Riccardo Del Punta, the Capability Approach and Reflexive Labour Law

Ralf Rogowski

1. Introduction

Riccardo Del Punta did not just occupy a unique position in Italian labour law with his innovative liberal stance but gained a growing international reputation in the later stages of his career. This was mainly due to his pioneering use of the Capability Approach (CA) in labour law.

I got to know Riccardo Del Punta through discussions while he was working on his article on the relationship between labour law and the CA for the International Journal of Comparative Labour Law and Industrial Relations. This article had a longer period of gestion and was finally published in 2016 (Del Punta 2016). In these discussions, we started our animated explorations of similarities and differences between the CA and my own theory of Reflexive Labour Law (RLL). Our exchanges led to what I consider a real friendship and we started to mutually be visiting and inviting each other to participate in events in Florence and Warwick.

These exchanges included a memorable visit of Riccardo Del Punta in May 2018 at the University of Warwick where he was granted a scholarship and a two-week fellowship at Warwick's Institute of Advanced Studies (IAS). The highlight of this period was a workshop organised at the IAS on the occasion of his fellowship. The workshop was entitled Labour Market Policy and Labour Law Reform: Tensions and Opportunities. It brought together an interdisciplinary group of well-known labour lawyers, sociologists,

Ralf Rogowski, University of Warwick, United Kingdom, R.Rogowski@warwick.ac.uk, 0000-0003-3493-4074

Referee List (DOI 10.36253/fup_referee_list)
FUP Best Practice in Scholarly Publishing (DOI 10.36253/fup_best_practice)

and researchers in industrial relations and labour market policy. The gathering led to a publication, a special issue of the International Journal of Comparative Labour Law and Industrial Relations, jointly edited by Riccardo Del Punta and me (Del Punta and Rogowski 2019).

In the following I shall continue the discussion I had with Riccardo Del Punta about the relationship between RLL and CA in labour law which sadly now has to carry on without his interventions. In the following I shall briefly discuss the CA and Riccardo Del Punta's understanding of it, followed by a short outline of main tenets of RLL (and similarities with the CA) and ending with some comments on overlaps and differences between the CA and RLL as Riccardo Del Punta saw it.

2. Riccardo Del Punta and the Capability Approach

Riccardo Del Punta's approval of the CA is based on his belief that labour law needs a normative basis. Many of his publications are indeed concerned with values and normative concepts underlying labour law. The areas in which he discussed labour law values and which he covered in his writings include equality and labour law (Del Punta 2002), the meaning of a responsible labour law (Del Punta 2012) as well as the negative impact of neo-liberal economic policies (Del Punta 2002 and 2015) and the social media (Del Punta 2019a) on labour law and workers' rights.

His thoughtful approach to labour law, which is based on normative assumptions and focusses on the importance of values also characterises his method of teaching and guides his well-known textbook on Italian labour law and his numerous interventions in policy debates on labour law. I shared with Riccardo Del Punta an interest in critically assessing the policy context surrounding labour law reform and in particular labour market reforms on which he commented regularly (Del Punta 2004 and 2019b).

Riccardo Del Punta's search for a normative basis and values on which a liberal concept of labour law is based found a main answer in Amartya Sen's capability approach and Martha Nussbaum's elaboration of this approach. Let me briefly outline the basics of this theory (the following outline of the CA is based on Deakin and Rogowski 2011). Sen argues that policies and institutions should be evaluated by reference to how far they enhance individual capabilities, which Sen defines as the degrees of substantive freedom that enable individuals to achieve the subjectively-defined states of wellbeing that he calls 'functionings' (Sen 2009). Economic growth, on the one hand, and legally guaranteed rights, on the other, are only means to the greater end of securing individual well-being in this sense. Nussbaum more explicitly argues that policy should aim to fulfil certain objectively-defined developmental goals which include 'life', 'bodily health', 'bodily integrity', 'play', the 'ability to control one's environment', and 'affiliation' (Nussbaum 2000). Nussbaum's list of core capabilities can be seen as having a dual source: it is based, on the one hand, on empirical observation and experience concerning the basic conditions for human well-being in all so-

cieties, while, on the other, giving expression to social and economic rights set out in fundamental legal texts including the UN Declaration on Human Rights and the International Covenant on Economic, Social and Cultural Rights. More explicitly than Sen, Nussbaum argues that legal and other institutions of a given polity should be designed with the aim of ensuring that a threshold level of well-being is achievable for all its citizens. Sen and Nussbaum share a common focus on individual freedom as the end or goal of social policy, rather than as a means to another end such as economic growth or market efficiency.

