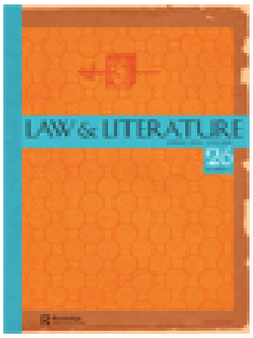

Law & Literature

ISSN: (Print) (Online) Journal homepage: https://www.tandfonline.com/loi/rlal20

Narrative Analysis as a Bridge between Humanistic and Legal Clinics Methodology. American and Italian Connections

Flora Di Donato

To cite this article: Flora Di Donato (2021): Narrative Analysis as a Bridge between Humanistic and Legal Clinics Methodology. American and Italian Connections, Law & Literature, DOI: 10.1080/1535685X.2021.1847789

To link to this article: https://doi.org/10.1080/1535685X.2021.1847789

Published online: 03 Feb 2021.

Narrative Analysis as a Bridge between Humanistic and Legal Clinics Methodology. American and Italian Connections

Flora Di Donato

Abstract, Presenting itself as exemplifying a certain postmodernist trend, the law and narrative approach has used methodological rigor to achieve success, riding the wave of the cultural and narrative turn of the seventies and eighties in such a way as to define the study of legal narrativity as a "useful enterprise," imagining that narration constitutes a legal category in its own right. If in Jerome Frank's day narration was generally associated with the linguistic distortions and manipulations practiced by attorneys and witnesses, it later came to be analyzed in terms of the consistency and plausibility of the stories told for the purpose of persuading a jury and, more recently, as a tool for coherently modelling fact and also as a tool for practicing clinical lawyering and case theory. The result is that we can now attribute additional values to narrations: a) as a method to analyse legal cases and re-construct facts in context; b) as a method to educate lawyers and other legal actors towards a more conscious use of storytelling in their daily activities; c) and as a device to include voices that are silenced or marginalised within legal discourse. Intended as a contribution to this debate, the paper offers a "narrative legal analysis" – situated in a civil law system – proposing the design of a research action that gives due consideration to voices that are otherwise not heard.

Keywords, Case analysis, human rights protection, clinical approaches, legal narratology

1. A NARRATIVE FOUNDATION FOR LEGAL ANALYSIS

Since the 1980s, the change in favour of more narrative understandings of the law facilitated the awareness that "to narrate events is not simply to recount them as they occurred, but to impose an order, perhaps to embellish or invent. A narrative is a construction, an artefact".[1] Today, this belief is not merely confined to the literary realm – there is a general acknowledgement that narrative is a

Law & Literature, PP. 1–20. ISSN 1535-685X, ELECTRONIC ISSN 1541-2601.

http://dx.doi.org/10.1080/1535685X.2021.1847789

basic cultural tool whose purpose is to make sense of experience and to construct meanings.[2] Furthermore, we have now understood that narrating people's stories and the impact that the application of the law can have on their lives can be considered to be a human strategy and a cure.[3] A strategy that is "in no way inferior to, 'scientific' modes of explanation that characterise phenomena as instances of general covering law".[4]

Therefore, in regards to the legal field, there are many reasons why, in my opinion, the combination of law and narrative is valid and pertinent today. The first fundamental reason is epistemological as well as epistemic in nature. Referring to an immanent dimension of knowledge, narration breaks out of the dominion of the humanities where it originated, to move transversally across the various fields of knowledge. As Hayden White wrote, it solves "the problem of how to translate *knowing* into *telling*, the problem of fashioning human experience into a form assimilable to structures of meaning that are generally human rather than culture-specific".[5]

In particular, since the publication of Amsterdam and Bruner's book[6],the narrative approach enables us to achieve a more refined understanding of how legal meanings are modelled, which nexuses of cause and time connect events, which characters play the key roles and which role and which actions can be attributed to them in the story. In other words, how knowledge of these elements is translated within the legal and judicial story and for what purposes. The narrative approach partners well with the dimension of legal proceedings where the facts are reconstructed *ex post*, according to the meaning that the events have for the law and from the standpoint of the parties to the conflict. Meanings that are conveyed in narrative form: from the stories told by clients to how they are understood and translated by their attorneys and on to the final decision handed down by the judge or the administrative agent. Constructivism's underlying assumption is that knowledge is right or wrong in the light of the perspective chosen, as it is never point-of-viewless. The individual's access to reality is mediated by symbols and the language they infer in the forms that provide the narration with its structure. It is in the narration that the events that happen in the world acquire 'meaning'. Stories are not just containers of facts: they are structuring forms that organise events. In this sense, it is the facts themselves that are 'constructed' by means of, and within, the broader characteristics typical of narration (normativity, consequentiality, particularity etc.).[7]

So, without denying the difference between what is real and what we can get to know (Putnam, 2012), and once the distinction between ontology and epistemology has been clarified[8] and it has been acknowledged that only the latter is relevant to the legal proceedings which create a communicative context (including linguistic codes, procedural rules, rhetorical artifices and interpretative dimensions), narrative comes across as a constitutive process that operates in

different ways to reorient our understanding of traditionally conceived dualities: facts and norms; theory and practice; individuals and institutions.[9]

On the basis of these premises, in subsequent paragraphs, I will firstly highlight the analysis of the relationship between fact-investigation and storytelling by elaborating upon the underlying connections among *Legal Realism*, *Law and Literature* and *Clinical Legal Education* (Part 2). Secondly, I will situate fact-investigation in the human rights field, particularly within the European framework of international protection, thereby highlighting how establishing the facts and the truth in the course of legal proceedings could be a complex issue where the procedure of the hearing for the asylum seeker rests almost exclusively on the *verisimilitude* and *coherence* of the story narrated by the applicant (Part 3). Thirdly, based on real stories of asylum seekers in Italy, my paper offers a narrative legal analysis, on the one hand and, on the other hand, the basis for a research action that gives due consideration to voices that are otherwise not heard in legal discourse (Parts 3.1-3.4).

