

THE MANDELA INITIATIVE

Dialogue and action to overcome poverty and inequality



Proportionate Income Differentials:

A Long Walk to Social Justice

A report of the 4th Build Ubuntu - Close the pay Gap workshops:

18 – 19 April 2017

Organised by the Labour and Enterprise Policy Research Group and the Institute of Development and Labour Law (University of Cape Town), and the Social Law Project (University of the Western Cape)



PSPPD
PROGRAMME TO
SUPPORT PRO-POOR
POLICY DEVELOPMENT

Hans **Böckler**
Stiftung 
Mitbestimmung · Forschung · Stipendien



Introduction

The Mandela Initiative action dialogues, hosted since 2012, are gatherings of around 25 experts from diverse sectors, including universities, government, civil society and elsewhere, who meet for several days on a particular theme. The gatherings afford all participants the time to speak about their work, and discussions on further possible action including how to multiply and expand successful projects. Action dialogues are university-led but do not focus solely on academic research; they seek rather to include many of those with experience and knowledge in the theme being discussed. Thus, the purpose of an action dialogue is to feed academic research and other knowledge into strategies and productive projects which can have an impact on poverty and inequality.

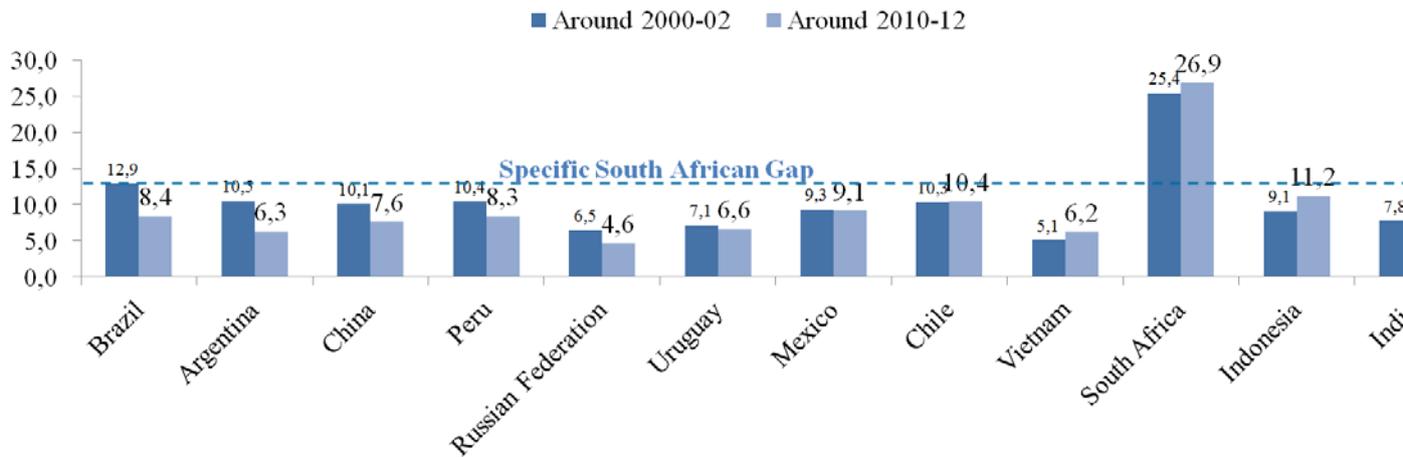
This action dialogue, in partnership with the Labour and Enterprise Policy Research Group and the Institute of Development and Labour Law (University of Cape Town), and the Social Law Project (University of the Western Cape) was part of the *Ubuntu – Close the Pay Gap* series of workshops.

The particular objectives of this fourth workshop were to look at the background and potential of a provision of the Equal Employment Act to address disproportional pay differentiations, and the possible hurdles in implementing this provision. The first day focused on disproportionate income differentials at the traditional workplace while the second day dealt with new forms of labour. On the first day section 27 of the EEA took the centre stage. The second day discussed the legal challenges of crowd work in the sharing industry and how disproportionate income differentials may be addressed.

Context

The top-to-bottom inequality in South Africa is among the highest in the world. The *Global Wage Report 2014/2015* has demonstrated that South Africa's vertical income differentials measured by the D9/D1-ratio¹ are around twice as much as in India, and three times as much as in Brazil.

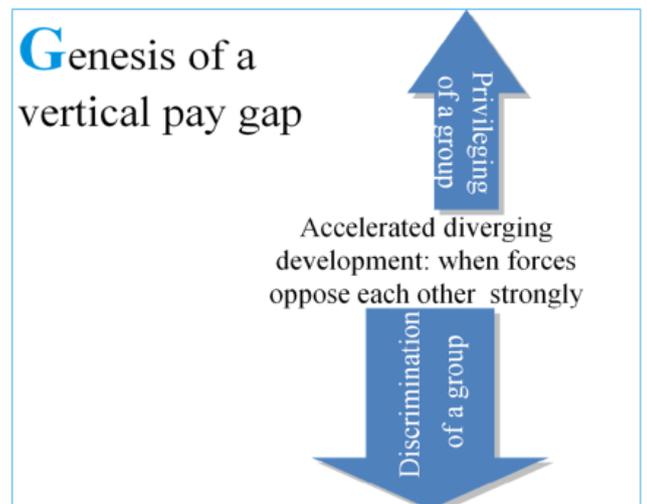
Top-bottom inequality emerging countries D9/D1-ratio



‘Among the countries in our sample inequality increased ... in South Africa, from a very high level inherited from the apartheid era.’ (ILO Global Wage Report 2014/2015, p. 25/26).

Before and under apartheid, skilled work performed predominantly by white employees was artificially overvalued, while unskilled work performed predominantly by black employees was systematically undervalued. These discriminatory social and legal norms laid the foundation for the existent disproportionate income differentials.

