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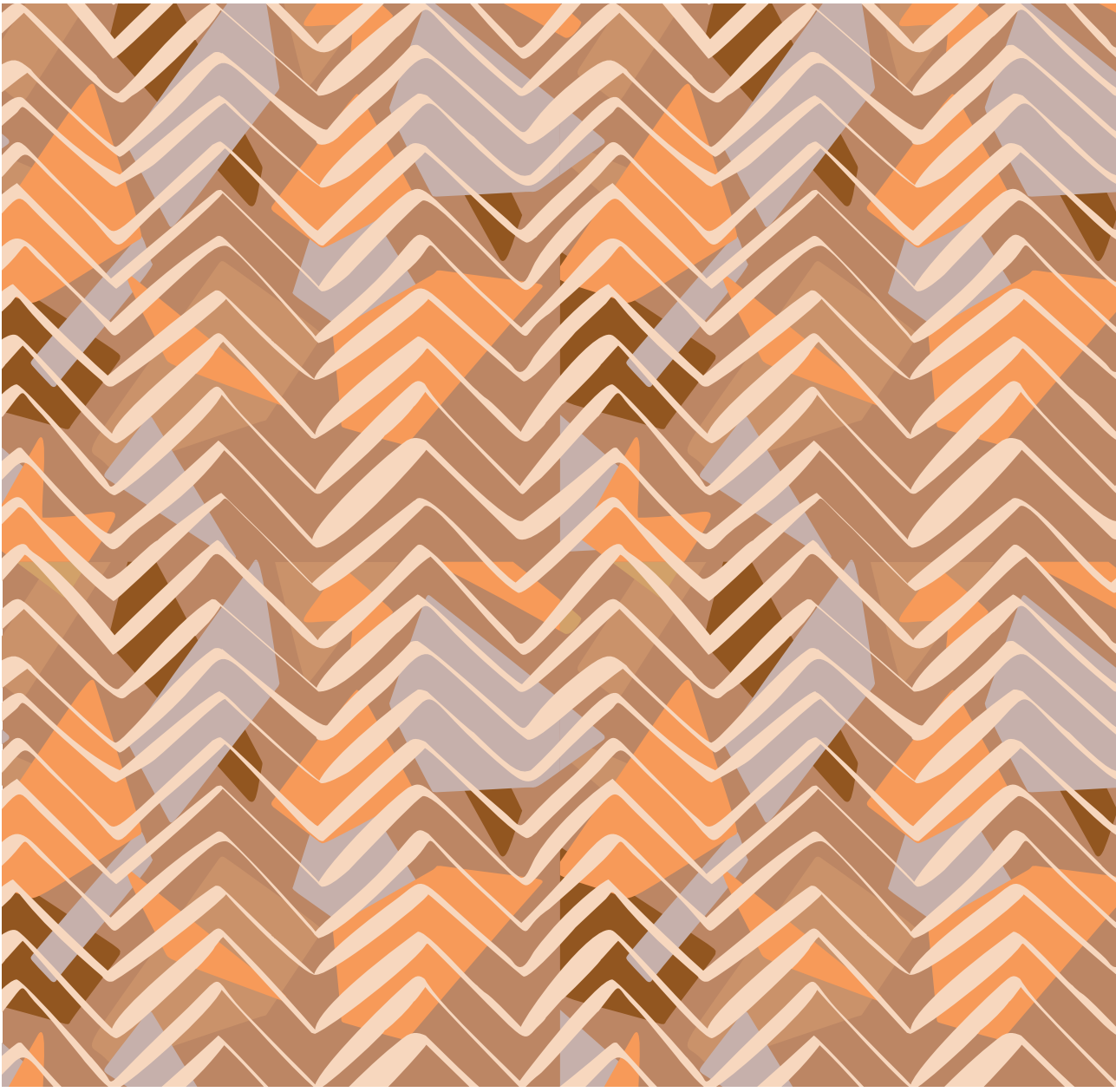

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EUROPEAN LAWYER AND INNOVATIVE TEACHING

ARTICLES

MEETINGS & READINGS

MARIA CECILIA PAGLIETTI*

QUALITY AND PLURALISM IN EUROPEAN LEGAL TEACHING

ABSTRACT. *In the field of modern legal education, the question we should ask our-selves is: what kind of jurists do we want to train? The answer to the question is crucial because the choice of educational model is neither ethically nor politically neutral, neither is legal education. The Clinical Legal Movement (CLM) might contribute to the purpose of reinventing legal education in Europe. I think the time has come for a systematic scholarly debate in the European legal academia and it seems to me that it should polarize around two issues: quality (ensure the inclusiveness of the quality dimensions for law clinics and the preservation of the diversity of the higher education institutions and teaching-learning modalities across the EU) and pluralism (of the models of clinical legal teaching -live-client, externship/internship programs-, of the areas of law covered -traditional/business-, of the students reached (politically minded, social committed or more business oriented).*

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1. Introduction

In the occasion of the first Roma Tre Law Review Seminars, we, the editorial board, thought to start with one of the flagships of our Department: clinical legal education.

It is a well-known issue that European legal teaching is coming under increasing pressure to reimagine itself. Experts claim several deficiencies: legal teaching (especially in civil law countries) is too dogmatic, too much doctrinal subject centered, too passive, too textbook-based, not sufficiently assessed on the law in action and on the European legal order.[1]

We are also aware that the unprecedented times characterized by social and economic turmoil across Europe has revealed a gap between legal education and legal realities.[2]

Thus, continental legal teaching is experiencing a process of obsolescence, and would need a 'Langdell revolution', promoting new teaching strategies, introducing practice-oriented, student-centered, problem and community-based, interactive learning methods in law schools.

And although the European scholarship had been admonished for years to 'sortir du néolothique',[3] the issue of the education of the jurist remained *de facto* neglected.[4]

[1] JH Merryman, 'Legal Education in Civil Law and Common Law Universities: A Comparison of Objectives and Methods' in N Picardi and R Martino (eds), *L'educazione giuridica*, *Modelli di Università e progetti di riforma*, vol 1 (2nd edn, Cacucci 1975) 168; LM Friedman and G Teubner, 'Legal Education and Legal Integration: European Hopes and American Experience' in M Cappelletti, M Seccombe and JHH Weiler (eds), *Integration Through Law. Europe and the American Federal Experience* (De Gruyter 1986) 345; M Vogliotti, 'L'urgence de la question pédagogique pour le droit postmoderne' (2014) 72 Revue interdisciplinaire d'études juridiques 73; R van Gestel and HW Micklitz, 'Why Methods Matter in European Legal Scholarship' (2014) 20 European Law Journal 292; P Calamandrei, *Troppi Avvocati!* (La Voce 1921) in M Cappelletti (ed), *Opere giuridiche*, vol 2 (Morano 1966) 65, 174 ff. discusses the 'metodo chiacchieratorio'.

[2] B Garth and G Shaffer, 'The Globalization of Legal Education: A Critical Perspective' in B Garth and G Shaffer (eds), *The Globalization of Legal Education: A Critical Perspective* (Oxford Academic 2022); U Eco, *Sei passeggiate nei boschi narrativi* (La nave di Teseo 2018).

[3] A Tunc, 'Sortir du néolithique (Recherche et enseignement dans les Facultés de droit)' [1957] Dalloz 71.

[4] B de Witte, 'European Union Law: A Unified Academic Discipline?' (2008) Working Paper, EUI RSCAS, 2008/34 <https://cadmus.eui.eu/bitstream/handle/1814/10028/EUI_RSCAS_2008_34.pdf?sequence=1&isAllowed=y>

On the contrary, it is urgent and topical, also considering that the role of the jurist requires a different training model from that which was conceived when State law was at the center of the legal universe and the function of the jurist revolved entirely around it.[5]

We need to re-think the role of jurists in society and, in the field of education, the question we should ask our-selves is: what kind of jurists do we want to train?

The answer to the question is crucial because the choice of educational model is neither ethically nor politically neutral,[6] neither is legal education.[7] It follows that legal education must, if it is to best serve all stakeholder interests, reflect this changing context.[8]

The Clinical Legal Movement (CLM) might contribute to the purpose of reinventing legal education in Europe.

And our Department has never shied away from scientific debate on the teaching of law either, promoting conferences[9] and publications on the subject.[10]

accessed 16 June 2023; E Conte, 'Educare il giurista. Le sfide del terzo millennio e le tentazioni della conservazione accademica' in B Pasciuta and L Loschiavo (eds), *La formazione del giurista. Contributi a una riflessione* (Roma TrE-Press 2018) 115; Merryman (n 1) 168.

[5] V Zeno-Zencovich, *Ci vuole poco per fare una università migliore. Guardando oltre la 'Riforma Gelmini'* (Il Sirente 2011) 36; A Alemanno and L Khadar, 'Reinventing Legal Education: How Clinical Education Is Reforming the Teaching and Practice of Law in Europe' (CUP 2018) 18.

[6] M Vogliotti, 'Per una nuova educazione giuridica' (2020) Dir e Quest Pubbl 229, 246.

[7] S Cassese, 'Legal Education Under Fire' (2017) 25 European Review of Private Law 143, 146.

[8] C Amato, 'Experiential Learning from the Continental Viewpoint. If the Cap Fits…' in R Grimes (ed.), *Rethinking Legal Education Under the Civil and the Common Law* (Routledge 2017) 13, 19.

[9] Eg, 'La didattica innovativa: le cliniche legali in italia e il confronto con le esperienze straniere', Rome Tre University, Department of Law, 28th May 2013.

[10] Pasciuta and Loschiavo (n 4).

2. Legal education in European higher education area. Quality and pluralism

As recalled, slowly, laboriously, not without idealistic swerves and persistent contradictions, we are witnessing a wave of modernization of legal teaching in continental Europe and in Italy in particular, as awareness of the need to review the relationship between theory and practice, between study and internship, has gradually consolidated.[11]

The profound change in perspective that, set within the European dimension of higher education (European Higher Education Area: EHEA), marks the transition from a monolithic model of knowledge transmission (based on frontal academic lecture modules), to a plural model, comprising alternative pedagogical modes that present the common trait of the experiential matrix (Learning by doing).

One of the most significant examples of these new teaching methods is the Clinical legal education, which is:

> [A] teaching method based on experiential learning, which fosters the growth of knowledge, personal skills, competences and values, as well as promoting social justice, by providing pro bono services. Clinical legal education uses practice-oriented, student-centred, problem-based, interactive teaching methods including, but not limited to, the practical work of students on real cases and social issues supervised by academics and professionals. These educational activities aim to develop professional attitudes and foster the growth of the practical skills of students with regard to the modern understanding of the role of the socially oriented professional in promoting the rule of law, the effectiveness of protection, providing access to justice and peaceful conflict resolutions, and solving social problems.[12]

[11] M Barbera, 'The Emergence of Italian Clinical Education Movement' in Alemanno and Khadar (n 5) 3.

[12] Art. 2(1) ENCLE, 'Standards for European Clinical Legal Education' <https://encle.org/upload/lg/news/ENCLE-Standards-Final-Version-July-2022.pdf> accessed 10 June 2023; see also STARS, 'STARS Project Guidelines for Clinical Legal Education' (2021) <http://www.lawstars.eu/articolo.aspx?id=273> accessed 10 June 2023; Roma Tre University, 'Guidelines for the Legal Clinics of the Department of Law of the University of Roma Tre' <https://giurisprudenza.uniroma3.it/wp-content/uploads/sites/3/file_locked/2022/12/Guidelines-LC-Roma-Tre-EN-DEF.pdf> accessed 10 June 2023.

In addition to the traditional and pre-eminent function of knowledge transmission in the proper sense, this new teaching method also has a further social and professionalizing function.[13]

Legal clinics represent also a tool of the Third Mission objective of universities, consisting in widening the traditional 'missions' (teaching and research) and adding a new one, 'a contribution to society' in cultivating social cohesion, reducing inequalities and raising the level of knowledge, skills and competences in society.[14]

It is well-known, in fact, that the movement for clinic-based legal education was inextricably bound up with the movement for community-based access to justice and other broader movements for social change and social justice,[15] in particular the access to justice movement of the 1960s and 1970s drawing on the work of Mauro Cappelletti.[16] From this background originates another deep link, the one between clinical legal education and legal aid programs.[17]

The need to bridge the gap between legal theorists and practitioners, the need to overcome the lack of interest in applied skills and, ultimately, the disconnect between law and society, constitute an added value of legal clinics, which become a bridge between the university and the labor market.[18]

[13] C Blengino and A Gascón-Cuenca (eds), *Epistemic Communities at the Boundaries of Law: Clinics as a Paradigm in the Revolution of Legal Education in the European Mediterranean Context* (Ledizioni 2019).

[14] S Bergan and R Damian (eds), 'Higher Education for Modern Societies – Competences and Values' (2010) Council of Europe higher education series No. 15 <https://rm.coe.int/higher-education-for-modern-societies-competences-and-values/168075dddb> accessed 10 June 2023.

[15] J Giddings and others, 'The First Wave of Modern Clinical Legal Education: The United States, Britain, Canada, and Australia' in FS Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (OUP 2010) 4; FS Bloch, 'Access to Justice and the Global Clinical Movement' (2008) 28 Wash. UJL & Pol'y 111; MR Marella and E Rigo, 'Le cliniche legali, i beni comuni e la globalizzazione dei modelli di accesso alla giustizia e di lawyering' (2015) 33 Rivista Critica di Diritto Privato 537.

[16] M Cappelletti and B Garth, 'Access to Justice: The Worldwide Movement to Make Rights Effective: A General Report' in M Cappelletti and B Garth (eds), *Access To Justice, A World Survey*, vol 1 (Giuffrè, Sijthoff/Noordhoff 1978). On the history of clinical legal movement: PA Joy, 'The Uneasy History of Experiential Education in U.S. Law Schools' (2018) 122 Dick L Rev 551.

[17] FS Bloch and MA Noone, 'Legal Aid Origins of Clinical Legal Education' in Bloch (n 15) 153.

[18] 'With labour markets increasingly relying on higher skill levels and transversal competences, higher education should equip students with the advanced knowledge, skills and competences they need throughout their professional

I think the time has come for a systematic scholarly debate in the European legal academia and it seems to me that it should polarize around two issues: quality and pluralism.[19]

Pluralism. If one were to identify a common thread running through the numerous courses that make up the clinical programs offer, it would be that of pluralism. Pluralism of the models of clinical legal teaching (live-client, externship/internship programs), of the areas of law covered (traditional/business), of the kind of students addressed and reached (politically minded, social committed or more business oriented).[20]

Quality. In spite of the considerable diffusion of the clinical courses in Italy, there is no homogeneity of models with which these courses are implemented in Law Schools, and, on the contrary, the clinical method is applied with a quantity of variations that sometimes disregard its very nature.

Part of the Italian clinical legal courses do not, despite their names, have even the minimum characteristics of legal clinics. The most recurrent misunderstanding, for instance, appears that of labelling as clinics courses those actually of a mere seminar nature, aimed at the retrospective analysis of cases decided by the courts. There are even abuses of the name that leads to depreciating the 'genuine' law clinics and fostering misconceptions regarding their role (the case of the 'fake clinics').

The fact that the student has to deal with real and not simulated cases is, on the other hand, a distinctive feature of legal clinics, as is the necessary supervision by a professional (at least according to our Guidelines, although Paul Mckeon has introduced, in his paper in this Issue, a new topic: that of the recognition of simulation courses as Legal clinics).

lives. Employability empowers the individual to fully seize the opportunities in changing labour markets': Communiqué of the Conference of European Ministers Responsible for Higher Education, Leuvenand Louvain-la-Neuve, 28-29 April 2009 <https://ec.europa.eu/commission/presscorner/detail/en/IP_09_675> accessed 16 June 2023.

[19] E van Bemmelen van Gent, 'Legal Education: A New Paradigm' [2012] Bynkershoek Law Review 2; C Blengino and A Gascón-Cuenca (eds), *Epistemic Communities at the Boundaries of Law: Clinics as a Paradigm in the Revolution of Legal Education in the European Mediterranean Context;* A Alemanno and L Khadar, 'Conclusion' in Alemanno and Khadar (n 5) 341.

[20] M Ball, 'Legal education and the "idealistic student": using Foucault to unpack the critical legal narrative' (2010) 36 Monash University Law Review 18.

3. Trends in clinical legal teaching: recognition and institutionalization

Our Law School has been, since the very beginning (1996), focusing on teaching methods strategies practice-oriented, student-centered, problem and community-based.[21]

We have faced some many challenges which are common to all or most European legal clinics.

We have some achievements but also ongoing challenges.

If we want to resort to a broad periodization of the implementation of the Roma Tre clinical courses, we may distinguish an early stage period (starting from early 2010s, characterized by the implementation of the first 3 law clinics: Immigration, Children and Small savers' rights); a second phase (late 2010s: where LCs had experienced a boom but suffered of lack of recognition and institutionalization being developed from volunteer arrangements (as in the rest of the Continental Europe); nowadays, we are witnessing to the path towards institutionalization.

In November 2022 have adopted a Regulation (which regulates the procedural requirement and organizational aspects of all the activities carried out by the Legal Clinics of the Department of Law and is tailored for the needs and context of our university) and the Guidelines (whose aim is to guarantee the quality of the activities carried out by the Legal Clinics and to ensure the transparency of the educational pathway and teaching model offered).

We suffered of lack of dedicated coordination; but now we have a Board of clinicians[22] and a coordinator, who is also the contact person for the enhancement of the Department's clinical expertise.

These are all tools to contribute to the recognition of LCs, help LCs to have a clear status within university courses and to gain public recognition, also, they promote the expansion of quality-ensured legal clinics.

[21] A Alemannoand L Khadar, 'Introduction' in Alemanno and Khadar (n 5) 1; M Mekki (ed) *Réformer l'enseignement du droit en France à la lumière des systèmes étrangers* (LexisNexis 2017).

[22] 'Whose activity is aimed at coordinating clinical activities within the Department, as well as ensuring the quality of the courses, the transparency of the training path and the teaching model offered': art. 2(7) Regulation on Legal Clinics.

4. Quality control in legal clinical teaching: the Guidelines

Quality measures for legal clinics consist of criteria formalizing the teaching methods and creating performance indicators in the field of legal clinical teaching.

In 2022 we adopted Guidelines (which are an adaptation of the Erasmus Plus project named 'Skills Transfers In Academia : A Renewed Strategy Enhancing LEGAL CLINICS in the European Union' – STARS, that Roma Tre legal clinic on Small Savers Protection granted along with other 4 partners[23]) which aim to ensure the inclusiveness of the quality dimensions for law clinics and the preservation of the diversity of the higher education institutions and teaching-learning modalities across the EU (and the Bologna process members).

The Guidelines goal is to upgrade the quality of all legal clinics of our Department, to create a sense of common framework and general objectives associated with the clinics, to harmonize and upgrade the practices at the legal clinics in our Department. For clinics already established, the Guidelines help them to stay on the right track and make sure they constantly strive for rigor and quality. For newly established clinics, or clinics-to-be, they provide a model based on best practices.

Originally labelled 'quality standards', their name changed (the shift was decided by the STARS Project) as it was perceived too binding, so the final version is 'Guidelines'.

It is a set of 8 articles divided in four sections, available on the Law School website, both in Italian and in English.

A first section covers the goals and definitions, a second part focuses on the overall structure and functioning, a third part offers guidelines for pedagogical purposes, and the last part deals with the quality of the legal services provided.

A detailed definition Legal Clinic (Art. 2(1)[24] is provided, along with the criteria

[23] It was a consortium, composed by 5 Universities (Luxembourg, Roma Tre, Brescia, Palackeho V Olomouci, Romano-Americana) that have granted the Erasmus Plus Programme (the European Commission's Programme for education, training, youth and sport), which aims to develop innovation in higher education, especially regarding to the innovative teaching methods (ie legal clinics).

[24] ENCLE (n 12); see also STARS (n 12).

defining clinical legal education and the distinction (as in the American Bar Association – ABA – revised Standards and Rules of Procedure for Approval of Law Schools, 2022-23) between legal clinics and other types of experiential courses, such as simulations and Moot Courts. Art. 2(2) provides, in fact, that:

Legal clinics are educational organizational units applying clinical legal education methodology. Legal clinics differ by their methodology from other student-centered educational programs such as, for example, moot courts or (in civil law jurisdictions) student presentation and analysis of existing case-law, since in legal clinics students are not involved in simulated proceedings but operate on the contrary in a real-life context.

The Guidelines cover students' well-being and information, transparency, resources, the quality of the service provided, users' positions and interests, confidentiality and use of personal data, and conflict of interest; they emphasize on the pedagogical tools the clinic should use, and define its methodology as 'practice-oriented, student-centered, problem-based, interactive teaching'. They also stress on ethics, deontology and confidentiality rules.

They also focus on the key risks to be prevented and the likely remediation to envisage when the risks materialize and may affect the quality of the legal clinics (for example a limitation of the number of students per supervisor, or the estimated desirable workload for students).

5. Pluralism: business (or transactional) clinics.

One of the main issues discussed when drafting the Guidelines was the terminological one related to the use of the word *client* instead of *user*.

Finally, we all agreed on the term user rather than client since it, having a wider meaning, may include consumers organizations, enterprises community or also associations, NGOs, organizations and institutions, giving the possibility to a wider range of subjects to benefit from the legal clinics services.

Here raises the issue of the business clinics (as in British English) or transactional

clinics (according to American English),[25] clinical courses which address to a variety of the targeted users representing clients who, in their business, would have no access to legal advices.[26]

Many reasons on several levels (economic, social, cultural and educational) pushed for the development of the business clinics:[27] The failure of the public interest law practice of litigation;[28] the rapid decline of public legal aid in many countries, which has meant that those with limited means are increasingly unable to get advices, vindicate and enforce their legal rights;[29] the need to broaden the clinical curriculum;[30] the Pandemic emergence.[31]

The trend towards business pro bono in clinical legal education has as many detractors as apologists.

Detractors believe that business clinics fail in pursuing the social justice mission and go against the spirit of the CLE movement; that clinics should focus on the

[25] For the terminological issue see D Schlossberg, 'An Examination of Transactional Law Clinics and Interdisciplinary Education' (2003) 11 Journal of Law and Policy 195.

[26] L Thomas and N Johnson (eds), *Clinical Legal Education Handbook* (University of London Press 2020).

[27] A detailed history of the development of transactional legal clinics in SR Jones, 'Small Business and Community Economic Development: Transactional Lawyering for Social Change and Economic Justice' (1997) 4 Clinical L Rev 195.

[28] LG Trubek, 'The Worst of Times… And the Best of Times: Lawyering for Poor Clients Today' (2011) 22 Fordham Urb. LJ 1123.

[29] M Ahmed and X Kramer, 'Global Developments and Challenges in Costs and Funding of Civil Justice' (2021) 14 Erasmus L Rev 181.

[30] SR Jones and J Lainez, 'Enriching the Law School Curriculum: The Rise of Transactional Legal Clinics in U.S. Law Schools' (2014) 43 Wash UJL & Pol'y 85, 94-95; Trubek (n 28).

[31] During the Pandemic there has been a massive development of business clinics, as a response to the legal issues business were going through (Washington: Entrepreneurship Law Clinic; New York University: Client Work; Yale: Entrepreneurship & Innovation Clinic; Small Business and Community in a Time of Crisis; Financial Markets and Corporate Law Clinic; UCI Law: Startup and Small Business Clinic; University of Michigan: Entrepreneurship Clinic; Harvard University: Predatory Lending and Consumer Protection Clinic; Federal Tax Clinic; Columbia: Entrepreneurship and Community Development Clinic; University of Chicago: Institute for Justice Clinic on Entrepreneurship; University of Pennsylvania: Entrepreneurship Legal Clinic; University of Virginia: Entrepreneurial Law Clinic; University of California—Berkeley: New Business Community Law Clinic; Duke University: Community Enterprise Clinic + Start-Up Ventures Clinic; Cornell University: Entrepreneurship Law Clinic; UCLA: Corporate Practice Clinic; George Town: Social Enterprise and Nonprofit Clinic; University of Texas - Austin: Entrepreneurship and Community Development Clinic).

provision of legal advice about personal matters to individuals who cannot afford a lawyer,[32] instead than give their free legal advices to entrepreneurs or other existing businesses that can afford a lawyer.[33]

They claim explicitly that the duty of the LCM is teach the lessons of social justice[34] – so that pro bono business assistance must be considered an oxymoron[35] – and advocate the depoliticization, gentrification[36] and agnostication[37] of clinical education.[38]

On the other hand, apologists underline the educational value, the economic benefits for the society and the strong social dimension of business clinics.

Representing business entities does not mean representing the elite[39] but, on the contrary, economically disadvantaged small business owners. These may be No-profit organizations, microenterprise (with no employees) or (very) small businesses, or individuals belonging to social disadvantaged groups, such as women[40] or minority owners firms.[41]

Let's just think about the case of the start-ups clinics: In this case legal advices

[32] S Wizner, 'Is Social Justice Still Relevant?' (2012) 32 Boston College Journal of Law and Social Justice 345, 346.

[33] V Roper and others, 'Understanding the Scope of Business Law Clinics: Perspectives from the United Kingdom, Israel and the United States' (2018) 5 J Int'l & Comp L 217, 218.

[34] F Quigley, 'Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics' (1995) 2 Clinical L Rev 37, 38 (advocating that a complete legal educational 'should include lessons of social justice').

[35] Jones, 'Small Business and Community Economic Development' (n 27).

[36] Panel Discussion, 'Clinical Legal Education: Reflections on the Past Fifteen Years and Aspirations for the Future' (1987) 36 Cath U L Rev 337, 342.

[37] JC Dubin, 'Clinical design for Social Justice Imperatives' (1997-1998) 51 SMUL Rev 1461, 1466.

[38] A Lopez, 'Learning Through Service in a Clinical Setting: The Effect of Specialization on Social Justice and Skills Training' (2001) 7 Clinical L Rev 307, 317.

[39] BG Garth and JS Sterling, 'Diversity, Hierarchy, and Fit in Legal Careers: Insights from Fifteen Years of Qualitative Interviews' (2018) 31 Geo J Legal Ethics 123.

[40] On women-owned businesses see biz2credit, 'Annual Women-Owned Business Study 2023' (2023) <https://www.biz2credit.com/research-reports/annual-women-owned-business-study-2023> accessed 10 June 2023.

[41] SR Jones, 'Promoting Social and Economic Justice Through Interdisciplinary Work in Transaction Law' (2004) 14 Wash UJL & Pol'y 249.

are provided to potential entrepreneurs which are usually young people with no income.[42]

Also, small enterprises play an important role in any economy: today small business is viewed as the new public interest law.[43]

So I think that in the modern clinical design features, there should be no tension between traditional and business clinics, intended as the contrast between social justice and education, between values and training. Traditional and business clinics can coexist without clash of values, without necessarily seeing in business clinics the deemphasize of the idealism, the public service goals and the concerns of access and justice towards the primacy of skills acquisitions. Once again, pluralism. The cultural, social and economic scenario is different than the one in the 1960s.

The law and the legal framework changed. The current legal system requires a greater range of competencies; corporate law developments, influenced by the social entrepreneurship movement, have altered the legal environment and the landscape of corporate practice.

Professionals changed. Since the 1990s scholars have been advocating 'the changing nature of work in law and the changing nature of the profession itself'[44] and claiming that 'the constant expansion of legal regulation means that rather than provide students with an exhaustive (but highly temporary) knowledge of the minutiae of legal rules in any one subject area, it has become more important to ensure that jurists have excellent research and problem-solving skills that enable them to continue to develop and enhance their knowledge once in practice'.[45]

Clinicians changed: modern clinicians are, for obvious generational reasons, less rooted in the 1960s ideology. They won the long battle for the integration of clinics within the law school curriculum and the regularization of the status of clinical faculty, so they are now (more) institutionalized (surely in the U.S, almost in Europe).

[42] Roper and others (n 33) 242.

[43] Jones, 'Small Business and Community Economic Development' (n 27).

[44] A Sherr, 'Foreword' in J Webb and C Maug (eds), *Teaching Lawyers' Skills* (Butterworths 1996) vi.

[45] J MacFarlane, 'The Legal Skills Movement Ten Years On: Triumph or Compromise' (1997) 24 JL & Soc'y 440.

Students changed: they are Digital Natives, which is the most racially, ethnically diverse, entrepreneurship generation ever;[46] they look for professional identity formation, as they are more careerists; they are more focused on their post-graduate marketability.[47]

I think that there is nothing wrong in this. I think that participate to a clinic having both the aims of a different intellectual perspective on legal doctrine (or practice or institutions) and the opportunity to be trained to be successful practitioners, does not diminish the social dimension of clinical legal teaching.[48]

[46] SK Berenson, 'Educating the Millennial Law Students' (2008) 1 Charlotte LR 51.

[47] MJ Kotkin, 'The Violence Against Women Act Project: Teaching a New Generation of Public Interest Lawyers' (1996) 4 JL & Pol'y. 449.

[48] Ibid 202 (discussing how small business development is also part of the multifaceted quest for economic justice for indigent people and others marginalized by the dominant society).

LAURA BUGATTI*

LEGAL CLINICS AS A LEADING FORCE FOR CHANGES IN LEGAL EDUCATION

ABSTRACT. *Criticisms of legal education have remained persistent over time, and the need for change and reform is a global concern. The current approach to legal education in civil law countries reflects the need to turn from a dogmatic to a problematic approach in order to consider both practical issues and social demands. Against this backdrop, the paper aims to explore the role played by clinical legal education in order to align continental legal education with this ambition, thereby making law school experiences more educational for students and, at the same time, promoting social justice and upholding the rule of law.*

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1. Entry restrictions to the practise of law and legal education under fire

The peculiarity of the professional legal services sector has over time legitimised the consolidation of a highly regulated professions market. These regulations include the entry barriers to the practise of law generally composed of academic studies, professional traineeship and bar examination(s).

Based on the need to protect the public interest, the entry restrictions are aimed at preserving the quality of professional services.[1] Setting the minimum requisites of human capital that must be possessed in order to enter into the legal profession (ie, regulating the 'input') is a way to ensure that only individuals with adequate training credentials are authorised to provide their services to the public and, thus, to ensure that a minimum quality of legal services is guaranteed (ie, ensuring the quality of the 'output'). Entry restrictions curb the most extreme consequences of adverse selection and prevent opportunistic behaviour (ie, 'moral hazard'); they also provide adequate protection for consumers despite the existence of strong information asymmetries, especially in the credence goods market.[2] Another rationale for professional regulation is the need to avoid negative externalities while protecting positive ones.[3]

At the European level, the possible deregulation of the professional sectors has gradually become one of the major concerns of the 21st century. Due to the absence of

[1] D Heremans and T Heremans, *Towards Evidence-based Professional Regulation* (Hart Publishing 2012) 171.

[2] C Shapiro, 'Investment, Moral Hazard, and Occupational Licensing' (1986) 53 Rev Econ Stud 843; T Heremans, *Professional Services in the EU Internal Market: Quality Regulation and Self-Regulation* (Hart Publishing 2012) 49. I Paterson, M Fink and A Ogus, *Economic Impact of Regulation in the Field of the Liberal Professions in Different Member States: Regulation of Professional Services* (Institut für Höhere Studien 2003 - European Network of Economic Policy Research Institutes Working Paper 52, February 2007).

[3] Quality of the legal services might have a severe impact, not only on the single client but also on society as a whole due to the inner link existing between the delivery of legal services and the achievement of public goals such as the good administration of justice and a well-functioning judicial system. See RNM Graham, *Legal Ethics: Theories, Cases, and Professional Regulation* (3rd edn, Emond Publishing 2014); FH Stephen, 'Regulation of the Legal Professions or Regulation of Markets for Legal Services: Potential Implications of the Legal Services Act 2007' (2008) 19 Eur. Bus. Law 1130; N Semple, *Legal Services Regulation at the Crossroad. Justitia's Legions* (Edward Elgar 2015) 28; B Hoorn Barton, 'Why Do We Regulate Lawyers: An Economic Analysis of the Justifications for Entry and Conduct Regulation' (2001) 33 Ariz. State Law J. 430, 470 ff.; F Zacharias, 'Lawyers as Gatekeepers' (2004) 41 San Diego L. Rev. 1387, 1394 and 1395.

competitiveness in the professional market, the alleged capacity of the regulatory restrictions to produce a reduction in consumer choice and an increase in price without also ensuring high quality standards has prompted the EU Institutions to advocate for a 'better regulation' of the professional sectors, including the legal sector.[4]

Notwithstanding the limited availability and fragmentary nature of empirical evidence on the complementary relation between qualification and entry requirements and the quality of legal services,[5] the Member States have not challenged or undermined the validity of such restrictions.

Despite the ongoing process of liberalising professions and on the wave of the Bologna Process, an increasing convergence of the legal educational system in Europe can be inferred,[6] as underlined in a statement by the EU Commission in 2016: 'In terms of qualification, higher education is required in the large majority of Member States (a law degree being compulsory), followed by a mandatory traineeship and/or additional professional experience and bar examination'.[7] Thus, at the end of its evaluation process, the Commission did not find any criticalities or suggest any reforms regarding the legal educational path as regulated at the national level by Member States.[8]

[4] COM(2004) 83 fin.; COM(2005) 405 fin.; COM(2013) 676 fin.; COM(2015) 550 fin.

[5] D Gillanders, J Love, A Paterson and F Stephen, 'Spatial Aspects of Deregulation in the Market for Legal Services' (1992) 26 Reg. Stud. 127; FH Stephen, JH Love and A Paterson, 'Deregulation of Conveyancing Markets in England and Wales' (1994) 15(4) Fiscal Studies 102; FH Stephen and JH Love, 'Regulation of the Legal Profession' in B Bouckaert and G De Geest (eds), *Encyclopedia of Law and Economics, Volume III: The Regulation of Contracts* (Edward Elgar 2000) 989; R Van den Bergh and Y Montangie, 'Competition in Professional Services Markets: Are Latin Notaries Different?' (2006) 2 J Competition Law Econ 189, 193–194.

[6] See, eg, the case of the Spanish system: the previous access pathway to become a lawyer – allowing law graduates to directly assume the title of 'abogado' – constituted a profound exception in Europe. In 2011, this system was reformed and aligned with the other MSs' regulations with the provision of a professional training period and an entry exam: Real Decreto 775/2011, de 3 de junio, por el que se aprueba el Reglamento de la Ley 34/2006, de 30 de octubre, sobre el acceso a las profesiones de Abogado y Procurador de los Tribunales, in BOE, n 143, 16 June 2011, 61762.

[7] Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and The Committee of The Regions on reform recommendations for regulation in professional services' COM(2016)820, 18.

[8] The EU Commission pointed out some criticisms on more circumscribed aspects, eg, the fact that in some MSs, 'training and experience obtained abroad are not duly taken into account when allowing access to legal traineeships for lawyers'; in some other MSs, there is the provision of additional professional qualification requirements in order

Even if substantial homogeneity across Europe of the entry pathway has been recognised and the importance of entry restrictions has not only been affirmed but even strengthened, debates continue worldwide regarding how legal education should be reshaped and restructured to ensure that only highly specialised and properly trained human capital can enter into the market of the regulated legal profession.

Criticisms of the legal educational model have remained persistent and the need for reforms seems to be a global concern.

Since the 17th and 18th centuries, continental legal education has been associated with the characteristics of abstract and dogmatic legal thinking. The shift towards natural law conveyed an approach in which private law was to be understood as pure science, disconnected from factual demands. This disconnect between law and society was later exacerbated with the rise of legal positivism: jurists faced with the comprehensiveness of national codes assumed the role of mere exegetes of the rules, abandoning the mission of serving the real needs of the society. This led to a formalistic, conceptual and positivistic approach to the study of law.[9] This perspective was only questioned after the Second World War when critical thinkers started to challenge the traditional approach to law. The emergence of a problematic approach to law in which there is an awareness that legal rules and principles are social constructs created by individuals in response to specific historical contexts and social needs rather than derivates of a universal and timeless law also forced a rethink of legal education. Thus, law also needs to be taught taking into consideration these practical implications.[10]

Critiques of the English educational system are also noteworthy. In the mid-20th century, some government reports[11] criticised the poor standards of English legal

to practise before the highest courts, and so on. See ibid 18-19.

[9] P Grossi, *La cultura del civilista italiano. Un profilo storico* (Giuffrè 2002)

[10] C Amato, 'Experiential Learning from the Continental Viewpoint: If the Cap Fits…' in R Grimes (ed) *Rethinking Legal Education Under the Civil and Common Law. A Road Map for Constructive Change* (Routledge 2017) 13. C Amato, 'Il modello clinico bresciano' in A Maestroni, P Brambilla and M Carrer (eds), *Teorie e Pratiche nelle Cliniche Legali*, *Vol. II Cliniche Legali* (Giappichelli 2018), 145, 149; C Amato and E Poillot, 'Towards a European Culture of Legal Clinics: Trasplanting the American Cinical Model', in A Janssen e H Schulte-Nölke (eds), *Researches in European Private Law and Beyond. Contributions in Honour of Reiner Schulze's Seventieth Birthday* (Nomis 2020) 383, 392; F Macario e M Lobuono, Il diritto civile nel pensiero dei giuristi (Cedam, 2010) 373.

[11] See, in particular: *Report of the Legal Education Committee* (Cmd 4663, 1934) ('Atkin Committee'); *Report of the*

education and the inefficiency of the system, pleading for reforms – notwithstanding that English legal education and training was born as a product of the legal profession. The dissatisfaction with the English education system has made it possible to advocate for the introduction of a three-stage model of legal education: an academic stage, a professional stage and a continuing stage.[12] This allows for the recognition of an educational model that would evaluate not only the practical training but also the university studies, thus making academic studies a key component of the teaching and learning pathway of future barristers and solicitors (at least until the recent reform for solicitors, according to which the Solicitors Regulatory Authority (SRA) decided to abandon the qualifying law degree (QLD) and the Legal Practice Course (LPC) in favour of a centralised examination system, the Solicitors Qualifying Exam – SQE).[13]

Committee Appointed by the Prime Minister under the Chairmanship of Lord Robbins (Cmnd 2154, 1963) ('Robbins Report'); *Report of the Committee on Legal Education* (Cmnd 4595, 1971) ('Ormrod Report'); Royal Commission on Legal Services, *Final Report* (Cm 7648, 1979) ('Benson Report'); *A Time for Change: Report of the Committee on the Future of the Legal Profession* (1988) ('Marre Committee'); Lord Chancellor's Advisory Committee on Legal Education and Conduct, *First Report on Legal Education and Training* (1996) ('ACLEC'); *Review of the Regulatory Framework for Legal Services in England and Wales* (2004) ('Clementi Report'); *Legal Education and Training Review, The Future of Legal Services Education and Training Regulation in England and Wales* (2013) <http://www.letr.org.uk/the-report> accessed 9 June 2023.

[12] Ormrod Report. See also *Legal Education and Training Review* (n 11) xiv: 'A number of recommendations are made in respect of the Qualifying Law Degree (QLD) and Graduate Diploma in Law (GDL). These continue to provide an important pathway into the legal services sector for a range of authorised persons, and thus constitute an important foundation for professional training'.

[13] SRA, *Statement of Solicitors Competence* (2015) <https://www.sra.org.uk/solicitors/competence-statement.page> accessed 9 June 2023; SRA, *Training for Tomorrow: Assessing Competence, Consultation Paper* (2015); SRA, *A New Route to Qualification: The Solicitors Qualifying Examination, Consultation Paper* (2017); SRA, *A New Route to Qualification: New Regulations, Consultation Paper* (2017) <https://www.sra.org.uk/sra/consultations/new-regulations.page> accessed 9 June 2023. For a comment on the SRA initiative, see R Fletcher, 'Legal Education and Proposed Regulation of the Legal Profession in England and Wales: A Transformation or a Tragedy?' (2016) 50 The Law Teacher 371; E Hall, 'Notes on the SRA Report of the Consultation on the Solicitors Qualifying Exam: "Comment is Free, but Facts are Sacred"' (2017) 51 The Law Teacher 364; E Fry and R Wakeford, 'Can We Really Have Confidence in a Centralised Solicitors Qualifying Exam? The Example of the Qualified Lawyers Transfer Scheme' (2017) 51 The Law Teacher 98; C James and J Koo, 'The EU Law "Core" Module: Surviving the Perfect Storm of Brexit and the SQE' (2018) 52 The Law Teacher, 68; J Gibbons, 'Policy Recontextualisation: The Proposed Introduction of a Multiple-choice Test for the Entry-level Assessment of the Legal Knowledge of Prospective Solicitors in England and Wales, and the Potential Effect on University-level Legal Education' (2017) 24 Int J Leg Prof 227; M Davies, 'Changes to the Training of English and Welsh Lawyers: Implications for the Future of University Law Schools' (2018) 52 The Law Teacher 100; P Leighton, 'Legal Education in England and Wales: What Next?' (2021) 55 The

Even today, the need to rethink approaches to teaching and learning law in theory and practise continues to inflame the debate among scholars.[14] This also stems from the economic, social and political challenges of the present time and the ongoing changes in the legal profession, which force questions about the validity of the current educational system in the face of new needs.

Indeed, the legal services landscape is rapidly changing, and the legal profession is facing a working environment marked by competition and deregulation, increasing globalisation and technological innovation. This new reality will have a deep impact on the traditional business work structures of professionals and the way in which legal services are provided and delivered. Even the content of the practise of law is going to be reshaped, influenced as well by the possibility of automatisation of some activities and the emerging tendency to the commodification of some legal services due to technological advancements. The global legal market is becoming more diverse with the entry of new players (such as Legal Tech startups), and innovation in the legal sector would require outside thinking and views; moreover, new legal skills, abilities and

Law Teacher 405. See also C Hood and C Simmonds, 'The Solicitor Apprenticeship' (2022) 56 The Law Teacher 420, with a focus on the relationship between the SRA reform and the solicitor apprenticeship.

[14] See R Grimes (ed.), *Rethinking Legal Education Under the Civil and Common Law* (n 10); O J Gstrein, M Fröhlich, C van den Berg and T Giegerich (eds), *Modernising European Legal Education (MELE). Innovative Strategies to Address Urgent Cross-Cutting Challenges* (Springer 2023); S Cassese, 'Legal Education Under Fire' (2017) 1 Eur Rev Priv Law 143, 144–145: the Author considered the French model and underlined that 'Teaching methods and materials are criticized as being too dogmatic and doctrinal, closed to the social sciences, and oriented towards the study of law as set out in books rather than to the study of law in action'; C Jamin, 'L'enseignement du droit à Sciences Po: autour de la polémique suscitée par l'arreté du 21 March 2007' (2010) Jurisprudence: Revue critique 125; C Jamin, *La cuisine du droit: L'École de Droit de Sciences Po: une expérimentation française* (LGDJ 2012); M Vogliotti, 'L'urgence de la question pédagogique pour le droit postmoderne' (2014) RIEJ 72, 73 ff; C Jamin and M. Xifaras, 'De la vocation des facultés de droit (françaises) de notre temps pour la science et l'enseignement' (2014) RIEJ 107; C Jamin and M Xifaras, 'Retour sur la "critique intellectuelle" des facultés de droit' (2015) 4 La Semaine Juridique 155; R Sefton-Green, *'Démoulages': Du carcan de l'enseignement du droit vers une éducation juridique* (Société de législation comparée 2015); referring to the situation of legal education in Germany, it was affirmed that: 'German experts too complain that doctrinal subjects are central in legal education, that legal education does not focus sufficiently on the application, active creation and implementation of the law, that law teaching does not pay enough attention to the European legal order and to the comparative approach, that academic reflection prevails over practice-oriented studies, and that there is not enough interdisciplinary cooperation' (Wissenschaftsrat, *Prospects of Legal Scholarship in Germany. Current Situation, Analyses, Recommendations*, Hamburg 9 November 2012). See also A Von Bogdandy, 'Le sfide della scienza giuridica nello spazio giuridico europeo' (2012) 2 Il diritto dell'Unione Europea 22.

attributes will become increasingly essential in the practise of law.[15]

Against this backdrop and starting from the Bologna Process,[16] European input to rethink the educational models remains extremely topical. Law schools must be engaged not only in the transmission of *knowledge* but also in the development of *skills* supported by *values*.[17]

In fact, legal education is an essential component in the creation of future professionals who will be able to face the new and unexpected challenges of the legal world and to take an active role in society, contributing to the improvement of legal systems towards justice.[18] The shift towards a legal educational model that encompasses knowledge, practical skills and values will contribute to meeting this expectation. In this context, this essay will attempt to demonstrate that clinical legal education is going to play a pivotal role in moving continental legal education towards these outcomes, making the law school experience more educational for students while also promoting equal justice and the rule of law.

[15] On the evolution of the legal profession see recently, among others: R Susskind, Tomorrow's lawyers (3rd eds, Oxford 2023); F Gianaria and A Mittone, *L'avvocato del futuro* (Einaudi 2022); L Bugatti, *La professione forense tra tradizione e innovazione* (Giappichelli 2022).

[16] On the Bologna Process, see LS Terry, 'The Bologna Process and Its Impact in Europe: It's So Much More Than Degree Changes' (2008) 41 Vand J Transnat'l L 107. Recommendation of the European Parliament and of the Council 2008/C 111/01 of 23 April 2008 on the establishment of the European Qualifications Framework for lifelong learning [2008] OJEU C11/1; Council Recommendation 2017/C 189/03 of 22 May 2017 on the European Qualifications Framework for lifelong learning and repealing the recommendation of the European Parliament and of the Council of 23 April 2008 on the establishment of the European Qualifications Framework for lifelong learning [2017] OJEU C 189/15.

[17] The need for a legal educational process that encompasses both knowledge and practical skills has also been suggested by the Council of Bars and Law Societies in Europe (CCBE), which has highlighted the importance of training and learning outcomes and competencies that include both theoretical and practical knowledge. See, eg, CCBE, *Comments on European Legal Training* (2010); CCBE, *Recommendation on Training Outcomes for European Lawyers* (2007), in which the CCBE has substantiated the training outcomes for European lawyers in terms of substantive knowledge as well as practical knowledge and skills; see also CCBE, *Recommendation on Continuing Training* (2003).

[18] On the purpose of legal education, see D Goldsworthy, 'The Future of Legal Education in the 21st Century' (2020) 41 Adel Law Rev 243.

2. The spread of legal clinics around the world and its arrival in Europe

Clinical legal education (CLE) in law schools is an increasing phenomenon. The roots of this movement can be traced to the United States in the early 20th century. At that time, the 'legal realism' movement began to criticise the revolutionary case method introduced at Harvard by Professor Christopher Columbus Langdell,[19] which was based on a 'Socratic approach' that moved from the analysis of concrete cases towards the reconstruction of legal principles in order to develop students' analytical and critical thinking skills rather than pursue the mere memorisation of rules and doctrine.[20] The legal realists challenged the formalistic and abstract approach to law in favour of a functional approach, arguing that law was a social phenomenon that could only be understood in its historical, political and cultural context and that legal rules and principles were shaped by power and social dynamics. According to this approach, the law was considered as a constantly evolving instrument at the service of social and economic needs, and the critical and proactive role of legal professionals in shaping law and further social ends was recognised.[21] It was in this context that legal clinics began

[19] CC Langdell, 'The Harvard Law School' (1887) 3 Law Quarterly Review 118, 123 ff. The case method was, indeed, already implemented, albeit with less resonance, in other law schools, such as the New York University: J Seligman, *The High Citadel: The Influence of Harvard Law School* (Houghton Mifflin 1978) 32–42; R Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* (University of North Carolina Press 1983) 52 n 14; A Chase, 'The Birth of the Modern Law School' (1979) 23 Am J Legal Hist 329, 333. On the link between the case method introduced during the 19th century at Harvard Law School and the English learning experience of the Inns of Courts during the Middle Age, see C Amato, 'Il modello clinico bresciano' in A Maestroni, P Brambilla and M Carrer (eds), *Teorie e Pratiche nelle Cliniche Legali, Vol. II Cliniche Legali* (Giappichelli 2018) (n 10) 145, 147–148; see also GK Gardner, 'Why Not a Clinical-Lawyer School? – Some Reflections' (1934) 82 U Pa L Rev 785, which, by contrast, emphasises the similarities between 'Mr. Frank's ideal law school and the "legal university" which existed at the Inns of Court during the Middle Ages': 'There is the same emphasis on the arts of forensic disputation, the same emphasis on the training of apprentices through watching and taking part in the work of courts and lawyers; the economics and social sciences which Mr. Frank would have young lawyers study corresponds to the English land law-which was the economics and social science of the middle ages-and which then furnished the substance of the business of the Court' (799–800).

[20] Langdell (n 19).

[21] J Frank, 'A Plea for Lawyer-Schools' (1947) 56 The Yale Law Journal 1303; J Frank, 'Why Not a Clinical Lawyer School?' (1933) 81 U Pa L Rev 907; J Frank, 'Both Ends Against the Middle' (1951) 100 U Pa L Rev 20; KN Llewellyn, 'On What Is Wrong with So-Called Legal Education' (1935) 35 Columbia Law Rev 651.

to flourish.[22]

Legal clinics immediately acquired a dual purpose. First, clinics were an alternative teaching method to the traditional pedagogical approaches, requiring an active and critical involvement of the student, who is placed at the centre of the learning process and called upon to act as a legal professional in real contexts, applying legal knowledge to real cases according to the 'learning by doing' model.[23] Second, since the very beginning, legal clinics have embraced a social justice orientation and a marked anti-individualism. Legal clinics assumed a fundamental role in strengthening the legal aid system, furthering access to justice for disadvantaged and vulnerable individuals.[24] Moreover, during the 1960s and 1970s[25] – in an era of political and economic turmoil

[22] JS Bradway, 'Legal Aid Clinic as a Law School Course' (1930) 3 South Calif Law Rev 320; JS Bradway, 'New Developments in the Legal Clinic Field' (1928) 13 St Louis L Rev 122; Frank, 'Why not a Clinical Lawyer School?' (n 18); Gardner (n 19); WV Rowe, 'Legal Clinics and Better Trained Lawyers – A Necessity' (1917) 11 Ill L Rev 591. On the roots of legal clinics in the US, see also L Serafinelli, 'Alle origini delle cliniche legali nella formazione del giurista statunitense: tra nativismo e New Deal' (2022) 49 DPCE Online <https://www.dpceonline.it/index.php/dpceonline/article/view/1436> accessed 9 June 2023.

[23] PK Kenneth, 'Clinical Education and Lawyer Competency: The Process of Learning to Learn from Experience through Properly Structured Clinical Supervision' (1981) 40 Md Law Rev 284: 'Traditional classroom legal education primarily is concerned with the process of learning through information assimilation. Usually the information to be assimilated is applied within the narrowly circumscribed confines of the instructor-defined classroom. In contrast, clinical education is primarily concerned with the process of learning from actual experience, learning through taking action (or observing someone else taking action) and then analyzing the effects of the action. The data of learning are provided primarily by the students' actual performances and experiences with clients who have legal problems. Such problems arise in a world where some facts cannot be ascertained, where personal qualities and interpersonal relationships often are crucial, where the "problem-solver" must take action and choose solutions while faced with unforeseeable contingencies. Clinical education provides a model of the multi-dimensional world of practice that traditional legal classroom education simply cannot provide. Education conducted in this true-to-life setting ensures that students have an opportunity to apply their learning to circumstances faced in actual practice'.

[24] The first legal clinics (at the beginning of the 20th century) were 'legal aid dispensaries', aiming to offer legal services to individuals in need: JS Bradway, 'The Nature of Legal Aid Clinic*'* (1930) 3 South Calif Law Rev 173; WP Quigley*,* 'Introduction to Clinical Teaching for the New Clinical law Professor: A View from the First Floor' (1995) 28 Akron L. Rev. 463, 467 ff.; FS Bloch and MA Noone, 'Legal Aid Origins of Clinical Legal Education' in FS Bloch (ed.), *The Global Clinical Movement. Educating Lawyers for Social Justice* (OUP 2011) 153, 156.

[25] P McKeown and E Hall, 'If We Could Instill Social Justice Values Through Clinical Legal Education, Should We?' (2018) 5 Journal of International and Comparative Law 143, 145. More generally, the markedly social and political contestation approach characterized the Critical Legal Studies: D Kennedy, 'The Political Significance of the Structure of the Law School Curriculum' (1983) Seton Hall Law Rev 1; D Kennedy, 'The Critique of Rights in Critical Legal Studies' in W Brown and J Hallen (eds), *Left Legalism/Left Critique* (Duke University Press 2002) 176;

and social upheaval including the civil rights and women's rights movements – CLE became a form of reaction to the deep-rooted social injustices with the aim of reducing inequalities and, more broadly, contributing to the promotion of social justice.[26]

With the inner dual foci of providing marginalised people with access to justice and teaching students practical legal skills and competences, the legal clinic movement subsequently expanded to other legal systems, acquiring a global dimension.[27] Between the 1960s and 1970s, the clinical legal movement spread to other common law jurisdictions, including the United Kingdom, Australia and Canada.[28] In South America, where the clinical movement initially resulted from forced transplant by American foundations and Universities in the early 1960s, it gained greater momentum in the 1990s, thanks as well to the support of a local clinical network known as 'public

D Kennedy, *Legal Education and the Reproduction of Hierarchy. A Polemic Against the System* (New York University Press 2004); A Hunt 'The Theory of Critical Studies' (1986) 6 Oxf. J. Leg. Stud. 1; R Mangabeira Unger, *The Critical Legal Studies Movement* (Harvard University Press 1986).

[26] MM Barry, JC Dubin and PA Joy, 'Clinical Education for this Millennium: The Third Wave' (2000) 7 Clinical L. Rev. 1, 8: 'The dearth of clinical legal education programs in the first half of the twentieth century reflects several conditions that law schools faced in that era. First, law schools were distinguishing themselves from apprenticeships, and clinical legal education efforts to create "model law offices" as part of law school education did not further this market differentiation. Second, law schools of this era were terribly underfunded and clinical legal education courses with intensive faculty supervision were not as economical as large classes employing the casebook Socratic method. Third, law school teachers of this era disagreed about the value – and feasibility – of teaching lawyering skills other than legal analysis'. The Authors have defined the development of CLE between the '60 and the '90 as 'the second wave of clinical legal education' (ibid 12). The development of legal clinics in the second half of the twentieth century also depended on the funding coming from Ford Foundation, as well as on the 'demands for social relevance in law school, the development of clinical teaching methodology, the emergence of external funding to start and expand clinical programs, and an increase in the number of faculty capable of and interested in teaching clinical courses' (ibid). LG Holland, 'Invading the Ivory Tower: The History of Clinical Education at Yale Law School' (1999) 49 J Leg Educ 504, 516-517; S Wizner, 'The Law School Clinic: Legal Education in the Interest of Justice' (2002) 70 J Leg Educ 1929, 1933.

[27] Regarding the expansion of CLE worldwide: Bloch (n 24); MC Romano, 'The History of Legal Clinics in the US, Europe and Around the World' in C Bartoli, *Legal Clinics in Europe: for a Commitment of Higher Education in Social Justice* (2016) Diritto & Questioni Pubbliche, 27; McKeown and Hall (n 25). As evidence of the current global dimension of the clinical movement, see the growing of the CLE network 'Global Alliance for Justice Education' (GAJE), <https://www.gaje.org/> accessed 9 June 2023.

[28] J Giddings and others, 'The First Wave of Modern Clinical Legal Education: The United States, Britain, Canada and Australia' in Bloch (n 24) 3; McKeown and Hall (n 25).

interest law clinics'.[29] After first being established in the Eastern regions of Africa in the early 1970s,[30] the clinical movement expanded to the rest of the African continent. In 1972, the first clinical programme was established in South Africa at the Cape Town University; there was a close connection between the expansion of clinical initiatives in South Africa and the end of apartheid in the 1990s.[31] Throughout the 1980s, CLE spread throughout southern Africa and more recently to other regions of East Africa (such as Kenya and Somaliland) [32] and in West Africa.[33]

In India, in the late 1960s-1970s, some prestigious universities started to include clinical courses[34] – although the evolution of clinical programmes as part of the curriculum came later – following some Bar Council and Government initiatives, focusing on the importance of practical aspects in legal education and advocating a greater involvement from law schools in legal aid systems through legal clinics. The CLE movement also spread in South and Southeast Asia, even if universities are still

[29] Romano (n 27) 30; E Castro-Buitrago and others, 'Clinical Legal Education in Latin America: Toward Public Interest', in Bloch (n 24) 69; JP Beca, 'The Civil Law Tradition… But with Clinics – A Case Study from Chile' in Grimes (ed.), *Rethinking Legal Education Under the Civil and Common Law* (n 10) 181.