2. FACT-INVESTIGATION AND LEGAL STORYTELLING AT THE CROSS ROADS BETWEEN CLINICAL LAW AND HUMANISTIC APPROACH

The issue of fact investigation has a long history, and yet is extremely pertinent today. In legal theory, fact investigation dates back to American realism, in which the legal philosopher Jerome Frank questioned whether facts were objectively reconstructed in the framework of a trial:

> Considering how a trial court reaches its determination as to the facts, it is most misleading to talk, as we lawyers do, of a trial court 'finding' the facts. The trial court's facts are not 'data', not something that is 'given'; they are not waiting somewhere, ready-made, for the court to discover, to 'find'. More accurately, they are processed by the trial court – are, so to speak, 'made' by it. On the basis of its subjective reactions to the witnesses' stories.[10]

Expressing an opinion that was revolutionary for the time, Frank stated that facts are not data, they are not "found" and are not waiting around somewhere to be discovered. Instead, he argued that facts are "made", that is created by the court on the basis of subjective reactions to the witnesses' stories. Frank thus drew attention to the point that subjective dimensions (such as opinions, perceptions and cognitive bias) are part of the process of construction of legal reality[11], with regard not only to judges, but also to witnesses, who in turn are also

"fallible", as they may have misunderstood or mistaken what they saw, or simply be unreliable, so that their evidence is biased:

> Most legal rights turn on the facts as 'proved' in a future lawsuit, and proof of those facts, in contested cases, is at the mercy of such matters as mistaken witnesses, perjured witnesses, missing or dead witnesses, mistaken judges, inattentive judges, biased judges, inattentive juries, and biased juries. In short a legal right is usually a bet, a wager, on the chancy outcome of a possible future lawsuit.[12]

One of Frank's contributions was to draw attention to certain critical aspects of fact-finding – the possibility that mistakes might be made, the role played by subjectivity in perceptions and representations – and the impossibility of perceiving these aspects as a result of logical deduction and reasoning. With the aim of shedding light on certain critical passages in the process of ascertaining facts, Frank thus advocated for an accurate factual investigation rooted in social science methods, bringing together the generalities of the law, interpretive frameworks and social and individual representations to contextualise and analyse law in action, i.e. the law that is created by the activity of judges, of attorneys etc.[13]

Since the time of Legal Realism, the idea has been that the study of facts is integrated with the study of the social sciences, so as to analyse the impact of the law in people's lives and promote a perspective of observation from the *bottom up*.[14] American Legal Realism was to lead the way not only to subsequent developments in the clinical law approach thereby increasing experiential learning in teaching as well as in learning law, but in some sense also to the humanistic turn in legal scholarship and in particular the *Law and Literature* and more widely the *Law and Humanities* movements. All of these movements became part of critical tools, albeit with different perspectives and methods, contributing to the revolt against legal formalism and projecting towards a policy of protecting the rights of minorities, following in the footsteps of *Critical Legal Studies* (CLS), of *Feminist Theory and of Critical Race Theory*. They are all movements that to a considerable extent shared a deconstructivist approach to the study of law and an interest in individuals' stories.

Since its inception in the 1980s, the *law and narrative* approach – which constitutes the focus of my contribution – has developed into a field in its own right and with its own nature, both a method for investigating legal reality in legal discourse, inside and outside formal tribunals, and a tool for combatting the dominant élite, for example by constituting the way for a woman to tell her own story, the way for an individual to belong to an ethnic group, the way for an individual to seek vindication or recognition, etc.

In 1981, Bennett and Feldman carried out a study that for the first time introduced the theory – not without criticism – that the effective representation

of a case in court depends above all on the storytelling ability of the legal actors (accused, lawyers, witnesses). In their view, jurors tend to base their decision on an evaluation of the "overall narrative plausibility" and "coherence" of the stories narrated, as well as considering them on the whole rather than on the basis of the verification of individual elements of the story. They also found that the structure of a story had a considerable impact on its credibility.

In 1989, the University of Michigan dedicated a symposium and a special issue to *Legal Storytelling*. It was an event that scholars judged significant, considering it to be an indication of the opening of the Law School to a different approach to law.[15] The main lesson learned through the symposium was that, in addition to highlighting 'diversity' (e.g. feminist legal theories, race-related issues and sexual difference), stories narrated in a legal dispute have the power to communicate the 'truth', even though they constitute only one of the possible ways of observing the world. Stories are always descriptions made from different points of view and are informed by their narrators' different cultural backgrounds.

In 1996, Brooks and Gewirtz published a collection of essays about law's stories, showing how academics' interest in literature and narration is related to overcoming the idea of objective truth and accepting the awareness that reality is socially constructed. The scholars believe that the narrative turn is of the 'politically reformist' type, evidence of a greater public dimension of law, with a realisation that the traditional models of judicial analysis are somehow connected to maintaining the status quo and do not respond sufficiently to the interests of certain local and social groups (such as minorities and women).[16]

At the same time, the legal sociologists Ewick and Silbey[17] collected stories about law from everyday life, showing an interest in understanding the connections between everyday human consciousness of legal problems and the practices of law. Moving the focus of investigation from legal texts to everyday legal practices, they made a significant contribution to the postmodern awareness that the law should give more definite consideration to the 'life of the people' it aims at.

Subsequently, by considering the law as "a storytelling enterprise thoroughly entrenched with culture", the noteworthy work of Amsterdam and Bruner, *Minding the Law*[18], published in 2000, became a turning point in the application of the narrative turn to the law.[19] As noted by Ann Shalleck:

> Mostly notably, Anthony Amsterdam and Jerome Bruner, in Minding the Law bring to bear their vast Knowledge of narrative theory to explain how understanding narrative helps us to decipher how lawyers persuade courts, how courts construct their understanding of law, and how these stories shape our collective lives. As narrative has become a critical feature of scholarship about law and lawyering, we learn different ways that it has the potential to produce insight and understanding, as well as to distort.[20]

In the same vein, by identifying a methodological value in the approach of law as narrative, Binder and Weisberg[21] called attention to the fact that narration is an indispensable element in the process of constructing legality, of which the stories of individuals, both as individuals in themselves and as communities, are part.

