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**School for Advanced Legal
Studies**

**“A Comparative Study of Gender-based Pay Equity
Implementation:
Lessons for South Africa”**

Submitted By:

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"...yet not I, but the grace of God that was with me."

I Corinthians 15:10

Dedication:

To my family: Dad and Mama - for their vision and unfailing support throughout my University career.

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Abstract:

Discrimination is defined as “the practice of treating one person or group of people less fairly or less well than other people or groups....” it is the “making or constituting of difference between”. Even though it must be admitted that there are marked differences between men and women, discrimination has caused these differences to present women as being inferior to men, not exclusively, but especially in the workplace. This paper will look at some of the reasons why despite the almost universal acceptance of gender equality as a fundamental human right, women remain substantially disadvantaged in the workforce. Special emphasis will be in the context of significant pay disparities between men and women, and women’s segregation into low status or marginal forms of work.

However, in as much, as a whole paper could be written on the reasons for pay inequity and arguments for and against pay equity, the fact remains that pay inequity is a phenomenon which 21st Century women can no longer live with in the light of their role as wage earners for their families and active participants in their country’s economies. As such, the more important study in my opinion, is how countries have sought to integrate pay equity into the fabric of their society.

In an October 1997 report, the South African Breakwater Project which monitors employment equity in South Africa bi-annually, stated that: “Income distribution in South Africa ranks among the most unequal in the world”. This could largely be attributed to the legacy of apartheid, that left the new South African government with many areas and levels of pay inequity to remedy. This may pose a danger to elimination of gender inequality that may easily be overshadowed by measures being taken to remedy racial inequality. It is my humble contention, that the two must go hand in hand with special emphasis being placed on the fate of the black woman. As a result, the comparative study of pay equity implementation in this paper is geared towards finding lessons to be learnt by South Africa as it embarks, with the Employment Equity Act 55 of 1998 newly in force, on a systematic elimination of discrimination in labor relations.

1.0 Introduction:

"[In 1964] employment discrimination tended to be viewed as a series of isolated and distinguishable events, due, for the most part, to ill-will on the part of some identifiable individual organization...Employment discrimination, as we know it today, is a far more complex and pervasive phenomenon...[The problem involves] 'systems' and 'effects' rather than simply intentional wrongs...[The consequences have been] perpetuation of the present effects of earlier discriminatory practices through various institutional devices..."¹

1.1 Sex Discrimination

Almost universally women have failed to reach leading positions in major corporations, private sector organizations, and consequently the higher echelons of the pay structure, irrespective of their abilities, training or motivation. This is only one level on which women seem to be under achieving. It is not difficult to find instances where women are unable to obtain admission to certain educational institutions or are under represented in a number of degree courses and careers despite their obvious academic ability. There can be no doubt that this is as a result of discrimination at varying levels based on their sex.

Discrimination is not a concept that is easy to explain and this could simply be attributed to the varying levels and/or methods in which it is practiced, each meaning something very different. Depending on the social-political climate of a country, certain types of discrimination are more prevalent and receive more attention than others. An example could be given of South Africa, a country emerging from a period of history during which the humanity of the majority of the inhabitants of the country was denied. In this situation, although one would think in the first instance of discrimination on the grounds of race or ethnic origin, one should not lose sight in a historical evaluation of the country of other forms of discrimination.²

¹ The House Committee on Education and Labor proposing amendments to the American Equal Employment Opportunity Act of 1972

² Basson AC; *The Regulation of Unfair Discrimination by the Employment Equity Act 55 of 1998* [1999] 11 SA Merc. LJ 240 at pp240

Sex discrimination, which is at the heart of the subject matter of this paper, is not a strange phenomenon to just about every country in the world. In the workplace, it is manifested in the unequal and unjustified distribution of income, training and promotional prospects of women and in their high levels of unemployment.

There are three major forms of discrimination recognized:

- Direct discrimination
- Indirect discrimination
- Victimization

The definitions of the first and last are pretty straightforward. Direct discrimination is easily recognizable and involves “an overt differentiation” based on one or more of a number of prohibitive grounds.³ Gender is one of those grounds and will involve a woman being treated less favorably than a man is or would be treated in the same circumstances. In order to prove direct discrimination, it is not enough to prove that one has been treated less favorably, but also that the *decision* to treat them in this way was made because she is a woman.⁴ Victimization occurs if one is treated less favorably than other persons are treated or would be treated because one has made a formal complaint or brought proceedings under sex discrimination or equal pay legislation. It should be noted, that even if one has not done any of the above, they are victimized if treated unfavorably because it is suspected that they have or intend to do so.

Indirect discrimination is more veiled in form, and occurs where an employment practice or policy imposes a superficially neutral criterion or requirement, but which has a disproportionate impact on one or more protected groups. In the case of sex discrimination, a person is unable to comply with these requirements by virtue of being a woman. In such a case, one must show that the proportion of women who can comply (if at all) with these conditions is considerably smaller than the proportion of men who can. The whole concept of indirect discrimination is made more complicated by the fact that the person who applies these requirements can defeat the claim by showing that such

³ Ibid. at pp242

requirements are justifiable. However, the fact that, for example, an employer did not *intend* to discriminate, is irrelevant. The mere fact that the requirements or practice have the effect of discriminating is often sufficient to establish a claim for indirect discrimination.

Good anti-discrimination law, will provide ample protection against all of the above. The bottom line when it comes to sex discrimination should be, that a person must not be “written off” or penalized simply because they are a man or a woman. It is with this in mind that a study on the systematic discrimination against women in the remuneration of their work can commence.

1.2 Distinction between “Equal Pay” and “Equal Pay for work of Equal Value”

Pay inequity is a problem that affects not only women but also minorities (including people with disabilities) and racial groups. However as stated above, in this paper the focus is on unequal pay as pertains to gender. Historically, women in paid labor were always paid less than their male counterparts partly as a result of the outdated ideology of male dominance which perpetuated a belief that men are worth more than women, that a woman will always be dependant upon a male for their survival, and consequently by implication that men deserve higher wages because they have families to support. This attitude has perhaps not changed very much as women are still earning between 50% and 80% of what men earn, in most countries in the world.

However, due to changing economic times and realities, the notion of “equal pay for equal work” (that is, exactly the same work in exactly the same conditions) caught on in the mid- twentieth century, becoming prevalent in many countries and continuing into the early 1970’s. This principle implies that individuals with the same qualifications and experience should receive equal pay *only* when they are performing the same work, under identical conditions. This was a start, but was soon found to give a seriously limited

⁴ Malone M; *Sex Discrimination: Your Right to Equal Opportunity*; Ross Anderson Publications; Bolton, 1983 at pp10

application to pay equity. This is because the principle did not deal with wage discrimination against women in jobs considered to be typically female known as occupational or job segregation occurring where women are confined to low status type of work, which is regarded as "suitable to their character". This is usually nurturing work, like nursing and catering or organizational work, like secretarial and clerical work. In these circumstances, it was found to be preferable to adopt the principle of "equal pay for work of equal value". Here, work was to be assessed on the basis of certain common (gender-neutral) criteria.

As such, work of equal value, even performed predominantly by women, could be defined as work which in terms of the demands made on the worker (under such headings as skill, effort and responsibility) is of equal value to that of a comparator (male) employed by the same employer. This criteria could be applied to work that is essentially very different in nature, widening the scope of situations where pay inequity could be dealt with but bringing along with it a myriad of problems that will become apparent as the paper progresses.

1.3 International Background to Pay Equity:

1.3.1 The International Labor Organization:

The ILO has since its' inception sought to promote gender equality. The principle of non-discrimination was properly established and embodied in the Declaration of Philadelphia in 1944. The declaration safeguards the right of women to "pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity". Besides this general stipulation, as early as 1919 in the ILO constitution, the issue of protection of women and recognition of "equal pay for work of equal value" was regarded as an area requiring immediate improvement.

It was not, however, until 1951 and ILO convention No.100 (Convention for Men and Women for work of Equal Value) that the principle of equal pay between men and

women for work of equal value was laid down. Article 1 of this convention defines remuneration quite broadly including not only the basic wage but also “any emoluments in cash or kind paid directly or indirectly to the worker by the employer in relation to the workers employment”. Article 2 specifically required that the principle of “equal pay for work of equal value” be applied by any combination of national laws or regulations. Similarly, convention No.111 of 1958 (Convention on Discrimination in Employment and Occupation) stated that the terms and conditions of employment (including remuneration) of an individual should not be subject to discrimination on the basis of sex.⁵ This convention was especially important as it dealt with indirect discrimination. This type of discrimination due to its hidden nature has been considered to be more insidious as on the surface, it appears that the criteria for any differentiation are neutral and fair but the effect or result is that a woman is discriminated against unfairly.⁶ These guidelines argued for raising wages in sex-segregated, female dominated jobs, on the grounds that this work had historically been sidelined and undervalued – this undervaluation being a form of discrimination in itself.⁷

In a 1993 working paper entitled “*Enforcement of Equality – Provisions for Women Workers*” the ILO also gave guidelines on key points to be considered in the application of the principles of equal pay, one of which was that: equal remuneration for work of equal value was intended to (and should) address the undervaluing, and subsequent lower pay of jobs undertaken primarily by women, when those jobs are found to be as demanding as the different jobs undertaken by men. It is suggested that such valuation should involve a composite of skill, effort and responsibility required by each job, as well as, the working conditions.⁸

⁵ Hodges-Aeberhard J; *Recent Developments Concerning Equal Pay for Work of Equal Value*; An Outline of Recent Developments Concerning Equality Issues in Employment for Labor Court Judges and Assessors; ILO, Geneva, 1997

⁶ Loveday G; *Gender Discrimination at the Workplace* [1997] TSAR 100 at pp. 102

⁷ Acker J; *Doing Comparable Worth – Gender, Class and Pay Equity*; Temple University Press; Philadelphia 1989 at pp. 6

⁸ Hodges-Aeberhard J; *Recent Developments Concerning Equal Pay for Work of Equal Value*; An Outline of Recent Developments Concerning Equality Issues in Employment for Labor Court Judges and Assessors; ILO, Geneva, 1997 at pp. 36

1.3.2 The United Nations:

The United Nations in 1946 established a Commission on the status of women, perhaps in recognition of the phenomenal contribution of women to world economies in addressing labor shortages during the two world wars. This Commission has since then played a pivotal role in social and labor developments in the promotion of gender equality in the international sphere. By close co-operation with the ILO, the Commission has functionally participated in establishing new international standards and in evaluation of the progress made in the implementation of these standards. The United Nations has not been left behind in as far as pay equity reforms are concerned. The UN prohibition of discrimination with regard to “equal pay for equal work” in the Declaration of Human Rights was later expanded to also cover the broader concept of “equal value”.

