Equal Opportunity and Gender Disadvantage

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Introduction

Recently, in Canada both the Federal Government and various provincial governments have introduced a series of measures intended to address gender inequalities in the workplace. These measures are of two basic types. Employment equity policies involve the implementation of affirmative action programmes designed to encourage the hiring and promotion of more women in, for example, the civil service. Pay equity policies have sought to institutionalize the principle of equal pay for work of equal value or, to use the American terminology, comparable worth. The aim of this paper is to resurrect the presently out of fashion view that the principles of affirmative action and comparative worth that underlie employment equity and pay equity can be defended on the grounds that they contribute to the realization of an ideal of equality of opportunity between men and women in Canadian society. This view, although once prevalent among those concerned with gender issues, has been pushed aside, largely because of doubts about the visionary depth of the ideal of equality of opportunity. It has been replaced instead by an ideal of equality of results which emphasizes the goal of reducing the gender wage gap. It is my intention here to formulate a principle of equality of opportunity that can incorporate recent feminist legal and political philosophy in a way that offers a promising way to analyze issues posed by gender inequalities in the workplace and, as a result, provide a clear rationale for the recent employment equity and pay equity initiatives in Canada.

Equality: Results or Opportunities

Egalitarians today disagree over the form of equality that institutions and public policy should be designed to promote. The fundamental question they ask is, “Equality of what?” For there is no consensus on the issue of the respects in which individuals should be made equal.1 There is an elementary distinction to be made among competing answers to this question between those theories of distributional equality that embrace equal opportunities and those that embrace equal results.

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Equality of opportunity, as a broad class of theories of distributional equality, holds that everyone should have an equal opportunity to enjoy a certain set of goods. Theories within this broad class differ principally over how they answer the following two questions: (1) Which goods are to be subject to the principle of equality of opportunity? (2) What are the necessary background conditions for there to be equality of opportunity? Equality of results, as a broad class of theories of distributional equality, holds that the outcome of a distributional process should result in everyone enjoying a certain set of goods in roughly equal proportion. Theories of equality of results differ principally over which goods people should enjoy in equal proportions.

Among those concerned with gender inequality in the workplace, the general tendency in recent years has been to defend employment equity and pay equity on the grounds that these policies will reduce significantly the wage gap between men and women in Canada. The main idea here is that if it is assumed that the objective of reducing the gender wage gap is desirable, then it follows that governments should implement policies that have this effect. This perspective assumes that ideal public policy concerned with gender inequalities in the workplace should seek to realize some ideal of equality of results. The relevant point is that the policies of employment equity and pay equity are warranted, provided that they do in fact reduce the gender wage gap.

Now, initially, there was significant optimism about the potential of employment and pay equity to reduce the gender wage gap in Canada. It was, for example, projected by one economist in 1987 that the Ontario Pay Equity Law could reduce the gap by 10 to 15 points in Ontario. A similar level of optimism greeted the Federal Government’s Employment Equity Act which was projected to increase significantly the number of women in upper management jobs and consequently have a positive effect on the average wage of working women. Certainly, a reduction in the gender wage gap seems to have been an important dimension of the American experience with these types of legislation. This original assessment of the effect of pay equity and employ was, however, blindly optimistic. It is now very doubtful that the implementation of affirmative action and pay equity programs by the Federal and Ontario Governments will have a significant impact on the

4. R.S.C. 1985, ch.23 (2nd Supp.).
5. For a general discussion, see Morley Gunderson, “Male- Female Wage Differentials and Policy Responses” (1989) 27 J. of Econ. Lit. 46.
7. Indeed, it has even been suggested that the Ontario Pay Equity Act will increase the wage gap among women. See Pat Armstrong & Hugh Armstrong, “Lessons from Pay Equity” (1990) 32 Studies in Pol. Econ. 29 at 52.
gender wage gap. Indeed, it is doubtful that even significant alterations and improvements on present legislation will make such programs more effective at reducing the gender wage gap. But, then, for those who have sought to justify their introduction on the basis that they will contribute to the reduction of the gender wage gap, the case for employment equity and pay equity appears to dissolve.

