

*Editorial*

## **Clinical scholarship across contexts and borders**

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Our summer edition reinforces the idea of clinic as a liminal activity – one that takes place in Schön’s ‘swampy lowlands’ of real world problems, complexities of practice and the development of services and solutions in response to immediate need. We often lament the liminal status of clinic, comparing it unfavourably with the established legal disciplinary camps. Certainly, the performative and scholarly standards are clear for doctrinal lawyers but you only have to glance at the papers in this issue to realise that we are having a lot more fun.

Ben Waters and Jeanette Ashton write in the shadow of legal aid cuts in England and Wales but rather than simply critiquing the ‘justice gap’, they report on the implementation of the CLOCK Community Legal Companion scheme. In their paper, they look both at the social benefits of this project and also the educational potential for the students in terms of skills, employability and confidence.

Emma Jones’ paper is also on the theme of innovation, drawing on the work of The Open University’s Open Justice Centre in the UK to provide online pro-bono opportunities for distance learning students. The creativity and ingenuity that has

gone into the development of the OU's suite of provision is quite remarkable and this paper should be a very useful resource.

The next two papers look at the development of clinic in specific contexts. Four lecturers from Poland - Kamil Mamak, Katarzyna Julia Kowalska, Ewelina Milan and Paweł Klimek give a detailed and nuanced picture of the evolving place of clinic in private and public universities within the Polish jurisdiction. Meanwhile Evan Hamman from Queensland reports on the collaborative development of clinic in China. Both papers add to our understanding of the nature of clinic – which aspects are in Aristotelian terms, 'essence' (without which it is not) and which 'accidents' (aspects depending on context).

The next pair of papers speak to the responsive and dynamic nature of clinic: Jan-Gero Alexander Hannemann and Georg Dietlein from Germany and James Marson and Katy Ferris from England give insight into and perspective upon the refugee crisis, the roles that clinics are playing in the immediate services needed by refugees on their arrival and the variety of ongoing support that they need.

Clinical work makes great demands on the student and the supervisor and so it is timely that colleagues from Italy and Spain - Andrés Gascón-Cuenca, Carla Ghitti and Francesca Malzani- bring us their excellent paper on the relevance of empathy. The clear use of theory and the powerful examples make this ideal reading to start the academic year – I will be putting it on the 'boot camp' reading list.

Finally in this edition, Victoria Roper reports from the second annual Commercial Law Clinics Roundtable at the University of Sheffield, demonstrating the vibrancy of this form of clinic and the key role that law school clinics can have in supporting local economies.

*Events reminders!*

Turin will be hosting the upcoming 6th Conference of the European Network for Clinical Legal Education (ENCLE), entitled “Clinical Legal Education: Innovating Legal Education In Europe.”, on 20th and 21st September 2018 in cooperation with the Department of Law of the University of Turin (UNITO) and the International University College of Turin (IUC). The [Programme](#) is now live and the conference promises to be a wonderful opportunity. We hope to see you there and at the next IJCLE conference hosted by Monash University in Melbourne, Australia on 28<sup>th</sup>-30<sup>th</sup> November 2018. The theme of the conference is *‘Adding Value – How Clinics Contribute to Communities, Students and the Legal Profession’* follow [this link](#) for more details.

## **A STUDY INTO SITUATED LEARNING THROUGH COMMUNITY LEGAL COMPANIONSHIP**

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### **Abstract**

Against the background of the current graduate skills agenda and its considered importance in relation to a UK law degree, this article considers the value of the CLOCK Community Legal Companion scheme, a collaborative social justice project involving law students, legal services providers, third sector advice agencies and law courts based in two areas of the country namely; Canterbury and Brighton. In recent years, the UK Government has significantly cut civil legal aid in areas such as housing, family and welfare benefits, with a view to easing the strain on the deficit. These cuts have been opposed by many, including lawyers, who have raised concerns that the most vulnerable within our communities could be left unrepresented in court and as a consequence an undue burden placed on our civil justice system. CLOCK therefore provides an opportunity for those within our communities who are caught in the so-called ‘justice gap’, to gain support and guidance from law students when they attend court unrepresented. The findings of a small-scale research project into the perceived benefits of Community Legal Companionship, conducted at two UK law schools; Canterbury Christ Church University and the University of

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Brighton, indicate that the socio-legal experiential learning opportunities for undergraduate law students presented by such initiatives, are also valuable in terms of legal skills acquisition. The research shows that the scheme not only enables law students to use their legal knowledge for the benefit of their local community, but also through analysis of their own perceptions, demonstrates how such a community-based project can provide undergraduate law students with valuable employability skills. Experiences of setting up a Community Legal Companion scheme, together with an overview of how the scheme operates in the Canterbury and Brighton County Courts, as well as students' reflections of participating as Community Legal Companions drawn from the empirical qualitative research, are evaluated in this article.

## **INTRODUCTION**

The number of self-represented litigants or litigants in person ("LiPs") arriving at court has risen steadily for over a decade. Interestingly, the rise in the LiP has coincided with implementation of the *Access to Justice Act 1999*, introduced to promote just that "access to justice". The reality however is that through various government initiatives and further legislation, most notably the *Legal Aid Sentencing & Protection of Offenders Act 2012* or LASPO, aspects of the 'Welfare State' have been systematically dismantled. This has included the introduction of competitive price tendering for legal aid contracts and the incremental withdrawal of legal aid for many areas of legal advice and assistance within civil justice and perhaps most notably private family law.

The reduction in local authority funding of the advice sector, the adverse impact on many people due to the prevailing economic climate, the rising cost of legal services and the reduction in court resources, has meant that a whole raft of UK citizens has been 'marginalised' and now fall within what is commonly termed the 'justice gap'. As highlighted in a 2017 Law Society of England and Wales report this has given rise to an increased number of LiPs who have been unable to either afford legal advice or indeed have the awareness to be able to access the few legal services still available which provide pro bono or limited fixed fee advice and assistance.<sup>2</sup> Reports from 2016 show that of all the cases defended in the county court, both the claimant and the defendant were legally represented in just 56% of them. Neither had representation in roughly 18% and 26% of cases were conducted with just the claimant being represented. Consequently, of all the proceedings commenced in the county court during 2016, 44% of those cases involved at least one party who was a self-represented litigant.<sup>3</sup> Whilst reliable pre-LASPO data on Litigants in Person are scarce, most available data concern LiPs in the family courts, although the National Audit Office (NAO) has claimed that the increase in LiPs has also been evident in the civil courts

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<sup>2</sup>Law Society of England and Wales "Access Denied? LASPO 4 years on: a Law Society review" <https://www.lawsociety.org.uk/support-services/research-trends/laspo-4-years-on/> (accessed on 28.12.17).

<sup>3</sup> National Statistics: Civil justice statistics quarterly, available at: <https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-> (accessed on 13.05.17).

as well.<sup>4</sup> The NAO observed that since the implementation of the government's 2012 reforms, there had been increases in the numbers of cases in the family courts where either or both parties did not have legal representation. This has included a 22% increase in cases involving contact with children (Children Act private law matters) in which neither party was legally represented, a 30% increase across all family court cases (including those that remain eligible for civil legal aid) in which neither party had legal representation and 80% of all family court cases starting in the January–March quarter of 2013-14 had at least one party who did not have legal representation.<sup>5</sup>

Judicial concern about the strain this is placing upon the civil justice system, particularly in the area of private family law, is evident.<sup>6</sup> Initiatives have therefore been explored and implemented by the Ministry of Justice through investment in Personal Support Units (PSU), LawWorks, Law for Life and the Royal Courts of Justice

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<sup>4</sup> National Audit Office, *Implementing Reforms to Civil Legal Aid*, 20 November 2014, HC 784 2014-15: p.15. in Grimwood G.G., House of Commons Briefing Paper Number 07113, 14 January 2016, *Litigants In Person: The Rise Of The Self-Represented Litigant In Civil And Family Cases*, p.6.

<sup>5</sup> Ibid.

<sup>6</sup> See the report of the proceedings of the Parliamentary Select Committee on Justice printed on 04.03.15 entitled *Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012*. In this report representatives of the Family Justice Council reported to the Committee that: "The judicial members of the FJC have all experienced a much greater pressure upon HMCTS both in terms of the administrative and judicial staff. Unwilling litigants in person take more time and resource from the courts, both administrative and judicial, CAFCASS and other supporting organisations". The Parliamentary Report of these proceedings is available at <https://publications.parliament.uk/pa/cm201415/cmselect/cmjust/311/31109.htm> (Accessed on 04.01.18). See also; The Law Society's Report entitled *Access Denied? LASPO Four Years On: A Law Society Review*, June 2017, available at [www.lawsociety.org.uk](http://www.lawsociety.org.uk) p.2. (accessed on 04.01.18).

Advice Bureau, in an attempt to remedy what is undoubtedly a growing problem for the civil justice system.<sup>7</sup> Due to closure of many charitable advice services and law centres during the recent period of austerity (there are now only 46 law centres in the UK compared with more than 60, twenty years ago),<sup>8</sup> universities have started to fill the space once occupied by legal advice services, which traditionally provided advice and assistance to those most in need and at no cost to the end-user. In 2016 Nottingham Law School's Legal Advice Centre became a teaching law firm after being granted Alternative Business Structure (“ABS”) status by the Solicitors Regulation Authority (SRA), the first of its kind in a UK university.<sup>9</sup>

CLOCK is a project designed, among other things, to give keen law students the opportunity to gain valuable employability skills by acting as Community Legal Companions (“CLCs”) at local county courts.<sup>10</sup> CLOCK stands for Community Legal Outreach Collaboration Keele and was initiated by Keele law school in 2012 following the introduction of LASPO and the reduction of legal aid, which has resulted in the growing numbers of people arriving at court without representation.<sup>11</sup> The project

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<sup>7</sup> Ministry of Justice, “More Support for Couples and Parents”, available at <https://www.gov.uk/government/news/more-support-for-separating-couples-and-parents>, in McKeown, P., & Morse, S. (2015), *Litigants in Person: Is There a Role for Higher Education?* Edited by Richard Owen. *The Law Teacher*, 49(1), 122-129.

<sup>8</sup> Law Centres Network, available at <http://www.lawcentres.org.uk/>, (accessed on 13.05.17).

<sup>9</sup>See: <https://www.ntu.ac.uk/about-us/news/news-articles/2015/nottingham-law-school-granted-abs-licence> (accessed on 13.05.17).

<sup>10</sup> *Supra*, McKeown, P., & Morse, S., note 7, at 123.

<sup>11</sup> Full details of the CLOCK project at Keele are available at <https://clock.uk.net/> (accessed on 13.05.17).



enables law students to become trained up as CLCs to provide signposting as well as other guidance and support to those in need and who attend court unrepresented.

## **ACCESS TO JUSTICE AND LASPO: FORMATION OF THE CLOCK SCHEME**

The CLOCK legal companion scheme was developed by Dr Jane Krishnadas within Keele University School of Law (“Keele”) following her work with a local domestic violence organisation ‘Voices of Experience’. Through this work it was apparent that, particularly post-LASPO, victims of domestic violence often find themselves navigating a number of legal pathways to resolve for example child arrangements and housing needs, often alongside criminal proceedings. The relationship with ‘Voices of Experience’ led to requests for assistance in court for litigants who were understandably daunted by the prospect of their forthcoming proceedings.

Keele set up a pilot McKenzie Friend scheme, following which Dr Krishnadas attended an address delivered by the then President of the Law Society, Lucy Scott Moncrieff, at the North Staffordshire Regional meeting on the challenges of meeting unmet community legal needs in the wake of LASPO. Representatives from the local Law Society, Citizens Advice Bureau and Keele considered the impact of LASPO and the so-called ‘justice gap’ on the community, particularly important in Stoke-on-Trent.<sup>12</sup> They considered the inevitable increased pressures on third sector

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<sup>12</sup> One of 20 local authority districts with the highest proportion of neighbourhoods in the most deprived 10% of neighbourhoods nationally on the Index of Multiple Deprivation 2010 and 2015

organisations and the sustainability of the city's high street law firms, many of which had worked under legal aid contracts providing advice on family and housing law matters, areas most affected by the LASPO reforms.

The CLOCK legal companion scheme was developed from that meeting, drawing on the McKenzie Friend role, but crucially developing it specifically for law students.<sup>13</sup> Although wider discussion of the McKenzie Friend role is beyond the scope of this article, concern about the increased use of fee-paying McKenzie Friends has been expressed in the legal profession on a number of occasions, and it may be that the role of the law student CLC will become increasingly important.<sup>14</sup> The CLC role is to provide legal information, not legal advice, to assist litigants with form-filling and arranging papers and perhaps most importantly, to signpost litigants to third sector organisations and legal providers who may be able to provide services under a legal aid contract or fixed fee or unbundled services. Where this is not possible, the CLC can accompany the litigant into court proceedings under McKenzie Friend principles, to provide moral support and take notes for them. As seen in the discussion of the

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<https://www.gov.uk/government/statistics/english-indices-of-deprivation-2010-technical-report>,  
<https://www.gov.uk/government/statistics/english-indices-of-deprivation-2015> (accessed on 03.07.17).

<sup>13</sup> For discussion of the development of the 'McKenzie friend' role which provides support and assistance to unrepresented litigants in court, and the growing concern regarding the proliferation of 'professional', fee-charging McKenzie friends and the variation in support provided, see Moore, S. and Newbury, A. *Legal Aid in Crisis: Assessing the Impact of Reform*, (Policy Press, 2017), pp 50-53.

<sup>14</sup> For further discussion on this see: <https://www.solicitorsjournal.com/news/legal-profession/barristers/25667/bar-council-mckenzie-friends-should-not-be-allowed-charge-leg> (accessed on 10.07.17).

study findings to follow, the CLC needs to be organised, professional, able to react quickly and calmly under pressure, and to utilise key communication skills such as listening and empathy in order to build a good rapport with the litigant. There is a recognition however that although the CLCs provide invaluable assistance and support, the goal is to secure professional advice even in these challenging times. CLOCK National, based at Keele, operates a web-based administrative system (the clock.uk.net national dataset) which is available for recording the information gathered from the service users, the aim being that this data will inform policy on a national level.<sup>15</sup>

CLOCK was born out of a collaborative discussion at the meeting mentioned above, looking at community need, and a collaborative, multi-agency approach is key to its ethos. Law schools, charitable organisations and legal service providers work together to provide a holistic service for litigants which, Moore and Newbury suggest;

*Perhaps highlights the key role that family law solicitors played, over and above purely being purveyors of legal advice, in the amount of both emotional and practical support that they were giving to their clients.<sup>16</sup>*

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<sup>15</sup> E.g. CLOCK submitted evidence to the Bach Commission on Access to Justice, which published its final report in September 2017, available at: [http://www.fabians.org.uk/wp-content/uploads/2017/09/Bach-Commission\\_Right-to-Justice-Report-WEB.pdf](http://www.fabians.org.uk/wp-content/uploads/2017/09/Bach-Commission_Right-to-Justice-Report-WEB.pdf) (accessed on 28.12.17).

<sup>16</sup> *Supra*, note 13, Moore, S. & Newbury, A., p52.

Since its inception at Keele, the scheme has grown and now includes a number of universities with CLCs volunteering at courts around the country. All law students at these universities participating as CLCs are monitored and insured by their respective universities. They are required to undertake DBS checks and are bound by the CLOCK confidentiality agreement. Companions from each institution commit to a certain number of court based help desk hours agreed by their respective institutions during term-time. Outside of term-time there is a reduced service, where the CLCs who live locally, signpost and arrange appointments depending on availability. CLCs are bound to report all community legal companion activities. It is important to recognise that CLCs do not provide advice and service users are made aware of this from the outset. A key part of legal companion role is signposting, thus being able to develop close links with legal and third sector partners is essential.

## **PEDAGOGICAL CONTEXT**

### **Experiential Learning and the Skills Agenda**

In December 2006 the government commissioned the Leitch Review to identify the UK's optimal skills mix in 2020 to maximise economic growth, productivity and social justice, and to consider the policy implications of achieving the level of change required. One of its recommendations was to widen the drive to improve the UK's high skills to encompass the whole working-age population, including preparing

young adults for their working lives.<sup>17</sup> High skills can be understood in different national contexts such as quality of employment, training opportunities, and the abilities of individual.<sup>18</sup> It is argued therefore that legal education provides rigorous and academically challenging ‘training’ to produce highly skilled students in order to prepare them for high quality (well-paid) employment.

The most recent review of legal education, the Legal Education and Training Review (LETR) published in 2013, made suggestions about encouraging law schools to embed practice-skills within the legal education curriculum. The review committee acknowledged the growing levels of interest and activity around work-based learning, apprenticeships, and the re-design of CPD points to a renewed interest in the workplace as a site of learning and source of professional competence. The committee considered this a matter of some relevance to the LETR in determining focus and direction of travel.<sup>19</sup> McKeown and Morse argue that students are often enthusiastic about engaging in clinical activities and, linked to this make the point that in a

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<sup>17</sup> The Leitch Review p.143, published in December 2006 is available at [http://www.delni.gov.uk/leitch\\_finalreport051206\[1\]-2.pdf](http://www.delni.gov.uk/leitch_finalreport051206[1]-2.pdf) (accessed on 08.06.17).

<sup>18</sup> Brown, P, Green, A, Lauder, H, *High Skills: Globalization, Competitiveness, and Skill Formation: Globalization, Competitiveness, and Skill Formation*, (Oxford University Press, 2001).

<sup>19</sup> Webb, J., Ching, J., Maharg, P. and Sherr, A., *Legal Education and Training Review (LETR), Setting Standards: The Future of Legal Services Education and Training Regulation in England and Wales* (London: Legal Education and Training Review, 2013). Available at <http://www.lettr.org.uk/the-report/index.html> (accessed on 26.05.17).

competitive market, it is important that universities offer courses and extra-curricular activities, which are appealing and relevant to prospective students.<sup>20</sup>

The development of a global clinical legal education movement has been well documented by many commentators with an interest in the field and none better so than by Bloch, who acknowledges that the UK's engagement with clinic has been distinctive because of the educational, professional and social context that has shaped the process of lawyer education and training.<sup>21</sup> It is fair to say that clinical legal education ("CLE"), in some form, is progressively becoming a more regular component of undergraduate legal studies in the UK, particularly as the number of law schools has grown.<sup>22</sup>

Duncan argues for CLE at undergraduate level of legal education and his views can be applied quite appropriately to the CLOCK project and the experiential learning opportunities available to students when providing assistance to those who are either ineligible for legal aid or cannot afford to pay for legal advice:

It provides the most powerful experience of the real context in which the law operates; it is the most effective way of developing transferable and specific professional skills and it provides a sound basis for ethical practice. It works most

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<sup>20</sup> Supra, note 7, McKeown, P., & Morse, S., p. 128.

<sup>21</sup> Bloch, F.S. (ed.), *The Global Clinical Movement: Educating Lawyers for Social Justice* (New York: Oxford University Press, 2001), p.7.

<sup>22</sup> Supra, note 7, McKeown, P., & Morse, S., p. 128. See also Carney, D., Dignan, F., Grimes, R., Kelly, G., & Parker, R. (2014), *LawWorks Law Schools Pro Bono and Clinic Report*, (2014, LexisNexis UK).

effectively when reinforced with built-in requirements for reflection and approaches to curriculum design which expect students to take some responsibility for their own learning. This experience should precede the training contract or pupillage. In designing courses which meet these objectives we can also help with the provision of legal services to those who cannot afford to pay for them.<sup>23</sup>

It is arguable that the CLC role is just as powerful in terms of experience of the real context in which law operates. Students immerse themselves in the court environment and have 'hands on' contact with court procedure and the operation of court process as a means of dispute resolution. The students are not directly supervised when at court, they have to think for themselves, respond to situations as they arise and take initiative as well as responsibility for their actions. In so doing these law students acquire valuable transferable skills. The role requires recognition of a CLC's ethical boundaries in not providing advice. Students assist service users without consultation which otherwise would be the case in a formal advice clinic environment. These are all things which the student can reflect upon. In undertaking these tasks at undergraduate level such law students are preparing themselves for the world of professional employment, whilst at the same time helping to provide the kind of legal

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<sup>23</sup> Duncan N, Ethical Practice and Clinical Legal Education, 7 *Int'l J. Clinical Legal Educ.* 7 2005, 7-19, p.19.

services which many service users would have received from legal services providers before the withdrawal of legal aid.

The growing interest with which UK law schools and those abroad are treating dispute resolution, alternative dispute resolution (“ADR”) and its teaching,<sup>24</sup> provides a perfect opportunity for students to work closely with people who are in dispute and apply practically the theory they have learnt in the classroom. Any court proceedings arise from some kind of dispute; whether it be a tenant questioning a landlord’s claim for rent arrears; a relationship breakdown involving domestic violence and/or children’s arrangements or a consumer contract dispute between a retailer and customer. All casework with which CLCs provide assistance, involves court service users seeking a civil remedy, which will ultimately achieve a resolution to their dispute in some way or another. Research undertaken by the authors at University of Brighton and Canterbury Christ Church University (the authors’ study) indicates that students recognise the importance of the role in placing their studies in context. An example of this provided by one participant in the study is as follows:

*“Currently I am studying family law...and have found that a lot of family cases have been assisted by the CLOCK scheme. This has allowed me to view the theoretical teachings of this module in practice”*

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<sup>24</sup> Waters B.D., *The Importance Of Teaching Dispute Resolution in a Twenty-First-Century Law School* *The Law Teacher* 51, 2, 2017, pp.1 and 8.



There are also clear links with many aspects of the legal education curriculum (at both undergraduate and postgraduate level) and at undergraduate level, this includes those foundational and/or core modules such as; English legal system, law of tort, property law, equity and trusts and some optional modules such as family law and intellectual property law. Teaching dispute resolution as a defined subject contextualises much of what student CLCs learn in such a module, it grounds the subject discipline theory and provides the opportunity for practical skills acquisition.<sup>25</sup> Even better, linking assessment to the CLC role will enable students to gain academic credit for their work-based learning.

### **Employability**

From the early part of the millennium, UK higher education institutions (“HEIs”) have been increasingly charged with promoting graduate employability.<sup>26</sup> This coincided with New Labour’s neo-liberal third way education policy drive to create a more educated nation, which in turn proposed to contribute directly to the development and enhancement of the so called ‘knowledge economy’.<sup>27</sup> For HEI’s, employability statistics are becoming increasingly more important and their performances are

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<sup>25</sup> Ibid, 227-246.

<sup>26</sup> Knight, P. T., & Yorke, M. (2003). Employability and Good Learning in Higher Education. *Teaching in Higher education*, 8(1), p.3.

<sup>27</sup> Waters, B. (2013). Widening Participation in Higher Education: The Legacy for Legal Education. *The Law Teacher*, 47(2), 261-269.

monitored<sup>28</sup> with the performance indicators having implications for league table positioning.

The LETR recognised that from the student perspective, competition generally for recruitment to the legal profession is likely to remain fierce for the remainder of the decade. The review committee considered that for employers it is likely to remain a buyer's market in the short-to-medium term, at least for those in the larger firms and in chambers generally, though inter-professional competition for those traditionally perceived to be the 'best' candidates is likely to continue to be strong, particularly in the commercial sphere.<sup>29</sup> In 2015 the Solicitors Regulation Authority announced its plans for wholesale changes to the qualification requirements for solicitors and in June 2017 the Solicitors Qualification (SQE) Draft Assessment Specification was published. This document emphasises the requirement to demonstrate a number of practical competencies at Stage 2 of the SQE, including; client interviewing, advocacy/oral communication, case and matter analysis, legal research and legal drafting. Elements of all these competencies are present within the CLC role.<sup>30</sup>

There is an arguable requirement for those students wishing to enter either branch of the legal profession to enhance their curriculum vitae with extra-curricular

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<sup>28</sup> See the Higher Education Statistics Agency (HESA) and the employment indicator, which is based on the Destinations of Leavers in Higher Education (DLHE) survey <https://www.hesa.ac.uk/data-and-analysis/performance-indicators/employment> (accessed on 30. 05.17).

<sup>29</sup> *Supra*, note 19, Webb, J., Ching, J., Maharg, P. and Sherr, A., paragraph 3.154.

<sup>30</sup> The SRA's draft Assessment Specification sets out the indicative design and content of the SQE and is available at <https://www.sra.org.uk/sra/policy/sqe/research-reports.page> (accessed on 10.01.18).

engagement, which can then give them an edge in the job application process. Community Legal Companion support provides the kind of graduate profile enhancement which is beneficial in this regard. The authors' research indicates that students who have been involved with the CLOCK project and lucky enough to be invited for interview (for training contract or pupillage) gain an advantage. Some students report that interest had been taken in the role at interview and whilst it cannot be claimed that such experience is the difference between being offered a job or not, it enhances employment prospects immeasurably. One CLC participating in the study commented that they had already experienced a benefit;

*“I've already been asked about [CLOCK] at interviews and it is a very interesting talking point. Additionally, it enables us to understand the court process better than fellow law students who are not part of the scheme.”*

Whilst recognising the challenges presented to university law schools in attempting to make work experience widely available as one way to redress the problems of differential access to the legal profession, Francis recognises that student experiences can be a powerful learning and teaching resource.<sup>31</sup> The authors' research suggests that a number of students acting as Companions and who intend to pursue careers as either solicitors or barristers recognise this:

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<sup>31</sup> Light, G. & Cox, R. Learning and Teaching in Higher Education: *The Reflective Professional* (2001) 79, in Francis, A. (2015). Legal Education, Social Mobility, and Employability: Possible Selves, Curriculum Intervention, and the Role of Legal Work Experience. *Journal of Law and Society*, 42(2), 173-201.

*“I want to be a lawyer, I am currently applying for LPCs and having the companion scheme on my CV will be invaluable.”*

Another commented:

*“I would like to have a career at the Bar. CLOCK will support this by giving me a great opportunity and experience which will help me to stand out for future employers, scholarship boards and law schools.”*

From their qualitative study into perceptions of the role clinical education plays in influencing employability, Alexander and Boothby found that alumni who had participated in CLE were overwhelmingly positive about their experience and continued to reflect on what they had learned there.<sup>32</sup> They also found that the diversity of experiences on entering the legal profession was highlighted by this group, including differing levels of support and supervision. The study also questioned employers who revealed that business awareness was considered to be important from their perspective, together with skills such as communication and self-management, although employers emphasised communication beyond conventional written and oral skills, to include interpersonal skills as being key. These are the kind of skills which are acquired by CLCs through participation in the CLOCK initiative

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<sup>32</sup> Alexander, J., & Boothby, C. (2016). Perceptions of the Impact of clinical legal education on employability. *SRHE International Conference on Research into Higher Education*, December 7-9 2016

and the authors' study reveals that students generally consider their skills are enhanced. For example, one participant revealed that;

*"[Being a Companion has] helped me to apply skills I already have and to use them in a novel situation e.g. when a litigant comes into the room, you have no advance notice of what s/he will need help with, and it's essential to be calm, inspire confidence, listen and fully grasp the issues before jumping in."*

Competition in the North American legal employment market is equally as fierce. In the USA research was undertaken into employment competencies and those acquired through law clinic experience. Hamilton reviewed a number of studies on the competencies employers want, and his meta-analysis offers this observation on the employment market for students:

In this challenging market for employment, a law student can differentiate herself from other graduates by demonstrating to legal employers that the student both understands the core competencies that legal employers and clients want and is implementing a plan to develop these competencies, including an ability to demonstrate that the student has experience with these competencies.<sup>33</sup>

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<sup>33</sup> Hamilton N., Law Firm Competency Models & Student Professional Success: Building on a Foundation of Professional Formation/Professionalism, 11 *U. ST. Thomas L.J.* 6, 26 (2013), in Kuehn, R. R. (2015), Measuring Clinical Legal Education's Employment Outcomes. *Wis. L. Rev.*, 2015, 645-537., p. 663.

The competencies which are required for legal practice in England and Wales are specifically expressed in the forthcoming SQE requirements mentioned earlier. The way in which these competencies are enhanced through different kinds of work experience initiatives is acknowledged through research undertaken by Ching and Henderson.<sup>34</sup> Whilst not considered by the researchers and authors of that report (CLOCK was its infancy at the time when the data was gathered), the CLC role should also be included in the category of such ‘work experience’ type activities. An example of how participants in the authors’ Canterbury/Brighton study consider that their role as a CLC has contributed to the development of some of these competencies is displayed by this CLC’s comment:

*“[N]ot only does it look good on your CV, but CLOCK has helped develop key skills for employment: client contact/customer care; organisational skills; professionalism.”*

The key skills mentioned by this CLC broadly relate to the kind of skills which indicate competence as recognised by the SRA, and which form part of the proposed assessment approach of the SQE.<sup>35</sup>

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<sup>34</sup> See the Report of Ching, J. and Henderson, P. Pre-qualification Work Experience in Professional Legal Education, (August 2016) and commissioned as part of the SRA’s Training for Tomorrow project, available at: <https://www.sra.org.uk/sra/policy/training-for-tomorrow/resources/workplace-learning.page> (accessed on 10.01.18).

<sup>35</sup> See *supra*, note 30.

## **Communities of Practice**

The concept of a community of practice is a group of people who share a craft and/or a profession and was first proposed by cognitive anthropologist Jean Lave and educational theorist Etienne Wenger.<sup>36</sup> Wenger then significantly developed the concept by presenting a theory of learning that starts with the assumption that engagement in social practice is the fundamental process by which we get to know what we know and by which we become who we are.<sup>37</sup>

In the sphere of legal education it is closely associated with professional ethics and an appreciation that aspirational lawyers will be entering a 'community of practice' when acting as legal executives, paralegals, solicitors and barristers. Baron and Corbin argue for a recognised need for law students to 'be professional and in turn act like professionals'. They refer to the Carnegie Report which looked into North American legal education and observe that the Report argues that law schools can take specific, concrete actions likely to encourage law students to appreciate that they will be entering the legal profession's 'community of practice'. This has relevance not only for Australia but also for other common law jurisdictions including the UK.<sup>38</sup>

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<sup>36</sup> Lave, J. (1991). Situating learning in communities of practice, *Perspectives on socially shared cognition*, 2, 63-82.

<sup>37</sup> Wenger, E., *Communities of Practice: Learning, Meaning and Identity*, (Cambridge: Cambridge University Press, 1999).

<sup>38</sup> Baron P., & Corbin L., Thinking like a lawyer/acting like a professional: Communities of practice as a means of challenging orthodox legal education, *The Law Teacher*, 46:2, 100-119, pp.100-101.

Situational or situated learning presents real time experience of ethical dilemmas. Dewey saw this as exposure to the ‘problematic’ that leads to and is the organiser for learning.<sup>39</sup> Students need to also have their moral sensitivities challenged to recognise that there are often “relevant others” who may be affected by legal actions.<sup>40</sup> The authors’ research reveals that Legal Companionship presents perfect opportunities for students to step out of their ‘comfort zone’ and have exposure the real life situations. For some students this has been challenging, as shown by these CLCs’ comments:

*“At times I have felt overwhelmed by having many service users come in and having to deal with them on my own. It’s also been tough to deal with areas of law that I am not familiar with....”*

And,

*“At times it can be intimidating as a law student in providing legal assistance when the service user has a case concerning an area of law you are not fully confident in dealing with or haven’t previously looked into.”*

It can be argued that the CLC role forms part of a ‘community of practice’. Companions are introduced to professional ethics and in the context of the CLC role, this requires students to recognise that they cannot provide legal advice and this can test their ethical boundaries.

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<sup>39</sup> Dewey, J. *Experience and Education*, (Simon and Schuster, 2007).

<sup>40</sup> Ibid p.104; and Hazard, G.C., Jr, “Dimensions of Ethical Responsibility: Relevant Others” (1992–1993) 54(4) *University of Pittsburgh Law Review* 965–977, at pp.969–971, in Baron P., & Corbin.



Constructionist theory is applicable here and theorists such as Savery and Duffy suggest that knowledge evolves through social negotiation and through the evaluation of the viability of individual understandings. They argue that the social environment is critical to the development of our understanding as well as to the development of the body of propositions we call knowledge.<sup>41</sup>

On ethics, Duncan argues;

*..... those dealing with real cases within their educational experience will perforce have come into contact with the ethical issues that are endemic in legal practice and will not have been able to evade them. They will have been under a duty to take decisions and actions....Furthermore, their experience will have addressed ethical issues in a way hard to achieve without clinical experience.*<sup>42</sup>

## **Community Engagement**

Another area to consider is the value of public service community engagement in assisting community members gaining access to justice. As well as an inherent sense of philanthropy associated with voluntary work within the community, it could also be a vital component if some voluntary services are to survive. The

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<sup>41</sup> Savery J. R., and Duffy T. M., in Wilson B. G., (1998), *Constructivist Learning Environments: Case Studies in Instructional Design*, (Englewood Cliffs, New Jersey, Educational Technology Publications), p.136.

<sup>42</sup> Supra, note 20, p.16.

authors' study indicated that students recognise the valuable community role they are playing as CLCs, this was evidenced by the responses provided by these CLCs who participated in the study:

*"I wanted to participate because the programme seemed like a great opportunity to gain work experience while giving back to the community."*

And,

*"I feel like the scheme really helps the community and it is a way that I can feel like I am helping as well as it improving my studies."*

Since 2010, successive Conservative-led governments have been keen to establish and promote their "Big Society" agenda in the UK. Whilst this seemingly embraces enterprising proposals to reinvigorate communities through greater autonomy, the initiative has in reality been devastating for some services situated in the voluntary sector that have traditionally relied on funding streams from *inter alia* local authorities, streams which during the current austerity era have all but dried up.<sup>43</sup>

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<sup>43</sup> See Future Funding Outlook for Councils 2019/20 Interim 2015 update, available at: <https://www.local.gov.uk/sites/default/files/documents/future-funding-outlook-co-18b.pdf> (accessed 28.12.17).

## **CLOCK IN KENT & SUSSEX: SETTING UP AND PRACTICAL ISSUES**

### **Setting Up**

After successfully establishing the scheme in some of the Staffordshire courts, the CLOCK franchise was adopted by a few law schools across the country. In addition to Keele, there are now 8 universities which operate a CLOCK help desk at their local county court run by law students, including; University of Brighton, University of Sussex, University of Wolverhampton, Birmingham City University, Salford University, Liverpool John Moores University, Staffordshire University and Canterbury Christ Church University with Open Justice at the Open University, University of Leicester and Lancaster University having recently joined.