[30] Such as the University of Dar-Es-Salaam in Tanzania: McKeown and Hall (n 25) 149; D McQuoid-Mason, E Ojukwu and GM Wachira, 'Clinical Legal Education in Africa: Legal Education and Community Service' in Bloch (n 24)

[31] McQuoid-Mason, Ojukwu and Wachira (n 30) 23; R Grimes and others, 'Street Law and Social Justice Education' in Bloch (n 24) 225, 228; B Lasky and MRK Prasad, 'The Clinical Movement in Southest Asia and India: A Comparative Perspective and Lessons to be Learned' in Bloch (n 24) 37; SP Sarker (ed.), *Clinical Legal Education in Asia. Accessing Justice for the Underprivileged* (Palgrave Macmillan 2015); MA (Riette) du Plessis, 'Forty-five Years of Clinical Legal Education in South Africa' (2019) 25 Fundamina 12; P Maisel, 'Expanding and Sustaining Clinical Legal Education in Developing Countries: What We Can Learn from South Africa' (2005) 30 Fordham Int. Law J. 374.

[32] As underlined in McKeown and Hall (n 25), concerning East Africa, 'Other clinics, such as the one at University of Addis Ababa, Ethiopia, and Makerere University, Uganda, were set up but did not survive the political turmoil of the time. Throughout the 1990s and 2000s, law clinics have been established in countries such as Kenya, Rwanda and Somaliland'.

[33] For more details, see McKeown and Hall (n 25) 149 who describe the peculiarities in the evolution of CLE West Africa, coming from the differences between anglophone and francophone countries.

[34] SP Sarker, 'Empowering the Underprivileged: The Social Justice Mission for Clinical Legal Education in India' in Sarker (n 301) 177; N Sharma, 'Clinical Legal Education in India: A Contemporary Legal Pedagogy' (2017) Indian JL & Just 165, 172 ff.

struggling to integrate clinics as credit-based clinical courses.[35]

The CLE movement has started to infiltrate Europe as well. In the mid-1990s, CLE was adopted in Central and Eastern Europe[36] – with Poland leading the way[37] – in a momentum of great transition resulting from the fall of the communist regime and the recognition of legal professionals' unprecedented role in contributing to the construction of the new legal system based on the 'rule of law'. In contrast, law schools in Western Europe have proved to be more resistant to embracing CLE, and are defined as the 'last holdout' in the worldwide acceptance of legal clinics;[38] nevertheless, we have recently witnessed an increased interest in CLE and an expansion of legal clinics even in such civil law countries.[39]

According to the local needs, circumstances and backdrop, in some regions, CLE has infiltrated the legal education system predominantly in response to a demand for educational reform in order to provide educational benefits for students, enhancing their learning experience through practical experience and in relation to the development of skills and competences essential for legal practise. In some other

[35] Bloch (n 24); M Dev, 'M Frank S Bloch (ed.): *The Global Clinical Movement: Educating Lawyers for Social Justice*' (2020) 11 JGLR 409; Lasky and Prasad (n 31). In China, the development of legal clinics is more recent, dating back to the 2000s: S Miyagawa and others, 'Japan's New Clinical Programs: A Study of Light and Shadow' in Bloch (n 24) 105, 108 ff.

[36] D Aksamovic and P Genty, 'An Examination of the Challenges, Successes and Setbacks for Clinical Legal Education in Eastern Europe' (2014) 20 IJCLE 427; M Tomoszek, 'Legal Clinics and Social Justice in Post-Communist Countries' in C Ashford and P McKeown (eds), *Social Justice and Legal Education* (Cambridge Scholars 2018); M Urban, L Krasnitskaya and KJ Kowalsks, 'Re-Thinking Legal Education in Central and Eastern Europe' in Grimes (ed), *Rethinking Legal Education Under the Civil and Common Law* (n 10) 155, 166–167; M Berbec-Rostas, A Gutnikov and B Mamysloswska-Gabrysiak, 'Clinical Legal Education in Central and Eastern Europe: Selected Case Studies' in Bloch (n 24) 53; V Tomoszková and M Tomoszek, 'A New Dawn in the Czech Clinical Movement: The Clinical Programme at the Law School of Palacký University in Olomouc' in A Alemanno and L Khadar (eds), *Reinventing Legal Education. How Clinical Education Is Reforming the Teaching and Practice of Law in Europe* (CUP 2018) 76.

[37] VK Wazynska-Finck, 'Poland as the Success Story of Clinical Legal Education in Central and Eastern Europe: Achievements, Setbacks, and Ongoing Challenges' in Alemanno and Khadar (n 36) 44.

[38] R Wilson, 'Western Europe: Last Holdout in the Worldwide Acceptance of Clinical Legal Education – Part I/II' (2009) 10 Ger Law J 823.

[39] C Bartoli, 'The Italian Legal Clinics Movement: Data and Prospects' (2015) 2 IJCLE 22; D Blazquez-Martin, 'The Bologna Process and the Future of Clinical Education in Europe: A View from Spain' in Bloch (n 24) 121; Alemanno and Khadar (n 36).

countries – in contexts of extreme poverty or political and social turmoil and upheavals, such as the civil rights and women's movement, the downfall of communist regime and the consequences of apartheid – the main mission of CLE was identified as pursuing social justice values, fighting against inequalities and providing public services for the benefit of the poor.

While CLE has assumed specific features depending on the historical, political and legal context in which it was implemented,[40] it has nevertheless retained its core composite nature as it has been spread worldwide, which unfolds between the goals of promoting social justice and innovative teaching.

The clinical movement in Europe is no exception. These two-fold traits of CLE clearly emerged from the definition provided by one of the main CLE networks at the European level:

Clinical legal education is a legal teaching method based on experiential learning, which fosters the growth of knowledge, personal skills and values as well as promoting social justice at the same time. As a broad term, it encompasses varieties of formal, non-formal and informal educational programs and projects, which use practical-oriented, student-centered, problem-based, interactive learning methods, including, but not limited to, the practical work of students on real cases and social issues supervised by academics and professionals. These educational activities aim to develop professional attitudes and foster the growth of the practical skills of students with regard to the modern understanding of the role of the socially oriented professional in promoting the rule of law, providing access to justice and peaceful conflict resolutions, and solving social problems.[41]

[40] E Poillot, 'Comparing Legal Clinics: Is There a Way to a European Clinical Culture? The Luxemburg Experience' in A Abbignente (ed.), *Diffusione dell'insegnamento clinico in Italia e in Europa: radici teoriche e dimensioni pratiche* (ESI 2016); Alemanno and Khadar (n 36).

[41] ENCLE (European Network of Clinical Legal Education): for more information, see <https://www.encle.org/> accessed 9 June 2023. The definition has also recently been taken up in the 'Quality guidelines for Legal Clinics' created in the framework of the European Project Erasmus Plus 'STARS - Skills Transfer In Academia: A Renewed Strategy' (University of Luxembourg, University of Brescia, University of Roma Tre, University Palackeho V Olomouci, Romanian-American University) <http://www.lawstars.eu/default.aspx> accessed 9 June 2023.

3. Legal clinics as an innovative teaching method: knowledge, skills and values

As already pointed out, CLE can be seen as an innovative and interactive legal teaching method that exposes students – in a student-centred learning environment – to the practical application of legal knowledge and enables them to acquire legal skills and competencies and develop values essential for legal practise. Students placed in a real-life environment learn through experience, by doing and reflecting. The learning comes from the direct exposure to real casework as well as from a deconstruction of that experience and an active reflection on it – on what has been done and what happened (or not) and the reasons.[42] Students are not only able to 'learn by doing', but also to maximise their learning through reflective practise.[43] During clinical courses, students are usually guided to reflect both during and retrospectively after their actions.[44] This process can involve supervisors' feedback and mentoring, peer-feedback and self-assessment, assisted by the use of appropriate tools, such as 'reflective journals'. These reflective moments, which allow the identification of areas of growth and change, prompt students to improve their future actions and their skills and knowledge.

As an experiential teaching method, CLE allows theoretical legal study to be combined with practical experience during the whole learning process. In legal clinics, the apparent conflict between theory and practise is overcome due to the opportunity to appreciate how law functions in a real-world setting.[45] The inductive method (moving

[42] R Grimes, 'Faking It and Making It? Using Simulation with Problem-Based Learning' in C Stevens and others (eds), *Legal Education: Simulation in Theory and Practice* (Routledge 2016) 171, 172.

[43] C Blengino, 'Che cosa (ci) insegnano le cliniche legali?' (2021) Diritto & Questioni Pubbliche 41, 48; C Blengino, 'Clinical Legal Education and Reflective Practice: The Epistemology of Practice on the Boundaries of Law', in C. Blengino and A. Gascon-Cuenca (eds), *Epistemic Communities at the Boundaries of Law. Clinics as a Paradigm in the Revolution of Legal Education in the European Mediterranean Context* (Ledizioni 2019) 21, 29; JS Balsam, SL Brooks and M Reuter, 'Assessing Law Students as Reflective Practitioners' (2017-18) 62 NY.L. Sch. L. Rev. 49; Evans and others, 'Reflective practice: The essence of clinical legal education', in Evans and others, *Australian Clinical Legal Education: Designing and operating a best practice clinical program in an Australian law school* (ANU Press 2017) 153–178.

[44] DA Shon, *Il professionista riflessivo. Per una nuova epistemologia della pratica professionale* (Dedalo Edizioni 1993); G Gibbs, *Learning by Doing: A Guide to Teaching and Learning Methods* (FEU 1988).

[45] Blengino (n 43) 46.

'dal concreto all'astratto anziché discendere dall'astratto al concreto')[46] imposes a shift from the continental traditional teaching method (dogmatic and deductive in its nature) in favour of a problem-based approach that unfolds from a concrete instance that comes from social reality and questions the law and its interpretation and application.[47] In particular, through the implementation of Problem-Based Learning (PBL) and the constant interaction with supervisors, students are guided in a learning process that allows them to acquire and develop a broad range of skills, attributes, competencies and abilities essential to workplace practices and to their future (professional) life.

As an example, due to the exposure to real casework, students are required to develop fact-finding competencies in order to gather, select and interpret factual information relevant to the case. Moreover, to navigate the complexity of the legal system(s), the ability to find legal information is crucial: students are required to conduct legal research by consulting relevant research tools and electronic legal databases. In doing so, students are engaged in the evaluation of factual and legal information and critical analysis in order to find solutions and make reasoned choices between alternatives based on well-reasoned arguments. The application of legal rules to a concrete case presupposes not only legal reasoning and argumentation skills but also a propensity for creativity in finding solutions and formulating multiple alternative strategies as well as critical thinking attributes. Working on real cases implies and fosters students' problem-solving skills. Moreover, both drafting/writing skills and rhetorical/communication skills are fundamental in order to perform legal tasks and, ultimately, to disclose the outcomes of those activities.[48] Interaction with real clients will also

[46] F Carnelutti, 'La Clinica del diritto' (1935) 1 Riv dir proc 169, 173.

[47] C Blengino, 'Fondamenti teorici di una pratica: approccio bottom up, prospettiva interdisciplinare e impegno civile nella clinica legale con detenuti e vittime di tratta' in Maestroni, Brambilla and Carrer (n 19) 231, 240.

[48] On Problem Based Learning, see R Grimes, 'Delivering Legal Education Through an Integrated Problem-Based Learning Model – The Nuts and Bolts' (2014) 21 IJCLE 228; R Grimes, 'Problem-Based Learning and Legal Education – A Case Study in Integrated Experiential Study' (2015) 13 Revista de Docencia Universitaria 361; R Grimes, 'Clinical Legal Education and Problem-Based Learning: An Integrated Approach to Study – Fit for Purpose?' in *Transformations in Legal Teaching and Learning: Proceedings of the Fifth National Spanish Conference on Legal Education* (Tirant lo Blanch 2014) 34. Among Italian Scholars, see G Pascuzzi, *Giuristi si diventa. Come riconoscere e apprendere le abilità proprie delle professioni legali* (il Mulino 2019); G Pascuzzi, *Il* problem solving *nelle professioni legali* (il Mulino 2017); G Smorto (ed.), *Clinica Legale. Un manuale operativo* (Edizioni NEXT 2015) 75 ff.

support the development of students' interviewing and counselling skills. Students placed in a grounded and situated learning environment are required to develop interpersonal skills: working with peers and supervisors as well as meeting multiple stakeholders (among others, lawyers and clients) allows them to understand how to communicate efficiently, to collaborate with others and to coordinate the activities to reach the outcomes. Working effectively as part of a team implies the development of time management, leadership and negotiation skills, the ability to share and delegate tasks, to be committed to work, to make decisions and to take responsibility for individual and team choices and actions.

These aforementioned practical, professional legal skills are just an example of the potentiality of CLE in developing professional attitudes and abilities among law students.

Legal clinics also offer a valuable opportunity for students not only to acquire new knowledge and develop skills and abilities but also to develop their ethical and value dimensions: CLE allows students to work directly with real cases and/or real-world legal issues, providing a unique opportunity to cultivate a strong sense of professional responsibility and a commitment to ethical conduct. Legal clinics give evidence of the need to extend the educational experience to legal ethics, values and professionalism components. In fact, in legal clinics, students are compelled to behave as actual competent and responsible legal professionals. Legal clinics also embody a privileged context for conveying such an educational experience.[49] The connection between clinical teaching and ethics is evident: in legal clinic courses, there is a palpable connection between what legal professionals do, the rules that govern how they should behave and the professional contexts in which they operate.[50] Students involved in legal

[49] D Nicolson, 'Ethics and Professional Responsibility, Part I – Teaching And Learning Legal Ethics: What, How and Why?' in Grimes (ed.), *Rethinking Legal Education Under the Civil and Common Law* (n 10) 68, 92 ff.

[50] JE Moliterno, 'On the Future of Integration Between Skills and Ethics Teaching: Clinical Legal Education in the Year 2010' (1996) 46 J Leg Educ 67, 68: referring to the US experience, the Author underlined that 'It seemed natural to incorporate professional responsibility teaching, which was, after all, about the ethics of and the rules governing lawyers, into skills teaching, which was, after all, about how lawyers do what they do. Indeed, the integration of mission between clinical education and ethics teaching has become so strong that any reference to one automatically includes the other'.

clinics who have to act as legal professionals in a real-life context and assume the related responsibilities (albeit under the supervision of academics and/or professionals) not only need adequate knowledge of legal rules and the ability to correctly apply them to concrete cases but also must be able to understand the context in which they operate, manage interactions with other stakeholders (clients, colleagues, judges and, more generally, society) and adopt appropriate and correct behaviours[51] in light of the ethical principles and in respect of the values and ideals of the legal profession that they embody.

Through legal clinics, students are given the opportunity to become aware and, to some extent, to directly experience the complexity of the ethical decision-making process[52] and appreciate its steps, which imply: (i) the ability to recognise the existence of ethical problems in complex and ambiguous situations and perceive the consequent need to make a moral decision ('moral sensitivity'); (ii) the ability to address mature ethical reasoning that is capable of leading to a morally defensible decision ('moral reasoning'),[53] (iii) the ability to prioritise the moral decision over other interests at stake, such as personal ones ('moral motivation'); and (iv) the ability to effectively implement the identified moral decision in practise ('effective implementation').[54] Moreover, discussing legal ethics, values and professionalism in legal clinics can assist students to

[51] Cf G Pascuzzi, *Diventare avvocati e riuscire ad esserlo: insegnare l'etica delle professioni forensi attraverso le trame narrative* (Trento Law and Technology Research Group. Research Papers Series 11, 2012).

[52] JR Rest, *Moral Development: Advances in Research and Theory* (Praeger 1986); JR Rest, 'Research on Moral Judgment in College Students' in A Garrod (ed.), *Approches to Moral Development* (Teachers College Press 1993) 201; JR Rest, 'Background: Theory and Research' in JR Rest and DF Narvaez (eds), *Moral Development in the Professions: Psychology and Applied Ethics* (Lawrence Erlbaum 1994).

[53] LA Kohlberg, *The Psychology of Moral Development: The Nature and the Validity of Moral Stages* (II, Harper & Row 1984); LA Kohlberg, 'A Current Statement on Some Theoretical Issues' in S Modgil and C Modgil (eds), *Lawrence Kohlberg: Consensus and Controversy* (Palmer 1986) 485; J Rest, DF Narvaez, MJ Bebeau and SJ Thomas, *Postconventional Moral Thinking: A Neo-Kohlbergian Approach* (Erlbaum 1999); DF Narvaez and J Rest, 'The Four Components of Acting Morally' in WM Kurtines and JL Gewirtz (eds), *Moral Development: An Introduction* (Allyn and Bacon 1995) 385; Nicolson (n 49) 88 ff.

[54] J Webb, 'Ethics for Lawyers or Ethics for Citizens? New Directions for Legal Education' (1998) 25 J Law Soc 134, 140; Rest and Narvaez (n 52), 23–24; CD Cunningham, 'Learning Professional Responsibility' in RV Magee and others (eds), *Building on Best Practices: Transforming Legal Education in a Changing World* (Carolina Academic Press 2015) 280, 289, from which are also borrowed the expressions 'moral sensitivity', 'moral reasoning', 'moral motivation', 'effective implementation'.

begin to identify their own professional sense, 'to develop their professional identities and to consider their roles within the legal profession'.[55]

4. Legal clinics and the social justice paradigm

Clinical legal education is not simply a teaching method based on experiential learning that develops students' knowledge, skills and values; legal clinics also play a very prominent role in promoting social justice.

Despite sharing a propensity towards a social dimension, clinical experiences that have emerged in continental Europe accommodate different models of legal clinics, and in line with this variety, the social mission of legal clinics can assume distinct and unique features.

In most cases, clinical activities aim to provide access to justice for individuals who are vulnerable, poor or marginalised (due to economic and/or social conditions) and offer needed legal services in underserved communities in fulfilment of the legal clinics' social justice mission.

This is what usually happens in live client clinics. In the in-house live clinics,[56] students work in the university environment under the constant supervision of academics and professionals to provide (usually pro-bono) legal assistance or perform other legal tasks in favour of the clients. In order to solve the client legal problems, the legal work of the law students may include problem analysis, factual investigation, legal research, client interviews, the drafting of legal documents, conflict management and so on. In externship experiences, the legal work is moved into a professional legal setting outside the university; these legal clinics are usually managed by (or in collaboration

[55] MA (Riette) du Plessis, 'The Role of Clinical Legal Education in Developing Ethical Legal Professionals' (2021) 54 De Jure Pretoria 278.

[56] See, as an example, the Legal Clinics of the University of Brescia: a C Amato, 'Il modello clinico bresciano', in Maestroni, Brambilla and Carrer (eds), *Teorie e Pratiche nelle Cliniche Legali, Vol. II Cliniche Legali* (n 10); C Amato and E Poillot, 'Towards a European Culture of Legal Clinics: Trasplanting the American Cinical Model' (n 10) 383, 392; M Barbera, 'The Emergence of an Italian Clinical Legal Education Movement: The University of Brescia Law Clinic', in Alemanno and Khadar, (n 36) 59.

with) non-profit organisations, government agencies, community legal centres, professional bodies or penitentiary institutes. In these situations, students – appropriately guided by tutors belonging to the host agency and, in some cases, also by academic staff – offer their collaborative work in providing legal assistance to marginalised individuals who face barriers to accessing justice.

In some legal clinics, the focus is shifted from assisting individual clients towards the community: students are required to offer assistance and advice in favour of groups of individuals with common concerns or interests in order to strengthen the protection of collective and public goods (such as the environment or consumer protection).

In street law clinics,[57] students are prompted to share legal knowledge with specific segments of the population (eg, migrants, young people and inmates) to educate lay people about their legal rights and about the means at their disposal to enforce them. Such clinics allow legal literacy among the community of reference to be improved by promoting the understanding of law.

The transformative power of legal clinics is particularly evident in the commitment of some clinics to conducting advocacy and policy actions on current and strategic issues of great social relevance.[58] Students are involved in empirical research aiming to discover 'how systems and policies can be improved for the betterment of the real world'.[59] These action research activities can materialise in reports aimed at raising public awareness or exerting pressure on political and institutional stakeholders[60] as well as in other activities of analysis, monitoring and in-depth study of the law in order to recommend or influence policy and/or law reform, moving the law towards the greater

[57] See, as examples: R Grimes, D Mcquoid-Mason, E O'Brien and J Zimmer, 'Street Law and Social Justice Education', in Bloch (n 24) 225; T Krupová and M Zima, 'Street Law and Legal Clinics as Civic Projects: Situation in the Czech Republic' (2017) 7(8) Oñati Socio-legal Series [online], 1647; R Grimes, 'Sample Handbook for Street Law Clinic' (2020) 4(1) Int J Public Leg Educ.

[58] On Policy Clinic, see R Dunn, L Bengtsson and S McConnell, 'Building A Policy Clinic Network – Cleo Workshop 13th May 2021' (2021) 28 IJCLE 244; R Dunn, L Bengtsson and S McConnell, 'The Policy Clinic at Northumbria University: Influencing Policy/Law Reform as an Effective Educational Tool for Students' (2020) 27 IJCLE 68.

[59] Dunn, Bengtsson and McConnell (n 58) 80.

[60] U Stege, M Veglio, E Roman and A Ogada-Osir (eds), *Betwixt and between: Turin's CIE. An investigation into Turin's Immigration Detention Centre, International University College* (Torino 2012, <http://www.ristretti.it/commenti/2012/ottobre/pdf3/rapporto_cietorino.pdf>).

public good. This allows the students to assume a critical approach, looking for what the law should be rather than what it is,[61] and they are given the opportunity to make their voices heard.

Few legal clinics pursue strategic litigations, that is, bringing single cases that can have a broader impact on society.[62] Clinics that bring strategic litigation cases are concerned not only with the win of the single case but also (and more) in using that case in creating fundamental changes in society, raising awareness of specific issues and promoting rights whether that is through challenging laws, clarifying laws, enforcing laws and/or building new laws.

Finally,[63] to address contemporary legal needs, in part emerging from the rapid development of technologies and current economic and financial advances, there is a growing expansion around the world of the so-called 'business legal clinics'. Students working in business legal clinics represent for profit (mainly early-stage startups, micro businesses and social enterprises) or non-profit organisations in order to support the entrepreneurial ecosystems while pursuing economic and social justice.[64] In most cases, the social dimension of clinical legal education is not abandoned: together with the traditional paradigm of offering services (pro bono) to entrepreneurs and small businesses that cannot afford to hire a lawyer to ensure access to justice to underserved entities, new social justice paradigms seem to emerge that encompass, for example, assisting businesses and non-profits to prioritise social and environmental impact over profit or directly addressing issues related to economic inequality, such as discrimination

[61] Amato, 'Il modello clinico bresciano' in Maestroni, Brambilla and Carrer (eds), *Teorie e Pratiche nelle Cliniche Legali, Vol. II Cliniche Legali* (n 10) 145, 158.

[62] L Masera, 'La tutela dei diritti dei migranti nell'attività delle cliniche legali dell'Università statale di Brescia: un caso di contenzioso strategico' in M Colombo (eds), *Immigrazione e contesti locali* (Annuario CIRMiB, Vita e Pensiero 2015) 155; L Minniti and S Spina, 'Introduzione. Le cliniche legali nelle università e negli uffici giudiziari. Realtà e prospettive' (2019) 3 Questione e Giustizia 75, 76.

[63] These clinical models should be seen as a continuum; they are often complementary or, in some instances, overlapping. There is scope for variations and hybrids depending on the aims and objectives of each clinical course: Evans and others, 'Reflective practice: The essence of clinical legal education', in Evans and others (n 43) 48.

[64] On the growth of the Business Law Clinics movement, see J Thompson and SR Jones, 'Law & Entrepreneurship in Global Clinical Education' (2018) 25 IJCLE 85; the Author also underlined the fact that, 'Some BLCs very deliberately stayed within the social justice mission of traditional law clinics, but some have chosen to stray from that mission' (ibid 93).

in employment. In addition, providing legal services to small businesses and non-profits contributes to the promotion of entrepreneurship growth that, in turn, can help to boost local economies, create more jobs, support employability, advance the ethical ethos of business and improve the overall standard of living and working in the community.

Following the adaptation of the US CLE model to the peculiarities of the European systems[65] and – more generally and worldwide – according to the evolution of the pedagogical mission of law schools as well as the deep evolution of the legal professions,[66] the social justice paradigm has been challenged, and it has proven to be a construct with mobile boundaries capable of accommodating the new needs of an ever-evolving society.

What is more constant is the ability of CLE to deeply enrich and impact the students' understanding of law and to influence their future actions as conscious professionals, 'provide students with the framework to critique the world in which they live and strive to develop their own moral position'.[67] Legal clinics offer students the possibility to think critically about the role of law in society, to cultivate a critical approach to existing rules, to understand the potential impact that professionals can have on law and on society, to learn 'that knowledge is constructed, and to gain the ability to challenge assumptions and explore alternatives'[68] and to acquire a positive attitude towards influencing the development of the law and even to contribute to challenging, shaping and changing the law if needed. From this prospective, CLE is a key tool for the transformation of legal education with the goal of creating future legal professionals committed to upholding and improving the rule of law and promoting social justice.

[65] J Weinberg, 'Preparing Students for 21st Century Practice: Enhancing Social Justice Teaching in Clinical Legal Education' (2021) 28(1) IJCLE 5, 10 ff: the Author highlighted the fact that 'Social justice' is a debated concept that is applied differently in different contexts, as well as the possibility to find out distinguishable elements of the notion.

[66] P Kosuri, 'Losing My Religion: The Place of Social Justice in Clinical Legal Education' (2012) BC JL & Soc Just 338; McKeown and Hall (n 25).

[67] McKeown and Hall (n 25).

[68] J Aiken, 'The Clinical Mission of Justice Readiness' (2012) 32 BC JL & Soc Just 231, 288.

5. Final remarks

The widespread movement towards CLE even in Europe and the fact that in most jurisdictions legal clinics have been accepted as part of mainstream legal education testify to the success of this teaching and learning method and the unbounded capacity of CLE to advance legal education.

Legal clinics are implementing a learning by doing approach that exposes students to practical legal experience and seeks to build the capacity of law students to practise law by applying their knowledge and skills in the provision of legal assistance, legal services and legal activities.

This does not mean transforming law schools into trade schools and professional traineeship experiences that aim to provide only professional and technical training to equip future legal professionals with practical skills, competences and attributes.

On the contrary, CLE involves the constant interaction of theory and practice, merging theoretical knowledge with practical abilities and combining experience and reflection. Students dealing with selected real cases with the help of professors/supervisors and the feedback of peers have the chance to experience the law in practice and then to discuss, debate and reflect in order to understand how the law functions (or fails to function).[69] The deductive method traditionally applied in law schools belonging to civil law countries has merged with the inductive method proper to problem-based learning, providing a more meaningful learning experience for students. Moreover, the possibility for students to experience the law in action stimulates their critical thinking and social commitment.[70] As underlined elsewhere, through CLE, 'law students learn about their professional responsibility for – and develop a personal commitment to – sustaining and supporting the rule of law, human rights, and social justice'.[71]

[69] DL Rhode, *In the Interests of Justice: Reforming the Legal Profession* (OUP 2000) 199.

[70] Critically, see E Santoro, 'Cliniche legali e concezione del diritto' (2019) 3 Questione Giustizia 122.

[71] Open Society Justice Initiative, 'Legal Clinics: Serving People, Improving Justice' (2009) 1.

GIACOMO CAPUZZO[*]

'THE REPRODUCTION OF HIERARCHY' IN ITALIAN LAW DEPARTMENTS AND INNOVATIVE TEACHING. THE ROLE OF LAW CLINICS[**]

ABSTRACT. *The topic of innovative teaching must be framed through a discourse that recognizes the eminently political nature of law departments. It is not possible to disregard, in the study of legal education, the fact that courses of study and teaching activities have nothing merely technical and neutral about them; they are practices and tools that are functional in placing students within social hierarchies proper to the legal world that awaits them. The law department is thus a hierarchically organized space in which students are taught the body of knowledge necessary to be part of that hierarchy.*

Every aspect of legal education is functional to hierarchical reproduction, from classes to curricula to teaching methods. The goal of critical study is to question legal education, expose the ideology behind it and propose alternative practices. In this sense, clinical legal education (CLE) can be conceived of as an innovative teaching that eschews hierarchical reproduction, as long as it is configured as a transformative practice that aims to protect general interests through collective conceived access to courts. In this way, students are immersed in an alternative, egalitarian educational space of shared and interdisciplinary knowledge.

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[**] This title and this article are a tribute to one of the most brilliant books I have ever read. Duncan Kennedy's work on Legal Education and the Reproduction of Hierarchy should be required reading for every student about to enter law school in any part of the world.

1. Introduction

Reflections on legal education and the state of teaching in law faculties cannot be separated from the consideration that these are intensely political places. Despite the efforts made to create niches of technical knowledge, with little intellectual content and without the necessary theoretical depth or effective scope of practical application, one glimpses an inseparable ideological dimension that constitutes the backbone of the legal education offered to students to take their place in the social hierarchies that characterize the neoliberal state.

Emphasizing the ideological dimension of legal education does not simply mean questioning what is taught in law classes, with which methods and techniques it is done: it means, above all, recognizing that there is nothing technical or objective about the choices regarding these topics. The disciplines included, the prevalence of frontal lectures, the preparation of students based on mnemonic data, the excessive professionalization of courses are all aspects peculiar to Italian legal education that have negative implications; however, the emergence of these aspects is not the result of chance; they are functional practices to introduce students into the social hierarchy that characterizes the legal world inside and outside universities.

It is impossible to think about innovative teaching without starting with a thorough understanding of how legal education is provided in the faculties and of the ideology that underlies this hierarchical system of knowledge production. In this sense, any reformist intention should be aimed at recognizing and counteracting this hierarchy. A complete dismantling of the latter does not seem conceivable with the means at hand; only innovative teaching can make it explicit and at the same time depower it by seeking to transform the practices that enable its reproduction.[1]

[1] On the progressive push for reforms of university education, see B De Sousa Santos, 'La Universidad en el siglo XXI. Para una reforma democratica y emancipadora de la Universidad' in R Ramirez (ed), *Tranformar la universidad para transformar la sociedad* (2nd edn, Senescyt 2012) 139.

2. Legal education and legal hierarchy

For reasons of brevity, it will not be possible to go into detail on all the areas and practices that support this hierarchy and make it possible to reproduce it. Duncan Kennedy's volume[2] on the subject provides a meticulous description of how such a hierarchy operates in US law schools, but it is not possible to overlap this experience with Italian law faculties: there are several differences between the two legal systems in this area, such as the fact that legal education in the US is provided within graduate schools for students who have already completed a university education, which requires that what Kennedy says be contextualized within the European and Italian contexts. At the same time, the considerations that the author draws from the analysis of this model of legal education remain unchanged, considerations that will be taken up here by attempting to describe the Italian model.

Access to law faculties has always been one of the available instruments of social mobility, since students enrolled in law faculties knew that the multiple possibilities offered by a law degree would allow them a wide range of professional opportunities and the necessary preparation to face the state examinations required by our system. In general, most law students are convinced that they will find more than just the opportunity to practice a socially valued profession; there is a related idea of public service, and that law represents a progressive force in society, so that the opportunity to study and practice law means choosing progress over chaos, modernity over tradition. This belief has endured even in recent years, when enrollments in law schools have declined, especially in those universities located outside of major urban centers, in smaller jurisdictions, or in more depressed economic realities.

However, other faculties have recently shown greater attractiveness: political science is often preferred to law because of the versatility of its curricula, which allows for less in-depth preparation in the legal field, complemented by a range of cross-curricular knowledge that attracts students precisely for the breadth of preparation offered.

The crisis in the legal profession and the freeze in public administration have

[2] D Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System, A Critical Edition* (NYU Press 2004).

also eroded the primacy of law schools, and the proliferation of three-year degree programs has attempted to reshape legal education by creating a series of shorter and more specialized career paths. This policy has ended up cracking the role of law schools as engines of social progress: the provision of intermediate job numbers, lacking general preparation in the legal field, highly specialized and with limited job outlets, represents the denial of the idea for which law school allowed the opportunity of access to professions and job positions considered socially admired.

3. The reproduction of hierarchy between faculty and students in Italian law departments

It is a common belief among law students that they are embarking on a demanding course of study that requires sacrifice, preparation, and a return on investment in social and economic terms. It is therefore a competitive environment in which each student must work hard, show intelligence, develop character, and know how to be tough with his or her peers.

From the very first year, these aspects are more than obvious; the faculty members are almost all Italian, mostly male, generally middle class, from the same city as their department, especially in the smaller law departments, and tend to be heterosexual or make an effort to appear as such. The classroom is therefore structured in a highly hierarchical order. The dominant teaching method is still the frontal lecture, in which each student projects the sense of deference developed during compulsory schooling onto the teacher, who is then free to deliver her lecture undisturbed. The frontal lecture allows the teacher minimal preparation, shelters her from any interruption or exchange with the students, reduces the need to prepare teaching materials other than those necessary for her own exposition, and paradoxically reassures the student herself, who can apply her study methods to a single teaching text instead of relating to multiple authors, multiple points of view, and a more complex overall view of the course topics.[3]

[3] See on this M Vogliotti, 'Per una nuova educazione giuridica' (2020) 20(2) Diritto & Questioni Pubbliche 229; E

The frontal lecture fits perfectly with the hierarchical nature of the organization within law classrooms. Apart from the deference they owe to the teacher, students are free to develop their own autonomy within the class, they can pay attention to the lecture, take notes or abstain from it, and in this lies the great difference with high school and other compulsory schools: the university teacher tends not to engage the individual student, but waits for him to relate to her. In the absence of a didactic device capable of filtering the relationship between teacher and student, such as dialogic or participatory classes might be, this relationship is established through the autonomous choices of each student: some will try to intervene during the class to stop the teacher's stream of consciousness; others will approach at the end of the lecture to ask the usual questions about the syllabus; others will turn to the teacher's own aides.

Meanwhile, the class continues, and it becomes clear that what is being learned is a set of terms and definitions, but above all a new language, a new way of expressing oneself, of thinking, of explaining one's ideas. Information begins to circulate, the commitment and sacrifice that everyone talks about suddenly take on real forms: codes, judgments, reference texts. As time passes and the different courses alternate, it becomes clear that neither the students nor the teachers are as homogeneous as they seemed at first glance. Teachers take on a name associated with a certain behavior: teachers take on a name associated with a certain behavior: some are more casual speakers than others, interrupting the lecture with a few jokes, hinting at their opinions on the facts of the day; others appear more demanding, more assertive and more authoritarian.[4]

On the other hand, the need to assimilate the language and the legal way of thinking in a short period of time leads the students to prefer teachers who are considered to be clearer, those who refer more to the volumes of the course, those who prefer definitions, normative references, those who tend to present law as a complex of technical, logical and neutral tools.[5]

Morin, *La testa ben fatta. Riforma dell'insegnamento e riforma del pensiero nel tempo della globalizzazione* (Raffaello Cortina Editore 2000).

[4] On this see D Kennedy, 'Legal Education as Training for Hierarchy' in D Kairys (ed), *The Politics of Law: A Progressive Critique* (3d edn, Basic Books 1998) 55-6.

[5] On presenting the law as a technical, apolitical and neutral tool, see G Capuzzo, 'Legal Expertise: On Some Uses

This approach wins over a large part of the students, not only because it provides a set of techniques for assimilating the new legal language, but above all because it explains, for the first time, what the rigor required of law students consists of.

Frontal lectures will thus be peppered with tedious, technical and often sufficiently complicated examples, chosen to illustrate the mechanical precision of the lawyer in using the available legal tools, without any political or moral significance. Students are required to present this approach as the correct one in order to be recognized as belonging to the community of legal experts. Consequently, students feel the need to conform to this standard in order to fully learn the language and mindset of lawyers.

The more technical, logical, abstract and authoritarian a teacher is, the more rigorous he or she is considered to be and the closer he or she is to the ideal of the law professor. Conversely, the more a teacher pays attention to issues of public policy, disregards the slavish analysis of formal technical data alone in favor of different points of view, and adopts a dialogical attitude, the more his image will deviate from the idealized figure mentioned above.

At the same time, teachers are in a unique position to observe the students in the classroom: those who are more attentive, those who are less so, those who attend all the lessons, those who are compulsive users of their laptops' keyboards, those who intervene with a question or a suggestion, those who sit in the front rows and those who remain further away. The student who is nearing the end of the lesson, the one who shows that he has read part of the assigned reading, i.e. the course book; the one who answers the occasional question of the teacher, the one who proves to be active in one of the various social moments that take place during the lesson: the collection of the attendance signatures, the discussion of the scope of the program. As already mentioned, the frontal lecture increases the autonomy of the students under the watchful gaze of the teacher, who judges the behaviors and interactions, the level of respect, the degree of amusement generated by one of his or her questions. As mentioned

of Law in Transnational Regimes' (2013) 4(2) Comparative Law Review <http://www.comparativelawreview.unipg.it/index.php/comparative/index> accessed 25 July 2023.

earlier, the frontal lecture increases students' autonomy under the watchful gaze of the teacher, who judges behaviors and interactions, the level of deference, the degree of amusement generated by one of his jokes.

4. Ideology and hierarchization in legal courses and curricula

The preceding paragraphs reconstruct how law departments of Italian universities are eminently political places where legal education is provided in a highly hierarchical environment from the perspective of both students and faculty.

According to Duncan Kennedy, there are two main areas related to legal education that contribute to the reproduction of hierarchy.[6] The first relates to the experience within the classroom, the undergraduate curriculum and, in particular, the classical teaching methods that function to expose students to a set of practices and attitudes with a hidden and often unacknowledged ideological dimension towards the economy, society and politics. The second concerns a sampling of various institutional practices aimed at stimulating students' voluntary adherence to the specular hierarchical construction of the legal world that awaits them outside the university.

We have already had the opportunity to talk about the hierarchical structure of classes; it is not, however, the case to investigate institutional practices, a topic that is beyond the scope of innovative teaching methods, so it is perhaps better to focus on the issue of curricula and teaching approaches, since it relates more directly to the main theme of this paper and introduces the second part of the discussion.

It is difficult to arrive at a general summary of the concepts that students learn during their legal career, but in general it can be said that they are pushed to assimilate a considerable number of rules organized according to abstract legal schemes and categories. They learn to apply these rules to factual situations, to rudimentarily use a list of balancing public policy arguments that lawyers can use to argue that a given rule should apply to one situation rather than another when a conflict arises. These are

[6] Kennedy, 'Legal Education as Training for Hierarchy' (n 4) 58.

arguments such as 'legal certainty', 'certainty of legal transactions', and 'the need to avoid market failures'.[7]

This background is often somewhat criticized by critical scholars who emphasize the formalistic scope of certain principles, such as that of legal certainty. However, this background can be particularly useful for the average lawyer because it allows for various reflections on the indeterminate nature of the legal system, the need to constantly balance conflicting legal interests, and the eminently ideological nature of different conceptions of law. In this area, the main question is how these concepts can be assimilated by the student.[8]

As seen in the previous section, professors tend to teach these skills through frontal classes in which it is stated that law is a precise and unambiguous language for initiates, and that it emerges from a rigorous logical procedure of legal reasoning; this formalistic and dogmatic approach to law provides a distorted image of the legal system, according to which legal issues can be resolved by applying neutral syllogisms to mere factual situations, but above all it legitimizes most of the rules in force in our system, which are considered untouchable by students. At the same time, the context of different disciplines (and different disciplinary scientific fields) presents each legal issue as distinct from the other, thus contributing to the persistence of inaccurate and deceptive dichotomies, such as those between public and private, market and family. Such a fragmented study of law makes it really difficult to have an integrated view of what law is, how it works, or how it might change.

Second, the formalistic teaching methods just outlined do not allow for an adequate transmission of legal skills; these are often acquired unconsciously through mnemonic study that privileges definitions, the repetition of code provisions from memory, without critical analysis and reasoning about how they work and how they are interpreted. Such teaching methods, accompanied by a scientific context that hinders interdisciplinarity both between legal disciplines and with other fields of knowledge,

[7] Ibid 59.

[8] D Kennedy, 'The Political Significance of the Structure of the Law School Curriculum' (1983) 14 Seton Hall Law Review 1.

accentuate real and imagined differences in students' abilities, but in such a way that students do not know when they are learning and when they are not, and have no way of improving or understanding their own learning process. As seen above, the assimilation of skills is perceived by students through the gradual emergence of differences among them, defining a hierarchical process based on a set of skills that are considered innate, rather than the result of each student's autonomous progress, a situation that reinforces class hierarchies.

Thirdly, the dominant teaching methods usually teach skills in isolation from substantive experiences that would enable students to understand the social repercussions of the legal rules analyzed in the classroom. This approach prevents students from assuming any future role other than that of trainee in a hierarchically organized law firm, where senior lawyers control the content and pace of depoliticized craft training in a context of intense competition, without protection and often without compensation.[9]

The ideological basis of such teaching approaches is the distinction between law and politics. Teachers convince students that legal language and thought exist in themselves and are independent of any kind of political consideration, and push them to accept as valid dogmatic arguments that are often incoherent or so vague as to be meaningless. Sometimes they are simply authoritative arguments, where the validity of the authoritative premise is placed outside the discussion by the professors. Sometimes they are policy arguments (e.g., transactional security, legal certainty) that are treated in one situation as if they were binding legal rules, but are ignored in the next case when they suggest that the decision was wrong.

Courses of study have a similar structure. Before private law, it is not uncommon to find Roman law, which functions both as a historical basis for the former and as a legitimizing tool for private legal institutions (the Roman dominium and private property). Constitutional law is usually included in first-year courses and serves as an introduction to understanding state structures and the discourse of rights. Teachers tend to present it as a legal discipline supported by an internal logic, as a logical exercise in legal reasoning, with evaluations of the politics of law remaining relatively in the

[9] This structure can be found in Kennedy, 'Legal Education as Training for Hierarchy' (n 4) 59-60.

background. Then, in the following years, there are courses that enrich the picture sketched in the first year between capitalism (civil law, commercial law, criminal law, labor law, civil procedure) and the administrative structure of the modern regulatory state (administrative law, criminal procedure, and tax law).[10]

There is no substantial difference with the first-year courses, which are also aimed at providing a formal set of knowledge about the discipline, limiting the recourse to questions of values and the substantive impact of legal rules within society. The only difference is the greater freedom of teachers to express their opinions; the progressive ones will imply that it is necessary to intervene in the market, but any intervention must be discreet because it is enormously complicated and, in any case, entrusted to a group of technical experts. Conservative teachers, on the other hand, will point out that the protection of the private individual derives from natural law and that much of the intervention of the state is irrational or inefficient, justified by policies that have nothing to do with the actual functioning of the legal system.[11]

Finally, there are peripheral subjects such as philosophy of law, history of law, and comparative law. These subjects are presented as not entirely relevant to the logical, neutral, serious, and rigorous hard core of law; depending on the department, they may be a kind of practical school, a divertissement, or a space for interdisciplinary study left for these disciplines precisely because they are not really law. As noted above, students tend to appreciate this kind of teaching context, the hierarchy of courses in the curriculum helps them to balance the study effort required for each discipline, the prevailing teaching methods crystallize in their minds a set of formal information and some organizing categories. In such a context, it would be quite unusual for a student to develop a critical attitude toward this system on his or her own.[12]

[10] Ibid 60.

[11] Ibid 61.

[12] Ibid 62.

5. Critical thinking and legal education: rights discourse and law clinics

Moreover, critical thinking cannot be developed without direct knowledge of the substantive implications that legal rules have within society. The eminently logical and abstract character of the classical teaching methods does not take into considerations the actual social and economic interests that hide behind the technical provisions. On the other hand, the main critique developed against this teaching method is not without remark. As Kennedy himself notes[13], the alternative approach is fundamentally centered on the discourse of rights; the identification and recognition of subjective rights becomes a teaching tool when it enables students to link the substantive interest of a particular social group, with the legal discipline that protects that specific position, Such a critique is quite common among left-wing students and it centers around a progressive program that can be reduced to recognizing people's rights and to bringing about the triumph of human rights over mere property rights'.[14] This critical approach fails to explain the indeterminacy that characterizes law; it merely points out that the system fails to enforce formally recognized rights. Rights discourse is internally incoherent, vacuous and circular. Legal thought can generate equally plausible justifications of rights for any kind of outcome.[15]

Subjective rights are by their very nature formal, in the sense that they provide individuals with legal protection against, any kind of arbitrariness against individuals – to speak of subjective rights is not precisely to speak of social justice between classes, races or sexes, consequently the legal discourse that is produced is traditionally individualistic and deliberately blind to the reality of substantive inequality.

In other words, the use of rights discourse as an alternative teaching tool is unable to teach students to free themselves from the logical-legal reasoning techniques that are used by a considerable proportion of teachers. From a certain point of view, rights discourse represents the perfect counterbalance for classical teaching methods

[13] On the critique of the rights discourse, see D Kennedy, 'The Critique of Rights in Critical Legal Studies' in W Brown and J Hallen (eds), *Left Legalism/Left Critique* (Duke University Press 2002) 176-226.

[14] Kennedy, 'Legal Education as Training for Hierarchy' (n 4) 62.

[15] On this see M Cappelletti, *Dimensioni della giustizia nelle società contemporanee* (Il Mulino 1994).

dominated by logical-legal reasoning, since it does not focus too much on deconstructing the abstract system that dominates the other approach, it merely mitigates it through the introduction of a series of value considerations that rest on a progressive legal rhetoric, which provides at most an emotional stance against the legal order.

In such a context, truly innovative teaching must push the students to think about law in a way that allows them to grasp its substantive indeterminacy, to criticize it without rejecting it outright, and to manipulate it without abandoning their own system of thought and action. Thus, it is not necessary to outline new teaching techniques when it is possible to go and rediscover used tools in the toolbox of legal education. The first one that comes to mind is, without a doubt, clinical legal education (CLE).

CLE represents the perfect example of how to produce a substantive educational approach that does not disregard the normative datum, but immediately drops it into the real dimension of different social interests. The origin and especially the evolution of legal clinics is imbued with the critical thinking centered around the rights discourse, yet these do not become entangled with it.[16]

This didactic method becomes innovative as it reaches into the folds of law to find technical solutions that can grant protection to specific social groups on a single legal issue. CLE is forced to leave both rights rhetoric and logical-legal reasoning in the background. Working within the legal order, it must address its antinomies, inconsistencies and vagueness. Clinicians cannot remain confined within the narrow fences of different disciplines but learn to navigate a legal world that knows no precise boundaries and that ranges from private to public, from administrative to civil more easily than one might imagine.[17]

CLE is a perfect example of how to produce a substantive educational approach that does not disregard the normative datum, but immediately drops it into the real dimension of different social interests. The origin and, above all, the development of

[16] On this see K Kreuse, 'Getting Real About Legal Realism, New Legal Realism and Clinical Legal Education' (2011) 56 New York Law School Law Review 295.

[17] On this see P Galowitz, 'The opportunities and challenges of an interdisciplinary clinic' (2012) 18 International Journal of Clinical Legal Education 165.

the legal clinics are imbued with critical thinking centered on the discourse of rights, but they do not become entangled in it.

This didactic method becomes innovative when it reaches into the folds of the law to find technical solutions that can grant protection to specific social groups on a single legal issue. CLE is forced to leave both legal rhetoric and logical-legal reasoning in the background. It must work within the legal order, addressing its antinomies, inconsistencies, and ambiguities. Clinicians cannot remain within the narrow confines of different disciplines, but must learn to navigate a legal world that knows no precise boundaries and that moves more easily than one might imagine from private to public, from administrative to civil.

6. Clinical Legal Education as innovative teaching

CLE has recently experienced exponential growth within the Italian legal system, a recent mapping carried out by the Association of Italian Legal Clinics reported the existence of more than ninety educational activities of various kinds that can be broadly traced back to the experience of CLE.[18] In such a context, it is necessary to reiterate what are the basic elements that have characterized CLE since its origin within the US legal system.[19]

These experiences appear to be very different from each other; indeed, it seems difficult to determine which of them can truly be called law clinics by assuming the intent of social transformation or access to justice for the disadvantaged. In terms of

[18] This mapping is currently under way and it is sponsored by the Association of Italian Legal Clinics: R Ciavarella, C De Martino and M D'Onghia, 'Mappatura delle cliniche legali nell'Università italiane', file from authors. The report is not published yet because only the first part, the quantitative one has been completed, as stated before, mapping is still under way, the second stage of the project is a qualitative study and it will be released at the next Association's General Assembly that will take place in Turin at the end of November 2023. This mappings is based on a previous study carried on by L Scomparin, 'Mappatura delle cliniche legali italiane. Working paper del Coordinamento Nazionale delle Cliniche Legali Italiane' (2020), file from the author.

[19] FJ Bloch and M Menon, 'The Global Clinical Movement' in FJ Bloch (ed), *The Global Clinical Movement. Educating Lawyers for Social Justice* (OUP 2011) 271.

teaching activities, the indispensable elements of law clinics are a training model marked by experiential learning and the direct interaction of students with the legal and social reality being studied. In other words, to be able to speak of law clinics, the confrontation of students with real cases is inescapable, whether when preparing legal opinions or litigation, or when the prevailing activity is mediation with institutions, drafting legislative proposals, making recommendations or other extrajudicial activity.[20]

Outlined in this way, CLE represents an interesting starting point for developing innovative teaching that can produce an effective critique of the classical approach to logical-legal reasoning. CLE means abandoning the frontal lecture, this does not mean that students will not attend explanatory moments by teachers, it means that learning takes place on an interactive and experiential level, the technical-legal component is explained through the study of its impact in the social dimension. More. The comparison with real cases illustrates, without the need for rhetoric, the reflections on different social groups of the legal rules that are studied within the different courses.[21]

The interactive character then contributes to a sharing of knowledge that is a fundamental trait of the clinical experience, unlike the frontal lecture in which the transfer of knowledge flows from the lecturer to the students by contracting with the students' autonomy its diffusion and sedimentation, within the CLE, lecturers and students contribute to creating shared knowledge through the reversal of the hierarchical logic that has been highlighted with the classical didactic approach.[22]

Clinical didactic activity is not immune to criticism; it has already been exposed how CLE is often entirely embedded within the rights discourse as a tool for substantive application of legal protections elaborated at the theoretical level; according to this scheme, the goal of social justice is achieved through the enucleation of a set of subject

[20] M Barbera, 'The making of a civil law clinic' in L Nogler and L Corazza (eds), *Risistemare il diritto del lavoro. Liber amicorum Marcello Pedrazzoli* (Franco Angeli 2012); M Barbera, 'The Emergence of an Italian Clinical Legal Education Movement: The University of Brescia Law Clinic' in A Alemanno and L Khadar (eds), *Reinventing Legal Education How Clinical Education is Reforming the Teaching and Practice of Law in Europe* (CUP 2018).

[21] See on this L Scomparin, 'Lo sviluppo delle cliniche legali italiane' [2019] Questioni e Giustizia 142.

[22] On this point see M Tushnet, 'Scenes from the Metropolitan Underground: A Critical Perspective on the Status of Clinical Education' (1984) 52 George Washington Law Review 272; C Blengino and A Gascon Cuenca, *Epistemic Communities at the Boundaries of Law: Clinics as a Paradigm in the Revolution of Legal Education in the European Mediterranean Context* (Ledizioni 2019).

rights and their recognition by the legal system. In these cases, the legal clinic becomes a platform for the defense of certain subjective rights, rather than a site for the manipulation and transformation of law itself. Viewed from the prism of a radical critique-to which the legal clinic movement pays a theoretical debt-this model of CLE can certainly appear little more than consolatory, as if students must fill up on good intentions during their formative years because they are destined for a profession where individual profit prevails, the CLE thus assumes a functional role in softening the system by making it more acceptable, in line with the *pro bono* activity promoted by international law firms.[23]

It is clear how CLE has potential to represent effective innovative teaching in the Italian university landscape without flattening them, on the one hand, on critical thinking revolving around a discourse on rights and, on the other, on a professionalizing dimension connected to a merely tecnical 'know-how' approach.[24] Specifically, CLE contains a transformative force of the legal and social dimensions that represents the greatest critical reach of this didactic approach. The conformation of the law clinic, which moves in an interdisciplinary context that is at the same time experiential, non-hierarchical, shared and collective, encourages an overall rethinking of the concepts and rules that come to the fore during its activities.[25]

CLE pushes to work on specific issues that affect well-defined legal and social interests, however, these interests are always thought of as collective, they transcend the protection of the rights of a single individual, even when clinical activities serve to protect a single individual, the perspective is always that of the social group(s) behind the person(s) assisted.[26]

[23] See MR Marella and E Rigo, 'Le cliniche legali, i beni comuni e la globalizzazione dei modelli di accesso alla giustizia e di lawyering' (2015) 33 Rivista critica del diritto privato 537.

[24] See Bloch (n 19).

[25] See C Blengino, 'Che cosa ci insegnano le cliniche legali?' (2021) 21 Diritto e questioni pubbliche 41; J García-Añón, 'Transformation in Legal Teaching and Learning: Clinical Legal Education as a Transformative Component' in J García-Añón (ed), *Transformaciones en la Docencia y Enseñanza del Derecho. Actas del V Congreso Nacional de Docencia en Ciencias Jurídicas, Unitat d'Innovació Educativa – University of Valencia* (2013).

[26] See on this C Blengino 'Fondamenti teorici di una pratica: approccio bottom up, prospettiva interdisciplinare e impegno civile nella clinica legale con detenuti e vittime di tratta' in A Maestroni, P Brambilla and M Carrer (eds),

Similarly, access to justice takes on different characters; it is no longer the individualist principle around which the clinical experience was formed in US law schools, where access to the protection of rights is not guaranteed to all. In a system such as the Italian one, where at least formally legal aid is guaranteed for those who cannot afford a technical defense, the principle has taken on a different dimension, one that is related to the question that every legal interest protected by CLE is a collective interest, in the same way access to justice cannot be understood as an action to protect an individual, but as a collective access to protect a specific social group.[27]

The transformative potential that can be found in some experiences of Italian law clinics is the classic product of the adaptation of legal models from other legal systems. The work of integrating CLE into the Italian legal system has seen active scholars and researchers who have shaped a method of practical teaching peculiar to the American legal world of law schools in order to place it within a civil law system characterized by a clearly conservative context with regard to legal education and teaching methods.

It is not possible to understand the impact of law clinics in the Italian legal system if we do not consider how they were introduced into the legal system as a tool for critiquing legal thought. If one looks carefully at the experience of the oldest law clinics, it is easy to discern in these activities a precise critical connotation of the type of legal education provided within the Italian legal system, the degree to which law faculties are detached from the actual social context in which they are situated, and the still pervasive formalism that continues to characterize much of Italian legal doctrine.[28]

A cursory glance at the scholars who were first involved in the development of the CLE model in Italy reveals the names of some of the most active exponents of Italian critical legal theory; the fact that this approach takes on the substantive connotations

Teorie e pratiche nelle cliniche legali (Giappichelli 2018) 233-260.

[27] See M Cappelletti and B Garth, 'Access to Justice and the Welfare State. An Introduction' in M Cappelletti (ed), *Access to Justice*, vol 4 (EUI 1981); G Marini, 'Giustizia accessibile a tutti' [1980] Politica del diritto 585.

[28] On the adaptation of the US law clinics' model into the civi law system with specific regard to Italy, see C Amato, 'Experiential learning from the continental viewpoint: if the cap fits...' in R Grimes (ed), *Re-thinking Legal Education under the Civil and Common Law. A Road Map for Constructive Change* (Routledge 2018) 13.

of anti-discrimination protection and of workers and women workers, of migrants and their status, of territory and the environment, rather than of prisoners and women prisoners, is only a direct consequence of the critical commitment that underlies these experiences and the work of these academics.[29]

Thus, the Italian CLE model was born as a critical tool of the Italian system, highlighting its limitations, such as the lack of inclination to substantive reflection, the rigid hierarchical construct that characterizes relations within departments, and the doctrinaire formalism.[30]

The importation of the U.S. legal model serves to counter these tendencies, the global CLE is rejected in the Italian experience as a critical teaching method, and the reference to social justice and public engagement, which represent the goals to which the work of law clinics must aspire, takes on a pregnant meaning in the Italian context, because it allows the functionalization of critical thinking to certain substantive areas proper to each law clinic. In this sense, the critical scope of CLE is expressed through the impact it has on the social context in which it operates.[31]

The indissoluble link between the critical academic dimension and the social transformative function of Italian CLE is perfectly illustrated by a few examples, among many, related to the activities of law clinics. The first one is one of the oldest clinics, called 'Salute, Ambiente e Territorio',[32] active at the Law Faculty of the University of Perugia, coordinated first by Maria Rosaria Marella and now by Giovanni Marini. This clinic accepts as clients only associations and committees working for the protection of the territory and the environment, and has distinguished itself in several cases, among others, concerning Ilva in Taranto, the right to housing in the city of Perugia, and the legal protection of a square in the Pigneto district of Rome. The second example refers to the legal clinic opened by Bocconi University in the San Siro district,[33] a very young

[29] See J García-Añón, 'La integración de la educación jurídica clínica en el proceso formativo de los juristas' (2014) 12 REDU 153.

