Access to Justice and Legal Clinics: Developing a Reflective Lawyering Space. Some Insights from the Italian Experience*

Marzia Barbera- Venera Protopapa[1692]

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[1692] Marzia Barbera is a Professor of Labour and Antidiscrimination Law at the University of Brescia and Venera Protopapa is a Labour Law Researcher at the University of Verona. The paper is the product of a shared reflection and elaboration. However, sections 1, 2, 3, 7 and 8 were drafted by Marzia Barbera; sections 4, 5, 6 and the introduction were drafted by Venera Protopapa.

Introduction.

The paper will explore the potential of legal clinics in contributing to making access to justice more effective. It intends to do so in the light of a critical assessment of the Italian system of access to justice, while taking into account the peculiarities of legal clinics as a public interest law actor.

To this end, the paper will move along a double dimension of access to justice and the different approaches to the issue of effective access to justice associated with each dimension. The first approach relies on an individualistic conceptualization of access to justice and focuses on providing legal services to those unable to afford a lawyer.[1693] The second one looks at access to justice as a collective right and, rather than focusing on the need for legal services of specific individuals, aims to address the problem of legal representation in court of group and collective interests.[1694]

This considered, the paper will analyze the Italian system of access to justice with the aim of highlighting its shortcomings. It will provide a brief description of the institutional context of legal aid in Italy and assess its effectiveness in terms of granting legal assistance to those unable to afford a lawyer. It will than offer an account of the mechanisms aiming to ensure effective access to justice, at the individual and/or collective level that have been put in place by private and governmental actors, focusing first on the court enforcement of the Workers' Statute,[1695] then on gender equality legislation and finally on the more recent experience of enforcement of antidiscrimination law provisions concerning, race, ethnic origin and nationality.

The enforcement of the Workers' Statute (one of the main pillars of Italian labor law) provides probably the most important example of engagement of private actors in making access to justice effective. Along with other national experiences, where the limitations of public legal aid have encouraged the emergence of private actors aiming to guarantee access to justice for the poor and the marginalized, in the Italian, case effective access to justice has moved through a subsidiary model of legal representation and advice set up by trade union organizations, which have acted, in the area of labor rights, as catalysts of access to justice demands.

The litigation on gender equality will instead offer the chance to analyze an example of the "governmental approach" , according to which public institutions, in line with their traditional role in protecting the public interest, assume the burden of defending new "diffuse rights" (i.e. collective and group rights) in court. [1696]

The analysis will then turn to the enforcement of the prohibition of discrimination on ground of race, ethnic origin and nationality, where new actors have showed up taking charge of effective access to justice. Case law allows identifying the emergence of purposive strategic action by a

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[1693] See Mauro Cappelletti et al, Access to Justice. Comparative General Report, 40 RABEL J. COMP. & INT'L PRIV. L. 669, 684 (1979). (The author refers to this approach as the "legal aid solution" and distinguishes between the European experience of the so called "judicare system", according to which the state pays a private lawyer to all those qualifying for legal aid and the US "public salaried attorney model", according to which legal services are provided by "neighborhood law offices" staffed with attorneys paid by the state.)

[1694] Id. at 693.

[1695] Legge 20 maggio 1970, n. 300, G.U. May 27, 1970, n. 131 (It.) [hereinafter the Workers' Statute]

[1696] Cappelletti, supra note 1, at 694.

group of human rights lawyers in collaboration with civil society organizations advocating for migrants' rights. Such lawyers, that have a sophisticated expertise in antidiscrimination law, quite unusual in the professional community of lawyers, strategically select cases, file claims (on behalf of the victims or in the organization's name), guarantee access to court to victims of discrimination and provide effective arguments to judges for legally founded decisions.

The paper will explore these experiences trying to go beyond their success or failure in enforcing rights in court as to enlarge the field of enquiry to the relation between legal strategies and political mobilization. It will thus discuss the danger that institutions and strategies designed to strengthen access to justice might disempower rather than empower individuals and communities that they aim to serve, fitting their individual and collective needs into pre-established frameworks and strategies. The analysis, moving from research carried out by the authors on each of these experiences, will highlight how many criticalities in the traditional model of public interest law litigation and challenges posed by old and alternative models of lawyering for social change are still largely unexplored and will suggest the need for European scholars and activists to fill this gap.

This part of the paper will set the ground for a context-sensitive assessment of the type of contribution legal clinics can provide in moving forward a critical reflection on public interest law practices in the Italian and more broadly in the European context, and in making access to justice more effective.

Such assessment will start by considering the constrains which hinder, in the national context, the role of legal clinics as providers of legal services and will highlight the peculiarities of legal clinics as a public interest law actor. Special attention will be dedicated to the implications resulting from the academic nature of legal clinics and the coexistence in clinics of educational and social justice aims.

We will argue that it is precisely the existence of this dual purpose that makes clinics a unique forum to better understand the nature of legal knowledge and legal practice and to reflect critically on how the right to access to justice is actually enforced. Clinicians are not only a community of practice but also a (world-wide) epistemic community. Legal clinics are therefore both a way to practice access to justice and a way to rethink and in case change such a practice and even to influence policies on access to justice issues of public actors and non-governmental organizations (advocacy coalitions, among others).

Providing a reflective space on existing practices of public interest law and promoting alternative practices of the law might thus represent the major contribution of legal clinics in making access to justice more effective.

1. The Italian system: a subsidiary model of public legal aid.

The Italian system of access to justice provides a remarkable example of subsidiarity, where social actors have supported and in some areas replaced the state in ensuring effective access to justice. The construction of this model dates back to the early '70s and has its roots in the enactment and

failure of the reform of the Italian legal aid system, in force since the '20s [1697], in the area of labor disputes[1698]. The most innovative feature of the reform (which was included in a more general reform of labor law proceedings) was the rejection of the idea of legal representation for the poor as an '*onorificum munus*' i.e. an honorary and compulsory office provided free of charge by lawyers as part of their professional duties. Following the example of other European countries, the law established a system of public legal aid, according to which legal representation in court was provided by private lawyers that were compensated by the state. Moreover, the law replaced the requirement of the "state of poverty" with the provision of an income threshold and a preliminary assessment of the legal basis of the claim by the same judge who had to decide it.

At the time of its enactment, this new model of legal aid was expected to shortly replace the old one, giving a boost to a general reform of the entire system. In fact, the prediction did not come true. The expected general reform had to wait for another thirty years[1699], not only because of the difficulties of reaching political agreement about its content but also because of the failure of the reform adopted in 1973, which made it impossible to take advantage of that experience. Its failure was marked by the provision of a cumbersome and imperfect mechanism for admission to state legal aid. The income threshold was too low and the law did not allow for an assessment of the social and family situation of the applicant, while the preliminary assessment of the claim implied a risky anticipation of the outcome of the dispute. However, the most serious shortcoming was the lack of any form of extrajudicial legal advice and assistance. Such services may fulfill a preventive function by avoiding unnecessary litigation but, as Cappelletti has rightly pointed out, they are primarily an essential element of any sound system of legal protection, as they are a way of empowering the weaker party of the proceedings.[1700] Access to knowledge of the law and advice on one's rights and obligations provides a reliable criterion of conduct that contributes to rebalance the inequality of power affecting parties in judicial proceedings in terms of asymmetric information and capacity of foreseeing the outcome of the dispute. The lack of such services in the '70s reform was probably related to the idea that their functioning would have put into question one of the basic features of the traditional model of legal aid, namely the choice to entrust the solution to the problem of fair access to justice to legal élites. Such a choice, on the contrary, remains unchallenged when advisory activities are offered by lawyers, before and after the trial, and are functionally linked to legal representation in court.

