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"Our Forgotten Tradition" The Neglected Role of Continental Legal Culture in the Parallel Evolution of the Law & Humanities and Legal Clinics Movements

1. An interdisciplinary convergence: the parallel evolution of the Law & Humanities and Legal Clinics movements in Continental Legal Culture

The purpose of this contribution is to identify points of similarity and possible convergence of the *Legal Clinics* and the *Law & Literature* movements, with particular regard to their historical evolution in Continental Legal Culture. These processes can be arguably reconstructed in parallel, as both movements sprung up in Europe from the very same necessity of reform in legal education, through the adoption of an interdisciplinary and pragmatic approach.The words of the late Piero Calamandrei (1924, 202, translation ours) can effectively prove that the Italian *Law & Literature* movement was inspired by the same pedagogical needs that contributed to the first experiments in *Legal Clinics*: "An antology of literary works, in which the legal phenomenon – that in class appear as lifeless as the empty shell of a chrysalis after the butterfly has emerged from it – may come alive, would be useful in giving law students the conscience that the jurist does not waste his time weighing words, but he is the severe guardian of all human miseries and passions" (Calamandrei, 1924, p. 202).

It comes as no surprise that the Continental counterparts to the Atlantic jus-literary movements – traditionally associated with American Realism and Legal Semiotics – share a common genomic heritage with the *Legal Clinics*' educational purposes, even in the absence of any evident overlapping or direct exchange: an interdisciplinary gene, we might argue; and it is therefore not by chance that many reflections on interdisciplinary openness in legal education are accompanied by analogous reflections on the introduction of *Legal Clinics* in the *curricula* of European universities.

In order to prove the *genetical* closeness of the two movements in our legal tradition, we will try to reconstruct a parallel history in the following paragraphs, moving from the brief analysis of the earliest contributions to the Italian movement of *Diritto e Letteratura*, and their interlocutors in Continental Europe.

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2. The antipositivist reaction and the origins of the European Law & Literature movement

Law has been originally compared to Literature in their common attempt to structure reality through the use of language: the language of Law reveals, in fact, more than a trace of its literary parenthood. These two seemingly heterogeneous domains share a common interest in linguistic problems: structure, rhetoric, ambiguity, interpretation, and the constant search for the meanings conveyed by linguistic signs. This parenthood is worth exploring through a brief etymological digression (Capuzza, 2012, 3): the Latin root word for Literature, *littera*, derives from the supine of the verb *lino* (to spread, to apply), *litum*. The act of wiping wax on a tablet was called *litura* and this gesture effectively represents the moment of reflection associated with literary creation: erasure means rethinking, meditation, return. This etymology holds close ties with Law: just think about the meaning of *littera* as edict, or the affinities between the verbs *legere* and *ligare*. The actual function of Law is to *legare*, and the word *lex* derives from *legare* like the word *ius* derives from *iungere* (Carnelutti, 1949, 3).The affinity between the expressive and conceptual processes of the two disciplines justifies their natural association: Law and Literature therefore provide an ideal breeding ground for interdisciplinary investigation.

In the last years, from the combination of Legal Realism with hermeneutics, literary criticism and European cultural studies, a spurious method was born, particularly wary of Legal Positivism, its intellectual constructions and its categories: *Law & Literature* studies have flourished as a Postmodern Legal Movement (Minda 1996), challenging traditional dogmas in the attempt to identify an "organic intellectual" that can transform legal education from within.

This attempt has characterized the Italian experience since medieval times: in the Italian *universitates*, legal studies have always been accompanied by philosophical reflections on the hermeneutical fundamentals of the *artes*, and by the presence of historical, philosophical and, more recently, anthropological and sociological academic subjects. The conspicuous contributions of Italian scholars to the *Law & Literature* movement – contemporary and even preceding the most renowned North American production (as in the case of Pietro Cogliolo we will review later) – cannot therefore be surprising. On the following pages, we will present some of the most influential contributions to the Italian movement of *Diritto e Letteratura* in the twentieth century, adhering to an authoritative periodization proposal (Sansone, Mittica 2008).

Giovanni Brunetti (1906) dedicates a whole paragraph of *Il delitto civile* – entitled *Il fatto illecito e il fatto immorale di fronte al diritto positivo* (The Illegal and Immoral Fact in the Face of Positive Law) – to the analysis of the Shakespearean *Merchant of Venice*, drawing lessons on the interrelationship between positive law and moral imperative.