It is my view that this conclusion reflects a fundamental flaw with thinking about the principles of affirmative action and comparable worth within a framework of equality of results. Such a framework sets the wrong standard for judging employment equity and pay equity legislation in Canada. Instead, we must judge this legislation in terms of its contribution to equality of opportunity. This suggestion in itself is neither original nor innovative. Indeed, it is on the basis of equality of opportunity that policies of this sort have been recommended in numerous influential Royal Commission reports and Green papers. The puzzle for me is why, despite these explicit public attempts to link pay equity and employment equity to equality of opportunity, there has been a widespread and persistent inclination among those concerned with gender inequalities in the workplace to evaluate and judge these legislative initiatives within the framework of a theory of equality of results. The answer lies, I suspect, in certain deep reservations that many people have about the very concept of equality of opportunity.

These reservations have two likely sources. The first is that equality of opportunity is frequently thought to be an extremely weak sort of egalitarian principle of justice. For some, it amounts simply to the idea that everyone has the equal opportunity to be unequal. For the women's movement in Canada, the relevant point is that the rhetoric of equal opportunity in the 1960s and 1970s seems not to have made a great deal of difference to the lives of ordinary Canadian women. The problem is that a focus on equality of opportunity appears not to capture the systemic nature of many of the disadvantages faced by Canadian women.

8. For a more agnostic pronouncement, see Morley Gunderson, Leon Muszynski, & Jennifer Keck, Women and Labour Market Poverty (Ottawa: Canadian Advisory Council on the Status of Women, 1990) at 159-61. This is partially because of the conceptual difficulty of understanding how the rationale for pay equity can be to reduce the gendered wage gap: "While the wage gap has been an important factor in the identification of the need for pay equity, it will be less useful in assessing its impact. The wage gap is based on the earnings of individual men and women. Pay equity will equalize the salaries of female jobs with equally valued male jobs that are of equal value." From Nan Weiner & Morley Gunderson, Pay Equity: Issues, Options and Experiences (Toronto: Butterworths, 1990) at 11.


The second difficulty with equality of opportunity is that, at first glance, pay equity and employment equity appear inconsistent with it. It is now, for example, a commonly held view in the United States, even among those sympathetic, that affirmative action programs compromise equality of opportunity because they favour members of disadvantaged groups over others in open competition for scarce offices and positions.12 Similarly, critics of pay equity argue that, because such programs interfere with the market determining wages, they too involve a compromise of equality of opportunity.13 The point is that an egalitarian perspective that emphasizes equality of results appears more easily able to justify such programs.

Fair Equality of Opportunity

These reservations about equality of opportunity are, I shall show, misplaced. A theory of equality of opportunity can be sensitive to gender as a form of systemic disadvantage and ground legislative attempts to address this form of disadvantage. The particular theory of equality of opportunity I have in mind here is an extension of what John Rawls calls fair equality of opportunity.

Fair equality of opportunity can be best understood through a contrast to what can be described as formal equality of opportunity. Formal equality of opportunity requires that everyone have the same legal rights of access to all advantaged social positions and offices and that these positions and offices be open to talents in the sense that they are to be distributed to those able and willing to strive for them.14 Equality of opportunity in this formal sense is the one that has most often received recognition in Canadian and American legislation. But formal equality of opportunity as a theory of equality of opportunity is deeply problematic because it discounts the initial starting positions of individuals. Similarly motivated and endowed individuals may differ in their success under formal equality of opportunity because they come from different socio-economic backgrounds. Is this fair? The principle of fair equality of opportunity was formulated by Rawls in response to this flaw in formal equality of opportunity. It maintains that, “those who are at the same level of talent and ability, and have the same willingness to use them, should have the same prospects of success regardless of their initial place in the social system, that is, irrespective of the income class into which they are born.”15