Sen's analysis emphasises the value of learning and deliberation over the goals of policy and the role of context in shaping the substantive elements of the CA. He does not set out in detail a conception of the goals which social policy should aim for. He does however provide some discussion on the contribution of markets in general and labour markets in particular to the enhancement of capabilities. In Development as Freedom (Sen 1999), he argues that individuals have reason to value certain freedoms which labour markets provide. Access to waged labour is an important capability for groups which have traditionally been subject to social discrimination and exclusion from participation in economic activity beyond the structure of the family. In Sen's work this argument is addressed to the case of developing countries in which labour markets are still in a process of formation, but the claim that labour market access is a significant capability in its own right is one with wider resonance. Sen's argument can be extended in the context of industrialised societies to argue the case for labour market institutions which provide alternatives to more traditional forms of risk allocation (social security law as an alternative to the family and access to the land), or more coercive ones (such as the poor law), and which seek to remove barriers to market access in the form of social discrimination (Deakin 2009). Extending this argument further, it can be argued that labour law rules have an egalitarian or solidaristic orientation, and are supported by democratic institutions which ensure a voice in the political process for groups most exposed to social and economic risks. This implies a role for labour law in not just mitigating the effect of social risks, but in establishing the conditions for effective deliberation in and beyond the workplace, through support for independent trade unionism and other forms of autonomous worker organisation, and for the principle of freedom of association in the context of collective bargaining and the right to strike (Kolben 2016).

In his work on justice (Sen 2009) Sen analyses to a considerable extent normative theories of justice but does not go into detail on the kinds of legal techniques needed to implement policy initiatives drawing on the capability approach. Thus, the kind of legal order implied by the capability approach has to be inferred from his wider body of work, and possible complementarities identified between Sen's arguments and insights from the sociology and economics of law (see Deakin and Supiot, 2009). The starting point here is to consider the role of what Sen calls 'conversion factors'. These are features of the physical or societal environment which assist the conversion of individuals' endowment into functionings. In introducing the idea of conversion factors, Sen stresses that individual well-being is only partially linked to a given person's physical capa-

bilities; it depends on a context which is societal, or to be more precise, institutional, in nature. Particular institutions, including those of the legal system, may assist, or frustrate, the process by which individuals realise their desired states or goals. This implies an active role for the legal system in supplementing the operation of markets.

Riccardo Del Punta was in many ways endorsing these basic assumptions of the CA (Del Punta 2016 and Del Punta 2019c). In fact, he saw the emphasis on individual capabilities and rights as a way to overcome the crisis of the foundations of modern labour law. In addition to Sen's view on contextualising the labour market, he saw the CA as means to address unequal power relations (Del Punta 2020). For him the CA was a valuable way to address the age-old topic of an unequal employment contract by justifying state intervention on the basis of protection of individual rights. In this way the CA contributes to avoid a neoliberal decline of labour law and serves as the basis of its regeneration (Del Punta 2015).

3. Reflexive Labour Law and the Capability approach

The theory of reflexive law and the CA share a number of basic assumptions. Their understanding of the relationship between the legal system and the market rests on three linked propositions. The first is that markets are not self-constituting. Markets, whether the 'labour market' understood in abstract terms, or the EU's 'internal market', rest on institutional underpinnings. Thus, there is a role for the legal framework as a 'conversion factor' which both creates and also regulates market-based forms of exchange. The reflexive law theory adds that the relationship between the legal system and the economy is one of coevolution and mutual constitution. The operational autonomy of the systems does not contradict their adjustment, through co-evolution, to each other, and their mutual adjustment over time to a common societal environment.

