The 'Capability' Concept and the Evolution of European Social Policy

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Abstract

Amartya Sen's capability approach has the potential to counter neoliberal critiques of social welfare systems by overcoming the false opposition between security and flexibility. In particular, it can be used to promote the idea of social rights as the foundation of active participation by individuals in the labour market. This idea is starting to be reflected in the case law of the European Court of Justice concerning free movement of persons but its use in the European employment strategy is so far more limited, thanks to the continuing influence of neoliberal 'activation policies'.

Introduction

The concept of 'capability', developed by Amartya Sen in a series of economic and philosophical texts (see 1985, 1999), could play a major role in the reshaping of the European Union's social and employment policies. The prominence of the capability concept in contemporary European debates owes much to the use made of it in the report on the *Transformation of Work and the Future of Labour Law in Europe* which was prepared for the European Commission by a group led by Alain Supiot (1999). The Supiot Report argued that a capability-based approach would help to overcome the opposition between 'security' and 'flexibility' which had been established in neoliberal critiques of labour law and the welfare state, and provide a basis for 'real freedom of choice' in relation to labour market participation. This analysis was further developed in a paper published in *Droit Social* by the economist Robert Salais (1999), one of the members of the Supiot group. A research programme was subsequently initiated, designed among other things to explore the potential role of a new 'politics of capabilities' within the wider project of European integration (see: http://www.idhe.ens-cachan.fr/Eurocap/index.html.).

The present paper aims to contribute to that programme of research by exploring some of the legal aspects of the capability concept. There is no precise juridical equivalent to Sen's notion of 'capability'. However, certain legal concepts undoubtedly bear a certain resemblance to it. This is particularly true of notions of contractual *capacity* which are recognized in both common law and civilian systems of private law. The task of exploring the links between 'capability' and legal 'capacity' has begun. My aim here is to focus on a different strand of legal thought, namely the set of ideas associated with the *duty to work*

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in labour and social security law. The content of the duty to work has shifted over time according to different notions of the capacity or ability of individuals to make themselves available for employment. These in turn have been shaped by particular conceptions of the employment relationship and of the family. To see how this process has occurred is to gain some insight into how the capability concept might operate if, as its proponents intend, it comes to serve as a new conceptual cornerstone for social law.

To this end, the next section explores Sen's definition of 'capability' and the use made of the notion in the Supiot report. The paper then looks at the historical development of legal analogues of capability in the English poor law and law of social insurance. The paper then returns the debate to a European level by considering some ways in which the capability concept is being (or could be) operationalised within the current employment and social policy of the EU.

Sen's notion of capability and its adaptation in the Supiot report

Sen's account of capabilities describes individual well being in terms of a person's ability to achieve a given set of functionings. In this context,

> …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, 1985: 75),

An individual's feasible set of utilization functions is constrained by the limits upon their own resources. This is not simply a question of choice. Non-choice factors affect 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. Apart from the resources available to an individual, their capability to make use of a commodity may depend upon access to a legal system which recognizes and guarantees protection of contract and property rights, but also upon access to health care, education and other resources which equip them to enter into relations of exchange with others. Thus 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 economic commodity or resource.

Thus pivotal within Sen's 'capability 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, and *environmental characteristics* could refer to climate, physical surroundings, or technological infrastructure. But in addition, *institutional* or *societal characteristics* would include social norms, legal rules and public policies. These can act to entrench inequality

of capability, as is the case with social norms which result in institutionalised racial discrimination or gender stereotyping, or, conversely, to offset inequality through legal interventions of various kinds, including anti-discrimination law.

Sen has not sought to develop a juridical theory which might give some institutional shape to the capability concept, beyond insisting that his 'capability approach' does not prescribe any particular set of outcomes for a given society or group of societies. The high level of generality and theoretical abstraction of the capability approach lends itself to adaptations which may be far from Sen's initial formulation; the Supiot report is perhaps best thought of in this way. In the Supiot report, the capability concept appears in the context of a discussion of the meaning of labour flexibility (1999: 267-291). The report notes that 'flexibility' is frequently associated with greater variability in the application of social protection and labour standards, and thereby appears to be opposed to 'security'. However, this view, it is argued, overlooks the degree to which the capabilities of an individual depend on them having access to the means they need to realize their life goals. These include guarantees of a certain minimum standard of living and the resources needed to maintain an 'active security' in the face of economic and social risks, such as those arising from technological change and uncertainty in labour and product markets. Thus 'real freedom of action' for entrepreneurs, in the form of protection of property rights and recognition of managerial prerogative, has its equivalent in guarantees for the development of human resources for workers. However, these, the report suggests, would not necessarily take the same form as the 'passive protections' traditionally provided, in twentieth century welfare states, against unemployment and other interruptions to earnings. Protection against social risks is not the same as mechanisms aimed to maintain security in the face of' risks:

> We can understand the fundamental difference between protection, on the one hand, and security in the face of risks, on the other, by seeing that the latter includes but goes beyond the former. The capacity to work flexibly is conditional upon being able to deal with the consequences of risks. Protective regulations, because of the essentially negative way in which they are formulated, go against this kind of learning process. Security in the face of risk, on the other hand, is about providing the individual with the means to anticipate, at any given moment, long-term needs… Thus guarantees of minimum living standards (for example, that each person should have an effective right to housing, and not just to a minimum income), far from being undermined by the need for flexibility, should be reinforced by virtue of this need, and, if anything, more clearly and concretely defined as a result, (Supiot, 1999: 278).

