Characteristics of university law teaching: theoretical, methodological and pedagogical profiles; the case of legal clinics

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Abstract

This contribution aims to propose an answer to the following problem. Given the fact that legal positivism and normativism have been in crisis for some time now and since then perplexities have been expressed from many quarters with reference to the teaching method of law oriented towards these theories, the question arises as to whether today, in order to overcome the problem, it is sufficient to propose an alternative methodology for learning law (case law method and legal clinics), or whether these also need a solid theoretical foundation.

Il presente contributo mira a proporre una risposta al seguente problema. Posto che il positivismo giuridico e il normativismo sono da tempo in crisi e in séguito sono state proposte da più parti perplessità con riferimento al metodo d'insegnamento del diritto orientato a queste teoriche, ci si chiede se oggi, per superare il problema, sia sufficiente proporre una metodologia alternativa per l'apprendimento del diritto (metodo casistico-giurisprudenziale e cliniche legali), oppure anche queste abbiano bisogno di una solida fondazione teorica.

Parole chiave

Normativismo; Giusnaturalismo; Giuspositivismo; Didattica giuridica; Metodologia giuridica.

Keywords

Normativism; Natural law; Legal positivism; Legal didactics; Legal methodology.

1. Theoretical and methodological profiles of the current university law teaching

For the purposes of this contribution, and with reference to legal didactics, let us distinguish between the theoretical, the methodological and the more strictly pedagogical aspects.

We also feel we can affirm that in secondary schools and law universities, despite the crisis of the theories that inspire law, this is still taught today according to the theoretical idea of normativism and with the frontal lecture method (hereinafter also called "traditional"), in which it is the teacher who is placed at "centre stage"; in what follows, we will also discuss the pedagogical aspect of today's way of teaching law.

That said, and in relation to the strictly theoretical aspect of legal didactics, the reference is

mostly Hans Kelsen, who, while rejecting the dogma of the statehood of law and any distinction between state and law[1], as is well known, introduced the idea of the fundamental norm, thus guaranteeing the positive reality of all legal norms and of the legal system as a whole[2]. There is no doubt that Kelsen still represents the prototype of the theoretical teaching of law in Law Schools today, even though, from a strictly methodological point of view, in fact, he seems the have added less than is assumed with respect to the lesson of the German Pandectics and the Jurisprudence of concepts, except, perhaps, by radicalizing the idea of legal qualification and hypothetical reasoning of the "if then" [3]. As is well known, through the fundamental norm he ensured the purity of legal science, freeing it from any possible political, psychological, social and economic interference. It is, on the one hand, a hypothetical norm, which is not addressed, if not mediately, to the judges who have to apply the law, but above all allows the recipients of the norms to identify valid law from simple commands; on the other hand, it is almost induced by positive legal norms, even positivized, as a positive norm of international law (the principle of government and effective rights).

Again, with reference to the methodology of legal teaching, to assert today that law is taught through the Kelsenian method is to maintain that the teacher's intent is to accustom students to "qualify" the fact and to reduce every concrete event to a case of regulatory application, a particular hypothesis referable to the general and abstract ones contained in the normative provision, and all this without any philosophical, political or economic interference [4]. On closer inspection, from a methodological point of view, the teaching that appears even more exemplary for our purposes is the teaching indicated by the Pandectics, in virtue of which, whatever the philosophical reference that constitutes its foundation (neo-Kantianism, neo-idealism, philosophical positivism), the legal method is also today that which characterized the period of codification. In other words, it is not our intention to assert that today's method of teaching law intends to reduce every paradigm of legal science to Carl Bergbohm's model, according to which legal norms can only be derived from natural law (on the other hand, even natural law can be declined in normativistic terms) [5], or Ernest Zitelmann's model, according to which it is legal dogmatics that is to be used for a broader construction of positive law [6] Rather, the thesis is that law is taught today with the method of the logical system proposed by Puchta, understood as a "conceptual pyramid"[7], in which the balance of the logical element with the organic element of law in favour of formal logic, as it was in Savigny's dogmatics, has disappeared[8]; this is how the continental jurist has proceeded since codification.

It should also be considered that, when discussing the legal method of codification, law, in relation to which legal science is to constitute the legal system, is attributed the character of positivity and prescriptiveness, as it consists essentially of "commands". From our point of view, it is of little relevance that in the twentieth century, on the other hand, general theorists regarded law as consisting exclusively of norms, hence the so-called "normativism", at times conceived (in particular by Kelsen) not as (unconditional) commands, but as hypothetical imperatives[9], which must

1 M. Luzzati, *Del giurista interprete: linguaggio, tecniche e dottrine*, Torino, 2016, pp. 162-169.

2 F. Gentile, *Intelligenza politica e ragion di stato*, Milano, 1984, pp. 147-159.

3 K. Larenz, *Storia del metodo della scienza giuridica* (1960), tr.it., Milano, 1966, pp. 175-186.

4 F. Gentile, *Politica aut/et statistica*, Milano, 2003, pp. 171-181.

5 G. Lazzaro, *Storia e teoria della costruzione giuridica*, Torino, 1965, p. 53.

6 MG Losano, *Sistema e struttura nel diritto; dalle origini alla Scuola storica*, I vol., Torino, 1968, pp. 233-243.

7 K. Larenz , *Storia del metodo della scienza giuridica*, cit., P. 21 .

8 W. Wilhelm, *Metodologia giuridica nel secolo XIX* (1958), tr. it., Milano, 1974, p. 54; G. Tarello, *La scuola dell'esegesi e la sua diffusione*, in *Storia della cultura giuridica moderna. Assolutismo e codificazione*, Bologna, 1976, p. 88 .