This is evident in the 1967 Declaration on Elimination of Discrimination against Women as adopted by the General Assembly, the 1993 Vienna Declaration and Programme of Action, and the 1995 Copenhagen Declaration on Social Development which all included statements supporting equal pay between the sexes for work of equal value. Similarly, at the 1995 Beijing Declaration and Platform for Action it was stated that governments should:

1. Increase efforts to close the gap between men and women’s pay
2. Take steps to implement the principle of equal remuneration for work of equal value by strengthening legislation
3. Comply with international labor laws and standards; and
4. Encourage job evaluation schemes with gender neutral criteria.

As a result of these international organizations asserting pressure on their member countries, and internal calls for change from academics, trade unions, practitioners and non-governmental pressure groups, most countries have today adopted the principle of “equal pay for work of equal value” applied through various methods as will be discussed in the 3rd and 4th Chapters of this paper.

1.4 Arguments for and Against Pay Equity:

Many arguments have been put forward to explain the existence of a wage/earnings gap between men and women. Whereas it is easy to prove that many working women are only part-time workers (especially in industrialized countries) and that there may be some interruptions in the working life of most women by way of maternity leave and other family commitments, it would be imprudent to take these reasons on face value as a full explanation for the disparity that exists. Other explanations may include employment discrimination and occupational segregation, as well as, undervaluation of women's work (which is central to the idea of equal pay for work of equal value).

Proponents of pay equity, who usually consist of unions whose membership includes women and women's advocacy organizations, argue that firstly, the case for equal pay can be based solely on facts, stating that:

- There is in *fact* a major gap in earnings between male and female workers in most countries in the world;
- That gap cannot fully be explained by reference to other factors and is primarily attributable to illegitimate sex discrimination;
- The same historic, social and legal attitudes that produced sex segregation in job allocation have spilled over into wage determination and this must be remedied.⁹

Proponents also believe that women, even though able to balance their jobs/careers with their family commitments, are limited by the opportunities offered to them which do not reflect their capabilities and often, if not always, result in lower wages. Further, that it no longer makes sense to argue that males are the breadwinners of the family therefore requiring a higher wage, necessity already exists for two wage-earners in a family due to the economics of the present time. As a result, the question to be considered is whether families will have two incomes or one and two-thirds incomes.

⁹ Weiler P; *The Wages of Sex: The Uses and Limits of Comparable Worth* (1986) 99 Harvard Law Review 1728 at pp. 1783

Opponents of equal pay mainly consist of employers who are at varying levels cautious, skeptical or openly opposed to the principle. They argue that the wage gap between men and women is attributable mainly to:

- Women's level of education – which is usually lower than their male counterparts;
- Women's family demands and/or responsibilities.

They believe that the concept of free choice is a very real one, that is, the power of an individual, male or female, to shape their own destiny. As such, a person chooses the amount of schooling they will pursue, the type of work they will engage in, the timing of their marriage and pregnancy. The argument being that, generally, women invest lightly in their education and training in anticipation of a lifetime of child-bearing and home-making.¹⁰ If and when a woman does take a job she often wants one where she has the flexibility to move in and out of paid labor with ease depending on her family commitments. The economy thus responds by giving women the flexibility they desire, but as a result they suffer a wage penalty. Finley¹¹ who is a strong proponent of pay equity, however succinctly argues that the 21st Century workplace is very different from this, that women do not bring with them to the work world fixed preferences for traditionally female or male work. Rather, that the workplace is a central site of development for women's aspirations and identities as workers.

Opponents also argue that any attempt to alter existing wage patterns, by whatever means, can never be efficient as:

- It will always be too costly – both to the state (in policing implementation) and to employers (who must bear the cost of any implementation).
- It reduces employee's collective liberties.

From these argument it is possible to pick out the more technical concerns underlying the whole concept of pay equity. Some of these are discussed in the next chapter.

¹⁰ Evans SM, Nelson BJ; *Wage Justice: Comparable Worth and the Paradox of Technocratic Reform*; University of Chicago, Chicago 1989 at pp. 59

¹¹ Kirp, Yudof, Franks; *Choice and Freedom* (1987) 96 Yale Law Journal 914 (an analysis by Finley L) at pp. 929

2.0 Key Features of Pay Equity:

*“Economics is neither the queen of the sciences nor the source of all wisdom, but it is a good place to start (though by no means the only one) in an attempt to develop general theories. And there is reason to urge emphatically that all sciences can learn something from other sciences”.*¹²

In as much as the whole issue of equitable remuneration has many moral, social and legal implications, for the two persons most affected – that is, the employer and employee, the issue revolves around giving and getting good return for efforts laid out. As such, it is about the economics of financially sustaining the enterprise to which they are both attached. For this reason, the three features discussed in this chapter explore some of the main concerns involved when a state or employer considers implementation of gender based pay equity.

2.1 Job Evaluation:

Indicators and definitions of work for many thousands of years have been created and formulated largely by middle and upper class men, as an aspect of their control over the society in which they live. Lewenhak¹³ a strong proponent of revaluation of women’s work feels that such control of economic institutions has become and remains one of the chief ways by which the status of women has been undermined in the workplace and the power of the elite maintained.

The establishment of economic “values” *per se* became necessary when, in pre-historic societies, people began exchanging goods and services – from that time until the present, value has been seen as being “exchange value”. Money/cash has been increasingly accepted as the medium through which the value of the goods or services to be exchanged is expressed. As a result, the view now predominant throughout the world is

¹² Boulding K; *The Skills of the Economist*; Howard Allen Inc., Cleveland – Ohio, 1958 at pp5

¹³ Lewenhak S; *The Revaluation of Women’s Work*; Croom Held Ltd., New York, 1988 at pp1

that if a product or service has no cash price tag, then it has no value. The impact of this on the status of women's work thus immediately becomes apparent – for most of the work that women do is either not paid (domestic in nature), therefore not having a cash price tag OR if in employment, is perceived to be unskilled or requiring little skill, and is therefore low in remuneration.

The main problem seems to involve a lack of understanding that the range of work done by women is not immutable and has changed over time. Today, the allocation of work between the sexes is virtually interchangeable, except in the matter procreation. As a result, any evaluation or revaluation of jobs done by women must of necessity involve the evaluation of jobs done by men. This ensures that over-valuation of typically male dominated jobs is dealt with at the same time as under-valuation of typically female dominated jobs. The factors that make certain kinds of work lower graded and consequently lower paid must affect men and women alike, a fact that does not sit well with most men.

Before going into the mechanics of how job evaluation works, it is worth noting that there is urgency to the fight for revaluation of women's work. Despite a high contemporary demand for labor in some countries, the overall trend is that fewer people are needed to produce goods and services. This is due to a range of emerging technologies, not least being computerization. Similarly, in industrialized countries there is a realization that non-industrialized countries can supply much cheaper labor, adding to the pressures which are putting people out of jobs in market economies – the effects of globalization are indeed being felt. The non-industrialized countries in turn face their own problems – the pressure of population on available land and hence on the job market is a growing crisis. Women, every bit as much as men, have to deal with the consequences of these phenomena. Women need to ensure that they have equal chances at attaining and retaining jobs, as to argue for pay equity presumes that there is a job for which one is receiving pay.

2.1.1 What is Job Evaluation?

There are two very different approaches taken to establish job values:

- Market Value Approach
- Job Evaluation Approach¹⁴

The Market Value approach involves the use of salary survey data to determine the price to be paid for various jobs. This is the most expedient method where acceptance is required for a wage system by employees, taxpayers and political leaders, as it is difficult to quarrel with salaries determined exclusively by market survey. However, for most enterprises, this method is not ideal, as it tends to ignore internal considerations of the organization and may invite comparison between jobs that are not truly comparable. Casually acquired survey information can never be a substitute for solid analysis of the relationships among jobs designed to meet specific objectives within an enterprise.

The main objective of job evaluation is to develop a set of value standards for establishing the *relative* worth of each job to a specific organization, which is then reflected in the remuneration package set up for the job. The process can be designed such that it ranks jobs into clusters having similar internal worth to the enterprise. A well-conceived and administered job evaluation plan helps improve employee perceptions of pay equity.

Job evaluation began before the Second World War, accelerating during and after the war as a consequence of government regulations that required certain kinds of accounting about employees. Various methods of job evaluation were developed over many years. In a number of developed countries in the 1960's it was generally agreed that equity in remuneration could be achieved through careful job measurement. Today, whole systems of pay administration have been turned up-side down by a demand for equal worth standard for judging pay discrimination, proponents seeing job evaluation as the method for ultimately establishing equal job worth.

¹⁴ The Hay Group; Handbook of Wage and Salary Administration; McGraw-Hill Inc., USA, 1984 at pp9/4

2.1.2 Specific Job Evaluation Systems:

There are many types of job evaluation systems but for the purposes of this paper, only the three main ones will be looked at briefly. These are:

- The Point Method
- The Factor Method
- The Hay Guide Chart – Profile Method

The Point Method

This includes any method of job measurement in which jobs are measured quantitatively in terms of abstract numbers (usually referred to as “points”).¹⁵ These points determine pay relationships but do not show the pay amounts. The objective of this method is to measure the content of each job and thus establish equitable pay relationships between all the jobs under consideration. The job is evaluated by factors instead of as a whole, and although different point evaluation systems use different factors (in content and number), under a given point system each factor carries its own scale of point values. Each job is measured independently by each factor, thus determining individual job factor point values, the total of which constitutes that job’s evaluation.

These measurements are based on the job’s requirements, responsibilities and conditions when occupied by a fully qualified person performing at an acceptable rate. Evaluations once established remain unchanged as long as the jobs remain the same but when a job is changed or a new one created, a revaluation is required. The most important thing to keep in mind is that the type and number of factors is not as important as the skill and consistency with which they are applied.

The Factor Method

In the factor method, the main factors to be considered are prescribed:

1. Mental Requirements
2. Skill Requirements
3. Physical Requirements

¹⁵ Ibid. at pp11/1

4. Responsibilities
5. Working Conditions

However, the content of these factors are not absolute and should be defined by each enterprise's Job Evaluation Committee to best suit the purposes of that enterprises job evaluation program.

*The Hay Guide Chart – Profile Method*¹⁶

The management consultants, the Hay Group, conceived this system in the United States of America in the early 1950's. It has its roots in factor comparison methods and is the single most widely used process for the evaluation of management, professional and technical jobs worldwide. Guide charts for the system were created in 1951 and contained basic reasons for grouping jobs together, arranged in some kind of rational order, on a scale. The observations of the creators were as follows:

1. While there were many factors one could consider, the most significant could be grouped as representing the know-how, problem-solving and accountability skills required for the job.
2. Jobs could be ranked not only in the order of importance within the structure of an organization but the distances between the ranks could be determined.
3. The factors appeared in certain kinds of patterns that seemed to be inherent to certain kinds of jobs.
4. The focus of the process of job evaluation must be on the nature and requirements of the job itself, not on the skill, characteristics, or pay of the jobholder.

