CAPABILITIES, SOCIAL RIGHTS AND EUROPEAN MARKET INTEGRATION

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by

Jude Browne
University of Cambridge
ESRC Centre for Business Research
j.browne@cbr.cam.ac.uk

Simon Deakin
University of Cambridge
ESRC Centre for Business Research
s.deakin@cbr.cam.ac.uk

Frank Wilkinson
University of Cambridge
ESRC Centre for Business Research
f.wilknison@cbr.cam.ac.uk

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Abstract
This paper explores links between the economic notion of 'capabilities' and the juridical concept of social rights. We begin by revisiting T.H. Marshall's classic analysis of social rights and their ambiguous relationship to the market. We then examine how far Amartya Sen's Capabilities Approach provides a framework for locating social rights within a market setting. We argue that Sen's non-dogmatic, context-orientated approach to defining the meaning of capabilities offers a viable way forward for thinking about the current tension between market rights and social rights in the European Union. This argument is illustrated by reference to the role played by mechanisms of corporate social responsibility in promoting gender equality.

Key words: Capabilities, social rights, European single market

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1. Introduction

The purpose of this paper is to explore links between the economic notion of 'capabilities' and the juridical concept of social rights. The notion of capabilities was developed first by Lancaster (1966) and Sen (1985, 1999), has more recently come to prominence in the debate over the European welfare state as a result of its use in the Supiot report on the transformation of work and employment relations (Supiot, 1999; Salais, 1999). We are concerned here with the potential of the 'capabilities' concept to clarify the relationship between social rights and the market order, in particular as expressed in the discourse of European integration. We begin by revisiting T.H. Marshall's classic analysis of social rights and their ambiguous relationship to the market (Marshall, [1949] 1992). We then introduce Sen's Capabilities Approach and discuss how far it provides a framework for locating social rights within a market setting. We argue that Sen's non-dogmatic, context-orientated approach to defining the meaning of capabilities offers a viable way forward for thinking about the current tension between market rights and social rights in the EU. This argument is illustrated by reference to the role played by mechanisms of corporate social responsibility in promoting gender equality.

2. Social rights

Social rights are usually understood as claims on resources in the form of income, services or employment. In T.H. Marshall's classic and still influential formulation, social rights were distinguished from 'civil' and 'political' rights. Civil rights were 'rights necessary for the individual freedom – liberty of the person, freedom of speech, thought and faith, the right to own property and to conclude valid contracts, and the right to justice'. Political rights were characterized in terms of 'the right to participate in the exercise of political power, as a member of a body invested with political authority or as an elector of the members of such a body'. Social rights were loosely defined, but according to Marshall covered a wide range of entitlements 'from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilised being according to the standards prevailing in society' ([1950] 1992: 8).

Marshall saw social rights as operating in tension with the market order. Civil rights were 'intensely individual, and that is why they harmonized with the individualistic phase of capitalism' (1992: 26). The social rights of the twentieth

century, by contrast, displaced the market, at least to a certain degree: the process of 'incorporating social rights in the status of citizenship' involved 'creating a universal right to real income which is not proportionate to the market value of the claimant' (1992: 28). This gave rise to what Marshall called 'a basic conflict between social rights and market value' (1992: 42). Yet he also wrote:

> 'Social rights in their modern form imply an invasion of contract by status, the subordination of market price to social justice, the replacement of the free bargain by the declaration of rights. But are these principles quite foreign to the practice of the market today, or are they there already, entrenched within the contract system itself? I think it is clear that they are (1992: 40).

In *Citizenship and Social Class*, this claim was followed by a discussion of the evolution of collective bargaining, which stressed its dual nature as 'a normal peaceful market operation' which gives expression to 'the right of the citizen to a minimum standard of civilized living'. However, Marshall later concluded that whatever else the post-war welfare state settlement had achieved, 'the basic conflict between social rights and market value has not been resolved' (1992: 42).

It is clear that Marshall did not expect the courts to play a prominent role in achieving this resolution. The institutions Marshall associated most closely with social rights were 'the educational system and the social services' (1992: 8). He also suggested that in relation to the receipt of welfare services, 'the rights of the citizen cannot be precisely defined… A modicum of legally enforceable rights may be granted, but what matters to the citizen is the superstructure of legitimate expectations' (1992: 34). This was in contrast to civil rights which he saw as 'an eighteenth century achievement… in large measure the work of the courts'. In this respect, Marshall reflected the emphases of his own time: when *Citizenship and Social Class* was written (1949), social rights were almost invariably seen as the product of legislative action and, increasingly, of bureaucratic provision. The question of the potential juridical basis of social rights was not seen as a significant issue.

3. The origin of the concept of capabilities: Lancaster and Sen

The concept of capabilities originates in debates within welfare economics. Lancaster (1966) was the first to draw a distinction between *commodities* and the *characteristics* of commodities. He envisaged consumption as an activity in which commodities, singly or in combination, are inputs and in which the output is a collection of characteristics:

> A meal (treated as a single good) possesses nutritional characteristics but it also possesses aesthetic characteristics, and different meals will possess these characteristics in different relative proportions. Furthermore, a dinner party, a combination of two goods, a meal and a social setting, may posses nutritional, aesthetic and perhaps intellectual characteristics different from a meal and a social gathering consumed separately (Lancaster, 1966: 133)

Lancaster's paper essentially recast traditional consumer theory, in which utility (happiness or the fulfillment of desires) is the driving force of consumption, in terms of the utility derived from the characteristics of commodities rather than from commodities themselves. In *Commodities and Capabilities*, Sen (1985) adopted the idea that characteristics are the desirable properties of commodities, and that command over commodities may confer command over their characteristics. However, he took Lancaster's insight further by arguing that knowledge of the characteristics of goods does not tell us what a person will do with them. In judging the well-being of a individual, it is therefore not enough to analyse simply the commodities to which he or she has access and the characteristics which they are capable of expressing. The *capability* of that individual to achieve a range of *functionings* with the commodity also has to be considered. Sen distinguishes between capabilities, functionings and characteristics by giving the example of riding a bicycle:

> It is, of course, a commodity. It has several characteristics, and let us concentrate on one particular characteristic, viz. transportation. Having a bike gives a person the ability to move in a certain way that he may not be able to do so without the bike. So the transportation characteristic of the bike gives the person the capability of moving in a certain way (Sen, 1992: 160).

