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Re-Systematising Labour Law: Beyond Traditional Systems Theory and Reflexive Law?

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I. Introduction

Reflexive law has an enduring place in the theory of labour law, having featured prominently in the work of leading labour law scholars.¹ Grounded in systems theory, reflexive law offers a key means of moving beyond command and control regulation,² to consider how law interacts with other social systems.³ Systems theory, as developed by Niklas Luhmann, argues that the world is composed of

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¹ See, eg, B Hepple, 'Enforcing Equality Law: Two Steps Forward and Two Steps Backwards for Reflexive Regulation' (2011) 40 *Industrial Law Journal* 315; R Rogowski, *Reflexive Labour Law in the World Society* (Cheltenham, Edward Elgar, 2013); C Barnard et al, 'Reflexive Law, Corporate Social Responsibility and the Evolution of Labour Standards: The Case of Working Time' (Working Paper, Cambridge, December 2004); S Deakin and R Rogowski, 'Reflexive Labour Law, Capabilities and the Future of Social Europe' in R Rogowski et al (eds), *Transforming European Employment Policy: Labour Market Transitions and the Promotion of Capability* (Cheltenham, Edward Elgar, 2011); C Barnard et al, 'Capabilities and Rights: An Emerging Agenda for Social Policy?' (2001) 32 *Industrial Relations Journal* 464; W Njoya, 'Employee Ownership in the European Company: Reflexive Law, Reincorporation and Escaping Co-Determination' (2011) 11 *Journal of Corporate Law Studies* 267; W Njoya, 'Job Security in a Flexible Labor Market: Challenges and Possibilities for Worker Voice' (2011–12) 33 *Comparative Labor Law & Policy Journal* 459.

² P Zumbansen, 'Law After the Welfare State: Formalism, Functionalism, and the Ironic Turn of Reflexive Law' (2008) 56 *The American Journal of Comparative Law* 769, 791.

³ G Teubner, 'Substantive and Reflexive Elements in Modern Law' (1983) 17 *Law & Society Review* 239.

social subsystems, each of which is autopoietically closed but cognitively open. Law, in this view, is one social sub-system, with its own system of self-referential and self-constituting communication. One system cannot influence, control, or determine other systems: instead, systems might occasionally ‘irritate’ each other. Law therefore cannot control the economy, labour market or organisations: it can only irritate other social systems to effect change. For Luhmann, then, the focus is on self-referential communications *within* systems, rather than any input-output relation between them.

In seeking a more inclusive theory of labour law, reflexive law seems an obvious option to consider, as it encompasses a wider range of regulatory techniques and actors than that envisaged by traditional and direct state regulation. That said, while reflexive law has been influential in labour law scholarship, and offers significant advantages over a focus on direct regulation, it appears to be built on unstable foundations. Systems theory, which has been the bedrock of reflexive law theory, arguably has a number of fundamental theoretical limitations, which limit its usefulness and applicability to a labour law context. This, then, should cause concern if systems theory is seen as the basis for labour law theorising through reflexive law.

In this chapter, I outline the prevailing limitations of systems theory, and how they might undermine labour law theorising, drawing on a case study of United Kingdom (UK) equality law scholarship. I map the difficulties of applying reflexive law to the UK context, and consider whether this might be related to the theoretical critiques of systems theory and reflexive law. I argue that, while the critiques of systems theory and reflexive law have weight, developing critical systems theory scholarship means that the theories still have much to offer labour law theorising.

II. Systems Theory

According to systems theory, law and other social areas occupy discrete, closed, self-referencing and self-reinforcing autopoietic systems.⁴ Legal autopoiesis applies self-referentiality to the legal sphere, arguing that ‘the reality of law consists of a multitude of circular processes’.⁵ For Gunther Teubner, circularity of the legal system also suggests its closure.⁶ Autopoiesis therefore seeks to map circular relationships, assess their internal dynamics and evaluate external interactions.⁷

⁴ See N Luhmann, *Law as a Social System* (F Kastner et al trs, Oxford, Oxford University Press, 2004).

⁵ G Teubner, ‘Introduction to Autopoietic Law’ in G Teubner (ed), *Autopoietic Law: A New Approach to Law and Society* (Berlin, Walter de Gruyter, 1988) 1.

⁶ *ibid* 2.

⁷ *ibid* 1.

Operational closure of systems means that they cannot communicate directly with each other. Each social system creates its own world view and ways of knowing: this might mean that 'world-views in different subsystems are thoroughly incompatible on the basis of their cognitive assumptions'.⁸ Communication between systems has to be 'translated' to fit within systems' own communicative processes. Social systems have *communication* as their basic element, not human beings,⁹ though humans belong to the environment of the system.¹⁰

As Teubner recognises, characterising systems as operationally closed but cognitively open sounds paradoxical.¹¹ However, the underlying assumption of systems theory seems to be that legal autopoiesis has the potential to render the legal system more responsive to social reality:¹² as Teubner explains, a 'radical closure of the system – under certain conditions – means its radical openness', arguing that the more closed and autonomous the legal system becomes, the more open it is to other influences.¹³ Rather than a relationship of direct or linear influence, though, law and social systems are subject to 'mutual interference' as they 'share the same world of meaning' and the elements of the systems are 'essentially similar'.¹⁴

Central to systems theory, therefore, is the idea that the legal system, in its functional logic, does not follow or remain beholden to moral considerations or political power structures. The legal system only obeys its own legal specifications, meaning that only law can produce law. On the flipside, however, law can only govern society by governing itself¹⁵ or, potentially, 'irritating' other systems through an 'external stimulation of internal self-regulating processes which, in principle, cannot be controlled from the outside'.¹⁶

III. Reflexive Law

Systems theory therefore posits the (non-legal) results of legal change as being fundamentally uncertain. This 'problem with regulation' can be depicted as a black box, as each (sub)system 'knows the input and the output of the other, but the internal processes that convert inputs to outputs remain obscure'.¹⁷ Autopoiesis therefore requires labour law to embrace reflexive regulatory techniques.¹⁸

⁸ G Teubner, *Law as an Autopoietic System* (Z Bankowski ed, A Bankowska and R Adler trs, Oxford, Blackwell, 1993) 62.

