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## Equal Pay and Dilemmas of Justice

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## **Abstract**

Equal pay for work of equal value is a fundamental principle in European Union (EU) law and so in the European Economic Area (EEA) Agreement. The paper takes as its point of departure the debate in Norway on the interpretation of EEA equal pay legislation, and relates this debate to the broader equal pay controversy in Norway. Among arguments on both sides in these debates have been arguments about what is right and just: Whereas proponents for strong equal pay commitments typically stress that social justice requires work of equal value to be paid as equally as possible, if necessary by means of state intervention and law enforcement (the law enforcement position), proponents for weaker equal pay commitments stress typically either (1) the relative justice of markets; pay ought primarily to be distributed through markets and according to market value and not according to some market-external equality standard (the free market position), or (2) that wages should be set as far as possible by strong democratic unions that negotiate with employers and employers' organizations (the collective bargaining position). The paper focuses on the confrontations between law enforcement and collective bargaining and interprets these confrontations as reflecting 'dilemmas of justice' (Nancy Fraser): in part a redistribution versus recognition dilemma, in part a justice-from-above versus justice-from-below dilemma. Finally, the paper investigates to what extent these dilemmas are genuine. Are there ways to narrow down the gap between the law enforcement camp and the collective bargaining camp?

## **Keywords**

Democracy – Equal Pay – European Economic Area – European Union – Gender – Justice



## Introduction

Equal pay for work of equal value<sup>1</sup> is a fundamental principle in European Union (EU) law incorporated in the European Economic Area (EEA) Agreement covering the 27 EU member states, Iceland, Lichtenstein and Norway.<sup>2</sup> The paper takes as its point of departure the debate in Norway on the interpretation of EEA equal pay legislation, and relates this debate to the broader equal pay controversy in Norway. Among arguments on both sides in these debates have been arguments about what is right and just: Whereas proponents for strong equal pay commitments typically stress that social justice requires work of equal value to be paid as equally as possible, if necessary by means of state intervention and law enforcement (the law enforcement position), proponents for weaker equal pay commitments stress typically either: (1) the relative justice of markets; pay ought primarily to be distributed through markets and according to market value and not according to some market-external equality standard (the free market position), or; (2) that wages should be set as far as possible by strong democratic unions that negotiate with employers (the collective bargaining position).

The first part of the paper gives a brief overview of European and Norwegian equal pay legislation and recent debates in Norway on the meaning and implications of this legislation. It also discusses the adequacy of framing the Norwegian equal pay controversy as an exchange on the implications of Europeanization and globalization and the relative merits of the Scandinavian model. The second part explores some of the central normative concerns that are raised in the equal pay controversy by introducing stylized versions of the three different positions referred to above: the law enforcement position, the free market position and the collective bargaining position. In the following part an attempt is made to elaborate on these three positions in terms of normative political theory. Part four of the paper introduces Nancy Fraser's idea of 'dilemmas of justice' in the context of her theory of justice,<sup>3</sup> and analyzes the dispute between law enforcement and collective bargaining as a double justice dilemma. Finally, the paper investigates to what extent these dilemmas are genuine and concludes.

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\* I am thankful for comments from participants at ARENA's Tuesday seminar, participants at the Norwegian annual national sociology conference (2011), Yvonne Galligan, Agustín José Menéndez and Anders Molander. The Agreement on the European Economic Area (EEA) is available at: <<http://efta.int/eea/eea-agreement.aspx>> (last accessed 12 December 2011).

<sup>1</sup> Often simply referred to as 'equal pay'.

<sup>2</sup> The Agreement of the European Economic Area from 1994 brings together the EU member states and the EEA states that are members of EFTA (The European Freed Trade Association) – Iceland, Liechtenstein and Norway – in the Internal Market. The EEA Agreement provides for the inclusion of EU legislation covering the free movement of goods, services, persons and capital throughout the EEA states. In addition, the Agreement covers cooperation in other important areas such as research and development, education, social policy, the environment, consumer protection, tourism and culture.

<sup>3</sup> Nancy Fraser, 'Social Justice in the Age of Identity Politics', in Nancy Fraser and Axel Honneth (eds), *Redistribution or Recognition? A Political-Philosophical Exchange* (New York: Verso, 2003).