[30] On this see R Mestre (ed), *Guía práctica para la enseñanza del derecho a través de las clínicas jurídica* (Tirant 2018).

[31] On the social impact of CLE, see L Arbetman, E O'brian, *Street Law: A Course in Practical Law* (McGill 2016).

[32] See the law clinic website, Clinica legale 'Salute, Ambiente e Territorio' <https://giurisprudenza.unipg.it/didattica/cliniche-legali/law-clinic-salute-ambiente-e-territorio> accessed 23 July 2023.

[33] See the law clinic website, Clinica legale 'Bocconi nel quartiere di San Siro' <https://www.unibocconi.it/wps/wcm/

clinic that provides legal assistance in one of the most vulnerable areas of the city of Milan.[34]

These examples, although very different, signal the tendency of the Italian CLE to establish a link between the university world and the community; a link that can reposition the university at the center of cultural activity and the social context, to increase the academic community's knowledge and awareness of the social problems that characterize the Italian reality. This objective depends on a consistent research activity, which must not be limited to the mere documentation of the different cases followed, but must generally include all the work carried out within the project, from the theoretical approach to the solution and presentation of the case.[35]

In this way, the legal clinics succeed in imposing the objective of reforming academic curricula and redirecting the training of lawyers towards social justice. Diversity and plurality of approaches are maintained, since students can be involved in a wide range of projects: from issues of diffuse interests that are an expression of the local area, to issues of health and the environment, to activities aimed at protecting the most vulnerable social conditions.[36]

The tension between critical theory and social justice is at the center of several reflections on CLE, including those of Cecilia Blengino, which revolve around the idea of CLE as a reflective practice that allows clinicians to immerse themselves in the contexts in which law is created, enabling them to grasp the complexities and contradictions inherent in legal phenomena, to rework feelings and emotions, and to recognize and overcome habitus and cognitive distortions. At the same time, the encounter with the people to whom the practice of law is directed allows future lawyers

connect/bocconi/sitopubblico_it/albero+di+navigazione/home/corsi+di+studio/giurisprudenza/laurea+magistrale+in+giurisprudenza/placement+del+corso/legal+clinic> accessed 23 July 2023.

[34] On this type of community-based clinics, K Tokarz and others, 'Conversations on "Community. Lawyering": The Newest (Oldest) Wave in Clinical Legal Education' (2008) 28 Washington University Journal of Law Policy 359.

[35] See on this P Brayer, 'A Law Clinic Systems Theory and the Pedagogy of Interaction: Creating a Legal Learning System' (2000) 12 Connecticut Public Interest Law Journal 1.

[36] See J Perelman, 'Penser la pratique, théoriser le droit en action: des cliniques juridiques et des nouvelles frontières épistémologiques du droit' (2014) 74 Revue interdisciplinaire d'études juridiques 133.

to confront the problem of access to justice in a direct and concrete way.[37]

Maria Rosaria Marella and Enrica Rigo had already arrived at similar considerations when they reflected on CLE in the prism of the commons: according to their approach, knowledge is a collective product in an authentic and progressive sense, and it belongs to an indeterminate community, or at least one that is not closed or circumscribed within the university framework.[38]

The legal clinic thus actualizes the most up-to-date and militant notion of the common good precisely because its function lies not simply in guaranteeing the collective use and management of the intangible resources that identify it, but redistributes those resources outside the community of reference, strengthening or creating ex novo ties of social (and political) solidarity between the student community and social actors outside it:

> The legal clinic, interpreted and acted as a common good, declines in current terms the social vocation of the early US law clinics, which, moving from instances of social justice, invented 'militant' forms of access to justice. Law clinics integrate (or can integrate) commons with strongly transformative connotations because their primary purpose is to share the knowledge produced in the university with the outside world, with the broader community living outside the university's boundaries.[39]

In this sense, CLE can be thought of as innovative teaching the moment one conceives it as a critical tool of classical teaching methods, an approach that can shake the foundations of logical-legal reasoning and frontal lecture. Through such use, one might find that the practices developed in this context, are also helping to change law as such.

[37] On reflective practice see C Blengino, *Svelare il diritto. La clinica legale come pratica riflessiva* (Giappichelli 2023); C Blengino and others, 'Reflective Practice: Connecting Assessment and Socio-Legal Research in Clinical Legal Education' (2019) 3 International Journal of Clinical Legal Education 54.

[38] MR Marella and E Rigo, 'Cliniche legali, Commons e giustizia sociale' [2015] Parolechiave 181.

[39] Ibid 191.

PAUL MCKEOWN*

WHAT IS THE IDENTITY OF EUROPEAN CLINICAL LEGAL EDUCATION?

ABSTRACT. *This article will explore whether there is, or can be, a common identity for the clinical legal education movement in Europe, despite differing traditions across the continent. The definition of clinical legal education will be critically analysed exploring the teaching methods and the purported aims of clinical legal education encompassing both the educational and social justice mission. Different models of clinical legal education will be analysed, such as live-client, placements, policy clinic, public legal education and, perhaps most controversially, simulated legal clinic. Each model of will be evaluated to establish whether it satisfies the perceived identity of clinical legal education. In conclusion, the article will advance the case for a broad notion of clinical legal education within Europe placing the student at the heart of its mission. Clinical legal education should be an inclusive movement, encouraging innovation to address the needs of students and society as a whole.*

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1. Introduction

Clinical legal education has seen a sporadic development across Europe. The first clinical legal education programme incorporated into the curriculum in the UK was at the University of Kent in 1973.[1] It was not until the millennium that clinical legal education exponentially grew within the UK, with a 1995 survey showing only 8 law schools offering live-client clinics in the UK.[2] Central and Eastern Europe saw the development of clinical legal education during the 1990s following the collapse of communism which resulted in major reforms to the legal profession.[3] Practice-orientated legal education saw law students trained in legal skills and values, and included them in the provision of free legal services.[4] These initiatives received sponsorship from organisations such as the American Bar Association, the Ford Foundation, the Open Society Institute and the Soros Foundations Network.[5] Despite the flourishing clinical legal education movement within the UK and Central and Eastern Europe, Western Europe was regarded as the 'last hold-out' in the worldwide acceptance of clinical legal education.[6] However, there has been a growth in clinical legal education throughout the last decade in Western Europe. The Bologna Process which sought to make education systems more compatible, enhance the quality of education and promote the attractiveness of European Higher Education is cited as a catalyst for this growth as integration of clinical legal education within the law school curriculum shared the goals.[7]

[1] J Giddings and others, 'The First Wave of Modern Clinical Legal Education: The United States, Britain, Canada, and Australia' in FS Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (OUP 2010).

[2] R Grimes, J Klaff and C Smith, 'Legal Skills and Clinical Legal Education – A Survey of Undergraduate Law School Practice' (1996) 30 Law Teacher 44, 63-64.

[3] M Berbec-Rostas, A Gutnikov and B Namyslowska-Gabrysiak, 'Clinical Legal Education in Central and Eastern Europe: Selected Case Studies' in Bloch (n 1).

[4] Ibid.

[5] Ibid.

[6] RJ Wilson, 'Western Europe: Last Holdout in the Worldwide Acceptance of Clinical Legal Education' (2009) 10 German Law Journal 823.

[7] L Hovhannisian, 'Clinical Legal Education and the Bologna Process' (2006) 2 PILI Papers <https://www.pilnet.org/wp-content/uploads/2020/04/Clinical-Legal-Education-and-the-Bologna-Process.pdf> accessed 7 May 2023.

The clinical legal education movement gathered momentum that resulted in the establishment of the European Network for Clinical Legal Education (ENCLE) in 2013. ENCLE aims to support the growth and quality of clinical legal education in Europe through the facilitation of transnational information sharing, fostering scholarship and research, convening conferences, workshops and training sessions and promoting collaboration between individuals engaged in clinical legal education.[8] By 2016, there were over 100 clinical legal education programmes identified within Europe.[9] However, this is likely to have been only a fraction of the clinical legal education programmes in existence as there were approximately 76 clinical legal education programmes in the UK alone in 2014.[10] ENCLE reports a network consisting of 120 law clinics throughout Europe and 250 individual members, thus highlighting the strength of the movement.

Whilst clinical legal education programmes are developing, there is not a consensus as to what constitutes clinical legal education. Many define clinical legal education within the context of its development within their jurisdiction. For example, the UK historically had a state funded legal aid system which was 'at least as comprehensive as any in the developed world'.[11] As such, access to legal advice was not a significant issue for most people in society during the formative years of the UK clinical legal education movement. Conversely, clinical legal education was established in Central and Eastern Europe during a significant period of political and social upheaval. Influenced by the US, clinical legal education programmes within Central and Eastern Europe focused on vulnerable and indignant groups.[12] As such, these

[8] ENCLE, 'What is ENCLE' (2020) <https://encle.org/about-us/what-is-encle> accessed 7 May 2023.

[9] C Bartoli, 'Legal Clinics in Europe: For a Commitment to Higher Education in Social Justice' [2016] Diritto & Questioni Pubbliche.

[10] D Carney and others, 'The LawWorks Law School Pro Bono and Clinic Report 2014' (2014) <https://www.lawworks.org.uk/sites/default/files/LawWorks-student-pro-bono-report%202014.pdf> accessed 7 May 2023; cf Bartoli (n 2) who identified 11 clinical legal education programmes within the UK.

[11] P McKeown, 'Can Social Justice Values be Taught through Clinical Legal Education' in C Ashford and P McKeown (eds), *Social Justice and Legal Education* (Cambridge Scholars 2018) 101.

[12] P McKeown and E Hall, 'If We Could Instil Social Justice Values Through Clinical Legal Education, Should We?' (2018) 5 Journal of International and Comparative Law 1.

countries continued the US tradition of public service through clinical legal education. In Western Europe recent years have seen significant social and political issues. In particular, Western Europe has seen an increase in the migrant population with 23.8 million non-EU citizens living in the European Union on 1 January 2022.[13] Since Russia's invasion of Ukraine in February 2022, the European Union has received the largest number of people fleeing war since the Second World War.[14] The migrant crisis has resulted in a number of social challenges including housing, employment and welfare which have seen a number of initiatives, including law school programmes, engage in seeking to address the issues.

The European clinical legal education movement is now established and transitioning into its adolescent years. Like any adolescent, it is wrestling with its own identity and what clinical legal education is in Europe, and whether there is a single European identity for clinical legal education. In light of the diverse development of clinical legal education within Europe, this article seeks to address whether a common identity can be articulated for the clinical legal education movement within Europe. This is an important discussion to strengthen the European clinical movement to ensure there is a common understanding when addressing stakeholders such as clients, universities, the legal profession, the judiciary as well as national and European bodies.

2. The Identity of Clinical Legal Education in Europe

Justice Potter Stewart stated:

"I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so.

[13] Eurostat, 'Migration and Migrant Population Statistics' (2023) <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Migration_and_migrant_population_statistics#Migration_flows:_Immigration_to_the_EU_was_2.3_million_in_2021> accessed 7 May 2023.

[14] European Commission, 'Statistics on migration to Europe' (2022) <https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/promoting-our-european-way-life/statistics-migration-europe_en> accessed 7 May 2023.

But I know it when I see it…"[15]

In many ways, similar statements could be made regarding the definition of clinical legal education. There is no consensus as to the definition of clinical legal education amongst the global movement although many scholars know it when they see it. In its broadest sense, clinical legal education 'is any kind of education that uses interactive teaching methods to teach practical skills…to law students.'[16] Such a definition is likely to encompass any form of skills teaching as it is difficult to envisage skills teaching that is not interactive. However, clinical legal education is more than skills teaching. Clinical legal education develops a student's knowledge and understanding of the law, the legal system, and the society in which it operates. Brayne et al highlight that through 'clinical techniques', students 'develop critical and contextual understanding of the law as it affects people in society. Thus, clinical education is defined as that which aims to achieve these intellectual and educational goals.'[17] Whilst this definition provides an overarching view on what is, or is not, clinical legal education, further clarification could be provided on what constitutes 'clinical techniques'. The definition also omits the development of skills. Brayne et al suggest using clinical techniques with nothing other than the goal of skills development would be merely practical training, not clinical legal education.[18] It would also be remiss to ignore the origins of the modern clinical legal education movement where clinical programmes were housed in 'legal aid clinics' serving low-income neighbourhoods.[19] The early clinical legal education programmes in Australia were also housed in community legal centres.[20] The clinical legal education programmes within the US and Australia were formed by individuals with strong notions of public service. As such, notions of clinical

[15] Justice Potter Stewart, *Jacobellis v Ohio* (1964) 378 US 187.

[16] Hovhannisian (n 7).

[17] H Brayne, N Duncan and R Grimes, 'Clinical Legal Education: Active Learning in Your Law School' (Blackstone Press 1998), xiii-xiv.

[18] Ibid.

[19] FS Bloch and MA Noone, 'Legal Aid Origins of Clinical Legal Education' in Bloch (n 1).

[20] Ibid.

legal education and public service became intertwined. Clinical legal education developed different missions; one mission regarding the education of students; the second mission was the provision of a public service and enhancing social justice. The early literature from the US suggested that the educational benefits of clinical programmes were secondary to the community service mission.[21] The US, through its sponsorship of clinical legal education in Central and Eastern Europe, have therefore influenced the notions of clinical legal education in Europe. Therefore, the elements of clinical legal education include the development of skills and an understanding of the law and its role in society, particularly in relation to indignant and vulnerable groups.

This understanding of clinical legal education can be seen in the definition adopted by ENCLE:

> Clinical legal education is a *legal teaching method based on experiential learning*, which fosters the *growth of knowledge, personal skills, competences and values*, as well as *promoting social justice*, by providing pro bono services. Clinical legal education *uses practice-oriented, student-centred, problem-based, interactive teaching methods* including, but not limited to, the practical work of students on real cases and social issues supervised by academics and professionals. These educational activities aim to develop professional attitudes and foster the growth of the practical skills of students with regard to the modern understanding of the role of the socially oriented professional in promoting the rule of law, providing access to justice and peaceful conflict resolutions, and solving social problems.[22]

Whilst the definition adopted by ENCLE could be regarded as 'cumbersome',[23] it succeeds in articulating the elements of a clinical legal education programme thus

[21] McKeown (n 11); G Grossman, 'Clinical Legal Education: History and Diagnosis' (1973) 26 Journal of Legal Education 162, 174.

[22] ENCLE, 'Standards for European Clinical Legal Education' Article 2(1) (emphasis added) <https://encle.org/upload/lg/news/ENCLE-Standards-Final-Version-July-2022.pdf> accessed 7 May 2023; see also STARS, 'STARS Project Guidelines for Clinical Legal Education' (2021) <http://www.lawstars.eu/articolo.aspx?id=273> accessed 7 May 2023.

[23] Bartoli (n 9) 22.

providing a common identity. However, despite, this definition, there is still scope for discussion on what is, and is not, a clinical legal education programme.

3. Do all live-client models conform to our understanding of clinical legal education?

Within his definition of clinical legal education, Wilson identifies five components: academic credit for participation; the provision of legal services by students to actual clients with real problems; those clients are indignant, that they cannot afford the cost of legal representation and/or they come from a disadvantaged, marginalised or underserved community; the students are supervised by a qualified lawyer, preferably an academic who shares the pedagogical objectives of clinical legal education; and the casework is preceded or accompanied by a course including skills, ethics and values of practice, as well as the relevant substantive legal knowledge.[24]

When many people think about clinical legal education they think about a live-client model; where students advise, and potentially represent, members of the public on legal matters. Whilst the exact manner in which the clinical programme operates is likely to vary between programmes, in essence, the legal clinic operates as a legal practice within the university, either as a component of the law programme or as an extra curricula activity. Some scholars, such as Wilson, above, suggest that clinical legal education must be embedded within the curriculum. Where a project is extra curricula, thus deriving no credit for participating students, then this is 'pro bono' rather than clinical. Students are placed in the role of lawyers typically supervised by a member of academic staff or an external practising lawyer. Students will often acquire substantive legal knowledge from their legal studies, although many live-client clinics specialise in areas not covered by the law school curriculum. As such, students will often be required to utilise and develop their research skills to address the issues raised by their client.

Within a live-client model, students will usually interview clients, research the legal issues relevant to their matter and advise the client on the options available to them.

[24] Wilson (n 6) 829–830.

As stated above, some clinical programmes will represent their clients by preparing documents, corresponding with an opponent, and advocating on behalf of the client at any court hearing. It is clear how such a model of clinical legal education is 'practice-orientated' given that students assume the role of the lawyer within such a model.

Live-client clinics embrace constructivist principles of learning. The client presents the students with a problem, thus demonstrating a 'problem-based' approach, requiring the students to find a solution. Unlike traditional approaches to legal education, where an academic will stand at the front of a lecture theatre and dispense knowledge that students passively acquire, the live-client model is 'student-centred'. Within this model of clinical legal education, the academic (or supervising lawyer) is not the '"sage on the stage" but the "guide on the side."'[25] Giddings identifies the various roles assumed by the clinical supervisor as translator; role model; collaborator; mentor; constructive critic; supporter; and builder of reflective practice.[26] By adopting the appropriate role at the appropriate moment in the student's clinical learning journey, the supervisor facilitates the learning by helping the student understand and contextualise the experience. Feedback will foster growth in the students' legal knowledge, skills development, and level of competence. The supervisor should also help students make sense of the law and how it operates in society. Quigley posits that supervisors should utilise the 'disorientating moment' to prompt reflection through critical thinking enabling the student to re-orientate how they perceive and understand the world.[27] Whilst many of the experiences within a live-client clinic may fall short of being disorientating, supervisors can still facilitate critical thinking through questioning the student experience. This critical thinking fosters a deeper level of learning about themselves and the world in which they are working.

The question arises as to whether all live-client models are a form of clinical legal education, or whether it is restricted to those programmes advising and

[25] Wilson (n 6) 829.

[26] J Giddings, 'It's More Than the Site: Supporting Social Justice Through Student Supervision Practices' in Ashford and McKeown (n 11) 46–47.

[27] F Quigley, 'Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics' (1995) 2 Clinical Law Review 37.

representing indignant, marginalised, or vulnerable groups.

As identified above, clinical legal education and notions of social justice are intrinsically linked. The literature on clinical legal education, predominantly emanating from the United States, suggests clinical legal education must include the provision of legal services to indignant, marginalised, and vulnerable individuals or groups.[28]

The term 'social justice' is often mentioned within the context of clinical legal education yet little attempt is made to define what is meant by the term. Clinical educators refer to social justice with an implicit understanding that everyone is referring to the same meaning. Perhaps, as illustrated, that implicit meaning is the provision of legal services to indignant, marginalised, and vulnerable groups. However, the meaning of social justice has occupied the thoughts of philosophers since ancient Greece.[29] In modern theory, normative ethics provides a framework to assist in determining what is 'just and unjust' or what is 'good and bad'.[30] Split into three branches, namely: virtue ethics, deontology, and consequentialism, the 'just' or 'good' outcome will depend upon which branch is applied. For example, applying the perspective of virtue ethics, altruism is virtuous trait and therefore altruistic actions are likely to be considered 'just' even if the outcome is 'bad'.[31] Deontologist focus on the action and consider whether that action is intrinsically 'good' or 'bad'.[32] Consequentialists will look for the best possible outcome that makes the world a better place.[33] In essence, different actions and outcomes may be justified depending upon the philosophical perspective; a notion often absent in the literature on clinical legal education.

[28] See S Wizner and J Aiken, 'Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice' (2004) 73 Fordham L Rev 997; S Wizner, 'Beyond Skills Training' (2001) 7 Clinical L Rev 327; JA Cohen and others, 'Legal Education and the Role of Law Schools in Defining and Training Lawyers for Public Interest Practice in the Twenty-First Century' (2000) 3 NY City L Rev 139; M Martin Barry, JC Dubin and PA Joy, 'Clinical Education for This Millennium: The Third Wave' (2000) 7 Clinical L Rev 1; JC Dubin, 'Clinical Design for Social Justice Imperatives' (1998) 51 SMU L Rev 1461.

[29] See A Hamedi, 'The Concept of Justice in Greek Philosophy (Plato and Aristotle)' (2014) 5 Mediterranean Journal of Social Sciences 1163.

[30] McKeown and Hall (n 12), 34–36.

[31] Ibid.

[32] Ibid.

[33] Ibid.

One area of practice often maligned as lacking in social justice is the business clinic.[34] Whilst a form of live-client model, business clinics by their very nature do not directly assist, or perhaps target, indignant, marginalised, and vulnerable groups. As such, business clinics may be 'deemed at best unconventional, at worst a threat' to the traditional clinical movement.[35] However, the work of business clinics can be justified as a 'good' from a philosophical perspective. For example, the majority of business owners are not 'Bill Gates types', affluent with power, connections and money.[36] The provision of legal advice and assistance to a small business owner is altruistic and an intrinsically good act. Further, local communities are likely to benefit through the services offered by a small business and the employment opportunities it may create, enhancing the local economy and benefiting society as a whole.

Business clinics may have an indirect benefit in assisting indignant, marginalised, and vulnerable communities. Such communities often receive charitable assistance. NGOs, charities and community groups must typically comply with legal obligations relating to structure and governance. Business clinics are able to provide legal advice and assistance thus ensuring that they are sustainable and can continue to benefit the communities they serve.

The social justice imperative of live-client clinics may also be re-conceptualised with a focus on the student rather than the clients. Whilst recognising that 'talent' rather than socio-economic background should determine entry into tertiary education, under-representation of those from lower socio-economic backgrounds continues to be a problem within Europe.[37] It should be noted that the position varies across different countries within Europe although broadly, trends in North-Western Europe have shown decreasing inequalities since 2000, they have continued to increase in South-Western European countries.[38] Eastern European countries have seen a rise in inequalities in

[34] E Campbell, 'Taking Care of Business: Challenging the Traditional Conceptualization of Social Justice in Clinical Legal Education' in Ashford and McKeown (n 11).

[35] Ibid 175.

[36] Ibid 179.

[37] F van Vught, 'The EU Innovation Agenda: Challenges for European Higher Education and Research' (2009) 21Higher Education Management and Policy 1.

[38] J Koucký, A Bartušek and J Kovařovic, 'Who gets a degree?: Access to Tertiary Education in Europe 1950-2009'

tertiary education reaching their average peak level after the year 2000.[39] However, whilst there has been an increase in the number of students from lower socio-economic backgrounds entering tertiary education, inequalities have become more subtle and less discernible as they changed from quantitative to qualitative characteristics.[40] This means that the inequalities are not necessarily in access to tertiary education, but in the subjects being studied, the prestige of institutions at which students can study and opportunities for graduates in the labour market.

Students from lower socio-economic backgrounds are less likely to attend the prestigious universities and are less likely to have the social capital to aid them in acquiring work placements and employment. This is illustrated in England where the less selective universities take the majority of students from poorer backgrounds.[41] On average, graduates from these universities have lower earnings than graduates of more selective universities.[42] Graduates of more selective universities have the best chance of becoming a higher earner, regardless of their background.[43] One explanation for this disparity is the lack of social capital amongst lower socio-economic groups. Social capital 'is the sum of the resources, actual or virtual, that accrue to an individual or a group by virtue of possessing a durable network of more or less institutionalized relationships of mutual acquaintance and recognition.'[44] Having a share of people from a higher socio-economic group among people from lower socio-economic groups is associated with upward income mobility.[45] This supports the notion that socio-economic background becomes less of an issue once an individual is at a university with those from higher socio-economic groups. This is likely due to their ability to enhance their social capital whilst at university.

(Education Policy Centre, Charles University 2010) <http://www.strediskovzdelavacipolitiky.info/download/Whogetsadegree.pdf> accessed 7 May 2023.

[39] Ibid.

[40] Ibid.

[41] The Sutton Trust, 'Universities and Social Mobility: Summary Report' (2021) <https://www.suttontrust.com/wp-content/uploads/2021/11/Universities-and-social-mobility-final-summary.pdf> accessed 8 May 2023.

[42] Ibid.

[43] Ibid.

[44] P Bourdieu and LJD Wacquant, *An Invitation to Reflexive Sociology* (University of Chicago Press 1992).

[45] R Chetty and others, 'Social Capital I: Measurement and Associations with Economic Mobility' (2022) 606 Nature

However, students who attend less prestigious universities may need to build their social capital in alternative ways. Live-client clinics may assist individuals in building social capital through exposure to the legal system, and the actors within that system, thus facilitating the establishment of networks that students can exploit to secure future employment opportunities. In summary, the live-client clinic can promote social mobility and therefore in and of itself satisfy the social justice mission.

The case for a live-client model as a form of clinical legal education is well-established. For the reasons set out above, live-client clinics are encompassed within clinical legal education regardless of the nature of work adopted. However, the question arises as to whether the live-client model of clinical legal education is the only model of clinic within the ambit of clinical legal education. For various reasons, such as physical, financial, and human resources or limitations imposed by professional bodies on who can engage in legal practice, many individuals or universities who would like to participate in clinical legal education are unable to establish a live-client model of clinic. Can these individuals and universities offer alternative clinical opportunities without exclusion from the clinical legal education community.

4. Alternative models of 'clinical legal education' (or are they 'clinical legal education'?)

Law schools have adopted various models of experiential learning. However, there has been debate about whether these models fall within the ambit of clinical legal education. Such models include placements (or externships), policy clinics, public legal education, and simulated clinics. This is not intended as an exhaustive list but merely examples of projects which may be adopted in addition to, or instead of, a live-client model.

4.1. Placement (or externship) model

Clinical legal education should be distinguished from work experience. Whilst work experience is invaluable, due to higher graduate employability rates and possibly

higher incomes,[46] experience alone is insufficient. As highlighted above, a defining aspect of clinical legal education is the incorporation of reflection to enable students to learn from their experiences and build upon their learning, thus contextualising that experience.[47]

Many universities incorporate some form of work experience within their programmes. Such experience may take many different forms, some of which fall within the definition of clinical legal education. For example, many programmes may incorporate a placement, internships, and externships.[48] Such opportunities may allow students to work in legal practice at a law firm or legal advice centre. Students may also be offered the opportunity to attend court with a member of the judiciary. Within the UK, a student may enrol on an apprenticeship which by definition incorporates both 'on-the-job' and 'off-the-job' training. As such, there are likely to be significant opportunities for placement whilst at law schools. An advantage for the law school is that placements are less resource intensive than the in-house live-client clinic as the university is not required to provide the physical space and equipment necessary for the project, nor is it required to workload staff to supervise casework.

Many law schools offer students the opportunity to undertake a placement at a law firm or a NGO. Whether such placements constitute a form of clinical legal education is likely to depend upon what the student actually does whilst participating in the placement. For example, if the student is a passive observer shadowing a lawyer, it is unlikely that such a placement would constitute a form of clinical legal education. Whilst the student may acquire some learning, through modelling, it is not student-centred. However, where a student partakes in a more active role, this may constitute a model of clinical legal education, transposing the principles of an in-house live-client model of clinic to an external environment. Where the placement is designed to engage

[46] A Blackwell and others, 'Transforming Work Experience in Higher Education' (2001) 27 British Educational Research Journal 243.

[47] R Heyler and D Lee, 'The Role of Work Experience in the Future Employability of Higher Education Graduates' (2014) 68 Higher Education Quarterly 348.

[48] For examples of placements, see L Bengtsson, C Thomson and BA Court, 'The Law in the Community Module at Northumbria University – Working in Partnership with Citizens Advice as an Effective Teaching Tool' (2021) 28 International Journal of Clinical Legal Education 111; L Donnelly, 'Clinical Legal Education in Ireland: Are Placement Programmes Good Enough?' (2018) 41 Dublin ULJ 189; P McKeown and S Morse, 'Litigants in Person: Is There a Role for Higher Education?' (2015) 49 The Law Teacher 122.

students with reflective practice, this would constitute a form of clinical legal education. Reflective practice can be undertaken with the placement provider although it is preferable that a member of academic staff, familiar with the educational goals, helps the student reflect upon their experiences.

Critics may suggest that many placements do not promote social justice. Such arguments are premised on the basis that a law firm may not be assisting indignant and/or vulnerable clients. However, this interpretation is a somewhat narrow conception of social justice as outlined above. In particular, students from lower socio-economic backgrounds have the opportunity to build their social capital, enhancing their employment prospects and thus enhancing social mobility.

In many respects, a placement is akin to live-client models of clinical legal education. The university has merely outsourced the practical element allowing students the opportunity to engage in professional legal practice. In some respects, the placement is more authentic as students are in the 'real world' rather than a more protected in-house live-clinic environment. However, there is a risk that students will not be able to take advantage of the learning opportunities as those directly supervising may not, and often will not, be familiar with clinical pedagogy. As such, a placement must be well designed to ensure it is educational.

4.2. Policy Clinics

Students in policy clinics engage in research projects with a view to influencing law reform or policy change. In contrast to a live-client model, where students focus on the law as it is, policy clinics allow students to consider how the law 'can be'.[49] From a social justice perspective, policy clinics may arguably have a greater impact than live-client clinics, thus aligning with notions of utilitarianism. Live-client clinics must focus on the interests of the individual, which may not align with the interests of wider society. Indeed, it is a professional obligation that a lawyer should 'act freely, diligently, and

[49] R Dunn, L Bengtsson and S McConnell, 'Building a Policy Clinic Network – CLEO Workshop 13th May 2021' (2021) 28 International Journal of Clinical Legal Education 244.

fearlessly in accordance with the legitimate interests of the client'.[50] This means that lawyers should act in the best interests of their client, regardless of broader issues. For example, if a client wishes to settle their matter rather than challenge a potentially unlawful policy, the lawyer must abide by the client's instructions even where the unlawful policy may continue. Alternatively, the client's case may be morally repugnant, but this should not deprive them of representation.

By contrast, policy clinics focus on the law as a whole and therefore the wider impact their work may have so students 'can see that their work may have a positive impact in generating change.'[51] Dunn et al highlighted that students appreciated the potential wider impact of their research albeit recognising that change can take time.[52]

Policy clinics are practice-orientated, merely exemplifying a different type of practice. Policy clinics may incorporate both empirical and doctrinal research and therefore draw upon an academic skill set. From an institutional perspective, policy clinics create opportunities for non-practitioner academics[53] to engage in clinical legal education. As with live-client clinics, there is a constructivist approach with students responsible for constructing their own knowledge of the law and the context in which it operates. Policy clinic also promotes the development of personal growth, skills competences, and values amongst students. Students develop a broad range of skills including research, oral and written communication, teamwork, and time management.[54] Students may also be exposed to issues that they have not experienced before thus challenging their knowledge and understanding of the world, particularly interaction between law and society. Such experiences may cause students to question their values and can be 'extremely personally challenging' for many of them.[55]

[50] International Bar Association, 'IBA Standards for the Independence of the Legal Profession' (1990) <https://www.ibanet.org/MediaHandler?id=F68BBBA5-FD1F-426F-9AA5-48D26B5E72E7> accessed 7 May 2023.

[51] L Curran, 'University Law Clinics and Their Value in Undertaking Client-Centred Law Reform to Provide a Voice for Clients' Experiences' (2007) 12 International Journal of Clinical Legal Education 105, 108.

[52] R Dunn, L Bengtsson and S McConnell, 'The Policy Clinic at Northumbria University: Influencing Policy/Law Reform as an Effective Educational Tool for Students' (2020) 27 International Journal of Clinical Legal Education 68.

[53] Academics who do not and have not practised as lawyers.

[54] Dunn, Bengtsson and McConnell (n 52) 90.

[55] Curran (n 51) 118.

The opportunity for the student to reflect is the core of what makes policy clinic a form of clinical legal education. Within the policy clinic design, opportunities should be embedded for the student to reflect with guidance from a member of academic staff to prompt critical thinking about their learning and understanding of the legal system.

4.3. Public Legal Education

Public legal education programmes typically involve students educating the public on their legal rights and responsibilities. The most notable example of public legal education is Street Law which was founded in 1972 at Georgetown University by a group of law students wanting 'to teach ordinary people about law and government using student-centred, interactive teaching methods.'[56] Street Law projects utilise a range of interactive teaching methods, including negotiations, case studies, civil discussions, and simulations such as mock trials.[57]

Public legal education projects such as Street Law provide students with the opportunity to develop their skills. Students must plan and deliver a public legal education session. This is likely to include research, written and oral communication skills. Students will often work as a team in delivering the session to the audience. As such, there are a range of skills and competencies developed during the course of the project.

Whilst initially a public legal education project may not appear to be practice-orientated, as it lacks individual advice and representation, it is arguable that the role of a lawyer goes beyond representation of the individual client. This is recognised by the International Bar Association who state it is the 'responsibility of the legal profession… to educate the members of the public about the principles of the rule of law, the importance of the independence of the judiciary and of the legal profession and to inform them about their rights and duties and the relevant and available remedies.'[58] Public legal education embodies this professional responsibility highlighting the importance of legal literacy in society. Students therefore have the opportunity to exhi-

[56] Steet Law Inc, 'Street Law's History' (2023) <https://streetlaw.org/who-we-are/about/history/> accessed 7 May 2023.

[57] Steet Law Inc, 'Approach' (2023) <https://streetlaw.org/our-work/approach/> accessed 7 May 2023.

[58] International Bar Association, 'IBA Standards for the Independence of the Legal Profession' (n 50).

bit the attributes of a lawyer in a similar manner to those undertaking live-client clinic.

Further support for the alignment of public legal education with professional legal practice is found in the activities and websites of law firms. Many law firms will deliver training sessions, inviting clients and prospective clients to attend. Law firms will also prepare and publish briefing notes on new and developing areas of law. These activities, whilst principally a marketing tool, highlight the role of lawyers in educating the public on the law. Students seeking employment may utilise their experience of public legal education to enhance their employability, evidencing their transferrable legal skills and an ability to align with the ethos of a prospective employer in delivering training and publishing updates.

Social justice is also embedded within public legal education projects, both in terms of the community and the students participating in the project. Grimes et al (2011) highlighted how Street Law helped to break down the racial barriers caused by apartheid by providing an opportunity for school children from black and white communities to share their experiences and debate important societal issues.[59] From a student perspective, Street Law exposes students to social issues and may engage them with members of society they have not previously encountered. This is espoused by MacDowell who stated that Street Law provided a 'powerful reality check'.[60]

Once again, this highlights the important role of the academic with a public legal education project that goes beyond checking the student's work. An academic should facilitate a critical reflection on the subject matter of the students' project. Whilst most projects may not have the significance of breaking down the barriers of apartheid, the projects will evoke an appreciation for the impact of the law and how it regulates and governs members of society. Students may experience a 'reality check' gaining an appreciation for the issues experienced by groups they address within their project. As such, the students can contextualise and understand the legal system in which they operate.

[59] R Grimes and others, 'Street Law and Social Justice Education' in Bloch (n 1).

[60] EL MacDowell, 'Law on the Street: Legal Narrative and the Street Law Classroom' (2008) 9 Rutgers Race and Law Review 285, 287.

4.4. Simulated Legal Clinic

Perhaps one of the most controversial models is simulated legal clinics whereby students engage with simulated scenarios and exercises. Simulated clinic may form part of an introductory or preparation programme for a live-client model. This has been identified by scholars as a matter of good practice in providing students with foundational knowledge before commencing a live-client experience.[61] However, can a stand-alone simulated legal clinic be considered a form of clinical legal education?

Simulated clinics may not accurately address the realities of professional legal practice. This argument appears to garner support from the Solicitors Regulation Authority, the regulator of the solicitors' profession in England and Wales, who recognise working in a law clinic as a form of qualifying work experience.[62] However, the Solicitors Regulation Authority do not recognise simulated legal services as a form of qualifying work experience highlighting that qualifying work experience must involve 'real life work' to enable prospective solicitors to experience 'work in practice, the challenges they face and to real clients.' [63] Whilst recognising the value of clinical legal education, it is misconceived of the Solicitors Regulation Authority to recognise clinical legal education as a form of qualifying work experience if the criteria is based upon the realities of professional practice. Even within a live-client clinic the environment is likely to be much more controlled than that of professional practice. Students are likely to experience a lower caseload and significantly higher levels of supervision within a clinical setting than that of professional practice. If the rationale relates to the development of competencies, this can be done within a simulated legal clinic. This can be contrasted with the American Bar Association who recognised the importance of simulated legal training stating:

[61] Wilson (n 6) 829.

[62] Solicitors Regulation Authority, 'Qualifying Work Experience for Candidates' (2023) <https://www.sra.org.uk/become-solicitor/sqe/qualifying-work-experience-candidates/> accessed 7 May 2023: Prospective solicitors must complete a period of two years qualifying work experience to qualify for admission to the roll of solicitors in England and Wales. Qualifying work experience provides experience of 'real life legal work' as well as the 'opportunity to develop some or all of the competences needed to be a solicitor'.

[63] Ibid.

While even well-structured law school clinical programs would rarely be able to duplicate the pressures and intensity of a practice setting, law schools provide a unique opportunity for exposing students to the full range of these practice skills, an opportunity that might not be readily available in actual practice. Moreover, the organized instruction in these skills, in a *simulated* or live-client context in law schools, enables students to relate their later practice experience to concepts that they have learned in law school, just as students are able to place the substantive knowledge that they acquire after law school in the framework of the concepts they have learned in their substantive courses.[64]

Ultimately, a simulated exercise will only be as realistic as those involved in the exercise can make it.[65] Whilst it is recognised that a real-life experience cannot truly be replicated due to the vagrancies of real-life clients, students are still able to develop the skills and competencies necessary for a career in professional legal practice including oral and written communication, research, case and time management, and teamwork. The Solicitors Regulation Authority merely require the opportunity to develop two competencies for an experience to count as qualifying work experience.[66] As a well-planned simulated experience would provide such an opportunity, it is unclear why a simulated experience would not count as qualifying work experience.[67]

If simulated legal clinics are incorporated within clinical legal education, should mooting and other skills-based teaching sessions also be part of the clinical movement? Clinical legal education is more than practical skills teaching and therefore what broader

[64] American Bar Association, 'Legal Education and Professional Development- An Educational Continuum: Report of The Task Force on Law Schools and the Profession: Narrowing the Gap' (American Bar Association, July 1992), 234-235 (emphasis added) <https://www.corteidh.or.cr/tablas/28961.pdf> accessed 7 May 2023.

[65] J Boersig, J Marshall and G Seaton, 'Teaching Law and Legal Practice in a Live Client Clinic' (2002) 6 Newcastle L Rev 51, 58.

[66] Solicitors Regulation Authority (n 23).

[67] It should be noted that qualifying work experience must include the provision of legal services. Section 12(3) of the Legal Services Act 2007 defines legal activity as 'an activity which is a reserved legal activity…and (b) any other activity which consists of one or both of the following – (i) the provision of legal advice or assistance in connection with the application of the law or with any form of resolution of legal disputes; (ii) the provision of representation in connection with any matter concerning the application of the law or any form of resolution of legal disputes.' As such, only live-client models of clinic are likely to count as qualifying work experience.

issues form part of a simulated legal clinic, after all, where is the social justice?

Those who oppose the inclusion of simulated legal clinic within the umbrella of clinical legal education may highlight an inability to promote social justice. Boersig et al suggest that live-client clinics provide 'an understanding of broader social justice issues' as clients 'are drawn from vulnerable groups' thus providing 'powerful social insights into the broader social issues that face the law'.[68]

It is however possible that a well-designed simulated legal clinic can provide for powerful social insights, akin to or perhaps greater than a live-client clinic. A live-client clinic is limited, or at least should be, in the type of cases it can accept. Some matters are likely to be too urgent or too complex for students. The educational benefit of live-client clinics should always be balanced against the interests of client. The supervising lawyer will owe the client a duty to act in their best interests, which may create a tension with the educational mission of clinical legal education. For example, if a client is homeless, it may not be in their best interest to allow students the time to undertake the necessary research and strategise an appropriate route to securing suitable accommodation. If the supervising lawyer were to accept such a case, it is likely that they would need to be directional in their approach to the case, thus under-mining notions of student-centredness. However, it is plausible that a well-crafted simulated case could provide a powerful insight into issues such as homelessness and the allocation of social housing. Students would have the opportunity to engage in the law around homelessness and social housing, exploring who is and is not entitled to assistance and the equity of distribution of social housing. If such simulated cases were supplemented with opportunities to discuss their findings and debate the issues, students would be exposed to social issues that face the law.

As with other models of clinical legal education, the educational opportunities are a matter of design. Academics can build opportunities into a simulated legal clinic prompting reflection. This may be easier for academics who have practised the law as they can draw upon their experiences, whilst maintaining confidentiality, to prepare realistic scenarios to facilitate deep levels of reflection. Even academics who have not practised the law could prepare a scenario based upon legal issues within the news. This

[68] Boersig, Marshall and Seaton (n 65) 66.

may also have the benefit of bringing the scenario to life for the law student.

Finally, there should also be an appreciation that not all students have the ability to commit to a live-client clinic. Such clinics raise issues around professional responsibility to the client. Any student who acknowledges that they cannot commit to this responsibility should be applauded, as this is a sign of professionalism in itself. For example, students may need to work or have family commitments making it impossible for them to devote the requisite time to a real client. It is therefore imperative that opportunities are offered within the curriculum for these students to develop their professional knowledge, skills, competences, and values.

5. Concluding Remarks

I know it when I see it; what is *it*?

There are common threads running through the models of clinical legal education set out above enabling an observer to distinguish clinical legal education from other forms of teaching and practical experience. Perhaps the starting point is to dissect the terminology, clinical legal education.

'Clinical' can be defined as 'of, relating to, or conducted in or as if in a clinic'.[69] A 'clinic' is defined as 'a class of medical instruction in which patients are examined and discussed' or is 'a group meeting devoted to the analysis and solution of concrete problems or to the acquiring of specific skills or knowledge'.[70] This definition highlights the first hallmark of clinical legal education in that it must involve people, problems, skills and knowledge.

'Legal' is uncontroversial, and merely distinguishes legal education from other forms of clinical teaching.

The final aspect is 'education', and it is this aspect which distinguishes clinical

[69] Merriam-Webster, 'Clinical' (2023) <https://www.merriam-webster.com/dictionary/clinical#:~:text=Medical%20Definition-,clinical,and%20treatment%20of%20living%20patients> accessed 8 May 2023.

[70] Merriam-Webster, 'Clinic' (2023) <https://www.merriam-webster.com/dictionary/clinic> accessed 8 May 2023.

legal education from other activities such a skills training and mooting. The methodology of clinical legal education embodies notions of deep levels of reflection. Clinical educators utilise real world issues, whether actual or simulated, to prompt students to reflect on the law, the legal system and wider society. Whilst such reflection may not be transformative, it should provide students with an opportunity to contextualise their understanding and appreciate how the law interacts with society. Student may also reflect upon their own performance to enhance their knowledge and skills development.

At the heart of clinical legal education is the student, after all, it is a 'student-centred' methodology. Within the design of any clinical legal education project, consideration must be given to student outcomes such as their learning and employability. The various models of clinical legal education, if designed correctly should enhance a student's knowledge and understanding of the law and society, including the impact of the law on society. The knowledge, skills and attributes acquired through clinical legal education should enhance employability. Clinical legal education should also offer students from lower social economic backgrounds the opportunities to enhance their social capital, growing networks which should enhance their employability and earning potential. As such, clinical education promotes social mobility.

Whilst it is acknowledged that clinical legal education and social justice are historically intertwined, a broader pluralistic approach should be adopted. In reality, most clinical opportunities will involve engagement with indignant, marginalised and vulnerable groups. Clinical legal education projects are likely to be developed in areas of unmet need and therefore there is a symbiotic relationship between clinical legal education and underrepresented groups. Clinical legal education may, or may not, provide a transformative experience for the student. However, it should educate them on the law in action.

However clinical legal education is defined in Europe, it should be broad and inclusive. Adopting a narrow and exclusionary interpretation risks stifling innovation. The ability to innovate in clinical legal education creates the opportunity adapt changing societal pressures and implement high quality learning opportunities.

CRISTINA PONCIBÒ*

BEYOND DICHOTOMIES: INTEGRATING SOCIAL AIMS AND MARKET CONSIDERATIONS IN EU LEGAL CLINICS

ABSTRACT. *Legal clinics in the European Union find themselves at the intersection of social aims and market considerations, navigating a delicate balance to fulfil their mission effectively. While their primary focus is to serve the social good and promote access to justice, they also need to consider the market realities of the legal profession. The Start-up Legal Lab at the Law Department of the University of Turin aligns with the proposed approach by embracing both market-oriented experiential practice and the pursuit of social aims. This approach recognises the interconnectedness of these two aspects and acknowledges that they should not be treated as separate or opposing forces. This approach leads to innovative solutions, a deeper understanding of legal issues, and ultimately, a more just and equitable legal system.*

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1. Introduction

Legal clinics within the European Union (EU) find themselves situated at the convergence point of social objectives and market considerations, deftly navigating a nuanced equilibrium to effectively accomplish their mission.

Traditionally, legal clinics have been driven by a strong commitment to social justice and a desire to level the playing field for those facing legal challenges. However, this noble mission does not exempt them from grappling with the practical considerations of running a successful legal practice. Embracing market considerations does not equate to compromising their core values. Instead, it enables them to build a stronger foundation for their operations, ensuring continuity and expanding their reach to assist more individuals in need. By approaching their work with a strategic mindset and a keen awareness of market dynamics, legal clinics can effectively harness resources to maximize their positive impact.

At the Law Department of the University of Turin, the Start-up Legal Lab stands as an exemplar of the comprehensive approach that seamlessly intertwines social objectives and market-driven practices. This innovative initiative recognizes that social welfare and market viability are not mutually exclusive. In fact, they can fuel each other's success and create a powerful synergy. By providing students with experiential learning opportunities that bridge the gap between theory and practice, the Start-up Legal Lab equips future legal professionals with the necessary skills to excel in both social justice advocacy and the competitive legal market. Graduates from this experimental learning course emerge not only with a deep understanding of the law, but also with a keen awareness of the business aspects of legal practice, making them versatile and adaptable legal practitioners.

The approach embraced by the Start-up Legal Lab promotes a comprehensive and interconnected understanding of the legal landscape. It acknowledges that societal challenges and market realities are intertwined and that addressing legal issues requires a multifaceted perspective.

This approach is essential to effectively tackle the complex problems faced by legal clinics and the broader legal system. By considering all perspectives and embracing the inherent interplay between social aims and market considerations, the legal

profession can foster innovative solutions that enhance access to justice, streamline legal processes, and create a more equitable and inclusive legal system. When legal clinics and legal professionals unite their efforts, drawing upon both their social commitment and market-oriented strategies, they can drive lasting positive change and promote a more just society for all.

2. Social justice: a reality check

Legal clinics in the EU aim to enhance students' practical skills, professionalism, ethical awareness, and social responsibility, while contributing to access to justice and the provision of legal services to underserved individuals or communities.[1]

In contemporary legal education, legal clinics serve as practical learning environments where law students can gain hands-on experience by working on real cases under the supervision of experienced attorneys. These clinics can be structured in different ways, and the structure can influence the goals and outcomes of the clinic experience.[2]

One approach to structuring legal clinics is to focus on stimulating students' imagination on how to defend the weak and marginalised. In this approach, the clinics may prioritize cases that involve individuals or groups who face legal challenges and lack access to adequate representation. The aim is to instil in students a sense of social justice and a commitment to using the law as a tool to protect and advocate for the rights of vulnerable populations. By working on these types of cases, students can develop empathy, critical thinking skills, and a deeper understanding of the societal implications of legal issues. This approach to legal clinics focuses on social justice and advocacy for disadvantaged individuals or groups. The clinics aim to create an environment where students can explore and challenge systemic inequalities. They may

[1] C Ashford and P McKeown (eds), *Social Justice and Legal Education* (Cambridge Scholars Publishing 2018).

[2] A Alemanno and L Khadar (eds), *Reinventing Legal Education. How Clinical Education is Reforming the Teaching and Practice of Law in Europe* (CUP 2018).

prioritise cases involving issues such as poverty, discrimination, access to healthcare, housing, immigration, or criminal justice reform. In these clinics, students learn to empathize with clients who may face significant barriers to justice. They develop skills in legal research, analysis, and creative problem-solving to craft strategies for defending the rights and interests of marginalized populations. Students are encouraged to think critically about the law's impact on society and explore alternative legal frameworks or strategies to address systemic injustices.

In the realm of social justice, the concept is far from one-dimensional. It encompasses a rich tapestry of interconnected dimensions, each addressing different aspects of inequality, discrimination, and the pursuit of fairness and equity. Social justice recognizes that achieving a just society requires a comprehensive approach that spans various domains of life. One aspect of social justice is distributive justice. It calls for an equitable allocation of wealth, income, and essential resources to address socioeconomic disparities and ensure that everyone has access to basic needs and opportunities. Distributive justice aims to create a society where no individual is left behind due to circumstances beyond their control. Economic justice is another vital element of social justice. It strives to address economic inequalities and create a more equitable economic system. Economic justice entails fair wages, equitable access to employment opportunities, social safety nets, and the reduction of wealth gaps. Its goal is to ensure that individuals and communities have the necessary means to thrive and participate fully in society, regardless of their socioeconomic background.

Racial justice is an integral part of the social justice discourse. It focuses on the elimination of systemic racism and the promotion of equality and fairness among all racial and ethnic groups. Racial justice seeks to dismantle racial disparities in areas such as education, employment, criminal justice, housing, and healthcare. By addressing these disparities, it aims to create a society where individuals are not discriminated against based on their race or ethnicity, and where everyone has an equal opportunity to succeed.[3]

Gender justice is yet another dimension of social justice. It centers on the

[3] Ashford and McKeown (n 1).

elimination of gender-based discrimination, oppression, and inequality. Gender justice challenges gender norms, promotes equal rights and opportunities for all genders, and addresses issues such as gender-based violence, wage gaps, and limited access to resources and decision-making power. Its goal is to create a society where gender does not determine one's access to opportunities, rights, or social standing.[4]

Recently, environmental justice is an evolving dimension of social justice that highlights the fair distribution of environmental benefits and burdens.[5] It addresses environmental inequalities that disproportionately affect marginalized communities, such as exposure to pollution or lack of access to clean water and green spaces. Environmental justice advocates for the right to a clean and healthy environment for all, recognizing that marginalized groups often bear the brunt of environmental degradation and should have an equal say in environmental decision-making. Access to justice is yet another critical aspect of social justice. It encompasses equal access to the legal system, fair treatment under the law, and protection of fundamental rights and liberties. Legal justice seeks to ensure that legal institutions are impartial, laws are applied equitably, and individuals have access to legal representation and a fair judicial process. It aims to create a society where justice is not influenced by one's social status or power but is accessible to all.

These dimensions of social justice form a complex and interconnected web, each contributing to the pursuit of a more equitable and inclusive society. They underscore the multifaceted nature of social justice and highlight the need for a comprehensive approach that addresses different forms of injustice across various domains. By recognising and actively working towards achieving social justice in all its dimensions, societies can strive towards a fairer and more just future for all.

[4] Ibid.

[5] Ibid.

3. Market-oriented legal clinical education

It is therefore true that legal clinics can also be structured with the primary goal of professionalising law students and preparing them for the legal market.[6] In this approach, the clinics may prioritize cases and legal areas that are in high demand and offer lucrative opportunities for future employment. The emphasis is on developing practical skills, such as legal research, writing, client counseling, and courtroom advocacy, that are valued by employers in the legal industry. The idea is to equip students with the tools they need to excel in their legal careers and meet the expectations of the market. This approach to legal clinics focuses on preparing students for the demands of the legal profession and the current market. These clinics prioritise areas of law that are in high demand and offer potential job opportunities. Examples may include corporate law, intellectual property, technology, real estate, or financial services. In these clinics, students gain practical experience by working on cases that reflect the types of legal issues they may encounter in their future careers. They develop skills in legal research, writing briefs, client counseling, negotiation, and courtroom advocacy. The clinics may also emphasise professional development, networking opportunities, and connections with potential employers to enhance students' job prospects.[7]

It is important to note that the two approaches to clinical legal education based on social justice and market are not mutually exclusive, and many legal clinics incorporate elements of both. They can provide students with a well-rounded education that combines the pursuit of social justice and the development of practical skills. Ultimately, the specific structure and goals of a legal clinic will depend on the educational institution's values, the needs of the community it serves, and the resources available. Many legal clinics strive to strike a balance, incorporating elements of both approaches. For example, a clinic focused on social justice may also incorporate practical skills training to equip students with the tools they need to effectively advocate for marginalised communities. Ultimately, the structure and emphasis of a legal clinic

[6] D Blázquez-Martín, 'The Bologna Process and the Future of Clinical Education in Europe: A View from Spain' in FS Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (OUP 2011).

[7] Alemanno and Khadar (n 2).

depend on the educational institution's priorities, the needs of the community, and the values of the legal profession.

4. Comparative perspectives

The two different concepts of legal clinics, i.e. stimulating imagination to defend the weak and marginalised, and professionalising students for market demand, can sometimes be in tension with each other, but they do not necessarily have to conflict.[8] The following sections discuss these tensions by comparatively examining perspectives about US and EU legal clinical education.

4.1. US perspectives

The history of legal clinics in the United States is marked by a rich and impactful evolution, driven by the pursuit of social justice and the need for practical legal education.[9] It encompasses significant milestones, movements, and shifts that have shaped the landscape of clinical legal education in the country.[10]

The roots of legal clinics can be traced back to the late 19th and early 20th centuries, influenced by the settlement house movement. These early clinics operated within settlement houses, which provided social services to immigrant communities. Recognising the legal needs of these marginalized populations, legal clinics emerged as an integral part of the settlement house movement, offering legal aid and assistance.

One of the most significant milestones in the history of legal clinics is the establishment of the Boston Legal Aid Bureau in 1900. Reginald Heber Smith founded the bureau with the belief that law students, under proper supervision, could provide legal assistance to low-income individuals. This pioneering model became a blueprint for future legal clinics across the country.

The 1960s and 1970s witnessed a surge in the growth and recognition of legal

[8] Ibid.

[9] Ibid.

[10] JP Ogilvy, 'Clinical Legal Education: An Annotated Bibliography (Third Edition)' (2005) 11 Clinical L Rev 2.

clinics, fuelled by social and legal reform movements. The civil rights movement, the War on Poverty, and the broader social justice movements of the time emphasized the need to address the legal needs of disadvantaged communities.[11] In response, law schools began integrating clinical programs into their curricula, offering students hands-on experience and the opportunity to work with marginalized populations. A pivotal moment in the history of legal clinics came in 1974 with the release of a report of the American Bar Association.[12] This influential report called for increased clinical education, bridging the gap between legal education and practice. The report's recommendations provided legitimacy and institutional support for clinical legal education across law schools.[13] Over time, legal clinics in the US diversified and specialized to address a wide range of legal needs. Clinics emerged in various legal areas such as criminal defense, immigration, family law, environmental law, and more. Some clinics focused on serving specific populations, such as veterans, immigrants, or victims of domestic violence, recognizing the unique legal challenges faced by these groups.

In such a context, legal clinics have played a significant role in expanding access to justice for underserved populations.[14] By providing free or low-cost legal services, clinics empower individuals who would otherwise lack representation. They contribute to reducing inequalities in the legal system and promoting equal access to justice, embodying the commitment to social justice that underpins clinical education. In addition to their impact on access to justice, legal clinics serve as training grounds for law students. Through direct client representation, students gain practical skills, develop ethical judgment, and enhance their understanding of professional responsibility. Legal clinics provide a bridge between the classroom and real-world legal practice, preparing

[11] J Giddings and others, 'The First Wave of Modern Clinical Legal Education: The United States, Britain, Canada, and Australia' in Bloch (n 6).

[12] ABA, 'Approval of Law Schools: Standards, Procedures, and the Future of Legal Education' (1974) 72 Michigan Law Review 1134.

[13] ES Milstein, 'Clinical Legal Education in the United States: In-House Clinics, Externships, and Simulations' (2001) 51 Journal of Legal Education 375.

[14] J Frank, 'Why Not a Clinical Lawyer School?' (1933) 81 University of Pennsylvania Law Review 907.

students for their future careers as compassionate and competent lawyers. [15]

Nowadays, legal clinics in the United States continue to play a vital role in legal education and access to justice initiatives, adapting to the changing legal landscape and the evolving needs of communities.[16] They have evolved to meet the demands of a complex and diverse society, embodying the commitment to social justice and practical legal training in the US and the EU.[17] In fact, the role of social justice remains a fundamental and integral aspect of legal clinics.