For the purpose of this paper, experiences establishing the schemes in Brighton (University of Brighton and University of Sussex) and Canterbury Christ Church University will be focused upon. Being aware of some of the work done by the Civil Justice Council, the judiciary, the Low Commission and others in connection with the growing numbers of Litigants in Person, The Master of the Rolls (then LJ Dyson) and Head of Civil Justice asked Mrs Justice Asplin to take on a judicial coordinating role in relation to LiPs. A national network of nominated judges for LiPs was established<sup>44</sup> and the initiative in the southeast region was therefore initially driven and by Kent

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<sup>44</sup> See The Civil Justice Council's summary of the Third National Forum on Access to Justice for Litigants in Person, November 2014, available at: <https://www.judiciary.gov.uk/wp-content/uploads/2011/03/web-summary-of-lip-forum-2014.pdf> (accessed on 11.01.18).

and Sussex family judges. In Brighton, the family court judges specifically asked for the introduction of CLOCK and HHJ Mary Lazarus based at Medway County Court, the nominated LiP judge for the Kent area, was supportive of approaches made through Canterbury, to establish CLOCK in the Canterbury Law Courts.

Both Canterbury Christ Church and the University of Brighton and the University of Sussex coordinated meetings in their respective areas attended by potential stakeholders including the judiciary, court staff, and representatives from the legal services community and third sector agencies. The initiatives gained momentum and the help desks in these courts became operational in January 2016 (Brighton) and May 2016 (Canterbury). Staffing of these desks requires the assistance of willing student CLCs and through training programmes adapted from the model designed by Keele, CLCs were trained up by the CLOCK partners and academic leads over a five day period. Sussex and Brighton collaborated and Canterbury Christ Church conducted their own training. Training varies according to the needs of the communities in the various CLOCK hubs, but will typically include training by local law firms on family law issues and court procedure and by local third sector organisations on issues which litigants may experience such as domestic abuse, housing and debt problems. Training also includes a visit to the local court with input from the court staff and judges. The academic leads provide training on legal ethics and experienced CLCs assist with simulations based on their experience at court so that new CLCs feel as prepared as possible before embarking on the role.

## **The Scheme in Operation**

Structures were put into place including a rota and a reporting system. A collaborative approach was adopted in Sussex where law students from both Sussex and Brighton universities were recruited for training. The training was delivered in Canterbury and Brighton by members of court staff, representatives from the local legal service community (law firms and barristers chambers) and third sector agencies who are part of the collaborative partner providers.

Once trained the CLCs are allocated to the court rota by choosing their own slots. Service users arrive at the Court Help Desk through a number of different routes including; phone calls, applications via the CLOCK Admin system which in turn alerts the Companion on help desk duty via email and in Brighton there is a separate, dedicated CLOCK email service, monitored by CLCs, through which applicants can access signposting and arrange appointments as required. Partner providers also refer service users. Some who attend court for a hearing are directed to the help desk by court staff. Brighton offers a drop-in service during term-time for those who need guidance and signposting recommendations. Once it is established by the CLCs that a service user requires assistance, the service user will sign a 'Community Care Letter' which sets out the limitations of the service and most importantly, that the CLCs do not provide legal advice. It may be at that stage that the service user is signposted to a legal aid franchised firm, affordable fixed fee or pro bono service e.g. Kent Law Clinic in Canterbury and the Sussex Family Law Clinic in Brighton. Partner

organisations most commonly include legal aid providers for private family law, and where applicable, those legal service providers who are prepared to give fixed fee legal advice, mediation providers and charitable support services.

## **THE BRIGHTON AND CANTERBURY RESEARCH STUDY**

The small-scale qualitative research study undertaken by the authors at the University of Brighton and Canterbury Christ Church University, was designed to determine the value of the CLOCK Companionship role for law students in terms of skills acquisition, community involvement and employability enhancement. The intention was to find out what such a social justice project says about experiential learning and what it can do for developing law students' employability and their readiness for the world of work. All CLCs from the University of Brighton and Canterbury Christ Church University were invited to participate. They were asked to complete a free text questionnaire ("Questionnaire 1") after the training prior to commencing the role and then a free text follow up questionnaire after the three-month pilot ("Questionnaire 2"). Responses were explored further in a focus group at each university. In Brighton, there were 11 responses to Questionnaire 1 from a possible 16 and in Canterbury 32 responses from 46, giving a combined response rate of 69%. In Brighton, there were 10 responses to Questionnaire 2 from a possible 14 and in Canterbury 23 responses from a possible 46, giving a combined response rate of 55%. In Brighton, 6 undergraduate CLCs took part in the focus group and in Canterbury

2.<sup>45</sup> Acknowledged limitations of the study include the small sample size and recognition that the students who participated were likely to be the most motivated of the group, which may impact on the transferability of the findings.<sup>46</sup>

## **Methodology**

Following ethics approval, in order to gather the data for this empirical research study, a purposive, mixed-method sampling approach was utilised, consisting of questionnaires and focus groups.<sup>47</sup>

Questionnaire 1 asked students about their motivations for applying for the scheme; whether they had any previous experience of volunteering; their expectations of training and whether the training had met those expectations; whether they had any concerns about the role; whether they thought volunteering as CLCs would support their academic studies and finally they were asked about their career aspirations and whether they thought volunteering as a CLC would support those plans. Questionnaire 2 asked about the assistance they had provided; what they had most and least enjoyed about being a CLC; whether they thought the training had prepared them for the role and anything that could be improved for future cohorts; whether

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<sup>45</sup> The CLOCK project started later in the academic year at Canterbury Christ Church which meant that the timing of the focus group could not be arranged until after the exam period, which is likely to account for the low number of participants.

<sup>46</sup> Denscombe, M. *The Good Research Guide for small-scale social research projects* (Oxford, Oxford University Press, 2007), p.299.

<sup>47</sup> Ibid pp. 178-183.

they felt volunteering as a CLC had supported their academic studies; whether the role had helped them to develop key skills and whether they felt that being part of the CLOCK project could support their future employability. In the focus groups, the findings from the questionnaires were explored in more depth.

### **Research Findings:<sup>48</sup>**

The data from Canterbury and Brighton produced similar themes with no discernible difference between the two cohorts. The data is discussed in more detail below but the key findings were as follows:

#### **Motivation for volunteering and perceived benefits**

Questionnaire 1, completed after the training but before commencing as CLCs , revealed gaining experience and enhanced employability as the biggest motivating factor, with helping the local community closely behind. Perceived benefits were CV enhancement and supporting their career plans alongside the development of key skills and support for academic studies.

Questionnaire 2, completed after three months in the role, and the follow up focus groups, gave the students the opportunity to reflect on their experiences as CLCs

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<sup>48</sup> The focus for this paper is on the theme of the value of community participation from the students' perspectives and these are the findings which are presented and discussed here. The feedback on the training itself and issues regarding the administration of the scheme has been used to improve the project for future cohorts.



including what they had most and least enjoyed and any actual benefits. The main findings were as follows:

### **Helping people in need and access to justice**

Interestingly, helping people in need was what the students had most enjoyed about being a CLC. Participants in the focus groups spoke passionately about how volunteering as CLCs had given them a real insight into the need in the local community for legal support and how personally rewarding they found being able to provide assistance. They also voiced frustration at the lack of support available and the difficulties LiPs face in navigating the court system.

### **Skills development**

All the students responding felt that volunteering as CLCs had helped them develop key skills, including empathy; the ability to communicate with a range of people; and how to deal with unexpected situations. This was alongside gaining greater insight into the court process such as court forms and the various types of hearings.

### **Employability**

Closely linked to skills development was the overwhelming feeling that their experience as CLCs would support their future employability. The students felt that the role would help them to “stand out” and be a good “talking point” at future interviews.

### Supporting academic studies

Most of the students felt that volunteering as CLCs helped to support their academic studies, particularly for those who were studying or intending to study Family Law. Many commented on how the experience had helped them make links between theory and practice and some that they could apply the professionalism needed for the role to their academic studies.

### Questionnaire 1:

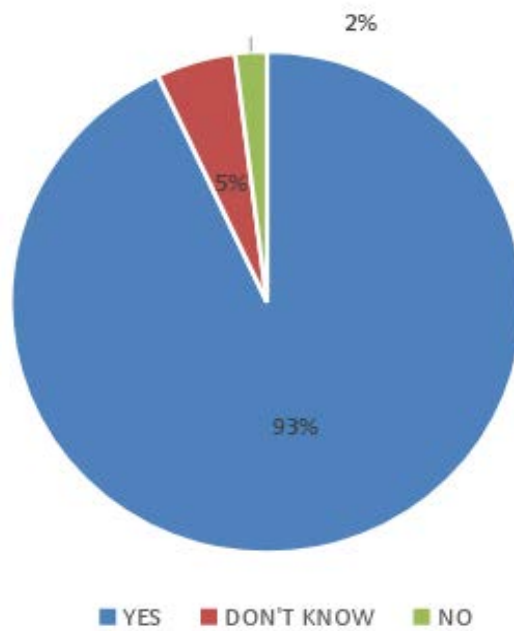
**Table 1: Students' motivations for applying for the CLOCK scheme  
(some students provided more than one answer)**

Gain experience / employability	54%
Help those who really need it, the less advantaged	51%
Help the court system	9%
Personal development	5%

Table 1 shows that one of the key motivating factors for participating in the CLOCK scheme was to help the local community. Many participants considered that the CLOCK scheme would give them an opportunity to provide community support and help deliver social justice to those most in need:

*"One of the main motivators behind my decision to participate in the CLOCK scheme was an attempt to help those who are in need of support and guidance."*

**Figure 1: Do you think volunteering as a CLOCK CLC will support your academic studies?**



**Table 2: What are your career aspirations?**

Solicitor (practice area not specified)	44%
Family lawyer	16%
Barrister (practice area not specified)	14%
Legal services	12%
Unsure	9%
Other	5%

In answer to the question about career aspirations, the answers fell into four categories; career as a solicitor, career as a barrister, uncertainty, and other career

pathway. As noted earlier, the majority of participants when responding revealed that they intend to pursue a legal career of some kind, whilst a minority were uncertain.

The work experience opportunities presented through the CLC role were acknowledged by nearly all the participants who responded to Questionnaire 1. For instance, one participant confirmed:

*“I wanted to participate because the programme seemed like a great opportunity to gain work experience while giving back to the community.”*

## **Questionnaire 2:**

**Table 3: What have you most enjoyed about being a CLOCK CLC?**

Helping people in need	82%
Court involvement	12%
Finding out more about the legal issues people have; learning about court documents; preparing myself for practice; learning about the different avenues available to litigants in person	6%

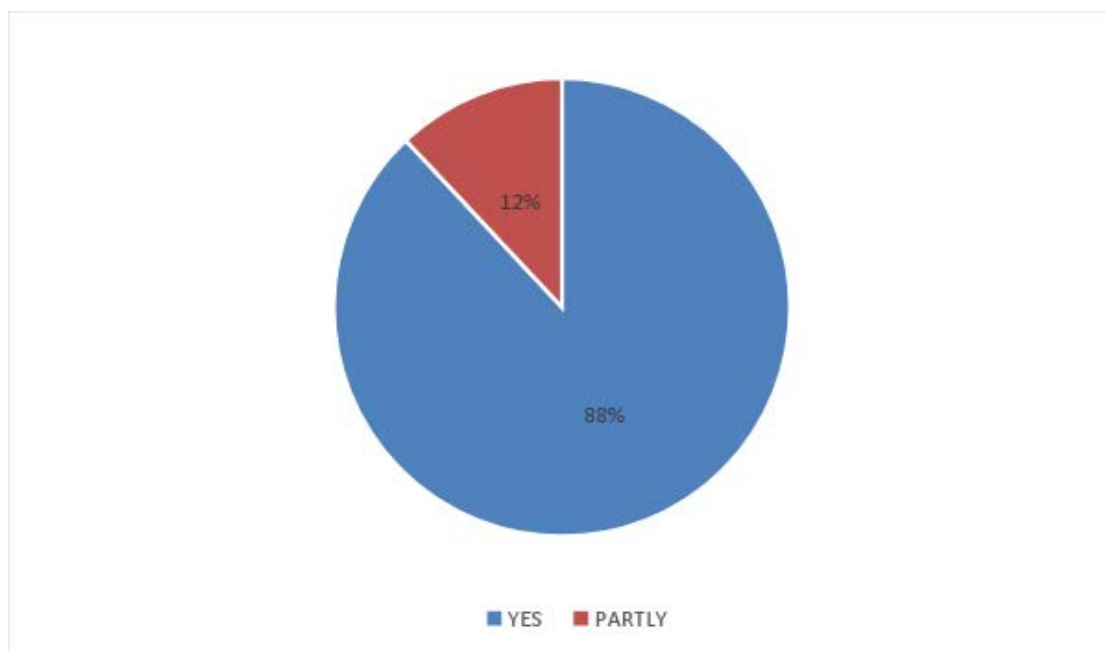
Assisting people in need was what most students did actually find most enjoyable once they had experienced the role as seen in Table 3. One student commented:

*“the sheer feeling you get from helping people and even just supporting them and talking them through things makes me feel like I’m making a difference (be it a cliché).”*

Another reflected on the continuous learning process of being a CLC:

*“it is very rewarding to be able to be a small part of making such a complicated and stressful process more transparent and manageable, especially as it reflects the area I want to work in in the future, and means I can draw from past experiences with litigants to assist future ones as well.”*

**Figure 2: Do you think volunteering as a CLOCK CLC has supported your academic studies?**



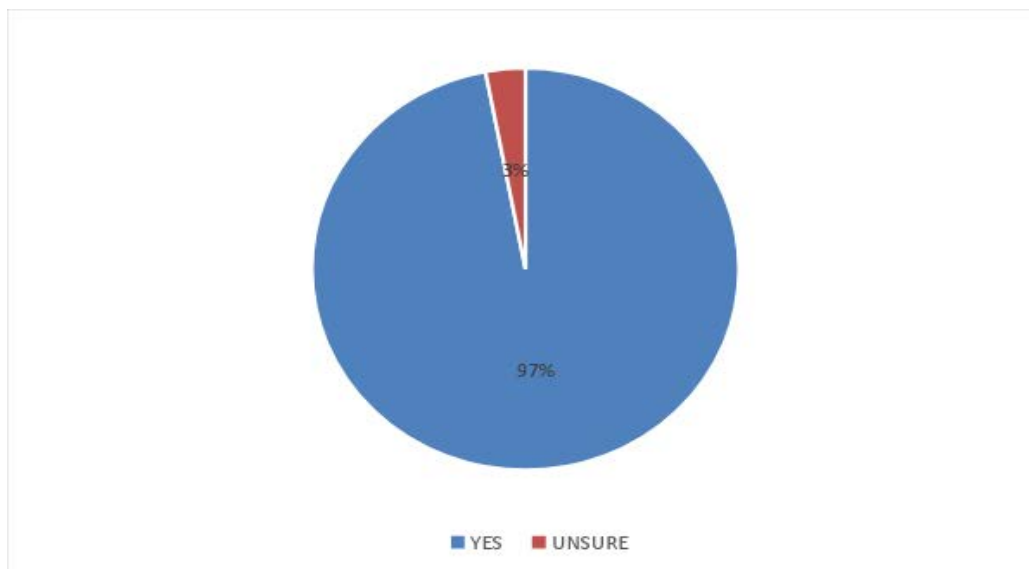
As to whether students felt volunteering as CLCs would support their academic studies, the majority felt that it would (see Figure 1) *“it will allow me to see how the*

knowledge is applied in real life” and “I am wanting to study Family Law in year 3 so this matches perfectly.” Again, this was borne out after experiencing the role (see Figure 2):

Another noted that the experience “reinforced what I learnt in the first year on legal structures” and, “it has made me even more organised and given me a professional work ethic that I can apply to my studies.” A minority of students were less sure of the role supporting their studies directly including one student who commented:

*“So far, I would say it has been an additional extra, rather than a support as the areas I’ve assisted LIPs with have not, strictly speaking, been part of my studies. It’s been a great insight into the barriers faced by those accessing the courts/justice system, or trying to.”*

**Figure 3: Do you think volunteering as a CLOCK CLC may support your future employability?**



When asked specifically about employability, again students’ expectations were borne out once they had carried out the role, with the vast majority (see Figure 4) stating that

they perceived their role as a CLC would have a positive effect. Typical comments included:

*“I believe that CLOCK will support my future career as a solicitor as it will help me stand out from my peers, help my experience in the legal sector and communication with individuals in difficult situations.”*

Standing out from the crowd in a competitive employment market was a common theme. This is in line with a research study in the USA which asked how law students could stand out and gain employment in a public interest legal job. The responses revealed that employers “value practical experience” and advise students to “[e]nroll in a clinical education programme”.<sup>49</sup>

Development of key skills was an emerging theme from Questionnaire 2. All CLCs felt that participating in the scheme had helped them develop key skills. These included empathy; dealing with people; time management; professionalism; communication skills; listening skills; and coping well under pressure. As noted earlier when considering the employability value of the scheme some students considered that “every aspect of [the skills acquired as a CLC are] transferable”.

The key themes of helping in the wider community, impact on academic studies and employability were further explored in the focus groups. University of Brighton

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<sup>49</sup> National Association for Law Placement, NALP Public Interest Employment Market Snapshot Report 3, 16 (2012) in Kuehn, R. R. *supra*, note 33 p.661.

students talked about the difficulties for often vulnerable people who are “*lost in the system*”. One said “*we are a bridge, someone to talk to*”, another “*court is so daunting*”.<sup>50</sup>

What emerged from the groups was an appreciation of the difficulties that litigants in person face when trying to access the court system. It was also clear that students had reflected deeply on their experiences, with one commenting that “[CLOCK has] *changed the way you look at people*.” Another, who had assisted a litigant who had recently served a prison sentence, said that CLOCK had helped her to overcome her own prejudices, saying “*there’s more to people than a stereotype*”. A recurring thread of the discussion was that they felt they were a link/bridge, particularly as in the Brighton Family Court, where they are based, what was the public counter, is now closed as a result of cuts to court funding.

Exploring further the question of whether volunteering as CLCs supported their academic studies, a common feeling was that it had helped them “*to piece things together*.”<sup>51</sup> For some of them, being part of the CLOCK project had shaped their future academic choices, one said that participating “*made me want to do Family Law. I had no interest in Family Law before*.” Another said that they were planning to take the

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<sup>50</sup> The views of the students correlate with the findings of the Law Society’s review ‘Access Denied? LASPO 4 years on: A Law Society Review, available at: <http://www.lawsociety.org.uk/support-services/research-trends/laspo-4-years-on/> (accessed on 03.07.17).

<sup>51</sup> This is in line with Maranville, D. A’s view that “[C]ontext helps students understand what they are learning, provides anchor points so they can recall what they learn, and shows them how to transfer what they learn in the classroom to lawyers’ tasks in practice.” ‘Infusing Passion and Context into the Traditional Curriculum through Experiential Learning’, *Journal of Legal Education*, Volume 51, No.1 (March 2001) p.52.



Innocence Project module as a final year elective so that they could explore access to justice further. All of the Brighton focus group participants felt that the experience had helped them to be more organised and had added meaning to their academic work, whatever the area. One student noted that having CLOCK as part of a module *“would be incredibly useful.”*<sup>52</sup>

There was evidence from the responses that students like the ‘reality’ of the experience. In support of the ‘real life’ experience which they are exposed to one participant said:

*“I think it will provide me with valuable experience in terms of what to expect when it comes to dealing with real life disputes as well as understanding the legal environment.”*

This supports a point that Kerrigan and Murray make when they say that clinical legal education requires participation in the legal system.<sup>53</sup> Another participant commented that at a networking event a lawyer had told her that every day is different and she felt that CLOCK had brought that home to her *“this is a real-life job”* and *“the more you do it, the more you enjoy it.”* Regarding development, dealing with people/communication skills was the most discussed skill, but participants also

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<sup>52</sup> At some of the participating universities, including the University of Sussex, students can volunteer as CLCs as the practical element of a clinical legal education module and this is something that both the University of Brighton and Canterbury Christ Church University are looking to develop.

<sup>53</sup> Kerrigan, K., & Murray, V. (2011). *A Student Guide to Legal Education and Pro Bono*. Palgrave Macmillan, pp.6-7.

reflected on the need to be professional in terms of time-keeping, organisation, dress and keeping a professional distance, all of which they felt would help them in terms of employability. There was a broad acceptance that participating as a CLC would be an opportunity to enhance their CVs. Participants also talked about developing professional networks with court staff, lawyers they meet at court and the CLOCK partners, which they felt confident would assist with future employability.

The broader research, which is being conducted by a team of CLOCK researchers nationally, considers the value of collaborative frameworks to support social and legal policy research and to monitor and critically analyse legal issues in the local community towards wider dissemination, social advocacy and policy reforms at local, national and international level. Our strong impression is that CLCs feel part of the wider context of access to justice and we were pleased to see their contribution recognised nationally at the LawWorks and Attorney General Student Awards 2016.<sup>54</sup>

## **CHALLENGES OF ESTABLISHING THE SCHEME**

Establishing such a scheme is not without its challenges though. At both Canterbury and Brighton it was necessary to take the lead on outreach into the local community to explore the possibility of stakeholder support. It was the responsibility of academic

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<sup>54</sup> For further details about the LawWorks and Attorney General Student Awards 2016 see: <https://www.lawworks.org.uk/solicitors-and-volunteers/get-involved/lawworks-attorney-general-student-awards-2016> (accessed on 10.07.17).

leads within the institutions involved to encourage members of the legal services community, third sector advice services, HM Court & Tribunal Service, to support the initiative. Whilst this was initially quite a challenging undertaking (albeit very much supported by members of the regional judiciary), it was soon evident that there was enthusiasm and support for the introduction of the scheme in both areas of the country. Indeed, as the scheme became more widely known, both Brighton and Canterbury were approached by a number of legal service providers wanting to come on board. It was also necessary to publicise the service through the universities' marketing channels and organise promotional material to distribute to various local community hubs, including MPs' constituency offices to raise awareness of the service.

Some of the additional practical challenges are those familiar to anyone running extra-curricular activities, such as recruiting sufficient numbers of students, securing training rooms and any other necessary resources. Brighton does not have dedicated administrative support and therefore decided to appoint a Student Liaison from both Brighton and Sussex to assist with aspects such as publicising rota gaps, forthcoming hearings for which a CLC has been requested and to manage the email service. It is important that the scheme runs as effectively as possible and ongoing dialogue with the CLCs, partners and court staff is maintained, so that the service can be improved.

Brighton is in the process of developing shadowing opportunities for their CLCs with the partners, with a view to facilitating increased understanding of their services.<sup>55</sup>

Given that this is a public-facing role, it is essential that students are fully committed to the project and fulfil their obligations to the initiative as well as to their fellow CLCs.<sup>56</sup> It is also essential to ensure CLCs feel supported, particularly given that there is no direct academic supervision of court desk activities. Close communication with the academic leads is essential and we also recommend input during the training week from student support services so that CLCs are aware of the wider pastoral support available to them should they find a particular case distressing.

To coordinate the scheme, it was considered necessary to form a steering group to support the Kent project. The CLOCK in Kent Steering Group comprises student CLCs, representatives from local advice and assistance services, law firms, the judiciary and the court service. The role of the steering committee is to provide support, advice and guidance to the CLOCK in Kent project to ensure that the project operates effectively and is a sustainable and viable initiative. Quarterly meetings of the steering group have been organised and these have been well attended so far.

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<sup>55</sup> To date CAFCASS and two of Brighton's practitioner partners have provided shadowing opportunities for our CLCs.

<sup>56</sup> At the University of Brighton for our first cohort we asked students to submit an application letter, outlining why they would like to participate in CLOCK. For our second cohort we followed the same process but with an additional short interview.

Training of the CLCs requires the support, supervision and coordination of academic and support staff members as well as representatives of the local partner organisations. The training programme needs to be designed with local community need in mind but broadly will include the use of local legal practitioners to provide guidance on court applications and procedure, local mediators to provide awareness and guidance on mediation referral, third sector agencies to provide awareness of local provision including domestic violence and housing advice and court staff to provide guidance on the court process.

## **CONCLUSION**

CLOCK has provided an opportunity to introduce clinical legal education to a number of UK law schools, or in other words, enable students to learn by 'doing', alongside the curriculum. Clinical legal education is intended to produce students that can take the learning experience offered by live clinics and reflect upon how and why cases were progressed and how this fits into the overall context of their legal studies.<sup>57</sup> Such approaches intend to empower students to become pro-active learners and to provide formative assessment methods, which are in themselves are a strategic and integral part of the learning experience. The CLOCK project proposes to achieve all these

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<sup>57</sup> See *Ibid*, Murray, V. pp. 226-249, for helpful analysis of Schön's established approaches to reflection (reflection on action and in action), and Greenaway, Boud, Gibbs & Kolb for models of reflection.

aspirations and there are opportunities to introduce summative credit based assessment, which can provide students with academic credit for their involvement.<sup>58</sup>

The benefits of participating in CLOCK from the perspectives of legal education and employability can also be viewed in conjunction with the requirements for law graduates as per the QAA Subject Benchmark for Law 2015,<sup>59</sup> which highlights among other requirements, the need for communication skills. It is also likely that the skills developed through the CLOCK scheme will become even more crucial as legal education providers transition to the Solicitors Qualifying Exam, which has an emphasis on key legal skills in Stage 2.<sup>60</sup>

Law students' experience is undoubtedly enhanced through the establishment of regional versions of CLOCK and the Community Legal Companion scheme. The advantages of such a project are self-evident. It assists the community, it facilitates potential mediation referrals for local mediation services (through agency signposting), it provides employability opportunities for students through personal professional development/CV enhancement, and gives them a sense of responsibility, independence of thought and achievement through community/public spirited social

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<sup>58</sup> Ibid pp. 250-268, for some ideas on assessment methods for such clinical legal education projects.

<sup>59</sup> QAA Subject Benchmark Statement: Law July 2015 UK quality Code for Higher Education Part A: Setting and maintaining academic standards: <http://www.qaa.ac.uk/en/Publications/Documents/SBS-Law-15.pdf> (accessed 10.01.17).

<sup>60</sup> Supra, note 30.

justice engagement, as well as enabling an appreciation of legal ethics.<sup>61</sup> Particularly given the overwhelming social justice motivations for participating discussed earlier, further longitudinal research would be interesting to explore the impact of volunteering for CLOCK as the CLCs graduate and progress in their careers, considering *inter alia*, whether there is an increased likelihood of them pursuing roles in areas more typically associated with social justice and whether they are more likely to engage in pro bono work than peers who have not participated in such a scheme, as a result.<sup>62</sup>

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<sup>61</sup> See generally; Bloch, F. S. (ed.) (2011) *The Global Clinical Movement: Educating Lawyers for Social Justice*, (New York: Oxford University Press); Baron, P. & Corbin, L. (2012). Thinking like a lawyer/acting like a professional: Communities of practice as a means of challenging orthodox legal education. *The Law Teacher*, 46(2), 100-119." 46(2); A. Francis, "Legal Education, Social Mobility, and Employability: Possible Selves, Curriculum Intervention, and the Role of Legal Work Experience." *Journal of Law and Society* 42.2 (2015): 173-201.

<sup>62</sup> See e.g. McKeown, P., 'Pro Bono: What's in it for Law Students? The students' Perspective', *International Journal of Clinical Legal Education*, Vol 24, No 2 (2017) pp 43-80 which explores students' motivations for participating in pro bono work and considers whether this is likely to instil a public service ethos which they will carry forward.

## **CONNECTIVITY, CONFIDENTIALITY AND CONFIDENCE: KEY ISSUES IN THE PROVISION OF ONLINE PRO BONO ACTIVITIES**

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### **Abstract**

The provision of pro bono activities for law students has become an established feature of the undergraduate legal education landscape in Law Schools in the United Kingdom (“UK”) and beyond, providing the experiential elements of clinical legal education programmes. Pro bono activities conducted online, or utilising and enhanced by technologies in other ways (for example, through the development of a mobile phone application providing legal guidance), are increasingly becoming a part of this offering, reflecting wider shifts within legal practice and society and an increasing recognition of the importance of digital literacy skills. This paper will situate these forms of online and technologically-enhanced pro bono activities both within the wider context of contemporary clinical legal education and also as a part of broader professional and societal shifts. It will explore a variety of innovative approaches being taken internationally, including work done by The Open University’s Open Justice Centre in the UK, before moving on to focus on a number of key challenges and opportunities which may arise through the increasing provision of these new forms of pro bono activities by Law Schools. These include the potential and pitfalls of the technology involved, issues with confidentiality (particularly in the context of online legal advice) and the issue of how to foster trust in the online environment. The paper will conclude with a number of suggestions for areas requiring further research and discussion to enable contemporary clinicians to fully utilise the potential of online and technologically-enhanced pro bono activities.



## **Introduction**

In the UK, most clinical legal education programmes involve the provision of pro bono activities. The phrase pro bono derives from the latin *pro bono publico* – “for the public good”. A definition of pro bono activity is provided by the *Joint Pro Bono Protocol for Legal Work* agreed by the Law Society, Bar Council and Chartered Institution of Legal Executives in England and Wales. This states that:

*...When we refer to Pro Bono Legal Work we mean legal advice or representation provided by lawyers in the public interest including to individuals, charities and community groups who cannot afford to pay for that advice or representation and where public and alternative means of funding are not available*

(Law Works n.d, section 1.1).

The focus on advice and representation in this definition is arguably reflected by the emphasis of clinical legal education within Law Schools in the UK, with Drummond and McKeever (2015) pointing out that the predominant type of activity is for students to provide legal advice to members of the public under supervision. However, within this the range of services offered vary considerably. Kerrigan and Murray (2011) show that legal advice clinics can range from in-house advice and representation clinics, which may provide a similar service to the client as that which they would expect if they instructed a law firm, to advice-only services which assist the client in identifying the legal issue and provide a referral service to other agencies. In addition to in-house

activities, students may take part in placements or externships or specialist projects such as the Innocence Project<sup>1</sup>, or Free Representation Unit.<sup>2</sup>

As well as the provision of legal advice, there are also a myriad of public legal education activities which law students are involved in, such as Streetlaw,<sup>3</sup> which form an important part of clinical legal education programmes. At first sight these pro bono activities are distinct from traditional legal practice as they do not involve the delivery of individual legal advice. However, they do involve “working to a specific brief and interacting with the public in relation to legal rights and responsibilities” (Kerrigan and Murray, 2011, p.7). Therefore, there is a significant overlap with the form of pro bono activities referred to in the *Joint Pro Bono Protocol for Legal Work*. For the purpose of this paper, the main focus will be on pro bono activities involving the provision of free legal advice and representation, but wider categories of public legal education activities will also be drawn upon on occasion given the close relationship between these different forms.

Traditionally, pro bono work in Law Schools has been carried out face-to-face (Kerrigan and Murray, 2011). This often involves Law Schools’ providing either drop-in or appointment-based advice and representation clinics on a number of different areas of law in a face-to-face setting. Some Law Schools locate their Law Clinic in the law faculty whereas others choose to share premises with community groups or other

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<sup>1</sup> <https://www.innocenceproject.org/>.

<sup>2</sup> <http://www.thefru.org.uk/>.

<sup>3</sup> <http://streetlaw.org>.

advice centres. Similarly, public legal education activities have commonly involved small groups of students visiting a school, prison or community group within the locality to provide face-to-face presentations. However, there is an increasing interest in, and the gradual introduction of, pro bono activities which are either conducted online, or harness online technologies to enhance their delivery and impact, both in the UK and internationally. As early as 2001, Barry et al recognised the importance of technology and how it could transform the delivery of clinical legal education. They segmented clinical legal education into three waves (the third wave being its future) and, when considering how it could adapt to the digital age, argued that:

*Aside from influencing the place of clinical education in the new millennium, technological advances will affect the forms of clinical education by making possible new and different teaching and service opportunities and clinical models*

(Barry et al, 2001, p.54)

This arguably mirrors an increasing engagement with technology amongst Law Schools as a whole, with many offering forms of blended learning and/or additional online materials to enhance the student experience (see, for example, Allbon, 2013). The increasing role of technology has also been noted in various aspects of pro bono work generally, including the use of online platforms by clearing houses to match firms offering pro bono services with Non-Governmental Organisations and social

enterprises<sup>4</sup> (Khadar, 2016) and the development of online self-help platforms for unrepresented litigants<sup>5</sup> (Udell, 2016). In society overall, this is a time of accelerated cultural and technology change with Sparks and Honey (2014, n.p.) describing the Post- Millennials or Generation Z, as the “first tribe of true digital natives”. As these students move through Law School, and potentially into the legal profession, their engagement with technology is likely to increase the importance of online, and technologically-enhanced, pro bono activities in response to increasing professional and societal demands. Indeed, the discussion below demonstrates that this is already occurring with examples ranging from online law clinics in the UK to the development of mobile phone applications and online dispute resolution platforms (for a snapshot of developments in the UK see Smith (2017)).

## **THE USE OF TECHNOLOGY WITHIN THE LEGAL PROFESSION AND SOCIETY**

This movement towards acknowledging and utilising the potential of technology within clinical legal education, the overall Law School experience and the wider provision of pro bono closely reflects wider shifts within legal practice and society as a whole. In terms of legal practice, the use of information technology has become an increasingly significant factor in the delivery of legal services and in the adjudication

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<sup>4</sup> See, for example, <https://www.trust.org/trustlaw/>.

<sup>5</sup> See, for example, <https://lawhelpinteractive.org/>.

of civil disputes. Smith and Patterson (2015) show that this is an area with potential to provide innovative solutions to increase access to legal advice and also to disseminate public legal education so as to raise levels of legal capacity. More broadly, technology is starting to drive the overall administration of justice. Online dispute resolution (“ODR”) now provides an alternative methods of resolving legal issues. This is a process where legal disputes are resolved via web based systems and there are a number of different versions available. In the United States of America (“USA”), Cybersettle, Inc was one of the first to provide online settlement via an automated dispute resolution platform which has been used predominately in personal injury cases. The claimant and defendant submit their highest and lowest settlement figures if the offer is greater or equal to the opposition’s offer the case automatically settles.<sup>6</sup> A French ODR platform called [demanderjustice.com](http://demanderjustice.com) provides an e-filing service for litigants in person and, if the dispute cannot be resolved via ODR, the system will create the documents to start legal proceedings.

