

VERTICAL INCOME INEQUALITY AS AN EMPLOYMENT EQUITY ISSUE

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1. What is at issue?

1.1 *Guy Ryder`s question*

Why is there so much legislation about gender pay equality and so little results? Guy Ryder, Director-General of the International Labour Organisation (ILO), recently reflected on this issue:

[W]hat we want to do is to answer the question which we all need to ask: Why after decades of legislation decades of advocacy for equal pay and against gender discrimination, the gender pay gap worldwide is still around 20 percent and shows no signs of closing and why women`s participations rights in our labour forces are about 25 percentage points below those of men. What do we need to do, more of the same or something different?

Help us answer that question!'¹

1.2 *The common approach in equality legislation*

A section demanding equal pay for equal work and for work of equal value is a common provision in the equality laws of countries around the world. But isn't this demand limited in its application? Only the first part of such a norm can be easily realised. It is feasible for a claimant to provide evidence of equal work. The underlying part of the demand – that is, the concept of work of equal value – also requires proof. But how can work of equal value be proven?² Work of equal value means that both the claimant and a comparator work on the same occupational level. Assessing the claim of the claimant requires an understanding of mutual occupational levels. Which occupational levels are equal and how many exist? Is it

¹ Guy Ryder. (2014). It's time to unite against inequality', 4th Uni World Indaba [Video file]. Retrieved from <http://www.uniglobalcongress.com>, 9:49–10:35.

² Guidance is provided in the South African Employment Equity Regulations, 2014 and the Draft Code of Good Practice on Equal Pay for Work of Equal Value. However, this guidance is of little practical value in determining what is, in real terms, work of equal value, because the former displaces the focus of the discussion from the true meaning of the term 'equal value' to words such as 'qualification', 'impact', 'size' and/or 'influence'.

possible to differentiate between and assess seven or eight occupational levels or are there more than a hundred such levels?

1.3 The need for norms and benchmarks

As long as the current legislation does not provide norms and benchmarks by which to compare and to differentiate occupational levels, courts are obliged to rule on such issues. However, it is doubtful that the courts are able to perform these tasks. Equality law is a reaction to discriminatory practices which are, in turn, a result of prejudices and stereotypes in a society. As long as legislation does not define within which occupation groups work of equal value exists, courts are forced to arrive at their decisions without recourse to a body of law. However, without a framework of specifications, change cannot be driven. On one hand, the courts are at risk of maintaining practices influenced by stereotypes and prejudices because judges may not be in agreement as to what kind of work is to be considered to be of equal value. On the other hand, legislators cannot be expected to develop legislation to cover more than the minimum level of norms and benchmarks so as effect equal pay for work of equal value. The principle of separation of powers between the state and the courts will result in a rather restrained attitude towards specifying what work of equal value is. The failure of legislators to establish norms and benchmarks may result in a vicious circle: as long as the legislator does not provide criteria for work of equal value, the judiciary may not break the vicious cycle of income differentials for work of equal value.

1.4 Difficult to measure without a legal framework: work of equal value

In order to figure out what non-discriminatory remuneration is, it may be helpful to look at it from a broader perspective. ,To discriminate in employment and occupation is to treat people differently and less favourably because of certain characteristics, such as their sex. (...) It impairs the opportunities of men and women to develop their potential, skills and talents and to be rewarded according to merit. Discrimination at work produces inequalities in labour market outcomes and places members of certain groups at a disadvantage.³ Discrimination against women refers to unequal treatment of women on the basis of their gender. The

³ International Labour Conference, 91st Session, 2003 Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, Report I (B), recital 45

difference of treatment is influenced by views towards the role of women in society. A less favourable treatment of women at the workplace is caused by views and opinions inherited from the past.

The ILO Committee of Experts noted in 2007 that

... historical attitudes towards the role of women in society, along with stereotypical assumptions regarding women's aspirations, preferences, capabilities and 'suitability' for certain jobs, have contributed to occupational sex segregation in the labour market. As a result, certain jobs are held predominantly or exclusively by women and others by men. These views and attitudes also tend to result in the undervaluation of 'female jobs' in comparison with those of men who are performing different work and using different skills, when determining wage rates.⁴