Rawls in A Theory of Justice emphasizes two principal ways to approximate fair equality of opportunity. First, it is important to avoid excessive concentrations of wealth. This lays the foundations for Rawls’ advocacy of what he describes as

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a property-owning democracy.16 Second, an education system should be designed to minimize the effects of one’s socio-economic class on an individual’s ambitions and the development of his or her natural talents and abilities. As Rawls puts it, “Chances to acquire cultural knowledge and skills should not depend upon one’s class position, and so the school system, whether public or private, should be designed to even out class barriers.”17

It is a common place criticism of Rawls to say that while he is sensitive to race and class as forms of disadvantage that can have a disparate impact on opportunities, he fails to recognize gender as a similar form of disadvantage.18 The more interesting issue is if and how the theory of fair equality of opportunity can be extended to cover gender issues. An obvious starting point is to consider how formal equality of opportunity might be extended to cover gender issues. Off hand, this is not a difficult task: formal equality of opportunity can be interpreted to forbid similarly motivated and talented individuals being denied access to offices and positions on the basis of sex in the same way that it forbids denial of access on the basis of race or social background. And, of course, formal equality of opportunity in this sense has received legal status in Canada in various human rights bills and in the Civil Rights Act of 196419 in the United States. But, since this level of formal equality of opportunity among men and women has proven not to be enough, it is logical to turn to fair equality of opportunity.

Fair equality of opportunity is motivated by a concern that similarly endowed and motivated individuals begin from roughly equal starting positions. For Rawls, it is obvious that the single most important factor influencing people’s initial starting position is family background. The truth is that people come from a wide range of family backgrounds, some of them very privileged, others profoundly disadvantaged.20 Fair equality of opportunity, in contrast to formal equality of opportunity, raises then the issue of justice between families. From a policy perspective, justice between families is a central aim of much current social policy and progressive taxation, for the tendency is to redistribute income between families or households rather than between individuals. On the whole, directing policies principally at injustices between families might make sense if the concern is only with the impact of race and class on equal opportunities.

But, if fair equality of opportunity is to be extended to cover the impact of gender on the equal opportunities of women, then this raises the issue not only of justice between families but also justice within families. It is largely undisputed that in North America women, even those in the labour market, continue to carry a much greater responsibility for domestic labour and primary care for children than men. Rarely too do women have access to an equal share of a household’s income and

17. Rawls, A Theory of Justice at 73.
financial resources. This injustice within families become especially apparent when there is marital breakdown, for a striking feature of divorce and separation is the asymmetrical economic effects it has on men and women. While divorce or separation in Canada and the United States usually entails a significant reduction in the standard of living for the ex-wife, it generally translates into a significant improvement for the ex-husband. The important point is that in order to achieve a standard of fair equality of opportunity that is sensitive to gender, policy must be directed not only at injustices between families but also injustices within families.

Analytically, it is possible to divide public policies directed at injustices within families into two broad classes, on the one hand, home-based policies, and, on the other, workplace-based policies. Including housewives in existing pension schemes and having the state collect child-support payments from absent fathers are examples of home-based public policies directed at injustices within families. Employment equity and pay equity legislation should, in my view, be regarded as workplace-based policies directed at injustices within families with the goal of achieving fair equality of opportunity. For this reason, I shall focus the rest of the discussion on the character of workplace-based policies, and put home-based policies, which I have discussed elsewhere, aside.

Gender Disadvantage in the Workplace

The purpose of workplace-based policies is, as we have just seen, to remedy for injustices within families that affect adversely the initial starting position of women under a scheme of fair equality of opportunity. This purpose distinguishes these kinds of policies from those policies designed to eradicate directly discriminatory practices in the workplace such as sexual harassment. But my specification of this purpose is still too vague. In particular, we need to be clearer about which injustices within families are to be remedied for; and this presupposes an account of sexual discrimination.