The post-apartheid government of Nelson Mandela acknowledged the existence of the apartheid wage gap. They were mindful that the vertical pay gap needs not only be ‘deracialised’ but needs to be reduced substantially:



Large pay differentials are rooted in apartheid inequality where whites expected a standard of living that could only be sustained if income distribution was highly unequal. Once based almost entirely on race, these differentials are now being deracialised rather than narrowed. The Commission believes South Africa must adopt the long-term goal of reducing earnings differentials substantially, not simply deracialising them.²

In this regard, the South African Constitution of 1996 and the EEA underpin the demand for non-discriminatory pay structures. In particular, section 27 of the EEA was enacted

to address disproportionate income differentials between the top and the bottom pay classes:

*The section was extremely controversial when introduced into the Act. One can see why; its potential for impacting on wage rates is considerable.*³

The provision has the potential to result in the creation of norms and benchmarks to achieve proportionate income differentials but it has not yet been implemented adequately.

To discuss this potential of the EEA, approximately 35 academic, trade union and civil society experts from South Africa and abroad participated in the deliberately small-sized workshop. The furthest journey, from Washington DC, was made by Prof Wilma B Liebman, who was the former head of the US National Labour Relations Board during the Barak Obama administration, and a leading expert on new forms of labour.

From Frankfurt, Germany, researchers of the German metal worker trade union IG Metall were joined by a researcher and representatives of the National Union of Metal Workers South Africa (NUMSA). Other discussants were, amongst others, from the National Labour and Economic Development Institute, the Cape Bar Society of Advocates, the Casual Workers Advice Office, the Congress of South African Trade Unions, the Alternative Information and Development Centre and the International Labour Research and Information Group. Two Uber drivers, who represented the #uberdriverssa movement shared their experiences of platform work.

Day 1: Disproportionate vertical differentials – the potential of section 27 of the EEA

Prof Debbie Collier and Dr Ruediger Helm (both University of Cape Town) started the action dialogue with a warm welcome and introduced in the first day. Edward Webster, professor emeritus at the Society, Work and Development Institute (SWOP) and interim director of the newly-formed Southern Centre for Inequality Studies, University of the Witwatersrand, delivered the keynote speech on behalf of the Mandela Initiative, focusing on inequality in South African working life.

The Mandela Initiative keynote: Inequality in working life: Developing an intersectoral and multi-dimensional approach to the study of inequality in South Africa



Prof Edward (Eddie) Webster, professor emeritus in the Society, Work and Development Institute (SWOP) and interim director of the newly formed Southern Centre for Inequality Studies, University of the Witwatersrand

Edward Webster's keynote speech for the Mandela Initiative focused on inequality in South African working life. He began his talk by drawing on figures on inequality in the workplace, the poor wages of the vast majority of the South African workforce, and the high executive salaries, even in global comparison. He raised the question of how alternative sources of power could be strategically used to reduce inequality in working life.

He suggested that there are two dominant narratives in the inequality discourse in South Africa. On the one hand, there are those who see inequality as a function of the distribution of capabilities. From this perspective, skills development, significant material incentives and labour market flexibility are required at both the level of the sector and the firm to unlock the dynamic potential of the economy.

The alternative narrative of South Africa's inequality argues that the distribution of economic power in South Africa (rather than the unequal distribution of capabilities) is a potential leading causal factor driving inequality. Indeed, economic power is the defining characteristic of the global rules that govern investment and trade. This perspective requires that the distribution of economic power be addressed head-on and requires a bolder and more integrated approach combining inclusive growth strategies, substantial social protection, capability development and labour activation at a scale sufficient to reconfigure structural deficiencies in the distribution of power. Inequality in power in South Africa, he argued, is produced and reproduced at the intersection of race, class, gender, sexuality and other aspects of identity. An intersectional approach is necessary to understand the way in which these different dimensions of power interact to reproduce inequality

Webster raised the question of what sources of power are available to the dominated and the excluded? How can this power be used strategically – combining what he called structural, associational and societal power with institutional power – for example the rights provided for in the Bill of Rights in the Constitution. However, he concluded, a focus on inequality has often been at the expense of an adequate and simultaneous focus on how to

grow the productive forces of the economy, and how to address inequality in a sustainable way, having regard to power imbalances in society. He echoed the sentiments of the Minister of Finance in his 2017 budget speech, when he said that transformation without growth would be narrow and unsustainable, while growth without transformation would only reinforce the inequitable patterns of wealth inherited from the past.

Addressing vertical inequality and the potential of section 27 of the EEA:

Section 27 of the EEA, its vertical approach and potential for collective bargaining

Ruediger Helm, Researcher at the Institute of Development and Labour Law (IDLL), UCT



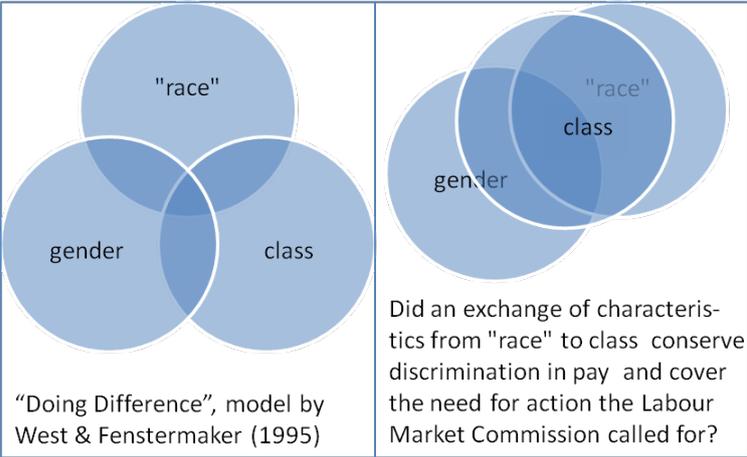
Ruediger Helm presented his research on section 27 of the EEA, its genesis and the potential of the provision. The implementation of section 27 of the EEA may result in the creation of norms and benchmarks to achieve proportionate income differentials.