The study of "legal narrativity" was subsequently presented by Brooks (2002, p. 2)[22] as a useful enterprise. As an eminent scholar in this field, he argued that narrative should be considered as a legal category with a crucial role in the process of legal adjudication and in the construction of legal reality. Obviously, in recognising the potential of legal narrative as an autonomous field, Brooks was aware of the possible resistances and the suspicion of legal scholars, who might consider narratology a threat to law's autonomy and hermeticism.

Although this list lays no claim to being exhaustive, the works mentioned above constitute significant contributions to the turn to narrative in the law and the storytelling enterprise. In fact, with time, the law as a narrative approach has therefore ended up becoming a tool for making a critical analysis of the law, contributing to revealing particular, implicit and often instrumental elements that are often left unstated by formal law, including grass-root requests – the voices of the more vulnerable parts of society – and paving the way for other forms of expressiveness typical of the humanities. The recent transition from the label of *Law and Literature* to the broader one of *Law & Humanities* marks the determination to harmonise the study of law with that of other forms of human expression (literature, films, theatre, painting), so as to reduce the technicality of the law and include other cultural dimensions of experiential life in legal discourse, as a possible bond for a life in common inspired by principles of empathy and acknowledgement of others as underlying principles of modern democratic societies.[23]

On the other hand, legal narrative has started being employed with practical wisdom. Storytelling is an important tool for lawyering and adjudication, especially for engaging with clients and developing a lawyer-client relationship.[24] Leading clinical scholars have sought to identify how narrative theory can yield narrative practices that help lawyers develop an understanding of their clients' lives and their clients' desires in seeking help through lawyers.[25] In their view, telling the story is also the 'cure' for silenced or powerless voices to be heard.[26]

Therefore, for example, Alfieri stresses the potential of (poor) clients' stories as a means of social change, despite lawyers' "attitude to silent clients' voices" and representations.[27] He highlights how lower-income and subordinated people are not completely powerless or helpless. In his view, clients possess skills and knowledge that enable them to recount "alternative stories", resisting the dominant elites' views in society. As such, he urges that attorneys should not simply work for clients, but with clients as lay allies.[28]

In these scholars' views, lawyering construed as the human art of problem-solving is inherently connected to a dimension of storytelling: stories shape the

understanding, the knowledge and the management of a problem.[29] López in particular has introduced the concept of "lay lawyering" because it does not only concern technicians (lawyers) but all ordinary (lay) people: "lay lawyering – the things one person does when he helps another solve a problem".[30] In López's view, storytelling is a critical device to understand and analyse the work of (lay) lawyers: "solving a particular problem always demands specific knowledge, regarding the relevant audiences, stories, and storytelling practices. Training people to adapt their culturally specific problem-solving knowledge to unfamiliar audiences and stories requires, at a minimum, that they be exposed to a new set of potential audiences and stories, and helped to identify and craft those stories the audience will find most persuasive".[31] In more general terms, López's proposal is to use alternative or so-called "rebellious" stories, in opposition to stock stories, in order to challenge elitist and fixed visions in society.

Shifting from the American academic panorama to the European one, international symposia were recently organised in Europe and Italy for the purpose of responding to this need to harmonise theoretical and practical dimensions in the study of law and humanities, illustrating both the shared humanistic roots of law and humanities and legal clinics and the possibility to find in narration a potential tool for linking these two perspectives and including the participation of laypeople in juridical discourse.[32] Particularly in a recent workshop entitled "Dignifying and Undignified Narratives in and of (the) Law", during the 2019 World Congress of the *International Association for the Philosophy of Law and Social Philosophy* (IVR)[33], we involved not just literary scholars but also legal scholars involved in practice[34] as well as in clinical legal education with the aim of reflecting upon the elaboration of a legal narratology with a European matrix[35], promoting a narrative consciousness and knowledge as part of a legal methodology[36] and a legal practice.[37]

To conclude, this brief reconstruction highlights that, if in Frank's day narration was generally associated with the linguistic distortions and manipulations practised by attorneys and witnesses, it later came to be analysed in terms of the consistency and plausibility of the stories told for the purpose of persuading a jury and, more recently, as a tool for practising clinical lawyering and teaching, a parameter for judging as well as the "glue"[38] to putting facts and law together through the elaboration of a case theory between clients and attorneys.

3. FACT INVESTIGATION AND HUMAN RIGHTS PROTECTION: COHERENCE AND PLAUSIBILITY IN ASYLUM STORIES

The current-day pertinence of the relationship between fact-investigation and storytelling is confirmed especially when we pass from the theory to the protection of human rights, framing the issue in a discourse about social justice on a

global scale, this being the approach adopted by global clinical legal education.[39] For some authors, in fact, because it is transnational in character, the protection of human rights affects each member of the global community, so should be considered to be an intrinsic part of the social justice mission of clinical legal education: "global access to justice is an aspiration – a global commitment – with diverse goals that require multifaceted measures of progress toward implementation".[40] One of the *topoi* of the human rights law clinic is that of the ascertainment of the facts, in particular by non-governmental organisations (NGOs), whenever human rights are violated. The problem that arises within this specific field is that of demonstrating what constitutes the human rights violation. Ascertaining that there has been an infringement of human rights – in an approach focused on including individuals in the elaboration of new policies and procedures – calls for the collaboration of the people involved, so as to understand who the victims are and the extent to which such factors as gender, race or language constitute a limit to the exercise of their rights.