⁹ Teubner, 'Introduction to Autopoietic Law' (n 5) 3.

¹⁰ N Luhmann, *Social Systems* (J Bednarz Jr tr, Stanford, Stanford University Press, 1995) chs 6, 7.

¹¹ Teubner, 'Introduction to Autopoietic Law' (n 5) 2.

¹² *ibid.*

¹³ *ibid.*

¹⁴ Teubner, *Law as an Autopoietic System* (n 8) 88–89.

¹⁵ *ibid.* 82.

¹⁶ G Teubner, 'Autopoiesis in Law and Society: A Rejoinder to Blankenburg' (1984) 18 *Law & Society Review* 291, 298.

¹⁷ *ibid.* 299–300.

¹⁸ S Deakin, 'Law as an Autopoietic System' (1997) 26 *Industrial Law Journal* 89, 90–91.

Reflexive law focuses attention on the limits of law and legal regulation, self-regulation in other systems,¹⁹ and the regulatory capacities of the legal system itself.²⁰ It seeks to understand legal and social change, including by mapping the relationship between changes in law and changes in society, and between legal and social structures.²¹ The role of reflexive law theory is therefore to help scrutinise the link between legal autopoiesis and societal regulation.²²

Reflexive law scholarship is based on the idea 'that regulatory interventions are most likely to be successful when they seek to achieve their ends not by direct prescription, but by inducing "second-order effects" on the part of social actors'.²³ Law should not command change: rather, law reform should 'irritate' other systems to promote and stimulate self-regulation.²⁴ Law, then, 'becomes a system for the coordination of action within and between semi-autonomous social subsystems'²⁵ through 'enforced or stimulated self-regulation'.²⁶ Thus, reflexive law seeks regulation 'without the unintended and undesirable side-effects associated with substantive law'.²⁷ It therefore has significant implications for the design of regulation that is aimed at bringing about social change,²⁸ and moves legal interventions beyond 'simple "command and control"'.²⁹ Applying reflexivity to law is assumed to improve the effectiveness of legal interventions.

For Ian Ayres and John Braithwaite, reflexive law can be achieved through the 'enforcement pyramid', where escalating government regulation reinforces market self-regulation.³⁰ Regulation should commence at the base of the pyramid, starting with 'restorative dialogue', information, persuasion and voluntary agreement.³¹ If these voluntary measures fail, regulation can become increasingly interventionist; it is the prospect of more interventionist measures that makes voluntary measures effective,³² and encourages firms to self-regulate.³³

¹⁹ Rogowski, *Reflexive Labour Law in the World Society* (n 1) 32.

²⁰ See especially Teubner, *Law as an Autopoietic System* (n 8) ch 5.

²¹ Teubner, 'Substantive and Reflexive Elements in Modern Law' (n 4) 242, 257.

²² Teubner, *Law as an Autopoietic System* (n 8) 65.

²³ C Barnard and S Deakin, 'In Search of Coherence: Social Policy, the Single Market and Fundamental Rights' (2000) 31 *Industrial Relations Journal* 331, 341.

²⁴ R Rogowski and T Wilthagen, 'Reflexive Labour Law: An Introduction' in R Rogowski and T Wilthagen (eds), *Reflexive Labour Law: Studies in Industrial Relations and Employment Regulation* (Deventer, Kluwer Law and Taxation Publishers, 1994) 7.

²⁵ Teubner, 'Substantive and Reflexive Elements in Modern Law' (n 4) 242.

²⁶ C McLaughlin, 'Equal Pay, Litigation and Reflexive Regulation: The Case of the UK Local Authority Sector' (2014) 43 *Industrial Law Journal* 1, 4.

²⁷ P Capps and HP Olsen, 'Legal Autonomy and Reflexive Rationality in Complex Societies' (2002) 11 *Social & Legal Studies* 547, 551.

²⁸ Deakin and Rogowski, 'Reflexive Labour Law' (n 1) 230.

²⁹ Hepple, 'Enforcing Equality Law' (n 1) 320.

³⁰ I Ayres and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford, Oxford University Press, 1992).

³¹ Hepple (n 2) 321.

³² *ibid* 322.

³³ Ayres and Braithwaite, *Responsive Regulation* (n 30) 4.

IV. Reflexive Law in Labour and Equality Law Scholarship

Reflexive law has played a prominent role in labour and equality law scholarship in the UK and European Union (EU). However, studies of equality law in particular are increasingly doubting the capacity for reflexive law (or, at least, what has been described as 'reflexive law') to protect vulnerable groups from discrimination. This research increasingly demonstrates the possible limits of 'reflexive' regulation in practice.