The past discrimination against unskilled and semi-skilled workers has resulted in the pay gap between the top and the bottom, and Helm indicated that this “unusually skew”⁴ pay structure led to the Labour Market Commission’s observation "that pay differentials between the highest and lowest paid in South Africa are extremely high both by developed and developing country standards"⁵. The commission deduced the demand that "South Africa must adopt the long-term goal of reducing earnings differentials substantially, not simply de-racialising them".⁶

Unskilled workers worldwide find themselves at the bottom of the pay scale. Helm argued that the inflated pay gap between the top and the bottom in South Africa is the result of apartheid-style pay practices that continued after 1994. Thus, section 27 of the EEA has not been put into practice.

However, perpetuating disproportionate income differentials deriving from unfair discrimination in the past is a concern of government and needs to be addressed in light of section 9 of the Constitution.⁷ The legal

Overlapping grounds of discrimination



framework requires that disproportionate income differentials should be reduced progressively, and section 27 has been thoughtfully constructed to achieve this. It is therefore a remarkable legislative tool for fairer, non-discriminatory wages in the country. The persisting issue, according to Helm, is the failure to implement the provision.

Helm indicated that the National Minimum Wage Panel in November 2016 stated in their report that “more consideration should be given to Section 27 of the Employment Equity Act (EEA), which would regulate the observed ratio between the top 5% and bottom 5% of earners in all companies and institutions“. However, voluntary steps might not be enough and “a regulated system could be considered that creates effective wage ceilings to reduce wage inequality“. ⁸ He also presented other legal tools that can inform this debate:

- Section 3.8 of the South African Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value (EP Code) which points to the Code of the Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices (HR Code).^{9, 10}
- The HR Code is a useful aid for employers in reducing discriminatory wage disparities between occupational levels, and a much-needed starting point for the implementation of section 27 of the EEA. In particular, section 6 of this code provides for job analyses and job descriptions that consist of two components: clear language¹¹ description of the outputs and inputs of a job. In this way jobs are less likely to be undervalued.
- The EP Code describes four criteria that are up to date and relevant for the evaluation of jobs: (1) the responsibility demanded of the work, including responsibility for people finances and material;¹² (2) skills qualifications, including prior learning whether formal or informal;¹³ (3) physical, mental and emotional effort required in performing the

The Geneva Evaluation System from 1950*		
	Skills	Stress
1. Intellectual Requirements	X	X
2. Physical requirements	X	X
3. Responsibility		X
4. Environmental factors		X

REFA *Methodenlehre der Betriebsorganisation, Anforderungsermittlung (Arbeitsbewertung)* Fachbuchverlag Leipzig (1991), 43.

work;¹⁴ and (4) physical environment, psychological conditions, time and geographic location where the work is performed¹⁵. These criteria resonate with the Geneva Evaluation System which was first introduced in 1950 and are useful and objective aids for assessing jobs in relation to comparable jobs or jobs with a comparable work load, and for determining to what extent income differentials between workers within an occupational level are justifiable.

The EP Code and the HR Code provisions require that jobs are categorised by not only taking into account all job requirements but also considering the relation to other occupational categories within a company, the same industry or beyond. This can ensure that jobs are ascribed an income according to the skill, education, expertise and experience required, and which will enable assessment of the income differentials between occupational categories within an industry, and to which extent such differentials are justifiable.

Helm asserted that the HR Code and the ER Code provide the theoretical foundation for the development of a non-discriminatory, proportionate targeted pay structure. The EEA Regulations¹⁶ provide for the collection of data to enable comparison between the current pay structure and the targeted pay structure. However, while these three provisions can be a starting point for the practical implementation on factory plant level more detailed and objective criteria need to be developed to address disproportionate income differentials. In this regard, the answer for employers and employees alike may still lie in collective bargaining, which is explicitly mentioned in section 27 of the EEA, and collective agreements may greatly assist with even more detailed and objective criteria for job evaluations. An example of objective criteria for the evaluation of the various jobs in an industry are the ERA¹⁷ collective agreements which were introduced in different regions of the German metal and electrical industries between 2003 and 2009. The founding principles of the ERA are based on the Geneva Evaluation System from 1950 and its continued scientific development.

In conclusion, Helm suggested a pilot project, for example on a company level, and which draws on national and international provisions and experience to gain initial practical experience on the potential of section 27 of the EEA. Due to the ERA's success in eradicating disproportionate income differentials between white and blue-collar workers in Germany, a closer look at the ERA, and in particular at the ERA collective agreement in Baden-Württemberg, may provide useful guidance on the implementation of section 27 of the EEA (see the next sections).

The Value Chain – the economic perspective and its impact on inequality

Carmen Ludwig (University of Giessen), Elias Kubeka (National Union of Metal Workers of South Africa - NUMSA), Melanie Roy (National Union of Metal Workers of South Africa – NUMSA) and Hendrik Simon (Goethe-University Frankfurt aM).

This presentation focused on transnational research (a project of NUMSA and IG Metall supported by the Friedrich Ebert Foundation) on the value chain and its impact on inequality.

The group introduced the problem: 80% of the global trade is currently controlled by international groups. Within these, Original Equipment Manufactures (OEMs, such as car manufacturer Volkswagen) are players in complex global value chains. These consist of a considerable share of supplier and external service providers, while the externalisation of a stage of the production or service (outsourcing) and relocation (offshoring) increased remarkably in the automotive sector in the last 30 years.

Their dominant position has enabled transnational groups to put pressure on factory plants and workers, to control them and to play them off against one another by using the narrative of competitiveness, and to fragment the unified labour entity on a local and global level while selectively circumventing normative labour standards. Therefore, global value chains may be characterised as "catalyst of inequality".