Thus, in the field of international protection, for example, as part of the first steps toward the formulation of a common asylum policy in the late nineties, the UNHCR has stressed the importance of oral testimony as evidence, especially when, as is often the case with asylum, claimants do not possess other types of material evidence attesting to their identity and their story of persecution.[41] In this context, fact-finders working in country of origin information (COI) units provide decision makers – caseworkers and judges – with the necessary information related to the countries of origin of asylum seekers. Given this peculiarity of international protection law, an evaluation of the credibility of claimants' narratives is a problematic issue.[42]

Both at international level and in the Italian legal system, the identification and recognition of the status of refugees are particularly arduous. In order to be credible, the applicant's story has to comply with two sets of parameters: it must be consistent in itself and it must correspond to what is known as COI (country of origin information). The function of COI is to answer the following question: "Do the place, the event and the traditions that the asylum seeker mentions truly exist and do they fit the given description?"

In Italy, a crucial stage in ascertaining the status of a refugee or, as an alternative, the status of subsidiary protection, is the "personal interview" (Art. 12 Legislative Decree N° 25, 2008), which takes place in the presence of a member of the Committee "paying due attention to the personal or general context in which the application arises, including the applicant's cultural origin or vulnerability" (Art. 15 Legislative Decree N° 25, 2008). According to Art. 13 of Legislative Decree N° 25, 2008, during the interview, "the applicant is guaranteed the possibility to express in an exhaustive manner the elements employed

as a foundation for the application", as provided for in Art. 3, section 5 of Legislative Decree N° 251, 2007 which specifies that:

> Should any of the elements or aspects of the declarations made by the applicant for international protection fail to be supported by evidence, they shall be considered truthful if the authority competent for deciding on the application believes that: a) the applicant has made every reasonable effort to describe the application in detail; b) all the relevant elements in his possession have been produced and a suitable reason for the absence of any other significant elements has been furnished; c) the declarations made by the applicant are considered consistent and plausible and do not contradict the general and specific information relevant to his case as available; […]; e) from the checks pursued, the applicant has been found to be generally reliable.

In the absence of evidence in the strict sense of the term, the applicant's statements are thus considered to be truthful if they are found to be "consistent and plausible" and "do not contradict" both the general information – i.e. the country of origin information, or COI – and the specific information about his case. The idea, therefore, is to investigate how the narrative activity of storytelling becomes the main tool for determining refugee status, and a key criteria for verifying the truthfulness of the story.

3.1. Case Analyses

The examples that now follow aim to consider in brief what happens when – in a climate of general suspicion[43] – credibility is not given to the voice of asylum seekers or they are incapable of expressing their experiences adequately when faced with committees and other organs deputed to assess their cases, either because they have no narrative skills or for other agentivity constraints (lack of understanding, fear, mistrust, lack of narrative training by the lawyers).[44]

I focus on the cases of Amenze and Margaret, who came to Italy from Nigeria, the first to escape from a forced marriage and the second to break free of forms of sexual exploitation.

3.1.1. The Case of Amenze: Simple as a Stream Water

Amenze fled her home first and then left her country (Nigeria) to get away from an arranged marriage and her father's death threats. When she reached Italy, the territorial committee expressed doubts about "the plausibility and general reliability of the statements made",[45] holding that her fear of persecution was

not well-grounded as intended by Art. 1 of the 1951 Refugee Convention. It therefore rejected her application for international and humanitarian protection under Legislative Decree N° 286/98. Amenze, assisted by a lawyer, appealed the decision of the committee, first before the civil court, then before the Court of Appeal, asking for the status of political asylum to be recognised or, on a lesser level, that of subsidiary protection. At both instances, her appeal was rejected, so Amenze decided to engage a different lawyer (the one who provided the case) to lodge a further appeal with the Court of Cassation, where it was admitted. I analyse just some passages of Amenze's case to show the steps in the process of establishing the "truth" by the authorities (the territorial committee, the tribunal, the Courts of Appeal and of Cassation) in order to highlight how *plausibility* and *coherence* are interpreted. The aim is to show the gaps between the "simple" story told by the client and the fixed expectations of the authorities and highlight the capability of the experienced lawyer to construct an alternative story.

In Benin dialect, Amenze means "stream water". In fact, if we observe the story as described in some of the minutes of the hearing, Amenze made no attempt to make her story coincide with the typical stories concerning her country of origin. For this reason, her story can be described as 'transparent', just like the stream water of her pseudonym.

The first step – the hearing before the territorial committee – produced a negative result. The reasons given by Amenze for escaping can be found in a passage from the minutes of the territorial committee:

> [...] My father wanted to oblige me to marry a friend of his who was a member of the same fraternity, called Ogboni. I went to stay with my aunt. After I escaped, my father drove my mother out of the house, saying that he wold not allow her to come back if she failed to convince me to marry his friend. My mother went to stay with her family, but my father [...] sent people there on two occasions to check whether I was also there. These people turned the whole house upside down [...] then, as I was not there, they shot my mother in the arm [...] some neighbours came running and took my mother to the hospital, but my mother did not have the money to pay for her care [...]. After this episode, my aunt [...] started saying we should save the money to leave for Libya, as my father persecuted me and would not leave me alone [...].
>
> [excerpt from the minutes of the Committee, 19.03.2014]

Amenze told the story spontaneously: she gave no other reasons by way of justifying her application for international protection, except that of having avoided an attempt at forced marriage, with the consequence that she was obliged to run

away, so as escape persecution by her father. Yet the territorial committee felt that this justification was not enough for it to consider that Amenze's story deserved recognition. Here are some of the arguments advanced by the committee:

> CONSIDERING that the general nature of the story as told and in some aspects its incongruence raised some doubts about the plausibility and the general reliability of the statements made, in particular:
> - the question concerning the forced marriage comes across as not very credible, as the applicant has stated that she continued living in her father's house for two years – despite his having threatened her and wanting to oblige her to marry – even though she continued to refuse to marry the man of her father's choice;
> - the fact that her father […] did not think of searching for her at her maternal aunt's house is also not very credible.
>
> HOLDING, for the reasons described above, that substantial doubt has emerged in relation to the credibility of the story as told and that no elements are believed to exist for considering as well-founded the fear of persecution as per Art. 1 (A) of the 1951 Refugee Convention […],
> decides
> not to recognise international protection and rejects the above application
>
> [excerpt from the minutes of the Committee, 21.03.2014]