Discrimination against women at workplaces results in the under-representation of women at highly paid job levels as well as through occupational gender segregation. It is within this context that we consider the gender pay gap. The same prejudices that cause the occupational gender segregation have also an effect on pay. This is particularly relevant in gender-biased pay disparity. As the Committee of Experts stated discriminatory views and stereotypes may result in an undervaluation of jobs. Hierarchizations of the gender relation work with dualisms (strong - weak; rational - emotional, etc.) and connect with the attribution of different characteristics (natures) to man and woman the precedence or subordination, from which various normative roles and expectations with regard to the woman's behaviour are derived. The job of a kindergarten teacher in Germany is seen as a 'typical female job'. When jobs for kindergarten teachers are offered under poor conditions the valuation of the action may be caused by stereotypes. The result in this example is an undervaluation of the pay for a kindergarten teacher caused by prejudices. The size of the difference to the next occupational level is influenced by discriminatory views. If the gender-based view caused the undervaluation the gap between the pay of a kindergarten teacher to income received on higher occupational levels is bigger as it would be without a gender influenced undervaluation. This may lead to disproportionate income differences between lower and higher occupational levels if the valuation of lower occupational levels is influenced by

⁴ International Labour Conference, 96th Session, 2007. Report of the Committee of Experts on the Equality of Opportunity and Treatment – General observation, clause 2. Report III (Part 1A)

prejudices causing an undervaluation of a work. On the other hand a 'typical male work' may be overvalued what also influences the amount of the difference in pay.

The gender pay gap can be broadly characterised in this context as being:

- unequal pay for equal work or work of equal value as well as
- disproportionate income differentials between different occupational levels.

Both result from a job evaluation influenced by stereotypes and prejudices. Disproportionate income differentials are of particular interest in this case. Comparing different occupational levels to each other in the same field or working environment may also help to answer the question of which work is work of equal value. By contrast, isolated attempts to enforce equal pay for work of equal value are unlikely to succeed in the long run if this moral imperative is not supported by norms and benchmarks set by legislation by or made binding through collective agreement.

1.5 The undervaluation of jobs

The difficulty for women as regards occupational advancement is denoted as 'glass ceiling'. This describes the obstacles which women encounter to entering top positions. In the South African labour market this consideration can be extended to groups disadvantaged by apartheid. The occupational segregation between black and white South Africans made it impossible to reach certain jobs during Apartheid. Black South Africans especially black women can also be confronted with a 'glass ceiling' in their career advancement as a result of discriminatory practices inherited from the past. There are many activities in South Africa to remove the 'glass ceiling' 'the unseen, yet unbreachable barrier that keeps minorities and women from rising to the upper rungs of the corporate ladder, regardless of their qualifications or achievements.'⁵ And it may still be more difficult for black South Africans to reach certain jobs in the private sector. Because 'the South African private sector workplace is

⁵ Federal Glass Ceiling Commission. *Solid Investments: Making Full Use of the Nation's Human Capital*. Washington, D.C.: U.S. Department of Labor, November 1995, p. 4

by and large still trapped in the apartheid era,⁶ as Alistair Smith the former executive director of NEDLAC stated. However, a significant larger concern is the income differential between the top and the bottom, inherited by the past.

Social standards and relevant laws divided the labour market described in a simplified form in a 'white' and a 'black labour market'. The differentiation went beyond that. For example black women are affected by multiple discriminations. However, it is enough to look at two characteristics to describe the evolution of a vertical wage gap as a result of discrimination based on race or gender. If one of the characteristic results in undervaluation and the other is neutral or results in overvaluation a pay difference between the incomes of the parties concerned appears. If the parties concerned do work of equal value, they should receive equal pay for work of equal value. If the parties concerned do work on different occupational levels, the difference between the pay should be non-discriminatory. Non discriminatory differentials between the occupational levels need norms and benchmarks for proportionate income differentials. The ILO states, that 'effective mechanism are needed to address the obstacles of discrimination when they occur. A common example involves claims for the non-discriminatory payment of wages, which should be set using objective criteria that takes into account the value of the work performed.'⁷ Subjective criteria should be avoided. As the Committee of Experts found: 'The ILO Committee of Experts found: 'Views and attitudes also tend to result in the undervaluation.'⁸

⁶ Alistair Smith, the former executive director of NEDLAC: the Independent 'World of Work' supplement (April 2015) p. 3

⁷ ILO Declaration on Fundamental Principles and Rights at Work (1998), Declaration Overview, p. 5

⁸ International Labour Conference, 96th Session, 2007. Report of the Committee of Experts on the Equality of Opportunity and Treatment – General observation, clause 2. Report III (Part 1A)

2. The vertical pay gap in South Africa

2.1 What the numbers tell us

[P]erhaps a less well-known fact is that, even by global standards, South African executives are remunerated at extraordinarily generous levels.⁹

While South African executive remuneration leads when compared internationally, the remuneration of low income groups totally deviates from this. It is reported that a worker with a monthly income of R5 700 has to work at the same monthly income over 93 years to receive the average annual bonus a director at Amplats (Anglo-American Platinum Limited) gets as additional income.¹⁰

The Khayelitsha¹¹ Commission Report states that, in relation to the income in this area of Cape Town, in 2013, ‘the median monthly income was R2 116 for an employed man and R1 526 for an employed woman’.¹²

The ILO measures ‘top–bottom’ income inequality by calculating the distance between the top and bottom deciles of income distribution using the so-called D9/D1 ratio. This methodology identifies ten income groups each representing the income of 10 per cent of the workers, beginning with the highest 10 per cent of income recipients.