9 F. Cavalla, *La norma giuridica secondo Hans Kelsen*, in S. Fuselli, P. Moro (a cura di), *Al Principio*, Milano 2022, pp. 273-303.

be obeyed merely because they have been laid down (in this sense, normativism is united with legal positivism).

It seems equally certain that law is attributed the character of statehood; "legal norms are laid down and sanctioned by the (modern) State, the political organization that, since the Peace of Westphalia (1648), has exercised a monopoly of force within territories, first European, then western, and finally world-wide". From this point of view, "statism can be said to be formalist, because it intends to reduce everything to state law". According to the legal systematics, norms form an "ordered", in particular "unitary", "coherent" (non-contradictory) and above all "complete" (non-lacunous) whole; a thesis that is defended not only through Zitelmann's "exclusive general" principle, whereby "everything that is not forbidden is permitted", but also through Bergbohm's legal "empty space", whereby "everything that is not regulated is legally indifferent"[10].

Yet, even today's normativism maintains that only through formal logic it is possible to implement the formation of the abstract-conceptual system and the framing of concepts under this same system; certainly, not through a concrete-conceptual logic oriented towards the "nature of the fact" like Hegel's, nor even oriented towards Schelling's "organological" thinking[11].

In any case, today's teaching of legal dogmatics is substantially attributable to the form that legal science took in the period of codification. In that historical moment, in fact, legal science, through the sequence "construction-subsumption-explication", enabled knowledge of positive law by means of an approach that can be traced back to the approach of the natural sciences towards their object. As if it were a matter of understanding a natural phenomenon, on the way of which the scientist could not interfere, but only record the occurrence"[12]. It follows that to this day there is a tendency to teach a complete legal system, completely self-sufficient and in no way influenced from the outside; just think of the well-known disputes over the "techniques" for resolving gaps[13].

On the other hand, there is no doubt that the nineteenth century represented a break with the past for legal methodology, in the sense of a definitive abandonment of the natural law paradigm, according to which the result of the legal method was still the construction of a system. It followed that the derivation of legal normativity could only take place in a system of explication of premises, and this through a legal methodology capable of generating a system, which "constructs the norms itself and at the same time allows the legitimation of the system itself"[14].

Hence, if it is true that norms, prescriptions with specific characteristics are taught today, always with reference to the method of teaching, it has been correctly observed that, while it is true that the Pandectics can be considered "an anti-natural law movement for its rejection of the metaphysics of the state of nature and of the mythical foundation of the state of nature", it is to be noted that it yielded more and more, beginning with the systematist Savigny, to a latent natural law theory, at least from the point of view of the methodological approach to law and of the task of legal science"[15]. Even then, one would have to discuss whether it is really correct to say that the method of Christian Wolff's natural law([16]) can be said to be so different from that of Puchta. Indeed, the ascertained latency of a natural law method presupposes the precise identification and connotation of a natural law method, antithetical to that of the legal positivism of codification, which thesis cannot easily be sustained. This

10 M. Barberis, *Giuristi e filosofi. Una storia della filosofia del diritto*, Bologna, 2011, pp. 133-135.

11 F. Viola, V. Villa, M. Urso, *Interpretazione e applicazione del diritto tra scienza e politica*, Palermo, 1974, pp. 23-50 .

12 K. Larenz, *Storia del metodo della scienza giuridica*, cit., p. 31.

13 P. Chiassoni, *Tecnica dell'interpretazione giuridica*, Bologna, 2007, pp. 173-183.

14 From a natural law perspective, "legal science outside the construction of the legal system" would not even be conceivable; cfr. R. De Giorgi, *Scienza del diritto e legittimazione. Critica dell'epistemologia tedesca da Kelsen a Luhmann*, Bari, 1998, p. 19.

15 P. Grossi, *La cultura del civilista italiano. Un profilo storico*, Milano, 2002, p. 17.

16 T. Opocher, *Christian Wolff filosofo del diritto e della politica*, Padova, 2013, pp. 55-97.

demonstrates that even certain forms of natural law have ended up legitimizing a normativistic teaching of law. In fact, there is a continuity between the Historical School and the Pandectics, not only in the sense that a latent natural law was present in both, but also because the same appeals to the logical rigour of the exact sciences revealed a desire to construct "an external system of legal science, which in nothing differs from the natural law model", except in the choice of the subsets of axioms on which the construction must be based[17].

