TEORIA E CRITICA DELLA REGOLAZIONE SOCIALE 2/2017

Questo numero della rivista dà conto del dibattito sui rapporti tra Law and Humanities e metodologia clinica, promosso in collaborazione con la *Italian Society for Law and Literature* (ISLL), in occasione del Convegno mondiale dell'*International Association for the Philosophy of Law and Social Philosophy* (IVR), svoltosi a Lisbona nel 2017. Trovando una radice filosofica comune nel realismo americano e nel conseguente allontanamento dal dogmatismo e dal formalismo tipici del 1900, *Law & Humanities e Legal Clinics* condividono ideali e fini comuni. Essi tuttavia sono distanti nei metodi. Lo scopo del workshop, i cui atti sono raccolti in questo volume, era di riscoprire sinergie tra i due movimenti gettando un ponte tra teoria e pratica. Nel far ciò, esso ha voluto richiamare l'attenzione sulla specificità del dibattito che va sviluppandosi in Europa, e in particolare in Italia, sul tema delle cliniche legali.

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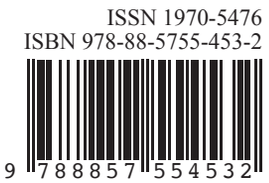

TCRS 2/2017

HUMANITIES E CLINICHE LEGALI / HUMANITIES AND LEGAL CLINICS

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HUMANITIES E CLINICHE LEGALI
DIRITTO E METODOLOGIA UMANISTICA

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HUMANITIES AND LEGAL CLINICS
LAW AND HUMANISTIC METHODOLOGY

A CURA DI FLORA DI DONATO E PAOLO HERITIER

MIMESIS / TEORIA E CRITICA DELLA REGOLAZIONE SOCIALE

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Teoria e Critica della Regolazione Sociale

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Humanities and Legal Clinics. Law and Humanistic Methodology

A cura di
Flora Di Donato e Paolo Heritier

Con il sostegno dell'Associazione Polis all'attività del Centro Studi di Teoria e Critica della Regolazione Sociale

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Recensioni

Flora Di Donato[1]

How to Increase the Role of Vulnerable People in Legal Discourse? Possible Answers from Law & Humanities and Legal Clinics: Teaching Experiences from Italy & from Switzerland.

1. Origins and Evolution of the Clinical Law Approach

The clinical law approach started in USA around 1930. In response to the Langdell *case method* (1871) that consisted of learning law through the study of selected cases (*law in books*), Jerome Frank, who along Karl Llewellyn (1930) was at the forefront of the Legal Realist movement, pleaded for clinical legal education, in order to give law students the opportunity "to see legal operations" (1932-1933, p. 916) and teach them "the human side of the administration of justice" (ibid., p. 918). Related to this, there was another aim: to make justice accessible to all people, particularly the most marginalized (Bradway, 1934). In particular Frank, being hostile to dogmatism and conscious that "trial court's facts are not 'data' […] are, so to speak, 'made' by it" (1950, pp. 23-24), was at the origin of a "constructive skepticism" in fact-finding. With the aim of throwing light on certain critical passages in the process of ascertaining facts, he advocated for an accurate factual investigation rooted in social science methods, bringing together the generalities of the law, interpretive frameworks and social and individual representations, so as to contextualise and analyse law in action, i.e. the law that is created by the activity of judges, of attorneys etc. (Frank, 1930; 1947; 1948). "The law student – wrote Frank – should be taught to see the interactions of the conduct of the society and the works of the courts and lawyers" (Frank 1950, ibid., p. 921). In fact, according to Frank, the case-method which up until then had been interpreted by Langdell mainly as a study of precedents, should not only be based on the study of judicial decisions but of all the documents of the trial, from the compilation of the first paper to the application made to the upper court (ibid., p. 916)[2]. The desired outcome of this model of education was to have students trained not as "mere technicians" but people consciousness "of the possible values of a rich and well-rounded culture in the practice of law" as "the practice of law and the deciding of cases constitute not sciences but arts – the art of the lawyer and the art of the judge" (ibid., p. 923)[3].

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2 On this methodology, see also Bradway (1958).

3 See also Frank, 1948.

Frank's first exposition of a modern concept of legal education will lead the way to not only to the subsequent developments of the clinical law approach but in some sense also to the artistic turn in legal scholarship and in particular *the Law and Literature Movement* (for this aspect cfr. Faralli, this special issue, pp. 11-16).

However, in the first half of 20th century, there were only a small number of law school clinics. Clinical legal education increased in the period of social and political activism, from the mid-1960s through the 1970s as an expression of clinical teachers' commitments to social justice (Grossman, 1973-1974; Wizner, 2002). Increasing the understanding of "the ways that the law reinforces oppressive systems and the ways that it can be used to challenge them" was at the core of pioneers such as Anthony Amsterdam (1984) and Gary Bellow (1973), engaged in advocacy for social changes: "As founders of a movement to change legal education – writes Shalleck (2016) – [clinicians] wanted to bring those commitments within the law school. To do this, they began creating educational experiences that reflected their desires to combat inequality, poverty, exclusion, and subordination, to make access to justice a reality for all and to make the vision of the lawyer who pursues justice present to law students"[4].

As at the time of Jerome Frank, this group of pioneers were very critical towards legal education since they estimated that the practice in the American law schools was disengaged from the world, from social facts and disengaged from the lawyers' responsibilities toward their clients. The call for social justice was a central issue in their discourse, fighting against inequality, challenging discrimination, or giving voice to the excluded.