For example, Christopher McCrudden identifies a number of potential problems with using reflexive regulation to recast equality law in the UK.³⁴ More generally, McCrudden puts forward three critiques of reflexive law: that it fails to recognise the role of conflicting political and economic interests and power, by depoliticising regulatory failure; that deliberation on *how* to implement certain values can undermine core values themselves; and that reflexive law has certain institutional requirements that must be in place for deliberation to succeed. Focusing on this third critique, McCrudden argues that the pre-conditions for effective reflexive regulation are not in place in the UK: namely, an obligation on firms to examine what they are doing (such as through the need to gather and review data on their workforce); that firms consider alternatives designed to shift patterns of inequality, and that this be reviewed by an external body; and a requirement to engage with other stakeholders. A reflexive approach to equality law is unlikely to be successful in this context. Instead, there is a risk of falling into 'non-regulation' or 're-regulation' by the courts.³⁵

Bob Hepple also uses reflexive law and the enforcement pyramid to model and critique UK equality law.³⁶ In his study of equality law enforcement, Hepple outlines a number of reforms in the Equality Act 2006 and Equality Act 2010 that move towards reflexive law, including the creation of a single Equality and Human Rights Commission (EHRC) with extensive enforcement powers, and the extension of the Public Sector Equality Duty (PSED) to all protected grounds. However, Hepple also identifies reforms that undermine this trend towards reflexive regulation, including limits to the EHRC's enforcement powers and budget, and removing any engagement requirement from the PSED.

In considering the potential advantages and disadvantages of reflexive regulation in the field of equality law, Hepple argues that there is a risk that reflexive law 'ignores or underestimates' the role of power, particularly the institutional power held by corporations and public bodies. To address these power disparities, Hepple

³⁴ C McCrudden, 'Equality Legislation and Reflexive Regulation: A Response to the Discrimination Law Review's Consultative Paper' (2007) 36 *Industrial Law Journal* 255, 263.

³⁵ *ibid.*

³⁶ Hepple, 'Enforcing Equality Law' (n 1).

reinforces the importance of engagement, which might include information, consultation, participation and collective bargaining.³⁷ If meaningful engagement is not present, then

the disadvantage of the reflexive regulation model is that it may simply serve to legitimate or rubber-stamp the exercise of corporate and institutional power unless individuals and groups affected by their actions have the legal power to compel engagement, and the enforcement agency has the power to ensure that agreements uphold the values of the legislation and, where necessary, to impose deterrent sanctions.³⁸

Hepple concludes, however, that these engagement mechanisms are not adequately in place in the UK, and are entirely absent from the statutory provisions of the Equality Act 2010. Thus, 'reflexive law' (at least, as it has been effected through the Equality Act 2010) is unlikely to be successful in Britain.³⁹ This may reflect the fact that politicians and policy-makers do not actually grasp what 'reflexive law' entails or, if they do, 'chose to ignore' it: thus, 'grand theories such as that of reflexive regulation may have little impact on the actual development of legal enforcement'.⁴⁰ The application of 'reflexive law' as a means of modelling legal and policy change may be confined to academic commentators seeking 'signs of a model of reflexive regulation'.⁴¹ More generally, the problem with 'reflexive regulation' is that it 'can mean all things to all people. No one can decide in advance what use different political groups will make of it'.⁴² In the case of equality law in the UK, 'reflexive regulation' has been used to undermine legal protection for vulnerable groups.

Sandra Fredman also uses reflexive law to critique the PSED and its requirement to have 'due regard' to equality issues,⁴³ questioning whether this '[reflects] a fundamental ambivalence as to the importance of equality, deferring to public authorities' view as to what priority equality deserves' or whether it could be given 'a more positive interpretation, regarding it as an instance of "reflexive law"'.⁴⁴ Fredman concludes that, while the 'due regard' standard has the potential to be reflexive, it is not working that way in practice. Relying on judicial review for enforcement of the PSED puts courts in a difficult position: they must both look to the substance of organisational decision-making, to ensure consideration of equality issues is not just proceduralism or 'box-ticking'; but, equally, a focus on substance not form makes it difficult to create a stable set of legal principles with predictable outcomes. For Fredman, this is the 'paradox' of using judicial review to enforce the PSED:

On the one hand, the role of courts is to supply a stable set of principles capable of guiding decision making without resort to litigation. On the other hand, the more settled

³⁷ *ibid* 322.

³⁸ *ibid* 323.

³⁹ *ibid* 332.

⁴⁰ *ibid* 334.

⁴¹ *ibid*.

⁴² *ibid*.

⁴³ S Fredman, 'The Public Sector Equality Duty' (2011) 40 *Industrial Law Journal* 405.

⁴⁴ *ibid* 418.

the principles, the more scope there is for mere procedural compliance and the less space is left for flexible decision making.⁴⁵

Thus, relying on established legal mechanisms (such as judicial review) for the enforcement of potentially reflexive tools (such as the 'due regard' standard) is unlikely to prompt cultural change and mainstream equality.⁴⁶ As Fredman concludes,

the "due regard" standard falls well short of the requirements for truly reflexive law, which would require a carefully modulated system of internal and external drivers, with judicial review as a last, not first resort. Without a duty to take action, the risk of proceduralism is difficult to overcome.⁴⁷

The impact of the due regard standard, then, may be no better than command and control regulation. This reflects the difficulty of implementing reflexive regulatory techniques in practice.