On the other hand, once any possibility of philosophically founding a legal system had ceased to exist, it was up to legal science, conceived as free from any philosophical interference that would invalidate its operation, and to the method "to construct a system of positive law in which rationality within contingency is organised, in which contingency is collected and set out in such a way as to be articulated according to a unitary, organic structure, from which the internal coherence of positive law emerges"[18]. The intent, even today, of university law teaching is to suggest to students the meaning of the construction of the legal system from law[19]. Max Weber himself, who was never uncritical of this jurisprudence, noted that "according to our habit of thought, it (the systematisation) consists in relating all the legal provisions derived, in such a way that it could form a clear system of rules, free of contradictions per se and above all tending to be free of gaps; this implies that all the cases can be taken into one of the rules, if their order is not to lack the essential guarantee"[20]. On the other hand, from Wolff, Puchta and Jhering onwards, legal science has turned into pure methodology and has freed itself of the theoretical problem of knowledge of law, truth and value. In fact, having deprived legal theory of any capacity to "legitimise just law", despite the "methodological conversion", legal epistemology has been forced to resort to instruments of legitimisation, by anchoring contingency to an external necessity or to principles or normative instances, which stand in contradiction to the methodological conversion". As it had happened with "the natural law tautology", which could "legitimise the law produced by attributing to it the character of necessity"[21].

As is well known, this is the same dilemma underlying Kelsen's fundamental norm. Indeed, the path that leads from Puchta to Kelsen coincides with the progressive disappearance of all Kantian philosophical-legal a-priorism.

On the other hand, it has rightly been pointed out that from Wolff's manual onwards "the idea that the solution of legal problems must be logically deduced from general concepts and principles that are recognized as having a particular value within the system has not disappeared from the programmatic horizon of legal science". Indeed, just as in common law the solution to a legal problem was derived from the analysis of a text endowed with particular authority, now the synthetic scientific concept, in the sense of being consistent with the legal system, had become the very foundation of the solution to a legal problem [22]. In this regard, it has been very accurately pointed out how Wolff's reconstruction of the method of legal science and the system, i.e., the idea that the systematic nature of law was of an external nature, "characterised by a logical connection between the parts of the system", and derived "from the jurist's application of the mathematical method", reached as far as the Jurisprudence of concepts, "assuming different characterisations and nuances depending on the authors"[23].

17 MG Losano, *Sistema e struttura nel diritto*, cit., pp. 269-280; cfr. W. Wilhelm, *Metodologia giuridica nel secolo XIX*, cit., p. 64.

18 R. De Giorgi, *Scienza del diritto e legittimazione*, cit., p. 20.

19 The formal activity of jurists is scientific, since "from the scientific form given to this matter, tending to point out and integrate the intrinsic unity to it, a new organic life arises, which reacts on the matter itself, so that from science as such a new form of legal production is necessarily derived"; cfr. F.K. Savigny (von), *Sistema del diritto romano attuale* (1840-1849), vol. 1, tr.it. Torino, 1886, pp. 69 ss.

20 M. Weber, *Economia e Società. III Sociologia giuridica* (1922), tr., it., Torino, 2000, pp. 493-500 and 506 ss.

21 R. De Giorgi, *Scienza del diritto e legittimazione*, cit., p. 21.

22 F. Wieacker, *Storia del diritto privato moderno* (1967), tr. it., Milano, 1980, pp. 488-489.

23 V. Velluzzi, *Interpretazione sistematica e prassi giurisprudenziale*, Torino, 2002, pp. 19-20.

That said, what is of interest to note in this contribution is that the method of legal didactics of the continental jurist even today is not able to disregard the construction of the legal system. The identification of the principle of rationality in law constitutes, in fact, a great achievement, especially from Puchta's thought onwards, so that "the apparatus constructed by legal science represents a closed system, an organism whose parts are connected according to relationships of a logical nature". In the organic connection of the system, to which the meaning of classification is most often attributed, the individual legal propositions are known by science as mutually conditioning and deriving from one another. This system of derivations is a product of scientific activity on law; "it takes as its foundation only abstractions proper to positive law, general concepts into which conceptualism constrains the reality of social relations". The rationality of law, then, is the principle of its conceptual autonomy: science studies law in the autonomous structure of its conceptual system [24].

Consequently, learners are encouraged by teachers to study the rationality of the legal system in the internal necessity of the organic connections between the parts of the system that science detects, so that the logical nature of that necessity and the deductive character of the operations that lead to the construction of the system allow a kind of "genealogy of concepts" to be identified, in which they acquire an existence capable of producing other concepts[25].