2. The dignity of the client at the core of the clinical law approach: collaborative lawyering

Providing representation to clients and asserting the dignity and autonomy of clients who suffered injustice was at the core of clinicians' emerging vision. In order to obtain this goal, they put an emphasis on the client-lawyer relationship by trying to develop techniques of factual inquiry, such as appropriate interview techniques, based on a form of active-listening "reflecting the facts and feelings the client has expressed" (Smith, 2010). Scholars, such as Lopez (Lopez, 1984), Alfieri (1990-1991) and White (1997), highlighted the importance of a more egalitarian collaboration between attorneys and (lower-income) clients. Alfieri in particular assumed that lower-income and "subordinated" people are not completely powerless or helpless. In his view, clients possess skills and knowledge which enable them to recount "alternative stories" resisting the dominant elites' views in society. As such, Alfieri urged that attorneys should not simply work for clients but with clients as "lay allies" (ibid.).

4 Manuscript in file with the author.

Lawyering, referring here to the task of problem-solving, risks being abstract or generic, disconnected from context, and presents the danger of "denying who we are" (Lopez, 1984). Thus, recognizing client's story demands looking at facts in terms of the stories that vulnerable people live, taking into account their voices. Those "voices" are synonymous with "dignity" and are considered equal in legal discourse (Luban, 2007) leaving room for alternative values which law tends to suppress (Delgado, 1989). In this way, lawyers are not only encouraged to respect client's "autonomy" but also to protect their dignity (Kruse, 2008).

The client becomes important in understanding the law and the case, starting from the specific experience of which he is the bearer, as an individual, as a member of a group or institution (Shalleck, 2016). Thus, clinicians involve the client as a "narrative agent" in the reconstruction of the case as well as in the definition of a legal strategy, in cooperation with the lawyer (Elmann, 2009).

The shift away from a lawyer-centred to a lawyer-client cooperation marks a turning point in professional practice and in the representation of the client-lawyer relationship, where the client is traditionally represented as the passive actor in the relationship. Contemporary scholars prefer to speak of client-lawyer relationship, wherein both parties, according to their specific competences, co-operate in the case: "Lawyers and clients tell stories to each other. […]. As clients and lawyers engage through reciprocal and interconnected narratives, they create the lawyer-client relationship" (Elmann *et al.*, 2009, pp. 139-140).

López, in particular, proposes a more collaborative and community-engaged problem-solving approach. To shape client roles, lawyer-client and client-community relationships, he urges "multiple, experimental forms of lawyer, client, and community collaboration, inclusion, intervention enforcement, evaluation, and innovation" (Alfieri, 2016, pp. 14-15). Those experimental forms should be based on some lawyering process, among which: "(1) collaboration with individual, group, and community clients; (2) inclusion of diverse client perspectives in framing and resolving problems; (3) encouragement of client-generated alternative approaches to community intervention and problem solving; (4) community-erected monitoring and enforcement strategies; (5) joint client-lawyer outcome measurement and impact evaluation; and (6) innovative organizational management and delivery system design" (Alfieri, 2016, p. 15).

Lopez's ideas, as I will show in § 4 – through the analysis of a special case of vulnerability – remain pertinent today, since lawyering is not only defined as a specialist knowledge, but understood more generally as a process that requires human and social skills. This is especially true when it comes to solving cases that involve vulnerable people such as certain groups of migrants (refugees, victims of domestic violence, and so on) in whose defence active voluntary associations very often collaborate with legal professionals. As demonstrated by Estelle d'Halluin, for example, the construction of new sites of vulnerability and the identification of the complex needs of people requiring protection, demands the development of new expertise. The chain of actors is expanded upon their competencies are able to face the expectations of the decision-making bodies, decisions that may risk being arbitrary (d'Halluin, 2016).

3. Raising Critical Points in Contemporary Clinical Legal Education: How to Fill the Gaps?

Even if the clinical law approach, in parallel with other movements such as *Law & Humanities & Legal Storytelling*, contributed to those significant advances in legal studies, I would like to raise at least two main points:

– Despite its original ideals to analyse the law in action with social sciences methods, clinical law is more rooted in practice than in doing fundamental research and it is isolated within the academic debate (Shalleck, 2016).

– There are relatively few methodological projects of how clinics "might be consciously designed" (Kruse, 2011-2012) to be "powerful agent of the progressive transformation of the social world" making the inclusion of the powerless in public discourse possible (White, 1997, p. 607).

In order to fill these gaps, my proposal is to combine the original clinical law approach with the methods of the humanities:

– By adopting a narrative approach to give voice to lay and vulnerable people and analyse the law in action.

– By really involving clients – with their stories, agency and understanding of the socio-legal environment in which they live – as active participants of action research and teaching.

3.1 Supporting Lay & Vulnerable People's Agency in Legal Processes: Giving them Voice

Lawyering meant as a more general problem-solving process is actually what all people do, whether or not they are lawyers: "We can see lawyers' problem-solving simply as an instance of human problem-solving" (Lopez, 1984, p. 2). Problem-solving" requires knowledge, on one hand, and "trying to persuade others", on the other (Ibid.).

In this activity of concrete problem solving that is rooted in daily life, stories play a crucial role. Why?

Storytelling is a Way of World Making

Narrative is the means through which humans organize and make sense of their experience of the world. Legal events acquire meanings through a structure – a plot – that organizes them in causal, temporal and emotional terms (Bruner, 1991; Brooks, 1992; White, 1981).