A second proposition of the CA and reflexive law is that the exercise of individual choice in market settings rests on institutional capacity-building. Individual market access is not simply a matter of being left alone by the state ('negative freedom'), but of having the substantive capacity to act which is implied by having access to certain social rights which the legal order recognises and protects ('positive freedom'). These include the rights recognised by private law in its limited, nineteenth-century sense, such as the right to hold property and to make contracts: capacitas in the narrow legal sense of the term. But they also extend to the rights which the modern welfare state seeks to guarantee, such as access to health care and education, membership of mutual or social insurance schemes for offsetting social and economic risks arising from labour-market participation, and participation in meaningful work: capacitas in the broad sense (Deakin and Supiot 2009). The transitional labour market concept, a key example of the empirical relevance of RLL (Rogowski 2015, ch. 6), rests on similar assumptions.

The third proposition is that in identifying the conditions for the effective coevolution of market-based and law-based institutions, a reflexive or learn-

ing-based conception of regulation or governance is to be preferred to one based on a 'one size fits all' approach. The legal system can be understood as codifying and embedding solutions to collective coordination problems. These are more likely to endure when they are the result of a learning process based on a diversity or multiplicity of viable models, and on the mobilisation of the knowledge available to the actors concerned. At this point, reflexive law theory intersects with Sen's open-ended and learning-based conception of capabilities.

Especially the third proposition is of central concern for of RLL. The main contribution of reflexive law theory to the analysis of labour law has been to offer an approach to analysing different regulatory techniques. 30 years after the publication of the book entitled Reflexive Labour Law (Rogowski and Wilthagen 1994), its claim that a new labour law theory is needed to match the complexity of labour law systems in the modern world with an adequate theoretical design is still equally relevant (Rogowski 2024). RLL is based on modern sociological systems theory and on post-structuralist approaches to law and society. It transforms the insights of these disciplines into questions which are relevant for the sociology and theory of law. The core of its approach is to view the legal system as an autonomous social system, located within society on the same plane as the economy or the political system (Luhmann 1995 and 2004; Teubner1993). In common with these other societal function systems, the legal system is ultimately guided by the need to protect its own autopoiesis, that is, its self-referentiality and self-reproduction. The recognition of this fact provides the basis for a realistic assessment of the limits, but also the possibilities, of law as a mechanism for social change.

The autonomy of the legal system is the precondition for the impersonal and abstract administration of justice, and for the institutional channelling of the state's monopoly on the use of force which is associated with the idea of the state based on the 'rule of law' or *Rechtsstaat*. Dissolving the boundary between the legal system and its external context would be counter-productive, as it would involve sacrificing the abstract and impersonal character of legal rules and their application (Zumbansen 2008). To the extent that law loses this autonomy, it comes to operate increasingly as the pure expression of political power, or as the simple manifestation of economic advantage in the terms of trade set by the market (Supiot 2010). At the same time, law's separation from other function systems constrains its use as an instrument of social and economic policy-making and insulates it from societal influences which would ensure its more effective alignment with its economic and political context. This is particularly problematic for areas of law such as labour law which are shaped by instrumental policy concerns and evaluated by reference to their social and economic impacts. The solution lies not in denying the possibility that law can influence, and be influenced by, its external context, but in finding institutional means to express the reality of law's autopoietic nature.

In the autopoietic approach to the study of social systems, a function system such as law or the economy is said to be 'operationally closed' but 'cognitively open' (Luhmann 1992). 'Operational closure' means that the system reproduces

itself entirely by reference to its own internal structures and modes of operation: from the internal viewpoint of those involved in the operation of legal acts such as legislation or adjudication, only law can produce law. 'Cognitive openness', on the other hand, implies that the system evolves over time by reference to an external context which consists of other, similarly constituted sub-systems. Systems are inherently dynamic: they are capable, through their own internal processes, of variation or mutation, and they respond, albeit imperfectly, to selective pressures coming from their social environment to which they are linked by mechanisms of 'structural coupling'. In this way, law, politics and the economy can be said to 'co-evolve', that is to say, to evolve by response to privileged irritations which each constitute for the other. The fit between them is incomplete, since 'structural coupling' can only produce various degrees of perturbation between systems, to which the operational processes of self-reproduction may or may not respond in direct terms.