Colm McLaughlin uses reflexive law as a theoretical framework to examine the implementation of collective agreements around equal pay in the UK local authority sector.⁴⁸ Drawing on qualitative interviews, including with senior human resources representatives from local authorities in England and union representatives, McLaughlin identifies three potential issues with the implementation of reflexive law in the equal pay context. First, he questions the extent to which unions can effectively challenge existing power relations in the collective bargaining process, given the divergent interests of their members.⁴⁹ This becomes particularly apparent in the equal pay context, where there are potential 'winners' (often women) and 'losers' (often men). Secondly, McLaughlin identifies potential contradictions and tensions between equal pay litigation and collective bargaining. In the context of equal pay, 'the law operates less as a default than a norm with potentially overriding effect, and collectively agreed settlements have no such protection from challenge via litigation'.⁵⁰ This sets the stage for conflict between collectively negotiated solutions on the one hand, which attempt to balance competing interests, and litigated outcomes based on individual rights on the other. Thirdly, McLaughlin identifies a need for 'effective bridging mechanisms between the legal sphere and the organisational sphere',⁵¹ particularly given local actors may not have the expertise or capacity to effectively bargain over equal pay. Overall, then, McLaughlin's study 'highlights that reflexive approaches do not always deliver the outcomes intended by parliament, and that the tribunals and litigation have also played an important role in delivering fairness and justice for some

⁴⁵ *ibid* 420.

⁴⁶ *ibid* 424.

⁴⁷ *ibid* 427.

⁴⁸ McLaughlin, 'Equal Pay, Litigation and Reflexive Regulation' (n 26).

⁴⁹ *ibid* 26–27.

⁵⁰ *ibid* 26.

⁵¹ *ibid* 27.

very low paid women'.⁵² This reinforces the need for statutory minima or rights to supplement or reinforce collectively negotiated solutions. Equally, though, these statutory minima or rights might serve to undermine or challenge the process of reflexive regulation. For McLaughlin, this is the 'ambiguous role of litigation, which may act as a catalyst to self-regulation in some instances while undermining it in others'.⁵³

In my own study of age discrimination law in the UK, I use reflexive law to both critique and normatively model potential changes to equality law.⁵⁴ I argue that reflexive law is a useful theoretical framework for two reasons: first, it helps to explain why age discrimination law has had limited impact on organisational practice, despite ten years of operation; and, secondly, it helps to shift the focus of academics and policy makers toward more creative regulatory interventions, as an alternative to a focus on command and control regulation.⁵⁵

While recognising these theoretical benefits, however, I also identify a worrying tendency in my empirical research for reflexive law to be confused with soft or non-law. As I map in that study, the focus of UK governments in relation to equality law (and age discrimination law in particular) has been primarily on 'restorative dialogue', information and persuasion,⁵⁶ which form the base of the enforcement pyramid and the default form of intervention in a reflexive law model.⁵⁷ I find that the UK government's focus on education and persuasion has not resulted in concrete organisational change: this is an 'irritation' that has not worked. I argue, however, that this is understandable from a theoretical standpoint, as reflexive law requires more than just dialogue to achieve change: there must also be increasingly interventionist action where dialogue and self-regulation fail. In the context of equality law, however, interventionist actions are being increasingly undermined by government reforms, which have made individual enforcement more difficult, and reduced the power and resources of the EHRC.

My study, then, illustrates the fundamental problems of relying on reflexive law to overcome a deregulatory governmental agenda.⁵⁸ Indeed, 'reflexive law' appears to have become a means and theoretical justification for furthering governments' retreat from social and employment regulation. I conclude, then, that

the use of a reflexive law [theoretical] framework may condone and enhance the push for deregulation and a withering away of governmental responsibility, rather than

⁵² *ibid* 28.

⁵³ *ibid* 3.

⁵⁴ A. Blackham, *Extending Working Life for Older Workers: Age Discrimination Law, Policy and Practice* (Oxford, Hart Publishing, 2016).

⁵⁵ *ibid* 227.

⁵⁶ J. Macnicol, 'The Age Discrimination Debate in Britain: From the 1930s to the Present' (2005) 4 *Social Policy and Society* 295, 298.

⁵⁷ J. Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford, Oxford University Press, 2002) 30.

⁵⁸ *cf* Ayres and Braithwaite, *Responsive Regulation* (n 30).

providing a way out of the deregulation/regulation divide. ... reflexive law should be used with a degree of caution and scepticism.⁵⁹

These concerns with the use of reflexive law are not limited to equality law: Catherine Barnard, Simon Deakin and Richard Hobb's empirical study of working time in the UK concludes that reflexive law is insufficiently developed in the UK, meaning relying on voluntary measures to promote organisational change is highly problematic. In the context of working time, the 'high hopes' of reflexive law have not been borne out:⁶⁰ statutory limits on working time have been easily avoided by employers, the culture of long working hours has not shifted, and working time regulations are not seen by employers as promoting efficiency. Thus, a reliance on self-regulation and multi-level and decentralised deliberation has been ineffective in practice.

These studies illustrate that there is a growing body of research that doubts the effectiveness of 'reflexive law' in the context of UK labour and equality law.⁶¹ This may reflect the limited or imperfect adoption or implementation of reflexive principles in regulation. Indeed, as Lizzie Barmes argues, innovative regulatory techniques have been overlaid onto existing legal rules, conveying inconsistent and poorly articulated messages to organisations.⁶² It is possible that reflexive regulatory techniques will be more successful in other labour law contexts, such as occupational health and safety,⁶³ though even these contexts experience challenges in implementation.⁶⁴ Alternatively (or additionally) it may reflect the particular limitations of the UK labour law context, where there are few mechanisms in place for engagement to moderate the power of organisations and public bodies. Reflexive law may be more successful in other national regulatory contexts, where stronger traditions of social dialogue and corporatism are built into the regulatory structure.