As anticipated, the shortcomings of public legal aid created room for trade union organizations to dominate the scene, putting in place a parallel system of legal representation and advice for workers that would aggressively compete with and even replace public legal aid.[1701] The role of

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[1697] For a critical description of that system see Mauro Cappelletti, The Emergence of a Modern Theme, in TOWARD EQUAL JUSTICE: A COMPARATIVE STUDY OF LEGAL AID IN MODERN SOCIETIES 33-36 (Cappelletti et al eds., 1981)

[1698] Legge 11 agosto 1973, n. 33, G.U Sept. 13, n. 237 (It.)

[1699] Following a ruling by the European Court of Human Rights Court (Artico v. Italy, 37 Eur. Ct. H.R. (ser. A) (1980) stating that the Republic of Italy had violated the right to legal assistance guaranteed by art. 6 (3) of the European Convention, in 1990 Legge 30 luglio 1990, n. 217, G.U. Aug. 8, n. 182 (It.) granted legal aid (with several limitations) in criminal proceedings. A general reform of the system was enacted only in 2002 (see further).

[1700] Mauro Cappelletti, Gratuito patrocinio. Le cavie della giustizia, L'ASTROLABIO, May 12, 1968, at 31, 33.

[1701] Giuseppe Tucci, L'accesso dei non abbienti alla giustizia: dal patrocinio gratuito al patrocinio retribuito dallo Stato, 29 RIVISTA GIURIDICA DEL LAVORO E DELLA PREVIDENZA SOCIALE [RIV. GIUR. LAV. PREV.], no. 2, 1978, at 145.

Italian trade unions had greatly expanded in the late '60s during the period of industrial unrest and workers' struggles. Coping with the new demands of justice produced by those social struggles was a way to further strengthen that role.

The system worked to some extent as an informal contingency fee system: unions offered their affiliates extrajudicial legal aid through their officers, while legal assistance and representation in court was provided through a mandate *ad litem* given by the employee to a private lawyer that collaborated with the union. Legal assistance was completely free and lawyers received their fees and recovered the incurred expenses from the losing party only in case of victory of their client.[1702]

The status and role of lawyers were strongly affected by these arrangements, becoming at one time less autonomous and more political. On the one hand, the relationship with the union represented an almost exclusive channel of their professional activity, since "trade union lawyers" were expected not to represent employers. This meant that their professional income depended on the continuity and amount of assignments they received through the unions. In addition, in cases of collective disputes of major relevance, unions played a decisive role in deciding whether to go to court. On the other hand, the collaboration between the lawyer and the union relied on mutual trust and was sensitive to the lawyers' political orientation. As a fact, most of the lawyers' providing legal representation through such mechanism were also left-wing activists.

It has been underlined that, in this context, "the involvement of the union, was the only means that ensured legal protection to workers, so that in sectors where such intervention did not occur access to justice was virtually non-existent".[1703] The entry into force of D.P.R. n. 115/2002[1704], which extended public legal aid to all types of litigation, was expected to fill this gap.[1705] Yet despite the long-awaited general reform of legal aid, the system did not improve. Its effectiveness has been undermined over the years by several factors, such as the irrational and meaningless complexity of the bureaucratic application procedure (for example: foreigners have also to prove their income in their own home country, a requirement often impossible to fulfill)[1706], the low

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[1702] On the crisis of this model, due to the new rules on costs related to access to courts and fees, see further, § 2.

[1703] Tucci, supra note 9, at 162.

[1704] Decreto Presidente della Repubblica 30 maggio 2002, n. 115, G.U. June 15, n. 126 (It.).

[1705] Legal aid is now available for Italian, non-Italian citizens, and stateless individuals who satisfy the specific requirements established by the law. In criminal cases, applications for legal aid are addressed to the court before which the case is pending. In all other cases the request is addressed to the local Bar Council, which must also assess that the claim is not manifestly unfounded. Once the application has been accepted, the beneficiary can appoint the attorney of his or her choice, choosing among lawyers listed in a special register. For an in-depth analysis of the system see Grazia Macrì, Difesa d'ufficio e gratuito patrocinio. Aspetti sociologici e giuridici, L'ALTRO DIRITTO (Nov. 9, 2017 17:37AM),
http://www.altrodiritto.unifi.it/ricerche/marginal/macri/.

[1706] According to some initial reading of the law, while in criminal cases legal aid was available to non-citizens regardless of their migrant status, in civil and administrative cases legal aid was granted only to migrants with regular residency status. The issue has been addressed by the Constitutional Court in Corte Cost. 14 maggio 2004, n. 144 which ruled that the right to access to justice guaranteed by art. 24 of the Constitution is an inviolable human right, which cannot be denied on the basis of the regular or irregular presence of the alien on the national territory. However, the fact that Legge 15 luglio 2009, n. 94, G.U. Jul. 24, 2009, n. 170 (It.) criminalizes unauthorized entry and permanence makes it unlikely for undocumented migrants to apply for legal aid in civil procedures.

income threshold established by the law, [1707] and the significant discrepancy between "legal aid fees" and ordinary fees.[1708] Finally, D.P.R. n.115/2002, in line with previous legislation, failed to cover any activity other than litigation, extrajudicial legal advice and assistance included. All these have strongly limited the ability of public legal aid to respond effectively to the need for legal services of the poor, while casting serious doubts on the quality of the legal services. There are no data on the number of those in need of legal services and therefore it is impossible to estimate the extent to which legal aid covers the justice demand of the poor. However, if we consider the number of individuals who would meet the income requirements of the law [1709] and the number of those actually admitted to the benefit, it is reasonable to conclude that the latter represents only a small (although slowly growing) percentage of those unable to afford a lawyer.[1710] The crisis of the system is all the more evident if we consider that, starting from 2014, data show a decrease of the total cost of legal aid, contrary to what would have been logical to expect, considering the before mentioned growing trend in the number of people admitted to the benefit.[1711]

By contrast, legal services provided by trade unions have always been easier to access, in most cases of a good professional quality and have included, unlike public legal aid, pre-trial legal advice and assistance.[1712]

It is therefore easy to understand why sociological and legal studies on the judicial use of the law and the defense in the courts of individual and collective interests have mainly focused on the particular subsidiary mechanism of access to justice earlier described. The next paragraph will give an account of the legal actions brought under the Workers' Statute, which constitutes the most significant part of this experience, both from a political and a legal point of view.

[1707] The threshold is adjusted every two years. In 2017 the income threshold was established in 11.528,00 Euro. In case of criminal proceedings the income threshold is increased by approximately 1.000,00 Euro for each member of the family. With regard to civil proceedings this provision does not apply and therefore in order to qualify for legal aid the applicant should have a family income lower than 960,00 Euro per month.

[1708] D.P.R. n. 115/2002 (It.) provides that legal aid fees in civil proceedings are reduced by half. Further pressure to limit the costs of the system has resulted in 2014 in a reduction also for criminal proceedings. Poor profitability has generated a tendency among lawyers to enroll in the special legal aid register only during the first phase of their career or in absence of wealthier clients, ultimately affecting to a certain extent the quality of legal aid.

[1709] In 2016, the number of families living under the threshold of absolute poverty (that is with a monthly income of about 1.000,00 Euro) was 1.619.000, for a total of 4.742.000 individuals who were in the position of satisfying the income requirement. While it is obvious that not all of them were in need for legal services, these figures shed some light on the potential dimension of the access to justice demand in Italy.