…a Relational Tool

Storytelling makes the bridge between minds and cultures possible, linking individuals to society (Bruner, 1986). Because of its relational nature, "narrating can be a means of social inclusion;" a way to include and empower voices of a minority by mediating situations, relations and purposes (Daiute & Kreniske, 2016).

a Social and Cultural Process

Stories are constructed according to cultural scripts: Tools such as films, novels, tales, myths or visual images circulating in society (Sherwin & Wagner, 2012), are bearers of values, representations and visions of the world. Legal meanings and

truth's representations depend on the context, on a knowledge which is culturally constructed and embedded within local and interpretative practices (Geertz, 1973). Public legal narratives (constitutional texts, parliamentary discourses, laws, administrative decisions), for example, are essential to produce legal knowledge and to achieve an imagined community, determining who belongs and who does not (Daiute *et al.*, 2015; Olson, 2015).

Thus, as has been shown with the application of narrative theories to legal studies (Brooks, 2006), *law & narrative* are part of the same process of the construction of legal reality. In fact, while law tends to simplify reality by using categories, for instance "citizens/foreigners" and qualifications ("the abusive husband", "the woman victim"), narratives tend to explore possibilities by giving meanings to reality and by expressing the complexity of human vicissitudes. In this sense, legal narratives are opportunities for silenced voices to be heard.

A legal story is normally provoked by a conflict of visions/aims (between two or more parties): the institutions & the client, for example. Resolving or reducing the conflict requires a "new narrative" that restore the canonical order that has been violated, or to create a new one (Bruner, 2002). This new narrative should be constructed with respect to formal rules, cultural conventions but also taking in account individual subjectivities and agency (Charon, 2006). Human agency in the context of law requires expertise. Thus, the question that I am going to raise is *how to help clients develop a kind of expert agency through the construction of a legal story?*

3.2 Example of a Conflictual Story Solved Thanks to the Active Involvement of the Protagonists: the Case of Line

I will provide an example of a case that has been solved thanks to the active involvement of the protagonist and a performative use of legal narrative (shaping facts and law in an appropriate way as well as expressing feeling and emotions). This is the case of Line arrived in Switzerland from Cambodia as an asylum seeker. After 20 years, she decided to apply for the Swiss citizenship. She was then confronted with two refusals. The first time her motivations seemed to be generic to the naturalization committee that didn't allow her the citizenship at the local level (municipal). Here are some of the arguments used by the committee:

1. Line only attended compulsory school and worked in a factory when she was young (Swiss factory).

2. She converted to the Muslim religion – the same religion as her husband –- and she wears Pakistani clothes;

3. *Her motivation for the request to be naturalized is generic: "she is worried about the future of her children"*[5];

4. Her children are not integrated into school.

5 The italic is mine.

Then the committee concluded that: "*the applicant does not give the impression of being integrated or assimilated to our uses and customs and decided*, unanimously, to give a negative answer to her application" (Extract from the decision of the committee).

The second time, the cantonal committee presumed that she had not paid taxes.

Line reacted in different ways to show that there was a gap in factual investigation and that she was integrated. First, she went to a lawyer, then she engaged herself in daily exchanges with local administration and ultimately petitioned the Federal Court.

Going through these different kinds of that I call *legal agentivity* (Di Donato, 2014) she has been able to motivate her demand with legal and personal arguments, such as the following ones: "*the Court violated the law by making an incomplete decision, it inaccurately and incompletely notes relevant facts*. This situation has marked the lives of my children over the years, they have raised the question of their identity, citizenship and future (extract from Line's petition, dated September 1998).

Finally, the Federal Court held that "it is not possible to refuse naturalization on the basis of such a lacunar truth acquiring procedure" (September 2011) and sent the case to the lower court. Currently Line has obtained the citizenship after three appeals to the justice and many negotiations with the local administration that has finally found a financial agreement.

Lines' case is interesting for many reasons:

1. because the protagonist, over the time, became able to deal with formal rules and local practices playing an active role in the solution of the case;

2. she didn't renounce her own identity thereby expressing feelings and emotions within the judicial petitions;

3. the decision of the Federal Court had an impact on the local procedure as the administration had to change the way of constructing the legal file with the information about the case.

Anyway the vast amount of time and energy spent by Line (and other clients in similar cases that I have analysed)[6] motivated me to propose the creation of socio-legal spaces within academies to analyse and solve cases, with the active participation of "lay" and expert actors in order to elaborate a common understanding of legal problems, thereby increasing laypeople's consciousness and agency in legal settings. Such a space would allow clients' (foreigners) to understand how the legal system works; what the rules (formal/informal) are, and the practices with which they are expected to deal.

In fact, as lawyering generally demands specific knowledge regarding the relevant audiences, stories, and storytelling practices, my proposal is to training laypeople to adapt their specific problem-solving knowledge to "unfamiliar audiences" and empowering their participation in legal settings. This could be the case for immigrants living in a foreign cultural-legal system, as well as the case of natives who are not able to deal with the specificity of the law.

6 I refer to the cases collected within the framework of the project "Immigrants' trajectories of integration between indeterminate legislative criteria and uncertain lifecourse. Analysis of legal cases" (FNS_147287): http://p3.snf.ch/Project-147287. [website consulted on March 8th 2018].

4. Clinical courses as *socio-legal spaces* for case solution? Giving examples of courses thought at the University of Neuchâtel and the University of Naples

Clinical courses could be developed as *socio-legal spaces* with the involvement of real actors (clients and professionals) in clinical legal teaching and case solution. I will specifically provide two examples of courses that I have thought, last year (on 2016), at the University of Neuchatel, and this year (on 2017) at the University of Naples.

4.1. The Swiss Course

The Swiss course was part of a pilot experience funded by the Service of Quality of the Rectorate at the University of Neuchâtel within the broader framework of a course on human rights and migration law entitled "Approche clinique du droit"[7]. The teaching module was organized in two parts: the first part dealing with the introduction of some principles of legal clinical pedagogy; the second part dealing with the analysis of the Swiss legislative framework regulating cases of foreigner women who are victims of domestic violence.