Amenze appealed against this decision to the court, with the assistance of a lawyer. The court rejected her appeal, justifying its decision reiterating that the premises for detecting the status of refugees are:

> the socio-political and normative condition of the country of origin and the correlation between said condition and the specific position of the applicant […] detecting the situation of persecution of those who (for reasons of race, membership of a particular social group, political opinion or religious belief, or for reason of their own tendencies or lifestyle) probably risk sanctions against their physical integrity or personal freedom (cf. Cass. 20.12.2007, N° 26822).
> [excerpt from the decision of the Court of First Instance, 22.10. 2014]

The substance of the ruling was that "the affair [...] concerns private questions (the applicant fled Nigeria because she did not want to marry a friend of her father's) and not in fact any violence or degrading treatment for religious, political or racial reasons" (excerpt from the decision of the Court of First Instance, 22.10. 2014).

The court's decision was then confirmed by the Court of Appeal with largely similar reasons, since it shared the motives stated by the judge of first instance, who had decided that the premises for recognising the status of political refugees in accordance with Art. 13, s. 5 of the Legislative Decree did not exist. In this case, the Court of Appeal considered that the reasons for Amenze's escape related to:

> Private violence that cannot be related to violence or degrading treatment for religious, political or racial reasons. [...] There are therefore no concrete elements for holding that, were the applicant to return to her country of origin, she would be subjected, by the authority of the state or by any other exercising control over the territory, to persecution for political, religious or racial motives.
>
> [excerpt from the decision of the Court of Appeal, 20.09.2014]

Since she had had no success in the first two instances, Amenze decided to play the last card in her hand, lodging an appeal with the Court of Cassation, although for this purpose she engaged a different attorney, based in Naples, who is well known in the field of defending the rights of foreigners. The first element that this new attorney highlighted in the appeal was the inadequacy of the investigation conducted by lower courts, which was based on the rule of subjective credibility, without putting what happened to the asylum seeker into the context of the situation in the country (as per Art. 8 of Legislative Decree N° 25, 2008). In his introduction to the appeal to the Cassation, the attorney asked for the appealed decision to be thrown out both for error in the decision-making process (*error in iudicando*) and for procedural errors (*error in procedendo*). With regard to the first kind of error, the attorney complained about the lack of co-operation on the part of the Court of Appeal that had in fact argued that the events narrated before the committee did not concern the political, social and normative conditions of Nigeria, but episodes of private violence that could not be related to violence or degrading treatment for religious, political or racial reasons. According to the attorney, this reasoning was faulty because Art. 8 of Legislative Decree N° 251/07 provides for the motives of persecution to include also membership of a "particular social group". This group comprises "members who share an innate characteristic or a common history that cannot be changed". In addition, "as a function of the situation in the country of origin [...] due account is given

to considerations of gender, including gender identity". When calling attention to the error at law (*error in iudicando*), the attorney underpinned his arguments with the Istanbul Convention, 2011, which came into force on 8 August 2014, adopting legislative measures to guarantee that gender-based violence against women can be recognised as a form of persecution under Art. 1, A (2) of the 1951 Convention relating to the status of refugees. Thus, the attorney argued that Amenze had escaped from Nigeria because of her:

> Well-founded fear of being a victim of gender violence, this being the reason why her status of refugee should be recognised [...]. This kind of persecution was not the subject of any investigation on the part of the Court of Appeal, which, by reducing the motives of persecution to religion, race and political opinion, failed to assess the danger of persecution related to gender identity in a context (that of Nigeria) of endemic violence against women (even featuring predatory behaviour on the part of state officials and the police: Amnesty International, Nigeria Annual Reports 2011, 2012, 2013, 2014-2015 and 2015-2016).
>
> [excerpt from the appeal to the Court of Cassation, 16.03.2016]

According to the attorney, the court neither examined nor pronounced on the specific issue of the risk of serious harm caused by inhuman and degrading treatment (Art. 14, section b) deriving from Amenze being obliged to contract a forced marriage in a context of absolute absence of safeguards on the part of the authorities, such as to justify the recognition of subsidiary protection as per section b) of Article 14. In this way, the court failed to comply with the duty to co-operate in the investigation vested in the international protection judge. On the basis of these arguments, the Court of Cassation accepted the appeal for both errors, stating that the previous instances had unjustifiably restricted the scope of the motives of persecution of relevance for the purposes of recognising the status of refugee, "excluding the relevance of the persecutory behaviour attributable to membership of a particular social group and in the case in hand excluding the relevance of behaviour attributable to gender identity" (excerpt from the decision of the Court of Cassation, 16.03.2016).

The case of Amenze, which had a positive conclusion thanks to the attorney's consolidated experience in this field of the law and to the adequate investigation he conducted personally into the political and social situation of his client's country of origin, is a typical example of how the story told by a (vulnerable) client risks being overwhelmed by routine decisions where general country of origin information (COI) is given precedence over the voice of a client like Amenze.

In addition to highlighting the dynamics whereby the COI tends to overlap and overwhelm the individual's story, an analysis of this case also raises a number of further issues that range from the problem of the gap between the strength of the person's story and its credibility compared to that of the judging authority, to the true ability of vulnerable clients to represent themselves and to be heard in the procedure of the hearing. These are issues to which I shall return in the general conclusions to this article, where I shall discuss the possibility of making use of storytelling as an effective tool of client empowerment.