[1710] In 2014, the number of applicants in criminal proceedings was 157.074 and the number of beneficiaries 133.250. During the same year, with regard to civil proceedings, the number of applicants and of those benefiting from legal aid reached respectively, 134.580 and 124.884. For further data see RELAZIONE AL PARLAMENTO SULL'APPLICAZIONE DEL D.P.R. 115/02, TESTO UNICO DELLE DISPOSIZIONI LEGISLATIVE E REGOLAMENTARI IN MATERIA DI SPESE DI GIUSTIZIA (2015) and RELAZIONE SULL'APPLICAZIONE DELLA NORMATIVA IN MATERIA DI PATROCINIO A SPESE DELLO STATO, RIFERITA AI PROCEDIMENTI CIVILI (2015).

[1711] In 2014, despite a growth in the number of beneficiaries, there was a decline in the cost of legal aid. Such variation can be explained by the reform providing for a reduction of fees and, more generally, by the tendency to contain attorneys' compensation. As already noted, poor profitability has affected over the years the quality of the legal assistance under public aid. The current trend raises even more serious concerns on the future financial sustainability of the system and the quality of the services it provides.

[1712] Also consumer's groups and tenants' organizations provide legal services to their members. Usually, these organizations offer a preliminary advice through their lay personnel and then refer clients who need it to lawyers specialized in the relevant area of law, with whom they have an arrangement concerning fees. It should be noted that, compared to unions, they are significantly less known to those that might potentially benefit from their activity.

2. The enforcement of the Workers' Statute: a utilitarian approach to access to justice.

The first research on the enforcement of the Workers' Statute covered the years immediately following its entry into force. It was carried out by a group of well-known sociologists and legal scholars and had a wide impact on the Italian literature on law and society issues.[1713] It was the first time that scholars analyzed the demand of justice and the judicial response by large aggregates, highlighting the relations existing between the behavior of the actors of the judicial process and the social and political structure in which they were situated.

The study moved from the conceptual assumption that access to justice is mainly an actor-driven process. In this regard, the research's findings showed the inadequacy of any deterministic interpretation of the relationship between the political and social framework and the quantitative and qualitative trends of the demand for justice and judicial response. During this first phase of enforcement of the Workers' Statute, each of the actors appeared to be guided in their decisions more by a utilitarian logic, not dissimilar from that governing political negotiation, rather than by the turns of social conflict. On the input side (the demand of justice), unions carried out a role of gatekeepers of the quality and quantity of individual and collective claims,[1714] as to maximize the benefits and minimize the losses arising from litigation for the trade unions themselves. On the output side (the answers given by the judiciary), the judges (apart from some examples of judicial progressive activism) showed to shape their decisions so as to strengthen and legitimize their role, avoiding overly radical readings of the law as well as abstract hermeneutic approaches, typical of traditional formalism. In conclusion, the study led the authors to describe the management of the right to access to justice by social and institutional actors as an example of "judicial lobbying". Despite the persistence of traditional legal practices, the practice of using the judicial process as an institutional realm where to deal with social conflicts transformed the structure of the civil dispute and the same judicial function, by giving space to a negotiation of individual and collective interests over which the court often played a function more similar to mediation than to jurisdiction.

If we look at how trade unions managed individual and collective access to justice, we can see that the "organizational risk" variable played a different role over the years, depending from each trade union's strength and the characteristics of the context in which they operated. During the first years of enforcement of the Workers' Statute, the use of the law as a tool to solve collective conflicts was particularly aggressive in those areas where trade unions were still organizationally weaker and therefore the risks of losing space for action related to demanding the conflict to a third party were lower. On the contrary, individual claims prevailed in those areas where unions were already consolidated and therefore not affected by possible negative outcomes as legal aid providers. In the same areas, collective claims decreased, provided that trade unions had a lot to lose in case of unfavorable outcome of collective disputes and were much more exposed to risks associated with that event, since they were involved in the proceedings in their own name.

[1713] SINDACATO E MAGISTRATURA NEI CONFLITTI DI LAVORO (Tiziano Treu ed., 1975/1976); Tiziano Treu, Una ricerca empirica sullo Statuto dei lavoratori negli anni '80, 6 GIORNALE DI DIRITTO DEL LAVORO E DELLE RELAZIONI INDUSTRIALI 497(1984); Marzia Barbera, Vecchi e nuovi attori sulla scena dello Statuto, RIV. GIUR. LAV. PREV., no. 1, 1995, at 11.

[1714] Article 28 of the Workers' Statute, supra note 3, gives trade unions standing before the courts for defending their collective interest in cases of trade union discriminatory conduct.

The last research on the enforcement of the Statute was carried out in the '90s and showed a different scenario. On the one hand, the ability of trade unions to control and accommodate conflicts had progressively weakened, on the other the very fragmentation of the labor market and subordinate worker's status had translated in a fragmentation of the workers' interests and representation, ultimately resulting in a variety of attitudes with respect to judicial action. One of the main novelties of this period was precisely the emergence of new trade union organizations that placed themselves in clear opposition to historical trade unions. The collapse of individual claims and the increase of collective claims by independent unions were nothing but symptoms of these developments. The same developments meant that often labor courts had to deal with conflicts, which were no longer bipolar but multipolar. Cases such as those relating to reductions of working time or collective dismissals involved, at the same time, the limits of the employers' power to pursue their economic interest and the limits of the union's power to dispose of the positions of the individuals in court. The attitude of the judges towards trade unions became ambivalent: sometimes they decided in favor of the individual, sometimes in favor of the collective actor. The consequence was a changed perception of the role of the judiciary by the same trade unions, which produced a general lack of propensity to resort to the judicial path and channel individual disputes to it. In summary, at the end of the '80s, the attitudes of the trade unions towards litigation reveal less reliance on the judicial resolution of conflicts, resulting also in a decrease of individual claims, while the new, so called "autonomous trade unions" were more ready to play this card.

In conclusion, research on the enforcement of the Workers' Statute acknowledges the political nature of the role of trade unions as gatekeepers of the quality and quantity of legal claims, providing a clear example in which litigation is used in support of political mobilization rather than as its substitute. The approach of trade unions towards law and courts appears guided by considerations on the political implications of legal action. While the relation between legal and political strategies is clearly stated, no account is provided of the weight of the individuals' preferences and voice within the strategies put in place by trade unions. Nevertheless, it is not difficult to discern a marked dependence of individual access to justice from the strategic choices of trade union organizations, which raises at the very least, the issue of how trade union representatives interacted with the workers, individually and as a community, and to what extent they gave weight to the individuals' personal choices.

What is certain, however, is that also this system of legal representation and advice shows clear signs of crisis and it is unlikely that it will continue to work as it did in the past. The first reason for this crisis is related to the abolishment of the full or partial exemptions from court fees applied to employment and welfare proceedings since the enactment of Law n. 533/1973. The second one is related to the weakening of the general exceptions to the standard "loser pays all" rule under the Codice di procedura civile and the specific exceptions established by the Law n. 533/1973 in relation to social security claims.[1715] Fee shifting is mostly considered as a key re-

[1715] According to the original version of the relevant provision, the judge could deviate from the general rule in two different cases: a "split outcome" or the presence of a "good cause". The wording of the clause allowed judges, especially in employment and welfare

source for claimants that do not have the financial capacity to afford the cost of litigation. However, it can play also as a barrier to access to justice, provided that it implies a higher risk if the claim is dismissed, namely the risk to pay the cost for both sides. Both developments have rebalanced the allocation of the costs of the proceedings in favor of the employer and jammed the representation model put in place by trade unions and "trade union lawyers", confirming that the idea that rules governing costs and fee allocation are not only an incentive or a deterrent to litigation, but also a way of removing or rebuilding barriers to access to justice, is all but far from the true.