The sequence is therefore as follows: (1) the inherent *characteristic* (transportation) of the commodity (bicycle) is (2) converted into a certain *functioning* (riding the bike) thereby (3) enhancing the individual's overall capability set. In this sense, the concept of capability reflects the various combinations of functionings that a particular person can achieve. In *Development as Freedom,* Sen offers this set of definitions:

> the concept of 'functionings'… reflects the various things a person may value doing or being. The valued functionings may vary from elementary ones, such as being adequately nourished and being free from avoidable disease, to very complex activities or personal states, such as being able to take part in the life of the community and having self-respect… A 'capability' [is] a kind of freedom: the substantive freedom to achieve alternative functioning combinations' (Sen, 1999: 75).

As a further illustration, Sen has followed Lancaster in using the example of eating as both a nutritional and social activity. Thus:

> The conversion of commodity-characteristics into personal achievements of functioning depends on a variety of factors – personal and social. In the case of notional achievement it depends on such factors as (1) metabolic rates, (2) body size, (3) age, (4) sex (and, if a woman, whether pregnant or lactating), (5) activity levels, (6) medical conditions (including the presence or absence of parasites), (7) access to medical services and the ability to use them, (8) notional knowledge and education, and (9) climatic conditions. In the case of achievements involving social behaviour and entertaining friends and relatives, the functioning will depend on such influences as (1) the nature of the social conventions in force in the society in which the person lives, (2) the position of the person in the family and in the society, (3) the presence or absence of festivities such as marriage, seasonal festivals and other occasions such as funerals, (4) the physical distance from the homes of friends and relatives and so on. (1985: 17-18).

As these examples show, an individual's capability is to some degree a consequence of their *entitlements*, that is, their ability to possess, control and

extract benefits from a particular commodity. An individual's feasible set of utilisation functions is therefore constrained by the limits upon their own resources. However, there are also non-choice factors affecting functioning, for example, an individual's metabolic rate which is a consequence of their physical state. The state of an individual's knowledge may also be a non-choice factor, although this can be improved by education. Here the element of choice may lie elsewhere, at the collective or societal level, that is to say, with policy makers, government officials, and judges. The same questions arise in the choice of commodities. Quite apart from the resources available to an individual, their capability to make use of a commodity may depend at a fundamental level upon access to a legal system which recognises and guarantees protection of contract and property rights.

Crucial, therefore, to Sen's 'Capabilities Approach' is the idea of *conversion factors*. These are the characteristics of an individual's *person*, their *society* and their *environment* which together determine their capability to achieve a given range of functionings. *Personal characteristics*, in this sense could include an individual's metabolism, or their biological sex; *societal characteristics* would include social norms, legal rules and public policies (such as norms which result in social discrimination or gender stereotyping, or legal interventions to offset these phenomena); and *environmental characteristics* could refer to climate, physical surroundings, technological infrastructure and legal-political institutions.

4. Reframing social rights: institutionalizing the capabilities approach

Sen's Capabilities Approach offers a new way of assessing and evaluating legal, social, political, and economic interactions. Individuals' well-being and substantive freedoms are analysed through an examination of their capability sets, understood as their ability to maximise their potential functionings. An individual's capability becomes 'a set of vectors of functionings, reflecting the person's freedom to lead one type of a life or another' (Sen, 1992: 40). Individual well being in the form of equality of capability is regarded as an 'end' rather than as an instrumental device for achieving another goal such as economic efficiency. Nevertheless, the Capabilities Approach is not a full theory of justice; Sen states that '[it] is not clear that there is any royal road to evaluation of economic or social policies' (Sen, 1999: 84). Rather, it can be used as an evaluative tool or space in which to assess individual's freedoms or potential. Sen's insistence that there is no universally-

applicable, prescriptive list of functionings and capabilities means that attention is focused instead on social choice procedures by which the content of capability sets can be collectively determined in particular contexts. The implication of this approach is that a procedure which aims at equality of capability should focus on the conversion factors which, in a given society, determine the conversion of impersonal and transferable resources, such as human and physical capital, into functionings and capabilities. The Capabilities Approach therefore offers a dual methodology: it aims, on the one hand, at a set of metrics for 'quality of life' within a diverse range of settings (such as the 'budget set' in the commodity space which represents an individual's freedom to buy commodity bundles, or the 'capability set' in the functioning space which reflects their freedom to choose from possible ways of living), and, on the other, a normative framework for judging particular institutional forms and policy proposals.

The idea we wish to pursue here is that social rights be understood as part of the process of 'institutionalising capabilities', that is to say, as providing mechanisms for extending the range of choice of alternative functionings on the part of individuals. In using capabilities in this way to re-orient the rationale of social rights, we may also come closer to achieving the resolution between social rights and the market order which was left unresolved by T.H. Marshall.

Sen sees capabilities as a consequence not simply of the endowments and motivations of individuals but also of the access they have to the processes of socialisation, education and training. These processes enable them to exploit their resource endowments. By providing the conditions under which access to these processes is made generally available, social rights involving interference with contract may be not just compatible with, but become a precondition to, the operation of the labour market. This argument is best illustrated by example from the field of social law.