When conceptualising social systems as operationally closed systems of communication, it becomes possible to understand how different communication systems operate with different types of regulation. Furthermore, attention can be directed to the important relationship between modes of external regulation and processes of self-regulation (Bothfeld and Kremer 2014). This can be demonstrated by analysing the relationship between labour law and industrial relations. Although labour law forms part of the legal system and is thus constituted by legal communication, collective agreements and collective bargaining belong to the self-regulatory structure of the industrial relations system and are foremost constituted by industrial relations communication (Rogowski 2015, ch. 3). What is known in continental European labour law orders as 'collective labour law' is, in most cases, based on an understanding of the beneficial role of social partners in achieving public goods (Dukes and Cannon 2016). It is based on a relatively sophisticated notion of voluntarism and state abstentionism and reveals elements of reflexivity in the political and legal approach to regulating industrial relations. Collective labour law supports industrial relations. A good example of this is the constitutional protection granted to industrial relations in Germany, which imposes a duty on public authorities to guarantee the autonomy of collective bargaining (*Tarifautonomie*). Autonomy of collective bargaining (art 9 abs 3 of the Basic Law) guarantees industrial partners' freedom to negotiate collective agreements without state interference, and this constitutional right includes protection of engagement in collective actions (strikes and lockouts) that are needed in order to reach settlement (Müller-Jentsch 2018). From a social systems perspective, it is a form of governing collective violence. Strike law limits the use of collective action to the industrial relations system, thereby protecting politics and other spheres of society from the interference of collective bargaining.

The theory of reflexive law argues that the legal system becomes consciously reflexive when it recognises that the societal domains which it purports to regulate, and to which it also seeks to respond, are themselves independent autopoietic systems, which have arisen from the most pertinent characteristic of

modern society, namely functional differentiation. The separation of law and politics from each other and from the sphere of the market creates the possibility of a decentred social structure, in which power is diffused among a number of autonomous but mutually linked institutions. On this basis RLL applies Niklas Luhmann's notion of reflexivity and Gunther Teubner's insights on limits and new directions of legal regulation to labour law. RLL is both a theory and a description of labour law operations (Rogowski 2015 and 2024). It describes a stage in the development of modern labour law at which labour law realises its systemic limits regarding the regulation of other social systems. Furthermore, labour law detects, at this reflexive stage, a source of strength in its capacities for regulation of self-regulation.

In practice this means accepting that law is both enabled and constrained by its autopoiesis. The realisation of its autopoietic nature becomes the source of innovation in the legal system when law and in particular labour law have to find new ways of regulating self-regulation. RLL emphasises the importance of procedure and soft law as facilitative and supportive instruments in regulating self-regulation (Rogowski 2016). The future of labour law is linked to its ability to switch from traditional top-down and command -based regulation to a form of regulation that is based on long-term dialogue of equal partners in which law offers to support self-regulation in forms of code of practices, mission statements or corporate social responsibility schemes.

Thus, RLL advocates an identity shift of labour law from an imposing to a facilitating force in society. RLL also sheds new light on the origins of labour law: and its evolution within the modern legal system. It explains the development of the field of la-bour law can be explained by the concept of functional differentiation. Labour law is the product of differentiation within the legal system and specific reflexive processes within it. In fact, labour law initially evolves as a subsystem of a national legal system, largely in reaction to legal perceptions of the facilitative role of law within industrial and employment relations (Rogowski 2020).

4. Conclusion: The link of the CA and RLL according to Riccardo Del Punta

Riccardo Del Punta was mainly concerned with CA as a theoretical mean to respond to the crisis of labour law as he saw it. However, he realised links and the potential of RLL in his capability-based theoretical endeavours. He was particularly interested in the new understanding of regulation offered by the reflexive law theory. RLL argues that for labour law to be successful it needs to support self-regulation in the economy and industrial relations (see Rogowski 2015, ch. 3 and Rogowski 2019a). This approach has concrete implications for regulatory design. Its starting point is that in seeking to influence other autopoietic systems which are operationally closed to their environment, the legal system must have resort to indirect means of regulation. Legal intervention is dependent for its success on self-regulation within the systems which are the target of legal initiatives. Thus, the law can only work in so far as it facilitates self-reflexion and self-regulation in the regulated field.