## EU and Norwegian equal pay debates<sup>4</sup>

The principle of equal pay for work of equal value was included in the constitution of the International Labour Organization (ILO) in 1919, and ILO-100 (Convention Number 100 concerning equal remuneration for male and female workers for work of equal value) came into force in 1952. Five years later (1957) the famous Article 119 (later Article 141 EC, now Article 157 TFEU) was included in the Treaties of Rome as the only article on social policy placing a direct obligation on the member states.<sup>5</sup> In subsequent years, the equal pay article has been given direct effect by the decisions of the European Court of Justice (ECJ), has spurred numerous claims before national courts, and has led to a number of EU Directives. Council Directive 75/117/EEC on equal pay was approved on 10 February 1975.<sup>6</sup> In 2006 the Recast Directive 2006/54/EC of the European Parliament and of the Council merged and consolidated previous gender equality directives including the Equal Pay Directive in a directive 'on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation'.<sup>7</sup> The new super-directive implied, however, no substantial change in EU's equal pay legislation.

What does this legislation imply for Norway as an EEA state? The equal pay issue is addressed in paragraph 5 of the Norwegian Gender Equality Act. Originally, when the Act was passed (1978),<sup>8</sup> paragraph 5 stated in very general terms that 'women and men shall have equal pay<sup>9</sup> for the same work or work of equal value'.<sup>10</sup> How the expression 'work of equal value' was to be understood more specifically was not spelled out in the paragraph. However, in preparatory documents 'work of equal

<sup>4</sup> The presentation of the Norwegian equal pay controversy is based on public reports and existing empirical studies, in particular *Arbeidsurdering som virkemiddel for likelønn* (NOU 1997: 10); *Kjønn og lønn: Fakta, analyser og virkemidler for likelønn* (NOU 2008: 6); Egil Bugge Tenden, *Hvorledes likestilling? En analyse av konstruksjonen av likestillingslovens bestemmelser om likelønn, arbeidsplikt og seksuell trakassering 1990-2001*, hovedoppgave, Institutt for statsvitenskap, Universitetet i Oslo (Oslo: Universitetet i Oslo, 2001); Geir Høgsnes, 'Likelønn: Forhandlingsstruktur og makt', in Anne Lise Ellingsæter and Jorun Solheim (eds), *Den usynlige hånd? Kjønnsmakt og moderne arbeidsliv* (Oslo: Gyldendal Akademisk, 2002); Trond Petersen, 'Likestilling i arbeidslivet', *Tidsskrift for samfunnsforskning*, no. 4 (2002), 443-480; Erling Barth, Marianne Røed and Hege Torp, *Towards a Closing of the Gender Pay Gap*, Country Report Norway (Oslo: Institutt for samfunnsforskning, 2002); Hege Skjeie and Mari Teigen, *Menn imellom: Mannsdominans og likestillingspolitikk* (Oslo: Gyldendal Akademisk, 2003), at pp. 145-164; Erling Barth, Kalle Moene and Michael Wallerstein, *Likhet under press: utfordringer for den skandinaviske fordelingsmodellen* (Oslo: Gyldendal Akademisk, 2003).

<sup>5</sup> Anna van der Vleuten, *The Price of Gender Equality: Member States and Governance in the European Union*, (Aldershot: Ashgate, 2007), at p. 33. See also Ilona Ostner, 'From Equal Pay to Equal Employability: Four Decades of European Gender Politics', in Mariagrazia Rossilli (ed.), *Gender Policies in the European Union*, (New York: Peter Lang, 2000); Catherine Hoskyns, *Integrating Gender: Women, Law, and Politics in the European Union* (New York: Verso, 1996).

<sup>6</sup> The directive states that: 'the principle of equal pay, means, for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration' (Article 1).

<sup>7</sup> Available at:

<<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:204:0023:0036:en:PDF>>. For an analysis of the process leading to this directive, see Sara Clavero and Yvonne Galligan, 'Gender Equality in the European Union: Lessons for Democracy?', in Yvonne Galligan (ed.), *Deliberative Processes and Gender Democracy: Case Studies from Europe*, RECON Report (Oslo: ARENA, forthcoming).

<sup>8</sup> Norway ratified ILO-100 in 1959.

<sup>9</sup> Pay refers here to 'ordinary remuneration for work as well as all other supplements or advantages or other benefits provided by the employer'.