Concretely speaking, we analysed the case of a victim, Mrs Geraldine, with the collaboration of the client herself and the voluntary association responsable for her legal and human protection: the Centre Social Protestant (CSP)[8]. Specifically, a social worker employed at the CSP helped us to get in contact with the client and to consult – with her authorization – the legal file to reconstruct the administrative path of Mrs. Geraldine. The case was analysed in collaboration with a lawyer expert of migration law in order to introduce law, jurisprudence and administrative practices on this issue. In the classroom, we asked to students to analyse the legal file in order to reconstruct the biography as well as the administrative path of the client. Then, we met Mrs. Geraldine who – in presence of the social worker – narrated her story to the students. I reconstruct here her case.

4.2. The case of Mrs. Geraldine

Mrs. Geraldine's case is interesting for at least two reasons. Firstly, because the story's reconstruction, through the analysis of official documents, shows how temporal elements – such as, for example, the duration of marital union – and legal categories – such as integration – can be subject to different interpretations and factual reinterpretations by the different actors involved in the story. Secondly, because Mrs. Geraldine is not assisted by a lawyer but by social workers during the administrative-legal procedure for applying for the extension of the residence permit. This new form of legal, human and social protection marks a new stage in the process of lawyering – what Lopez

7 For more information, please visit the website: http://www.unine.ch/ius-migration/home/formation/module-pedagogique-approche-clin.html [website consulted on March 8th 2018].

8 The CSP is a private association of counselling, guidance and social assistance. For more information, please visit the website: https://csp.ch/ [website consulted on February 28th 2018].

(2017) had been hoping for since the 1990s – in which clients, lawyers and voluntary associations work together to identify the needs of vulnerable people and defend them.

4.2.1. The legal framework

The case of Mrs. Geraldine falls within the application of art. 50 of the Federal Act on Foreign Nationals (FNA)[9]. This article intends to protect foreign women who are married to a Swiss national or a person resident in Switzerland and are victim of domestic violence, allowing them to stay in Switzerland in case of separation or divorce under certain conditions, such as extreme violence, integration into Swiss society, three years of marriage and the possibility of returning to her country of origin may be detrimental to her:

> 1. After the dissolution of the marriage or of the family household, *the right of a spouse and the children to be granted a residence permit and to have their residence permit extended* in accordance with Articles 42 and 43 subsists if:
> a. *the marriage lasted a minimum of three years and integration has been successful*; or
> b. important personal reasons make an extended residency in Switzerland necessary.
> 2. There are important personal reasons in terms of paragraph 1 letter b in particular *if a spouse has been the victim of marital violence* or did not marry of his or her own free will and social reintegration in the country of origin appears to be seriously prejudiced.
> 3. The time limit for being granted a permanent residence permit is governed by Article 34.

Since the criteria introduced by the art. 50 are defined in a general way (successful integration, intensity of violence and so on), they are subject to sometimes restricted interpretations by the authorities. Thus, from within this framework, strong evidence is required by the authorities to prove the degree of violence: often medical diagnoses are not trusted and women are not heard[10]. According to the art. 77 al. 6 OASA are considered to be indicators of domestic violence[11]:

> a. medical certificates;
> b. police reports;
> c. criminal complaints;
> d. measures within the terms of Art. 28b of the Civil Code, or
> e. criminal judgments pronounced on this matter.
> 6bis When considering the major personal reasons referred to paragraph. 1, let. b, and in art. 50, paragraph 1, let. b, LEtr, the competent authorities shall take into account the recommendations and information provided by specialized services.

9 For more information, please visit the website: https://www.admin.ch/opc/en/classified-compilation/20020232/index.html [website consulted on February 28th 2018].

10 See the ODAE Report (2016) on the subject of foreign women who are victims of domestic violence:
https://odae-romand.ch/rapport/rapport-thematique-femmes-etrangeres-victimes-de-violences-conjugales-obstacles-au-renouvellement-du-permis-de-sejour-en-cas-de-separation/ [website consulted on February 28th 2018].

11 This is the Ordinance on admission, residence and employment of 24 October 2007: https://www.admin.ch/opc/it/classified-compilation/20070993/index.html [website consulted on February 28th 2018].

The jurisprudence of the Federal Court also made it clear that the domestic violence must be of a certain intensity: it must be so intense that the physical and psychological integrity of the person concerned is seriously affected and that marital life could no longer be continued[12]. Moreover, authorities consider the level of integration of the victim within the Swiss context. This may be essentially of two types: a) economic and b) socio-cultural. Specifically, they evaluate whether or not these women have a job, speak the local language, are socially integrated, are not offenders. Finally, as regards the duration of three years of the marital union, it is considered as a starting point of the procedure: abandonment of the family unit (not at the time of the initiation or at the beginning of the divorce proceedings).

Experts find that in these kinds of cases, the narrow application of the law creates contradictory conditions: women who are victims of violence live in such dire and alienated conditions that in many cases they are not able to look for a job, take care of their children, attend language courses, or generally integrate into Swiss society. In most cases, these women, afraid of leaving Switzerland and returning to their home country, choose to remain with their abusive husbands and to be silent. Considering these extreme and paradoxical situations, many organizations (at local and international level) are active in claiming these women's rights and in providing legal and human assistance (Barzé 2012; Di Donato 2012b)[13]. The Federal Court frequently intervenes in defense of the victim's right by contextualizing the interpretation of legal criteria[14]. Since the criteria introduced by the art. 50 are defined in a general way (successful integration, intensity of violence and so on), they are subject to sometimes restricted interpretations by the authorities. Moving from this legal framework, we reconstructed the case of Mrs. Geraldine with the collaboration of the client and the social workers.