While the specific emphasis may vary across different clinics and contexts, social justice continues to be a significant guiding principle in clinical legal education. Legal clinics have historically been grounded in a commitment to social justice, aiming to address the legal needs of marginalized communities and promote access to justice for all individuals, regardless of their socioeconomic status or background. This commitment to social justice is driven by the recognition of systemic inequalities, discrimination, and structural barriers that affect individuals and communities. Therefore, it is worth noting that, in clinical legal education in the US, the role of social justice is multifaceted. It encompasses providing legal assistance to underserved populations, challenging systemic injustices, advocating for policy reforms, and working towards equitable outcomes. Clinics also nurture a wider sense of social responsibility and a commitment to using the law as a tool for positive social change. They encourage students to critically analyse the root causes of legal problems and explore strategies for systemic reform. By engaging in direct client representation and the impact of social injustices on individuals, lives.[18]

Additionally, it is important to recognise that the emphasis on social justice may vary across different clinics and institutions. Some clinics may have a stronger focus on direct service provision and immediate legal needs, while others may place more

[15] Bloch (n 6).

[16] Harvard Law School has 36 clinics to choose from: Harvard Law School, 'Clinical Programs' <https://hls.harvard.edu/clinics> accessed 14 July 2023.

[17] RJ Wilson, 'Training for Justice: The Global Reach of Clinical Legal Education' (2004) 22 Penn State International Law Review 5.

[18] RJ Wilson, *The Global Evolution of Clinical Legal Education. More Than a Method* (CUP 2017).

emphasis on systemic advocacy and social reform. The balance between these priorities can depend on various factors, such as the clinic's mission, the specific legal needs of the community served, available resources, and the institutional context.

Thus, it is essential to note that while social justice remains a central value, there can be practical considerations in clinical legal education. These considerations include equipping students with practical skills, preparing them for the demands of the legal profession, and responding to the evolving legal market. The aim is often to strike a balance between social justice goals and professionalisation, recognising the importance of both aspects in preparing students for their legal careers. In contemporary society, the understanding of social justice has evolved to encompass a broader and more nuanced perspective. While the core principles of equality, fairness, and addressing systemic injustices remain foundational, new understandings of social justice have emerged to reflect the complexities and intersections of various social, economic, and cultural factors.[19]

4.2. EU perspectives

In the EU, the expression 'legal clinic' does not have a universally standardised definition.[20] However, legal clinics in the EU generally refer to educational programs or initiatives within law schools or universities that provide law students with practical training and hands-on experience in the field of law. Legal clinics offer students the opportunity to work on real cases, under the supervision of experienced lawyers or faculty members, and engage with clients to provide legal assistance, advice, and representation. The specific focus, structure, and objectives of legal clinics can vary across different countries and institutions within the EU. Some legal clinics may emphasize social justice issues, while others may focus on specific areas of law, such as human rights, immigration, environmental law, or business law. The scope of services provided by legal clinics can also vary, ranging from legal research and analysis to

[19] Giddings and others (n 11).

[20] The European Network of Legal Clinics (ENCLE) specifics that, 'Clinical legal education is a law teaching method based on experiential learning, which develops not only knowledge, but also skills and values and at the same time promotes social justice'. See the website of ENCLE <https://encle.org/> accessed 14 July 2023.

drafting legal documents, negotiation, or even.

In such a context, legal clinical education a diverse and evolving history that reflects the unique legal systems and educational structures within different member states. While there is not a single unified history of legal clinics in the EU, their development can be traced back to the mid-20th century, following the models established in the United States.[21]

In the late 20th century, legal clinics in the EU experienced significant growth and expansion, particularly during the 1970s and 1980s. Many law schools and universities recognized the value of clinical legal education as a means to bridge the gap between legal theory and practice. This growth was influenced by the clinical legal education movement, which emphasized the importance of hands-on learning and practical training for law students.

In some countries, such as the United Kingdom, the Netherlands, and Sweden, legal clinics have a long-established tradition and a robust presence within legal education.[22] In countries like the United Kingdom, the Netherlands, and Sweden, legal clinics have a long-established tradition and a strong presence within legal education. These countries have recognized the value of clinical legal education in preparing law students for practice and promoting access to justice. In the United Kingdom, legal clinics have flourished for decades. Law schools across the country have integrated clinical legal education into their curricula, providing students with practical hands-on experience. Legal clinics in the UK often focus on areas such as family law, housing law, immigration law, and criminal law.[23] They offer free or low-cost legal services to individuals who cannot afford private representation and contribute to addressing the justice gap. Similarly, in the Netherlands, legal clinics have become an integral part of legal education. Law schools collaborate with legal aid organizations and community groups to provide students with experiential learning opportunities. Dutch legal clinics

[21] Blázquez-Martín (n 6).

[22] Wilson, *The Global Evolution of Clinical Legal Education* (n 18).

[23] C Bartoli, 'Legal Clinics in Europe' [2016] Diritto & questioni pubbliche 21.

cover various practice areas, including civil law, criminal law, and administrative law.[24] They emphasise collaboration, interdisciplinary approaches, and community engagement. Sweden also boasts a strong tradition of legal clinics. Law schools in the country have established clinics that offer free legal advice and assistance to marginalized communities. Swedish legal clinics often focus on human rights, discrimination, and social justice issues. They provide law students with valuable practical experience and encourage critical thinking and reflection on the ethical dimensions of legal practice. The long-established tradition and robust presence of legal clinics in these countries serve as models for others seeking to enhance their legal education systems.[25]

On the other hand, some EU member states have seen more recent growth in clinical education initiatives.[26] These countries may have been influenced by broader trends in legal education or changes in educational policies. The establishment of legal clinics in these countries often reflects a growing recognition of the importance of practical skills training and the need to bridge the gap between theory and practice. These countries may have undergone legal reforms or educational reforms that prioritize clinical education as a means to enhance the professional skills and practical experience of law students.

The variations in the development of legal clinics in the EU are also influenced by local legal needs and the availability of resources. The legal challenges and social issues prevalent in a particular country or region can shape the focus and specialization of legal clinics. For example, countries with significant immigration issues may prioritize immigration clinics, while others may focus on areas such as human rights, environmental law, or family law based on the local legal landscape and societal needs.

Additionally, the institutional commitment to clinical education plays a role in the development of legal clinics. Some universities and law schools may have a strong commitment to clinical legal education and prioritize the integration of clinical programs within their curricula.[27] This commitment is often reflected in the allocation

[24] Ibid.

[25] Ibid.

[26] Wilson, *The Global Evolution of Clinical Legal Education* (n 18).

[27] C Blengino and A Gascon-Cuenca (eds), *Epistemic Communities at the Boundaries of Law: Clinics as a Paradigm in*

of resources, faculty support, and the development of partnerships with external stakeholders. Institutions that prioritize clinical education create an environment conducive to the growth and sustainability of legal clinics. Legal clinics in the EU cover a wide range of legal areas, reflecting the diverse legal needs and priorities of different countries and communities. Some clinics specialize in areas such as human rights, immigration, environmental law, criminal justice, family law, or intellectual property. The focus areas of legal clinics often align with the pressing social and legal challenges prevalent in each country or region, allowing students to address real-world legal issues and gain practical experience in their chosen fields.[28]

Collaboration and partnerships are key features of legal clinics in the EU. Many clinics work closely with external stakeholders, including legal aid organizations, NGOs, government agencies, and local community groups. These collaborations enable clinics to expand their reach, leverage resources, and effectively address pressing legal needs in partnership with relevant stakeholders. By collaborating with these organizations, legal clinics can provide comprehensive legal services to marginalized communities and contribute to positive social change.

To foster collaboration and knowledge sharing among legal clinics in Europe, the European Network of Legal Clinics (ENCLE).[29] Founded in 2009, ENCLE has steadily grown to become a vital platform for collaboration, knowledge-sharing, and advocacy within the European legal clinic community. ENCLE's history is rooted in the recognition of the importance of legal clinics in legal education and access to justice. The network was established to foster cooperation among legal clinics, provide a space for exchange of best practices, and promote the development of clinical legal education in Europe.

ENCLE's primary tasks involve facilitating communication and cooperation among its member clinics. The network serves as a platform for sharing experiences, innovative ideas, and research findings related to clinical legal education. It organizes

the Revolution of Legal Education in the European Mediterranean Context (ESI 2019).

[28] Alemanno and Khadar (n 2).

[29] See the website of ENCLE <https://encle.org/> accessed 14 July 2023.

conferences, seminars, and workshops that bring together legal clinic practitioners, professors, and students from across Europe to discuss and address the challenges and opportunities in the field. ENCLE's goals are multifaceted and encompass various aspects of legal clinics and clinical legal education. ENCLE aims to disseminate and promote best practices in clinical legal education across the EU.[30]

By sharing successful models, methodologies, and strategies, the network supports the enhancement of the quality and effectiveness of legal clinics. It also advocates for the integration and recognition of clinical legal education within legal curricula across EU. The network emphasizes the value of experiential learning, ethical engagement, and the practical application of legal knowledge as integral components of legal education and seeks to foster collaboration among legal clinics and other relevant stakeholders. By connecting clinics and facilitating partnerships with law schools, universities, legal organizations, and civil society, the network aims to create a supportive and interconnected community of practitioners and scholars. It is also important that it recognises the importance of engaging with policy-makers and contributing to legal and policy discussions at the European level. The network actively participates in relevant initiatives, providing expert input and advocating for policies that promote access to justice, legal education, and the development of legal clinics.

In recent years, there has been an increased recognition of the value of clinical legal education and legal clinics in the EU.[31] Some countries have taken steps to integrate clinical education into their national legal education frameworks and regulations. This recognition highlights the importance of practical skills training, access to justice, and fostering social responsibility among future legal professionals. Legal clinics are increasingly seen as an essential component of legal education, enabling students to bridge the gap between theory and practice while making a positive impact on the communities they serve.

The growth and evolution of legal clinics in the EU continue to be shaped by factors such as legal reforms, educational policies, local needs, and the broader European

[30] Bartoli (n 23).

[31] R Grimes, *Re-Thinking Legal Education under the Civil and Common Law: A Road Map for Constructive Change* (Routledge 2018).

legal landscape. As legal clinics adapt to changing social and legal realities, they play a crucial role in preparing law students for the challenges of the legal profession, advancing access to justice, and promoting social justice principles across the European Union.[32]

4.3. Analysis

By conducting a comparative and preliminary analysis of the development legal clinical education in the EU and the US, it is possible to observe a shared commitment to striking a delicate balance between serving the social good and navigating the practical realities of the legal profession. Today, both jurisdictions seem to understand that the pursuit of social aims must be complemented by market-driven strategies to ensure the sustainability and effectiveness of legal clinics and legal services.

This unified approach, adopted on both sides of the Atlantic, has yielded numerous benefits. It has led to innovative solutions that address the diverse challenges faced by legal clinics in their mission to promote access to justice. By drawing upon a wide range of perspectives and expertise, legal practitioners have gained a deeper understanding of legal complexities and have honed their abilities to provide effective legal assistance to individuals and communities in need.

Moreover, the sections before about US and EU have reinforced the idea that the integration of social and market-oriented perspectives can also contribute in fostering a more just and equitable legal system. By recognising the symbiotic relationship between social objectives and economic viability, legal clinics and practitioners can align their efforts more effectively, amplifying their impact on both the community they serve and the legal profession as a whole.

5. Beyond dichotomies

Legal education is undergoing a transformative shift, recognising the need for an approach that combines market-oriented experiential practice with the pursuit of social aims. In response to this evolving landscape, clinical legal education emerges as a

[32] AG Amsterdam, 'Clinical Legal Education. A 21st Century Perspective' (1984) 34 Clinical Law Review 612.

beacon of innovation and progress.

At the heart of the legal clinics is the understanding that legal education should not be confined to the development of practical skills alone. Instead, it must encompass a broader perspective that acknowledges the intricate interplay between market forces and social considerations within the legal profession. By integrating these two dimensions, the clinic prepares law students for the multifaceted challenges they will encounter as legal practitioners.

In particular, students engage in a dynamic and multifaceted learning experience. They delve into real-world cases and projects, honing their practical skills through experiential practice. However, the clinic goes beyond a narrow focus on skills acquisition by fostering critical thinking and reflection. It encourages students to consider the broader implications of their legal work on individuals, communities, and society at large.

This model instils a deep understanding of the social and ethical dimensions of the law. Students are encouraged to explore the ways in which their legal expertise can be leveraged for positive social change. They critically examine the impact of legal practice on diverse stakeholders and develop a sense of social responsibility that extends beyond the confines of the courtroom.

The proposed approach recognises that true progress is born from interdisciplinary collaboration. By forging partnerships with professionals from diverse fields—business, social sciences, public policy, and advocacy-the clinic creates a rich and collaborative environment. This interdisciplinary approach broadens students' perspectives and equips them with the tools to develop comprehensive and innovative solutions to legal challenges that account for both market dynamics and social impact.

The legal clinic not only empowers students with practical legal skills but also nurtures a commitment to social justice and equity. Graduates become agents of positive change, actively seeking opportunities to address systemic challenges and promote justice within the legal profession and society at large. [33]

Such a paradigm for legal education embodies a comprehensive view that embraces both market-oriented experiential practice and the pursuit of social aims. It

[33] D Kennedy, 'Legal Education and the Reproduction of Hierarchy' (1982) 32 Journal of Legal Education 591.

prepares students to navigate the intricacies of the legal field while promoting a deep understanding of the social implications of their work. By fostering interdisciplinary collaboration and a sense of social responsibility, the clinic nurtures well-rounded legal professionals who strive for excellence and social progress.[34] By embracing this diversity, the clinic recognises that there is no single 'right' answer or approach to legal problems, but rather a spectrum of valid solutions.[35] This recognition opens the door to more nuanced and multifaceted analyses of legal issues, fostering a more robust and inclusive legal discourse within the clinic.[36]

It is possible to mention some examples of legal clinics that exemplify the integration of market-oriented experiential practice and the pursuit of social aims.

a. The Access to Justice Legal Clinic

This clinic operates with a comprehensive approach by providing free legal services to marginalized communities while also addressing systemic issues. Law students engage in practical legal work, such as client representation and advocacy, to address the immediate legal needs of underserved populations. Simultaneously, they analyse the underlying social and economic factors contributing to the clients' legal challenges. By combining direct legal assistance with systemic analysis, the clinic equips students to tackle both individual cases and broader social issues. [37]

b. The Entrepreneurship and Social Impact Clinic

In this clinic, students gain practical experience in advising start-ups and entrepreneurs on legal matters while emphasizing the importance of social impact. Students work with socially conscious businesses, helping them navigate legal complexities while considering the ethical and social implications of their ventures. The

[34] K Lenaerts, 'EU Values and Constitutional Pluralism: The EU System of Fundamental Rights Protection' (2014) 34 Polish Yearbook of International Law 135.

[35] MR Marella and E Rigo, 'Le cliniche legali, i beni comuni e la globalizzazione dei modelli di accesso alla giustizia e di lawyering' (2015) 32 Rivista critica di diritto privato 537.

[36] Ibid.

[37] Ibid.

clinic also offers educational programs to empower entrepreneurs in underserved communities, fostering economic development alongside a commitment to social responsibility.[38]

c. The Environmental Justice Legal Clinic

This clinic takes an approach to environmental law by combining experiential practice with a focus on social justice. Students engage in environmental advocacy, litigation, and policy work to protect vulnerable communities affected by environmental degradation. The clinic emphasizes the intersectionality of environmental issues, addressing the disproportionate impact on marginalized populations. By integrating legal skills with social awareness, the clinic prepares students to advocate for environmental justice and sustainable practices.

d. The International Human Rights Clinic

Operating within this framework, this clinic exposes students to international human rights law while promoting social change on a global scale. Students work on cases involving human rights violations, collaborating with international organizations and advocacy groups. The clinic offers a comprehensive learning experience that combines practical legal skills with an understanding of the social, political, and cultural factors that affect human rights. Through their work, students contribute to the pursuit of justice and the protection of fundamental rights worldwide.

These examples demonstrate the diverse ways in which legal clinics integrate market-oriented experiential practice with the pursuit of social aims. By combining practical legal training with a broader understanding of social issues, these clinics prepare students to be versatile, socially conscious legal professionals who can make a positive impact in their respective fields.[39]

[38] A Arimoro, 'Clinical Legal Education: Vision and Strategy for Start-up Clinics in Nigeria' (2019) 26 International Journal of Clinical Legal Education 132.

[39] Ibid.

6. The Start-up Legal Lab

In such a context, the Start-up Legal Lab at the Law Department of the Turin University embodies a comprehensive and forward-thinking approach that seamlessly integrates market-oriented experiential practice with the pursuit of social aims. This unique strategy recognises the intrinsic link between these two seemingly distinct aspects, refusing to treat them as separate or conflicting forces. Instead, it leverages their synergies to drive innovation and bring about positive change within the legal profession.

In recent years, there has been a significant spread of experiences in the law courses of Italian universities that were generally defined as 'legal clinics'.[40] The lowest common denominator of these different experiences is represented by a teaching method of law that focuses on a 'practical' approach, aimed at flanking, but usually not overcoming, the traditional legal teaching in Civil Law countries.[41] This trend seems to place Italian law courses within what has been called a global clinical movement centred on the valorisation of the professionalising aspect of legal teaching.[42] It is this valorisation that makes it generally argued that, from a didactic point of view, the clinical approach represents a significant step forward. In universities that have undergone this dramatic torsion, legal clinics are the ideal tool for law degree courses that must no longer present themselves as mere producers of knowledge, but must above all provide skills, abilities or competences vaguely underpinned by certain values.[43]

In such a dynamic context of academic teaching, in the academic year 2019-2020 a new legal clinic project named 'The Start-up Legal Lab' (also: the Lab) has been launched by a team of professors and researchers at the Law Department of the University of Turin.[44]

[40] Wilson, *The Global Evolution of Clinical Legal Education* (n 18).

[41] Blázquez-Martín (n 6).

[42] Ibid.

[43] C Bartoli, 'The Italian Legal Clinics Movement: Data and Prospects' (2015) 22 International Journal of Clinical Legal Education 213.

[44] Giddings and others (n 11).

The scope of the clinical project consisted in providing law students an experiential training, which is indispensable for approaching the world of technological and social innovation and being able to consciously deal with the difficulties and legal risks associated with the frontier themes of European and transnational law.[45]

The students are called upon to tackle a practical and real case that the lecturers will be able to identify, from year to year, thanks to the collaboration of young tech and social innovators – in a variety of forms, such as: fresh graduates, junior professionals, PhD students, start-ups, cooperatives, associations, foundations and organisations – preferably from the world of incubators and, in particular, from the incubators of the University of Turin and Turin Polytechnic. The task assigned to the teams of students is to deal with a number of practical and real cases related to frontier issues in law, which typically concern the launching on the market of new solutions, innovative products and new services.[46]

Furthermore, the selection of practical cases focuses primarily on two directions. Firstly, young innovators will be selected who need support for the realisation of their idea and do not have the resources due to their young age and lack of resources. The absence of resources exposes young people to the risk of not being able to pursue a new idea that could create value for society, and also of behaving – unwittingly – in a manner that does not comply with legal and legal requirements, thus incurring risks of criminal, administrative, civil and contractual liability.

On the other hand, innovative start-ups operating in socially useful sectors will be identified.[47] Social activities include, for example, those of social assistance; health care; socio-health care; education, education and training; protection of the environment and the ecosystem; valorisation of the cultural heritage; social tourism; university and post-university training; research and provision of cultural services; out-

[45] See the website of the 'Entrepreneurship and Innovation Lab' <https://www.giurisprudenza.unito.it/do/corsi.pl/Show?_id=n8x2#submenu> accessed 14 June 2023.

[46] SR Jones and JJ Thompson, 'Law & Entrepreneurship in Global Clinical Education' (2018) 25 Int L J Clinical Legal Educ 85.

[47] The so-called start-ups with a social vocation pursuant to Article 25, paragraph 4, of Italian Law Decree No. 179/2012, converted into Law No. 221/2012, which operate exclusively in the sectors indicated in Article 2, paragraph 1, of Law Decree No. 155/2006, which regulates social enterprises.

of-school training, aimed at preventing school drop-out and school and training success; and instrumental services to social enterprises. Additionally, special attention will be paid to gender equality and policies for the inclusion of vulnerable persons in the selection of practical cases to be submitted to the students.

Students are supervised by the lecturers and experts involved by the lecturers, as well as by the teaching tutor. As far as possible, experts from outside the university are involved in the lessons of the first phase, such as, for example, representatives from the world of associations, foundations and organisations, as well as university incubators. The total number of students admitted will be a maximum of 20. Students will be selected on the basis of academic merit and motivation. Those interested should fill in a form, sending their curriculum vitae (from which the average of the examinations taken should also emerge) and a brief motivation letter. At least a basic knowledge of English is required. At the end of the course, students are asked to produce a written paper (eg legal opinion, contract, general conditions, privacy policy, draft court document, possibly amicus curiae, response to an EU Commission green paper, for example) and to present the results of the research and studies carried out during a final meeting attended by all the stakeholders involved in the project.[48]

The Start-up legal Lab poses a strong emphasis is placed on engaging with innovative topics in law by grounding on an interdisciplinary perspective.[49] These clinics recognise the importance of staying at the forefront of legal practice and addressing emerging legal needs in an ever-evolving world. By focusing on innovative topics, legal clinics not only provide cutting-edge legal services, but also contribute to legal scholarship and shape the development of the law in emerging areas.[50] The clinical experiment keeps a close watch on developments in areas such as technology law, intellectual property, data privacy, environmental law, human rights, and social justice.

[48] The final grade considers participation in the course, including the frontal teaching part, and primarily assesses the quality of the final written paper as well as the presentation of the results of the research work carried out.

[49] RL Hyams and L Ross, 'Multidisciplinary Clinical Legal Education the Future of the Profession' (2012) 37 Alternative Law Journal 103.

[50] The University of Chicago, The Law School, 'Innovation legal clinic' <https://www.law.uchicago.edu/clinics/innovation> accessed 14 June 2023. See also George Mason University, Antonin Scalia Law School, 'Innovation Law Clinic' <https://www.law.gmu.edu/academics/clinics/innovation_law_clinic> accessed 14 June 2023.

By closely monitoring these fields, clinics position themselves to provide specialized assistance and develop expertise in these innovative domains. This proactive approach allows them to understand the unique legal challenges that arise from emerging technologies, social movements, and evolving societal norms.

Moreover, the Start-up Legal Lab provides an opportunity for legal clinics to gain a deeper understanding of the practical applications of the law in innovative areas.[51] By working alongside with incubators and startups, the clinic enhances the ability of students to provide specialised legal services tailored to the unique challenges posed by emerging technologies, business models, and regulatory frameworks.

In addition, the Start-up Legal Lab contributes to the understanding of legal frameworks and propose legal reforms or regulatory changes to address challenges in innovative domains. In addition, by combining interdisciplinary expertise and fostering creativity, these collaborations generate innovative legal solutions to address specific legal challenges posed by emerging technologies, social issues, and regulatory complexities. Through these projects, legal clinics actively contribute to the development of practical and impactful legal tools, apps, or platforms that address pressing legal needs in innovative domains.

Finally, by actively embracing market-oriented experiential practice, the Start-up Legal Lab not only equips its participants with practical skills and real-world experience but also fosters a keen understanding of the evolving market dynamics. This approach empowers aspiring legal professionals to navigate the intricacies of the contemporary legal landscape effectively. Simultaneously, the Lab remains steadfast in its commitment to social aims, driven by a passionate dedication to promote access to justice and advance the cause of social equity.

[51] OECD, 'Disruptive Innovations in Legal Services' (2016) <https://www.oecd.org/competition/disruptive-innovations-in-legal-services.htm> accessed 14 July 2023.

7. Conclusions

In the contemporary landscape of legal clinics in the EU, the recognition of the crucial roles of experiential learning alongside the pursuit of social justice has become increasingly prominent. While social justice remains a fundamental pillar, it is essential to acknowledge that it can encompass multiple meanings and interpretations. The evolving nature of society and the legal profession calls for a comprehensive approach that embraces innovation, pluralism, and the diverse conceptions of social justice.

Legal clinics today are proactively focusing on fostering innovation and embracing an approach to stay at the forefront of legal practice.[52] They understand the importance of integrating new technologies, exploring interdisciplinary collaborations, and engaging with emerging legal topics. By embracing innovation, legal clinics can enhance their services, improve efficiency, and address the evolving needs of their clients in a rapidly changing world. Moreover, legal clinics recognise the value of social justice and the diverse perspectives it brings. They understand that the legal field benefits from a variety of approaches, voices, and experiences. Consequently, they actively promote inclusivity, respect for diversity, and collaboration among stakeholders.

It is imperative to acknowledge the need for a reconciled vision of legal clinics that addresses the challenges faced by legal clinical education today.[53]

Actually, it is possible to find ways to reconcile and balance these two perspectives within a legal clinic by considering the proposed approach to clinical legal education. There may be tension in selecting cases that align with social justice goals while also meeting market demand. To reconcile this, a clinic can prioritise cases that have both social justice implications and practical learning opportunities. This way, students can work on cases that address systemic injustices while also gaining skills and experience relevant to the job market. Additionally, one way to address this is by incorporating critical analysis and ethical discussions within the curriculum. This helps students understand the broader implications of legal practice and encourages them to think critically about the social impact of the law. Some students may have a stronger

[52] A Korn and L Hlass, 'Assessing the Experiential (R)evolution' (2020) 65 Villanova Law Review 713.

[53] Wilson, 'Training for Justice' (n 17).

inclination towards one perspective over the other. The point here is that it is important to create an inclusive and pluralistic clinical legal education in the EU, where diverse viewpoints are respected and encouraged. Providing opportunities for dialogue, reflection, and exposure to different perspectives can help students appreciate and understand the importance of both social justice and market demands.

By embracing this approach, legal clinics foster a more robust and inclusive legal discourse. This approach leads to innovative solutions, a deeper understanding of legal issues, and ultimately, a more just and equitable legal system. Surely, social justice remains a guiding principle for legal clinics. However, the conception of social justice can vary depending on individual perspectives, cultural contexts, and evolving societal norms. Acknowledging this plurality of meanings allows legal clinics to engage in meaningful dialogue, address diverse social justice concerns, and adapt their approaches to meet the complex needs of the communities they serve.

In light of these considerations, it is reasonable to conclude that the Start-up Legal Lab qualifies as a legal clinic. Actually, it aligns with the contemporary landscape of legal clinics that strive for both experiential education and the pursuit of social justice. It demonstrates a commitment to integrating new technologies, engaging with emerging legal issues, and promoting diverse perspectives. As a result, we argue that clinical legal education can effectively contribute to a more just and equitable legal system, while continuously adapting legal education to the evolving needs of society.

The Start-up Legal Lab crafts innovative solutions that address both the needs of a dynamic legal market and the marginalized segments of society. Rather than viewing social and market considerations as conflicting priorities, the Lab demonstrates that when thoughtfully intertwined, they form a powerful catalyst for transformative change. This not only leads to a deeper comprehension of legal issues but also results in a more just and equitable legal system.

The Lab underscores the potential of aligning market-oriented experiential practice with unwavering dedication to social objectives, paving the way for a future where legal professionals can be both socially conscious and commercially adept. In doing so, the Lab propels the legal profession towards a harmonious coexistence of social responsibility and professional excellence, redefining the parameters of success within the EU legal community.

ENRICA RIGO[*]

LEARNING BY CARING: A PROPOSAL FOR A FEMINIST PERSPECTIVE ON CLINICAL LEGAL EDUCATION

ABSTRACT. *Rather than maintaining a contraposition between the professional and the social justice model of legal clinics, the article proposes a care-oriented approach to clinical legal education. The* learning *by* caring *methodology provides a lens for a feminist perspective on clinical legal education that goes beyond the 'feminization' of the themes confronted in the clinics.* Caring *implies an approach to law and social justice that calls into question traditional paradigms of access to justice centered on legal decisions and rights adjudication. More than calling for problem solving approaches caring calls for medium- and long-term strategies that* take charge *of the problems at stake.*

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1. From learning by doing to learning by caring

Legal clinics are largely intended as examples of experimental learning that implement the methodology of *learning by doing* where *doing*, besides *solving* problems, is often associated with *performing* and *competing*. The learning by doing approach has been central to the development of the European Higher Education system under the auspices of the *Bologna Process.* The interaction of students with real (or real-simulated) worlds and social-environments has been considered essential to acquire the soft and transferable skills necessary for professional careers. In this picture, the social justice mission that had originally characterized Legal Clinics has been progressively overshadowed by the learning outcomes and has become a by-product of the skills acquiring process.

Rather than maintaining a contraposition between the professional and the social justice model of legal clinics, I propose a care-oriented approach to clinical legal education that questions both sides of the dispute. Further, I vindicate that the shift from *learning by doing* to *learning* by *caring* provides a lens for a feminist perspective on clinical legal education that goes beyond the 'feminization' of the themes confronted in the clinics. *Caring* implies an approach to law and social justice that calls into question traditional paradigms of access to justice centered on legal decisions and rights adjudication. Indeed, more than calling for problem solving approaches *caring* calls for medium- and long-term strategies that *take charge* of the problems at stake. Most of the challenges of contemporary society revolve around some kind of crisis that are concerned with or affect care: from the special care needs of people in vulnerable conditions, to the lack of care highlighted by environmental crisis. In many cases, ultimate solutions are neither feasible or desirable goals to respond to the crisis of contemporary societies. Although strategies of *care* do not necessarily provide solutions to problems, they may teach us ways to take charge of and to cope with the problems. To use Donna Haraway words, caring has to do with that 'mundane trouble' that sustains and reproduces lives and societies: 'Staying with that kind of mundane trouble requires facing those who come before, in order to live responsibly in thick copresents, so that we may bequeath

something liveable to those who come after'.[1]

2. Feminist perspectives on clinical legal education and care

Clinical legal education and legal feminism have frequently shared common fields of struggles for the enhancement of women rights. An important example is the role plaid by the Refugee law clinic at Harvard University and the Refugee and Human Rights Clinic at UC Hastings College of the Law in the field of gender and asylum.[2] More generally, the legal activism of legal clinics has contributed to the development of the *radical legal realism* that characterizes feminist jurisprudence.[3] A feminist perspective on legal clinics is, thus, not only defined by the themes involved, such as gender violence, intersectional discrimination, reproductive rights, sexual orientation, gender identity and so on. It is also concerned with the approach to law and legal education in itself.

Leaving aside these fields of encounter between legal clinics and legal feminism, the scarcity of feminist theoretical perspectives on clinical legal education mirrors the long absence of feminism in legal education as such.[4] In turn, this can be seen as a consequence of the challenge that a feminist epistemology poses to traditional methodologies of teaching and learning law. Feminist epistemology is based on experience rather than rational abstraction and, therefore, calls into question any sharp distinction between theories of knowledge and ethics as well as any depiction of knowledge as something that flows from the teacher to the students or that is discovered through a Socratic method.[5] According to Susan Williams, in a feminist epistemology,

[1] D Haraway, '*When Species Meet*: Staying with the Trouble' (2010) 28 Environment and Planning D: Society and Space 53, 53.

[2] K Musalo, 'A Short History of Gender Asylum in The United States: Resistance and Ambivalence May Very Slowly Be Inching Towards Recognition of Women's Claims' (2010) 29 Refugee Survey Quarterly 46; D Anker, 'Legal Change from the Bottom up: The Development of Gender Asylum Jurisprudence in the United States' in E Arbel, C Douveregne and J Millbank (eds), *Gender in Refugee Law. From the Margins to the Centre* (Routledge 2014).

[3] MC Quinn, 'Feminist Legal Realism' (2012) 35 Harvard Journal of Law and Gender 1.

[4] C MacKinnon, 'Feminism in Legal Education' (1989) 1 Legal Education Review 85.

[5] SH Williams, 'Legal Education, Feminist Epistemology and the Socratic Method' (1993) 45 Stanford Law Review 1571.

'knowledge is socially created, not individually discovered, and it is created through a process that involves emotion as well as reason'.[6] Indeed, the mobilization of feelings and emotions is also central in the analysis of the critical legal scholar Mark Tushnet who underlines that, 'Clinical education concerns people, unstructured situations, and feelings, all of which in our culture are generally associated with being female'.[7]

As anticipated above, I vindicate that the *learning by caring* approach provides an important lens for a feminist perspective on clinical legal education as it articulates a feminist epistemology. However, 'care' is not a straightforward term to define. Emma Dowling recently observed that the English word 'care' does not come from the latin *cura* (which means to look after something or someone), but rather from the old English *caru* which express sorrow, anxiety or even burdens of the mind.[8] The normative tradition of the 'ethic of care'[9] certainly incorporate this emphasis on duties, compassion and self-denial, to the point that its critics highligh the risk of undermining the autonomy and agency of both the care givers and the care receivers.[10] Nonetheless, other meanings of care can be ascribed to different philosophical traditions such as that of Michel Foucault that intended the 'care of the self' as a practice of freedom where, in turn, freedom rather than duties and liberation and lays at the basis of ethic.[11] If Foucault's main reference for the care of the self is Greek philosophy, care can also be traced in the Christian theology. In contrast with his own time, the central figure of

[6] Ibid 1574.

[7] M Tushnet, 'Scenes from the Metropolitan Underground: Critical Perspective on the Status of Clinical Education' (1984) 52 George Washington Law Review 272, 274. See also M Tushnet, 'Critical Legal Studies: A Political History' (1991) 100 Yale Law Journal 1515.

[8] E Dowling, *The Care Crisis. What Caused It and How Can We End It* (Verso 2022).

[9] This expression refers to the stream of studies initiated by Carol Gilligan and its influence on several scholars among whom Nel Noddings, Eva Kittay, Virginia Held and Joan Tronto. See C Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press 1982); N Noddings, *Caring: A Feminine Approach to Ethics and Moral Education* (University of California Press 1984); E Kittay, *Love's Labor: Essays in Women, Equality and Dependency* (Routledge 1999); V Held, *The Ethics of Care: Personal, Political, and Global* (OUP 2006); J Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (Routledge 1993).

[10] J Keller, 'Autonomy, Relationality, and Feminist Ethics' [1995] Hypatia 128.

[11] M Foucault, 'The Ethics of the Concern of the Self as a Practice of Freedom' in P Rabinow (ed), *Ethics. Subjectivity and Truth* (New Press 1984).

the patristic Augustine of Hippo celebrated human manual work, that should not be considered as a punishment for sin, and, alongside with the care for nature, included in manual work the care for the bodies and souls.[12]

By referring to Joan Tronto's definition,[13] Dowling affirms that in feminist academic theory care encompasses 'all the supporting activities that take place to make, remake, maintain, contain and repair the world we live in and the physical, emotional and intellectual capacities to do so'.[14] Both feminist theory that use the category of *care* and Marxist and Workerist feminists that implement *social reproduction* analysis to focus on the maintenance and reproduction of labor force and social relations in capitalist societies, have stressed that care work has been naturalized, made invisible and unrecognized in order to be freely exploited and depleted.[15] Historically, most care and social reproduction activities have been cast as women's unpaid work, and this has to do with both the subordination and the invisibilization of care, one the one side, and its crisis in capitalist societies, on the other. As Nancy Fraser puts it, 'on the one hand, social reproduction is a condition of possibility for sustained capital accumulation; on the other, capitalism's orientation to unlimited accumulation tends to destabilize the very processes of social reproduction on which it relies'.[16]

This short overview makes clear that, contrary to what we tend to think, care does not indicate a peaceful relationship but rather involves the recognition of conflict. As domestic workers, housewives, sex workers, parents and many other care-giving figures continuously experience, we care about what we dislike as much as what we like. Around care, gendered, racialized and class hierarchies are constituted, and they concern both care givers and care receivers. Ultimately, care indicates relations of dependency and *vulnerabilities* – in the sense of *inevitable* dependency highlighted by Martha

[12] Saint Augustine (of Hippo), *The Literal Meaning of Genesis* (Paulist Press 1982).

[13] Tronto (n 9).

[14] Dowling (n 8) 21.

[15] L Fortunati, *L'arcano della riproduzione. Casalinghe, prostitute, operai e capitale* (Marsilio 1981); A Picchio, *Social Reproduction: The Political Economy of the Labour Market* (CUP 1992); S Federici, *Caliban and the Witch* (Autonomedia 2004); T Bhattacharya, 'Introduction: Mapping Social Reproduction Theory' in T Bhattacharya (ed), *Social Reproduction Theory: Remapping Class, Recentering Oppression* (Pluto Press 2017).

[16] N Fraser, 'Contradictions of Capital and Care' (2016) 100 New Left Review 99, 100.

Fineman[17] – as well as their incorporation into politics and law.[18]

Through the lens of a feminist epistemology the conflictual nature of care should not be neglected. On the contrary, it is rather fundamental to understand how without care 'there could be no culture, no economy, no political organization',[19] as well as the extent to which 'care creates the fabric that holds our societies together and brings our generations together'.[20]

3. Law, care and legal clinics

If we look at law through the lens of care, we are forced to rethink the very paradigm of rights' adjudication and decision. While to decide means to solve a problem, by cutting off the reasons of one of the parties, and by drawing a line between the lawful and unlawful, before and after, inside and outside; to take care, instead, means *to stay with* the problem (to use once again Donna Haraway's expression): to take charge of the problem and to shoulder it through paths that do not follow linear trajectories. Think about disabilities, gender identity, intersectional issues: these are not problems that you 'solve'. When you stay with your problem, you take routes that you need to change, sometimes you need to step back or just to take a rest, but you rarely know where the route will take you. From this point of view, a feminist epistemology does not establish a truth but needs to be continuously questioned and verified.

The lesson of care is a lesson that I learned working with antiviolence centers self-organized by feminist groups. Violence against women is not *solved* by jailing the perpetrators. Women *stay with* the problem of secondary victimization, *stay with* the consequences of violence on their kids, s*tay with* the problem of finding their path in a

[17] M Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 Yale Journal of Law & Feminism 1.

[18] MG Bernardini and others (eds), *Vulnerabilità: etica, politica, diritto* (IF Press 2018).

[19] Fraser (n 16) 99.

[20] Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the European Care Strategy', COM (2022) 440 final.

patriarchal society. The new established Legal Clinic on the fight against gender-based violence and multiple discrimination at the Law Department of Rome Tre University[21] is the result of a collaboration with the University's antiviolence-center run by the feminist organization *Casa delle donne Lucha y Siesta*. The antiviolence centre is dedicated to the memory of Sara Di Pietrantonio, a student of our University who was victim of femicide in 2016. I consider both the University's antiviolence centre and the Department's legal clinic as important achievements that reinforce the engagement of the University in the contrast of gender violence. The two projects also wield a high symbolic meaning as, in Italy, the femicide of Sara Di Pietrantonio marked the momentum of a renewed awareness of the structural nature of gender violence and coincided with the outbreak of a feminist wave that politicized gender violence at the global level, from Latin America to Europe.

Many slogans of the feminist No One Less (Ni Una Menos) movement highlight the challenge that the reproduction and maintenance of life poses to patriarchy, capitalism and colonialism and the violence produced by these mutually sustained systems.[22] At the same time, and in contrast to the positions of a large part of 'governance feminism',[23] the 'solution' against gender-based violence advocated by the No One Less movement does not call for the increase of punishments but rather for women's access to rights, welfare and income that are at the basis of self-determined and autonomous choices. Proposals for transformative justice processes upheld by anti-carceral black feminists influence the discussions on abolitionism that, beside the critique to prisons, today includes migrants' confinement and criminalization as well as the use of coercive measure for the treatment of mental illness.[24] The incitement of

[21] The Clinic on Gender-Based Violence and Multiple Discrimination is coordinated by the Private Law Professor Maria Rosaria Marella, the Penal Law Professor Antonella Massaro and myself. The clinic also builds on the long experience developed within the collaboration between feminist antiviolence organizations and the Legal Clinic on Migration and Asylum that I have coordinated since 2010.

[22] R Gutiérrez Aguilar, 'La lotta femminista contro la violenza in Messico' in M Bonomi (ed*), La luna che muove le maree. L'assalto al patriarcato* (AgenziaX 2020) 37.

[23] J Halley and others, 'From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism' (2006) 29 Harvard Journal of Law & Gender 335.

[24] A Davis and others, *Abolition. Feminism. Now* (Haymarkets Books 2022).

the Italian tradition against mental asylums to re-invent institutions and to convert 'cure' into 'care' resonates with the anti-carceral motto 'Care Not Cops'.[25]

By drawing on the legacy of re-inventing institutions, my proposal for a feminist perspective on clinical legal education is to develop care-oriented legal clinics that shift the focus from 'problem solving' approaches to 'taking charge' of the problems through care strategies that redefine access to justice as a responsive and transformative social process. Disabilities, gender-based violence, people in need for international protection, environmentally displaced persons are examples of conditions of vulnerability that challenge traditional conception of social justice and requires long term strategies that continuously adjust themselves according to changing needs and conditions. This proposed approach extends the educational goal of legal clinics that should not be limited to the legal competencies necessary to obtain a favourable decision but should be concerned with the whole process of accessing justice, the different legal and social actors involved, as well as the consequence of legal decisions considered in medium and long terms.

In care-oriented legal clinics students are both care receivers of learning processes and caregivers toward groups and individuals in vulnerable conditions. At the same time, a care-oriented mission should be considered transversal to all University's missions. Through the teaching mission, Universities are in fact called to answer the need for care expressed by students and the academic community as a whole. Indeed, the Covid- 19 pandemic increased the complexity of the higher education environment, boosting the gaps in access to education and producing new challenges for students in coping with isolation, distance learning, increased fragility and issues, related to psychological and emotional well-being. Through the research mission, Universities are called to develop innovative and responsive care strategies required by stakeholders (ie, public institutions, NGOs and associations, social enterprises and other social actors). Finally, in line with their third mission, Universities should play an active role in shaping the surrounding environment by addressing structural care gaps and weaknesses, with a specific focus on vulnerable social groups.

[25] F Rotelli, *L'istituzione inventata. Almanacco Trieste 1971-2010* (Alfa & Beta 2015); David and others (n 24).

Legal clinics could be conceived as institutions of care that intervene along three lines in order to transform social justice's paradigms from decision to care: people, urban scale and environment. Caring for people means to take care of persons assisted by the clinics, students but also of to take care of the academic community at large. It means to stay with the problem of the masculinity of legal culture and how to survive it, to resist it and to transform it in all academic legal subjects. Caring at the urban scale means to understand clinics as commons within the urban social fabric and among the pool of resources and actors responsible for their management.[26] The urban scale plays a central role in reproducing and sustaining life and life relations, and it represents a strategic field for rethinking communities of care beyond families, neighborhoods, and gender binarism. Finally, caring for the environment has to do with the fact that, exactly like natural resources, unpaid care-work is 'naturalized' in order to be made freely appropriable end exploitable or, at most, remunerated with the coin of 'love' and 'virtue'.[27] As underlined by MacKinnon, 'The legal realists' famous aphorism – that you can tell more about what a judge will decide based on what he had for breakfast than on legal doctrine – leaves out who cooked the breakfast and who served it'.[28] Clinical legal education implies a lot of care and relational work and part of the transformation of legal culture also concerns the fair recognition of this work.

[26] MR Marella and E Rigo, 'Le cliniche legali, i beni comuni e la globalizzazione dei modelli di accesso alla giustizia e di *lawyering*' (2015) 33 Rivista critica del diritto privato 537.

[27] Fraser (n 16).

[28] MacKinnon (n 4) 89.

ISLAMBEK RUSTAMBEKOV[*], OTABEK NARZIEV[**]

ACCESS TO FREE LEGAL AID IN UZBEKISTAN: THE CASE OF TSUL LEGAL CLINIC

ABSTRACT. *This paper outlines the practice of Uzbekistan in launching a free legal aid initiative in the form of legal clinic activity at Tashkent State University of Law. It mainly focuses on a brief analysis of clinical education in Uzbekistan; shapes the legal status, main tasks, and forms of activity of the TSUL legal clinic; and highlights the main problems and development perspectives of legal clinic activity in Uzbekistan.*

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1. Introduction

Clinical legal education in Uzbekistan has more than two-decade history. The main aim of this paper is to present the experience of the TSUL legal clinic in the field of providing legal assistance through legal clinics, to analyze problems and perspectives of giving free legal aid, as well as to develop recommendations on improving the system of free legal assistance and the activities of legal clinics in Uzbekistan.

Legal clinics' emergency history as part of legal education in the world goes back more than a century. The first clinics were established in the United States of America in the 19th century. Initially, legal clinics were alien to universities and law schools because of the growing need to free legal aid and access to justice worldwide, legal clinics organizing out of the university areas.

Sarker highlights the importance of clinical legal education in Asia and its growing influence in the region.[1] The first legal clinics in Uzbekistan were established in 2000 at the Tashkent State Law Institute (currently Tashkent State University of Law – TSUL) and the University of World Economy and Diplomacy (UWED). Similar clinics then followed them at the Namangan, Andijan, and Karakalpak State Universities. In recent years several clinics established beyond the university's scope. For instance, a legal clinic at the Council of the Federation of Trade Unions of Uzbekistan, a business clinic at the Chamber of Commerce and Industry of Uzbekistan, and three legal clinics in the Fergana Valley, which was established with the initiative and efforts of Youth Agency of Uzbekistan and UNODC.

In recent years, the Ministry of Justice of Uzbekistan launched several initiatives to support the improvement of free legal aid, raise legal awareness of the population, and expand legal clinics throughout the country. Particularly, all law colleges of Uzbekistan established separate legal clinics. Launching new legal clinics opened new horizons for TSUL legal clinic in expanding clinical legal education and free legal aid in all regions of Uzbekistan. The Ministry of Justice of Uzbekistan initiated the drafting of a special law 'On Free Legal Aid'. The bill was worked out and put into public

[1] SP Sarker, *Clinical Legal Education in Asia* (Palgrave Macmillan 2015).

discussion,[2] which made a huge impulse to the further development of the free legal aid system in Uzbekistan.

2. Legal clinics: a brief analysis of past, present, and future tendencies

A brief analysis of legal clinics established in the past, running present, and future tendencies show that they differ in several measures, like institutional relation, a sphere of activity, legal aid rendering subjects, and form of activity.[3]

Initially, legal clinics were the structural unit of higher educational institutions, mainly law schools. They had a dual aim: to train the students in professional skills and help people who do not have access to legal services. Senior students, under the supervision of teachers or legal practitioners, provided legal assistance in such clinics.[4]

The contemporary meaning and practice of legal clinics changed the conventional understanding of clinical legal education. Therefore, currently, legal clinics go beyond universities, and their activity is more diversified and specialized. For instance, Duke University was a pioneer in establishing the first legal clinic in the USA. At that time, it was a legal clinic dealing with general legal issues. This university currently has 12 specialized legal clinics, like Appellate Litigation Clinic, Children's Law Clinic, Civil Justice Clinic, Community Enterprise Clinic, etc.[5]

Diversification and specialization of legal clinic activity were in the case of Uzbekistan clinics too. For instance, in 2000, TSUL established a legal clinic on general legal issues. Then TSUL launched a unique clinic focused on small and medium businesses, street law, and human rights clinics. Currently, the university is negotiating

[2] Draft Law 'On Free Legal Aid' (Uzbekistan) <https://regulation.gov.uz/uz/document/4329> accessed 21 April 2023.

[3] O Madhloom and H McFaul (eds), *Thinking About Clinical Legal Education: Philosophical and Theoretical Perspectives* (Routledge 2021).

[4] L Thomas and N Johnson, *The Clinical Legal Education Handbook* (Institute of Advanced Legal Studies, University of London Press 2020).

[5] Duke Law, 'Duke Law Clinics' <https://law.duke.edu/clinics/> accessed 21 April 2023.

with Syracuse University to establish a new Clinic at TSUL to render free legal aid to people with disabilities.

Future tendencies on clinical legal education and free legal aid promise more directions and forms. Last year's legal clinic's experience in lockdown and quarantine situations showed the necessity of digitalizing the whole process. The recent tendencies show that there will be launched special clinics in protecting consumers' rights in the digital world, clinics on personal data protection, and clinics on cyber law.[6] In rendering legal aid, we suppose that there will be mediation and other ADR types, including ODR (online dispute resolution); and exclusive use of Artificial Intelligence software (see Table 1).

[6] O Madhloom and I Antonopoulos, 'Clinical Legal Education and Human Rights Values: A Universal Pro Forma for Law Clinics' (2021) 9 Asian Journal of Legal Education 23.

Table 1. Comparison of legal clinics in the Past, Present, and Future

Criteria of comparison	Past	Present	Future
Aim	- Student training - Legal aid	- Legal aid - Student training - Rising legal awareness - Spread legal ethics	- Legal aid - Student training - Rising legal awareness - Spread legal ethics - *The aim is not limited to one jurisdiction*
Institutional relation	- University department	- Beyond the university - State Entity section - NGO section - Independent NGO	- Beyond the university - State Entity section - NGO section - Independent NGO - *Globalization* - *No 'physical law clinic', ie, virtual clinic*
Sphere of activity	- General legal issues	- Specialization - Representation of interests	- Specialization - Representation of interests - *Special clinics in protecting consumer rights in the digital world* - *Clinics on personal data protection* - *Clinics on cyber law*
Subjects (legal aid providers)	- Law Students	- Law Students - Entity employees - NGO members - Individuals - Non-lawyers	- Law Students - Entity employees - NGO members - Individuals - Non-lawyers - *Multinational companies sections* - *AI software*
Subjects (legal aid recipients)	- Poor people	- Poor people - Every legal aid seeker - Juveniles - People with disabilities - Entities (startup or insolvent)	- Poor people - Every legal aid seeker - Juveniles - People with disabilities - Entities (startup or insolvent) - *Investors clinics* - *Representation in ICSID and other dispute resolution institutions* - *AI software*
Form of activity	- Direct reception and consultation	- Direct - Indirect - Distance	- Direct - Indirect - Distance - *Full digitalization of activity* - *Usage of Mediation and other types of ADR*

3. TSUL Legal Clinic: legal status, main tasks, and activity indicators

TSUL legal clinic is a university's structural unit, which is associated with ensuring the compatibility of theoretical knowledge of students with practice, the development of practical skills in students, and impartial legal advice to individuals and legal entities.

The clinic's primary purpose is to form and develop practical skills in students, render free legal aid to persons in need of legal protection, and raise the population's legal awareness and legal culture.

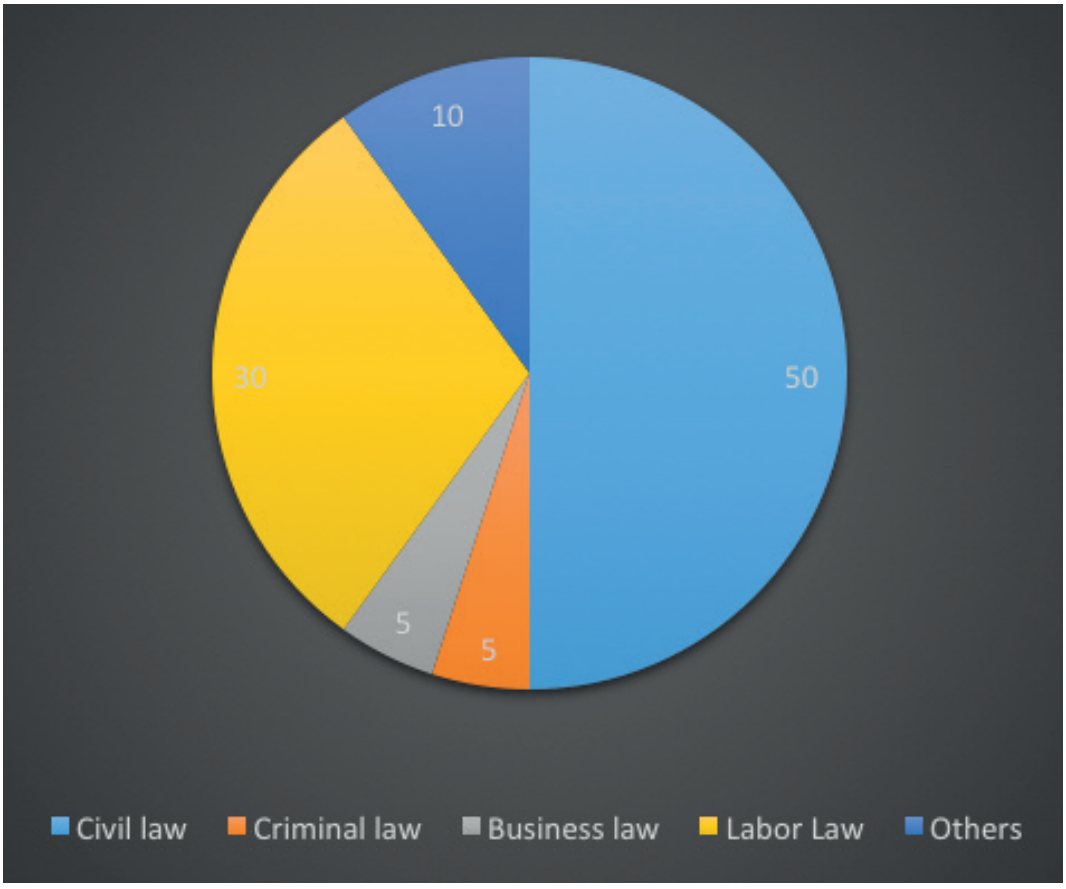
The main tasks of the clinic are: (i) Ensuring that students' theoretical knowledge is compatible with practice; (ii) Providing free legal assistance to individuals and legal entities; (iii) Improving the level of professional training in the legal field by developing students' skills in dealing with appeals of legal entities and individuals; (iv) Application of materials related to the activities of the clinic in the educational process.

The clinic performs the following functions to perform the tasks assigned to it: (i) Take organizational measures to organize the performance of students in the clinic; (ii) To prepare a list of candidates to involve them in the activities of the clinic; (iii) Establish cooperation with public and economic administration, judicial and law enforcement agencies, advocacy, and other organizations, thereby involving practitioners in clinical activities; (iv) Conducting competitions among students working in the clinic and encouraging them; (v) Ensuring timely and quality consideration of appeals of individuals and legal entities for legal advice; (vi) Expanding the scope of legal aid through the organization of mobile legal advice for legal entities and individuals; (vii) Based on the nature and complexity of the appeals of individuals and legal entities, to make recommendations on the need to apply to the relevant state and economic administration bodies, judicial law enforcement agencies, and advocacy structures to resolve them.

3.1. Offline (direct) reception and counseling

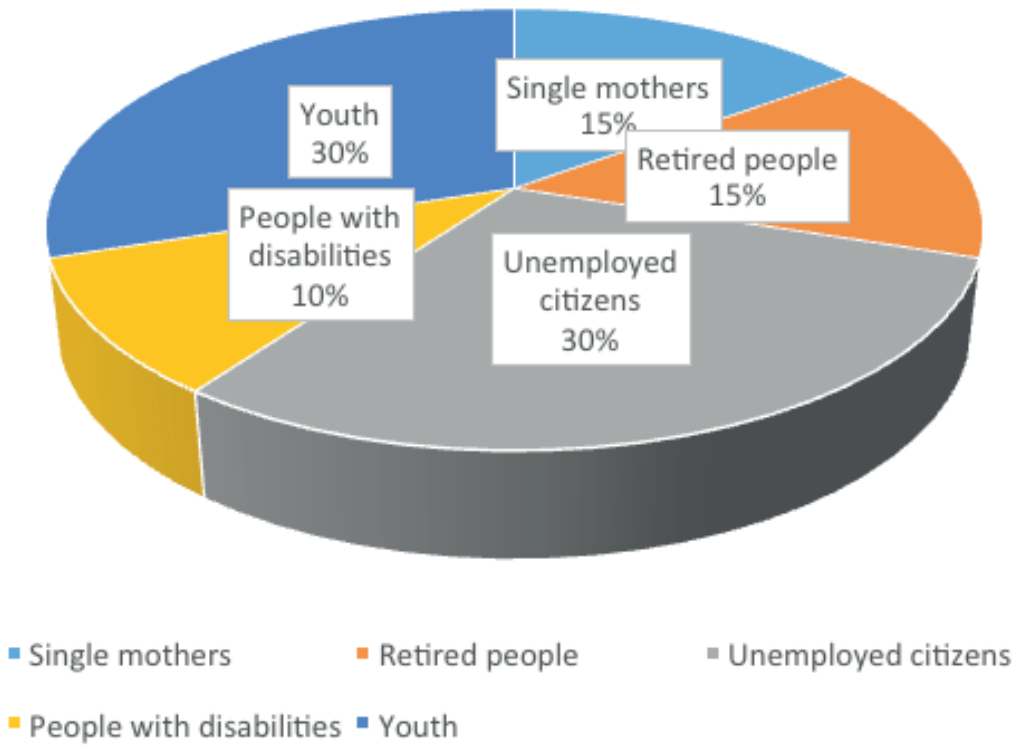
Every person has a right to directly visit and get free legal services from the TSUL legal clinic from Monday to Friday from 10 am to 3 pm. For many citizens, the clinic is the only way to seek free legal advice. Overall, in the first quarter of 2023, 540 citizens sought legal assistance from the TSUL legal clinic. Most inquiries relate to civil law, mainly housing and family law making up half of the inquiries. Around 15 percent of addresses belong to labor law, and the remaining 15 percent are administrative law issues (see diagram 1).

