept international labour standards and practice accordingly. The principle regarding wages under the MNE Declaration urges the multinational enterprises to provide workers an adequate level of wages, with a special attention to developing countries. This Declaration shall be further touched upon in the later part of this thesis.

Notwithstanding the number of international instruments addressing the wage issue, the status of wages remains in a weak position. This might result from (1) Wage policy depends largely on the national state of affairs, including economic and social protection, human rights acceptance and also the state of freedom which leads to the existence as well as the active or passive trade union's activity. (2) It is fairly clear when observing the binding status of those documents which were listed above, the majority of those instruments only have recommendation status or exist as a symbolic figure for the advocacy of international human rights as well as international labour standards. (3) The reluctance to push for a certain level of wages due to the fear for economic and investment damages. Even within the ILO Conventions systems, wage issue was given the fundamental status for only the principle of "*Equal remuneration*"³⁸ which prioritised tackling the issue of gender discrimination within labour field.

Perhaps, looking into the ILO Declaration on Fundamental Principles and Rights at Work, one could find a satisfying explanation for the low ranking of wage issue. The Declaration recognised the following rights as fundamental rights: "*(a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation.*"³⁹ It is clear that the issues addressed by the Declaration hold universally important values. The recognition and protection of these rights are urgent because the violation of these

³⁶ International Labour Office, "*Protection of Wages*", International Labour Conference, Report VII(1), 32nd Session, Geneva, 1949

³⁷ ILO, *Protection of Wages Recommendation No. 85*, Recommendation concerning the Protection of Wages, Geneva, 32nd ILC session (01 Jul 1949)

³⁸ ILO, *Equal Remuneration Convention no. 100 (C100)*, 34th ILC session, Geneva, 1951. C100 was marked as fundamental on the ILO Conventions list by the ILO webpage, accessed on March, The term 2016.

³⁹ ILO, *Declaration on Fundamental Principles and Rights at Work and its Follow-up*, International Labour Conference, 86th Session, Geneva, 18 June 1998, Annex revised 15 June 2010.

principles undermines human rights and social justice, deepens poverty and hinders progressive economic and social development.

Therefore, to combat these issue, the Declaration emphasised that national economic condition should not be used as an obstacle to limit or delay the implementation and enforcement of these rights.⁴⁰ However, it is different with wage issue. ILO Minimum Wage Conventions regulates a system of minimum wage fixing with reference to both economic and social consideration. This, perhaps, is to achieve the right to adequate living wage laid down in ILO Constitution progressively step by step. Also, it might be because of the lack of consensus on whether wage issue has fundamental value evidenced by the low ratification rate of all ILO Minimum Wage Conventions.

However, this lack of consensus does not necessary mean that wage issue is not fundamental issue or of great importance similarly to a fundamental issue. The reason for that is because, even though it is not the sole measure, wage issue could possibly contribute to achieving full realisation of all fundamental rights mentioned above or, at the same time, be promoted by those rights. The rights to form, join trade union and collective bargaining are rights designed to protect workers' right, including wage right. One of the measure to tackle child labour is to ensure adequate wages for the child's parents,⁴¹ which will be further discussed later in this thesis. Equal wage for work of equal value is the principle entailed the non-discrimination right. Although, the elimination of Force Labour is a broad concept, it also offers protection against extremely low wages.⁴²

Thus, the right to an equal and fair living wage is implicitly protected under fundamental rights, even though it is not explicitly regulated as fundamental.

2.2.2. Why a living wage.

2.2.2.1. Living wage and Minimum wage.

The international law regarding remuneration seemingly has the intention to promote the right to wages which is sufficient, in the majority of the case, for the workers and their family to sustain their life to the extent described as “decent living”. The wage regulation is trusted to each country to adapt the concept of wages into the national situation. However, existing today is not a living wage but rather a minimum wage. It is important to take a further look into these two concepts, is minimum wage a living wage? What is

⁴⁰ Ibid., see also “*ILO Declaration on Fundamental Principles and Rights at Work*”, ILO homepage [Accessed May, 2016] <http://www.ilo.org/declaration/lang--en/index.htm>

⁴¹ ILO, “*Company policies to prevent child labour and ensure that children go to school*”, Q&As on business and child labour, [Accessed on May 2016], available at http://www.ilo.org/empent/areas/business-helpdesk/faqs/WCMS_DOC_ENT_HLP_CHL_FAQ_EN/lang--en/index.htm

⁴² ILO Director-General, “*A Global Alliance Against Forced Labour ILO - Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and rights at Work 2005*”, Report I (B), International Labour Conference, 93rd Session 2005, p.5

the differences between the two and their relationship? As well as the question about the necessity of living wage and the things that would entail. Those are questions that need answers.

First of all, what is it between living wage and minimum wage?

Nowadays, many countries have either a law on the level of wages which is deemed as “minimum” or the policy that allows collective bargaining in different economic section for a minimum wage standard, which normally carries out by the work of a trade union. Minimum wage is the bottom ground which means no salary paid to employee could go lower than the agreed level. The term “minimum wage” is also not defined, in many of ILO’s conventions, the most mentioned term regarding minimum wage are “*minimum rates of wages*” in Conventions No.26⁴³ as well as “*minimum wage rates*” and “*minimum rates*” in Convention no.99⁴⁴, except for the Convention no.131. Despite using those terms, no definitions have been offered.

However, by the text of the conventions, the components for minimum wage can be extracted. In one of the Reports of the Committee of Experts, the elements that minimum wage contains include (1) payable sum for workers in virtual of employment contracts; (2) not includes bonuses or other benefits. The assessment of the Committee results to the conclusion that minimum wage which is designated and enforced by national law is different with the concept of “minimum income” which represent the minimum standard for a worker to sustain his life.⁴⁵ Seemingly, minimum wage, if exists, protected by the national law is the only type of wages that would be guaranteed to workers for the work or services they perform. However, minimum wage does not concern nor cover every aspect of a person’s life, in reality, minimum wage might not even be an effective wage that could support the worker’s life alone not to mention his other dependents.

Considering those elements of minimum wage with the now advocated living wage, the feature that stands out the most is the fact that living wage, as in its name, demands for a subsistent payment suitable of living. Living wage extends its range into other needs such as housing, healthcare, foods, safe water, other living expenses as well as those of the workers’ dependents. As mention in the Report of Committee of Expert, minimum wage in C131 does contain the requirement for the consideration of workers’ and their family’s needs though it is not strictly regulated.⁴⁶

⁴³ ILO, *Minimum Wage-Fixing Machinery Conventions no.26 (C26)*, 11st ILC session, Geneva, 1928: Art.1 para 1; Art.3 para 2(3); Art.4 para1. See more in the C99

⁴⁴ ILO, *Minimum Wage Fixing Machinery (Agriculture) Convention (C99)*, 34th ILC session, Geneva, 1951. The three terms “minimum rates of wage”, “minimum wage rates” and “minimum rates” were used correspondingly within the convention.

⁴⁵ ILO, *Minimum wage: Wage-fixing machinery application and supervision*, Report III Part 4, International Labour Conference 79th session, Geneva, 1992. Para.27-55

⁴⁶ Ibid.

One other element is living wage currently known as a voluntary sum that would be paid to employees by businesses who are joining side with wage activists. “Should living wage be a statutory wage” is a difficult question. Despite having minimum wage enforced in many countries, the first issue is about the enforcement of the law on the informal economic sector where, due to the lack in effective control, payment lower than minimum wage is still a tough reality. Second issue is the loose nature of labour market as it requires least intervention from the government, imposing absolute authority on economic is highly undesirable. The other issue is on the improvement of minimum wage rates. Raising the bar for minimum wage has always met with great difficulty and unwillingness not only from the employers themselves but also from the populations who believe in the myth that higher minimum wage would hurt their opportunity for job as well as causing the employed people their own jobs. Even though, this myth has been proven to be low in accuracy by many reports, in a 2013 review, raising minimum wage was concluded to cause slight change in employment speed and did not dramatically increase unemployment rates.⁴⁷

The minimum wage is not a living wage, at the present moment, the two concepts are clearly differing from each other. Although, sometimes the borderline can be blurred together, it could be when the amount of minimum wage itself reaches the level of a living wage or together with national social protection plan provide adequate living standards for all populations. Minimum wage is designed in the course of fighting “*unduly low wages*” and though being denied to be the solution for poverty, it is one key factor, not the sole factor, in the war against poverty. Examining the international instruments regarding wages, the relationship between minimum wage and living wage seemingly come out clearer as they have the same objective as well as target. However, minimum wage holds the bottom ground for wages, preventing excessively low payment and exploitation while living wage advocates for higher living standards which described as “decent living”. The two concepts somehow reflect two different states of evolution of wages in accordance with the level of economic and societal development. The demand for better wages comes with higher level of consciousness in understanding people’s rights as well as higher living standards and economic superiority in comparison with other countries.

Idealistically, minimum wage should be a concept of providing living wage for individual, fulfil the worker’s own living subsistence. While living wage is aiming for a method to support not only the worker but also the family or the dependents. Therefore, it is also appropriate to think of minimum wage as a preparatory concept for the evolution into living wage.

⁴⁷ John Schmitt, “*Why Does the Minimum Wage Have No Discernible Effect on Employment?*”, Center for Economic and Policy Research (CEPR), 2013, p.9

2.2.2.2. The feasibility of a living wage.

Living wage movement has met a fair amount of resistance, mostly from the business side, arguing that bringing up a high standard of wages such as living wage will cause a great deal of negative impacts on the employment rates as well as in economic development.

Many economists argued that a level of wages as high as living wage, although tempting to be acquired, is expected to bring damages to the employment relationship and to the consumers as the price of goods would go up along with the raise in wages. In the UK, the type of business that raises the most significant concern is the small businesses, proximately under 10 employees, as they claim to be under heavy burden from the expensive cost of labour which would trumped over the profits. The retailers, furthermore, worry over the increase in goods price as the labour cost raises and the consumption needs would, as the consequences, drop accordingly.⁴⁸

On top of that, the most frequent logic that applies in response to living wage is the vacuum of high cost for labour leading to the unwillingness to employ as well as the reduction in companies' labour force. Meaning that the enforcement of a statutory living wage would possibly lead to not only a fall in employment rates but also increase that in unemployment. The workers who are most likely to suffer from these changes as anticipated are workers of low-skills category and also young, inexperienced workers, they might face the pressure of termination of contract and difficulty in acquiring a job, respectively.

One particular article pointed out that the enforcement of living wage will impose great challenges to all stakeholders not only within the basic employment relationship, workers-employers-government (assumedly with the participation of trade union as well), but also extents to other non-governmental organisations (NGOs). Since it would take every source of power to deal with the shift in labour marker as the NGOs have raised the worrying issue that “*any supply chain living wage initiative may not reach informal workers, and may drive further ‘informalization’ of employment*”.⁴⁹ The possible expansion of informal economic sector could possibly be one of the most potential damaging effects due to its widely precarious nature, ambiguous, hard to manage and probably be the place where low-paid is more of an obvious issue.

However, while making the assessment, the impacts of living wage is said to be worthy and feasible. While one side arguing that living wage could result to the increase in price

⁴⁸ Shane Hickey, “*Business community warns living wage could hit employers and staff*”, the Guardian, 2015, [Accessed on March 2016], available at: <http://www.theguardian.com/small-business-network/2015/sep/16/business-community-warns-living-wage-could-hit-employers-staff>

⁴⁹ Doug Miller and Peter Williams, “*What Price a Living Wage? Implementation Issues in the Quest for Decent Wages in the Global Apparel Sector*”, Global Social Policy vol. 9(1), 2009, p.99-125, (p.116)

of goods, in the same article, Miller and Williams has concluded that the increase in wages leads to the increase in cost of produces is not necessarily be the absolute causes-effects formulation. On the contrary, they claimed that “*raising the level of workers pay in the direction of existing code standards on a living wage would necessitate only a modest increase in the retail price or could be absorbed in part or fully from critical path savings*” and that this negative effect can be prevented with a breakthrough out of the ordinary method of business.⁵⁰

One general review of the studies on the impacts of living wage ordinances in some areas the U.S has found out that the majority of reports indicated a fair number of positive developments. The findings of all those studies included:⁵¹

(1) Living wage does not put a burden on municipal budget, on the contrary, in some case, the municipality cost on contracts even dropped. For instance, “*the first year under Baltimore’s living wage law, the real cost of city contracts actually decreased. Nominal contract costs rose 0.2%, but after adjusting for inflation costs declined by 2.4%*”;

(2) Living wage benefits working family, or at the least, causes no harms. The studies in Boston and Los Angeles indicated that the affected targets of living wage are mostly adults who are struggling for the basic make-ends-meet. Those target fits right into the primary target of living wage movement. At the same time, there are no signs of “*diminished employments*” and there is only a very small raise in loss of jobs. This suggested that the unemployment rates generally would not increase or only grow in a modest figure, also, the elimination of jobs is not much of concern;

(3) By paying a living wage, there are increases in productivity as well as drops in labour turnover among affected firms. The reports found the opposite of which was anticipated, in all concerned cities, workers are confirmed to less likely to leave their jobs due to the sustainability of wages, performance in work is more focus and shown to be taken more dedicated efforts. Since the cost for labour is higher, employers changed their method in recruitment, instead of changing employees in fast rotation, employers lower the labour turnover and, therefore, reduces the cost of training the new recruits. Though, it is noteworthy that this is not necessarily the potential risk for any growth in unemployment rates as this myth has been proved to be almost unchanged under the enforced living wage ordinances.

At the same time, while expressing the troubled thoughts on the negative impacts of living wage on the economic and hiring issues, many reviews also revealed a brighter perspective and pointed out that those problems, mentioned above by many economists, can be resolved with a change of business model and activities as well as an adjustment

⁵⁰ Ibid.

⁵¹ Jeff Chapman and Jeff Thompson, “*The economic impact of local living wages*”, Economic Policy Institute, Report on Wage, Incomes and Wealth, 2006

in competition between the big companies and the smaller one in which new policy might be needed.⁵²

The advantages of living wage are also reflected in the report published by the LWF, in which, not only many different regional reports on living wage' impacts can be found but also case studies. The LWF concluded that there will be excessive cost results from the establishment of living wage. Once it is enforced, the pressure as well as the burden would seem to be hard to handle, however, it is manageable by both the employers and the clients. Meanwhile, the case study also presented the same conclusion that the relationship between wages and costs is not as obvious as others might claim in reality, many factors are needed to established and adjustments are possible to eliminate the arisen costs. The matter lies on the management plan of businesses.⁵³

After all, living wage is a new concept to put into practice with legal foundation, the struggles to adapt is expected. While the debate on whether living wage would be more like a threat than a cure, there are achievements have been made which reflected in the U.S living wage finding. For now, it is fairly reasonable to give a hope for the bright side that living wage would contribute to a change in poverty problems with least harms.

⁵² Shane Hickey, see *supra* note 48.

⁵³ Jane Wills and Brian Linneker, "*The Costs and Benefits of London Living Wage*", Trust for London and Queen Mary University of London, 2012, p.36-38.

Chapter 3. Living wage and State responsibility.

3.1. State obligation regarding wage regulation.

3.1.1. Wage regulation.

Extending the scope of research on the legal aspect that support living wage, the next level in protecting workers' right to a fair and adequate wage is handed down to each nation. In the end, the matter of protection to workers' rights cannot be depended solely on the international law. Since international law reflects the agreements (or rather compromises) between States in order to keep a peaceful and prospective relation, States have, undoubtedly, obligations to codify or put into practice, in accordance with the nation's own regime - civil or common law, the communal agreed principles in international legal instruments.

Therein, one of the issues desperately needs State's attentions is the remuneration standard for workers. Wage regulation or wage policy is the effort to set up a standard for the amount as well as the form of payment together with other related manners that workers, at their basic level of skills and experiences, receive for result or the performance of certain works. To be precise, whether States should provide a law on national wage is highly dependable on each State's internal affairs. It is not absolute that States are bound to regulate for their work force a standard of wages. In fact, the more developed trade unions rights in a country is, the less likely for State to force its way into labour affairs, take Germany and Sweden as the example. Although, this will be discussed more closely in the next part of the Chapter.