4.2.2. Summary of the story

Mrs Geraldine, a Cameroonian national, arrived in Switzerland in 2003 as an asylum seeker. In 2007 she married Mr. Harnold, a Swiss citizen, after six months of cohabitation. In December 2008, Mrs. Geraldine discovered that she was pregnant. She was unaware of the father's identity since she did not have extramarital relations but thinks she was raped in Geneva during an evening when she went out dancing and accepted a drink from a stranger. The couple decided to keep the child despite the doubt regarding paternity. They experience significant marital difficulties shortly after their marriage due to the gambling addiction of Mr. Harnold, etc. Very quickly, Mr. Harnold displayed violence to the extent of hitting his wife while she held her baby in her arms. Police intervention was necessary on several occasions. In June 2010, Mrs. Geraldine sought refuge

12 See judgments: ATF 138 II 229, ATF 136 II 1, TF 2C_748 judgment of 11 June 2012, TAF judgment C-4895/2010 of 6 March 2013.

13 See the FOGE Report "Assessing the severity of domestic violence. Sociological Background Report: http://www.ebg.admin.ch/dokumentation/00012/00196/index.html?lang=fr

14 See for example: TF 2C_649/2015; TF 26_964/2015. Among the associations active on Swiss territory, there is the one mentioned above Observatoire romand du droit d'asile et des étrangers (ODAE): https://odae-romand.ch/ [website consulted on February 28th 2018].

at Malley Prairie Center[15] in Lausanne as a consequence of her husband's violence and her misbehavior towards the child. In July 2010, the District Court of Lausanne ordered protective measures regarding the matrimonial union. In 2012, Service de la population (SPOP)[16] issued a positive opinion in favor of renewing Mrs Geraldine's residence permit in accordance with Art. 50 LEtr, due to the duration of the marital union (3 years) and her successful integration. The State Secretariat for Migration (SEM) – which is a federal parliamentarian institution "to protect and defend the rights of migrants and refugees in their regions of origin and transit"[17] –, on the other hand, ron its side, refused to grant a cantonal residence permit by questioning the duration of the conjugal union and by considering that violence is not proven satisfactorily. The Centre Social Protestant (CSP), mandated by Mrs. Geraldine, appealed to the Tribunal Admistratif Federal (TAF) against the decision of the SEM.

4.2.3. The administrative and legal path of Mrs. Geraldine

The administrative-legal process began in 2010, when Mrs. Geraldine, following the episodes of violence of which she is a victim, asked to be sheltered at the Malley Prairie Center in Lausanne. The Centre informed the authorities of the above and requested that Mrs. Geraldine's rights to an economic subsidy be taken into account:

> Dear Madam, Sir,
> I would like to inform you that Mrs Geraldine and her daughter Isabel are currently staying in our reception centre.
> Mrs. Geraldine has started a separation process and we are awaiting the court's decision. She has no income at the moment. I thank you for reconsidering her entitlement to subsidies for her and her daughter, whose custody she requested. While remaining at your disposal for further information, please accept, Madam, Sir, the expression of my best regards.
> (Communication dated 18.6.10)

A medical examination, practiced at the Chuv of Lausanne[18], revealed that Mrs. Geraldine was the victim of assault by her husband. They were recognized as "victims of offences" (art. 1 LAVI[19]):

15 For more information, please visit the website: http://www.malleyprairie.ch/fr/index.php [website consulted on February 28th 2018].

16 At the heart of important social issues, the Population Service (SPOP) is responsible for the implementation of federal and cantonal migration legislation. It also promotes the integration of foreigners. For further information please consult the following website: https://www.vd.ch/autorites/departements/deis/population/ [website consulted on February 28th 2018].

17 For further information please consult the following website: https://www.sem.admin.ch/sem/en/home.html [website consulted on February 28th 2018].

18 For more information, please visit the website: http://www.chuv.ch/fr/chuv-home/ [website consulted on February 28th 2018].

19 This is about The Federal Law on the Assistance to Victims of Criminal Offences of the 23 March 2007. For further information please consult the following website: https://www.admin.ch/opc/fr/classified-compilation/20041159/index.html [website consulted on February 28th 2018].

> According to Mrs. Geraldine's statements, on Friday, May 21,2010, around 8:00 p. m., at their home in Lausanne, she was assaulted by her husband. […]. She says she is afraid of her reactions when her husband "pushes her to the limit". On physical examination, we found the following injuries:
> at the level of the head on the outer part of the upper left eyelid, a brown scar [...];
> a beige scar on the left upper limb [...]; on the right lower limb [...].
> (Medical examination dated 6.7.10 – CHUV)

Following the separation, Mrs. Geraldine applied for a renewal of her licence B. A police report was sent to the SPOP stating that "the couple's behaviour was the subject of police action on 05.09.2009, following domestic violence". The latter, in turn, asked Mrs. Geraldine to cooperate in the fact-finding, in accordance with art. 90 LEtr:

> Foreign nationals and third parties participating in proceedings under this law shall cooperate in determining the facts which are decisive for its application. They must particularly: a) Provide accurate and complete information on the elements that are essential for regulating the stay; b) Provide the necessary supporting evidence […].
> (Request for information by the SPOP dated 21.2.11)

It is in this context that Mrs. Geraldine provided the *Centre Social Protestant* with a mandate for legal assistance during the administrative procedure:

> Mrs. Geraldine has been using our service since November 25, 2009 to help her with various administrative procedures. [...] In view of the victim status of our client, her daughter of Swiss nationality and the length of her stay in our country, we kindly ask you to renew Mrs. Geraldine's residence permit. In accordance with Article 50 paragraph 1 letter b of the Federal Act concerning foreigners as well as the case law of the Federal Court of 4 November 2009 (2C_460/2009).
> (Letter of the CSP dated 1.3.11)

The SPOP requested additional information about the family situation and Mrs. Geraldine's financial independence:

> Is a divorce proceeding pending? Given that the person concerned is working at 50%, does she intend to increase her working hours? (if necessary, inform us of any new employment contract, even at a later date). If not, what are her intentions in order to be financially autonomous in view of her current income?
> (SPOP letter dated 12.5.11)

According to the SPOP, Mrs. Geraldine was entitled to the renewal of her residence permit in accordance with art. 50 para. 2b LEtr and submitted its recommendation to the SEM for confirmation:

> An in-depth analysis of her situation shows that her resumption of her stay in Switzerland is justified for major personal reasons: *"successful integration" and "three years" of cohabitation with her Swiss husband.*
> (Positive response from the SPOP dated 9.10.12)

The SEM, for its part, believed that the conditions of art. 50 were not completed and prompted Mrs. Geraldine to provide comments in a written submission[20].

> Madam,
> The Service de la population in Lausanne forwarded to the SEM the document of the person named for examination and decision. The above-mentioned cantonal authority is willing to grant to Mrs. Geraldine a residence permit in accordance with Article 50 of the Federal Law on Foreigners of 16 December 2005.
> *The SEM intends to refuse the approval of this permit.*
> *However, in order to respect the right to be heard, you have the right to state your opinion.* To do so, you can send your comments in writing in one of Switzerland's official languages by 28 January 2013 to the following address […].
> (Letter from the SEM dated 17.12.12)

This is how exchanges between the SEM and the CSP took place. Their various factual reconstructions relate to the duration of the conjugal union; the intensity of the violence and the financial autonomy Mrs. Geraldine. Specifically, the CSP pointed out that Mrs Geraldine lived for more than three years with her husband, whose behaviour was inappropriate and violent. To the point that Mrs Geraldine and her daughter have been recognised as victims of violence by the LAVI centre[21]:

> We do not understand your Office's point of view when Mrs. Geraldine fulfills the criteria of both letter a. and letter b., paragraph 1 of Article 50 of the Federal Law on Foreigners of 16 December 2005. […]
> Our mandator married on May 11, 2007 and separated on July 7, 2010 as a result of the abusive and inappropriate conduct of her husband […]. *She therefore lived more than three years in a marital union.* […]
> *She started working very quickly since her arrival in Switzerland in April 2003 as an asylum seeker. […]*
> *The LAVI centre in the canton of Vaud has recognised both our client and her daughter as victims of offences within the meaning of Articles 1 and 2 of LAVI (see Exhibit 15)* […]
>
> In view of the fact that all LAVI centre staff receive specific training in order to be able to assess and take care of victims, we would like to point out that the *severity of domestic violence has been demonstrated and that our client's residence permit must be extended in accordance with Article 50 (1) and (2) of the Federal Directive.* […]
> It *should also be remembered that domestic violence is a serious and alarming public health problem that is the leading cause of female homicides in Switzerland and that it is therefore important to protect victims before it is too late.*
> (CSP's answer to the SEM dated 28.1.13)

20 Please note that "the right to be heard" which is provided for in art. 8 of the Swiss Constitution is here reduced to the possibility of sending proposals in writing.

21 This is the case the Centre established according to the above law (footnote 19): For further information please consult the following website: https://www.vd.ch/themes/social/aide-aux-victimes-et-auteur-e-s-de-violences/violences-lavi/ [website consulted on February 28th 2018].

For its part, the SEM questioned the duration and effectiveness of the marriage, the intensity of the violence, the financial autonomy and the integration of Mrs. Geraldine and refused to extend her residence permit by setting a deadline for her to leave the Swiss territory:

> *Some elements of the case suggest that the marital union had lost all of its meaning before the three-year deadline; the woman received substantial social benefits; the reality of the abuse is not demonstrated to her satisfaction (intensity of violence): based on the case, there does not appear to be a "systematic willingness to harm his wife".* […].
> No cases required in the context of art. 50:
> "*No particularly successful social and professional integration" or "reintegration in Cameroon seriously compromised."*
> Ruling:
> "*The approval for an extension of the residence permit is denied."*
> "*A deadline is set for leaving Switzerland."*
> (Refusal of the SEM dated 11.2.13)

Finally, recourse to the TAF from the CSP was essential to prove that the 3 years of marital union were effective and that violence has been proven by experts.

> Your Honor,
> *At the request of Mrs. In Geraldine, we appeal against the Federal Office for Migration's decision of 11 February 2013[...].*
> *In its decision, the SEM seems to question our client's claims, particularly in view of letters sent to the SPOP by Mr. Harnold, despite the fact that he twice went back on his statements; [...].*
> *It is outrageous that the SEM seeks to question the words of our client by declaring in particular that "the reality of a conjugal community actually lived for more than three years is questionable" […].*
> *The SEM points out first of all that the person concerned received substantial social benefits. Even though since October 2012, she has been 70% employed at a gross monthly salary of 2,778. 75, the SEM cannot automatically conclude that she has now acquired her financial independence on a professional level.*
>
> CONCLUSIONS
> *The appeal shall have suspensive effect and Geraldine shall be entitled to continue to live and work in Switzerland until the end of this procedure.*
> Primarily:
> *The decision of the Federal Office for Migration of 11 February 2013 is hereby cancelled.*
> *The appeal against the decision of the Federal Office for Migration of 11 February 2013, refusing to approve the extension of a residence permit proposed by the canton of Vaud, is allowed.*
> (Appeal to the TAF dated 13.3.13)