Before turning to such an account, it is worth emphasizing the radical character of fair equality of opportunity that has hopefully now become apparent. The extension of Rawls’ notion of fair equality of opportunity to gender issues rests on seeing the continuity between the family and the workplace. Injustices that exist within the family are translated into injustices in the workplace. By emphasizing the importance of initial starting positions, fair equality of opportunity, unlike formal equality of opportunity, challenges the conventional public/private distinction. Unfortunately, though, this is ordinarily overlooked in feminist analyses of equality of opportunity. Challenging the public/private distinction, neatly captured by the slogan “The personal is political,” has been a mainstay of feminist thought. Political philosophers such as Rawls are generally perceived to have left this distinction intact and, as


22. See my Rights and Deprivation, supra note 1, ch. 8.
a result, their work is often regarded with suspicion.23 My point is that this reservation is misplaced since fair equality of opportunity should be regarded as challenging the public/private distinction, not reinforcing it.

An answer to the question of which injustices within families should be remedied by workplace-based policies requires an account of sexual discrimination because the issue turns fundamentally on how those injustices come to be reflected in the workplace. Developing an adequate theory of sexual discrimination has been the focus of much recent feminist legal and political theory. By and large, the tendency has been to react against the received approach to sexual discrimination which holds that sexual discrimination occurs when women are treated differently from men on the basis of some arbitrary or socially constructed difference between men and women. Following convention, I shall refer to this approach as the sex-based difference view.24 While the difference view is widely criticized by feminists for its limitations, it is important not to overlook that it is superior to the view that in the workplace men and women should be treated the same, no matter what.25 The latter view is deeply problematic because of the fact that it seems to imply that measures such as maternity leave and job security for pregnant women discriminate against men. What is worrisome here is that an approach that emphasizes sameness as the standard for identifying sexual discrimination may be used to hurt women, not benefit them. The virtue of the difference view is that it is able to say that maternity leaves and job security for pregnant women are not instances of sexual discrimination against men because the differential treatment rests on a difference between men and women that is not arbitrary.

The principal objection to the difference view of sex discrimination concerns the question of what differences between men and women warrant differential treatment. A nice illustration of this tension was raised in the U.S. Supreme Court’s Manhart decision in 1978.26 At issue was a provision in the pension scheme of the Los Angeles Department of Water and Power requiring women employees to contribute approximately 15 percent more in premiums to obtain the same pension coverage as men. The logic for this requirement, based on actuarial findings, was that women as a group live longer and therefore are a greater liability in a pension scheme. After all, without this requirement, it might seem that male employees are suffering sexual discrimination because they are subsidizing the pensions of female employees. While the Supreme Court struck down this requirement, a parallel can undeniably be made to the claim that maternity leaves rest on biological

25. For an account of this view in Canada at the turn of the century, see Constance Backhouse, Petticoats and Prejudice (Toronto: The Osgoode Society by the Women’s Press, 1991) at 276-88.
differences between men and women. The pertinent point is that it seems that on the sex-based difference view the distinction between these two cases is purely arbitrary. They either both identify instances of sexual discrimination or neither does. Yet, an adequate account of sexual discrimination needs to identify grounds for distinguishing them.

The most persuasive response to this problem is, in my view, to say that the difference view mistakenly assumes that men can suffer from sexual discrimination in our society. There are two competing views about why it is generally the case that only women can suffer sexual discrimination. One view—the sex-based dominance view—says that men cannot suffer sexual discrimination because we live in a male-ordered society in which institutional power relations between men and women are hierarchical in nature. The idea is that the sexual discrimination suffered by women is a reflection of this male-order; and since there is no such parallel in the case of men, they cannot suffer sexual discrimination. As Catharine MacKinnon has put it,