<sup>10</sup> NOU 2008: 6, *supra* note 4, at p. 104.

value' was given a rather narrow definition, as referring to work that appeared as 'similar'. Accordingly, it was argued, the value of work could not be compared meaningfully across trades and professions.<sup>11</sup>

When Norway became an EEA member in 1994 the question was whether this interpretation was in accordance with the practice of the ECJ. Critics from women's civil society organizations and the state feminist apparatus, including the Ministry of Children, Equality, and Social Inclusion and the Gender Equality and Anti-Discrimination Ombudsman, argued that the interpretation was in conflict with EU law. Alternating governments, most ministries and the social partners disagreed for a very long time.<sup>12</sup> However, after years of discussions and negotiations, paragraph 5 was amended in 2002.<sup>13</sup> The section now says that 'women and men in the same enterprise shall have equal pay for the same work or work of equal value' and that this 'shall apply regardless of whether such work is connected with different trades or professions or whether the pay is regulated by different collective wage agreements'. This implies a substantial widening of the definition of what can be regarded as work of equal value.

The controversy about the scope of pay comparisons resulting in the 2002 amendment has been interpreted as part of a larger conflict between defenders of the social democratic Scandinavian model<sup>14</sup> – a model which central characteristics are relatively small wage differences, a generous welfare state, strong unions and a centralized collective bargaining system<sup>15</sup> – and proponents of Europeanization and internationalization of Norwegian anti-discrimination law.<sup>16</sup> This interpretation makes sense to a certain extent. Actors in favor of a narrow scope of pay comparison have argued that widening the scope could marginalize the significance of free collective bargaining and open the way for equal pay technocracy. This would, it is argued, compromise the Scandinavian model's institutional balance and merits from the point of view of productivity and competitiveness.<sup>17</sup> Critics, on the other hand, have argued that the Scandinavian model is at odds with international law and ECJ rulings in the domain of equal pay, and in the end, when paragraph 5 was amended in 2002, it was made with reference to Norway's international obligations and the EEA Agreement.<sup>18</sup>

The story is, however, more complex. For one thing, equal pay cannot easily be reduced to a requirement forced upon the Scandinavian model from the outside, since a normative commitment to gender equality must be added to the list of this model's central characteristics.<sup>19</sup> And the other way around: The principle of free collective bargaining is protected by international conventions such as paragraph 23 of the

<sup>11</sup> Ot.prp. nr. 1 (1977-78) *Lov om likestilling mellom kjønnene*.

<sup>12</sup> Skjeie and Teigen, *supra* note 4.

<sup>13</sup> Tenden, *supra* note 1.

<sup>14</sup> This model is also sometimes referred to as the Nordic model or the Norwegian model.

<sup>15</sup> Barth, Moene and Wallerstein, *supra* note 4.

<sup>16</sup> Skjeie and Teigen, *supra* note 4; Øyvind Østerud, Fredrik Engelstad and Per Selle, *Makten og demokratiet* (Oslo: Gyldendal Akademisk, 2003).

<sup>17</sup> See Høgsnes, *supra* note 4; Barth, Moene and Wallerstein, *supra* note 4.

<sup>18</sup> See NOU 2008: 6, *supra* note 4, at p. 104.

<sup>19</sup> Arnlaug Leira, *Working Parents and the Welfare State: Family Change and Policy Reform in Scandinavia* (Cambridge: Cambridge University Press, 2002).

Universal Declaration of Human Rights and paragraph 28 of the Charter of Fundamental Rights of the European Union, and is not a particularly Scandinavian principle.

Secondly, there have been other equally significant debates in Norway about the scope and strength of equal pay commitments that are not, at least not primarily, debates on the merits of Europeanization and internationalization of the Scandinavian model, and of Norwegian law in particular. One example is the discussion on whether paragraph 5 was to include a 'same enterprise' clause and the more exact meaning of this clause (what is to count as the 'same enterprise'?).<sup>20</sup> Another example is the 2010 debate on whether the state should finance an 'equal pay pot' to reduce the gender pay gap.<sup>21</sup> In both cases the discussion of whether to preserve or to Europeanize/internationalize the Scandinavian model was part of the framing of the debates, but hardly decisive; other considerations provided the core parameters for these debates.

## What is just? Three stylized positions

To understand more of the Norwegian equal pay controversy we must read it – also – as a more general debate about justice and rightness. Jürgen Habermas famously distinguishes between three discourses in politics: pragmatic discourses about factual matters and means-end efficiency, ethical discourses raising questions about self-realization and the good life, and moral discourses about what is just and right.<sup>22</sup> It is the latter – the moral dimension of the equal pay controversy – that will be interrogated further in what follows. Three central positions can be distinguished: the law enforcement position, the free market position, and the collective bargaining position. The first is typically highlighted by those who argue for stronger equal pay commitments, be it for a wider scope for wage comparisons, a wider definition of 'same enterprise' or a state-financed equal pay pot; the second and the third is typically highlighted by those who argue for weaker commitments; be it for a narrower scope for wage comparisons, a stricter definition of 'same enterprise' or against an equal pay pot.