10 % lowest wages	10 % 2nd lowest wages	10 % 3rd lowest wages	10 % 4th lowest wages	10 % 5th lowest wages	10 % 5th highest wages	10 % 4th highest wages	10 % 3rd highest wages	10 % 2nd highest wages	10 % highest wages
D1		D3		D5		D7		D9	

The threshold value between the 10 per cent of the highest and the 10 per cent of the second-highest income is D9; the threshold between the lowest and the second-lowest income group is the threshold D1. The ratio between these thresholds is used to measure the top–bottom inequality.

⁹ K Massie, D Collier & A Crotty. 2014. *Executive Salaries: Who Should Have a Say on Pay?*, p xxxi.

¹⁰ P de Wet ‘Mining strike: The bosses eat, but we are starving’ *Mail & Guardian*, 16 May 2014.

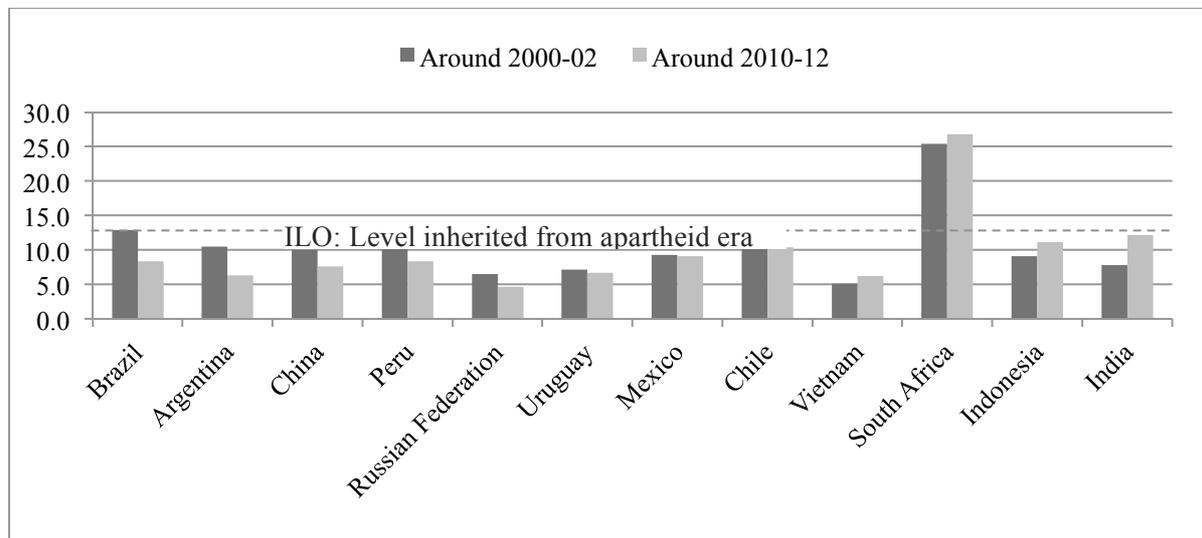
¹¹ Khayelitsha is a township located in Cape Town with significantly more than 350.000 inhabitants

¹² Khayelitsha Commission Report. 2014. ‘Towards a Safer Khayelitsha’, chap 4, para 27 at 39.

In a consideration of wages in developed, emerging and developing countries, the data on South Africa show significant inequality between the bottom and the top wage-earners.

Top–bottom inequality of emerging and developing economies over the past decade

(D9/D1 ratio) ILO *Global Wage Report 2014–15*¹³



The ILO's report pointed out that 'among the countries in our sample, inequality increased ... in South Africa, from a very high level inherited from the apartheid era.'¹⁴

South Africa has also the most adverse position within the same group of countries with respect to middle-class inequality (D7/D3 ratio).¹⁵ Middle-class inequality in South Africa, at a D7/D3 ratio of 3.7 in the period 2010-12, is higher than the top–bottom inequality in Iceland, Slovakia and the Czech Republic at more or less the same time – at a D9/D1-ratio of 3.6.

2.2 The heritage of discriminatory legislation

¹³ ILO *Global Wage Report 2014/15: Wages and Income Inequality*, 25 fig 22 a.

¹⁴ ILO *Global Wage Report 2014/15: Wages and Income Inequality*, 26.