An orthodox economic view of laws which protect women against dismissal on the grounds of pregnancy would be as follows (see Gruber, 1994). From the viewpoint of enterprises which would otherwise dismiss pregnant employees once they become unable to carry on working as normally, such laws impose a private cost. These enterprises may respond by declining to hire women of child-bearing age who will, as a result, find it more difficult to get jobs. If this happens, there may be an overall loss to society in terms of efficiency, because resources are

misallocated and under-utilised, as well as a disadvantage to the women who are unemployed as a result.

An alternative way of thinking about discrimination against pregnant workers is as follows. In the absence of legal protection against this type of discrimination, women of child-bearing age will not expect to continue in employment once (or shortly after) they become pregnant. It is not necessary for all market participants to make a precise calculation along these lines; rather, a norm or convention will emerge, according to which pregnant women expect to lose their jobs and their employers expect to be able to dismiss them without any harm attaching to their reputation. The overall effect is that investments in skills and training are not undertaken, making society worse off as a result. Women workers will have an incentive not to make relation-specific investments in the jobs which they undertake. In an extreme situation, they may withdraw from active participation from the labour market altogether, and norms may encourage this too – as in the case of the 'marriage bar' norm, according to which any woman who married was expected thereupon to resign her position. This norm was widely observed in the British public sector up to the 1950s and, in the case of some local authorities, was actually enshrined in regulations.

What is the effect of the introduction of a prohibition on the dismissal of pregnant women under these circumstances? In addition to remedying the injustice which would otherwise affect individuals who are dismissed for this reason, a law of this kind has the potential to alter incentive structures in such a way as to encourage women employees to seek out, and employer to provide training for, jobs involving relation-specific skills. The demonstration effect of damages awards against employers may over time lead to a situation in which the norm of automatic dismissal is replaced by its opposite. Stigma attaches to those employers who flout the law. As more employers observe the new norm as a matter of course, it will tend to become self-enforcing, in a way which is independent of the law itself. Conversely, more women will expect, as a matter of course, to carry on working while raising families, in a way which may have a wider destabilising effect on the set of conventions which together make up the 'traditional' household division of labour between men and women. Pregnancy protection laws, therefore, can be seen as institutionalized 'conversion factors' which expand certain individuals' capability sets. Hence they provide the conditions under which, for women workers, the freedom to enter the labour market becomes more than merely formal; it becomes a substantive freedom.

5. Juridical forms as the foundation of the market order

The argument for seeing social rights as playing a foundational role with respect to the market order must be placed within the context of a broader set of arguments concerning the role of norms and conventions in the economy. In the *théorie des conventions*, the market rests on numerous inter-locking *conventions* which guarantee the conditions under which it operates. Conventions or social norms can be thought of as forms of shared information which enable parties to coordinate their behaviour on the basis of mutual expectations of each other's conduct (Lewis, 1969). The price mechanism, for example, encodes knowledge about scarcity in a way that saves on transaction costs, in the sense that consumers do not need to know the reason for a particular shift in prices (such as a disruption to supply); the price signal is enough for them to adjust their behaviour. The existence of norms is also in a general sense, a source of efficiency, since it enables those who follow the norm to save on the transaction costs of endlessly searching for the solution to commonly recurring coordination problems. The returns to following a particular norm increase the larger the number of people who can be expected to adhere to it. The institution of money is an example of this: its use enhances efficiency by saving on the transaction costs which would otherwise arise in a system reliant on barter. Its effectiveness rests on a widely-shared convention to the effect that coins or notes, which may have little or no inherent worth, have value when used as a medium of exchange in the context of commercial transactions (see Agliétta and Orléan, 1998).

In Hayek's theory of spontaneous order, most clearly laid out in the first two volumes of *Law, Legislation and Liberty* (Hayek, 1973, 1976), the central, constitutive role of underpinning the market is performed by the rules of private law. Property rules which serve to identify the subject-matter of exchange. Repeated disputes over ownership result in socially-wasteful conflicts. The emergence of rules for settling these disputes is therefore a precondition of an extended system of exchange. Norms favouring the enforcement of contracts and respect for the security of commercial undertakings can be seen in the same light. In Hayek's terms, the function of these 'abstract rules of just conduct' is that 'by defining a protected domain of each [individual], [they] enable an order of actions to form itself wherein the individuals can make feasible plans' (1973: 85-86). In other words, these norms supply institutional support for the 'motive power' of individual economic actors, without which there would be no basis for the decentralised action upon which the spontaneous order depends for its effectiveness.

Hayek did not seek to deny that, in a wide range of contexts, the norms of just conduct are supported by legal mechanisms of various kinds: 'in most circumstances the organisation which we call government becomes indispensable to assure that those rules are obeyed' (Hayek, 1973: 47). Hence, for Hayek, the exercise of 'coercion' or legal enforcement of norms was justified within a spontaneous order 'where this is necessary to secure the private domain of the individual against interference by others' (ibid., 57). While a given rule of just conduct may have had a spontaneous origin, in the sense that 'individuals followed rules which had not been deliberately made but had arisen spontaneously' (ibid., 45), such rules do not lose their essential character merely by virtue of being put into legal form: '[t]he spontaneous character of the resulting order must therefore be distinguished from the spontaneous origin of the rules on which it rests, and it is possible that an order which would still have to be described as spontaneous rests on rules which are entirely the result of deliberate design' (ibid., 45-46). In this perspective, it is the particular function of private law – what Hayek quoting Hume, refers to as 'the three fundamental laws of nature', *that of stability of possession, of its transference by consent,* and *of the performance of promises'* (1976: 140) – to underpin the spontaneous order of the market.