This description of Puchta's thought and activity is very similar to a certain way of proceeding of continental jurists. In his work, as also in Savigny's, the methodological need for a system that encompasses the whole of law from the outset coexists with the idea that it is possible for the jurist to systematically reconstruct the entire legal experience[26]. There is no doubt that in the latter sense, legal methodology becomes more and more stringent, only then to become an example of the continental jurist's way of proceeding. Science produces law, because it brings to light what is implicit in positive law and arises from it by internal necessity; in this way "the law produced by science is valid law, just as the law that arises from custom or the legislator's propositions is valid"[27]. It is certain that, as often argued in the literature, already in Puchta there is the formalism that would lead to Kelsen and, to some extent, also the anti-formalism that would later characterise the jurisprudence of interests, the sociology of free law and the themes of the so-called "second" Jhering[28], but here the question, for our purposes, is of less interest.

It is more important to note that the legal method actually practiced by jurists, and still taught today in continental universities, is still that proposed by Puchta. In fact, he influenced generations of jurists in a way that cannot be compared to the methodological influences exercised by, for example, anti- formalist jurists, such as François Gény and Hermann Kantorowicz. Indeed, Puchta combined the idea of positive law, understood as a product of historical evolution, with the rational nature of the same; this means above all learning to systematise. Puchta ruled out the possibility that systematic knowledge could depend on other forms of knowledge, from which the object would appear to be conditioned by the "outside", since, by its very nature, every legal construction must be independent of some philosophical foundation.

In the meantime, the idea that the construction and formation of legal concepts made scientific knowledge of law possible had taken shape and would never again abandon jurists, whatever the conception of legal experience that constituted its foundation and the condi-

24 R. De Giorgi, *Scienza del diritto e legittimazione*, cit., pp. 51-52.

25 The theme of juridical construction will mainly be the prerogative of Rudolf (von) Jhering, a pupil of Puchta. Karl (von) Gerber, another of his pupils, will deal with the organization of public law and his influence on Kelsen is very well known.

26 M.G. Losano, *Sistema e struttura nel diritto*, cit., pp. 218-227.

27 R. De Giorgi, *Scienza del diritto e legittimazione*, cit., p. 54.

28 F. Viola, V. Villa, G. Urso, *Interpretazione e applicazione del diritto tra scienza e politica*, cit., pp. 27-28.

tion of that knowledge; indeed, the more science was able to marginalise theory and philosophy, the more operative and effective it would be. It mattered little, in these terms, that it was the "general-concrete" concept in Hegel's sense, the aprioristic fundamental concept according to the meaning assumed in neo-Kantianism, the "general-abstract" concept in Bierling's formal logic. On the other hand, not even "Husserl jurists" were able to renounce the legal system and its cognitive capacity. Lastly, Karl Engisch, who certainly cannot today be defined as an exponent of legal positivism, still in the 1960s, stated that even a legal system, which moves "hesitantly case by case and proceeds from rule to rule", grows "according to immanent principles, which as a whole give life to a system"[29].

Jhering, in effect, "keeps law free from internal necessities and constructs it as a closed organism, as a rational system, whose rationality no longer depends on the material instance of the multiple in it, but now depends only on the logical closure of a complex of abstractions rendered autonomous"[30]. He pursued the path indicated by Putcha, managing to overcome the obstacle of material forces, which come from society and history, by transferring to science every task of justification of the legal system.

"With history suppressed, the material instance eliminated, law presents itself as the production of science, as an autonomous complex of abstractions that reproduce themselves from within"; according to this perspective, "jurisprudence is pure methodology, it is a technique that organises the calculation of the reproduction of forms"[31]. This function is entrusted to the "legal construction", which is that practical (operational) activity by which, through invention-abstraction, rules are transformed into legal concepts and institutions. The first law that must preside over legal construction is the "doctrinal law that must apply exactly to positive law"; the second establishes that legal construction cannot violate "systematic unity", since science cannot "contradict itself". The result is the system, which has a double usefulness, since it enables orientation by facilitating judicial decisions and also allows the production of a new subject material that can supplement positive law[32]. Jhering compared the concepts that are the subject of legal science and general theory to biological bodies: just as the latter mate and reproduce, so do legal concepts, generating other legal concepts. Here legal formalism substantially presents itself as "conceptualism", also allowing for the production of "legal maxims". From this point of view, jurisprudence unravels, develops this objectivity and enriches it with the explication of implicit forms, attributing to itself the character of an activity producing new and superior abstractions. It is interesting to note, though not for our purposes, that the "legal bodies" obtained on the basis of analysis and abstraction are similar to the chemist's compounds, since "matter is stripped of its practical and imperative form and takes on the form of a body"[33].

There is no doubt that Jhering's system has been much criticised. Now it was considered as an ambiguous mixture of internal and external system, resulting in a clear absence of scientificity[34]. Now as a total abstraction resulting in the loss of any relationship with legal experience[35]. Someone has lamented the emptiness of the abstractions of legal science, which are as just as empty as the original abstractions, in which the form of the social relations on which they were produced were fixed: "science organises and gives life to forms that are real abstractions; to objectified forms that are separated from the real life of individuals and dominate it only when this real life itself has become an abstraction, an abstraction that lives in the reality of the modern state"[36].