For each factor, the judgement of value is reflected in a single number (at a later point the size of the number is significant), but more important is the sequence of the numbers. While all jobs by definition must have some of each factor, however much or little, relative amounts of each may be vastly different. These amounts gave job its *shape*. For example:

- Up-hill – where accountability exceeds problem-solving
- Flat – where these factors are exactly equal

¹⁶ Ibid. at pp15/1

- Downhill – where accountability is less than problem solving, and so on.

This concept of typical “job-shape” is the “profile” in the “Guide Chart – Profile Method”.

2.1.3 Criticism of Job Evaluation

Critics of job evaluation like American policy-maker Blumrosen¹⁷ condemn job evaluation completely, insisting that “occupational segregation of females and minorities, is of itself *prima facie* evidence of pay discrimination aided and abetted by job evaluation plans which rationalize as appropriate the pay for segregated jobs”. As such, since job evaluation systems as seen above are designed to reflect prevailing wages in their choice of factors and salary setting practices, it is possible that the process of describing and evaluating jobs reflects pervasive cultural stereotypes regarding the relative worth of work that is traditionally done by men and that traditionally done by women.

2.2 Calculation of Wage Adjustments:

Even in a climate of sophisticated remuneration systems and administration, many managers when faced with the responsibility of reviewing, recommending and approving employee pay increases still make decisions with less than full consideration of the pertinent facts involved. Even under normal circumstances, pay increase judgements should be made not only considering each individuals specific job level, length of service, the date and amount of last increase, but also the pay levels of others on the same or similar jobs within the enterprise and the industry at large. This is usually quite a systematic process for which the enterprise has budgeted.

It is an economic fact, that wages and unemployment vary inversely, presumably because of a relationship between the market demand for labor and the rate of increase in wages. A spontaneous wage hike that is beyond the normal demands of the market place will inevitably cause some unemployment in all but the most efficiently managed enterprises. Ideally, such an enterprise in the case of gender-based wage adjustments, would be able

to take a long hard look at their female labor component, make organizational changes, weed out the less competent workers (both male and female) and try to keep their wage bill from rising any more than it should. In reality, few of such enterprises exist.

It is then not difficult to see why employers are reluctant to voluntarily take on the task or the responsibility of calculating and giving pay increases to their female employees even where it has been ascertained that the enterprise is either practicing sex discrimination in its remuneration or has systematically undervalued the work of its female employees. However, where under a court order, pay equity scheme in force or a collective agreement the employer is compelled to adjust wages, then the ability of the enterprise to pay compensation and/or make a permanent adjustment depends largely on the pay system already in place.

To have an effective pay system, it must provide for a pay-increase budget consistent with the company's total financial control system, accounting procedures and personnel policies. Along with this, an effective program must be flexible enough to deal with special compensation situations without jeopardizing the operation. This said, the shock-absorption of the system in practice only works where there is one or at most a handful of employees to be compensated or considered. Where an enterprise must restructure its whole pay system to do away with pay inequity, the problem is more complex. Such large-scale adjustments have seldom been done and working examples are few and far between.

The most efficient wage adjustment system to date has been redlining. This system is also called "red-circling", and is the policy of freezing wages or denying further wage increases (to the previously advantaged group) for a period of time. Therefore, in equal pay, this would mean in order to achieve equity, the wages of current male employees might be frozen until female wages in that enterprise catch up. Red-lining is obviously preferable to an absolute cut in pay for jobs which under a job evaluation scheme are

¹⁷ Blumrosen R; *Wage Discrimination, Job Segregation and Title VII of the Civil Rights Act of 1964* (1979) 12 *Journal of Law Reform* 3

found to be over valued. This of course does not mean that the male workers or unions will approve of the move.

Disadvantages of redlining include:

- It tends to create a two-tier wage structure, with new employees starting at the new lower wage, with new employees starting at the new lower wage, so that workers on the same job may be paid different rates for a period of time. One way of minimizing this problem is by choosing a line closer to actual male pay.
- It also elicits protests from unions who are concerned that if they acquiesce to different pay for the same job, they may have internal problems with their members. Despite this, it can still be argued that it is a reasonable system, for wage equity could never be achieved if the higher paid continue to get proportional increases that equal those going to the lower paid.

It should be noted that a red line is only a central tendency and there would still be employees above any line when such factors as merit are considered.

Another method suggested for implementing equal worth wage adjustments has been to accelerate annual increases to the lower-paid group and decelerate increases to the higher-paid group. This could be another, if less popular, but viable option as the main point of equal worth adjustments is that they should to a great extent fund themselves, putting as little financial pressure on the employer as possible. Whatever the case and method adopted, an efficient equal worth standard would provide for:

1. Time to remedy inequities – that is, a period of several years from the introduction of the new standard.
2. Seniority and performance – allowing for differences in pay under merit pay plans where such differences are attributable to seniority and/or individual performance.¹⁸

¹⁸ Hay Group; *Handbook of Wage and Pay Administration*; McGraw-Hill Inc., 1984 at pp64/5

In the same token, a reasonable wage adjustment program is one that is well thought-out, gradual and would include:

- a) Taking a look at the effectiveness of one's organization
- b) A judicious but regular annual increase, gradually narrowing the gap without dramatically affecting profits
- c) At the same time vigorously pursuing job advancement for women.¹⁹

2.3 The Paradox of Maternity Benefits:

In this section of the paper two main issues will be addressed:

1. Why it is that employer's use maternity as a reason to discriminate against women in the workplace.
2. Why maternity benefits are an essential part of every woman's pay package, as of right, without having to affect the equality issue.

With regard to the first point, it is hard to overlook the fact that the whole issue of maternity is one of the major reasons given by employers for discriminating against women when it comes to initial employment, promotion and equal pay. Presumably, their reluctance lies with providing maternity leave (which is perceived to be costly) as the employer must find a suitable temporary replacement for their employee and deal with the possibility that she may not want to be reinstated after the birth of the child. As a result, the feeling is that men are superior workers to women simply because the issue of maternity leave and pay do not affect them.

In spite of this mentality, one cannot ignore the fact that after the conception of a child there follows a period of up to 12 months (including pregnancy, childbirth and early infancy) in which a mother and her baby are particularly vulnerable. More so, the problems of this period affect working women adversely as their employment and pay opportunities are affected at a time when the family as a whole may be experiencing greater financial constraints.

¹⁹ Ashley WJ, *The Adjustment of Wages*; Longmans, Green & Co., London, 1983 at pp14

Since it is largely accepted that women are a productive, significant and necessary part of our present-day workforce, slowly, often reluctantly, governments have therefore accepted the need to take measures to protect and promote the well being of mother, baby and family during this period. The ILO under their Maternity Protection Conventions of 1919 and 1952 has further reinforced this need. However, it cannot be said that many countries have a coherent policy on maternity, this often being attributed to a lack of agreement on the desired direction of such policy OR a reluctance to consider the expenditure involved in providing for it.²⁰

In the United States of America, there has been an identification of three general approaches to maternity policy.²¹

- The strict equality theory assumes that there are no significant differences between men and women, and that they must be treated equally in all respects. As such, pregnancy leave and pay should be treated like any other illness or disability.
- The “special woman” theory assumes that women are significantly different from men and concludes that women ought, therefore, to receive special treatment and protection. Legislation should therefore discriminate in favor of women, the rationale being that women are both the weaker and more special sex, and that the law must protect them.
- The equality of difference theory agrees with the special woman theory that differences do exist between the sexes. Advocates of this theory however argue that because differences exist, *some* allowances ought to be made to accommodate these differences but not to the extent of the special woman theory. Women should therefore be entitled to paid maternity leave but either a woman or a man may take parental care leave.

Under the Pregnancy Discrimination Act, America decided to use a hi-breed of the third theory. The Act was meant to ensure the avoidance of “accentuating the burden of

²⁰ Brown JC, Small S; *Family Income Support Part 9 – Maternity Benefits*; Policy Studies Institute, London, 1985 at pp3

²¹ Lofaso A; *Pregnancy and Parental Care Policies in the United States and the European Community* [1990] 12 Comparative Labor Law Journal 458

childbirth naturally imposed on mothers by preventing employers from contributing to the economic and personal hardships that can accompany a decision to have a family”²² In practice, the Act did nothing practical for the fate of a working mother. The only significant protection a pregnant woman was given against employment termination, is that an employer cannot fire her for being pregnant or for some reason that is really a guise for discrimination.

In the United Kingdom, the Employment Protection Act passed in 1975 provided that women who had at least one year service with the same employer were entitled to paid maternity leave and to reinstatement after the birth of the child. There was a legislated minimum of 4 weeks worth of leave. Further, a payment was required of an employer at his own expense, being the difference between the current level of National Insurance Maternity Allowance and a full weeks basic pay. The right to paid leave was independent of any intention to return to work after the birth of the child. These provisions of course caused a great deal of controversy, as they imposed a compulsory requirement on all employers whereas until then occupational provisions for paid maternity leave was entirely voluntary.

The main problem stemmed from the fact that women in higher wage brackets would receive higher maternity payments, this meaning that there would be no ceiling on maternity pay. The cost of these payments was to be shouldered substantially by the employer. As a result, many employers seek to implement their own schemes rather than rely on the concept of statutory maternity pay. This is especially so, where an employer is well aware of the need to retain the services of women within their employ whose skill, training and experience would be hard to replace.

As seen from the above examples, a standard maternity benefit package includes three vital components:

1. The rights of an employed woman to a period of maternity leave
2. A cash benefit to replace wages lost during the leave period

²² Ibid. at pp474

3. Health and medical insurance during pregnancy, childbirth and postnatal care. In South Africa, all the three components exist but not as a coherent package.²³ Maternity leave is covered under the Basic Conditions of Employment Act (BCEA), and a woman is entitled to a 3-month maternity leave period. This provision however does not guarantee reinstatement after the mandatory leave period. Women also have a right to partial wage replacement, through the Unemployment Insurance Fund for a period of 6 months – this only covers 45 per cent of their previous wage. Since the 6 months worth of wage replacement does not mesh with the 3 months leave mandated by the BCEA, it means that women who are only allowed to take the standard 3 months leave period will not collect the total benefit accorded them. Skilled and salaried workers will often belong to a medical aid scheme, which offers fairly good coverage in the privatized health care system. Unskilled and casual workers on the other hand receive no health insurance coverage during this period.

The result of these provisions is a situation where working women are almost exclusively dependent on the benefits provided *voluntarily* by employers or provided as a consequence of collective bargaining agreements. Another consequence is that where a woman may require an extended period of maternity leave, she may be forced to resign and later seek re-employment as a new worker at a lower wage and with a break in service, as reinstatement is not guaranteed.

It seems from the brief country studies above that what policy-makers need to keep in mind is the purpose for the existence of maternity benefits. They exist for no other reason than to enable women to fit into their career patterns a role essential to the sustenance of mankind, without endangering their lives. The paradox of these benefits is therefore, that what is being provided for is not a policy *for* maternity, but a policy for equal opportunities *in spite of* maternity. This distinction is not always clear cut and easily understandable.