Phrased in this way, the capability concept can be understood as an answer, of sorts, to the neoliberal critique of labour and social security law. That holds, among other things, that regulation which interferes with freedom of contract upsets the process of mutual learning and adjustment which is implicit in market relations. As Hayek put it, private law is the precondition of the market order in the sense that without it, individuals are not free to use their own information and knowledge for their own purposes. Private law is certainly a product of governmental action: 'in most circumstances the organisation which we call government becomes indispensable to assure that those rules are obeyed' (1973: 47). However, legal coercion to enforce contract and property rights is justified 'where this is

necessary to secure the private domain of the individual against interference by others' (1973: 57). By contrast, public or regulatory law, which Hayek regarded as consisting of specific commands and directions aimed at the substantive redistribution of resources, introduces an illegitimate form of interference *by the state*. Where this occurs, the 'spontaneous order' of the market is upset, and a certain part of the advantages to individuals and society alike of a market order, in terms of a higher degree of specialization and a more extensive division of labour, are lost.

The capability approach offers a response, based on the *market-creating* function of the rules of social law. In order to participate effectively in a market order, individuals require more than formal access to the institutions of property and contract. They need to be provided with the economic means to realize their potential: these include social guarantees of housing, education and training, as well as legal institutions which prescribe institutionalized discrimination. Mechanisms of this kind, by extending labour market participation on the part of otherwise excluded or disadvantaged groups, may enhance the aggregate value of production.[1]

If the capability approach attempts to answer, at a certain theoretical level, some aspects of the neoliberal critique, it also moves beyond the conceptualization of social rights in the post-1945 welfare state. T.H. Marshall, perhaps the most articulate exponent of this tradition, saw social rights as operating in tension with market relations. Civil and political rights had 'harmonized with the individualistic phase of capitalism' in the nineteenth century (1949, 1992: 26). By contrast, social rights, which Marshall defined as ranging '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' (1992: 8), created entitlements which were 'not proportionate to the market value of the claimant'. Marshall, it is true, made something of an exception in this respect for collective bargaining, which he thought was 'a normal peaceful market operation' which also gave expression to 'the right of the citizen to a minimum standard of civilized living' (1992: 42). But for the most part, social rights were in 'basic conflict' with the market.

The capability approach, by contrast, sees one of the principal purposes of social legislation and social rights as encouraging the participation of individuals in the labour market. It is only by putting in place effective mechanisms for dealing with the effects upon individuals of economic uncertainty that the legitimacy and effectiveness of the market order can be maintained. This is not necessarily a call for the individualization of labour law; the 'conversion factors' by which individual capabilities are enhanced are likely to be collective in nature (Supiot, 1999: 268). But in the passage from 'passive protection' to 'active security' (*ibid*, 1999: 269), it is likely that many features of existing welfare state and labour law systems would not survive unscathed.

The capability approach to labour and social security law appears particularly novel when set against the post-1945 paradigm of protection based around 'stable employment for an adult male able to provide, by these means, for the needs of a nuclear family' (Supiot, 1999: 267). That model makes certain assumptions about employment and family relations which no longer command general assent, and perhaps never did. However, the 'standard employment contract' was itself a reaction to a quite different view of the conditions under which individuals should make themselves available for waged work.

The prehistory of the capability concept: notions of ability to work in the English poor law and social insurance

The English 'poor law' was the precursor not just of the welfare state but of modern employment policy. In the sixteenth and seventeenth centuries, the 'poor' were not simply those with a low income, but all who were dependent on wages from employment as their principal means of subsistence: 'those who labour to live, and such as are old and decrepit, unable to work, poor widows, and fatherless children, and tenants driven to poverty; not by riot, expense and carelessness, but by mischance' (Dalton, 1746: 164). The poor law was, in one sense, a survivor of feudalism; as T.H. Marshall put it, 'as the pattern of the old order dissolved under the blows of a competitive economy… the Poor Law was left high and dry as an isolated survival from which the idea of social rights was gradually drained away' (1949, 1992: 14). However, there was another sense in which the poor law was a response to the emergence of a labour market. The enactment of legislation dealing with wage rates, poor relief and labour mobility (or, as it was put, 'vagrancy') from the fourteenth century onwards is evidence how far traditional feudal ties based on obligatory service (villeinage or serfdom) had already declined by that point.

Under the poor law, relief was delivered locally, through parishes (small administrative units covering only a few square miles), but organized nationally, in the sense that within the framework set by the Elizabethan legislation, every parish was required to set a local tax to be paid by householders (a 'poor rate'), to suppress indiscriminate giving, and to organize in its place a regular system of welfare support (Poor Relief Act 1601 (43 Elizabeth I c. 2), s. 1). Legislation called for the unemployed to be set to work, but the cost of implementing this provision was found to be excessive, and only a minority of parishes constructed workhouses for the purpose; for the most part, those suffering destitution for lack of work received cash doles ('outdoor relief') in the same way as the sick and the aged. Local poor law officers were required to provide relief to all those with a *settlement* in the parish in question. Thus relief became, in a customary sense, if not necessarily in the modern legal sense of a justiciable entitlement, the 'peculiar privilege' of the rural poor (Snell, 1985: 73).

One of the principal means of acquiring a settlement, from the late seventeenth century, was through a yearly hiring, which was the normal form of employment for young, unmarried workers in agriculture. The young thereby had an incentive to leave their home parish to search for employment elsewhere, acquiring a settlement in return for annual service as they moved from one employer to another, thereby ensuring that they would not be subject to removal to their parish of origin. In this way, the poor law, along with the emerging notion of the contract of service, encouraged and supported labour mobility (Slack, 1990).