However, this argument must also admit the existence of limits to the spontaneous operation of markets. Robert Sugden (1998) acknowledges the limits of market ordering when he accepts that the market is good at meeting one particular type of objective, namely satisfying those wants or preferences which can be encapsulated in property rights. The market will not provide well in relation to those wants or preferences for goods for which no property rights exist. It therefore fails to work well in relation to non-excludable public goods or indivisible commodities (see also Sen, 1999: 127-129).

The spontaneous order argument for markets is based on the power of individuals to make mutually-agreed exchanges with others; but this only satisfies wants *in general* if each transaction affects only those who are party to it. If there are externalities, then transactions between some parties affect the opportunities of others to satisfy their wants. As the Coase theorem recognises (Coase, 1961, 1988) the state has a role in dealing with externalities in situations where negotiation is unduly costly. But this opens up another arena for policy intervention in an area where the market is not self-correcting.

Nor is this point simply related to limits to the spillover effects of exchange. Sugden argues that for the market to operate effectively, it is necessary not simply to have a system of property rights, but for individuals to have *endowments* in the sense of items of value which are tradable – 'the market has a strong tendency to supply each person with those things he wants, *provided that he owns things that other people want, and provided that the things he wants are things that other people own'* (1998: 492, emphasis added). Another way of putting this is to say that the market has no inbuilt tendency to satisfy the wants of those who do not have things that other people want.

This leads us to pose the central question in understanding the role of social rights in relation to the present process of global economic change: can a market order function effectively in a situation in which there are large and enduring disparities in the wealth and resources of market participants? For neoclassical economic theory, the answer is clearly that it can; supply and demand can still be brought into equilibrium and resources will flow to their most highly valued use, value simply being measured by willingness to pay (Posner, 1999).

From the point of view of the theory of spontaneous order, however, the answer is not so clear. Extremes of inequality have the effect of excluding certain groups from the market altogether. The result is not just that these individuals no longer have access to the goods which the market can supply; the rest of society also suffers a loss from their inability to take part in the system of exchange. Resources which could have been mobilised for the benefit of society as whole will, instead, remain unutilised. The logic of this position, as Sugden makes clear (1998: 493), is that redistribution is needed not to reverse the unpleasant results of the market, but rather to provide the preconditions for the market working in the first place. Although Sugden does not put in such terms, one implication of his approach is that many of the redistributive and protective rules of labour law have a market-creating function.

The argument for redistribution, and for regulation, can be taken a step further. The market itself may be a cause of inequality; inequality, in other words, may be *endogenous*. Neoclassical theory simply denies this on a priori grounds; the causes of inequality are assumed to be *exogenous*, in the sense that different individuals have different capacities and propensities to work. The market itself tends towards proportionality of effort and reward, by setting wages in proportion to the contribution which particular individuals bring to the employment relationship.

However, an implication of the path dependent nature of norms and conventions within labour markets is that forces are at work which disrupt this assumed correspondence of efforts and rewards. Notwithstanding Hayek's suggestion that, at the end of the day, it is imperfections which drive the process of competitive market discovery, markets which are completely unregulated contain within them the seeds of their own destruction. This is because, in the terms used by spontaneous order theory, the symbiotic relationship between the general and particular mechanisms can break down. When this occurs, the market loses its capacity for self-correction. Persistent inequalities mean that groups and individuals may lack the resource endowments to enter the market in a meaningful way. In an extreme case, the market will destroy itself unless these negative effects are counter-acted by non-market institutions in the form of regulation and redistribution. In a less extreme case, the market order will continue to function, but will fail to provide adequate economic opportunities for an increasingly large segment of the population.

To sum up this part of the argument: the operation of spontaneous order within labour markets is a complex process, involving the interaction of a number of forces on the supply-side and demand-sides of the exchange. Conventions structure both the demand and supply for labour in such a way as to produce persistent inefficiencies, or structural inequalities. Because of the path-dependent nature of conventions, these effects may become locked in, with the result that they influence the direction of economic change independently of the forces of supply and demand. The trajectory of economic development is determined by cumulative, feedback effects, which can produce a 'pathology of the labour market' in which inefficiencies, and hence inequalities, become endogenous. There can be no assumption that a self-correcting mechanism will undo these effects.

6. Social rights, capabilities and the market

In Hayek's account of the role of law in market ordering, it is the institutions of private law – in particular, property and contract – which guarantee to individuals the conditions for their effective participation in the market. The inadequacy of this conception in the context of the labour market is what inspires the idea of social rights. The particular juridical form of social rights is however difficult to define precisely. According to Antonio Lo Faro (2000: 152), 'the notion of social

rights can refer to a series of predominantly, but not exclusively, financial benefits bestowed by the public machinery within the context of social policies of the redistributive type'. The problem with this idea, as he notes, is that many of the 'rights' in question depend, for their realisation, on certain economic and political conditions which are independent of the legal form of the benefits or claims in question. The idea of the 'right to work' can be cited as one example of this problem; its effective realisation appears to depend upon external economic conditions or, perhaps, on various kinds of government action, which the legal system is more or less powerless to affect.

Lo Faro's critique should not be taken to justify a clear-cut division between social rights on the one hand and political/civil rights on the other. As we have already noted, the enforcement of civil rights also depends on the existence of a legal infrastructure, in the form of courts and enforcement agencies, which at a fundamental level requires government intervention. More generally, it rests upon the widespread recognition within a society of conventions of property and contract, which are taken for granted at the level of everyday economic interaction. While there is a complex link between formal institutions, on the one hand, and the emergence of these tacit conventions on the other, it is not feasible to suppose that the latter can exist wholly without reference to the former. This is a basic observation of the process of industrial development which is now widely acknowledged in debates concerning the appropriate legal framework for economic growth.