3. A different story: ligation on gender discrimination.

Scholarly comments on the Italian gender equality legislation adopted to transpose the European Gender Equality Directives of the '70[1716] have been almost unanimous in lamenting a very low level of litigation. This figure is somehow surprising if we consider the high number of claims filed under Article 28 of the Workers' Statute, which, as previously mentioned, grants trade unions legal standing to act in cases of trade union discrimination. Such difference has been explained through the fact that, while under art. 28 of the Workers' Statute, trade unions defend their own rights as collective organizations, equality rights are conceptualized in the Gender Equality Directives as individual rights, hence the low level of litigation based on these different grounds.[1717] This conclusion, however, is in same way contradicted by the huge volume of litigation on individual employment rights that has strongly relied on the support of trade union organizations.

A different account has been given in a well-known essay on multilevel gender equality litigation.[1718] First of all, it has been argued that, while the percentage of litigation on gender equality rights represents a small percentage of the overall litigation figures regarding labor law disputes (usually considerably high), the number of gender equality cases decided by Italian courts has been nonetheless significant. They went unnoticed by scholars for specific, path-dependent reasons. Legal doctrine did not pay much attention to antidiscrimination litigation, neither supported its strategic use before the European Court of Justice, because academics channeled their expertise and experience on legislative reform as a way to incorporate EU law within the Italian system. [1719] Secondly, in order to explain the comparatively lower litigation levels on gender equality, the author stresses the importance of mobilization efforts by actors interested in fighting discrimination. If we consider the role played by Italian trade unions organizations in this context, we could

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proceedings, enough discretion to decide that each party would have to pay its own attorney. The provision was amended in 2005 requiring the judge to explicitly state in the decision the "good cause", in 2009 allowing the judge to derogate to the general rule only for "serious and exceptional reasons" and in 2014 only for "serious and exceptional reasons" related to the "absolute novelty of the issues" considered or an "overruling of precedents". Moreover, also the provision of the Law n. 533/1973 (It.) providing that in disputes concerning social security benefits, the losing worker would not reimburse the costs of the social security agency, unless his/her claim was proved to be manifestly unfounded and frivolous, has been rewritten and an income eligibility requirement introduced.

[1716] Legge 9 dicembre 1977, n. 903, G.U. Dec. 17, 1977, n. 343 (It.) and Legge 10 aprile 1991, n. 125, G.U Apr. 15, 1991, n. 88 (It.), now merged in Codice per le pari opportunità, Legge 11 aprile 2006, n. 198, G.U. May 31, 1991, n. 125 (It.).

[1717] Dagmar Schieck, Enforcing (EU) Non-discrimination Law: Mutual Learning between British and Italian Labour Law?, 28 INT'L J. COMP. LAB. & INDUS. REL. 489 (2012).

[1718] Claire Kilpatrick, Gender Equality: A Fundamental Dialogue, in LABOUR LAW IN THE COURTS: NATIONAL JUDGES AND THE ECJ, 31 (Silvana Sciarra ed., 2001).

[1719] This attitude can be explained if we consider that in Italy there has traditionally been a huge crossover between the academic and the governmental spheres, sometimes with a tragic outcome. Given the political weight of their advisory activity, in the past, at a time when terrorist groups still had a considerable strength and popular support, several academic experts were killed in terrorist attacks.

argue that they did not support and even less promote gender equality litigation (according to the law, they could act on behalf of the individual) not only because they privileged more traditional, class conflict-based disputes, but also because it was not clear what benefits the organization could expect from such litigation.

It is true that other actors, the Gender Equality Advisors set up in 1991, were supposed to be the main characters of the story, but in fact litigation levels were not affected in substantial way by their activity, partly because of the scarce resources allocated to them and partly because of their preference for alternative means of dispute resolution (although they have not proved to be particularly effective), mostly related to the fear that failures in court would undermine their institutional status.

The problem is that the "governmental approach" has been nowhere very successful. Both in common law and civil law countries, traditional public institutions, which, according to their role in protecting the public interest, should assume the defence of new emerging "diffuse rights" are by their natures unable to do so. [1720] They are too susceptible to political pressure, whereas "diffuse rights" frequently have to be vindicated against political entities, and incapable, by training or expertise, to vindicate effectively the new rights. On the other hand, other governmental solutions to the problem - in particular, the creation of highly specialized public agencies - have shown, for a number of reasons, apparently unavoidable weaknesses. Public agencies tend to be responsive to organized interests with a stake in the outcome of an agency's decision, and those interests tend to be predominantly those of the very entities, which the agency is supposed to control.

Such considerations find further support if we compare the experience of enforcement of gender equality legislation with that concerning discrimination based on race, ethnic origin and nationality. Litigation levels in this different area of antidiscrimination law in which collective enforcement has been entrusted to private actors, in particular civil society organizations, appear to confirm the constrains of governmental actors in ensuring effective access to justice. While, the limited efficacy of Gender Equality Advisors in enforcing gender equality rights overshadows the issue of the implications of legal strategies for other forms of mobilization, it highlights the crucial role accountability mechanisms can play in balancing, to some extent, pressures from political counterparts of marginalized groups.

4. New struggles and new actors: litigation on discrimination based on race and national or ethnic origin.

If we compare the enforcement of gender equality legislation with the most recent litigation on the subject of race, ethnic origin and nationality, the picture changes again.

Reports on the enforcement of the prohibition of discrimination under the Racial Equality Directive[1721] and the prohibition of discrimination provided by the Consolidated Immigration Act

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[1720] Cappelletti, supra note 1, at 695.

[1721] Council Directive 43/2000 O.J. (L 180) 22 [hereinafter RED].

1998[1722] (raced, ethnic origin, nationality) show that initially litigation around such provisions was almost exceptional. Indeed, in its first report on Italy (2001) the European Commission against Racism (ECRI) noted that the 1998 antidiscrimination provisions on racial discrimination had been very rarely applied.[1723] However, the figures regarding the enforcement of the same legislation over the last ten years show a substantial rise in litigation (still mainly aimed to challenge institutional discrimination). This different trend appears to be related to the fact that more recently new actors have entered the frame. Case law shows there is a well-established network of civil society organizations systematically engaged in litigation on discrimination on grounds of race, ethnic origin, and nationality, in particular with regard to employment and social security issues.[1724] Compared to civil society organizations, trade union organizations appear to have had a minor role, although an in depth analysis allows to identify forms of coordination and in some cases also the existence of organizational and political ties between the former and the latter.