Problematically, these studies may reveal more fundamental problems with attempting to use reflexive regulation in practice. As Hepple notes, this may be because legislators do not or will not engage with the ideas of reflexive law. Equally, 'reflexive law' may be used as a convenient label to justify and legitimise a de-regulatory push. Potentially, though, this may also reveal that reflexive law,

⁵⁹ Blackham, *Extending Working Life for Older Workers* (n 54) 228.

⁶⁰ Barnard et al, 'Reflexive Law, Corporate Social Responsibility and the Evolution of Labour Standards' (n 1) 35.

⁶¹ Though, of course, other scholars find reflexive law to be more compelling: see, eg, Rogowski, *Reflexive Labour Law in the World Society* (n 1).

⁶² L Barmes, 'Equality Law and Experimentation: The Positive Action Challenge' (2009) 68 *Cambridge Law Journal* 623, 635; D Ashiagbor, 'Evaluating the Reflexive Turn in Labour Law' in A Bogg, C Costello, A Davies and J Prassl (eds), *The Autonomy of Labour Law* (Oxford, Hart Publishing, 2015) 143.

⁶³ Rogowski, *Reflexive Labour Law in the World Society* (n 1) 38; T Wilthagen, 'Reflexive Rationality in the Regulation of Occupational Safety and Health' in R Rogowski and T Wilthagen (eds), *Reflexive Labour Law – Studies in Industrial Relations and Employment Regulation* (Deventer, Kluwer Law and Taxation Publishers, 1994).

⁶⁴ Wilthagen, 'Reflexive Rationality' (n 63).

and the systems theory it is grounded in, are divorced from the reality of regulation, such that achieving truly reflexive regulation in practice is prohibitively difficult.

V. Critiques of Systems Theory

As McCrudden argues, no system of regulation is perfect;⁶⁵ equally, no theory of labour law or regulation is perfect. However, the repeated problems identified with the implementation of reflexive law in the UK necessitate consideration of whether there are more fundamental problems associated with reflexive law, and the systems theory on which it is based. Indeed, systems theory has been criticised on a number of grounds, potentially reducing its persuasiveness as a basis for labour law theorising. Some of these critiques have been foreshadowed in the equality law literature above. Below, I synthesise the key critiques of systems theory, focusing on three areas: (1) the relative autonomy of legal systems and inter-systemic interactions, (2) the place and role of humans, bodies and agency in the context of legal systems, and (3) problems related to normativity. These critiques may provide additional explanations for some of the difficulty in applying reflexive law in the UK context.

A. Autonomy of Legal Systems

First, it is questionable whether law's operations can be classified as a closed system, separate from society and other social systems: indeed, 'it is highly debatable whether any social system can be closed'.⁶⁶ It is arguable that law's content can only come from beyond law. For Sidney Post Simpson and Ruth Field,

law is not and cannot be an autonomous subject. No system of thought, except possibly pure mathematics, can be isolated, kept within previously determined categories, and re-main healthy or effective. This is peculiarly true of the law, which reflects and embodies in its substance the institutions of the community. Law without social content or significance ... is law without flesh, blood or bowels.⁶⁷

The content and substance of law is derived from 'the facts of social life'; and critiques of law and its effectiveness should be grounded in assessing how well the law achieves social ends, which are not derived from law itself.⁶⁸

⁶⁵ McCrudden, 'Equality Legislation and Reflexive Regulation' (n 34) 262.

⁶⁶ AL James, 'An Open or Shut Case? Law as an Autopoietic System' (1992) 19 *Journal of Law and Society* 271, 275. See also SP Simpson and R Field, 'Law and the Social Sciences' (1946) 32 *Virginia Law Review* 855, 862.

⁶⁷ Simpson and Field, 'Law and Social Sciences' (n 66) 862.

⁶⁸ *ibid.*

Internally-driven legal critiques, grounded in legal theory, 'can be directed to nothing more significant than the logical symmetry of the legal system'.⁶⁹ Thus, for Adrian L. James, 'law, by its very nature, is a *social* institution and the environment in which it "exists" is a *social* environment'.⁷⁰ Key normative legal concepts, such as 'justice', are moral and social constructs.⁷¹ Law is also inextricably linked with other social institutions, like Parliament, 'so that the nature, shape, and content of law, as well as its external representations such as the machinery of the courts, are determined of necessity by its parameters, both social and institutional'.⁷² James therefore argues that law is an inherently *open* system, which is influenced and changed by its environment and, in turn, creates pressure for social change.⁷³

Relatedly, it is arguable that by focusing on the internal self-reproduction of legal systems, systems theory pays too little attention to the impact and social influence of legal norms.⁷⁴ This inwardly focused orientation neglects the study of the empirical impact of law. In contrast, Hubert Rottleuthner makes 'a plea for a nonreductionist, "multiple," and empirically oriented sociology of law'.⁷⁵ In this approach, 'one could try to answer the question of how legislative, administrative, or court decisions come into existence, of how statutes and their interpretations are changed, and what impact they have'.⁷⁶

To better recognise the dynamism or porosity of boundaries between systems, Thomas E. Webb uses complexity theory as an alternative systems theory to critique autopoiesis. This theory has a different understanding of boundaries, seeing them as contingent, emergent, and interfacing.⁷⁷ For Webb, systems can only be understood in the context of interaction, not alone or in isolation.⁷⁸ Boundaries are context dependent, rather than 'hard' or fixed,⁷⁹ and can be the subject of competing accounts and disagreement.⁸⁰ Boundaries are therefore better seen as 'flexible facilitator[s]' that help distinguish systems, rather than confining or restricting.⁸¹ Webb's critique of autopoiesis offers an alternative understanding of systems theory that may better represent law and the legal system, and its relationship with other social systems.