*The law enforcement position* upholds equal recognition of – and so equal pay for – work of equal value as a basic principle of social justice. Since this principle is so basic, proponents of this position argue for implementing it strictly – with as few restrictions and limitations as possible – by means of state intervention and law enforcement.

*The free market position*, on the contrary, takes it that the point of departure must be markets and the relative fairness of well-functioning markets. Work should be paid primarily according to its market value and not according to market-independent standards of 'value' and 'equal value', and limits on free markets and economic liberties should be as few as possible.

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<sup>20</sup> NOU 2008: 6, *supra* note 4, at pp. 105-106.

<sup>21</sup> As proposed in NOU 2008: 6, *supra* note 4.

<sup>22</sup> Jürgen Habermas, *Between Facts and Norms* (Cambridge, MA: The MIT Press, 1996), at pp. 15-52, 95-99.



Finally, defenders of *the collective bargaining position* argue that wages should be determined not by the free market, but as far as possible by means of collective struggles and negotiations between strong unions and employers. The crucial normative standards are democracy – linked to the idea of collective bargaining as a key element in democracies – and redistributive fairness – linked to the belief that strong unions and collective bargaining safeguard against large and increasing wage differences.

These positions are stylized and constructed to get a clearer picture of the moral grammar of the Norwegian equal pay controversy: The moral concerns of different real-world political actors with regard to the equal pay issue are seldom captured by one of these positions exclusively. On the contrary, when real-world political actors argue about what is right with regard to equal pay, they often refer to several of these three stylized positions. However, they often weigh them differently. NHO, the largest employers' organization, is not opposed to equal pay legislation as such or to negotiations with unions on pay, but ends up typically with stressing free market concerns more than other actors. Also the largest workers' organization, LO, accepts a substantial scope for markets and equal pay legislation, but ends up typically with stressing the principle of free collective bargaining. Finally, women's civil society organizations typically stress the concerns of the law enforcement position, even if they deny neither the role of collective bargaining nor of markets.<sup>23</sup>

Also, even if these three stylized positions are central – and will be in focus in the rest of the paper – they do not necessarily capture all the moral concerns and arguments that are raised in the equal pay controversy. For example, to the extent that the Norwegian equal pay controversy is a discussion of whether to preserve or to Europeanize/internationalize the Scandinavian model, this raises the question of the role of nation state decision-making relative to that of supranational decision-making in a just society.<sup>24</sup>

Furthermore, the law enforcement position, the free market position and the collective bargaining position introduce claims about what is right and just. The first position regards equal recognition of work of equal value as a basic principle of justice; the second stresses the fairness of markets; whereas the third appeals to values of democracy and redistributive justice. However, the positions rely also on – in part disputable – factual and pragmatic claims and on arguably controversial ethical standards. This will be examined more closely toward the end of the paper.

Finally, the law enforcement position, the free market position and the collective bargaining position are stylized positions, but also positions constructed from a 'bottom up' perspective in the sense that they all reflect central moral concerns in a local, ongoing equal pay controversy. However, it is not necessarily a one-to-one relationship between the central moral concerns of a real-world controversy and the arguments and conclusions that end up being central in a more 'top down' philosophical approach. Moral and political philosophers typically start with general

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<sup>23</sup> Statement on the hearing on NOU 2008:6 Kjønn og lønn: Fakta, analyser og virkemidler for likelønn, Ministry of Children, Equality and Social Inclusion, 26 June 2008. Available at: <<http://www.regjeringen.no/nb/dep/bld/dok/hoyringar/hoeringsdok/2008/horing---nou-2008--6-kjonn-og-lonn/horingsuttalelser.html?id=505160>>.

<sup>24</sup> We could perhaps think of this as an exchange between a national and a cosmopolitan position.

moral and political concepts, principles and arguments, and deduce from this general level the more particular approach to more particular questions such as equal pay. The following section will give an overview of how the equal pay issue and moral arguments with regard to equal pay is dealt with in normative political theory.

## Equal pay in normative political theory

Turning to philosophical discussions of equal pay, the first striking fact is the relative lack of contributions in this area. A preliminary search for analyses of the equal pay principle in leading academic journals<sup>25</sup> led to zero findings. This is surprising given the significance of the principle in national and international law. An investigation of the publications of the 'usual suspects' – in this case feminist moral philosophers and political theorists – resulted in some, but few, findings.<sup>26</sup> Very few contributions concentrate on equal pay as the only topic or as one of more core topics. Most often equal pay is referred to in passing. This unexpected state of affairs is something of a riddle, given the centrality of equal pay for the women's movement. Feminist activists and the women's movement have contributed to shaping the agenda of feminist political theory in a variety of ways; why not here?