In his central analysis of the CA in «Labour Law and the Capability Approach», Riccardo Del Punta agreed with RLL that «the kind of regulation that is more functional with the CA is a reflexive or learning-based conception of regulation or governance, … i.e., regulation of self-regulation'» (Del Punta 2016, 400). He was aware that for the attainment of his normative labour law objectives an adequate enforcement mechanism is required and, in this context, he embraced RLL.

We can conclude from our survey of intersection between the CA and RLL as Riccardo Del Punta saw it that there are three areas of overlay There is in the first place the acknowledgment that the function of labour law is fundamentally changing because of new forms of employment, technological innovations at the workplace and variations in expectations towards life courses. Second, there is the need to strengthen individual social rights to manage transitions and switches of social statuses during the life course and thirdly and probably the area where the CA and RLL are most fruitfully overlapping is the need for adequate new forms of regulation that enable to challenge the crisis in the foundation of labour law.

References

Bothfeld, Silke and Stefanie Kremer. 2014. "Reflexive Regulation of Employment Conditions: A Good Way to Reconcile Economic Eficiency with Social Protection?." In Henriette Sinding Aasen, Siri Gloppen, Anne-Mette Magnussen and Even Nilssen (eds) *Juridification and Social Citizenship in the Welfare State*. Cheltenham: Edward Elgar, 43–59.

Deakin, Simon. 2009. "Capacitas: Contract Law, Capabilities, and the Legal Foundations of the Market." In Simon Deakin and Alain Supiot (eds) *Capacitas: Contract Law and the Institutional Preconditions of a Market Economy*. Oxford: Hart, 1–30.

Deakin, Simon and Ralf Rogowski. 2011. "Reflexive Labour Law, Capabilities and the Future of Social Europe." In Ralf Rogowski, Robert Salais, and Noel Whiteside (eds.) *Transforming European Employment Policy – Labour Market Transitions and the Promotion of Capability*. Cheltenham: Edward Elgar, 229-254.

Deakin, Simon and Alain Supiot (eds.). 2009. *Capacitas: Contract Law and the Institutional Foundations of a Market Economy*. Oxford: Hart.

Del Punta, Riccardo. 2002. "What has equality got to do with Labour Law? An Italian perspective." *International Journal of Comparative Labour Law and Industrial Relations* 18, 2: 197-214.

Del Punta, Riccardo. 2004. "Biagi's reform and its implications for the Italian labour market." *Employment Law Bulletin* 10, 8: 85-94.

Del Punta, Riccardo. 2010. "The Economic Challenge to Labour Law." In Giuseppe Casale and Adalberto Perulli (eds.) Compliance with Labour Legislation: its eficacy and eficiency, Working Document Number 6, Labour Administration and Inspection Programme LAB/ADMIN, ILO, Geneva, 5-16.

Del Punta, Riccardo. 2012. "Per un diritto del lavoro «responsabile»." In Gianni Vattimo, Pasquale Davide de Palma and Giuseppe Iannantuono (eds.) *Il lavoro perduto e ritrovato*. Milano, Udine: Mimesis, 51-76.

Del Punta, Riccardo. 2015. "Labour Law on the Edge: Neoliberal Decline or Regeneration?" In Proceedings of the Twelfth International Conference in

Commemoration of Marco Biagi, *Labour and Social Rights: An Evolving Scenario*, Collana Fondazione Marco Biagi: Giappichelli, 121-138.

Del Punta, Riccardo. 2016. "Labour Law and the Capability Approach." *International Journal of Comparative Labour Law and Industrial Relations* 32, 4: 383-405.

Del Punta, Riccardo. 2019a. "Social Media and Workers' Rights: what is at Stake?" *International Journal of Comparative Labour Law and Industrial Relations* 35, 1: 79-100.

Del Punta, Riccardo. 2019b. "Labour market reforms and beyond: the Italian case." *International Journal of Comparative Labour Law and Industrial Relations* 35, 3: 355 -378.

Del Punta, Riccardo. 2019c. "Is the Capability Theory an Adequate Normative Theory for Labour Law?" In Brian Langille (ed.), *The Capability Approach to Labour Law*. Oxford: Oxford University Press, 82-102.