The second half of the eighteenth century saw falling real wages in agriculture at the same time as access to the land was restricted by enclosure (Slack, 1990: 66). The social upheaval which accompanied the depopulation of rural areas was matched by a similarly far-reaching process of transformation in the poor law and labour legislation. The response of those charged with the administration of the poor law to falling real incomes in agriculture in the 1790s was the institution of a practice of wage supplementation, known as the Speenhamland system after the rural district in which it was first adopted. It began as an ad hoc addition of poor relief to wages, designed to bring incomes up to subsistence level. At the same time, attempts to deal with the problem through the implementation of a minimum wage (through the revival of the wage fixing powers of the Elizabethan Statute of Artificers) were rejected

both locally and in the national parliament.[2] The combined effect was to relieve employers of the obligation to pay the customary level of wages; during the same period, yearly hirings were becoming increasingly uncommon (Hobsbawm and Rude, 1973; Snell, 1985), and changes to the law of settlement made it more difficult for wage earners and their dependants to acquire the right to relief (Deakin, 2001). As employment grew less stable and access to relief by the traditional route of the settlement by hiring, under which the employer absorbed the costs of short-term interruptions to earnings, became increasingly restricted, expenditure on poor relief grew to the point where a national debate was launched on the feasibility of maintaining the poor law system. This continued, at intervals, over several decades in the early nineteenth century, during which time the administration of poor relief became steadily more restrictive and punitive. This process culminated in the 1834 Poor Law Report[3] and the Poor Law (Amendment) Act[4] of the same year.

The new poor law which was put in place after 1834 was founded on the principle of 'less eligibility', meaning that relief should not provide a standard of living superior to that enjoyed by the least-well off 'independent' household. The assumption was that once the 'distortion' of wage supplementation was removed, wages would rise to the point where the subsistence needs could be met. On this basis, the unwillingness of individuals to accept wages set by the market could only be evidence of poor 'character', which it was the role of the law to address by disciplinary means. Thus a wilful refusal to accept an offer of employment at the going rate of wages became a criminal offence punishable by imprisonment.[5] At this point, in the absence of a minimum wage and before the development of collective bargaining, the relevant wage was whatever an employer was willing to offer, and not the customary rate for that trade. In addition, the simple fact of destitution as a result of unemployment or sickness would normally lead to the confinement in the workhouse of the wage earner and other family members.[6] Beginning in the 1840s, a series of regulatory orders spelled out the implications of this policy for the administration of poor relief: outdoor relief was to be limited as far as possible to the aged and infirm, denied to the adult 'able bodied', and under no circumstances combined with wages; if it were to be paid, exceptionally, to those who were able to work, it had to be combined with a 'labour test' designed to deter the work shy; and in order to ensure that conditions inside the workhouse were, as far as possible, below those of the worst-off household outside, a consciously degrading and punitive regime for workhouse inmates was put in place.[7]

In this context, being *able* to work was defined as having the physical capacity to labour, and the labour test functioned to distinguish the work-shy from those genuinely incapable of working. But of course, physical ability to work was only one aspect of being 'able bodied'. A further, implicit assumption was that the claimant for relief had no means of their own; that they were *propertyless*. Capability, then, was a function of the duty to work which was imposed on those with no means of subsistence but their own capacity to labour. The independently wealthy were not subject to the duty to work.

Bentham recognized, and implicitly endorsed, the dual standard at work here. The old poor law, he complained, had ceased to draw an appropriate distinction between 'natural' poverty, which the law could not hope to relieve, and the 'evil' of indigence. By enabling 'the condition of persons maintained without property by the labour of others [to be] rendered more eligible than that of persons maintained by their own labour' the old poor law removed the incentive to work upon which the market depended for its effectiveness: 'individuals destitute of property would be continually withdrawing themselves from the class of persons

maintained by their own labour, to the class of persons maintained by the labour of others; and the sort of idleness, *which at present is more or less confined to persons of independent fortune*, would thus extend itself sooner or later to every individual… till at last there would be nobody left to labour at all for anybody' (emphasis added) (Poynter, 1969: 125-126). It was because the numbers of the propertyless greatly outweighed those of the idle (or 'independent') rich that the law had to coerce the former into employment, while leaving the latter to enjoy their 'fortune' undisturbed.

Just as the new poor law was a response to the perceived failings of Speenhamland, so the welfare state of the twentieth century was constructed by way of reaction against what were seen as the shortcomings of the system put in place after 1834. By the end of the nineteenth century, there was a growing consensus that the new poor law had failed in its own terms. Wages had risen following the restriction of outdoor relief, but not to the extent which had been anticipated. Destitution was an ever-present phenomenon in Britain's major urban areas and in many rural districts. When numbers of the unemployed increased, as they did in particular during the long recession which lasted from the 1870s to the 1890s, the response of the poor law administrators was to tighten the disciplinary operation of the system; outdoor relief was made more selective, the labour test more severe, and workhouse conditions made more demeaning. Thus throughout the 1880s and 1890s, a number of urban poor law unions were constructing special 'test workhouses' with the aim of subjecting the adult able-bodied to a particularly stringent regime of discipline (Webb, 1909).