Lo Faro's observations are orientated towards a different issue, namely the appropriate balance between substantive and procedural norms. The 'substantive' version of social rights may be contrasted, Lo Faro suggests, with a 'procedural' version which has the two-fold merit of avoiding the neoliberal association of social rights with economic 'costs', and stressing the links between social rights and participative democracy. This version takes, as its concrete form, constitutional guarantees of freedom of association and collective representation. There is an important connection here to the idea of a social choice procedure of the kind which Sen sees as providing the most appropriate basis for the achievement of equality of capability. In the particular context of the contemporary process of European integration, any such procedure is required to address the need to locate social rights within the logic of market integration.

Sen's Capabilities Approach justifies a wide range of legal relations or 'social rights' which may require substantial policy intervention in the labour market and

elsewhere in order to guarantee that externalities or market failures are corrected and individuals are equipped with largely equal 'capability sets'. This stands in contrast to a pure market mechanism which is based exclusively upon a process of resource allocation according to voluntary transactions between (often competing) individuals, without specific reference to the resulting 'quality of life' either of those engaged in the transaction or of third parties. At the same time, the Capabilities Approach may provide a basis for resolving the uncomfortable relationship between on the one hand, social rights, and on the other, a dynamic market economy – thus transcending rather than reinforcing the dilemma famously identified by Marshall.

There are several ways in which Sen's approach might be helpful in this regard. In thinking about social rights in a manner influenced by Sen, we might discern two categories of such rights: (1) social rights as immediate claims to *resources* (financial benefits such as welfare payments) and (2) social rights as particular forms of *procedural* or institutionalized interaction (such as rules governing workplace relations, collective bargaining and corporate governance). In relating to the first of these categories, we can think of social rights simply as claims to commodities which can then be converted by individuals into functionings or potential functionings (capabilities). The provision of sick pay, maternity pay, or social welfare benefits are social rights in a quite traditional, well recognized sense.

The second category of social rights, however, is more subtle and links closely to Sen's distinctive idea of 'social conversion factors'. Sen suggests that social or institutional settings shape individuals' possibilities of achieving their goals. Resources must be filtered through such frameworks as part of the process of enhancing functionings and potential functionings. Social rights, seen in this way as procedural rights, are the means by which to shape those institutional environments to ensure that all individuals are able to convert their assets – skills, capital – into positive outcomes. This works in both a direct and an indirect way. Directly, such rights can range from the provisions of anti-discrimination laws (which may aim at enabling ethnic minority workers to engage effectively in the labour market) to more indirect forms of intervention (such as the provision of assistance to women with children to enable them more successfully to strike a satisfactory work-life balance.) More indirectly, the very existence of social rights can contribute to the development of a different social ethos or set of norms which may enhance individuals' functionings or potential functionings. A society which

recognises a wide range of social rights is unlikely to be a society which possesses norms and expectations which create obstacles for particular groups of individuals to engage in lives that they have reason to value. At this level, the objective of public intervention through the legal-political system is to 'seed' social conventions to the extent that they are 'taken for granted' in the way that conventions of property and contract currently are.

Given that social rights can work in this variety of ways, they should be viewed as providing us with a central normative goal – equality of capability – which can then be seen to structure our conversation about social and economic policy, *without presupposing* any particular economic model or policy programme. This leaves open to further argument the particular form of social rights recommended by the Capabilities Approach. The Capabilities Approach is not in itself prescriptive about the mechanisms that should be employed to realize its goal and thus can be sympathetically disposed to a variety of *means* of ensuring capability equality, including direct state provision of resources, compulsory reshaping of institutions, or voluntary action to refashion widely held norms. The relative efficiency of the systems is assessed through a context-dependent process of social learning, rather than being theoretically or dogmatically asserted. The Capabilities Approach is inherently non-dogmatic in asserting what rights individuals should possess at particular times and places. It encourages and enables a debate over the precise meaning of 'capabilities' in different circumstances, thus enabling a reflexive approach to the content of social rights in different circumstances, including in different economic and social situations.

This flexibility, of course, ensures that the Capabilities Approach may be more easily rendered compatible with a market model than other forms of social rights theory. In this way the Capabilities Approach and its form of social rights should not be seen as replacing or radically stifling market mechanisms but rather offering a framework for market-steering the resultant of which provides better, fairer, market transactions. Taking this point a step further, in so far as the Capabilities Approach does prescribe a particular overall goal, it is one that might be understood as inherently sympathetic to a market mechanism. This is because the Capabilities Approach concentrates not on guaranteeing that individuals possess a given set of resources but rather upon aiming to enable individuals to develop their capacity to be substantively free to make their own effective choices, thus enabling genuine and dynamic interaction in the market.

7. An illustration: the role of corporate social responsibility in European integration

Corporate social responsibility (CSR) was identified as an appropriate area for intervention at EU level at the Lisbon summit in March 2000, which stressed its links to the goal of building a 'dynamic, competitive and cohesive knowledge-based economy'. The EU is not alone in highlighting this issue: other prominent recent initiatives include the United Nation's *Global Compact*, adopted in 2000; the ILO's *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* (dating back to 1977, but updated in 2000), and the OECD *Guidelines for Multinational Enterprises* (2000). In July 2001 the Employment and Social Affairs Directorate produced a Green Paper on *Promoting a European Framework for Corporate Social Responsibility* (Commission, 2001) which pointed European corporate practice firmly in the direction of a stakeholder orientation.

The Green Paper defined CSR as 'a concept whereby companies decide voluntarily to contribute to a better society and a cleaner environment' (Commission, 2001: 5). More precisely, 'companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis' (Commission, 2001: 8). The Green Paper insisted, however, that CSR is not a pretext for deregulation: 'corporate social responsibility should not be seen as a substitute to regulation or legislation concerning social rights or environmental standards'. Instead, companies are encouraged to 'go beyond' compliance with existing regulatory controls, and it is argued that legislation is needed to supply a 'level playing field' on the basis of which improved practices can be developed (ibid.).