¹⁵ ILO *Global Wage Report 2014/15 -Wages and Income Inequality* 25 fig 22 b.

The labour market during the time of and before apartheid was a prototype of a discriminatory working environment. Matshikwe¹⁶ points out that discriminatory law can be traced back at least to 1841. The income differentials between occupational levels of advantaged and disadvantaged groups were extreme. This has not changed in the twenty or so years since the end of apartheid. The vertical wage gap in South Africa is part of the legacy of political, legal, social and economic oppression during the past centuries.

In addition to discrimination by 'race', the gender pay gap is also inherited from the past.¹⁷ Ntuli explored gender wage discrimination and found in 2007 – in respect of the wage differentials – that despite 'the abolition of legalised discrimination and the introduction of affirmative action legislation, there is still wide acknowledgement that a significant portion of these wage differentials is due to gender discrimination inherited from the past'.¹⁸

2.3 The creation of disproportionate income differentials

The vertical wage between the occupational levels gap was a result of prolonged discrimination. It has not been caused by the 'free market' it is caused by systematic discrimination. And this makes it to an issue of equality law. The worldwide basic norm, the ILO Convention No. 111 addresses all forms of discrimination. The former South Africa was a prototype of a discriminatory society and shows the different effects of prolonged discrimination.

[P]ressed both by white employers and white workers, who shared an interest in the tight control of black labour, successive governments enacted a web of laws and regulations designed to guarantee and enshrine the superior economic status of whites

¹⁶ EL Matshikwe: *An Analysis of the Policy-making Process in the Department of Labour with Specific Reference to the Employment Equity Act, (Act 55 of 1998)*. (unpublished thesis, Port Elizabeth Technikon, 2004) 69.

¹⁷ R Nyman: 'So many legislative changes with such little impact - a gender analysis of labour reform', *Law Democracy & Development*, Vol. 2, p. 225 – 242, (1998), p 226.

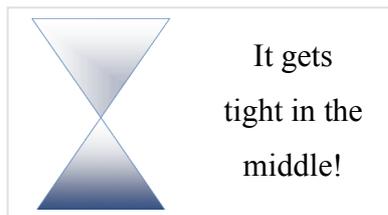
¹⁸ M Ntuli: *Exploring Gender Wage "Discrimination" in South Africa, 1995- 2004: A Quantile Regression Approach*, IPC Working Paper Series Number 56, May 2007, p 2.

and to perpetuate a master-servant relationship between the races at all levels of society.¹⁹

The effect of the discrimination of one group, combined with the preference shown to another group over a long period of time, is a divergent development created by a remunerative system. A compounded effect on inequality will be the result when the groups (of which there can be more than two) are strictly separated and experience long-term contrary treatment implemented by law and governed by social attitudes.

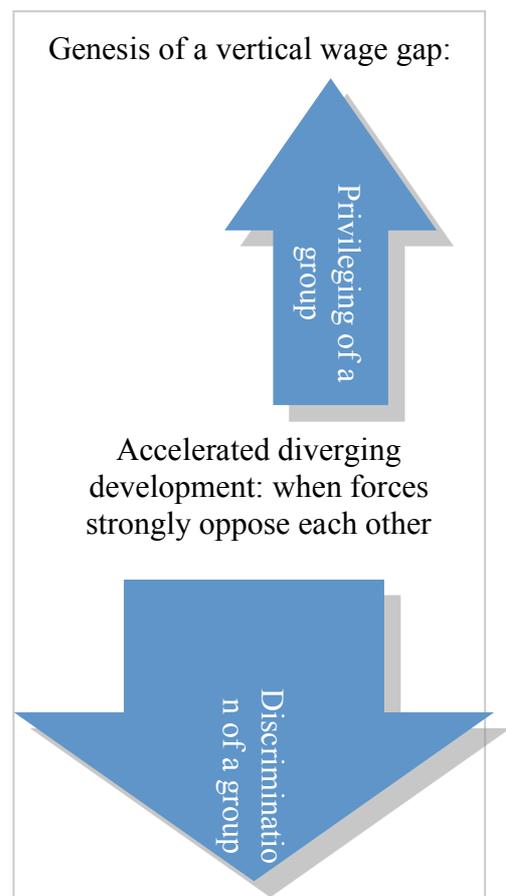
A web of laws and regulations made the division of South African society so 'successful', and perpetuated the 'master-servant' relationship between the 'races'.²⁰ The colonial years of the past century and from 1948 the apartheid policies artificially reduced the cost of the majority labour force and increased the cost of employing a favoured minority.²¹ As a result, employers faced higher costs for skilled and supervisory workers and very low costs for unskilled workers.²²

The result of the political and legal oppression and the political and legal preference reminds one of an hourglass. For a society, hardly any space in the middle means that the



minority is pushed up and the majority pushed down. This

dynamic still remains unchanged today.