The sheer expense of this effort was one factor which helped to turn the tide of opinion; also important was the work of the 'social science' movement which set out to measure the extent of destitution outside the poor law system. 'Independent' households could not subsist on the wages offered for low-paid work, and were reliant in practice on ad-hoc charitable giving; the casualisation of urban occupations undermined efforts to establish a living wage and imposed unnecessary search costs on employers and workers alike.[8]

A key text in laying bare the deficiencies of the new poor law was the Minority Report of the Poor Law Commission of 1909, which was drafted by Sidney and Beatrice Webb. For the Webbs, the new poor law was constructed on a false premise, namely that destitution was always and everywhere the result of personal irresponsibility. This, in turn, was the result in turn of the undue attention placed in 1834 on 'one plague spot – the demoralization of character and waste of wealth produced in the agricultural districts by an hypertrophied Poor Law' (Webb, 1909: 4). The Webbs did not believe that the 'personal character' of those in poverty was completely irrelevant; it was '…of vital importance to the method of treatment to be adopted with regard to the individuals in distress'. However, it was not 'of significance with regard to the existence of or the amount of Unemployment' (Webb, 1909: 233).

As Beveridge had put it, unemployment was 'a problem of industry', that is, a feature of economic organization, rather than the result of personal irresponsibility. His research on casualisation[9] was called in aid to show that 'chronic over supply of casual labour in relation to the local demand was produced and continued, irrespective of any excess of population or depression of trade, *by the method by which employers engaged their casual workers*' (emphasis in original). This 'inevitably creates and perpetuates what have been called "stagnant pools" of labour in which there is nearly always some reserve of labour left, however great may be the employer's demand' (Webb, 1909: 200). It was continued

exposure to the effects of under-employment which precipitated decline into the permanently unemployed, a body which, leaving aside 'the rare figure of the ruined baronet or clergyman' consisted of 'those Unemployables who represent the wastage from the manual, wage earning class' (1909: 200).

To this, the Webbs added an important rider: the effects of casualisation were exacerbated by the poor law itself. The outdoor labour test, by providing intermittent work for the unemployed, 'facilitates and encourages the worst kind of Under-employment, namely, the unorganized, intermittent jobs of the casual labourer'. Likewise, the workhouse test for the able-bodied, by 'establishing a worse state of things for its inmates than is provided by the least eligible employment outside', not only engendered 'deliberate cruelty and degradation, thereby manufacturing and hardening the very class it seeks to exterminate'; it also 'protects and, so to speak, standardizes the worst conditions of commercial employment' (1909: 67). Thus the 'fatal ambiguity' (1909: 72) of 'less eligibility' was that standards inside and outside the workhouse, since they were mutually reinforcing, would drive each other down, until 'the premises, the sleeping accommodation, the food and the amount of work exacted, taken together, constitute a treatment more penal and more brutalizing than that of any gaol in England' (1909: 79).

The solutions advanced by the Minority Report reflected its diagnosis of the problem. Their principal aim was to remove the 'able-bodied' from the reach of the poor law. The key mechanisms for achieving this end were labour exchanges which, in addition to reducing search costs, would break the power which employers had to maintain 'pools of labour' in reserve, waiting for work:

> What a National Labour Exchange could remedy would be the habit of each employer of keeping around him his own reserve of labour. By substituting one common reservoir, at any rate for the unspecialised labourers, we could drain the Stagnant Pools of Labour which this habit produces and perpetuates, (1909: 261).

The Minority Report also addressed the issue of unemployment compensation as an alternative to poor law relief. It argued in favour of a hybrid public-private system, under which government would have the power to subsidise the private insurance schemes already run, at that point, by certain trade unions. In the event, Part II of the National Insurance Act 1911 went further by instituting a fully state-administered system. However, the form of unemployment compensation which initially emerged was similar to that discussed by the Minority Report, namely a system of compulsory insurance 'applied only to particular sections of workers or to certain specified industries, under carefully considered conditions' (1909: 291). This was gradually extended during the inter-war period to cover the vast majority of the workforce; a key feature of the system, and a significant departure from the poor law, was that workers were entitled for the most part to refuse work at wages below those which they had received in their previous employment, or which were out of line with standards set by collective agreements between employers' associations and trade unions in the relevant district.

In this respect, social insurance dovetailed with state support for labour standards. The case for general legislative standards in the labour market was put by the Webbs in *Industrial Democracy*, the first edition of which appeared in 1896. Their 'National Minimum' of living

and working conditions would 'extend the conception of the Common Rule from the trade to whole community'. Low-paying and casualised trades were 'parasitic' as by paying wages below subsistence they received a subsidy from the rest of the community; thus 'the enforcement of a common minimum standard throughout the trade not only stops the degradation, but in every way conduces to efficiency'. In this respect, the deficiencies of the selective model of regulation contained in nineteenth century factory legislation were clearly recognised:

> …this policy of prescribing minimum conditions, below which no employer is allowed to drive even his most necessitous operatives, has yet been only imperfectly carried out. Factory legislation applies, usually, only to sanitary conditions and, as regards particular classes, to the hours of labour. Even within this limited sphere it is everywhere unsystematic and lop-sided. When any European statesman makes up his mind to grapple seriously with the problem of the 'sweated trades' he will have to expand the Factory Acts of his country into a systematic and comprehensive Labour Code, prescribing the minimum conditions under which the community can afford to allow industry to be carried on; and including not merely definite precautions of sanitation and safety, and maximum hours of toil, but also a minimum of weekly earnings, (Webb, 1896, 1920: 767).

A third component in the re-regulation of the labour market was provided by full employment policy. In Beveridge's view, an effective social insurance scheme could not work unless 'employment is maintained, and mass unemployment prevented' (Beveridge, 1944, 1967: 17). The responsibility for providing the conditions for full employment lay with the state: '[i]t must be function of the State to defend the citizens against mass unemployment, as definitely as it is now the function of the State to defend the citizens against attack from abroad and against robbery and violence at home' (1967: 29). Full employment, in turn, had a specific sense. It did not just refer to the absence of unemployment, but to the availability of employment of a particular kind: 'at fair wages, of such a kind, and so located that the unemployed men can reasonably be expected to take them; it means, by consequence, that the normal lag between losing one job and finding another will be very short' (1967: 18). Beveridge's combined scheme for social security and full employment therefore sought to complete the work of the Minority Report of 1909 in reversing the effect of the poor law. As he put it: "…the labour market should always be a seller's market rather than a buyer's market' (1967: 18).