Wage regulation can cover a fair number of issues regarding remuneration. These issues vary from the minimum level of wages, wage machinery system as well as the conditions for paying wage. Therefore, regulating wages is not merely about introducing a figure as a minimum which worker should receive but also about what type of payment will be accepted as an appropriate wage. According to the ILO Convention no.95 on the *protection of wages*, the form of wages should be regulated as legal tender, thus, other forms, for instance "promissory note, voucher or coupon", which are introduced to represent such legal tender would be prohibited. Besides, a desirable wage regulation should provide protection of wage and the means to protect such as establishing wage machinery system and labour inspection.⁵⁴

Wage regulations are closely related to living wage, under a sufficient rule of remuneration, States allow and provide a firm foundation for living wage to grow from. Whether it is an enforceable national wage policy or a provision which entrusts wage

⁵⁴ ILO, *Protection of Wages Convention no.95 (C95)*, 32nd ILC session, Geneva, 1949

issue to collective bargaining and to trade union, an efficient wage regulation should reflect government's effort to provide and promote everyone's right to a decent living standards which, in this aspect, would be achieved partly through a decent living wage.

3.1.2. State Obligation on wage regulation.

The polity of a nation is easily told by the living condition of its own people. Measuring a level of development of a country is not wholly depended on the level of national income and the economic power but also the prosperous and peaceful livelihood of its own populations. The interactions between the government and its own people push the movement of growth rates, these interactions can take many forms, though, the most obvious would be through the labour relationship. People who reside within a nation through working, producing goods and paying taxes, keep a government operating and nurturing prosperities, the authority has the responsibility to protect and take measures to ensure people's labour rights, including wage issue. Hence, it is no doubt that wage protection is the matter which would be decided accordingly to a country's development goals.

However, after the two World Wars, international relations have become more and more interactive so that, as a collective effort, States can achieve their mutual goals and maintain peace and security, as the result, internal affairs on fundamental issues have been putting under international observations. Regarding the right to a living wage, it falls within the goal to provide everyone a decent living standard and within the scope of labour rights protection which came into agreement between State parties to the ILO and many other conventions.

Under international labour law, State stand as one pillar in the tripartite system for protecting labour rights of all workers, hence, the responsibility to protect remuneration falls within State's positive obligation. Depending on each country, wage policy can be differentiated. There are many factors which affect wage regulation, including the existence of workers' organisation, trade union and the distribution of population in different economic sectors, informal or formal. In order to operate an effective supervision upon labour issue, particularly wage employment, a wage regulation with sufficient scope of protection is essential to State's labour management.

Moreover, there are other economic and social reasons for State to care for wage policy as one of its obligation. In its reports, the ILO has many times pointed out that wage issue does pose its effect on a nation's economic and social development and management. Those impacts, which were said to be necessary not only to developing countries but also industrialised nations, include (1) controlling the households' consumption rate due to wages being the determination factor on household's income. To boost up the economy, State would have to care about the increase in consumption rates and the flow of goods within the country. Low wage would hinder this growth since family would have to

minimize their spending to save money for other purposes;⁵⁵ (2) “*many countries seek to achieve positive growth rates and create jobs while at the same time trying to reduce imbalances between their imports and their exports*”.⁵⁶ The report claimed that wage growth will contribute to solve this issue by helping in balancing trade account and boost the competitiveness of businesses; (3) at international level, there is evident that the gap between wage growth and productivity would bring negative effect as it resulted in some countries a sign of “*a declining labour income share*”;⁵⁷ (4) the final impact focus on the influence of the formal sector employees on political strength of a developing nation which said to be more than just numerical power and the support of such group is valuable.⁵⁸ Wage issues would be an important factor in the road to build up a sustainable and successful economic policy.

For all of those reason, wage regulation is not only an obligation that State bears to protect working population but also an issue which needs attention because of the dramatic impacts it could cause for many other issues in economic, social to political spheres. Protection of wages as part of the national labour law is fundamentally important, thus, wage regulation should not be limited to only the minimum amount of payment or the form that it takes but also the investigation and supervision machinery with proper sanctions in case of violation.

3.2. State obligation under international law.

3.2.1. Direct obligation.

A State has an obligation under international law to provide protection to workers’ right to a decent wage and promote living wage as a mean to achieve the aim for a decent living standards for all which is said to be one pathway toward the preservation of global peace and friendly relations. To further demonstrate such responsibility, it is appropriate to re-examine the source where the State’s direct liability is enshrined. This chapter is going to examine State obligation by the coverages of the instruments, from general public international law to international Labour Law.

Firstly, concerning the issue of wage protection obligations of the State within UN documents, they are described in two folds, the first is the communal goal of all States to create global stability, sustainability and well-being though labour aspect with the aim for ensuring a decent living standard, promoting full employment followed by the principle of equality, the second fold is the realisation of the right to a minimum level of wages

⁵⁵ ILO, “*Global wage report 2014/15: Wages and income inequality*”, International Labour Office, Geneva, 2015, p.1

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ ILO, “*Wage policy: Wage, Non-wage Labour Cost and Their Relation to Employment under conditions of structural adjustment*”, International Labour Office, Geneva, 1992, p.12-13

which secures the first fold's objective for the workers and their family. Hence, it is appropriate to interpret that the UN documents, in the wage protection sphere, urged its members to aim for a goal of an adequate living wage rather than a minimum wage which only support individual.

The Article 55 of the UN Charter has emphasised the human rights objectives that all member States vowed to uphold, particularly on the issue which would potentially support the right to living wage:

Article 55. With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

- a) Higher standards of living, full employment, and conditions of economic and social progress and development;
- c) Universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Generally, the UN Charter would not be a document to be cited, the provisions and enforcements of international human right law. The specialised issues will often be left for other specialised international organizations and the States to further interpret. After all, as Scott Long scrutinised, "*international human rights*" are not the rights which arise from international framework alone but to be the issue emerged from the very occurrences at the national level which led to the result that people who "*realised their dignity has been injured, and strive to imagine remedies and solutions*".⁵⁹ For that reason, the traditional approach to the UN Charter often refers to the Charter as a guidance statute for member States instead of it being an international law instrument with legal binding effect. The UN charter within the international legal system remains to be in the highest position, the scope of protection offered by the provisions themselves is highly ambiguous and broad. These provisions do not have interpretation and can only be applied if the States have both accepted and enacted the Charter's clauses enshrined in the specific legal instruments at the lower level into their domestic law.

Despite such traditional approach to the Charter, human rights advocates are looking for an innovative approach in order to achieve better protection of Human Rights. They argue that UN Charter should also have effect in domestic law as a better foundation and support for the implementation of the UDHR and its two Covenants.⁶⁰ One could argue that signing for the UN Charter, States have agreed on its provisions as a common goal.

⁵⁹ Scott Long, "*Making the Mountain move: An Activist's Guide to How International Human Rights Mechanisms Can Work for You*", available at: <http://www.iglhrc.org/binary-data/ATTACHMENT/file/000/000/179-1.pdf>; Also cited in Julie A. Mertus, "*The United Nations and Human Rights - A Guide for a New Era*", Thomas G. Weiss and Rorden Wilkinson (Ed.), "*Global Institutions Series*", Routledge, 2005.

⁶⁰ Bernhard Schluter, "*The Domestic Status of the Human Rights Clauses of the United Nations Charter*", California Law Review 61, Issue 1, 1973, p.110-164, (p.111-113)

Accordingly, the Charter recommended State to strengthen up and raise the standard of living, promote full-employment on the basis of equality for all. Also, it pointed State to lower legal instruments which contain more specific guidance on how the rights in Art.55 should be implemented. Despite that, the UN Charter still contains obligations for States. Therefore, the application of the related rights in the Charter, which are adopted to the specific binding international instruments, needs to be read in the light of the Charter and be contained in the context of national law.

Furthermore, the UDHR together with the ICESCR have further prescribed on the elements which contribute to “a decent life” goal. It is, though, not necessary mean that wage protection is the sole measure to achieve such goal, every key aspect should receive proper safeguard so that, as a whole, the progress toward the goal enshrined in the UN Charter would have a firm foundation to keep moving on.

In the Article 23(3) of the UDHR, the principle regarding remuneration was stated as followed:

Article 23(3). Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection

Correspondingly, in Article 7(a) of the ICESCR, the condition of wages was laid down more specific:

Article 7. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

(ii) A decent living for themselves and their family in accordance with the provisions of the present Covenant;

Even though, the UDHR does not have legal binding status, it has been complemented by the ICESCR, a treaty concerns the economic, social and cultural aspect of human rights, which is considered to have adopted and expanded the norms that was contained in the UDHR. The ICESCR is legally binding upon its member States that ratify it due to being a treaty,⁶¹ besides, the status of the UDHR within the international law system has, arguably, been the customary international law.⁶² Therefore, under the UDHR and the

⁶¹ Vienna Convention on the Law of Treaties, 1969, article 26

⁶² Kaufmann, “*Globalisation and Labour Rights – The Conflict between Core Labour Rights and International Economic Law*”, Oxford Hart Publishing, 2007, p. 29

ICESCR, States are bound to recognize the right to work for everyone with adequate remuneration which exceed a certain minimum rate that (1) provides the workers' and their family' subsistence needs; (2) is enacted in accordance with the protection against discriminatory wages, especially in case of women workers. The principle of equal pay for equal work has engraved in the very early state of human right evolution.

Additionally, implementing the rights under ICESCR had been prescribed in four components (1) take steps; (2) to the maximum of State's available resource; (3) with the purpose of achieving progressively full recognition of rights in the Covenant; and (4) by all appropriate means.⁶³ With developing countries, the Covenant allows the reference to Countries' economic development and Human Rights in the case of economic rights guarantee to non-nationals.⁶⁴ ICESCR requires State Parties to pursue the rights enshrined in the Covenant by all appropriate means including the adoption of national regulation.⁶⁵ It is arguable that these requirements are not specifically imply a national regulation on either minimum wage or living wage but to describe a developing process from an adequate minimum wage to a living wage regulation.

Having adopted the right to work, including the right to "*just and favourable remuneration*", the ICESCR, however, was subjected to a debate on whether it should bear the implication of how the right to work would be implemented. Moreover, the consensus on the right to work was given under the condition that such right could only be achieved progressively along with each State's economic development stage. Therefore, instead of enforcing the right to work, and its contents, the ICESCR and the UDHR only require States the obligation to "ensure" instead of "guarantee". The implementation of the right to work as well as wage protection were left for the ILO to decide.⁶⁶ Thus, to attain the remuneration goal which was set out in the UN's documents, States often refer to ILO conventions and activities for guidance.

As follows, the provisions safeguarding wage issues have been engraved in many of the ILO core documents, including its Constitution, the Philadelphia Declaration 1944 and the series of basic conventions on wage policy: C95, C100 and C131.

The founding principles of the ILO contained in its Constitution recognised the right of workers for "*an adequate living wage*" as far as being a mean to achieve social justice, the essential element to maintain "*universal and lasting peace*". The preamble reaffirmed the need to tackle injustice and social inequality in labour conditions that create hardships and struggles toward the large number of people. Such disturbances are so great that it would jeopardise the global peaceful order (emphasis added):

⁶³ ICESCR, see *supra* note 22, Art.2(1)

⁶⁴ *Ibid.* Art.2(3)

⁶⁵ *Ibid.* Art.2(1)

⁶⁶ Kaufmann, see *supra* note 62, p.29-39

Whereas universal and lasting peace can be established only if it is based upon social justice;

And whereas conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required; as, for example...the provision of *an adequate living wage*

Thereupon, the Philadelphia Declaration 1944 and 2008 have reiterated the importance of wages in a different concept, “*minimum living wage*”. There are different interpretations regarding such change. The first observation was that the term “minimum” in minimum living wage is the justification and giving qualification for the meaning of “*an adequate living wage*” in the Constitution. The usage indicated that an adequate living wage is a level of wages that would provide subsistence living needs for workers and their family. The other interpretation argues that the phrase “*minimum living wage*” is referred to a certain minimum level of wages, as Anker described, holds an important role in practical implementation since a minimum wage as stated in C131 included the anticipation for the impacts of minimum wage on national economic.⁶⁷

Affirming the objectives in its major documents, the ILO has adopted several series of conventions and recommendations on minimum wage-fixing regulations and protection. However, while recognising the necessity of living wage, the ILO wage monitoring conventions, which directly address wage level and wage machinery, only concern a minimum wage system instead of a living wage. Since the ILO Conventions and international labour standards are designed as minimum international standards so that they can aim for a low universal reach and achieve the best practice possible. This means they must take effort to meet the organisation objectives as well as encourage States to adopt the ideologies.⁶⁸ For that reason, minimum wage reflects the agreement between States and the international labour standards, especially in developing countries, to ease the hesitations to adopt a high wage level that they could not afford. Although, it must be clear that the provisions of the conventions have implicitly raised the support for the right to a living wage.

For instance, according to Article 3 of the Minimum wage fixing Convention:

Article 3. The elements to be taken into consideration in determining the level of minimum wages shall, so far as possible and appropriate in relation to national practice and conditions, 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 standards of other social groups;

⁶⁷ Richard Anker, “*estimate a living wage: a methodological review*”, International Labour Organization, Geneva, 2011, p.4

⁶⁸ ILO Report V(1), see *supra* note 34, p.7

- (b) Economic factors, including the requirements of economic development, levels of productivity and the desirability of attaining and maintaining a high level of employment.

Article 3 of the Minimum wage-fixing convention no.131 has affirmed that a minimum wage should take into account the needs of workers and their family while considering the state of economic development in the ratifying countries. The criteria hold a similar reasoning with a living wage while opening an opportunity for State to adjust them into their legislation. As the consequences, the minimum wage convention only set out the objective to tackle “*unduly low wage*” as the main goal while putting the aspirational target which to combat against low-paid and in-work poverty as to raise family out of poverty into Recommendation⁶⁹ as the supplement to the convention. The text of the Recommendation is read as follow:

I. Purpose of Minimum Wage Fixing

1. Minimum wage fixing should constitute one element in a policy designed to overcome poverty and to ensure the satisfaction of the needs of all workers and their families.
2. The fundamental purpose of minimum wage fixing should be to give wage earners necessary social protection as regards minimum permissible levels of wages

Also:

3. In determining the level of minimum wages, account should be taken of the following criteria, amongst others:
 - (a) The needs of workers and their families;
 - (b) The general level of wages in the country;
 - (c) The cost of living and changes therein;
 - (d) Social security benefits;
 - (e) The relative living standards of other social groups;
 - (f) Economic factors, including the requirements of economic development, levels of productivity and the desirability of attaining and maintaining a high level of employment.

Although, considering the meaning of the words in both the Convention and its Recommendation, the components which minimum wage should be consisted of are more or less of recommendation nature.

However, taken into account the fact that the Convention requires a State to establish a minimum wage fixing system: “*Each Member of the International Labour Organisation which ratifies this Convention undertakes to establish a system of minimum wages which covers all groups of wage earners whose terms of employment are such that coverage would be appropriate*”.⁷⁰ Article 3 has shed a light on the elements which the national minimum wage should follow. It should not be taken as lightly as a mere

⁶⁹ ILO, *Minimum Wage Fixing Recommendation No. 135*, Recommendation concerning Minimum Wage Fixing, with Special Reference to Developing Countries, Geneva, 54th ILC session (22 Jun 1970), Part I para 2

⁷⁰ ILO C131, see *supra* note 33, Article 1.

recommendation. Therefore, C131 requires State to establish its own national minimum wage law along with all of the components above.

Other than the requirement for a national minimum wage system, the Convention also requires proper enforcement of the existing system with sanction to protect workers' right to wages. Within the provision for protection of minimum wage law, the Convention paid tribute to the recognition of right to collective bargaining as one of the means. The term "*shall be fully respected*" was used in this regard. This could possibly be interpreted similarly as in Business' "respect" obligation as State should not interfere with workers' right to collective bargaining.⁷¹

However, in State's side, the obligation would not stop at "refrain from doing something". According to article 4 of C131, State obligation in this regard is to create and maintain minimum wage machinery which can be amended to adapt with changes. The machinery should include in its operation the right to collective bargaining and rights to be represented for both workers and employers. However, the criterion "*adapted to national conditions and requirements*" is very broad and it gives State who has not recognised freedom of association to exclude the effective enforcement of the right to collective bargaining and right to representative.⁷²

Similarly, the right of workers and their family for an adequate wage has also been implied in the C95, the Protection of Wages Convention, when the Convention laid down the requirement for partial payment in kind as (emphasis added):

Article 4(2). In cases in which partial payment of wages in the form of allowances in kind is authorised, appropriate measures shall be taken to ensure that—

(a) Such allowances are *appropriate for the personal use and benefit of the worker and his family*; and

⁷¹ Ibid. Article 2

⁷² Ibid

Article 4

1. Each Member which ratifies this Convention shall create and/or maintain machinery adapted to national conditions and requirements whereby minimum wages for groups of wage earners covered in pursuance of Article 1 thereof can be fixed and adjusted from time to time.