The essay by Alfredo Ascoli and Cesare Levi (1914), *Il diritto privato nel teatro contemporaneo francese e italiano* (Private Law in Contemporary French and Italian Drama) – published on the *Rivista di Diritto Civile* founded in 1909 by Ascoli himself – demonstrates the vitality of Italian civil lawyers' literary in-

terests, and represents the first example of collaborative work between a jurist and a drama critic, such as Levi.

Comparative lawyer Roberto Vacca, in *Il diritto sperimentale* (1923), deals with the methodological issues of comparing legal systems, affirming the need and the opportunity to observe positive law as a natural act – determined by human nature and by the rules of social aggregates – through the application of the experimental method of traditional natural sciences.

In this work, Vacca (ibid. p. 245) points out how the behaviour of characters in literary works can describe (translation ours) "certain ways of acting and thinking inherent to human nature much better than some old treatise of philosophy of law, and also much better than many of the modern legal psychology manuals" (ibid.).

An essay by Antonio D'Amato (1936), *La letteratura e la vita del diritto* (Literature and the Life of Law), is almost unanimously recognized as the first systematic Italian contribution to the *Law & Literature* movement (Preface, translation ours): "There is a shortage of such studies, because they demand real breadth of culture, but there is an increasing need to reaffirm the convergence of disciplines in the one and only study of the ways in which the human spirit is revealed and has evolved historically" (ibid.). The author points out that Literature is "a precious material, in itself capable of explaining the origins and the evolution of legal institutions" (ibid.).

D'Amato argues that Law and Literature are both manifestations of the collective consciousness, different moments of the actualization of the spirit – expressed through Literature first, then formalized in legal provisions: "Literature can provide the broader basis for the provisions that will be enacted into Law: Law will thus tend to evolve when it no longer responds to the *opinio necessitatis* that reflects the true needs of social life" (ibid.).

D'Amato, recalling Croce's idealism, considers Literature as an authentic representation of the needs and aspirations of society, fulfilling an auxiliary function in the evolution of Law, since "whenever Law is in harmony with the spirit of humanity and responds to the rhythm of collective consciousness, Literature, far from contradicting it, follows its transformation; and – when it does not respond accordingly – Literature succeeds in pushing Law forward, almost as a thermometer of the legal sensibility of the people" (ibid.).

D'Amato's essay can also be read as a complete review of previous studies published in Europe, in Germany, in Italy, and in the United States: these works are classified along lines suggested by Fehr, Wigmore and Cardozo. The author refers specifically to *letteratura nel diritto* (Literature in Law), including those works that magnify the aesthetic elements of Law ("the desire of jurists to do something beautiful and harmonious", ibid.), and to *diritto nella letteratura* (Law in Literature), including those works in which Literature is an instrument of inquiry capable of dwelling on "more typical facts relating to the life of Law".

The constitutionalist Ferruccio Pergolesi is one of the most prolific authors in the Italian *Diritto e Letteratura* movement: his work on the subject date back as far as the 1927 article *Il diritto nella letteratura* (The Law in Literature), and reaches its maturity in the 1949 essay entitled *Diritto e giustizia nella letteratura moderna narrativa e teatrale* (Law and Justice in Modern Narrative and Drama).

Pergolesi addresses the question of the purpose and disciplinary boundaries of *Law & Literature* studies, justifying the subject of his inquiry as follows (1927, translation ours): "Drawing its contents from life itself, Literature must include a complex and varied legal material. Law in Literature appears to be justified as a subject of serious study, even of scientifical study. It could be said that the Literature of a Nation might help, when used with great caution, in understanding the history of its Law – that is to say – of its legal practices, of its civil history" (Pergolesi, 1927, p. 1278).

Pergolesi refers to the works of Italian, French, Spanish, English, German, Polish, Russian and North American authors in the most diverse genres of fiction, theater and poetry: his research focuses on living law, family law and succession law as well as public law; dealing with trials, the enforcement of judgments and, at the same time, with the ethical issues of justice.

In the German area, Swiss legal historian Hans Fehr laid the foundations of the German *Recht und Literatur* movement with the publication of the trilogy – repeatedly quoted by D'Amato himself – composed of *Das Recht im Bilde* (1923), *Das Recht in der Dichtung* (1931) and *Die Dichtung im Recht* (1937).