At the same time the Green Paper stressed the economic advantages of CSR for companies. Thus 'where corporate social responsibility is a process by which companies manage their relationships with a variety of stakeholders who can have a real influence on their licence to operate, the business case becomes apparent… [CSR] should be treated as an investment, not a cost' (Commission, 2001: 5). Positive direct effects of CSR were thought of as including 'a better working environment, which leads to a more committed and productive workforce' (Commission, 2001: 8), while indirect effects included attracting the interest of consumers and investors. The Green Paper noted the importance of strategies for attracting and retaining skilled workers, which included achieving greater

workforce diversity and addressing issues of the work-life balance. Stress is also placed on health and safety and on corporate restructuring. Here, the Green Paper raised the theme of employee voice, stressing that restructuring can 'cause the motivation, loyalty, creativity and productivity of the employees to suffer' in the absence of 'procedures for information, dialogue, cooperation and partnership' (Commission, 2001: 11). It went on to argue that '[s]ocial dialogue with workers' representatives, which is the main mechanism of definition of the relationship between a company and its workers… plays a crucial part in the wider adoption of socially responsible practices' (Commission, 2001: 19), and made a reference to the important role to be played in this regard by the (then draft) Directive on Information and Consultation (Commission, 2001: 20).

The Green Paper devoted much of its attention to issues of reporting and auditing of companies' social performance and to the implications for investment practice. A number of initiatives for social and environmental reporting advanced by legislation at member state level were discussed, along with standards drawn from industry practice and the involvement of non-governmental organizations. It was suggested that 'the involvement of stakeholders, including trade unions and NGOs, could improve the quality of verification' of company reporting on the so-called 'triple bottom line' (social, economic and ethics performance) (Commission, 2001: 19). On the investment side, the existence of social investment forums in the UK, France, Germany and Italy was noted. In this context, the Green Paper highlighted the need for standardization in the metrics used by socially responsible investment (SRI) practices. Against the background of the call made at the Stockholm European Council in 2001 to 'create a dynamic and efficient European securities market by the end of 2003', the Green Paper argued that 'European market indices identifying companies with the strongest social and environmental performance will become increasingly necessary as a basis for launching SRI funds and as a performance benchmark for SRI'. But '[t]o ensure the quality and objectivity of these indices, the assessment of the social and environmental performance of companies listed in them should be done on the basis of the information submitted by the management *but also by the stakeholders'* (emphasis added).

The Green Paper began a process of consultation which eventually resulted, in April 2002, in the adoption of a Council Resolution on the follow up to the Green Paper on corporate social responsibility.[1] In the manner characteristic of numerous initiatives in the social policy field dating back to the late 1980s, this instrument affirmed the linkage between 'a high level of social cohesion,

environmental protection and respect for fundamental rights' with the aim of 'improving competitiveness in all types of business, from SMEs to multinationals, and in all sectors of activity'.[2] The role of the stakeholders in 'encouraging business to adopt socially responsible practices' was stressed, as is a particular role for 'the participation of workers and their representatives in a dialogue that promotes exchanges and constant adaptation'.[3] At the same time, there was a reminder that CSR 'must be understood as complementing regulations or legislation or norms on social and environmental rights, for which it cannot be a substitute'.[4]

For the time being, however, the concrete manifestations of the EU's CSR policy will be few. The Resolution envisaged the promotion of CSR in three areas: initiatives aimed at exchanging good practice; increased awareness of the impact of CSR on economic performance; and training of executives and workers in CSR issues.[5] The Commission was called on to issue a further communication incorporating the conclusions of the parties who responded to the Green Paper and to the debate which it stimulated, as well as to 'query carefully the added value of any new action proposed at European level.'[6]

It would nevertheless be a mistake to regard the EU's CSR initiative as mere window dressing. The agenda advanced in the Commission's Green Paper coincides with calls for greater shareholder activism within corporate governance. Active engagement with management on the part of institutional investors and others is seen as a principal mechanism for advancing an SRI agenda. This agenda is furthest advanced in the one country whose corporate governance system most clearly prioritises shareholder interests, namely the UK. During 2001 the DTI Company Law Review recommended a regime of greater disclosure by companies of information relating to issues of social and environmental responsibility, the 'operating and financial review', on the grounds that this would assist shareholders and other stakeholders in making better informed judgments on non-financial aspects of corporate performance (DTI, 2001: 49-54). In addition, legislation requiring pension funds to disclose their voting policy and to state their position in relation to social, ethical and environmental investment matters came into force in 2001.[7] A number of recommendations of the Myners report on institutional investment which was also carried out under government sponsorship in 2001 sought to advance the same end (Myners, 2001).

CSR has the potential to bridge the gap between social policy and corporate governance, with some unexpected consequences. In the continental context, multiple stakeholder groups have been to the fore in holding corporate management to account. Continental systems may be moving closer to the shareholder value orientation of UK corporate governance. At the same time, the growing CSR movement in the UK holds out the prospect of humanising the shareholder value concept, and moving it in the direction of ensuring greater corporate accountability on social and environmental issues. There are substantial obstacles to such an outcome in the form of collective action costs and asymmetries of information in the chain of accountability between financial analysts, fund managers, and the ultimate beneficiaries of pension funds and insurance policies, not to mention entrenched ideological opposition to CSR in parts of the financial and business community. However, it is precisely this intriguing possibility which the CSR initiative has now placed on the agenda at both UK and EU level.