⁶⁹ *ibid.*

⁷⁰ James, 'An Open or Shut Case?' (n 66) 275.

⁷¹ *ibid.* 275.

⁷² *ibid.*

⁷³ *ibid.*

⁷⁴ H Rottleuthner, 'A Purified Sociology of Law: Niklas Luhmann on the Autonomy of the Legal System' (1989) 23 *Law & Society Review* 779, 790–91; cf M King, 'The "Truth" about Autopoiesis' (1993) 20 *Journal of Law and Society* 218, 230.

⁷⁵ Rottleuthner, 'A Purified Sociology of Law' (n 74) 794.

⁷⁶ *ibid.* 790.

⁷⁷ TE Webb, 'Exploring System Boundaries' (2013) 24 *Law and Critique* 131, 133.

⁷⁸ *ibid.*

⁷⁹ *ibid.* 135.

⁸⁰ *ibid.* 139.

⁸¹ *ibid.* 145.

B. Humans, Bodies and Agency

Second, systems theory replaces a theoretical focus on autonomous individuals with a focus on communicative processes. Systems theory effectively claims that the legal system can ‘operate without agents’,⁸² because human beings are considered to be ‘bearers’ of the system, rather than participants in the system.⁸³ Autopoiesis is therefore a non-humanist theory, and only observes systemic communications, not human actions.⁸⁴ While humans are seen as part of the *process* of communication, they are not its cause or origin.⁸⁵

This theoretical focus on communicative processes, not individuals, carries a number of risks. First, it may underestimate the capacity of individuals to determine, affect and critique social systems.⁸⁶ In some situations, unintended consequences are better attributed to individual agency rather than systems: individuals act within and are part of society,⁸⁷ and can be powerful agents of change. Recognising the agency of individuals, and their ability to construct and respond to legal change, helps to explain the potential for legal reform to have unintended consequences.⁸⁸

To some extent, of course, reflexive law does speak to agency: in its focus on ‘structuring mechanisms for self-regulation’, rather than commanding specific results,⁸⁹ and internal communicative processes, reflexive law can empower people (individually or collectively) to be active participants in the regulatory environment. Thus, reflexive law does not ignore agency, as it acknowledges that some agency resides in parties to collective employment and labour relations, and accounts for particularity and a need for local solutions (as opposed to state or centralised solutions).

Going further, though, David E. Van Zandt argues that there is a need to refocus on actors, and sees law as a complex collection of individual decisions about whether to invoke or avoid the power of the state.⁹⁰ For Van Zandt, it is *people* employing ‘the legal system and its legal rules to accomplish tasks in the real world.’⁹¹ It is the actors, as users of the legal system, who breathe life into the law, and their decisions that shape law.⁹² In this view, autopoiesis just complicates our

⁸² Capps and Olsen, ‘Legal Autonomy and Reflexive Rationality’ (n 27) 552.

⁸³ *ibid* 554–55.

⁸⁴ A Philippopoulos-Mihalopoulos and TE Webb, ‘Vulnerable Bodies, Vulnerable Systems’ (2015) 11 *International Journal of Law in Context* 444, 445.

⁸⁵ *ibid* 446.

⁸⁶ See, eg, James (n 67) 276.

⁸⁷ Capps and Olsen, ‘Legal Autonomy and Reflexive Rationality’ (n 27) 552–58.

⁸⁸ E Mertz, ‘Conclusion: A New Social Constructionism for Sociolegal Studies’ (1994) 28 *Law & Society Review* 1243, 1246–47.

⁸⁹ Teubner, ‘Substantive and Reflexive Elements in Modern Law’ (n 3) 251.

⁹⁰ DE Van Zandt, ‘The Breath of Life in the Law’ (1991–92) 13 *Cardozo Law Review* 1745, 1754.

⁹¹ *ibid* 1756–57.

⁹² *ibid* 1757. Van Zandt in particular refers to judges, lawyers, legislators, as well as (potential) litigants and other users of the legal system.

conception of law, and has little to offer.⁹³ However, in the context of labour law, a focus on individuals alone is insufficient, and ignores the collective and relational aspects of work. Thus, in this context, collective, community or relational responses may be more appropriate than what Van Zandt proposes. Equally, though, traditional systems theory may underestimate the importance of community.⁹⁴

Secondly, autopoiesis tends to ignore the material or corporeal,⁹⁵ making it a 'bodyless' theory. Since the underlying notion of being 'human' is normatively male,⁹⁶ systems theory remains gendered, even if it is framed in neutral language. Contrary to this 'bodyless' approach, then, critical and feminist scholars have called for the incorporation of the body into law, as embodiment is seen as having a direct effect on people's lived experiences.⁹⁷ In this view, meaning (in life and law) comes from corporeality, and recognition of the body allows the legal system to appreciate some of its limits.⁹⁸ In seeking to enrich systems theory, then, Andreas Philippopoulos-Mihalopoulos and Webb see vulnerability (a key quality of a living body) as a constant of autopoiesis,⁹⁹ which is ever-present and cannot be ignored.¹⁰⁰ For these authors, a recognition of vulnerability opens up new communicative possibilities,¹⁰¹ and allows for the theoretical development of autopoiesis.¹⁰² Thus, while ignoring the human and vulnerable may undermine and stultify the development of systems theory, it appears possible to extend systems theory to encompass vulnerability.¹⁰³

Thirdly, systems theory's theoretical focus on communication, rather than autonomous individuals, might minimise consideration of power disparities and create inequality of communicative opportunities.¹⁰⁴ Systems theory has been criticised for its limited focus on the distribution of power, particularly in the context of labour law, where power is especially unevenly distributed. Systems theory does not consider how power is distributed or redistributed, and has no normative content in relation to the balancing of power between employers and workers.¹⁰⁵ Hugh Collins therefore argues that reflexive law 'runs counter to the traditional spice of labour law': traditionally, labour lawyers have seen 'the world

⁹³ *ibid* 1758.