The welfare state of the mid twentieth century therefore gave rise to a specific conception of social rights: a model of social citizenship based on employment. The duty to work was not completely neutralized. On the contrary, access to economic security depended on labour market participation. However, this was conditional upon the capacity of the state, through a combination of regulation and macroeconomic management, to guarantee access to stable and well remunerated employment, and to provide for collective provision against the principal hazards for wage earners in a market economy, in particular unemployment, illness and old age. Encoded in the complex mass of detail of national insurance legislation was a commitment to social integration and solidarity across different occupational groups: '[w]orkers of every grade in every town and village in the country are now banded together in mutual State-aided insurance… They are harnessed together to carry the industrial population through every vicissitude' (Cohen, 1938: 10).

There were qualifications to this idea, the most important of which was the differential treatment of male and female workers. Beveridge's social insurance scheme treated married women as dependent on a male breadwinner, and allowed them to opt out of most aspects of the scheme; in return they were able to claim the long-term benefits of retirement and widows' pension on the basis of their husbands' contributions. As a result of decisions taken in the 1940s, a high proportion of married women either stayed outside the national insurance scheme altogether or opted to pay a lower rate, up to the late 1970s (Williams, 1982).

The roots of the differential treatment of men and women in social insurance systems are to be found in contemporary assumptions about the family and the employment relationship. This is most clearly seen in the extensive discussion by the Webbs, in the 1909 Minority Report, of the question, 'are women able-bodied?'

The new category of 'unemployment' differed from the concept of 'able-bodiedness' in the way it carefully defined the status of the applicant for relief by reference to the employment which had been lost and to which the applicant was expected to return: as the Minority Report recognised in referring to the intentions of the Unemployed Workmen Act 1905, the 'bona fide Unemployed' were 'the men and women who, having been in *full work at full wages*, find themselves without employment through no fault of their own' (emphasis added) (Webb, 1909: 1). This category, in the view of the authors of the Report, necessarily excluded women whose domestic responsibilities prevented them from becoming 'regular and efficient recruits of the industrial army' (1909: 209). Thus in response to the questions 'are women able-bodied?', posed at the beginning of the Report, and 'are women unemployed?', posed at the end, the same answer was supplied: only if they were 'unencumbered independent wage earners, both supporting themselves entirely from their own earnings and having no one but themselves to support'.[10]

The logical conclusion was the male breadwinner wage:

> …we have chosen so to organise our industry that it is to the man that is paid the income necessary for the support of the family, on the assumption that the work of the woman is to care for the home and the children. The result is that mothers of young children, if they seek industrial employment, do so under the double disadvantage that the woman's wage is fixed to maintain herself alone, and that even this can be earned only by giving up to work the time that is needed by the care of the children. When the bread-winner is withdrawn by death or desertion, or is, from illness or Unemployment, unable to earn the family maintenance, the bargain which the community made with the woman on her marriage – that the maintenance of the home should come through the man – is broken. It seems to us clear that, if only for the sake of the interest which the community has in the children, there should be adequate provision made from public funds for the maintenance of the home, conditional on the mother's abstaining from industrial work, and devoting herself to the care of the children, (Webb, 1909: 211).

In this way, the welfare state was constructed on a notion of ability to work which presupposed a particular family structure.

Contemporary European social and employment policy from a capability perspective

In the post-war welfare state, the duty to work was qualified by state guarantees of full employment and by access to a breadwinner wage, underpinned by collective bargaining. The decline of the breadwinner wage, which has accelerated since the 1970s, is a complex phenomenon (Creighton, 1999). On the one hand, increasing female participation in paid employment, coupled with the growing importance of sex discrimination and equal pay legislation, has eroded the assumption that well-paid, secure and stable jobs should be reserved for male earners. On the other, the notion of a breadwinner wage is of declining relevance for the increasing proportion of households with children which contain a single parent, normally the mother (up from 7% of all such households in 1971 to 21% by 1994[11]). Both trends are particularly visible in the UK, but also illustrate the range of forces involved.

Thus overall participation rates for married women have increased markedly, from 10% in 1931 (this low figure influenced Beveridge to believe that married women should be a special class of contributors to national insurance) to 22% in 1951, 42% in 1971 and 53% in 1971. However, this growth has increasingly taken the form of part-time work: in 1971 this accounted for one third of all female employment, but by 2001 had reached almost half of the total.[12] An unduly large proportion of female part-timers are employed on very low weekly wages, in part because of an artificial fiscal subsidy which until recently applied to employment below the level of national insurance contributions.[13]

In general, and notwithstanding attempts to legislate for equality of treatment,[14] part-time work still confers relatively lower incomes and proportionately fewer employment-related benefits than is the case with full-time work. There has been a narrowing of the gender pay gap and average job tenure rates for women have been lengthening at the same time as those of men have been falling. Equal pay legislation, beginning in the 1970s, contributed significantly to the substantial reduction in wage inequality between men and women, and the longer job tenure of women was the result in part of the passage of maternity protection legislation, mandating a period of maternity leave and providing for the right to return to employment. However, these gains are largely concentrated on the situation of full-time working women; in the 1990s, while the gender pay gap was falling in overall terms, it remained constant for part-time work. Thus notwithstanding the elimination of discrimination against part-time workers in relation to terms and conditions of employment and access to occupational pension schemes, part-time work remains poorly paid in relation to full-time employment (Robinson, 2003).