3.1.2. The Case of Margaret: How to Construct a Credible Story?

Margaret's story as a victim of trafficking is a typical one. She was recruited in Nigeria by criminal networks for the purpose of introducing her to the market for prostitution, with the false promise that she will be able to build themselves a new life in Europe, with a safe, honest job. Upon arrival in Italy, identification is the first delicate step towards organising adequate protection and assistance. I analyse some passages of this process undertaken by an anti-trafficking organism based in Naples, in order to show the story process construction and the lawyer's lack of correct training about the fact-finding method and elicitation of the client's story. I emphasize both the role of the lawyer and the non-lawyer (a cultural mediator) who understand issues of human trafficking victims and thereby assists in the case. My analysis explores how these diverse collaborations interrupt or support, from their diverse perspectives, the construction of a successful case in the respect of the client's narrative.

The process of identifying Margaret undertaken by Dedalus took the form of a series of interviews that I was able to attend, held in the co-operative's offices between February and April 2018. What now follows is my own brief description of the three phases of these interviews with Margaret, based on the notes I took during the meetings and subsequently edited.

During the first meeting, the lawyer, Evelyne, who had prepared the setting for the interview and given me permission to attend, explained to Margaret how it would proceed, emphasising the function and significance of the path they were about to embark on together, that of piecing her story together and orienting it for the purposes of the interview she would have with the committee, which was due to meet Margaret several months later. Evelyne also underlined the importance of building a story that would give her a better chance of obtaining the status of international protection, explaining that recognition of asylum is based on the premise that that there are good reasons for believing that the applicant would be running a serious risk if she were to return to her country of origin: "We have to be very accurate in reconstructing your story from when you were still in Nigeria. We shan't get it all done today: it's a complicated job. *If we make a good job of it, we have a better chance of constructing a story that will*

lead to a happy ending". Barbara (the cultural mediator), speaking partly in English and partly in the applicant's language, added: "*you must convince them* about the risks you are going to face, you must show solid reasons. It's not a problem if you don't remember: feel free and relax."

Evelyne then asked for more details about the various stages of the journey: "*Shall we go on a little part of this journey*? Let's say we are leaving Benin City". Margaret took up her story again, specifying that, after several hours of travelling, the person who was responsible for them had left them somewhere, giving each of them a number: they were to stay in this unidentified place until they were called for on the basis of this number. Since there were some gaps in the story, after about two hours of interviewing, Evelyne suggested stopping and taking it up again another time, commenting like this: "The journey is a very important stage for piecing the story together. So we'll stop now and continue next time". Margaret showed signs of impatience and asked how long she would have to wait before the committee would summon her for the hearing: she had lodged her application in November of the previous year and three months had already gone by. Evelyne answered that the waiting time was generally up to one year from the beginning of the procedure and that the aim was not to rush things, but to do a good job.

During the second meeting, Barbara guided Margaret by highlighting gaps ("points we miss"): "they are direct, you must be specific". "From Nigeria to Libya, how many days did it take? How long you did stay in Libya? Where? How did you survive? Did they give you clothes?". Considering Margaret's reticence, the mediator tried to encourage her further, suggesting she thinks seriously about the consequences of being sent back home, asking "What happens if you go back?" Margaret answered: "My life would be worse, nobody could care for my children". Barbara explained to her that the questions she would be asked during the committee hearing would be something like "Why did you leave your country?", reminding her that the committee would have to decide whether she would be allowed to stay in Italy: "They will ask you whether you were capable of defending yourself in Nigeria by going to the police. The committee has information about Nigeria, they combine information. You should be more aware about your country. You must be able to give an account. There are a lot of gaps we need to fill".

In the third meeting, which took place after another two weeks, Barbara once again pointed out the need to achieve greater clarity about some of the stages of the journey, explaining the meaning of the questions better and asking her to be more precise and concise in her answers. Barbara started showing signs of impatience, because she and the lawyer had not compiled enough material to piece the story together: "I am not understanding anything, so what do we do? You don't forget the truth because it is your truth, truth is inside you, so you answer quickly". Barbara then burst out impatiently in Italian, asking "*ma che stiamo*

facendo?" (What are we doing here?), then also in English "We are doing everything we can. I am not responsible because I tried. It is time! Who was that man? I want the name! What happened between the two of you? Is he the father of your baby? How long did you stay at that house? Who was he?" Margaret then began talking in her own language, without stopping, alternating her story with bursts of tears. Barbara added the occasional comment in Italian that enabled me to understand the gist of the story: "She [the madam] brings in seven men every day and takes money for just three weeks".

The short excerpts from these conversations show how the kind of questions evolved from one meeting to the next, becoming more pressing and direct as the meetings grew ever more intense. In addition, this verbal behaviour was accompanied by Barbara's increasing impatience, as she tried to encourage Margaret to tell her story, saying that she had done everything possible to help and support her in the path she would tread towards the hearing before the committee. The steps taken by Evelyne, the lawyer, who was only present in the first of these meetings, were more incisive and restricted to defining the operative and legal framework.

Regarding the interaction between Margaret and the two operators, there appears to be an apparent lack of understanding and respect for daily, sociocultural storytelling when the mediator says that the "truth is inside you". Margaret seems to have had even less opportunity to tell her stories in a spontaneous way, i.e. the kind of people she met during the trip and how she came to an awareness of what she was involved in. As has been showed in other cases[46], the fact that a story is spontaneous and transparent is not enough on its own to make it worthy of recognition and protection. This may perhaps explain the artificiality of the situation described above, and the "forcible reshaping" of the story by the cultural mediator.

4. TO CONCLUDE: FOR A MORE CONSCIOUS USE OF STORYTELLING TO SUPPORT VULNERABLE CLIENTS' PERFORMANCES

Presenting itself as typical of a certain postmodernist and realist trends, over the years the law and narrative approach has used methodological rigour to achieve success, in such a way as to define the study of legal narrativity as a useful enterprise and imagine that narration constitutes a legal category in its own right. This is especially proven within the field of international protection, where the category of "truth" has been substituted by the criteria of coherence, plausibility, verisimilitude of the stories told, all typical characteristics of narrative.