²³ Matthias C: *The Rights of Maternity Benefits*. Agenda No.22 of 1994 at pp6

Another issue that may be worth considering is the various ways in which maternity pay can be funded, as it is acknowledged that in most developing countries the state may only be able to give partial assistance, if any at all. One way is by a “pay out” by the employer, depending on the contribution of the female employee. This method is administratively probably the most efficient, as the normal pay arrangements between the employee and her employer are continued. Another alternative may be to create a Maternity Pay Fund by a levy imposed on all employers. Such a fund would be centrally governed and would especially cut costs for firms who have a large number of female employees.²⁴ Such an across-the-board levy would also acknowledge that male employees have a share in creating a remedy for maternity pay.

²⁴ Brown JC, Small S; *Family Income Support Part 9 – Maternity Benefits*; Policy Studies Institute, London, 1985 at pp121

3.0 Implementation:

*"You can legislate equality all you want, but you cannot make people think it and live it, particularly if they have been conditioned through inherited tradition and their own life experience to the concept of inequality"*²⁵

In looking at the various works written on implementation of pay equity, it becomes clear that implementation is carried out in three main forms:

1. Pay Equity Litigation
2. Pay Equity Schemes
3. Collective bargaining/agreements.

Sometimes a combination of two or more of the strategies is used. Each of the above requiring a great deal of legislation to lay down its' foundations. In spite of the sentiments of Honorable Madame Justice Wilson expressed in the quote above, the role of legislation in pay equity is an important and often difficult one. Legislators must not only try to combat the inertia of social partners in the workplace (which may not necessarily always be intentional), but must also create channels by which employees can lodge their complaints without further repercussions. Legislators also face the practical difficulty of trying to define discriminatory actions that have not yet been clarified with sufficient precision in industrial relations practice.²⁶ In doing so, they must also guard against what has commonly become known as "protectionist legislation" which is founded on the perception that women being the "weaker" sex require protection for their own good. Such legislation, which is supposed to be designed to promote women's, interests ends up, subscribing to unjustified discrimination against women in employment. Consequently, the success or failure of each of the strategies above may perhaps be, at least partly, attributed to the strength of such legislation as will be seen in the country case studies in the 4th chapter of this paper.

²⁵ Wilson B: *Law in Society: The Principle of Sexual Equality* (1983) 13 Manitoba Law Journal 221 at pp. 225

3.1 Pay Equity Litigation:

This is the area of implementation perhaps facing the greatest difficulties. Even aside from the problem of the necessity of individuals initiating complaints which may be difficult to prove and costly, there is the difficulty of judges coming to grips with the nature of equal pay for work of equal value. This concept does not involve only the problem of the individual, her comparator and their employer, but requires a great deal of remuneration data to show the wage patterns of that particular employer. At time there may even be the need for an independent expert in the field to shed light on this data. Even where the concept is enshrined in specific legislation, it is often left up to the courts to clarify the scope of such legislation in these matters, and provide judicial remedies that give force to its implementation.

Hodges-Aeberhard²⁷ looks at some of the elements a court must consider when presented with a pay equity case. The court must first decide whether the individual or group bringing the claim, have the *locus standi* to do so. It must then look at the meaning of "work of equal value" in the context of the complaint. The main difficulty with this is that to make comparisons between two different types of jobs will require a suitable gender-neutral job classification system which rarely exists in an organization which is being brought to court on a remuneration discrimination claim. A court is however forced to compare the jobs and also decide whether the complainant may choose a comparator in another enterprise, other than the one in which they work. There are few, if any, jurisdictions where this has been allowed.

Once a *prima facie* case is made, the court must then decide with whom the burden of proving the case will lie. Many legislators and courts have decided that if a complainant can establish facts from which discrimination may be presumed to exist, it shall then be for the respondent to prove that the "apparent" discrimination is due to objective factors

²⁶ Eyraud F; *Equal Pay and the Value of Work in Industrialized Countries* [1993] 132 ILR 33

²⁷ Hodges-Aeberhard J; *Recent Developments Concerning Equal Pay for Work of Equal Value; An Outline of Recent Developments Concerning Equality Issues in Employment for Labor Court Judges and Assessors*; ILO, Geneva, 1997 at pp. 39

unrelated to the sex of the claimant.²⁸ The court then considers at this point what defenses an employer can invoke, and how indirect discrimination affects the factual situation. Finally, the court is bound to seek adequate remedy if the case is proved. Here it is worth noting, that not only is rectification the goal, there are other issues to be considered, for example:

- Compensation for further financial loss
- Protection against retaliatory measures; and
- Punitive damages in an effort to deter further infringements of the principle.

All things considered, it is not difficult to see why courts are reluctant to accept such claims. The cases are not only taxing but the courts always have in mind how far-reaching the effects of their decisions may be, not only to the enterprise in question but for other women performing similar work. It is often the case that courts will be more reluctant still, to interfere in wage policy, which is seen to be a management matter for which only the employer is responsible.

3.2 Pay Equity Schemes:

These are also known as proactive measures, and have been relatively successful in areas where they have been introduced. They involve legislated situations where employers are required to *institute* pay equity, whether or not there has been a complaint or *prima facie* evidence of discrimination in remuneration in their enterprise. Pay equity schemes differ from “equal work” and “equal pay” litigation as they are not complaints-based or driven in nature. It is the responsibility of employers to demonstrate that they are not engaged in discriminatory pay practices in any of their establishments. Whilst comparisons may be made across occupations, pay equity schemes (mainly for organizational purposes) are restricted to the same establishment/enterprise. Comparisons are made between jobs/occupations as long as they are considered to be of equal value according to a set principle, in most cases job evaluation is used.

²⁸ *Ibid.* at pp. 37

As simple and attractive as this system of implementation seems it comes with a long list of attendant problems, not least being the “funding” factor. Such a system requires a long process of background investigation and planning, most of the time performed by a full time Task Force. This Task Force, must come up with a new classification system, must analyze the possibility and/or feasibility of compensation, must create a new (and lasting) wage plan, find a way of having it implemented and make provision for future maintenance of pay equity.

Acker,²⁹ a member of the Task Force appointed to put in place a pay equity scheme in the Oregon State of the United States of America, felt that at all times there were five questions that should be on the mind of any Task Force charged with such a role:

- 1) How would they know when pay equity had been fully implemented or achieved?
- 2) Why are such projects so slow in implementation? (even in places where conditions are seen to be optimum for implementation of such a program)
- 3) How suitable is a management tool like a Task Force, for the task of achieving a radical reform like pay equity?
- 4) To what extent can a program like this upset old patterns and mentalities of inequality?
- 5) Can pay equity schemes as an approach to wage setting be used in concert with other ways of wage setting, such as collective bargaining?

These questions are designed to ensure that the Task Force has some long term goals aimed at changing the mindset of the social players in the plan, that adequate budgeting is done taking into account the many delays that come with such programs, and that reasonable bench-marks are set when the Force can evaluate its own performance in the light of the task it is charged with.

Ultimately, for any jurisdiction intending to implement such (or a similar) scheme, there must be a fair and balanced appraisal of what practical benefits such a policy would contribute to pay equity for women in the chosen area. Such an appraisal would include

²⁹ Acker J; *Doing Comparable Worth – Gender, Class and Pay Equity*; Temple University Press; Philadelphia 1989 at pp19

the feasibility of such a program, that is, whether it is workable in its own right and implementable without unacceptable costs to background economic institutions.

3.3 Collective Bargaining and Agreements:

At this point, one would then consider whether collective bargaining would be a more viable option in the light of especially the financial limitations found on the two former implementation strategies. Historically, even though unions have been instrumental in helping free women workers from abuse by employers regarding working hours and unsafe working conditions, they have failed to achieve significant gains in closing the wage gap between men and women.³⁰ In many countries, women now account for close to half the labor force, but quantitative increases in female labor force participation (as will be seen in the table below) has not been matched by qualitative improvements in remuneration. Occupational segregation persists; therefore the majority of women are in “female dominated jobs” characterized by irregular status and low pay.

The inertia of the unions in assisting women could be attributed to a number of reasons, for example, the fact that in union leadership the men often discriminated against the women in any case; also that women’s “double burden”, that is, their responsibilities for their jobs and homes meant that many of them were relegated to part-time work and the unions claimed to find it difficult to protect part-time workers. Unions also typically justified their failure to help women by treating their concerns, such as day care and maternity leave, as political rather than union matters.

³⁰ Browne N, Giampetro-Meyer; *The Overriding Importance of Market Characteristics for the Selection of Pay Equity Strategies: The Relative Efficacy of Collective Bargaining and Litigation in the Nursing Industry* (1989-90) 11 *Industrial Relations Law Journal* 414 at pp. 433

*Labor Force Participation Structure and Trends*³¹

	Labor Force		Labor Force Participation Rate					
	Total (thousands)	Annual growth %	Total		Male		Female	
	1996	1980-96	1980	1996	1980	1996	1980	1996
<i>South Africa</i>	16635	2.7	37.5	39.7	48.9	49.3	26.2	29.2
<i>Canada</i>	15796	1.6	49.6	53.8	60.1	59.1	39.1	47.6
<i>United States</i>	136884	1.4	48.5	51.4	58.2	56.4	39.1	45.4
<i>United Kingdom</i>	28967	1.3	47.8	50.1	60.0	57.6	36.3	42.4

It has become increasingly important that Trade union movements understand that their response to the challenges facing women is critical, in terms of their ability to meet the needs of women workers and more generally, to play an effective role in social dialogue and social action in the context of globalization. As such it becomes clear that if collective bargaining is to work to assist women in pay equity, they must take a bold step to be more unionized. Women must be encouraged to join, stay and be pro-active both as members and leaders of unions. In a survey conducted by the ILO,³² with data being collected from 57 nations and 160 trade unions in 1998, it was found that women accounted for less than a third of the highest decision-making bodies in over 60 per cent of the unions surveyed. Worse still, 7 per cent of the unions surveyed did not have a single woman in that body at all. Once membership and leadership positions are

³¹ World Labor Report; *Industrial Relations: Democracy and Social Stability*, ILO Publications Bureau: Geneva 1997-98 Table 7 at pp. 262

increased, women should look beyond initial organization to traditional strategies such as negotiation and striking in order to have their demands met.

Women's added involvement would necessarily mean that they must be consulted and involved in negotiating teams, should be well prepared for negotiations and should "follow up" their negotiations. It would also be important during such negotiations to give attention to atypical women workers (for example, part-timers, casuals, trainees and home-based workers) and their remuneration needs.