Conversely, the rise in single-parent households, while undermining the idea that it is necessarily a male earner's duty to provide for the other family members, has been accompanied by a growing polarization of income and opportunities: while dual-earner households have been growing in number, an increasing proportion of households are without employment altogether. In 2002, of those households with married or cohabiting

couples between the ages of 25 and 49, around one third had two full-time earners and a further third had a full-time male earner and a part-time female earner. Less than 20% had a sole male breadwinner, around 4% had a sole female breadwinner, and around 6% of this age group had neither partner in work. At the same time, the division of household tasks between men and women remains unequal. This is so across all households, including those with two full-time earners and even those with sole female breadwinners, but it is particularly marked for households with part-time female earners and for those solely dependent on a male breadwinner (Harkness, 2003).

The overall effect is that 'the erosion of the [male breadwinner family wage] has been only partial and has been accompanied by a number of interrelated problems, including increasing polarization between households, greater poverty, an uneven distribution of opportunities between households and difficulties in combining paid work with childcare' (Creighton, 1999: 519). The principle of family subsistence no longer guarantees access to a living wage; instead, low pay is topped up with fiscal subsidies (tax credits), avoiding the 'burden' of regulation of employment.[15] In turn, the absence of a living wage is no longer, as it was at various points in the evolution of social insurance system, a good ground for refusing an offer of employment.[16] The withdrawal of benefits from the unemployed, now termed 'jobseekers', who refuse work on the grounds of its unsuitability or low level of remuneration is a policy which successive governments, Conservative and Labour, have followed during the 1990s.[17] Nor are lone parents completely exempt from the duty to work; although they cannot be deprived of benefit for refusing to take up paid work, they are obliged to attend periodic interviews with an employment adviser, on pain of losing part of their social security entitlements.[18]

This is the background, at least in the UK, against which the capability debate is currently being played out: a neoliberal-inspired *activation policy*, which is in many respects the polar opposite of the policy of full employment which it has replaced. Full employment, in its classic, Beveridgian sense, implied a set of measures to control and stabilize the labour supply. The policy of 'a high employment rate', by contrast, aims to increase numbers in employment even if this is carried out at the cost of creating categories of low paid and 'flexible' work which do not provide access to a living wage. Deregulation of terms and conditions of employment goes hand in hand with the restriction of the conditions under which social security benefits are made available. For the time being, contemporary policy is closer to the old, pre-1834 poor law, in the use being made of tax credits and other forms of wage subsidisation which echo Speenhamland, than it is to the late Victorian institutionalisation of the workhouse and labour yard. Yet it was precisely the same combination of rising expenditure and the use of poor relief to subsidise low wages which prompted the 1834 reforms, the last vestiges of which were swept away as recently as the 1940s.[19]

The UK is, from one point of view, something of a special case within the European Union. Other systems, in particular the Nordic countries, appear to have been more successful in replacing the male breadwinner model with alternatives based on an equitable household division of labour, regulation of working time aimed at achieving a more effective balance between working time and family time, and the use of active labour market policy measures to support transitions into paid employment (Supiot, 1999). However, while this model exists within certain Member States, it is striking that, to date, the European Union has done little to propagate it.

This is the consequence, first of all, of the restricted scope for harmonization of social security law at European level. In lieu of harmonization, the Treaty of Rome provided for the limited alternative of the coordination of social security systems. In the traditional meaning of this term (prior to its use as part of the 'open method of coordination' or OMC), coordination referred to measures designed to ensure that in moving between different social insurance regimes, migrant workers were not unduly penalized by comparison those whose employment remained within a single Member State.[20] Far from seeking to set a common standard for social security across different national regimes, it presupposed difference between them. Notwithstanding the far-reaching changes made since the 1950s in other areas of competence, social security remains an area in which the organs of the Community have very little capacity to act, as opposed to reacting to the effects of national diversity.

The inability of the European Union to take the initiative in this area also results from the approach which has been adopted to the implementation of the employment strategy. A full assessment of the use of the OMC in the context of employment is beyond the scope of the present paper. However, notwithstanding the attention justifiably devoted to the OMC as a novel technique of regulatory learning, it is looking less likely over time that it can serve as a viable means for implementing a progressive policy agenda, in particular one of the kind set out by the Supiot report. This is because the employment strategy bears the traces of its origin in the early and mid-1990s, at a series of European summits which set out the goals of counter-inflation policy and macroeconomic stability which accompanied the adoption of the single currency (Deakin and Reed, 2000). This accounts for the emphasis within the employment strategy upon the promotion of labour flexibility and the reduction of social security expenditure, themes which have led the Commission to give negative evaluations of the employment record of the Nordic systems while leaving the UK's neoliberal approach relatively free of criticism (Raveau, 2004). The 'learning process' encouraged by the employment strategy is, at least for the time being, skewed towards neoliberal policy objectives; as such it is a potential force for the kind of deregulatory competition between European welfare states which has been long debated but, until now, has been limited in its impact.[21]

Against this rather unpromising background, what are the prospects for the capability approach as the foundation of a new conceptual framework in labour and social security law? The 'prehistory' of the concept of capability suggests the need for care here. For most of the period of the poor law, notions of 'able-bodiedness' were derived from the existence of a duty to work which the law imposed on the propertyless. Social insurance carved out a limited series of exceptions to this principle, based on a model of the breadwinner wage which now lacks legitimacy. Is it possible to see in the concept of capability a basis for reversing the logic of the poor law and reinventing the welfare state, so that the duty to work is *only* imposed under circumstances where the state has provided the conditions under which individuals are equipped for *effective* labour market participation? Simply to state this proposition in such terms is to see how far removed today's mainstream debate is from any such conception of capability.