In these terms, the history of the legal meth-

29 K. Larenz, *Storia del metodo della scienza giuridica*, cit., p. 197.

30 R. De Giorgi, *Scienza del diritto e legittimazione*, cit., p. 67.

31 *Ibidem*.

32 G. Lazzaro, *Storia e teoria della costruzione giuridica*, cit. pp. 15-39.

33 K. Larenz, *Storia del metodo della scienza giuridica* cit., p. 31.

34 MG Losano, *Sistema e struttura nel diritto*, cit., pp. 233-241.

35 G. Lazzaro, *Storia e teoria della costruzione giuridica*, cit. pp. 121-124.

36 R. De Giorgi, *Scienza del diritto e legittimazione*, cit., p. 67.

od can be told as the history of the isolation of the legal form, since law now appears only as a rational product of science, and its internal necessity is converted into logical necessity.

The Kelsenian "solution", even when it has been declined in a linguistic-analytical sense, has allowed the concept of law to be freed from every traditional essentialist aspect; the legal system is known by learners as a set of enforceable and institutionalised norms, in relation to which you do not look at all aspects of law and jurisprudence, but only at the way in which jurists say it should operate. And this on the basis of the idea that the science of law must be based on rigour; the theory of the legal system, the legal norm, the analytical theory of concepts and definitions are studied, studies that are fundamental for those who intend to reduce law to a norm. Incidentally, starting instead from the idea of legal positivism as an ideology, we cannot but refer to the "great division", according to which, since value judgments cannot be derived from factual premises, one must deny the claim to access knowledge of objective values of justice[37].

According to the teaching of Herbert Hart, also a normativist, albeit in a different way from Kelsen, legal norms are conceived as a complex "social practice", above all of a linguistic nature; hence the ways in which "the recipients of the norms themselves also react verbally in the social situations in which we say there is a norm". In Hart, Kelsen's fundamental norm has become the norm of recognition[38]; it is a positive norm, addressed to those who must apply the law; it summarizes the criteria by which norms are accepted into legal systems. The validity of a norm depends on its belonging to the legal system on the basis of the criteria for belonging to said system, and the existence of the individual norms of a system coincides with its validity, simply because the same social existence is attributed to it as to the system. This is of course not effective if the legal system itself is not effective or as a whole is obeyed[39].

2. The new "horizons" of law teaching and some pedagogical references

There is no doubt that normativism and legal positivism have been in crisis for at least fifty years now; and this, despite the fact that they still innervate the teaching of law in Italian and continental universities.

Yet, albeit with a lot of approximation, it is possible to state that, spurred by the emergence of the theories of human rights, European law, constitutionalism and case law, those positivist and normative theories that affirm the neutrality of law and legal science have been largely refuted and now appear definitely discredited[40]. It is therefore of no interest here so much to understand which philosophical orientations have taken the place of normativism and certain legal positivism, as to discuss what is consequently happening in Law schools.

In fact, for at least twenty years now, the teaching of law "by problems", the case method teaching devised by Cristopher Langdell at the end of the nineteenth century and that of the so-called "legal clinics" has been spreading in these; three different methods of teaching law which, although profoundly different from one other, all propose the concreteness and particularity of law, as opposed to its generality and abstractness.

Teaching by "problems", also known as "*problem solving*" from the point of view of pedagogy, is constituted through the re-evaluation of the topics in legal thinking, performed by Theodor Viehweg, as a result of the pre-understanding in the hermeneutic process. Viehweg suggests that the jurist should set and solve concrete problems, not through deductive procedures, but through attempts that draw on "a repertoire of points of view"

37 B. Celano, *Dialettica della giustificazione pratica. Saggio sulla Legge di Hume*, Torino, 1994. Ethical non-cognitivism, as is well known, is typical of legal positivism; cfr. D. Canale, Conflitti pratici. Quando il diritto diventa immorale, Bari-Roma, 2017, pp. 78-85.

38 H. Hart, *Il concetto del diritto* (1961), tr. it., Torino, 2002.

39 M. La Torre, *Il diritto contro se stesso. Saggio sul positivismo giuridico e la sua crisi*, Firenze, 2020, pp. 55-72.

40 F. Viola, 1900-2020. *Una storia del diritto naturale*, Torino, 2021, pp. 5-55.

([41]), an activity that belongs precisely to the legal method of "thinking by problems"[42].

On the other hand, in the teaching of the "*case method*", also known as the "case law" method, developed in the United States, students learn the "practice of law", thanks to the Socratic and inductive method proposed by the learner. The method teaches how to solve concrete cases[43], which are discussed according to the dialectical method of *quaestiones*[44].