Moving from the two examples of stories, I have focussed, among other things, on a specific feature of narration as a tool for lawyering and for developing a lawyer-client relationship, thereby supporting vulnerable clients' performance in legal settings. In both cases, the attorney's narration tries to translate

the client's representations into terms expected by the legal system or, on the contrary, tries to convey 'rebellious' visions of facts and law, thereby trying to change the contours of law. This happens through the contextualisation of the cases, by referring to foreign legal systems, for example, as in Amenze's case. The client-attorney's story is then seen to be oriented towards transformation, challenging the fixed and canonical nature that is otherwise typical of legal narrations. On the other hand, in Margaret's case, the examples illustrate the existence of a lack of awareness about the functions of narrative in law.

Any increase of this awareness requires the development of conceptual as well as practical skills for clinical lawyering. This educational goal, which continues to be most typical of US law schools, require clinical teaching to be extended towards some crucial topics, such as 1) making law students (and legal scholars) aware that clients are human beings and that facts must be connected not only to legal elements, but also to broader stories, to multicultural issues, including gender, race and inequality; 2) creating settings for listening adequately to the client's story; 3) framing the lawyer-client relationship in terms of reciprocity rather than in term of asymmetries, thereby involving clients as channels in the case theory as well as in the solution of the case.

Hence my direct invitation to practitioners as well as to clinicians to learn how narration can be employed technically, to support not only their everyday professional practices, but also their clients' 'performance', so as to mediate between their positions and society. Drawing on the cases of Amenze and Margaret (as well as on other cases explored along my research path[47]), my final argument is to propose designing new socio-legal tools to achieve substantive justice.[48] Specifically, in order to achieve this goal, I would propose conceiving of legal clinics as socio-legal spaces to raise different voices "democratically"[49] and realise effective forms of collaborative lawyering, with the active participation of lay and expert actors (lawyers, volunteer associations), in order to address the multidimensional problems faced by the client and to elaborate a common understanding of socio-legal problems, thereby increasing laypeople's consciousness and agency in legal settings. Such a space would allow clients to understand how the legal system works, what the formal and informal rules are and the practices with which they are expected to deal. In fact, as lawyering generally demands specific knowledge regarding the relevant audiences, stories and storytelling practices, in response to López's invitation, my proposal is to train laypeople to adapt their specific problem-solving knowledge to 'unfamiliar audiences'.

DISCLOSURE STATEMENT

No potential conflict of interest was reported by the author(s).

ORCID

Flora Di Donato http://orcid.org/0000-0001-6665-0733

1. Cf. Guyora Binder and Richard Weisberg, *Literary Criticism of Law* (Princeton, NJ: Princeton University Press, 2000), 205.
2. Jerome Seymour Bruner, *Acts of Meaning* (Cambridge, MA: Harvard University Press, 1990).
3. Rita Charon, *Narrative Medicine* (New York: Oxford University Press, 2006).
4. David Herman, Manfred Jahn, Marie-Laure Ryan, "Introduction," in *Routledge Encyclopedia of Narrative Theory,* eds.. D. Herman, M. Jahn, and M.-L. Ryan (London: Routledge, 2008), IX–XI.
5. Hayden, White, "The Value of Narrativity in the Representation of Reality," in *On Narrative*, ed. T. W. J. Mitchell (Chicago, IL: The University of Chicago Press, 1981), 1.
6. Anthony G. Amsterdam and Jerome Bruner, *Minding the Law* (Cambridge, MA: Harvard University Press, 2000).
7. Flora Di Donato, *La costruzione giudiziaria del fatto. Il ruolo della narrazione nel 'processo'* (Milano: Franco Angeli, 2008); *The Analysis of Legal Cases. A Narrative Approach* (London: Routledge, 2020).
8. Maurizio Ferraris, *Manifesto del Nuovo Realismo* (Roma-Bari: Laterza, 2012).
9. Michele Taruffo, *La semplice verità. Come i giudici costruiscono i fatti* (Roma-Bari: Laterza, 2009).
10. Jerome Frank, *Courts on Trial* (Princeton, NJ: Princeton University Press, 1949), 23–4.
11. Julius Paul, *The Legal Realism of Jerome N. Frank. A Study of Fact-Skepticism and the Judicial Process* (Herausgeber: Green, Leon, 1959), 77.
12. Jerome Frank, *Courts on Trial* (Princeton, NJ: Princeton University Press, 1949), 27.
13. Jerome Frank, *Law and the Modern Mind* (New Brunswick: Transaction Publishers, 1930); "A Plea for Lawyer-Schools," *Yale Law Journal* 56, no. 8 (1947): 1303–44; "Say It With Music," *Harvard Law Review* 61 (1948): 921–57.
14. Katerine R. Kruse, "Getting Real About Legal Realism, New Legal Realism, and Clinical Legal Education," *New York Law School Law Review* 56 (2011–2012): 659–81.
15. See the minutes of the *Legal Storytelling Symposium* in *The Michigan Law Review* 87 (1988–1989).
16. Peter Brooks and Paul Geewirtz, *Law's Stories* (New Haven, CT: Yale University Press,1996).
17. Patricia Ewick and Susan Silbey, *The Common Place of Law. Stories from Everyday Life* (Chicago, IL: The University of Chicago Press, 1998).
18. Anthony G. Amsterdam and Jerome Bruner, *Minding the Law* (Cambridge, MA: Harvard University Press, 2000).
19. Peter Brooks "Narrative Transactions – Does the Law Need a Narratology? ," *Yale Law Journal of Law and Humanities* 2 (2006): 201–19, eds. M. Del Mar and Peter Goodrich, *Legal Theory and Humanities.* Vol. 5 (Surrey: Ashgate, 2006/ 2014), 171–98.
20. Ann Shalleck, "Narrative Understanding: Revisiting the Stories of *Lay Laywering*," *Clinical Law Review* 24, no. 2 (2018): 467–86.
21. Guyora Binder and Richard Weisberg, *Literary Criticism of Law* (Princeton, NJ: Princeton University Press, 2000), 205.
22. Peter Brooks, "Narrativity of the Law," *Law and Literature* 14, no. 1 (2002): 1–10.
23. Martha Nussbaum, *Not for Profit: Why Democracy Needs the Humanities* (Princeton, NJ: Princeton University Press, 2010); Sarat, Austin, Anderson, Matthew, Frank, Catherine O, eds, *Law and the Humanities: An Introduction* (Cambridge: Cambridge University Press, 2010); Desmond Manderson, ed. *Law and the Visual: Representations, Technologies, Critique* (Toronto: University of Toronto Press, 2018).
24. Carolin Grose, Margareth E. Johnson, *Lawyers, Clients and Narrative* (Durham: Carolina Academic Press, 2017).
25. Stefan Ellmann, *et al., Lawyers and Clients. Critical Issues in Interviewing and Counseling* (St. Paul, MN: Thomson Reuters, American Casebook Series, 2009), 139 ff.
26. Richard Delgado, "Storytelling for Oppositionists and Others: A Plea for Narrative," *Michigan Law Review* 87, no. 8, (1989): 2411–41.