2. Provision shall be made, in connection with the establishment, operation and modification of such machinery, for full consultation with representative organisations of employers and workers concerned or, where no such organisations exist, representatives of employers and workers concerned.

3. Wherever it is appropriate to the nature of the minimum wage fixing machinery, provision shall also be made for the direct participation in its operation of--

(a) representatives of organisations of employers and workers concerned or, where no such organisations exist, representatives of employers and workers concerned, on a basis of equality;

(b) Persons having recognised competence for representing the general interests of the country and appointed after full consultation with representative organisations of employers and workers concerned, where such organisations exist and such consultation is in accordance with national law or practice.

(b) The value attributed to *such allowances is fair and reasonable*.

The term was not interpreted by the preparatory document or the supplement recommendation. Though, it is arguable that the aim of wage fixing machinery should take into account, in any case, the sustenance of a suitable living standard for worker and his family. Hence, when determining the national minimum wage, by negotiation or by regulation, this objective must be kept in consideration. Furthermore, the General Survey on protection of wages has further discussed this issue of partial payment in kind. It did not address the issue on level of wages nor living wage in particular. Although, it did take into account the “*risk of unduly diminishing the cash remuneration necessary for the maintenance of workers and their families*” as the main argument for calling out to State for a limitation of partial payment in kind.⁷³ Hence, the level of payment, which is under protection of C95, could possibly be understood as a standard that would tackle family’s low-wages.

Other than the implication on the purpose of wages, C95 puts a number of obligation to ratifying States regarding the protection of wages. Some provisions are similar to the protection of wages in C131, especially on the participation of workers’ and employers’ organisations upon determining national wage law. The two similarity is the requests for respecting the right to collective bargaining⁷⁴ and for determining the coverage of national wage law in the course of establishing and operating national wage law. For instance, determining the groups of worker who would be covered by the protection of national minimum wage legislation, the group which is excluded shall be addressed by other law or action plan.⁷⁵

Beside those similarity, C95 requires State to include in its legislation many other fundamental issues regarding wages, particularly, the type of wages (payable cash as legal tender, other form similar to it would be prohibited);⁷⁶ The manner of paying wages (directly to the employee or other manner accordance to the law or collective agreement);⁷⁷ The rule on the deduction of wages (in accordance to national law or

⁷³ Committee of Expert, “*General Survey of the reports concerning the Protection of Wages Convention (No. 95) and the Protection of Wages Recommendation (No. 85), 1949*”, International Labour Conference, 91st Session, Report III (Part 1B), 2003, para.118

⁷⁴ Ibid., C131 – Article 4 and C95 – The right to collective bargaining is an action that is mentioned multiple times in many different Article. This could possibly mean that the Convention itself has assumed the right to collective bargaining as one of the basic rights and means to protect minimum wage legislation.

⁷⁵ According to Article 1 of C131 and Article 2 of C95, the Conventions require ratified States to adopt a minimum wage system into national legal order, such national minimum wage should apply to all group of wage-earners. Unless State has stated on its first report to the Committee of Expert on the Application of the Convention regarding the excluded group of wage-earners and the reasons for the exclusion, the established minimum wage should cover every worker without distinction.

⁷⁶ ILO C95, see *supra* note 35, Art.3

⁷⁷ Ibid., Art.5

collective bargaining; the deduction of wages with intention to obtain or retain the job is prohibited).⁷⁸

The Convention was supplemented by its Recommendation no.85, according to the Recommendation, the necessary provisions, which State obliged to prescribe under the Convention, include:⁷⁹ (1) The Deduction from wages; (2) Periodicity of Wage Payments; (3) Notification to Workers of Wage Conditions; (4) Wage Statement and Payroll record; and (5) Association of Workers in the Administration of Works Stores.

Another aspect of living wage that the major documents mentioned above also concern is the issue of equality, especially in case of women. The principle of equal pay for work of equal value urges State to take actions to close the wage gap between different groups of people, with special attention to women as in the ILO Convention no.100 on Equal Remuneration.⁸⁰ This principle is closely related to the right of everyone to a living wage because for living wage being understood relatively as a family wage, it is urgent to call for the abolishment of the traditional “male breadwinner” role and acknowledge the fact women are by no means being the minor workforce of a country.

Wage protection is an essential part of the national development plan which needs to be properly included within State legislation. For the human rights objectives of States under international law to be fulfilled, the responsibilities under all of the conventions that State has ratified must be collectively accomplished instead of achieving individually. Under the international law, besides the primary goal as to ensure decent living standard, the state should provide a guideline for wages in which minimum wage should be interpreted not as a level that employers should aim for but it is a standard of remuneration to start with. So that the living wage would not be confused with minimum wage. Furthermore, a mechanism for protecting wages is needed.

3.2.1. Other obligations affecting wages.

Relating to the right to a living wage, there are other obligations that arise from other international conventions concerning State’s protection. These obligations, although not particularly about wages, have significant impacts on wage issues.

Firstly, it is argued to be an element which constitute to a living wage in the previous analysis, equal pay for work of equal value is a part of the right to not be discriminated which has influence on many other problems as well. Hence, by taking effort in

⁷⁸ Ibid., Art. 8,9

⁷⁹ ILO, *Protection of Wages Recommendation No. 85 (C085)*, Recommendation concerning the Protection of Wages, 32nd ILC session, Geneva, 01 Jul 1949

⁸⁰ ILO C100, see *supra* note 38.

eliminating discrimination in general, States has indirectly strengthened the foundation to promoting the right to an equal living wage for everyone.

State obligation to combat discrimination has been regulated in a large number of international legal instruments. Besides all of the instruments which were mentioned in the previous part of the Chapter, the elimination of discrimination has been regulated and agreed upon in the UN International Convention on the Elimination of All Forms of Racial Discrimination (CERD) and specifically on gender discrimination in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Both of the two conventions prohibited discrimination on unequal remuneration based on the ground of race, colour, or national or ethnic origin in CERD⁸¹ and of gender in CEDAW.⁸² Additionally, the ILO fundamental Convention no.111, which is widely ratified, also requires State Parties to adopt a national policy combatting discrimination on the grounds similar to that in CERD and CEDAW which “*has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation*”.⁸³

Secondly, living wage also has benefit in regard to the protection of children. According to the Article 18(1) of the Convention on the Rights of the Child: “*States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern*”.⁸⁴ The Convention affirmed that the responsibilities to take care of the child fall evenly to both parents and the role of the parents is critical in the well-being and development of children. This means that the parents are not only the source of affection and care for healthy mental development but also the main source of economic, materials dependence for the child.⁸⁵

Even though, the matter on how the child would be raised is arguably belonging to the family integrity issue which was argued that such issue is only the best well-protected when there is no interference from the State, the State should have obligation to provide assistance for the families who are willing to do the best for their child but economically unable.⁸⁶ Such assistance could come from a better labour regulation for the parents, in

⁸¹ *The International Convention on the Elimination of All Forms of Racial Discrimination*, UNGA Res.2106 (XX), 1965, Art.5(i)

⁸² *The Convention on the Elimination of All Forms of Discrimination against Women*, UNGA Res.34/180, 1979, Art.11(1)(d)

⁸³ ILO, *Discrimination (Employment and Occupation) Convention no.111*, Convention concerning discrimination in Respect of Employment and Occupation, 42nd ILC session, Geneva, Entry into force 15 Jun 1960, Art.1, Art.3

⁸⁴ *Convention on the Rights of the Child*, UNGA Res.44/25, 1989, Art.18(1)

⁸⁵ Duncan Linsey, “*The Welfare of Children*”, Oxford University Press, 1994, p.322

⁸⁶ Kay P. Kindred, “*God blesses the Child: Poor Children, Parens Patriae, and a State Obligation to Provide Assistance*”, Ohio State Law Journal 57, p.519-542. (p.520-521)

this regard, one could argue that a better wage that support the whole family as a living wage would be of the best interest.⁸⁷ Also, there should be no distinction between the wages for the husband or wife since the obligations are equally divided between them.

Thirdly, State also has the obligation to protect workers from forced labour. According to the Forced Labour Convention no.029, the term “force or compulsory labour” is generated from two criteria (1) the menace of penalty; and (2) against worker’s will.⁸⁸ The criteria of “*penalty*” is said to include “*psychological abuse*” in order to put workers to the situation when they cannot leave.⁸⁹ In reality, due to deception and fraud, workers take up the job and cannot leave due to the fear of repercussion is said to be common. One of the issue entailed with these kind of job is the condition of work, including low wages.⁹⁰ Consequently, pushing workers into working with unduly low wages could constitute to forced labour. Hence, State also has obligation to abolish forced labour which can serve to protect workers’ wages and indirectly support a living wage.

Lastly, the right to a living wage might possibly be one of the results from an effective and protected exercise of the right to collective bargaining or the right to form and join trade unions. Needless to say, the freedom of association has been considered as fundamental human rights and labour rights. It can be found in many international legal instruments such as UDHR Article 20, ICCPR Article 22, ILO core Convention no.87 on Freedom of Association and Protection of the Right to Organise Convention and Convention no.98 on Right to Organise and Collective Bargaining Convention.

The effective protection of right to association and right to collective bargaining would grant the opportunity for workers to have better voice on various issues including wage standards. Workers, by exercising their right to be represented and negotiate on the sensitive matter closely to their live, would be able to speak up without fear of being punished by the employers. The sign of living wage not just being an emerging demand but coming into national labour practice could possibly be one of the indicator for the health practice of right to collective bargaining and freedom of association.

Allowing the freedom of forming trade union, the State places the responsibility to protect wages partly into trade unions’ hands while keeping the role in supervision. Through legal negotiation and collective bargaining, the standard of wages, though results from agreement, is protected by the law. In the situation when there is no organization or trade union which would represent workers in negotiating wages through collective bargaining,

⁸⁷ C. K. Shukla, S. Ali, “*Child Labour: Socio-economic Dimensions*”, Sarup & Sons, New Delhi, 2006, p.179

⁸⁸ ILO, “*Forced Labour Convention no.029*” (C029), Convention concerning Forced or Compulsory Labour, 14th ILC session, Geneva, 28 Jun 1930, Entry into force on 01 May 1932, Art.2(1)

⁸⁹ Patrick Belser, “*Forced Labour and Human Trafficking: Estimating the Profits*”, Special Action Programme to Combat Forced Labour, International Labour Office, Geneva, March 2005, p.2; and The report of Director-General, see *supra* note 42

⁹⁰ Klara Skrivankova, “*Between decent work and forced labour: examining the continuum of exploitation*”, Joseph Rowntree Foundation, UK, November 2010, p.7

the responsibility to provide a minimum level of wages or any other wage standards, if there are alternative type which is better in ensuring workers a better life, should be taken upon by the Government.

Chapter 4. Living wage in Business and Human rights

4.1. Living wage and Business relation.

4.1.1. Corporate Social Responsibility (CSR)

To understand the concept of CSR and the role of CSR within the international law systems, it is important to come back to the definition of “soft” law and the status and significance role of soft law in international law.

International soft law is often referred to a set of norms that have no legal binding status but hold legal aspect within itself. Soft law is described as “*international norms that are deliberately non-binding in character but still have legal relevance, located “in the twilight between law and politics.”*”⁹¹ This was further demonstrated as a shift in the meaning of “law” from its original understanding and meaning due to the adaptation to the new world politics and international relation. Soft law provision generally has no enforcement clause and depends mostly on the intention of the States or the Parties who are members to the instrument.⁹² Hence, soft law can be understood as a collection of norms, codes that are agreed upon as a result of a national or international relationship. The document is not expressed the wills to be bond legally, but it reflects a certain level of compromise nonetheless.

Not only are the rules, which are accepted in soft law, often vague and ambiguous, but also are the concept of soft law itself. Many scholars, thus, has been arguing about soft law being divided into two phenomenon: (1) the set of norms which appear not in the form of instrument which is recognized by international law; (2) the set of norms which was laid down in the more recognisable international legal documents, but nonetheless unenforceable.⁹³ This discussion on its definition often introduces soft law as a complex concept and, therefore, shall not be discussed in depth. The type of soft law, which shall be discussed in regard to CSR shall be portrayed with the distinctive features as having the qualities of “*generality, vague normative content or subjective nature*”⁹⁴ and with non-binding legal status.

Despite having doubt on the actual purpose of putting the “soft” element on soft law and the observation that Soft law falls short in rank within the hierarchy of international legal

⁹¹ Jon Birger Skjærseth, Olav Schram Stokke and Jørgen Wettestad, “*Soft Law, Hard Law, and Effective Implementation of International Environmental Norms*”, the Massachusetts Institute of Technology, Global Environmental Politics 6:3, August 2006, p.104-119. Also in Thürer, Daniel, “*Soft Law*”, R. Bernhardt (Ed.) In “*Encyclopedia of Public International Law 4*”, Elsevier, Amsterdam, p.452–460.

⁹² Wade Mansell and Karen Openshaw, “*International Law – A Critical Introduction*”, Hart Publishing, United Kingdom, 2013, p.26

⁹³ La’ Szlo’ Blutman, “*In The Trap Of A Legal Metaphor: International Soft Law*”, International and Comparative Law Quarterly 59, July 2010, p. 605–624

⁹⁴ Ibid.

order, it is a mutual agreement that soft law carries within itself a very important message. The most common example to illustrate the importance of soft law is the UDHR. Being the non-legally-binding instrument, the UDHR is the corner-stone for the adoption of the two legal binding covenants, ICESCR and the *International Covenant on Civil and Political Rights* (ICCPR), which are two pillars of International Human Rights Law. Furthermore, the Declaration have been referred to in many occasions as a proof of compromise and consensus.⁹⁵ Hence, the ambiguous norms in soft law can be used as foundation for hard law and potentially serves as materials in case of adopting hard law concerning that particular issue. Therefore, the adoption of soft law is not for the sole purpose of being an inspirational goal.⁹⁶

Since the time of creation, CSR has been called with different names, such as “Corporate Responsibility” or “Corporate sustainability” which highlighted the focal issue that Corporate should pay attention to. However, the purpose of CSR concept remained. The possible impacts to the labour market, to the environment as well as to the general living standards, caused by the Corporate, have given rise to the issue of CSR. And this emergence has sparked the debate on whether it is necessary for Companies to take on such responsibilities and the impacts, positive or negative, these obligations have on the Companies’ operation.⁹⁷

Generally, there is not yet a clear consensus on the definition of the term CSR. The discussion regarding CSR problems often arise and surround many the questions concerning the business activities, code of conducts and policies, for instance, what Corporate’s contributions to the society are and how their business activities affect different stakeholders and the environment in the particular area. The effects of CSR have always received a large amount of attentions.

CSR embraces the recognition of Corporate Responsibilities toward their workers, the society and other aspects which are affected by Companies’ activities. One example for such recognition is the Draft of ISO 26000:

[Corporate Responsibility is the] responsibility of an organization for the impacts of its decisions and activities on society and the environment, through transparent and ethical behaviour that (a) contributes to sustainable development, health and the welfare of the society; (b) takes into account the expectations of stakeholder; (c) is in compliance with

⁹⁵ Wade Mansell and Karen Openshaw, see *supra* note 91

⁹⁶ Jon Birger Skjærseth, Olav Schram Stokke and Jørgen Wettestad, see *supra* note 90.

For further intensive analysis on the issue of the relationship between hard law and soft law, see also: Abbott, Kenneth W., and Duncan Snidal, “*Hard and Soft Law in International Governance*”, International Organization 54, 2000, p.421–456; Sand, Peter H., “*Lessons Learned in Global Environmental Governance*”, Environmental Affairs Law Review 18, 1991, p.213–277 and Young, Oran R., “*The Politics of Regime Formation*”, International Organization 43, 1989, p.349–376.

⁹⁷ Michael Blowfield and Alan Murray, “*Corporate Social Responsibility*”, Oxford University Press, Second Edition, 2011, p.7

applicable law and consistent with international norms of behaviour; and (d) is integrated through the organization and practiced in its relationships⁹⁸

The ILO has provided a definition for CSR, which read as follow:⁹⁹

Corporate Social Responsibility (CSR) is a way in which enterprises give consideration to the impact of their operations on society and affirm their principles and values both in their own internal methods and processes and in their interaction with other actors. CSR is a voluntary, enterprise-driven initiative and refers to activities that are considered to exceed compliance with the law.

The definition describes CSR as activities and initiative, in which Corporate recognises and take into account the impacts its business operations has on society, particularly on human rights. CSR is voluntary action, thus, it is non-binding. It reflects the obligation to “respect” as “*CSR cannot substitute for the role of government*”¹⁰⁰ and Companies’ operations “*are considered to exceed compliance with the law*”.