¹⁹ E L Matshikwe: *An Analysis of the Policy-Making Process in the Department of Labour with specific reference to the Employment Equity Act, (Act 55 of 1998)* (unpublished theses Port Elizabeth Technikon 2004) 69.

²⁰ Ibid.

²¹ Green Paper: *Employment and Occupational Equity*, 01. July 1996, Notice 804 of 1996, par 2.4.5.

²² Ibid.

3. Legislative measures to address the vertical wage gap

As a legacy of Nelson Mandela's presidency, South African law includes a provision calling for the elimination of disproportionate vertical income differentials. The provision – section 27 of the Employment Equity Act²³ (EEA) – is part of the affirmative action chapter of the EEA and addresses vertical income inequality. The final version of s 27 of the EEA was adopted on 19 October 1998²⁴ and came into force on 1 December 1999. This provision differs from common norms in equality law. The provision does not ask for *proof* of discrimination. It addresses the *outcome* of discrimination. The primary objective is found in s 27(2) of the EEA²⁵:

[W]here disproportionate income differentials are reflected... a designated employer must take measures to progressively reduce such differentials...

Like a quota system to reduce the under-representation of women at higher occupational levels, this section directly addresses the result of discrimination – the vertical wage gap and is part of the affirmative action chapter of the EEA.

‘[T]he primary aims of affirmative action must be to redress the imbalances created by apartheid,’ Nelson Mandela stated in October 1991.²⁶

Choosing a legal concept which is based on the result of discrimination and which does not ask the individual claimant for proof of discrimination is the essential element in this approach and an extremely important demand for a non-discriminatory South Africa.

²³ Act No. 55 of 1998

²⁴ Employment Equity Act 55 of 1998, *Government Gazette* Vol. 400, No. 19370, 19 Oct 1998.

²⁵ Act The Employment Equity Amendment Act 47 of 2013 introduced an additional issue in s 27 of the EEA. The dual orientation is of no benefit for the readability of the provision. In its anticipated effectiveness in the intervention against disproportionate vertical income differentials caused by apartheid, s 27 of the EEA has lost nothing of its original intention.

²⁶ Employment Equity Draft Bill, Notice 1840 of 1997 Department of Labour, *Government Gazette* vol 390, No 18481, 1 December 1997: Explanatory memorandum of the Employment Equity Bill, *The legacy of discrimination*, p 5.

3.1 The drafting history of s of the 27 of the EEA

As the drafting history shows, the aim was to find an effective legal tool against vertical income discrimination. There was no international model for a legal provision to address this wrong.

In 1996 the Presidential Commission to Investigate the Development of a Comprehensive Labour Market Policy – the Labour Market Commission – demanded:

[A]ffirmative action plans often focus on the demographic proportions of the employed, and devote less attention to the question of discrimination and disadvantage in wages and other conditions of employment. The Commission is mindful that discrimination in remuneration persists and needs to be addressed in ways that are both conceptually and practically demanding. *When, for example, are wage differentials justified between different categories of workers, what is the legitimate extent of these differentials, and what are the best methods for identifying and rectifying inequitable differentials* [highlighting, RH]?²⁷

Subsequently, a Green Paper, published by the Department of Labour on 1 July 1996, stated that the ‘differences in income and status in the economy go hand in hand with “race” and gender.’²⁸

The Green Paper was followed by the Employment Equity Draft Bill of 1 December 1997 which stated:

[A]partheid has left behind a legacy of inequality. *In the labour market the disparity in the... incomes reveals the effects of discrimination...* These disparities are reinforced by social practices which perpetuate discrimination in employment against these disadvantaged groups, as well as by factors outside the labour market... These disparities cannot be remedied simply by eliminating discrimination. *Policies,*

²⁷ Report of the Presidential Commission to Investigate Labour Market Policy: *Restructuring the South African Labour Market*, June 1996, par 473.