27. Anthony Alfieri, "Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative," *Yale Law Journal* 100 (1990–1991), 2107–47.
28. Anthony Alfieri, "Rebellious Pedagogy and Practice," *Clinical Law Review* 23, no. 5 (2016): 36.
29. López, Gerald P., *Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice* (San Francisco, CA: Westview Press, 1992).
30. López, Gerald P., "Lay Lawyering," *UCLA Law Review* 32 (1984): 1–60.
31. López, Gerald P., *Rebellious Lawyering*. San Francisco: Westview Press.
32. Flora Di Donato and Paolo Heritier eds. "Humanities and Legal Clinics. Law and Humanistic Methodology," Special issue of *Teoria e critica della regolazione sociale*, 2, (2017).
33. The workshop was organised in collaboration with the Italian Society for Law and Literature (ISLL). The ISLL, based in Bologna, is devoted, among other fields, to the exploration of the binomial of law and narrative. See Maria Paola Mittica Mittica, "Cosa accade al di là dell'Oceano? Dirittto e Letteratura in Europa," *ANAMORPHOSIS – Revista Internacional de Direito e Literatura* 1 (2015): 3–36, http://rdl.org.br/seer/index.php/anamps/article/view/.
34. Jeanne Gaakeer, *Judging from Experience* (Edinburgh: Edinburgh University Press, 2019).
35. On the concept of Narratology, see Monika Fludernik, *An Introduction to Narratology* (London: Routledge, 2009). Gerald Prince, *Narratology: The Form and Functioning of Narrative* (Berlin: Mouton Publishers, 1982/2012). About the European context, see for example, the project "On stories and storytelling as a basic cultural condition underlying the Norwegian criminal process," directed by Frode Helmich Pederson in Norway: https://www.uib.no/personer/Frode.Helmich.Pedersen.
36. Ann Shalleck and Jane H. Haiken, "Supervision: A Conceptual Framework," in *Transforming the Education of Lawyers: the Theory and Practice of Clinical Pedagogy*, eds. Susan Bryant, Elliott S. Milstein, Ann Shalleck (Durham: Carolina Academic Press, 2014), 169–203; Flora Di Donato, *The Analysis of Legal Cases. A Narrative Approach* (London: Routledge, 2020).
37. Jeanne Gaakeer, *Judging from Experience* (Edinburgh: Edinburgh University Press, 2019).
38. Jeanne Gaakeer, "The Perplexity of Judges Becomes the Scholar's Opportunity," eds. Greta Olson and Franze Reimer, *German Law Journal. Special Issue Law's Pluralities* 2 (2017): 233–440, 337 ff.
39. Frank S. Block, ed., *The Global Clinical Movement* (Oxford: Oxford University Press, 2011).
40. For an overview of the transnational dimension of global clinical legal education that takes the European context into account, see Richard Wilson, R. *The Global Evolution of Clinical Legal Education More than a Method* (Cambridge, MA: Cambridge University Press, 2018).
41. Barbara Sorgoni, "What Do We Talk About When We Talk About Credibility? Refugee Appeals in Italy," in *Asylum Determination in Europe*, eds. Nick Gill and Anthony Good (Cham: Palgrave Socio-Legal Studies, Springer, 2019).
42. Guy Coffey, "The Credibility of Credibility Evidence at the Refugee Review Tribunal," *International Journal of Refugee Law* 15, no. 3 (2003): 377–417.
43. Olga Jubany, *Screening Asylum in a Culture of Disbelief* (Cham: Springer, 2017).
44. For the whole stories, see Flora Di Donato, *The Analysis of Legal Cases. A Narrative Approach* (London: Routledge, 2020), ch. 9.
45. Excerpts from the minutes of the committee, 21.03.2014.
46. Flora Di Donato, *The Analysis of Legal Cases. A Narrative Approach* (London: Routledge, 2020).
47. Ibid.
48. Frank S. Block, ed., *The Global Clinical Movement* (Oxford: Oxford University Press, 2011).
49. Colette Daiute and TeundeKovács-Cerović, *Minority Teachers – Roma in Serbia – Narrated Education Reform* (Belgrade: Institute of Psychology, Faculty of Philosophy, University of Belgrade Association of Pedagogical Assistants of Serbia, 2017).

Flora Di Donato is Professor of Philosophy of Law and of Clinical Legal Training at the University of Naples Federico II. She has been a lecturer, a research fellow and a visiting scholar in several Italian, Swiss and USA

universities. Her contributions to fact-finding, lawyer- client relationships, narrative analysis and, more generally speaking, the analysis of the law from a bottom-up perspective have made her a pioneer in translating and in further developing some aspects of contemporary legal education – in particular the clinical law approach – from the U.S. context to that of Europe. In 2010, she was awarded the Annual RCSL Adam Podgórecki (ISA) Prize for the book *La costruzione giudiziaria del fatto. Il ruolo della narrazione nel processo* (Milan, 2008). In 2020 she published with Routledge *The Analysis of Legal Cases. A Narrative Approach* (New York and London).