Statistics show that unionization amongst women is a trend that has already begun. For example, in Britain, the recruitment of women into trade unions has been a key factor in halting a decline in British union membership, with females accounting for almost half of union members. 1999 statistics show that since 1997 about 60,000 women have joined a union altogether accounting for 46 per cent of trade unionists. Union membership among black women has increased from 29 per cent in 1997 to 30 per cent in 1999, rising to 40 per cent in the Afro-Caribbean community. All this recruitment has been largely due to union's willingness to take up issues, which tend to relate to women in particular, such as childcare and benefits for working mothers.³³

Promoting gender equality at the workplace should not however end once the collective agreement has been signed – implementation of the provisions is the real challenge. Systematic efforts at monitoring such implementation should be put in place and may include regular reporting procedures and the keeping of statistics, which indicate levels of compliance.

³² ILO; *The Role of Trade unions in Protecting Vulnerable Women Workers*; EMPFORM, July 1999

³³ The Scotsman, Tuesday 4th May 1999, Headlines – *Women help halt decline in British Union Membership*

4.0 The Comparative Study

"I was of the opinion that successful borrowing could be made from a very different system even from one of a much higher level of development and a different political complexion. What, in my opinion, the law reformer should be after in looking at foreign systems was an idea which could be transformed into part of the law of his country."³⁴

4.1 United States of America

Initially like in all other countries, the law confined itself to imposing the principle of equal pay only in cases of jobs considered to be identical, even though the job titles may be different. This was of course very restrictive, for example, in America, women could not legally be required to lift a weight of more than thirty (30) pounds, but even where the work was otherwise identical with that of a man, the men needed only to be required to occasionally lift heavier weights and that would justify paying them a higher wage.³⁵ Only in 1963 with the passing of the Equal Pay Act did setting of separate wage scales for men and women become illegal. Since then, inequalities in pay for same or comparable work have been decreased although not completely eliminated. In America, "equal pay for work of equal value" is known as comparable worth.

America has been one of the few countries that has attempted to go down the route of Pay Equity Schemes. An example of this is the comparable worth project in the State of Oregon.³⁶ The project was born in 1981 when an amendment to the States Civil Rights Act was proposed requiring all employers in the State to pay comparable wages for work of comparable value – needless to say this move received very little support. As a result, in 1983 a feminist senator introduced, and legislation was passed appointing a Task force on Classification Equity. The Task Force analyzed job content data for 32,000 State employees, evaluated 2,000 job classifications, determined wage inequities, developed new compensation and classification plans, and developed an implementation strategy.

³⁴ Watson A; *Legal Transplants and Law Reform* (1976) 92 Law Quarterly Review 79

³⁵ Eyraud F; *Equal Pay and the Value of Work in Industrialized Countries* [1993] 132 ILR 33 at pp. 34

³⁶ Acker J; *Doing Comparable Worth – Gender, Class and Pay Equity*; Temple University Press; Philadelphia 1989

In 1985 the Pay Equity Bill resulting from their work was passed by the Legislature but vetoed by the Governor. However, work continued on the project and in 1987 with a new Legislature and Governor, another comparable worth bill was passed. Women State workers began to get equity increases in October 1987.

The Task Force faced many problems; for example, it was clear from the onset that pay equity was a political question. The project was primarily a political attempt by the Legislature, to insert women's interests into a wage setting system that had been for the longest time the province of management and unions. The management and union negotiations, conflicts and agreements for many years resulting in women's relative wage disadvantage, whether this was their intention or not. Despite this, employers were extremely reluctant to participate in the scheme as they stood to lose the most, especially in financial terms.

The other major problem faced was the issue of job evaluation. This is one of the central features of any pay equity strategy as seen in the 2nd Chapter of this paper and it involves comparing the physical effort expended or knowledge required in two often quite different jobs and judging how much these requirements are ultimately worth to a firm.³⁷ This situation is made more difficult by the fact that most women are usually found in office/administrative work while men are found primarily in the plant and in executive positions, giving rise to such questions like how one may explain that the accountability of a personal assistant is worth the same as (or sometimes much more than) the working conditions of a machinist working with heavy handling equipment.

In the end, due to political forces and the struggle between management and labor, the intended scheme failed. The scheme put in place in 1987 had little resemblance to the true comparable worth first envisioned by the task force. Several thousand low-paid workers did indeed receive wage increases, alleviating their poverty but ultimately

³⁷ Weiler P; *The Wages of Sex: The Uses and Limits of Comparable Worth* (1986) 99 Harvard Law Review 1728 at pp. 1765

leaving largely unfulfilled the goals of the women's movement to attain equity based on the evaluation of the worth of their jobs.³⁸

In the area of Pay Equity Litigation, it is clear from a reading of case examples that judges are reluctant to interfere with wage policy as they consider this to be a management matter for which the employer alone is responsible. In America, a woman will ask the court to adopt pay equity under Title VII of the Civil Rights Act 1964, which is the anti-discrimination provision. An employer is however presented with four defenses, introduced by the Bennett Amendment to Title VII. This section of the Civil Rights Act only came into play due to a perception by the Senate that the Equal Pay Act was too narrow in effect, and that Title VII would provide a much broader attack on employment discrimination in all forms. When the Civil Rights Bill went to the Senate with a ban on sex discrimination firmly attached, some attention was given to how this new legislation would fit in with the Equal Pay Act which was then only just coming into effect. This concern produced an amendment to Title VII authored by Senator Bennett which stated [in brief] that it would not be a violation of the Civil Rights Act for an employer to "differentiate upon the basis of sex in...wages or compensation paid...if such differentiation is *authorized* by the provisions of [the Equal Pay] Act".³⁹

The defenses provided that an employer might be absolved from responsibility if they can prove that any pay inequity is as a result of:

1. A seniority system
2. A merit system
3. Earnings by quantity or quality of production
4. That the wage differential is based on any factor other than sex.⁴⁰

The last defense has been the cause of many problems, its' ambiguity allowing an employer to justify his/her wage setting behavior on the "market".

³⁸ Acker J; *Doing Comparable Worth – Gender, Class and Pay Equity*; Temple University Press; Philadelphia 1989 at pp. 151

³⁹ Weiler P; *The Wages of Sex: The Uses and Limits of Comparable Worth* (1986) 99 Harvard Law Review 1728 at pp. 1794

The arguments put forward by employers as the “market defense” is:

- Either, that the predominantly male job commands a higher wage in the existing labor market and the employer is powerless to alter the dictates of a local labor market, however much he/she may be a supporter of a reduced gender wage gap.
- Or, alternatively that there is a single labor market where differentiation between workers is not actually based on sex (even though it may appear so) BUT on the basis of their prospective productivity alone.⁴¹

The real reason, however behind this defense lies in the employers’ need to protect themselves from the penalty/expense they would incur from putting in place a comparable worth scheme in their individual firm. Substantial amounts of money are likely to be involved on the part of such an employer who uses it to increase the wages of his female workers to eliminate a sex-based wage differential. This means that inevitably there will be a squeeze on the employers prices and/or profit margins, as his overall production costs rise. This results in a decline in business with the ultimate solution, perhaps being, job losses. One of the solutions to such a problem seems to be in adjusting the wage rate for male jobs downwards while at the same time revising the female wage rate upwards – this means that the employers total wage bill remains roughly the same. Unfortunately, this may mean the employer suffers yet another penalty, as there will be an outcry from the male workers who will then move to firms as yet not affected by comparable worth. In the end, the employer either suffers the loss of his male employees OR pays them an incentive to stay, effectively completing a vicious cycle.

Case law is indicative of the courts’ acceptance of this defense, for example, in the case of American Federation of State, County and Municipal Employees (AFSCME) V State of Washington [1985] 770 F.2d 1401, Judge Kennedy felt that it ought to be recognized “that employers may be constrained by market forces to set salaries under prevailing

⁴⁰ Browne N. Giampetro-Meyer, *The Overriding Importance of Market Characteristics for the Selection of Pay Equity Strategies: The Relative Efficacy of Collective Bargaining and Litigation in the Nursing Industry* (1989-90) 11 *Industrial Relations Law Journal* 414

⁴¹ *Ibid.* at pp. 419

wage rates for different job classifications”. Further, that he could not find anything in the language of Title VII indicating that Congress intended to “abrogate fundamental economic principles such as the laws of supply and demand or to prevent employers from competing in the labor market”. Economists explain this principle, very simply stating that, in the labor market the price for someone’s services is a function not only of their usefulness to the firm that wants to employ them, but also of the number of people who are ready and willing to do the work at the offered price. The courts have generally not been receptive to comparable worth claims brought by women, showing a general reluctance to delve into the real issues of the cases. It should also be noted, that such cases are few and far between as such litigation is costly and cumbersome for the complainant.

Suggestions made for the improvement of pay equity litigation, aimed at encouraging those suffering to bring complaints include:

1. Placing the burden of proof on the employer once the complainant has made a *prima facie* case of sex-based wage inequality.
2. Nullifying discriminatory clauses in collective agreements and individual labor contracts.
3. Ordering more effective remedies.
4. Allowing common interest groups and trade unions to bring equal pay claims, thus minimizing the cost and pressure on complainants.⁴²

⁴² Hodges-Aeberhard J, *Recent Developments Concerning Equal Pay for Work of Equal Value: An Outline of Recent Developments Concerning Equality Issues in Employment for Labor Court Judges and Assessors*; ILO, Geneva, 1997 at pp. 37

4.2 Canada:

In Canada, the general feeling is that pay equity has been placed on the policy agenda only as a result of the work of feminists. Here, the problem of the wage gap has been moved away from individual or group complaints-driven implementation – where complaints were made to commissions and tribunals typical of Canadian Human Rights Acts, to legislature based pro-active models.⁴³ In other words, pay equity schemes, which have been introduced in five Canadian Provincial jurisdictions – Manitoba, Ontario, Nova Scotia, Prince Edward Island and New Brunswick. All of the above schemes have certain characteristics in common:

- a) All are based on a system that involves a comparison between men's and women's jobs
- b) All the jobs in an establishment are divided into "classes" or "groups" and are designated as either female or male "job class"
- c) Each "job class" is evaluated using a gender neutral job evaluation scheme
- d) Once evaluations are complete, the remuneration paid to the female classes is compared to that paid to comparable male classes
- e) If this comparison reveals discriminatory pay practices, the legislation requires that the employers adjust the wages paid for female jobs to equal those paid for male jobs.

More has been written on the Ontario pay equity scheme than on any other scheme, largely due to certain unique characteristics and its uncommon success. For example, Ontario's Pay Equity Act 1987 is unique in that it covers the private, as well as, the entire public sector. Its' extension to employers in the private sector causing it to be heralded as "having gone the furthest in the world",⁴⁴ thus demonstrating a serious commitment to closing the wage gap in the province. This Act serves to challenge the use of the "market" as the sole determinant of women's wages and insists that employers evaluate and pay those doing women's-work according to the same measures of value used in assessing their male employees.