²⁸ Green Paper: Employment and Occupational Equity, 01. July 1996, Notice 804 of 1996, Department of Labour, Ministry of Labour, Employment Equity: chapter Inequalities in income and status, 2.2.1.

programmed and positive action designed to redress the imbalances of the past are therefore needed [highlighting, RH].²⁹

The Draft Bill did not include a provision to address the vertical wage gap. Instead, it called for discussion and ideas: ‘

[W]e want to abolish discrimination in the workplace. Let this Bill be the subject of debate in every workplace and by all workers and employers.³⁰

On 22 July 1998, the Congress of South African Trade Unions (COSATU) submitted a proposal. The submission included a concept for reducing the vertical wage gap and convinced the legislator:

[T]he legislature had not paid sufficient attention in the proposed legislation to the pay difference between the highest occupational level and the lowest occupation level. *The Department of Labour then proposed section 27 in response to COSATU's proposal for closing the wage gap* [highlighting, RH].³¹

The EEA, including a section dealing with the vertical wage gap in the affirmative action chapter, was passed by the National Assembly on 19 October 1998 and gazetted on 1 September 1998.³² However, there was a lot of resistance.

[T]he section was extremely controversial when introduced into the Act. One can see why; its potential for impacting on wages rates is considerable.³³

The controversies may explain why the provision seems to be invisible in the today South Africa and its still has to be implemented.

²⁹ Employment Equity Draft Bill, Notice 1840 of 1997 Department of Labour, Government Gazette vol 390, No 18481, 1 December 1997: Explanatory memorandum of the Employment Equity Bill, The legacy of discrimination, p 6.

³⁰ Ibid, p 1.

³¹ N Hlongwane ‘Commentary on South Africa’s position regarding equal pay for work of equal value’,(2007) 11 (2) *Law Democracy & Development* 81.

³² Employment Equity Bill (B 60B-89) of 1 September 1998

³³ S Godfrey, J Maree, D du Toit & J Theron. *Collective Bargaining in South Africa*, p 170.

3.2 S 27 of the EEA addresses income differentials between the top and the bottom of the salary scale

According to s 27(1) of the EEA, designated employers have to submit a statement for income differentials periodically. On the Income Differential Statement – the EEA4 form – income differentials between the top and the bottom have to be reported. The design of the EEA4 form also shows that there can be no question that the approach of s 27 of the EEA is vertical.³⁴ The EEA 4 form in its original version only asked for the wages at the top and those at the bottom..

Section D: Total income differentials

Income Levels		
All occupations and levels	1.	R
	2.	R

[I]n completing the Income Levels, the first income level (1) represents the average equivalent yearly remuneration and benefits of the five highest paid employees. The second income level (2) represents the average equivalent yearly remuneration and benefits of the five lowest-paid employees.³⁵

The design of the form was changed once in a while, firstly 2006. Nevertheless, when studying the different designs of the EEA4 form over the past years one might get the impression that there is a lack of political will to put the norm into practice. However, it is also possible that the administration felt pressure to implement the section more effectively.

3.3 Intermediate result

S 27 EEA requires the progressive reduction of disproportionate income differentials. The original core demand of the section has not been modified according to the amendment of

³⁴ Section D, Regulations Employment Equity Act 1999, EEA 4A and EEA 4A form 1999.

³⁵ Instructions, Regulations Employment Equity Act 1999, EEA 4A and EEA 4A form 1999.

2013. The section calls for proportionate income differentials and still needs to be put into practice.

3.4 Assistance provided by international sources

The ILO Declaration of Philadelphia (1944)³⁶ requires a non-discriminatory workplace. Wages and earnings have to ensure a 'minimum living wage' and need to guarantee a 'just share'. The concept of a 'just share' refers, in general, to income differentials between workers and employers and, specifically, the income associated with the different occupational levels. The ILO Convention No 100 of 29 June 1951 requires in Article 3(1) that ratifying states implement positive action to ensure non-gender-discriminatory remuneration. The ILO Convention No 111 of 25 June 1958 refers to the Declaration of Philadelphia and calls for the eradication of all forms of inequality at the workplace, which includes vertical discrimination through the structure of a remuneration system. The Declaration on Fundamental Principles and Rights at Work of 1998 states that the elimination of discrimination at work includes the need for non-discriminatory payments. The ILO explains in regard - as quoted in parts above - to this declaration:

[E]ffective mechanisms are needed to address the obstacles of discrimination when they occur. A common example involves claims for the non-discriminatory payment of wages, which should be set using objective criteria that takes into account the value of the work performed.³⁷

An area of increasing importance for a non-discriminatory remuneration structure, assured through objective criteria that take the value of work into account, can be detected like a clear thread running from the Declaration of Philadelphia through the adoption of the Conventions No 100 and No 111, right up to the Declaration on Fundamental Principles and Rights at Work of 1998.

³⁶ Declaration Concerning the Aims and Purposes of the International Labour Organisation (Declaration of Philadelphia), 10.10.1944.

³⁷ ILO declaration overview: 'InFocus Programme on Promoting the Declaration on Fundamental Principles and Rights at Work' (1998).