The Dutch government in particular pioneered the use of ODR with the [Rechtwijzer.nl](http://Rechtwijzer.nl) project (translated as “signpost to justice”, “roadmap to justice” or “conflict resolution guide”) The project was run by the Dutch Legal Aid Board with support from the

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<sup>6</sup> Charles Brofman a US trial lawyer invented Cybersettle. In 1995 he was at court trying to negotiate a settlement with opposing counsel in an insurance claim. They agreed to secretly write down on a piece of paper their settlement figures and hold it up to the court clerk, if the amounts were close the court clerk would put a thumbs up and if not, the papers were destroyed without either side seeing the figures. The court clerk gave them the thumbs up as they were a \$1000 apart and they agreed to split the difference and settle the case. This experience prompted Brofman to launch Cybersettle in 1998 using a “double blind” bidding process- see [www.cybersettle.com](http://www.cybersettle.com).

Netherlands Ministry of Security and Justice. The University of Tilburg developed the first two generations of the website and the third generation was evolved by the Hague Institute for the Internationalisation of Law (“HiiL”).

*Rechtwijzer 2.0 is the first ODR platform for difficult problems such as divorce and separation, landlord-tenant disputes and employment disputes. (HiiL 2017)*

It launched in The Netherlands in 2014 helping people with divorce related issues and was extended in 2015 to include landlord-tenant, consumer conflicts and employment issues. Rechtwijzer.nl was more than ODR, as it provided legal information and signposting to support litigants in person too. The process began with a series of questions related to the issue in question to help the individual navigate the legal process. It encouraged applicants to consider whether a legal response was the appropriate cause of action in all the circumstances. Research from Bickel et al (2015) which evaluated users’ experiences of Rechtwijzer found they commented positively on their interaction with the website.<sup>7</sup> However, the project ran into difficulties, with Rechtwijzer Version 2.0 proving to be financially unsustainable. Building on the lessons learned by Rechtwijzer, Justice42 has emerged- this is a new online divorce platform supported by private investment and being developed by many of the HiiL team behind Rechtwijzer (Smith, 2017).

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<sup>7</sup> The report summarises research conducted with users of Rechtwijzer in supporting them in divorce and consumer cases- the satisfaction rates for divorces was 7.51 and for consumer cases 7.29 and they indicated they would recommend the website to other people. A 7 point scale was used ranging from not at all (1) to a large extent (7).

In England and Wales there are also an increasing number of examples of ODR. The Ministry of Justice launched Money Claim Online (“MCOL”) in 2002, a form of ODR which allows claimants and defendants to make or respond to a money claim online. A MCOL is for fixed amounts of money of less than £100,000 against no more than two defendants in England and Wales. If the claim is disputed it will proceed to hearing before a District Judge.<sup>8</sup> Low value personal injury cases are being dealt with via a claims portal where the inbuilt case management system runs the process, but it does not resolve the claim, if the matter cannot be settled it still proceeds to a final hearing before a judge.<sup>9</sup> Disputes relating to online purchasing of goods and services can be resolved by an ODR platform provided by the European Commission. A complaint can be made by consumers and traders in the EU, Lichtenstein, Norway and Iceland to be resolved by an approved dispute resolution body the service is either free to use or with a minimal charge. Traders are not obliged to engage with the ODR process but it is mechanism to resolve issues without incurring significant court costs.<sup>10</sup>

This use of ODR reflects the growing mainstreaming of digital processes:

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<sup>8</sup> The guidance for making a claim is available online at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/520203/money-claim-online-user-guide.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/520203/money-claim-online-user-guide.pdf). This is 27 pages long and therefore arguably somewhat inaccessible for a litigant in person. If the claimant secures judgment and the defendant fails to pay the debt the claimant can also request a warrant to enforce payment online.

<sup>9</sup> <http://www.claimsportal.org.uk/en/>.

<sup>10</sup> <https://ec.europa.eu/consumers/odr/main/index.cfm?event=main.home.howitworks>.

*To serve the needs of a 21<sup>st</sup> Century society, the justice system must be **digital by default** and design.... The creation of online justice cannot therefore simply be a matter of digitising what might be called the frontline processes. It must go further than that. It must properly embrace what is described as Online Dispute Resolution.*

(Ryder, 2016, n.p.)

The impact of the reduction in legal aid and the rise of litigants in person in the UK has also encouraged the senior judiciary and government to review the use of technology within the traditional court process (Her Majesty's Courts and Tribunals Service, 2015). The importance of digital engagement was outlined by the publication of the 2016 Civil Courts Structure Review by Lord Briggs ("the Briggs Report"). The focus has been on designing a new process that incorporates the experiences of other jurisdictions but is more transformative in nature. The Briggs Report proposes a new online court to be used by litigants which will become a compulsory form of civil dispute resolution for certain types of claim. The value and types of claims the online court will adjudicate on are potentially significant. Lord Briggs recommends the online court should deal with claims up to £25,000 but it should be a gradual process starting with claims up to £10,000 and limited to specified money claims. For example, a dispute with a company where they did not provide goods or services and it is for a fixed amount of money. This would exclude unspecified money claims at present, for example personal injury, professional negligence cases, and non-monetary claims such as injunctions, specific performance and possession of homes. However, it is



expected that in the future unspecified money claims will also fall within the remit of the court. The recoverable costs regime will be the same as used in the Small Claims Track where the Civil Procedure Rules Part 27 Practice Direction states that states the amount paid for legal advice and assistance in small claims is a sum not exceeding £260.00. In addition there will be a further recoverable fixed cost payment for advice at the start to determine the merits of a case. It is not intended that lawyers will be excluded from the online court but limiting it to fixed recoverable costs potentially significantly limits the role lawyers are likely to play in the process, demonstrating that both the legal profession and Law Schools will need to adapt to meet the realities of an online justice system.

Technological innovation is challenging and early pioneers are not always the ultimate beneficiaries but the experience of Rechtwijzer is influencing exciting new developments occurring in other jurisdictions and has contributed to the development of the Civil Resolution Tribunal and MyLawBC.com in Canada.<sup>11</sup> Ambitious technological solutions may be risky but in society more generally, technology is increasingly becoming a key component of our lives - the forecast for the number of smart phone users in the UK by 2022 is 53.96 million (Statista, 2018). Google<sup>12</sup> and other search engines are regularly used to find information and locate services. In 2017 internet use increased further with 89% of adults using the internet in past 3 months. In adults over 75 years of age the growth of internet use is particularly

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<sup>11</sup> <https://www.mylawbc.com> and <https://www.civilresolutionbc.ca>.

<sup>12</sup> [www.google.co.uk](http://www.google.co.uk).

marked, in 2011, 20% of adults over 75 years were internet users compared with 78% in 2017 (Office for National Statistics, 2017). Faster mobile speeds enable connectivity on the move, which has led to the increasing popularity of smart phones. There has also been a significant growth in e-commerce with 41.36 million people engaged in online shopping in 2016 (Kemp, 2017). Technology has the ability to allow users to access information, as well as communicating at a distance and at a time to suit them.

The statistics above illustrate that, for the law student of today, the environment in which they will live and work, and potentially practice law in, is imbued with technology. This demonstrates the importance of incorporating this element into clinical legal education programmes to produce citizens, and lawyers, with appropriate digital skills. The meaning of the term “digital skills” is itself evolving (and is also sometimes referred to as digital competency or literacy). However, van Dijk and van Deursen (2014) suggest six categories, including operational and formal skills (for example, knowing how to access the internet and then navigate it using a web browser); information skills (for example, locating, selecting and evaluating relevant information on the internet); communication skills (for example, instant messaging and emails); content creation skills (for example, creating a blog post or forum post) and strategic skills (involving using digital mediums to achieve a particular personal or professional goal). The value of each of these categories to law students and lawyers is clear in terms of both discrete tasks, such as locating a case online and checking its current status and also more broadly, from being able to curate

your online presence when job hunting, to enhancing the profile and reputation of your law firm. It is these digital lawyering skills which are becoming increasingly key within contemporary society.

The provision of online and technologically-enhanced pro bono activities offers key opportunities to integrate and develop this important range of digital skills. This is already being acknowledged by, and reflected in, a range of clinical legal education programmes internationally as a number of Law Schools developing their traditional pro bono work in new and innovative directions.

## **THE GROWTH IN ONLINE AND TECHNOLOGICALLY-ENHANCED PRO BONO ACTIVITIES**

The most developed examples of online and technology-enhanced pro bono activities can arguably be found within the USA, where the use of technology to promote access to justice is more firmly established. Rostain et al (2013) discuss how students at Georgetown University Law Center have developed a 'Same-Sex Marriage Adviser' application that can be used across fifty states in the USA. The purpose of the application is to help users decide whether they are able to get married or cohabit within the state in which they live and what impact it might have on their legal rights. The application is an automated advisor which fulfils an unmet legal need because there are legal and financial consequences for those who are embark on same-sex marriage and many people cannot afford a lawyer to advise them on these issues

(Rostain et al, 2013). In order to build the app, the students create a complex design document which maps the journey of the end-user. Students learn a myriad of skills through this process, not only the ability to identify the relevant law, but also how to deconstruct legal rules in a way that will be accessible and appropriate to the needs of the end-user (Rostain et al, 2013).

Similar projects are happening across a number of law schools in the US because of the Access to Justice (A2J) Author Course Project which developed from a collaboration between CALI- the Center for Computer-Assisted Legal Instruction<sup>13</sup>, ITT Chicago-Kent College of Law and Idaho Legal Aid Services. The A2J Author Course Project provides the training materials to facilitate the development of technological solutions to address access to justice issues. At ITT Chicago-Kent they have created a Center for Access to Justice and Technology and in 2010 they started the Justice & Technology Practicum which uses the A2J software to allow students to develop customer friendly web-based interfaces for legal assembly to be built (Staudt et al 2013). Students work directly with litigants-in-person to understand the barriers they face in accessing legal services. The knowledge and understanding the students gain from working with these clients helps and prepares them for designing the document templates required to develop an application (Goodenough et al, 2012).

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<sup>13</sup> Most US law schools are members of CALI- see its mission statement [www.cali.org/about/mission](http://www.cali.org/about/mission) CALI is non-profit consortium of law schools, law libraries and similar organisations.

Also, as part of the Practicum, students learn about the ethical issues that arise with the developments of technology (Staudt et al 2013).

Although the above programmes demonstrate the innovative use of technology within pro bono activities, and by doing so promote access to justice for those who access them, they do still retain face-to-face teaching elements within their wider clinical legal education provision for students. However, a wholly online clinical legal programme is being delivered at Charles Darwin University (“CDU”) in Australia<sup>14</sup>.

The clinic comprises of three streams, an environmental law stream, a refugee law stream and the indigenous justice stream. The students are placed in external organisations and are supported via skype, email and telephone by supervising lawyers and faculty staff. Ethical issues relating to client confidentiality are taught as part of the class and students are required to sign confidentiality agreements. Documents are shared and created in accordance with the protocols of the external organisation. Students use online databases to carry out legal research (McCrimmon et al, 2016) Students in the environmental law stream are either placed with an international pro bono organisation providing advice on climate change or supporting an environmental community legal centre based in the Northern Territory. In the refugee law stream, students are able to observe court hearings via the Federal Court’s video link system, whilst in the indigenous justice streams, students are placed with law firms where they carry out legal research, attend meetings and interviews via

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<sup>14</sup> The program began as a pilot in 2014 and in 2016 it became a fully accredited module.

Blackboard Collaborate (McCrimmon et al, 2016). The vast majority of law students at CDU are studying online by utilizing technology they have found an innovative way to create an external placement scheme online.

The project at CDU demonstrates that technology can be used to cross regional and state borders suggesting that, with proper supervision, similar online pro bono projects could be developed internationally (McCrimmon et al, 2016). The variety of online pro bono activities undertaken at CDU also demonstrate that technology is relevant not only to public legal education but also to the specific provision of legal advice and representation.

Indeed, in the UK, the focus of online and technologically-enhanced pro bono activities to date does appear to have been on the use of technology within the Law Clinic setting, mirroring the predominance of this form of clinical legal education activity (Drummond and McKeever, 2015). The University of Cumbria has previously piloted an online Law Clinic (Thanaraj and Sales, 2015). This involved potential clients' completing an online contact form and clicking to accept the clinic's terms and conditions before the query being reviewed by a tutor. If deemed suitable, students would then completed an e-signed agreement with the client and conduct discussions via an encrypted client portal and video conferencing with documents stored securely online (Thanaraj and Sales, 2015). Some other university Law Clinics currently offer email advice, and/or Skype interviews, including Strathclyde University.<sup>15</sup> The Open

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<sup>15</sup> <https://www.lawclinic.org.uk/oac>.

University's Open Justice Centre has also recently launched a wholly online advice-only Law Clinic, interviewing clients in real time via Adobe Connect and providing advice by email.<sup>16</sup> Members of the public complete a web enquiry form which is then received into a dedicated mailbox from which it is triaged. If the matter is accepted into the Law Clinic, it will then be inputted into the Clio case management system and all communications between students and supervisors relating to the issue will take place online via this platform. The client will be interviewed online (using audio and/or video) via Adobe Connect and will be able to access the resulting letter of advice via the case management system.

As a distance learning provider, The Open University has had to develop an online solution that works for its geographically dispersed student body. Students working in the Law Clinic are based across the UK, and also internationally, rendering face-to-face meetings and discussions impossible. Many also have a range of work and professional commitments which preclude them from accessing pro bono opportunities which are face-to-face or held at particular times and places. For these students, the Law Clinic provides a valuable opportunity to develop both their digital and legal skills in a way which enhances employability and gives them a greater insight into issues around social justice, professional identity and legal values and ethics. At the same time, the clients of the Law Clinic are also widely geographically dispersed and may have lacked the knowledge or resources or ability to source

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<sup>16</sup> <http://law-school.open.ac.uk/>.

appropriate advice within their local area, The Law Clinic provides them with an accessible way to access this without having to travel or take part in a potentially daunting face-to-face discussion.

The above paragraph demonstrates the specific benefits for students and clients' of The Open University's Law Clinic. However, for Law Clinics within conventional, face-to-face university settings, utilising such online technologies also has significant potential benefits, including smaller overheads (with no physical presence required), streamlined case management processes and wide accessibility to clients who may be unable or unwilling to access legal advice face-to-face (Thanaraj and Sales, 2015). With many Law Schools seeing social justice as an important part of their mission, and during a time when numbers of Law Centres are declining (Ryan, 2017) and geographic areas have been identified as "legal aid deserts" (The Law Society of England and Wales, 2018, n.p.), it is arguably increasingly important for pro bono activities to transcend geographic boundaries and be as accessible as possible to those in need (whilst acknowledging the potential demands of this in terms of finance and resources).

There are also educational advantages in utilising any form of online or digitally-enhanced pro bono activity in terms of developing the digital skills of both students and staff and preparing students for the workplace of the future. Given the aspirations of many law students to work within the legal profession (see Hardee (2016) in the UK context) and the shift towards ODR and digital justice systems, it can



be seen that incorporating relevant technologies within clinical legal education programmes could have a significant impact upon student employability, a key tenet of contemporary higher education policy (Department for Education, 2017, p.8). Digital lawyering skills require an appreciation and understanding of technology. Rule 1.1 in the Model Rules of Professional Responsibility governing lawyers in the USA states that a lawyer should represent a client competently and that “competent representation requires the knowledge, skill, thoroughness, and preparation reasonably necessary for the representation”. In the UK, the Solicitors Regulation Authority’s (“SRA”) Code of Conduct (2011), governing the behaviour of solicitors in England and Wales, includes, in principle 5, para. 2.9, a requirement to exercise “competence, skill and diligence...” with Goodenough and Lauriston (2012, n.p.) suggesting that, if the legal landscape is evolving technologically, “we should ask the question whether a lawyer who has not been trained to understand the technology is indeed competent”. Similar technological advancements are also happening in a wide range of other workplaces that law graduates may encounter. Therefore, introducing online or technology-enhanced pro bono activities within clinical legal education programmes offers much potential in terms of the personal and professional growth of students.

However despite these significant advantages, there are also a number of challenges and barriers to overcome which require careful consideration by any clinician interested in utilising digital technologies effectively in pro bono work. The first of

these involves identifying and implementing user-friendly systems and acknowledging the difficulties that the use of such technology may pose for both some clients and students, and even the clinicians supervising the Law Clinic, who may not have the resources, support or appropriate levels of digital skills to utilise the potential opportunities available (Department for Culture, Media and Sport, 2017).

### **CONNECTIVITY: TECHNOLOGICAL CHALLENGES AND BARRIERS**

Identifying user-friendly technology systems that can either act as a vehicle for, or significantly enhance, pro bono activities may be a significant undertaking. It is likely to require a high level of input from other parts of the institution, such as Information Technology and Procurement Departments, which in turn may have resource implications and incur costs and delay. Flood, considering the use of technology in legal education generally, suggests that:

*... law faculty will have to familiarise themselves more with the technology or providers will have to employ more media and IT support staff to help implement this development.* (Flood, 2015, p.86)

In relation to the implementation of a specific clinical legal education programme, The Open University's Open Justice Law Clinic experience indicated that a significant level of IT support was required, together with other support, for example, in terms of marketing and promotion given the geographically-dispersed nature of the Law Clinic's potential clientele. However, this is not a problem which is unique to clinical

legal education and pro bono activities – a recent report into higher education globally highlighted the importance of integrating technology across the board, indicating that:

*Real-world skills are needed to bolster employability and workplace development. Students expect to graduate into gainful employment. Institutions have a responsibility to deliver deeper, active learning experiences and skills-based training that integrate technology in meaningful ways.*

(The New Media Consortium, 2017, p.2)

It argues that institutions without “robust strategies” for developing online, blended and mobile learning models “simply will not survive” (The New Media Consortium, 2017, p.2). Although this is a broad generalisation, it is reasonable to assume that many universities are likely to be investing heavily in technology in the near future, which may well provide more easily accessible support and resources for clinical legal programmes and pro bono work.

As well as demonstrating (once again) the increasing importance of technology, the above report also reinforces the relevance of online and technologically-enhanced pro bono activities to employability. One of the key opportunities afforded by online clinical legal education programmes is the potential development of a new generation of digital lawyers, who have the skills to become the legal professionals of the future. However, it cannot be assumed that all students have these capabilities and skills when beginning their clinical legal education. It may take a significant amount of time, effort and resources to up-skill students in a way which enables them to utilise technology appropriately and efficiently. As Allbon explains, when discussing the

development of a legal skills wiki, “students are less-technology savvy than we often assume” (2013, n.p.) with a seeming familiarity with technology sometimes masking inadequacies around retrieving and evaluating relevant information online (see also Bates, 2013)

Similarly, not all clinicians will have the technical abilities, resources and time to work with their students on developing technologically-innovative projects. These issues may be lessened as the role of technology in higher education continues to develop. However, even if, at present, a lack of time, resources or motivation preclude a significant investment in online and technologically-enhanced pro bono activities for some clinical legal education programmes, it is still possible to explore the potential of such innovations with students and encourage them to think about how they could apply their own personal skillset in this manner, both now and in the future. Such projects also provide interesting ethical issues to discuss with students, for example, does the use of crowdfunding to promote commercial cases as an investment opportunity create negative public perceptions of the justice process (Spendlove, 2015)? Will large, organised groups, who are able to access media publicity, prevail over minority interests and is this appropriate (Davies, 2013)? What should happen when the money raised exceeds the costs incurred (Padgett and Rolston, 2014)? Students can also be encouraged to consider wider issues around the introduction and use of artificial intelligence into the provision of legal services and the future of the legal profession as a whole (for discussion on this see Susskind and Susskind (2017)).

Perhaps the most significant issue in technological terms is that of the digital literacy of the end-user. Collard et al (2011) argue that a prerequisite of being able to access the justice system is the existence of a sufficient level of legal capability (knowledge, skills and attitudes) that enables an individual to engage with the justice system. Legal capability is defined as including the ability to recognise and frame the legal dimension of problems and find out more about the legal dimension of a problem. (Collard et al, 2011, pp.3-4). Thus without the requisite level of legal capability individuals are unable to recognise the legal dimension of their problems and are thus excluded from accessing the justice system. However, evidence suggests that it is not just lack of legal capacity that prevents people dealing with legal problems but also poverty and social exclusion (Buck et al, 2007). This has significant implications because “issues of digital exclusion are exacerbated amongst those who are socially excluded” (Reboot UK, 2018, p.3). As this article has previously discussed, the digitalisation of the court process is already well under way, but if the end-user has a lack of digital skills and confidence this will only serve to further entrench exclusion from the justice system.

It is recognised that increasing digital engagement is paramount to ensuring the successful delivery of online justice. As a result, programmes aimed at developing digital inclusion are increasing, for example, Reboot UK worked between March and September 2017 to assist 35 organisations to support excluded people to enhance

digital skills and confidence (Reboot UK, 2018). The Good Things Foundation<sup>17</sup> is also working to bring together community groups to create the Online Centres Network which will help people who are socially excluded to gain digital literacy skills. For Law Schools using technology in their interactions with end-users (such as in an online Law Clinic) it is necessary to consider what guidance and assistance can be offered to facilitate access to the service, for example, are the instructions given on websites or in emails clear and step-by-step? Is the provision accessible to those with disabilities (such as a visual impairment)? Is there a telephone number for people to call to access IT support? Can hard copies of guidance be posted out? If online pro bono activities are to provide support for those who are most in need, these are key issues to be considered during both the design and implementation of relevant projects. The experience of The Open University's Law Clinic suggests that both piloting the provision and liaising with colleagues with specific expertise in accessibility and inclusion can assist in identifying key considerations in this area. It is also vital to obtain feedback from the end-users to ensure that their needs are both listened to and responded to.

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<sup>17</sup> [www.goodthingsfoundation.org](http://www.goodthingsfoundation.org).

## **CONFIDENTIALITY: COMPLYING WITH LEGAL AND ETHICAL DUTIES**

Another key issue which arises when considering the development of online and technologically-enhanced pro bono activities, in particular the provision of individual legal advice or representation in an online setting, is the need to comply with the obligations placed on both students and clinicians in the Law School in relation to client confidentiality. This is a challenge already having to be tackled in legal practice, as law firms are increasingly adopting new, more agile technology. Practice management systems are becoming cloud based, which has led to a significant rise in the use of mobile technology.<sup>18</sup> Cloud computing software facilitates access via the web instead of on individual computers and all data is stored off-site. Advantages include the ability to access documents remotely, including via mobile applications, and the option to interact with clients outside of the office. It also provides the functionality for clients to log into the system to access their case. Data is encrypted and is backed-up off site. Cloud computing, and particularly its ability to facilitate mobile access to data, has the potential to offer significant benefits to both law firms and Law Clinics, but it is not without risk, primarily in relation to breaches of ethical obligations of competence and confidentiality.<sup>19</sup> Data security is a concern with the

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<sup>18</sup> See CLIO [www.goclio.co.uk](http://www.goclio.co.uk). CLIO is an example of a cloud based legal case management software, there are other examples being used by law firms, including Amicus Cloud, Rocket matter, My Case etc. Law firm practice management software automate, and have a number features including managing correspondence, documents, calendars and time recording.

<sup>19</sup> See sections 4.1, 4.3, 4.5 of the SRA Code of Conduct (2011), which require effective controls to be put in place to ensure the protection of client confidentiality and the Law Society of England and Wales practice note on cloud computing (2014).

increased use of tablets and smart phones and the flexibility to work from anywhere.

Law firms are at risk of the loss or damage of data and this risk is increasing as the internet is being used to process and transmit confidential client data

The SRA Code of Conduct (2011), at rule 4.1, states that practitioners (including Law Clinics) must achieve the outcome of keeping “the affairs of clients confidential unless disclosure is required or permitted by law or the client consents”.<sup>20</sup> Ethical obligations arise not only from the Code of Conduct but also from the statutes which govern data protection and information security<sup>21</sup>. The new General Data Protection Regulations in force from May 2018 impose further obligations on organisations and strengthen individual rights with respect to their personal data, emphasising the need for data controllers and processors to obtain informed consent from individuals, only hold such personal data as is necessary and ensure that information held is both secure and accurate.<sup>22</sup> A significant fine can be imposed for failure to notify a breach and for the breach itself. Otey-Stringfellow (2012, p.224) argues that this increasing amount of regulation creates an “ethical minefield” for experienced lawyers, but even more so for law students and those about to enter the practice of law who are less familiar with their professional and ethical obligations.

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<sup>20</sup> Chapter 4 Confidentiality and disclosure states that protection of confidential information is a fundamental part of the client relationship, it occurs as a matter of law and of conduct. Rule 4.5 states you must have appropriate measures in place to identify and mitigate the risks of client confidentiality. The indicative behaviours which accompany the rules state the systems in place need to reflect the size, complexity and the nature of the work involved (SRA, 2011).

<sup>21</sup> In the UK these include the Data Protection Act 1998, the Regulation of Investigatory Powers Act 2000 and the Computer Misuse Act 1990.

<sup>22</sup> <https://gdpr-info.eu/>.



Incorporating technology into the pro bono activities offered by clinical legal education programmes gives students the opportunity to be in a real-life situation with clients and deal with confidential information online, thus enabling them to experience and explore the ethical concerns of internet communication. Goldfarb (2012) identifies self-development and self-monitoring as being especially valuable skills of clinical legal education, enabling students to learn from experience and apply that to future choices, to help prepare them for a rapidly changing legal landscape. Using online and technologically-enhanced pro bono activities are particularly useful in giving students time to think and reflect on their use of technology. This can be achieved if provision is made for students to reflect on the professional demands involved in utilising technology in the clinical setting by incorporating reflective writing into the design and assessment of the clinical experience.

There are distinct advantages to introducing technology into the Law Clinic by, for example, incorporating the use of case management software.<sup>23</sup> Using such software provides important preparation for practice and is also a valuable opportunity to address some thorny ethical issues that may arise as a result of its incorporation by providing a greater understanding of its practical use, a greater awareness of the ethical issues likely to arise and experiential learning opportunities to tackle those issues which do actually occur. Ethical pitfalls could include law students preparing

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<sup>23</sup> In the USA, Kuehn, and Santacroce, (2014) found in the 2013-14 Survey of Applied Legal Education that case management software in Law School clinics is the most common type of technology employed in casework with 58.6% reporting its use, up from 48.5% in the 2010-11 Survey and 40.5% in 2007-08.

documents in the case management system and emailing copies to their home computer, risking potential breaches of client confidentiality. Other issues could involve students having documents stored on personal computers after they have left the clinic or sold the computer. An understanding of internet security, and how hackers operate, is required to understand the ethics of working from a public WIFI spot and how free WIFI networks allow hackers to access the network and view the contents of the device. Training in the Law Clinic gives law students the opportunity to identify such ethical and practical issues and learn how to address them.

Online and technologically-enhanced pro bono activities certainly pose new challenges for both legal professionals and law students. Understanding how and where data is stored, the encryption of data, and the risks that arise when devices that hold data are lost are all issues associated with the use of technology. Law students also need to carefully consider the use of social media and think about how to manage an online presence not only for themselves but for their clients, to ensure confidentiality is protected (Colvin, 2015; Lackey and Minta, 2012). More generally, it is also crucial that the clinical legal education curriculum addresses questions of technological professionalism by engaging students in a critical discussion of the potential for technology to revolutionise the legal system and the profession, but also requiring them to analyse, and consider how to respond to, the ethical implications that arise when utilising evolving technologies. By educating law students through

and on technology they will be able to support clients with the innovative changes that are happening in the justice system (Goodenough et al, 2013).

### **CONFIDENCE: FOSTERING TRUST ONLINE**

Whilst much of the above discussion has focused on the technological elements of change and evolution that take place within an increasingly digitalized legal system and society, the wider issues involved speak equally to exploration of, and reflection on, the human side of pro bono work, clinical legal education and the legal profession. For students and practitioners to act effectively and ethically in such a world requires them to consider the impact and consequences for the people involved. When providing forms of advice and even representation online, they may be at a distance from their client or other end-user, but that person is still contending with the myriad emotions that can arise from being involved in a legal query or dispute and having to seek legal help and guidance (Barkai and Fine, 1987). They may present many of the same legal, ethical and practical dilemmas which can arise in face-to-face legal work, alongside which students and practitioners will have to contend with the added pressures of navigating the complexities of the online or technological experience as well (Jones et al, 2017).

As an example, one way this could be contextualised for students is by exploring some of the rich literature that exists on the subject of trust, and considering how this could be applied within an online Law Clinic. The sixth mandatory principle given by the

SRA in their Code of Conduct (2011) is that practitioners must “behave in a way that maintains the trust the public places in you”. The concept of trust lacks a single, universal definition, but it can be described as involving a certain level of confidence that something, or someone, will behave in a way that meets your expectations of how it, or they, should behave and that this behaviour will be beneficial, or at the very least not harmful, to you (Brien, 1998). It plays a crucial role within the legal profession, with Webb and Nicolson arguing that:

*We commonly enter into trust relations because of a perceived risk. For example, clients consult lawyers because they have caused accidents, face financial loss from another’s breach of contract or because they want to protect their interests in new business ventures. Trust therefore acts as a mechanism for attempting to reduce risk or control it at acceptable levels. At the same time, trust relations are also themselves risky, precisely because they require an act of faith in committing oneself to the relationship, and because the greater our trust the more vulnerable we are to being unexpectedly let down, if not betrayed. We thus enter trust relationships on the basis of a generally implicit calculus: both that entering the relationship provides a mechanism for dealing with the particular social risk complained of, and that the offer of trust within the relationship indicates that the trustee is not predisposed to cause harm. (Webb and Nicolson, 1999, p.150)*

Trust within the legal profession can operate at the level of both individuals and institutions. For example, an individual solicitor may attend networking events, join relevant associations and spend time reassuring their clients during stressful periods to develop relationships of trust between them and their client on an individual level. At the same time, clients will need to feel a level of trust in relevant legal professions, institutions and processes that will be involved in their issue (Webb and Nicolson, 1999). Clients in an online Law Clinic, or other end-users seeking information on legal topics, are unlikely to know the individual clinicians and law students involved, at least initially. This therefore requires them to place a level of trust in the Law School and in the digital technology they are being asked to navigate.

There is a large body of work on the issue of trust in relation to online consumer transactions, which suggests the level of trust a consumer has in a vendor and website will significantly influence their decision to purchase online (see, for example, Kim et al, 2008). The literature on ODR, although less well-developed in relation to trust, also indicates that it has a key part to play in the process (Rule and Friedberg, 2005). For example, it is likely that issues of trust will arise even prior to the client completing their initial enquiry into an online Law Clinic. There may be questions over the design of the website, its interfaces and the information provided on it that can significantly influence the client's initial decision to request assistance (Wang and Emurian, 2005). Thus this echoes the argument made above about the importance of embedding easily accessible guidance and assistance in any such provision. Even if the client chooses to approach the Law Clinic, they may still lack trust in the digital technologies involved

and be reluctant to provide personal information or give full details of their issue without any face-to-face contact. This could similarly impact in relation to public legal education activities online, where users will also be required to have some form of interaction with the online design and content provided.

At an individual level, law students involved with a client will have to consider how they can develop the client's trust in an environment where they are not meeting face-to-face and the usual bodily and visual cues that assist in developing rapport and trust are likely to be missing (Brett et al, 2007). They will have to be aware of the considerable potential for communications to be misconstrued (Brett et al, 2007). There will also be important ethical considerations to be tackled around whether simply having a code of ethics is sufficient to create a relationship of trust, how such a relationship can be effectively fostered and how the use of technology can be balanced with the very human issues involved. This provides a practical opportunity for law students to contextualise their theoretical understanding, considering the possible consequences of limiting the discharge of the lawyer's ethical duty to professional code compliance alone and exploring the utilisation of wider, character-based approaches to legal ethics practice. (Arthur et al, 2014, p.10).

## **CONCLUSION**

Technology is impacting increasingly and significantly on the practice of law. In 1994, Katsch defined the characteristics of a digital lawyer, stating:

*... The digital lawyer will be employing a broader range of skills and an outlook that reflects not simply what the new technologies do but the manner in which they do it.*

(Katsch 1994: 1169)

Susskind (2013, p.xiii) predicts that “the legal world will change more radically over the next two decades than over the last two centuries”. Technology is driving change and the practice of law is being revolutionised by the development of online courts and virtual law firms, the uptake of technological innovations such as cloud computing and the internet’s ability to offer legal knowledge. Every generation practising law has faced different challenges, but an increasingly digitalised legal system and society poses new and ever more complex dilemmas. At the same time, it also offers exciting new opportunities to generate new forms of online and digitally enhanced pro bono activity and enhance the provision and scope of existing offerings. Given these challenges and opportunities, it is ever-more important that clinical legal education programmes engage with these topics and that there is sufficient training to equip law students to address the myriad of issues that being a digital lawyer can encompass. Even if some, or most, of these law students do not then go on into legal practice, many of the technical, ethical and practical lessons they absorb will be of relevance within both their professional and personal lives in the future, as society increasingly shifts towards the greater use and integration of technology in every walk of life.

These wider legal and societal shifts have implications both for clinicians and law students. Benfer et al (2013) states that recognising generational shifts between legal educators and law students is important in thinking about how we educate the millennial generation. For clinicians, this may mean spending time reflecting on how to embed the key pedagogical benefits of clinical legal education within a changing environment, when addressing law students who may be unreceptive to more traditional teaching methods and pedagogies. To prepare law students for the future, the incorporation of digital literacy into the clinical legal education curriculum is essential, but critically, it is not about teaching ‘computer’ skills. Instead, as Goodenough and Lauritsen (2012, n.p.) argue, it is “about gaining an understanding of the way in which technology works and appreciation of the issues that may arise when using technology”, something which online and technologically-enhanced pro bono activities offer through their practical engagement with these theoretical issues. The incorporation of such online and technologically-enhanced pro bono work into clinical legal education programmes can help law students’ use and understand technology, not only to develop the skills they require for the practice of law, but also to actively engage in thinking of new ways technology can be used to support access to justice (Giddings, 2013; Boske, 2011).