The gender-neutral approach to sex discrimination law obscures...the fact that women’s poverty and consequent financial dependence on men (whether in marriage, welfare, the workplace, or prostitution), forced motherhood, and sexual vulnerability substantively constitute their social status as women, as members of their gender. That some men at times find themselves in similar situations does not mean that they occupy that status as men, as members of their gender. They do so as exceptions, both in norms and in numbers. Unlike women, men are not poor or primary caretakers of children on the basis of sex.27

The other view—the sex-based disadvantage view—says more moderately that only women can suffer sexual discrimination because unlike men their gender is a form of disadvantage in our society. A parallel can be made to racism where it might be said that white people in North America cannot suffer racism, pace the claims of white supremacist groups, because for them their race is not a form of disadvantage in our society. Deborah Rhode explains this view on sexual discrimination in the following passage:

a disadvantage framework is concerned not with difference but with its consequences. The legitimacy of sex-based treatment does not depend on whether the sexes are differently situated. Rather, analysis turns on whether legal recognition of gender distinctions is more likely to reduce or to reinforce gender disparities in political power, social status, and economic security.28

On both views, gender currently functions to limit the opportunities for women. It is difficult, however, to judge which of these two views is more accurate in their account of why. My inclination is to think that each has explanatory power within certain domains.29 While issues like rape and domestic violence raise questions about dominance and the hierarchical nature of gender, issues like low wages and the segregation of women in certain types of jobs better reflects the idea of gender.

28. Rhode, Justice and Gender, supra note 24 at 83.
29. See also Rhode, Justice and Gender, supra note 24 at 85.
as a form of disadvantage. For our purposes, it is adequate to work within the sex-based disadvantage framework.

The significance of the disadvantage view, from the perspective of fair equality of opportunity, is that it focuses on how differences—biological or socially constructed—between men and women affect their success under a scheme of equality of opportunity. It presupposes, according to Rhode, “a substantive commitment to gender equality—to a society in which women as a group are not disadvantaged in controlling their own destiny.”30 This focus fits the concern with initial starting positions that differentiates fair from formal equality of opportunity. My thought is that the disadvantage framework of sexual discrimination explains how gender as a form of systemic discrimination affects the equal opportunities of women.

To be more specific, it explains why “disparate impact” is a violation of a standard of equality of opportunity, and not simply of equality of results. A regulation, law, or practice has a “disparate impact” when it affects in a disproportionate and adverse manner a particular group in society.31 The classic example of disparate impact was provided by the nineteenth century French writer Anatole France who cites laws that forbid the rich as well as the poor from sleeping under bridges.32 Ordinarily, disparate impact is taken as the standard test for systemic discrimination against a particular group in society.33 The central question that the existence of disparate impact raises, in this context, is whether or not it violates some standard of equality when it occurs unintentionally. While gender undeniably generates intentional discrimination against women, it is also generally perceived to generate systemic discrimination in the sense that many laws and employment practices have a disparate impact on women.

Taking disparate impact and systemic discrimination seriously may seem to lead logically to some ideal of equality of results. The reasoning is that disparate impact is wrong because it indicates an unequal result. Indeed, it is sometimes suggested that the only way to take systemic discrimination seriously is through an ideal of equality of results. This way of thinking underlies, I suspect, why judging legislation purely by its effects on reducing the gendered wage gap has become prevalent. But adopting an ideal of equality of results makes arguments against systemic discrimination a “soft” target for criticism. Rainer Knopff, for example, in his recent book *Human Rights and Social Technology: The New War on Discrimination* argues that measures designed to combat systemic discrimination against women and visible minorities run counter to Canada’s liberal democratic tradition. His argument basically is that those who object to disparate impact and systemic discrimination are committed to some type of ideal of equality of results and that this ideal is fundamentally “illiberal.”34 While there may be some debate about Knopff’s

understanding of liberalism, it is largely undeniable that he is on firm ground when he says that equality of results does not enjoy wide spread public acceptance and that any legislation based on it faces a legitimation problem. The attraction of taking disparate impact seriously within the framework of fair equality of opportunity is that the prospects are better for the successful adoption of public policy to combat it.35