The emergence of CSR is the most practical example for the growing demand for Corporate to pay more retribution to the society and people it affects. Nowadays, it is not possible for a Company to totally ignore its social responsibilities. One of the prominent observation on that matter was made by Eberstadt as she stated:

Indeed, business might never have turned back toward responsibility and accountability if the culmination of corporate irresponsibility had not been the collapse of the economic system¹⁰¹

The scope of soft law is extensively large. It is difficult to identify exactly on what makes a document a part of soft law regime.¹⁰² This thesis argues that the international instruments designed as guidelines for Corporate to undertake actions to prevent negative impacts from its business operation to human rights (hereinafter: CSR instruments) constitutes “soft law”. Taking on only the fact that soft law reflects the consensus of stakeholders on an issue in a form of non-binding instrument which includes legal aspect,

⁹⁸ Draft of ISO 26000, *International Guidance Standard on Social Responsibility*, 4 September 2009; also cited in Michael Blowfield and Alan Murray, “*Corporate Social Responsibility*”, Oxford University Press, Second Edition, 2011, p.8

⁹⁹ Subcommittee on Multinational Enterprises, “*InFocus Initiative on Corporate Social Responsibility (CSR)*”, GB.295/MNE/2/1, 295th Session, March 2006, Para 1, [Accessed May, 2016] available at: http://www.ilo.org/public/libdoc/ilo/GB/295/GB.295_MNE_2_1_engl.pdf

¹⁰⁰ Ibid. Para 2.

¹⁰¹ Nicholas N. Eberstadt, “*What History Tells Us About Corporate Responsibilities*”, *Business and Society Review/Innovation*, 1973, p.76-81; also cited in Archie B. Carroll, “*A History of Corporate Social Responsibility: Concepts and Practices*”, Andrew Crane, Abigail McWilliams, Dirk Matten, Jeremy Moon and Donalds. Siegel (Ed.) in “*The Oxford Handbook of Corporate Social Responsibility*”, Oxford University Press, 2008, p.19-46.

¹⁰² Youseph Farah, “*Toward a Multi-Directional Approach to Corporate Accountability*”, Sabine Michalowski (Ed.) in “*Corporate Accountability in the Context of Transitional Justice*”, Routledge, New York, 2013, Chapter 2.

one can argue that CSR instruments indeed belongs to a branch of soft law, particularly, the branch which regulate upon global economic governance.

Since CSR instruments are inherently a part of soft law, they also bear all of soft law's importance. CSR instruments reflect a growing trend of commitment of Businesses toward building a better society. Even though, the obligations in these instruments are based on voluntary actions, they can potentially become an accepted norm which should be taken into account when adopting hard law instrument. There are evidences revealing that the relationship between CSR instruments as a part of soft law and hard law strengthening each other's norms and regulations, rather than undermining the legitimacy of national and international legal order.¹⁰³ It is noteworthy that CSR and the principles embedded in CSR instruments are a part of the maintaining and protecting human rights effort.¹⁰⁴ By creating a system with the cooperation between State and Corporate, CSR and its guiding instruments can contribute to a more effective protection of human rights and labour standards. However, it is important not to take CSR as the primary principle protecting human rights because of its voluntary and non-binding nature.

The importance of CSR and CSR instruments are not only lied in it being preparatory material and enhancing hard law. In the 1950s, when the concept first appeared, CSR is the response to the societal pressure from the Corporate. It was created at the time when the Governments failed to address social needs and fix loopholes in their legal systems in order to scope with globalisation.¹⁰⁵ The movement was marked as “*beyond compliance*”¹⁰⁶ and “*beyond charity*”¹⁰⁷ which defined its own nature as a type of responsibility not an unfinished inspirational promise and urged Corporate to take actions to integrate CSR into their business activities. Furthermore, accepting CSR puts Companies in the situation where they have made a promise of commitment, the consequence of breaching CSR should not be taken lightly.

On the issue of living wage, there are numbers of key instruments which touch upon CSR in the aspect of labour. These key documents are MNE Declaration, ILO Declaration on Fundamental Principles and Rights at Work, ILO Declaration on Social Justice for a Fair Globalization, the Principles Global Compact, the UN Guiding Principle on Business and

¹⁰³ Abbott, Kenneth W., and Duncan Snidal, ‘*Hard and Soft Law in International Governance*’, International Organization 54, 2000, p.421–456; Virginia Haufler, “*A Public Role for the Private Sector: Industry Self-Regulation in a Global Economy*”, Carnegie Endowment for International Peace, Washington, 2001

¹⁰⁴ “*Corporate Social Responsibility & Human Rights*”, Australian Human Rights Commission, 2008 [Accessed on May 2016] available at: <https://www.humanrights.gov.au/publications/corporate-social-responsibility-human-rights>

¹⁰⁵ Maria Gjølborg, “*Explaining Regulatory Preferences: CSR, Soft Law, or Hard Law? Insights from a Survey of Nordic Pioneers in CSR*”, Business and Politics 13, Issue 2 Article 4, 2011, p.3.

¹⁰⁶ World Business Council for Sustainable Development (WBCSD), “*The Business Case for Sustainable Development: Making a Difference Towards the Johannesburg Summit 2002 and Beyond*”, Geneva, 2002

¹⁰⁷ Michael E. Porter and Mark Kramer, “*Strategy and Society: The Link Between Competitive Advantage and Corporate Social Responsibility*”, Harvard Business Review, vol.84, p.78–92

Human Rights and the OECD Guidelines for multinational enterprises. These instruments create a unified reference systems directing international guiding principles on CSR. Perhaps, the mutual aim of the system was brought forth by the MNE Declaration and reiterated by the OECD Guidelines for multinational enterprises as to “*encourage the positive contribution which multinational enterprises can make to economic and social progress and to minimize and resolve the difficulties to which their various operations may give rise*”.¹⁰⁸

4.1.2. Living wage and the CSR.

Is Wage protection and Living wage a part of CSR and its instruments?

While the purpose of CSR is to reflect on what Companies should do and be able to do to contribute to the society, its components regarding wage protection have not been laid out very clearly in international guideline on CSR. Although, it is rather clear that, by acting “*in harmony with the development priorities and social aims*”¹⁰⁹ of the Country where the Business is operating in, CSR should embark on the same goal that Countries are pursuing, particularly the goal on combatting poverty and providing everyone a decent living standard.¹¹⁰ One measure to provide better living standards for workers is to pay them a decent wage. Also, wage policy is the closest thing at hand that Corporate can directly regulate in its own policy. Hence, providing its workers a wage satisfying their subsistent needs is the business responsibility.

However, the current CSR is highly depended on the voluntary basis which comes from the Companies themselves. As the result, one of the issue arose from such loose regulation is that CSR is only widely accepted if it is beneficial to both stakeholders, a win-win situation. As mentioned in the Chapter 2, many reports have been done on the relationship between wages and productivity, particularly on living wage and its impacts on businesses. Raising wages does not hinder the companies’ profit, on the contrary, it evidently gives a boost in productivity and, therefore, benefiting the employers. Thus, a better wage policy could be one of issue that Company should take into account as its primary social responsibility along with occupational safety and health and working hours.

To conclude, one could argue that wage protection is indeed fallen under CSR and the urge to adopt a decent wage regulation is crucial for not only workers and their family

¹⁰⁸ ILO, *Tripartite Declaration Of Principles Concerning Multinational Enterprises And Social Policy*, adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva, November 1977) as amended at its 279th (November 2000) and 295th Session (March 2006), para 2; and OECD, *OECD Guidelines for Multinational Enterprises*, OECD Publishing, 2011, “*Considering*” <http://dx.doi.org/10.1787/9789264115415-en>

¹⁰⁹ Ibid., (MNE Declaration), para.10

¹¹⁰ These goals can be extracted from the majority of Human Rights Declarations and Conventions, i.e the UDHR Preamble, the ICESCR Art.7, the ILO Constitutions...

but also for the sake of the employers. The responsibility to protect and ensure an adequate wage standard that will provide workers' and their family' basic subsistent needs, in practice, lies in Corporate's operational policy. Corporate should not just count it as a voluntary obligation, it is crucial and it is beyond compliance and charity.

Due to the importance of wage issue within CSR, it is necessary to examine the global framework in order to find out to what extent international guiding principles offer its guidance on wages. To elaborate on the contribution of CSR on the matter of wages, particularly on living wage. It is appropriate to look at three most well-known source of international CSR regulations: the UN Guiding Principles on Business, the Ruggie Principles of respect, protect and remedy; the MNE Declaration from the ILO; and the *Organisation for Economic Cooperation and Development (OECD) Guideline*.

The UN Guiding Principles on Business and Human Rights, the so-called Ruggie principles, is a good starting point for the examination of global CSR. It is not the first international document addressing the relationship between business and human rights and the obligations prevailing from such relation. Though, it offers a coverage over State obligations and Businesses' Obligations to respect and protect Human Rights.

Generally, the Ruggie principles covers the relationship between States and Businesses with holistic approach. It contains many requirements for States to adopt national legislations which give guidance and assist national and multi-national corporate on the issue of businesses' impacts on human rights. For the purpose of this thesis and this Chapter, which concentrates on Business and Rights to living wage, the provisions or requirements regarding the right to adequate wages from both side will be examined in order to draw out whether Ruggie principles offers support to the right to a living wage.

The foundational Ruggie principles reads as follow:¹¹¹

- (a) States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms;
- (b) The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights;
- (c) The need for rights and obligations to be matched to appropriate and effective remedies when breached.

The Ruggie principles require the provisions above to be read as a whole and individually. This means that not only each stakeholder has its own obligations and requirements and

¹¹¹ UN, "*Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*", 2011, The Human Rights Council endorsed the Guiding Principles in its resolution 17/4 of 16 June 2011

these obligations must be in line with other stakeholders' practice and enforcement according to the purpose of the principles.

First of all, on State obligations, although they promote the joint effort between States and Businesses, the Ruggie principles placed the heaviest burden on State. The operational principles entailed from the foundational principle of "protect" consist of ¹¹² "(a) striving to achieve greater policy coherence and effectiveness across departments working with business, including safeguarding the state's own ability to protect rights when entering into economic agreements;¹¹³ (b) promoting respect for human rights when states do business with business, whether as owners, investors, insurers, procurers or simply promoters;¹¹⁴ (c) fostering corporate cultures respectful of human rights at home and abroad;¹¹⁵ (d) devising innovative policies to guide companies operating in conflict-affected areas;¹¹⁶ and (e) examining the cross-cutting issue of extraterritoriality"¹¹⁷

The duty of States is to protect human rights and to prevent potential harmful infringement to human rights by business due to legal gaps. The requirements are rather broad and ambiguous, but nevertheless require States to adopt and strengthen national legal order. Fulfilling the responsibilities set out in the principles, States are required to provide legal platform to protect its populations' human rights from negative impacts of business activities or potential harmfulness activities. Besides, "access to remedy" principle also place heavier burden on State as the main provider of protection.

On the Business side, Ruggie principles was designed to call out for Corporate to embrace on "respecting human rights" as their policy. Based on the legal and guiding foundation which provided by States, Corporate's duty is to not breach national law. This duty was portrayed more in the sense of "negative obligations" to not act against rather than actively involved in the protection of human rights. The foundational principles regarding Business's respect for Human Rights contain mostly the responsible to refrain from the infringement of national law on Human Rights (principle 11) as well as the recognition of Corporate's ability to pose influence over international law, thus, should respect all international human rights (principle 12). There are only few principles which pay attention to actual activities that Corporate should do in order to fulfil its obligation under Ruggie principles. Those principles are:¹¹⁸

¹¹² "The UN "Protect, Respect and Remedy" Framework for Business and Human Rights", Briefing, September 2010, available at:

<http://business-humanrights.org/en/un-secretary-generals-special-representative-on-business-human-rights/un-protect-respect-and-remedy-framework-and-guiding-principles>

¹¹³ The UN guiding principle on Business and Human Right, see *supra* note 111, Principle 8, 9, 10

¹¹⁴ *Ibid.*, Principle 3, 4, 5, 6

¹¹⁵ *Ibid.*, Principle 5

¹¹⁶ *Ibid.*, Principle 7

¹¹⁷ *Ibid.*, Principle 1, 2

¹¹⁸ *Ibid.*

13. The responsibility to respect human rights requires that business enterprises:

(b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.

As well as (emphasis added):

15. In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:

(b) A human rights *due diligence* process to identify, prevent, mitigate and account for how they address their impacts on human rights;

According to the UN guiding principles, the important feature in Corporate duty to respect Human Rights is its due diligence elements. By acting with due diligence, Businesses are required to “*identify, prevent and mitigate*” the negative impacts on human rights arising from their activities. The Human Rights included are those which is internationally recognised with a minimum preference to “*those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.*”¹¹⁹

The ILO Declaration on Fundamental Principles and Rights at Work focused on 4 main components: (1) Freedom of association and rights to collective bargaining; (2) abolishment of force and compulsory labour; (3) the elimination of Child Labour; and (4) non-discrimination.¹²⁰ As analysed in Chapter 3, all of these principles and rights are, to some certain extent, either promote and protect the right to just and favourable wages or be improved and protected.¹²¹ Additionally, the International Bill of Human Rights consists of The UDHR, ICCPR and ICESCR¹²². As mentioned in the previous analysis, the right to a living wage is recognised under UDHR and ICESCR as a part of the right to work and protection of human dignity. Hence, by upholding the recognised rights in the International Bill of Human Rights, Corporate has the obligation to ensure a decent wage for its workers and their family. It is important to keep in mind the importance of this reference to these two instruments. Because it not only reflects the source of interpretation for obligations under international law, but also be the demand to strengthen the cooperation of supervising bodies in international legal system.

¹¹⁹ Ibid. Principle 12

¹²⁰ ILO Declaration on Fundamental Principles and Rights at Work, see *supra* note 39.

¹²¹ Patrick Belser, see *supra* note 89, p. 14 and see also Report of Director-General, see *supra* note 42.

¹²² UN, *The International Bill of Human Rights*, Fact Sheet No.2 (Rev.1), Geneva, June 1996

The responsibility to respect the right to an adequate wage generally can be deducted from the principles. However, the principles themselves are quite broad. Thus, it is difficult to clearly identify their supports for any better wage rights other than the wage regulation which countries have. The Ruggie principles only addressed the duty of State to protect Human Rights, which include right to adequate wage, and call out to Corporate to respect and act accordingly to such national legal framework. However, to exercising the negative obligations to respect Human Rights, Corporate would have to have a well-managed operating systems with proper assessment of their impacts for the potential risks not only to themselves but also their concerned Stakeholders.¹²³

The responsibility to act upon their respect for Human Rights, particularly in the case of their own workers, has been more on the Corporate's side in the MNE Declaration. The MNE Declaration is issued to be a guideline for State and multi-national enterprise. Its purpose is to encourage multi-national enterprises on what they can do in order to positively contribute to the concerned area in which their business operation will affect as well as the fundamental labour rights and human rights of their workers.¹²⁴

The MNE Declaration urges States to adopt national legislation in order to provide protection for workers and guidance to Businesses within their territory. The Declaration recognised the demand for efficient hard law to protect workers' rights in the road to progressive economic and social development. In its Preamble, the MNE Declaration established its own role to "*be commended to the governments, the employers' and workers' organizations of home and host countries and to the multinational enterprises themselves*".¹²⁵ The Declaration, thus, has no legal-binding effect on any of the Stakeholders but being the international guidance for Labour protection.

There are numerous requirements for multi-national enterprises to follow in the Declaration. Therein, wage protection is divided into general principle and specific requirement for developing countries (emphasis added):¹²⁶

33. Wages, benefits and conditions of work offered by multinational enterprises should be *not less favourable* to the workers than those offered by comparable employers in the country concerned.

34. When multinational enterprises operate in developing countries, where comparable employers may not exist, they should provide the *best possible wages*, benefits and conditions of work, within the framework of government policies. These should be related to the economic position of the enterprise, *but should be at least adequate to satisfy basic needs of the workers and their families. Where they provide workers with*

¹²³ UN Guiding Principles, see *supra* note 111, Principle 3,4,5,6

¹²⁴ ILO MNE Declaration, see *supra* note 108, Preamble para.2

¹²⁵ *Ibid.*, para 3

¹²⁶ *Ibid.*

basic amenities such as housing, medical care or food, these amenities should be of a good standard.

