

THE MAKING OF A CIVIL LAW CLINIC

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The story I am going to tell is a story of a latecomer in clinical education. The Clinic of Brescia was established two years ago and we are still in the making process. All Faculty staff has an academic origin and we still keep on doing our usual teaching job together with the clinical job. As clinicians, we are experiencing a sense of loneliness, since the Clinic of Brescia is the first and, so far, the only one ever established in Italy. But at the same time, we feel we are like explorers, like pathfinders going through new territories, new lands to be annexed and conquered.

I am afraid this presentation will stick more than I wish to the academic lecturing style that we try to overcome. No interactive tools or cooperative exercises. But I know that to be patient with people who are learning is one of the virtues of clinicians and so I count on your patience.

1. The starting point: an example of reflective practice?

The Legal Clinic of Brescia was born out of a deep feeling of dissatisfaction about the state of legal education in Italy and the undervaluation of the social dimension of the law within the academic institution.

The issues we were facing at the time we decided to establish a Clinic concerned:

- **first**, what we teach and how we teach in a legal system that, as civil law systems tend to do, disregards experiential and problem solving centred learning;
- **secondly**, how the function of the law in society is

appreciated within a mode of thinking that still presents the law as a closed normative system, despite different attempts, undertaken over time, to open it to the reality of social relations (the subjects I teach - i.e. labour law and anti-discrimination law - are two of the main fields where such kind of attempts has taken place).

Then we got to know the Clinical education model and it seemed to be a good answer to both problems, so we started studying it.

2. "There are more things in heaven and earth..."

But as we went through this process of adaptation, we realized that there were more things in heaven and earth than in our philosophy and that our task would have been harder than we thought.

Clinics are an offspring of the common law tradition and their transplant in a civil law system could be highly problematic: we had to match not only different pedagogical methods, but also different legal cultures.

I will first explore what these cultural differences are about and will then describe our attempt to create a hybrid model of legal clinic, which seems to suit better the specificity of a civil law system, while keeping the basic assumption of the clinical education.

3. The core of our teaching: language as main instrument of legal knowledge

Let me start by saying that, as civil lawyers, the core of our mainstreaming teaching method is language. We are embedded in an epistemic community where it is believed that the main instrument of knowledge is constituted by written and oral language, not by

experience: the language of legal texts (constitutions, codes, laws), the language of precedents and doctrine, as organized in manuals and casebooks. It is through language that we face the challenge of interpretation, that of assigning a given meaning to legal rules and principles. And it is through language that legal doctrine conceptualizes the different parts of the legal system within a single theoretical framework.

Finally, it is through language that we teach the law and train our students to practice it.

4. " *The perfect teacher is the perfect orator*".

A good way to illustrate this last point is to quote a definition of the teaching skills that a colleague of mine gave just a few days ago during a discussion on our teaching methods held in our Faculty. According to his definition "*The perfect teacher is the perfect orator*".

Now, the perfect "orator", as described by Cicero, is the one who master the art of:

- finding the arguments (*inventio*);
- disposing them in logical order (*dispositio*);
- adorning the speech with rhetoric devices (*elocutio*);
- retaining the argument in memory (*memoria*);
- exposing the speech with grace, dignity, gesture, modulation of voice and face (*acti*).

The listener is just a passive recipient of a speech that has to prove something and to entertain and to persuade (*probare, delectare, flectere*) the audience.

Indeed, this is the way we still conceive a perfect lecture, the ideal model so to say, although, as I will say later, more interactive methods of teaching have been introduced lately.

It has been suggested that our "oratorical teaching" is mandated by the universalistic nature of the European public universities, rather than being inherent to the civil law approach. The fact that in Europe public universities are inexpensive, at least if compared to American universities, allowed a larger number of people to enjoy university education and, as a consequence, lectures are often given to class of large size, with hundred students, sitting in benches and looking at a higher seat, where the teacher speaks alone and at large, for one hour or more.

In other words, the argument runs this way: it is because European universities are mass universities that more interactive methods, such as the Socratic method, are precluded.

While I agree that differences in teaching style are also due to structural and institutional factors, it seems to me would that the most relevant differences between the ways law is taught in civil law and common law systems are, as I said at the beginning, of a cultural nature. I will try now to describe some of these cultural differences by using the oratorical device of dichotomy. This is, of course, a way of oversimplifying complex issues (a form of reductionism, if you like), but it can help in the discussion of those issues.

5. The main dichotomies:

Text versus fact and logic versus experience

That language is the main instruments of the knowledge and of the transmission of legal rules is true since the disappearance of the so called "silent law" (made by rules which were kept alive and effective only by long-standing compliance) and it is actually true both for common law and civil law system, since both systems rely on language to set, conceptualize and analyse the law, the *corpus juris*.

What constitutes a specific feature of civil law systems, and influences deeply our way of learning and understanding the law, is the primacy of the text, the long-standing idea (which goes back to our positivist tradition, and even behind, to the Roman tradition) that the law should be written, in order to prevent magistrates from applying it arbitrarily, since law is created by legislature, by the State or by other public authorities.

Since the law is not created but just learned by interpreters, in the civil law tradition the role of *juris periti* (of the ones who are learned in the law) is crucial: legal doctrine plays a fundamental role in conceptualizing the meaning of principles and rules, a role which also judges often refer to when applying the law. Scholarly interpretations of law, collected in treaties, manuals, is thus a substantial part of what we teach and what our students learn, and in a way that leads them to believe that manuals and treaties are the law.

As a consequence, the knowledge and the mastering of substantive, written law and of what legal doctrine elaborate are the main ability that we require our student to acquire.

The other fundamental characteristic of the civil law tradition is that legal reasoning proceeds from abstractions and judicial decisions are described as syllogisms, as a deductive reasoning, which starting from a generalization, arrives at a specific conclusion that is logically implied by the premises.