The development and provision of online and technologically-enhanced pro bono activities within clinical legal education programmes provides the ideal opportunity to consider the impact that technology is having on both society in general and the



practice of law in particular. It gives law students a relatively safe space in which to explore the technological, ethical and practical implications which may arise within the clinical legal education programme itself, but also in their future professional and personal lives as well, particularly if they do become one of the new generation of digital lawyers. This exploration may arise through students tackling specific issues that occur during their work online, such as queries in relation to the use of social media and the guarding of client privacy. It may also be via their consideration of broader digital issues, for example, around the use of crowd funding of court cases and the role of trust in online legal transactions. Of course, a number of these issues could be explored within more traditional clinical legal education settings, but discussing them via the use of, and in the context of, online and technologically-enhanced pro bono activities arguably offers law students richer contemporary opportunities for experiential learning and reflection both in and on action (Kemp et al, 2016; Kolb, 2014; Schön, 1991).

Each generation encompasses a different perspective and outlook on the world, which shapes their attributes and traits, and characterises their behaviours. Clinical legal education's reflective pedagogy, insights into social justice and contextualisation of legal issues are all traditional benefits in terms of its use within the educational and professional development of law students. As clinicians, we now have a responsibility to apply these values to our pro bono work within the online setting in a way which allows law students to experience, reflect on and discuss the potential and pitfalls of

digital lawyering and that will equip them for a potential future in a changing profession. This requires clinical legal education programmes to consider the use of online and technologically-enhanced pro bono activities and to explore topics such as network security, cloud computing, encryption, security, wireless networks and data protection. However, they also need to embed a consideration of ethics into these topics to assist the ethical formation of law students by developing their understanding of their ethical obligations and the ethical issues involved.

Particular topics for further research, to facilitate the adaptation and development of online and technologically-enhanced pro bono activities, include the extent to which technology is, or may be, a barrier towards effective experiential learning for some students, the impact of technology on the client experience in an online Law Clinic setting and the most effective methods to foster online reflective practices by law students. It will also be fascinating to trace how students' conceptions of issues such as confidentiality, privacy and trust are influenced by the digital environment. Overall, the development of online and technologically-enhanced pro bono activities offers both challenges to, but also opportunities for, engagement with pro bono activities and the wider teaching of both clinical legal education, as law follows society as a whole into the dawning of a brave, new, digital world.

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## **THE PAST, PRESENT AND FUTURE OF CLINICAL LEGAL EDUCATION IN POLAND**

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### **Abstract**

This paper was written by four lecturers, who are employed at different universities located in Poland's two largest Cities: Warsaw and Cracow. Two of these universities are financed by the government and the other two are financed from students' fees. Our paper critically examines the history of clinical legal education in Poland. It also assesses the economic, legal and social background to the differences and similarities between clinical legal education and legal practice. Furthermore, the paper explains how learning outcomes have led to law clinics becoming a pedagogical and professional treasure trove for individual clinical students and the wider law faculty. The results of this research will demonstrate the invaluable role of learning outcomes to clinical education and professional development. Therefore, the paper will suggest that the methodology of clinical legal education can be employed as a model for Polish higher education.

### **I. HISTORY OF CLINICAL LEGAL EDUCATION IN POLAND**

From a practical point of view, the oldest profession of legal assistance in Poland is the advocate profession. Its sources go back to the Duchy of Warsaw and the

Napoleonic Code applicable therein<sup>1</sup>. Therefore, after regaining independence by Poland in 1919, the self-government of advocates was established. The sources of similar analogical profession, the attorney at law profession, date back to the 1960s, when, following the limitation of advocates' privileges, attorneys at law became the only lawyers rendering services to state-owned enterprises. At the beginning of the 1980s, the self-government of attorneys at law was established. Subsequently, privileges of attorneys at law have constantly been extended. Finally, since 2015, attorneys at law and advocates, have been eligible to appear before courts in all cases and differences between these two legal professions are marginal. In addition, the 1990s have seen the emergence of a new profession of the legal adviser. This is not a licensed attorney, yet its position, similarly to that of legal clinics, has been anchored both in the sphere of codified and applied law<sup>2</sup>. From a theoretical point of view, the training of future lawyers in Poland has a much longer tradition, with the first faculty of law established in Cracow in 1364. It took 600 years to combine academic and practical training, as only by 1<sup>st</sup> October 1997 the first legal clinic at the Jagiellonian University was opened, at the same time being the first legal clinic in Cracow,<sup>3</sup> and first successful legal clinic in Central and Eastern Europe<sup>4</sup>.

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<sup>1</sup> P. Skuczyński, *Etyka adwokatów i radców prawnych*, C.H. Beck 2016, p. 6.

<sup>2</sup> Act of 2 July 2004 on freedom of business activity (consolidated text: Dziennik Ustaw of 2015, item 584, as amended); Judgment of the Constitutional Tribunal of 26 July 2003 SK 22/02 (Dziennik Ustaw of 2003, No. 206, item 2012, v. 1.).

<sup>3</sup> M. Szewczyk, *Thoughts on the reform of the teaching of law* [in] *The Legal Clinic. The Idea, Organization, Methodology*, C.H. Beck 2005, p. 17.

<sup>4</sup> E. Rekosh, *The development of clinical legal education: a global perspective – international experience, the history of legal clinics* [in] *The Legal Clinic. The Idea, Organization, Methodology*, C.H. Beck 2005, p. 43-44.

However, the very idea of establishing legal clinics in Poland in the faculties of law is much older. The oldest known postulate of introducing clinical training in Poland originates from “*Studia i szkice prawne*,” [Legal studies and sketches] a book published in 1904, in which Szymon Rundstein contained a chapter entitled, “Legal Clinics”<sup>5</sup>. This chapter highlighted the necessity of creating legal clinics in Poland, because he regarded the then forms of training future lawyers as having little practical effect. Rundstein even compared the training of law at the time to teaching amputation using carrots, which took place at certain German medical universities<sup>6</sup>. The model of legal clinic functioning, presented in the said publication, was based on the model being discussed in Germany and did not differ significantly from the one present nowadays in Poland. The publication indicated that:

*“In order to prevent the excessive scholastics of lectures, the establishment of so-called legal clinics by universities was proposed. To make it a little bit clearer – the intention was to establish free-of-charge legal assistance offices for poorer people. An office is to be set up at the university under the management of a professor designated by a faculty. Advice is provided by specialists in the presence of students, who, by doing so, may familiarize themselves with life, participate in discussions, answer questions and redraft required acts [...]”<sup>7</sup>*

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<sup>5</sup> S. Rundstein, *Studia i szkice prawne*, Lviv 1904, pp. 229-235.

<sup>6</sup> *Ibid*, p. 232.

<sup>7</sup> *Ibid*, p. 233.

The core of these assumptions function nowadays: clinics are operated by universities, legal advice is provided for indigent people, students take part in discussions and prepare written opinions and documents and the specialised staff supervise the process. The main difference is that it is not lawyers, but students who provide advice, which is possible due to the fact that the written manner of responses was set as a principle of operations of clinics. Written manner is the inner requirement of operation of a legal clinic which is required by The Legal Clinics Foundation in Poland<sup>8</sup>.

The direct model of functioning of clinics in Poland has not been influenced from Germany, but from the United States. It is connected with, *inter alia*, Prof. Maria Szewczyk, who, during a scholarship in the United States, familiarised herself with legal clinics operating there. Her keen interest in this idea convinced the authorities of the Faculty of Law and Administration of the Jagiellonian University to create a first legal clinic in Poland, which happened, as indicated above, in 1997 with the help of Halina Nieć. An anecdote, told by Prof. Szewczyk, reveals that the idea of visiting a law clinic in the United States, during her scholarship, was regarded the same as a proposal for visiting a university hospital and for a long time she refrained from it.<sup>9</sup>

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<sup>8</sup> All clinics in Poland have to meet standards of the polish legal clinics' activity which are required by the Legal Clinics Foundation. One of the standards require that: "legal advice is given in written only". The standards are available in English on the website: <http://www.fupp.org.pl/en/legal-clinics/standards>, access: 10.07.2017.

<sup>9</sup> Cf. T. Bełkowska, *Świąteczny podarunek*, Alma Mater, December 2012 – January 2013, no. 152–153, pp. 12-13.

A year before the opening of the first clinic in Cracow, a conference organised by the European Law Student's Association was held, which related to clinical legal education. It was organised with the assistance of the American Embassy and the Polish bureau of the Organization for Security and Co-operation in Europe.<sup>10</sup> The aim of this conference was to familiarise Polish academicians with the idea of clinical legal education. The second clinic was then established at the University of Warsaw in 1998. Other clinics at the non-public universities, which are in the care of the authors of this publication, were established in 2004 (The Lazarski University Student Legal Clinic, Warsaw) and 2009 (The Student Legal Clinic at the Faculty of Law, Administration and International Relationships of the Andrzej Frycz Modrzewski, Cracow University).<sup>11</sup>

The establishment of the University Legal Clinics Foundation (ULCF)<sup>12</sup> in 2002 was an important moment in the history of the Polish clinical movement, which had already been postulated during the meeting of legal clinics' representatives in 2001.<sup>13</sup> The statutory objective of the ULCF is financing legal clinics and carrying out other programs of practical legal education. This includes preparing and standardising the activity of the clinics, initiating works on the organisation and the promotion of projects of legal regulations regarding their activities, in cooperation with legislative, executive and judicial authorities and self-governments of legal professions. The

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<sup>10</sup> K. Olechowicz, *Historia klinik prawa*, *Klinika* 5(9)/2008, p. 20.

<sup>11</sup> For more information please see, <http://spp.ka.edu.pl> (Last cited 24/05/2017).

<sup>12</sup> For more information please see, <http://www.fupp.org.pl/o-fundacji/statut> (Last cited 24/05/2017).

<sup>13</sup> F. Czernicki [in:] *Studencka poradnia prawna. Idea. Organizacja. Metodologia*, Warsaw 2005, p. 238.

ULCF, ran since its creation by Dr. Filip Czernicki, standardises the operations of the legal clinics in Poland, helps to establish new entities and unites the community of the clinical movement in Poland. This is enabled through organising periodical conferences, during which both the students and their mentors have an opportunity to share their experiences and problems that relate to their clinics.

Just after two years of law clinics operating in Poland, it was advocated to regulate their operations and principles of functioning by means of an Act. In addition, it was suggested that a system of free-of-charge legal assistance be established within legal clinics, whereby students could represent their clients in courts.<sup>14</sup> Until now, the aforesaid recommendations have not been implemented, even though on 5<sup>th</sup> August 2015, the Free-of-Charge Legal Assistance And Legal Education Act was enacted.<sup>15</sup> Legal clinics still remain outside the system of free-of-charge legal assistance, and people who provide such advice are not authorised to act on behalf of the clients in courts.

The model of clinical legal education which was implemented in Poland, is a “live client clinic”<sup>16</sup>, “i.e. the education through work with a real client who has a legal problem, which reflects the work of a legal adviser. Besides, the second important pillar of the practical legal education, which is commonly linked with legal clinics, are

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<sup>14</sup> F. Zoll, *Introduction to a Draft Act on University Legal Clinic*, *Klinika. Czasopismo Uniwersyteckiej Poradni Prawnej UJ*, no. 1(2)/2000, p. 9.

<sup>15</sup> Ustawa z dnia 5 sierpnia 2015 r. o nieodpłatnej pomocy prawnej oraz edukacji prawnej, *Dziennik Ustaw* of 2015, item 1255, as amended.

<sup>16</sup> M. Szewczyk, *Idea uniwersyteckich poradni prawnych*, *Klinika. Czasopismo Uniwersyteckiej Poradni Prawnej UJ*, no. 1/1999, p. 15.

street law-style programs – carried out on a large scale at the Lazarski University. It is worth noticing that Poland was the third country in which the idea of street law in legal education was introduced, thanks to Prof. Monika Płatek from the University of Warsaw<sup>17</sup>.

An important aspect which connects the Polish clinical movement is publications, which are generated as a result of the operations conducted in legal clinics. One of the experience exchange forums is the magazine *Klinika*, initially issued by the Jagiellonian University, and later by the ULCF, in cooperation with C.H. Beck publishing company<sup>18</sup>. The editorial information of the first issue from 1999, stated that the magazine was supposed to be, “a forum of exchanging experiences regarding the operation of particular clinics. It was supposed to present (...) not only “the clinical education method”, but also all innovative educational programs.”<sup>19</sup> It seems that the assumptions of the authors of the first issue remain valid now – merely two decades after writing them down. Indeed, it is a magazine which aims to improve the operation of the legal clinics in Poland by exchanging experiences. In regards to the publications, it is worth noting that the ULCF, in cooperation with C.H. Beck, managed to issue a

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<sup>17</sup> A. Światłowski, *Place of „Clinic Programmes” of the Street Lawtyfe in Legal Clinic Education in Poland*, *Klinika. Czasopismo Uniwersyteckiej Poradni Prawnej UJ*, no. 3/2000, p. 20.

<sup>18</sup> “*Klinika. Czasopismo Uniwersyteckiej Poradni Prawnej UJ*” issue 1/1999.

<sup>19</sup> *Od redakcji* [in:] *Klinika. Czasopismo Uniwersyteckiej Poradni Prawnej UJ*, no. 1/1999, p. 7.

series of textbooks, which help to improve the workshop skills of mentors<sup>20</sup> and students<sup>21</sup>.

The short, review of the history of the Polish clinical movement seems to confirm the opinion of Prof. Eleonora Zielińska discussed previously, that the commencement of clinical education within law faculties is regarded as the beginning of a new era in educating lawyers.<sup>22</sup> In addition, nowadays it is hard to imagine a law faculty lacking this kind of education, further proven by the number of legal clinics in operation – currently in Poland there are 25 law clinics in 16 cities.<sup>23</sup>

## **II. LEGAL, ECONOMIC, POLITICAL AND SOCIAL DENOTATION OF CLINICAL LEGAL EDUCATION IN POLAND**

Twenty years of the evolution of clinical education has had a bearing on Polish codified and applied law.<sup>24</sup> Therefore, the current Polish clinical movement is worth analysing in terms of economic, social, political and legal issues. The objective of this analysis is to highlight the perspectives of the development of the clinical movement, in the background of the parallel expanding conglomerate of Polish liberal legal

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<sup>20</sup> E.g. I. Kraśnicka [ed.], *Metodologia pracy w SPP*, Warsaw 2009, B. Namysłowska-Gabrysiak [ed.], *Studencka poradnia prawna. Podręcznik dla opiekunów*, Warsaw 2009.

<sup>21</sup> E.g. B. Namysłowska-Gabrysiak [ed.], *Studencka poradnia prawna. Kompendium dla studentów*, Warsaw 2008.

<sup>22</sup> E. Zielińska [in:] *Studencka poradnia prawna. Idea. Organizacja. Metodologia*, Warsaw 2005, p. XVI.

<sup>23</sup> Data for 2015/2016, the report entitled “Studenckie Poradnie Prawne. Podsumowanie działalności za rok akademicki 2015/2016”. <http://www.fupp.org.pl/kliniki-prawa/publikacje/raporty> (Last cited 24/05/2017).

<sup>24</sup>Judgment of the Constitutional Tribunal of 26 July 2003 SK 22/02 (Dziennik Ustaw of 2003, No. 206, item 2012, v. 1.).



professions, the centralising market of fee-based and free-of-charge legal services and the generational conflict, which is a natural phenomenon in a stable country.<sup>25</sup>

The multidimensional analysis is always subject to a degree of subjectivity.<sup>26</sup>

Therefore, it must be stated that the author of this section is a 31-year-old male, a legal adviser, trainee attorney at law and an academic teacher. He provides legal assistance for both fee-based and free-of-charge legal services. In addition, he practises both as a tax law specialist and as a lawyer in general. His geographical area of practice embraces the most urbanised part of Poland, i.e. the Upper Silesia and the Cracow Agglomeration, wherein area of 17,662.5 square kilometres is inhabited by circa 5 million people, therefore almost two times more than in the Warsaw Agglomeration<sup>27</sup>.

However, this area does not have a function of a capital city, but its role is just as important, because it serves more like the largest capital city's background. As a consequence, the biggest law firms (Dentons, Sołtysiński Kawecki & Szlęzak, Domański Zakrzewski Palinka, CMS, Deloitte Legal)<sup>28</sup> and the so-called "big four" tax advisory companies (Deloitte, KPMG, PwC, EY),<sup>29</sup> with their registered offices in Warsaw, focus on this area to a lesser extent. Moreover, this area lacks the autonomy,

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<sup>25</sup> R. Prasad, *Generation gap. A sociological study of Intergenerational conflicts*, New Dehli 1992, p. 191.

<sup>26</sup> A. Gelman, C. Hennig, *Beyond Subjective and Objective in Statistics*, 2015, p. 9. [http://www.stat.columbia.edu/~gelman/research/published/gelman\\_hennig\\_full\\_discussion.pdf](http://www.stat.columbia.edu/~gelman/research/published/gelman_hennig_full_discussion.pdf) (Last cited 02/01/2018).

<sup>27</sup> Central Statistical Office, *Size and Structure of Population and Vital Statistics by Territorial Division in 2010, 2011, pp. 13-14.* [https://web.archive.org/web/20111127094758/http://www.stat.gov.pl/gus/5840\\_655\\_PLK\\_HTML.htm](https://web.archive.org/web/20111127094758/http://www.stat.gov.pl/gus/5840_655_PLK_HTML.htm) (Last cited 02/01/2018).

<sup>28</sup> For more information please see, <http://www.rp.pl/Rankingi/304209944-Ranking-Kancelarii-Prawniczych-Rzeczpospolitej-2017---wyniki.html> (Last cited 20/05/2017).

<sup>29</sup> For more information please see, <http://www.rp.pl/Rankingi/306219998-Ranking-Firm-Doradztwa-Podatkowego-2016-wybralismy-najlepszych.html> (Last cited 20/05/2017).

unified local self-government, one unified court of appeal and tax chamber, a result of which the law firms are run by sole practitioners more frequently and the prices of legal services are lower than in the capital city.

Before an analysis of the centralisation of the market of fee-based and free-of-charge legal services is made, it is worth discussing the conglomerate of the Polish liberal legal professions. Currently, alongside the advocates, attorneys at law and legal advisers, legal services are being rendered as part of quasi-legal professions, such as a tax adviser, a chartered accountant and a patent agent<sup>30</sup>. In addition, many young lawyers decide to specialise in a particular field of law. Trainee advocates and trainee attorneys at law are entitled to represent the clients in courts, from the completion of the sixth month of traineeship, which lasts 45 months in total<sup>31</sup>. As a result, we can talk about the conglomerate and not the orderly system of the Polish liberal legal professions. This conglomerate is full of paradoxes, such as:

- employing attorneys at law and advocates in the offices of legal advisers, due to the lack of restrictions for the latter to advertise their services
- running law offices independently by trainee attorneys at law and trainee advocates, who, at the same time, act as legal advisers

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<sup>30</sup> Act of 5 July 1996 on tax advisory services (consolidated text: Dziennik Ustaw of 2016, item 794, as amended), Act of 7 May 2009 on chartered accountants and their self-government, entities authorized to audit financial statements and on public supervision (consolidated text: Dziennik Ustaw of 2016, item 1000, as amended), Act of 11 April 2001 on patent agents (consolidated text: Dziennik Ustaw of 2016, item 221, as amended).

<sup>31</sup> Act of 26 May 1982 – Law on advocacy (consolidated text: Dziennik Ustaw of 2016, item 1999, as amended), Act of 6 July 1982 on attorneys at law (consolidated text: Dziennik Ustaw of 2016, item 233, as amended).

- rendering tax law services by trainee attorneys at law and trainee advocates, who, since the completion of the sixth month of traineeship, have entitlements equal to those of tax advisers
- a possibility to account fees for attorney at law traineeship as tax deductible costs, which is not applicable for fees for advocates' traineeship.

To conclude, there are two legal professions self-governments and internal regulators (of advocates and attorneys at law) and three quasi-legal professions self-governments and internal regulators, which, from the point of view of the market, restrict the powers of unlicensed legal advisers to render legal services. Moreover, these self-governments are dominated by the older generation.<sup>32</sup> Nevertheless, the younger generation still enters the legal services market, carefully omitting the advertisement ban and making use of expanded powers of trainee advocates and trainee attorneys at law. As a result, the diversified conglomerate of liberal legal professions originated, in which the free market crowds out the licensing.

At the same time, legal services are rendered by law students, who do it without remuneration employed in law firms, or free of charge in legal clinics under the

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<sup>32</sup> The average age of members of the Presidium of the Polish Bar Council (*Prezydium Naczelnej Rady Adwokackiej*) and the Presidium of the National Council of Attorneys at Law (*Prezydium Krajowej Rady Radców Prawnych*) is 57 years. <http://www.nra.pl/nra.php?id=329> (Last cited 03/01/2018), <http://kirp.pl/o-samorzadzie/organy-ustawowe-i-regulaminowe/prezydium-krajowej-rady-radcow-prawnych/> (Last cited 03/01/2018).

guidance of academic teachers.<sup>33</sup> During 2015 and 2016, however, a parallel state system of free-of-charge legal assistance was established.<sup>34</sup> Consequently, the younger generation of lawyers on a wider scale has been grouping in non-governmental organisations (NGOs), which, on the basis of the contests organised by local self-governments, constitute 50 per cent of 1,500 free-of-charge legal assistance points (FLAP).<sup>35</sup> The remaining 50 per cent of the FLAP are those operated by legal professions self-governments of advocates and attorneys at law. Moreover, on the estimation based on the questionnaires, it stems that 40 per cent of lawyers employed in the FLAP and recruited by NGOs are graduates of the legal clinics.<sup>36</sup>

As a result, during 2015 and 2016 the quasi-regulated market of free-of-charge legal services began in Poland. Nonetheless, legal services are concurrently rendered by the offices of the Members of Parliament and the Senatorial offices, as well as by small law firms. These law firms act due to economic interests, and treat a free-of-charge service as a service aimed at attracting clients.

That said, in Poland, free-of-charge legal services exist in parallel to the corporations of liberal legal professions. In the former, the clinical legal education method was applied only with respect to part of the younger generation of lawyers<sup>37</sup>.

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<sup>33</sup> Currently, the University Legal Clinics Foundation coordinates 25 legal clinics, in which circa 2,000 students and 300 lawyers operate. <http://www.fupp.org.pl/kliniki-prawa/publikacje/raporty> (Last cited 20/05/2017).

<sup>34</sup> Act of 5 August 2015 on the free-of-charge legal assistance and legal education (Dziennik Ustaw of 2015, item 1255, as amended).

<sup>35</sup> Dogma Association in Mikołów, running 33 FLAP that hire 52 lawyers (mainly in the Upper Silesia), can serve as an example.

<sup>36</sup> The questionnaire conducted among the lawyers employed by the Dogma Association in Mikołów on 9 April 2017 thanks to the courtesy of President Iwona Serbeńska.

<sup>37</sup> A. Zoll [in:] *Studencka poradnia prawna. Idea. Organizacja. Metodologia*, Warsaw 2005, p. XV.

Nevertheless, in the light of the increased competition, clinical legal education is a method that allows adopting models of responsibility for the client and strengthens the quality of the services rendered. This method shall have a wider application in the process of the education of aspiring lawyers and its use by the older generation of practice teachers<sup>38</sup> and NGOs, so that sole practitioners can develop the know-how worked throughout the last 20 years by ULCF.

The brands of the biggest and most renowned law firms indicate the increasing involvement in the English, Scottish, Canadian, American and Dutch capital,<sup>39</sup> although the Polish market of free-of-charge legal services is certainly not as dominated by the so-called “big four” as the market of fee-based tax advisory<sup>40</sup>. However, it cannot be disregarded that the fastest growing law firm in Poland is Deloitte Legal, with KPMG D. Dobkowski, PwC Legal and EY Law also operating in the Polish fee-based market of legal services.<sup>41</sup> In Poland it is still not customary to establish branches providing free-of-charge legal assistance in the biggest law firms in order to strengthen their image. It is even more important as the FLAP are mainly

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<sup>38</sup> The teachers, who teach practical subjects during academic studies and during advocates and attorneys at law apprenticeships, such as civil or criminal procedure, so students and trainee: advocates and attorneys at law shouldn't take a part in so many lectures and solve theoretical cases, but they should write more documents, such as writs or appeals and take a part in real cases, at least they should simulate.

<sup>39</sup> <http://www.rp.pl/Rankingi/304209944-Ranking-Kancelarii-Prawniczych-Rzeczpospolitej-2017---wyniki.html> (Last cited 20/05/2017).

<sup>40</sup> <http://www.rp.pl/Rankingi/306219998-Ranking-Firm-Doradztwa-Podatkowego-2016-wybralismy-najlepszych.html> (Last cited 20/05/2017).

<sup>41</sup> <http://www.rp.pl/Rankingi/304209944-Ranking-Kancelarii-Prawniczych-Rzeczpospolitej-2017---wyniki.html> (Last cited 20/05/2017).

located outside the area of the capital city and the public money aimed at financing the FLAP are distributed on the basis of tenders organised by local self-governments<sup>42</sup>.

There are tax solutions that could boost the free-of-charge legal assistance activities of the biggest law firms. Such solutions encompass the possibility to reduce the tax basis of the *Personal Income Tax (PIT) and Corporation Income Tax (CIT)* by the donations granted to NGOs and the possibility to transfer 1% of the PIT to the latter.<sup>43</sup> Such solutions already exist in the tax systems of other highly developed countries.<sup>44</sup> Moreover, the corporate structures coming from the highly developed countries such as the United States, Canada, Australia, Japan, Germany, France, the Netherlands and the United Kingdom, are, as a rule, comprised of the so-called corporate foundations, such as the Ronald McDonald House Charities<sup>45</sup>. Therefore, it is likely to expect that the “big four” will enter the Polish market of free-of-charge legal services in the coming years.

Nevertheless, if such action is to have only the image reasoning behind it, it will be similar to French-German Opel solution which manufactures cars in the Polish Upper Silesia and exports them to the United Kingdom under the Vauxhall brand. In essence, rendering the high quality free-of-charge legal services comes down to the

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<sup>42</sup> Article 11 paragraph 1 and 2 of The free-of-charge legal assistance and legal education Act 2015.

<sup>43</sup> Act of 26 July 1991 on the personal income tax (consolidated text: Dziennik Ustaw of 2016, item 2032, as amended); Act of 15 February 1992 on the corporate income tax (consolidated text: Dziennik Ustaw of 2016, item 1888, as amended)

<sup>44</sup> P. Klimek, Elementy zapobiegające nadmiernym odliczeniom darowizn na gruncie podatków dochodowych, [in:] I. Czaja-Hliniak (ed.), *Nauka prawa finansowego po I dekadzie XXI wieku – Księga Pamiątkowa dedykowana Profesorowi Apoloniuszowi Kosteckiemu*, Cracow 2012, pp. 449-463

<sup>45</sup> P. Klimek, *Możliwość odliczenia 1% podatku dochodowego na rzecz fundacji korporacyjnych i społecznych*, *Edukacja Prawnicza*, no. 5 (125); Extra supplement: *Klinika – Czasopismo Fundacji Uniwersyteckich Poradni Prawnych*, no. 10 (14), pp. 21-23.

models adopted in clinical legal education and the responsibility for the client's problem. In the absence of such models, the authority of the clinical movement can collapse in the same manner as the authority of the biggest law firm, which lobbies the government authorities in an unreasonable manner.<sup>46</sup>

Therefore, the key challenge for the Polish clinical movement is to educate by disseminating good models, based on practical abilities, such as regularity of conduct, revision of the most essential newly issued legal acts and court judgments and interviewing a client in a reliable and skillful manner in order to determine the nature of the problem. Only then will assistance which is provided to the most socially disadvantaged people be effective, irrespective of whether it will be provided by a student, legal adviser, advocate, attorney at law or tax adviser, acting individually or in a renowned law firm.

To sum up, in order to develop clinical education throughout all law schools in Poland, the clinical movement shall:

- from the economic point of view: take into account the phenomenon of increasing importance of the biggest law firms, which may be interested in the market of free-of-charge legal services
- from the social point of view: remain resilient to the intensifying divisions between lawyers providing legal assistance

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<sup>46</sup> [http://www.batory.org.pl/upload/files/Programy%20operacyjne/Odpowiedzialne%20Panstwo/Lobbying\\_Raport.pdf](http://www.batory.org.pl/upload/files/Programy%20operacyjne/Odpowiedzialne%20Panstwo/Lobbying_Raport.pdf) (Last cited 20/08/2017)

- from the political and legal point of view: react to decisions which are contrary to pro bono interests, by lobbying in order to guarantee that legal clinics have the same status of the FLAP and are financed from the public resources. However, if this status and financing proves to be too excessive, then the clinical movement shall focus on the cooperation with NGOs, as the estimates highlighted in various questionnaires indicate that in 2016 the FLAP refused the assistance in 68,300 cases, including assistance to the following persons: poor, disabled, unemployed, those afflicted with alcoholism, single parents or non-nationals.<sup>47</sup>Therefore, there is still a considerable number of people who require legal assistance. However, the large amount of NGOs can be developed, thanks to younger generation of lawyers educated with clinical legal education method. NGOs do not possess as advanced legal knowledge and skills as the clinical movement can provide.

### **III. THE LEGAL CLINIC – A TREASURE TROVE OF LEARNING OUTCOMES**

Since, the 1970's the European Union has sought to harmonize and improve the educational systems of member states through the adoption of a centrally agreed set

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<sup>47</sup> The questionnaire conducted among the lawyers employed by the Dogma Association in Mikołów on 9 April 2017 thanks to the courtesy of President Iwona Serbeńska.



of frameworks and policies known as the Bologna process.<sup>48</sup> One of the most important aspect of this process was the establishment of learning outcomes that were then incorporated into the parliamentary legislation that regulates the educational practices of member states.<sup>49</sup> In Poland, the 2005 Higher Education Act incorporated the standardised qualification framework into law.<sup>50</sup> This was augmented by the 2011 Education Act which requires all elements of syllabi to be matched to specified learning outcomes.<sup>51</sup> It is hoped that this will led to a shift from subject/teacher based pedagogy to learning that is more focused on the needs of the learner.

These outcomes are divided into three categories: knowledge, skills and social competences that are gained in the course of education by a learner:<sup>52</sup>

- a) knowledge – “the outcome of the assimilation of information through learning. Knowledge is the body of facts, principles, theories and practices that is related to a field of work or study. In the context

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<sup>48</sup> <http://www.pilnet.org/public-interest-law-resources/25-clinical-legal-education-and-the-bologna-process.html>

<sup>49</sup> *“The shift to learning outcomes. Conceptual political and practical developments in Europe”*, CEDEFOP 2008

<sup>50</sup> Law on higher education (pdf, Dziennik Ustaw – Official Journal of Laws of 27 July 2005, No.164, item 1365, as amended; art. 9 ust. 1. punkt. 2). [http://en.uw.edu.pl/wp-content/uploads/2014/06/law\\_on\\_higher\\_education.pdf](http://en.uw.edu.pl/wp-content/uploads/2014/06/law_on_higher_education.pdf) (Last cited ?).

<sup>51</sup> Rozporządzenie Ministra nauki i szkolnictwa wyższego z dnia 2 listopada 2011 r. w sprawie Krajowych Ram Kwalifikacji dla Szkolnictwa Wyższego, Dz.U. 2011 nr 253 poz. 1521.

<sup>52</sup> For more information please see, <http://www.nauka.gov.pl/krajowe-ramy-kwalifikacji/> (Last cited on 26/05/2017).

of the European Qualifications Framework,<sup>53</sup> knowledge is described as theoretical and/or factual”<sup>54</sup>

b) skills – “the ability to apply knowledge and use know-how to complete tasks and solve problems. In the context of the European Qualifications Framework, skills are described as cognitive (involving the use of logical, intuitive and creative thinking) or practical (involving manual dexterity and the use of methods, materials, tools and instruments)”<sup>55</sup>

c) competence – “the proven ability to use knowledge, skills and personal, social and/or methodological abilities, in work or study situations and in professional and personal development”. In the context of the European Qualifications Framework, competence is described in terms of responsibility and autonomy.”<sup>56</sup>

The previous section discussed developments in legal education and the practice of working with real clients in Polish legal clinics. This has enabled learning outcomes

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<sup>53</sup> The European Qualifications Framework (EQF) is “a reference tool to compare the qualification levels of the different qualifications systems and to promote both lifelong learning and equal opportunities in the knowledge-based society, as well as the further integration of the European labor market, while respecting the rich diversity of national education systems”.

<sup>54</sup> Annex I for Recommendation of the European Parliament and of the Council of 23 April 2008 on the establishment of the European Qualifications Framework for lifelong learning, (Official Journal 111/1 of 6.5.2008).

[https://eurlex.europa.eu/legalcontent/EN/TXT/HTML/?uri=CELEX:32008H0506\(01\)&from=EN](https://eurlex.europa.eu/legalcontent/EN/TXT/HTML/?uri=CELEX:32008H0506(01)&from=EN) (Last cited?).

<sup>55</sup> Ibid.

<sup>56</sup> Ibid.

to be introduced to a greater extent than other parts of Polish Higher Education. The ultimate aim of the education process of a legal clinic is to develop a student's social competences and skills, which are based on knowledge of the law, that the student can use to feed into their future learning. An equally important element of education in Polish clinics is that, underlying all three components (knowledge, social competences and skills) stands a human being (the student) living in a particular economic, political, legal and cultural system, who throughout the entire education process is confronted with ethical dilemmas.

In the light of the considerations set forth in the previous section of this publication, the legal clinic may be perceived as the place where both the student and the teacher (mentor) are effectively educated. The authors of this article understand the aims of effective education are the following:

- a) preparing students for professional practice and provide effective assistance to the clients;
- b) developing the students' sense of taking responsible for problems;
- c) assisting the student in obtaining such learning outcomes that allows them to understand what has been learnt.

This understanding of the educational process allows educators to fully implement in the clinics the requirements of the Bologna Process, together with its flagship "learning outcomes." The positive effects of this have been registered by both the students and the university senior management. There is a common belief among

students that law clinics are ideal places where, under the vigilant eye of their mentors, one can verify their knowledge, skills and competences required for the practical exercise of the profession.<sup>57</sup> This positive effect has been noted by the senior management of the authors' universities, as it is seen as a demonstration of the implementation of the aims envisaged by the Bologna Process and successive ministers of education.