Secondly, when equal pay is given thorough treatment in normative political theory literature, the question is often framed in 'for' or 'against'-terms: You are either in favor of the 'equal pay for work of equal value' principle, or you dismiss it. This contradicts experiences from the Norwegian case where all participating actors seem to agree that the principle is valid in one variant or the other. The controversy concerns the more specific meaning, scope and implications of the principle and how to weight different moral concerns.

Thirdly, in the normative political theory literature we are often confronted with the law enforcement position and the free market position, more seldom with the collective bargaining position. The role of collective bargaining in a democratic society is explored,<sup>27</sup> but seldom with reference to the equal pay question. This once more contradicts the experience from the Norwegian case where the collective bargaining position is articulated in one way or another by most stakeholders.

With regard to the free market position, this position is articulated in the normative political literature and is the central argumentative approach – often in combination with a set of secondary arguments – of those who propose to debunk the equal pay principle. An elaborate outline of this position is made by Ellen Frankel Paul, and may here serve as an example.<sup>28</sup> Paul's main argument is a justice argument for free markets. Since the moral right to individual liberty must also include economic liberties, and since the market value of work is the result of individuals that are making use of liberties that are justly theirs, valuing work with reference to market-

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<sup>25</sup> Such as *Ethics*, *Journal of Political Philosophy*, *Philosophy and Public Affairs*, *Philosophy & Social Criticism*, *Journal of Applied Philosophy*, *Philosophy of Economics*, *Politics*, *Philosophy & Economics* and *Constellations*.

<sup>26</sup> The search was made on the following names: Anne Phillips, Susan Moller Okin, Martha Nussbaum, Eva Kittay, Seyla Benhabib, Iris Marion Young, Elizabeth Anderson and Nancy Fraser.

<sup>27</sup> For a good overview, see Ian Shapiro, *Democratic Justice* (New Haven: Yale University Press, 2001).

<sup>28</sup> Ellen Frankel Paul, *Equity and Gender: The Comparable Worth Debate* (London: Transactions Publisher, 1993), at pp. 39-62.

external standards of value and equal value, represents an injustice, despite the self-perception of proponents of equal pay as facilitators of (social) justice.

In addition, Paul presents two secondary arguments. Her first secondary argument is that there cannot be objective criteria of value that different kinds of work can be assessed as equal or unequal with reference to, in the sense that all proposals of criteria would be controversial and partial reflecting some actors' interests and values more than others'. Hence, any market independent job evaluation scheme implemented by means of state force would be fundamentally paternalistic and so illegitimate because it would force some citizens' notions of valuable and virtuous work practices upon all citizens. Paul's second secondary argument is that the implementation of equal pay results in inefficiencies. Here, her argument is based on the assumption that free markets maximize efficiency, making all societies where markets are corrected by other means, legal or administrative,<sup>29</sup> vulnerable to inefficiencies.

The efficiency argument for markets is present also in the Norwegian equal pay controversy, in versions similar to Paul's or more moderately as part of arguments for the Scandinavian model and the scope of markets this model allows for. Also the argument against the possibility of objective job evaluation schemes are discussed in the Norwegian controversy,<sup>30</sup> even if those who brings it up do not follow Paul in her radical conclusion.

Finally, the law enforcement position – and in particular the equal recognition argument that is central to it – is elaborated by normative political theorists such as Angelika Krebs and Axel Honneth in addition to Nancy Fraser and linked to their respective philosophical frameworks.<sup>31</sup> In the next section the equal recognition argument will, first, be contextualized in relation to Fraser's theory of justice. Secondly, the confrontations between law enforcement and collective bargaining and the different moral concerns they inhabit will be analyzed as a double justice dilemma.

Contributions such as Paul's and Fraser's highlight the relevance of entering the terrain of normative political theory to analyze real-world controversies about justice and fairness, such as the Norwegian equal pay controversy. However, lessons can also be drawn the other way around: The analysis of real-world controversies can also add to normative political theory. In 'top down' normative political theory deliberations on the equal pay principle is marginal, framed as a 'for' or 'against' controversy, and relatively disconnected from the concerns raised by the collective bargaining position. Arguably, consulting an empirical case has given us a richer picture of the equal pay controversy as a moral controversy and opened up new analytical possibilities.

