

Addressing Gender Inequality through Corporate Governance

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Introduction

There is a growing recognition of the link between corporate governance, social policy, and issues of economic performance. The Turnbull report's emphasis on internal audit as a means of managing corporate risks (ICAEW, 1999) was based on the premise that corporate compliance with a variety of external regulatory controls and liability regimes would be essential to the maintenance of shareholder value in an increasingly competitive business environment. In the same vein, the Company Law Review Steering Group's recommendation for greater disclosure by companies of information relating to issues of social and environmental responsibility, through the proposed operating and financial review or OFR (Company Law Review Steering Group, 2000: 180-193; 2001: 49-54), aimed to enable shareholders and other stakeholders to make better informed judgments on non-financial aspects of corporate performance. In turn, investors are now being encouraged in a variety of ways to place greater weight on voice and less on exit in their relations with companies (Monks and Sykes, 2001). Requiring pension funds to treat their right to vote on company resolutions as a fiduciary asset, and thus to publicise and in some circumstances justify their voting record, is a part of this process, as are related recommendations of the Myners report on institutional investment (Myners, 2001). Completing the circle is the perception of government that progressive human resource management, including awareness of the implications of workforce equity and the work-life balance issue, is set to become a major factor in enhancing the performance of UK companies.

These themes came together in the Kingsmill *Review of Women's Pay and Employment* (Kingsmill, 2001), which in addition to making a major contribution to public policy in relation to gender equality, marked a significant step in the corporate governance debate. This is because the Review saw corporate governance mechanisms, rather than regulatory legislation, as the principal mechanism for bringing about desired improvements in relation to equality in pay and employment. These developments were paralleled, to a certain degree, at EU level. There, too, there has been a debate about the role of non-government actors in promoting a social policy agenda, which is put largely in terms of a debate over the meaning of corporate social responsibility. However, there are potentially significant differences in the emphasis placed within the EU debate on the respective roles of shareholders and other stakeholders, and on the role to be played by regulation acting as a 'floor of rights' (European Commission, 2001).

Against this background, our project will explore empirically and theoretically the developing linkage between corporate governance, pay equity, and social rights. More specifically, we aim to do the following:

- examine how far actors at corporate level (human resource and finance managers, and employee representatives) perceive the issue of pay equity in terms of governance and competitiveness rather than (or as well as) fairness of treatment;
- examine to what extent institutional investors are willing to put pressure on the companies in which they invest to prioritise the issue of gender equality;
- study the mechanisms by which pay equity issues are addressed within companies, in particular in terms of the internal audits recommended by the Kingsmill review, and the outcomes in terms of the extent of gender equality and segregation;
- study the techniques and metrics (many of which are only just in the process of emerging) through which institutional investors and financial markets view the social performance of companies, with particular reference to the proposed Operating and Financial Review, and consider outcomes in terms of long-term share performance;
- assess more generally how successful ‘soft law’ strategies such as those recommended by Turnbull and Kingsmill are in practice, and how far they rely, directly or indirectly, on ‘hard’ legislative standards of the kind provided by background legislation on pay equity at both UK and EU level, and on constitutional recognition of basic social rights including the right to equality of treatment.

Methods

Jude Browne’s doctoral research (Browne, 2000) produced a study of vertical occupational gender segregation in one large organization, the BBC, which was considered in many ways a model employer for women’s career progression. The study found that vertical occupational gender segregation was nonetheless still clearly apparent within the organisation irrespective of both progressive employment practices and of a significant recent reduction in horizontal segregation in educational background. This revealed the restrictions that individuals faced irrespective of their immediate organizational environment.

Our new research will begin with a similar empirical study within a number of organisations in the British labour market, specifically drawing a sub-sample of around half of the 50 most successful organizations identified by Kingsmill Review of 2001 (upon which Browne was a consultant). Interviews will be conducted with managers on both the human resource side and the finance side (it is possible that the perceptions of these two groups, because of their different professional backgrounds, will not be the

same); with employee representatives; and with employees. In addition there will be interviews with institutional investors and policy makers.

The wider context: capability theory

Our work is informed by a theoretical perspective which draws on Amartya Sen's capability approach and on developments in regulatory theory, in particular the notion of 'reflexive' law and governance.

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).