4. The way forward

Critics may state that the wage gap is caused by the poor education of many employees. But it is a common South African misconception that the significantly low remuneration of unskilled workers is caused by the lack of state education and not as a result of discrimination. The lack of education is the reason why unskilled workers earn at the lowest wage level. Unskilled workers everywhere in the world earn the lowest wages in any given country. The significance of the South African situation is the enormous gap that exists even today between the highest and lowest wages imaginable, even without the circumstances of South African history.

The Bantu Education Act³⁸ was promulgated in 1953. On 16 June 1976 students in Soweto started protesting for better education but the police responded with teargas and bullets. Today, 16 June is a national holiday, Youth Day, which honours the young people who lost their lives during this struggle against apartheid and for a non-discriminatory education system. The access to education has been taken away from these workers by the Bantu Education Act, they were forced to remain unskilled. To reach fair wages for unskilled employees is all the more important in view of the fact that disproportionate income differentials as a heritage from the apartheid era have not been eradicated until today. The eradication of vertical income discrimination will not change the fact that unskilled workers are paid at the lowest occupational level. However, putting s 27 of the EEA into practice means that employees at the lowest income level will receive non-discriminatory pay that, according to the ILO Declaration of Philadelphia, could be a 'just share of the fruits of progress'.

[S]ection 27 EEA holds a great potential to reduce the pay gap, but its efficacy will depend on both the extent to which employees, and society, can mobilise around its provisions and the extent to which the EEC is able to fulfil its mandate in providing norms and benchmarks.³⁹

³⁸ Act No. 47 of 1953; later renamed the Black Education Act, 1953.

³⁹ K Massie, D Collier & A Crotty *Executive Salaries: Who Should Have a Say On Pay?* (2014), 171.

The extreme income spread between the occupational levels was not the result of a low level of skills, nor a lack education, nor the 'free market', nor low productivity. It was caused by the law and social standards in the past. As Piketty states:

[T]he history of the distribution of wealth has always been deeply political, and it cannot be reduced to a purely economic mechanism.⁴⁰

Why not use the law to remedy the wrong? Norms and benchmarks set by collective agreements, workplace policies and the ECC can result in non-discriminatory income providing 'equal dignity and respect regardless of their membership in particular groups'.⁴¹

4.1 The 'Build Ubuntu – Close the Pay Gap' project of the IDLL

The implementation of s 27 of the EEA, however, seems to be invisible in the everyday reality of South Africa. The 'Build Ubuntu – Close the Pay Gap'-project of the Institute of Development and Labour Law (IDLL) at the University of Cape Town (UCT) aims to develop principles to facilitate the reduction of disproportionate income differentials in the workplace. It is in an early stage and will be soon developed. Broadly, the aims of the project are to:

- Document the wage differentials within multinational companies (pay packages by occupational levels at various global locations)
- Identify how wages/wage differentials are generated within companies (pay policies)
- Establish normative principles on wage differentials – what would constitute fair and efficient differentials
- Identify strategies that will shift pay policies from unfair to fair pay policies.

In pursuing the aim of reducing disproportionate income differentials further findings could arise. As a part of this project, difficulties with the interpretation or application of s 27 of the EEA will be examined. The outcome of the project will show whether or not this legislation

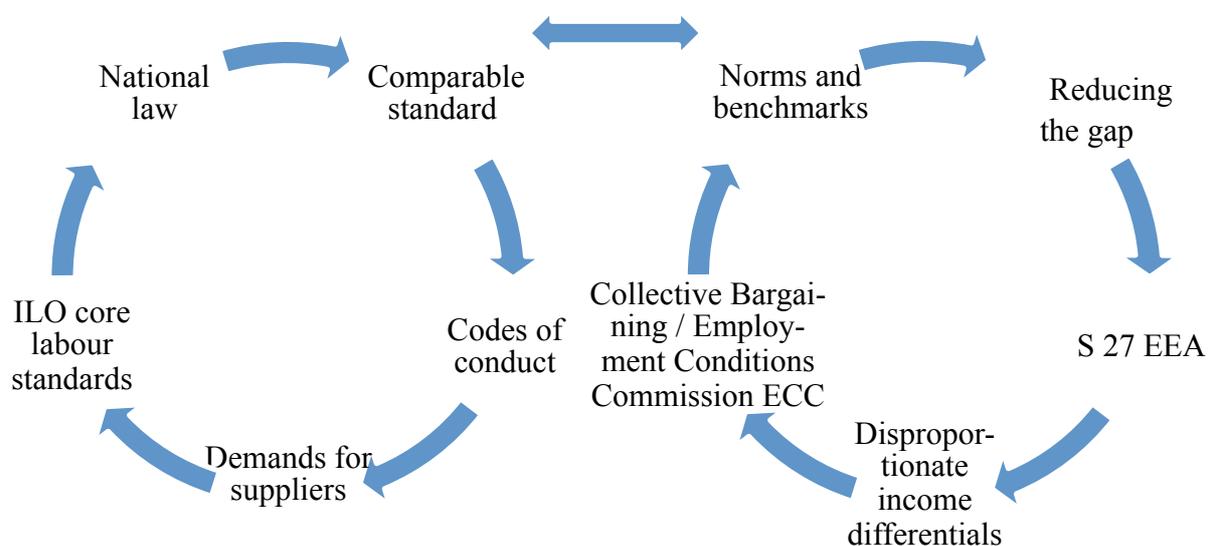
⁴⁰ Thomas Piketty *Capital in the Twenty-First Century* (2014), 20.