⁴³ Fudge j, McDermott P; *Just Wages: A Feminist Assessment of Pay Equity*; University of Toronto Press. Toronto 1991 at pp. 5

⁴⁴ New York Times, 27th July 1989, Headlines – "Ontario has gone the furthest in the World"

One key factor that reflects whether a jurisdiction is committed to closing the wage gap, is how wage adjustments are calculated. The American method is the use of an "average pay line" or what is commonly referred to as "red -lining" – if one job rate falls below the pay line calculated for an establishment, the job class receives a permanent wage increase. Ontario, on the other hand, moved decidedly away from this approach, introducing the complex and much less costly "job to job" comparison scheme. To be entitled to a pay equity adjustment in Ontario, a female job class has to be lucky enough to be in an establishment with an "appropriate male comparator" with the same value/level of job as the female job class seeking a wage adjustment. If there is more than one appropriate male comparator, the female job class is entitled to a wage adjustment to the level of the lowest paid male comparator.

Unlike most other pay equity schemes, Ontario's Pay Equity Act also established an independent tribunal to resolve disputes that arise during the implementation process. When an employer and an individual/ union cannot agree on an aspect in the pay equity implementation process, either party may request the Pay Equity Commission to appoint a Review Officer whose job it is to attempt conciliation. If the parties are still unable to reach a settlement, the Review Officer may issue an order binding on both parties, unless they seek a hearing on the matter before the Pay Equity Hearings Tribunal (which is a quasi-judicial body having the mandate to finally resolve the matter). The Review Officer's order is not a precedent for any other parties, and copies of the order available only to the parties in the dispute. This is much like the working of the South African CCMA as will be seen later in the paper.

One of the issues which seems, from a study of this scheme, not to have been resolved is that of the role of trade unions. There is mention of unions only in respect of litigation (as above) when there are problems in implementation, but they seem to have been completely cut out of their long-standing role as bargaining agents in negotiation of wages. It therefore seems useless for the unions to engage in lengthy and expensive litigation on behalf of their female members if decisions reached cannot be used in negotiations.

4.3 The United Kingdom:

The U.K. presents perhaps a more successful implementation model for pay equity. In the U.K. the Equal Pay Act (EPA) was passed in 1971, but employers given five years within which to implement the principle. The Act did not therefore come into force until the end of 1975 by which time the Sex Discrimination Act 1975 (SDA) had been passed. The EPA was re-enacted as Schedule 1 of the SDA but the two Acts were not consolidated, they were supposed to in effect provide a single comprehensive code in the field of employment.

Britain was also under an obligation to implement "equal pay for work of equal value" by virtue of its' position as a member of the European Community. The Community's response to the principles of pay equity was initiated in Article 119 of the Treaty of Rome. This Article went for the narrower guarantee of "equal pay for equal work". When the European Commission monitored the implementation of Article 119, it immediately encountered difficulty in determining what the formulation of the equal pay guarantee meant in actual practice. The realization was that this Article did not incorporate ILO Convention No. 100 in its entirety. Further, member states were proving to be slow in complying as this Article was felt to affect intra-community economic competition, therefore, those complying before the others would be at an economic disadvantage as their production costs rose.

It was therefore felt that a directive was necessary for clarification and speedy implementation. The Council approved an EC directive to this effect in February of 1975. Article 1 of this directive incorporates "same work" and the principle of "work to which equal value is attributed". The Article also considers the issue of a job classification system, stating that where such a system is used in determining pay, it must be based on the same evaluation criteria for both men and women, and "so drawn up to exclude any discrimination on the ground of sex".⁴⁵

⁴⁵ Ephron S; *The Equal Pay Guarantee in the EEC* (1986) 7 Comparative Labor Law Journal 197 at pp199

It is worth noting at this point, that the European Court of Justice (ECJ) has indicated that Article 1 of the directive was not intended to replace Article 119 of the Treaty. In the case of McCarthy's Ltd. V Smith 129/79 [1980] ECR 1275, which revolved around a woman seeking to make comparison with her male predecessor, the court stated that Article 1 of the Directive should only be seen as an attempt to amplify the meaning of equal pay and not altering its' content or scope.

Britain as a signatory of the European Community Treaty of Rome, therefore implemented equal pay but at this point the EPA had not provided for equal value claims. The only exception to this was where an employer had voluntarily undertaken a job evaluation study, which were few and far between. This changed with the Equal Pay (Amendment) Regulations 1983 which provided for the procedure to be used in an equal value claim, in the light of enforcement proceedings brought against the United Kingdom government in the case of Commission of the European Communities V United Kingdom [1982] IRLR 333. In this case, the ECJ held that the UK was in breach of its' obligations under the Treaty of Rome, in not "providing a remedy in its' national courts for equal value claims where no system of job classification exists".

The EPA operates by implying into an employment contract an equality clause. S.2 (a) of the Act, provides that, where such a contract is less favorable to the woman than a term of a similar kind in a contract under which the man is employed, "that term of the woman's contract shall be treated as so modified as not to be less favorable...". The equality clause can therefore only operate where there is a contractual term relating to the matter in dispute and in one of the following circumstances:

- Where a woman is employed in like work with a man in the same employment
- Where a woman is employed in work which is rated as equivalent with that of a man in the same employment
- Where she is employed in work of equal value with a man in the same employment.

It is also open to an employer in any of the above cases to argue that any variation in terms between the sexes is due to a "genuine material factor" other than sex. This is

perhaps the English equivalent of the American “market defense”. In this respect Courts in the U.K. have not been as willing to blindly accept this defense. In the case of Rainey V Greater Glasgow Health Board [1987] IRLR 26 it was held that, material factors were not rooted in the personal equation between employees (that is, between the complainant and her comparator), the difference must be *material*, that is, significant and relevant, and current at the time of the claim. The burden of proof at this point being shifted onto the employer. In any case, as held in Barber V NCR (Manufacturing) Ltd. [1993] IRLR 95 EAT, evidence must be led to show the historical process by which a difference in hourly rates has been arrived at. An objective factor justifying such a result must be clearly proved.

The woman may choose as a comparator any male worker in the same employment whom she believes is performing like work. This comparator may or may not be a representative of a group of male employees. The experience has however been that the likelihood of success is greater if he is indeed a representative of such a group. It had been suggested in the Court of Appeal in the case of Leverton V Clwyd County Council [1988] IRLR 239 that the terms and conditions of the employment of the woman and her chosen comparator must be at least broadly similar. Further, according to S. 1(6) of the EPA the comparator has to be in the same employment, that is, “employed by her employer or any associated employer...”. However, the ECJ has now granted relief to complainants by holding in the case of Scullard V Knowles [1996] IRLR 344 EAT that the class of comparators under Article 119 is broader than that defined under S. 1(6) of the EPA. The European court does not therefore draw a distinction between work carried out in the “same establishment or service” and other establishments. To the extent that this is a wider class of comparators, the English Courts must yield to Article 119, which has direct effect as between individuals.⁴⁶

Further, in respect of the comparator, the Equal Opportunities Commission (EOC), which is the body charged with reviewing the working of all equal opportunities legislation in

⁴⁶ Rubenstein M; Discrimination: A guide to relevant case law on Race and Sex Discrimination and Equal Pay. Eclipse Group Ltd., London 1999. 12th Edition

the U.K., had called for an amendment to the Act providing for comparison with a hypothetical male. This is because, as the situation stood, there was no redress for women who were segregated into an employment in which there were no comparable males engaged in the same employment. This suggestion was taken up in case law, and has been successful to some extent but in certain circumstances the principle has been difficult to apply. For example, where a woman's complaint is based on remuneration discrimination due to pregnancy, the courts attempts to use an "ill" male as a comparator in the case of Webb V EMO Air Cargo Ltd. [1994] IRLR 482 has been roundly rejected as this of course does not do justice to the woman's situation as it hardly imports the correct meaning – pregnancy not being an illness (which is an unfortunate matter) and serving a useful purpose, essential for the good of mankind.

The Employment Appeal Tribunal was charged with the duty of dealing with complaints in the employment sphere, the EOC assisting them with recommendations. For example, in looking at "like work", the EOC has encouraged the Tribunal to take a broad approach and not place emphasis on trivial distinctions. Instead, when it comes to differences of practical importance and the frequency with which they occur, the actual work performed by the employees must be examined and not merely the contractual obligations under which they perform.⁴⁷

It is perhaps due to this system of open communication between the EOC, the Tribunal, the Courts, employers and employees, as well as the recommendations that we see greater success in especially pay equity litigation in the U.K.

⁴⁷ Bourn C, Whitmore J; The law of Discrimination and Equal Pay, Sweet & Maxwell Ltd., London 1989

5.0 South Africa's introduction of Pay Equity

"...the measures we envisage [are]...to see to it that those who have been denied access to qualifications in the past can become qualified now, and those who have been qualified all along but overlooked because of past discrimination, are at last given their due."

*President Nelson Mandela*⁴⁸

The new South Africa is confronted with the "double-trouble" of employment inequity on two major fronts – race and gender. Since the stepping down of the apartheid government in 1994 there have been many policy changes in the realm of labor relations, some of these changes culminating in the Employment Equity Act 55 of 1998 (EEA) which has only recently come into force. This Act was drafted to be consistent with other international instruments on pay equity.

The types of statistics of pay inequity, which must be dealt with only, serve to amplify the problem. An investigation conducted by the Labor Market Commission (1996) and confirmed by the ILO Country Report (1996), shows that amongst all the black people (including Indians and colored people) employed, one third of them earn below R 500 per month as compared to 5% of white employed people. The same report shows that in spite of the fact that women consist over one third of all employees in South Africa, more than 50% of employees who earn under R 2000 per annum are women (this translates to roughly R 167 per month).⁴⁹ The problem of pay inequity in South Africa probably being compounded by the fact that women and black people are concentrated in occupations at the lower end of the remuneration spectrum.

A survey conducted by the Economic Research Unit of the University of Natal in 1987 shows that this is a problem that was allowed to grow unchecked during the apartheid years. The survey, which was conducted in the cities of Cape Town, Durban,

⁴⁸ Explanatory Memorandum to the Employment Equity Bill, *The Vision of the Bill* [1998] 19 ILJ 1345 at pp. 1346

Johannesburg and Port Elizabeth, showed clearly that within each race, significant earnings differentials between the sexes existed. This was in spite of the fact that females had more schooling (except in the case of coloreds). The table below is an example of some of the data collected.