Finally, it is worth noting the teaching of law through the methodology of legal clinics, conceived by Jerome Frank, in which the learning of law develops through the discussion of a number of "cases", not understood as a set of facts and legal assessments enunciated by a jurisdiction, which are analysed retrospectively, but through the assistance to lawyers who advocate real disputes, deepened in action, the encounter with which completes the learning contained in the books[45]. In this sense, the experience of reality takes the place of the nevertheless systematized and objective view of legal concepts and principles, allowing to highlight the economic, social and institutional contexts, structures and subjectivities in which the articulations of these are embedded, with reference to the "messy" practice of law[46]. The client's case is not the concrete case as opposed to the abstract case, or the particular case as opposed to the general case. Legal clinics then give the possibility to learn the law in action and judicial practices, indeed even how law is perceived and understood by the assisted party. This gives rise to the so-called "*lawhiering*", the lawyer's discourse and its technical, ethical and social dimension, the idea of "construction" of "stories" in view of legally structured "negotiations". The theme of social justice and its relationship to legal meanings is developed, with the aim of achieving greater equality and social justice.

Methodologies for learning the law that differ profoundly from one another, as do the possible interferences between them, we were saying, because, just to give some examples, by applying the case law method, during a university lecture the teacher illustrates a controversial case and the students discuss it. However, it should be noted that it is one thing for that case to be discussed through a problem-based approach; another thing is that the objective of the lecture is to trace the concrete case in point back to the abstract case; in this way, of course, students are learning through a case law method, though without being taught the problematic relational nature of legal experience, because the approach continues to be that of normativism. On the other hand, suffice it to think that Frank's legal clinics started up in antithesis to Langdell's *case method,* according to which through the study of the case one had to go back to the legal principles of the system. Or about the possible contradiction of a university lecture in which the teacher "centre-stage" teaches the problematic nature of law in a traditional way[47]; the opposite being also true, when one intends to practice normativism during a lecture in which learners play a central role.

It should also be considered that the pedagogical theoretical framework, in which these new ways of teaching law seem to be set, is particularly typical of the more recent twentieth-century constructivist pedagogy[48]. This is considered preferable today, since, among other undoubted merits, it seems to be able to combine the "school of competences", which has clearly

41 P. Moro, *L'arte della scrittura giuridica*, Pordenone, 2016, pp. 55-74.

42 L. Mengoni, *Diritto e valori*, Bologna, 1985, pp. 11-58.

43 E. Bettarello, in Moro P. (edited by), *Insegnare diritto ed economia*, 2020, pp. 166-181.

44 Cf. Ancona, *Via iudicii. Contributi tomistici alla metodologia del diritto*, Padova, 2012, pp. 13-39.

45 J. Frank, *Law and the Modern Mind*, Transaction Publishers, New Jersey, 1930.

46 C. Jamin, *La Cuisine du Droit. L'Ecole de Droit de Sciences Po: une expérimentation française*, Lextenso, Dalloz, pp. 4 ss.

47 Just think of the well-known film by P. Weir, *Dead Poet Society*, 1989, in which the leading teacher criticizes the traditional way of teaching literature, thus proposing, in his turn, a teaching method in which the teacher does not assume a marginal position; on the contrary, he ends up placing himself "centre-stage".

48 S. Zullo, *La didattica del diritto tra teorie dell'apprendimento, orientamenti pedagogici e strategie per l'insegnamento*, in V. Marzocco, S. Zullo, T. Casadei (a cura di), *La didattica del diritto. Metodi, strumenti e prospettive*, Pisa, 2019, pp. 64-67.

prevailed also in Italy since the 1980s, with the idea that knowledge is above all a product, the result of an interaction between the learning subject and the surrounding environment, and this also by going back to the knowledge already developed by the subject. In this sense, constructivism is also influenced by a strongly cognitivist approach[49]. The learner is placed at the centre of the learning process, as opposed to the idea that the central figure in teaching is the teacher. The student then becomes first the "constructor" and then the "interpreter" of his or her own knowledge, of which a strongly subjective and creative content is also emphasized, this being the sum of the instructions given by the teacher, his or her own personal experiences and the relationship of these with the environment, in which he or she is called upon to operate. In the intentions of this pedagogical approach, it helps to learn useful knowledge, but also a method capable of dealing with a constantly evolving reality, hence the emphasis on multidisciplinarity, which characterises the school of this new century.

This is of course the result of the important lesson of the French pedagogue Jean Piaget, according to whom the development of intelligence is closely related to the ability to adapt to the surrounding environment[50]. This teaching, which partly coincides with John Dewey's well-known "learning by doing", is better combined today with the constructivism of New Yorker Jerome Bruner, according to whom learning is a process that takes place within a specific social context, and this requires above all knowledge of models, including linguistic models, that each community shares within itself[51]. It would appear then necessary to abandon the idea of explaining reality through causalism, since cultural psychology seeks above all to understand the meaning that man gives to his own life experience, which must go further, regardless of any form of conceptualization. Thus, the so-called "narrative thinking" is developed, by virtue of which, by telling one's individual story, it is possible to give meaning and learn by going back to a specific life experience[52]. Therefore, alongside paradigmatic understanding, by virtue of which knowledge based on rationalisation must be developed in the learner, narrative thinking must be learned and taught. From this perspective, the learner must not so much rationalise the experience and exchanges with the social world, but narrate experience with reference to his or her own life; and this also through memories and feelings, bearing in mind that it is the narrator who attributes meaning to events and who also contributes to the formation of knowledge in those who listen to him or her[53].