Crucial to this '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; *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.

In Sen's capability approach, 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, 1993: 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 capability approach is not a full theory of justice; Sen states that '[i]t 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 greater equality of capability should focus on the conversion factors which, in a given society, determine the translation of impersonal and transferable resources, such as human and physical capital, into functionings and capabilities. The capability 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.

One of the ideas which we wish to pursue in our project is that social rights, such as the right to equality of treatment in relation to gender, should 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. 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, even though they involve interference with freedom of contract, may be not just compatible with, but become a precondition to, the operation of the labour market.

An orthodox economic view of laws which protect women against dismissal on the grounds of pregnancy is that, 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 that 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.

Recent empirical research casts light on this conjecture. In the United Kingdom, pregnancy protection laws were significantly strengthened in the mid-1990s, as a result of the combined effect of a number of rulings of the European Court of Justice, extending the scope of the (then) Equal Treatment Directive to pregnancy cases, and the implementation of the Pregnant Workers' Directive of 1992. These changes meant that both protection against dismissal and the right to return to work after pregnancy were more effectively guaranteed. The result has been a lengthening of the average job tenure of full-time women workers which has contributed to a more general rise in labour market participation by women of working age (Robinson, 2003).

CSR as an institutional 'conversion factor'

Notwithstanding this example, there is a perception among legislators and policy makers that there are limits to the effectiveness of legislative action in this area. The issue of gender equality therefore provides a concrete context in which to examine the potential impact of corporate social responsibility or CSR as an alternative, or possibly complementary, 'conversion factor' to that of equality legislation. 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. This is why 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* would be 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 previous 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 had been estimated 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.

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 could not 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.

If an exercise such as Kingsmill were effectively carried out, it could 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 proposed by Kingsmill was to track the impact of equality policy in practice. In this sense, it embodied a learning process, revealing information about structural barriers to equality at the same time as disseminating knowledge about how they might be addressed. By directly highlighting reputational losses from discriminatory treatment and the financial consequences of employee turnover, the Review aimed 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, were called in aid to promote the same end.

This type of approach does not mean 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. Indeed, the reliance of Kingsmill on entirely voluntary audits arguably accounts for its limited success so far in shifting employer attitudes.

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 or ‘reflexive’ 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. But this implies, at the very least, 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. Nor should a role for regulation and ‘hard’ sanctions be ruled out. Thus it is likely that for CSR to work well as a conversion factor, it should be seen as complementary to legislation rather than as an alternative to it.

Capabilities and rights

A capability-orientated analysis can be understood as focusing our attention on how social rights can be used to 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. They can do this in one of two ways: either as claims to resources, such as social security benefits, or access to health and education services; or as rights to take part in forms of procedural or institutionalised interactions, such as those arising out of collective bargaining or corporate governance. 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, as we have seen, they arguably 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.

At the same time, we should acknowledge that there are potential difficulties, even dangers, inherent in the capability approach. Sen’s account of the capability approach focuses on the position of the individual and the real or effective choices which are available to each person. Alain Supiot, on the other hand, reminds us why social rights cannot be conceived exclusively in individualized terms: ‘the most innovative aspect of the welfare state was not its social provisions – typically less generous than those of fascist or communist states – but its guarantee of right to collective action, which allowed the dominated to fight the dominant classes with their own vision of a just society’ (Supiot, 2003: 135). Little will be gained if individualised claims to access to resources are used to undermine still further the principal institutions of the welfare state – collective bargaining, social insurance and progressive taxation. Yet the right to equal treatment between men and women has been used on numerous occasions to *level down* the standard of social protection enjoyed by workers. There is undoubtedly a dimension to the law of human rights which quite at home with the idea that, in a globalised economy, collective institutions should continually have to justify their existence in the face of market imperatives. From this perspective, a capability-based analysis *needs* the idea of social rights if it is not to become a pretext for weakening collective provision. It will therefore be important, in any discussion about social rights and capabilities, to insist on a distinction between the empowerment of persons which results from an extension of their *individual* capability sets, and the *collective* mechanisms through which this empowerment is achieved. In our project, the interaction of these individual and collective levels will be studied empirically, through the case studies and data collection described above – in effect, therefore, our work is an exercise in the empirical sociology of human rights.

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