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<sup>29</sup> For example legal equal pay clauses and technocratic job evaluation schemes managed by equal pay administrators.

<sup>30</sup> NOU 1997: 10, *supra* note 4.

<sup>31</sup> See Angelika Krebs, *Arbeit und Liebe* (Frankfurt am Main: Suhrkamp, 2003); Axel Honneth, 'Redistribution as Recognition: A Response to Nancy Fraser' and 'The Point of Recognition: A Rejoinder to the Rejoinder', in Nancy Fraser and Axel Honneth (eds), *Redistribution or Recognition? A Political-Philosophical Exchange* (New York: Verso, 2003), *Pathologies of Reason* (2009). New York: Columbia University Press, and Axel Honneth, *The Pathologies of Individual Freedom: Hegel's Social Theory* (Princeton: Princeton University Press, 2010).

## Equal pay: A double dilemma of justice

Fraser's point of departure is justice understood as 'participatory parity': A just society is a society where citizens 'interact with one another as peers'.<sup>32</sup> However, if this is to be achieved, certain conditions must be fulfilled. Participatory parity requires, first, *redistribution* of goods such as income and property.<sup>33</sup> This is the first so-called *objective* condition of justice: The distribution of material resources must be such as to secure everyone's economic independence and autonomy. A society characterized by poverty, exploitation and grand economic inequalities is an unjust society.

However, justice has also a second *inter-subjective* and a third *political* condition which is recognition and democratization, according to Fraser.<sup>34</sup> *Recognition* requires that institutionalized patterns of cultural evaluations express equal respect for all participants. A just society cannot be based on norms that systematically disrespect certain categories of people, putting stigmas on them or marginalizing their experiences, contributions and sufferings. Finally, *democratization* requires political deliberation and decision-making procedures that include all. No group can be excluded from forums and spheres where political questions are deliberated and decided upon. Political marginalization or exclusion of this kind is just like cultural misrecognition and economic injustice incompatible with participatory parity.

What Fraser refers to as dilemmas of justice occurs when implementing redistribution causes misrecognition, or when implementing recognition causes maldistribution;<sup>35</sup> seemingly in cases where dilemmas between redistribution and recognition occur, we cannot have it both ways. Other examples of dilemmas of justice are when implementing redistribution and/or recognition – justice-from-above – creates a democratic deficit (injustice-from-below), or when democratization – justice-from-below – creates output problems in terms of misrecognition or maldistribution (injustice-from-above); when just outcomes are achieved through less than democratic or undemocratic means, or democracy produces unjust outcomes.

How can this be related to the question of equal pay? In Fraser's scheme the problem of unequal pay for work of equal value – where women are typically paid less than men for work of equal value – is mentioned as an example of misrecognition: Women's work is not recognized properly and reflects the fact that cultural evaluations historically, but also in contemporary societies, regard women, women's experiences, values and practices as second to men and men's experiences, values and practices.

Furthermore, if we as suggested focus on the confrontations between the equal recognition argument and the law enforcement position that follows and the

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<sup>32</sup> Fraser, *supra* note 3, at p. 36.

<sup>33</sup> *Ibid.*, at pp. 16-17.

<sup>34</sup> *Ibid.*, at pp. 17-19, 67-68.

<sup>35</sup> An example of the first is welfare policies (for example transfers to single mothers) that may have culturally stigmatizing effects (single mothers are labeled as 'dependent'); an example of the latter is when the state allows for or even supports conservative religious communities that are important to some religious peoples' identity and feeling of self-respect, but that critical of women's full participation in higher education and the labor market.

collective bargaining position,<sup>36</sup> these can arguably be reconstructed as reflective of what seems to be a double justice dilemma: First, a dilemma between redistribution versus recognition, where one seemingly has to choose between equal pay for work of equal value for women and men and redistributive fairness (replacing collective bargaining with equal pay technocracy will result in more severe maldistribution, according to the collective bargaining position); second, a 'justice-from-above versus justice-from-below' dilemma, where one seemingly has to choose between equal pay for work of equal value for women and men (that is a just outcome in terms of recognition and justice-from-above) and democracy in terms of the inclusion of social partners in decision-making (democratization and justice-from-below).

## Ways out?

The question is whether this is only seemingly so. To what extent are the 'redistribution versus recognition' dilemma and the 'justice-from-above versus justice-from-below' dilemma in the confrontations between law enforcement and collective bargaining genuine and to what extent are there ways to narrow the gap between these positions?