*Mean earnings by race and gender.*⁵⁰

Table 4 Mean monthly income (Y), Years of Schooling (S), Labor Market Experiences (Ex), by sex and race – No. Of Persons Studied (N)				
	Y (Rands)	S	Ex	N
Males	1184.03	9.40	14.81	743
Females	859.28	9.80	12.45	462
<u>Africans</u>				
Males	670.60	8.26	15.92	413
Females	524.60	8.72	14.57	107
<u>Whites</u>				
Males	2415.60	12.19	13.77	191
Females	1657.50	12.23	11.21	120
<u>Coloreds</u>				
Males	884.00	8.97	12.59	113
Females	522.60	8.18	12.10	201
<u>Indians</u>				
Males	1596.60	10.50	14.46	26
Females	1086.00	11.82	12.59	34

⁴⁹ Van der Walt M: *Leveling the "Paving" Fields* [1997] ILJ 22 at pp. 23

5.1 The Employment Equity Act:

The primary purpose of the EEA is to achieve employment equity through:

- a) the elimination of unfair discrimination
- b) the implementation of affirmative action to advance black people, women and people with disabilities (referred to in the Act as “designated groups”)

It is worth noting at this point that the unfair discrimination provisions of the Labor Relations Act of 1995 are now covered under the EEA in Chapter II. In this chapter, unfair discrimination is defined as “any distinction, exclusion or preference made on one or more grounds including race, gender, sex, pregnancy, marital status, family responsibility....” among other criteria. Such discrimination, which is prohibited, is in respect of employment policy or practices which include, recruitment procedures, advertising and selection criteria, job classification and grading, remuneration, employment benefits, and terms and conditions of employment, among other criteria.

The word “unfair” is not defined in the Act but has been held in the case of Association of Professional Teachers & Another V Minister of Education & Others (1995) 161 ILJ 1048 to be “differentiation [not] based on an objective ground and such differentiation has the effect of nullifying or impairing the recognition, enjoyment or exercise by all persons on an equal footing of all rights and freedoms”.

Another point worth noting in respect of the above provision, is that under this Act, a claim for unfair discrimination may be based on one or more of the prohibitive grounds stated, thus making it possible for a black woman to attack a discriminatory practice on dual grounds, that is, race and sex. In a country with a history like South Africa’s, being black and a woman means that one was open to discrimination on two levels. One thing that black women must guard against, as they perhaps borrow a leaf from Black American women who suffered the same experience at the end of slavery, is to be referred to exclusively under the stereotypical experiences of white women.⁵¹ A black

⁵⁰ Pillay P; *The Determinants of Earnings and Occupational Attainment in the South African Labor Market*; Economic Research Institute (ERU), University of Natal, Durban, 1993 at pp6

⁵¹ Scarborough C; *Conceptualizing Black Women’s Employment Experiences* (1989) 98 Yale LR 1457

woman's working experience does not fit in with the concept most people have of women as being "timid and delicate", requiring protection.

Black women in South Africa have been unskilled domestic servants and laborers for years, being required to put in long hours of work and deal with the kind of economic hardships a white woman would probably not have. So, even if black women are now being given equal opportunities at education, training and jobs with higher remuneration similar to white women, they still:

- a) Fill the less prestigious and lowest paying jobs within any given sector
- b) Fill them in far smaller numbers than white women.

These observations do not by any means suggest that black women should be given super-remedies or relief, but merely emphasize the reality facing them and their struggle for decent jobs and wages. Black women must also be more prepared than any other group to fight to be conceptualized correctly and be given the equality they deserve.

The general approach taken by the Act is that employment equity encompasses both the elimination of discrimination, as well as, the establishment of specific measures to accelerate the advancement of designated groups. Such measures would deal with problems like unemployment of women and occupational segregation, and would include affirmative action and employment equity plans. This is very useful as a long-term goal for equipping women (and indeed other designated groups) with the skill and experience they would need to put up a credible fight against wage inequity as will be discussed later in this chapter.

For women currently in the workforce and already suffering from the earning differential, Chapter III of the Act speaks of the development of Employment Equity Plans. These plans may seem to only cater for employment and promotion at a first reading, but when this chapter is read together with Chapter II their relevancy to all issues of unfair discrimination is evident. An equity plan does not compulsorily apply to employers with less than 50 employees. This ensures that whilst every employer is obliged to ensure that there is no discrimination, smaller employers need not bear the administrative burden of

conducting audits, reviews and submitting reports. This is also a realistic starting point to ensure the effective monitoring of implementation in the first few years of the legislation's operation, especially since the Act includes both the public and private sectors.

The general procedure of setting up an Employment Equity Plan includes preparing a profile of the establishments workforce, reviewing its' employment policies and practices, preparing and implementing a plan in consultation with the employees and/or registered trade unions, lodging a summary of the plan with the Director-General at the Department of Labor; and reporting annually or bi-annually to the Department on the progress of implementation. This procedure is much like the implementation of Pay Equity Schemes as used in Canada and means that with regard to wage inequity, a business will be required to draw up detailed pay policy procedures and practices, with remuneration benefits set out for each category of employee and accurate descriptions of each position to justify the rate paid. This may ultimately mean seeking specialists to undertake the task, a costly affair. A further problem exists in that no mention has been made of a well thought-out job evaluation or gender-neutral classification scheme, which would be essential in dealing with claims rooted in the principle of "equal pay for work of equal value" which is not yet part of pay equity implementation in South Africa.

Under Chapter V of the Act, a Commission for Employment Equity (CEE) has been established as an advisory body to the Minister and as a monitory body. An employee or trade union representative may bring an alleged contravention of the Act to the attention of the CEE, labor inspector or the Director-General. Any dispute (both of this nature and with regard to unfair discrimination) is first referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) which operates on a "no fee, no cost, no barrier" system that is attractive and accessible to all complainants. The first step in CCMA dispute resolution is conciliation, which can either be done in a plenary session (with both parties present) or in a side caucus (where each party is dealt with separately). If this fails, arbitration may be tried, but in any case, within thirty days a settlement must be reached or the matter is referred to the Labor Court, under S.10 of the Act.

In respect of gender pay equity, the Industrial Courts in South Africa would be steering through largely un-chartered waters, as the courts have not had to deal with many sex discrimination cases, most cases pertaining to race discrimination. So far with regard to “equal pay” one case stands out – South African Chemical Workers Union & Others V Sentrachem Ltd. (1988) 9 ILJ 410 where it was held that wage discrimination based on race or *any other difference* between employees, other than skill or experience, is an unfair labor practice. This was confirmed when the Industrial Court decision was taken on review to the Supreme Court. The unfairness in this case lay in the payment of unequal wages for performance of the *same* work, and on the facts it was not necessary to consider the effect of a wage discrepancy in respect of work which was not identical but was alleged to be equivalent or have equal value. However, since inception of the South African interim Constitution (Act 200 of 1993), the South African courts are obliged to take cognizance of applicable public international law and “may have regard to comparable foreign case law in the interpretation of *inter alia* employment related rights”.⁵²

It seems that in theory, whether an Employment Equity Plan or collective/other bargaining is used, every possible thing that could ease the process of implementing pay equity in South Africa has been thought of. A long-term goal is in place, adequate time is provided for implementation, and a speedy dispute resolution system has been set up. The latter only becomes complicated on reaching the Labor Court stage, as at this point it becomes expensive and the vast majority of women (especially black women) will not be able to afford it. There has been a suggestion in this respect by a Joint Committee on “Improvement of Quality of Life and Status of Women”, that a fund be set up consisting of fines collected from employers for non-compliance with their equity plans, which would be used to cover the litigation costs of those who cannot afford it.⁵³ It is hard to tell how viable this would be, but it is a legitimate idea.

⁵² Loveday G; Gender Discrimination at the Workplace [1997] TSAR 100 at pp. 108

⁵³ Joint Committee on Improvement of Quality of Life and Status of Women, August 1998 – “*The Employment Equity Bill: A Gender Analysis*”

The problem with South Africa's scheme probably lies in an uncommon place. That is, in the minds of the social players in the workplace. It is difficult to perceive whether employers are really aware of the remuneration ramifications of the Act, as they focus instead on its' recruitment, training and career planning demands. In the meantime, the Act may also be creating what Johan van der Westhuizen, a Professional Executive with human resource consultants FSA-Contact terms as "unrealistic pay expectations"⁵⁴ amongst the designated groups, who may think that under the new provisions all employees doing a particular job must earn the same wage irrespective of skill, experience or productivity. As such, it will probably take a great deal of education, and considerably more "hit and miss" disputes before the true fruits of the legislation come forth. Further, even in as much as litigation is being avoided, the courts may be the only place where such illumination and precedent is found and made, respectively.

In this respect, therefore, there is much that still needs to be done. Apart from all the questions that need be considered in a pay equity case, no defenses are as yet provided for employers. As has been seen in the American courts it is not enough to merely provide defenses - these must be properly defined in content and scope to avoid ambiguity as in the example of the "market defense" which is wreaking havoc in pay equity litigation in America. Similarly, no mention is made of the remedies to be offered in such cases, and indeed not even a word on what system would be used under the Employment Equity Plans to calculate wage adjustments. Depending on the resources at hand, this may take the form of "red-lining" as in America or "job to job in Canada, or alternatively a completely different system befitting the circumstances of this country may be developed.

While all this is being legislatively "sorted out", South African women may also consider using the method now being used by women in industrialized countries (as they wait on their courts to become friendlier towards pay equity seekers) to achieve wage equity – collective bargaining. As seen in the table in Section 2.3 of this paper, South African

⁵⁴ Van der Westhuizen, 28th September 1998 – *"Equity Bill (SA) raising Unrealistic Pay Expectations"*, FSA-Contact

women have already begun taking a more participatory role in unionization, and should encourage their unions to take up their remuneration and job valuation problems with a greater seriousness and vigor.

5.2 The Basic Minimum Wage:

An option as yet not explored in this paper as an alternative short-term method of improving women's wages, is the use of a basic minimum wage. It has been felt that a minimum wage is the only practical way to protect workers where there is free foreign competition, especially in a time where Multi-National Corporations (MNC's) are on the increase. It is perhaps far more important to workers (both male and female) but more so disadvantaged workers that wages should never fall below a certain point, than that they should be more adequately remunerated.⁵⁵ The suggestion in South Africa has been that a national statutory minimum wage, which would keep in line with the inflation rate, could go a long way to raising the poverty wages earned by most women.

Other ways of dealing with low wages considered included:

- *Social Welfare* – Presumably, the government would make social welfare payments to the low paid. This method is fraught with difficulties, not least, how this would be funded as it is hard to imagine any developing country using its scarce tax revenue for this purpose with efficient results. It has also been proved in countries where its use has been attempted, that it creates a dependence on welfare payments.
- *Collective bargaining* – Trade unionists have traditionally argued against a national minimum wage in the belief that strong trade unionism, combined with collective bargaining are enough to eliminate low wages. It is possible that this is a viable method but the fact remains that even in the most advanced countries, women's trade union membership remains stubbornly at low levels.
- *Economic growth* – There is little or no evidence that economic growth, on its own, would eliminate low pay except perhaps in the long run.

⁵⁵ Ashley WJ, *The Adjustment of Wages*; Longmans, Green & Co., London, 1983 at pp50

- *Voluntary targets* – The setting of these for collective bargaining would mean that trade unions would seek agreement with employer’s organizations on a voluntary minimum wage for all companies. This measure is flawed in the same way collective bargaining on this issue is: large parts of the working population who need the changes the most would not benefit from it and non-unionized companies would not be compelled to adopt the minimum wage. Further, these non-unionized companies would exert competitive pressure on those companies that do adopt the minimum wage.⁵⁶

As early as 1985, COSATU (The Congress of South African Trade Unions), the largest trade union federation in South African history had made an uncharacteristic move and called for “a legally enforced national minimum living wage for all workers”.⁵⁷ This was in response to the plight of especially domestic and agricultural workers who are amongst the lowest paid in the country. Other low paid workers include: non-unionized staff, sub-contractors, casual laborers, part-time workers, temporary and home workers, almost all of these categories monopolized by women.

