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Trajectories and Future Perspectives in Law and Humanities

1. Before the Law

I would like to begin with two premises.

The first. Each society needs to be regulated, and this need can be expressed in multiple ways: from extremely simple forms of regulation to very sophisticated systems of norms characterized by a high level of complexity. The field of normativity can only be addressed as a field composed by different, plural expressions of normativity (Napoli, 2013). This plurality of forms of normativity, as I will try to argue in this paper, relates to the very structure of human life and to its intrinsic connection with norms of various nature: it is only through norms that different forms of life and existence can coexist and for this reason law is constructed in a way that allows different actors to be listened to within the realm of the "just", and of the conventionally "accepted". Or, at least, law should aim at functioning in such a way. For this reason, the double-parallel methodological perspective of both law and humanities (which theoretically embraces individual narratives because of the use of literary and other artistic productions) and legal clinics (which give space, voice and legal protection to those whose voices are often marginalized) might constitute a step of groundbreaking innovation in the trajectories taken by interdisciplinary studies on law.

But let us go back to the initial question, the plural and multiple nature of normativity. As stated before, I assume that – within the field of plural normativities – law acquired in time a differentiated character and it is (at least in the Western world) the most paradigmatic tool of social regulation.

It is actually difficult to define the origin of each source of normativity and to distinguish each source from the others and for this reason the field of normativity should be observed by imagining a permanent comparison between the many natures of norms that coexist in each society: legal, religous, economic, etc. It is by bearing this premise in mind that we must understand the value of transdisciplinary studies on law and also of clinical approaches to law, especially in fields that intersect with fundamental rights such as migration, gender, children's rights, and rights of disabled persons.

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As a matter of fact, law constitutes a specific form of normativity that – in order to regulate the multiple forms of life that exist in reality – is characterized by abstraction and generality so it is at the same time attached *to* and detached *from* the single social relations. But we must keep in mind that *before* the law, there is normativity as a broader field and even before that, there is *humanity*: this is the core of both law and humanities and legal clinics. In fact, if compared to other normative languages, such as religion and culture, law has two functional attitudes that differentiate it from other forms of norms: (i) it defines the specific temporal and spatial context of its application and it is reciprocally defined by such context; (ii) the *ratio* of its norms is to be positioned at a level of generality that allows to judge, dinstinguish, define. Juridical norms are characterized by the difference between the realm of norms and the realm of facts.

The field of normativities defines the historical space in which the formalisation of the legal techniques faces the regulatory criteria built up by other social practices. This field is broader than the law. It exists before the law. It also exists after the law. A fundamental contribution to this reflection is the work of Michel Foucault on the archeology of human sciences, which is coherent with the antecedent reflections of Georges Canguilhem (1998) on normativity. According to Canguilhem's remarks on historical epistemology, human life is basically normative. Norms populate reality because we have a sort of "normative pulsion" and norms are the basic tools to understand the world. Man is a normative animal inasmuch as it is rational: in order to exist, human beings need to regulate and to be regulated. Norms are a way through which human beings are in contact with the environment around them: some of them help constructing the environment, others have different functions. In any case, all norms serve the same function – the adaptation to an external environment. Also when trying to adapt to a new environment, and when facing societal changes, human beings try to establish patterns of regularity, thus normativity can be considered as a foundational characteristic of human life. Life is a force that produces norms, because its permanent change and movement require to regulate the new, the unknown, the unexpected. Even when an incoherence or a problem occur, this occurrence should be seen as the emergence of a different normative order and not as a disruption of a precedent order or the absence of it. According to the espistemic approach to normativity suggested by Canguilhem, a norm demonstrates a certain level of attachment to a value. It does not reflect a relationship with reality but a relationship with a judgment on value.

2. Questioning the Nature and the Evolution of Law and Humanities Scholarship

And so I get to the second premise. Almost twenty years ago, Austin Sarat questioned the very nature of the interdisciplinary studies in law and humanities by asking what difference law and humanities scholarship had made to the prevailing understandings of law or the humanities, and whether that scholarship had lived up to its promise (1998, 401). Originally, law and humanities scholarship was mainly

conceived as: (i) a corrective to certain tendencies in law schools and in professional legal education, and – most importantly – to the rise of technocratic approaches to law: turning to the humanities was important to the degree that it could feed the law; (ii) an opportunity to include the cultural dimensions of human life in legal discourse through the introduction of the perspective of the humanities.