The various exchanges of information show that a factual element that contributes to the construction of the case are Mr. Harnold's letters which initially stated that the marriage between him and Mrs. is fictitious, therefore risking her losing the B permit. Then he reconsidered his opinions and confirmed that she never wanted to take ad-

vantage of him. In this letter of 21.05. 2013, the CSP tried to prove that Mr. Harnold is not reliable, he was trying to take revenge on his wife following the separation application. This is a typical attitude that the CSP comments on this type of situation:

> *Since our mandator filed a complaint against her husband following the spousal violence, he has not ceased to make multiple procedures to "get revenge" what he himself confesses in his letters of 14 February 2012 and 24 January 2013. This type of attitude is known to specialists in domestic violence* […]*;*
> *Mr. Harnold uses the procedure of marriage cancellation to try to put pressure on our mandator by asking for a right to visit the child, while refusing to provide long-term support for her. Mr. Harnold is unreliable.*
> (Letter of from the CSP to the TAF dated 21.5.13)

Afterwards, Mr. Harnold came back from his previous attitude by sending a letter to the SPOP where he withdrew the accusations against his wife and admitted that he has acted under the impulse of the separation:

> After being able to find the dialogue with Mrs. Geraldine [...] have decided to forgive each other in such a way that everyone can fulfill their parenting role for this child […] Therefore I believe that for the good of the family it would be nice if I could go back to my position of a year ago on whether or not madam could stay in Switzerland I didn't just listen to my heart when I wrote to you and maybe a little bit about the shock of separation. […] For example, I withdrew the request for the cancellation of marriage because I am now convinced that she never wanted to take advantage of me and that she loved me.
> (Letter by Mr. Harnold dated 24.1.13)

The SEM, for its part, confirmed that, in its view, the conditions were not satisfied. It was the TAF that puts order in the narratives, stating that in this case the time-condition was fulfilled and that the fictitious marriage hypothesis does not exist. In addition, the integration of Mrs. Geraldine in the Swiss society was successful. Here are some passages of the legal arguments of the TAF:

> Law
> 5.1.2.1. The existence of a genuine marital union within the meaning of the latter provision presupposes that the relationship between the spouses is actually lived and that the latter have the will to maintain it (cf. in particular ATF 138 Il 229, 2; 137 Il 345, 3.1.2). This is based essentially on the length of time the couple has lived together in Switzerland […]. In other words, the minimum period of at least three years of marital union begins at the beginning of the actual cohabitation of the spouses in Switzerland and ends when they cease to form a common household (see in particular ATF 140 Il 345, para. 4.1;138 li 229, para. 2).
> 5.1.2.2. *In the present case, the claimant married a Swiss national on 11 May 2007 and has been living separate and apart from him since June 2010 with the result that her marital union lasted more than three years. The time condition of art. 50 para. 1 let. a LEtr is therefore fulfilled by the concerned party.*
> 5.1.2.3. The competent authorities have therefore examined the couple's situation on several occasions, without taking into account the hypothesis of a fictitious marriage.

> Finally, with regard to the civil proceedings for cancellation of the marriage initiated in May 2011 […] in a letter of 24 January 2013 which he personally handed over to the SPOP, the individual indicated that he wanted to withdraw all the accusations that were partly motivated by anger [...]. According to him, he was convinced that his wife never wanted to take advantage of him and truly loved him..
> 5.1.3. *In addition to living together in Switzerland for at least three years, the implementation of art. 50 para. 1 let. a LEtr still presupposes that the integration of the claimant is successful.*
> 5.1.3.2. *In the present case, the appellant entered Switzerland as an asylum-seeker on 16 April 2003 […] and has been living in Switzerland for little more than 12 years. Moreover, it is not contested that she has mastered the French language, her mother tongue...[...]. A review of the case shows that she has a stable job....*
> that *she has no debts, that she is fluent in the language spoken in the country where she lives and that she has not seriously violated public order.*
> Conclusion:
> As *long as it satisfies the two conditions for the application of art. 50 para. 1 let. a LEtr, the appeal must be granted, the contested decision of 11 February 2013 annulled and its extension by the Waldensian cantonal authorities of its approved residence permit.*
> *(Excerpts From Line's petition to the Federal Court dated May 2011).*

In reconstructing Mrs. Geraldine's case, by combining the story narrated by the client with the content of the legal file, some crucial points were highlighted: facts are object of discretionary evaluation by the authorities. Objective constraints such as the duration of the marriage are subject to interpretation (even behind the real dates) ; the administrative authorities express doubts regarding the credibility of the victim despite the medical diagnosis, on the basis of the declarations of her husband.

These two elements – among others – highlight the vulnerable condition and the weak position of a foreign woman even compared to that of her husband, who is both a man and a Swiss citizen.

4.2.4. Students' testimonies

In telling the story, in the classroom, Mrs. Geraldine was wonderful, and her story was perceived as "really true", showing the impact of possible gaps between the official story – the one narrated by the lawyer and the administration – and the one narrated by the client which was full of emotions and details that showed the complexity of the human vicissitude underlying the case.

The main interest in listening to the true voice of the victim was to understand whether and how she come to understand and to narrate her problems in terms of violation of rights (Merry, 2003): how did she act within the law? Who helped her to frame the problem in legal terms and ask for legal assistance: neighbors, volunteer associations?