At the same time, what has been emphasised by the authors in the previous sections is that the notion of "effective education" cannot be considered in isolation from the economic, legal, social and cultural situation in which the students and their mentors function. Pedagogical practices in Poland are often centred on more traditional knowledge or teacher centred methods and this has proved to be a barrier to a more fuller implementation of the learner centred approaches based on learning outcomes. In addition, many students focus on the attaining of a qualification or certificate as a means in itself rather than focusing on developing their skills and knowledge.

In contrast to these more traditional teacher/knowledge centred pedagogical practices favoured in most of Polish higher education, legal clinics have embraced more learner centred methods. The considerable autonomy enjoyed by Polish legal clinics has allowed them to employ a number of fresh approaches to clinical education, comprising of diverse approaches to the students' education, applied educational

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<sup>57</sup> In press R. Dunn 'The Knowledge, skills and attributes considered necessary to start day one training competently and whether live client clinics develop them' (2018)

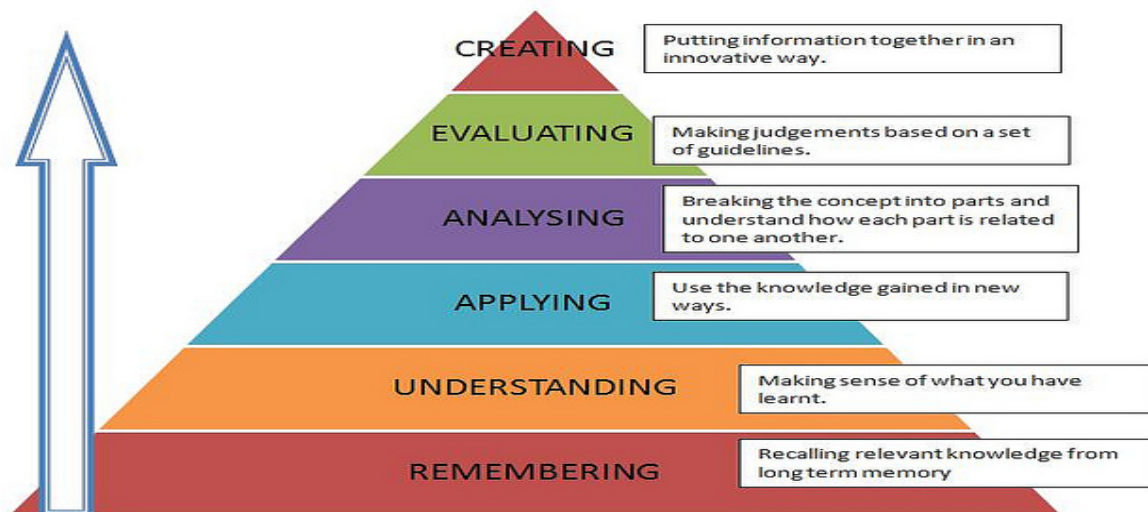
methods and open-mindedness of the academic teachers. Above all, such clinics are treasure troves of knowledge, in regards to the educational methods and developing learning outcomes, which are not merely a wish list. It should be noted that the learning outcomes are most effective when they are transparent and measurable, clearly defined and able to be accomplished by the students. Transparency enables the student and the clinician to clearly understand what learning needs to be achieved, while measurability means it is clear to what extent the student has achieved their goal. It also can provide a robust framework for assessing and assessment. In addition these elements can provide the basis for a dialogic relationship between clinicians and students. Beyond the university environment potential employers could use these transparent and measurable learning outcomes to select applicants.

This could be accomplished by the legal clinic emphasising to students the links between the syllabus, assessment criteria and its expectation of students. However, more work needs to be done in this area. The classes in Polish legal clinics are planned in such a manner that the outcomes can contribute to the achievement of the educational goals set forth in Bloom's taxonomy (see Figure 1), displayed below,<sup>58</sup> which constitutes a hierarchy of increasingly complex processes. These processes, in the context of clinical legal education, are aimed at preparing students both in the

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<sup>58</sup> Bloom, B. S. (ed.). *Taxonomy of Educational Objectives*. Vol. 1: *Cognitive Domain*. New York: McKay, 1956.

course of short seminars and training sessions, as well as for producing opinions or judicial documents.<sup>59</sup>



**Figure 1 – Bloom's Taxonomy of Learning<sup>60</sup>**

At the top of his taxonomy, Bloom placed “creating,” which can be understood as the ability to design, construct, use and create something new. Creating, being the final learning outcome, ideally fits into the education process in Polish legal clinics where the final learning outcome for the student is the preparation of an opinion or a writ. Therefore, the outcome of the student's work with each client is creating something new and, in order to accomplish it, the student has to apply social skills competences based on the gained knowledge such as successfully interaction with clients, fellow students and mentors. The knowledge which the student has ,

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<sup>59</sup> Tyler, Jo A., and Faith Mullen. "Telling tales in school: storytelling for self-reflection and pedagogical improvement in clinical legal education." *Clinical L. Rev.* 18 (2011): 283.

<sup>60</sup>[https://www.google.pl/search?q=bloom+taksonomii&source=lnms&tbm=isch&sa=X&ved=0ahUKEwiRkdewp4\\_UAhXHSBQKHbMhD3AQ\\_AUICCgD&biw=774&bih=373&dpr=2.4#imgrc=AO5AHsIFk6QbEM](https://www.google.pl/search?q=bloom+taksonomii&source=lnms&tbm=isch&sa=X&ved=0ahUKEwiRkdewp4_UAhXHSBQKHbMhD3AQ_AUICCgD&biw=774&bih=373&dpr=2.4#imgrc=AO5AHsIFk6QbEM) (Last cited 28/05/2017).

understood, applied, analysed and assessed is to meet the challenge of providing legal assistance.

We strongly believe that working with clients, rather than published materials, gives students valuable experience of the complexity of real life legal practice. This can furnish students with a sense of the enormous responsibility for providing effective assistance to clients and the potentially far reaching consequences of their actions. Working with clients requires the tutor to introduce additional learning outcomes, which, without the client's participation, would not be possible. Soren Kierkegaard argues that having social skills are more important than an understanding of theory or pedagogy when seeking to relate to another person in a subject manner.<sup>61</sup> As clinicians we can help students develop these personal competences through their practice in law clinics.

The Polish qualifications framework can be adapted by institutions to better meet their particular needs.<sup>62</sup> For example at Lazarski University, the Faculty of Law and Administration Directional learning outcomes (see Table 1 below) defines 11 desirable skills. This means that even if the student does not master everything, he will still

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<sup>61</sup> S. Wasiołka, the presentation *Narzędzia informatyczne w pracy dyrektora szkoły*, Poznań 27.11. 2013 <https://www.slideshare.net/Jozeffbazin/prezentacja-dyrektorzy-pozna>

<sup>62</sup> J. Kudła, M. Stachowiak – Kudła, A. Figurski Quality of Teaching and Research in Public Higher Education in Poland: Relationship with Financial Indicators and Efficiency „Journal of Management and Business Administration. Central Europe” Vol. 24, No. 4/2016, p. 88–108 0

graduate. However, the level of their mastery of the skills is partly reflected in their final grade.<sup>63</sup>

**Table 1 - Faculty of Law and Administration Lazarski University Directional learning outcomes: Law**

K_U01	1. is able to properly interpret and explain the importance of particular legal norms and mutual relations between these norms within different branches of law
K_U02	2. is able to use the acquired theoretical knowledge of different branches of law to describe and analyse the reasons and the course of processes of amending law and is able to formulate own opinions and select critical data and methods of analysis that are used in legal studies
K_U03	3. is able to forecast changes in legal regulations with the use of sophisticated research methods and tools typical of legal studies
K_U04	4. is efficient in dealing with the Polish legal system; uses adequate norms and legal rules in order to solve particular problems; has good skills in solving complicated legal problems in specified branches of law in accordance with subjects selected on his/her own
K_U05	5. has good skills in using the acquired knowledge to present own opinions, doubts and suggestions as well as supporting them with elaborated arguments and following ethical principles
K_U06	6. has a skill in proposing particular solutions of legal problems on his/her own and in carrying out a procedure of decision-making in this area
K_U07	7. has a skill in forecasting consequences of the planned actions in different branches of law
K_U08	8. has well-developed research skills; formulates issues, selects adequate research methods, techniques and tools that are used in legal studies; develops, presents and interprets research findings; is able to draw adequate conclusions and to indicate directions of further research within the selected branches of law
K_U09	9. has a good skill in drawing up basic procedural documents regarding legal issues, preparing written analyses of selected legal issues with a proposal of adequate solutions with the use of the acquired theoretical knowledge

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<sup>63</sup> In the Polish education system, each student after completing a course receives a grade on the scale of 1 - 5, with 1 being the lowest grade and 5 the highest. Passing grades are from 3 to 5. However, with regards to ECTS points all passing grades are awarded the same number of ECTS points. Therefore, a clear description of the attainment of the desirable skills by a student is important for potential employers as a way to differentiate between candidates.



K_U10	10. has a good skill in preparing speeches directly connected with legal matters and regarding issues on the borderline between law and other sciences with the use of the acquired theoretical knowledge
K_U11	11. has linguistic skills in accordance with the requirements specified for the B2 level of Common European Framework of Reference for Languages

The analysis of the survey outcomes lets us conclude that work within the clinic allows the students to gain and preserve the skills marked with symbols K\_U01, K\_U04, K\_U05, K\_U06 and K\_U09. The most important out of the skills appears to be the one marked with symbol K\_U09, i.e. “has a good skill in drawing up basic procedural documents regarding legal issues, preparing written analyses of selected legal issues with a proposal of adequate solutions with the use of the acquired theoretical knowledge”<sup>64</sup>.

This ability is of particular importance, as the preparation of even a simple writ in the Polish legal system requires an in-depth analysis of a problem, because in the majority of cases a writ constitutes a written analysis of the problem (e.g. in the case of a statement of claim or complaints) fulfilling the requirements of the procedural law. Furthermore, it is essential to remember that errors or formal shortcomings in pleas cannot be often corrected or supplemented during Polish court proceedings. Therefore, any erroneous analysis of the problem may result in the erroneous preparation of court documents without the possibility of corrections, which may result e.g. in the exhaustion of the access to court in seeking remedies.

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<sup>64</sup> [https://www.lazarski.pl/fileadmin/user\\_upload/dokumenty/wydzial-prawa-jakosc/Efekty\\_ksztalcenia\\_Prawo.pdf](https://www.lazarski.pl/fileadmin/user_upload/dokumenty/wydzial-prawa-jakosc/Efekty_ksztalcenia_Prawo.pdf)

Of course, let us not forget the fact that establishing a successful Legal Clinic would not be possible without the support of the clinical teachers, who are well aware that only through the use of well-selected educational methods may the desired learning outcomes be achieved. Therefore, in the context of the changes to the manner of teaching expected to be implemented in Polish higher education, law clinics become not only a place for creating concepts on dealing with such changes, but also a resource bank of experience and knowledge for practitioners, who are able to cope with new challenges. To sum up, the key to the success of Polish legal clinics lies in the structure and implementation of these educational programs. Students can achieve the learning outcomes, allowing them to become creative, in line with Bloom's taxonomy. Thus the creation of original legal opinions by the students from their interaction with clients, examination of documents and knowledge of the law is the most tangible benefit of clinical education. In addition, teachers work in a group comprising of more open-minded people who are well prepared to exercise their profession. This is undoubtedly one of the key pillars that support the successes of the Polish legal clinics, particularly with regard to the implementation of educational outcomes.

Thus Polish legal clinics are good places to help students understand the relationship between theory and practice,<sup>65</sup> as, stated in the well-known Arabic proverb, "A man who learns and learns, yet fails to apply the knowledge that has been learnt, is like a farmer who sows and sows, yet fails to harvest crops from a field."

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<sup>65</sup> Grimes, Richard. "Learning law by doing law in the UK." *International Journal of Clinical Legal Education* 1 (2014): 54-57.

Therefore, legal clinics are places where the change to the Polish legal education culture can originate.

#### **IV. METHODOLOGY OF CLINICAL LEGAL EDUCATION – THE FUTURE OF POLISH HIGHER EDUCATION**

All educational methods, used when working with a group, shall be adjusted to the needs and abilities of the learners, as well as focused on the outcome of this specific interaction between the lecturers and the learners. Only ensuring that the academic courses are based on such model of thinking about the courses with the students allows teaching and building relationships in an effective manner, making a good cooperation throughout an academic year possible.

The cooperation developed with the students is extremely important, in particular in clinical education, as this relationship directly impacts the fulfilment and implementation of the clinical education standards,<sup>66</sup> which apply to all university legal clinics, forming part of the ULCF's network.<sup>67</sup>

The clinical courses, due to a smaller number of students in the groups and a closer working relationship between the lecturers and the students (which is necessary for working on documents for clients or for workshops during which each of group member should have emotional comfort to present their opinion) could serve as a

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<sup>66</sup> I hereby refer to the extended standard, which relates to ensuring by a legal clinic of the supervision of the didactic staff over the students (standard no. 2 no. 9/2014 of the resolution of the University Legal Clinics Foundation dated 08 March 2014, <http://www.fupp.org.pl/kliniki-prawa/standardy> (Last cited 18/05/2017).

<sup>67</sup> Please read more on the activities of this foundation: <http://www.fupp.org.pl> (Last cited 18/05/2017).

model for all university courses.<sup>68</sup> In Poland the courses at higher educational institutions may adopt a form of, *inter alia*: lectures, workshops, seminars or conservatories, all of which have one objective: to transfer knowledge. Yet in regards to clinical courses, an additional objective lies in transferring also practical abilities, necessary in the lawyers' future professional work<sup>69</sup>.

Moreover, sensitising to the needs of people threatened by social exclusion also remains an essential element of implementation of the clinical program.<sup>70</sup> The courses which may have the aforesaid educational effects may adopt a form of simulations, workshops or Oxford-style debates. The model of clinical courses is extremely valuable for the purposes of preparing all courses with a group and should be used as an great example of how to work and teach, using methods which involve all group members and allow to memorise by doing, which is better than only by listening. It is encouraging that within the judge traineeship programs the emphasis has been put on active forms of work with the group, in didactic work with future judges and prosecutors.<sup>71</sup> The methodology of education at such types of traineeship envisages

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<sup>68</sup> One can indicate e.g.: M. Szeroczyńska, I. Mulak, *Jak uczyć prawników dobrej komunikacji z klientem*, Warsaw 2015; Ł. Bojarski, B. Namysłowska-Gabrysiak, *Symulacja rozpraw sądowych jako metoda edukacyjna. Materiały do przygotowania i przeprowadzenia symulacji*, Warsaw 2008.

<sup>69</sup> See more e.g.: F. Zoll, *Jaka szkoła prawa*, Warsaw 2004, and the whole charter by: L. Wortham, C. Klein, Ł. Bojarski in: *The Legal Clinic. The Idea, Organization, Methodology*, Warsaw 2005. The book can be find here: [http://www.fupp.org.pl/down/legal\\_clinic.pdf](http://www.fupp.org.pl/down/legal_clinic.pdf). (Last cited ?).

<sup>70</sup> P. Kubiak, *O empatii i wypaleniu w pracy studenta kliniki prawa – czyli jak pomagać i się nie przejmować*, in: *Klinika* no. 18(22)2015, p. 9 et seq., as well as A. Świderek: *Metodyka zajęć Street Law, znaczenie dla społeczeństwa obywatelskiego i dobre praktyki*, in : *Klinika* no. 13 (17) 2012, p. 3 et seq.

<sup>71</sup> See F. Zoll, *Wprowadzenie do programu aplikacji ogólnej oraz aplikacji sędziowskiej i prokuratorskiej*, <https://www.kSSIP.gov.pl/aplikacje/o-aplikacjach/metodyki-nauczania> (Last cited 18/05/2017).

case study methods, the simulation of proceedings and main courses (which are intended to be run using the interactive method and implemented in a small group).<sup>72</sup>

Currently, the works on the reform of the Act dedicated to higher education are pending in Poland. They are performed by the Ministry of Science and Higher Education. In the Ministry's view:

*“an in-depth revision is required for the system of financing the universities, as well as the manner of managing the universities and the higher educational institutions. It is necessary to internationalise the education, intensify the cooperation between the science and the business, create new paths of academic and didactic career and adjust the number of students for particular fields of study to real needs of the labour market<sup>73</sup>.”*

The centre of each reform and the main objective shall always be fulfilling the students' needs and transferring the necessary knowledge to them in the course of higher education studies. The experience of these Polish clinical teachers may be used for the purposes of contemplated higher education reforms in Poland as regards, *inter alia*, the methodology of working with students.

Only the complete preparation and open-mindedness to active methods, as well as new technologies and the modern attitude towards a student-lecturer relationship and the role of a lecturer himself, will allow the full implementation of the

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<sup>72</sup> Ibid.

<sup>73</sup> For more information please see, <http://www.nauka.gov.pl/strategia-gowina/> (Last cited 18/05/2017).

recommenations of the programmes of higher education institutions and enable them to educate in a responsible manner in the future.

While projecting the changes to the higher education sphere, also the technological innovations shall be implemented during the work with the students. It is particularly important with respect to the implementation of law-related courses due to the increasing computerisation of the judicial system.<sup>74</sup> A student has to be prepared to work individually with the courts' computerised system and shall be able to use adequate IT platforms.

Courses in smaller groups undoubtedly facilitate the transfer of knowledge (with good impact on activating<sup>75</sup>). They also allow the implementation of the standards of the university legal clinics, for years being undertaken on the basis of the model of a small group – active methods – and substantive support of a mentor.

This method of conducting the courses is increasingly being used also for the implementation of other academic courses (traditionally more non-interactive) and allows the students to have an opportunity of participating in the attractive activities outside of the legal clinic.

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<sup>74</sup> Regarding the computerization of the judicial system, see further: K. Flaga-Gieruszyńska, J. Gołaczyński, D. Szostek, *Informatyzacja postępowania cywilnego*, Warsaw 2016; R. Cisek, *E-protokół i inne „nowinki” informatyzacji sądownictwa, czyli po co to komu?* in: *Kwartalnik Naukowy Prawo Mediów Elektronicznych* no. 3/2011 p. 5 et seq., K. J. Furman (Kowalska), *Przygotowanie do wykonywania zawodu prawnika w świecie z informatyzowanego wymiaru sprawiedliwości – rozważania na tle działalności europejskich klinik prawa*, in: *Prawo Mediów Elektronicznych*, 2015.

<sup>75</sup> B. Niesporek-Szamburska, *Metody i formy pracy*, online: <http://www.fil.us.edu.pl/dok/doktoranckie/dokument3.pdf> (Last cited 15/12/2015).

The methodology of clinical education shall constitute the inspiration for planned courses at higher education institutions. Of course, the implementation of its certain achievements, e.g. teaching through the mock court trials or conducting workshops with a group of students, requires not only a qualified lecturer, but also an adequate architectural and technical background (the size of an auditorium, the desks and chairs layout are of importance). These elements shall be taken into account when planning changes of and introducing new classes to the timetable of academic courses of a given university. Undoubtedly, the demand for such backup will generate the change of the way of thinking about the academic sphere.

It is crucial to ensure that academic teachers are able to constantly enhance competences in regards to pedagogy, group work and public appearances.

Persons willing to practise in this profession shall have completed courses in this respect. It would be desirable to introduce such courses as early as during the doctoral studies. The needs as regards the enhancement of teachers' competences are met by one of the projects of the Ministry of Science and Higher Education, aimed at the establishment of models of teachers' education,<sup>76</sup> the main objectives of which are:

*“preparing a detailed comparative analysis regarding the systems of teachers’  
education in selected European countries and recommendations as regards*

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<sup>76</sup> For more information please see, <http://www.nauka.gov.pl/projekty-i-inicjatywy/opracowanie-modelowych-programow-ksztalcenia-nauczycieli-w-ramach-dzialania-3-1-kompetencje-w-szkolnictwie-wyzszym.html> (Last cited 18/05/2017).

*the changes to the system of teachers' education in Poland, and establishing models of teachers' education at the higher education institutions."*<sup>77</sup>

Such high expectations shall be met by the teachers exercising their profession at all educational levels, including the academic stage<sup>78</sup>.

## CONCLUSIONS

A progress in diversity of legal professions is currently being observed in Poland. This can be seen, *inter alia*, in the possibility of employing the lawyers with three years of experience in providing free-of-charge legal advice in free-of-charge legal assistance points, which results in the fact that the students, acting in the clinics since the second year of their studies, are granted the right to practice the profession of a legal adviser instantly following graduation.

Such a dimension of the progressive deregulation of legal professions means that the legislator has confidence in the quality of legal assistance provided at Polish legal clinics, which use and develop modern education methods and new technical solutions, making it possible to achieve outstanding learning outcomes.

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<sup>77</sup> Ibid.

<sup>78</sup> In the literature, it is pointed out that training is an inseparable element of teacher's professional development. See: G. Kosiba, *Doskonalenie zawodowe nauczycieli – kategorie, kompetencje, praktyka*, in: *Forum Oświatowe*, Vol 24, No 2(47) (2012), the short abstract available on: <http://forumoswiatowe.pl/index.php/czasopismo/article/view/17/30> (last cited: 14.07.2018), as well as: *Podnoszenie kompetencji nauczycieli kształcenia zawodowego we współpracy z przedsiębiorstwami*, report by: Instytut Nauk Społeczno-Ekonomicznych sp. z o.o., s. 25 and A. Jastrzębska, *Kilka uwag o podnoszeniu kwalifikacji zawodowych nauczycieli, czyli o zawodowym dojrzeniu*, on: <http://edurada.pl/artykuly/kilka-uwag-o-podnoszeniu-kwalifikacji-zawodowych-nauczycieli-czyli-o-zawodowym-dojrzewaniu> (last cited: 14.07.2018).



It may be concluded that clinical legal education has proved to be a good educational method because lawyers educated in legal clinics haven't many barriers or issues with finding a job, and currently constitutes an answer to the needs of a widely understood market of legal services in Poland, in both the fee-based and free-of-charge sectors.<sup>79</sup>

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<sup>79</sup> K. Mamak, W. Górowski, *Absolwenci studenckich poradni prawnych cenieni na rynku pracy*, 2017. <http://karne24.com/dr-gorowski-absolwenci-studenckich-poradni-prawnych-cenieni-rynku-pracy/> (Last cited 03/01/2018).

## **ESTABLISHING AN ENVIRONMENTAL LAW CLINIC IN CHINA: A REVIEW OF RELEVANT FACTORS AND VARIOUS MODELS.**

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**Keywords** Environmental Law Clinic (ELC), China, Clinical Legal Education, Environmental Law, Experiential Education

### **Abstract**

This paper looks at the factors which affect the establishment of Environmental Law Clinics (ELCs) with a particular focus on models that might be most effective in a Chinese context. The paper is the result of desktop research and a clinical program where five law students and one supervising academic from an Australian Law school attended a Chinese law school in early December 2016. During the visit, Australian law students conducted a workshop with Chinese law students as well as visited several NGOs in Wuhan and Beijing to grasp a better understanding of the environmental issues the country faces. The observations in this paper are preliminary in nature and further discussion of educational goals and community needs will be required before settling on a particular model. Brief recommendations and a list of relevant factors for consideration for Chinese ELCs are provided at the end of the paper.

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## INTRODUCTION

Clinical Legal Education (CLE) is one of legal education's biggest success stories.<sup>2</sup> Drawing largely on practices from nursing and medicine, law schools from almost every part of the world have taken up the task of training and educating their students through the powerful paradigm of experiential education. The 'traditional' model of CLE involves law students attending lawyer-client advice sessions or assisting with upcoming cases. Under supervision, these students gain insights into what lawyers do and the types of legal issues their clients face. More sophisticated models of CLE have evolved to include students working on initiatives like law reform and education such as workshops, seminars and information sessions. Some models have also experimented with other disciplines such as finance, business, science and social work.

The goal of CLE has traditionally been two-fold. First, there should be a focus on student 'learning through doing' (i.e. the experiential part). It is this work-integrated experience that separates CLE from classroom-based learning where students absorb information through lectures and texts. Further, most legal clinics involve a social-justice aspect, as opposed to an experience, for example, in corporate firms or private businesses with a focus on making profit (these types of initiatives are more commonly referred to as internships, placements or secondments). The second goal of CLE is thus to provide a

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<sup>2</sup> Wilson, R., (2009) Western Europe: Last Holdout in the Worldwide Acceptance of Clinical Legal Education. 10(6) *German Law Journal*, 359-382.

benefit or service to the community. In the literature, this is often referred to as 'service learning'.<sup>3</sup> The discipline of law is uniquely placed for service learning because of its ability to address questions of justice, fairness and equality.

Environmental Legal Clinics (ELCs) are a specialized form of legal clinic. Their focus, as the name implies, is on the application, analysis and improvement of environmental laws. Apart from Schroeck's recent work,<sup>4</sup> Wei's paper from, 2009,<sup>5</sup> and Pei-Pei He and other's 2016 research<sup>6</sup>, little appears to have been published about ELCs in China. Schroeck's paper emphasized a need for partnerships with United States (US) law schools which have an established history of ELCs but noted there are several challenges that face the Chinese context. Wei emphasized the differences in legal systems of the US and China, suggesting a focus should be had on training and recruiting professional staff to run the clinics. Finally, Pei-Pei He and others suggested that non-government organizations (NGOs) need to be closely aligned with ELCs and curriculum

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<sup>3</sup> Smith, L. (2004). Why Clinical Programs Should Embrace Civic Engagement, Service Learning and Community Based Research. *Clinical Law Review* 10(2), 723-754. See also: Laurie A Morin and Susan L Waysdorf 'The Service-Learning Model in the Law School Curriculum' (2012) 56 N.Y. L. Sch. L Rev 561, 567.

<sup>4</sup> Schroeck, Nicholas J (2016) "A Changing Environment in China: The Ripe Opportunity for Environmental Law Clinics to Increase Public Participation and to Shape Law and Policy." 18(1) *Vermont Journal of Environmental Law* 1-17.

<sup>5</sup> Wei, Xu (2009) 'A Comparative Study of Environmental Law Clinics in the United States and China' 19 *Education Law Journal* 75-94.

<sup>6</sup> Pei-Pei He, Yu-Jing Zhuang, Ying Lin and Cheng-Hui Zheng 'Environmental Law Clinics in Collaboration with Environmental NGOs in China' 9(3) *Sustainability* 2017 337; doi:10.3390/su9030337

development. All authors covered some of the benefits and impediments to the operation of ELCs in China.

The arguments in this paper shy away from a 'casework model' of an ELC where students engage in environmental litigation. Whilst China has enjoyed something of an 'environmental awakening' of late, with an influx of new laws and specialist environmental courts and tribunals (there are now over 900 specialist forums), the practice of public interest environmental litigation is still relatively scarce. There are several possible reasons for this, including:

- a lack of trained judges and lawyers specializing in environmental law;
- the complexity and expense of gathering expert evidence;
- the time-consuming and laborious nature of litigation procedure;
- the possibility that litigation could be seen as political or;
- the lack of effective transparency and right to information systems; and
- the fact that case law in China plays 'little role in the whole system of law' and that lawyers rely more on 'theoretical explanations of laws and regulations.'<sup>7</sup>

For these reasons, and others, this paper suggests that Chinese ELCs should focus on law reform, policy and community empowerment – at least in the short term. The focus of such an ELC would avoid providing 'services' to individual clients but encourage a small

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<sup>7</sup> Wei, above n 4.

group of students (say 5-10) to help deliver a reform or education project (a report, written analysis, journal article, website resource, education video etc.).<sup>8</sup> Non-casework models can provide students with a broader array of experiences for their future work, whilst, at the same time, allowing the clinics to be powerful forces for change through the practice of 'community lawyering.'<sup>9</sup> As Robertson has suggested, ELCs which undertake tasks outside of litigation (such as compliance and regulatory work) are also able to provide students with:

*a more realistic look at the practice of environmental law, and [one that] better prepares them to enter practice.*<sup>10</sup>

Pei-Pei He's paper is important in this regard, that is; that NGOs need to work closely with ELCs and universities to show them the type of work they *actually do* in practice, most of which is not litigation.<sup>11</sup>

In the end, whichever model of ELC is considered, the situation is 'ripe' for China to start trialing different approaches.<sup>12</sup> US law schools aggressively experimented with clinical

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<sup>8</sup> Building the clinic around the language of 'environmental justice' or 'environmental governance' allows students and other stakeholders to situate the practice of the clinic in a broader theoretical space than just law.

<sup>9</sup> Tokarz, Karen L. and Cook, Nancy L. and Brooks, Susan L. and Bratton Blom, Brenda (2008) Conversations on 'Community Lawyering': The Newest (Oldest) Wave in Clinical Legal Education' 28 *Washington University Journal of Law and Policy* 45.

<sup>10</sup> Robertson, H., (1998) Methods for Teaching Environmental Law: Some Thoughts on Providing Access to the Environmental Law System, 23 *Columbia Journal of Environmental Law* 237, 269.

<sup>11</sup> Pei-Pei He above n 5.

<sup>12</sup> Schroeck above n 3.

models in the 1990s, and today the US leads the world in ELCs - not to mention the production of passionate and skilled conservation advocates. In the next decade, more than ever, there is the opportunity for Chinese law schools to investigate new ways of addressing environmental issues and teaching environmental law. The goal of this paper is to shed some light on the practical aspects of how that might be achieved through the establishment of ELCs.

## **APPROACH AND STRUCTURE**

The findings in this paper are primarily based on desktop research carried out by the author with the assistance of five Australian law students between November 2016 and March 2017. As part of the research, a half-day workshop was held in partnership with a Chinese law school. During the workshop, the participants presented and discussed models of ELCs as well as the teaching and practice of environmental law in China. The author and students in the clinic also met with NGOs in Beijing and Wuhan to help understand the nature of environmental issues in China. Further research on this topic would be beneficial using empirical or case study approaches of existing ELCs. In this instance, time and resources did not permit that to occur and the recommendations in this paper should be understood in that light.

The paper is structured in three parts. Part one gives background and context to the idea of an ELC, looking at the benefits of CLE more generally and what an ELC might involve.

It also seeks to clearly define an ELC, something that has not been adequately achieved in the past. Part two of the paper considers existing ELC models categorizing them into casework, non-casework and hybrid/comprehensive approaches (type 'A', 'B' and 'C' approaches). Part three of the paper then looks at the Chinese context, noting ELCs that already exist and pointing out some of the challenges that litigation-focused (type A) models might encounter. Finally, part four of the paper provides recommendations about establishing an ELC in China including a list of relevant considerations such as funding, staffing, outputs and evaluation.

## **PART 1: BACKGROUND AND CONTEXT**

### **The Benefits of Clinical Legal Education (CLE)**

CLE can be a life-changing experience for any law student. It can open their eyes to the realities of the law and the impact of our systems and institutions upon wider society. It can give students a valuable set of contacts on which to call on later in life, and provide them with hands on experience to put on the resume. At the same time, CLE can support civil society providing them with much needed assistance on issues they may themselves lack the resources to pursue such as law and policy reform and community education. Universities are also recognising the benefits of CLE including being able to offer practical experiences to their students and, at a faculty level, engaging with external actors outside of the academic world (i.e. government, non-government and other private actors). Some



of the main benefits to the university, community and student have been summarised in table 1 shown below.

**Table 1 Benefits of CLE from three perspectives**

University	Student	Community
Improve Standing and reputation of the law school in society	Hands on experience of 'real life' legal matters to translate theory to practice	Attention to legal issues which might otherwise be under-analysed or under-resourced for want of resources
Opportunities for further research and collaborations with NGOs and government actors	Introduces to group of peers or networks to call on and collaborate with later in life	Links community to academic and professional sector which they might otherwise have little dealings with
Chance for academics to show impact from work and apply for further funding opportunities	Instils a sense of social justice and community empowerment in future practice	Gives communities a voice, platform or outlet they might otherwise not have had (e.g. through website or social media platforms)
Ability to differentiate itself from other universities, courses and programs	Gives students something they can point to in their resume and credit towards their degree	Reveals to communities how law and justice is relevant to their everyday lives

There are various ways of delivering CLE in tertiary education and as Giddings remarks, there is certainly no 'one size fits all' approach.<sup>13</sup> One method involves hosting a clinic onsite at the university using existing space with paid lawyers or legally trained 'clinicians' to supervise student work. Another option involves running a clinic off-campus (externally) where the law school partners with a legal aid center or other *pro bono* or community organization.<sup>14</sup> As Giddings sets out in some depth, there are various other hybrid models as well.<sup>15</sup>

In terms of supervision, which is a key question for any clinic, lawyers or clinicians can be employed on the staff of the university on a permanent or part time basis. Alternatively, supervisors might be kept 'at arm's length' from the university through a contractual arrangement from semester to semester or year to year.<sup>16</sup> Another possibility is that some funding from the law school may be provided to a partner organization as remuneration for their supervisory work of the students (i.e. outsourcing of education

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<sup>13</sup> Probably the best and most comprehensive exploration for various models is found in Jeff Giddings, *Promoting Justice through Clinical Legal Education* (Justice Press, 2013).

<sup>14</sup> See Giddings, *Ibid.*

<sup>15</sup> *Ibid.*

<sup>16</sup> One of the biggest problems in establishing and continuing a clinic is supervision of students. See for instance; Giddings, Jeff; McNamara, Michael (2014) 'Preparing Future Generations of Lawyers for Legal Practice: What's Supervision Got to Do With It?' 37(3) *University of New South Wales Law Journal* 1226. Lawyers are often not trained to assess and provide academic feedback to students and are often not cognizant of the academic context in which the students participate in the program. Supervision from universities is often not prioritized as research, collaborations and travel usurps time and effort on the part of more senior academics with the knowledge and wisdom to dispense powerful lessons through 'light bulb' moments.

responsibilities). In the end, it is about what works best for the law school in the current strategic, financial and educational climate in which it operates.

### **Defining an ELC**

ELCs, much like the jurisprudence of environmental law itself, are a relatively new phenomenon.<sup>17</sup> Whilst examples of ELCs are easy enough to find on the web, predominately in the United States (US), from an academic standpoint they have been under-studied and many for example may not be actually operational or fully-functioning. Similarly, whilst the benefits of CLE to student well-being and employability are increasingly well-known,<sup>18</sup> the pedagogical benefits of ELCs, and indeed other specialist clinics (like human rights, intellectual property, labour law etc), are noticeably absent from the literature. Accordingly, settling on a definition of what an ELC is and what it seeks to achieve is not easy task. Nonetheless, drawing from the broader CLE literature, a working definition of an ELC can be constructed as follows:

*'An ELC is a form of specialist legal clinic whereby tertiary students, under supervision, engage with various aspects of environmental governance in order to meet community needs as well as their own learning goals.'*

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<sup>17</sup> See Wei, above n 4.