By imagining nowadays a response to Sarat's questioning of the nature and mission of law and humanities, with this paper I intend to investigate the potential of this scholarship in relation to political and social issues that characterize contemporary life. In particular, I intend to show how the interest of legal scholarship towards the humanities originally conceived seems now too narrow which is why I already mentioned the utility of working, as law and humanities scholars, in permanent connection with practical cases. This is the great innovation brought into legal discourse by legal clinics.

If the two premises are true, then a broader and more inclusive methodology is needed in the study of law's interaction with the critical "potential" of the humanities. It is undoubtlable that – despite the widespread scholarship falling into the category named "Critical Legal Studies" – the contours and the public impact of law and humanities scholarship remain too often blurry. Douzinas (2014) rightly claimed that "approaching legal questions through the humanities and through aesthetics in particular gives integrity to legal language" for a number of reasons, among which the psychological intimacy the humanities afford, an intimacy that can realize moments of sympathetic identification with people whose experiences and contexts may be quite different from our own. Moreover, the capacity to cultivate sympathy opens the possibility for the humanities to have a salutary counter-institutional effect thus producing a methodology which is in a dialectic relationship with legal normativity. Approaching law as one of the normative tools in society (and not as the exclusive normative tool) allows for a broader and more thorough understanding of law in particular at a time when the world's normative orders have become subject to rapidly progressing globalization. When considered within a set of many other forms of normativity (religion, economy, for instance), law can be rediscovered as a legitimate object of cultural analysis with important implications for contemporary concerns and problems.

As is common knowledge, at the beginning of the Nineties the turn to the humanities was seen originally as a response to the egemony of other disciplines and as a process that could help feed the law and to build a new, fresh conception of lawyers, judges, and legal professionists. Yet this first turn was characterized by an emphasis on the crucial role that rhetorical and literary discourse could play for legal education, as argued by James Boyd White (1973). The humanities were conceived in this originary phase of the scholarship as a source of inspiration that could help raise important questions about conflicts, society, values.

There was, then, a second age. That was when the discipline looked instead at the humanities in a way that does not canonize them in order to recuperate the critique: the critique of society, the critique of social relations, of values – in other words, that critical attitude that is necessary to nurture a cultural study of law.

But what does the expression "a cultural study of law" actually mean, today? I think that such a perspective should not be considered as a mere way to observe how law is represented – that is to say to look for artistic expressions containing legal themes – but it means instead to observe the normative language that different cultural forms entail (both directly and indirectly). Literature and the arts offer sets of images that *mean* something, by representing a model or a form of life and thus can have a normative value. When approached from this perspective, the humanities appear as bodies of knowledge and not just as bodies of singular narratives: law as well, if juxtaposed to the humanities thus conceived, does not appear as a mere body of forensic and procedural skills, but as a fertile cultural practice.

2.1. Continuities, Discontinuities

Let us consider an exemplary analysis in law and literature.

Susan Sage Heinzelman has beautifully depicted the interferences and differences between the function of imagination in law and the function of imagination in the novel (2009, 213). Let us begin with an element of discontinuity. There is, according to her, a deep affiliation between the novel and the law and this affiliation involves a balancing act between the demands inherent in affirming the status of the rule of law and the generic demands of the novel (2014). The most superficial and obvious remark about this relationship between the novel and the law is that the law seeks the *truth*, wheras the novel relies on *fiction* and does not seek the truth. Law has a different engagement with the real and fiction engages with the imaginary.

If the level of imagination differentiates the novel and the law, their mutual engagement with the construction of cultural discourse is actually an element of discontinuity: just like the novel, law shapes and is shaped by the ideological patterns that dominate a determinate context and a historical period. A legal reform (for instance, on family law, on marrriage) can impact the life of individuals inasmuch as an influent novel (for instance, *Pride and Prejudice*). Heinzelman takes the English Novel of the XVIII and XIX century and confronts it with the centralized legislation of the same period. The legislation promoted certain values of a certain class, namely the elite class, male and propertied. This perspective for imagining life and family in particular reflects in both languages a superiority of men over women and an exclusion from the discourse on power of the poor, of women, of children. If law perpetrated in the preservation of class privileges also after that period, novelists shifted their interest more towards the voices who had been textually excluded (West, 1988, 140): novels started to represent justice from the perspective of the excluded so in that case they constituted a source of representations of the world from the perspective of the subordinate social classes. Structures of feeling are organized at a societal level through their formal repetition in the novel, just as the formal and repeated performances of the law in action are a way of organizing the subject's response to its authority and of thereby creating a legal subject.