With the Norwegian case in mind, the easy way out would be to say simply that most actors in the end belong to both camps, to a greater or lesser extent. As already noted, the moral concerns of different real-world political actors with regard to the equal pay issue are not captured by one of the three stylized positions exclusively. On the contrary, when real-world political actors argue about what is right and just with regard to equal pay, they often refer to two or more of these positions, even if they often weigh them differently. However, they may do so because the arguments involved are compatible or more compatible than they seem, reflecting that the above-mentioned dilemmas are not genuine or only in part genuine, or they may do so because they are actors that behave irrational in the sense that they pursue incompatible goals or goals that have a lower level of compatibility than assumed by the actors themselves, reflecting that the above-mentioned dilemmas *are* genuine or in part genuine: Equal pay, redistributive fairness and social partner democracy cannot be achieved at the same time, at least not fully or adequately. The question here is thus a harder one: To what extent is real argumentative integration between the law enforcement position and the collective bargaining position possible? And to what extent are the justice dilemmas that are seemingly involved genuine and contradictions and trade-offs unavoidable?

At least two strategies of argumentative, possibly dilemma-reducing, strategies can be outlined: an *empirical* and an *ethical* strategy. The extent to which trade-offs must be made depends, first, on the soundness of a set of factual and pragmatic claims underlying the different arguments even in their stylized versions. This is the point of departure of the empirical strategy. Consider for example to what extent it is the case that women in fact are paid less for work of equal value. That is, how much of the gender pay gap – the gap between women's and men's average pay – is actually the

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<sup>36</sup> The confrontations between equal recognition and free market cannot be analyzed in terms of justice dilemmas within the parameters of Fraser's theory of justice. Whether this is a problem for Fraser depends on the extent to which the free market position inhabits legitimate concerns. This discussion must be left for another occasion.

outcome of unequal pay and unequal recognition, and how much of this gap must rather be explained with reference to other causal factors?<sup>37</sup> Concretely, the fear that implementing equal pay can give lower scores on redistributive fairness variables is often linked to the assumption that it would justify massive redistribution in favor of middle class women with higher education.<sup>38</sup> However, this depends on the extent to which middle class women with higher education in fact are paid unduly according to the job evaluations schemes that are used (that again depend on the particular standards and evaluations of these schemes, and on the significance of education in this connection) and how much women (and men) with higher education jobs of equal value (according to the evaluation schemes) are paid relative to working class women (and men) with work of equal value (and to what extent this distribution is unfair). It may be that middle class women with higher education, or at least segments of this group, are paid relatively well according to the job evaluation schemes that are used, be it because higher education, or certain kinds of higher education, in fact pays off in the polity in question, or because the job evaluation scheme that is used put limited weight on higher education as job value increaser, or it may be that they suffer from relatively low pay, because higher education does not pay off, or because higher education is regarded as a significant indicator of high job value. Similarly, under an equal pay regime the wage difference between people with higher education, or groups of people with higher education, and the working class, or segments of the working class, may be big or small, depending on the weight put on higher education as a job value increaser relative to other indicators. The real extent of the 'recognition versus redistribution' dilemma will vary accordingly.

Consider also to what extent it is the case that social partner democracy in fact results in unequal pay. Empirical studies show for example considerable national variation on this point between EU member countries.<sup>39</sup> Among countries that score relatively high on social partner democracy, some score better on equal pay than others, and the other way around: Low score on social partner democracy may very well go hand in hand with low score on equal pay. The real extent of the 'justice-from-above versus justice-from-below' dilemma will thus vary relative to the strength of the actual causal relationship between social partner democratization and pay structure.

Consider finally whether it is the case that the equal recognition case is served better by as much law enforcement and state intervention in markets as possible. To what extent may somewhat less state intervention and less ambitious legislation serve efficiency better and so strengthen the economic basis of possibly costly equal pay policies in the long run?<sup>40</sup> The real extent of the involved justice dilemmas will vary accordingly.

The point here is not to conclude that the double justice dilemma in the confrontations between law enforcement and collective bargaining will disappear or even decrease if we pursue the empirical strategy and investigate the soundness of the central factual and pragmatic claims of these confrontations, but that this is a strategy that can and

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<sup>37</sup> For an overview of this debate, see Joyce P. Jacobsen, *The Economics of Gender* (Malden, MA: Blackwell, 1998).

<sup>38</sup> Høgsnes, *supra* note 4.

<sup>39</sup> van der Vleuten, *supra* note 5, compares France, Germany, Great Britain and the Netherlands.