It follows that reproducing the prescriptions of the pedagogical system of constructivism to the teaching of law, especially that of Piaget and Bruner, although constructivism has never developed a general didactic model, means affirming that ideal learning is that in which the law to be taught is not contained in normative texts, or in their conceptualisation, but coincides with that practiced in concrete operating with reality. So true is this that it even seems to be possible to argue that the emergence today of the clinical-legal method, started in the United States, even in contrast to the case-law method[54], has roots that are not so much philosophical-legal, but above all pedagogical[55].

It therefore seems natural that the genesis in university circles of case studies, "*prob-*

49 And this going back to J. Dewey, *Come pensiamo* (1910), tr. it., Firenze, 1961; with particular reference to the relationship between pedagogy and democracy, see C. Faralli, *John Dewey. Una filosofia del diritto per la democrazia*, Bologna, 1990, pp. 63-198.

50 J. Piaget, *Lo strutturalismo* (1968), tr. it., Milano, 1974.

51 J.S. Bruner, *Il significato dell'educazione* (1971), tr.it., Roma, 1986.

52 F. Di Donato, P. Heritier, *Humanities e cliniche legali. Diritto e metodologia umanistica*, in *Teoria e critica della regolazione sociale*, 2, 2017, Milano, 2018, pp. 35-54.

53 J.S. Bruner, *Il significato delle storie* (2002), tr. it., Roma-Bari, 2006.

54 J. Perelman, *Pensare la pratica, teorizzare il diritto in azione; le cliniche legali e le nuove frontiere epistemologiche del diritto*, in F. Di Donato, F. Scamardella (a cura di), *Il metodo clinico-legale. Radici teoriche e dimensioni pratiche*, Napoli, 2016, p. 90.

55 C. Faralli, *American Realism's New Proposals for Legal Education: Legal Clinic and Law & Humanities*, in F. Di Donato, P. Heritier (a cura di), cit., pp. 11-16

lem-solving"[56], trial simulations and legal clinics [57] would end up being perfectly combined with the idea that law lives not only in the experience of the trial, in which fact and law, subjective rights and procedural actions lose all autonomous characterisation, but is also found in the everyday life of man.

At this point, one must ask whether the idea of learning "law by doing" or the practice of "law in action" are sufficient in themselves for the purpose of proposing legal didactics that can account for (and overcome) the difficulties of legal positivism and normativism, or whether these methods, at least apparently avoiding even a theoretical-philosophical approach, surreptitiously introduce other philosophical orientations or even allow empirical research to become theory itself.

The need for a theoretical approach to the practice of legal clinics

The question we set out to answer in the previous paragraph can now be rephrased as follows. If it is true that in university courses dedicated to legal teaching, there is a need to accustom learners to new teaching and learning tools, such as "European-style" legal clinics (given that mostly in continental Europe, to all intents and purposes, students continue to deal with "concrete cases", but always purely theoretical and, with reference to the trial, only simulations), it would seem appropriate to understand whether it is necessary to base this form of education on some theory of law (of norms, sanctions, trial)[58]. And this on the basis of the reasoning that either it is not conceivable that certain teaching tools do not have a theory of reference, or it is the practice of law "in action" itself that becomes a theory, which is then constructed and reconstructed by operating in the concreteness of legal experience[59]. Moreover, if the framework in which legal clinics are embedded in university studies is that of pedagogical constructionism, we must also ask ourselves whether lessons in legal didactics should be limited to providing the tools and techniques in view of the operational goals that the teacher (or the learner) has set for him or herself from time to time; or, since there can be no learning of a method without an idea (albeit a concealed one) of law[60], it would in any case appear necessary to ask the philosophical question[61].

Indeed, it is quite well known that legal clinics in the United States soon took on a precise trend, in some cases perhaps more ideological than philosophical, but what is certain is that they are not neutral from a theoretical point of view. In fact, alongside the learning of *lawyering*, which essentially means teaching everything that is relevant and contributes to the constitution of the lawyer's "narrative", they have given a stimulus to important theoretical studies. These have developed an important commitment to a substantial conception of justice, which, already starting with legal education, opposes the inequalities and discrimination of those who are excluded from participation in the justice system. They have also proposed other well-known critical theories (the Feminist Theory, the Racial Theory, the *Critical Legal Studies* and the Sociological Legal Studies), all of which are dedicated, essentially, to the relationship between social justice and legal meanings.

On the other hand, the so-called "clinical thinkers" have often wondered about the dy-

56 G. Pascuzzi, *Giuristi si diventa*, Bologna, 2019, pp. 83-140; A. Lotti, *Apprendere per problemi. Una sperimentazione didattica nelle facoltà umanistiche*, Bari, 2007.