Diagram 1. The relevance of appeals to the law sphere in %



The applicants' structure is quite diverse: around one-third of them are youth and another one-third are unemployed citizens. Single mothers and retired people also make up about one-third of applicants. Ten percent of addresses to legal clinic services were people with disabilities (see diagram 2).

Diagram 2. The structure applicants in %



3.2. Online addresses

During the coronavirus pandemic, TSUL clinic students found themselves building their legal abilities and learning to engage with clients exclusively through digital means. The TSUL legal clinic's Telegram channel, using Uzbekistan's most popular messaging app, was launched in September 2019 and currently has more than

3,500 members.[7] During the pandemic, the telegram channel was a critical and often the sole means for people to access free legal advice. It also makes access to free legal aid much faster and simpler for the population. In a short period, the online legal services of the TSUL clinic became popular among the population and its scale tripled compared to offline addresses.

Currently, TSUL legal clinic is working on the further development of online services for citizens. Particularly TSUL legal clinic launched and actively running its profiles and pages on famous social networks.[8] The aim is not only to answer citizens' questions but also to increase their legal awareness systematically and at the same time, train students to deal with real legal issues.

3.3. Public awareness-raising events

One of the main goals of the TSUL legal clinic is to contribute to raising the legal literacy of the population. In this regard, the clinic systematically organizes various outdoor activities to promote legal knowledge among the population. For instance, in the 2022-2023 academic year, the management and students of the clinic conducted more than 20 such events, mainly in communities. The legal clinic volunteers visited 11 districts of Tashkent and answered citizens' legal appeals in the scope of mobile receptions. Under the motto of 'Raising legal awareness and legal culture in society – a priority', the clinic posted a series of public articles on legal literacy through the official website of the Uzbekistan national information Agency (UzA).

3.4. Street law project

Street Law is a volunteer project in which law students use interactive methods to teach schoolchildren the basics of law they need in everyday life. Street Law was officially launched in Uzbekistan in 2018. Tashkent State University of Law launched

[7] TSUL Legal Clinic, 'Telegram Channel' <https://t.me/TDYU_yuridik_klinikasi> accessed 10 June 2023.

[8] TSUL Legal Clinic links in social media: TSUL Legal Clinic, 'Instagram' <https://instagram.com/tsul_legal_clinic?igshid=1e41daomut3o> accessed 10 June 2023; TSUL Legal Clinic, 'Facebook' <https://www.facebook.com/tsullegalclinic/> accessed 10 June 2023; TSUL Legal Clinic, 'YouTube Channel' <https://www.youtube.com/channel/UC4uvuX9DE2fSt6KZUxihMNA> accessed 10 June 2023; TSUL Legal Clinic, 'TikTok' <https://www.tiktok.com/@tdyu_yuridik_klinikasi/> accessed 10 June 2023.

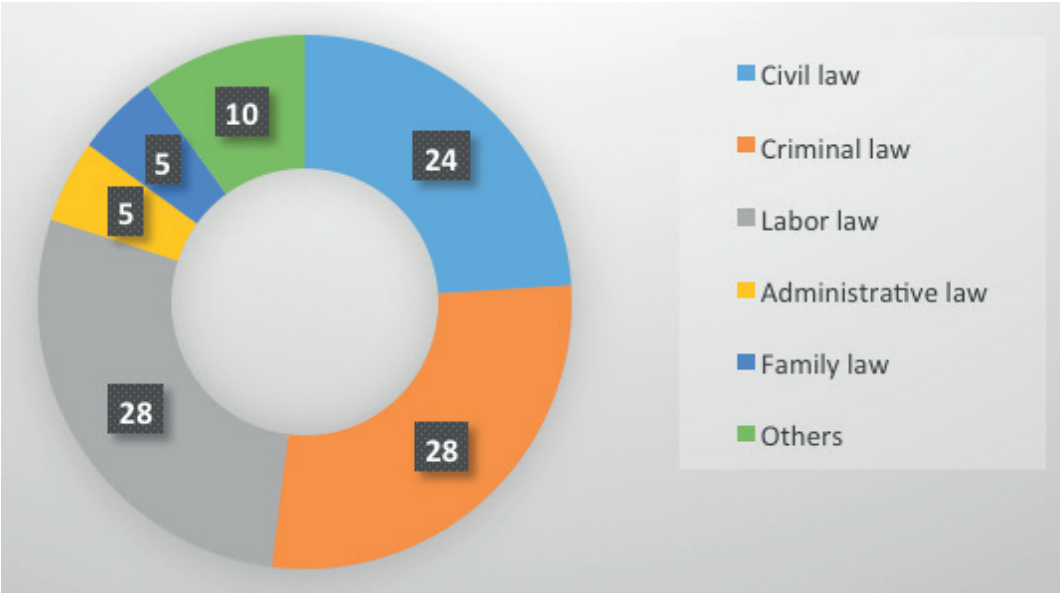
the project within the year based on the Presidential Decree 'On radical improvement of the system of raising legal awareness and legal culture in society' dated 9 January 2019. At the initial stage, there were approximately 15 volunteers and 5 schools involved in the project and the project was limited to only Tashkent city. In 2020, the Ministry of Justice and TSUL in collaboration with Street Law Inc. (USA) made huge efforts on expanding the scope of the project to all regions of Uzbekistan. Tashkent State University of Law is providing methodological support for all law colleges to run the Street Law project in their regions.

Thanks to these initiatives currently, more than 600 volunteers from TSUL and 14 law colleges in all regions of Uzbekistan are teaching Street Law lessons in more than 60 elementary schools throughout the country. These lessons helped to raise the legal awareness and legal culture of more than 6300 secondary schoolchildren. Through the Street Law project, TSUL legal clinic provides additional opportunities to develop qualities and skills such as critical and analytical thinking, teamwork, stress management, time management, communication, and solidarity.

3.5. Written appeals

In addition to online addresses, the number of citizens applied in written form to the TSUL Legal Clinic. In the last three months, this figure was around 40 requests. A quarter of the written appeals related to civil law cases, while applications relating to criminal and labor laws consisted of around 30 percent each. Family law, administrative law, and other legal issues covered the rest of one-third of the written requests (see diagram 3).

Diagram 3. The relevance of written appeals to the law sphere in %



3.6. Mobile receptions

The TSUL Legal Clinic held a series of roundtable discussions on legal literacy among the people through mobile receptions organized by the university in 11 districts of Tashkent. In particular, in the last two years, about 200 people visited the mobile receptions for Yunusabad district residents. About 400 people attended the mobile receptions for the residents of Mirabad and Yakkasaray, where they received free legal advice and practical assistance for the solution of their legal problems.

Also, Legal Clinic volunteers organized mobile receptions in 2 secondary schools

for Shayhantahur district residents, which were attended by about 500 citizens. Legal Clinic volunteers provided legal advice and assistance, as well as advocacy for electoral legislation.

4. Perspectives of development legal clinic activity

Considering the report on 'Assessment of Uzbekistan Law Clinic at TSUL'[9] in 2020 we are considering the improvement of clinical legal education and significantly enhancing the capacity of the legal clinic in the following directions.

Digitalization of services: (i) creating a professional and multifunctional Telegram bot; (ii) creating a modern and accessible website for the legal clinic; (iii) creating a short video and audio materials on popular issues. For such purposes, the TSUL legal clinic is under the necessity to obtain appropriate equipment, including 1-2 professional cameras, professional computers, microphones, etc.

Expanding the scope of free legal aid in the country: (i) support in methodological and legal assistance to four legal clinics that are created in Fergana, Namangan, and Andijan regions; (ii) support in methodological and legal assistance to 14 legal clinics created in the 14 regional law colleges; (iii) Launching new programs on providing legal assistance to vulnerable people.

Student training: (i) In September 2020, we selected around 80 new students (mainly 2nd-year courses) for the legal clinic. For them, we need to organize a set of training devoted to interviewing, consulting, 'street law', 'professional identity', and 'legal ethics';[10] (ii) Preparation of students involved in the TSUL legal clinic for attending the international contest among legal clinics around the globe; (iii) Organizing "Summer school" with the involvement of the students of the regional legal clinic; (iv) To support TSUL students' participation in international competitions related to clinical legal education.

[9] Prepared by Yvonne Troya, Clinical Professor of Law at the University of California, Hastings College of Law (2019).

[10] The last two topics of the training were also recommended by the results of the 'Assessment of Uzbekistan Law Clinic at TSUL' report, on 24 March 2019, at 10 and 17.

Improving the work with the citizen's problems: (i) Enhancing the direct form of consultation through organizing systemic visiting receptions in the mahalla, civil courts, and public receptions of the President and prime minister; (ii) To launch the indirect assistance and consultation by establishing a particular web platform and developing the clinic's profiles on social media; (iii) Studying and analyzing citizens' appeals (paying particular attention to the cause of the problem: legislative; law enforcement; or level of legal literacy, etc.); (iv) Submitting proposals to the Ministry of Justice on taking the necessary measures to eliminate the revealed facts of violation of the law; (v) Summarizing appeals and preparing case studies for further use in the educational process.

Legal Advocacy: (i) Developing and spreading the activity of Street law; (ii) Organizing offline and online consultations for serial posting on the internet platforms of the clinic; (iii) Preparation and free distribution among the population of manuals in the form of questions and answers on legal problems that are often found in everyday life; (iv) Preparation of booklets, and brochures for foreign citizens staying in the Republic of Uzbekistan in the event of certain life situations requiring legal solutions or obtaining legal information; (v) Preparation and free distribution of practical guides for investors and separate guides for labor migrants; (vi) Organization of e-learning mechanisms of 'Legal services to the population' and "Basics of law" subjects; (vii) Publishing quarterly information and analytical journal, "Legal Clinic," along with the results of scientific and analytical studies of legal issues; (viii) Organizing serial events in the schools, lyceums, and colleges on increasing the sense of justice.

5. Cooperation with law colleges in the regions of Uzbekistan

The Legal Clinic is a unique phenomenon; one of the few opportunities for close and honest collaboration between educational institutions specializing in jurisprudence teaching.[11] This cooperation consists of fulfilling the professional legal community's social mission – providing free legal aid to citizens and creating new

[11] RA Boswell, 'The Global Evolution of Clinical Legal Education: More Than a Method' (2018) 67 Journal of Legal Education 1081.

interactive teaching methods. In this regard, a considerable number of specific ways of interaction open up for higher educational institutions.

(i) Exchange of experience and holding conferences. Within the framework of this area of cooperation, it is proposed to organize regular online and offline meetings to exchange experiences and methods of consulting citizens and discuss the possibility of organizing joint programs and competitions for student clinicians.

(ii) Development of educational and methodological complexes. In this vein, it is possible to create unified ethics of counseling in a legal clinic and develop a common approach and technique for interviewing and counseling, which will serve as a guide for students and teachers in their activities in a legal clinic.

(iii) Conducting joint training and courses to improve the qualifications of teachers and students. During the initial organization of legal clinics in legal, and technical schools, the Legal Clinic of TSUL proposes to conduct joint training and courses on the main goals and objectives of the legal clinic, work with citizens' appeals, and their advice. The training provides for the coverage of the following topics: The rule of law and access to justice; Interviewing and consulting a client; Features of providing legal advice to specific categories.

Based on the participation results, the most successful participants will be offered the opportunity to undergo an internship at the Legal Clinic of TSUL to gain practical skills in providing legal assistance.

(iv) Creation of unified databases and dispatching services. To ensure the timely provision of primary legal advice to citizens and improve legal clinics' activities, it is proposed to create a unified database and dispatching services at legal clinics. Within the framework of this activity, it is also proposed to assist the Legal Clinic of TSUL in digitalizing the activities of the legal clinic, transferring its main activity to the online format by creating its platforms on social networks, web pages, and messengers.

(v) Publishing magazines and collections of articles. Based on the collected applications and the consultations provided, it is proposed to create monthly journals and collections of essays on law branches. These journals and collections should serve as an ideal link between theoretical and practical knowledge. They will outline citizens' life problems who have found effective solutions within the framework of legislation.

(vi) Organization of joint field events for primary legal consulting of the population.

Previously, the TSUL Legal Clinic organized several such outreach events in school halls and public receptions in Tashkent and the Tashkent region.

(vii) Assistance in the creation and development of the 'Street Law' program. The Street Law program aims to educate law students voluntarily in essential legal knowledge in everyday life through interactive methods. To implement the Decree of the President of the Republic of Uzbekistan 'On additional measures to ensure the supremacy of the constitution and law, strengthening public control in this area, as well as improving legal culture in society' dated 13.12.2019 No. PP-4551 is an outstanding volunteer group of teachers and students running Street Law activities in schools. Considering the effectiveness and importance of the role of the 'Street Law' program in the legal education of the population from a young age, it is proposed to create these programs at legal clinics of legal, technical schools.

(viii) Attracting distinguished students to practice in the Legal Clinic of TSUL.

6. Conclusion

In this paper, we tried to outline the experience of TSUL in launching and maintaining a free legal aid program in the form of legal clinical education. Our analysis showed that university legal clinic has a huge impact on the quality of future lawyers. Students involved in the legal clinic's activity are most successful than the students who did not have such practice. Moreover, legal clinic contributes solution to social problems by providing systemic free legal aid. In this sense, the TSUL legal clinic acts as an agent and assistant of the state. In addition to mentioned features, the legal clinic's activity positively affects the rise of legal awareness and legal culture in the long-term perspective.

Today free legal aid initiative in Uzbekistan is raised to a new stage. This stage is mainly characterized by the creation of the legal basis of free legal aid activity, expanding the legal clinic's activity beyond universities, and developing forms of rendering free legal aid, mainly reflected in the digitalization of legal services.

The paper also outlines the huge perspectives of developing free legal aid, pro bono activity, and clinical legal education in Uzbekistan, which mainly covers the creation of legal bases of free legal aid, promoting involvement of professional lawyers

and law firms in pro bono services, and full digitalization of legal services industry. All of these measures increase the level of access to justice through access to pro bono legal services and free legal aid to a vulnerable population.

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THE EFFECTIVENESS OF JUDICIAL PROTECTION OF PRISONERS' RIGHTS[*****]

ABSTRACT. *The paper results from a research project which aims at critically reconstructing the different levels at which the system of protection of prisoners' rights is articulated. In particular, after analysing the non-jurisdictional instruments, the essay will focus mainly on the forms of jurisdictional complaints, in order to highlight the profiles that still risk undermining their effectiveness.*

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[***] Research Fellow, Laboratorio dei Diritti Fondamentali – Collegio Carlo Alberto; author of paras 2, 3.2 and 3.3.

[****] Research Fellow, Research Centre 'Diritto Penitenziario e Costituzione – European Penological Center'; author of paras 3, 3.1 and 4.

[*****] The paper is the result of the research work carried out by the authors A Maratea and S Piergiovanni within the project 'The effectiveness of the judicial protection of prisoners' rights', funded by the Research Center 'Diritto Penitenziario e Costituzione – European Penological Center' and directed by Professor G Fiorelli.

1. The long road to effective protection of prisoners' rights

The judicial protection of prisoners' rights,[1] which is the focus of the project 'The effectiveness of the judicial protection of prisoners' rights' funded by the Research Centre 'Diritto Penitenziario e Costituzione – European Penological Center', is undoubtedly one of the most sensitive issues in the prison system, to which for a long time – perhaps even too long – proper attention has not been paid, first and foremost, by the national legislator.

Indeed, the requirement to guarantee prisoners adequate protection of their subjective legal positions – the violation of which is a potential consequence of the restrictive regime – has only recently received specific statutory provision within the prison system. This occurred when Law Decree No. 146 of 23rd December 2013, transposed into Law No. 10 of 21 February 2014[2] – as part of a broader reformist design aimed at reducing the phenomenon of prison overcrowding – has filled a long-standing gap in the Italian law about the protection of prisoners' and internees' rights.

Before this legal reform, with only rare exceptions jurisdiction, prisoners could only rely on a 'generic' right of complaint pursuant to Article 35 of the Law No. 354 of 26th July 1975 (Prison Act and enforcement of liberty deprivation and restriction measures).

This provision, even today, does not lay down any rule on the methods and

[1] For an in-depth examination of protection of prisoners' rights, see, among others, F Fiorentin, 'La tutela dei diritti dei detenuti' in F Fiorentin and A Marchesilli (eds), *L'ordinamento penitenziario* (Giappichelli 2005) 70 ff; C Fiorio, 'I diritti fondamentali delle persone detenute' in F Fiorentin (ed), *La tutela preventiva e compensativa per i diritti dei detenuti* (Giappichelli 2019) 3 ff; V Grevi (ed), *Diritti dei detenuti e trattamento penitenziario* (Zanichelli 1981); A Menghini, *Carcere e Costituzione. Garanzie, principio rieducativo e tutela dei diritti dei detenuti* (Editoriale scientifica 2022) 148 ff; A Pennisi, *Diritti del detenuto e tutela giurisdizionale* (Giappichelli 2002); M Ruotolo, 'La tutela dei diritti dei detenuti' in M Ruotolo (ed), *Diritti dei detenuti e Costituzione* (Giappichelli 2002) 189; S Talini, *La privazione della libertà personale. Metamorfosi normative, apporti giurisprudenziali, applicazioni amministrative* (Editoriale scientifica 2018).

[2] The law is published in G.U., *Serie Generale*, 21 February 2014, No. 43, p. 14. An overview of the legislation is offered by F Caprioli and L Scomparin, *Sovraffollamento carcerario e diritti dei detenuti, le recenti riforme in materia di esecuzione della pena* (Giappichelli 2015); R Del Coco, L Marafioti and N Pisani (eds), *Emergenza carceri. Radici remote e recenti soluzioni normative* (Giappichelli 2014); A Della Bella, *Emergenza carceri e sistema penale* (Giappichelli 2014); M Ruotolo, *Il senso della pena. Ad un anno dalla sentenza Torreggiani della Corte EDU* (Editoriale scientifica 2014).

results of the complaint procedure: the decision, taken *de plano* at the end of a procedure lacking adversarial and procedural formalities, ends up being a mere suggestion to the Prison Administration. It lacks the binding force of judicial decisions, against which neither further complaints to the Supervisory Court nor, even less, appeals to the Court of Cassation are allowed.[3]

Inevitable, therefore, that such a jurisdictional *deficit* would draw the attention of the Constitutional Court.[4]

The Constitutional Court was asked to review the constitutionality of Articles 35 and 69 of the Prison Act, in so far as they do not provide for judicial protection against acts of the Prison Administration that are detrimental to the rights of detainees, on the basis of the assumption that the restriction of personal liberty – according to the current constitutional system based on the primacy of the human person and his rights – does not in any way entail a *capitis deminutio* in the face of the discretionary power of the authority responsible for its implementation.[5]

Although implying an inherent limitation of liberty, the state of detention does not deprive the prisoner of his or her inviolable rights, the recognition of which is accompanied by the correlative attribution of the power to assert them before a judge in a jurisdictional procedure, according to minimum procedural standards constitutionally due. These standards include 'the possibility of cross-examination, the stability of the decision and the possibility of appeal by Cassation'.[6]

And the procedure, initiated by the generic 'complaint' pursuant to Article 35 of the Prison Law, appeared in breach of these minimum guarantees in cases of prisoners' rights violations.

[3] In this sense, let me refer to G Fiorelli, 'Procedimento per reclamo e "nuova" giurisdizionalità?' in Del Coco, Marafioti and Pisani (n 2) 138 ff.

[4] Judgment of the Constitutional Court No. 26 of 8 February 1999 [1999] Giur cost 176, with critical notes by S Bartole, 'I requisiti dei procedimenti giurisdizionali e il loro utilizzo nella giurisprudenza costituzionale', ibid 190; E Fazzioli, 'Diritti dei detenuti e tutela giurisdizionale', ibid 199; M Ruotolo, 'La tutela dei diritti del detenuto tra incostituzionalità per omissione e discrezionalità del legislatore', ibid 203; C Santoriello, 'Quale tutela giurisdizionale nei confronti dei provvedimenti dell'Amministrazione penitenziaria?', ibid 222. See also F Della Casa, 'Un importante passo verso la tutela giurisdizionale dei diritti del detenuto' [1999] Dir pen proc 850.

[5] In this meaning, Judgment of the Constitutional Court No. 26 of 8 February 1999 (n 4) 182.

[6] In these terms, Judgment of the Constitutional Court No. 26 of 8 february 1999 (n 4) 182.

Hence, the declaration of unconstitutionality – pronounced in Judgment No. 26 of 1999 – of the contested provisions.

However, due to the absence of a general jurisdictional remedy and being impossible to choose from a wide range of procedural forms[7] – without trespassing on the sphere traditionally reserved for legislative discretion – the judges of the Constitutional Court limited themselves to sanctioning the principle of the full protection of the rights of persons *in vinculis*, without specifying the exact procedural type to be followed in the complaint.

To this end, the Constitutional Court called on the legislature 'to exercise its regulatory function in implementation of the principles of the Constitution'.[8]

Well, despite specifying the exact, it took almost fifteen years – and, in particular, the intervention of the European Court of Human Rights – for the legislature to introduce an instrument of judicial protection of prisoners' rights within the prison system.[9]

In the well-known *Torreggiani* case[10], the European Court of Human Rights – hearing numerous appeals by Italian prisoners who complain about the violation of

[7] For an in-depth analysis of the several complaints provided for by the Prison Law, see L Marafioti, 'Il procedimento per reclamo' in P Corso (ed), *Manuale della Esecuzione penitenziaria* (Zanichelli 2019) 405 ff.

[8] Thus, Judgment of the Constitutional Court No. 26 of 8 february 1999 (n 4) 188.

[9] On this point, L Marafioti, 'Deflazione carceraria e tutela giurisdizionale penitenziaria: nuovi propositi e illusioni normative' in Del Coco, Marafioti and Pisani (n 2) 9, speaks about 'regulatory lethargy'.

[10] European Court of Human Rights, 8 January 2013, *Torreggiani and others v Italy*, No. 43517/09, No. 46882/09, No. 55400/09, No. 57875/09, No. 61535/09, No. 35315/10, No. 37810/10, which required the Italian State to provide – within one year from the finality of the judgment – remedies to ensure the immediate cessation and reparation of the violations caused to the detainee for inhuman or degrading treatment, due to the situation of prison overcrowding. Commenting on the decision, see M Dova, 'Torreggiani c. Italia: un barlume di speranza nella cronaca del collasso annunciato del sistema sanzionatorio' [2013] Riv it dir proc pen 948; M Pelissero, 'La crisi del sistema sanzionatorio e la dignità negata: il silenzio della politica, i compiti della dottrina' [2013] Dir pen proc 261; F Romoli, 'Il sovraffollamento carcerario come trattamento inumano o degradante' [2013] Giur it 1188; M Ruotolo, 'Quale tutela per il diritto a un'esecuzione della pena non disumana? Un'occasione mancata o forse soltanto rinviata' [2013] Giur cost 4549; G Tamburino, 'La sentenza Torreggiani e altri della Corte di Strasburgo' [2013] Cass pen 11; F Viganò, 'Sentenza pilota della Corte EDU sul sovraffollamento delle carceri italiane: il nostro Paese chiamato all'adozione di rimedi strutturali entro il termine di un anno' (2013) Dir pen cont <https://archiviodpc.dirittopenaleuomo.org/d/1990-sentenza-pilota-della-corte-edu-sul-sovraffollamento-delle-carceri-italiane-il-nostro-paese-chiamato-all-adozione-di-rimedi-strutturali-entro-il-termine-di-un-anno/> accessed 22 July 2023.

their right not to suffer inhuman or degrading treatment or punishment as a result of prison overcrowding – observes that 'the complaint addressed to the supervisory magistrate pursuant to Articles 35 and 69 of the Prison Law, is an accessible remedy, but not effective in practice, since it does not allow a rapid end to imprisonment under conditions contrary to Article 3 of the Convention'.[11]

According to the interpretation of the Strasbourg Court, the complaint pursuant to Article 35 of the Prison Law would indeed represent an inadequate 'preventive remedy' to prevent the continuation of the violation of the right to be protected from inhuman and degrading treatment.

Having thus admonished the Government for its inability to demonstrate 'the existence of a remedy capable of allowing persons imprisoned in conditions detrimental to their dignity to obtain any form of reparation for the violation suffered'[12], the European Court of Human Rights called on Italy to establish, within one year, an effective remedy or a combination of remedies capable of offering prompt reparation for the prejudice observed during the detention regime.

In response to this admonition, the legislature implemented the *Torreggiani* judgement' by introducing preventive and compensatory remedies for violations of prisoners' human rights.[13]

In particular, the legislator has articulated the protection along two levels: a first level of 'non-jurisdictional guarantee', represented by the right of 'general complaint'[14] provided for by Article 35 of the Prison Law, and a second level of 'jurisdictional guarantee', represented by the 'new jurisdictional complaint'[15] regulated by Article 35-bis of the Prison Law, to underline the progressiveness of the protection mechanisms and their traceability to a unitary system.[16]

[11] Thus, ECHR, *Torreggiani and others v Italy* (n 10) 97.

[12] In these terms, ibid.

[13] For an overview of the preventive and compensatory remedies for violations of prisoners' human rights, see Fiorentin (ed), *La tutela preventiva e compensativa per i diritti dei detenuti* (n 1).

[14] See para 2.1.

[15] See paras 3 ff.

[16] The progressiveness of the instruments of protection is emphasised by the CSM, 'Opinion rendered on the text of Decree-Law No. 146 of 23 December 2013', concerning urgent measures on the protection of the fundamental

2. Non-judicial prisoners' rights protection's forms

2.1. National Guarantor for the rights of persons detained or deprived of liberty

In relation to the first level of guarantee, one of the subjects identified by Article 35 of the Prison Law as a possible recipient of the 'generic complaint' is the National Guarantor for the rights of persons detained or deprived of liberty.

This guarantee institution was introduced into our legal system in 2014[17] in the form of a collegial body, composed of the President and two members who shall remain in office for five years, which cannot be extended.

Independent guarantee figures for the protection of human rights, with particular reference to the prison, were urged on several occasions at the international level.

The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment[18] established a European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). The Committee shall, by means of visits, examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment. The members of the Committee shall be chosen from among persons known for their competence in the field of human rights or having professional experience in the areas covered by the Convention and they shall be independent and impartial. More specifically, the Article 9 of the European Prison Rules of 2006 states that all prisons shall be subject to regular government inspection and independent monitoring.

For the purposes herein, it is of importance the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).[19] The objective of the Protocol is to establish a system of regular

rights of prisoners and the controlled reduction of the prison population (Council Resolution of 23 January 2014).

[17] See Article 7, law-decree 23 December 2013, No. 146, converted with amendments by the law 21 February 2014, No. 10.

[18] Adopted on 26 June 1987 and come into force for Italy on the first of April 1989.

[19] Adopted on 18 December 2002 by the General Assembly of the United Nations by resolution A/RES/57/199 and come into force for Italy with the law 9 November 2012, No. 195.

visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.[20] The national preventive mechanisms shall be granted at a minimum the power to regularly examine the treatment of the persons deprived of their liberty in places of detention,[21] with a view to strengthening, if necessary, their protection against torture and other cruel, inhuman or degrading treatment or punishment and to make recommendations to the relevant authorities with the aim of improving the treatment and the conditions of the persons deprived of their liberty and to prevent torture and other cruel, inhuman or degrading treatment or punishment, taking into consideration the relevant norms of the United Nations. As national preventive mechanisms,[22] Italian government identified the National Guarantor for the rights of persons detained or deprived of liberty.[23]

In this sense, as national preventive and independent mechanisms, the National Guarantor can carry out his task of monitoring the treatment of the persons deprived of their liberty through the power of free access to all places of detention and their installations and facilities, without any authorization from the competent authorities being required. According to Optional Protocol,[24] deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.[25]

[20] Article 17, OPCAT.

[21] Article 19, letter a), OPCAT.

[22] Although it is beyond the scope of this contribution, it is worth noting that the National Guarantor, as national preventive mechanism, has also been assigned the task of monitoring the Immigration removal (CPR), through the attribution of un unconditional power access; also, based on the UN Convention on the Rights of Persons with Disabilities, it has also been assigned the task of monitoring facilities for the elderly or persons with disabilities.

[23] On the elements of impairment of the independence requirement see C Florio, 'Art. 7 d.l. 23 dicembre 2013, n. 146 conv. l. 21 febbraio 2014 n. 10' in F Della Casa and G Giostra (eds), *Ordinamento penitenziario* (Wolters Kluwer 2019) 1373.

[24] Article 4, paragraph 2, OPCAT.

[25] Thus, its power of unconditional access is extended not only to prisons, but also to police stations, Residences for Security Measures (REMS) and wards where compulsory health treatment is carried out (psychiatric diagnostic and treatment service, SPDC).

During the visits made by the Guarantor, he is called to regularly monitor human rights violations into places where people are deprived of their liberty, on the one hand, soliciting the administrations directly concerned to take the necessary measures; on the other, making recommendations to the relevant governmental and parliamentary authorities in order to disclose the problems that plague the prison system outside prison walls. To this end, it is obliged to transmit an annual report on its activities to the Presidents of the Senate of the Republic and the Chamber of Deputies, as well as to the Minister of the Interior to the Minister of Justice.[26]

A further purpose of the visits is to identify any critical issues and find solutions, through an activity of intermediation and collaboration with the responsible authorities. In this sense, the National Guarantor operates as an instance of protection of collective and individual interests compromised by the inertia of the administration or by its illegitimate or inappropriate conduct, intervening on its activity, not by binding it to remedy violations of certain rights, but by having at its disposal the powers and functions through which to prevent the emergence of a conflict between the person *in vinculis* and the administration itself.[27]

The National Guarantor, like Local Guarantors, exercises its function as a preventive and non-binding resolution mechanism also in individual situations of hostility that may arise between detained persons and the administration. This function is exercised by conducting interviews and exchanging correspondence with prisoners. Indeed, the Article 18, paragraph 2, of the Prison Law, recognizes to all prisoners as a genuine right to have meeting and correspondence with Guarantors of human rights.

Furthermore, following the amendment of 2018,[28] the interviews do not have to be counted in the total number of those scheduled and do not require prior authorization by the Head of the single prison. This is to avoid forcing the prisoner to face the alternative between exercising the right to maintain family and emotional relations and the right to extra-judicial protection.[29] The meetings in question are carried

[26] See Florio (n 23) 1378.

[27] See MG Coppetta, *sub* art. 35 in Della Casa and Giostra (n 23) 458.

[28] Amended by Article 12-bis, paragraph 1, letter a), law-decree 207/2008, converted with law No. 14/2009.

[29] See Florio (n 23) 1377; K Natali, 'La giurisprudenza di merito' in Fiorentin (ed), *La tutela preventiva e compensativa*

out in the manner pursuant to the Article 18, paragraph 3, of the Prison Law and, therefore, in 'dedicated premises' and without auditory control by penitentiary agents. Pursuant to the Article 35, of the Prison Law, even prisoners under Article 41-*bis*, penitentiary law, have been granted the right to have access in full confidentiality to the meeting with this authority, which, as a result, will take place without the glass partition and without the obligation to listen to the contents of the same.[30]

It should be specified that any interview with the Guarantor may also be for the purpose of allowing the detainee to make general oral complaints covered by Article 35 of the Prison Law and discussed below.

On the occasion of the meeting – and beyond them – the National Guarantor may be the recipient of complaints pursuant to Article 35 of the Prison Law, reserving to the Judicial Authority the jurisdictional complaints requiring the intervention of the Supervisory judge.[31]

The introduction of the figure of the Prisoners' Guarantor aims, without any doubt, to strengthen the protection of prisoners. In this direction, the Guarantor, in his capacity as guardian of the rights of detainees and injured by the penitentiary Administration, carries out an action in competition with that of the Supervisory judge. To this end, Article 35 of the Prison Law, includes both of the aforementioned persons among the possible recipients of general complaints,[32] which may be oral or written and, the latter, may also be submitted in a sealed envelope. The law – as already mentioned[33] – does not provide for any rules regarding the procedure, the decision and the manner of intervention.

per i diritti dei detenuti (n 1) 374; A Della Bella, 'I reclami ex art. 35-bis ord. pen. avverso le prescrizioni del regime detentivo', ibid, 337-338.

[30] Which, precisely in order to guarantee the necessary confidentiality of interviews with this figure, admits the possibility of addressing the Garanti also in a sealed envelope. On this point, see Florio (n 23) 1377-1378; and Natali (n 29) 376.

[31] See Florio (n 23) 1378.

[32] Article 35 also includes the Head of the prison, the Regional Superintendent, the Head of the Department of Prison Administration, the Minister of Justice, the judicial and health authorities visiting the facility, the President of the Regional Council and the Head of State.

[33] See para 1.

However, through a systematic interpretation of the individual rules on criminal execution, the latter will follow the same procedure as that described in Article 75, paragraph 4, of the Executive Regulation, which provides for a general obligation to inform the complainant as soon as possible.[34] The administrative and non-jurisdictional nature of the measure renders inadmissible both the complaint to the supervisory court pursuant to Article 14-ter of the Prison Law, and the appeal to the Court of Cassation pursuant to Article 111 of the Constitution. The lack of procedural guarantees, which has always characterized the general complaint, configures it as a remedy unsuitable to ensure adequate protection of the rights of detainees and, consequently, it remains a rule lacking in effectiveness, since no authoritative powers of the Guarantor are contemplated in the event that the Administration refuses to intervene. Nevertheless, the extreme 'pliability' of the generic complaint, which may well be directed towards any aspect of the organization of prison life, makes it possible to convey an infinite typology of requests not covered by judicial remedy.

Among other things, the prison represents one of the places where the actual reality is furthest removed from the legal model described by the rules, with the direct consequence that in that total institution, in that closed regime, control over the legality of the same and the legality of the actions within it, is complex.[35] Moreover, the practices of prison life often take the form of daily harassment that is hardly noticeable and which lacks the requirement of seriousness necessary for the enforceability of judicial protection, as discussed below. Consequently, the presence of a para-judicial intermediate protection mechanism appears necessary for two reasons. Firstly, it allows an external and highly specialized look inside the prison walls. Secondly, the constant presence in places of deprivation of liberty of 'other' figures of protection makes it possible to reach all those situations that inevitably escape the control of the Supervisory judge already burdened with multiple functions;[36] furthermore, in Italy, there are few Supervisory judges and they are forced to cope with a quantity of prisoners that, on the

[34] See Coppetta (n 27) 459.

[35] See A Margara, 'Carcere, i vantaggi dell'Ombudsman' [2003] Narcomafie.

[36] See A Ciavola, 'L'area di applicazione del nuovo rimedio giurisdizionale' in Fiorentin (ed), *La tutela preventiva e compensativa per i diritti dei detenuti* (n 1) 148-149.

contrary, is borderline unsustainable.[37]

2.2. Regional and Local Guarantor for the rights of persons detained or deprived of liberty

In addition to the National Guarantor, the guarantors for persons deprived of their liberty include regional guarantors at territorial level. As early as 1997,[38] the Antigone association had already felt the need to establish a form of guarantee in places of detention characterized by independence and specialization, experimenting with it first at the local level and then flanking it with an institutionalized figure at the national level. But it was only in 2003 that the first territorial Guarantor of the City of Rome[39] was established, followed by those of numerous other municipal, provincial and regional authorities. This guarantee institution was borrowed from the figure of the *ombudsman* of Scandinavian culture,[40] ie a mechanism set up to protect and guarantee the good performance of the administration *vis-à-vis* the citizen with the function of receiving complaints and possibly suggesting non-binding solutions. Currently, these guarantee institutions, with specific competence in prison matters, appear to have been activated in all the Regions and Autonomous Provinces of Italy, except for the Autonomous Province of Bolzano.

Regardless of their different names, they are conceived as guarantors of the rights of persons *in vinculis*, in a sense that is not only defensive but also assertive of the positions of individuals *vis-à-vis* the power of the administrations. Like the National

[37] See D Aliprandi, 'Magistrati di sorveglianza, sono meno di 200 per oltre 55.000 detenuti' *Il Dubbio* (Rome, 10 February 2017).

[38] See '"L'Ombudsman e la tutela dei diritti umani nei luoghi di detenzione" convegno internazionale promosso dall'Associazione Diritti umani – Sviluppo umano di Padova e dall'Associazione Antigone (per i diritti e le garanzie nel sistema penale) Università di Padova (14-15 novembre)' (*Radio radicale*, 14 November 1997) <https://www.radioradicale.it/scheda/101058/lombudsman-e-la-tutela-dei-diritti-umani-nei-luoghi-di-detenzione-convegno> accessed 22 July 2023.

[39] Next, it was the Region of Lazio that was the first to have a regional prisoners' Ombudsman, with Lazio Region Law No. 31 of 6 October 2003.

[40] See D Bertaccini and B Desi (eds), *I garanti (dalla parte) dei detenuti: le istituzioni di garanzia per i privati di libertà tra riflessione internazionale ed esperienza italiana* (Bologna University Press 2018) 51-82; Margara (n 35).

Guarantor, their essential function is to promote and guarantee the exercise of the fundamental rights of persons deprived of their liberty, such as, among others, the right to health, the right to education, the right to vocational training, the right to culture, the right to sport, the right to socialization and relations with their families and any other service aimed at recovery, social reintegration and integration into the world of work. In other words, the specific competences of the individual guarantors are distributed on the basis of the competences attributed to the regional or local authority to which they belong. By way of example, health protection, which is now the responsibility of the regional health service, will be the responsibility (though not the exclusive responsibility) of the Regional Guarantors; the Local Guarantors are competent on issues that may concern contacts with the territory or, Municipal Guarantors, on requests for identity documents. However, all matters relating to prison conditions and prison life remain within common competence.

The functions – not only of protection, but also of control on the work of the prison administration and on the detention conditions within the institutions – are similar to those envisaged for the National Guarantors. Specifically, the regional and sub-regional Guarantors are also allowed to conduct colloquia with prisoners (Article 18, paragraph 2, of the Prison Law); they can visit prison establishments without permission (Article 67 of the Criminal code); as well as, they can be the recipients of 'generic' complaints, pursuant to Article 35 of the Prison Law.

2.3. The role of the Third Sector and Antigone's experience: National Observatory on Prison Conditions, Antigone's Ombudsman and legal information desk

Still within the first non-jurisdictional level of guarantee of the protection of prisoners' rights, an absolutely prominent position is held by the Antigone association.

Antigone is an association founded in 1992 that deals with justice, human rights, and prisons. It is called Antigone because, like the heroine of the Greek tragedy, they fight for justice to be without the cruel traits of revenge.

Its many activities, Antigone is involved in the collection and propagation of reality of prisons' information, both as a constant reading of the relationship between regulation and implementation and as an information base for raising social awareness

of the prison problem.

These actions are carried out through the National Observatory on Prison Conditions[41] which received the permanent authorization from the Ministry of Justice to visit all the Italian detention centers. After each visit, the observes draft a report in which they describe the structural condition, the prison environment, the adherence to prison legislation and other salient features of the prison visited. All these information flow in the annual report on the prison conditions in Italy. It is a very important document that is normally used by whoever want to know the Italian detention system: media, students, experts and political parties.

Within Antigone, a significant position is taken by the Antigone's *ombudsman*,[42] which was established in 2008 and built on the Scandinavian ombudsman model.

The Ombudsman receives legal advice requests on many different issues: unjust transfers, denied access to health care, help to obtain an alternative measure to detention, prison overcrowding, denunciation of violence on prisoners. The support provided is mainly along two lines: on the one hand, information and promotion aimed at prisoners on their rights; on the other hand, assistance in the activation of these rights, through the preparation of petitions, complaints and reports to the competent authorities. Antigone's Ombudsman does not have any institutional role but uses the authority of the Association and its members to push for the just recognition of the rights of detained persons and the hours spend in solving the cases are completely volunteer The Ombudsman cooperates with National Observatory on Prison Conditions, with the regional Antigone offices and with the legal information desk active within prisons. He dialogues with the National, Regional and Locals Guarantors for the rights of persons detained or deprived of liberty, as well as with third sector associations active on the territory and within prisons.

It has filed to the European Court of Human Rights over 1000 cases of violation of Article 3 of the European Convention of Human Rights that prohibits torture, inhuman and degrading treatments.

In collaboration with Antigone association, since the beginning of 2015 the

[41] See <https://www.antigone.it/cosa-facciamo/osservatori> accessed 22 July 2023.

[42] See <http://www.osservatorioantigone.it/difensore_civico/> accessed 22 July 2023.

Department of Law has activated several legal information desks in prison which has a long-standing experience in the field of guarantees in the penal system and prisoners' rights. The first, in 2015, has been activated at the Regina Coeli Prison and in 2017, at the Rebibbia Women's Prison. Additionally, at the beginning of 2020, the Guarantor of persons deprived of their liberty of Region Lazio launched a project of integration with universities and qualified associations to strengthen the instruments aimed at protecting the rights of prisoners, to be realized through the establishment of new Legal Desks for the rights of prisoners in eleven of the fourteen prisons in the region. As part of this project, and thanks to Antigone's high specialization in the field, the Department of Law of the University of Roma Tre has been entrusted with the activation of the Desks at the Prison Institutes of Rome Regina Coeli, Rebibbia Femminile, Casa di Reclusione, and Terza Casa Circondariale. The new desks act in synergy with the staff of the Guarantor's Office, communicating the cases in which it is necessary to speak with the heads of public administrations or competent authorities to resolve the problem expressed by the detainee, and periodically reporting to the Guarantor all problems of a general nature related to the Institute that emerged during the activities.

The activities described above are necessary for the purposes of the discussion, as they fall within the concept – in the broadest sense understood – of para-jurisdictional protection of the rights of detained persons at a level other than the institutional level and which, transversally and jointly with the activities of the institutional figures of the guarantors, perform overlapping functions. In fact, the activity carried out by the National Observatory and the legal information desks allows, on the one hand, to give a non-institutional voice to the problems within the penal institutions, both with reference to the detention and structural conditions of the prisons, and with regard to the concrete needs of the prisoners – collectively and individually – that emerge in the course of daily prison life and that correspond, on different levels, to the effective exercise of their rights. Moreover, it is well known that the role of an external observer, by the mere fact of observing, can modify the reality he observes and, consequently, also the observed, thus orienting it towards a vision more in line with the requirements of legality imposed by the legislation.

On the other hand, the work of the Ombudsman and of the legal information

desks (albeit limited to the reality of the Roman prisons) ensure that prisoners can effectively exercise their rights through the support that these two figures offer in the concrete drafting of petitions, in the submission of appeals to the Court of Human Rights and through the activity of dialogue with the professionals within the institutions in order to redeem conflicts that arise between them and the prisoners, preventing any situations of power abuse.

When reference is made to power abuse, it does not only and exclusively concern its manifestation through the exercise of physical violence,[43] but refers, for the most part, to the authority's discretion to derogate and apply the legislation in force where this leaves gaps, lack of clarity or when it is itself the authority that grants it discretionary power. In fact, the problems that are put forward often do not concern major violations, but rather everyday life issues that are apparently of little importance but which, in practice, translate into violations of the rights of subjects *in vinculis*. And this because every phase of the prisoners' day takes place under the direction of an authority that governs their existence in every aspect.

Therefore, the activities carried out by the Antigone association can undoubtedly be traced back to all those preventive mechanisms and protection of human rights that respond to the demands of the international community and guarantee the effectiveness of protection.

3. Forms of judicial protection of prisoners' rights: complaints under Articles 35-bis and 35-ter of the Prison Law

Once the analysis of the figures and means that fall within the forms of non-judicial protection of the rights of detainees has been concluded, it is possible to focus on the access requirements and procedures that characterize the second level of guarantee of prisoners' legal positions, ie the jurisdictional one.

In particular, it will be necessary to investigate what is the relationship between the former institution of the generic complaint and the new forms of jurisdictional

[43] Which is, without a doubt, the ultimate expression of the abuse of the exercise.

complaint, as well as to verify whether the critical issues previously posed by the absence of a remedy lacking the characteristics of jurisdiction can really be considered overcome.

3.1. Serious and actual prejudice to the exercise of rights

Trying to strike a delicate balance between the effectiveness of the forms of protection of rights and the efficiency of access to the courts,[44] the legislator has made access to the judicial complaint subject to the fulfilment of specific conditions.[45]

In particular, pursuant to Article 69, paragraph 6, letter b), of the Prison Law, the prisoner is entitled to complain to the Supervisory Penitentiary Magistrate about the activity carried out by the Administration in breach of prison regulations, provided that actual and serious prejudice to the exercise of his rights has resulted.

Therefore, three requirements are essential:[46] an administrative action illegitimate because of the failure to comply with the law on the prison system or its regulation; a prejudice to the exercise of the prisoner's rights, causally linked to the act or conduct of the Administration; the seriousness and actuality of the injury suffered.

Regarding the first requirement, namely the wrongful act committed by the Administration, the legislative option of using the term 'non-compliance' initially made it difficult to identify the possible sources of the prisoner's prejudice.

According to the now prevailing interpretation,[47] the administration may answer

[44] On the complementarity and contextual contrast between the two profiles see I Pagni, 'Effettività della tutela giurisdizionale', *Enc dir* (Annali X, 2017) 357 ff. On the subject, see also M Luciani, 'Garanzie ed efficienza nella tutela giurisdizionale' (2014) 4 Rivista AIC.

[45] On the subject, GM Napoli, 'I diritti delle persone detenute tra pregiudizi collettivi ed effettiva garanzia' [2021] Riv it dir proc pen 1349, qualifies Article 35-bis of the Prison Law as a 'secondary guarantee instrument'.

[46] See L Marafioti, 'Il procedimento per reclamo' (n 7) 428; in an adhesive sense, see also M Bortolato, 'Torreggiani e rimedi preventivi: il nuovo reclamo giurisdizionale' [2014] Arch pen 576; as well as K Natali, *Il reclamo giurisdizionale al magistrato di sorveglianza* (Giappichelli 2019) 57.

[47] In this sense see S Romice, 'L'effettività della tutela preventiva dei diritti dei detenuti e degli internati. A proposito del reclamo giurisdizionale ex art. 35-bis o.p.' (2016) Dir pen cont 6; A Della Bella, *Emergenza carceri e sistema penale* (n 2) 140; Ciavola (n 36) 134; A Menghini, 'La Cassazione sulla portata applicativa del c.d. reclamo giurisdizionalizzato' [2018] Giur it 731; E Valentini, 'Il reclamo: casi e forme' in Caprioli and Scomparin (n 2) 218; A Menghini, *Carcere e Costituzione* (n 1) 228. On the issue, see Natali, *Il reclamo giurisdizionale al magistrato di sorveglianza* (n 46) 58.

either for having engaged in merely material conduct, whether active or omissive, or for having adopted an unlawful administrative measure. With reference to the latter case, in particular, not only acts adopted in breach of the law, but also those vitiated by an excess of power,[48] ie expressing an unreasonable exercise of administrative discretion,[49] are relevant.

Focusing now on the nature of the relevant prejudice, it should be noted, first of all, that the legislator has identified as the object of injury not the right in the static sense, but its dynamic manifestation.

Indeed, the reference in the legislation to the prejudice caused to the exercise of rights attributes relevance to conduct that undermines the dialectical relationship between the prisoner and the Administration, which is established when the prisoner enters the Penitentiary Institution and from which arise precise duties of protection on the part of the public custodian.[50]

In order to make the offences deserving of judicial protection selectable *ex ante*,[51] the legislator has, then, identified two parameters that must be established in order for the prisoner to have an interest in bringing proceedings: the *actuality* and the *seriousness* of the prejudice caused by the Administration.

However, both requirements have caused considerable difficulties in practical application.

In particular, about *seriousness*, it has been critically observed[52] that the violation of a right should in itself be considered worthy of a judicial injunction, especially when it is suffered by an intrinsically vulnerable subject such as the one *in vinculis*. Moreover, it proves difficult to draw a clear-cut line between sufficiently serious injuries and those

[48] Romice (n 47) 7, expresses some doubts on this point.

[49] On the various forms of excess of power see, among others, V Lopilato, *Manuale di diritto amministrativo* (Giappichelli 2021) 800.

[50] In this sense, see Romice (n 47) 11.

[51] This intention has been made explicit by the legislator since the *Relazione di accompagnamento al d.d.l. di conversione del d.l. n. 146 del 2013*.

[52] Bortolato (n 46) 580; D Vicoli, *sub* art. 69 o.p. in F Fiorentin and F Siracusano (eds), *L'esecuzione penale* (Giuffrè 2019) 818.

without such connotations, with considerable consequences in terms of legal certainty.[53] Indeed, the task of filling the parameter in question with meaning is, *de facto*, left to the sensitivity of the individual Supervisory Penitentiary Magistrate, competent to decide in the specific case.[54] The doctrine has therefore proposed to mitigate through interpretation the selective effectiveness of the seriousness requirement,[55] from which only those injuries so slight as to constitute mere discomfort or annoyance would be excluded.

Even the *actuality* requirement presented significant critical aspects.

Particularly, as specified by the legislator itself,[56] the existence of this prerequisite must be assessed not only at the time the complaint is lodged, but also at the decision-making stage. Therefore, both injuries that are no longer in progress are excluded from the scope of Article 35-bis of the Prison Law, in respect of which the possibility of resorting to compensatory remedies remains firm,[57] and imminent injuries, from which the prisoner seems unable to defend himself in any way.[58]

[53] On this point, see S Talini, 'Il "diritto all'effettività dei diritti": quali forme di tutela per le persone private della libertà?' in M Ruotolo and S Talini (eds), *I diritti dei detenuti nel sistema costituzionale* (Editoriale scientifica 2017) 456.

[54] On this subject see L Degl'Innocenti and F Faldi, *Il rimedio risarcitorio* ex *art. 35*-ter *ord. pen. e la tutela dei diritti del detenuto* (Giuffrè 2017) 20, according to which 'seriousness must be assessed on a case-by-case basis with reference both to objective aspects (extent and duration of the injury) and to subjective aspects consisting of the prisoner's personal circumstances (age, sex, health conditions...)'.

[55] See F Della Casa, *sub* art. 69 o.p. in Della Casa and Giostra (n 23) 939.

[56] See *Relazione di accompagnamento al d.d.l. di conversione del d.l. n. 146 del 2013*, 14.

[57] In this sense, see Della Casa, *sub* art. 69 o.p. (n 55) 939; Bortolato (n 46) 582; Vicoli (n 52) 819, who recalls that such an indication may be inferred even from European Court of Human Rights case law and, in particular, from what was stated in the judgments, 10 January 2012, *Ananyev v Russia*, No. 20292/04, and *Torreggiani and others v Italy* (n 10).

[58] It is precisely the requirement of the actuality of the injury that has led doctrine to doubt the preventive nature of the complaint *ex* Art. 35-bis of the Prison Law. In particular, see Talini, 'Il "diritto all'effettività dei diritti"' (n 53) 455. Furthermore, the lack of a remedy of a preventive nature was the subject of Corte cost., 22 November 2013, No. 279 [2013] Giur cost, 6, 4514, with comments by F Della Casa, 'Il monito della Consulta circa il "rimedio estremo" della scarcerazione per il condannato vittima di un grave e diffuso sovraffollamento'; A Pugiotto, 'L'Urlo di Munch della magistratura di sorveglianza (statuto costituzionale della pena e sovraffollamento carcerario)'; M Ruotolo, 'Quale tutela per il diritto a un'esecuzione della pena non disumana?' (n 10).

3.2. Protectable subjective juridical situations

As already pointed, the Article 69, paragraph 6, letter b), of the Prison Law delimits the range of the preventive judicial protection by explicitly referring to the serious and current injury inflicted to the subjective legal situations. It has already been said through which actions (or omissions) the penitentiary administration may incur liability. It is now necessary to move on to the analysis of the interpretative issues concerning the determination of the necessary criteria to identify protectable subjective juridical situations. On this point, it is useful to start from the principle clearly expressed by the Constitutional Court in the well-known Judgment No. 26 of 1999, in which it is laid down that, according to the constitution, the restriction of personal freedom does not mean at all a *capitis deminutio*[59] in front of the discretionary power of the authority in charge for its execution; in other words, the person who suffers a prison punishment retains the ownership of fundamental rights and active subjective situations that are not degraded by the discretionary interventions of the penitentiary administration. However, the interests behind the legal positions of the detainees, while being while being qualitatively like those of free subjects, they have a difference in terms of content, suffering a boundary inherent in the needs arising from detention.[60] Indeed, the qualification of the protectable legal positions of prisoners and internees *vis-à-vis* the prison administration remains a debated terrain in case law today.

Among others,[61] one of the most debated issues concerns the possibility of bringing legitimate interests into the category of protectable claims under the procedure of the Article 35-bis of Penitentiary Law. Indeed, to solve this interpretative doubt, the Joint Sections intervened in 2003, reaffirming what had already been affirmed by the Constitutional Court in 1999. According to the Joint Sections,[62] the inmate is always the unalienable rights-holder and the exercise thereof is not referred to the simple

[59] See Corte cost., 11 February 1999.

[60] In this sense see Romice (n 47) 18.

[61] For a comprehensive treatment on the subject see GM Napoli, 'La natura giuridica delle pretese della persona detenuta azionabili davanti al magistrato di sorveglianza' in Fiorentin (ed), *La tutela preventiva e compensativa per i diritti dei detenuti* (n 1) 151-182.

[62] See Cass. Sez. Un., 26 February 2003, No. 25079 and, in the same sense, Cass., 14 June 2017, No. 54117.

discretionary of the penitentiary administrative authority; otherwise, the penitentiary administrative discretionarily is always bound by its requirements and purposes; and even though it remains a regulatory power, it must always be exercised in accordance with the general principles of the legal system and without incurring the exercise of a non-proportional power compared to the aim pursued. Consequently, if the administrative action should be exercised outside these boundaries, it would result in an undue invasion of the recipient's legal sphere, causing that injury to the exercise of the detainee's rights that would allow the remedy under Article 35-bis to be activated.[63] In this sense, the traditional distinction between rights and legitimate interests is entirely marginal.[64] However, the Court of Cassation, on other occasions, has returned to this distinction, stating that when the power of the administration is normatively qualified as discretionary, there can be no talk of a subjective right, but the prisoner can only claim a legitimate interest and activate different remedies than judicial complaints.[65]

Moreover, it is common ground that the injury of mere fact expectations has nothing to do with the scope of this form of protection. Nor can the generic complaint under Article 35 of penitentiary law be made in respect of consequential damages that receive protection under the general rules that the legal system lays down for legal proceedings,[66] as well as all those subjective situations that may come into consideration at the time of application of the institutions proper to the criminal execution, concretely affecting the extent and quality of the punishment, for which the law lays down specific rules.[67] On the other hand, all those rights connected with the constitutionally assigned re-educative function of punishment, which find their basis in Article 27, paragraph 3, of the Constitution, are undoubtedly to be regarded as protectable subjective judicial

[63] See Napoli, 'La natura giuridica delle pretese della persona detenuta azionabili davanti al magistrato di sorveglianza' (n 61) 161.

[64] See Ciavola (n 36) 137.

[65] See, among others, Cass. pen., Sez. I, 12 December 2014, No. 3568; Cass. pen., 11 June 2014, No. 39966; Cass. pen., Sez. I, 20 March 2015, No. 20485; Cass. pen., No. 54117 of 2017.

[66] See Romice (n 47) 23; Cass. pen., Sez. I, 26 March 2015, No. 20488; Cass. pen., Sez. I, 15 January 2013, No. 4772.

[67] See Ciavola (n 36) 140; G Varraso, *sub* art. 35-bis in A Giarda and G Spangher (eds), *Codice di procedura penale commentato* (5th edn, 2017) 2366. See also Cass. Sez. Un., 26 February 2003, No. 25079.

situations; as well as the nucleus of the essential goods of life detectable by the combined provisions of Articles 2 and 13 of the Constitution and owned by every person.[68]

3.3. The identification of rights subject to protection: the domestic and supranational case law

Without any claim to exhaustiveness, it is now necessary to focus on the analysis of some of the rights identified by national and supranational case law that can be protected through the remedy under Article 35-bis of the Prison Law. Indeed, from the literal wording of Article 69, paragraph 6, letter b), of Prison Law it is not possible to identify which rights may give rise to a violation by the administration.[69] Consequently, it will be up to 'living law' to select the individual interests that can benefit from judicial protection. On the contrary, what is normatively established is the reference to the dynamic profile of the manifestation of the injury; in other words, the injury worthy of protection will concern, not the right in the abstract, but above all its 'exercise', ie all those injuries that concretely prevent the detainee from exercising it.