The increasing engagement of civil society organizations in litigation can be explained as the result of two distinctive factors.[1725]

On the one hand higher levels of litigation can be related to legal-institutional factors, such as the growing opportunities for litigation resulting from the domestic implementation of the RED, and in particular to the possibility provided under the implementing decree of the RED for civil society organizations to act on behalf or in support of individual victims and in their own name in instances of collective discrimination. Relying on the provisions concerning legal standing, activist lawyers in collaboration with civil society organizations have promoted and helped to consolidate in courts an interpretation of the legislation implementing the RED such as to include within the reach of the prohibition of discrimination on grounds of race and ethnic origin also nationality-based differential treatment, expanding opportunities to challenge in court discriminations affecting third country nationals. In doing so, they have enhanced access to courts for migrants, both at the individual and collective level, thus replicating the same subsidiary mechanisms that have been described above, and set the ground also for a more effective enforcement of the prohibition of discrimination in general. All the groundbreaking legal concepts provided by the new European antidiscrimination legislation have been firstly tested in litigation promoted by civil

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[1722] Decreto legislativo 25 luglio 1998 n. 286, G.U. Aug. 18, 1998, n. 191 (It.).

[1723] European Commission against Racism and Intolerance (ECRI), 2001 Report on racism and discrimination in Italy (June 2001).

[1724] Among the organizations that have played a prominent role in this regard, it is worth mentioning Associazione Studi Giuridici sull'immigrazione (ASGI), an association of lawyers and university professors with very high expertise on migration law and very influential on issues concerning migration, asylum and citizenship and most recently on discrimination. Besides litigation, the association is particularly active in lobbying activities ranging from issuing reasoned opinions in cases of violation of the prohibition of discrimination, to lobbying national and EU institutions. Another association quite active in this field is Avvocati per niente (APN), a pro-bono lawyers' association promoted by CARITAS. It is a faith-based association aimed to providing free legal assistance to socially disadvantaged individuals. Finally, litigation has been promoted in a significant number of case by Fondazione Guido Piccini, a partner of the trade union Confederazione Generale Italiana del Lavoro (CGIL), which is aimed at "promoting culture, solidarity and equal protection of human dignity" mainly through training initiatives, education and social assistance projects and human rights protection activities.

[1725] For an analysis of litigation on the prohibition of discrimination, the conditions that encouraged such litigation and its consequences in terms of policy response see Venera Protopapa, Antidiscrimination Law and Legal Mobilisation in Italy. Shaping Equality for Migrants (Oct. 26, 2016) (unpublished Ph.D dissertation, University of Milan) (on file with author).

society organizations. [1726]

On the other hand, the engagement in litigation by civil society organizations can be explained by the escalation of exclusion and intolerance towards migrants that followed the significant electoral success of the center-right in the 2008 general election and the local elections held between 2008 and 2009 in a number of northern Italy municipalities and the policy developments that ensued. Following its victory, the center-right majority, in line with its electoral campaign strongly focused on security and fight against illegal migration, provided municipalities with extended powers concerning "public safety" and "urban security".[1727] Such extended powers translated into the adoption of a number of local ordinances, in particular in Northern Italian municipalities governed by the center-right majority that directly or indirectly targeted migrants.[1728] These ordinances were integrated by a number of welfare measures adopted at the local level aiming to selectively support the resident population. This considered, the turn to the courts by civil society organizations can be understood in light of the pressures felt by organizations advocating for migrants' rights to provide "adequate" responses to the set of measures above mentioned, the so called "local policies of exclusion"[1729] and challenge their legitimacy in the eyes of the general public.

Civil society organizations would find in the judiciary a particularly receptive interlocutor. Judges would show themselves, at least during the first years of enactment of such litigation strategies, very open to the claims brought by civil society organizations, in line with an understanding of their role as an anti-majoritarian institution. While supporting the view of litigation as a promising strategy to counter "local policies of exclusion", early successes in court have provided valuable precedents, improving therefore chances of success, and strong incentives for extending the scope of litigation strategies to other exclusionary policies, such as those concerning access to employment in the public sector (left mostly to individual enforcement) and access to social security (until then almost an exclusive domain of constitutional review).

Finally, litigation around antidiscrimination law provisions appears to have strongly counted, in terms of resources, on fee shifting. As we have previously noted, reforms of civil procedure rules

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[1726] The RED provides definitions of discrimination that are characterized by an objective approach to discrimination that explicitly exclude any relevance of intent; broadens, as far as direct discrimination is concerned the area of available comparators; refers, as far as indirect discrimination is concerned, to "a particular disadvantage" rather that disproportionate impact; allows a shift of the burden of proof once the complainant has established a prima facie case; includes a prohibition of victimization. For an analysis of the policy-making process and potential impact of the adoption of the RED in terms of creating better opportunities for litigation at the national and EU level see Evans Case & Terry Givens, Re-Engineering Legal Opportunity Structures in the European Union? The Starting Line Group and the Politics of the Racial Equality Directive, 48 J. COMMON MKT. STUD. 221 (2010); Marzia Barbera, Not the Same? The Judicial Role in the New Community Anti-Discrimination Law Context, 31 IND. L. J. 82 (2002).

[1727] L. n. 94/2009 (It.) LE ORDINANZE SINDACALI IN MATERIA DI INCOLUMITÀ PUBBLICA E SICUREZZA URBANA. ORIGINI, CONTENUTI, LIMITI (Anna Lorenzetti & Stefano Rossi eds., 2009); Nazzarena Zorzella, I nuovi poteri dei sindaci nel pacchetto sicurezza e la loro ricaduta sugli stranieri, DIRITTO, IMMIGRAZIONE E CITTADINANZA, no. 3/4, 2008 at 57.

[1728] Ordinances on population registration providing additional conditions for the registration of migrants, such as a certain income or a passport with an entry visa or limiting registration only to certain categories of migrants such as holders of a long-term resident permit, represent the most classical example in this regard. For a collection of such ordinances, see CITTALIA, Oltre le ordinanze: I sindaci e la sicurezza urbana (March 9, 2009).

[1729] Maurizio Ambrosini, We are against a multi-ethnic society: policies of exclusion at the urban level in Italy, 36 ETHNIC & RACIAL STUD. 143 (2013); Maurizio Ambrosini & Elena Caneva, Local policies of exclusion: the Italian case (Robert Schuman Centre For Advanced Studies, 2012).

have over the years limited the possibility to depart from the general rule under which the losing party should reimburse all his or her opponent's expenses including court fees and lawyer's fees in view to prevent frivolous litigation and abuse of procedural rights.[1730] However, an analysis of the case law focusing on the way the general rule and its exceptions have played for civil society organizations and individual victims shows that, not only the defender has been condemned to pay all the cost incurred by civil society organizations and individual victims in the overwhelming majority of cases in which they have been successful as to the merits of the claim, but also that the latter have continued to benefit in a significant number of unsuccessful claims from decisions departing from the general rule, due to the "peculiarity of the issues under review", to the "complexity of legal framework" or to the "novelty of the issues addressed by the court".

While, at least for the moment, it can be said that the bet of the European legislature to entrust the enforcement of the prohibition of discrimination not only to individual victims but also to civil society organizations, has been a winning bet, it is important to notice that the effects of this strategy on the long run are hard to predict.

Given the absence of stable links between these NGOs and grassroots' organizations and movements representing the groups whose rights are litigated, there is a risk litigation strategies will hinder collective action and fail to channel victories in courts in the political discourse. In this case, resorting to the courts to overcome situations of social and political weakness, instead of being an auxiliary instrument of social mobilization and collective action, might become their substitute.

The risks of such strategy are all the more serious if we add to the picture the particular vulnerability of migrants as individuals and the lack of strong organizations in the migrants' community. In other words, there are enough reasons to fear migrants themselves will end having a minor role and no voice in shaping strategies.

5. Empowering or disempowering individuals and communities?

The involvement of new actors in litigation activities aimed to enhance access to justice for vulnerable communities, such as migrants, brings, once again, the issue of the role played by private actors in lobbying courts in defense of individual and collective interests to the attention of legal scholars and social scientists.