The issue of gender equality provides a concrete context in which to examine the potential impact of CSR. Although it has had equal pay legislation since the 1970s, Britain's record on pay equality lags behind that of many other European countries. A recent study, the European Structure of Earnings Survey (SES) of 15 European countries, reported that Britain's record on equal pay was so poor that it was ranked only 12th when looking at full-time employers – and last in 15th place – when both part-time and full-time workers were included. In response to rising criticism the Cabinet Office set up the Kingsmill Review to investigate Women's Employment and Pay in Britain (Kingsmill, 2001). The remit for the Kingsmill Review stipulated that it should seek non-legislative solutions to the gendered pay gap. Thus the Review relied on the model of corporate governance emerging from the Cadbury Report (1994) and its successors, the Turnbull Report on internal company audit (1999), and the Company Law Review (2001). In effect, this meant that the Review was required to focus on developing the 'business case' for retaining and maximising women's skills and experience in the labour market as a way of bringing about a positive impact on the gender pay gap in Britain.

The Review identified the requirements of 'enhancing returns' and 'minimising risk' as the two most fundamental drivers of corporate governance. It is in this context that it suggested that *good human capital management* is crucial to realizing corporate governance objectives. In illustrating the importance of these issues, the Review pointed to some potentially major governance challenges

relating to skilled labour shortages. It noted that although UK employment stood at 74.8% (the highest employment rate for 11 years and approaching the full employment rate of 75% [as defined by the Government in the March 2001 Budget]), the National Skills Task Force estimated that there were approximately 110,000 hard-to-fill vacancies largely in industries such as financial and business services, wholesale and retail, manufacturing and public administration and health (Kingsmill, 2001: 32). This labour shortage was reported to be caused by skills shortages – these sectors had grown by 227,000 jobs over the last year, outstripping the average increase in the whole economy (op. cit: 33). At the same time, the UK birth rate was continuously decreasing and had fallen by 41% since the 1960s. The pressure on the supply of labour was set to increase as it was estimated by the EU that by the year 2020 the size of the working age population would be largely unchanged but would have to support a further 18 million people over the age of 65 (Social Trends, 1996).

In light of such trends, the Review argued that businesses were operating in a climate in which competition for employees was becoming more fierce, especially with technological innovation rapidly increasing knowledge-intensive sectors of the labour market. As a result, it claimed, the potential impact on businesses of the mismanagement of human capital would become increasingly acute. This was the core of the Review's argument that any business which does not maximise this resource to its full potential cannot expect to maintain its productivity and competitiveness in the face of rising demand for, and falling supply of, skilled labour.

The Review's principal recommendation was to call for greater transparency in terms of gendered pay trends within organizations, in the form of internal pay reviews, with a particular focus on gendered employment patterns. These internal audits should in principle be designed to be comparable across all employing organizations. The recommendation was pitched in terms of the human capital management practices necessary to aid the efficient and well-considered allocation of resources. In language which directly mirrored the CSR debate at both EU and UK level, three types of risks and costs to organizations were identified: (1) the risk and cost of reputational damage (including loss of investor confidence, loss of shareholder confidence and loss of consumer base) from gender bias; (2) the risk and cost of potential litigation against unequal pay practices; and (3) the risk and cost of a rising inability to recruit high calibre employees, due to an organisation acquiring a poor reputation as an employer.

In addition the Review adverted to the high cost of turnover of staff and the associated recruitment and training costs which arise from inability to manage the issue of the work-life balance. Department of Trade and Industry figures estimate that the typical recruitment costs of replacing an individual are approximately £3,500 – ranging from £1000 for an unskilled manual worker to over £5000 for a professional employee. These costs dramatically increased for employees with specialist training – for example the NHS had estimated that £200,000 was lost if a doctor left, £34,000 for a nurse, and £22,000 for a physiotherapist (www.dti.gov.uk)

In keeping with its non-interventionist brief, the Review recommended that the public sector should take a lead in this new initiative, in the hope that the private sector would follow suit out of fear of being 'named and shamed'; only if this failed to work would regulation be considered. It is intended that internal pay reviews of government departments and agencies will be completed by April 2003 and similar action will be taken in the wider public sector in areas where a disproportionate number of women are employed. In terms of private sector firms, the Review envisaged a campaign to encourage organizations to conduct similar reviews.

8. Conclusion: learning about capabilities?

If the Kingsmill exercise is effectively carried out, it can be expected to have a far-reaching impact and effect on the understanding of gender inequality in the labour market. The aim of the audits is to track the impact of equality policy in practice. In this sense, it embodies a learning process, revealing information about the structural barriers to equality at the same time as disseminating knowledge about how they may be addressed. By directly highlighting reputational losses from discriminatory treatment and the financial consequences of employee turnover, the review aims to induce employers to internalize the social costs of gender inequality. Corporate governance mechanisms, in particular the processes of internal audit and engagement by institutional shareholders, are called in aid to promote the same end.

This does not meant that a public discourse about equality is excluded; far from it. The Kingsmill exercise was launched against the background of a substantial body of legislation at both UK and EU level on the issue of sex discrimination, which in turn is underpinned by the quasi-constitutional guarantees of equal pay and equal

treatment which are contained in the EC Treaty. The possibility of further legislative intervention exists. The issue here is not whether there should be intervention, but what form it should take. According to the argument we have presented here, procedural mechanisms may be able to play an important role in implementing, at a micro level, the objectives of a rights-based agenda. The aim is to make some forms of social rights effective through a combination of investor activism and the creation of a market in information concerning the social performance of companies. In itself, this implies a public-regulatory response to the existing inadequacies of accounting conventions (which do not yet adequately address the issue of non-financial reporting) and the availability to companies of strategies based on low levels of investment in human capital. However, there is reason to believe that it is through just such a combination of economic incentives and public encouragement that learning about capabilities will proceed.