In support of minimum wage legislation, the ILO gives four purposes why such legislation may be important:

1. To end the “sweating” of labor – this occurs due to very low wages and bad working conditions.
2. To exercise upward pressure on the general level of pay – this is because the general level of wages is too low to satisfy the needs of workers and their families.
3. It should be used as an instrument of more equitable income distribution.
4. Eliminates unfair competition – certain industries are highly competitive, and profitability may depend on how much they can exploit the work force. Such legislation would limit the extent to which profitability involves using unfair labor standards.

⁵⁶ Young G; *The National Minimum Wage*; Labor Research Service, Cape Town, 1991 at pp10

⁵⁷ *Ibid.* at pp7

Critics of the minimum wage, however, argue that it could be an expensive affair and it would only work if the demand for labor by employers were less than their utility. This would mean limiting employment opportunities or jobs would be lost. Another limitation of the minimum wage, is the effect of the decision as to whether the wage would be set at a national or sectoral level. In a survey conducted by COSATU in 1994⁵⁸ it was found that over 80 per cent of domestic workers in South Africa earn below R 500 per month, while 18.1 per cent earn below R 150 per month. The problem would then be that if minimum wages were set sectorally, the minimum wage for domestic workers would be lower than any other sector. Furthermore, as higher paid workers are found in the organized sectors, they would have the power to negotiate wages well above the others. A low minimum wage in one sector could exert downward pressure on a higher minimum wage in another sector, and result in competition between different sectors.

In spite of these problems, a national minimum wage is a recognition that every person who works, deserves a wage that is able to sustain a civilized life and that their efforts (however unskilled they may be) are “worth” a certain basic amount. As such, it is an important stepping stone towards a living wage, a necessity within the context of a high unemployment economy where wage earners support the unemployed, and large racial and gender income disparities exist. If it is therefore agreed that the National Minimum Wage should not aim for a general rise in wages, but would exist as a means to protect the weakest sections of the workforce from gross exploitation, the following factors will have to be taken into account when setting a figure:

1. The minimum basic wage needed to sustain a civilized life.
2. Current wage levels in the economy, including regional and industrial differentials.
3. The paying ability of enterprises.
4. The effect of the minimum wage on inflation, employment and the national economic development plan.⁵⁹

⁵⁸ COSATU; *Labor Reform: Addressing Women's needs?*; NMC Workshop on Equal Opportunities, Midrand, September, 1994 at pp10

⁵⁹Young G; *The National Minimum Wage*; Labor Research Service, Cape Town, 1991 at pp16

5.3 Affirmative Action:

This section of the paper examines briefly the workings of an affirmative action plan and the efficacy of its use as a long-term measure to move women permanently out of predominantly female occupations and low-status work. The aim of such a program in the area of gender-based pay inequity, would be job advancement for women and the building of employment practices that are informed equally by women's experiences and needs. In the arena of anti-discrimination policy used to rectify the adverse effects of years of discrimination, affirmative action is probably the most controversial approach. Faundez⁶⁰ has defined affirmative action as "[involving] treating a sub-class or group of people differently in order to improve their chances of obtaining a particular good or to ensure that they obtain a proportion of certain goods". This definition is a confirmation of the fact that such a scheme does not involve the advancement of its benefactor or even one individual, but a "group".

Affirmative action measures fall in two broad categories:

1. Those meant to ensure the proper operation of an equal opportunities system.
2. Those which involve preferential treatment of persons in target groups.

This said, examples show that some measures are clearly more acceptable than others, aside from any objective they may have. Less controversial measures are: getting rid of testing requirements of jobs involving irrelevant characteristics, reviewing interviewing practices to make them fairer, fair recognition of educational qualifications and work experience, introduction of flexible working hours to accommodate everyone, and provision of special training programs for groups which have suffered discrimination. Measures considered to be less tolerable on grounds of fairness are: dismissing employees to make room for a person from a target group, creation of more jobs than necessary, and hiring of persons who do not have the requisite skills or qualifications, as this introduces the risk of reverse discrimination.

⁶⁰ Faundez J; *Promoting Affirmative Action* (1994) 7th Annual Labor Law Conference

In South Africa, affirmative action has been introduced through S.8 of the South African Bill of Rights, which prohibits unfair discrimination, either directly or indirectly of any target group mentioned in S.8 (2). “Women” is one of the target groups mentioned. Further, the Employment Equity Act provides specifically for affirmative action in S.2 (b) where one of the purposes of the Act is said to be “to [implement] affirmative action measures to redress the disadvantages in employment experienced by designated group”. S.15 (1) of the Act defines affirmative action measures as those “designed to ensure that suitably qualified people from designated groups have equal employment opportunities....”. Measures suggested by the Act include:

- Identifying and eliminating employment barriers including unfair discrimination.
- Measures designed to further diversity in the workplace based on equal dignity and respect of all people.
- Making reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities.
- Other measures including preferential treatment and numerical goals but excluding quotas.

There have been many arguments for and against such programs, not least that the new constitution in view of South Africa’s history should not allow for active preferential treatment of one color or gender, as this by implication discriminates against the other color and/or gender. Further, as employers begin to respond to pressures to adopt affirmative action policies, more and more formerly favored white males (described as “now suddenly less than fashionable”⁶¹) can be expected to cry foul as they find themselves discarded for black and/or female competitors for employment or promotion. The dilemma here lies with whether it is properly within the objectives of an employer to pursue the redress of harm caused by general societal discrimination (not whether such discrimination deserves to be remedied – it obviously does). Proponents of affirmative action, however argue on this point that this is the only forum at which past wrongs may

⁶¹ Grogan J, *Affirmative Action Affirmed – George V Liberty Life* [1996] 13 Employment Law 6 at pp6

be remedied, as color-blind and gender-blind approaches will only continue to produce inequality.⁶²

Leading on from this is the issue of equality. Equality is said to be the object that true affirmative action seeks to achieve, that it aspires to a society in which people are treated equally in all respects. Stated in this way, the proposition seems quite simple but in essence it is rather more complex. For example, on asking the question – what is being treated as equal, there are several options to consider:

1. *Equality of opportunity to succeed* – this concept takes us much further back and means insisting that everyone receives the same start in life by way of basic necessities and education, but accepts ensuing distinctions based on factors such as effort, ability, money invested and educational results.
2. *Equality of outcomes* – this means taking some ascriptive criterion, for example, race or sex and redistributing benefits on the basis of these factors.⁶³

There are no constant or certain answers as to what is best, but for the purposes of a permanent advancement of women in the types of jobs and remuneration they acquire is concerned, equality of opportunity to succeed seems to be the more logical goal.

In conclusion, it is worth noting that as much as affirmative action is playing an important role in South Africa, being imperative at this stage in its history, there must be a recognition that it can only be an interim and temporary measure. According to the presiding members of the Industrial Court in the case of George V Liberty Life Association of Africa Ltd. [1996] 13 Employment Law 6, affirmative action is a measure that should automatically fall away once a state of general equality has been achieved and that “non-discrimination is a value and a constitutional right. Affirmative action is a means to an end and not an end in itself”.

⁶² Smith N; *Affirmative Action under the New Constitution* [1998] South African Journal on Human Rights 84 at pp87

⁶³ Brassey M; *Affirmative Action – the Objectives* [1995] 11 Employment Law 132 at pp133

6.0 Conclusion

"If there is one universal truth, it is that the complexity of an issue increases in direct proportion to the number of lawyers and economists dealing with it".⁶⁴

Nearly all the features of wage structure sketched in almost all the books read for this paper are based on economic factors; it is the social factors, which are missed in the economist's interpretation. The differentiation between the rates paid to men and women in the same employment lends itself as a prime example to this theory. The attitude to women in most societies is highly ambivalent. On one hand, a tradition of chivalry and perceptions about their frailty make women the object of much *formal* respect, but on the other hand, in the workplace the assumption that women should normally occupy the humbler positions is strongly entrenched.

Those women, who manage to rise to higher levels within an enterprise, tend to be clustered in certain activities, to the point where certain functions within the company are almost feminized. An example of this is the large number of female Personnel and Human Resource Managers. The fact that the organizational structure of corporations are such that a career path in human resource management is less likely to lead directly to "the top" than other strategic areas such as product development or corporate finance only serves to amplify the problem facing women.

As a result in concluding, it is perhaps worth noting that the goal of the "equal pay for work of equal value" principle is to make visible and equitably reward the previously hidden skills demanded in many female-predominant jobs. What should not be forgotten is that it is not an error that keeps these skills unseen, it is the deeply entrenched societal and industrial norms that have been in place for centuries. The danger is that these attitudes will in turn be carried into the new millennium.

⁶⁴ Willbourn S; *A Secretary and a Cook: Challenging Women's Wages in the Courts of the United States and Britain*; Ithaca 1989 at pp. 157

A first step towards ensuring that this does not happen would be, it seems to me, to tone down the pressure placed by especially feminists and economists on employers. Pay equity is perhaps not designed to close the *entire* wage gap, rather it should be designed to reduce that part of the gender wage gap that is attributable to the systematic undervaluation of women's work. If employers are made to understand this, they may be more receptive to any pay equity policy imposed on them. Another step would be a realization that the exercise of rights and the use of litigation are only *part* of a process of social reform involving gender equity. This is perhaps the greatest strength of the South African legislation, as it tries to cut out adversarial dispute resolution as much as possible.

Ultimately, pay equity in my opinion requires more long-term than short-term goals. Examples of these are affirmative action in education and vocational training for women. Education has been said many a time to be the key to opening up the minds of human beings and should be used extensively to help eradicate beliefs hampering the recognition of women as deserving, such as:

- The idea that certain knowledge and skills are "natural" or "inborn" in women, therefore not requiring further training. For example, nurturing and organizing.
- The equation of women's skills with what anyone can do with only a basic education, for example, clerical work.
- The identification of skilled work with masculinity and unskilled work with femininity.⁶⁵

In the workplace, the achievement of pay equality would also require:

- Adequate mechanisms which locate pay inequality within the mainstream of labor relations
- An overhaul of the behavior patterns of the institutions involved.⁶⁶

⁶⁵ Acker J; *Doing Comparable Worth – Gender, Class and Pay Equity*; Temple University Press; Philadelphia 1989, at pp. 194

⁶⁶ Stackpoole-Moore J; *From Equal Pay to Equal Value in Australia: Myth or Reality?* (1989) 11 Comparative Law Journal 273

This would not by any means be an easy task for any country, not least South Africa, but perhaps one well worth the effort.

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