The capability approach may nevertheless be helpful in providing a particular way of thinking about social rights with respect to market processes. The purpose of the capability approach is not to provide a blueprint for social reform; as Sen has put it, '[i]t is not clear that there is any royal road to evaluation of economic or social policies' (1999: 84). This

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.

In the context of social welfare, the capability approach suggests a particular way of thinking about social rights: either as claims to resources, such as social security payments, or as rights to take part in forms of procedural or institutionalised interactions, such as those arising out of collective bargaining. When social rights take the form of claims on resources, they are the equivalent of commodities which individuals can convert into potential or actual functionings. When they take the form of proceduralised rights, they come close to what Sen calls 'social conversion factors', that is, social or institutional settings which shape the set of possibilities open to individuals in terms of achieving their goals. Social rights shape the institutional environment in such a way as to enable all (or more) individuals to convert endowments in the form of human and physical assets into positive outcomes.

Juridical support for the idea is beginning to appear in the interstices of European Union social welfare law. One illustration of this is the parity accorded to social and economic rights in the Charter of Fundamental Rights of the European Union, adopted in 2000 (Hervey and Kenner, 2003). Whatever the limitations of particular provisions of the Charter (and there is evidence that they diluted in the drafting process), the equivalence accorded to the rights contained in the 'Equality' and 'Solidarity' chapters on the one hand, and those dealing with economic and political rights on the other, marks an important departure from the practice of subordinating social rights to economic considerations, which is to be found, for example, in the relationship between the European Convention on Human Rights and Freedoms and the European Social Charter, and arguably in the Treaty of Rome and its various successors. The significance of this move is reflected in the determined (but so far unsuccessful) effort made to restore the traditional priority of market considerations in the 2003 draft of the European Constitution (Bercusson, 2004).

A second source of institutional support for the capability approach may be found in the developing case law of the European Court of Justice on the concept of solidarity. As Catherine Barnard explains, this idea is underpinned by

> …the notion that the ties which exist between the individuals of a relevant group justify decision-makers taking steps – both negative and positive – to ensure that the individual is integrated into the community where they have the chance to participate and contribute fully. The negative steps include removing obstacles to integration and participation; positive steps include active programmes to encourage participation of those otherwise excluded. If this reading is correct then the use of solidarity as a guiding principle can help liberate decision-makers and decision-takers from the straitjacket of formal equal treatment, (Barnard, Deakin and Morris, 2004).

The claim that participation in a market presupposes active measures of integration, and not simply the removal of formal obstacles, is very much in the vein of recent writing on capability theory. The appearance of this idea in the context of the case law of persons[22] indicates its potential, but also its limits. It goes beyond the requirements of formal equality in insisting on the need for state action to remove the conditions which inhibit

effective market participation. At the same time, it is only within a relatively narrow and established legal framework that the idea, to date, has much purchase. The Court's approach is suggestive of the kind of reasoning which might be put to good effect, if the legislative structure of European social law were to be developed further.

Conclusion

This paper has examined the concept of capability from an historical perspective in order to try to gain some traction on the issue of its usefulness for contemporary EU social law. The idea has potential as a way of breaking out of the impasse established by neoliberal policies, which increasingly view social rights as a fetter on the growth and integration of markets. Capability theory, in contrast, insists on paying regard to the institutional preconditions for the effective participation of individuals in market activities. Contrary to neoliberalism, these are not limited to the provision, by private law, of contractual capacity or the right to hold property, but extend to collective mechanisms for the sharing and distribution of social risks arising from the operation of markets. However, the example of the male breadwinner model offers an example of the urgent need to review and renew these mechanisms. The EU, which already recognises that social rights have a place within an integrated market order, is ideally placed to play a central role in this process. It is disappointing, therefore, that the 'learning process' associated with the employment strategy has done more to endanger than to encourage institutional innovations of the kind needed to move this debate forward. This should perhaps serve as a reminder that notions of capacity or capability represent contested terrain, in which many different conceptions of the market order struggle for acceptance.

Notes

[1] See generally S. Deakin and F. Wilkinson, '"Capabilities", ordineo spontaneo del mercato e diritti sociali' (1999) 2 *Il diritto del mercato del lavoro* 317 (also published in English as CBR Working Paper No. 174, September 2000 (http://www.cbr.cam.ac.uk/pdf/wp174.pdf); S. Deakin and J. Browne, 'Social rights and market order: adapting the capability approach' in T. Hervey and J. Kenner (eds.) *Economic and Social Rights under the EU Charter of Fundamental Rights. A Legal Perspective* (Oxford: Hart, 2003); J. Browne, S. Deakin and F. Wilkinson, 'Capabilities, social rights and European market integration', in R. Salais and R. Villeneuve (eds.) *Europe and the Politics of Capabilities (*Cambridge: Cambridge University Press, 2004); and S. Deakin and F. Wilkinson, *The Law of the Labour Market: Industrialization, Employment and Legal Evolution* (Oxford: Oxford University Press, 2005), ch 5..

[2] The classic account of Speenhamland remains J.L. and B. Hammond, *The Village Labourer 1760-1832* (London: Longmans, Green and Co., 1920).

[3] Reproduced in S.G. and E.O.A. Checkland (eds) *The Poor Law Report of 1834* (Harmondsworth: Penguin, 1973).