Wage protection, similar to the Ruggie Principles, is the combination of Country's and Business's effort, though, in MNE Declaration, the principles are clearer as it requires Business to consider a wage offer which is "*no less favourable*" than the national law and practice or "*best possible wage*". These principles offer the opportunity to provide better wages than the condition of wages in the country concerned.¹²⁷ With special regard to the developing countries where there is no comparable employers, the Declaration requires an assessment into the elements concerning the basic needs of workers and their family in order to provide a wage that satisfies such needs.¹²⁸

The component of living wage can be found within the principles of the MNE Declaration, even though, the Declaration only require Corporate to act upon its best effort. In the MNE guideline for employers provided by the International Labour Office of Employer, the requirement of "*best possible wage*" was interpreted included the economic condition of the Company.¹²⁹ This means the Declaration has been flexible so that it maintains the aspect of encouragement for Business, an entity which is not subjected to international law, in order to further extent and strengthen the cooperation of Business in the course of protecting human rights.

It is noteworthy that the text of the Declaration, though, seem to protect the right to a minimum wage with the consideration to Companies' economic capacity, it recommends Corporate to provide workers and their family at the minimum rate of a living wage. Moreover, in the light of the Declaration, the criterion of "*best possible wage*" is required a payment level which, at the minimum, is sufficient to sustain workers' and their family's basic living standards. Hence, wage protection in MNE Declaration might have given the implication for a living wage rather than just a minimum wage.

However, it is noticeable that the MNE Declaration itself does not mention minimum wage convention. Even though, the Declaration has urged State to ratify many other conventions,¹³⁰ the Convention no. 131 on Minimum wage fixing is nowhere to be found

¹²⁷ Roger Blanpain, Michele Colucci, "*The Globalization of Labour Standards: The Soft Law Track*", published by The Kluwer Law International, 2004, p.54

¹²⁸ ILO MNE Declaration, see *supra* note 108.

¹²⁹ "*Tripartite Declaration Of Principles Concerning Multinational Enterprises And Social Policy An Employers' Guide*", International Labour Organisation of Employer, 2004, Part.VII(4)(a)

¹³⁰ MNE Declaration, see *supra* note 108: The General policy of the MNE no.9 is read as follow (noted that the C.131 was left out in the urge for State to ratify a number of other Conventions):

9. Governments of States which have not yet ratified Conventions Nos. 29, 87, 98, 100, 105, 111, 1 22, 138 and 182 are urged to do so and in any event to apply, to the greatest extent possible, through their national policies, the principles embodied therein and in Recommendations Nos. 35, 90, 111, 119, 122, 146, 169, 189 and 190. 1 Without prejudice to the obligation of governments to ensure compliance with Conventions they have ratified, in countries in which the Conventions and Recommendations cited in this paragraph are not complied with, all parties should refer to them for guidance in their social policy

within the text of the MNE. This fact is rather unsettling on why State obligation on decent wage regulation starting from a minimum wage was not mentioned, while the ILO is progressively promoting minimum wage as one of its important agenda. As the result, the requirement from the MNE to the State on wage issue is somehow lagging behind.

Even though, this finding remains to be a loophole in the MNE, there are many finding on the positive effect of MNE on minimum wage. In the one 2009 survey on the implementation of the MNE Declaration in Ghana, minimum wage level within the MNEs is found to be generally higher than the national minimum wage in many area, including mining industry, agriculture and manufacture.¹³¹ Another example for the inclination in raising minimum wage reflected many amendments or new legislation on minimum wage in Cuba, Brazil and New Zealand.¹³² Still, it is noteworthy that the missing of minimum wage legislation in the MNE might be an important point since the requirement for State to provide guidance and legal foundation, particularly in this case: wage protection, is a central point in the MNE.

The last soft law instrument on CSR which will be discussed in this thesis is considered to possess stronger enforcement than the other two, it is the OECD Guideline for Multi-national enterprises, the 2011 revision. Similar to the rest of its relative soft law instruments, the OECD Guideline offers non-binding principles and standards for multi-national enterprises in the era of globalisation to operate in line with national and international standards. The guideline also recognised the UN “*Respect, Protect and Remedy*” Framework and the MNE Declaration, along with other ILO labour standards.¹³³ This created a network of CSR instruments which possibly be used to implement each other.

However, the OECD Guideline has its major differences in comparison to other two instruments. Firstly, the OECD Guideline was created as a multilateral agreement between States who have given consent to positively act upon the principles and standards. The guideline is the recommendations addressed by adherent States toward multi-national enterprises who operate within the territory in order to bring out the positive contribution of Businesses to “*economic, environmental and social progress worldwide*”.¹³⁴ By declaring the connection to the Guideline, State commits itself to the implementation of the principles and standards laid down in the instruments. Hence, it is binding on adherent States.

¹³¹ Samuel Sarpong and Ishaque Kwabena Otoo, “*Survey On The Implementation Of The MNE Declaration In Ghana*”, Ministry Of Employment And Social Welfare In Collaboration With Ghana Employers’ Association And Ghana Trades Union Congress, Survey funded by the ILO, June 2009, p.11

¹³² Subcommittee on Multinational Enterprises, “*Follow-up on and promotion of the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*”, International Labour Office – Governing Body, GB.294/MNE/1/2, 294th Session, Geneva, November 2005

¹³³ OECD, *OECD Guidelines for Multinational Enterprises*, OECD Publishing, 2011.

¹³⁴ Ibid. Foreword

Secondly, the implementation of the Guideline is supported by a mechanism called “*National Contact Points*” (NCPs). This mechanism is established by the adherent States themselves in order to assist Multi-national enterprises and their Stakeholders for a better implementation of the Guideline.¹³⁵ This means by declaring to be adherent State, the country has committed itself to the obligation of promoting Labour rights and Human Rights as well as actively taking action to encourage Businesses complying with the Guideline. The NCPs also act as mediator and providing complaint mechanism as part of its operation. It could be said that the OECD Guideline, generally, imposes stronger implementation on its target, the State and the Business.

Thirdly, OECD Guideline has agreed on the establishment of investment committee. It is in charge of the development of the Guideline’s coverage. Periodically, the Committee holds a hearing to exchange opinions on the issue covered by the Guideline. The Committee welcomes the participation of other Stakeholders, including civil society and trade unions. This feature makes the Guideline itself become a living instrument with good adaptation to the rapid changing world.¹³⁶

Wage protection under the OECD Guideline has some similarities with that under the MNE Declaration. The OECD adherent countries urged Corporate to:¹³⁷

- a) Observe standards of employment and industrial relations not less favourable than those observed by comparable employers in the host country.
- b) When multinational enterprises operate in developing countries, where comparable employers may not exist, provide the best possible wages, benefits and conditions of work, within the framework of government policies. These should be related to the economic position of the enterprise, but should be at least adequate to satisfy the basic needs of the workers and their families.

The wording of the principle used “observation” to address Corporate’s responsibility regarding wages. This could be understood as to thoroughly study the national labour regulation and practice. From that point, multi-national enterprise should compare as well as comply with the existing practice in the host country in accordance with the principle of “no less favourable”. In the Commentary to the Chapter V on employment, the Guideline reiterated that the Guideline being non-binding concentrates on addressing the expected behaviour of Businesses parallel to the MNE Declaration from the ILO. It further explained the relationship between the OECD Guideline and the MNE Declaration

¹³⁵ Ibid.

¹³⁶ Ibid., Part IIA(14) and the Amendment of the Decision of the Council on the OECD Guidelines for Multinational Enterprises, Part.II, para.1-3. see also OECD, “*Responsible Business Conduct Matters*”, OECD Publishing, 2014

¹³⁷ OECD Guideline, see *supra* note 133, Part.V(4)(a) and (b).

as a complementation to each other, the MNE Declaration focuses more on laying out the principles and the Guideline further concentrates on Corporate's behaviour.¹³⁸

Therefore, it is appropriate to interpret the Guideline's wage principles in the light of that in the MNE Declaration. In the previous analysis, the supportive aspect of the principles toward living wage has been analysed. The similarity of wording reflects the mutual intention of the two instruments for a fair wage that would be sufficient for not only workers but also their family.

Also, the Guideline also seek out to Corporate's responsibility to combat and eliminate Child Labour. Arguing that, in this particular issue, the active role of Business is crucial, thus, encouraging Corporate to tackle the root cause of the issue. One of the measures, which can be taken, is closely link to the concept of living wage, it is to pay the workers more sufficient wages that could possibly cover basic living standard for their family so that the children would not be forced into labour and would have better opportunity to get their education.

Furthermore, on the protection against wage inequality and the right to collective bargaining, all three instruments have clear call for closing the inequality gaps and for promoting workers' right to collective bargaining. According to UN Guiding Principle 12, MNE Declaration "*Equality of opportunity and treatment*" Clause and OECD Guideline paragraph 1(e), the criteria for equality cover not only between men and women but also in the ground of race, nationality, politic and opinions. The demand for equality was urged by the instruments as both State's and Business' responsibility to strengthen up national policy and operational code of conduct in order to erase the gaps generally in employment and particularly in wages.

The three instruments also affirmed workers' right to collective bargaining. The right to form and join trade union was referred back to the ILO Declaration on Fundamental Principles and Rights at Work. Again, the Right to collective bargaining and right to be represented is requested to be multiple Stakeholders' responsibility, it is the responsibility of State to ensure or accept the right to freedom of association and protect such rights by national law. Corporate has the obligation to recognise the right to join trade unions or workers' organisation and exercise their right to collective bargaining, voluntary negotiation. The right to collective bargaining is fundamental right for workers to secure an efficient benefit as well as protection, this right is in the Principle 12 of the UN Guiding Principles, "Collective Bargaining" Clause of the MNE Declaration and Part.V.1(b) of the OECD Guideline.

On the business side of living wage, generally, there are principles signified the supportive intentions for the right to living wage. Solely addressing the Corporate, the

¹³⁸ OECD, "*Responsible Business Conduct Matters*", OECD Publishing 2014, Para.48

CSR instruments encourage Companies to take into their consideration an adequate wage which includes basic needs, starting from the core components: housing, food and health care, of workers' family as a whole not just the individual employee. However, it could not be stressed enough that, for the CSR instruments to be effectively implemented, a firm foundation from National wage regulations and enforcement, in compliance with recognised international human rights and labour rights, are highly needed. Yet, on the issue of living wage, the international labour standards on wages mostly concern minimum wage fixing machinery with reference to the goal of a decent, equal and fair living wage for workers and their family. Hence the effect of CSR guiding instruments can vary depends on Business' compliance, envision and business's sense in order to provide workers higher wages than national minimum wages.

4.2. Living wage movement and Business.

This part dedicates to the living wage movement which has been initiated by the Multi-national enterprises. It will give a brief description on the ideology of Company who has decided to embrace the concept of living wage and take effort to increase payment level for their workers. Whether the actual wage level paying by such Company has reached the level of a living wage, the action itself illustrates a first step toward the future for globalising living wage.

Despite the lack in definition of living wage, many Businesses have shared the same idea on the components constituted to a living wage or embraced their own definition of what is a living wage. After announcing the road map to a living wage, the Fashion Giant, H&M has stated that *“a fair living wage should at the very least cover the worker and their family's basic needs and a discretionary income. This wages should be reviewed annually and negotiated with democratically elected trade unions”*.¹³⁹

The definition provided by the Business is seen to describe an inspirational goal rather than a genuine definition, though, the idea of family wages could still be found by breaking down the wording of the statement. Moreover, the description from H&M also addressed the right to collective bargaining as part of living wage scheme, a component which often accepted as part of wage policy, though, does not appear on the definition. However, this definition is rather vague and ambiguous considering wideness of *“fair living wage”*, *“basic needs”* and *“discretionary income”*. It is in need of either a more descriptive definition or an interpretation.

Despite the lack of definition, the living wage movements in the UK and US have provide significant assistance to companies who would like to practice their duty to respect workers' right to a fairer wage. Companies are welcome to use living wage calculation

¹³⁹ H&M, 'A fair living wage to garment workers', [Accessed on April 2016], available at: <http://about.hm.com/en/About/sustainability/commitments/responsible-partners/fair-living-wage.html>

system which has been made available. The living wage calculation tools are provided by the MIT¹⁴⁰ *Living Wage Calculation* and the LWF in the US and the UK respectively. For example, after deciding to raise its worker's wages in the US with the purpose of providing them a better family wage, IKEA has relied on the MIT living wage calculation tool in order to elaborate on a wage figure matching the living wage level in its area.¹⁴¹

With the participation of different stakeholders, including the civil society and living wage advocate organisations, living wage movement is gradually accepted and supported by both the municipal authority and businesses. In late 2015, recognised the need for a better wage, the Dallas City Council has approved an increase of wages to \$10.37 per hour for “*all contractors and subcontractors hired by the city*” with exception for separate wage level through collective bargaining for construction contractors. Such movement was the result of continuous effort to pushing for better wages for workers, started by the sanitation workers in 2010. This change was made using the MIT tool¹⁴² and reflected the necessary change from the authority due to the pressure from workers and civil society.

Hence, it is most likely for Businesses to change their approach to employment relationship in the environment where there is support provided. This support for living wage can be either a demanding pressure or a living wage supportive environment which give incentive or assist Companies in their course of enhancing workers' right to living wage. Also, the changes in many Corporate can possibly create a more competitive spirit between Companies, as the result, the standard of wages might as well be raised as the social pressure go on, at the same time, Companies are in need of attracting qualified workers.

According to the OECD Annual Report 2013,¹⁴³ international CSR is taking effort to promote a change in ideology of Businesses regarding Human Rights. The Report showed that there is rising trend in upholding Human Rights within Business practice. In the new world of interconnection and information rapid-shared, caring about community and society should be considered because it is essential for not only for the people within such Community but also for the sustainable development of the Companies themselves. Recognising the importance of such Business conduct, many multinational enterprises has committed themselves to gradually raise the minimum level of wages for their workers until reaching the goal of a living wage in the expected future. Moreover, the living wage race, which initiated by these enterprises, are expected to sparkle other

¹⁴⁰ MIT stands for *Massachusetts Institution of Technology*

¹⁴¹ Steven Greenhouse, “*Ikea To Increase Minimum Hourly Pay*”, the New York Times, June 26, 2014, [Accessed on May 2016], available at: http://www.nytimes.com/2014/06/26/business/ikea-plans-to-increase-minimum-hourly-pay.html?_r=0

¹⁴² Amy K. Glasmeier and Ronette Chanel Seeney, “*Another Dallas Agency Uses MIT Living Wage Tool*”, April 2016, [Accessed on May 2016], available at: <http://livingwage.mit.edu/articles/17-another-dallas-agency-uses-mit-living-wage-tool>

¹⁴³ OECD, *Annual Report on the OECD Guidelines for Multinational Enterprises 2013: Responsible Business Conduct in Action*, OECD Publishing, 2012, p.135.

Businesses' interests and encourage them to follow the positive approach toward their workers too.

In the food industry, the living wage movement within Business in the UK is led by Nestle. The enterprises have announced its action plan to raise basic wages for workers in the UK in 2014, before the latest national minimum wage was introduced in 2015. Answering to the call from the LWF, Nestle took opportunity to change its wage policy and become the first mainstream manufacture in the food industry in the UK to take the step in adopting living wage. Nestle became one of LWF accredited employers and keeps a close cooperation with other trade unions and partners of LWF for a better implementation of living wage plan.¹⁴⁴

The living wage movement is moving forward rapidly, especially in the UK and US. The UK LWF has published the searching system for listing their accredited employers who has made commitment to embark on the sustainable development through wages aspect. The US living wage movement also received support from many big Companies including Costco, GAP Inc, QuickTrip, Ben&Jerry and many more.¹⁴⁵

According to IKEA after its second round of wage raising, the imminent results were the decrease in labour turn-over and the increase in qualified and high-skill workers. The Company did not have to spend money on constant training for new staff along with the strong attraction to better qualified workers. Moreover, as Rob Olson claimed, "*it makes strong business sense*".¹⁴⁶ After all, it would be very difficult for Businesses to operate sustainably and productively when their workers could not make enough to live.

To conclude, the global framework to guide Corporate on CSR holds an important position in international legal systems, particularly in Human Rights protection. It is supplementing human rights norms and strengthening the cooperation between Stakeholders in order to push forward a better mechanism for protecting human rights and labour rights. In practice, the Guidelines play an important role, together with other organisation, in assisting Corporate on CSR, resulting to promising signs of accepting living wage in recent years.