In light of the asymmetric distribution of power between capital and labour, the need for strong transnational organising, along the entire value chains to establish and strengthen trade union counterforce on local and global levels, was pointed out. In this regard, research on the interchange between organising strategies along the value chain of various German automotive groups and their supplier emerged out of the cooperation project of the two sister trade unions, IG Metall (German: "Industriegewerkschaft Metall" / "Industrial Union of Metalworkers") and NUMSA.



Melanie Roy and Elias Kubeka presented the findings of analyses of the South African automotive value chain. This industry contributes the biggest share (33%) to national industrial production and is thereby one of the most dynamic industrial sectors. At present, seven car manufacturers dominate the automotive sector, within those three German groups (BMW, Daimler, Volkswagen).

Roy described the strong resistance from executives against organisation along the value chain. The dependency of South African enterprises on their foreign parent group, the dominance of OEMs in the local value chain, and anti-union managements are the most serious challenges. Kubeka illustrated NUMSA's negotiation strategy which is an innovative strategy for anti-union environments.

Carmen Ludwig and Hendrik Simon explained the effects of the imbalance of power on labour standards in the German value chain. The researchers referred to the special significance of the automotive sector for the German labour market and highlighted recent trends in the industry such as digitalisation, automation, electrification and relocation. They also outlined the special position of power of OEMs in the German automotive industry which caused a dramatic increase in the hierarchic imbalance between OEMs and suppliers on the one hand and between capital and labour on the other. The researchers pointed out OEMs' fragmented control of suppliers in the value chain by competition-driven prices and efficiency pressure as well as by production and efficiency controls in the supplier enterprises.

The research group noted the extreme pay inequality along the entire value chain. It can be structured in a hierarchy of:

1. permanent workers in OEMs;
2. agency workers in OEMs;
3. permanent workers in supply and logistic companies; and
4. agency workers in supply and logistic companies.

They also pointed out positive, cross-company organising strategies of trade unions such as running working groups with participants from OEMs, supply and logistic enterprises which provide an intensive exchange on problems and organisation strategies along the (national) value chain. In the analysed case studies, the research group noted the extreme pay inequality along the entire value chain. This is reflected in the different status of workers in one company, in national and transnational value chains.

The presentation concluded with a focus on a deeper cooperation¹⁸ between NUMSA and IG Metall to contribute to better communication channels and constant exchange of information as a core component of organising along the entire global value chain.

The first day concluded with discussions on how section 27 of the EEA can be put into practice, whereafter participants gathered for dinner and a jazz concert by the Titilayo Adedokun Band at the District Six Museum.

Day 2: Fairness in the sharing industry – crowd work

The value chain – the economic perspective and its impact on inequality

Fairuz Mullagee, Social Law Project, University of the Western Cape

Fairuz Mullagee of the Social Law Project (SLP) of the University of the Western Cape described the work of the SLP on new forms of labour, and reflected on these in relation to the day's programme, which focussed on new forms of labour, the sharing industry and platform work and how to address the issue of low income in this field.

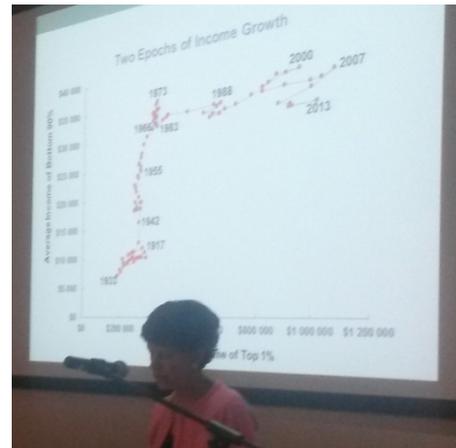


Gig economy, crowd work and new forms of labour

Wilma B. Liebman, Rutgers University's School of Management and Labor Relations

Wilma B. Liebman was designated by President Obama to be Chairman of the U.S. National Labor Relations Board (NLRB) on 20 January 2009. First appointed as a Member of the NLRB in 1997 by President Bill Clinton and reappointed by President George Bush, she served as Chairman until 27 August 2011 when her third term expired. Since then, she has been engaged in various advisory roles and consulting projects and has taught at several universities. She presently serves as a Visiting Distinguished Scholar at Rutgers University's School of Management and Labor Relations.

Liebman shared her expertise on new forms of labour and the development of the 'gig economy' – a topic of growing global concern – and she discussed their impact on working conditions in the U.S. Companies aimed at disrupting existing economic arrangements launch with rapidity, employing digital technology, and platform-based business models that instantly bring together buyers and sellers in an unending



stream of enterprises that supply labour and services on demand. Ride-hailing 'app' Uber has grabbed public attention with its nearly \$70 billion valuation. But even before Uber burst on the scene, crowd-work platforms offered opportunities for matching workers to work. Work options on crowd-work platforms range from low skill, low-pay microtasks (sometimes referred to as cognitive piecework), as on Amazon Mechanical Turk; to online freelancing, as on Upwork; to complex, more remunerative scientific challenges and competitions, as on Topcoder and InnoCentive. These crowd-work platforms, as well as gig economy companies like Uber, typically rely not on regular employment relationships with individuals who work through the platform, but rather on short-term, episodic contracting arrangements, often for paltry pay. Unlike online marketplaces for real-world services performed in local labour markets (like Uber), crowd-work platforms allow their clients to access a truly global crowd of workers to take on work performed exclusively online. This means that workers in high-wage countries may be competing against those in low-wage countries.

Liebman explained that the gig economy has triggered multiple policy debates in the U.S.: what it actually is; how big it is; whether it offers promise or peril – good jobs or bad jobs; what impact these new forms of work will have on the labour market; what it means for persistent and deep inequality; whether gig workers should properly be classified as 'employees' under workplace laws (with all the rights, benefits and protections that classification entails); if existing legal doctrines are adequate for a changing workplace and labour market; what all of this means for the future of work, economic security, labour standards, social protections and worker bargaining power; whether the government should respond to the digital transformation, and, if so, how and when; and if this in fact is a new phenomenon, or is it just a continuation of existing trends?

