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The Capability Approach and the Legal Regulation of Employment: A Comment on Deakin

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Introduction

Sen's capability concept has become increasingly influential and has been applied in a variety of contexts that have extended its utilisation well beyond the original formulation in the context of economic development. It is clearly a versatile concept, capable of a variety of interpretations and applications. As the papers in this special issue illustrate, one area where the capability approach provides a valuable analytical tool is the analysis of human capability in the workplace, a topic which itself is multi-faceted. Within developed economies, the workplace and employment are central, either directly or indirectly, to the economic security of the great bulk of the population who are completely or substantially dependent on the return from their own labour. It might be expected that, given its underlying premises, the capability concept would have much to offer to the analysis of labour relations generally as well as to its separate components, in this case the law.

The paper contributed by Simon Deakin illustrates the capability concept's potential for providing a theoretical foundation for rethinking much of our approach, not only to employment law but also the various systems of law that provide economic and legal security for workers generally. The paper focuses on issues surrounding the "duty to work" in labour and social security law. The idea of a duty to work is, of course, one that has a long history and the legal enforcement of that duty has varied over time. In the main, the duty to work has always had a strongly punitive element although modern systems of social welfare have ameliorated that aspect to some degree. Deakin's paper, taking into account a number of academic developments in Europe, and particularly the work derived from Supiot, discusses the idea that the foundation of an individual's active participation in the labour market must be found in clear social rights. While Deakin's paper was written in 2005, the ideas in it have a particular contemporary resonance, given the current economic recession and the resulting unemployment. It is in periods such as this that the structures of the social welfare systems providing economic security to workers come more clearly into the political spotlight and the embedded assumptions, such as a duty to work, come under greater scrutiny. The ideas covered in Deakin's paper and the work from which it is derived make an important contribution to the debate on social security and welfare systems and their interface with the labour market.

The law and capability

Legal rules, as Deakin points out, are an important institutional characteristic of society and can act either to promote or constrain capabilities. Although Sen has not sought to develop a juridical theory which might give some institutional shape to the capability concept, others

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have begun to formulate such a theory. In his article, Deakin refers to the work of Supiot with whom he has collaborated (Deakin, 2005, p.1). Supiot's work has been particularly influential in Europe and has provided the foundation for a major research programme within the European Union (see Supiot, 2001 and the references in Deakin). Deakin refers to the visionary intentions of the proponents of the capability concept; the intention that the capability approach should come to serve as a new conceptual cornerstone for social law (Deakin, 2005, p.16). Whether or not such a radical vision can be realised remains to be seen. Even if the debate on the capability concept only has the effect of providing a new lens through which employment law can be viewed, it may still make a major contribution to the theoretical debate on the structure and breadth of labour law and to the direction of and motivation for legal reform. As is suggested in Deakin's paper, a credible theory that presents an alternative to the new-right's neo-liberal orthodoxy is a welcome development. This paper and the work it refers to begin that task for labour law.

Deakin writes from the particular perspective of the European Union. From a New Zealand perspective, one might suggest that there is room for greater optimism for alternatives within Europe with its range of diverse legal traditions to draw on and with its developed "social market" ethos. Such a cultural context may be more responsive than countries dominated by the Anglo-American free market model and the common law concepts that have long dominated labour law discourse. However, it is also true that New Zealand has long had a strong social welfare ethos and, as it is the nature of the social welfare system that is at the heart of the capability approach in this context, there may well be room for the emergence of a capability based dialogue.

In any social or economic system, the law plays a central role. Whether the law acts to promote or constrain capabilities in a particular legal system will be dependent on how other factors, particularly economic, social, and political factors, influence the structure of the law at any particular time. In 1972, in the introductory chapter to *Labour and the Law*, Professor Otto Kahn-Freund wrote that "the law is a technique for the regulation of social power" (Kahn- Freund, 1972: 4) and went on to make the point that while the law may support, restrain and sometimes create social power the law itself is not the principal source of social power. As with other social forces, the law is subject to the shifting winds of political, economic and other contemporary social forces that change over time, sometimes rapidly and sometimes slowly. As the period from the mid-1980s to the mid-1990s illustrated relatively extreme ideological perspectives can emerge rapidly and result in fundamental changes in a short space of time before their excesses are restrained and a more balanced approach restored. It is generally the more extreme positions that have such an impact. The more moderate positions, as is inherent in the capability concept, tend to take longer periods to mature.

It must be also be recognised that the law is a prisoner of its own history. To paraphrase Keynes's well known comment, "even the most liberal modern lawyer is usually in the thrall of the ideas of long-dead judges and legislators", a tendency that can be particularly apparent in labour law. Common law notions of the nature of property and the common law concept of "freedom" of contract remain powerful constraints on any debate on reforming labour law. The legal origins of labour law in the law of feudal obligations and later the law of master and servant continues, as Deakin's paper illustrates, to carry the weight of its past. The paper's discussion of the prehistory of the capability concept shows how a range of historical mind set, economic theory and political pressures come together in changing eddies to shape the legal obligations imposed on the "working poor" at any particular time.