<sup>18</sup> See for example James, Colin G., (2008) 'Lawyers' Wellbeing and Professional Legal Education' 42(1) *The Law Teacher: The International Journal of Legal Education*, 85-97.

This definition is broad enough to integrate students from other disciplines into the clinic (science, media, business, information technology etc), as well as cover the concept of environmental governance, which includes factors within and outside the law such as: the role of the media, NGOs and epistemic communities (e.g. universities and scientific bodies); the influence of human rights and other norms, policy considerations and other soft law non-binding instruments etc). The other key part of the definition is that students must be 'supervised' in some form that is an integral aspect of what CLE entails. The reference to a student's 'own learning goals' is derived from the pedagogical literature, a bulk of which theorises that students learn best when they set their own benchmarks for success through 'self-regulated learning.'<sup>19</sup>

Specialist clinics like ELCs have become more prominent in the United States, Australia and Europe since the 1980s.<sup>20</sup> The growth has been in response to a demand for more specialised fields of legal practice and more particular (and complex) community concerns. As Evans and Hyams write, one of the greatest benefits of specialist clinics is that they are able to:

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<sup>19</sup> See for instance: Barry J. Zimmerman (1990) Self-Regulated Learning and Academic Achievement: An Overview, *Educational Psychologist*, 25:1, 3-17

<sup>20</sup> See Giddings, above n 12, 101.

*...speak directly to the burgeoning particular interests of individual students and can generate an even greater degree of energy for the specialisation than they experienced in the general practice clinic.*<sup>21</sup>

As Wei writes, specialist ELCs have a unique capacity to combine:

*...social concerns about environmental issues with more traditional legal education...[and] serve as tools of social equity for helping the victims in environmental issues, especially those who cannot afford to hire a lawyer.*<sup>22</sup>

### **Establishment and composition of ELCS**

The first ELC was reportedly developed in the United States at the University of Oregon in 1976. Thereafter, they ‘sprouted like mushrooms’ and today, there are about 35 ELCs in the US including: Harvard, Yale, Chicago, Washington, Maryland, Duke, Tulane, Lewis & Clark and Pace.<sup>23</sup> The growth of ELCs in the US has been considerable. So much so, in fact, that it was reported in the 1990s that some universities were ‘using environmental law for experiments with clinical or interdisciplinary approaches to legal education.’<sup>24</sup>

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<sup>21</sup> Evans, A., and Hyams R., (2015), ‘Specialist Legal Clinics: Their Pedagogy, risks and payoffs as externships’

<sup>22</sup>(2) *International Journal of Clinical Education* 147-180.

<sup>22</sup> Wei, above n 4, 76.

<sup>23</sup> Babich, A., (2013) ‘Twenty Questions (and Answers) About Environmental Law School Clinics’ 22(1) *The Professional Lawyer* 45.

<sup>24</sup> Robertson, above n 9.

In addition to the US, Canada has a handful of ELCs including clinics established at: University of Victoria (Vancouver Island); University of Calgary (part of a Public Interest Law Clinic); York University's, (Osgoode Hall Law School); and the University of Ottawa's Ecojustice Clinic.<sup>25</sup> Central and South America are also home to several ELCs including Clinicas Juridicas (Juridical Clinic) at Universidad de Palermo in Buenos Aires and Costa Rica's Conservation Clinic at the University of Costa Rica (UCR). Several law schools in Australia (including Macquarie University which runs a Land and Environment Court experience), South Africa, China and Spain also have specialist ELCs built into their curriculums.<sup>26</sup> In all, a conservative estimate is that there are approximately 50 ELCs worldwide, with about two thirds located in the US.

In the US models, students in ELCs are likely to assist with legal advice and casework for individual clients (such as conservation organizations, concerned residents or community associations). There are special rules in many US jurisdictions, unlike in China and Australia for instance, which allow students to participate first hand in cases including advocating in Court. Law students in California for instance, can be accredited, to 'appear on behalf of clients 'in any public trial, hearing, arbitration, or proceeding.'<sup>27</sup>

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<sup>25</sup> My thanks to Canadian academic Pierre Cloutier de Repentigny for confirming these ELCs

<sup>26</sup> For an overview of an ELC in Spain, see Borràs, S, et al., 'The Environmental Law Clinic: A New Experience in Legal Education in Spain' (Chapter 5) in Daniela Ikawa, Leah Wortham (eds.) *The New Law School, Reexamining Goals, Organization and Methods for a changing world* (Public Interest Law Institute, 2010).

<sup>27</sup> Rule 9.42 ('Certified Law Students') California Rules of Court 2017

Likewise, law students in Florida can also apply for certification to represent clients in Court.<sup>28</sup> Various other states in the US have their own rules for student advocacy through CLE.

In addition to assisting with legal advice or casework in specific cases, students at an ELC may also work with academics or other organizations on research, education or law reform initiatives that are useful to broader society.<sup>29</sup> This might involve, for example:

- updating factsheets, handbooks or other community education resources;
- assisting in contract drafting or leasing or conveyancing work needed, for instance, to establish a private conservation reserve;
- preparing research or co-writing conference papers or journal articles
- pressuring companies to 'become greener' or go low emission by compiling reports or releasing public information in 'easy to understand' formats;
- launching and/or maintaining eco-friendly social media campaigns about a topical issue (e.g. water pollution in a local catchment, contamination levels in soil);
- commenting or making submissions on upcoming law and policy reforms at the local, state or national level.

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<sup>28</sup> Students in Florida can achieve 'legal intern certification' pursuant to Chapter 11, Rules Regulating the Florida Bar (the 'Student Practice Rule').

<sup>29</sup> McNamara, Judith, Campbell, Catherine, & Hamman, Evan, (2014) 'Community Projects: Extending the Community Lawyering Model' 12(2) *International Journal of Clinical Legal Education*, 18.

The potential scope of work at ELCs appears broader than other types of clinics and likely reflects the transdisciplinary array of problems that stakeholders in environmental governance face on a daily basis (legal, scientific, technological, financial, conceptual, etc). ELCs are likely to be unique in this way and can expose law students (and other students) to a wide variety of community projects outside of litigation, which help develop a student's notion of social justice and build their capacity to address complex issues in a systematic and supervised way.<sup>30</sup> Students who partake in ELCs also have the benefit of being exposed to environmental issues first hand and take some degree of ownership or responsibility over their experience.

For some students, experience in an ELC can sharpen their passion for the environment and the natural world, whilst for others they may realize for the first time a desire to pursue a career path in public interest advocacy. Some students may also find work with or through the ELC or its stakeholders, whilst others might make valuable social and business contacts for future work. Most ELCs, like other clinics, can also be adapted to focus on the skills which universities wish to build in students by placing an emphasis on specific strategies or legal tools including representation, community education, and policy.<sup>31</sup>

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<sup>30</sup> *Ibid.*, 9.

<sup>31</sup> Karin M., and Runge, R., (2011) 'Toward Integrated Law Clinics That Train Social Change Advocates' 17 *Clinical Law Review* 563, 570.



Moreover, because of the public interest and 'grass roots' nature of the work that they do, ELCs can also be a powerful way of universities connecting with their local community and the organizations that represent them. For those universities that wish to specialize in environmental law and governance, they can also prove a valuable part of competitive advantage acting as a magnet for the country's best and brightest future environmental lawyers.

The number of students enrolled in ELCs varies considerably. As Robertson estimated in the late 1990s, ELCs (in the US) have enrolled 'anywhere from three to fourteen students each semester.'<sup>32</sup> That said, most ELC operations tend to be niche and relatively small initiatives, and student groups are often kept to a manageable size of between 4 and 10 students rotating through the clinic at different times. Most law schools with ELCs seem to offer it as an undergraduate (elective) option in later years of the degree, though there is no reason why it cannot be offered at the postgraduate (e.g. Masters of Laws) level or built into practical legal components of legal admission processes post-graduation. As Clubb remarks, postgraduate clinics have the potential to engage older students in a wider appreciation of socio-economic factors and deliver more targeted and sophisticated benefits to complex problems in the community.<sup>33</sup>

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<sup>32</sup> Robertson, above n 9, 267

<sup>33</sup> Clubb, C.,

(2013) 'Masters of Our Destiny - The Integration of Law Clinic into Post Graduate Masters Provision.' *19 International Journal of Clinical Legal Education* 395.

## Challenges faced by ELCs

ELCs face considerable challenges, as Giddings remarks, perhaps more so than any other form of clinic.<sup>34</sup> The reasons for this seem relatively straightforward. The practice of environmental law, protection and conservation is often directly opposed to the interests of both government and private enterprise (mining, chemicals, agriculture, shipping, development etc). It comes as little surprise that taking on cases or advocating issues that challenge those interests can result in condemnation or criticism from those who stand to lose from the circumstances. The Tulane Environmental Law Clinic in the US, for example, was famously the subject of extensive criticism over litigation it was involved in several years ago.<sup>35</sup> At the time, Tulane's ELC program represented citizens who challenged the issuing of environmental permits to the petrochemical industry. In response, the industry 'developed an eleven-point plan' to "kneecap" the university financially.<sup>36</sup> Likewise, it has been reported that the University of Oregon's clinic and University of Pittsburgh's have been attacked by state officials and industries.<sup>37</sup>

Funding is of course another major roadblock to establishing an effective ELC (or indeed any form of clinic). As environmental law is often an elective – or a small component of

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<sup>34</sup> Giddings, above n 12, 133.

<sup>35</sup> Kuehn, R., (2000) 'Denying Access to Legal Representation: The Attack on the Tulane Law Clinic' 4 Wash. U. J. L. & Pol'y 033 <[http://openscholarship.wustl.edu/law\\_journal\\_law\\_policy/vol4/iss1/](http://openscholarship.wustl.edu/law_journal_law_policy/vol4/iss1/)>

<sup>36</sup> Joy, P., and Kuehn, R., (2010) 'Kneecapping' Academic Freedom' Washington University in St. Louis Legal Studies Research Paper No. 10-11-01. Available at SSRN: <https://ssrn.com/abstract=1719325>, 9.

<sup>37</sup> Giddings, above n 12, 133.

of university curriculums - marketing the idea of an ELC to law school management may prove harder than for other initiatives which drive research agendas and increase student enrolments. Furthermore, conservation and community organizations which may work with the ELC are often member-driven and receive little or no government funding for their activities. Reliance on a percentage of a successful judgment in a case is one option for ELC funding, but in jurisdictions outside of the US, these forms of 'contingency fees' may be illegal. Moreover, in public interest environmental hearings 'there is often no pot of gold at the end of the rainbow.'<sup>38</sup>

Like other specialist clinics that focus on public interest issues (consumer advocacy, human rights, refugees, labor law etc.) ELCs can also struggle to manage student expectations and attract student interest. In many parts of the world, including China, public interest law is not a lucrative career pathway for law students. This is particularly the case in uncertain economic times where students have accumulated considerable debt over the course of their degree. There are also cultural considerations at play. In China, for instance, students may well be the only child of their household, and there are high expectations that they will one day succeed financially and perhaps avoid the type of work that ELCs do. One of the core challenges of ELCs is therefore to change the

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<sup>38</sup> Preston, B (2013) 'Environmental Public Interest Litigation: Conditions for Success' (Speech delivered at the International Symposium: Towards an Effective Guarantee of the Green Access: Japan's Achievements and Critical Points from a Global Perspective, Awaji Island, Japan, March 2013) <[http://greenaccess.law.osaka-u.ac.jp/wp-content/uploads/2013/04/13en\\_preston.pdf](http://greenaccess.law.osaka-u.ac.jp/wp-content/uploads/2013/04/13en_preston.pdf)> 11

'charitable' image of the work they undertake and be able to market their existence to high performing students with a passion or interest in working in environment, public interest, administrative law or other related areas of law.

Finally, successful clinics manage their student expectations well. To do this, students need to be given a realistic idea of what they will and won't be doing.<sup>39</sup> As McNamara et al writes, without clear expectations and direction, students can be frustrated and confused about their experience.<sup>40</sup> Maintaining student interest in a specialist CLE along the semester can be challenging, time consuming and administratively demanding.<sup>41</sup> Students may tend to focus exclusively on assessment tasks, rather than on the needs of the clinic and its clients, thereby 'playing the game' of the law school, rather than contributing to the real community needs.

Some of this may flow from the fact that legal clinics are still generally viewed as though they are separate or not 'as important' as the rest of the regular law curriculum.<sup>42</sup> This is likely a result of the traditional view of academic tertiary education and its historical focus on teaching 'black letter law'. Nevertheless, those students who have experienced the advantages of a legal clinic often suggest (anecdotally) that the benefits of such a

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<sup>39</sup> Evans and Hyams, above n 20.

<sup>40</sup> McNamara et al, above n 28.

<sup>41</sup> Evans and Hyams, above n 20.

<sup>42</sup> Hall, J., and Herrigan, K., (2011) 'Clinic and the Wider Law Curriculum' *International Journal of Clinical Education* 25-37.

model are so unique to education that clinics should form part of the compulsory curriculum. Despite this, it remains that in most institutions clinics are seen as optional rather than a core unit that delivers relevant knowledge and skills.<sup>43</sup> The challenge for ELCs are no different in this regard. Some universities - like Rovira i Virgili University in Spain, for example - have tried to address this by making an ELC 'both a core subject in the syllabus of the master's degree in environmental law and an elective in the undergraduate course in law.'<sup>44</sup>

## **PART TWO: EXISTING ELC MODELS**

This part of the paper categorises the different focuses (or models) of ELCs into three groups: Type A, B and C. Table 2 below summarises the three basic models of ELCs that are available. The three types were based on desktop research undertaken by the author and clinical students.

Type A (casework) models tend to focus on litigation, legal advice and work related to court proceedings. An example of a Type A clinic model is the Columbia Law School ELC, in which students advocate for citizen and environmental groups before state and federal agencies, and have both a local and national focus on environmental litigation.<sup>45</sup>

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<sup>43</sup> Ibid.

<sup>44</sup> Borràs et al, above n 25.

<sup>45</sup> Columbia Law School, Environmental Law Clinic, 'Clinical Education <[www.law.columbia.edu/clinics/environmental-law-clinic](http://www.law.columbia.edu/clinics/environmental-law-clinic)>

Pace University's environmental litigation clinic is another example of a Type A model, and since the 1990s has run several important cases.<sup>46</sup> Another example of a type A clinic is the Clinicas Juridicas (Juridical Clinic) at Universidad de Palermo in Buenos Aires, Argentina. Enrolment in this clinic is mandatory for all law students in 4th or 5th year. Under supervision, students assist qualified lawyers who are representing clients on issues including civil, criminal, mediation, family, human rights, immigration and environment law. Students undertake research, conduct interviews and prepare documents for upcoming cases.<sup>47</sup>

**Table 2. Three basic CLE models categorised by the nature of the work they do**

	Type A (Casework)	Type B (Education-Reform)	Type C (Comprehensive)
Focus of ELC	Predominately Litigation-focussed, undertakes casework, representation and legal advice to particular clients in and related to court or tribunal proceedings.	Concentrates on law reform, and tends to focus on information and education regarding environmental issues rather than one-off legal advices or representation in Court	Focuses on a wide range of legal activity including litigation, case work, advice, education initiatives, policy and law reform.

<sup>46</sup> Pace University, 'Pace Environmental Litigation Clinic' <[www.law.pace.edu/pace-environmental-litigation-clinic](http://www.law.pace.edu/pace-environmental-litigation-clinic)>

<sup>47</sup> Universidad de Palermo, 'Clinicas Juridicas', Facultad de Derecho (Law Faculty), <[http://www.palermo.edu/derecho/facultad/clinicas\\_juridicas/casos/index.html](http://www.palermo.edu/derecho/facultad/clinicas_juridicas/casos/index.html)>

Type B (law reform-education) models of ELCs tend to concentrate on non-litigious tasks such as students assisting with community education, policy and law reform. These tasks are broader than ‘one-off’ cases and do not necessarily involve serving individual clients, but rather, focus on delivering wider community gains. The University of Victoria ELC (in Canada), for instance, appears to adopt this type of model.<sup>48</sup> It reportedly operates on a local level in order to optimise community involvement, and, in addition to meeting with community groups about their legal issues, produces handbooks and other documents for community organisations and the general public. In another example, at Queensland University of Technology (QUT) school of law in Australia final year law students partner with an environmental NGO to prepare law reform submissions, factsheets, handbooks, YouTube videos, community events and other non-litigious services.<sup>49</sup>

Finally, Type C (hybrid or ‘comprehensive’) models involve a combination of Type A and B, in which both litigation and reform-education work are undertaken. These clinics are comprehensive in their scope (or at least claim to be) and likely attract significant oversight and funding commitments from the university. There are numerous examples of Type C clinics in the United States and most may, by default, end up working on law

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<sup>48</sup> University of Victoria, Faculty of Law ‘Environmental Law Centre,’ <<http://www.elc.uvic.ca/programs/clinic/>>.

<sup>49</sup> See Hamman, E., Maguire, R., & McNamara, J., (2014) Pro bono partnerships in environmental law: enhancing outcomes for universities and CLCs. 39(2) *Alternative Law Journal* 115-119.

reform, research and community education where no cases are available or active for students to work on. At Berkeley Law School (in the US) for example, clinic students undertake litigation, but are also encouraged to develop advocacy skills in law and policy reform. Students work on research about particular environmental issues across five main areas: climate change, toxics reduction, drinking and sanitation, green job creation, and equity in access to nature.<sup>50</sup>

The advantage of Type C clinics is that they offer students the chance to develop courtroom and legal drafting skills as well as see the broader context in which environmental law operates. Berkeley Clinic director Claudia Polsky recently commented on the need for developing student skills outside of litigation:

*I'm not inclined to add another amicus brief to 15 others in a case simply because it would give students useful experience writing an amicus brief. In a world of rapidly rising temperatures and pollution levels, and an alarming rate of species extinction, we need to make a real-world difference in addition to teaching lawyering skills.<sup>51</sup>*

There are several examples of Type C clinics in the human rights context as well. At the Public Interest Law Clinic at Universidad Nacional de Tucuman (Argentina) for instance, students conduct litigation on behalf of individuals for human rights infringements. At

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<sup>50</sup> Berkeley Law School, 'Environmental Law Clinic takes on Urgent Issues'  
<<https://www.law.berkeley.edu/article/environmental-law-clinic-takes-urgent-issues/>>

<sup>51</sup> Ibid.



the same time, students at the clinic also work on projects related to access to justice and information, such as producing 'layperson-friendly' guides to the law and citizen rights.<sup>52</sup> The categories A-C are by no means static. At times, ELCs may begin as one form of clinic and morph into another. The Centre for Human Rights Law and the Environment (CDHA) in Argentina, for example, began as a Type C clinic, incorporating a range of programs that included student-led litigation, advocacy, community engagement, and capacity building of key actors locally and nationally. The clinic represented individuals and communities impacted by environmental degradation or unsustainable use of natural resources, and works to protect communities from future negative impacts.<sup>53</sup> In the past it ran a number of successful cases, for example, against mining companies that did not comply with rules regarding clean-up and rehabilitation of the area. However, after a few years, CDHA found that student-based litigation was too difficult as cases took too long and the timing was too unpredictable to fit within a university course. Thus the organisation now continues as a Type B clinic, focusing on community engagement and advocacy.<sup>54</sup>

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<sup>52</sup> Puga, M., (2010) 'Challenges for Legal Clinics in Argentina' *The Law Teacher* 239-259.

<sup>53</sup> Center for Human Rights Law and the Environment, 'Mission and Activities', [http://wp.cedha.net/?page\\_id=6271&lang=en](http://wp.cedha.net/?page_id=6271&lang=en).

<sup>54</sup> Ibid.

## Internal or External Delivery?

External clinics (clinics hosted 'off-campus') are often seen as more cost effective than onsite models, but they still have their own set of challenges.<sup>55</sup> They may, for instance, be deficient from a teaching and learning perspective, as students may not understand their own attributes, learning styles and learning needs without effective university supervision present. The law school may therefore have little control over the day-to-day learning of the students, with reliance that the external institution will provide the students with educationally useful and valuable activities, and an expectation that the students themselves are proactive and honest in how they are viewing their experience.<sup>56</sup> The external organization may also hold a different view of social justice from the students or university, which can cause an uneasy relationship between the university and the partner.<sup>57</sup> This conflict may also cause broader image issues for conservative universities or law schools where a partner may be seen as too 'radical' or 'political' for other forms of work the university undertakes (for instance in other faculties like mining, petrochemicals, business, investment etc).

Internal clinics also have their own set of challenges. First, there are the considerable costs of establishment.<sup>58</sup> Suitable office space, computers, reception staff etc may be needed.

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<sup>55</sup> Giddings, above n 12.

<sup>56</sup> Evans and Hyam, above n 20.

<sup>57</sup> Taylor, A., (1977) 'Clinical Legal Education' 2(2) *Studies in Higher Education* 137-147.

<sup>58</sup> Chmerkinsky, E., 'Why Not Clinical Education', (2009) 16 *Clinical Law Review* 38.

Costs can also increase due to the small student-to-faculty ratio, meaning several students may need to be supervised very closely by a senior academic.<sup>59</sup> Further, clients (if the clinic sees clients) need to come on-site at the university to deliver documents, receive advice or give instructions to lawyers. There may be logistical issues where clients are some distance from the university or, in some countries, there can be security issues with attendance by non-students on campus grounds. Lastly, internal clinics can also face recruiting problems, attempting to find suitable staff and develop the sort of profile and reputation that specialist clients would consider appropriate for their needs.<sup>60</sup>

One issue which affects both internal and external clinics is that there is a lack of information more generally concerning clinic establishment.<sup>61</sup> The information that does exist mostly relates to the US yet the establishment of clinics should ideally take in to account the local cultural setting.<sup>62</sup> This means that setting up new legal clinics may involve extensive research and due diligence (costs) before the clinic is active including taking into account the culture of the communities for which the services are intended.

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<sup>59</sup> Ibid.

<sup>60</sup> Evans and Hyams, above n 20.

<sup>61</sup> Puga, above n 51.

<sup>62</sup> Ibid.

## **PART 3: ELCS IN THE CHINESE CONTEXT**

### **Why establish an ELC in China?**

China is an emerging superpower. Over the last three decades it has lifted millions out of poverty and greatly increased public infrastructure and investment in health and education and other important services. It has also become a major geo-political player on the regional and world scene able to negotiate and influence future international agendas. Of course, this has also come at great environmental cost. Air pollution cripples major cities like Beijing, Shanghai and Wuhan, particularly in the winter months, and water pollution from sewerage, chemical production and fertilizer run-off has affected large parts of China's inland lakes and river systems including the mighty Yangtze. The impacts on human health and biodiversity are obvious and the financial costs of such degradation are increasingly recognized.

In response, the Chinese Communist Party (CCP) has made important advances, strengthening its Environmental Protection Law (in 2015), introducing tort legislation for pollution victims to receive compensation (in 2009), making water pollution a priority in the latest five year plan and allowing NGOs to play a stronger role in the co-regulation of pollution. Hundreds of newly established specialist environmental courts (including a special chamber in China's Supreme Court) will require trained judges and environmental lawyers. NGOs, law firms and government agencies will also need

practitioners and researchers who have hands on experience of the workplace and environmental issues surrounding compliance.

Legally-trained graduates will thus play an ever-important role in the refinement and application of China's environmental governance systems. ELCs can play a central role in the development of these skills. China's graduates will not only need to be passionate about conservation issues, but technically skilled in understanding and using environmental law as a positive source for change in their communities. With their focus on experiential tasks, ELCs are one of the only vehicles that can offer that. Numerous ELCs can also help to establish a movement of younger scholars and practitioners one which is connected to the world to draw examples from, but also one that understands and is able to suggest solutions in accord with its own customs and laws.

### **Existing ELCs in China**

China already has (or has had) a handful ELCs operating across the country, though they are still in the 'embryonic stage.'<sup>63</sup> At Sun Yat-sen University, in Guangzhou, for instance, an ELC was established in 2003 – said to be the first in China.<sup>64</sup> As Pei-Pei He and others report, a major grant from the Ford Foundation in 2000 helped to lay the ground work

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<sup>63</sup> Pei-Pei He, above n 5.

<sup>64</sup> Baskir, C et al., (2015) 'Chinese Clinical Legal Education: Globalizing and Localizing', in Sarker, Shuvro Prosun (Ed.) *Clinical Legal Education in Asia: Accessing Justice for the Underprivileged* (Palgrave Macmillan, 2015), 42.

for other clinical initiatives at Peking University, Tsinghua University, Renmin University of China, Wuhan University, Zhongnan University of Finance and Political Science, East China University of Politics and Law and Fudan University.<sup>65</sup> The Sun Yat-sen clinic was originally intended to carry out litigation work (i.e. a Type A model), however, due to a lack of public interest cases, the clinic has taken on a policy and law reform approach instead (Type B model).<sup>66</sup> Reportedly, it took the clinic several years before it could build a rapport with the local community and relevant organizations to conduct such work.<sup>67</sup>

Another ELC exists at China University of Political Science and Law associated with the Centre for Legal Assistance to Pollution Victims in China (CLAPV).<sup>68</sup> The CLAPV clinic is unique in China as it focuses on litigation and pursues about 15 cases per year.<sup>69</sup> As Stern reports, these cases are 'mostly referrals from CLAPV's legal assistance hotline and come from all over the country.'<sup>70</sup> By comparison, the Sun Yat-sen model, cases only provided a moderate form of work for the clinic.<sup>71</sup>

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<sup>65</sup> Pei Pei He, above n 5.

<sup>66</sup> Hamman et al., above n 48.

<sup>67</sup> Phan, P., (2005) 'Clinical Legal Education in China: In Pursuit of a Culture of Law and a Mission of Social Justice' 8(1) *Yale Human Rights and Development Journal* 141.

<sup>68</sup> Wei, above n 4, 82.

<sup>69</sup> Stern, R., *Environmental Litigation in China: A Study in Political Ambivalence* (Cambridge Univ. Press, 2013), 196

<sup>70</sup> Ibid.

<sup>71</sup> Wei, above n 4, 82.

Most of the other existing ELC projects in China seem to have had assistance or partnered with US universities or funders. Other relevant study partnerships also exist. Vermont Law School in the US, for example, famous for its environmental law focus, has established the U.S.-China Partnership for Environmental Law in 2006 to build capacity amongst Chinese students and lawyers. As Schroeck reports, Vermont partners with Renmin University in Beijing to deliver a specialist environmental law program.<sup>72</sup> Some of its more interesting outputs and learning experiences include the production of joint research papers.<sup>73</sup> The partnership's geographical focus more recently has shifted to include the rest of Asia as well.<sup>74</sup>

### **Challenges for ELCs in China**

In addition to the challenges that face ELCs in other parts of the world, there are particular challenges that face Chinese law schools. A recent paper by Pei-Pei He and others pointed to several defects in the ELC system including: a lack of qualified teaching faculties; incomplete legal clinic goals; and a lack of an effective curriculum system.<sup>75</sup>

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<sup>72</sup> Schroeck, above n 3, 15

<sup>73</sup> Vermont Law School, 'Joint Research Project Papers'  
<<http://www.vermontlaw.edu/academics/centersand-programs/us-asia/publications/joint-research-project-papers>>

<sup>74</sup> Vermont Law School, 'US-Asia Partnerships for Environmental Law'  
<[www.vermontlaw.edu/academics/centers-and-programs/us-asia](http://www.vermontlaw.edu/academics/centers-and-programs/us-asia)>

<sup>75</sup> Pei Pei He, above n 5.

Despite recent amendments allowing ‘registered’ NGOs to bring public interest suits, public interest litigation is still rare. As Schroeck recently commented:

*The Chinese legal system [still] limits the ability of citizens and public interest advocates to affect social change. Control still ultimately rests with the Communist Party, with minimal rights for citizens. Corruption is still a significant barrier.*<sup>76</sup>

More recently, NGO collaborations (including funding opportunities) have been restricted by tougher laws introduced by the CCP. As Fulda recently wrote:

*A controversial new law regulating the activities of foreign non-profit organizations (NPOs) in China came into effect on January 1 [2017]. Under the Overseas NGO Law, foreign NPOs will have to meet very stringent registration and reporting guidelines.*<sup>77</sup>

All this adds to the already tight funding around existing ELC models. Wei makes this point succinctly:

*In the US, ELCs may receive reward in the form of an order for attorney fees from the judge when they win a case. That is both a relief to the fund-raising problem as well as an impetus to try the hardest to win the case. However, there is not such a mechanism in China....[Moreover] in China, most universities are state-owned. Although there are also*

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<sup>76</sup> Schroeck, above n 3, 17

<sup>77</sup> Fulda, A., (2017) A new law in China is threatening the work of international NGOs The Conversation <<http://theconversation.com/a-new-law-in-china-is-threatening-the-work-of-international-ngos-70884>>



*some foundations that are willing to support ELCs in China, such as the Ford Foundation and the Lingnan Foundation, the general prospects are not so optimistic, and funds themselves are tight...Seeking funds [thus] takes a lot of time away from the substantive work of the ELCs and sometimes even threatens the initial establishment or the continued existence of ELCs.<sup>78</sup>*

A further impediment to ELCs in China is that there are limited opportunities and incentives for law graduates to work directly in public interest environmental law either during or after university. Most middle-class students in China are from one-child families and are reluctant to pursue public interest careers where salaries and prestige are far less than the more established commercial pathways. This phenomenon is not necessarily specific to China. Countries like Australia and the US face a shortage of public interest lawyers not to mention relatively small percentage of students willing to make it their career path in a time of high competition for jobs and salaries.

Finally, another major consideration in the Chinese context is the staffing of the ELC. As Wei points out, 'most [Chinese] professors feel that they do not have time to take up other roles and responsibilities beyond their [existing] teaching and research.'<sup>79</sup> In comparison, many of the supervisors in the US are experienced *clinicians*, rather than lecturers or professors with experience in classroom teaching and legal research. Universities may

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<sup>78</sup> Wei, above n 4, 87.

<sup>79</sup> *Ibid.*, 87

have to find additional funds to employ clinicians outside of their research, service and teaching work. The benefits need to outweigh the costs in this regard.

**Recommendation: Establishing an external ‘education-reform’ model**

The unique set of challenges facing China’s environmental governance systems suggests emulating the litigation-style US (Type A) model of ELCs may not work particularly well.

In the short term, ELCs in China should consider focusing on law reform, education and broader advocacy initiatives to develop something of a movement of relevant material and resources. Emerging ELCs across several universities might be joined together in some collegiate way, for instance, through a Chinese association of ELCs. The collective could meet regularly to discuss different approaches to pedagogy and community service around environmental law as well as connect with ELCs throughout the rest of the world.

In terms of a way of delivering such a model, Chinese universities would do well to avoid expensive ‘in-house’ approaches where the costs and risks of the clinic are absorbed by the law school. On the contrary, law schools should consider collaborating, on a trial basis, with external established organizations such as China’s Global Environment Institute (GEI), Friends of Nature, Natural Resource Defense Counsel (NRDC), Institute of Public & Environmental Affairs (IPE), or WWF-China. These organizations (particularly the domestic NGOs) can be effective partners in the experiential learning experience for students, as well as help to develop effective curriculum content in CLE

more generally. Indeed, recent empirical research has suggested that 'curriculums designed in cooperation with [NGOs] can better solve the dilemmas' faced by China's current environmental law courses.<sup>80</sup> Partnerships would of course need to be cognizant of recent changes to overseas NGO funding and collaboration laws in China.<sup>81</sup> Although many of the larger NGOs are based in Beijing or Shanghai they may have regional offices or related groups working in other cities. Online collaborations (i.e. cyber projects) could also be an option for rural and remote places so the university does not have to pay for the cost of student travel.

The advantages of an external education-reform model might include:

- the ability to produce research or other outputs over a planned period (one or two semesters);
- access to existing resources on topical and 'real life' issues that affect a variety of people;
- the opportunity for students to work across several related disciplines (for instance, science, policy and media);
- the ability of the law school to control assessment and supervision in a defined period (including developing student skills in project planning) but not necessarily of the content of the work;
- the opportunity to undertake team work which would simulate student practice post-graduation;

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<sup>80</sup> Pei Pei He, above n 5.

<sup>81</sup> See Fulda, above n 76.

- the ability of students to work remotely and in their own time without constant client, partner or;
- the chance for students (and the university) to reference results of their work (for their resume).

**Additional factors for consideration**

In addition to the type of model considered appropriate (Type A, B and C), there are several specific factors that should also be canvassed. A summary is included in table 3 below.

**Table 2 Relevant considerations when establishing an ELC in China**

Consideration	Relevant Questions
<b>FUNDING:</b>	How will the ELC be funded? Would a trial period be beneficial? How many staff are needed to run the ELC? Will they be part time or full time? What other resources are needed (computers, texts, translation services etc)? Can the ELC be ‘built on’ to an existing initiative?
<b>SUPERVISION:</b>	Who will supervise the students from an assessment point of view? Who will supervise and provide feedback on their substantive work? Do guidelines need to be developed?
<b>STUDENTS:</b>	How many students will be involved? Will they be postgraduate or undergraduate? Will the course be mandatory or optional? What length of ‘university’ time will the clinic run for? (one semester or two?) What will be the form of assessment? How will the course be ‘marketed’ to potential students?

<b>CONFIDENTIALITY:</b>	How will issues of confidentiality and privacy be managed? What happens when students work offsite and may have access to confidential data or systems?
<b>FOCUS:</b>	Would a specific area of law be helpful to look at (water, soil, air pollution, biodiversity etc.)? What scale could the clinic cover (local, regional, national, international issues)?
<b>EVALUATION:</b>	How will the clinic be evaluated by supervisors and course coordinators? How will the perspectives of students, supervisors, clients and partner organizations be evaluated?
<b>IMPACT AND OUTPUTS:</b>	What scholarly or other outputs can be gained from the ELC? Can the clinic be built around a research agenda, for instance, 'access to environmental justice' in China?
<b>LINKAGES</b>	How can the ELC link with other organizations in the community? How can it link with Government? Is there the possibility of students doing government work through the ELC? How could ELCs 'talk' to each other?