<sup>40</sup> Jacobsen, *supra* note 37.

must be pursued, before we conclude that it does not. The second possibly dilemma-reducing strategy – the ethical strategy – should be thought of in similar terms.

The point of departure of the ethical strategy is that some of the normative standards involved in the equal pay confrontations are not proper standards of impartial justice but rather thick, partial, value-based point of views, or ethical claims if we follow Habermas' discourse scheme. Consider for example the extent of which equal recognition operationalized as equal pay for work of equal value with reference to some job evaluation scheme is really a proper standard of justice. One may agree or disagree with the standards of justice subscribed to by Ellen Frankel Paul, but agree with her that job evaluation schemes are necessarily partial and value-based (and thus not proper standards of justice), or, more modestly, take the position that it has yet to be shown fully that they are not, and positively, that equal recognition operationalized as equal pay is a justice claim on par with justice claims for redistribution and democracy, and that can thus be involved in and create genuine justice dilemmas.<sup>41</sup>

Or consider the question of what kind of democracy justice requires. The 'justice-from-above versus justice-from-below' dilemma of the disputes between law enforcement and collective bargaining rests on an idea of democracy as social partner democracy. However, this implies also that the extent of this dilemma – of equal pay as 'technocratic reform'<sup>42</sup> – depends on the significance from the point of view of justice of social partners' inclusion in democratic decision-making. To what extent and in what sense does just democratization of society require the inclusion of social partners? Can other democratic mechanisms compensate for lower scores on social partner democracy as a result of equal pay implementation – be it representative parliamentary democracy or other democratic mechanisms, for example as they occur in the literature on deliberative and transnational democracy? If justice requires social partner democracy, and equal pay implementation creates a social partner democracy deficit that cannot be compensated for by means of other democratic mechanisms, the 'justice-from-above versus justice-from-below' dilemma is full-fledged. If, on the other hand, the social partner democracy notion of the collective bargaining position turns out to be a thick, ethical democracy notion, this notion may or may not be challenged by equal pay implementation, but if it is, the dilemma arising is not a pure dilemma of justice, but a dilemma that occurs for those that subscribe to a particular, comprehensive and contestable idea of democracy. Again, the point is not conclude one way or the other with regard to the genuine or not so genuine character of the above-mentioned dilemmas, but to point at variables of the equal pay controversy that must be further investigated before a conclusion of this kind can be drawn.

## Summing up

Equal pay is a central principle of national and international law, but creates controversy. The equal pay controversy in Norway has been interpreted as part of a larger conflict between defenders of the social democratic Scandinavian model and

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<sup>41</sup> A closer scrutiny of the arguments put forward by Axel Honneth and Angelika Krebs would be an apt place to start the investigations.

<sup>42</sup> Sara M. Evans and Barbara J. Nelson, *Wage Justice: Comparable Worth and the Paradox of Technocratic Reform* (Chicago, IL: University of Chicago Press, 1989).

proponents of Europeanization and internationalization of Norwegian anti-discrimination law. Accordingly, when paragraph 5 of the Norwegian Gender Equality Act was amended in 2002, it was made with reference to Norway's international obligations and the EEA Agreement. The story is, however, more complex. To understand more of the Norwegian equal pay controversy we must read it – also – as a more general moral debate about justice and rightness. Three central stylized positions were distinguished to capture the moral grammar of the Norwegian equal pay controversy: the law enforcement position, the free market position and the collective bargaining position. The three positions were then fleshed out in terms of normative political theory. An important lesson was that normative political theory may be useful in analyses of the moral dimensions of real-world controversies such as the Norwegian equal pay controversy. However, the analysis of real-world controversies can also add to normative political theory. In 'top down' normative political theory deliberations on the equal pay principle is marginal, framed as a 'for' or 'against' controversy, and relatively disconnected from the concerns raised by the collective bargaining position. Arguably, consulting an empirical case gave a richer picture of the equal pay controversy as a moral controversy and opened up new analytical possibilities. Taking seriously the interconnections between the equal pay issue and the right to free collective bargaining, Nancy Fraser's idea of 'dilemmas of justice' was introduced and used to analyze the dispute between law enforcement and collective bargaining as a double justice dilemma between both redistribution versus recognition and input (democratization) versus outcome. Finally, two possibly dilemma-reducing strategies were discussed, an empirical and an ethical strategy. The point of this endeavor was not to conclude that the double justice dilemma disappears or even decreases if we pursue these strategies, but that these strategies can and must be pursued, before we conclude that it does not.



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