The business model is glorified for promoting economic growth, offering firms and workers flexibility, and expanding opportunities, especially in the developing world. But, said Liebman, increasingly the model is under scrutiny, and particularly the power imbalances between platform and participants and the economic insecurity faced by platform workers. Platform earnings may be below the statutory minimum wage. If the model continues to grow, more and more individuals will be working without the rights, protections and benefits of employment status, and increasingly labour standards may be set on the basis of these practices. The online platform economy workforce may still be small in the U.S., but it is growing, and its potential to disrupt the labour market and reinforce downward trends demands attention.

Liebman pointed out that more than three decades of stagnated wages have been a key driver of increasing income inequality, as have a weakening of collective bargaining and a decline in the share of corporate income that has gone to worker wages. Since 1980, only the top 1% have seen their incomes rise. Critics believe that gig economy arrangements will worsen these trends by perpetuating workplace practices of the last 3 – 4 decades that have made work more precarious – including the accelerating use of nonstandard work arrangements (like contract workers, temporary help agency workers, independent contractors, on-call workers), or what has been called the “fissured workplace.”¹⁹ Accurate data are limited, but recent surveys show that from 2005 – 2015, the incidence of these alternative work arrangements – both offline and online – increased by 50% in the U.S., accounting for all net employment growth.

Numerous lawsuits have been filed in U.S. courts against platforms like Uber alleging that their service providers should be treated as “employees” under workplace laws. Preliminary decisions have been generally favourable, but the legal questions are far from finally resolved. To date, only one such case has been filed against a crowd-work platform and that settled at an early stage without resolving the status issue. These cases are complex, costly and time consuming to litigate, with results uncertain. Legal challenges may likely yield answers that are either ambiguous or place platform workers outside the scope of protections. Compounding the difficulties is that the participation agreement that many platform workers (like Uber drivers or Amazon Mechanical Turkers) must sign to work on a platform blocks their access to the courts, including a waiver of their right to bring legal claims in court and to proceed on a class action basis.

Meanwhile, a broader future of work debate has been catalysed. Attention has focused on the limits of the existing “employment” boundaries of workplace laws, which exclude many workers, and the need to reach beyond the existing ambiguous legal tests to provide some governance in this unregulated sector of the economy. Also, as millions of the self-employed work without a safety net, a range of proposals have surfaced to construct a system of social protections de-linked



from employment – from universal access to portable and prorated benefits, with mandatory contributions for all work performed, to wage insurance and a guaranteed basic income. Further, restoring worker voice and power is increasingly seen as critical to improving labour standards, especially, as with platform work, in a regulatory vacuum. Creative approaches to empower and assist those excluded from workplace laws are being tested, as in the City of Seattle, which has enacted an ordinance that would allow Uber type drivers (who are independent contractors) to engage in collective bargaining. Taking another approach, an independent drivers’ guild in New York City entered into a five-year agreement with Uber, providing some support and benefits for drivers. Other groups are pursuing possibilities for worker ownership of platforms.

Liebman suggested that there are more questions than answers at this point in the ongoing gig economy debates, and that what we are facing is a mix of both continuity and change. But she cautioned, pointing to the disruption and obvious discontent that the 2016 election of Donald Trump exposed, that we ignore the transformation at our peril. Globalisation and technological change have created winners and losers, and the gig economy is widening the digital divide. As more people feel left behind, political risk escalates. We are sitting on a tinderbox, and various pressures could ignite it: the fear that technology will eat jobs, the growth of new forms of labour and the end of standard employment, increasing income inequality, and a populist backlash. She concluded that the implications of these pressures urgently need to be attended to, and wise policy choices made. The ongoing exploration of public and private strategies is a start and will test what is possible.

The South African perspective

Rodger Ronnie, *Social Law Project, University of the Western Cape*



Technology advancements impact on how work is done, how people and workers interact, and how the market and society are organised. In South Africa, this 'fourth industrial revolution' and the future of work, as elsewhere in the world, are becoming more technology-driven and network-oriented – but, to whose benefit?

Price-Waterhouse-Cooper defines 'shared economy' as sharing economies that allow individuals and groups to make money from underused assets. In this way physical assets are shared as services. For example, a car owner may allow someone to rent out her vehicle while not using it, or a condo owner may rent out his condo while on vacation. While this definition sounds fine, it is in many instances far removed from the harsh living and working realities of the majority of the global population.

Ronnie presented two views on the technological advancements on which the shared industry rests:

1. *Empower the poor and reduce inequality.* In this scenario the future world of work will also improve: safer, cleaner, more flexible, more fulfilling, etc. But this seems overly optimistic and sets too much store in the ability of technology to on its own change the world and liberate the workplace.
2. *Will entrench existing divisions and inequality:* In this scenario the inequality between countries will become even more stark, with those able to harness the technological advances moving forward rapidly and those with little or no capacity continuing to languish, stuck with providing primary goods to developed countries.

Ronnie suggested that appropriate, forward-thinking policies can promote new technologies that will help to lift the bottom layers of society out of poverty and avoid technologies that will exacerbate inequality. Similarly, appropriate policies can provide some cushion in response to global economic instability.

The 2016 report of the World Economic Forum illustrated the challenges to and of job creation under current global conditions. It pointed out that, to prevent a worst-case scenario – technological change accompanied by talent shortages, mass unemployment and

growing inequality – reskilling and upskilling of today’s workers will be critical. 65% of children entering primary school today will end up working in new job types that do not exist yet. Additionally, job gains were unable to offset expected losses.

Global competition has driven innovation most intensively in the private sector, resulting in the erosion of standard employment, collective bargaining and worker rights, while the centre of gravity of trade unionism has shifted to the public sector. Traditional labour law finds application more readily in the public sector, whereas the private sector shows a growing need for regulatory innovation to counter this process of attrition and ensure the effective protection of non-standard workers.