These considerations were generated from the general literature on CLE and the workshop experiences undertaken by the author and the clinic students. Best practice

guidelines are also available online which give excellent advice regarding student assessment and other issues.<sup>82</sup>

## CONCLUSION

Further research, particularly of an empirical nature, is needed to realize the full potential of specialist ELCs in China. Certainly, there are many environmental challenges facing China and CLE provides a small but important part of that solution. One of the most important contributions seems to be for ELCs to operate as a basis to assist in capacity building and inspiration of new ideas around environmental challenges for the future. Universities can be an integral part of that drive, particularly through the law school. As Stern notes, ELCs can act as 'portals' in this way – a mechanism for generating new ideas about how to tackle the country's most urgent environmental problems.<sup>83</sup> A more pressing question then arises: what model might work best for such a program? The arguments in this paper suggest although China's judicial and legislative systems are developing at pace, there are significant barriers to a US-style litigation (Type A) clinic. These include: the need for constant funding; the complexity of environmental evidence; the length of environmental hearings; travelling to and from the court; and the politically

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<sup>82</sup> In Australia see: Evans, A et al, *Best Practices: Australian Clinical Legal Education* (Australian Government, 2013). In the US, see: Stuckey, R, *Best Practices for Legal Education: A Vision and a Road Map*, 2007.

<sup>83</sup> Stern, above n 68, 166.

sensitive nature of cases (see for instance, the Tulane Law School example). For these reasons, this paper suggests that an education-reform ELC model (i.e. a Type B model) might be best suited to Chinese law schools. It is further suggested that such a model might be best undertaken in external mode in collaboration with domestic NGOs in China.

## **THE DEVELOPMENT OF REFUGEE LAW CLINICS IN GERMANY IN VIEW OF THE REFUGEE CRISIS IN EUROPE**

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### **I. INTRODUCTION**

Coming to an unknown country, seeking for refuge, having nobody anymore, because of the family murdered by a criminal regime, not being able to speak the language of the country, having no idea of the legal system – this scenario can put refugees in very difficult circumstances, especially if the refugees need legal advice concerning their situation. There is not only the pressure of getting along with the horrific experiences the refugee went through but sometimes even legal problems that have to be solved, sometimes problems that may decide whether a person can stay in the country or has to leave it.

And most of the time small issues, like how to deal with certain formalities or what steps to undertake next, are in question. This is where law clinics, especially the specialized refugee law clinics, might help.



## II. DEVELOPMENT OF LAW CLINICS IN GERMANY

Law clinics and clinical legal education are a new and fast developing field within the German jurisdiction.<sup>1</sup> Until 2008 law clinics were not allowed under a German law (*Rechtsberatungsgesetz*) which partly goes back to the time of national socialism in Germany that aimed at pushing Jewish lawyers out of the legal advisory market.<sup>2</sup> In order to give legal advice (even free of charge or among relatives) you needed a state permission, which is available only to the members of the bar. The law did not provide any exception for free legal services (including those of law clinics), legal advice within the family or at least giving simple legal advice on specific topics which can be handled by non-attorneys (like the LLLT-model in Washington allows<sup>3</sup>). This led to the

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<sup>1</sup> See J.-G. A. Hannemann / G. Dietlein, *Studentische Rechtsberatung in Deutschland*, JURA – Juristische Ausbildung, Vol. 39 (2017) p. 449 – 460; see also J.-G. A. Hannemann / J. Lampe, *Clinical Legal Education – Observing, Comparing and Analyzing the Differences in Germany and China for Each Other's Respective Advantages*, 2 ASIAN J. LEGAL EDUCATION 157 – 169 (2015); U. Stege, *Le développement du mouvement clinique en Europe*, in: Xavier Aurey (ed.), *LES CLINIQUES JURIDIQUES* 49 – 60 (PUC Caen 2015).

<sup>2</sup> Original version: *Gesetz zur Verhütung von Mißbräuchen auf dem Gebiete der Rechtsberatung* (Law on the prevention of abuses in the field of legal advice, 13th December 1935), in: *Reichsgesetzblatt* 1935 I p. 1478 seq.; later called „*Rechtsberatungsgesetz*“ (Act on legal services, since 1962); see Weber, *Die Ordnung der Rechtsberatung in Deutschland nach 1945* (Tübingen 2010); Simone Rücker, *Rechtsberatung. Das Rechtsberatungswesen von 1919–1945 und die Entstehung des Rechtsberatungsmissbrauchsgesetzes von 1935* (Tübingen 2007).

<sup>3</sup> A “Limited License Legal Technician” is not a fully trained lawyer, but a trained and licensed person “to render limited legal assistance or advice in approved practice areas of law” (Washington’s Admission to Practice Rules, Rule 28). The aim was to give (affordable) legal advice to those who are unable to afford the services of an attorney. At the moment (since their introduction in Washington in 2012), Legal Technicians are authorized only to advise clients in family law cases (divorce, custody). The Washington State Bar Association compares them with a nurse (which fits well into the image of a legal “clinic”): “Think of them like nurse practitioners, who can treat patients and prescribe medication like a doctor- well-trained, qualified and competent professionals who can provide you with the help you need” (see [www.wsba.org/Licensing-and-Lawyer-Conduct/Limited-Licenses/Legal-Technicians](http://www.wsba.org/Licensing-and-Lawyer-Conduct/Limited-Licenses/Legal-Technicians)).

grotesque situation that a fully trained law graduate in Germany who decided not to work as an attorney but a judge could not even give free legal advice to his son. In 1998 *Helmut Kramer*, Judge at the Higher Regional Court of Braunschweig, started an initiative to have the *Rechtsberatungsgesetz* declared unconstitutional: He – as a judge – gave free legal advice, indicated himself to the authorities, was punished with a fine of 600 Deutsche Mark (350 \$) and brought this case to the Federal Constitutional Court of Germany, which in 2004 finally gave him right.<sup>4</sup>

In 2007 the German law of legal counselling was fundamentally reformed. Since 2008 everyone is allowed to provide legal advice free of charge under certain conditions. § 6 of the German *Rechtsdienstleistungsgesetz* says: *“Legal services which are not connected to paid activity (free legal services) are permitted. Any person providing free legal service outside family, neighbourhood or similar close personal relations shall ensure that this legal service is provided by a person authorized to give such legal services, by a person with a qualification to judge or under the guidance (Anleitung<sup>5</sup>) of such a person. Guidance requires briefing and training as well as participation in the provision of the legal service depending on the scope and content of the legal services to be provided, as far as necessary in the individual case.”* With this reform, the legislator explicitly wanted to allow charitable involvement

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<sup>4</sup> FEDERAL CONSTITUTIONAL COURT OF GERMANY (Bundesverfassungsgericht), Decision of 29th July 2004 (1 BvR 737/00), in: *Neue Juristische Wochenschrift* 2004, p. 2662 (also see: [http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2004/07/rk20040729\\_1bvr073700.html](http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2004/07/rk20040729_1bvr073700.html)).

<sup>5</sup> The German word “Anleitung” is a key word at this point, since it is crucial for the legal frame of legal clinics. “Anleitung” basically means to guide someone. It is important to note that “Anleitung” (guidance) is not such a strong word like direction, supervision, instruction or monitoring.

in the field of legal advice which previously (at least for non-attorneys) was prohibited<sup>6</sup>.

Due to this change, law clinics became allowed in Germany for the very first time. Actually, this legal development was prepared by the jurisdiction of the German Constitutional Court (*Bundesverfassungsgericht*) which stated that free legal advice (by a legally trained person) cannot be prohibited in general.<sup>7</sup> There used to be law clinics/first experiments even before 2008, but officially their interactions were illegal. Since 2008, more and more law clinics were opened. Since 2011 law clinics spread all over the country.<sup>8</sup> Suddenly law clinics became more and more accepted within society, university and academic curricula. The first student law clinics have been founded – either on the initiative of universities or by students themselves. Meanwhile almost every German law faculty has at least one law clinic. Until 2016 there developed more than 132 law clinics, until 2018 even 152 – of which one can consider approximately 76 to be stable and long-lasting. In 2012 a few law clinics formed the German law clinic umbrella organization BSRB (*Bund Studentischer Rechtsberater*)<sup>9</sup>

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<sup>6</sup> See DEUTSCHER BUNDESTAG (German Parliament), Bundestags-Drucksache (parliamentary materials) no. 16/3655, p. 39 (<http://dip21.bundestag.de/dip21/btd/16/036/1603655.pdf>).

<sup>7</sup> FEDERAL CONSTITUTIONAL COURT OF GERMANY (*Bundesverfassungsgericht*), Decision of 16th February 2006 (2 BvR 1087/04 and 2 BvR 951/04), in: *Neue Juristische Wochenschrift* 2006, p. 1502 (also see: [www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2006/02/rk20060216\\_2bvr095104.html](http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2006/02/rk20060216_2bvr095104.html)).

<sup>8</sup> J.-G. A. Hannemann, *GJLE* [German Journal of Legal Education] 2016, p. 199 seq. ([b-s-r-b.de/wp-content/uploads/2016/06/GJLE\\_vol3\\_2016.pdf](http://b-s-r-b.de/wp-content/uploads/2016/06/GJLE_vol3_2016.pdf)).

<sup>9</sup> J.-G. A. Hannemann / G. Dietlein, *STUDENTISCHE RECHTSBERATUNG UND CLINICAL LEGAL EDUCATION IN DEUTSCHLAND*, p. 31 seq. (Springer Berlin 2016); J.-G. A. Hannemann / P. Mertes, *GJLE* 2014, p. 165; J.-G. A. Hannemann / J. Lampe, *Justament* 09/2012, 16; J.-G. A. Hannemann / G. Dietlein, *Studentische Rechtsberatung*, *AD LEGENDUM*, Vol. 11 (2014), p. 79.

which also publishes a journal about clinical legal education approaches in Germany (*German Journal of Legal Education = GJLE*).<sup>10</sup> Nowadays there are even first court decisions concerning clinical legal education.<sup>11</sup>

Law clinics in Germany usually have two interests: on the one hand, there are students who want to practice law (which they are taught at university), who want to gather first experiences and understand what it means to be a lawyer, on the other hand, law clinics always have a social and charitable component. Law clinics also want to give access to justice.<sup>12</sup> This is why they are not only helpful in an academic system, but also in the legal system.

Law clinics are – like “legal technicians” – a good way to get an affordable (which means free) and limited legal advice.<sup>13</sup> These two aspects, the social and the academic one correlate with each other. The client is a concrete person with human dignity and a real problem that urges to be solved. This is also the reason why students prefer to work on real cases from everyday life than on pure academic cases. At least this is the experience of everyone who became a member of a law clinic. But even more important is the fact that students – in the very theoretical and fictional case-based legal education in Germany – mostly learn more by working on real cases than on theoretical. The life

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<sup>10</sup> ISSN: 2509-8667.

<sup>11</sup> G. Dietlein / J.-G. A. Hannemann, NJW [Neue Juristische Wochenschrift] 2015, p. 1123 seq.

<sup>12</sup> See Frank S. Bloch, Access to Justice and the Global Clinical Movement, 28 WASH. U. J. L. & POL'Y 111 (2008); Stephen Wizner / Jane Aiken, Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice, 73 FORDHAM L. REV. 997 (2004).

<sup>13</sup> Cfr. footnote 3.

is the best teacher. And real cases (in which something is at stake) are the best appetizers to deal with the theoretical basics.

Most of the cases law clinics receive are cases in the field of consumer law (purchases, rent, employment law etc.).<sup>14</sup> There are even a few approaches to deal with criminal law, which is still quite difficult in Germany to do as a student.<sup>15</sup> This is related to the fact that in a criminal case only an attorney can obtain access to the files of the public prosecutor and may appear in court.<sup>16</sup> Due to the importance of a penal judgement for the sentenced person, this seems to be justified. There are also various specialized law clinics which deal with internet law or start-ups.<sup>17</sup> Another special type of law clinics are refugee law clinics which have acquired a high significance due to the refugee crisis in Europe.<sup>18</sup> In 2016 about 37 specialized refugee law clinics offer legal advice especially to refugees.<sup>19</sup>

The authors want to point out the importance of refugee law clinics within the German system, the legal framework of student legal counselling in Germany, the background of the refugee law clinics as well as their benefits to society as a whole.

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<sup>14</sup> J.-G. A. Hannemann, First statistical evaluation of the development of law clinics in Germany, GJLE 2015, p. 145 seq.

<sup>15</sup> The law clinic from the "Freie Universität Berlin" is for example offering legal advice in the field of criminal law (see <http://www.jura.fu-berlin.de/fachbereich/einrichtungen/strafrecht/lehrende/momsenc/FU-Law-Clinic/index.html> [01.09.2017]).

<sup>16</sup> J.-G. A. Hannemann / G. Dietlein, STUDENTISCHE RECHTSBERATUNG UND CLINICAL LEGAL EDUCATION IN DEUTSCHLAND, p. 25 seq. (Springer Berlin 2016).

<sup>17</sup> J.-G. A. Hannemann, Overview of existing law clinics in Germany (Übersicht bestehender Legal Clinics in Deutschland), GJLE 2016, p. 199 seq.

<sup>18</sup> Cfr. GJLE 2017, p. 34.

<sup>19</sup> J.-G. A. Hannemann / G. Dietlein, STUDENTISCHE RECHTSBERATUNG UND CLINICAL LEGAL EDUCATION IN DEUTSCHLAND, p. 31 seq. (Springer Berlin 2016).



*Map:* The map shows the different refugee law clinic locations in Germany. The size of the arrow indicates the number of law clinics at the specific place. Surprisingly there is no city where two refugee law clinics are working independently from each other. Every city has just one refugee law clinic, but sometimes several civil law / general law clinics (not specialised on refugee law). The map also shows that not in every city a refugee law clinics exists and that

*there are much more civil / general law clinics. This map does not show all civil / general law clinics in Germany.*

### **III. THE REFUGEE CRISIS IN GERMANY**

Germany is an immigration country. In 2014 every fifth person (which is about 16 million people) has had at least one migration background within the family (which means that at least one member of the family had immigrated to Germany since 1949 or had ancestors who immigrated since 1949).<sup>20</sup> 56 % of these people hold the German citizenship. 44 % of all people who immigrated since 2011 have an academic degree, whereas in the German society “only” 24 % have achieved graduation. One could add that 28 % of immigrants do not have any professional qualification and 8 % no school graduation (often due to personal circumstances in the situation of persecution).

While in former times foreigners often came to Germany as immigrant workers (in order to work there for several years and later leave the country again which often did not happen), the massive immigration to Germany in the years 2014 – 2016 was a refugee topic which has its roots in war, expulsion, political and religious persecution and also in social poverty.<sup>21</sup> The extraordinary number of refugees and asylum seekers from Syria, Iraq, Afghanistan, Albania and many other states in 2014 to 2016 led

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<sup>20</sup> Federal Statistical Office (Germany), STATISTICAL YEARBOOK 2014 - GERMANY AND INTERNATIONAL, p. 42 (Statistisches Bundesamt, Statistisches Jahrbuch 2014 – Deutschland und Internationales).

<sup>21</sup> See Patrick Kingsley, THE NEW ODYSSEY: THE STORY OF EUROPE'S REFUGEE CRISIS (London 2016). More data see: eurostat, Asylum and first time asylum applicants by citizenship, age and sex Annual aggregated data (rounded), [http://ec.europa.eu/eurostat/en/web/products-datasets/-/MIGR\\_ASYAPPCTZA](http://ec.europa.eu/eurostat/en/web/products-datasets/-/MIGR_ASYAPPCTZA)

Germany and whole Europe into a pan-European refugee crisis. In the core time (October 2015 – September 2016) more than 50.000 asylum applications were monthly filed with the Federal Office for Migration and Refugees (*Bundesamt für Migration und Flüchtlinge* = BAMF).<sup>22</sup> Overall, there were more than one million asylum applications in 2014 to 2016 (2014: 200,000 / 2015: 475,000 / 2016: 745,000).<sup>23</sup> About 300.000 asylum procedures are still pending in 2017. Every month more than 25,000 hearings are held and more than 70,000 decisions on applications for asylum are made, of which over 40 % are positive.<sup>24</sup> This did not only lead to an excessive overload of the BAMF, but of all parties involved in refugee management (municipalities, churches, private organisations) since the refugees were already in Germany when applying for asylum. The discussion about the admission procedures for refugees and foreigners in Germany was heated by the fear of terror and crime and polarized the entire country. One should note the particularly important role of the Chancellor of Germany Angela Merkel who stand up for the opening of Europe for refugees against strong political resistance.<sup>25</sup> Matthias M. Mayer (Bertelsmann Foundation Germany) remarks correctly: *“Merkel is clearly the face of Germany’s refugee policy. Before the summer of 2015,*

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<sup>22</sup> Federal Office for Migration and Refugees (Germany), Asylum statistics 2 / 2017 ([www.bamf.de/SharedDocs/Anlagen/DE/Downloads/Infothek/Statistik/Asyl/201702-statistik-anlage-asyl-geschaeftsbericht.pdf](http://www.bamf.de/SharedDocs/Anlagen/DE/Downloads/Infothek/Statistik/Asyl/201702-statistik-anlage-asyl-geschaeftsbericht.pdf)).

<sup>23</sup> Federal Office for Migration and Refugees (Germany), Recent statistics 2 / 2017, p. 3 ([www.bamf.de/SharedDocs/Anlagen/DE/Downloads/Infothek/Statistik/Asyl/aktuelle-zahlen-zu-asyl-februar-2017.pdf](http://www.bamf.de/SharedDocs/Anlagen/DE/Downloads/Infothek/Statistik/Asyl/aktuelle-zahlen-zu-asyl-februar-2017.pdf)).

<sup>24</sup> Federal Office for Migration and Refugees (Germany), Asylum statistics April 2017, p. 10 ([www.bamf.de/SharedDocs/Anlagen/DE/Downloads/Infothek/Statistik/Asyl/aktuelle-zahlen-zu-asyl-april-2017.pdf?\\_\\_blob=publicationFile](http://www.bamf.de/SharedDocs/Anlagen/DE/Downloads/Infothek/Statistik/Asyl/aktuelle-zahlen-zu-asyl-april-2017.pdf?__blob=publicationFile)).

<sup>25</sup> See Joyce Marie Mushaben, Angela Merkel’s Leadership in the Refugee Crisis, 116 CURRENT HISTORY (2017), Issue 788, p. 95 – 100.



*Merkel's style of politics was characterized by pragmatism and incremental steps, rather than following a sweeping political vision. Now, in a departure from her usual style, Merkel has made Germany's open asylum policy her personal political project—despite strong resistance from many quarters.”<sup>26</sup>*

Germany is one of the richest countries in Europe and has a tremendous responsibility (not only of historical nature). Many citizens are concerned about the refugees and their life circumstances. But asylum law can also be abused. One has to differentiate between a refugee (someone who has to leave his country forcedly because he is persecuted or no longer safe) and general migration, especially the so called "economic refugees" (those who have a future in their country, but hope for a better life in another country). With regard to the limited availability of resources and capacities in every country, this distinction is a question of justice – as some refugees are really worried about their life, while others are only concerned about the quality of their life. This is why immigration needs regulation. In the area of (ordered) migration it is legitimate to look at criteria like language skills, school degrees, chances on the labour market etc. With regard to refugees these criteria are absolutely inappropriate. The aim is to protect human beings from persecution, regardless of whether the host country benefits from it.

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<sup>26</sup> Matthias M. Mayer, Germany's Response to the Refugee Situation: Remarkable Leadership or Fait Accompli?, p. 6, in: Bertelsmann Foundation, Newpolitik, May 2016, available at [www.bfna.org/sites/default/files/publications/Germanys\\_Response\\_to\\_the\\_Refugee\\_Situation\\_Mayer.pdf](http://www.bfna.org/sites/default/files/publications/Germanys_Response_to_the_Refugee_Situation_Mayer.pdf)

Refugees are regularly confronted with a variety of complex legal issues which they cannot handle with – not only because of the language.<sup>27</sup> In 2013 approximately 51.2 million people were fleeing worldwide, of whom about 187,600 were accepted as refugees in Germany.<sup>28</sup> In addition, 109,580 initial asylum applications were submitted.<sup>29</sup> From 173,072 in 2014<sup>30</sup> this number increased to 441,899 in 2015<sup>31</sup> in Germany.

The refugee crisis in Germany is also accompanied by an overload of courts and public administration. For most judges and public officials the flood of asylum applications came surprisingly. Resources are missing to answer all asylum requests in reasonable time. The refugee crisis led to a human resource crisis at some regional courts and regional administrations. This leads to the unacceptable situation, that in a large number of asylum procedures and court proceedings nothing happens for a long time. The average process time at some courts is already nine months, even if asylum seekers need fast solutions.<sup>32</sup>

Especially since 2016 the administrative courts in Germany (Verwaltungsgerichte) have been overloaded with proceedings. Every fourth asylum procedure goes to

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<sup>27</sup> Refugee Law Clinic Munich, Annual Report, p. 11

([http://www.lawclinicmunich.de/images/LawClinicMunich\\_Jahresbericht\\_1415.pdf](http://www.lawclinicmunich.de/images/LawClinicMunich_Jahresbericht_1415.pdf)).

<sup>28</sup> UNHCR Global Trends 2013, p. 13 ([www.unhcr.de/service/zahlen-und-statistiken.html](http://www.unhcr.de/service/zahlen-und-statistiken.html) [01.09.2017]).

<sup>29</sup> Federal Statistical Office (Germany), STATISTICAL YEARBOOK 2014 - GERMANY AND INTERNATIONAL, p. 42.

<sup>30</sup> Ibid., p. 41.

<sup>31</sup> Ibid., p. 42.

<sup>32</sup> See [www.tagesspiegel.de/berlin/fluechtlinge-in-berlin-zahl-der-asylverfahren-vor-dem-verwaltungsgericht-steigt-stark/14671732.html](http://www.tagesspiegel.de/berlin/fluechtlinge-in-berlin-zahl-der-asylverfahren-vor-dem-verwaltungsgericht-steigt-stark/14671732.html).

court.<sup>33</sup> In some administrative courts, asylum procedures account for two-thirds of all administrative proceedings (e.g. Münster<sup>34</sup>, Gelsenkirchen<sup>35</sup>). In many courts the asylum procedures have tripled from 2015 to 2016 (e.g. Saarland<sup>36</sup>) or even quadrupled (like in Berlin: over 9.000 asylum complains in 2016<sup>37</sup>, 13.000 procedures pending<sup>38</sup>). By the way, a large proportion of all complaining asylum seekers are Syrians who fight against the fact that they were only granted subsidiary protection, which does not entitle their families to come to Germany for family reunion. In most of these proceedings, the administrative courts grant the applicants from Syria the full asylum protection which is given to all refugees in the situation of political persecution. On the other hand, it has to be noted, that other refugees (mostly from Albania, Serbia, Macedonia, Kosovo, Bosnia-Herzegovina) bring an action to court, even though they know they have no chance of being recognized as asylum seekers.<sup>39</sup> Asylum law and court processes, which give more time until to have to leave the country or being deported, can also be abused.

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<sup>33</sup> See [www.zeit.de/politik/deutschland/2017-07/asylverfahren-verwaltungsgericht-richter-ueberlastung-fluechtling](http://www.zeit.de/politik/deutschland/2017-07/asylverfahren-verwaltungsgericht-richter-ueberlastung-fluechtling).

<sup>34</sup> See [www.wn.de/Muenster/2651382-4571-Faelle-beim-Verwaltungsgericht-Asylverfahren-sorgen-fuer-Klagewelle](http://www.wn.de/Muenster/2651382-4571-Faelle-beim-Verwaltungsgericht-Asylverfahren-sorgen-fuer-Klagewelle).

<sup>35</sup> See [www.waz.de/staedte/gelsenkirchen/die-zahl-der-asylverfahren-nimmt-rasant-zu-id209297363.html](http://www.waz.de/staedte/gelsenkirchen/die-zahl-der-asylverfahren-nimmt-rasant-zu-id209297363.html).

<sup>36</sup> See [www.focus.de/regional/trier/migration-saar-verwaltungsgericht-asylverfahren-zahl-verdreifacht\\_id\\_6451391.html](http://www.focus.de/regional/trier/migration-saar-verwaltungsgericht-asylverfahren-zahl-verdreifacht_id_6451391.html).

<sup>37</sup> [www.moz.de/artikel-ansicht/dg/0/1/1540175](http://www.moz.de/artikel-ansicht/dg/0/1/1540175).

<sup>38</sup> [www.rbb24.de/politik/beitrag/2017/08/verwaltungsgericht-berlin-kritik-bamf-asylverfahren.html](http://www.rbb24.de/politik/beitrag/2017/08/verwaltungsgericht-berlin-kritik-bamf-asylverfahren.html).

<sup>39</sup> [www.faz.net/aktuell/politik/inland/asylklagen-an-verwaltungsgerichten-auf-hochststand-13755084.html](http://www.faz.net/aktuell/politik/inland/asylklagen-an-verwaltungsgerichten-auf-hochststand-13755084.html).

#### **IV. THE DEVELOPMENT OF REFUGEE LAW CLINICS IN GERMANY**

Also lawyers recognized that there is a lack in understanding the refugee law throughout Germany. This is why they established specialization in the field of refugee law / migration law for lawyers (§ 14p Fachanwaltsordnung).<sup>40</sup>

This development underlined the importance of refugee clinics. More and more citizens became interested in this field and started to work for refugee law clinics, even people with no law background at all.<sup>41</sup>

#### **V. THE LEGAL FRAMEWORK OF REFUGEE LAW CLINICS**

A great chance for the constitutional state, but also for the refugees themselves are the refugee law clinics which record a massive spread all over the country since 2013. The law of asylum in Germany is relatively complex. Since it is normally not component of the law curriculum at university, refugee law clinics organize their own courses in foreigners' law, mostly in cooperation with attorneys who practice in this topic. These attorneys are often also willed to accompany and supervise the work of the refugee law clinic (which is necessary according to German law). The Act on Legal services (RDG 2007) allows law students (and actually everyone) to advise clients free of charge as long as they are guided by a person who is authorized to provide legal services or has the qualification as a judge which is to have passed the second state examination

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<sup>40</sup> Kai von Lewinski, Law Clinics in der Fachanwaltsausbildung – Knappen als Königsmacher?, GJLE 2016, p. 53 seq.

<sup>41</sup> Boris Paal, GJLE 2016, p. 2.

(e.g. every educated lawyer, judge, attorney at law, notary, public prosecutor). The legal question is how far such guidance by a lawyer has to be made.<sup>42</sup> This question has implications for the organization of the legal clinic, because if “guidance” really means strict supervision, the law students cannot really work independently on their cases and for the supervisor going through every little detail of the case (again) would not be efficient, especially when dealing with easy and standard cases.

On the other hand, a guidance that is not strict enough can lead to advisory errors which have to be avoided in the interest of the client who cannot assess the quality of legal advice.

### **1. The education that is necessary to work in a refugee law clinic**

Refugee law is in Germany not part of the standard academic curriculum for law students.<sup>43</sup> Before students are allowed to work in a refugee law clinic, they have to go through one or two semesters of preparation courses which usually contain at least one lecture on refugee law as well as a weekly tutorial where students discuss cases with their supervisors / cooperating attorneys / professors.<sup>44</sup> Some refugee law clinics provide “fast track” education programs, e.g. seven intensive weeks with a total workload of 42 hours.<sup>45</sup> Many of them want their students to undertake an internship (with an attorney) before they are advising someone.<sup>46</sup>

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<sup>42</sup> See fn. 4.

<sup>43</sup> *Schaich*, GJLE 2016, p. 156 seq.

<sup>44</sup> *Born*, GJLE 2015, p. 103; *Thomson*, GJLE 2015, p. 108; *Uzuner*, GJLE 2015, p. 113.

<sup>45</sup> *Thomson*, GJLE 2015, p. 110.

<sup>46</sup> *Uzuner*, GJLE 2015, p. 115.

A few law clinics also established cooperation with other refugee helping institutions where the students can already test their knowledge under lawyer supervision.<sup>47</sup>

A few refugee law clinics are also educating people to be legal advisors who are not law students.<sup>48</sup>

Since these law clinics are organised by students they have a statute and organise the Refugee law clinic in the legal form of a registered association (“eingetragener Verein”) which is a public registered, non-profit organisation and usually works independently from the prospective university.<sup>49</sup> This is to be considered the most common legal form for German law clinics in general<sup>50</sup> even though there is a strong trend for law clinics to enter a cooperation with the university.<sup>51</sup>

## **2. Why is working in a refugee law clinic an advantage to the students?**

The refugee crisis hit Europe hard. The media are reporting about this topic on a daily base. Especially young people are interested in helping to improve the situation or refugees and to set an impact.<sup>52</sup> This is mostly the first motive to work in a refugee law clinic.

In a few refugee law clinics it is also possible to get a certificate which can be recognized in the academic curriculum at law school / university as a law course or a

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<sup>47</sup> *Born*, GJLE 2015, p. 103.

<sup>48</sup> *Born*, GJLE p. 2015, 104; *Uzuner*, GJLE 2015, p. 114.

<sup>49</sup> *Thomson*, GJLE 2015, p. 109.

<sup>50</sup> *Hannemann*, GJLE 2015, p. 138 seq.

<sup>51</sup> *Hannemann*, GJLE 2015, p. 138.

<sup>52</sup> *Uzuner*, GJLE 2015, p. 113.

legal internship.<sup>53</sup> Such an internship is particularly interesting for German law students, as an internship / practical training of three months is required for the first state exam in law.

The confrontation with asylum law (which is not part of the standard academic curriculum in law school) expands the horizon of students and can give them new motivation for their studies, since they recognize that legal issues can play an existential role in real life. But this is only a side effect of a refugee law clinic.<sup>54</sup> The main focus is on the concerns of the refugees, even if they are less interesting for law students or concern non-legal topics. However, this also leads to a small disadvantage of the refugee law clinics: the relevance of asylum law in the state exam is rather low (compared to consumer law or general civil law).

### **3. What cases are refugee law clinics working on?**

Usually the refugees have concrete questions concerning the whole process of seeking asylum in Germany.<sup>55</sup> After solving all the questions, they are accompanied through the process of seeking asylum by usually at least two members of the refugee law clinic who are supervised by a lawyer (mostly an attorney-at-law) who is specialised in asylum law.<sup>56</sup>

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<sup>53</sup> *Thomson*, GJLE 2015, p. 111.

<sup>54</sup> *Born*, GJLE 2015, p. 102.

<sup>55</sup> *Born*, GJLE 2015, p. 103.

<sup>56</sup> *Born*, GJLE 2015, p. 103.

Refugee law clinics are helping people to cope with legal questions concerning asylum law. But it is not only the refugee law that is put into focus but sometimes even simple non-legal problems that occur, e.g. dealing with certain administrative matters that can easily become quite difficult. In Germany, asylum law is a fundamental right for politically persecuted, protected by the constitution (Art. 16a Grundgesetz<sup>57</sup>). But only few people actually can rely on this fundamental right which is granted under certain conditions. In addition, refugees can derive rights from international and European regulations (1951 Refugee Convention, EU Dublin regulation, EU regulations 2011/95/EU, 2013/32/EU, 2013/33/EU). All national regulations concerning refugees are bundled in the German *Asylgesetz* (national asylum act 1992<sup>58</sup>) which is supplemented by the *Asylbewerberleistungsgesetz* (act concerning aid / services for asylum seekers 1993<sup>59</sup>). Important are also the regulations in the *Aufenthaltsgesetz* (act about the residence, employment and integration of foreigners in the federal territory 2004<sup>60</sup>).

At the end of a asylum procedure, there is a decision which either allows the asylum seeker to remain in the country or not. There are different statuses that entitle a person to stay in Germany for a certain period of time (status as a refugee, subsidiary protection, ban on deportation, recognition as asylum seeker with fundamental asylum right). And if the asylum seeker receives a negative decision concerning his

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<sup>57</sup> The "Grundgesetz" (Fundamental Law) is the Constitution of the Federal Republic of Germany, cfr. [https://www.gesetze-im-internet.de/gg/art\\_16a.html](https://www.gesetze-im-internet.de/gg/art_16a.html).

<sup>58</sup> Recently published in: Bundesgesetzblatt I 2008, p. 1798 seq.

<sup>59</sup> Original version: Bundesgesetzblatt I 1993, p. 1074 seq.

<sup>60</sup> Original version: Bundesgesetzblatt I 2004, p. 1950 seq.



request for asylum there is always the possibility to go to court. The court might alter the administrative decision.

#### **4. Asylum questionnaire**

Quite often refugees need help with completing a typical asylum questionnaire. Even though these questionnaires exist in several languages it is sometimes difficult to understand the legal terms which are used in such forms. Especially if the asylum seeker has no specific education or never had to deal with administrative stuff. Sometimes this can be confusing and difficult coming from a different jurisdiction. This is also a field which law clinicians will help in.

#### **5. The hearing**

Also refugee law clinics try to help their clients to prepare for the hearing ("*Anhörung*").<sup>61</sup> This is a very important step in the asylum procedure where the refugee will be interviewed by German administrative officials. Within this hearing there are several experts estimating whether the refugee should receive the so-called asylum title or not. There are translators and even people from the particular region the refugee is referring to be his home region to estimate if the refugees is telling the truth. The hearing is of great importance since here will be made a decision whether the asylum seeker will be considered to be a refugee who is seeking for asylum because

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<sup>61</sup> *Hilb*, GJLE 2014, p. 126 seq.

he is threatened in his country with death, bodily harm or discrimination. Many asylum seekers only wish to improve their life circumstances. These are so called economic asylum seekers. These people have to go back to their countries because the places are reserved for those who otherwise will not be able to survive because of war and other disturbing circumstances. Therefore, the translators are even investigating whether the dialect the person is speaking is authentic. Moreover, the story how the refugee came to Germany has to make sense. In case of doubt there are always an examination as well as several tests to find out if the asylum seeker belongs to the group of officially recognized refugees. The committee will even investigate on the language and especially the accent the refugee is speaking. Experts know the habits in the particular region in detail. On that base one can find out if the truth was told or not.

Based on the decision from this committee it might happen that the asylum seekers will be send back to his country. In this case the government will pay for his flight back and provide him sufficient money to start a new life back home. For asylum seekers who do already know that they will not be considered to be refugees there is the option to declare themselves to go back to their country of origin and then to receive an extra amount of money as motivation to go back home.