To some extent, the impact of litigation strategies promoted by civil society organizations in defense of migrants' rights might raise even stronger concerns, provided that, unlike in the case of trade union organizations providing legal services for their own members, the above mentioned civil society organizations lack significant numbers of migrants among their membership, and have no stable links with migrants' organizations. And still, to this day, the issue is hugely unexplored.

Those interested in starting a critical reflection on such practices would clearly benefit from a stimulating dialogue with US public interest law scholars. Indeed trade-offs between legal and

[1730] See supra note 19.

political mobilization, as well as risks of lawyers' domination of marginalized clients have been widely analyzed by the latter. [1731]

As to trade-offs between legal and political mobilization, research on the impact of litigation strategies across several areas of practice of public interest law has extensively illustrated the limits of litigation as a reform strategy. Stressing the complexities of the relation between rights, remedies and social change, several scholars have observed that litigation strategies are likely to atomize collective claims and drain movement resources, from more promising strategies.[1732]

Along with the critique of litigation as social reform strategy, research has highlighted dangers of lawyer domination of individuals and affected communities. Scholars concerned with lawyer domination have warned against lawyers ignoring the preferences and contributing to disempower poor and marginalized individuals and communities, reinforcing their feeling of powerlessness, rather than challenging it.[1733]

Nevertheless, the US scholarship on public interest law has not missed to emphasize the potential of litigation strategies when integrated within a larger campaign.[1734]

More recently research has provided empirical support to such considerations and developed a theoretical model for explaining how law matters for social reform focusing in particular on the relevance of litigation during the different stages of development of movement activity and the contextual factors (legal or extra-legal) that encourage the use of legal tactics and determine their effectiveness.[1735]

Criticism towards the existing model of public interest law and increasing empirical findings supporting the idea of law as "politics by other means"[1736] have determined a shift of paradigm in public interest law. In this new paradigm lawyers cease to play the "main characters" assuming the role of "supporting players". As supporting players their expertise is instrumental to facilitate the mobilization of the affected constituencies. Examples of alternative practices of public interest lawyering show lawyers might facilitate mobilization to translate information about the law and make it intelligible to community groups as they make decisions on their strategic choices, legal tactics included, as well as translate community needs and organizational claims into legal causes of action, use legal tactics to support and protect community organizations, and pursue legal change as a route to opening up spaces for community voice.[1737]

Lopez was among the first to articulate an alternative vision of lawyering consistent with this

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[1731] Scott L. Cummings & Deborah L. Rhode, Public Interest Litigation: Insights from Theory and Practice, 36 FORDHAM URB. L.J. 603, 608 (2009).

[1732] JOEL F. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE (1978); STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE (1974).

[1733] Derrick A. Bell, Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation, 85 YALE L. J. 470 (1976); GERALD P. LÓPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE (1992).

[1734] HANDLER, supra note 33; SCHEINGOLD, supra note 33.

[1735] Michael McCann, Law and Social Movements: Contemporary Perspectives, 1 ANN. REV. L. & SOC. SCI., 17 (2006).

[1736] RICHARD L. ABEL, POLITICS BY OTHER MEANS: LAW IN THE STRUGGLE AGAINST APARTHEID, 1980–1994 (2015).

[1737] Jennifer Gordon, Concluding Essay: The Lawyer Is Not the Protagonist: Community Campaigns, Law, and Social Change, 95 CAL. L. REV. 2133 (2007).

paradigm-shift. Lawyering in itself, he argues, "has to be remade as part of any effort to transform the world". His "rebellious" idea of lawyering, as he calls it, demands lawyers and those with whom they work to "nurture sensibilities and skills compatible with a collective fight for social change".[1738]

In order to do so lawyers must be able to evaluate the likely interaction between legal and "non-legal" approaches to problems, know how to work with others in designing, and pursuing strategies aimed at responding immediately to particular problems and, more generally, at fighting social and political subordination. They must understand as Lopez concludes "how to be part of coalitions, as well as how to build them, and not just for purposes of filing or 'proving up' a lawsuit".

At bottom the rebellious idea of lawyering recalls a view of the "client and lawyer as part of a larger network of cooperating problem-solvers". This view relies according to Lopez on two convictions: that "the lawyer is not necessarily better than the client or others (professional or lay) to serve as representative" and that the 'law is not necessarily better able than other remedial cultures (formal and informal) to respond meaningfully to any particular problem".

Yet, while the benefits of the shift of paradigm in public interest law practice have been largely documented and theorized, its critical aspects have been discussed much less in comparison.[1739]

In a context of absolute inadequacy of public legal aid, where private actors have played and probably will play in the future an even more central role in the effort to make access to justice effective, the criticalities of the subsidiary mechanisms of access to justice that have been put in place by such actors and the challenges posed by traditional and alternative models of public interest law practices are becoming urgent to address.

This is all the more evident if we consider that, though litigation levels are not comparable to those concerning migrant rights, litigation strategies are increasingly attracting the attention of civil society organizations operating in other areas of antidiscrimination law, such as LGBTI rights and disability rights.[1740] Ultimately, a rich body of research providing detailed accounts of the involvement of civil society organizations in litigation strategies, especially as far as gender equality, disability rights and environmental protection are concerned, in other EU countries and at the EU level, shows the relevance of such issues goes well beyond the Italian case.[1741]

6. Clinics as a public interest law actor.

[1738] Lopez, supra note 34.

[1739] It has been rightly observed that there are inevitable tensions between lawyering and organizing as components of an integrated model, pointing in particular to trade-offs between organizing and conventional legal practice, to the confusion of roles affecting the lawyer-organizer, and the risks of domination of clients in the law and organizing context. See Scott L. Cummings & Ingrid V. Eagly, A Critical Reflection on Law and Organizing, 48 UCLA L. REV. 443, (2001).

[1740] See in particular litigation concerning the prohibition of discrimination promoted by Rete Lenford, an organization of lawyers aiming to provide judicial protection for homosexual, transsexual and inter-sexual persons' rights.

[1741] With no claim of exhaustiveness, see RACHEL. A. CICHOWSKI, THE EUROPEAN COURT AND CIVIL SOCIETY LITIGATION, MOBILIZATION AND GOVERNANCE (2007); Alter. J. Karen & Jeanette Vargas, Explaining Variation in the Use of European Litigation Strategies European Community Law and British Gender Equality Policy, 33 COMP. POL. STUD. 452 (2000); Tania A. Börzel, Participation Through Law Enforcement: The Case of the European Union, 39 COMP. POL. STUD. 128 (2006); LISA VANHALA, MAKING RIGHTS A REALITY?: DISABILITY RIGHTS ACTIVISTS AND LEGAL MOBILIZATION (2011); Lisa Vanhala, Legal opportunity structures and the paradox of legal mobilization by the environmental movement in the UK, 46 L. & SOC'Y REV. 523 (2012).

As we have seen in the first part of this paper, criticalities in the traditional model of public interest law litigation and challenges posed by old and alternative models of lawyering for social change represent two main areas urging for investigation in the Italian, and more broadly in the European context. The identification of this gap in research sets the ground for reflecting on the role legal clinics can play to make the right to access to justice more affective.

We argue that clinics can enhance access to justice by creating a space where a critical reflection on actual practices of the law is promoted and tensions arising from different models of representation are explored.