‘Team driving’ or ‘owner-driver’ schemes exemplify structural change. In essence, workers employed as drivers are transformed into independent contractors to whom their previous work is outsourced by their former employer in the capacity of ‘client’. While independent contracting relationships were found to be spurious in many cases, in at least one case the Labour Appeal Court has dismissed the claim of owner-drivers that they were still employees and found that they were independent contractors.²⁰ The judgment is inconclusive to the extent that the circumstances of the owner-drivers differed considerably, involving differing degrees of dependency on the former employer which could be suggestive of employment relationships in certain cases.

Ronnie pointed out that there is a stark contrast between the developed parts of the global economy (capital-intensive industries, where investment focuses on maximum efficiencies, advanced technology and labour replacement), and less developed parts (less capital-intensive, continuing to rely on less-skilled labour that have become uncompetitive). In much of the developing world it is compounded by mass unemployment, which tends to be concentrated among those with limited formal skills while, at the developed end of the market, there are shortages of certain skills. South Africa falls in this group.

Partners’ or ‘independent contractors’ market their services via an online platform owned by a third party or platform owner, whereby the latter receives a fee and may determine terms and conditions on which the services are provided. This model has proved to be extremely lucrative, and in South Africa the number of Uber drivers is projected to increase from 4 000 to 15 000. Uber is also using the platform to expand the range of services it can offer, ie. UberEATS. Other examples are AirBnB, or using Linked in to develop new customers

and clients. What is being shared, Ronnie asked, or was it simply a veil for naked greed by those who control the technology?

Internationally, legal controversy surrounds the status of Uber ‘driver-partners’ and may extend to similar workers in other sectors. Some countries have banned Uber because drivers did not comply with passenger transport regulations; in South Africa Uber drivers must be licensed as transport operators by provincial governments. Like elsewhere, Uber is also facing competition from similar services, such as Taxify. Similar dynamics may play out in other sectors where technology is used, eg Domestly and Sweep South – for domestic workers.

Overall, a sustainable legal model for coordinating the work of self-employed operators, comparable to the employment contract in the employment model, may be essential if the sharing economy is to grow beyond a certain point.

In the context of South Africa’s high unemployment figures, and that a considerable proportion (23%) of employment is mainly in ‘elementary occupations’, as well as evidence of insufficient basic numeracy and literacy skills among workers and work-seekers (pointing to inadequacies in basic education), advanced technology will have a limited impact on the unemployment rate – but may create new jobs. The focus should therefore be on elementary occupations, which will continue to be filled by the largest section of the labour force given the inherent problems in ECD and school education system. Ronnie asserted that, only when this situation is corrected will the country be in a position to shift over to a more high-skill economic trajectory – and if possible gain benefit from the shared industry. This job creation potential needs to be aided by meeting social security needs.

Ronnie suggested that co-operative enterprises are a viable and resilient form of enterprise and have transformative potential to revitalise struggling sectors and generate decent employment across value chains. And, that the ‘sharing industry’ technologies could be harness for the purposes of these.

Darcy du Toit, Social Law Project, University of the Western Cape

The ‘gig economy’ is perhaps the most innovative but also the most challenging example of the many new forms of work generated by the modern economy. Much attention has been focused on Uber as an iconic example in this field, due to the many legal challenges it has

faced in different countries. Many of these involve claims by drivers that they are ‘employees’, entitling them to the protection of labour law. The facts have shown in many cases that this claim is well-founded and that the relationship between Uber and its drivers is one of disguised employment. This may also be true of some other operations in the gig economy, though not all. But where it is disguised employment, this means it should be subject to the same regulatory framework as all other forms of employment.

This leaves two major problems. First, even where work in the ‘gig economy’ can indeed be classified as ‘employment’, it is a highly unconventional type of ‘non-standard’ employment. And labour lawyers have grappled for many years with the fact that labour law as it currently stands is mainly effective in regulating ‘standard’ employment, but ineffective in regulating non-standard employment. Thus, while being classified as ‘employees’ will bring workers in the gig economy certain protections, the benefits will be limited and will in many cases not empower them in the way that trade union rights have historically empowered employees in the mainstream economy.

Second, not all work in the gig economy can be classified as employment, perhaps to a growing degree, as entrepreneurs find ways of restructuring work relationships in ways that clearly move them beyond the definition of employment. Crowd-work is one example. Labour law as we know it is entirely inapplicable to such forms of work.

In both cases, the right to fair labour practices for all workers points at the need to develop appropriate forms of protection. A starting point would be to take ‘work’ as opposed to ‘employment’ for all forms of labour legislation to make it applicable to all those who do paid work for others.

But that will not automatically bridge the gap between labour legislation and non-standard employment. Many non-standard workers already enjoy all labour rights on paper but not in practice. In reality, the diversity of new forms of work means that *effective* regulation appropriate to different work situations will be equally diverse. Such legislation would exist alongside the Labour Relations Act and have equivalent status.

This, in turn, calls for new types of regulatory institutions: what is appropriate to each different form of work cannot be identified without input from all key role-players involved, especially the workers. Trade unions, for example, have very little presence among workers in the gig economy and other new forms of work so that new forms of organisation will need

to be encouraged and protected by legislation, appropriate to different work situations, in the same way that trade union organisation is encouraged and protected by the LRA. Experience also shows that organisations representing non-standard or gig workers will need to participate both in formulating such legislation and in monitoring its application, as trade unions have done in the case of traditional labour law.