Capability and the law

At the risk of oversimplification, Sen's notion of capability posits that an individual's capability possibilities reflects their ability to utilise a personal set of functionings. The set of utilisable functionings available to any individual will be determined by a mix of personal, environmental and institutional factors. Central to this picture is Sen's core notion of conversion factors that structure an individual's capability by setting limits to the freedom of the individual to achieve their chosen set of functionings. The notion of a conversion factor seems particularly apposite in a legal context given the strong gatekeeper role that is typically performed by legal rules. As noted above, the nature of the gate may be the result of a variety of social pressures, but the law is perhaps the most direct and blunt implement for translating those pressures into a form controlling the ability to access a wide range of societal and institutional resources.

Deakin, drawing on Supiot, notes the point that:

> The capabilities of an individual depend on them having access to the means that they need to realise their life goals". He goes on to make the point that these means include a minimum standard of living and "the resources needed to maintain an 'active security' in the face of economic and social risks" and states: "Thus 'real freedom of action' for entrepreneurs, in the form of protection of property rights and the recognition of management prerogative, has its equivalent in guarantees of human resources for employees, (Deakin, 2005: 3).

Deakin's paper argues that a capability approach "can be understood as an answer, of sorts, to the neoliberal critique of labour and social security law" (Deakin, 2005: 3) The capability approach, unlike the neo-liberal conception of labour law, accepts that employees, as much as employers, need legal guarantees and protections if they are to participate in a market order. And as Deakin notes, effective participation must mean more than formal access to the institutions of property and contract. Formal rights mean very little in the absence of measures that provide underlying economic security. It is economic security, not formal legal rights, that are necessary to maintain active and flexible labour market participation. It is only when a measure of economic protection, housing, income and the like, is combined with measures that promote and open economic opportunities, such as training and protection within employment, that most individuals enjoy genuine choices and the ability to develop individual capability.

Law performs many functions but one of the most important is the allocation of risk within society. In many cases, risk can be distributed by standard contractual mechanisms with the expectation that the relevant risk can be commercially distributed through devices such as pricing, insurance and the like. Employers are generally well placed to manage economic risk through a combination of legal devices, for example corporate structures and the ability to diversify capital investment, as well as through contract. Moreover, a combination of the common law rules of contract and property has the effect that employment risk is easily shifted to employees. For example, at common law employment is effectively at will allowing the risk of economic downturn to be immediately mitigated by shifting it on to the shoulders of employees in the form of unemployment.

Employees, unlike employers, can do little to distribute risk. Generally, they lack the financial resources to diversify financial risk through substantial savings. For most employees, the only effective means of risk diversification is through ensuring a range of income sources within the household, generally by having all adult members of the household in some form of paid employment. Labour law has of course ameliorated some of these risks. Most developed countries now provide some form of protection against arbitrary of unjustified dismissal and most, although not New Zealand, provide for at least some measure of compensation in the case of redundancy. In the main, however, employee economic risk is carried by the state through some form of social insurance or social welfare.

Deakin's paper

Deakin's paper focuses on the duty to work in labour and social security law. He considers this from two perspectives, the first historical and the second looking forward to contemporary European social and employment policy. The first part of his paper looks at transformations over time of the notion of the duty to work tracing changing attitudes to unemployment from the days of the English Poor Laws to the modern welfare state. While much of this early history is of limited direct relevance to New Zealand, and later social security approaches differ between the United Kingdom and New Zealand, this account is marked by a number of themes that are reflected in New Zealand's experience. One particular theme is the changing, or perhaps more accurately cyclical, attitude to "able to work" which oscillates between a recognition that ability to work is largely a consequence of economic and labour market conditions at any particular time to the notion that failure to work is largely a personal deficiency that should be addressed by state imposed disciplinary or coercive sanctions. The paper goes on to deal with the breakdown of a welfare model that existed for much of the post-war period, essentially a model of social citizenship based on employment and where economic security depended on labour market participation. This model was however dependent on the state, through a variety of measures, guaranteeing stable and well remunerated work together with a strong system of social insurance and was centred on the idea of a "breadwinner wage" underpinned by collective bargaining (Deakin, 2005: 11).

The latter part of the paper deals with the problems that have occurred with this model as the result of social and economic changes in the latter part of the twentieth and the early years of this century. The neo-liberal approach to the labour market is, of course, fundamentally opposed to this post-war model based on full employment. As Deakin notes, a high employment rate is quite different from the traditional notion of full employment and is generally achieved at the cost of low paid flexible work which, in many cases, does not provide access to a living wage. Labour market deregulation was accompanied by increased restrictions on access to welfare benefits and subjecting those on benefits to a more rigorously monitored regime. Deakin makes the interesting point that contemporary policy, with its use of tax credits and wage subsidisation, is not dissimilar to the pre-1834 poor law. While Deakin does not supply answers to the current problems in European social policy, and indeed could not be expected to, the paper does identify a number of issues that those developing such a policy will be required to face. What he does suggest is that the concept of capability may provide a basis for reinventing the welfare state so that the duty to work is conditional on the state providing the conditions under which individuals are equipped for effective participation in the labour market. The capability approach is seen as suggesting a particular way of thinking about social rights, either as claims to resources or the right to take

part in procedural or institutionalised interactions (Deakin, 2005, p.16-17). Deakin sees some room for movement of this type in some European Union instruments and having at least some traction in judicial developments. His conclusion, however, has a more general appeal. Deakin concludes that the idea of capability offers an alternative to neo-liberal policies which view social rights as a fetter on the growth and integration of markets. Capability theory, by contrast, considers the preconditions for effective participation in markets which extend beyond contractual and property rights to collective mechanisms for the distribution of social risks arising from the operation of markets.