Within the limitation of the thesis, three of the international instruments concerning CSR has been looked into to highlight the CSR principles regarding living wage. These three documents, together with the others, are interconnected, emphasising on: (1) the

¹⁴⁴ Gatwick, "Nestlé announced as first major manufacturer to become a 'Living Wage' employer in the UK", Jun 30, 2014, [Accessed on May 2016]. <http://www.nestle.co.uk/media/pressreleases/nestle-living-wage>

¹⁴⁵ Mary Mazzoni, "3p Weekend: 10 U.S. Companies That Pay Above Minimum Wage", Feb 28th, 2014, [Accessed on May 2016] <http://www.triplepundit.com/2014/02/3p-weekend-10-companies-pay-living-wage/#>

¹⁴⁶ Dave Jamison, "Ikea's Minimum Wage Hike Was So successful, It's Raising Wages Again", the Huffington Post, Jun 24, 2015 [Accessed on May 2016]. http://www.huffingtonpost.com/2015/06/24/ikea-minimum-wage_n_7648804.html

obligation of State to “protect” by providing a firm national legal system with wage regulations referencing to ILO ideology and mechanism; (2) the Corporate to respect by human rights by establishing for themselves a decent code of conducts in which the risks to Human Rights would be investigated with planned responses. Corporate is also required to refrain from acting against national law of the country in which it operates in. Furthermore, wage provisions under these instruments, besides referencing to ILO conventions, gave the implication for a better wage than a minimum wage.

Chapter 5. The current legal aspect of living wage in Vietnam

5.1. Wages in Vietnam.

To elaborate on the probability of a living wage in Vietnam, it is appropriate to examine the legislation regarding wages in Vietnamese legal order. This section will give a brief description on Vietnam's Minimum wage legislation with specific statutory wage levels in different economic sectors and the current wage policy, including the minimum wage development plan. Although the enforcement of wage law will not be examined in depth, it shall be mentioned as an element affecting wage growth and living wage movement in Vietnam.

It is noteworthy that Vietnam has many legislations addressing specific groups under special conditions. These groups are granted additional bonuses due to their special conditions of work or their vulnerability. It is specific wage regulation which does not apply to the majority of workers and, therefore, will not be addressed in detail in this thesis. Moreover, another issue which shall not be addressed is the wage calculation process for State's workers and workers who work in State-owned Companies due to the complexity as well as the relevance to this thesis.

5.1.1. National minimum wage and Living wage.

5.1.1.1. Briefing on Vietnam National Minimum wage.

Since the economic reform in the 1986, Vietnam economic is rapidly growing and becoming one of the fastest-growing economy in the world. Generally, it is said to be doing fairly well in many aspects of labour reform and attracting foreign investment due to the hard-working and fast-learning labour workforce. Vietnam has lifted itself from low-wage income into lower middle income¹⁴⁷ which indicates the growing speed of the economy and the increase in wages among its population.

Minimum wage legislation in Vietnam is divided into "Basic" or "Reference" minimum wage and Regional minimum wage. Reference minimum wage is the basic wages applied to workers in the public sector and government-based companies. Reference minimum wage is also used as starting point for these type of workers to move up the wage ladder within the public sector. Regional minimum wage is applied to workers in the private

¹⁴⁷ The World Bank, *Vietnam country overview*, Updated Apr 11, 2016, [Accessed on May 2016] available at <http://www.worldbank.org/en/country/vietnam/overview>; see also Jane Le Skaife, "Vietnam is no longer an Undeveloped Country", *New Geography*, 2001, [accessed on May 2016], available at: <http://www.newgeography.com/content/002154-vietnam-no-longer-underdeveloped-country>

sector, including garment industry and others. Regional minimum wage divided labour market into 4 geographical regions, the highest level of minimum wage is the region I.

Since the separation of minimum wage level between public and private sector, Reference minimum wage for State workers, whose wage scale is 2.34 and below, has risen 5% from 1.150.000 VND/month to 2.100.000 VND/month, this rate will be applied since 1st May, 2016.¹⁴⁸ Although the rate for State workers are low compared to the World Bank Vietnam poverty wage line of 526.200 VND/month and the Living wage indicator figure for living wage in Vietnam at the rate of 6.865.300 VND/month,¹⁴⁹ wages in the public sector can be raised according to different categories and levels called “the wage scale”.¹⁵⁰ The condition to raise one’s rate depends on different organisations, professions or level of skill,¹⁵¹ for example, raising wage according to the number of years, job evaluations or raising wage by taking test.

Beside the general minimum wage legislation, Vietnam has been issuing many other legal instruments. These documents specifically addressed wage issues of special working groups, including low-paid artisan who is recognised by the Government¹⁵² and “heavy, harmful and dangerous situations for teachers in public vocational education establishments”.¹⁵³ However, these legislations are special grants for workers with special conditions, therefore, they shall not be analysed in depth in this thesis.

In the latest legislation on regional minimum wage, compare to 2015, minimum wage in all regions has grown about roughly 12%.¹⁵⁴ Accordingly, Region I minimum wage has risen from 3.100.000 VND/month (roughly 138 USD) to 3.500.000 VND/month (156 USD), from 2.750.000 VND/month (123 USD) to 3.100.000 VND/month (138 USD), from 2.400.000 VND/month (107 USD) to 2.700.000 VND/month (120 USD) and from 2.150.000 VND/month (96 USD) to 2.400.000 VND/month (107 USD) for Region II, III

¹⁴⁸ Resolution No. 99/2015/QH13 on “*Resolution on State budget estimates in 2016*”, 11 Nov 2015, Art. 2(1)(d)

¹⁴⁹ “*Wage in Context*”, Wage Indicator, Updated Jan 2016, [Accessed on May 2016], available at: <http://www.wageindicator.org/main/salary/wages-in-context>

¹⁵⁰ Decree No. 205/2004/NĐ-CP on “*the system of wage scales, wage tables, and wage based allowance regimes in State companies*”, entry into force on 01 Oct 2004, Art.3 and Decree No. 49/2013/NĐ-CP on “*Detailing the implementation of a number of articles of the Labour Code on wages*”, entry into force on 1 Jul 2013, Art. 7, 8. And its Circular No. 17/2015/TT-BLDTBXH on “*Guiding the formulation of salary scale, salary table, salary allowance and salary change and grading for employees in one member limited liability companies owned by the state under Decree No. 49/2013/NĐ-CP detailing the implementation of some articles of Labour Code on salary*”, entry into force on 10 Jun 2015,

¹⁵¹ Circular No. 18/2008/TT-BLDTBXH, Amended Circular No. 12/2003/TT-BLDTBXH, on “*Guiding the implementation of a number of articles of the Government’s Decree No. 114/2002/ND-CP on wages*”, entry into force on 16 Sep 2008.

¹⁵² Decree No. 109/2015/NĐ-CP on “*Support of low-income people’s artisans and elite artisans*”, entry into force on 1 January 2016.

¹⁵³ Decree 113/2015/NĐ-CP on “*Providing special allowances, supplements, responsibility allowances and allowances for work in heavy, harmful and dangerous situations for teachers in public vocational education establishments*”, entry into force on 1st January, 2016

¹⁵⁴ Vietnam Briefing, “*Vietnam’s Minimum Wages to Increase in 2016*”, Sep 2015, [Accessed on May 2016], available at: <http://www.vietnam-briefing.com/news/vietnam-minimum-wages-increase.html/>

and IV respectively.¹⁵⁵ Furthermore, these standards of wages are bottom ground of wages applied to unskilled workers without any basic training in normal working conditions. Skilled workers will have their minimum wage increased by at least 7% of the standard minimum wage. The criteria for the term “skilled” are included in the Decree on Regional minimum wage. It includes national or international university, college or training school certification and above, certification for qualifying profession training provided by the employers and any other qualifications indicated completion of profession training.¹⁵⁶

The determination of national minimum wage legislation is made by the decision of a tripartite systems. It consists of *the Vietnam General Confederation of Labour (VGCL)*, *the Ministry of Labour, Invalid and Social Affairs (MOLISA)* and *the Vietnam Chamber of Commerce and Industry (VCCI)* which represent workers, the government and the employers respectively.¹⁵⁷ These three organisations created the *National Wage Council (NWC)* which will annually hold conference to determining on any changes regarding wage policy and level of minimum wage based on negotiation. The criteria to determine minimum wage in Vietnam is based on the minimal living needs of the employees and their families, the social and economic conditions and the wage standards on the labour market.¹⁵⁸ Despite the progressive efforts on improving the protection of workers’ rights after the economic reform, the lack of independent status of VGCL remained in question by both international community as well as national entity including the workers themselves.¹⁵⁹

On Vietnam wage policy, wage growth in Vietnam is having constant changes in the recent years. Stating in many conference, VGCL and MOLISA have announced their goal to provide workers an adequate standard of minimum wage. This goal is established in accordance with the Vietnam Labour Code. The definition of minimum wage provided by the Code is known as a basic standard of wages for worker with the lowest level of skill, this standard shall be sufficient for workers and their family.¹⁶⁰ According to the

¹⁵⁵ Decree no.103/2014/NĐ-CP on “*Region-based minimum wages for employees working for companies, cooperative unions, cooperatives, cooperative groups, farms, households, individuals and organizations hiring employees under labour contracts*”, entry into force on 1st January, 2015 and Decree no.122/2015/ND-CP on “*Region-based minimum wages for employees working for companies, cooperative unions, cooperatives, cooperative groups, farms, households, individuals and organizations hiring employees under labour contracts*”, entered into force on 1st January, 2016. The Decree no. 122 has replaced no.103 in 2016.

¹⁵⁶ Decree no.122/2015/ND-CP on “*Region-based minimum wages for employees working for companies, cooperative unions, cooperatives, cooperative groups, farms, households, individuals and organizations hiring employees under labour contracts*”, entered into force on 1st January, 2016, Art.5

¹⁵⁷ AmCham Vietnam, “*From the archives: Vietnam’s “Minimum Wage Roadmap” to 2020*”, Aug 28, 2014. Updated: Sep 7, 2015, [accessed on May 2016] available at <http://www.amchamvietnam.com/30445570/thinking-about-vietnams-minimum-wage-roadmap/>

¹⁵⁸ Vietnam Labour Code, 10/2012/QH13, adopted in 1994, Last amendment in 2012, Para1, Art.91.

¹⁵⁹ Michael F. Martin, “*U.S - Vietnam Economic and Trade Relations: Issues for the 112th Congress*”, Congressional Research Service, Dec 2010, p.16.

¹⁶⁰ Vietnam Labour Code, see *supra* note 158, Art.91(1)

Plan, wage would be raised gradually on yearly basis and expecting to reach basic living wage for workers to secure their live by 2020.¹⁶¹ The new Wage policy was established with the parallel plans of establishing research Committee of labour productivity in order to lessen the burden to Companies' budget.¹⁶²

Briefly on the constitution of enforcing wage regulation, the responsibility to labour matters fall into MOLISA's authority. According to the Vietnam Labour Code, Inspection Law¹⁶³ and Decree no. 39/2013/ND-CP¹⁶⁴, Vietnam has established for itself a Labour Inspection system under MOLISA with different level from the Central level to provincial level. The Inspectorate responsibility generally consists of activity related to the implementation of labour policy, including conditions of work, wage policy and occupational safety and health.¹⁶⁵

5.1.1.2. Vietnam Wage in Practice.

Some researchers have claimed that the changes in minimum wage regulations would probably affect *Foreign Direct Investment* (FDI) Companies within Vietnam territory the most due to the large number of workers who are hired to work in chain supply factories.¹⁶⁶ However, it would be somewhat unsettling if the raise in Regional minimum wage would heavily affect Businesses. Because if the new policy does weight down Companies' wage budget, then the number of worker receiving minimum wage level might be relatively high. This issue is related to the fact that FDI companies generally apply Vietnam minimum wage level as a standard for workers. As long as the legal wage tenders remain low, factory workers are most likely to receive such amount as the basic wage.

Furthermore, a survey showed that minimum wage level in Vietnam remains to be low and does not secure workers' basic living needs, especially in the Region I. In 2015, minimum wage survey claimed that the standard of wage at the time only cover roughly 70% or workers' minimal living cost. It is estimated to have a necessary raise of 30 to 33% in order to meet up with the living standard in the city.¹⁶⁷ Therefore, it is important

¹⁶¹ Conclusion No. 23-KL/TW on “*Some issues on wage, social insurance, preferential allowances for people with meritorious services to the nation and orienting reform till 2020*”, the 5th conference of the XI Party's Central Committee, 29 May 2012

¹⁶² Ibid. see also AmCham Vietnam, see *supra* note 156

¹⁶³ Inspection Law no. 56/2010/QH12, entry into forced 01 Jul 2011

¹⁶⁴ Decree no. 39/2013/ND-CP on “*defining the functions, tasks, powers and organizational structure of the Ministry of Labour, Invalids and Social Affairs*”, entry into forced 16 Jun 2013.

¹⁶⁵ See more on Vietnam Labour Inspection at ILO, “Vietnam: Labour Inspection Structure and Organization”, [Accessed on May 2016], available at:

http://www.ilo.org/labadmin/info/WCMS_150920/lang--en/index.htm

¹⁶⁶ Tu Phuong Nguyen, “*Vietnam's latest minimum wage rise business as usual*”, posted on East Asia Forum on 17 October, 2015, [Accessed May 2016], available at:

<http://www.eastasiaforum.org/2015/10/17/vietnams-latest-minimum-wage-rise-business-as-usual/>

¹⁶⁷ Ibid. and see also “*Min wage fails to cover min living cost in Vietnam: survey*”, Tuoi Tre News, 2014, accessed on May, 2016: <http://tuoitrenews.vn/society/21464/min-wage-fails-to-cover-min-living-cost-in->

for Vietnamese government to carefully examine its own minimum wage legislation and its plan to enforcement wage law so that it give foundation to protect Vietnamese workers from having full-employment but with low wages.

5.1.1.3. Vietnam and living wage.

In order to analyse Vietnam wage policy and whether this policy would have any connection to living wage, this section will elaborate on some components of minimum wage policy and goal in Vietnam to compare with the living wage movement.

It needs to be clear that wage policy in Vietnam at the current time remain at the minimum wage standard, not a living wage and nowhere near the living wage standard. Examining the current minimum wage policy as well as the public announcement from MOLISA, minimum wage in Vietnam is aiming for the fulfilment of individual living wage. This is not necessary mean that Vietnamese government would not realise living wage goal. There is much room left to improve the wage protection policy and system as well as other issue affecting wages in Vietnam and while tackling these issues, it is possible for Vietnam to embrace the living wage movement.

Firstly, on the level of payment, due to the steady increase in minimum wage these recent years, workers' condition of living has been reported to have made some improvement. The NWC since its establishment has proposed a "Road map" as a plan step by step increase minimum wage level in the private sector until 2020. The objective is to achieve a level of wages that meets workers' basic living needs.¹⁶⁸ At this moment, minimum wage rate in Vietnam, though having steady change, remained at a low level compared to other countries in the Region. It is only above Bangladesh, Myanmar, Mongolia, Laos, Pakistan and Cambodia.¹⁶⁹ Moreover, minimum wage in Vietnam, though it is rising, Vietnam still has many other challenges including low productivity rate, inflation control which would possibly undermine its new wage policy and generate adverse effects on wage growth.

Furthermore, MOLISA, in its estimation, has reiterated that the current minimum wage level, despite its slight improvement in workers' life, has not had any significant contribution to live up to its original objective as well as in boosting productivity. Hence, minimum wage policy in Vietnam, at this moment, is still struggling to fix the issue of unduly low wage workers. It is rather far-fetched for the issue of living wage to be

[vietnam-survey](#) and "*Vietnam to raise minimum wage by up to \$18.9 per month in early 2015*", Tuoi Tre News, published on November 2014, [Accessed on May 2016], available at: <http://tuoitrenews.vn/society/23970/vietnam-to-raise-minimum-wage-by-up-to-189-per-month-in-early-2015>

¹⁶⁸ Ibid.

¹⁶⁹ Department of Labour and Employment, "*Comparative Wages in Selected Countries*", National Wages and Productivity Commission, Philippines, February 29, 2016 [Accessed May, 2016], available at: http://www.nwpc.dole.gov.ph/pages/statistics/stat_comparative.html

introduced, although, the debate on what is most needed for workers are a minimum wage or a living wage has been going on.¹⁷⁰ Therefore, it is promising that the living wage movement would be responded as long as many issues affecting wage growth would be dealt with properly.

On the second component, the Vietnamese Labour Code allows workers their right to collective bargaining with representatives from the Trade Union. As mentioned above, the VGCL has been making progressive movements on improving workers' condition of work and minimum wage, evidenced by the constant raise in wages and the decrease in wildcat strike from 2011 to 2014¹⁷¹ Although, VGCL is the only legal trade union in Vietnam which is run by the government. There are concerns on its credibility and demand for changes, despite its achievement on wage growth. It is expected to be reformed as Vietnam is looking forward to be a part of the Tran-National Pacific Partnership Agreement. This shall be further discussed in the later part of this Chapter.