Law is *Kulturerscheinung*, culture, education: Fehr reinterprets the pandects and German law in search of symbolisms and poetical meanings.

A similar approach is employed by Gustav Radbruch, one of the most aggressive opponent of Kelsenian Legal Formalism: according to the German legal philosopher, Law can only be understood by moving from its purpose and from its idea. Law, as a cultural phenomenon directed towards the implementation of certain values, falls within the concept of *Kultur*.

In a futuristic and seminal work, published in 1938 in Italian under the title *Psicologia del sentimento giuridico dei popoli* (Psychology of the Legal Reasoning of Nations), Radbruch uses Literature as a means to understand the idea of Law in different Nations.

By way of example, Russian Literature may prove that Law, in that cultural context, has no lasting foundation or absolute justification: Tolstoj opposes, in fact, the political community with a communion of love, which is obtained without threat and coercion.

In the history of French Literature, on the contrary, Law is presented as the most rational of cultural forms; justice, for Gustave Flaubert, identifies with the very idea of Law, and includes the whole concept of morality.

Conversely, British Law stands out for a peculiar concreteness: it captures the "nature of things" in relation to each case considered. In Anglo-Saxon tradition, therefore, "legal intelligence is more widespread than in any other Nation" (ibid., p. 245) and Literature has great legal content.

British legal culture is flexible and "wholly merged with the idea of equity" through the union of historicism and natural law; natural law, in the British legal tradition, is strongly tied to the "greater sense of freedom" that emerges in Common Law p. 246.

Although naive, the comparative approach adopted by Radbruch and Vacca is of particular interest, in a historical perspective: it demonstrates that the issues raised by *Law & Humanities* studies could greatly benefit from the contribution of comparative lawyers, more incline to explore the fuzzy boundaries between disciplines and more open to share methodologies.

Nonetheless, it was the distance between the predicates of legal positivism and the complexities of reality that generated the *Law & Literature* movement: this very same feeling of uneasiness has permeated the field of legal education, where the first experiments in *Legal Clinics* were taking place.

2.1. The reflection on legal education between la Clinique Juridique and the Rechtsklinik

More than eighty years after its publication, Francesco Carnelutti's proposal (1935, p. 169 da clinica del diritto, translation ours) of "integrating legal dogmatics with Legal Clinics" still retains its actuality, playing a central role in the never-ending debate on legal education: "I do not know if it would be possible to compare the teaching subjects taught in medical schools and in law schools, but one thing is certain: unlike the future doctor, the future lawyer, as long as he remains in University, never gets in contact with the reality that represents the ultimate goal of his studies" (ibid.).

The programmatic enunciation of Carnelutti is precisely to bring law students into contact with reality, but they continue to "live in this absurdity": graduating from law school and becoming lawyers "without ever having seen a living case of law" (ibid.).

In this sense, the operative proposal of Carnelutti differs from the solution that he himself refers to, previously developed by Julien Bonnecase (1929, 186) in France, where Henri Capitant was already directing an *Institut clinique de jurisprudence* at the *Palais de justice de Paris* (Bonnecase, 1931, 61).

Strongly critical of the conservative and entrenched positivist école de l›exégèse, Bonnecase (1929, 197) wishes to demonstrate that "law schools must be establishments of high philosophy, centres for social education and Legal Clinics" (Carnelutti, 1935, p. 173), and proposes a *retrospective clinic* aimed at "describing and analyzing what has happened" – namely case studies – which is, according to Carnelutti (ibid., 173), only "half a clinic".

Carnelutti also identifies the limits of this approach: the critical analysis of case studies might work if the "selected cases are alive, real, in flesh and bone", but cannot be sufficient by itself. Tom, Dick and Harry (*Tizio, Caio e Sempronio*), protagonists of legal examples, "are puppets, not men; and with puppets, in school, all you can do is make students laugh" (ibid.). The author does not even spare the experiments in trial simulation "akin to a theatrical play, assigning students the roles of the parties involved" resulting in a "funny and miserable show" (ibid.). And Carnelutti is also very critical of post graduate internships, where the apprentice "offers low quality work, receiving in exchange the opportunity to watch and emulate the attorneys. In the courts or in the offices, interns are nothing but errand boys. Internships do not even represent a surrogate of Legal Clinics" (ibid., 173).