Comment

In discussing Supiot (2001) and others Deakin (2005: 5) argues that labour law must put in place "effective mechanisms for dealing with the effects upon individuals of economic uncertainty." Supiot, looking at the question in the context of increasing globalisation, is of the view that such a change requires a new approach to the governance of work and in particular one that allows the management of uncertainty. In the case of employees, he sees the guarantee of the development of human capital and real freedom of action as essential in achieving this. The following comment looks at some of the challenges that a capability type approach might face in New Zealand.

Any debate on the future of labour law and social policy generally needs to take account of the peculiar attitude to the law in common law based systems. The law in countries with an English heritage is an amalgam of the judicially created common law and of parliamentary statute law. The problem is that the legal mind often has a problem in grasping this rather basic idea. At the heart of much common law legal education and legal philosophy is an underlying belief that the common law is "real law" and that statutory "intervention" is not only an inferior sort of law but one that should be regarded with considerable suspicion as "interfering" with "fundamental common law rights". Inherent in the common law's approach is a simplistic dichotomy between property rights and contractual rights that presents a major barrier to a capability based approach to social policy. Property rights have always enjoyed, and continue to enjoy, a high and expanding level of legal protection. Contractual rights, on the other hand, are dependent on the terms of the contract itself. In the particular case of employment the common law right to terminate the contract, effectively at will, has the effect of denying employees any clear legal stake in their employment. The common law has never recognised that an employee might have protectable rights in the continuity of their employment. This is not so much a legal issue as an ingrained ideological one. Property has always been a flexible concept and the common law has never found doctrinal problems in utilising this flexibility to give proprietary status to such abstract ideas as "customer connection", "team glue" and the like to enable this "property" to be protected against errant ex-employees (Riley, 2005, 187-191). The purpose of employment at common law is not to provide economic security for workers and their families but to allow the effective utilisation of property.

This simplistic common law dichotomy has also been adopted by much of the law and economics movement where it is argued that the common law, being the aggregated result of many transactions, results in an economically more efficient legal outcome than is likely from government intervention (or as others might label it, legislation by democratically elected legislatures). The enthusiasm for the common law, or at least what economists understood the common law to be, reached its zenith in the Employment Contract Act 1991. That Act

abolished the pre-existing pluralistic industrial relations system that provided for a high degree of joint regulation of working conditions and replaced it with one of employer dominated, individualised, regulation of the employment relationship. Although there have been some significant reforms under the Employment Relations Act 2000 that give greater recognition to employee economic interests, for example good faith obligations and consultation rights, the Labour government adopted a very cautious approach to reform. For example, it failed to make any reforms around the problems of redundancy and its approach to job loss on the transfer of an undertaking was, at best, lukewarm.

To gain traction any radical change, such as a capability approach has to overcome the philosophical deadweight of the common law, a task that is likely to be extremely difficult where the common law is the only game in town unlike the situation in Europe. However, to think of modern labour law as the common law with add-ons is a fundamental mistake. The modern contract of employment, or employment relationship, only makes sense if seen as an integrated legal structure comprising both the common law and statute (Anderson, 2007). Labour law in this holistic sense does, of course, contain a range of protections from the minimum wage to protection against unjustified dismissal that might be seen as compatible with a capability approach and certainly this conception of the law provides room for further evolution in that direction.

The problem of the common law is less apparent in the second half of the capability equation that of a welfare system more aligned to a capability based approach. New Zealand's relatively strong social welfare system is one that grew out of New Zealand's own social environment and, while not without faults, its underlying structure and philosophy is such that a major change in mindset is not necessary if a more capability focussed approach were to be adopted. For example, the combination of ACC and universal superannuation provide a relatively strong degree of economic security for those who are no longer able to work because of accident or age. That being said, however, there are still issues in attitudes to the work-welfare interface and the personal versus social "fault" tension that seems inherent in any discussion of entitlement to unemployment benefits. The current recession will no doubt once again highlight this tension although currently there appears to be some recognition, for example in the ReStart programme,[1] that some account must be taken of economic misfortune in the transition from employment to unemployment. That being said there continues to be strong conflicts between the "benefit" ethos that drives social welfare and a "social insurance" ethos that might more accurately reflect the need to provide economic protection for those made unemployed by the state of the economy.

The capability concept is unlikely to become the dominant driver in labour law and the labour law-welfare law interface, in the short term, but it does provide a force that is compatible with many elements of New Zealand's labour/welfare law structures and which can provide a greater degree of theoretical support for the progressive reform of those structures.

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Notes

[1] On this programme see: http://www.workandincome.govt.nz/individuals/a-z-benefits/restart.html