This reflective inquire moves from a self – reflective exercise on clinics as a public interest law actor. Access to justice plays an essential part in legal clinics. Indeed, it has been noted that access to justice is "inherent in the clinical methodology, which seeks to prepare students for the practice of law as competent and professionally responsible lawyers while delivering legal services and promoting social justice". [1742]

Though a lot has changed over the years, in the US, where the clinical movement started, clinics were established out of concern for a large unmet need for legal representation and began at many law schools "primarily as programs to enable law students to provide free legal services to the poor or to bring important impact litigation, under the supervision of practicing attorneys".[1743]

Access to justice was anything but irrelevant in the Italian experience as well. While providing an alternative to formalist conceptions of law and way of teaching, clinics were viewed also as a way to offer an answer to entrenched problems of social conflicts in an era of declining effectiveness and scope of public legal aid. [1744]

Looking at how the clinical movement has evolved over the years, can we still imagine a future in which clinics are able to significantly affect access to justice?

While it is open for discussion whether the clinical movement is meeting its full potential in this regard, it should be noted that it is very unlikely it will ever be able to provide a subsidiary mechanism of legal aid similar to those described in the first part of this paper.

There are many institutional and financial constrains that hinder this development, first and foremost, the fact that the Italian academic system does not recognize the position of the clinical professor.[1745] Supervision in clinics is usually carried out by faculty members in collaboration with lawyers. While the former have no expectation to receive any additional remuneration as clinicians, the latter, often hired as adjunct professor, are in most cases remunerated only for a small part of their working hours. The rigidities stemming from of a system of university curricula that

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[1742] Frank S. Bloch, Access to Justice and the Global Clinical Movement, 28 WASH. J. L. & POL'Y 111, 111 (2008).

[1743] Stephen Wizner & Jane Aiken, Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice, 73 FORDHAM L. REV. 997, 998 (2004).

[1744] Marzia Barbera, The emergence of Italian Clinical Legal Education movement, in REINVENTING LEGAL EDUCATION IN EUROPE: HOW CLINICAL EDUCATION IS REFORMING THE TEACHING AND PRACTICE OF LAW (Alberto Alemanno & Lamin Khadar eds., forthcoming 2018).

[1745] Id.

is state controlled significantly constrain efforts to promote clinics as an ordinary law school course and claim official status for clinical supervisors. All these casts serious doubts on the ability of clinics to effectively respond as a public interest law actor to the unmet need for legal representation.

But even if such constrains did not exist, there is an intrinsic tension between the clinics' objective to promote access to justice and its educational focus.[1746] We argue that this very tension distinguishes legal clinics from any other actor providing legal services for the poor or pursuing through courts the interest of marginalized communities but also provides clinics with a number of comparative advantages that are likely to qualify their contribution to effective access to justice in terms of innovativeness and effectiveness.

Such advantages are related, first of all, to the academic component of legal clinics and more specifically to the fact that clinics enjoy the same guarantees of freedom applying to traditional teaching activities and research. As it has been noted, this has two main consequences.[1747] On the one hand, academic freedom puts clinicians and students in a privileged position, compared to other public law actors, to choose free from interferences the issues they intend to deal with and the methodology they consider more appropriate for doing so. It follows that clinics can decide to focus on the issues that are considered more relevant by affected communities, that can entail support to already existing efforts to deal with a specific problem or to build together with such communities the available strategies to address it, being free to opt for legal or non-legal approaches to the problem. On the other, it extends to clinical activity the same credibility that is generally associated with academic research. This perceived credibility of the clinic is likely to facilitate the relationship with public authorities that might have a role in the process of dealing with a specific problem or other actors actively engaged in finding a solution to it, while conferring salience and legitimacy to the social justice claims the clinics support and opening up space for clients to be heard.[1748]

These are without doubt major points to take into consideration when exploring the potential of clinics as a public interest law actor. Yet, there is another aspect of clinics that makes them inherently different from any other actor in public interest law. It is related to the clinical methodology itself and finds expression in the ability of legal clinics to reflect critically on how clinics themselves affect access to justice and in general on public interest law practices. This is not to say that other public interest law actors do not reflect critically about what they do and on the impact of their

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[1746] Wizner & Aiken, supra note 44.

[1747] Arturo J. Carrillo, Bringing International Law Home: The Innovative Role of Human Rights Clinics in the Transnational Legal Process, 35 COLUM. HUM. RTS. L. REV., 527, 575-80 (2003).

[1748] As part of university, the clinic is likely to be less subject to pressure coming from outside funding. While it true that, like in the case of NGOs, donors might exercise pressure to influence the choice of issues the clinic is going to deal with and the strategies that will be deployed for this purpose, it should be considered that the possibility to use university resources protect clinics from having outside donors establish its agenda. The previous paragraph highlighted civil society organizations have relied of fee shifting for obtaining the necessary resources for litigation. While fee shifting compared to outside funding might ensure better autonomy, it is also true that reliance on fee shifting is likely to push such organizations away from non-fee-generating activities (See Laura B. Nielsen & Catherine R. Albiston, The organization of public interest practice: 1975-2004', NEWCASTLE L. REV. 1591 (2005).

activities. The difference between legal clinics and other actors in this regard stands in the fact that clinics are *by design* a reflective lawyering space.

7. Clinics as a reflective lawyering space.

The uniqueness of legal clinics in this regard once again goes back to the coexistence in clinics of social justice aim and educational aims. The existence of this dual purpose makes clinics a forum that facilitates a better understanding of the nature of legal knowledge and legal practice and a critical reflection on how the right to access to justice is actually enforced.

It is because clinics put together the knowledge of the law and the practice of the law that students experiment that there is no law in the abstract. *All law is embedded in facts; all law is contextual.*[1749] In clinics students learn that the meaning of the law is only revealed by the practice of the law, where the order of abstract and objective principles give way to the disorder of the reality, which appears confused, subjective, indefinite, contradictory.[1750] Experiential learning, thus, complements the learning "in the books", allowing the student to comprehend and reach out and touch the economic, social, ideological, political and institutional contexts in which the "objective" legal principles operate.[1751] Cases handled by legal clinics concern real people and not abstract legal subjects. The starting point is therefore not the fiction of a legal entity but the materiality of life, its indivisible substratum and the relations of power that shape the social structure [1752].

Furthermore, "reflective observation" is an essential part of the constructivist model of learning, on which clinics are grounded. In this context, reflexivity denotes the ability to recognize one's epistemic relationship with reality, one's way of knowing and interpreting reality, the reference patterns, the tacit assumptions used in the attribution of meaning to facts.

Clinical methodology is therefore a pedagogy that promotes an active and autonomous research and construction of knowledge and not a passive reception of content and techniques. Students can learn through the elaboration of preexisting schemes of meaning, without altering those schemes; or can transform meaning patterns, either dysfunctional or inadequate to new situations, through a reorganization of meaning. It is what Bateson calls "deutero-learning" or "learning how to learn" , which allows a subject who learns not only to solve particular problems, but also to be able to solve problems in general.[1753] Reflexivity is a necessary element of deutero-learning: experience alone is not enough, reflection is needed, as to transform knowledge in conscious thought. And reflection needs to be activated both in relation to the problem setting phase as it is in relation to the problem solving phase.

It must not be hidden that the specificities of the genesis of clinics in the European context are likely to represent a constraint, both with regard to the innovative and critical role of clinics. In

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[1749] PAUL W. KAHN, MAKING THE CASE. THE ART OF JUDICIAL OPINION 3 (2016).