Individual interests can be traced back to homogeneous categories of rights affected by administrative activity.

First of all, reference is made to complaints concerning the right to health, of which only a few examples will be given.[70] In the case law dealt by the supervisory judiciary, one of its declinations concerned the dietary treatment of the prisoner as an essential component for the psycho-physical well-being of the person, with reference, firstly, to the prohibition for persons under Article 41-bis of the Prison Law to receive or purchase foodstuffs to be cooked. According to one orientation, the judges had held

[68] See Pennisi (n 1) 175; Valentini (n 47) 215.

[69] On the appropriateness of the division between claims subject to judicial remedy and non-judicial remedy, see D Galliani, 'Le briciole di pane, i giudici, il senso di umanità' in Fiorentin (ed), *La tutela preventiva e compensativa per i diritti dei detenuti* (n 1) 73-76.

[70] For more in-depth case law on the right to health, see, si veda Natali, 'La giurisprudenza di merito' (n 29) 362-369, and Natali, *Il reclamo giurisdizionale al magistrato di sorveglianza* (n 46) 85-100. For a constitutional perspective on the right to health see M Caredda, 'Il diritto alla salute nelle carceri italiane. Questioni ancora aperte' in M Ruotolo and S Talini (eds), *Dopo la Riforma. I diritti dei detenuti nel sistema costituzionale*, vol 1 (Editoriale scientifica 2019).

that this limitation affected a mere interest and not a subjective right;[71] the Italian Constitutional Court intervened on this point, definitively establishing the existence of a fundamental right to cook food in one's own cell for persons under a differentiated regime, declaring unconstitutional Article 41-bis, paragraph 2-quater, letter f), limited to the words 'cooking food'.[72]

Moreover, sporting activity, having a positive impact on the psychophysical health of prisoners, has also been analyzed by the courts of merit in relation to compliance with your right to health. Indeed, it is the access to creative rooms, promenade rooms and the sports field equipped with instruments suitable for athletic and recreational use that has been held by the judiciary as a right of the subject in a differentiated regime.

In the international perspective, not finding express recognition within the European Convention for the Protection of Human Rights and Fundamental Freedoms (henceforth 'ECHR'), the European Court of Human Rights (henceforth 'the Court'), through an extensive and evolutionary construction, according to established case law, has brought the protection of the right to health of persons deprived of their liberty within the scope of the prohibition of torture and inhuman and degrading treatment or punishment (Article 3 ECHR).

In order to safeguard the health and well-being of persons *in vinculis*, the Court's pronouncements about inadequate cell space are all too well known to be examined in detail: it suffices, here, to recall that according to the Court's well-known guideline, this can constitute inhuman and degrading treatment.[73] Moving on, some of the Court's judgments found violations of Article 3 ECHR for the failure to provide adequate and timely medical care in the face of the worsening health condition of a prisoner suffering from leukemia.[74] Similarly, the Court also found a violation of Article 3 ECHR in cases of procrastination in the provision of medical care appropriate to the actual needs of a

[71] See Mag Sorv Macerata, 6 April 2017. In the same sense see Mag Sorv Reggio Emilia, 15 March 2011.

[72] See Corte cost, 12 October 2018, No. 186.

[73] Among others, 16 July 2009, *Sulejmanovic v Italy*, No. 22635/03; *Torreggiani and others v Italy* (n 10); 20 October 2016, *Muršić v Croatia*, 7334/13.

[74] ECHR, 14 November 2002, *Mouisel v France*, No. 67263/01.

detainee seriously ill with multiple sclerosis;[75] failure to provide care for a woman suffering from hepatitis and viremia;[76] of making a diagnosis that was not followed by appropriate treatment or adequate medical supervision;[77] but also in the case of refusal to provide a prisoner with the dentures he needed and could not afford to buy,[78] or eyeglasses damaged during arrest.[79] In a ruling in 2010,[80] the Court clarified what the State's obligations are in the treatment of sick prisoners: the States must ensure that a person is detained in conditions which are compatible with respect for his human dignity, and that, given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance.[81]

The Court also ruled on the forced feeding of prisoners on hunger strike, which was declared lawful if it was indispensable to save their lives, even in the absence of their consent and provided that it was medically necessary, adequate procedural safeguards were observed and that the manner in which it was carried out did not exceed the minimum threshold of severity; otherwise it may constitute a violation of the prohibition of torture.[82]

The Court has also ruled on the non-admission of prisoners to sanitary residences for the enforcement of custodial security measures, in line with national case law, both substantive and lawful.[83] Specifically, case law on the topic, at various levels,

[75] ECHR, 2 November 2006, *Serifis v Greece*, No. 27695/03.

[76] ECHR, 12 July 2007, *Testa v Croatia*, No. 20877/04.

[77] ECHR, 24 February 2009, *Poghosyan v Georgia*, No. 9870/07.

[78] ECHR, 16 February 2010, *VD v Romania*, No. 7078/02.

[79] ECHR, 20 April 2010, *Slyusarev v Russia*, No. 60333/00.

[80] Ibid.

[81] For more in-depth, see F Cecchini, 'La tutela del diritto alla salute in carcere nella giurisprudenza della Corte europea dei diritti dell'uomo' in A Massaro (ed), *La tutela della salute nei luoghi di detenzione. Un'indagine di diritto penale intorno a carcere, REMS e CIE* (Roma TrE-Press 2017) 23 ff.

[82] ECHR, 5 April 2005, *Nevmerzhitsky v Ukraine*, No. 54825/00 and ECHR, 19 June 2007, *Ciorap v Moldova*, No.12066/02. For the Court's orientation on the compatibility of the state of health with 'normal' conditions of detention, prison sanitary conditions and detention e mental health, see Cecchini (n 81) paras 4.2, 4.3 and 4.4.

[83] Corte cost, 27 January 2022, No. 22.

has stigmatised the phenomenon of the so-called 'waiting lists' as a result of which, in the absence of 'available places', unaccountable and dangerous persons are detained, while waiting, in prisons. The European Court of Human Rights, in the case of *Sy v Italy*,[84] held that the applicant's placement in the ordinary prison regime prevented him from receiving therapeutic treatment appropriate to his medical condition, thus constituting a violation of Article 3 ECHR. Moreover, the Court, like the Italian Constitutional Court's ruling,[85] found that there was a violation of the right to liberty and personal security under Article 5 ECHR as a consequence of the unlawfulness of part of the applicant's detention in prison.

Returning to national case law, worthy of mention is the recognition for persons *in vinculis* of the right to access to medically assisted procreation (hereinafter MAP) techniques in the presence of the requirements of Law No. 40 of 2004.[86] The Court of Cassation[87] held that the failure to ensure the right of access to MAP techniques was unlawful since restrictions could not be justified by the need to respect the dignity and humanity of the person; it also extended the right to access to MAP to prisoners under the differentiated detention regime suffering from viral diseases with a high risk of transmission to the partner and foetus.[88]

The right to maintenance family and emotional relations of inmates under Article 41-bis regime – which is carried out, for the most part, through in-person meeting and phone call – is severely compressed because of the necessary balancing act with the – often pre-eminent – requirements of security. Consequently, the case law of the courts of merit is very copious. On the subject of meeting and phone call, by way of example only,[89] mention should be made, firstly, of the Court of Cassation's ruling

[84] EHCR, 24 January 2022, *Sy v Italy*, No. 11791/20.

[85] See Corte cost, 27 January 2022: Court found a violation of Article 13, Const., holding that the placement of an inmate in a facility not qualified as a REMS constitutes a restriction of personal liberty *contra legem,* since it is implemented beyond the boundaries indicated by Article 13 of the Constitution.

[86] For more in-depth, see Talini, *La privazione della libertà personale* (n 1) 212-221.

[87] See Cass pen, sez. I, 20 February 2008, No. 7791.

[88] Ibid.

[89] For more in-depth case law on the right to affectivity, see Natali, 'La giurisprudenza di merito' (n 29) 369-372;

of 2014 in which it expressly affirmed the principle that a prisoner's right to have meeting and phone call with his family members, as an expression of a fundamental right, can never be completely impeded, not even when relevant social defence requirements are taken into consideration.[90] On the other hand, on the subject of the duration of in-person meeting, the Court of Cassation considered the extension of interviews from one to two hours to be legitimate, exceeding the requirements of the rule, and therefore, even if the interview took place in the previous week and the family members are resident in the same municipality as the institution.[91] In addition, the Court of Cassation held that the disapplication by supervisory magistrates only of a ministerial circular that, by imposing an interval of 30 quiet days, prevented the close fixing of the same.[92] On the other hand, with reference to the manner in which they are carried out, it has been recognised that they can be carried out without the dividing glass if the interlocutor is the child under 12 years of age and, according to a ruling by the supervising magistrate, must also be extended to the grandchild *ex filio*.[93]

In conclusion, without any doubt, human dignity, as the supreme principle of the legal system, constitutes an insurmountable limit for the execution of a measure restricting personal liberty. Therefore, it constitutes an insurmountable limit for the administration, beyond which a significant prejudice is generated as it affects the most intimate perimeter of the freedoms guaranteed to the prisoner.[94]

Natali, *Il reclamo giurisdizionale al magistrato di sorveglianza* (n 46) 101-116; A Della Bella, 'I reclami ex art. 35-bis ord. pen. avverso le prescrizioni del regime detentivo' (n 29) 331-338. For a constitutional perspective on the right to affectivity, see Talini, *La privazione della libertà personale* (n 1) 253-284, and S Talini, 'L'affettività ristretta' in Ruotolo and Talini (n 70) 70-94.

[90] See Cass, 12 December 2014, No. 7654.

[91] See Cass, 12 December 2014, No. 3115. In the same sense see Cass, 20 March 2015, No. 20486.

[92] See Cass, 25 November 2016, No. 10462.

[93] Scheme provided for in Circular No. 3592/6042 of 9 October 2003, in relation to which the courts of merit clarified that the favourable discipline must also be extended to the grandchild *ex filio*. See Mag Sorv Macerata, 6 April 2017.

[94] See Natali, *Il reclamo giurisdizionale al magistrato di sorveglianza* (n 46) 388.

4. The judicial procedure for the protection of prisoners' rights

4.1. The structure of the grievance procedure

Once the analysis of protectable subjective legal situations is complete, it is necessary to examine the procedure created by the legislator to check whether the prisoner's grievances are well-founded.

In particular, as provided by Art. 35-bis of the Prison Law, when the prisoner lodges a judicial complaint, it starts a proceeding to be conducted in the forms of the surveillance procedure, governed by Arts. 666 and 678 of the Code of Criminal Procedure.

Therefore, even in the judicial complaint procedure, there is an initial phase designed to examine the admissibility of the petition, followed by the holding of an adversarial hearing between the parties, which concludes with the adoption of an order, subject to appeal.

In spite of the legislator's intentions to provide guarantees, the decision to extend the model of the surveillance procedure to this proceeding immediately aroused considerable perplexity, given the different functions that characterise the two procedures.[95] Indeed, the jurisdictional complaint is justified by a grievance raised by the prisoner against the activity carried out by the public Administration and is connoted, therefore, by a contraposition of interests between the individual and the State, which is instead absent in the 're-educational jurisdiction'.[96] The judicial complaint procedure is, therefore, characterised by an antagonism between the parties, which makes it more similar to the logic of the judgement of cognition,[97] rather than to the surveillance procedure's one,[98] where the parties and the judge cooperate to

[95] On this point see, critically, K Natali, 'Il reclamo giurisdizionale per la tutela dei diritti dei detenuti' [2017] Riv it dir proc pen 1474, who says that it would have been better to create a procedure *ad hoc*.

[96] G Giostra, *Il procedimento di sorveglianza nel sistema processuale penale* (Giuffrè 1983) 142.

[97] On this topic, see K Natali, *sub* art. 35-bis o.p. in Fiorentin and Siracusano (n 52) 456, as well as Natali, 'Il reclamo giurisdizionale per la tutela dei diritti dei detenuti' (n 95) 1475 ff.

[98] About lack of conflict between the parties involved in the surveillance judgement, see A Gaito and G Ranaldi, *Esecuzione penale* (Giuffrè 2000) 83.

achieve the goal of social reintegration of the convicted person.[99]

It is precisely these different functions that made it necessary to introduce exceptions to the reference model, mostly developed in practice.

A first aspect, not expressly regulated, concerns people holding the power of initiative.

Article 678 of the Code of Criminal Procedure provides, in fact, that surveillance proceedings may be initiated at the request of the Public Prosecutor, the prisoner, his lawyer or *ex officio*.

In the absence of any legislative indication, it is controversial whether it is possible to attribute a power of action to the same people also in the context of proceedings under Article 35-bis of the Prison Law.

In particular, many doubts concern the possibility of recognising the Supervisory Penitentiary Magistrate's power to initiate proceedings *ex officio*: in fact, on the one hand, such an opportunity could be considered functional to the exercise of the role of guarantor of the legality of the sentence,[100] which he undoubtedly holds, but, on the other hand, this would seem difficult to reconcile with the noted antagonistic nature of the judicial complaint.

Majority doctrine tends, therefore, to exclude the active legitimacy of the Supervisory Penitentiary Magistrate,[101] considering that *ex officio* prosecution – insofar as it derogates from the rules of fair trial laid down in Article 111 of the Constitution – cannot be applied outside the surveillance proceedings, where it is justified by the peculiar purposes pursued in that context.

Even preliminary examination of the admissibility of the complaint raised some critical issues. Indeed, by express provision of the law, at this stage the Supervisory

[99] About the surveillance judgement, A Scalfati, 'Procedimento di sorveglianza "tipo" e art. 111 della Cost.' in A Scalfati (ed), *Giurisdizione di sorveglianza e tutela dei diritti* (Cedam 2004) 11.

[100] On this topic, F Fiorentin, 'L'iniziativa tra principio della domanda e poteri *ex officio*' in Fiorentin (ed), *La tutela preventiva e compensativa per i diritti dei detenuti* (n 1) 193.

[101] In this sense see M Bortolato, *sub* art. 35-bis o.p. in Della Casa and Giostra (n 23) 467; Natali, *sub* art. 35-bis o.p. (n 97) 456; M Bortolato, 'La tutela dei diritti dei detenuti' in F Della Casa and G Giostra (eds), *Manuale di diritto penitenziario* (Giappichelli 2021) 104. *Contra*, see Valentini (n 47) 233 ff.

Penitentiary Magistrate is required to proceed pursuant to Article 666, paragraph 2, of the Code of Criminal Procedure, ie to ascertain that the complaint is not manifestly unfounded for lack of the legal conditions and that it does not constitute a mere repetition of a previous application.

It is precisely the verification of the merits of the petition that runs the risk of turning into a real assessment of the merits,[102] since it must at least concern the subjective legal situation alleged to have been harmed, as well as the seriousness and actuality of the injury resulting from it. This profile is even more critical due to the absence of hearing of the parties, since Article 666, paragraph 2, of the Code of Criminal Procedure only requires the prior hearing of the Public Prosecutor, whereas the prisoner may only contradict during the phase of the appeal against the decree of inadmissibility.[103]

Once this preliminary examination has been successfully passed, the Supervisory Penitentiary Magistrate sets the date of the hearing. No express provision was made for the period that may elapse between the filing of the complaint and the holding of the hearing. Since this is an urgent procedure, due to the actuality of the prejudice to the exercise of rights, it would have been preferable instead to specify in advance a maximum time limit for the setting of the hearing, so that the excessive length of time does not undermine the effectiveness of the protection.

Once the date of the hearing has been fixed, pursuant to Article 35-bis, paragraph 1, of the Prison Law, the notice of the setting of the hearing must be served on the prisoner lodging the complaint, as well as on the Administration concerned.[104]

[102] In the context of surveillance proceedings, it has been proposed to resolve this profile through a restrictive interpretation of the concept of 'legal conditions', understood as referring only to legal conditions. In particular, the jurisprudence of legitimacy now seems to be constant in considering that the reasons for inadmissibility must be 'self-evident' and must not imply the resolution of controversial issues. On this topic, see Cass, Sez. III, 3 November 1994, No. 2886, in CED Cass, rv 200724-01; Cass, Sez. III, 27 April 1995, No. 1477, ibid, rv 202474-01; Cass, Sez. I, 27 April 2004, No. 24164, ibid, rv 228996-01; Cass, Sez. I, 10 January 2013, No. 6558, ibid, rv 254887-01; Cass, Sez. I, 16 September 2014, No. 41754, ibid, rv 260524-01; Cass, Sez. I, 29 March 2018, No. 32279, ibid, rv 273714-01; Cass, Sez. I, 23 June 2020, No. 22282, ibid, rv 279452-01. See also Scalfati (n 99) 12.

[103] On this topic, see Bortolato, *sub* art. 35-bis o.p. (n 101) 469; R Mastrotaro, *Il 'giusto procedimento' di sorveglianza* (Giappichelli 2022) 81. In case law, see Cass, Sez. V, 5 May 1998, No. 2793, in CED Cass, rv 210936-01; Cass, Sez. I, 27 April 2004, No. 24164, ibid, rv 228996-01; Cass, Sez. V, 14 June 2007, No. 34960, ibid, rv 237712.

[104] To be identified, as the case may be, in the prison administration, or in the competent local health authority,

Moreover, the reference to the provisions on surveillance proceedings implies that the same notice must also be served on the Public Prosecutor and on the prisoner's lawyer.

The described configuration of the hearing of the parties represents the most relevant novelty of the judicial complaint procedure. Indeed, Article 35-bis of the Prison Law does not merely guarantee the presence of the technical parties but ensures that those bound by the underlying substantive relationship are actively involved. In particular, the Administration concerned is guaranteed an advance discovery of the content of the complaint, notified together with the notice of the hearing. Moreover, the Administration may appear at the hearing with its own employee, thus being able to exercise the powers of a party.[105]

As for the complaining prisoner, the reference to the surveillance proceedings allows him to participate personally at the hearing, also by telematic means.

By providing for such participation, the reform made by law-decree 2 October 2018, No. 123 on Article 678, paragraph 3.2, Code of Criminal Procedure has remedied the profound inequality of treatment[106] that existed in the previous discipline, where personal participation in the trial depended on the *locus custodiae*, being limited to prisoners confined in the district of the Magistrate hearing the case.

Since the reform, if the complainant resides in the district of the court that has jurisdiction and expresses the intention to attend the hearing, the Supervisory Penitentiary Magistrate must order that he be brought before the court.

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when the exercise of the right to health is at stake, or in the school administration, when the prisoner's grievance concerns the right to education. On this topic, see K Natali, 'La fase introduttiva dell'udienza di reclamo giurisdizionale' in Fiorentin (ed), *La tutela preventiva e compensativa per i diritti dei detenuti* (n 1) 203 ff.

[105] Bortolato, 'La tutela dei diritti dei detenuti' (n 101) 107. According to the Author, it is precisely the possibility of appearing with one of its own employees that excludes the Administration from necessarily having to be represented by the Avvocatura dello Stato, as is, as a rule, provided for by Art. 1 of the royal decree 30 October 1933, No. 1611. In adhesive sense, see also Natali, 'La fase introduttiva dell'udienza di reclamo giurisdizionale' (n 104) 209. Moreover, the legal representation of the Avvocatura dello Stato has been expressly excluded in case law with reference to the complaint to the Supervisory Penitentiary Tribunal against the order issued by the single judge. See, in particular, Cass, Sez. Un., 21 December 2017 (dep. 2018), No. 3775, in CED Cass, rv 271648-01.

[106] On this topic see, among more authors, G Lozzi, *Lezioni di procedura penale* (Giappichelli 2020) 894 ff; F Caprioli, 'Procedure' in F Caprioli and D Vicoli (eds), *Procedura penale dell'esecuzione* (Giappichelli 2011) 339 ff; Fiorelli (n 3) 145.

However, participation will take place remotely if the prisoner has expressly requested it or if he is detained in an institute outside the jurisdiction of the court hearing the case. It must be said, however, that Article 678, paragraph 3.2, of the Code of Criminal Procedure gives the Supervisory Penitentiary Magistrate the power to order the translation of the person concerned, whenever deemed appropriate.

Anyway, following the amendments introduced by law-decree 10 October 2022 No. 150, the modalities of remote participation[107] will have to comply with the guarantees set out, in general, in the new Article 133-ter of the Code of Criminal Procedure, ie they will have to be implemented 'in such a way as to safeguard the hearing of the parties and their effective participation'.

Also on the evidence gathering, the reference model is the surveillance procedure, where the judge has broad powers to admit evidence *ex officio*.

Consequently, there is an inversion of the balance that normally governs the distribution of rights to evidence between the parties and the judge:[108] if in the cognitive process, pursuant to Article 190 of the Code of Criminal Procedure, the *ex officio* initiative plays an entirely subsidiary role; in the prison context it is configured as the main instrument for acquiring the cognitive material useful for the decision.

This approach certainly has the merit of rebalancing the asymmetry that pervades the relationship between the prisoner and the Administration, allowing the judge to order the *ex officio* gathering of sources of evidence that are difficult for the prisoner to access.

The means of evidence that can be gathered are mainly documentary evidence, but it is also possible to proceed with the taking of oral evidence, as well as with expert report. On this topic, Article 185 disp. att. of the Code of Criminal Procedure provides that proceedings may be conducted without any particular formalities. The only express limitation is represented by the respect for the hearing of the parties, imposed by Article 666, paragraph 5, of the Code of Criminal Procedure. On this point, it has been observed that the very absence of formalities, while guaranteeing a speedier and more

[107] On the topic of remote participation modes see Corte cost, 22 July 1999, No. 342.

[108] See N Rombi, 'La fase istruttoria nel procedimento per reclamo' in Fiorentin (ed), *La tutela preventiva e compensativa per i diritti dei detenuti* (n 1) 223 ff.

streamlined conduct of the evidence gathering, runs the risk of nullifying the guarantee of hearing of the parties.[109]

Once the evidence gathering phase has been completed, the Supervisory Penitentiary Magistrate makes a ruling, by order, on the merits of the matter complained of and adopts the consequent measures. In particular, on the merits of the complaint, Article 35-bis of the Prison Law requires to ascertain whether the prisoner has actually suffered prejudice to the exercise of his rights and whether it is still current.

Once this has been ascertained, the Supervisory Penitentiary Magistrate orders the Administration to remedy the situation, discretely determining the most effective restorative measure in the specific case,[110] and fixes a time limit for compliance.

The order thus pronounced is, in turn, subject to appeal before the Supervisory Penitentiary Tribunal.[111] In fact, unlike the other remedies operating in the prison environment,[112] the judicial complaint procedure provides for a second level of merit, within the competence of the Supervisory Penitentiary Tribunal, to which a complaint can be lodged within fifteen days from the notification of the filing of the order, issued by the single judge.[113]

On this point, it must be noted that while such a provision is certainly appreciable because it ensures control over issues that are mainly of a practical nature,[114] nevertheless its current configuration has certain aspects that risk undermining the effectiveness of the remedy.

First of all, it is possible that the Supervisory Penitentiary Magistrate, who issued

[109] See Caprioli (n 106) 348.

[110] For some critical remarks on this point, see Fiorelli (n 3) 147.

[111] On this topic, see Bortolato, *sub* art. 35-bis o.p. (n 101) 477; Scalfati (n 99) 17.

[112] The only previous case of a double degree of merit is regulated in the Art. 680 of the Code of Criminal Procedure, about security measures and declaration of habituality or professionalism in the offence or of tendency to commit an offence.

[113] On the subject of the relationship between the two levels of the trial of first instance, it is controversial whether the complaint directed to the Supervisory Penitentiary Tribunal can deal with issues that are new in relation to those submitted to the Supervisory Penitentiary Magistrate. In adhesive sense, see Cass, Sez. V, 12 July 2018, No. 42625, in CED Cass, rv 274053-01; *Contra* see Cass, Sez. I, 8 October 2020 (dep. 2021), No. 2303, ibid, rv 280229-01.

[114] In this sense, Marafioti, 'Il procedimento per reclamo' (n 7) 429.

the contested order, in the silence of the law, is also part of the collegial court of second instance, compromising its impartiality.[115]

Secondly – as will be seen in more detail below – paragraph 5 of Article 35-bis of the Prison Law allows recourse to a judgement of compliance only if the time limits for appeal have already expired. Therefore, the provision of an intermediate level of appeal, between the first instance and the judgment of legitimacy, results in an inevitable lengthening of the time taken by the proceedings, with the consequent risk that the prejudice, suffered by the prisoner and still ongoing, will end up worsening.[116]

Indeed, it should be recalled that the order issued by the Supervisory Penitentiary Tribunal, as judge of the appeal, may be appealed to the Court of Cassation for violation of the law within fifteen days. Therefore, the guarantee of greater control over the fairness of the decision adopted could, paradoxically, lead to a worsening of the concrete conditions in which the prisoner finds himself.

4.2. The enforcement of the measure and the judgment of compliance

Once the appeal stages have been completed, the instruments to protect prisoners' rights are not yet finished.

In fact, it is possible to bring a special judgement of compliance aimed at challenging the Administration's persistent failure to fulfil its obligations, in order to prevent the recognition of prejudice to the exercise of a right from remaining a mere statement of principle.[117]

In particular, Article 35-bis, paragraph 5, of the Prison Law allows the prisoner or his lawyer, with a special power of attorney, to request compliance from the same Supervisory Penitentiary Magistrate who upheld the complaint.[118] For this to be the

[115] Della Bella, *Emergenza carceri e sistema penale* (n 2) 141, considers that the question can be resolved by way of interpretation through the analogical extension of the cases in which such an exclusion is provided for (reference is made, in particular, to Art. 30-bis and 53-bis of the Prison Law). On the subject of the judge's impartiality in surveillance proceedings, see Scalfati (n 99) 9 ff.

[116] In this sense, Della Bella, *Emergenza carceri e sistema penale* (n 2) 141.

[117] On this topic, see F Fiorentin, 'Lesioni dei diritti dei detenuti conseguenti ad atti e provvedimenti dell'amministrazione penitenziaria' [2010] Giur merito 2834.

[118] For the orientation that extends jurisdiction also to the Supervisory Penitentiary Tribunal see Cass, Sez. I, 30

case, it is necessary that, at the expiry of the time limit set for compliance, the Administration has not implemented[119] the order upholding the complaint and that the latter is no longer subject to appeal.

Once the application has been submitted, proceedings begin, conducted in accordance with the forms set out in Articles 666 and 678 of the Code of Criminal Procedure, and, when they are over, the Supervisory Penitentiary Magistrate may order compliance, specifying the manner and timing of compliance. But if, in the meantime, the Administration has adopted acts in breach or circumvention of the order that have remained unfulfilled, the Supervisory Penitentiary Magistrate has the power to declare those administrative acts null and void. Finally, where necessary, a commissioner *ad acta* may be appointed.

Before the introduction of these rules, the prisoner was, *de facto*, powerless against the Administration's inaction, although the binding effect of the decisions adopted by the Supervisory Penitentiary Magistrates was already generally recognised.[120]

In order to deal with this situation, the doctrine[121] had proposed to apply, even in the prison environment, the judgement of compliance, ie the instrument used in the administrative sphere to make the orders given by the judicial authority to the public Administration[122] enforceable.

May 2019, No. 30382, in CED Cass, rv 276406-01; Cass, Sez. I, 8 June 2020, No. 21940, ibid, rv 279334-01. Still on the subject of jurisdiction to decide on the request for compliance see Cass, Sez. I, 13 January 2022, No. 17167, in CED Cass, rv 282953-01.

[119] About the problem of inaccurate fulfilment, see A Luzio, 'Tutela dei diritti dei detenuti ed ottemperanza' in Del Coco, Marafioti and Pisani (n 2) 167; Marafioti, 'Il procedimento per reclamo' (n 7) 430; Natali, *Il reclamo giurisdizionale al magistrato di sorveglianza* (n 46) 277; Valentini (n 47) 249.

[120] In particular, for the thesis based on Art. 69, paragraph 5, of the Prison Law, see Corte cost, 23 October 2009, No. 266, [2009] Giur cost 3766, with comment by C Renoldi, 'Una nuova tappa nella "lunga marcia" verso una tutela effettiva dei diritti dei detenuti'; Corte cost, 7 June 2013, No. 135. On this topic, see also A Gargani, 'Sovraffollamento carcerario e violazione dei diritti umani: un circolo virtuoso per la legalità dell'esecuzione penale' in D Brunelli, S Canestrari and F Basile (eds), *Studi in onore di Franco Coppi* (Giappichelli 2012) 1037 ff.

[121] M Ruotolo, 'Sul problema dell'effettività della tutela giurisdizionale dei diritti dei detenuti' [2012] Giur cost 690. *Contra* F Falzone, 'La sentenza n. 266/2009 della Corte costituzionale: è innovativa dell'attuale sistema dei diritti dei detenuti? [2010] (3) Rass penit crimin 120.

[122] On the subject of the judgment of compliance in administrative proceedings see, among more authors, G Mari, 'Il giudizio di ottemperanza' in MA Sandulli (ed), *Il nuovo processo amministrativo* (Giuffrè 2013) 457 ff; Lopilato

Despite its formal qualification, the remedy introduced in the penitentiary context turns out to be only partially superimposable on the reference model. Consider, first of all, the fact that the jurisdiction is conferred on the Supervisory Penitentiary Magistrates, instead of the administrative judge, who ordinarily has jurisdiction over actions for compliance brought not only against the administrative judge's decisions, but also against final decisions of the ordinary judge.

Even more relevant appears the difference that limits compliance in the prison context to orders that can no longer be appealed, as opposed to a general model that can be activated against executive orders, even if not final. Consequently, although the order of the Supervisory Penitentiary Magistrate is already enforceable, pursuant to Article 666, paragraph 7, of the Code of Criminal Procedure, the prisoner is, *de facto*, forced to wait for the definition of all levels of appeal, before being able to resort to executive protection.[123]

The repercussions in terms of the right to appeal are obvious, since the decision to request a review of the decision at first instance would delay the possibility of enforceable protection, with the consequent risk that the prejudice to the exercise of rights, still in progress, would end up being aggravated. It has, therefore, been proposed on several occasions[124] to expunge from the text of Article 35-bis, paragraph 5, of the Prison Law the reference to the measure 'no longer subject to appeal', admitting recourse to the enforcement of the order even before the time for appeal has expired. Although this is a fundamental profile for the overall effectiveness of the remedies system, the legislator has not yet intervened to change it.

(n 49) 2031 ff; A Travi, *Lezioni di giustizia amministrativa* (Giappichelli 2023) 395 ff.

[123] More generally, on the relationship between irrevocability and enforceability, see Gaito and Ranaldi (n 98) 38 ff; Caprioli, 'Irrevocabilità, esecutività, giudicato' in Caprioli and Vicoli (n 106) 64 ff; R Fonti, 'Il giudicato penale' in M Ceresa Gastaldo (ed), *Procedura penale esecutiva* (Giappichelli 2020) 40. With specific reference to the stability of the order concluding the surveillance procedure, see Scalfati (n 99) 18; Mastrotaro (n 103) 288 ff.

[124] See the *Relazione* accompanying the articulation proposed by the *Commissione per la riforma dell'ordinamento penitenziario nel suo complesso*, established by ministerial decree 19 July 2017 and chaired by Professor Glauco Giostra, 120, as well as the *Relazione finale* issued on 17 December 2021 by the *Commissione per l'innovazione del sistema penitenziario*, established by ministerial decree 13 September 2021 and chaired by Professor Ruotolo, 166 ff. Both reports are available at <www.giustizia.it> accessed 24 July 2023.

The prison judgement of compliance[125] deviates further from the reference model because it does not allow the Supervisory Penitentiary Magistrate to order the Administration, at the request of a party, to pay a sum for each subsequent breach or non-compliance, or for each day of delay in execution. It is worth noting that, originally, law-decree 23 December 2013, No. 146[126] had contemplated this possibility, limiting the amount of the daily penalty to a maximum of one hundred euros and pointing out that the Supervisory Penitentiary Magistrate's ruling would constitute an enforceable title for the collection of the overall sum owed by the Administration.

However, when the decree was converted, this provision was unreasonably removed from the text of Article 35-bis of the Prison Law, with detrimental effects on the effectiveness of the protection.[127] Therefore, even recently, its reintroduction has been called for.[128]

4.3. The ineffectiveness of compensatory remedies under Article 35-ter of the Prison Law

Even with regard to the remedies of a restorative nature, regulated by Article 35-ter of the Prison Law, doubts have been expressed as to their effectiveness.

In particular, this provision allows those who have suffered a detention contrary to humanity, for a period of not less than fifteen days, to apply to the Supervisory Penitentiary Magistrate in order to obtain a reduction of the prison sentence still to be served, equal to one day for every ten days served in conditions detrimental to human rights. If, on the other hand, the violation has lasted less than fifteen days or if the residual period of imprisonment precludes the application of the specific form of protection, the Supervisory Penitentiary Magistrate may award compensation in the form of a pecu-niary payment, amounting to EUR 8 for each day of detention contrary to humanity.

Finally, if the execution of the custodial sentence has already ended or the injury

[125] An expression used by Natali, *Il reclamo giurisdizionale al magistrato di sorveglianza* (n 46) 273.

[126] See Art. 3, law-decree 23 December 2013, No. 146 in Gazz. Uff., Serie Generale n. 300 of 23 December 2013.

[127] See Luzio (n 119) 291.

[128] See *Relazione finale*, 17 December 2021, by *Commissione per l'innovazione del sistema penitenziario* (n 125) 168.

was suffered during the pre-trial detention in prison, the relevant action must be brought before the civil court and only pecuniary compensation is allowed.

A first profile, which may prejudice the effectiveness of the remedies under Article 35-ter of the Prison Law, concerns the need to ascertain that the prejudice complained of by the prisoner is current. According to one interpretation,[129] in fact, by virtue of the reference to Article 69, paragraph 6, letter b) of the Prison Law, contained in the above-mentioned provision, even this form of complaint was to be considered subordinate to the actuality of the injury complained of, and the latter had to be ascertained both at the time the application was submitted and – according to the most extreme view – at the time of the decision. This had led to the pronouncement of a significant number of decrees of inadmissibility, especially in the period immediately following the entry into force of Article 35-ter of the Prison Law.

The hermeneutical option now prevailing,[130] however, considers that the reference to Article 69, paragraph 6, letter b) of the Penitentiary Act is limited to listing the relevant injuries under Article 35-ter of the Prison Law within the genus 'prejudice to the exercise of rights', without incorporating the relevant requirements. It was therefore opted for the solution that would ensure the widest possible application of the compensatory remedies under Article 35-ter of the Prison Law.

A further factor of ineffectiveness coincides with the 'mobile reference' to the case law of the Strasbourg Court, expressly provided for in the text of Article 35-ter of

[129] We refer to what F Fiorentin, '"Rimedi compensativi" per l'inumana detenzione: l'attualità del pregiudizio non è (probabilmente) rilevante per il risarcimento' [2016] Cass pen 692, calls the 'actualist' thesis, supported, in particular, by Mag sorv Alessandria, 31 October 2014 in [2015] Cass pen 2018, with comment by A Penoncini, 'Il "rimedio risarcitorio" da detenzione inumana tra aspettative costituzionali e svilimenti ermeneutici', and by Mag sorv Vercelli, 24 September 2014, available at <www.personaedanno.it> accessed 24 July 2023. The CSM had also expressed a favourable opinion on the subject. See, in particular, technical opinion adopted by resolution of 30 July 2014, No. 92, para 6, <www.csm.it> accessed 24 July 2023.

[130] In the doctrine, see E Santoro, 'Contra CSM: parlare a nuora perché suocera intenda. Pedanti osservazioni sulla competenza dei magistrati di sorveglianza a riconoscere l'indennizzo ex art. 35-ter per la detenzione inumana e degradante' (2015) Dir pen cont <www.archiviodpc.dirittopenaleuomo.org> accessed 24 July 2023; Penoncini (n 129) 697 ff; G Giostra, 'Un pregiudizio "grave e attuale"? A proposito delle prime applicazioni del nuovo art. 35-ter ord. penit.' (2015) Dir pen cont, para 5 <www.penalecontemporaneo.it> accessed 24 July 2023. In the jurisprudence of legitimacy, see Corte cass, Sez. I, 16 July 2015 (dep. 2016), No. 876, in CED Cass, rv 265856-01, Corte cass, Sez. I, 16 July 2015, No. 46966, ibid, rv 265973-01; and lastly, Corte cass, Sez. I, sent. 29 March 2017, No. 19674, ibid, rv 269894-01; Corte cass, Sez. I, sent. 2 October 2020, No. 31042, ibid, rv 279798-01.

the Prison Law.

As is well known, indeed, the aforementioned remedies operate when the injury referred to in Article 69, paragraph 6, letter b) of the Prison Law[131] has integrated detention conditions such as to violate Article 3 ECHR, 'as interpreted by the European Court of Human Rights'.

Due to the legal provision of a reference to the case law of the Strasbourg Court, which is by nature characterised by a casuistic approach,[132] considerable uncertainties in concrete application have occurred.

In fact, on the basis of this referral, the complaint can only be upheld if the Supervisory Penitentiary Magistrate considers that the existence of detention conditions which, according to the case law of the Court, constitute a violation of Article 3 ECHR has been adequately proven. This makes the burden of proof on the person concerned particularly difficult, since the case-law of the European Court appears to lack unequivocal criteria for assessing when the treatment suffered can be considered inhuman and degrading. In order to compensate for these evidentiary difficulties, a number of pre-filled forms, accompanied by a *vademecum*, have been prepared as a matter of practice[133] to assist the prisoner in preparing a complaint.

Moreover, according to jurisprudence of legitimacy,[134] there would be a relative presumption of truthfulness with regard to the elements put forward by the

[131] For the application of the guarantees typical of surveillance proceedings in Articles 666 and 678 of the Code of Criminal Procedure, with the peculiarities provided for the judicial complaint *ex* Art. 35-bis of the Prison Law, see Corte cass, Sez. I, sent. 16 July 2015 (dep. 2016), No. 876, in CED Cass, rv 265855-01, as well as Corte cass, Sez. I, sent. 16 July 2015, No. 46966, ibid, rv 265973-01. In the doctrine, see A Della Bella, 'Il risarcimento per i detenuti vittime di sovraffollamento: prima lettura del nuovo rimedio introdotto dal d.l. 92/2014' (2014) Dir pen cont, 7 <www.archiviodpc.dirittopenaleuomo.org> accessed 24 July 2023, as well as Marafioti, 'Il procedimento per reclamo' (n 7) 432. *Contra* see M Deganello, 'I rimedi risarcitori' in Caprioli and Scomparin (n 2) 277.

[132] See A Laurito, 'Reclamo giurisdizionale e rimedi compensativi a tutela degli internati: gli esclusi "eccellenti" della riforma' [2016] (7-8) Giur pen web 10; S Romice, 'Brevi note a margine dell'introduzione dei rimedi risarcitori in favore dei detenuti e degli internati' (2014) Federalismi, Focus Human Rights, 6 <www.federalismi.it> accessed 24 July 2023.

[133] See eg S Filippi, 'Nota esplicativa e modelli di reclamo per denunciare le condizioni di detenzione ex artt. 35-bis, 35-ter e 69 L. 354/1975' (*Osservatorio Antigone*) <www.osservatorioantigone.it> accessed 24 July 2023.

[134] See Cass, Sez. I civ., sent. 11 May 2018, No. 23362, in CED Cass, rv 273144-01, as well as Cass, Sez. IV civ., sent. 8 June 2020, No. 18328, ibid, rv 279208-01.

complainant, whenever the request appears to be sufficiently determined and has been verified by the defendant Administration as to the existence of detention and the relevant period. It is therefore the prison Administration that must present contrary evidence to refute the complainant's allegations.

The reference to the Strasbourg case-law also affects the criteria that should guide the national Supervisory Penitentiary Magistrates during the decision. Indeed, the court hearing the compensatory complaint must assess the detention conditions, complained of by the applicant, in the light of the interpretation provided by the ECHR on inhuman and degrading treatment. Consequently, the judge is obliged to keep himself constantly informed of the hermeneutical developments outlined in the European Court. With the aim of lightening the burden of updating, imposed on the judge, the doctrine[135] has proposed to use the rulings of the European Court of Human Rights, on the subject of detention conditions, as a minimum standard of protection, from which the national judge, while never being able to depart *in pejus*, could adopt a divergent interpretation, aimed at increasing the level of protection guaranteed to the person concerned. However, the Court of Cassation took the opposite view on this point, and, in its most authoritative opinion,[136] held that the mobile reference makes European case-law a normative parameter, which integrates the preceptive content of Article 35-ter of the Prison Law and is therefore binding *erga omnes*. It follows, therefore, that it is impossible for the national court to depart, even if *in melius*, from the indications provided at supranational level, as long as they are the expression of a right consolidated in the ECHR case-law.

It seems, therefore, that if the national interpreter doubts the compatibility with the Constitution of Article 35-ter of the Prison Law, thus supplemented, the only possible course of action is to request the intervention of the Constitutional Court.

[135] In this sense, F Fiorentin, 'Rimedi risarcitori per l'inumana detenzione: il giudice ordinario come l'asino di Buridano' [2017] Cass pen 1194.

[136] See Cass, Sez. Un., 24 September 2020 (dep. 2021), No. 6551 in CED Cass, rv 280433.

5. Prisoners' right and their discontinuous effectiveness

The correctional idea is at the heart of the Italian prison model. This entails awards and penalties as a governing principle of prison life. The model has managed for the last fifty years to manage penitentiary institutions. The possibility of early release, subject to good conduct and cooperation with treatment programmes, has structured the system in terms of stability and manageability. In the process, prison treatment, including social, occupational and recreational opportunities, has become increasingly dull and bureaucratised. This custodial model tends to restrain and 'entertain' people, rather than plan for their social and occupational integration. In general, Italian penal institutions, with some notable exceptions, are places where life is spent in idleness, in a cell for too many hours a day. Every minor thing is regulated by 'application', which grants permission by the authority in charge to do whatever prisoners thinks appropriate for their rehabilitation. These applications are swamped in a slow bureaucratic process where approval is discretional if not arbitrary. In this paternalistic model, prisoners' rights are downgraded to concessions, to gifts from the authorities.

Prison life often flows without clarity around the rules to be followed and the rights that can be demanded. It is unusual that written rules relating to the prison regime itself, in the respective languages of the inmates, are distributed. Prisoners are too often infantilised and any form of responsibility is taken away from them. Rehabilitation activities are almost entirely left to local authorities, cooperatives and voluntary associations. Few prisoners (less than one thousand) enjoy open regimes of incarceration. Around 10,000 are detained in high surveillance units, where rehabilitative treatment is drastically reduced, and more than 700 are kept in special security prisons (41-bis sections), mainly members of criminal organisations who are deprived of any external contact. The remaining prisoners are kept under a medium security regime.

In this prison model we can observe a deep gap between the rights officially granted to prisoners by rules and regulations and the rights actually enjoyed by them. What is practically lacking is a 'meta right', namely the right to claim one's rights. Changes are always very slow in the prison system. Since 2013 – after *Torreggiani*'s pilot judgment – prisoners have the opportunity to initiate legal procedures when their rights are violated. Written complaints are sent to magistrates in charge of supervising the

running of institutions. Moreover, in Italy a national independent organism entrusted with the monitoring of the places and conditions of detention has been set up in 2014. Despite these relevant legal changes, the problem of the effectiveness of rights still remains in the hands of the prison administration. There are too many differences from prison to prison. It is not easy to claim prisoners' rights in the condition of restricted liberty. For this to happen, a cultural revolution is needed to transform every prison officer into the first guarantor of prisoners' rights.

One example is paradigmatic. The most important issue in custodial institutions remains the psycho-physical conditions of the inmates. This was part of the remit of the Ministry of Justice. But since 2006, in the name of equity in the provision of health services, prisoners have access to the same health system, which is decentralised at the regional level, as ordinary citizens. However, the provision is insufficient, also because the health system is more oriented towards therapy rather than prevention. The sanitary and hygienic conditions in prison, particularly in large cities, would require regular monitoring and control, which do not often take place.

Changing the subject, according to the official regulations governing prisons, work is a right for all inmates who have been sentenced. But just one out of three inmates works. Prisoners should earn two thirds of the salary earned by workers in liberty for the same job, but this does not happen. Around 85% of those who do work are employed by the prison administration itself, which does not provide the 'fortunate' workers with an attractive occupational record. Who would mention in their CV that they have been cooks, dish washers or cleaners in a prison institution?

Also, the right to education is hardly promoted and left to the discretion of governors. There is a lack of national strategy in this area, as there is a lack of understanding how education would impact on recidivism.

It is not easy to guarantee human rights in prison even when these are expressly provided for in the laws. For this reason, it is important, probably decisive, for external and independent eyes (like the academic ones) to look at what happens inside prisons and push institutions to reduce the gap between punishment provided for in the laws and punishment actually imposed.

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NASCENT MACHINES: A COMPARATIVE LOOK TOWARD UNITED STATES AND ITALIAN CONSTITUTIONAL COPYRIGHT PROTECTIONS

ABSTRACT. *Just like Victor Frankenstein's infamous monster, artificial intelligence is a developing hodgepodge in need of supervision. The broad applicability of AI in its current, nascent state warrants specific regulation that addresses the need for (1) a uniform, legislative definition of artificial intelligence, (2) a determination of the requisite degree of human participation in artificial intelligence machine usage that is both sufficient and necessary for copyright protection, (3) an ad hoc approach to future litigation involving artificial intelligence usage, and (4) both the precautionary and innovation principles to be considered as overarching guidance in the regulation of artificial intelligence. This paper provides a comparative analysis of United States and Italian Constitution and copyright protections afforded to humans as contrasted to artificial intelligence. As such, this paper will first establish some background on artificial intelligence regarding how it is used to derive outputs under its human user's direction. The applicability of United States and Italian laws will also be briefly overviewed alongside the precautionary and innovation principles. An analytical comparison of United States and Italian Constitution and copyright provisions will provide the foundation for the above referenced four-part solution. Responses to possible counterarguments will also be addressed and rebutted.*

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1. Introduction

The perpetuated belief that artificial intelligence and human intelligence are equally meritorious of the same legal protections is fictional at best. Just like Victor Frankenstein's infamous monster, artificial intelligence is a developing hodgepodge in need of supervision.[1] The theme of responsibility is prevalent in *Frankenstein,* and it should be just as salient in regulating artificial intelligence since the consequences of letting a creation run wild without supervision are dire.[2] What is not understood cannot be properly regulated. As such, a suitable legal framework is required to ensure the proper regulation of artificial intelligence as more and more entities incorporate machine learning into their products and services.[3]

This paper will provide a comparative analysis of current United States (hereinafter 'U.S.') and Italian Constitution and copyright protections afforded to humans as contrasted to artificial intelligence. More specifically, this paper will consider the First Amendment and Copyright Act as well as certain Articles of the Italian Constitution alongside select provisions of the 'legge sul diritto d'autore' ('laws on the rights of the author'). A consideration of the international law concepts inherent in the precautionary and innovation principles will supplement the comparative analysis that follows. This comparative analysis will serve to propose that the Italian approach suggests a more workable basis for formulating a solution which addresses the lack of salient artificial intelligence regulation in the U.S. The subsequent comparative, four-pronged solution geared specifically toward the U.S. legislature will accordingly (1) articulate the need for a concise definition that encompasses the current state of artificial intelligence, (2) mandate a requisite degree of human participation and supervision

[1] See M Shelley, *Frankenstein: or, The Modern Prometheus* (first published 1818, Maurice Hindle ed, Penguin 2003) 81.

[2] Shelley's character, Dr. Victor Frankenstein, warns: 'Learn from me, if not by my precepts, at least by my example, how dangerous is the acquirement of knowledge and how much happier that man is who believes his native town to be the world, than he who aspires to become greater than his nature will allow'. Ibid 54.

[3] See K Peretti and others, 'AI Regulation in the U.S.: What's Coming, and What Companies Need to Do in 2023: Part One of a Two-Part Article' (*Cybersecurity Law & Strategy*, 14 February 2023) <https://www.law.com/2023/02/14/ai-regulation-in-the-u-s-whats-coming-and-what-companies-need-to-do-in-2023/> accessed 28 March 2023.

both sufficient and necessary for legal protections to apply to the process and outputs of artificial intelligence, (3) require an ad hoc approach to future litigation involving artificial intelligence usage, and (4) establish that the precautionary and innovation principles should be seen as overarching guidance to U.S. legislators in the regulation of artificial intelligence.[4]

Part I begins by establishing some background on artificial intelligence machines specifically related to how exactly the computer program is used to derive outputs from the source material that is plugged into it. The applicability of U.S. and Italian constitutional and copyright provisions will also be briefly overviewed alongside the precautionary and innovation principles in Parts II, III, and IV, respectively. Part V offers an analysis of U.S. and Italian constitutional and copyright provisions. This analytical section will also provide the foundation for the comparative, four-pronged solution nestled within a theoretical and descriptive framework of the issue. Finally, Part VI identifies and responds to potential counterarguments.

2. What artificial intelligence is and how it works

What is artificial intelligence? Such a technically difficult question is best answered through a three-part approach. First, the evolution of the machine from a simple algorithm designed to play chess[5] to the increasingly multitudinous applications said machine has today must be explored by establishing a distinction between 'weak' and 'strong' artificial intelligence.[6] Second, it is crucial to juxtapose a definition for intelligence with the lack of adequate definition for artificial intelligence in its current

[4] See D Castro and M McLaughlin, 'Ten Ways the Precautionary Principle Undermines Progress in Artificial Intelligence' (*Info Tech & Innovation Found*, 4 February 2019) <https://itif.org/publications/2019/02/04/ten-ways-precautionary-principle-undermines-progress-artificial-intelligence/> accessed 25 February 2023.

[5] See generally J McCarthy, 'What is Artificial Intelligence?' (*Stanford Formal Reasoning Grp*, 12 November 2007) <http://www-formal.stanford.edu/jmc/whatisai/node1.html> accessed 25 February 2023.

[6] JC Flowers, 'Strong and Weak AI: Deweyan Considerations' [2009] 1-2, <https://ceur-ws.org/Vol-2287/paper34.pdf> accessed 25 February 2023. See generally JR Searle, 'Minds, Brains, and Programs' (1980) Behav & Brain Scis 417, 417-24.

state. Third, the definition for artificial intelligence, or lack thereof, in the U.S. will be explored.

First, there are two types of artificial intelligence: weak and strong.[7] Weak artificial intelligence serves as a problem solving tool.[8] This category of artificial intelligence carries out a particularized set of tasks; its efficiency and capabilities are limited to the specific field of problems it is designed to solve.[9] Examples of weak artificial intelligence include 'intelligent systems that use machine learning, pattern recognition, data mining, or natural language processing'.[10] On the other hand, strong artificial intelligence transcends its counterpart's mere status as a tool by seeking to emulate a mind or, more aptly, an intelligence capable of comprehension.[11] Unlike weak artificial intelligence, strong artificial intelligence is capable of assimilating and modifying information inputs autonomously, much like a human mind can.[12] The concept of 'emergent works', or the 'output produced by an autonomous AI' which 'implies the self-contained and unforeseeable nature of the production process' is more aptly attributed to strong artificial intelligence.[13] Strong artificial intelligence thus implies a self-awareness and cognitive skillset that is attributable to the mind of a natural person.[14] Because a working strong artificial intelligence is not currently within an imminent realm of feasibility, the primary focus of this paper's legal analyses will be applied to weak artificial intelligence (hereinafter referred to simply as 'AI').[15]

[7] See ibid.

[8] See ibid.

[9] See UK-RAS Network, 'Artificial Intelligence and Robotics' [2017] 6 <https://www.ukras.org.uk/wp-content/uploads/2021/01/UKRASWP_ArtificialIntelligence2017_online.pdf> accessed 25 February 2023.

[10] Ibid.

[11] See Flowers (n 6).

[12] See UK-RAS Network (n 9).

[13] Cf TW Dornis, 'Artificial Creativity: Emergent Work and the Void in Current Copyright Doctrine' (2020) 22 Yale JL Tech 1, 9. See AM Turing, *Computing Machinery and Intelligence* (1950) 59 Mind 433, 434.

[14] See UK-RAS Network (n 9).

[15] See, eg, M Lavrichenko, 'Thaler v. Vidal: Artificial Intelligence – Can the Invented Become the Inventor?' (2022) 44 Cardozo L Rev 699, 702 (stating that although strong AI does not yet exist, 'there is no stopping the growth and evolution of AI systems'); DW Opderbeck, 'Artificial Intelligence, Rights and the Virtues' (2021) 60 Washburn LJ

Second, intelligence is defined as 'the computational part of the ability to achieve goals in the world' which occurs in 'varying kinds and degrees … in *people*, many animals, and some machines'.[16] Importantly, there is not yet a solid definition of intelligence that is independent of a relation to human intelligence.[17] More specifically, whereas human intelligence has a definition that exists per se, artificial intelligence lacks a definition that is independent to an understanding of human intelligence. Human intelligence is not wholly applicable to the machine in its current state because human intelligence, unlike the artificial intelligence attributable to AI, 'relates to adaptive learning and experience'.[18] Meaning, that human intelligence is not constrained to a predetermined set of particularized data like AI; human intelligence is instead capable of abstract and critical thinking.[19] Therefore, the definition of human intelligence is concrete and uniform, unlike the many differing, unstable definitions of artificial intelligence.

Third, there is no uniform legal definition for AI in the U.S. Rather, there exists a multitude of diverse definitions. In fact, 'American law has been far from agreeing on a definition of [artificial intelligence]'.[20] A number of definitions for AI exist across multiple jurisdictions and federal agencies, but none of them are consistent.[21] This begs the question, how can the U.S. legislative branch, both on the state and federal level, begin

445, 473 (concluding that a conversation about the rights for strong AI cannot occur 'unless, and until, a strong AI emerges'); H Surden, 'Artificial Intelligence and Law: Overview' (2019) 35 Ga St L Rev 1305, 1309 (describes strong artificial intelligence as a merely aspirational vision); A Ng, 'AI for Everyone: Introduction' (*Coursera*, 2019) ('[strong artificial intelligence] … may be decades or hundreds of years or even thousands of years away') <https://www.coursera.org/learn/ai-for-everyone/lecture/SRwLN/week-1-introduction> accessed 25 February 2023.

[16] McCarthy (n 5) (emphasis added).

[17] See ibid.

[18] S Gupta, 'Artificial Intelligence vs. Human Intelligence: Who Will Build the Future?' (*Springboard*, 11 October 2021) <https://www.springboard.com/blog/data-science/artificial-intelligence-vs-human-intelligence/> accessed 25 February 2023.

[19] See ibid; see also UK-RAS Network (n 9).

[20] 1 Modern Privacy & Surveillance Law 11.07 [1] (2022).

[21] See, eg, VT Stat Ann T 3, § 5021; National Artificial Intelligence Initiative Act of 2020, 116 Pub L 283, 134 Stat 3388 (1 January 2021), *codified at* 15 USC §§ 9401–62, § 9401(3); John S McCain National Defense Authorization Act for Fiscal Year 2019, 115 Pub L 232, 132 Stat 163 (13 August 2018), § 238(g).

to regulate AI without knowing what exactly AI even is? The lack of a coherent definition lends itself to a cacophony of issues concerning legislation and, subsequently, regulation.[22]

3. U.S. Constitution and Copyright Law protections as related to AI

A look toward both the U.S. Constitution and the applicable copyright laws that come out of the relevant constitutional grant is an important bedrock to attaining a deeper understanding of how provisions from both sources relate to AI. The following provides an explanation of how U.S. Constitution and copyright provisions apply to AI, if at all. First, the constitutional framework which provides for copyright protections pursuant to the Copyright Act of 1976 (hereinafter 'Copyright Act') will be described. Second, the Copyright Act and its structure as related to AI and authorship will be considered. Relevant case law which contains elements of constitutional and copyright law protections will be discussed as well.

First, U.S. copyright laws protects the economic interests of creators. More aptly, 'Article I of the Constitution authorizes Congress "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"'.[23] Pursuant to this constitutional grant, Congress has codified copyright protections in federal statutes such as the Copyright Act.[24] In *Harper*, the Court noted that the dichotomy between an idea and an expression '[strikes] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression'.[25] Based on the foregoing, the extent of 'who or what can be an author for purposes of the Copyright Act is ultimately a constitutional question'.[26]

[22] See B Casey and M Lemley, 'You Might Be a Robot' (2020) 105 Cornell L Rev. 287, 326-27 (noting the lack of a legal definition for AI and describing the disastrous attempts at legal definition which inadvertently affect broad categories of entities despite having one target entity in mind).

[23] *Kelley v Chicago Park Dist*, 635 F3d 290, 296 (7th Cir 2011) (quoting US Const Art 1).

[24] See 17 USCS 101 ff.

[25] *Harper & Row, Publrs v Nation Enters*, 471 US 539, 556 (1985).