Notes

[1] 2002/C 86/03, *Official Journal*, 10.4.2002.
[2] Ibid., Art. 11.
[3] Ibid., Art. 10.
[4] Ibid,. Art. 14.
[5] Ibid., Arts. 17-19.
[6] Ibid., Art. 21.
[7] The Occupational Pension Schemes (Investment and Assignment, Forfeiture, Bankruptcy, etc.) Amendment Regulations, SI 1999/1849, reg. 2(4), amending SI 1996/3127.

References

Agliétta, M., and Orléan, A (eds.) (1998) *La monnaie souveraine* (Paris: PUF).

Cadbury Committee (1992), Report of the Committee on the Financial Aspects of Corporate Governance (London: Gee).

Coase, R.H. (1988) *The Firm, the Market and the Law* (Chicago: University of Chicago Press)

Commission (2001), *Promoting a European Framework for Corporate Social Responsibility. Green Paper*. COM (2001) 366 final (Luxembourg: OOPEC).

Company Law Review Steering Group (1999) *Modern Company Law for a Competitive Economy: The Strategic Framework* (London: DTI).

Company Law Review Steering Group (2000) *Modern Company Law for a Competitive Economy: Developing the Framework* (London: DTI).

Company Law Review Steering Group (2001) Modern Company Law for a Competitive Economy: Final Report Volume 1 (London: DTI).

Craig, C., Rubery, J., Tarling, R. and Wilkinson F. (1982) *Labour Market Structure, Industrial Organisation and Low Pay* (Cambridge: Cambridge University Press)

Deakin, S. (1999) 'Organisational change, labour flexibility and the contract of employment in Great Britain', in S. Deery and R. Mitchell (eds.) *Employment Relations, Individualisation and Union Exclusion* (Annandale, NSW: Federation Press)

Deakin, S., Hobbs, R., Konzelmann, S. and Wilkinson, F. (2002) 'Partnership, ownership and control: the impact of corporate governance on employment relations' *Employee Relations Journal*., 24: 335-352

Deakin, S. and Wilkinson, F. (1991) 'Labour law, social security and economic inequality' *Cambridge Journal of Economics*, 15: 125-148

Deakin, S. and Wilkinson, F. (1992) The law and economics of the minimum wage' *Journal of Law and Society* 19: 379-392

Deakin, S. and Wilkinson, F. (1994) 'Rights versus efficiency? The economic case for transnational labour standards' *Industrial Law Journal*, 23: 289

Deakin, S., and Wilkinson, F. (1999), 'Labour law and economic theory: a reappraisal', in G. De Geest, J. Seegers and R. Van den Bergh (eds.) *Law and Economics and the Labour Market* (Aldershot: Elgar)

DTI (2001) Business and Society. Developing Corporate Social Responsibility in the UK (London: Department of Trade and Industry).

Greenbury Committee (1995), *Directors' Remuneration: Report of a Study Group Chaired by Sir Richard Greenbury* (London, Gee).

Hampel Committee (1997), *Final Report of the Committee on Corporate Governance* (London, Gee).
Hayek, F. (1973) *Rules and Order* (London: Routledge)
Hayek, F. (1976) *The Mirage of Social Justice* (London: Routledge)
Hayek, F. (1979) *The Political Order of a Free People* (London: Routledge)
Humphries, J. (1977) 'Class struggle and the persistence of the working class family', *Cambridge Journal of Economics* 1: 241
ICAEW (1999) *Internal Control. Guidance for Directors on the Combined Code* (London: Institute for Chartered Accountants in England and Wales).
Kingsmill, D. (2001) *Review of Women's Employment and Pay* (London: DTI).
Lancaster, K. (1966) 'A new approach to consumer theory' *Journal of Political Economy*, 74: 132-157.
Lewis, D. (1969), *Convention: A Philosophical Study* (Cambridge, MA: Harvard University Press).
Lo Faro, A. (2000) *Regulating Social Europe. Reality and Myth of Collective Bargaining in the EC Legal Order* (Oxford: Hart).
Marshall, T.H. [1949] (1992) *Citizenship and Social Class* (London: Pluto).
Marsden, D. (1996) 'Employment policy implications of new management systems', *Labour*, 9: 17
Myners, Paul (2001) *Institutional Investment in the United Kingdom: A Review* (London: HM Treasury).
Posner, R. (1998) *Economic Analysis of Law* (5th. ed.) New York: Aspen Law and Business
Roe, M. (1996) 'Chaos and evolution in law and economics' *Harvard Law Review,* 109: 64.
Salais R. (1999) 'Libertés du travail et capacités: une perspective pour une construction européenne?' *Droit Social* 467.
Sen, A. (1985) *Commodities and Capabilities* (Deventer: North-Holland).
Sen, A. (1992) *Inequality Reexamined* (Oxford: OUP).
Sen, A. (1999) *Development as Freedom* (Oxford: OUP).
Social Trends (1996) in ONS (1998) *Social Focus on Women and Men* (London: Office of National Statistics).
Solow, R. (1992) *The Labour Market as a Social Institution* (Oxford: Blackwell)
Sugden, R. (1986), *The Economics of Rights, Co-operation and Welfare* (Oxford : Basil Blackwell).
Sugden, R. (1989), 'Spontaneous order, *Journal of Economic Perspectives,* 3: 85-97.

Sudgen, R. (1998) 'Spontaneous order.' In P. Newman (ed.) *The New Palgrave Dictionary of Economics and the Law* (London: Macmillan).

Supiot, A. (ed.) (1999) *Au delà de l'emploi. Transformations du travail et devenir du droit du travail en Europe* (Paris: Flammarion).

Tarling, R. and Wilkinson, F. (1997) 'Economic functioning, self-sufficiency and full employment', in J. Miche and J. Grieve-Smith (eds.) *Employment and Economic Performance* (London: Routledge)