Panel discussions on organisation and regulation

Teresa Munchick and Zweli Ngwenya, #uberdriverssa movement²¹

The panel discussions were strongly influenced by the experiences of the #uberdrivers-samovement. Uber is one of the fastest growing companies in the world. It has grown drastically in the past three years, from operating in 42 cities to over 500 cities globally. It is an app-based service and therefore does not have 'employees' but 'independent contractors'.²² Participants gave insights into the circumstances under which local Uber drivers have to perform their duties. Conflicts over the working conditions in this 'app work' are:

- Uber drivers are viewed as independent contractors, who have no rights and are not entitled to any benefits;
- They are called partners but are not consulted on any decisions;
- Uber has flooded the market with too many vehicles leading to drivers having to work ridiculously long hours, which leads to accidents;
- If you are not working you are not earning money, so a lot of drivers are working 80 – 100 hours a week and are not taking a day off, and not taking holidays; while drivers are also at risk of accidents, or witnessing accidents, without trauma counselling available;
- Drivers are often earning less than minimum wage;
- Drivers are however responsible for car instalments, care insurance, passenger liability insurance, which make insurance costs very high;
- The Uber rates have not increased since 2013/14, despite constant fuel hikes and cost of living increases;
- The rating system and de-activation of drivers at Ubers' own discretion are not transparent or fair;

- The rates are not really sustainable when you take in account all the hidden costs. Particularly if drivers are a partner that has a driver;
- Drivers generally can't afford medical aid, life insurance or funeral policies;
- It isn't possible or viable to be eating healthy food or go to gym because of budgets and not being able to take time off;
- Physically it is hugely unhealthy to drive in a car for 15 – 20 hours, some even sleeping in their cars and not going home for a whole weekend;
- The hours also affect their relationships;
- Drivers' lives are in danger every day. Intimidation of Uber drivers by meter taxi drivers is at a crisis level. Uber drivers are beaten, their cars smashed and sometimes set alight. Meter taxi drivers, understandably, cry unfair competition due to the low rates of Uber.
- Drivers' safety is compromised by the introduction of cash trips as Uber does not take any identification, so there is no means to catch the robbers or hijackers of Uber drivers and their cars.
- If a client stashes drugs in a driver's car, the driver is vulnerable to being charged with possession with no legal help. (This has happened to an Uber driver.)
- Drivers have no means of getting hold of anyone at Uber out of office hours, 09h00-12h00 weekdays, except by message built into the app. There are no phone numbers at all that can be called to communicate with the company.
- Uber creates fear due to the threat of deactivation from the Uber drivers' app. They do not recognise unions, associations or groups.

Drivers do not have a common workspace so they do not have a meeting place to gather and mobilise. Uber drivers need help to achieve better working conditions and protection under labour laws.

The subsequent discussions with participants included the trade union organising aspect. It was suggested that traditional trade unions may think of including freelancers in their organisation as well. The IG Metall has decided to do so.

Organising labour broker workers

Ighsaan Schroeder, Casual Workers' Advice Office

The CWAO have been organising labour broker workers over the past two years, with having referred over 300 cases to the Commission for Conciliation, Mediation and Arbitration (CCMA) and bargaining councils, 4 600 workers were assisted to be made permanent, with at least another 4 000 workers' cases pending.

Schroeder shared some of the results of these intervention: Some workers' wages increased from R29 to R55 per hour after their wages were compared to the earnings of other permanents who do similar work or work of equal value. Where there were no comparators, the CWAO had bargaining council or sectoral determination minimums, while in a handful of cases, there have also been union collective agreements to argue for extension. In other instances, workers did not necessarily win big wage increases but won provident fund and medical aid membership, and other workplace-specific rights that are meaningful to previously marginalised workers (eg access to the company clinic, previously restricted only to permanents). At Dis-Chem, for example, 822 workers have been made permanent, the contracts of the two labour brokers cancelled, and the workers now have medical aid and provident fund membership.

Schroeder introduced the CWAO's mobilisation campaign, which focused on new rights for the new workers that neoliberalism has created. Aside from the rights won, an equally important result was the level of worker self-organisation that accompanied the campaign. This involved workers forming themselves into a Forum that meets every second week, with an average attendance of around 179 workers from an average of 31 workplaces, from across industries, ranging from engineering, heavy chemicals, logistics to printing. Meeting since April 2015, attendance has never dropped below 85, with the highest turnout sitting at 504 workers. No subscriptions are required to become a member, and the Forum does not work on the basis of representative democracy. Mass participation from members from the same company is encouraged.

The average age of workers is around 33, and they by this time generally have had at least 3/4 different jobs spread across different industries. Schroeder pointed out that most of these workers are completely hostile to trade unions – and this reality is critical for the future of labour and for the action dialogue discussions.

At the same time, labour broker workers understand the need to organise themselves at the workplace and have indeed done so. Schroeder said the CWAO was attempting to solve the problem of worker hostility to unions by workers organising themselves into workplace councils. These are effectively workplace trade unions.

The LRA describes a trade union as any group of workers who associate for the purpose of regulating relations with an employer. As such, these workers' councils can bargain with the employer and they can embark on strike action. But Schroeder pointed out that the LRA discriminates against them in different ways because they are not registered trade unions (eg., they cannot get organisational rights and, until recently, couldn't represent their members at the CCMA).

There were around 13 such workers' councils, at different stages of development. At other workplaces, more traditional workers' committees, the old shop steward model, are facilitated by the CWAO. In others, workers have joined unions after becoming permanent. Often, their reasons for joining are intriguing. In one instance, the workers joined the union as a defence against the union, reasoning that – should there be retrenchments – the union would identify the non-member labour broker workers as the ones to be retrenched. In most other instances, workers joined exclusively as an additional defence against dismissal.

Schroeder said the CWAO campaign was met with increasingly fierce resistance from employers. This included simply ignoring the new rights, legal challenges, dismissal, retrenchments and other reprisals like short-time, all intended to break workers' organising initiatives. He asserted that the counter-offensive must be located in the broader context of on-going capitalist restructuring of the world of work – largely through technological innovation/de-skilling, production outsourcing, and financialisation.