Here is some students' testimonies about the meeting with the client:

> In my opinion, Mrs Geraldine's words have clearly shown this aspect: *behind the laws and the arrests, there are always individuals with their own histories*. To listen to Mrs

> Geraldine, and at the same time to be aware of the possibility that others doubted what she was saying, highlights the precarious situation in which many women like Mrs Geraldine find themselves (Mira).
> *It was the first time that we met a person involved in the case studies in the course and this has given a true taste of* reality*, more than abstract theory* [...] I think that to be able to take a judicial decision, you need to find a balance between the two, between the human and the legal aspects (Anonymous).

4.3. The Italian Course

My current course in Naples is entitled "Formazione clinico-legale"[22]. It was created on 2016 by the Law Department – while the widespread of clinical legal teaching in Italy and in Europe (Bartoli, 2016) –, in continuity with my pioneer research on fact-finding, storytelling and client's role in case reconstruction (Di Donato, 2008; 2012). In fact, as legal philosophers working in a Department of Law, it seemed important to me and my colleagues to allow for a methodological approach as a preliminary step for the creation of a legal clinic. Thus it was possible to respond to two of the critiques evoked in the clinical debate:

a) the frequent lack of planning that "consciously" aims at making clinics "agents of social transformation" also taking into account the active role that vulnerable individuals can have in legal discourse (Kruse, 2011/2012; Di Donato, 2016);

b) the need to reflect on the new figure of "social jurist" that clinical courses should aim to train (Bartoli, 2016).

As for the Swiss course, during the first edition (Spring semester 2016/2017), I taught some principles of clinical legal education. Each lesson was articulated into two parts: theory & cases analysis, by focusing particularly on the use of narrative in case construction. Thereafter, the accent was placed on the cultural dimensions of cases: how do they originate and find solutions in a context of human relations and legal practices? The magical moment of the course was the meeting of a real client enabling the students to pass from fiction to reality. We analysed a labour law case that of Viviane, who crafted a solution to her own case, winning a battle for herself and her colleagues – an action both individual and socially shared (Di Donato, 2012a). Viviane is a theatre actress who was invited to work as a promoter in a theatre company in the province of Naples. The company adopted illegal internal working practices, such as salaries that did not comply with current legislative parameters, camouflaged by the use of false pay packets. Viviane's activity – together with that of the other employees – ended up clashing with the co-operative's 'bad management', which was also facilitated by the lack of controls on the part of the local funding authorities. The reconstruction of the story was based first on legal files made available by Viviane and her attorney and then on an interview which students had with her. Viviane's story is interesting, both because of the context where it took place and because of the

22 For more information, please visit my homepage: https://www.docenti.unina.it/flora.didonato [website consulted on March 14 th 2018].

methods she adopted to 'manage' her case, calling on assistance from her colleagues and from a broader territorial network.

Here is the testimony of one of my students after the meeting with Viviane. As for the Swiss framework, my student puts emphasis on the gaps between the official story – the one narrated in the legal file – and the one narrated by the client which was full of emotions and details that showed the complexity of the human vicissitude underlying the case.

> For me, reading the trial file and listening to Viviane's live voice were two different stories, two different narratives with different facts. Whom to believe? The Viviane of 10 years ago or today's Viviane, who has also appropriated and understood everything to be able to succeed, albeit with emotion, in telling the facts by eliminating or adding something. There was a lot of discomfort that was read between the lines and the statement that certain things go so I created a deep unease, as if we were to accept abuse and so forth by bad politics and resign ourselves to corruption.
> [...] Undoubtedly the study of law in this way opens up new scenarios and resolves from the crisis of law itself and the teaching of law and allows the formation of jurists who will one day be able to apply this knowledge that seems to outline, but that dig up inside. (Bernardo)

Then the course ended with a visit at the Neapolitan Court in the framework of the inauguration of the *Osservatorio Giuridico, di Ascolto e di Orientamento sui Diritti Sociali*[23] – created at the Council of the Order of Lawyers of Naples and in collaboration with the Community of Sant'Egidio[24] – which will one of our partners for the next edition of the course (Spring semester 2018).

Picture 1)
The inauguration of the Osservatorio by Ilaria.

23 The Observatory pursues the objective of contributing to the legal protection of individuals in a state of social hardship through monitoring, analysis and reporting on specific problems concerning the conditions of effective protection of the fundamental rights and freedoms of people in situations of personal and social marginalization.

24 For more information, please visit the website: http://www.santegidionapoli.org/ [website consulted on March 14 th 2018].

Let me conclude with the words of one of my students about the visit at the Court:

> The "announcement screen" (picture 2) highlighting the proceedings in rooms at different levels of the building captured all my attention. I seemed to see it moving as the announcements changed in accordance with the magistrate hearing, as if the legal proceedings being announced were train arrival and departure times. I have come across a legal culture that considered "cases" and not "people in cases", and in the greatness of the board an idea of architecture of the high courts and almost divine invincibility. The highest court tower is 29 floors (picture 3) symbolizing the impotence of the person within the justice machine (Bernardo).

Pictures 2) the announcement screen by Bernardo and 3) the architecture of the Court by Ilaria

Conclusions

The aim of this contribution was to recall some crucial steps of clinical legal education, from its origins until its contemporary diffusion in Europe (including in Switzerland and in Italy, where I currently work). I wanted to put emphasis on the need to link clinical legal education with methods from the humanities field, especially storytelling as a tool to reconstruct cases, make individual stories public and to empower clients' legal agency. Moreover, by showing some examples of cases reconstructed with the active involvement of the clients as well as the social workers who provided them legal aid, I gave examples of new forms of collaborative lawyering which demand new expertises to face the complexity of problems affecting vulnerable populations. Finally,

I proposed to conceive of clinical courses as socio-legal spaces in which to discuss and analyse cases with the participation of lay and expert actors in order to share a common understanding and promote collective problem solving.

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