⁴¹ *The President of the Republic of South Africa vs. Hugo*. 1997 (4) SALR 1 (CC), Par [41].

is sufficient to reduce vertical income differentials and to what extent. The project may contribute to Guy Ryder's question why 'the gender pay gap worldwide is still around 20 percent and shows no signs of closing.' A legal concept which addresses the results of discriminatory practices is possibly a more effective tool for addressing discrimination. Difficulties in the realisation of equality laws may be bypassed when the legislator refers to the results of discrimination. Quota systems to realise a non-discriminatory gender representation are an example for that; here, too, s 27 of the EEA may be a model for a more effective provision. The development of standards for proportionate income differentials may also attribute to a better understanding of work of equal value. This should be the result income differentials may not be justified.

4.2 The international perspective of the development of norms and benchmarks

Putting s 27 of the EEA into practice is also important on an international scale. Some international companies have the same or very similar production processes to ours. Comparing the remuneration of comparable factory jobs in South Africa and in factories elsewhere (primarily in Europe) will highlight the different practices and policies between the income of skilled and unskilled workers in various regions of the world. Using survey analysis, research and case studies, income data at similar workplaces in different parts of the world will be collected and compared to the findings of the Inequality-adjusted Human Development Index (IHDI) and other international indices.



Multinational companies would be able to implement these standards into their codes of conduct and would have an indicator to prove fair treatment of unskilled workers. In a world where it is becoming important for the consumer in Sweden how a production company located in South Africa treats its employees, this can be a significant outcome which could develop into an international standard in the future.

4.3 The relevance of vertical income differentials as an employment equity issue

The Archbishop Thabo Makgoba supplements with:

[T]he levels of inequality in our society are shocking. We are also a society which has massive disparities of income, largely based on race but increasingly based on whether you have made it into the middle class. The ‘Build Ubuntu - Close the Pay Gap’ project of the Institute of Development and Labour Law at UCT, which aims to put Section 27 of the Employment Equity Act into practice, is a decisive contribution on the long walk to a more just society. I urge you to give it your full backing’.⁴²

According to the ILO’s *Global Wage Report 2014/2015*, South Africa is, in fact, one of the most unequal societies in the world. The provision to correct this is in place. All that is now required are the necessary steps to put it into practice. The implementation is also relevant for the general development of equality law. The findings of the Build Ubuntu – Close the Pay Gap-project may show an effective way to put provisions of this area of law into practice.

Cape Town, 15 July 2015 / Dr Ruediger Helm – Researcher at the IDLL

⁴² The Most Reverend Dr Thabo Cecil Makgoba, Anglican Archbishop of Cape Town, in a letter to pledge his support to the project

Annex: s 27 EEA

The text of s 27 of the EEA is as follows. The grey text is part of the Amendment Act of 2013 and addresses the new additional purpose of the Act which is not discussed here. The key points are in italics.

S 27 Income differentials and discrimination

(1) Every designated employer, when reporting in terms of section 21(1), must submit a statement (...) on the remuneration and benefits received in each occupational level of that employer's workforce.

(2) *Where disproportionate income differentials, or unfair discrimination by virtue of a difference in terms and conditions of employment contemplated in section 6(4), are reflected in the statement contemplated in subsection (1), a designated employer must take measures to progressively reduce such differentials* subject to such guidance as may be given by the Minister as contemplated in subsection (4).

(3) *The measures* referred to in subsection (2) *may include*

(a) *collective bargaining;*

(b) compliance with sectoral determinations made by the Minister in terms of section 51 of the Basic Conditions of Employment Act;

(c) *applying the norms and benchmarks set by the Employment Conditions Commission;*

(d) relevant measures contained in skills development legislation;

(e) *other measures* that are appropriate in the circumstances.

(4) The Employment Conditions Commission must research and investigate norms and benchmarks for proportionate income differentials and advise the Minister on appropriate measures for reducing disproportional differentials. (...)