Starting from this understanding of legal reasoning, what we try to teach to our students is mainly how to connect principles and rules in a formal, logical structure and how to built a theory on it.

On the contrary, common law systems, based on judicial precedents, favour the idea that legal knowledge starts from facts, from a problem, since law is created by judges after a question has been asked by a private party through the filing of a lawsuit.

The form of reasoning most used in common law is case-based, is inductive: it progresses from observations of individual cases

to the development of a general principle .

As a consequence, what is required to students is to think analytically and analogically, to start from the problem, to conduct a strict scrutiny of the circumstances by which precedents can be distinguished from to the current dispute or extended analogically to it.

These differences between the two systems give an account of why it is in common law systems that alternative ways of teaching have been first developed, focused non only on the knowledge of legal rules and tools of interpretation, but also on other abilities, which requires to start from the problem, which are based on inductive or pragmatic mental operations, such as problem-identification analysis and ends-means thinking and which are experiential.

In the civil law system existing law schools tend to think that they can keep on going without all this. Why?

I would argue that is because it is traditionally believed that arguments based on experience or observation are best expressed by induction, inductively; while arguments based on laws, and rules are best expressed by deduction, deductively.

As you will remember, Justice Holmes protested against this, arguing that *"The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, and even the prejudices which judges share with their fellow-men, have had a good deal more to do than syllogism in determining the rules by which men should be governed"*

It seems to me that at this point what is at stake is a different concept of the law and of the role of lawyers.

If so, then, what law and being a lawyer are about?

6. Another dichotomy:

Judges or lawyers make the law?

Another difference which goes back two the different cultural tradition of the two systems and which might give an explanation of way civil law countries are late comers in clinic education is that our formalist tradition prevents us from sharing the view of American realists (and I am quoting again Justice Holmes) that "*law is nothing but the prophecies of what the courts will do in fact*".

But once we are brought to accept the importance to know how the law operates in practice, we have then to realize that, in fact, clinical education philosophy is departing even from traditional legal realism, as clinicians tend to think that law is not what judges do but what lawyers tell the judges to do.

This time I owe this suggestion to a talk with prof. Oppenheimer this suggestion, and I would say that it is not just a witty paradox but it rather reflects another big differences between the two system of legal education, depending, this time, on the respective roles of lawyers and judges.

In civil law countries, the criminal court system is inquisitorial and judges are in control of the litigation process. In civil cases, litigation is more adversarial, but judges still play an active role in admitting evidence and even in deciding (as it happens in employment or in anti-discrimination cases) what evidence is required and from whom. In common law system, on the contrary, it is the lawyer who controls the process and makes all the important decisions on behalf of her client. This, I think, explain why a class on Evidence or on Torts in the US could easily starts from the question "what are the client objective in this litigation?", while in Italy will more likely starts from the question "what are the rules and precedents that govern this situation?"

I do not think that the basic rules of conducts are different in the two systems or that lawyers are confronted with different ethical dilemmas depending on their being part of one or the other system.

But I do believe that we have a different view of the lawyer's role in the delivering of justice.

I wonder whether a common law lawyer would ever subscribe the statement made by the late President of the Brescia Bar Association while giving a lecture to our Clinic's students on ethical issues:

"Lawyers participate together with judges (even if with different roles) in the public duty of administrating justice".

In common law systems lawyers are seen mainly as an agent of the client and, even if their main duty when ethical issues are at stake are towards the court and not towards the client, I doubt that they could be defined as people performing a public service.

As I understood from a discussion that I had yesterday with an Australian colleague to refer to public service when talking about professionalism means to refer to what lawyers can do for the community's sake , not for the legal system's sake.

The respective roles of judges and lawyers in civil law system, along with the insistence on cognitive knowledge as the main apprenticeship to which law schools must attend, explain why they share the same apprenticeship track. How to develop the different kind of behaviours and abilities that these roles require (we must actually add the role of notary) within a unique training track is the specific challenge that civil law schools must tackle.

So far, only bad news about the chances of establishing a clinic in a civil law systems *and* surviving.

7. The differences between the two systems have become more and more blurred.

But this is only one side of the coin. The other side is that many of the differences that I have mentioned have become more and more blurred, starting with the contrast between civil law and common law legal systems, with the growing importance of case-law

in civil law countries, and the growing importance of statute law and codes in common law countries, that requires a new attention to the interaction of rules and principle.

The first move can be observed very clearly in the new European "*jus commune*", the law of the European Union. The European Court of Justice decisions are framed in a common law mode of reasoning and, as a result, the style of a lecture of European law tends to be very similar to the case analysis and interpretation style of an American law class.

On the other hand, there is an hybridation/integration of legal techniques, with a growing use in civil law systems of procedural rules, negotiation and counselling, which all require more flexible approaches and thinking processes closer to those used by common lawyers; and a growing space in common law systems for substantive rules, which requires a new attention to the interaction of rules and principle and to theoretical thinking.

Finally, the idea that advocacy can produce social change came to the fore also in civil law systems along with new pieces of legislation in the field of anti-discrimination protection and consumers rights, which provide new litigation tools, like class actions and public interest actions.

At the institutional level, the reforms following the so called "Bologna Process" and the construction of a *new European Qualification Framework* are giving way to the idea that there are different types of apprenticeship to which law school must attend. The intellectual and cognitive apprenticeship that is traditionally provided to students is only one part of the learning process. Law schools are asked to introduce methods of teaching that develop not only knowledge but also skills and ethical perspectives.

The conclusion is that we need to cross the borders and to integrate the two traditions. And we can do that through the very essence of the clinical method, through experience and self-reflection. We must experience the change and reflect on it. And have a big fun.