[4] 4 & 5 George IV c. 76.

[5] Under the Vagrancy Act 1824 (5 George IV c. 83), it was an offence punishable by one month's hard labour to become chargeable to poor relief in the case of 'every person being able wholly or in part to maintain himself, or his or her family, by work or other means, and wilfully refusing or neglecting to do so'. In earlier vagrancy legislation, dating from 1744, a crime was committed only where there was 'a refusal to work for the usual and common Wages given to other Labourers in the like Work'. In the 1824 Act, the reference to 'usual and common wages' was removed.

[6] Workhouses existed in certain parishes prior to 1834, but after that point their use increased substantially thanks to the restriction of outdoor relief.

[7] The principal orders were the Outdoor Relief Prohibitory Order of 21 December 1844, the Outdoor Relief Regulation Order of 14 December 1852, and General Consolidated Order of 24 July 1847 (dealing with workhouse conditions). They are reproduced, with amendments and consolidations, in H.R. Jenner-Fust, *Poor Law Orders* (London: P.S. King, 1907).

[8] On the significance of the surveys of urban poverty carried out by Booth and Rowntree, see the account of Rowntree's work in A. Briggs, *Social Thought and Social Action: A Study of the Work of Seebohm Rowntree* (London, Longmans: 1961); on Beveridge, see J. Harris, *William Beveridge: A Biography* (2nd. ed., Oxford: Clarendon Press, 1997).

[9] *Unemployment: A Problem of Industry* (London: Longmans, Green and Co., 1909).

[10] Ibid., at p. 208. For further discussion of the Webbs' analysis of the issue of female 'able-bodiedness', see A. Picchio del Mercado, *Social Reproduction: the Political Economy of the Labour Market* (Cambridge: CUP, 1992), at pp. 86-94.

[11] Creighton (1999: 527), citing figures of the Office of National Statistics and official Census data which also show that during roughly the same period, the divorce rate in the UK rose from 2.0 per 1,000 members of the married population (in 1960) to 13.6 (in 1995), and the number of births outside marriage from 5.4% of all live births (in 1961) to 37% (in 1994).

[12] Overall participation rates are drawn from the official Census of Population (published by the *Office of Population Censuses and Surveys*) and those on part-time work from the Labour Force Survey (published monthly in the Department of Trade and Industry's *Labour Market Trends*).

[13] See S. Deakin and F. Wilkinson, 'Labour law, social security and economic inequality' (1991) 15 *Cambridge Journal of Economics* 125. Changes made to the law of national insurance in the late 1990s removed much of the subsidy effect (see Social Security Act 1998, s. 51, and Social Security Benefits and Contributions Act 1992,s. 6A, as inserted by the Welfare Reform and Pensions Act 1999).

[14] Principally in the form of the Protection of Part-Time Workers (Prevention of Less Favourable Treatment) Regulations, SI 2000/1551, implementing Directive 97/81/EC Concerning the Framework Agreement on Part-Time Work concluded by ETUC, UNICE and CEEP, OJ L 14, 20.1.98, p. 9. On the important limitations in the 2000 Regulations, see A. McColgan, 'Missing the point? The Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000' (2000) 29 *ILJ* 260.

[15] The tax credit scheme is governed by the Tax Credit Acts 1999 and 2000. See generally N. Wikeley, *Wikeley, Ogus and Barendt's Law of Social Security* (5th. ed.,

London: Butterworths, 2002), ch. 10. Although a statutory minimum wage was put into place in the late 1990s by virtue of the National Minimum Wage Act 1998, it operates at a low level and is intended to be topped up by tax credits in order to provide a sustainable income for households.

[16] The National Insurance Act 1911, s. 86(3) made disqualification from unemployment benefit under this heading conditional upon it being shown that the work in question was outside the claimant's normal occupation and/or, in certain instances, was remunerated below the going rates set by collective agreement or custom and practice in the industrial sector or district in question. Despite some weakening of the test during the 1920s, in remained more or less in place up to the 1980s, when it was diluted in various ways (on which, see Deakin and Wilkinson, 'Labour law, social security and economic inequality', op. cit.).

[17] The Jobseekers Act 1995, passed by a Conservative government, confirmed the trend begun in the 1980s towards the tightening of benefit conditions and expansion of the grounds for disqualification from benefit on the basis of non-availability for work (see previous note). The Labour administration, elected in 1997, has maintained the same approach to the definition of benefit entitlements for those out of work.

[18] By virtue of the Welfare Reform and Pensions Act 1999, inserting ss. 2A-2C into the Social Security Administration Act 1992.

[19] The last workhouses were converted into hospitals with the creation of the National Health Service in 1946 and poor relief for the sick and aged was replaced by national assistance in 1948.

[20] For an overview of this highly complex and, within European legal studies, relatively neglected topic, see Wikeley, Ogus and Barendt's *Law of Social Security*, op. cit., ch. 3.

[21] On regulatory competition in EU welfare state and labour law policy, see generally K.-H. Paque, 'Does Europe's common market need a social dimension?' in J. Addison and W.S. Siebert (eds.) *Labour Markets in Europe: Issues of Harmonisation and Regulation* (London: Dryden, 1997), and S. Deakin, 'Labour law as market regulation', in P. Davies, A. Lyon-Caen, S. Sciarra and S. Simitis (eds.) *European Community Labour Law: Principles and Perspectives, Liber Amicorum Lord Wedderburn* (Oxford: Clarendon Press, 1996).

[22] The most important decisions are those in Case C-184/99 *Grzelczyk* [2001] ECR I-6193 and Case C-413/99 *Baumbast* [2002] ECR I-000.

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