Lastly, Vietnam is making an effort to erase the gender inequality that has been dwelling within the society for such a long time. Stated by the humanitarian aid agency from the Australian Council of Trade Union: "*Our experience in workers' education in Vietnam also leads us to believe that the government...is sensitive to the needs of women and men workers*".¹⁷² Vietnam also has Gender Equality Law concerning the equality between men and women in many aspects including employment opportunity, equal pay for work of equal value. Gender equality law aims to abolish gender inequality structure in economic-social, human resources development and gender relation ranging from daily live to societal level.¹⁷³ Once the gender inequality is reduced, the idea of living wage as a family wage might as well in need as the next stage of development due to the equal contribution to household income and the living wage for individual as a starting point of the minimum wage.

Overall, there are signs that Vietnam minimum wage policy is moving closer and closer to the living wage movement. Even though, it will take more time to solve the current issues, it is still promising that living wage would become a demand and be taken into consideration in the future.

¹⁷⁰ Quynh Vu, "*minimum wage standard or minimum living standard*", VnEconomy, July, 2011, [Accessed on May 2016], available at: <http://vneconomy.vn/doi-hanh-nhan-muc-luong-toi-thieu-hay-muc-song-toi-thieu-20110706054423264.htm>

¹⁷¹ Thúy Hiền, "Công đoàn tham gia giải quyết tranh chấp lao động và đình công: Thực trạng và giải pháp", Tổng Liên Đoàn Lao Động Việt Nam, 05/02/2015, [Accessed on May, 2016] [Trans: Thuy Hien, "Union in labour dispute settlement and strike: limitations and solutions, VGCL, 05 Feb 2015] available at: <http://www.congdoanvn.org.vn/details.asp?l=1&c=1&m=8589>

¹⁷² Peter Jennings, "*Re: Human Rights Watch Report: "Not yet workers" paradise" of May 4 2009*", Australian People for Health, Education and Development Abroad, Inc., Sydney, June 17, 2009

¹⁷³ *Gender Equality Law*, no. 73/2006/QH11, entry into force on 1st July, 2007. Art.4

5.1.2. Vietnam international obligations regarding wages.

5.1.2.1. International Law.

Regarding international obligations on the wage issue, Vietnam is a party to some of the instruments which have been mentioned in the previous analysis of the relation between living wage and international provisions regarding wages. Therefore, the full content would not be repeated in this section.

Living wage ideology can be found in many general international law and international labour law. Many of the instruments are of non-binding status and remain to be guidance for States to achieve international mutual goals and agreements. Regarding the right to a living wage under public international law, Vietnam is having its obligation to realize such rights, including right to adequate remuneration and principle of equal pay for work of equal value under the UDHR and the ICESCR which it is a party to these instruments.

Moreover, Vietnam is also member of the ILO since 1992, therefore, it is bond by the obligation under the organisation's Constitutions and the Conventions that Vietnam has ratified. However, Vietnam has not ratified either the Convention no.131 on minimum wage fixing or the Protection of wage Convention C95, the two main Conventions particularly concern wages. At the same time, the ILO Freedom of Association and Protection of the Right to Organise Convention no.087 and the ILO Right to Organise and Collective Bargaining Convention no. 098 concerning worker' right to form, join Trade Union and right to collective bargaining which essential for worker's rights protection have not yet been ratified.

It is welcoming that Vietnam has established for itself a minimum wage fixing system by collaborating with the ILO. Also, Vietnam has been directing its attention on the issue of gender equality in employment and remuneration by adopting Gender equality law, being a party to CEDAW and ratifying the Equal Remuneration Convention no.100 and the Discrimination (employment and Occupation) Convention no.111. On other issue also affecting wages, Vietnam has also signed the Convention on the Rights of the Child in 1990¹⁷⁴ as well as the ILO Minimum Age Convention no. 138 in 2003 and the ILO Worst Forms of Child Labour Convention no. 182 in 2000 prioritising the protection of Children from labour exploitation. The Force Labour Convention no. 029 has also been ratified. It is important to keep in mind the strong relationship between wage issues and the fundamental principles and rights at work which has been analysed in above Chapters.

¹⁷⁴ UN, *Convention on the Rights of the Child*, New York, 20 November 1989, Vietnam has been its official member since 28 Feb, 1990, available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en

The UDHR, ILO Constitution and the ILO Philadelphia Declaration have an “*authoritativeness*”¹⁷⁵, which influence their member States, including Vietnam. Vietnam has the obligation to realise and take step to fulfil the goal stated in these instruments. Regarding the issue of living wage, all of these documents has made themselves clear on the objective of achieving an adequate and fair wage for workers and their family regardless of their gender. Even though these instruments are not legally binding, their role in the international law remain as general guidance and hold important status within international legal norms.

Under legally binding instrument, the ICESCR, Vietnam clearly is subjected to the obligation to take step to its maximum resource to achieve the full realisation of the rights set forth in the Covenant. The Covenant urges the country to take every appropriate means possible for fulfil its obligations.¹⁷⁶ This means the obligation under ICESCR is included the establishment of national legislation as well as other measures to ensure the effective implementation of that law on the respective matter. Particularly in wage issue, the obligation under ICESCR is to achieve equal remuneration between men and women which would secure them and their family a basic living standard or higher.

Furthermore, adding up to the commitment on the abolishment of gender inequality, Vietnam is also member to CEDAW, ILO C.100. This means Vietnam is committed to the ensure and protect women’s rights, particularly in labour aspect, the right to equal remuneration. Moreover, Vietnam also needs to take into account the fact that women are discriminated against in the opportunity for employment¹⁷⁷ and delivers further protection and public awareness on equality for women.

To conclude, Vietnam has the responsibility to ensure the full realisation of the right to an adequate and fair wage for workers and their family under the international legal instruments that it has ratified. It is noteworthy that the responsibility to achieve “*full realisation*” of a right should not stop at the level of adopting national law. There are other movements, such as awareness raising, action plans to enhance the enforcement of national legislation and to tackle issues which relate to the protection and development of the right in concern, should also be taken into account as the fulfilment of Vietnam’s obligations. It is also important for Vietnam to ratify ILO conventions regarding wages

¹⁷⁵ Authoritativeness in this context is indicating the influential power a norm has, even though it does not belong to a legally binding instrument. Due to the wide recognition of the norm, it is believed to be accurate and normative, even to the point of having its own authoritative influence.

¹⁷⁶ ICESCR, see *supra* note 22, Art.2(1).

¹⁷⁷ ILO Vietnam, “*Đẩy lùi phân biệt giới trong tuyển dụng và môi trường làm việc giúp doanh nghiệp thành công*”, 5 March 2015 [Trans: ILO Vietnam, “*Reducing gender inequality in employment and working environment helps Company success*”, posted on 5th March, 2015], [Accessed May 2016], available at: http://www.ilo.org/hanoi/Informationresources/Publicinformation/Pressreleases/WCMS_348643/lang--vi/index.htm

and freedom of association and take steps to achieve the full implementation of the rights enshrined in these instruments.

5.1.2.2. The Trans - Pacific Partnership Agreement.

Extending the discussion on living wage in Vietnam to the Corporate Social Responsibility, though, CSR is the soft law on the behaviour of Business regarding human rights, labour rights and societal issues, Vietnam also has to direct its attention on this matter. Since CSR is not only about the Companies' operation alone, it also requires actions from State in order to assist Companies on their course of respecting Human Rights. This is one of the reason on why Vietnamese government should be attentive and thorough in their national minimum wage legislation.

According to the Ruggie principles, the cooperation between country and businesses working in the domicile of it is crucial. The “*respect, protect and remedy*” framework essentially operates by the best effort of both stakeholders. Even though Businesses are required to take active role in their capacity, code of conduct and operation regarding the potential risks to human rights that their activities might affect, State is particularly hold heavier responsibility in providing a foundation for Businesses to respect and follow.

Vietnam is expecting to embrace on some major reform in national labour system in which the issue of wages might be pushed to take greater step in evolution. This is the result of signing the *Trans - Pacific Partnership* (TPP), a trade agreement between Vietnam, many of Pacific Nations and the U.S. Even though there are many controversies around the TPP, Vietnam is looking up to be a part of the Agreement as the Labour Confederation of Hanoi has stated in its study the promising benefits that TPP is expecting to bring to the Global economy as well as Vietnam's.¹⁷⁸ However, this thesis will not elaborate specifically about the TPP itself and its potential impacts in depth. This section shall only explore the requirement for changes in labour regulation and other components that Vietnam has committed itself to.

The capability of labour protection provided by the TPP is claimed to be the strongest among all the past free trade agreements in the history. For many years, labour activists have been complaining on the lack of labour protection or the weak enforcement of such protection in trade agreement.¹⁷⁹ The key aspects of labour protection offered by the TPP, which potentially will affect wage regulation in Vietnam, are:

¹⁷⁸ Phú Minh, Hồng Vân, “*Tác động của Hiệp định TPP đối với kinh tế Việt Nam*”, Liên Đoàn Lao Động Thành Phố Hà Nội, 2/2016. [Trans: Phu Minh and Hong Van, “*The impacts of TPP on Vietnam's economy*”, Labour Confederation: Hanoi City, published on February, 2015, [Accessed May 2016]. <http://congdoanhanoi.org.vn/nghien-cuu-trao-doi/tac-dong-cua-hiep-dinh-tpp-doi-voi-kinh-te-viet-nam.377017.aspx>

¹⁷⁹ “*Q&A: The Trans-Pacific Partnership*”, Human Rights Watch, January, 2016, accessed on May, 2016. <https://www.hrw.org/news/2016/01/12/qa-trans-pacific-partnership>; see also Axel Marx, Brecht Lein and

(1) the compliance with not only ILO core labour conventions, including the right to freedom of expression, the abolishment of forced labour, the elimination of child labour and non-discrimination, but also its standards regarding minimum wage, condition of work and occupational safety and health¹⁸⁰. The TPP reiterated on the cooperation with the ILO¹⁸¹ on the guidance regarding labour standards and the TPP considers issue of remuneration as a separate and important point that Parties should take into account.

(2) Labour disputes shall be subjected to the same arbitrary procedural equally with the other provisions of the TPP.¹⁸² The members to the TPP agreed upon applying trade sanction for violation of labour rights which protected under TPP. The Agreement recognised the urgency to protect labour rights equally with trade issues in order to ensure that workers and Businesses in every TPP country will be protected from exploitation and granted equal chance to economic competition.

Especially in the case of Vietnam, The U.S and Vietnam had also agreed upon the Investor-State Dispute Settlement (ISDS), a special international arbitrary procedural. Under the ISDS, investor from one of the other member States could bring the labour dispute to the international arbitrary panel instead of using the domestic court.¹⁸³ This mechanism is expecting to bring about the neutrality and non-bias in Labour dispute settlement.¹⁸⁴

(3) The establishment of Labour Council and National Contact Points which includes complaint mechanism.¹⁸⁵ The Labour Council shall hold the international conference every two years in order to discuss about the matters related to the provisions of the TPP as well as the complaints which were made through the National Contact Points in each Party State. The Contact Points will assist the Council on the matter relating to the Agreement and provide the Council meeting with information and complaints regarding the necessary improvement of the TPP and the issues which arose in each country.

(4) The TPP also regulated on other aspects such as “*transparent administrative and judicial proceedings*”;¹⁸⁶ the non-derogation clause of labour protection that State Parties

Nicolás Brando, “*The protection of labour rights in EU Bilateral Trade Agreements. A Case Study of the EU-Colombia Agreement*”, Leuven Centre for Global Governance Studies, University of Leuven, 2016, p.20

¹⁸⁰ The Trans - Pacific Partnership Agreement (TPP), Art.19.1

¹⁸¹ Ibid. Art.19.10

¹⁸² Ibid. Labour Dispute Settlement.

¹⁸³ “*FACT SHEET: Investor-State Dispute Settlement (ISDS)*”, Office of the United State Trade Representative, March, 2015, [Accessed on May 2016], available at: <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds>

¹⁸⁴ Ibid.; see also Harout Jack Samra, “*Investor-state dispute settlement in the newly signed Trans-Pacific Partnership*”, International Arbitration Newsletter, Dec 2015, [Accessed on May 2015], available at: <https://www.dlapiper.com/en/us/insights/publications/2015/12/international-arbitration-newsletter-q4-2015/investor-state-dispute-settlement/>

¹⁸⁵ TPP, see *supra* note 180, Art.19.12 and Art.19.13

¹⁸⁶ Ibid. Art.19.8(3)

should not in any circumstances lower labour protection for economic benefit;¹⁸⁷ as well as the urge to encourage Businesses to voluntarily take initiative in CSR¹⁸⁸ and to exercise in their best effort to ensure “*acceptable working conditions, including a minimum wage, limits on hours of work, and occupational safety and health*”.

(5) Due to the assessment of Vietnam’s human rights and labour rights violation records, Vietnam has a separate requirement to follow, it is the so-called Consistency Plan. The Plan is expected Vietnam to carry out complete legal reform in 5 years in order to benefit from the tariff-reduction and other advantages of the TPP.¹⁸⁹ Particularly, under the Plan, Vietnam will have to:¹⁹⁰

Viet Nam shall enact the following legal reforms, either by amending existing laws, decrees or regulations or by issuing new laws, decrees or regulations and shall enact any additional changes required to ensure consistency across the legal code

As well as:

...ensure that its laws and regulations permit workers, without distinction, employed by an enterprise to form a grassroots labour union (in Vietnamese *to chuc cua nguoi lao dong*) of their own choosing without prior authorisation...or greater certainty, a grassroots labour union registered with the competent government body shall have no lesser rights in law and practice with regard to the labour rights as stated in the ILO Declaration than a grassroots labour union under the VGCL.

Since the VGCL is the only legitimate trade union which affiliate with Vietnamese government, Vietnam will have to legalise the right to freedom of association in the context of labour law. The Plan is expecting to open the door for Vietnamese workers to exercise their rights to form and join trade union, the right to collective bargaining and right to strike independently.

Vietnam joining the TPP and its Consistency Plan is marking the beginning of a major shift in Vietnam national labour legislation. the TPP is hoping to bring in the “*cross-affiliation*”¹⁹¹ process, a process in which workers are allowed to form Trade Unions and connect with other Trade Unions to become a bigger and stronger network. This process aims for strengthening the right of workers to form Trade Union and expanding their

¹⁸⁷ Ibid. Art.19.4

¹⁸⁸ Ibid. Art.19.7

¹⁸⁹ For further information, see “*Tentative U.S.-Vietnam “consistency plan” links tariff benefits to labor compliance*”, World Trade Online, 4 Oct 2015, [Accessed on May 2015], available at: <http://www.bilaterals.org/?tentative-u-s-vietnam-consistency>

¹⁹⁰ “*US-VN Plan for Enhancement of Trade and Labor Relations*” (Consistency Plan Vietnam), Annexed to the TPP, Part.I

¹⁹¹ “*Lawyer in Vietnam Oliver Massmann: Labour requirements in the Trans-Pacific Partnership Agreement and their impact on Vietnam’s legal system*”, Duane Morris Vietnam, posted on March 2016, [Accessed on May 2016] <http://blogs.duanemorris.com/vietnam/2016/03/18/lawyer-in-vietnam-oliver-massmann-labour-requirements-in-the-trans-pacific-partnership-agreement-and-their-impact-on-vietnams-legal-system/>

unions' network in order to gain better voice and protection of their labour rights. Also, Examining the “cross-affiliate” process shall as well be used to collect necessary data for the examination of the fulfilment of the 5-year Consistency Plan.¹⁹² It is promising that the TPP might have great impacts on the improvement of workers' wage regulations as well as other conditions of work.

As mentioned above, minimum wage and living wage are two different concepts but interrelated, the urge for a better standard of minimum wage might very well lead to the demand for a living wage due to (1) the needs to maintain adequate living standards for not only the workers but also their dependences and; (2) the demand for combatting against in-work poverty. Even though the TPP Labour Chapter does not regulate a concrete standard for any labour issue, it is a combination between the cooperation with the ILO, the Ruggie guiding principles and the implementation process and development of the OECD CSR mechanism. It is reasonable to believe in the probability of success in protecting and improving workers' life that the affiliation of the prominent sources of labour standards, the well-established UN Business guiding principles and the CSR implementation and supervision mechanism of the OECD Guideline would bring.