From the perspective of fair equality of opportunity, the disparate impact of a labour law or workplace practice on women is discriminatory when the disproportionate and adverse effects reflect the initial starting position of women. The most striking instance of discrimination of this sort is the practice of paying low wages to employees in certain female-dominated occupations. This practice has a disparate impact in the sense that it results in women employed in such jobs having low incomes. It is frequently said that this disparate impact is not discriminatory because the practice of paying low wages in those sectors of the economy is not directed at disadvantaging women but rather reflects the large supply of workers capable of doing those jobs. Moreover, the fact that these low wages affect women more than men is said to be a reflection of women’s choices—they choose these career paths despite knowing they are poorly paid.36 But my view is that neither of these two considerations disqualify this practice from the charge of sexual discrimination. The relevant question to be asked is why do so many women pursue job prospects that have such low wages and consequently further contribute to driving down wages. The answer has to lie, at least partially, in some consideration of the injustices within families. The sexual division of labour within the family as well as the unequal access to family financial resources makes it necessary for many women to pursue occupations that can accommodate these facets of their lives. The initial starting position of women in the labour market does, therefore, come to be reflected in the disparate impact of the practice of paying low wages to employees in female-dominated sectors of the economy. This workplace practice is, then, discriminatory under fair equality of opportunity and policies should be designed to remedy for it.

Pay equity and employment equity can be understood as workplace-based policy responses to this widespread discriminatory labour practice. Pay equity ideally functions to correct market-determined wages in these occupations so that they are consistent with fair equality of opportunity. The problem with relying solely on the market to determine wages in female segregated occupations is that those wages inevitably reflect the unequal starting positions experienced by women in the workplace. (The market by its very nature is unable to correct for unequal starting positions.)37 Pay equity approaches this problem by making wages in female-dominated occupations equal to market-determined wages earned by men in occupations of

35. This may, however, have certain costs in terms of undermining the cohesiveness of the women’s movement. See Johanna Brenner, “Feminist Political Discourses: Radical Versus Liberal Approaches to the Feminization of Poverty and Comparable Worth” (1987) 1 Gender and Society 447.
comparable worth. In this sense, pay equity is predicated on the notion that the mar­
et should determine wages. All any pay equity policy purports to do, then, is cor­rect in some cases market outcomes that have been tainted by sexual discrimination.

While pay equity targets the workplace practice of paying low wages in female dominated occupations by raising those wages to levels equal to other occupations of comparable worth, employment equity targets this practice by giving women more opportunities to pursue job prospects in occupations other than those traditionally dominated by women. The disadvantage of gender placed on women is one of the principal reasons why so many women go into female-segregated occupations. Employment equity seeks to ensure that hiring and promotion practices do not reflect engendered disadvantage. Timetables and quotas for the hiring of women serve this function by compensating women for the disadvantage gender places on their initial starting position in a system of competitive equality of opportunity. The issue is, of course, trickier than this because class and race also influence the initial starting position of individual women; the inevitable consequence of an employment equity program that only focuses on gender as a form of disadvantage is that it is likely to benefit principally white women from well-off family back­grounds. For this reason, it makes sense to have an integrated employment equity program such as the Federal Employment Equity Plan which addresses both gender and race as a form of disadvantage.

Conclusion

I have argued in this paper that the rationale for employment equity and pay equity legislation is to promote fair equality of opportunity by remedying for the disadvantageous effect gender has on the initial starting position of women in com­petition for scarce offices and positions. We should judge Canadian legislation which implements principles of affirmative action and comparable worth against this rationale, and not against its ability to reduce the gender wage gap. But chang­ing the metric for evaluating this sort of legislation does not mean that current leg­islation is without flaws. It might well be the case that existing legislation does not address adequately the adverse effects of injustices within families on the oppor­tunities for women in the workplace. But that raises questions for research that are very different from ones raised by a focus on the gender wage gap.