The parallel drawn between the novel and the law by Heinzelmann suggests that the dangers of reducing law and humanities to a mere interdisciplinary perspective aimed at detecting traces of one discipline within the other are many. Among these dangers, I see the following in particular: (a) law could be conceived as a merely written norm and literature and the humanities could be conceived as the world of affects, sensibility, and the unreasonable. On the contrary, law is never only a written norm and the humanities consist of very complex stylistic rules and the content of the messages they convey can influence our behavior (they can be, in other words, normative). (b) If law is considered as a means of power enforcemenet, intrinsically unfair, and the humanities on the contrary are considered as the language of individual justice, the discipline would lead nowhere. It is useul to look back at the famous exhortation by James Boyd White (1973, xiii)

> I think that law is not merely a system of rules (or rules and principles), or reducible to policy choices or class interests, but that it is rather what I call a language, by which I do not mean just a set of terms and locutions, but habits of mind and expectations – what might also be called a culture. It is an enormously rich and complex system of thought and expression, of social definitions and practices, which can be learned and mastered, modified or preserved, by the individual mind. The law makes the world. An the law in another sense (…) is a kind of cultural competence: an art of reading the special literature of the law and an art of speaking and writing – or making compositions of one's own – in this language.

Law is a complex system of thought and expression, of social definitions and practices that can oppress, or protect. It can grant or deny rights (Hunt 2007, 67); it can acknowledge or repudiate one's humanity, moral worth or entitlement; it can create spheres of violence or intimacy; and create feelings of misery, deprivation, safety or respect. The fact that law can affect the subjectivity of the creatures that will never produce the law or criticize it (the "textually excluded": West, 1988) means that the intimate relationship between individuals and the norms should be protected, observed and valued in its many forms. This relationship finds an expression in the humanities, where the single narrative counts and is at the center of a world, whatever that is. It is only through the humanities that we can observe how law touches upon every human interest and every aspect of conflictuality in human life. General theory of law should lead to the humanities for three reasons: (a) first, the psychological intimacy art affords realizes moments of sympathetic identification with people whose experiences and contexts may be quite different from our own. Thus art is intrinsically political because it shows unexpected perspectives on reality; (b) second, the capacity to cultivate sympathy opens the possibility for art to have a salutary counter-hegemonic and counter-institutional effect and thus art produces a field which is in a dialectic relationship with legal normativity; (c) third, art helps raising consciousness about the effects of power and historical patterns of oppression, exploitation, and marginalization. It helps develop and integrate a sensitive understanding of the ways in which language can shape our perception of others

and, thus, the way we interact within our communities. In short, arts can help us see, understand, and identify with those whose lives and experiences are often illegible *before the law*. Now, this is where I see the intersection between law and humanities and legal clinics becoming productive and potentially groundbreaking: in the relevance attribute to the single experience and to the *case*.

3. Phenomenology of Normativity

The final point I want to make is that normativity appears in many forms but it always is a constitutive aspect of human life and it is by this remark that law and humanities scholarship should be driven by. There would be no coexistence without norms in their many forms. In the way human life and reality are constructed through the tensions between forms and changes, legal normativity emerges as one of the many possible forms of regulation of life and reality. The relation between law and the world is not in the least unilateral; it seems, instead, that there is a reciprocal connection of constructing and reshaping between legal normativity and those implicit or explicit normative narratives conveyed by the humanities. Legal discourse inherits in diverse spaces and contexts all the voices conveyed by the humanities. In their function as instances of legal normativity, juridical norms incorporate the vast complexity of life and reality. Or in the words of Guido Calabresi (1989): "Law feeds and is fed by the world around it. Fortunately, that world is at least as aptly described and understood by the humanities as by the social sciences. Hence, and also fortunately, it is impossible fully to understand law without a deep and sympathetic knowledge of the liberal arts".

Law and humanities thus understood can capture the impact, the compliance and the effectiveness of law on social change in an innovative way. Such an approach does not necessarily pertain to the field of legal sociology but it is instead a way of reading the law critically in its interconnection with society and through the lens of its structurally political nature. Law and humanities is the field of the plural normativities which can fill in the gap between the ideal of the law and the actual practices flowing from it, between law-in-theory and law-in-action. Legal rules are only one of a number of systems of rules, often overlapping and entwined, which shape our agency, and by which we are judged, as noted by Malcom Feeley (1976, 501). In different cultures and at different times, law performs different functions and is entwined in different ways with other forms of social control and methods of dispute settlement. Law, unlike kinship, language, or power, does not seem to be a "fundamental phenomenon". Like other normative phenomena (among which I list the humanities) law is not ubiquitous, and its nature varies, thus such a nature can never be entirely grasped and understood, but only practiced and acted. And here, once again, the parallel between law and humanities and legal clinics emerges as powerful.

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