5.2. Remaining challenges and obstacles to adopt a living wage.

At a glance, Vietnamese minimum wage regulation is pushing forward for a better amount of payment which would fulfil worker's basic living needs. However, there are challenges which Vietnam has not overcome. As the result, wage growth is still undermined and remains as a subject that would fear not only Businesses but also the workers. Living wage, despite being the next step of wages development, needs a foundation that would grow out from national minimum wage regulation. This section is expecting to point out the components which are affecting minimum wage growth and undermining living wage movement in Vietnam.

Firstly, it is the issue of Trade Union. Though the VGCL is increasing its effort in protecting workers from low-wages and bad condition of work progressively, its credibility and purposes are still constantly questioned. One of the indications for the ineffective operations of the VGCL is the series of “wildcat strike” demanding for fairer wages and condition of work, including working hour. The reasons for these strikes are often concern the fact that Businesses cut down the usual bonuses as the way to sneak through the loophole in the new minimum wage law,¹⁹³ or workers are forced to over-

¹⁹² TPP Consistency Plan Vietnam, see *supra* note 190, Part. VIII, Para1

¹⁹³ Lê Tuyết, “Vụ 3.000 công nhân Nissey Việt Nam đình công: Giám đốc Cty tuyên bố tăng lương không sai với luật!”, Báo Lao Động, 17/ 2/2016 [Trans: Le Tuyet, “3000 Vietnam Nissey workers strike: the CEO announced that wage raise policy is not contrary to the law”, Lao Dong News, 17 Feb 2016], [Accessed on May 2016], available at: <http://laodong.com.vn/chung-toi-co-mat/vu-3000-cong-nhan-nissey-viet-nam-dinh-cong-giam-doc-cty-tuyen-bo-tang-luong-khong-sai-voi-luat-518314.bld>

work and be refused to work more shift with less hours;¹⁹⁴ or the harsh penalty on workers' wage for unreasonable resting hours, holiday and hours of work.¹⁹⁵ It is noteworthy that these reasons are very common for wildcat strike in Vietnam.

The series of wildcat strike reflects a number of issues in the VGCL operation: (1) it is the lack of representation and supervision on business' conduct. The question is raised as whether the VGCL actually knows what is happening within the closure of the factories in the areas that its regional Unions is working on. (2) The slow reaction to labour dispute is also in question. Because the majority of strike in Vietnam is wildcat strike and strike is used as the first resort¹⁹⁶ to demand for labour dispute settlement. This might be because VGCL is not clear on the situation that workers are subjected to and also because of the lengthy in waiting time for approval of strike, the complication of the procedure¹⁹⁷ as well as the probability of workers not knowing of their right to strike at all. (3) there is another issue which has arisen that, as the result of VGCL's ineffective operation, Business might get away with firing workers, who are under training time and have not signed the labour contract, after strike for the reason of "*in need for upgrading, maintaining and improving working facilities and environment*".¹⁹⁸

Consequently, the role of VGCL will continue be challenged as long as the implementation of Vietnam Labour Law remains to be weak as it is now. There are many obstacles that the VGCL would have to overcome in order to perform better representation for Vietnamese workers. The Vietnamese new minimum wage law is encouraging which indicates the progressive development of the relationship between

¹⁹⁴ Lê Tuyết, "TP.Hồ Chí Minh: Gần 400 công nhân đình công vì tăng ca kiệt sức", Báo Lao Động, 7/1/2016 [Trans: Le Tuyet, "Ho Chi Minh City: Around 400 workers strike due to exhaustion from over-work", Lao Dong News, 7 Jan 2016], [Accessed on May 2016], available at: <http://laodong.com.vn/cong-doi-tpho-chi-minh-gan-400-cong-nhan-dinh-cong-vi-tang-ca-kiet-suc-286294.bld>

¹⁹⁵ Nguyễn Duy, "Nghệ An: Cả ngàn công nhân đình công đòi quyền lợi", Báo Dân Trí, 14/11/2015 [Trans: Nguyen Duy, "Nghệ An: Thousands of workers strike, demand for rights", Dan Tri News, 14 Nov 2015], [Accessed on May 2016], available at: <http://dantri.com.vn/viec-lam/nghe-an-ca-ngan-cong-nhan-dinh-cong-doi-quyen-loi-20151113223434812.htm>

¹⁹⁶ East Asia Forum, "Vietnam's Regular Minimum Wage Increases are not without Discord", Economy Watch, Oct 2015, [Accessed on May 2016], available at: <http://www.economywatch.com/features/Vietnams-Regular-Minimum-Wage-Increases-are-not-without-Discord1019.html>

¹⁹⁷ International Trade Union Confederation (ITUC), "2010 Annual Survey of violations of trade union rights – Vietnam", 9 June 2010, [accessed 12 May 2016], available at: <http://www.refworld.org/docid/4c4fec4e3b0.html>

¹⁹⁸ Phước Bình, "Quảng Nam: Gần 100 công nhân đình công, hơn 30 người mất việc", Báo Lao Động, 15/8/2015; [Trans: Phuoc Binh, "Quang Nam: Around 100 workers strike, over 30 workers were fired", Lao Dong News, 15 Aug 2015], [Accessed on May 2016], available at: <http://laodong.com.vn/cong-doi-quang-nam-gan-100-cong-nhan-dinh-cong-hon-30-nguoi-mat-viec-364837.bld>; see also Quang Trường, "Vụ đình công ở Quảng Nam: Công ty đã xin lỗi công nhân", Báo Người Đưa Tin, 16/08/2015 [Trans: Quang Truong, "Strike in Quang Nam: Company has apologised to workers", Nguoi Dua Tin News, 16 Aug, 2015], [Accessed on May 2016], available at: <http://www.nguoiduatin.vn/vu-dinh-cong-o-quang-nam-cong-ty-da-xin-loi-cong-nhan-a202298.html>

Trade Union and workers. However, the enforcement is needed to be more effective and attentive to the reality of worker's life.

Secondly, it is encouraging that minimum wage regulation in Vietnam is being reviewed annually in order to be more realistic and to have real impacts on workers' life. However, the issue of enforcement remains as many Businesses will slip through the weak protection of workers as well as the lack of representation from the VGCL to cut down the amount of payment paid to workers. Furthermore, it seems that Vietnam has other issue urgently needed solutions so that wage growth would not be a dire move. It is the problem with the slow growth in productivity in accompany with the instability in inflation rate.

Raising wages would lose its meaning if inflation control and productivity rate are not well-adjusted. On the one hand, inflation rate in Vietnam has been fluctuated, according to the World Bank's data. Even though, inflation rate hit its lowest in 14 years, 0.6%,¹⁹⁹ it is predicted to rise again in 2016 due to the raise in "*electricity, education and healthcare prices*".²⁰⁰ It is also reported that during the beginning of 2016, inflation has been unstable and reached its peak during New Year time.²⁰¹ On the other hand, the productivity rate is said to be growing at a very slow speed. It is a danger to wage growth since wage growth and productivity should be raise at the same ratio. Even though wage growth can increase productivity, it is not the sole factor affecting productivity growth rate. On the contrary, wages outgrown productivity would affect inflation even more. Hence, for the wage growth not to be undermined, Vietnamese government might need to shift its focus on the other two elements and address them with further action.

Thirdly, gender inequality remains to be a pressing issue despite the adoption of Gender equality law in 2007. Several reports on the issue of discrimination against women in many areas, including employment opportunity and wage inequality.²⁰² The enforcement of Gender Equality Law did not make significant development. Describing the situation of gender inequality in Vietnam, the FIDH* President, Karim Lahidji, has claimed that "*Vietnam has made extensive legal commitments to guarantee women's rights on paper but has taken no steps to enforce or protect them in practice. Thirty-three years after Vietnam's ratification of CEDAW, Vietnamese women and girls are still relegated to the*

¹⁹⁹ "Inflation, consumer prices (annual %)", Vietnam, the World Bank, updated until 2015 [Accessed May 2016], available at: <http://data.worldbank.org/indicator/FP.CPI.TOTL.ZG>

²⁰⁰ Mai Nguyen and My Pham, "*UPDATE 1-Vietnam has record low 2015 inflation, but pace could jump in 2016*", the Reuters, Dec 2015 [Accessed May 2016], available at: <http://www.reuters.com/article/vietnam-economy-idUSL3N14D1NN20151224>

²⁰¹ Thái Hà, "*Lạm phát tăng cao nhất hai năm vì Tết*", Vneconomy, 24/2/2016, [Trans: Thai Ha, "*Inflation is reaching its peak in 2 years because of Tet*", Vneconomy News, 24 Jan 2016], [Accessed May 2016], available at:

<http://vneconomy.vn/thi-truong/lam-phat-tang-cao-nhat-hai-nam-vi-tet-2016022408449239.htm>

²⁰² ILO Vietnam, see *supra* note 177.

status of second class human beings".²⁰³ The UN Committee on the Elimination of Discrimination against Women also expressed its concerns over the fact that the access to justice for women remain low and that Vietnam should improve capacity-building in order to tackle the "*substantive gender inequality in line with the Convention*".²⁰⁴ Particularly in this Observation, the issue of gender wage gap was said to remain to be persistence and needs more extensive improvement of "*women's access to higher-paid jobs and decision-making positions*".²⁰⁵

Stating on the issue of gender inequality in Vietnam, the Vietnam Committee on Human Rights (VCHR) president, Vo Van Ai, has concluded: "*Vietnamese officials claim that its shortcomings in implementing CEDAW are due to the lack of financial resources. The CEDAW Committee said they are due to Vietnam's lack of political will. But most of all, it is the one-party state with its lack of transparency, political freedoms, and the pervasive control of the Communist Party that impedes the realization of women's rights in Vietnam*".²⁰⁶ It is clear that on the Gender issue, more actions must be taken in order to enforce the existing legislations. In labour aspect, it is important for the Government, the municipal authorities as well as the VGCL to recognise the urgent needs to take active role in cooperation with each other in order to tackle the gender gap in employment, especially in wage inequality. Without gender equality, living wage would have a hard time emerging in Vietnam due to the uneven in earning between members of a family.

²⁰³ "*Vietnam: UN committee review unmask grave violations of women's rights*", FIDH Press Release, Vietnam, 29 July 2015 [accessed May 2016], available at:

<https://www.fidh.org/en/region/asia/vietnam/vietnam-un-committee-review-unmasks-grave-violations-of-women-s#>

²⁰⁴ UN CEDAW, "*Concluding observations on the combined seventh and eighth periodic reports of Viet Nam*", 61st session, 6 to 24 July 2015. Para 9(d)

²⁰⁵ Ibid. para 28(a) and 29(a)

²⁰⁶ FIDH, see *supra* note 203.

* The Worldwide Human Rights Movement

Chapter 6. The future of a living wage – a concluding remark.

“By living wages, I mean more than a bare subsistence level — I mean the wages of a decent living.” - Franklin D. Roosevelt²⁰⁷

Living wage can tentatively be defined as a standard of wage fulfilling workers’ and their family’s subsistence needs, including foods, housing, health care, education and other essential needs such as clothing and travelling. Living wage is not individual wage as in the case of minimum wage. It is considered to be a family wage, sufficient for workers to take care of their immediate family members who needs their support.

Living wage is the concept which was borne out of the course of protecting human dignity and allowing workers and their family the rights to participate in normal civil life as citizen, the right to enjoy life as human being. It is to ensure a decent life with decent living standard against poverty. Living wage belongs to the human right of labour right. It is the respect to rights which are adherent to living being against potential exploitation and abuse of authority, promoting social equality, decent living standard and combatting poverty.

Within the framework of international law, many provisions of the instruments regarding labour rights have implicitly offer protection for living wage as one of the essential means to archive the goal to a decent living standard and poverty reduction. The right to a living wage can be found in many instruments, binding or non-binding, such as explicitly in the UDHR, the ICESCR, ILO Constitution, ILO Philadelphia Declaration and implicitly in ILO C131 on minimum wage fixing, ILO C95 Protection of wage. Although the right to a living wage is only implicitly given through the social consideration clause in C131 and C95, it is not necessary mean that these Conventions do not promote living wage. Arguing that living wage is the next step of development after a minimum wage, one could make an observation that these Conventions urge for a progressive evolution of worker’s right to an adequate and fair wage sufficient for a decent living.

Under the international labour standard, wage is not addressed as fundamental labour rights. However, it is considered to be of great importance. Particularly, the four fundamental pillars of labour rights in ILO declaration on Fundamental Principles and Rights at Work, even though they are not mainly concern wage issue, they are designed to either promote or to protect worker’s right to fair wage. The right to freedom of association, especially, the right to form, join trade union and to collective bargaining are assisting workers’ right to negotiate their wage standard without fearing the abuse of power from the employers. The prohibition of forced labour offers its protection against

²⁰⁷ “Franklin Roosevelt’s Statement on the National Industrial Recovery Act”, June 16, 1933, [Accessed on May 2016] available at <http://docs.fdrlibrary.marist.edu/odnirast.html>

exploitation and low wage. The principle of equal pay for work of equal value which protect workers from wage inequality can be extracted from the non-discrimination principle. Furthermore, the abolishment of child labour can be supported by ensuring workers' right to adequate wage.

The implication of living wage within international law has been an obstacle to realise the right to a living wage. While the international framework on wage and other aspects affecting wage, such as equal wage, discrimination, is requiring States to establish national regulation system to protect labour rights, the goal for a living wage does not make it to domestic level. States and Trade unions often stop at the recognition for a minimum wage. However, it is important for the right to an equal living wage to be realised at domestic level because the national legal order is the foundation for Corporate to exercise its duty of respecting the human right in labour.

Hence, the need for a clarification on living wage goal in the international level is imminent. It is not necessary mean that a brand new framework should be introduced, but the aim for a living wage should be state clearly and a mutual definition on living wage should be discussed and agreed on. Also, the conclusion of such discussion should come in document form provided by the ILO Committee of Expert and the CESCR so that State Parties to the related instruments could use it as a guideline on wage issue.

Furthermore, it is of great importance to make the statement on the strong cooperation between the ILO, the CESCR and the existing international framework on CSR, particularly on living wage. The reason for that is because the guidelines on Business and Human Rights, such as the Ruggie Principles, the OECD guideline and the ILO MNE Declaration often refer to these machineries for State obligation on Labour Rights. Therefore, strengthening the current international framework on wage, both in hard law and soft law, so that the goal to achieve an equal living wage for everyone is a deed that needs to be done.

On the business side, there is increasing effort from many Corporate and Multinational Enterprises to realise and enforce a higher wage standard for their workers following the international guidance on CSR. The level of wage is often determined according to the Business's economic situation and policy coordinating with the living wage movements established by many activists and civil societies. There are positive result regarding productivity, labour turn-over rate as well as the boost in reputation, such incentives were confirmed by many living wage Businesses. However, with small Businesses with more limited resources, the dilemma remains on how the necessary adjustment could be made regarding business operation so that higher wage would not be a major burden on Business's budget.

Studying on Vietnam situation as developing country with living wage, one could observe that the right to a living wage is of necessity everywhere, not only an issue of

industrialised countries. The demand for adequate wage will gradually and eventually lead to the insistence for a living wage. It is promising that the living wage movement would be positively responded to in most country as long as a coherent and effective national legal system and policy are established so that wage growth would not be undermined as the cause of economic damage, job lost and high inflation rate.

Country has the responsibility to ensure the full realisation of the right to an adequate and fair wage for workers and their family under the international legal instruments that it has ratified. The responsibility to achieve “full realisation” of a right should not stop at the level of adopting national law. There are more to the realisation and protection of wage than issuing a paradigmatic labour regulation. It is awareness raising, action plans to enhance the enforcement of national legislation and to tackle issues which relate to the protection and development of the right in concern. Those should also be taken into account as the fulfilment of State’s obligations on wage under international law.

Taking into account the complex situation of a nation, it is important to acknowledge that simply raising the level of statutory wage would not always be the correct response to the call for living wage. Prioritising the issues which would affect or potentially hinder wage growth then addressing them is also a necessary step to take in order to carry out an effective wage policy. It is appropriate to examine the issue of inadequate wage in connection with many other wage-related factors whilst bearing in mind the fact that statutory wage level is not the issue that can be solved alone.

Finally, it should be highlighted that the national wage regulation will play a key role in steering Companies’ operation regarding the protection of human rights, particularly in the aspect of wage rights. It is crucial that the right to a living wage is realised in the international as well as in the domestic level. It is recommendable that State should adopt living wage as either a statutory wage or a second national wage standard other than minimum wage with incentive as standard for Businesses to follow. The right to a living wage should be included in national policy on protecting wage. National regulation is the root to administer Corporate’s operation, with effective safeguard system for wage in both original countries and host countries, wage rights should be able to develop to a living wage.

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