[1750] Jeremy Perelman, Penser la pratique, théoriser le droit en action: des cliniques juridiques et des nouvelles frontières épistémologiques du droit, REVUE INTERDISCIPLINAIRE D'ÉTUDES JURIDIQUE 133 (2014).

[1751] Jerome Frank, Why Not a Clinical Lawyer-School?, U. Pa. L. Rev., 907 (1933).

[1752] Enrica Rigo, Introduction at the Workshop Le Cliniche Legali come Prospettiva sul Diritto: le sfide teoriche e concettuali (Feb. 13 2017).

[1753] GREGORY BATESON, STEPS TO AN ECOLOGY OF MIND: COLLECTED ESSAYS IN ANTHROPOLOGY, PSYCHIATRY, EVOLUTION, AND EPISTEMOLOGY (1972).

the United States, clinics were promoted strongly by public interest lawyers that had long experience into public interest law practice and were part of a larger network of organizations promoting access to justice, often in conflict with members of the academia. By contrast, in Italy clinics have been mainly promoted by academics. Though often moved by the desire to contribute to communities they were embedded as researchers and teachers, academics contributing to the establishment of legal clinics had generally no experience in public interest law practice or even other experiences different from scientific research or any past history of working with poor and marginalized communities. Such consideration suggests caution in imagining clinics as radically different from traditional teaching classes, detached from positivist conceptions of law, and bridging between universities as elitist institutions and society. This is all the more true if we consider the role Bar Associations have played in the establishment of clinics. Though support from Bar Associations, whether political or in terms of human resources, has proved to be very important for the consolidation of clinical programs, it is true at the same time that it has often brought in the clinic lawyers with no experience of public interest law and a conception of legal practice that is exactly the one clinics should aim to challenge.

This picture however does miss the impact that the clinical methodology can have in promoting a reflection on the views of all those participating in the clinic, be they students, professors or lawyers. Reflective practice concerns not only those who learn but also those who teach: questioning the meaning of one's teaching allows the teacher to tie "the art of practicing in conditions of uncertainty with the uniqueness of the art of the research typical of the scientist"[1754] and to give way to actions that modify the ordinary sense attributed to consolidated patterns of action. Clinics push those participating in it to explicit and challenge implied assumptions, avoid automatic associations and overconfidence in deploying a specific strategy, in favor of a continuous reflection on the best ways to affect the life of those the clinic is seeking to help. The results of this process are constantly confronted with empirical evidence the clinic itself makes available and can generate a continuous activity of rethinking and refinement of the way it operates.

8. Clinic as a catalyst for change.

Though such reflection is primarily focused on the clinic itself, it can reasonably aim to serve more broadly all actors interested in making access to justice more effective. Besides training competent and ethical lawyers with a more critical understanding of their role as public interest advocates, clinics can play a "catalyst for change" role in the development of the movement of public interest law itself.[1755]

On this regard, clinics can be seen as an epistemic community, capable of rethinking, and in case changing, public interest law practices, and of influencing policies on justice issues of public actors and non-governmental organizations (advocacy coalitions, among others).[1756]

[1754] DONALD A. SCHÖN, THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION (1983).

[1755] Deena R. Hurwitz, Lawyering for Justice and the Inevitability of International Human Rights Clinics, 28 YALE J. INT'L L. 505, 531 (2003). See also Carrillo, supra note 41, 584.

[1756] The concept of epistemic community has been developed mainly by international relations

Epistemic communities are held together by shared intentions, expectations, symbols, behavioural rules, and points of reference. The *episteme,* "delimits…the proper construction of social reality for its members".[1757] But expertise and authoritative knowledge are above all a product of social context. Society confers the authority and recognition that make epistemic communities influential. [1758]

The diffusion of legal clinics in the Italian and in other European universities has taken place mainly through an epistemic community composed by academic and professional élites, operating in different legal systems and connected on the basis of a variety of inclinations: field of interests, ideology, methodological approaches, shared legal policies, and so on. Such networks do not operate in a formal or targeted manner, but are the result of a series of migrations of student and scholars who take part in doctoral or master programs or are involved in academic or research project exchanges. They are then brought to review their training and their teaching in the light of that experience and to transfer it into their legal system. Through these fluid networks, different conceptions and approaches circulate from one system to another and influence local legal education, profession models and public policies. [1759]

These developments can be seen as an example of how, in a globalised world, transnational circulation of legal models influences every aspects of the law, including structures of legal expertise and education.[1760] However, the globalisation of the legal education and profession is not only a market-driven process. In spite of a sweeping marketization of the intellectual labour and the production of knowledge[1761], and in spite of the differences between national legal systems, the legal clinic movement is reorienting the training of lawyers towards a public/social perspective, bringing law students within a broader, transnational, justice oriented advocacy community.[1762]

As we have seen, research on public interest law practices has extensively highlighted the limits of public interest litigation. Among such limits, there is also a danger of cultural elitism: public interest litigation is a technical tool that requires specialist skills to be mastered. And if it is mastered, it is mastered by few people. The number of actors is inevitably limited. Social change becomes an affair of the few people who can participate in the conversation. Providing a reflective space on existing practices of public interest law and promoting alternative practices of the law

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scholarship to describe "a network of professionals with recognized expertise and competence in a particular domain and domain and an authoritative claim to policy-relevant knowledge within that domain or issue area." Peter M. Haas, Introduction: epistemic communities and international policy coordination, 46 INT'L ORG. (SPECIAL ISSUE) 1, 3 (1992). Epistemic communities have played a significant role in transnational processes and scholars have used this concept to interpret phenomena ranging from EU integration to policies dealing with climate change or with AIDS in Africa. On the role of epistemic communities in the creation of transnational legal regimes see, more generally, Knowledge, Power and International Policy Coordination, INT'L ORG. (SPECIAL ISSUE) (1992).

[1757] John G. Ruggie, International responses to technology: Concepts and trends, 29 INT'L ORG 557, 570 (1975); Mai'a K. Davis Cross, Re-thinking Epistemic Communities Twenty Years Later, 39 REV. INT'L STUD. 137, 160 (2013).

[1758] See Peter Haas, When does power listen to truth? A constructivist approach to the policy process, 11 J. EUR. PUB. POL'Y 575 (2004).

[1759] See Giacomo Capuzzo, «In mani esperte»: il ruolo della legal expertise nei sistemi transnazionali, 32 RIVISTA CRITICA DI DIRITTO PRIVATO, 497 (2014).

[1760] DANIEL E. BONILLA MALDONADO, El trabajo jurídico pro bono en perspectiva comparada, in LOS MANDARINES DEL DERECHO: TRASPLANTES JURÍDICOS, ANÁLISIS CULTURAL DEL DERECHO Y TRABAJO PRO BONO, 29 (2017) (The auther argues, "el mercado de las ideas jurídicas tiene una dimensión global").

[1761] Max Weber had already analysed this kind of processes a century ago. See MAX WEBER, Science as Vocation, in THE VOCATION LECTURES (David Owen & Tracy Strong eds., Rodney Livingstone trans., Illinois: Hackett Books, 2004) (1918).

[1762] See Frank S. Bloch & N.R. Madava Menon, The Global Clinical Movement, in THE GLOBAL CLINICAL MOVEMENT. EDUCATING LAWYERS FOR SOCIAL JUSTICE, 267 (Bloch ed., 2011).

by making use of their expertise and authoritative knowledge might represent the major contribution of legal clinics community in making access to justice more effective and enhance the autonomy of those seeking redress for the violation of their rights.