A succinct digression on the debate that took place in post-unitarian Italy between Pietro Cogliolo – supported by Emanuele Gianturco and Carlo Fadda – and Vittorio Scialoja, can historically contextualize Carnelutti's reform project. Cogliolo (1917, 37, translation ours) addressed these words to his students: "The distance between the practice of Law and the Law taught in universities has led to the misconception that in our universities we teach legal concepts that have no use for real

life". His proposals for "increasing the number of courses that offer practical exercises in private law" – presented with Carlo Fadda in Milan in 1887 – met the resistance of Vittorio Scialoja, who reduced these practical exercises to "jokes, or at least pure and simple fun" (ibid.). Cogliolo quotes Emanuele Gianturco's *Crestomanzia di casi giudiziari in uso accademico* – "a true model for legal education" – published in 1884 under the undeniable influence of the provocative conceptions of Rudolf von Jhering.

It comes as no surprise, therefore, the coincident publication in 1884 of the *Crestomanzia* of the Neapolitan jurist and of Jhering's *Scherz und Ernst in der Jurisprudenz*. The fifth letter of the Scherz contains two ironic proposals, to overcome the obstacles of a legal education based solely on theory: the institution of Legal Clinics – "museums" displaying collections similar to the anatomical, pathological and pharmacological collections of medical schools – and the abolitions of examinations, as they should be – according to Jhering – either taken repeatedly during the whole duration of legal studies or never taken.

In this context, Carnelutti has been endowed with the task of bridging the gap between theoretical preparation and practical knowledge: "How can we bridge this gap? We can be bridge it because we must. We never even tried to look for a remedy. We will bow our heads in the face of impossibility when, at least, we will have made a serious effort" (Carnelutti, 1935, p. 171).

The pursuit of such a passionate purpose necessarily moves from "that sum of cognitions and experiences related to practical knowledge" (ibid.): Carnelutti therefore informs his positions to a concreteness unknown to the French tradition of the *clinique juridique*. But his inquiries will also lead to the very boundaries erected by legal positivism, at the crossroads of disciplines: his works – along with Cogliolo and Calamandrei's writings that we will review in the following paragraph – can be read today as the paradigm of a possible convergence between jusliterary pursuits and the practice of Legal Clinics.

2.2. Men of the Renaissance: Calamandrei, Carnelutti and Cogliolo's contributions to both movements in Italy

Francesco Carnelutti, as many Italian legal scholars of his time, was a highly cultivated and well-versed man of the Renaissance: his research dealt not only with the implementation of *Legal Clinics*, but also with the relationship between aesthetics and Law, anticipating many decades of studies on *Law & Humanities*. In his *Metodologia del diritto* (1939, 59, translation ours), he wittily points out the importance of the hermeneutical issues common to legal interpretation and performing art forms, like music:

> There is not much difference between the interpreter of a music score and the interpreter of a legal text. It means that – among other things – to be a jurist, one must first be an artist of the Law. The truth is that reading the civil code is no different than reading a score. Depending on what passes through the mind of Toscanini, Wagner's music becomes one thing or another. To what extent this is the work of the creator and to what extent this is the work of the re-creator?

Even further back in our history, Pietro Cogliolo dedicated seminal pages in his *Saggi sopra l'Evoluzione del Diritto Privato* to the relationship between Law and language and the functional use of rhetorical figures in normative sources, touching upon subjects covered by *Law as Literature* studies published a century later (1885, p. 87, translation ours):

> The relationship between language and Law can demonstrate the importance of logic in the legal discourse; there is always a certain hidden motive in the choice and use of words, and the same applies to the creation of norms: the power of the mind expresses, formulates, and satisfies the needs felt. The power of intellectual work in the creation of the legal building is manifested by rules that are not separated from each other but coordinated under a few fundamental principles; Roman law and the modern legal systems that emulate it are, for this reason, a wonder to behold.

We have already described Cogliolo's intolerance to the inconsistencies between the practice of Law and the Law taught in universities; he was a forerunner of a different model of legal education (1894, 6, translation ours):

> When some of you, in turn, will take the case file from me and see a real case, looking at real documents and preparing yourself for a public dispute in which other young students will contradict you, and when some others, presided by me, will listen to the closing statements and write a decision, you would then understand that guided and honest practice is the ideal complement to serious scientific study.

Attention to the contact with legal tools is also placed by Carnelutti:

> Among all legal tools, there is only one that the students will touch with their hands: the code. I ask that henceforth notary deeds, court proceedings, credit bills, business books should not be the subject of lesson without being shown to the students. I ask that you do not teach banking law without visiting a bank, or maritime and criminal law without visiting a harbor or a house of correction, or procedural law without bringing students to the hearings (Carnelutti 1935, p. 172).