[26] A Bridy, 'The Evolution of Authorship: Work Made by Code' (2016) 39 Colum J L & Arts 395, 398.

The question on point thus becomes: can AI be considered an author of its outputs pursuant to the Copyright Act? This question is considered below.

Second, copyright in a protected work 'vests initially in the [author(s)] of the work'.[27] The U.S. Supreme Court itself has recognized that 'as a general rule, the author is the party who actually creates the work, that is the person who translates an idea into a fixed, tangible expression entitled to copyright protection'.[28] The 'person' indubitably refers to the human person.[29] More recent case law establishes that an author is human; an author can neither be a computer program, animal, nor plant.[30] Just last year, the U.S. Copyright Office refused to register an AI generated artwork, titled 'A Recent Entrance to Paradise,' because it did not possess the requisite human authorship for a copyright claim to be sustained.[31] In other words, 'if a work's traditional elements of authorship were produced by a machine, the work lacks human authorship' and the work cannot be registered by the Copyright Office.[32] So, copyright law protections are afforded to human authors; the law only protects '"the fruits of intellectual labor" that "are founded in the

[27] 17 USCS 201(a).

[28] *Community for Creative Non-Violence v Reid*, 490 US 730, 737 (1989).

[29] Ibid.

[30] See 17 USCS 102 (b) ('in no case does copyright protection … extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery regardless of the form in which it is described, explained, illustrated, or embodied in such work'). See, eg, *Naruto v Slater* 888 F3d 418, 426 (9th Cir 2018) (holding that a monkey lacks the requisite statutory standing under the Copyright Act to sue for copyright infringement related to pictures it took of itself); *Kelley*, 635 F3d at 303 (holding that a 'living garden lacks the kind of authorship and stable fixation normally required to support copyright').

[31] See U.S. Copyright Office Review Board, 'Second Request for Reconsideration for Refusal to Register A Recent Entrance to Paradise' (14 February 2022) US Copyright Office, 2 (stating that an artwork 'autonomously created by a computer algorithm running on a machine' is not eligible for copyright protection because a non-human cannot be an author and because there is 'no evidence on sufficient creative input or intervention by a human author in the [w]ork') <https://www.copyright.gov/rulings-filings/review-board/docs/a-recent-entrance-to-paradise.pdf> accessed 25 February 2023.

[32] U.S. Copyright Office, 'Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence' (16 March 2023) 88 Fed Reg 16190, 16192 (clarifying that works generated by AI may be eligible for copyright registration if there is sufficient human authorship but noting that 'while some prompts may be sufficiently creative to be protected by copyright, that does not mean that material generated from a copyrightable prompt is itself copyrightable') <https://www.federalregister.gov/documents/2023/03/16/2023-05321/copyright-registration-guidance-works-containing-material-generated-by-artificial-intelligence#footnote-28-p16192> accessed 16 March 2023.

creative powers of the [human] mind"'.[33] As a constitutional matter, such protections are extended only to 'those constituent elements of a work that possess more than a *de minimis* quantum of creativity'.[34] Copyright protections thus extend to the creativity of an autonomous, human mind and not to AI.[35] However, it has been suggested that 'the copyright protection afforded [to] a computer program may extend to the program's output if the program "does the lion's share of the work" in creating the output and the human user's role is so "marginal" that the outputs reflects the program's contents'.[36]

Figure 1. A Recent Entrance to Paradise

[33] U.S. Copyright Office Review Board (n 31) (citing U.S. Copyright Office, Compendium of US Copyright Office Practices § 306 (3d edn, 2021)) (quoting *Trade-Mark Cases*, 100 US 82, 94 (1879)).

[34] *Feist Publs, Inc v Rural Tel Serv Co*, 499 US 340, 363 (1991).

[35] See ibid 345 (stating that many creative works meet the low level of creativity required for copyright protections and that a work may be original 'even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying'); see also U.S. Copyright Office Review Board (n 31).

[36] *Design Data Corp v Unigate Enter, Inc*, 847 F3d 1169, 1173 (9th Cir 2017) (quoting *Torah Soft Ltd v Drosnin*, 136 F Supp 2d 276, 283 (SDNY 2001)); see *Rearden LLC v Walt Disney Co*, 293 F Supp 3d 963, 969 (ND Cal 2018) (applying the lion's share of the work standard). See generally 4 Nimmer on Copyright §13.03[F].

In *Design Data*, the court reinforces that the 'human contribution to the expressive components' of a computer program's output is a substantial consideration in determining whether or not a copyright is infringed.[37] Plaintiff in *Design Data* alleged defendant infringed its copyright by downloading an unauthorized copy of its computer program and using the downloaded copy of the program to generate output, which was then imported and distributed within the U.S.[38] The facts of this case did not establish that the computer program's output were meritorious of copyright protection because the evidence failed to show that the program did the 'lion's share' of the work in generating outputs.[39] Although *Design Data* does not directly deal with AI, the 'lion's share of the work' standard is relevant for a comparison to the Italian case law standard, described in the following section.

4. Italian Constitution and copyright protections as related to AI

Italian Constitution and copyright provisions apply to AI in a similar manner to U.S. Constitution and copyright provisions. However, there is an important distinction in the standard used in Italian and U.S. case law as compared below. First, a brief overview of both the Italian constitutional and statutory framework as related to AI will be established for a comparative analysis to be effectuated. Second, a summary of one recent case decided in the Italian courts provides a clear understanding of how the constitutional and statutory legal frameworks apply to AI.

First, although a specific provision relating to AI does not currently exist in any Italian legislative provisions, the Italian Constitution contains various applicable principles and provisions which can affect AI and vice versa.[40] Article 2 of the Italian

[37] 4 Nimmer on Copyright § 13.03[F][1][e]; see *Design Data* (n 36); see also *Rearden* (n 36).

[38] See *Design Data* (n 36) 1171.

[39] Ibid 1173.

[40] See generally E Fabrizi and others, 'Artificial Intelligence – Italy' (*The Global Legal Post*, 2023) <https://www.globallegalpost.com/lawoverborders/artificial-intelligence-1272919708/italy-1602230361#1> accessed 25 February 2023.

Constitution turns on human dignity as a guaranteed right.[41] It states that 'the Republic [recognizes] and guarantees the inviolable rights of the person, both as an individual and in the social groups where *human personality* is expressed'.[42] Furthermore, Article 3 of the Italian Constitution states:

All citizens have equal social dignity and are equal before the law … [i]t is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social [organization] of the country.[43]

A special emphasis must be placed on the use of the word 'human person' in the Italian Constitution. The use of the word 'human' supports the inference that protection is afforded to the human person, not the legal person or otherwise.

The scope of copyright protection afforded to human persons under Italian law is iterated in Articles 1 and 2 of the Italian copyright law. Articles 1 and 2 of the Italian copyright law provide a list of creative works including but not limited to literature, music, figurative art, architecture, and computer programs which are protected.[44] Although Article 2 extends protection to some 'computer programs', the totality of the Italian copyright laws only protects such software if it is both creative *and* original.[45] Under Article 6 of the Italian Copyright Law, entitlement to copyright for an author consists of the creation of the work as a particular intellectual expression of an author.[46]

[41] See Art 2 Costituzione (Cost) (It), translated and published in English by the Italian Parliamentary Information, see *Constitution of the Italian Republic*, Archives & Publications Off Senate Serv for Official Reps & Commc'n, <https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf> accessed 25 February 2023.

[42] Ibid (emphasis added).

[43] Ibid Art 3.

[44] See Art 1-2 L 633/1941 (explaining that computer programs are protected 'provided that they are original and result from the author's own intellectual creation') <https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1941-04-22;633> accessed 25 February 2023.

[45] See ibid.

[46] See ibid Art 6

The creative character imbued into the work is crucial for determining whether or not copyright protection may be afforded to it.[47] For a creative work to be protected, there must be a degree of creative character imbued within it.[48] The concept of 'creative character' is traditionally understood as an extrinsic expression of the author's personality.[49] Because AI does not possess the capability to form a personality since it is a tool rather than an autonomous being, AI cannot be described as having the creative character required for copyright protection under Italian laws.[50] Through this background, it is clear that AI does not per se have the creative character required for Italian copyright protection.

Second, the Italian Court of Cassation, Italy's highest court of appeal, recently released a decision that directly relates to the applicability of copyright principles and provisions to AI. In *Rai*, plaintiff designer claimed copyright violation against defendant because defendant used an AI output based on plaintiff designer's original creation as a fixed scenography for the 2016 Sanremo Music Festival.[51] The Court held that fact finding is necessary to ascertain whether, and to what extent, defendant's use of AI software had absorbed the creative expression of the plaintiff designer.[52] Unfortunately, this was not ascertained in *Rai* because the plea was incorrectly raised and thus deemed inadmissible.[53] *Rai* is still relevant to this discussion because it is crucial to an understanding of Italian law as applicable to AI which is in turn useful for enhancing the standard, or lack thereof, for U.S. courts to apply to AI. This is because *Rai* establishes that use of AI software per se is not sufficient to deny the creative character

[47] See ibid; see also G Meoli, 'Opere in cerca (di diritto) d'autore' (*Italy Intellectual Property Blog (L'IP in Italia)*, 7 February 2023) <https://www.ipinitalia.com/diritto-dautore/opere-in-cerca-di-diritto-dautore/#> accessed 25 February 2023.

[48] See ibid.

[49] Ibid.

[50] See generally Flowers (n 6).

[51] See *Rai Radiotelevisione Italiana SpA v Biancheri Chiara*, No. 1107/2023, 1 <https://www.italgiure.giustizia.it/xway/application/nif/clean/hc.dll?verbo=attach&db=snciv&id=./20230116/snciv@s10@a2023@n01107@tO.clean.pdf> accessed 26 June 2023.

[52] See ibid 5.3.

[53] See ibid.

of plaintiff designer, whose creativity was arguably absorbed by AI in its tool-like capacity for the generation of an output. Therefore, a finding of fact is necessary for determining how much creativity is absorbed by the AI software used.[54]

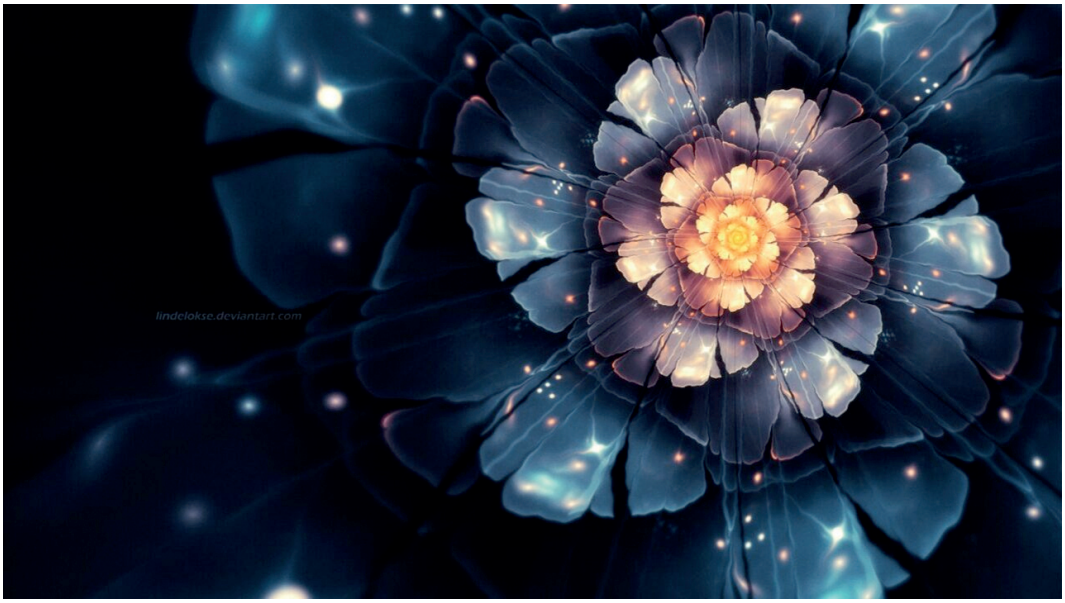

Figure 2. The image at issue in *Rai Radiotelevisione Italiana SpA v Biancheri Chiara*

5. The precautionary and innovation principles

The following provides a brief overview of the precautionary and innovation principles, respectively. The 1998 Wingspread Statement regarding the precautionary principle states that 'when an activity raises threats of harm to the environment or human health, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically'.[55] This Statement concluded that

[54] See ibid.

[55] The Wingspread Conference was a three-day conference in which its 32 participants from the United States, Canada, and Europe devised the Wingspread Statement on the precautionary principle. 'Wingspread Conference

'corporations, government entities, organizations, communities, scientists, and other individuals must adopt a precautionary approach to *all* human endeavors'.[56] The European Risk Forum states that the innovation principle 'was introduced in October 2013 to ensure that[,] whenever policy or regulatory decisions are under consideration[,] the impact on innovation as a driver for jobs and growth should be assessed and addressed'.[57] As related to the evolving nature of AI, the threats involved are not yet fully established. However, the impact of AI on innovation across a multitude of disciplines creates a dire need for regulation to preemptively address threats on the distant horizon of strong AI. The innovation principle thus complements the precautionary principle because 'precaution and innovation are equally important' catalysts for regulation of AI by U.S. legislators.[58]

6. Comparative analysis of U.S. and Italian laws and the solution derived thereof

Domestic and international lawmakers are obligated to regulate the transnational consequences of increasingly prevalent AI practices in both the commercial and personal realms. A comparison of U.S. constitutional and copyright provisions to respective Italian laws illuminates structural similarities which deviate in application with respect to the different approaches iterated in U.S. and Italian case law. Ultimately, the approach described in Italian case law is most helpful for legislators in the U.S. due to its focus on the creative character of the human person as opposed to the work processed and generated by the machine.

First, neither the U.S. Constitution nor the Copyright Act afford protection to AI outputs – the end product generated as a result of AI's tool-like processing function

on the Precautionary Principle' (*Sci & Envtl Health Network*, 5 August 2013) <https://www.sehn.org/sehn/wingspread-conference-on-the-precautionary-principle> accessed 25 February 2023.

[56] Ibid (emphasis added).

[57] The European Risk Forum aims to 'promote awareness and adoption' of innovation in a coordinated fashion. 'The Innovation Principle – Overview' (*Eur Risk Forum*, 5 March 2015) <https://www.eriforum.eu/uploads/2/5/7/1/25710097/innovation_principle_one_pager_5_march_2015.pdf> accessed 25 February 2023.

[58] Ibid.

– per se because AI cannot be considered an 'author' in its current state. The Italian Constitution and statutory provisions suggest much the same.[59] Second, while there are many similarities between U.S. and Italian copyright law, there are some crucial differences in the countries' respective case law which produce two different analytical frameworks for resolving copyright protection issues as related to AI. Similarities in the copyright laws of both the US and Italy indicate that copyright infringement involves usurpation of a protected work during the creative process and when a final product or output is reached.[60] Both the U.S. and Italian legal frameworks revolve around a human-centric notion that works eligible for copyright protection possess some degree of autonomous human participation. The main difference lies in the approaches used by U.S. and Italian case law with respect to AI.

Relevant U.S. case law suggests that copyright protection depends on whether AI did the lion's share of the creative expression whereas Italian case law focuses on the degree to which the artist's creative expression was absorbed by the machine.[61] Although *Design Data* is not centered on AI, the implications of the case holding render it more than merely tangentially related to this discussion. If there is enough human contribution to the expressive component of a computer program's output, then the program cannot be said to have done the 'lion's share of the work'.[62] Conversely, if a computer program itself does the 'lion's share of the work' and the human contribution behind the program is de minimis, then the output is more aptly seen to reflect the program's contents.[63] However, given the limited function of AI, it would be relatively improbable for an AI to autonomously do the lion's share of the work in generating an output.[64] In sum, the U.S. approach is more focused on the degree of work performed by the machine whereas the Italian approach proves to be a more workable foundation for U.S. based regulation since it is more aptly centered on the artistic expression that

[59] See generally subsections II and III and the Background section of this paper.

[60] See generally 17 USCS 101 ff. See Art. 1-2 L 633/1941 (n 44).

[61] See *Design Data* (n 36); see also *Rai* (n 51).

[62] *Rearden* (n 36) 970.

[63] *Design Data* (n 36) 1173.

[64] See Flowers (n 6).

is absorbed by the use of a machine.

The Italian approach is a more viable one because it better recognizes the limitations of AI. AI in its current state cannot do the 'lion's share of the work' because it is not capable of autonomous function.[65] Because AI is managed by autonomous humans like a tool and because AI is currently incapable of individual freedom of thought and the subsequent spontaneity that is inherent in such conscious freedom, it cannot be described as doing work per se since such a notion reasonably and erroneously conveys that AI is able to be autonomous. Therefore, the Italian approach is a better catalyst for formulating a solution toward the regulation of AI in the U.S. precisely because it is more concerned with the artistic expression involved or absorbed in the creative process preceding an AI's output.

In order to supervise the machine and ensure that it does not become a danger to society, a solution separated into four main pillars is necessary.[66] The four pillars of the solution geared toward U.S. legislators are as follows; (1) legislators should create a uniform legal definition for AI that is not wholly relied on the legal definition for human intelligence; (2) it is important to establish the requisite degree of human participation and supervision both sufficient and necessary for copyright protections to apply to the use and outputs of AI; (3) a fact intensive, ad hoc approach to future litigation should be applied to cases and/or arbitration involving the use of AI; (4) the precautionary and innovation principles should be seen as overarching guidance in the regulation of AI. These pillars are described in depth below.

6.1. Creating a uniform legal definition for AI

First, and to reiterate, what is not properly understood cannot be properly regulated. Faulty definitions regarding the capabilities of AI lend themselves to a veritable minefield of false positives relating to what AI is actually capable of. Definitions that misconstrue AI as the 'capability of a functional unit to perform functions that are generally associated with human intelligence such as reasoning and learning' are

[65] See ibid. See generally *Design Data* (n 36).

[66] See generally Shelley (n 1).

speculative at best and erroneously misinformed at worst.[67] So, for a proper regulatory framework of AI to exist, there must first be a proper, *legislative* definition for AI in its current state. The emphasis on legislative is because legislative definitions constitute language that is authoritative and indelible unless provided otherwise in the text of a particular legislation.[68] For example, the dictionary definition of 'apple' does not have any authoritative power.[69] A person can elect to use the word 'apple' to mean something else in a conversation and there is no authority that can stop that individual from doing so.[70] This example is illustrative of how the word 'apple' can be used to refer to the dictionary definition of the fruit or even to the well-known tech company, Apple. By contrast and through the imposition of a legislative definition, the U.S. legislature 'has the authority to determine how we understand a legislative term that appears in a statute, if not in the real world[,] then in the word [sic.] of norms'.[71]

A legislative definition is not open to interpretation; it is, in most circumstances, a '[coercive determination of] the sole way by which a term should be used in certain factual circumstances'.[72] Without a proper legislative definition of AI that provides authoritative language identifying and describing AI's relatively nascent state, the term 'artificial intelligence' is left open to interpretation. A proper legislative definition of AI in its current state would recognize that the term refers to what is currently understood as AI rather than strong artificial intelligence.[73] As such, the limitations of AI require explicit specification so that it may not be conflated with strong artificial intelligence. The computational nature of AI is inherently limited in that the machine cannot autonomously create an output without a human input beforehand; such a fact must

[67] See Int'l Org for Standardization & Int'l Electrotechnical Comm (2015) ISO/IEC 2382:2015, Information Technology – Vocabulary <https://www.iso.org/obp/ui/#iso:std:iso-iec:2382:ed-1:v2:en> accessed 5 March 2023. See generally n 21.

[68] See Y Roznai, 'A Bird is Known by its Feathers – On the Importance and Complexities of Definitions in Legislation' (2014) 2 Theory & Prac Legis 145, 145.

[69] See generally ibid.

[70] See generally ibid.

[71] Ibid 147.

[72] Ibid 145.

[73] See Flowers (n 6).

be incorporated into any legislative definition of AI.[74]

Therefore, an authoritative definition for AI should be precise and comprehensive but it should not be so over-inclusive that it confuses the functional limitations of AI with strong artificial intelligence. One way policy makers may circumvent the issue of an over-inclusive definition for AI is to distinguish between supervised and unsupervised use of AI by a human. Supervised use would adequately encapsulate the tool-like nature of AI whereas unsupervised use would better articulate the more autonomous qualities of strong artificial intelligence.[75] Incorporating a definition of AI with reference to supervised learning would represent the responsibility of a creator in regulating the actions, or outputs, of their creations.[76]

6.2. Human participation necessary and sufficient for legal protection of AI outputs

Second, just as AI should be given a uniform definition, the degree of human participation that is both sufficient and necessary for copyright law protection to be afforded or denied to the use and output of an AI should be defined. U.S. case law incorporates an approach centered on a computer program doing the 'lion's share of the work' whereas Italian case law focuses on how much of the human author's creativity was absorbed by the machine in generating its output.[77] Because the Italian approach is more workable, creating a threshold for the degree of human participation should focus on the amount of creativity absorbed rather than the amount of work the AI did. If, for example, an AI absorbs more than a majority (>51%) of a participating human author's creativity, the AI output may be considered eligible for copyright protection so long as the source material is not subject to copyright.[78]

[74] See UK-RAS Network (n 9).

[75] See generally Flowers (n 6). See also ibid.

[76] See generally Shelley (n 1) 181.

[77] Compare *Design Data* (n 36), with *Rai* (n 51).

[78] See US Copyright Office (n 32).

6.3. Ad-hoc approach to AI litigation

Third, the evolving nature of AI is best addressed on a case-by-case basis by courts. The human-centric approach to copyrightable works in both constitutional and copyright encompasses precedent that is decades old, and such precedent must be adhered to for *stare decisis* purposes. Legislators are unable to foresee every situation that may arise under a particular statute or law.[79] It is the duty of courts to say what the law is on an ad hoc basis.[80] Therefore, although a uniform legislative definition of AI would be unable to foresee every possible issue that may arise in a vast plethora of possible controversies, the courts would be able to consider precedential copyright law holdings in tandem with such a definition in any future litigation on an ad hoc basis.

6.4. The precautionary and innovation principles as guiding frameworks for legislators

Fourth, the precautionary and innovation principles are equally important considerations in the creation of effective regulation for AI. This is because '[b]oth the [innovative] and precautionary approaches attempt to reconcile the normative goals of promoting innovation, managing risk, and regulating efficiently in the face' of legal uncertainty in speedy technological innovation related to AI.[81] Both principles must be considered during the creation of a legislative definition for AI. With regard to the formulation of a legislative definition of AI, the precautionary approach would serve to encourage information gathering pertinent to achieving an understanding of AI in its current state.[82] The innovative principle encompasses the view that the majority of technological innovations do not pose an irreversible risk or threat of harm to society.[83] Under the innovation principle, technological innovation should be encouraged, and

[79] See HJ Friendly, 'Reactions of a Lawyer – Newly Become Judge' (1961) 71 Yale LJ 218, 220.

[80]See generally ibid 222.

[81] R Crootof and BJ Ard, 'Structuring Techlaw' (2021) 34 Harv J Law & Tec 347, 379.

[82] See ibid 385-86 (asserting that 'equipped with a clearer understanding of the differences and tradeoffs between [the precautionary and innovative] approaches, legal actors attempting to resolve a legal uncertainty will be better prepared to consciously identify and publicly justify their regulatory orientation').

[83] See Castro and McLaughlin (n 4).

any resulting harms should be addressed as they become readily apparent.[84]

The most appropriate view is to consider both approaches as if they exist in a gray area rather than as strictly black and white.[85] Therefore, the path to a legislative definition for AI should be guided by both the precautionary and innovation principles. The resulting definition would not be either strictly precautionary or innovative. Rather, it would either be more precautionary or more innovative depending on the U.S. legislature's analysis of the evolving threats involved to both individuals and large corporations in their unregulated use of AI.

7. Responses to counterarguments

Proponents of artificial intelligence machines may contend that Frankenstein's monster only killed because it was rejected by humanity and that declining to afford constitutional copyright protections to AI is tantamount to such a consequential rejection.[86] This is certainly not the case for several reasons. First, none of the constitutional and copyright law provisions discussed above provide adequate regulation for AI at its current, relatively nascent, state. Second, the process that goes into using AI and generating an output is sufficiently different from the process that goes into using other machines, like cameras; such an important difference warrants an ad-hoc approach in AI related litigation and/or arbitration. Third, proponents of the innovation principle who call for the total or partial abandonment of the precautionary principle misunderstand the co-dependent nature of the two principles; both principles are necessary for a comprehensive regulation of AI as it continues to evolve.

First, the available constitutional and copyright provisions provided for in U.S. law cannot be the catalyst for artificial intelligence regulation because they are inapplicable to machines such as AI which serve a tool-like purpose. Arguments

[84] See ibid; see also Crootof and Ard (n 81).

[85] See Crootof and Ard (n 81).

[86] See generally Shelley (n 1).

stipulating that such a human centric approach is outdated fail for two reasons – first, because of precedent and, second, because, at its current state, AI is unable to possess the autonomy necessary to distinguish itself from the human participation required to make its tool like capabilities function.[87] In other words, AI that operates free from prerequisite human input is still far from becoming a cognizable feat.[88] An AI output that is based on the human input of commands or source material cannot be categorized as emergent or autonomous behavior of the machine.[89] Importantly, proponents of the view that AI is getting closer to the point of autonomy through the production of emergent works rely, to at least some extent, on a 'result-oriented' approach to creativity rather than a 'process-oriented' one.[90] The existence of both approaches as applied to the question of whether or not AI is capable of autonomous creation illustrates a sharply contested point in this field of scholarship. This only further iterates the need for a concrete legislative definition of AI that differentiates the limitations and capacities of weak and strong artificial intelligence, respectively.

Second, AI is sufficiently different from other pre-programmed software installed in a tool, such as a camera, so as to warrant an increased need for regulation. Some of the most prevalent arguments regarding the function of AI is that increased regulation is unnecessary since using AI is no different from a camera in the hands of a user.[91] Although the use of AI is nearly functionally identical to the use of a camera insofar that the direction of a human user is required to make a tool such as AI or a camera function properly, AI's broad applicability in various fields necessitates regulation in the shape of a concrete legal definition for AI applied to disputes on an ad hoc basis.[92]

[87] See Flowers (n 6); see also Searle (n 6).

[88] See ibid; see also n 15.

[89] See Dornis (n 13) 13 (stating that 'a finding of creativity … of an artificially intelligent actor is often described as requiring autonomy and independence form the influence of human intelligence').

[90] Ibid 13-14. Compare Turing (n 13), with Searle (n 6).

[91] See Nat'l Comm'n on New Tech 'Uses of Copyrighted Works' (1978) Final Report of the National Commission on New Technological Uses of Copyrighted Works 4, 44 (stating that 'the computer, like a camera or typewriter, is an inert instrument capable of functioning only when activated either directly or indirectly by a human') <https://www.tech-insider.org/intellectual-property/research/acrobat/780731.pdf> accessed 4 March 2023.

[92] See JC Ginsburg and LA Budiardjo, 'Authors and Machines' (2019) 34 Berkeley Tech. LJ 343, 393 (referring to

Furthermore and unlike the static nature of a camera, AI generates and will continue to generate more legal quandaries in its capacity as an evolving technological innovation. Because of this, a legislative definition and guided regulatory framework are needed.[93] Here, like when demarcating AI from strong artificial intelligence for the purposes of establishing lack of autonomy in AI, it is the lack of a legislative definition for AI that remains a prevalent roadblock toward a principally guided regulation of AI.

Third, arguments favoring a total reliance on the innovation principle without regard to the precautionary principle are misguided. The following position encapsulates a fundamental misunderstanding of the complementary relationship which exists as between the precautionary and innovation principles.[94] For instance,

> When it comes to AI, policymakers should rely on the innovation principle, not the precautionary principle … we should proceed on the assumption that AI will be fundamentally good, and while it will present some risks, as every technology does, we should focus on addressing these risks, rather than slowing or stopping the technology.[95]

By focusing on the benefits or disadvantages of one approach over the other, the benefits of applying either principle are curtailed. For example, if a certain technology contains components which poses a 'significant or irreversible' threat, the precautionary principle would likely be a better guide for legislators.[96] Therefore,

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the prevalent use of AI in homes, businesses, governments, and social media uses) (citing 'OK, House, Get Smart: Make the Most of Your AI Home Minions' (*Wired*, 16 May 2017) <https://www.wired.com/2017/06/guide-to-ai-artificial-intelligence-at-home/> accessed 5 March 2023; E Brynjolfsson and A McAfee, 'The Business of Artificial Intelligence' [2017] Harv Bus Rev <https://hbr.org/cover-story/2017/07/the-business-of-artificial-intelligence> accessed 5 March 2023; C Conglianese and D Lehr, 'Regulating by Robot: Administrative Decision Making in the Machine-Learning Era' (2017) 105 Georgetown LJ 1147, 1151-53; 'How Artificial Intelligence Is Edging Its Way Into Our Lives' *NY Times* (New York, 12 February 2018) <https://www.nytimes.com/2018/02/12/technology/artificial-intelligence-new-work-summit.html> accessed 5 March 2023.

[93] See Crootof and Ard (n 81).

[94] See ibid.

[95] Cf RD Atkinson, '"It's Going to Kills Us!" and Other Myths About the Future of Artificial Intelligence' (*Info Tech & Innovation Found*, June 2016) 38 <https://www2.itif.org/2016-myths-machine-learning.pdf> accessed 25 February 2023.

[96] See Crootof and Ard (n 81) 382, 386 (exemplifying concerns with 'the growing threats to privacy and civil rights

legislators should consider both principles instead of rejecting one principle entirely when determining which is better suited to guide a regulatory scheme for AI.

In conclusion, current constitutional and copyright provisions are incompatible with AI and thus ill-suited to 'supervise' the man made and operated machine.[97] The inherent limitations of AI and the machine's reliance on a human actor render it ineligible for copyright protections. A comparative review of U.S. and Italian laws sheds light on the need for regulation centered on a four-part approach which defines AI, establishes the requisite human participation necessary to either foreclose or allow for copyright protections to outputs, advocates for an ad hoc approach to future litigation, and considers the precautionary and innovation principles as overarching guidance for U.S. The 'discovery and wonder' inherent in technological innovation as related to AI should not be abridged or hampered.[98] Rather, AI should be appropriately supervised so that its legal implications do not run wild.[99]

raised by facial recognition technologies').

[97] See Shelley (n 1).

[98] Ibid 51-52 (consider, '[n]one but those who have experienced them can conceive of the enticements of science … in scientific pursuit there is continual food for discovery and wonder').

[99] See ibid 81.

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AUTOMATING THE JUDICIAL SYSTEM: EMBRACING ARTIFICIAL INTELLIGENCE FOR TRANSPARENCY AND EFFICIENCY

ABSTRACT. *This article describes the mechanism for using artificial intelligence (AI) in legislative, executive and judicial activities, defines the goals, objectives and functions of AI, as well as the positive and negative aspects of its implementation in the state management system. The author argues that the use of AI in the legal field can help increase transparency, fairness and efficiency of the judicial process, and can also contribute to the development of new human rights, such as the predictability of the law and the right to peace of mind. The article also highlights the risks associated with the use of AI in the legal field, such as the possibility of dehumanizing the justice system, the need to establish ethical, legal and technological principles for the implementation of AI in the judicial process.*

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1. Introduction

The age of information technology has caused society's focus to shift from the physical world to the virtual one. The virtual world has enabled transparency and accessibility of information, thus exposing corrupt activities, declarative legislation, unfair justice, human rights violations, discrimination, and other issues. However, while society can monitor the online actions of government bodies, there is little influence over them. It is futile to discuss these problems without the government's involvement, as they often only react when the situation becomes explosive. Therefore, society requires a new social order that puts the interests of the people first. This order can be achieved through modernizing the concept of collective decision-making to allow society to control the behavior of those in power. I propose using transparency, information technology, artificial intelligence, and cyberspace to achieve true democracy with liberal values. I believe that by applying AI, we can not only renew the activities of the government branches but also the entire political system. Through AI, people can identify and solve problems, ultimately achieving timely legal resolutions. However, AI poses both prosperity and threats to civilization, so we must take precautions. I recommend adopting an alternative normative act at the UN resolution level to establish humanity's supremacy over AI.

2. AI and the new technological order of humanity

The state apparatus has evolved over thousands of years, with changes in class-based social and economic formations such as slavery and feudalism, and the overcoming of racial, religious, and other prejudices.[1] The change in government structure occurred due to the inefficiency of legislative, executive, and judicial powers during those times. Examples of this are modern government models that have emerged through various revolutions and civil wars, where the previous branches of power were unable to fulfill their obligations due to natural circumstances and social injustice.

[1] N Bostrom, *Superintelligence: Paths, Dangers, Strategies* (OUP 2018).

Today, we see that the exceptional rights and powers granted by the people to their representatives, and most importantly protected by law, have created a caste of 'untouchables' throughout history. Elected officials have become mired in the quagmire of lobbying for foreign interests, corruption, and lies, which are often exposed in the media and social networks. Political parties and governments openly ignore their own statutes and laws, fixating on strengthening their own power, disputing government positions and distributing goods, forgetting that they were elected to represent the interests of voters and social justice. With the uncontrolled cyberspace, it has become much more difficult for them to hide or ignore social problems, but they still try to reduce the reaction of social networks to meaningless discussions of the problem. State structures independently approve plans and make decisions within their own approved reporting, without taking into account public opinion. Despite the acknowledged facts and the declared significance of IT, the government apparatus is not interested in the widespread implementation of AI, full digitalization, and automation of the legislative, executive, and judicial system, citing insufficient data and the unexplored nature of the phenomenon, caution in its application, population and technology readiness, and a lack of specialists. The saddest part is that society cannot resist them or change the political system because elected officials will never accept conditions that undermine their rights and privileges.[2]

3. The theory of the virtual parliament, or the theory of the 'falling walls'

The technological revolution and the advent of AI in its ambiguous and transcendent sense is truly a call for awareness for all nations to take control and oversight over the activities of all branches of government. Humanity stands on the threshold of a new socio-economic formation – an information technology social order where the population is technically capable of influencing democratic governance.[3] All the tools for its implementation are available: (i) the development and approval of fundamental

[2] YN Harari, *Homo Deus: A Brief History of Tomorrow* (Harper 2016).

[3] I Goodfellow, Y Bengio and A Courville, *Deep Learning, Tech and Government* (MIT Press 2016).

human rights and freedoms, (ii) a high level of education, (iii) increased public interest in the legislative process and protection of their rights, (iv) 80% of the population in developed countries connected to the Internet,[4] (v) biometric data of most of the population digitized, (vi) social networks and platforms, (vii) practical technological advances in AI, (viii) the ability of artificial intelligence to analyze big data and provide practical solutions, (ix) constant improvement of information technology and self-learning AI, (x) upgrading of the technological framework, and many more.

Before the era of information technology, the method of collective decision-making at the state level typically involved the understanding of selecting representatives from the people to represent and protect the interests of voters in the legislative, executive, and judicial branches.[5] This rule arose because of the physical impossibility of the entire population being present within the walls of the government apparatus. The axiom is that cyberspace has erased this limitation, eliminated the concept of 'walls of buildings'.

Having all the above-mentioned tools, modern society has a real chance to develop and implement ethical, legal, and technological principles of the 'virtual' parliament and other state structures, ie, to implement the mechanism of 'collective decision-making' literally without delegating their exclusive rights and powers. Biometric data or special IDs will serve as confirmation of physical presence in the virtual parliament. On 'smart' digital legislative platforms of the virtual parliament, every citizen will have the opportunity to exercise 'exclusive' rights and powers of elected officials, such as: (i) participate in discussions and approve laws in accordance with established rules, (ii) participate in the work of committees and commissions of the parliament, (iii) monitor and participate in the execution of parliament's instructions, (iv) participate in parliamentary hearings, (v) propose legislative initiatives, (vi) submit parliamentary requests, (vii) address questions to members of the government, (viii) appeal to relevant officials to take measures to immediately prevent violations of citizens' rights, and more.

[4] DataReportal, 'Digital Around the World' <https://datareportal.com/global-digital-overview> accessed 12 June 2023.

[5] R Kurzweil, 'The Singularity is Near' in RL Sandler (ed), *Ethics and Emerging Technologies* (Palgrave Macmillan 2013).

The exclusion of elected officials from the people-deputy-law chain will allow for: (i) achieving transparency of the activities of the entire government apparatus, (ii) direct and free expression of the will of citizens, (iii) directly demanding accountability from decision-makers in the executive branch, (iv) implementing on a practical level the principles and requirements of democratic governance, as declared by the United Nations[6], (v) achieving social justice, (vi) excluding hidden lobbying of interests of certain social groups and the executive branch, (vii) eradicating corruption, (viii) excluding the adoption of anti-social decisions, (ix) reducing state expenditures on maintaining the deputy corps, and more. A virtual legislative platform will enable the adoption of transparent public legal decisions based on principles of social justice and equality, freedom of speech, the right to vote, the right to represent one's own interests, protection of violated constitutional rights, and more. It will enable the modern society to achieve its goal of building a system of relationships based on democratic and liberal values. Naturally, this goal can only be achieved through ensuring the appropriate transparency of the government mechanism, social influence, and control. It will indeed give modern society all the powers granted to parliamentarians.

The virtual parliament will usher in a new era for humanity – the direct and immediate application of the concepts of 'democracy' and 'democratic principles' as defined by the foundational documents of the United Nations.[7]

Democracy is a universal value, based on the free expression of the people, who determine their political, economic, social, and cultural systems, and on their active participation in decision-making on all aspects of their lives. People must have the right to vote on decisions that affect their lives, and the right to demand accountability from decision-makers based on inclusive and fair rules and institutions that regulate social relations.[8]

[6] United Nations, <https://www.un.org/> accessed 12 June 2023.

[7] E Brynjolfsson and A McAfee, *The Second Machine Age: Work, Progress, and Prosperity in a Time of Brilliant Technologies* (WW Norton & Company 2020).

[8] OHCHR, 'About Democracy and Human Rights. OHCHR and Democracy' <https://www.ohchr.org/en/about-democracy-and-human-rights> accessed 16 June 2023.

The algorithm for launching and effectively operating the virtual parliament will include: (i) the unconditional application of the principle of the inviolability of human rights and freedoms established by universally recognized international instruments in national legislation, (ii) the definition and establishment of imperative, universally applicable, spatial, and technical frameworks for AI at the level of UN resolutions, (iii) the creation of technical and legal foundations for a digital legislative platform, (iv) the development of mobile applications for (a) the "virtual" parliament, (b) an online law drafting simulator, (c) an online social survey, (v) the development of a technical system for the use of biometric data in the discussion and voting procedure, (vi) the development of etiquette for public discussion and publication of opinions, (vii) active legal education of the population.

The proposed theory may seem like a fantasy, but the potential of AI should not be underestimated. The achievements and technological developments of AI in various fields such as social and economic, law enforcement, military, and others can be endlessly described, as well as plans for the development of AI areas until 2030. Many existing AI developments can be used collectively in virtual legislation: (i) moderators and controllers of ethical and technical norms on virtual platforms, (ii) search, analysis, and comparison of normative acts both vertically and horizontally, (iii) analyzing big data and providing reasonable practical recommendations for improving legislative and judicial bases, (iv) analyzing and summarizing scientific research, social network comments, and digital platforms on legal issues based on data processing in different languages and speech recognition, (v) an online problem-solving simulator, (vi) an organizer of online voting procedures using retina recognition or fingerprinting, (vii) informing people about upcoming votes, (viii) machine vision of the norm-making process, (ix) identifying unlawful actions (cybersecurity), (x) percent financial control of the state budget, (xi) law enforcement control.

The final theory of 'falling walls' envisions the emergence of a new information and social structure based on information technologies and the citizen's right to participate directly in lawmaking.

The transparency theory of executive power, aided by IT, will practically implement the principle of transparency and shed light on many pressing issues in

government administration.[9] Online tracking and AI analysis of the activities of all branches of government will enable society to give them an objective assessment and react in a timely manner.[10] Conducting virtual online nationwide voting to select representatives of the executive and local self-government bodies, using biometric data and AI, will eliminate various dirty tactics in the struggle for power. Elected representatives will always know that they are under the watchful eye of society and AI, on whose evaluation not only the next elections but also their early removal from office directly depend. A virtual platform for monitoring their activities using AI will allow for online tracking of the entire budget execution and government program process, from legislative approval to analysis of the effects achieved upon its adoption.[11]

The AI will provide society with a detailed financial analysis of the government budget, including (i) the entire chain of recipients of funds, (ii) 'smart' monitoring of each stage of expenditure for legality, transparency, and efficiency, (iii) the final effectiveness of the invested funds, (iv) options for optimizing government spending, and more. All of this will allow for the timely detection and prevention of corrupt schemes or inefficient methods used by executive authorities in budget execution. The constant online monitoring of the activities of the government apparatus by AI will shed light on the daily routine of any employee, from the president to the janitor, that is paid from the national budget. Society has the right to know what a person receiving public funds is doing during working hours. Now, an employee's work will be evaluated not only by their superiors but also by society. Essentially, society will be informed (i) about the tasks for which the employee is paid, (ii) whether they are fulfilling their responsibilities, (iii) their necessity, effectiveness, creativity, and timeliness, (iv) whether their salary corresponds to their lifestyle, and more. AI will allow for the tracking,

[9] 'Transparency and Accountability in the Executive Branch of Government: The Past, the Present and the Future', School of Law of the Cyprus Campus of the University of Central Lancashire (UCLan Cyprus), 4 November 2021 <https://www.uclancyprus.ac.cy/transparency-and-accountability-in-the-executive-branch-of-government-the-past-the-present-and-the-future/> accessed 16 June 2023.

[10] S Gulyamov and M Bakhramova, 'Digitalization of International Arbitration and Dispute Resolution by Artificial Intelligence' (2022) 9 World Bulletin of Management and Law 79.

[11] P Savaget, T Chiarini and others, 'Empowering Political Participation Through Artificial Intelligence, Science and Public Policy' (2019) 46 Science and Public Policy 369.

modernization, and control of the activities of federal and municipal services in the redistribution of resources based on the priority needs of the population. The creation of virtual government digital platforms for monitoring will erase the boundaries of information vacuums, temporal and territorial spaces. They will give people the opportunity to unite around social interests, discuss state, legal, and local problems, collectively propose solutions, and AI, in the form of various online simulators, will analyze and summarize them for public approval. The finale of the Theory of Transparency of Executive Power will be the adoption of the Code of Control of Executive Power, the goal of which is to provide legal frameworks for transparent activities of executive authorities and local self-government based on information technologies and citizen rights to participate directly in state governance.

The Theory of Transparency in the Judicial System will be catalyzed by the automation of the justice system and the use of AI, which will allow the principle of transparency, free access to justice, reduction of time and costs of legal proceedings, and support for the case until its logical conclusion to be implemented in practice.[12] The algorithm of actions for launching and efficient functioning of the justice system will be the development of software (i) for online applications and (ii) 'judge simulator', the task of which is to check the completeness and reliability of the claim, mediation, transfer of the case for consideration in court, and most importantly, support for the claim until its logical conclusion.

AI monitors the progress of the case until its logical conclusion, ie, it exercises control over (i) acceptance of the application, (ii) mediation, (iii) the legal process, (iv) resolution of the problem by the Supreme Court, (v) resolution of the problem at the legislative level, and (vi) execution of the court's decision.

First and foremost, official websites of all courts and law enforcement agencies of the state should be combined into one interactive platform to simplify the search and online submission of applications. The function of AI at this stage is to accept an application from the applicant in accordance with the requirements of the legislation. AI guides the applicant by asking directive questions until the correct application form

[12] S Larsson and F Heintz, 'Transparency in Artificial Intelligence' (2020) 9(2) Internet Policy Review <https://policyreview.info/concepts/transparency-artificial-intelligence> accessed 16 June 2023.

is reached and requests the necessary documents for acceptance for review. All submitted documents should be digitized, except for exceptions where digitization is currently not available.

After filling in the necessary fields of the application, AI accepts it for review and initiates a request for a 'predictable' decision from the judge simulator. Based on its results, the applicant has the right to refuse or further review the application. Here, in addition to the decision-making process, AI (i) analyzes the reasons for the plaintiff's refusal, (ii) checks the criminal nature of the evidence presented, (iii) identifies the reason that prevented the completion of the application, (iv) takes action if it detects violent actions against the plaintiff, (v) sends the unfinished application to the "criminal" or "family" section to law enforcement agencies for verification and preventive measures against violence and blatant human rights violations, (vi) identifies a statistical problem (legal or technical) preventing the acceptance of applications, (vii) sends the identified problems to the relevant bodies for resolution, (viii) informs the parties about the problem resolution, and much more.

4. Mediation

The accepted claim, together with the results of the 'predictable' decision, is sent to the defendant for consideration. The defendant is given a certain period to present their arguments for refusing the plaintiff. The AI enters these arguments into the judge-simulator's database and sends the plaintiff the results of the 'predictable' new decision for further consideration. In fact, this procedure represents mediation and is conducted until the judge-simulator makes a decision that satisfies both parties. In addition to the mediation procedure itself, AI (i) analyzes the reasons that prevent the process from satisfying the parties, (ii) checks the criminal nature of the evidence presented by the parties, (iii) identifies gaps and inconsistencies in legislation, (iv) identifies statistical problems in the mediation process, (v) sends identified problems to the appropriate authorities for resolution, (vi) informs the parties about the elimination of the problem, (vii) directs and monitors the execution of the decision approved by both parties, and more.

5. The judicial process

If one party believes that there are legal or technological gaps in the judge-simulator's decision, they can demand that the case be heard by a real judge. After thoroughly studying the case, the judge makes their own decision, justifying the incorrectness of the judge-simulator's decision. If legal gaps or inconsistencies in legislation are revealed during the judicial process, and the judge cannot make a fair and reasonable decision, the case is suspended. The problem is then passed on to the AI in the Supreme Court, following all data protection regulations. If there are no substantial grounds for changing the judge-simulator's decision during the court hearing, the court approves the judge-simulator's decision and holds the party accountable for not substantiating their claim. Here, AI (i) monitors and informs the parties about the deadlines for all court procedures, (ii) checks the criminal nature of new evidence presented by the parties, (iii) keeps records of court sessions, (iv) acts as a judge-simulator, (v) can serve as a scientific and practical advisor to the judge, (vi) sends identified problems and inconsistencies in legislation to the Supreme Court for resolution, (vii) monitors the decision-making process online, (viii) informs the parties about the elimination of the problem, (ix) directs and monitors the execution of the judicial decision, and more.

6. Resolution of the problem by the Supreme Court

Here, the AI (i) conducts online monitoring of the Supreme Court's consideration of the case, (ii) can recommend reasonable options for applying foreign law by analogy, (iii) analyzes and summarizes the opinion of the entire panel of judges, (iv) keeps records of court sessions, (v) acts as a judge-simulator, (vi) logically concludes the judicial process with a positive decision to resolve the problem, (vii) adds the normative act to the AI database, and (viii) in case of a negative decision, passes it for further discussion at the legislative level.

7. Resolution of the problem at the legislative level

Here, the AI (i) monitors the deadlines for considering the issue in the 'virtual' parliament, (ii) informs the parties about the resolution of the problem, and (iii) directs and monitors the enforcement of the court decision.

8. Enforcement of the court decision

Here, the AI (i) as an enforcement officer executes the court decision in digital form if possible (online debt collection, conducting online auctions of digital real estate, etc.), (ii) monitors the deadlines and activities of court executors online, (iii) identifies problems hindering the enforcement of justice, (iv) passes the identified problems to the appropriate authorities for resolution, and (v) informs the parties about the resolution of the problem, and more.

The emergence of new human rights and positive aspects of the Theory of Transparency in Legal Proceedings Predictable law is the right to predictable justice based solely on the letter of the law without the human factor.[13] This means that if the applicant enters accurate data, there is every reason to protect their rights under the law, and in the case of a decision opposite to the AI, the judge is obliged to justify it.[14]

Modelled Law – the right to receive free legal advice for modeling (predicting) upcoming legal proceedings. Based on new data entered, AI can model various outcomes of predictable decisions and give legal advice on the correct formation of the evidence base. In addition, anyone without legal education can use this free service, reducing their expenses on expensive legal support.[15]

Right to peace of mind. AI will not consider an application if there is not sufficient evidence of the defendant's guilt. After all, the plaintiff's arguments and facts

[13] AW Diamond, 'The Right to Predictable Justice' (2022) 102 Iowa Law Review 917.

[14] RH Helmholz, 'The Presumption of Innocence in Law' (2018) 93 Michigan Law Review 2441.

[15] F Dadgostari and others, 'Modeling Law Search as Prediction' (2021) 29 Artif Intell Law 3.

will be checked when the application is filed, not during the traditional legal process. This means that the defendant has the right to protection against groundless and unfounded claims arising from acts of ill will, criminal activity, or other reasons. The principle of the presumption of innocence will come into effect when the burden of proof rests with the plaintiff, and the right to peace of mind will be realized in practice.[16]

Online broadcast of legal proceedings. Provided that all data protection procedures are met, online broadcasting will allow the media and all interested parties to track legal proceedings. This will help achieve transparency, anti-corruption policy, reasoned and adequate legal decisions, and limit various external pressures on the outcome of justice.

Competitiveness of the judiciary. The judiciary will have to compete with artificial intelligence in making alternative decisions. This means that a judge must prove his or her scientific and practical decision-making that differs from the reasoned decision of AI. The state and society will have the right to provide legal and social assessments of the actions and decisions of judges. Therefore, the judiciary will have to work thoroughly on continuous professional development.

Accessibility of justice. The use of online applications will ensure free access to fair justice, erase the boundaries of legal literacy, spatial and temporal distances, and various social and material inequalities.

Automating the justice system and reducing timeframes will quickly resolve many standard social and household disputes in civil law (property division, inheritance, etc.), commercial law (contractual relationships, consumer protection, etc.), obvious human rights violations, administrative disputes (fines, taxes, utility payments, etc.), and other statistical disputes that do not require a human factor and can be resolved at the normative level.[17]

The process of identifying problems and directing them to state authorities: The AI system will identify practical material and procedural legal problems, contradictions

[16] A Duff, 'The right to mental peace' (2016) 10 Criminal Law and Philosophy 677.

[17] B Marr, 'The Future of Lawyers: Legal Tech, AI, Big Data and Online Courts' *Forbes* (Jersey City, 17 January 2020 <https://www.forbes.com/sites/bernardmarr/2020/01/17/the-future-of-lawyers-legal-tech-ai-big-data-and-online-courts/?sh=43db3d8ef8c4> accessed 12 June 2023.

in legislation and human rights violations, and statistical problems. It will promptly direct them to the relevant authorities for resolution and control the resolution of the problems at the legislative level.

9. Monitoring the entire process and logically completing the case

The AI will enable monitoring the lawfulness of all actions of the participants in the legal process and notify in advance of any violations of the time limits of legal proceedings and legislative activity. It will ensure transparency and fairness of the legal process and will complete the legal case, including its execution.[18]

10. Risks in the theory of transparency in legal proceedings

10.1. Dehumanization of the law

According to some scholars, full automation of judicial decisions leads to dehumanization of the justice system.[19] The principle of humanity displayed by the judge will be absent, which is an integral part of any legal decision. Due to the imperfections of AI in determining and analyzing emotions, feelings, spiritual condition, humanity, and other qualities inherent only in humans, it is necessary to define the boundaries of AI application in legal proceedings. The most important thing is to establish the categorical right of a judge to make decisions in the fields of family relationships, criminal prosecution, and religion. However, it is essential to remember that all normative acts included in the AI database were adopted by people based on the principles of humanity. AI naturally applies material and procedural norms similar to a real judge through a judge-simulator. At the same time, a vast number of legal cases

[18] UNESCO, 'Artificial Intelligence and the Rule of Law' <https://www.unesco.org/en/artificial-intelligence/rule-law> accessed 12 June 2023.

[19] V Mayer-Schönberger and T Cukier, *Big Data: A Revolution That Will Transform How We Live, Work, and Think* (Mariner Books 2021).

do not require an analysis of a person's condition; previously made legal decisions and legislative norms are applied automatically, which will reduce the human factor in making legal decisions.[20]

10.2. Limitations of data analysis

While AI can be used to search for solutions in legal cases by conducting limitless data analysis in cyberspace, this can also prolong the legal process. Therefore, it is essential to define and restrict the scope of AI's search for solutions at all stages of the legal process, both in terms of time and space.

10.3. Technical risks

As an automated system, AI is directly linked to information technology, communication lines, software, electricity, and other technical resources. Risks such as hacking, data theft, viruses, unauthorized changes to the database, and other technical and human factors cannot be ruled out. Thus, special attention should be given to cybersecurity when using AI. Modern technologies allow constant monitoring of illegal intrusions into the system, and various technical means ensure the necessary level of security.[21]

10.4. Unpreparedness of the traditional legal system for IT challenges

Digitization and virtualization expand the range of technical procedures in the legal process, requiring new legal frameworks and technological solutions. Examples include the emergence of new rights requiring regulation, lack of clear AI powers, the need for significant capital investments and scanning of previously resolved cases, some adults' resistance to radical IT changes, unsatisfactory current legislation, the need for technological updates in all government agencies directly or indirectly related to the

[20] ML Rich, *Ethics and the Limits of Law* (Routledge 2014). See also J Stanton, 'The Limits of Law', *The Stanford Encyclopedia of Philosophy* (Spring edn, 2022) <https://plato.stanford.edu/entries/law-limits/> accessed 12 June 2023.

[21] EJ Kim, 'Ethical Considerations in Artificial Intelligence Governance' (2020) 6 International Journal of Management Science and Business Administration 50. See also TA D'Antonoli, 'Ethical Considerations for Artificial Intelligence: An Overview of the Current Radiology Landscape' (2020) 26 Diagn Interv Radiol 504.

new legal process, the impossibility of digitizing certain types of evidence, and more.[22]

However, I believe that these risks can be resolved as they depend on material costs and societal motivation. The final stage of the Theory of Judicial Transparency will be the adoption of the Digital Justice Code, the goal of which is to provide a legal framework for the new transparent judicial system based on information technology and the protection of human rights.

11. Conclusion

This article describes the mechanism of AI implementation in lawmaking, executive and judicial branches of government, outlines the goals, tasks, and functions of AI, as well as the positive and negative aspects of AI implementation in the administrative system of the state. It is evident that humanity stands on the threshold of a new socio-economic formation – an information-technological society, where the population is technically capable of influencing democratic governance. Having modern technological tools, society has a real chance to develop and implement ethical, legal, and technological principles in a 'virtual' parliament and other 'virtual' state structures. The virtual legislative platform will enable transparent public legal decisions based on the principles of social justice and equality, freedom of speech, the right to vote, the right to represent one's own interests, protection of violated constitutional rights, and more. Online monitoring of the activities of government officials and the analysis of the functioning of all branches of government by artificial intelligence will allow society to give them an objective assessment and timely response. The implementation of AI in the judicial system will allow for the tracking of the lawfulness of all actions of participants in the judicial process, advance warning about violations of the terms of legal proceedings and lawmaking, ensure transparency and fairness of the judicial process, and complete the legal case, including its execution. Additionally, AI will enable the development of new human rights such as predictable law, modeled law, the right

[22] GE Marchant, 'Artificial Intelligence and the Future of Legal Practice' (2017) 14 ABA SciTech Lawyer 21.

to mental peace, improvement of the intellectual potential of the judiciary, accessibility to justice, and most importantly, monitoring of the entire process and logical completion of the legal case. AI, being a transcendent creation of humans, represents both prosperity and a threat to civilization. In this work, I have provided the vision of global AI threats and proposed a way to prevent them.

DAVID DE CONCILIO*

BETWEEN LAW AND ACADEMIC NOVEL: *OBITER DICTA* BY F. ANNUNZIATA

Milan, March 2020. At the dawn of the COVID-19 pandemic, Giacomo Bergamini, PhD student in comparative law, struggles with his research project. His supervisor, Achille Briola, guides him in developing a thesis proposal based on the work of Gino Gorla (1906–1992). By analysing Gorla's archives at the UNIDROIT in Rome, Giacomo discovers some handwritten notes with the potential to profoundly change our understanding of the Western European legal tradition. Based on this discovery, Giacomo and Achille engage in a virtual dialogue, but they will have to face the consequences of radical choices and unforeseen events.[1]

A novel is not the kind of literary product that one expects to find among the reviews of an academic journal. And yet from this brief synopsis it is immediately clear how *Obiter dicta* is not just a novel. It is a product that must be read from the perspective of that branch of studies known as 'Law and Literature': born in the United States in the twentieth century under the impulse of the great American jurists,[2] this movement has found a late and yet great success among the European scholarship of these last thirty years,[3] within the broader field of studies of Law and Humanities.[4] In particular,

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[1] F Annunziata, *Obiter dicta. Romanzo* (La Vita Felice 2022).