Schroeder concluded that this situation has created a generalised precariousness and instability not only into the workplace but also into the working class as a whole, affecting the ability to organise at work, but also in the community and broader society. He urged that the discussion on section 27 must be located in a context of a hugely ascendant capitalist class, a collapsing trade union movement and the emergence of a very large section of workers with unstable work, no organising experience and no struggle experience.

He posed the question to participants: which social force is going to lead the resistance to the bosses' pretensions: is it going to be the traditional, full-time permanent

worker or is it going to be the new workers? He, and the CWAO, believed it will be the new workers.

The way forward

The Anglican Archbishop of Cape Town, Dr. Thabo Makgoba, in June 2015 wrote to the *'Build Ubuntu - Close the Pay Gap' Project*, with the following message:

The levels of inequality in our society are shocking. The differences in living standards between those who stay in the wealthy parts of our cities and those who live in the rest of South Africa are glaring. We are failing in our efforts to eliminate the desperate conditions in which many of our people live, creating potential for an explosion of anger.

We are also a society in which has massive disparities of income, largely based on race but increasingly based on whether you have made it into the middle class. To overcome these disparities and achieve full respect for human dignity, we have to eliminate disproportionate income differentials. Fairness in the workplace is at the core of creating an equal society.

The 'Build Ubuntu - Close the Pay Gap' Project of the Institute of Development and Labour Law at UCT, which aims to put section 27 of the Employment Equity Act into practice, is a decisive contribution on the long walk to a more just society. I urge to give it your full backing.'

Such backing has also been given by the Mandela Initiative, the Hans Böckler Foundation, the Programme to Support Pro-poor Policy Development, the participants of the workshop and so many more. And this backing gives also guidance on the way forward.

At the initiative of the Social Law Project of UWC, a project on the development of a workplace model for "Social Justice in the Digital Economy" is planned, with a focus on working conditions and dignity for platform workers. The project aims to work close together with the Mandela Initiative.

The project on section 27 of the EEA, based at UCT, will develop further and work on a pilot project most likely along the transnational value chain. This will also be done in close cooperation with trade unions, social organisations and the Mandela Initiative.

References and notes

1 The International Labour Organisation's *Global Wage Report 2014/2015* measures "top-bottom inequality" by the D9/D1-ratio. This method identifies 10 income groups, each indicative of the income of 10% of the income earners, starting with the uppermost 10% of income recipients. The D9/D1-ratio determines how the ratio of the highest income of the lowest decile fits in the lowest income of the highest decile.



2 Lewis, DH & MM Ngoasheng (1996) *Restructuring the South African Labour Market: Report of the Commission to Investigate the Development of a Comprehensive Labour Market Policy*. RP 83/1996. Cape Town: Department of Labour. Para 228.

3 Godfrey, S, Maree, J, Du Toit, D & Theron, J (2010) *Collective Bargaining in South Africa*. Cape Town: Juta. P. 170.

4 Green Paper (1996), Chapter 2, para 2.4.6.

5 Report of the Labour Market Commission (1996), para 226.

6 Report of the Presidential Commission to Investigate Labour Market Policy: Restructuring the South African Labour Market, June 1996, para 228.

7 Section 29 (1) (d) read with the introductory sentence of the PERPUDA (Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000).

8 Recommendations on Policy and Implementation National Minimum Wage Panel Report To The Deputy President, November 2016, 103-104.

9 Code of the Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices, *Government Gazette* vol. 482, no. 27866, 4 Aug. 2005 (HR Code).

10 Ibid, section 3.8.

11 Ibid, section 6.3.1.2.

12 ER Code, section 5.4.1.

13 ER Code, section 5.4.2.

14 ER Code, section 5.4.3.

15 ER Code, section 5.4.4.

16 Employment Equity Regulations, 2014, *Government Gazette* vol 448 no 38837, 1 Aug 2014 as amended.

17 ERA (= Entgeltrahmenabkommen) is a collective 'Payment Framework Agreement' for a collective bargaining region in the metal and electronic industry. A collective payment framework agreement delineates norms and benchmarks for determining different occupational levels. These norms and benchmarks are the long-term foundations of the remuneration structure contained in a collective agreement. The normal annual negotiations on the level of remuneration in a branch are usually conducted on the basis of a collective wage framework agreement.

18 An initial step by the NUMSA-IG Metall research project in this regard was a workshop for 60 members of works councils (German: Betriebsratsmitglieder), shop stewards and full-time trade unionists from Germany and South Africa planned for the second quarter of 2017 in Port Elizabeth.

19 Weil David (2014) *The Fissured Workplace: Why work became so bad for so many and what can be done to improve it*. Cambridge, MA, Harvard University Press.

20 In July 2017, two months after this dialogue, the CCMA ruled in a case filed by eight Uber drivers that they should legally be regarded as employees of Uber South Africa. The company, however, has indicated intent to oppose the ruling and will seek a review of the hearing in the Labour Court (set for December 2017).

21 On the 7th of July the CCMA found that Uber drivers in South Africa are employees within the meaning of the Labour Relations Act 66 of 1995 as amended. The Uber drivers were legally represented by two participants of the workshop, Adv. Suzanna Harvey and Prof. Darcy du Toit of Bradley Conradie Halton Cheadle Attorneys.

22 Definitions of various levels of independent contracters: **Drivers** are also called Driver Partners even when they don't own their own vehicle. They usually drive for someone either on a percentage basis usually 20 – 25% before Uber's cut of 25%. The owner of the vehicle then pays for fuel. Some drivers are on 'rental' deals with owners usually paying R 2 500 per week for an Uber X (Toyota Corolla/ Nissan Almera); they then pay for their own fuel, or R 4 500 per week for an Uber Black. **Driver/ Partners** drive their own vehicles. **Partners** own vehicles and 'employ' drivers. (No formal contracts. Often agreements are only just a handshake, often only meeting the driver once when handing over the vehicle.)