Cogliolo's words seem to reconnect the wisdom of Roman law with the necessities of modern legal education: "We should try to teach not only the theoretical *institui* but also the practical *audire* of Roman times; not only the *lectura* but also the *disputatio* of medieval times; not only doctrinal dogmas but also the *Legal Clinics* of modern times" (Cogliolo, 1894, p. 6).

Piero Calamandrei shares similar sensibilities to Cogliolo and Carnelutti: Calamandrei is remembered as a man of robe and letters, the personification of the perpetual dialogue between the juridical and literary dimensions; exalted as "a rare example of those men who concentrate in themselves a whole civilization", "a Renaissance man, with the culture of a jurist and the sensibility of a literate", he has defined himself "a man of letters repressed by legal knowledge": his literary vein and his classical culture are present in all his legal and political writings. As a poet and leader of the Italian resistance, Calamandrei has penned a most moving

epigraph, the *Lapide ad ignominia* (*Ode to Kesselring*), when *Generalfeldmarschall* Albert Kesselring defiantly described the Marzabotto massacre as a "normal military operation", claiming that he had "saved Italy" and that the Italians ought to build him "a monument".

In Calamandrei, the jurist and the writer perfectly coexist: as a jurist he has rejected the theoretical constructions of abstract technicalism, as a writer he has overcome the idea of art for art's sake, constantly faithful to an ideal of balance and sobriety.

For the reasons described above, he's the paragon of the Italian movement of *Diritto e Letteratura*, as demonstrated by his *Le lettere e il processo civile* (1924, p. 202, translation ours): "By reading certain pages of novels it is possible to form a closer impression of the ways in which reality affects the laws and of the laws' inadequacy to achieve the practical goals for which they were implemented, better than by reading specialist literature written in technical jargon".

Calamandrei's interests ranged widely: he has written seminal pages on the issues of legal education and the necessity of its reform – as further proof of the aforementioned genetic closeness of the *Legal Clinics* and *Diritto e Letteratura* movements in Italian legal culture – dedicating *L'università di domani* (1924) to the connection between scientific research and teaching. His work gained the admiration of Giovanni Gentile, who offered him a position within the Ministry of Education; the Florentine jurist, however, refused, in the conviction that "at a passionate moment like this", the teaching position is "a battlefield trench: second to none for freedom and therefore for responsibility" (Calamandrei 1968, 197-198).

3. By way of conclusion: interdisciplinarity and the future of legal education

Beyond the theoretical reflections generated by the issues of legal education, we will not achieve our real purpose if we do not always keep in mind the empathetic relationship between the teacher and the learner. These roles are not fixed once and for all, but interchangeable: it is true, in fact, that everyone involved in this process is teaching and learning at the same time, with the same tension and intellectual curiosity towards what still remains unknown.

What we can learn from the words of the Masters of our legal tradition is that, in order to obtain a correct and rigorous legal training, we must open ourselves to the *concordia discors* of interdisciplinarity, adopting historical and comparative perspectives, balancing disciplinary depth and transdisciplinary breadth, without neglecting geopolitics, economics, anthropology, bioethical dilemmas, literature, performing arts, *humanities* in general. This lesson is, of course, not unknown to American legal culture: it would suffice to reproduce here the letter that, in May 1954, Justice Felix Frankfurter wrote in reply to a 12-year-old boy interested in a career in the law that requested his advice:

> My Dear Paul:
> No one can be a truly competent lawyer unless he is a cultivated man. If I were you I

would forget about any technical preparation for the law. The best way to prepare for the law is to be a well-read person. Thus alone can one acquire the capacity to use the English language on paper and in speech and with the habits of clear thinking which only a truly liberal education can give. No less important for a lawyer is the cultivation of the imaginative faculties by reading poetry, seeing great paintings, in the original or in easily available reproductions, and listening to great music. Stock your mind with the deposit of much good reading, and widen and deepen your feelings by experiencing vicariously as much as possible the wonderful mysteries of the universe, and forget about your future career.
With good wishes,
Sincerely yours,
Felix Frankfurter.

I will conclude with the words of Francesco Carnelutti (1959, 6, translation ours): "The jurist that does only know the Law, does not even know the Law".

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