[2] For a historical account of this movement, K Stierstorfer, 'The Revival of Legal Humanism' in K Dolin (ed), *Law and Literature* (CUP 2018); C Baron, 'Droit et littérature, droit comme littérature?' [2021] Tangence 107, 125-126.

[3] The scholarly production in this sense is extremely vast. Here we will refer just to a limited number of recent works: JS Lanter and C Baron (eds), *Droit et littérature* (Société française de littérature générale et comparée 2019); M Cau and G Marchetto (eds), *Droit et littérature* (2005) 5 Laboratoire Italien <https://journals.openedition.org/laboratoireitalien/179> accessed 16 June 2023.

[4] See recently S Stern, M Del Mar and B Meyler (eds), *The Oxford Handbook of Law and Humanities* (OUP 2020); C Battisti, S Fiorato and D Carpi (eds), *Law and the Humanities: Cultural Perspectives* (de Gruyter 2019).

Obiter dicta can be placed into the branch of 'Law and Literature' known as 'Law *in* Literature', which studies the numerous works that use law as a literary subject. And yet, this novel is not merely yet another product of this kind, but it shows its own peculiarities which make it worth to delve into it more deeply.

Firstly, Filippo Annunziata's book can be rather considered a product of Law and Humanities in a wider sense. The author, indeed, seems to seek to establish a dialogue between law and art in a broader perspective, going beyond literature alone and involving several other means of human creativity, such as music and cinema, through the character of Achille Briola. In Achille's cultural tastes it is easy to denote a certain ideal of the humanistic education of the jurist, seen as an intellectual *tout court*. Certainly, this carries the echoes of the Author's own interests and experiences, as Annunziata is both a jurist and a musicologist.

The second element which is worth to mention is the absolute centrality of law in *Obiter dicta*. In light of the synopsis of the book, this might seem a trivial consideration; however, upon closer examination, this feature is much less obvious than one could assume. In fact, fictional literary works that we commonly include in the 'Law in Literature' canon only rarely show a genuine interest in law as such. Usually, in these products law is rather used as a metaphor or narrative device, instead of being an object of interest in itself.[5] In contrast *Obiter dicta* shows a striking, intense, and meticulous immersion in law: legal doctrine, historical critique, and technique are of great interest to the Author. Perhaps this could be better understood by using – albeit in a somewhat improper way – Hart's famous theoretical distinction between the internal and external perspectives on law:[6] in this sense, *Obiter dicta* is a product of an eminently internal perspective, as it is evident in its sensitivity, interests, and in the role that legal doctrine plays in the novel. This, however, emerges not only from how the book speaks, but also to whom it intimately speaks: that is to say, to jurists above all.

[5] See RA Posner, *Law and Literature* (3rd edn, HUP 2009) 21.

[6] HLA Hart, *The Concept of Law* (Clarendon Press 1961) distinguishes between two different perspectives with which one looks at a legal system. The underlying idea is quite intuitive: the internal perspective is that of legal professionals, such as jurists, lawyers, and judges; the external perspective is that of laypeople, such as sociologists or writers observing and describing the law.

However, if we consider *Obiter dicta* a legal novel, saying 'legal' means everything and nothing: what kind of law is the law in this book? The answer to this question shows another peculiarity on the novel. In most literary works, law tends to enter with its casuistic and procedural dimension: the trial, which is naturally the closest to the common representation of law and also the most dramatic.[7] This is not the case in *Obiter dicta*, where the crux lies instead in legal doctrine. This doctrinal emphasis creates a link with the other dimension of the book: since doctrine, understood in the continental European sense of the learned opinions of jurists, pertains necessarily to the representation of the academic world, the Author combines the literary treatment of legal themes with a certain type of genre literature: the academic novel.

Academic novels are a literary product originated in the Anglosphere that has spread greatly in recent decades, including Italy.[8] Usually, a distinction is made between two types of novels in this genre: the so-called 'campus novel,' which portrays university life from the students' perspective, and the academic novel strictly speaking, usually focused on the scholar's point of view. In both cases, often these books aim at unveiling the academic world and its rules, either criticising or idealising it.[9]

By naturally placing itself in this category, *Obiter dicta* encompasses numerous themes and functions of the academic novel. In terms of pure literary criticism, the dichotomy of the two protagonists, the doctoral student Giacomo and the Professor Achille, makes it both a campus novel and an academic novel in a proper sense. This dichotomy of perspectives also becomes a generational dichotomy: they represent the two opposite poles of the academic career, the apprentice and the *Homo Academicus*.[10] Therefore, it is a dichotomy of aims and perspectives. On one hand, *Obiter dicta*

[7] Posner (n 5) 33.

[8] See L Magro, 'Il romanzo accademico. Appunti per uno studio sul campus novel italiano (L'accademia e il fuori: Il problema dell'intellettuale specializzato in Italia, Pisa, Auditorium Le Benedettine, 23-24 giugno 2022)' <https://www.academia.edu/81964009/Il_romanzo_accademico_Appunti_per_uno_studio_sul_campus_novel_italiano> accessed 16 June 2023; L Magro, 'Narrare l'accademia: Una conversazione sul *campus novel* con Dario Ferrari, autore di La ricreazione è finita' *Il Tascabile* (Rome, 29 May 2023) <https://www.iltascabile.com/societa/campus-novel/> accessed 16 June 2023.

[9] Magro, 'Il romanzo accademico' (n 8).

[10] Borrowing the famous terminology of P Bourdieu, *Homo Academicus* (Editions de Minuit 1984).

describes the allure of the academic life through Achille, who represents the ideal scholar, the *Homo Academicus* that everyone wants to be: success, culture, the Professor's house museum, the intellectual satisfactions; this aligns with a certain taste of academic novel as a genre that at times makes an escapist form of literature. On the other hand – and again this is perfectly consistent with the academic novel genre – *Obiter dicta* describes and condemns the dysfunctional aspects of that world that we know well: pretentiousness, pettiness, toxic relationships, selfishness, questionable morality.

This does not mean, however, that Achille and Giacomo embody two opposite, one-dimensional stereotypes, as they carry ambiguities, contrasts, and contradictions: Achille, professionally accomplished, still experiences a growing unease, while Giacomo despite enduring the most toxic flaws of academia, is fatally attracted to and stimulated by it, succumbing to vices and becoming a sort of anti-hero.

In the background, the recent events of the pandemic are not just a narrative device and do not have a purely journalistic dimension: the insularity of life during the pandemic reflects the insularity of the academic world. And even this insularity is ambivalent: it fascinates (Giacomo no longer wants to leave the seclusion of his house), but it also creates alienation. Insularity becomes both an idyllic environment of escapism and a cause of discomfort and dissatisfaction.

The dramatic events that occur at the end of the novel also raise important themes in the book. Through Giacomo's perspective, *Obiter dicta* is first and above all a coming-of-age novel, embodied through his doctoral research. The narrator himself states it well at a certain point: '*la tesi è un rito di passaggio verso la vita adulta, con la quale bisogna confrontarsi*'. Thus, Annunziata's book becomes a *Bildungsroman*,[11] a story of growth where the initial dichotomy between the apprentice and the master is solved with the Giacomo's initiation to the mysteries of academia, thus becoming he himself a *Homo Academicus*. Like all the rites of passage, this initiation requires a sacrifice: the boy becomes a man learning the difference between expectations and reality, as well as the necessity to compromise.

[11] And, incidentally, the *Bildungsroman* is another genre that often intertwines with the literary canon of both the campus novel and the canon of 'Law in Literature': Magro, 'Il romanzo accademico' (n 8); Posner (n 5) 36, 156.

In conclusion, *Obiter dicta* is a pleasant novel that lends itself to multiple levels of interpretation, especially but not exclusively for jurists and academics. By demonstrating the complexity of the symbiotic relationship between literary fiction and legal academia, it can certainly contribute to shape both our understanding of 'Law in Literature' studies and the Italian canon of academic novel.

FEDERICO DI SILVESTRE*

TOWARDS PSD3: THE DYNAMICS OF DIGITALIZED PAYMENT SERVICES MARKET

On 14 April 2021, the Roma Tre University, Law Department, hosted the international conference 'Towards Psd3: The Dynamics of Digitalized Payment Services Market'. The conference was held under the auspices of the Centro Grandangolo – Research Centre Paolo Ferro-Luzzi for advanced studies of Banking and Finance Law in Europe (scientific committee: professor Concetta Brescia Morra and professor Maria Cecilia Paglietti).

The conference provided a critical analysis of the regulatory provisions governing the digitalized payment service market within the European Union (EU), in the framework of the current process of revision of the Payment Service Directive (PSD2).[1]

The first session of the conference, named '*The Macro level*: Pluralism in the Multi-level Governance of Payment Services' and chaired by Vincenzo Zeno-Zencovich (Roma Tre University), opened with the speech of Olhao Cherednychenko (University of Groningen). Her presentation focused on the divide between public and private in EU financial regulation. In national legal systems, public law regulates the relationships between public parties and public authorities, in the pursuit of the public interest and distributive social justice. Moreover, public law is enforced by public authorities through public law means, in order to ensure *ex ante* compliance and deterrence. On the contrary, private law aims at administering the interaction between private parties pursuing private interests. Enforcement is achieved by aggrieved private parties through private law means which allow *ex post* compensation. Differently, EU financial

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[1] Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC [2015] OJ L 337.

regulation emphasizes mainly on three main issues: (i) the definition of the outcome to be achieved, (ii) the standard of conduct required from market participants and (iii) the enforcement techniques appropriate to ensure compliance. This approach can also be applied in the framework of EU payment regulation. The outcome to be achieved is the creation of a single payment market as well as the promotion of innovation, fair competition, and consumer protection. The standards of conduct required for market participants aim at defining issues such as the authorization to operate as a payment institution, the access to banks' payment systems and client databases, the allocation of damages in case of unauthorized payment transactions. Enforcement techniques include both public enforcement, private enforcement, and hybrid enforcement redress through regulatory agencies. In EU payment regulation, the distinction between public and private law is not recognised as such; indeed, public law and private law concepts are used as regulatory tools in novel combinations and the EU's experimentation with regulatory tools has led to the emergence of legal hybrids, which combine elements of public and private law.[2] The above analysis shows that EU financial regulation has blurred the divide between public and private law. However, the conceptual distinction between these two categories has not entirely lost its significance in EU and national law. In this regard, it is useful to evaluate the interplay between EU and national law in regulatory standard-setting and enforcement.[3]

Benjamin Geva (Osgoode Hall Law School of York University) was the second panellist of the conference and gave a speech about regulatory reforms and the evolution of banking, money and payments fields. PSD2 and the rise of digital currencies led the way to a new payment object. As a matter of facts, back in the Nineteenth century,

[2] HW Micklitz, 'The Visible Hand of European Regulatory Private Law – The Transformation of European Private Law from Autonomy to Functionalism' in P Eeckhout and T Tridimas (eds), *Competition and Regulation* (2009) 28 Yearbook of European Law 3; OO Cherednychenko, 'Public Supervision over Private Relationships: Towards European Supervision Private Law?' (2014) 22 ERPL 37.

[3] OO Cherednychenko, 'Islands and the Ocean: Three Models of the Relationship between EU Market Regulation and National Private Law' (2021) 84 The Modern Law Review 1294; OO Cherednychenko, 'Regulatory Agencies and Private Damages in the EU: Bridging the Gap between Theory and Practice' (2021) 40 Yearbook of European Law 146; OO Cherednychenko and M Andenas, *Financial Regulation and Civil Liability in European Law* (Edward Elgar 2020).

society used to conceive money as 'that which passes freely from hand to hand throughout the community in final discharge of debts […] being accepted equally without reference to the character or credit of the person who offers it and without the intention of the person who receives it to consume it'.[4] However, over the years, money has ended up not only been conceived as coins and banknotes, but also as bank money, e-money and digital currency. A banknote can be defined as an unconditional promise in writing signed by a banker who commits to pay a certain sum on demand to the bearer, being the holder in possession who presents it for payment. It is transferrable from one person to another by delivery. Digital currency, instead, is an entity that amounts to a string of bits. The string must have a numerical value and, in order to prevent double spending, it must have a unique identity.[5] Digital currency can be issued either privately or by a central bank. A particular type of digital currency is the stablecoin, which is denominated in, namely pegged to, or claimed at par with, either an official currency's unit of account (as well as a basket of such currencies) or the value of a specified amount of a designated commodity, whether or not it is backed by a reserve of such currency or commodity. Stablecoin may be dived in: (i) algorithm-based stablecoins, which maintains a stable value via protocols that adjust quantity in response to change of demand and, not being adequately collateralized, are the most fragile, and (ii) asset-linked stablecoins, which maintain a stable value by referencing a commodity, digital asset, fiat currency or a basket of any of the above and are either off-chain[6] and or on-chain.[7] The main risks associated with stablecoins are issuer's insolvency, exchange's insolvency, systemic risk, and weak interoperability. Stablecoin issued by central banks for a specified number of the national monetary currency units is called Central Bank Digital Currency. Such a coin is an e-banknote, since like the stablecoin

[4] *Moss v Hancock* [1899] 2QB 111, 116.

[5] G Samid, *Tethered Money: Managing Digital Currency Transactions* (Elsevier 2015).

[6] Ie, backed by fiat currency and/or high-quality liquid assets, and because transactions are validated and authenticated by an independent third-party outside of the main blockchain network before they are reintegrated back into the main blockchain).

[7] Ie, backed by digital assets which are riskier and thus tend to be overcollateralized and are carried out on a blockchain from start to finish where they are verified and recorded on a public distributed ledger that cannot be changed after they are validated.

it is written electronically and is transferable by control, which is functionally equivalent to the transfer by physical delivery of a paper banknote.

The next panellist to intervene was Michelle Everson (Birkbeck University of London), who addressed the crisis of European agencies. In the EU, financial agencies are intergovernmental, transnational, or supranational in character and were primarily created to face financial crises and systemic risk. Traditionally, European doctrine has held that European regulation must be strengthened to improve an inadequate mix of regulatory and supervisory skills and to create a co-ordinated early-warning system to identify macro-systemic risks.[8] Unwieldy EU regulation and discrepancies in national implementation has been seen as regulatory failings because they led to differential treatment of financial instruments, both violating the pre-requisite of the neutrality of financial supervision in the EU market and delaying the adaption of European financial services to the pace of global financial market change.[9] Autonomous regulatory models gain normative legitimacy as postulation of a concept of *pareto*-efficiency mediates against concerns that executive power should never be endowed with too broad a mandate. Discretionary powers may be delegated to independent agencies where they have no redistributive consequences, or the subject-matter of regulation is value-neutral in terms of general welfare losses.[10] According to some scholars, European financial agencies might partially substitute the activity of the European Commission in financial matters, since the Commission might appear too bureaucratic, too politicised and composed only of generalists.[11] In addition, it has been argued that a 'central bank is not an appropriate institution for macro-prudential supervision because central bankers are not legitimate politically to make decisions that involve important trade-offs between political and economic objectives'; 'such decisions should be left with finance ministries

[8] Opinion of the European Economic and Social Committee on the 'Report of the de Larosière Group' (Own-initiative opinion) [2009] C 318/11.

[9] Ibid.

[10] G Majone, 'The Rise of the Regulatory State in Europe' (1994) 17(3) West European Politics 77.

[11] M Busuioc and M Groenleer, 'The Theory and Practice of EU Agency Autonomy and Accountability: Early Day Expectations, Today's Realities and Future Perspectives' in M Everson, C Monda and E Vos (eds.), *European Agencies in Between Institutions and Member States* (Kluwer Law International 2013).

and other elected officials'.[12] Another important issue to take into account is the non-accountable commodity of reputation. Indeed, 'damage to an institution's reputation (and the resulting loss of consumer trust and confidence) can have very tangible consequences – a stock price decline, a run on the bank, a spike in policy surrenders, an outflow of assets under management, a drop in new sales, a ratings downgrade, an evaporation of available credit, regulatory investigations, shareholder litigation, etc'.[13] Against this scenario it would be useful to find a way of institutionalising and constitutionalising market, epistemic and deliberative knowledge within a system that is simple enough for people to understand the rational of the regulatory steps taken at European financial level.

The contribution of Daniel Sarmiento (Universidad Complutense of Madrid) addressed the concept of a level playing field in the context of payment services within the EU. Level playing field is a principle based on the notion of equality among the European Member States and among consumers operating in the common European market. A market having these characteristics requires specific obligations and rights on market operators, Member States and consumers. The creation of a level playing field in the payment system is a complex project, as it necessitates to impose stringent obligations on the operators in the sector and to create a coherent, consistent, and functional payment system for the benefit of consumers and market operators. To realise this goal, it would be necessary to face the issues of: (i) regulatory fragmentation, (ii) creation of appropriate standards of equality and (iii) definition antitrust and competition standards. In relation to regulatory fragmentation, it is first of all necessary to consider that the EU is working at the creation of an internal market for payment systems. The choice of the legal instruments (namely directives or regulations) to be used in this process is crucial in defining how and to what extent a level playing field can be guaranteed in the market. Moreover, further complexity is added by the fact that

[12] E Ferran and K Alexander, 'Can Soft Law Bodies be Effective? Soft Systemic Risk Oversight Bodies and the Special Case of the European Systemic Risk Board' (2010) University of Cambridge Faculty of Law Research Paper No. 36/2011, 1.

[13] G Stansfield, 'Some Thoughts on Reputation and Challenges for Global Financial Institutions' (2006) 31 The Geneva Papers on Risk and Insurance – Issues and Practice 470.

lately, especially in the field of banking law, regulations are assuming more and more the characteristics of directives, as on certain occasions Member States are left partially free to choose how to comply with the regulation's provisions. This approach may lead to a fragmentation of the rules applicable to payment systems. The second issue under analysis is the definition of appropriate equality standards. This point is central because market operators are not subject to the same compliance duties and because some operators conduct business in domestic markets only and other also in transborder markets. Therefore, it would be necessary to define what is the standard of equality that is required from the EU legislator. A useful guide in this sense is the Arcelor case of 2008,[14] where the European Court of Justice coded its case law on equality, stating that a discrimination arises in case of different treatment of comparable situations in lack of an objective justification. The concept of equality stemming from the Arcelor case can be applied also to the PSD2 framework, leaving a rather broad level of discretion to the legislator in defining equality standards. The third and last point is linked to the concept of essential facilities, ie, assets or infrastructures necessary to a third party to offer its own product or service on a given market. In the payment market, the essential facilities doctrine is particularly relevant because payment infrastructures are essential facilities. In EU case law, the essential facilities doctrine has been addressed in the Bronner case,[15] where the European Court of Justice ruled that if a dominant player, that has control over resources being indispensable to operate in the market, refuses to other players the access to such resources, a breach of Article 102 of the Treaty on the Functioning of the European Union may occur. However, in Slovak Telekom case, the Court also stated that implicit rejections are not covered by Article 102. Applying Slovak Telekom case's implicit rejection regime to payment services may collide with the application of a level playing field in that specific sector.

The conference continued with the keynote speech of Piero Cipollone (Deputy

[14] Case C-127/07 *Société Arcelor Atlantique et Lorraine and Others v Premier ministre, Ministre de l'Écologie et du Développement durable and Ministre de l'Économie, des Finances et de l'Industrie* [2008] ECR I-09895.

[15] Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG* [1998] ECR I-07791.

Governor of the Bank of Italy). The payment sector is a key component of the European single market and because of its fragmentation among national borders, it has been the target of several technical and regulatory interventions. In this scenario, PSD2 has been a landmark, as it has brought about greater harmonisation and competition in payment services. However, two more milestones need to be achieved. First, we need to allow innovation to be as disruptive as it was meant to be in the PSD2. Second, we ought to embed into the new regulation the dramatic changes in the technological landscape that occurred since PSD2 came into force. As for the first issue, there are at least three hurdles that must be overcome. First, the lack of full administration and complete application of the rules across Member States. As a matter of fact, the payment services framework still needs to be fully aligned with other European policies and regulations. Second, it would still be necessary to foster a strong competition within and across Member States and to better clarify the role of technological providers in the payments sector. In relation to the second issue, it is worth noting that PSD2 entered into force in Italy in 2018. The new technological landscape that has emerged in the last few years has offered many opportunities to develop new payment solutions which can improve general wealth. Whether this potential will be realised or not it depends on the way PSD3 will be designed and implemented. Before PSD2 came into existence, the main actors in the field of payment services were traditional payment service providers such as banks, electronic money institution and payment institution. PSD2 has contributed to bring the exclusivity of bank-customer relationship to an end, as it allows other players, such as third-party providers, to offer new services to their customers, like the so-called open banking services. This scenario may lead from open banking towards open finance, where technological interdependencies will be equally stronger for payment solution and financial services developed on a blockchain platform. It is now necessary to ponder the consequences of this new technological paradigms on the existing regulatory framework. One way forward is to think about the product-oriented approach, thereby all entities involved in the supply chain of a payment services need to comply with the core principle underlying the other side of the payment system, regardless the existence of a contractor relation among themselves. Moreover, it is also crucial to constantly bear in mind that the ecosystem to be dealing with is very dynamic,

and therefore it would be appropriate to monitor how this ecosystem will evolve overtime. Finally, the regulators should ask themselves whether a closer interaction with the payment industry might be useful to better direct their interventions in the field of payment services.

The first session closed with the presentation of Maria Cecilia Paglietti (Roma Tre University), analysing whether the rules governing the allocation of legal responsibility in the event of unauthorized payment transactions need regulatory changes, in order to better ensure consumer protection and consistency. Continuing market developments have led to new payment methods, new security risks for electronic payments and new political trends. Any attempt to create consistency in application and enforcement of relevant provisions should take into account the risks of forum shopping, regulatory uncertainty, and alteration of the level playing field. It would be possible to ensure an appropriate level of consumer protection and consistency in the application of relevant rules not only by regulatory means, but also resorting to interpretative instruments, namely: (i) a proper reconstruction of the relationship between special supranational rules and general domestic private law and (ii) an open texture nature of PSD2. In relation to the first point above, a fundamental rule under PSD2 to be considered is the one stating that financial institutions shall bear payment losses unless such losses are caused by consumers' gross negligence or fraud. In this regard, the European Court of Justice recently took the chance to clarify that the subject matter of payment losses is regulated exhaustively by the PDS2, rejecting the continued application of domestic regulatory additions of general private law.[16] Such ruling of the European Court of Justice guarantees a high degree of harmonisation. In relation to the open texture nature of PSD2 (ie, the co-presence of general clauses and specific rules), it would be fair to say that, on the one hand, this approach makes it possible to regulate a large number of cases, gives the legal framework flexibility, allows the prevention of obsolescence and grants the setting of different levels of protection and liability based on the user's particular degree of vulnerability; but on the other hand, it

[16] C-337/20 *DM and LR v Caisse régionale de Crédit agricole mutuel (CRCAM) – Alpes-Provence* [2021] Court reports – general.

broadens the margins of discretion of the judge and therefore the risk of arbitrary choices. In this framework, the definition of gross negligence is decisive, since if the customer is grossly negligent, the financial loss is shifted from the financial institution. Under Recital 72 of PSD2, gross negligence is defined as a 'conduct exhibiting a significant degree of carelessness' (like, for example, 'keeping the credentials used to authorise a payment transaction beside the payment instrument in a format that is open and easily detectable by third parties'). In addition, Recital 72 also states that in assessing gross negligence on the part of the payment service user, account should be taken of all of the relevant circumstances. The concept of gross negligent adopted by Member States does not really differ, as it is commonly intended to be 'a higher standard than the standard of negligence, so more than just carelessness'.[17] Moreover, gross negligence is generally excluded in cases of sophisticated frauds.[18] In conclusion, instead of changing completely the relevant legal framework, it would be advisable to maintain level 1 legislation[19] as it is, while level 2 legislation[20] might be used to clarify the concept of gross negligence, explicitly mentioning examples of behaviour that constitute gross negligence.

The second session of the conference was chaired by Concetta Brescia Morra (Roma Tre University) and was named '*The Micro level*: The Impact of Financial and Digital Asymmetries'. Dirk Haubrich (European Banking Authority) opened the session with a speech about the contribution of the EBA to a consistent interpretation of PSD2 and to an improved PSD3. The panellist argued that on the one hand PSD2 has created a positive ground-breaking effect in the payment services sector, but on the other hand it also generated competing demands, requiring the EBA to make difficult trade-offs. PSD2 brought about an enhancement in competition, since hundreds of electronic money institutions, payment institutions and banks are now authorised to provide payment initiation services and account information service in the EU. Enhanced

[17] Cour de Cassation 1st July 2020, 18-21487; Cass. civ., 19 November 2001, n. 14456; ABF, n. 540/2023.

[18] Gross negligence cannot be attributed to the customer due to the insidiousness of the means of attack.

[19] Ie, the directive and the relevant national transposing legislation.

[20] Ie, regulatory acts of the regulatory agencies.

payment security and consumer protection were also further benefits of the directive. As a matter of facts, a study of 2020 data demonstrates a high reduction of fraud related to card payments, and 2021 and 2022 data are supposed to result in similar, if not better, figures. The directive is also believed to have facilitated innovation and promoted customer convenience, providing a wider and increasingly consumer-friendly choice of different payment options. Against this background, the European Banking Authority secured the transparency of electronic money institutions and payment institutions activities and improved the level-playing field across different types of payment service providers. In addition, EBA made efforts ensuring technological neutrality and contributing to a single payment market in the European Union. Bearing in mind the pros and cons of PSD2's experience, in June 2022, the EBA submitted to the European Commission its recommendations on what ought to be improved under PSD3. In this regard, EBA remarked that less tech-savvy groups of the society have been excluded from electronic transactions due to banks imposing smartphone-based authentication solutions on their customers; therefore, the EBA suggested that PSD3 imposes a requirement for banks to duly consider the needs of all their customers when designing their authentication solutions, in order to allow consumers to execute electronic payment transactions without having to rely on smartphones or similar technological devices, and at no additional cost for the consumer. Finally, the EBA suggested giving specific bodies the powers to get the industry to comply with PSD3's legal requirements.

The second panellist of the second session was Marta Bozina (Juraj Dobrila University of Pula), who carried out a comparative analysis of PSD2 and the Market in Crypto-assets Regulation (MiCAR).[21] Technological advancements add value to payment products and services, but they also increase their riskiness. Such riskiness arises from new types of asymmetries in digitalized payments. The term 'asymmetry' can describe various security risks connected with the ascent of disruptive technologies in payments, as well as related conceptual ambiguities or regulatory gaps. Legislation should identify new asymmetries and provide appropriate solutions. PSD2 harness

[21] Proposal for a Regulation of The European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937, COM/2020/593 final.

asymmetries arising from the increasing use of third parties in payments execution. Indeed, the directive contributed to the creation of a level playing field for payment services providers in the digital age, fostered security of digital payments and prevented the misuse of consumer data. However, market and technology continued to develop alongside PSD2 implementation and new asymmetries emerged. A crucial example is the rise of crypto assets, which are backed by cryptography and distributed ledger technologies, not issued or guaranteed by a public authority and exploitable in various economic functions. In the EU, crypto assets are mainly regulated by MiCAR.[22] PSD2 and MiCAR promote similar goals, as they both aim at establishing a bespoke legal basis for new players in the market,[23] setting up a pro-competitive approach[24] and boosting consumer confidence and market integrity.[25] However, PSD2 and MiCAR overlap marginally (i) when considering 'funds' and (ii) when addressing the legislative treatment of new players in the market, specifically crypto assets service providers (CASPs). In relation to the first point above, it is worth noting that the EBA warned about new formats of crypto assets which broadly correspond with the definition of e-money provided by the Second Electronic Money Directive (EMD2).[26] If a company executed 'payment services' with a crypto asset that qualifies as e-money using distributed ledgers technology, such activity would fall within the scope of the PSD2 by virtue of being 'funds'. Such a situation would bring about an incoherent definition of crypto assets as funds,[27] which would result problematic especially in respect of asset-referenced tokens (ARTs) and e-money tokens (EMTs). Payment appeal of ARTs and

[22] MiCAR is one of the operational pillars of the Digital Finance Package and provides a far-reaching legislative framework for crypto assets, crypto asset issuers and crypto asset service providers (CASPs) operating within the EU.

[23] PSD2, Recitals, p. 6; MiCAR, Recitals, p. 1.

[24] PSD2, Recitals, p. 67; MiCAR, Recitals, p. 5.

[25] PSD2, Recitals, pp. 4-6; MiCAR, Recitals, p. 5.

[26] Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC [2009] OJ L 267.

[27] T van der Linden and T Shirazi, 'Markets in Crypto-Assets Regulation: Does It Provide Legal Certainty and Increase Adoption of Crypto-Assets?' (2023) 9 Financial Innovation 11.

EMTs will depend on stabilization mechanisms;[28] but still, a better coordination between PSD2 and MiCAR in the definition of 'funds' would be necessary. Furthermore, moving to the analysis of the asymmetries stemming from CASPs' legislative treatment, if a CASP contracts with a payee to accept crypto assets (other than EMTs), it should abide with the same rules on consumer protection as those envisaged under the PSD2 for payment service providers. However, PSD2 and MiCAR provisions on consumer protection are not superimposable. Therefore, it would be necessary either to authorize the CASP under the PSD2 regime, or to designate a PSD2-authorized payment service provider. In addition, a clarification regarding the nature of CASPs' business would also be required.[29] In light of the above, it would be fair to say that a closer coordination between PSD2 and the MiCAR would be convenient.

The speech of Alberto Pozzolo (Roma Tre University) centered on the concept of open banking, which can be defined as a special kind of financial ecosystem governed by certain security profiles, application interfaces, and guidelines with the objective of improving customer choices and experiences.[30] Traditionally, most of financial transactions and underlying payments are intermediated by banks. Such banking transactions produce information which is: (i) valuable to the intermediary bank and (ii) owned only by the bank that records it, not by the customer that produces it. Open banking, on the contrary, is based on opening the access to information otherwise captive in a bilateral relationship between a bank and a customer and aims at creating a market for customers' data obtained from payment information. This scenario would be feasible if all the payment operators, through software rules and programs that facilitate the interaction between different computer systems, have access to the information that the payer agreed to share. In the EU, the starting point for open banking was the approval in 2015 of PSD2, requiring that financial institutions open up they data to account service information providers, payment initiation service

[28] G Gimigliano, 'Payment Tokens and the Path Toward MiCA' (2022) 8(1) The Italian Law Journal 367.

[29] European Commission, 'A Study on the Application and Impact of Directive (EU) 2015/2366 on Payment Services (PSD2)' (2021) FISMA/2021/OP/0002 181.

[30] Further information on the subject is accessible online at 'European Economy – Banks, Regulation, and the Real Sector' <https://european-economy.eu/> accessed 16 June 2023.

providers and card-based payment instrument issuers. The rationale was to enhance competition, favor financial inclusion, and foster innovation. The impact of open banking will depend on how information will be spread and used. On the supply side, customers are likely to open information to a small number of counterparts of their choice. Instead, on the demand side, third parties will join open banking mainly if they have some way of preserving at least part of the value of the information they own. The long-run effects of open banking are challenging to predict, but regulation must play a key role, as proactive regulation will be crucial to avoid a scenario of late interventions.

Gabriella Gimigliano (University of Siena) gave an effective overview of provisional payment service from consumers' perspective. The three guidelines of the analysis were the concepts of (i) consumer, (ii) payment service and (iii) vulnerable consumer. A consumer is an individual acting for purposes which are outside his trade, business and profession. A systemic interpretation of PSD2 allows to define payment services as any transfer of funds and transaction data. The concept of vulnerable consumers, instead, can be inferred by the combined interpretation of the Unfair Commercial Practices Directive (UCPD)[31] and the Payment Account Directive (PAD).[32] Under the UCPD, an unfair commercial practice is any conduct that materially distorts the economic behaviour and is contrary to professional diligence. Traders are required to avoid carrying out such practices against consumers. In addition, the PAD provides that: all consumers are entitled to hold a payment account, no discrimination against consumer is permitted and only credit institutions are allowed to provide such service to consumers. The combined interpretation of UCPD and PAD reveals that EU policymakers are familiar with the concept of consumers' vulnerability. Therefore, not mentioning vulnerability in the PSD2 appears as a clear policy-making choice. However, according to the speaker, not mentioning consumer's vulnerability in PSD3 would not

[31] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L 149.

[32] Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features [2014] OJ L 257.

be the best approach. Firstly, because money cannot be seen as a passive technical instrument of the market, but it is instead an active institution in human societies that is socially and historically constructed, which can establish comparative values in a range of circumstances – social, political and economic.[33] Moreover, the concept of 'monetary policy' is not limited to its operational implementation, but it also entails a regulatory dimension, intended to guarantee the status of the euro as the single currency.[34] Therefore, clear and comprehensible information on the right to open and use a payment account with basic features should be provided by Member States and credit institutions to consumers. Member States should ensure that communication measures are well-targeted and capable of reaching out to unbanked, vulnerable and mobile consumers. Credit institutions should actively make available to consumers accessible information and adequate assistance about the specific features of the payment account with basic features on offer, their associated fees and their conditions of use.

Stefaan Voet (University of Leuven) closed the second session with a speech dealing with the remedies available to achieve enforcement of the PSD2 provisions, namely: court enforcement, alternative dispute resolution (ADR) and public enforcement. Consumers' right to seek for court enforcement is contained in many provisions of the PSD 2 and specifically: Recital 98,[35] Recital 100,[36] Art. 25,[37] Art. 52[38] and Art. 99.[39] Moreover, in relation of court enforcement, relevant provisions are enclosed also

[33] M Mellor, 'Democratizing Finance or Democratizing Money?' (2019) 47 Politics & Society 635.

[34] Cases C-422/19 and C-423/19, *Johannes Dietrich and Norbert Häring v Hessischer Rundfunk* [2021] Court reports – general.

[35] 'Without prejudice to the right of customers to bring action in the courts […]'.

[36] 'Without prejudice to the right to bring action in the courts to ensure compliance with this Directive […]'.

[37] 'Member States shall ensure that decisions taken by the competent authorities in respect of a payment institution pursuant to the laws, regulations and administrative provisions adopted in accordance with this Directive may be contested before the courts'.

[38] 'Member States shall ensure that the following information and conditions are provided to the payment service user: […] 7. on redress: (a) any contractual clause on the law applicable to the framework contract and/or the competent courts'.

[39] 'Where appropriate and without prejudice to the right to bring proceedings before a court in accordance with national procedural law, […]'.

within Directive 2020/1828 on representative actions for the protection of the collective interests of consumers. According to this directive, in case of a violation of PSD2 provisions, consumers will have right to a collective action. The entities designated by law to pursue collective actions on behalf of consumers are specific qualified entities, ie any organisation or public body representing consumers' interests which has been designated by a Member State as qualified to file collective actions. Representative actions may be both domestic – if the representative action is brought by a qualified entity in the Member State in which the qualified entity is designated – and cross border – if the representative action is brought by a qualified entity in a Member State other than the one where the qualified entity is designated. An alternative to court enforcement is ADR, which is specifically envisaged by Chapter 6 'ADR procedures for the settlement of disputes', Recital 98[40] and Art. 102[41] of the PDS2.[42] Finally, consumers may resort to public enforcement. In this scenario, it is necessary to analyse the concept of regulatory redness, ie, the outcome of redress being paid as a result of the intervention of a public authority. According to the speaker, it would be necessary to introduce fair procedural rules, predictable and transparent process, ministerial and stakeholder oversight, possibility for courts to impose more serious sanctions, and a mechanism for appeals.

The concluding remarks of the conference were entrusted to Mads Andenas (University of Oslo), who reviewed and analyzed the main issues that emerged during the two sessions of the conference. First, the speaker stressed out the fact that, in the digital payment system, financial data collected by payment operators are becoming an asset of particular interest, which the European legislator ought to regulate appropriately. Furthermore, taking due account of the typically transnational nature of the payments sector and the need to effectively protect consumers operating in the single European market, it would be advisable to avoid an excessively fragmented regulatory regime and

[40] '[…] Member States should ensure effective ADR procedure […]'.

[41] Which makes explicit reference to the Directive 2013/11/EU on alternative dispute resolution for consumer disputes.

[42] For further information on the matter, see S Voet and others, 'Recommendation from the academic research regarding future needs of the EU framework of the consumer Alternative Dispute Resolution' (ADR) (JUST/2020/CONS/FW/CO03/0196).

an ineffective enforcement mechanism. The speaker also underlined the importance of correctly addressing the new systemic risks stemming from recent technological developments that have affected the digital payments sector, such as, the growing importance of the role played by digital currencies in recent years.

SIRIO ZOLEA[*]

MAKING THE MANIFOLD: PRIVATE LAW TO THE TEST OF THE COMMONS IN A BOOK BY M. SPANÒ

Michele Spanò's recent book is destined to be discussed within the whole academic community and in the general debate in the country.[1] For this reason, and for its intrinsic merits of accuracy of the analysis, originality of the reasonings, and evocativeness of the terminology used, it undoubtedly deserves to be reviewed. This is why it is a real honor for the reviewer to perform such a challenging task.

This book has the important merit of returning to the topic of the commons in the legal field, which had been a hot topic within the Italian (and international) doctrine of economic, social and legal sciences a few years ago, especially in the aftermath of the Global Financial Crisis started in 2007. The new global crises due to the consequences of the pandemic and the Russian-Ukrainian conflict, perhaps for their different intrinsic nature, have not yet solicited the same abundancy of reflections from authors of juridical fields. For this reason, it is particularly relevant to read now – and to analyze from the perspective of a reader concerned by the difficult context of this moment of history – the most recent attempt to update and develop the legal doctrine of the commons, through the publication in 2022 of *Making the Manifold*.

It is however necessary to specify that this book collects a series of essays written during the long period 2013-2021, clearly because the author evaluates them as topical and suited to communicate something to today's reader as well. Thus, they have resisted the past of time, which, nowadays, perversely tends to make obsolete even the article written the day before. For this reason, in our times, the rare ability of Spanò to write beyond the contingent makes his doctrinal work particularly remarkable.

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[1] M Spanò, *Fare il molteplice: il diritto privato alla prova del comune* (Rosenberg & Sellier 2022).

The book is composed by an introduction and seven essays, united by the thread of the commons as paradigm of reconstruction and reassembly of the legal order after its crises. The work is characterized by interdisciplinarity, as this thread crosses essays focused on diverse legal disciplines: philosophy of law, history of law, general theory of law, and transversely in relation to the traditional bipartition between public law and private law, which is openly questioned and challenged by the author.

After an introduction aimed at explaining the thread and the main goal of the book, the attempt to legally establish the commons, overcoming the centrality of the subjective right in the system of private law, the seven essays/chapters develop this idea in different thematic fields and in different directions.

Chapter 1 is specifically dedicated to the aim of establishing the commons in a philosophical and legal perspective. Developing and paying homage to the vision of Yan Thomas, historian of Roman law, this essay analyses the crisis of the traditional forms of mediation and representation and promotes the disruptive role of the commons, as a form of critique of property and as a *tertium genus* beyond private and public property and, more generally, beyond the classical bipartition of private and public law. Following the path of Yan Thomas, the author rediscovers how the commons had already been conceived in Roman Law and had not only characterized the legal orders of the Middle Age. The field of procedure, with particular reference to the expansionary vocation of the class action, more than the field of substantive law, is interpreted and proposed to the reader as a suitable context where the rationale of the commons can be successfully developed.

Chapter 2 develops this latter consideration, taking cues from the reflection of Sir Henry Maine that substantive law is secreted in the interstice of procedure, and sketching more in details Spanò's vision of the remedies as stronghold for the commons and against the pernicious hegemony of the subjective right. The role of the commons as a hinge between substantive law and procedure is emphasized. The inspirational intellectual debate of German (Bernhard Windscheid, Theodor Muther) and Italian authors (Giovanni Pugliese) is retraced, in order to investigate the theoretical relationship between action and substantive right. According to the vision of the author, remedies, unlike subjective rights, do not pre-exist the interests punctually and

specifically generating them and thus are not built abutting a predetermined entity, but they reflect the mutability of the needs of a society increasingly embracing the commons.

Chapter 3 concerns the cooperative character of private law and, to this end, it critically develops some insights from Emilio Betti's thought. The sequency private autonomy-*negozio giuridico (Rechtsgeschäft)*-contract, placed at the basis of the system of private law and backed by the public support of the state machinery, is criticized as overcome by the processes of socialization of work and by the increased social cooperation. The aim of the author is to find – on the horizontal level of the relations between private individuals – the regulatory arrangements that might serve as means of social cooperation alternative to the public dimension. The alleged associations, traditionally believed, between sociality and economic exchange and between public and universal are both criticized, in favor of forms of normativity that are developed in an extra-state reconstruction of civil law, by following policies that focus on the needs. In other words, the intuition and the aim of the author are to make private autonomy more socially cooperative and to open the legal order to this conception of private autonomy.

Chapter 4 is devoted to the idea of a role of private law as an infrastructure for the commons. Once again beyond the dichotomy private-public, there is a close proximity between private law and the spontaneous cooperative vocation characterizing the dimension of the commons. Both private law and policy should be freed from the pollution of the sovereign prejudice, through the development of a renewed role of the legal phenomenon as a mediation without representation that goes directly to the heart of social relations, where the social players are directly the genuine protagonists.

Chapter 5 focuses more in depth on the already mentioned class action, in a time of 'tortification' of private law and of sunset of subjective right. This chapter is another time on the trail of Yan Thomas: his interpretation of the concept of city is an interesting model of collective entity in the Ancient Rome, which disregards the modern conception of representation as personification of the collectivity and prefers a procedural approach (quasi-representation). Nowadays, the spread of the class action is evoked by Spanò as a disruptive element of subversion of subjective right and full politicization of the procedure. The rights and needs of a 'class' are not private nor public, but common to many people and to each member of the group. They are not

individual nor general and they do not preexist the event that makes them arise, giving birth to the class itself. A class is a collectivity of adjectives without a determined subject. Each member of the class, similarly to what happened for the roman city, can express the collective dimension without a mechanism of representation, but through a form of quasi-representation that fits with the shifting figures of contemporary society: users and consumers.

Chapter 6 extends the logic of the commons to the private institutions. Concepts such as autonomy, relationships, and cooperation are reinterpreted developing the deconstruction of the subjective right as a legal expression of a capitalist market economy. The author criticizes the bourgeois kind of relationship between political power, conceived under the banner of sovereignty, and the dimension of the sociality, of the civil society, misleadingly identified with the economic exchange. Such an ideological attempt to reconcile reason and will attests to the connection between the form of the subjective right and the economic substance of a capitalist market economy. The current of thought of institutionalism, internally very diverse (Santi Romano, Maurice Hauriou, Widar Cesarini Sforza, etc.), was born as a response to the crisis of the bourgeois theory of law, conceived as a system of relationships, and these authors affirmed, in different ways, that law is the organizing principle of groups. Taking inspirations from them, Spanò extols cooperation as a source of both economic value and legal power, while legal relationships are to be fully exposed in their social dimension and mutualism is to be generalized in the multiple fields of the collective, the manifold and the common.

Chapter 7, finally, represents, in the logic of the book, the last step in order to go beyond the subjective right and the opposition public law (sovereignty, generality, equality)/private law (property, particularity, difference). Freed from this compression, private law would lose its rivalry with the collective, the manifold and the common, allowing to (re-)discover its real non-patrimonial cooperative vocation, and public law would be freed from the idea of sovereignty. To enable this path, it is essential to develop the logic of trans-subjective rights, which express the manifold without the need of a reference entity, a totality, a unity. In this way, law can fully provide the social infrastructure and can fill the collectivity with a normative equipment.

All the mentioned essays, in their succession and reciprocal links, provide not

scattered cues, but a systematic reflection which combines re-elaborations of distinguished authors of the past, reflections on history of law and analyses of the contemporary tendencies of the legal order, all matched to support an enterprising fundamental thesis, always thoroughly argued – whether or not one shares it. Some recurring themes characterize the entire work: searching for the roots of the culture of the commons in the legal configurations of the past; overcoming the opposition between public and private; unraveling the link between subjective right and capitalist market economy; investigating, with particular reference to the potential of the class action, the flexibility of the field of the procedure as a development ground for the legal culture of the commons; the centrality of social cooperation and its vocation for an autonomous development in private law without the need for public sector intervention; the will to free the legal system from the encumbrance of sovereignty; and, above all, summarizing it all, the role of the commons as a potential reconstructive paradigm of the legal order after its crisis. The cooperative nature of private law and its intrinsic openness to the collective dimension make it possible an evolution of its focus from the level of the property and of the economic exchange to the level of the manifold and of the commons.

The intuition of the manifold, according to the author, has always been present in the Western legal tradition since its Roman roots. Artificially removed from the bourgeoise thought, in an attempt to tailor the legal system to the emerging market economy, the dimension of the commons remained dormant until such contradiction has become blatant. Already some authors of the 20th century, particularly those associated with the current of thought of institutionalism, had proposed critical insights that had made the system creak. After World War II, limitations and restrictions to private autonomy originated from the Constitution and attributed to the intervention of the state, together with the theory of functionalization of contract (Stefano Rodotà, in particular), have exacerbated the crisis of the contract hegemony within the legal order. Nowadays, in Spanò's thought, the development of productive forces in the direction of their socialization and the valorization processes do not seek to – and can no longer – express themselves in the ability to mediate of the state. This is why, following the last phase of re-expansion of the market logic, the need for social and collective expresses itself in new ways, more immediate, requiring and stimulating the direct horizontal cooperation among private individuals, testing and discovering new

forms of private autonomy. The protagonist of this innovative legal conception is a new kind of individual, a 'social individual', whose anthropologic model is much far away from the Robinsonian, capitalist model, and who implies the presence of a collective subject and of a social ground for subjective situations. The spread, in the legal field, of trans-subjective rights and the successful development of new sectors such as labor law, family law, environmental law, consumer law, etc., permit new approaches, according to which the real interests and needs distribute *a posteriori* the rights that will enable the subjects to act and claim, and not the other way around.

The two levels of being and ought to be, of what exists and what, according to Spanò's view, should hopefully happen, are closely intertwined in the book, to the point that, in some passages, the reader may find himself uncertain wondering on which of them is actually placed. In other words, the author argues that the evolutionary trend of contemporary law (where, precisely? It is the first question the legal comparatist would be inclined to ask to circumscribe the discourse) is towards a generalization and a spread of the paradigm of the commons in the whole legal order, and, at the same time, that such tendency is desirable and should be supported (by whom, precisely? It is the first question the political scientist would be inclined to ask to circumscribe the terms of the conflict prefigured). It might be observed that the 'optimism of the will', in the book, prevails on the 'pessimism of the intellect'. Maybe a breath of optimism cannot hurt in distressing times such as the ones we are experiencing.

An important merit of the book is the ability to reveal many mystifications and contradictions in the bourgeois traditional conception of the legal order, taking ideas from the reflections of Italian and international thinkers of the last century and linking them in new chains of association to bring out the full critical potential of their analyses. Of course, Spanò is not just the collector of precedent elaborations, but these serve to shore his original reasoning, focused on the legal system of nowadays and aiming to find evolutionary answers and ways out in the face of the crisis of legitimacy that is going out not only through the legal sphere, but through the whole society. In order to understand the reason why authors like Spanò spend their admirable efforts in trying to overcome the risk of a stalemate in legal thinking in the face of the problems and threats of our time, it is paramount to recognize the general character – 'organic' character, if we want to use the Gramscian terminology – of such crisis. The

fundamental political and economic choices made since the 80s, at the time of the neoliberal wave, have fundamentally moved social wealth and social power from the wages to the profits, breaking the Keynesian economic compromise and the constitutional legal and social compromise that had been inaugurated in the post-war period. The failure of such compromises to resist as a barrier to this wave and the resulting change in mentality are perhaps the reasons why some of the authors who believe in strengthening the collective dimension in society are today trying to seek out new roads towards this direction, which are not anymore focused on the intervention of the state. It is to be hoped that these new roads are susceptible to be traced deep enough to get somewhere and not to get lost in the desert.

The crisis, which Spanò commendably investigates in his book, and for which he proposes his solution, is today aggravated by the consequences of globalization and of computer revolution, which exacerbate some economic inequalities (at both the domestic and the international level) and dangerously reshape societies apart from the representative democratic circuit. The distrust for representation seems to have been somehow embraced by Spanò. However, one might wonder whether this trend, today, is likely to really benefit mostly the big businesses, which are able to move very well on the opaque terrains of the soft law and of the global governance. In spite of the original promises of democracy and horizontality, the computer revolution has intensified the thrust towards the cul-de-sac of liquid society[2] – and, consequently, of liquid law. It is an alienating and dehumanizing model of society (and law), where all the stable benchmarks and values (starting with the work sphere), all the identities (starting with the class identity), all the previously hard-won collective rights implemented by the state (starting with protection from arbitrary dismissal and continuing with good public health and instruction, wages and pensions sufficient for a decent living, etc.) are erased in the name of the figure of a 'fluid' individual. Such an attempt to dissolve all the forms of collective representation, all the classes identities, all the intermediate bodies, potential sources of successful social conflicts, and to replace them with the fragile, harmless, scattered roles of users and consumers – living an ephemeral eternal present studded with uncertainties and fears – benevolently protected by legal rules written in the interest of market competition, is a tendency arranged, supported and favorized by the

[2] As dramatically depicted by Zygmunt Bauman in many of his works.

transnational capitalist class to remove any opposition and resistance to its hegemony.

Spanò's proposal seems to imply the suggestion to the subordinate classes – as it is unreasonable to expect that the push toward the manifold and the commons should come from those who already have everything – to finish absorbing and accepting the logic and the values of the liquid society and to try to exercise a counter-hegemony on that ground. However, one might wonder how to successfully realize it on a ground where the power relations are so favorable for a few oligopolists, and the majority of exploited people have apparently no means to organize themselves into a stable project of transformation of society. The question is why – *a fortiori*, in the midst of historical events (pandemic, geopolitical tensions) that, directly or indirectly, tend to put the state back at the center – the subordinate classes should renounce the struggle to preserve and re-enlarge the public dimension of the constitutional social compromise and should invest forces on a different ground where the preponderance of the opponent appears overwhelming.

The work of Spanò stands out for brave critical thinking, which is very important in a historical moment of widespread torpor of consciences. Despite the inputs of legal realism and critical legal studies, even now many legal reflections tend to considerate legal institutions regardless of historical and productive processes, as if they were 'pure' ideas of the human mind. Therefore, any contribution that takes on the more challenging, more complex, but more fecund task of digging deep should be received by the scientific community with the utmost regard. A full understanding of how legal institutions and the traditional structure of the legal order are tailored to satisfy the will of the economical ruling class is the necessary ground, for lawyers, to try to contribute to any effort aiming to use those institutions in an alternative way or, more radically, to replace them with others. The reflection of Spanò seems to prefer the first of these two roads, wishing that private law might open up to the manifold and to the commons, and consequently to the social and collective values, through a more flexible procedural and remedial approach. It remains to be understood why, flexible or not, the procedure should be able to express a balance of power relations in society other than that expressed in substantive law. Instead, the flexibility of the procedure and of the remedies has often been used by the fundamentally marked-oriented European lawmaker to introduce legal accommodations which bypass and outdo the more social-oriented national legal orders

inspired to the paradigm of people's constitutional democratic sovereignty.

What is somehow striking, in its radicality, is the choice of the author to refuse the public dimension, in favor of the dimension of the common, as the main (perhaps, it might seem, the only) bastion, in our times, of collective interest. According to the opinion of the writer of this review, there are some perplexities on such a choice, in a historical perspective, in the perspective of the analysis of the tendencies of the current legal orders (*de iure condito*, we might say) and in a perspective of suggestions for a hopeful evolution of the legal orders (*de iure condendo*).

From a historical point of view, a thing that an attentive reader might notice, in Spanò's reconstruction, is the choice – not completely explicable by the brevity of the book – to speak about the evolution of the legal thought on the collective dimension regardless of the experiences of the October Revolution and its long wave, real socialism in Europe and Asia. Many economic and legal orders, in Europe, during their socialist period, have much variously combined the public (centralized planned economy) and the common (soviet, kolkhoz, cooperative run enterprises, etc.), with multiple combinations depending on the place and time. Is it possible to speak about the path of the collective dimension in law prescinding from the historical legal experience of the collectivization of the economy? From the consequences that the fact of the collectivization ongoing in the East had on the expectations of the working classes and on the fears of the ruling classes in the West? And from the consequences that the collapse of the first and (at that time) main socialist experience, the Soviet Union, had on the fears of the working classes and on the expectations of the ruling classes in the west? In some passages, avoiding hints on such issues risks making the description of the complex path of legal thought seem an abstract succession of idealities, in spite of the general approach of the book of paying attention to the historical and productive processes.

While analyzing the existing situation and its structural trends, Spanò not only wishes, but he fundamentally declares already in place an evolution of the mode of production and of the legal systems towards the commons. On the point of this alleged evolution of the legal culture (in which legal orders, specifically?), a legal realist might wonder where its clues and traces are to be found in lawmaking, in the case law and in the practice of law. The examples provided in the book are not many and, although fascinating, they hardly appear amenable to generalizations beyond the specific areas to

which they refer. The example with the most potentially disruptive scope, the class action, seems to have many difficulties in gaining a foothold in our system. Furthermore, its long-standing popularity in the United States of America seems to have failed to make this country a bastion of the collective in the legal comparative landscape. If we look at the legal consequences of the pandemic crisis in Europe,[3] we can actually find several examples of how ideas such as social function and solidarity,[4] in a phase of emergency, have strongly re-entered private law systems in a way not seen in a long time, with effectively cross-cutting approaches between private and public segments of regulation (landlord-tenant law, labor law, contract law in general, social law, procedure law in all the fields, etc.): but this seems to have occurred rather through vertical authoritative interventions of the public authorities, recovering their missed sovereign functions and attitudes, than through horizontal forms of cooperation and self-organization of a civil society to the rediscovery of the collective interest within its own spaces of autonomy. Lastly, even if we look outside the West, for example at contemporary experiences of Asian socialism (China, Vietnam, etc.), the path of market socialism requires to these lawmakers mostly an effort to carefully balance industrial and other development-oriented state-led policies with relatively automatic market mechanisms working in a quasi-by-default manner,[5] in other words to balance the private and the public dimension, without a fundamental role for the commons in representing collective interests.

Finally, *de iure condendo*, moving from the interpretation of the world to the will to change it, there is definitely room for the greatest variety of points of view,

[3] See, eg, the special issues of the journal GiustiziaCivile.com on the law during the pandemic: *Speciale emergenza Covid-19* (2020) <https://giustiziacivile.com/editoriali/speciale-emergenza-covid-19> accessed 16 June 2023; E Calzolaio, M Meccarelli and S Pollastrelli (eds), *Il diritto nella pandemia. Temi, problemi, domande* (EUM 2020); *COVID-19 et droit des affaires* (2020) Dalloz; E Hondius and others (eds), *Coronavirus and the Law in Europe* (Intersentia 2021).

[4] See F Macario, 'Per un diritto dei contratti più solidale in epoca di "coronavirus"' (2020) 3 GiustiziaCivile.com <https://giustiziacivile.com/obbligazioni-e-contratti/editoriali/un-diritto-dei-contratti-piu-solidale-epoca-di-coronavirus> accessed 16 June 2023.

[5] See A Gabriele, *Enterprises, Industry and Innovation in the People's Republic of China: Questioning Socialism from Deng to the Trade and Tech War* (Springer 2020).

interestingly fueling the debate of scholars and citizens in general. Could, in the years to come, the dimension of the commons become – as it had perhaps been the case at the time of the enclosures – the focus of the class struggle, in economy, society and law, superseding the today still fundamental dialectic between public and private? Would this be advantageous for the social development of humanity? Is there relevant room for the commons in a world where the transnational capital is more and more characterized by the oligopoly of a few big companies, with new possibilities, through the digital platforms, to influence the common sense in a dangerously totalitarian way? Is no longer – in a time when unipolarism in international relations is crumbling and neoliberal ideology has shown its weaknesses – people's constitutional democratic sovereignty the fundamental claim for the subordinate class in response to such an economic transnational concentration? Should not the subordinate classes still claim more welfare state and more public intervention in economy, to realize social equality and solidarity? In a period of dispersion of intermediate bodies, should the workers and the subordinate classes in general accept a condition of precariousness, instead of seeking new ways to form again intermediate bodies and to claim the stability of the rights which is necessary to live with dignity? Only time can really give answers.

Conclusively, the book of Michele Spanò is a book which deserves large circulation because of its sharp critical thought. It is a book which should be read and commented, in its multiple facets, not only by specialists of philosophy of law, but by the whole communities of legal, political and social scholars and public administrators, who can all find in it many inspiring cues.

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