57 P. Heritier, *Vico e le Law and Humanities nella clinica legale della disabilità e della vulnerabilità*, in F. Di Donato, F. Scamardella (a cura di), cit., pp. 113-135.

58 T. Casadei, *Il diritto in azione: significati funzioni e pratiche*, in V. Marzocco, S. Zullo, T. Casadei (a cura di), cit., pp. 91-97; e P. Moro, *Il dialogo comeptitivo. Il metodo didattico del diritto e dell'economia*, in Id. (a cura di), *Insegnare diritto ed economia*, Milano, 2020, pp. 7-16.

59 Cfr T. Greco, *L'orizzonte del giurista tra automnoma ed teronomia*, in B. Pasciuta, L. Loschiavo, *La formazione del giurista*, Roma, 2018, pp. 45-68; it is enough to think, on the other hand, of bioethical disciplines, neuroscience and the new frontiers of legal informatics.

60 In this sense, undoubtedly P. Heritier, *Vico e le Law Humanities nella clinica legale della disabilità e della vulnerabilità* cit., pp. 117-122.

61 F. Gentile, *Ordinamento giuridico tra virtualità e realtà*, Padova, 2001, pp. 7-13.

namics of power that are generated between lawyer and client in the pursuit of social justice, or about the experience that communities and individuals make of law and justice and its possible absence in social life. This is already much more than a theory of law, but it presupposes a precise meaning of law in the context of human experience.

In continental Europe, and particularly in France, "law in action" accompanied by the "thinking by case" method aim at a possible "manufacturing" of contemporary law, and this through an interdisciplinary learning process that is simultaneously capable of effecting "social change". In this perspective, the discussion on the content of legal norms and the habit of overturning "procedural rituals" make it possible not only to detect some contradictions and the power relations that underpin them, but also to observe the impact of legal decisions on social transformation and the link between these and what is commonly referred to as the so-called "social conscience"[62].

From this point of view, then, the danger is the same as that in which the so-called "traditional teaching" fell in its time, to the extent that it was dominated by the conviction of the uselessness of a philosophical approach to the study of law[63], only to introduce it surreptitiously by assigning to law a function of social control. On the other hand, even radical empiricism, i.e., the apparent establishing of a praxis without theory, in which law has lost all autonomy, at the service of politics, society and the economics, breaking up into a multitude of cases, with no relation to one another, already denotes some conception of law. In this way, however, we construct a pedagogy of law, in which law is reduced to a mere tool, a tool which never discusses the question that is preliminary to all others: whether law is a technique or rather a relational good connected to the very essence of man.

In the first perspective, and in very general terms, legal clinics become nothing more than the sum of "singular cases"[64], based on the idea that "at the beginning" there is only a story, a "life story", to be framed and assessed juridically[65], completely separate from an integral vision of human experience, in which law has its precise raison d'être. Along this direction, the valorisation of the "singular case" and the need for justice that is undoubtedly associated to it, have enabled legal hermeneutics in continental Europe to become the true philosophy of jurists today, electing the "feeling" of legal *elites* as the main criterion for resolving interpretative and argumentative debates. With the advantage, for legal hermeneutics, of appearing, in the eyes of legal science academics, to be the most adherent activity to their actual research practices, continually proposing the complementarity of methods of analysis and pre-understanding as a surrogate for the rationality verification of interpretative-argumentative propositions.

In the second perspective, on the other hand, the continuous reconnection in legal clinics of the fact with the law and its many articulations in the sphere of legal experience suggest a sense of complexity of law, the nature of which therefore even allows the understanding of reality and in any case the recognition of law and practical reason as the very meaning of a community[66]. In these terms, and albeit briefly, this vision of law, which we feels we must share and which is thought to philosophically ground the practice of legal clinics, refers back to a precise conception of the human being and his actions, and in particular of practical reason, to which law belongs. From this perspective, the study of legal clinics provides an understanding of practical reason,

62 J. Perelman, in Di Donato F., Scamardella F. (edited by), cit., pp. 108-110

63 F. Gentile, F., *Legalità, giustizia, giustificazione. Sul ruolo della filosofia del diritto nella formazione del giurista*, Napoli, 2008, pp. 9-50.

64 In fact, the judicial discipline of the case of life, therefore of the "singular case", as opposed to the "particular case", by virtue of the difficulty of identifying the legal provision and of identifying its content, is no longer able to communicate with a general rule; cfr. F. Viola *Il futuro del diritto*, in "Persona y Derecho", 79, July-December 2018, pp. 19-20.

65 F. Viola, G. Zaccaria, *Diritto e interpretazione*, Roma-Bari, 1999, p.189,

66 E. Ancona, *Via iudicii*, cit., pp. 180-181.

understood as a work to be accomplished, and the reflection on this task concerns the most correct and appropriate way of implementing it. If law is a human work, it is not possible to know it by appealing to concepts that are extracted from facts, but only by looking at the reasons and in so far as these reasons contribute to the formation of the common good[67].

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67 F. Viola, 1900-2020: Una storia del diritto naturale, cit., p. 155.