⁹⁴ J Nedelsky, 'Reconceiving Autonomy: Sources, Thoughts and Possibilities' (1989) 1 *Yale Journal of Law and Feminism* 7.

⁹⁵ Philippopoulos-Mihalopoulos and Webb, 'Vulnerable Bodies' (n 84) 452.

⁹⁶ *ibid* 453.

⁹⁷ *ibid*.

⁹⁸ *ibid* 454.

⁹⁹ *ibid* 456.

¹⁰⁰ *ibid* 457.

¹⁰¹ *ibid* 456.

¹⁰² *ibid* 458.

¹⁰³ See also Philippopoulos-Mihalopoulos's extended 'reading' of Luhmann, which positions it in post-modern thought: A Philippopoulos-Mihalopoulos, *Niklas Luhmann: Law, Justice, Society* (London, Routledge-Cavendish, 2010).

¹⁰⁴ Philippopoulos-Mihalopoulos and Webb, 'Vulnerable Bodies' (n 84) 451.

¹⁰⁵ Though Luhmann does offer a theory of power as a 'communication medium': N Luhmann, *Trust and Power* (Cambridge, Polity, 2017).

in terms of interest groups, capital and labour, and conspiracies [of employers], competing in the workplace and in the legislature for the advancement of self-interest' and their comparative position.¹⁰⁶ Reflexive law moves the object of analysis from interest groups to 'communication systems', meaning that it 'translates political and economic battles into problems of communication between social systems'.¹⁰⁷ Thus, systems theory and reflexive law tend to make labour law appear less combative than it would be seen in a traditional view, and mask battles over power and the allocation of resources.

C. Normativity

Third, systems theory (and, therefore, reflexive law) is concerned with legal *process*, not legal *substance*.¹⁰⁸ Systems theory lacks its own normative element – indeed, it was never intended to provide a normative theory,¹⁰⁹ let alone a normative theory of legal change.¹¹⁰ Autopoiesis is not directed towards creating a better society or values – it is about taking a particular perspective to describe communication,¹¹¹ and to describe society as it is.¹¹²

While the absence of normative content is not seen as a limitation by systems theory scholars, it raises more concern among labour law scholars generally. For Diamond Ashiagbor, for example, a lack of normative content in reflexive law would leave labour law 'untethered from the sort of distributive or redistributive goals that characterise state regulation of employment relations'.¹¹³ As Ashiagbor contends, law must have normative content: if reflexive law is to steer the ordering of other systems, what goals will it pursue?¹¹⁴ It is this normative content which must be derived from somewhere (else).

That said, Ashiagbor argues that reflexive law may have some normative content, and tends towards an 'alliance' with neoliberalism, given its focus on the market and state as separate systems, the de-centring of the state, and its failure to consider power relations.¹¹⁵ Thus, by failing to adopt a normative position,

¹⁰⁶ H Collins, 'Reflexive Labour Law: Studies in Industrial Relations and Employment Regulation Ralf Rogowski Ton Wilthagen' (1998) 61 *The Modern Law Review* 916, 920.

¹⁰⁷ *ibid.*

¹⁰⁸ Rogowski and Wilthagen, 'Reflexive Labour Law' (n 24) 7; Teubner, 'Substantive and Reflexive Elements in Modern Law' (n 3) 255.

¹⁰⁹ Van Zandt, 'The Breath of Life in the Law' (n 90) 1760.

¹¹⁰ That said, some scholars have argued that reflexive law, at least, is a normative theory. For Barnard et al, reflexive law offers normative guidance on the appropriate form of governance, focusing on multi-level and decentralised deliberation: Barnard et al, 'Reflexive Law, Corporate Social Responsibility and the Evolution of Labour Standards' (n 2) 2.

¹¹¹ Philippopoulos-Mihalopoulos and Webb, 'Vulnerable Bodies' (n 84) 448.

¹¹² *ibid.* 449.

¹¹³ Ashiagbor, 'Evaluating the Reflexive Turn in Labour Law' (n 62) 125.

¹¹⁴ *ibid.* 134.

¹¹⁵ *ibid.* 132. See also H Arthurs, 'Corporate Self-Regulation: Political Economy, State Regulation and Reflexive Labour Law' in B Bercusson and C Estlund (eds), *Regulating Labour in the Wake of Globalisation: New Challenges, New Institutions* (Oxford, Hart Publishing, 2008) 28–29.

but suggesting a form of proceduralism that minimises direct state intervention, reflexive law and systems theory may (indirectly) adopt a normative position.¹¹⁶ Further, it is unclear how reflexive law and systems theory can be reconciled with minimum standards of employment or general prohibitions of discrimination, which are major regulatory advances of the post-war era: both would appear to be unreflexive forms of command and control regulation.¹¹⁷ There may, then, also be a need for fundamental rights, in addition to reflexive regulation.¹¹⁸

It may therefore be timely to consider a 'normative turn' in systems theory, to further promote and develop a critical systems theory as it applies to law.¹¹⁹ The obvious means of pursuing this might be to overlay other theories, which have normative content, onto systems theory and reflexive law. Indeed, some authors have added a normative element to systems theory to increase its usability (such as justice¹²⁰ or critical race theory¹²¹).