Del Punta, Riccardo. 2020. "Valori del diritto del lavoro ed economia di mercato." In Bruno Caruso, Riccardo Del Punta, Tiziano Treu (eds.), *Il diritto del lavoro e la grande trasformazione*, Milano: Il Mulino, 2020, 27-39.

Del Punta, Riccardo and Ralf Rogowski. 2019. "Introduction – Labour Market Policies and Labour Law Reform: Tensions and Opportunities." *International Journal of Comparative Labour Law and Industrial Relations* 35, 3: 279-283.

Dukes, Ruth and Catriona Cannon. 2016. "The Role of Social Partners." In Alan Bogg, Christina Costello and ACL Davies (eds), *Research Handbook on EU Labour Law*. Cheltenham: Edward Elgar, 89-113.

Kolben, Kevin. 2016. "Labour regulation, capabilities, and democracy." In Colin Fenwick and Shelley Marshall (eds.) *Labour regulation and development: Socio-legal perspectives*, Geneva: ILO, 60-81.

Luhmann, Niklas. 1992. "Operational Closure and Structural Coupling: The Differentiation of the Legal System." *Cardozo Law Review* 13, 5: 1419-41.

Luhmann, Niklas. 1995. *Social Systems*. Stanford, CA: Stanford University Press.

Luhmann, Niklas. 2004. *Law as a Social System*. Oxford: Oxford University Press.

Müller-Jentsch, Walther. 2018. *Tarifautonomie: Über die Ordnung des Arbeitsmarktes durch Tarifverträge*, Wiesbaden: Springer VS.

Nussbaum, Martha. 2000. *Women and Human Development: The Capabilities Approach*. Cambridge: Cambridge University Press.

Rogowski, Ralf. 2015. *Reflexive Labour Law in the World Society*. Cheltenham: Edward Elgar.

Rogowski, Ralf. 2016. "Regulation of Self-Regulation in British Labour Law." In Peter Collin (ed.) *Justice without the State within the State Judicial Self-Regulation in the Past and Present*. Frankfurt am Main: Klostermann, 91–112.

Rogowski, Ralf. 2019a. "Reflexive Labour Law and Industrial Relations from the Perspective of Modern Social System Theory." In Adalberto Perulli and Tiziano Treu (eds.) *The Role of the State and Industrial Relations*. Alphen aan den Rijn: Kluwer, 41-57.

Rogowski, Ralf. 2019b. "Theories of Labour Law Assessed from the Perspective of Reflexive Labour Law." In Alysia Blackham, Miriam Kullmann and Ania Zbyszewska (eds), *Theorising Labour Law in a Changing World: Towards Inclusive Labour Law*. Oxford and Portland: Hart, 265–272.

Rogowski, Ralf. 2020. "Sociology of Labour Law." In Jiří Přibáň (ed.), *Research Handbook on the Sociology of Law*. Cheltenham: Edward Elgar, 346–356.

Rogowski, Ralf. 2024. "Reflexive Regulation of Labour Law." In Alysia Blackham and Sean Cooney (eds.), *Research Methods in Labour Law*. Cheltenham: Edward Elgar, 70-83.

Rogowski, Ralf (ed.). 2023. *The Anthem Companion to Niklas Luhmann*. London and New York: Anthem Press.
Rogowski, Ralf and Ton Wilthagen (eds) (1994. *Reflexive Labour Law. Studies in Industrial Relations and Employment Regulation*. Deventer: Kluwer.
Sen, Amartya. 1999. *Development as Freedom*. Oxford: Oxford University Press. Sen, Amartya. 2009. *The Idea of Justice*. London: Allen Lane.
Supiot, Alain. 2001. *Beyond Employment. Changes in Work and the Future of Labour Law in Europe*. Oxford: Oxford University Press.
Teubner, Gunther. 1993. *Law as an Autopoietic System*. Oxford: Blackwell. Zumbansen, Peer. 2008. "Law after the Welfare State: Formalism, Functionalism and the
Ironic Turn of Reflexive Law." *American Journal of Comparative Law* 56, 3: 769–805.