VI. Conclusion: The Ongoing Relevance of Systems Theory and Reflexive Law

In sum, then, there is a growing school of scholarship that seeks to enrich and extend systems theory, including through critical normative scholarship,¹²² an expanded focus on complexity and the dynamism of systems,¹²³ and renewed recognition of vulnerability.¹²⁴ These ideas have potential to develop and enhance systems theory and reflexive law as they apply to labour law. Given labour law is fundamentally about power and its (re)distribution, this shift and expansion in reflexive thinking could address the potential mismatch in focus between reflexive law and labour law.

Thus, it is clear that labour law has something to learn from its 'reflexive turn'. As Michael King notes, a systems approach may 'be able to offer some sobering thoughts on the capacity of law to regulate the behaviour of other systems' and, for all its limitations, still represents 'a considerable advance on the simple input-output models of previous critical and socio-legal theories'.¹²⁵ Further,

¹¹⁶ Though, as Deakin and Rogowski note, this link between means and aims 'is not inevitable': Deakin and Rogowski, 'Reflexive Labour Law' (n 1) 232–33.

¹¹⁷ See, more generally, the discussion of values and rights in Philippopoulos-Mihalopoulos and Webb, 'Vulnerable Bodies' (n 84) 448–49.

¹¹⁸ See, eg, Barnard and Deakin, 'In Search of Coherence' (n 23) 343–44.

¹¹⁹ A Fischer-Lescano, 'Critical Systems Theory' (2012) 38 *Philosophy & Social Criticism* 3.

¹²⁰ AJ Colangelo, 'A Systems Theory of Fragmentation and Harmonization' (2016) 49 *New York University Journal of International Law and Politics* 1.

¹²¹ S Sargent, 'Transracial Adoption in England: A Critical Race and Systems Theory Analysis' (2015)

11 *International Journal of Law in Context* 412.

¹²² Fischer-Lescano, 'Critical Systems Theory' (n 119).

¹²³ Webb, 'Exploring System Boundaries' (n 77).

¹²⁴ Philippopoulos-Mihalopoulos and Webb, 'Vulnerable Bodies' (n 84).

¹²⁵ King, 'The "Truth" about Autopoiesis' (n 74).

as Collins has noted, a positive aspect of systems theory is that it makes scholars and others more attuned to the difficulties and complexities of enacting effective regulation.¹²⁶ For Ashiagbor, the benefit of reflexive law is that it ‘nudges legal scholars away from the over-preoccupation with “old governance” measures’, including statutes, directives and rule enforcement.¹²⁷

However, as Ashiagbor points out, the relevance of reflexive law and systems theory to labour law going forward must be assessed against three related questions.¹²⁸ First, is reflexive law *descriptively* appropriate for understanding existing regulatory interventions? The answer, at least in the UK studies described above, appears to be no (for now). Secondly, is reflexive law *normatively* the right approach for labour law? (And, relatedly, does reflexive law condone and reinforce a neoliberal turn?) Thirdly, is reflexive law *empirically* an effective approach to regulation? It is arguable that the studies described above show that reflexive law has never been perfectly implemented in UK equality law; this makes it difficult to answer this third question with any certainty. Ashiagbor’s third question, then, might become: is it possible to ever perfectly implement reflexive law in the UK context, such that it can be empirically evaluated?

This chapter concludes, then, with more questions than answers. Systems theory and reflexive law have substantial potential to illuminate the difficulty of labour regulation, and the risks of unintended consequences as a result of legal intervention. The challenge going forward, though, is to develop a critical systems theory tailored to labour law, which emphasises the dynamism of systems; engages with the centrality of people, vulnerability and power; and lends law normative content. This would be a more inclusive systems theory, particularly in positing people, in all their diversity and vulnerability, as a central focus. We are reaching a critical juncture in systems theorising, where there is growing potential and need for theory to be developed and expanded to be more inclusive and better reflect the realities and demands of labour law.

Even with this theoretical development, however, it still appears difficult to translate systems theory and reflexive law into practical regulatory interventions. The apparent failure of ‘reflexive law’ in the context of UK equality law flags the practical and regulatory challenges of implementing theory in practice, and the need for systemic change to make reflexive interventions effective. While this may reflect the non-engagement or mis-understandings of policy makers with regulatory theory, it could equally reveal the national limitations of the UK context, which is ill-prepared for a reflexive turn. Reflexive law, if implemented improperly, runs a substantial risk of ‘non-regulation’ or ‘re-regulation’.¹²⁹ the very risks it is trying to overcome. Failed reflexive law, then, is just as bad – if not worse – at achieving impact than command and control regulation.

¹²⁶ Collins, ‘Reflexive Labour Law’ (n 106).

¹²⁷ Ashiagbor, ‘Evaluating the Reflexive Turn in Labour Law’ (n 62) 143.

¹²⁸ *ibid.*

¹²⁹ McCrudden, ‘Equality Legislation and Reflexive Regulation’ (n 34) 263.

Despite the theoretical potential of reflexive law and systems theory, it should therefore be used with caution in some national contexts, particularly where there are few mechanisms in place for engagement to moderate the power of organisations and public bodies. The disjunction between reflexive theory and reflexive practice reflects a gulf between academic scholarship and policy: perhaps another example of systems that cannot directly communicate. This explanation would be cold comfort to those who experience discrimination or occupy a vulnerable position in the labour market. More needs to be done to work to translate theoretical regulatory benefits into practical outcomes.