If the person is officially recognized to be a refugee in Germany he will receive a monthly payment as well as place to live for free.

But what if something went wrong within the procedure of the hearing and due to misunderstandings or other circumstances the asylum seeker's request for asylum will

be denied? In this case one has to go as quick as possible to the courts before the asylum seeker will be send back to maybe even a country he does not belong to.

## **6. Help on non-legal problems**

It is not easy to get along in a new country, when someone comes from a different jurisdiction. Sometimes refugee law clinics have to help on non-legal problems. Either in other fields of law (e.g. labour law or family law) or with general life questions like how to visit the doctor or receiving medicine. Of course, there are even more random questions that might come up.

Refugee law clinics also help in these fields.

## **VI. HOW DO REFUGEE LAW CLINICS WORK IN GERMANY?**

### **1. Proper training of students before legally advising refugees**

First of all, students who are involved in refugee law clinics can be divided into two groups. First group includes translators who help to translate documents, letters as well as conversations. These students do not have to be law students. In fact, it is not even necessary that they are students at university as long as they are able to help in translating, but most of translators in refugee law clinics are law students.<sup>62</sup>

The other group are students who want to give legal advice to refugees. These students – who already have studied law – nevertheless have to go through a special training

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<sup>62</sup> *Hannemann*, GJLE 2015, p. 145.

in refugee law first.<sup>63</sup> This is necessary because refugee law is not part of the mandatory curriculum at law school / university.

This training usually takes approximately one or two semesters. Only after this training students have the knowledge and understanding of refugee law in order to be able to join meetings with refugees to provide legal advice. Afterwards the students will usually receive a certificate which confirms their acquired skills and knowledge.

## **2. Legal advice from students**

Usually refugee law clinics have an open meeting once or twice per week to establish the first contact with refugees. Afterwards the refugee law clinic will work with the asylum seeker until a decision was made and either asylum or no asylum has been granted. The concept of immediate legal advice without an ongoing relation [so-called: ad hoc advice]<sup>64</sup> is not applicable here.

But a refugee law clinic does not only deal with refugee law. Also in other areas like civil law refugee law clinics try to help their clients. Sometimes the refugees are seeking for advice concerning everyday life which might be different from how it used to be in their countries of origin. But also, medical or psychological help is needed. Moreover, the refugee law clinic is helping to organise and prepare all meetings with

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<sup>63</sup> See also *Hilb*, GJLE 2014, p. 123.

<sup>64</sup> See *Hannemann*, GJLE 2015, p. 141.

the administration, preparing letters, helping to fill out forms as well as preparing the hearing of the refugee.<sup>65</sup>

If the refugee law clinic is not able to help on a particular problem it may send the refugee to a helping institution which is more familiar with the particular problem.

In Germany refugee law clinics cooperate with catholic and protestant church institutions (*Caritas, Diakonie*) as well as welfare institutions and social initiatives.

### **3. The board of advisors**

There might come up situations in which students are not able to deal with a case anymore and the fully trained lawyer is necessary to help further. Students are trained to understand, whether the case requires professional help from a lawyer or not. If there are any doubts they have to consult their advising lawyer. This is what the German law provides with "guidance". Therefore, it is helpful to establish an advisory board consisting of lawyers / law professors / attorneys / notary publics etc. in order to fulfil the legal requirements of the "*Rechtsdienstleistungsgesetz*" concerning guidance / supervision. The members of the advisory board take the responsibility of guiding and supervising the practicing law students.

To build up an advisory board is not a problem for legal clinics. Most of lawyers are open-minded to this idea and feel honoured to work in a pro-bono-initiative. The idea of pro bono work of attorneys in Germany is older than law clinics and respected by

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<sup>65</sup> See *Oehl*, BRJ [Bonner Rechtsjournal] 02/2013, p. 152.

all lawyers. Actually, many lawyers already work on pro bono projects (e.g. giving legal advice to a charity club for free). But not only lawyers are advising refugee law clinics. Also, interpreters, translators and experts who are familiar with the appropriate cultures and nations are more than welcome to support the work of the refugee law clinic.

#### **4. Limitation of liability**

Since refugee law clinics mostly cannot afford a liability insurance, the limitation of liability of the law clinic is a point to be considered. The law clinic does not get any financial return for the legal advice. Neither the refugee can verify whether the legal advice from the law clinic is right. This indicates how important it is to deliver sustainable and well researched advice.

The best measure to limit liability is good organisation of the clinic and good monitoring of acting students. Nevertheless, one should also consider legal measures to limit liability.

The different mechanisms of limited liability protect the practicing students as well as the advisory board.

First of all the legal form of the refugee law clinic can already provide protection to a certain extent, if it is a legal form (corporate) that reduces liability for the advisor. Without choosing a specific legal form the law clinic will – under German law – be considered as society / association with unlimited liability („*Gesellschaft bürgerlichen*

*Rechts*”).<sup>66</sup> In that case the legal advisor (student) will be fully liable on his own. If the law clinic provides wrong legal advice, the law student will have to pay the damage on his own. That is why most of the legal clinics in Germany chose corporate legal forms with limited liability, primarily a registered association (*“eingetragener Verein”*), which is a non-profit legal person with limited liability of its members. Most of refugee law clinics chose this legal form.<sup>67</sup>

Besides the legal form there are other ways to protect the law students from legal liability. It is possible to make a contract with the client, that specifies the danger of law students giving legal advice. In this contract liability can be limited to intent and gross negligence.

Another additional way to protect the students who work at the legal clinic is to take out insurance with an insurance company for all cases the law clinic is working on. According to § 51 IV 1 Bundesrechtsanwaltsordnung (Federal law concerning attorneys) attorneys always have to be insured for at least € 250,000 in each case.<sup>68</sup> Possibly, liability problems could also be solved through the insurance of the supervising lawyers.

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<sup>66</sup> See J.-G. A. Hannemann / G. Dietlein, *STUDENTISCHE RECHTSBERATUNG UND CLINICAL LEGAL EDUCATION IN DEUTSCHLAND* 56 seq. (Springer Berlin 2016).

<sup>67</sup> *Ibid.*, p. 56.

<sup>68</sup> See Stephan Weth, in: Martin Henssler/ Hanns Prütting, *BUNDESRECHTSANWALTSORDNUNG*, § 6 RDG no. 18 (Beck München 2014, 4th edition); differently: Hanns Prütting, *Gutachten für den 65. Deutschen Juristentag 2004*, p. G 48; Volker Römermann, *NJW [Neue Juristische Wochenschrift] 2006*, p. 3030.

## VI. Conclusion

The field of refugee law clinics developed tremendously in Germany within the last few years. Nowadays one can find in almost every university city a law clinic and in most of them a refugee law clinic as well. Germany is a country of immigration. This is one of the reasons, why Germany is one of the economically strongest countries in Europe. Nevertheless, the refugee crisis from 2015 had a major impact on the country. Right wing parties became stronger and for the very first time a right-wing party (AfD) has entered German Parliament due to the parliamentary elections in September 2017. The fact that this party received 12.6% of the votes shows that the refugee crisis is affecting and worrying many people.

*“When you come out of the storm you won’t be the same person that walked in. That’s what the storm is all about” (Haruki Murakami).*



## **AFTER ARRIVAL, THE PROBLEMS FACING REFUGEES AND THEIR FAMILIES: A CLINICAL LEGAL RESPONSE**

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*Katy Ferris, Nottingham University\**

### **ABSTRACT**

Since 2016, a Refugee Family Reunion Law Clinic has operated from Sheffield Hallam University's Helena Kennedy Centre for International Justice (hereafter HKC Law Clinic). Given the austerity-driven political agenda of the UK government in cutting public funding to advisory services, the effects of LASPO and a continuing refugee crisis, refugees in many parts of the UK were in need of legal and non-legal assistance. To fill this gap in services university law clinics, including our own, began to offer specialised services to assist the refugee population. This has included family reunion and exceptional case funding applications, and expert legal advice for individuals who find themselves stateless, yet in many instances the formal assistance ends at this stage.

The HKC Law Clinic and its staff have remained in contact with many of our refugee clients (some are now engaged as interpreters). Through this interaction we have observed a particular problem of the lack of post-arrival support for refugees and their families. Developing the Therapeutic Jurisprudence philosophy upon which the clinic is based, and thus ensuring a therapeutically positive experience for the Clinic's users, we have begun a process of creating a more holistic clinical experience. Following the

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refugee clients' successful family reunion application, and when building their new lives together in the local region, our clinic offers a range of support services to assist in the pragmatic issues facing the family.

This aspect of the HKC Law Clinic is in its infancy, but this paper aims to demonstrate what university law clinics can achieve and provides examples of our experiences so far.

## INTRODUCTION

In this paper we aim to highlight a number of issues facing refugees and their families following reunion in the UK (and specifically to England and Wales). The authors run a law clinic in a university in England which specifically offers guidance for refugees in the local community to be reunited with their families living abroad. Far from being a straightforward system,<sup>1</sup> refugee family reunion cases are often very complex, time-consuming, require considerable research<sup>2</sup> and, frequently, financial contributions to assist in gathering the required evidence to substantiate an application.<sup>3</sup> With the

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<sup>1</sup> See Jacob Beswick, NOT SO STRAIGHTFORWARD: THE NEED FOR QUALIFIED LEGAL SUPPORT IN REFUGEE FAMILY REUNION, British Red Cross (2015) and Anne Staver, *Family Reunification: A Right for Forced Migrants?* REFUGEE STUDIES CENTRE WORKING PAPER SERIES 51 (2008).

<sup>2</sup> For instance, there is relatively little information regarding published or consistent time scales for the application process and overcomplexity in the use of the online visa application system (the TLS contact website) and ancillary online registration services.

<sup>3</sup> The use of DNA evidence is such an example. On the basis that the refugee cannot prove to the Entry Clearance Officer's satisfaction that they are the father of the applicant DNA evidence is required. However, detailed instruction as to when, where, how, and who should pay are not provided to the refugee. Without support from an experienced advisor it may be difficult for the refugee to know where to gather this evidence. See Beswick supra note 1, and Judith Connell, Gareth Mulvey, Joe Brady, Gary Christie, ONE DAY WE WILL BE REUNITED: EXPERIENCES OF REFUGEE FAMILY REUNION IN THE UK, Glasgow: *Scottish Refugee Council* (2010) where the costs

removal of legal aid for such cases through the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), and pending the successful passage through Parliament of the Refugees (Family Reunion) Bill, university law clinics, among other pro bono actors in the sector, are filling the gap in guidance.

We begin by identifying, to place the discussion in context, a range of problems which may affect the refugee in their application for family reunion.<sup>4</sup> This process may involve hardship and, at first, recourse to non-legal but possibly legal action to secure this right. Once the application is successful however, typically the law clinic has completed its task and moves to the next client (wishing prosperity and happiness to the now reunited family).

Our clinic has, adopting a Therapeutic Jurisprudence philosophy, recognised the need for additional care and support after the family has been reunited. This “post-arrival” support may even be seen as more significant to ensure the transition from disunited family to an effective, functioning and happy family unit. It is at present a severely under-researched area of practice in clinical legal education and our clinic has only made the first tentative steps to providing the holistic service needed. We present in this paper a series of case studies noting, not only the process of supporting the refugee client through their family reunion application, but also the problems they

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of acquiring DNA evidence, along with the costs of submitting appeals hearings in court (not to mention the emotional cost to family) are considered.

<sup>4</sup> As such the students need awareness of the specific cultural and emotional needs of this category of client. See Christine Zuni Cruz, *[On the] Road Back in, Community Lawyering in Indigenous Communities*, 5 CLINICAL LAW REVIEW, 557 (1999).

have encountered and our attempts to mitigate the worst of these. It has demonstrated the need for an effective system of post-arrival support and one which we aim to roll out from October 2018.

## **A RANGE OF PROBLEMS AFFECTING REFUGEES IN THE UK**

In 2012 the government enacted LASPO. The result led to significant cuts in available legal aid. This had a direct effect on groups including the victims of trafficking and unaccompanied children pursuing immigration advice. Refugees (in England and Wales) seeking family reunion applications were also adversely affected by being denied access to legal aid. A concession was made available where the refusal of legal aid would lead to a breach of European Convention or European Union law rights. In such circumstances an application under a system known as Exceptional Case Funding (ECF) may be made.<sup>5</sup> The system of ECF has been subject to criticism by organisations including Amnesty International due to its inadequacy and complexity. It does, however, at least provide a mechanism for the most vulnerable to obtain legal advice and to assistance with associated costs.

Individuals in the UK and with refugee or humanitarian protection status are legally entitled to apply to be joined by their immediate and pre-flight family members (spouse/civil partner/partner and children under the age of 18).<sup>6</sup> To do so they must

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<sup>5</sup> See <http://www.legislation.gov.uk/ukpga/2012/10/section/10/enacted>.

<sup>6</sup> The right to family reunion arises from the 1951 Refugee Convention and is only a right given to recognised refugees who have been granted refugee status or, since October 2006, five-years limited leave to remain under the Humanitarian Protection mechanism. The right to family reunion is written

complete an application form and submit evidence to the Home Office. Submission of the application form is free, but problems arise where, for example, the person does not have experience of completing forms or where language barriers exist. They are reliant on their own abilities to complete what is often complicated paperwork and application forms, and/or to represent themselves in tribunals to secure their rights provided under international law.

The recent Syrian Resettlement Programme<sup>7</sup> has impacted the advice sector because dispersal of individuals will by necessity be wide and will likely include areas that are not well supplied with immigration lawyers. Assumptions may be held that refugees do not need legal assistance because they are resettled and protected persons. Of course, they will need post-integration services such as family reunion, travel documentation and so on. They may only trace missing family member's months after arrival in the UK and need support in this task. Political and media hostility towards the refugee crisis has been exacerbated during and post the referendum on the UK's continued membership of the EU. Safe and supported refugee advisory services and clinics is paramount.

British nationality and travel documentation applications are pivotal to refugees' integration, but, again, neither attract legal aid. Not having a travel document can lead to a child not being able to take part in a school trip and families being ostensibly

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into Part 8 and the relatively new FM section (Family Dependents) of the immigration rules (not under the Part 11 Asylum section).

<sup>7</sup> See <https://www.gov.uk/government/publications/syrian-vulnerable-person-resettlement-programme-fact-sheet>.

trapped in the UK. Refugees without access to free advice can easily fall prey to unscrupulous advisors when seeking assistance with these claims. They and their families can lose substantial sums of money and time if they make mistakes on the forms. There are many examples of refugees using out of date application forms that are still circulating when seeking refugee family reunion. The language barrier further may lead them misunderstanding a question on the application form or to omit evidence.

Prior to LASPO claims could be made from the legal aid fund for a lawyer to help the individual prepare and submit the application. Now the individual must pay a lawyer to provide this service. These are significant practical problems yet, despite calls for reform from organisations including the British Red Cross, legal aid is still denied. At the time of writing, the Refugees (Family Reunion) Bill, a private members' bill, is progressing through Parliament and with cross-party support. It seeks to address two of the most significant limitations in the current system – the reintroduction of legal aid for refugee family reunion cases (to mirror the access that continues to be available in Scotland) and to allow children to sponsor their family members to join them in the UK.

In response to the lack of legal aid, regional and national not-for-profit organisations, charities and (some) lawyers have been offering their services for free. More recently universities have been assisting on refugee-related issues. The Universities of Plymouth and of Bedfordshire offer advice on Refugee Family Reunion. The University of Liverpool provides an advice service on statelessness (persons who are

not considered as a national by any state). The University of Kent offers representation in tribunal and High Court proceedings and in complex failed-asylum cases. The University of Strathclyde assists destitute asylum seekers who have exhausted all rights of appeal but who may have grounds for a fresh application for asylum in the UK. More recently, Sheffield Hallam University opened its law clinic in Refugee Family Reunion. It provides guidance on refugee family reunion, has successfully completed two ECF applications and is adding post-arrival support mechanisms to its service provision.

That six universities have undertaken to provide specific advice and guidance in immigration and asylum for refugees is encouraging. Collectively they provide a mechanism for helping refugees and in producing the next generation of lawyers who have firsthand experience of the problems faced by refugees. Without this service, many refugees would continue to be displaced and separated from their families, be unable to complete applications for citizenship and the myriad other negative effects that status of a refugee can impose.

## **A THERAPEUTIC JURISPRUDENCE APPROACH TO CLINICAL LEGAL EDUCATION**

When offering legal and non-legal forms of advice or guidance to a group such as refugees, with unique problems and backgrounds dissimilar to many of the clients 'typical' law clinics may face, the adoption of a specific philosophy is required. For our purposes this was Therapeutic Jurisprudence (TJ).

TJ is a legal philosophy that focuses on aspects of the law or the legal process from an emotional and psychological side.<sup>8</sup> It recognises the human component of those involved in the law, with its rules and in their application. Whether the person involved in this process is aware or not, whether they are detached from the individual subject to the process or maintain a professional distance and apply the law without prejudice, the entire system may have adverse therapeutic and anti-therapeutic effects.<sup>9</sup> TJ develops approaches to help maximise positive (psychological/emotional) effects and has a history of bringing the behavioural sciences into its scholarship to help inform its development and to tease out therapeutic outcomes. It covers all legal domains, it is certainly not restricted to clinical legal education, and it applies to a range of stakeholders involved in the legal process.<sup>10</sup>

The law relating to refugee family reunion is particularly in need of a TJ focus and many law clinics will, generally, be acting in a TJ key (whether they have defined it as such or not). The wellbeing of the individual client (and in the case of family reunion

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<sup>8</sup> Bruce J. Winick and David B. Wexler: *Judging in a Therapeutic Key, Therapeutic Jurisprudence and the Courts* CAROLINA ACADEMIC PRESS DURHAM, NORTH CAROLINA, Introduction, xvii, (2003); and David B. Wexler, *From Theory to Practice and Back Again in Therapeutic Jurisprudence: Now Comes the Hard Part* (December 16, 2011). 37 MONASH UNIVERSITY LAW REVIEW, 33, 34 (2011).

<sup>9</sup> David B. Wexler *Therapeutic Jurisprudence: An Overview* PUBLIC LECTURE GIVEN AT THE THOMAS COOLEY LAW REVIEW DISABILITIES LAW SYMPOSIUM, Para 41 (1999).

<sup>10</sup> Tali Gal and David B. Wexler *Synergizing Therapeutic jurisprudence and Positive Criminology* cited in POSITIVE CRIMINOLOGY (ROUTLEDGE FRONTIERS OF CRIMINAL JUSTICE) edited by Natti Ronel and Dana Segev, Chapter 6, (2015); and David B. Wexler, *Getting and Giving: What Therapeutic Jurisprudence Can Get from and Give to Positive Criminology* 6 PHOENIX LAW REVIEW 907 ARIZONA LEGAL STUDIES DISCUSSION PAPER NO. 13-13 (2013).



also the members of the family the sponsor wishes to have join them in the UK) is at the centre of their activities. Information is provided to the student members of the clinic in their training about the nature of the conflicts around the world, information on geography and politics, it will seek to instil awareness of the plight of refugees and how they arrive in the UK. Much of this training seeks to dispel myths about refugees and their reasons for travelling to the UK (as negatively and erroneously propagated in the UK-centric media) and considers the treatment of the refugee from initial interview, to gaining status, and finally being granted leave to remain. The effects of the process as a whole on the individual, and the mechanisms that can aid wellbeing or alleviate the more negative effects of this adversarial, complex, and at times Byzantine system of justice can be addressed through applying a TJ philosophy.

In our training, we focus on the behaviour, language and emotion components of TJ (and their effects on the recovery of refugee clients). This uses perspectives gained primarily from the behavioural science literature where a more emotionally sensitive,<sup>11</sup> or psychologically aware and holistic legal system is envisioned. Further, both TJ and behavioural science facilitate the development of a creative<sup>12</sup> approach to problem solving. TJ is complex in the sense that it holds both a law reform agenda

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<sup>11</sup> Also referred to as “emotional lawyering.” Here there is a moving away from the traditional lawyerly “rational-analytical problem solving and an adversarial approach to conflict.” Susan Douglas, *Incorporating Emotional Intelligence in Legal Education: A Theoretical Perspective*, 9 E-JOURNAL OF BUSINESS EDUCATION & SCHOLARSHIP OF TEACHING, 56, 56 (2015). Also, on the topic of emotional intelligence see Marjorie A. Silver, *Emotional Intelligence and Legal Education*, 5 PSYCHOLOGY, PUBLIC POLICY, AND LAW, 1173 (1999).

<sup>12</sup> David B. Wexler *Therapeutic Jurisprudence: An Overview* PUBLIC LECTURE GIVEN AT THE THOMAS COOLEY LAW REVIEW DISABILITIES LAW SYMPOSIUM, Para 41, (1999).

with the aim of assigning therapeutic goals to current legal systems within the practical limits of due process and justice.<sup>13</sup> Underlying the philosophy is a belief in a system which, as holistically as possible, ensures the most positive and therapeutic interaction with the law and legal process for all involved.

## **TYPICAL CASES IN A REFUGEE FAMILY REUNION CLINIC AND THEIR POST-ARRIVAL IMPLICATIONS**

Every case handled by the HKC Law Clinic is unique, compelling and requires a personalised approach to ensuring the strongest case is presented in the application. Some cases have proven successful, others have been rejected or they continue, pending a formal decision. Each, however, has the common thread of involving an individual wanting to be joined in the UK by their families and facing significant problems, which would potentially be insurmountable, save for the assistance available from university law clinics. The Refugees (Family Reunion) Bill, if passed, would offer considerable help to refugees in the UK and specifically England and Wales, but whilst it is presently at its Report Stage in the Lords and has cross-party support, there is also the issue of Brexit and how this will dominate Parliamentary

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<sup>13</sup> Mark W. Patry, *Better Legal Counseling Through Empirical Research: Identifying Psycholegal Soft Spots and Strategies*, 34 CALIFORNIA WESTERN LAW REVIEW, 439 (1998); David B. Wexler and Bruce J. Winick, *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* CAROLINA ACADEMIC PRESS, DURHAM, NORTH CAROLINA, (1996); and David B. Wexler *Therapeutic Jurisprudence: An Overview* PUBLIC LECTURE GIVEN AT THE THOMAS COOLEY LAW REVIEW DISABILITIES LAW SYMPOSIUM, Para 41, (1999).

time for the foreseeable future. Consequently, university law clinics with a specialist refugee focus are likely to remain relevant.

The Helena Kennedy Centre for International Justice hosts a number of work-based learning clinics, providing students with experience of advising clients on civil and criminal issues, on national and international bases, each with human rights components. Given the long history of Sheffield Hallam University in clinical legal education, the centre was deemed to be an effective resource for providing a basis of assistance in response to the consequences of the developing refugee crisis. The clients who use the HKC Law Clinic are typically vulnerable and have experienced significant disruption to their lives. They are separated from their families and frequently display signs of distress and mistrust of organisations in authoritative positions. They may also fall victim to the requirements of the refugee family reunion system. This may include limited IT skills to complete the on-line application form, and frequently they have a different perspective to Western constructs regarding the celebrating and registering births. Further the collection, collation and maintenance of supporting documents necessary to substantiate their application may have been lost or be non-existent. These, along with the language and cultural barriers present, create an environment where emotional care for the clients is paramount. Thus, the

perspective advanced by Wexler and Winick<sup>14</sup> and Gould and Perlin<sup>15</sup> acts as an antidote to the negative effects affecting refugees within its legal and administrative system.

We could present a number of examples of cases our Clinic has dealt with since its inception. Over one hundred applications have been submitted and many successes, along with some rejected applications have resulted. In this section of the paper we are attempting to demonstrate what happens in and following our students' interactions with clients and the operation of a TJ approach. The narrative provided by the client and contextualising this is essential to facilitate the client's healing and to provide a meaning to the traumatic experience on their journey to the UK. Further, this narrative finds its way into the statement presented by the client to explain and make intelligible to the Entry Clearance Officer (ECO)<sup>16</sup> the circumstances around the client fleeing their country of origin and their contact (and sometimes lack of contact) with their family.<sup>17</sup>

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<sup>14</sup> David B. Wexler and Bruce J. Winick, *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* CAROLINA ACADEMIC PRESS, DURHAM, NORTH CAROLINA, (1996); David B. Wexler and Bruce J. Winick, *Essays in Therapeutic Jurisprudence*. CAROLINA ACADEMIC PRESS, DURHAM, NORTH CAROLINA, (1991); and David B. Wexler and Bruce J. Winick, *The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law* 13 CLINICAL LAW REVIEW, 605 (2006).

<sup>15</sup> Keri K. Gould and Michael L. Perlin, "Johnny's in the Basement/Mixing Up His Medicine": *Therapeutic Jurisprudence and Clinical Teaching* 24 SEATTLE UNIVERSITY LAW REVIEW, 339 (2000).

<sup>16</sup> An Entry Clearance Officer assesses and determines whether the application for refugee family reunion should be approved or refused.

<sup>17</sup> "... storying one's experience also entails (1) learning to attribute meaning in terms intelligible to one's community, and (2) positioning oneself (or, sometimes, being positioned) in the context of such accounts." Robert A. Neimeyer et al., *The Meaning of Your Absence: Traumatic Loss and Narrative Reconstruction*, in *LOSS OF THE ASSUMPTIVE WORLD, A THEORY OF TRAUMATIC LOSS*, 13-30

Throughout the exchanges between the client and the students, the students embody certain fundamental principles. They must demonstrate respect for the client and ensure the client's voice is heard and meaning is applied through their accompanying statement to the application. They explain to the client the procedures and requirements involved in a family reunion application, gain the trust of the client, support their legal, non-legal and emotional needs, and understand the clients' ultimate goals when seeking assistance. To encourage the clients in seeking help, to reassure them and to facilitate cross-cultural communication,<sup>18</sup> many of our interpreters are former refugees who can ensure the client's narratives are presented as authentically as possible. These interpreters assist the students in the questioning process and have regular discussions with the students to debrief and allow them to reflect on the interactions with clients. These interpreters are part of the education and training element of the Clinic and help "... raise provocative questions about roles, perceptions, and ethics, while promoting proactive lawyering."<sup>19</sup> The interpreters have also been helped either through our Clinic or one of our referral partners. This aids with the legitimacy of the work of the Clinic, its underlying holistic<sup>20</sup> approach

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(Jeffrey Kaufman Ed. 2002). Here, the lawyer / advisor helps to articulate the client's story in a way that is understandable to the Entry Clearance Officer in a way which has meaning to them, their culture and their laws. This ultimately facilitates their recovery.

<sup>18</sup> Here the student does not allow their own views to cloud the issue of the client's goals and perceptions. See Evelyn H. Cruz, *Through the Clinical Lens: A Pragmatic Look at Infusing Therapeutic Jurisprudence into Clinical Pedagogy* 30 THOMAS JEFFERSON LAW REVIEW, 463 (2009).

<sup>19</sup> Keri K. Gould and Michael L. Perlin, "*Johnny's in the Basement/Mixing Up His Medicine*": *Therapeutic Jurisprudence and Clinical Teaching* 24 SEATTLE UNIVERSITY LAW REVIEW, 339 (2000) at 365.

<sup>20</sup> In this regard see William van Zyverden, *Holistic Lawyering: A Comprehensive Approach to Dispute Resolution*, 3 BOSTON UNIVERSITY PUBLIC INTEREST LAW JOURNAL, 5 (1993).

and in enabling refugees to give something back to the communities who are in most need of help. A virtuous circle is thereby created.

The rationale for selecting which case studies are included in the paper was based on an interpretivist model.<sup>21</sup> We wished to gain an understanding of the post-arrival problems affecting refugees who had been reunited with their families and therefore a “typical case study”<sup>22</sup> sampling strategy was adopted. This ensures the chosen case studies illustrate the typical / normal issues facing refugees following their successful family reunion (and thus is considered to be representative). Here, a criteria-based sampling model was used. The first criterion involved maximising learning, and for Stake (1995), the selection should include those cases which “... are likely to lead us to understandings, to assertions, perhaps even to modifying of generalizations.”<sup>23</sup> The other criteria are: a typical unique case; cases representative of others; accessibility and hospitality (a research environment conducive to the collection of data); the identification of informants; and an intrinsic interest in the case. Therefore, we are confident that our case studies offer insights into the refugee experience which require attention and action.

The following case studies identify facts of cases we have heard at our clinic. These have been modified to protect the identity of the clients (although the salient features

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<sup>21</sup> See Kristin Braa and Rickard Vidgen, RESEARCH: FROM OBSERVATION TO INTERVENTION in PLANET INTERNET Kristin Braa, Carsten Sorensen, and Bo Dahlbom (eds) (Studentlitteratur AB 2000).

<sup>22</sup> Jason Seawright and John Gerring, *Case Selection Techniques in Case Study Research: A Menu of Qualitative and Quantitative Options*. 61 POLITICAL RESEARCH QUARTERLY, 2, June, 294 (2008).

<sup>23</sup> Robert Stake, THE ART OF DOING CASE STUDY RESEARCH, 4 (Sage Publications 1995).

of the case remain) and the names applied to the clients are fictitious. This, again, ensures the confidentiality of clients whilst allowing for important principles to be presented.

### ***CASE STUDY ONE***

An ongoing case involved assisting a woman from the Democratic Republic of the Congo (DRC) to be reunited with her four adopted children<sup>24</sup> still residing in the country of origin. The client had been in contact with the children since she fled the country, she continued to send financial support to help with their maintenance and was making decisions about their lives including education and health, and, despite referring to the children in her screening interview when she first arrived in the UK, she was refused entry clearance for the children to join her. Under refugee family reunion procedure, following her referral to our Clinic, we advised the preparation of a new application containing a fully detailed personal statement, along with more substantial evidence of proof of contact and financial support (we discovered her first application, assisted through a lawyer, contained neither and relied on an irrelevant

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<sup>24</sup> Whilst family reunion refers to the immediate family of the applicant (sponsor), provision is made for individuals (such as wider family members – nieces, nephews and grandchildren) to join them. Paragraph 319X manifests this right where the child is under the age of 18 at the date of application; is able to demonstrate serious and compelling family or other considerations which make the child's exclusion undesirable and alternative and appropriate arrangements have not been made for their care; the child is not leading an independent life; they are not married or in a civil partnership; they have not formed an independent family unit; they have been part of the family unit of the applicant at the time when they left the country of origin; and the child can and will be maintained and accommodated adequately in the UK without the need for recourse to public funds.

regurgitation of her asylum claim). The importance of the personal statement cannot be underestimated. Whilst court cases can concentrate on legal facts, official reports on the application and written justifications for decision-making, the statement offers numerous therapeutic benefits for the client. First, it provides the client with a voice.<sup>25</sup> It helps them to explain and contextualise their situation, why they had to flee their country of origin, what had led them to ostensibly abandon their family (including their children), their fears, emotions, their previous and on-going relationship with their family, and it facilitates putting in place these issues in an emotional and humane context. The process of writing of highly negative experiences also promotes wellbeing and has a therapeutic effect.<sup>26</sup> The students who help the client prepare this narrative are also affected by it. They share in the life experience of an individual who needs help, who is vulnerable and has faced significant adversity in reaching the UK. They gain an appreciation of the experiences refugees can encounter due to troubling personal and world events, they establish that they are invested in the client's case,<sup>27</sup> and it also demonstrates starkly that each client has their own story, and unique

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<sup>25</sup> Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE LAW JOURNAL 2107 (1991); Gerry Lopez, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (Westview Press 1982); Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICHIGAN LAW REVIEW, 485 (1994); and Jack Susman, *Resolving Hospital Conflicts: A Study on Therapeutic Jurisprudence*, reprinted in *LAW IN A THERAPEUTIC KEY* (David B. Wexler and Bruce J. Winick eds., Carolina Acad. Press 1996) (discussing the impact on patients and their sense of validation when nurses allowed them to "ramble").

<sup>26</sup> Joshua M. Smyth, *Written Emotional Expression: Effect Sizes, Outcome Types, and Moderating Variables*, 66 JOURNAL OF CONSULTING & CLINICAL PSYCHOLOGY, 174 (1998).

<sup>27</sup> James W. Pennebaker, *OPENING UP: THE HEALING POWER OF CONFIDING IN OTHERS* (William Morrow & Co. 1990).



circumstances which have impacted on their lives. The client understands that the students appreciate their concerns and this validates their experience. Deep learning and emotional development is evident.

The client, her husband and biological children had fled their home in the DRC and were frequently moving between this country and Rwanda to avoid government agencies who were persecuting the family. The client had given evidence to the International Criminal Court against the government for its involvement in war crimes committed in Eastern DRC. This is a very complex case for a number of reasons. First, the client's health and medical conditions mean that prompt reunion is required or the client faces the possibility that the Home Office will reject her family's application for reunion due to her becoming too ill to care for the children. Secondly, applications for refugee family reunion refer to nuclear, pre-flight families. This is typically the spouse and biological children of the client, but does extend to adopted children. However, the DRC is not a signatory to the Hague Adoption Convention<sup>28</sup> and therefore the UK does not recognise adoptions nor does it, as such, include these adopted children as part of the refugee family reunion application process. To circumvent this impasse, the students preparing the client's statement had to ensure they invoked European Convention on Human Rights (ECHR) Art. 8 to compel the ECO to consider the case (which remains to be assessed on its merits) and this provides a route of appeal if the application is unsuccessful.

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<sup>28</sup> The Democratic Republic of the Congo is not a party to the *Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*.

This case has challenged the students to control their emotions and focus on issues such as ensuring the client's narrative and reasoning is based within the parameters of the law and the application process. They needed to be mindful not to revert to sympathy or a patronising approach to the client's distressing circumstances. They have had to prepare a detailed personal statement (of some nine pages) which uses the ECHR and external sources (for example books and reports) to verify the factual information presented in the client's application. The students have also had to endure a protracted application process that has extended to the interviews of the client's family. Following the conclusion of interview arrangements, the authorities would not undertake the assessment due to the children not being in possession of passports. This is contrary to the guidance produced by the government and led to (respectful) arguments being presented to the agency to reconsider and to expedite the interviews due to the dangers faced by the children.<sup>29</sup> This case continues but has provided further experience for our students of the multitude of problems encountered in applications of refugee family reunion.

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<sup>29</sup> For further discussion of the role clinical legal education plays in the development of students as vigorous advocates see Michael Perlin, Catherine Barreda, Katherine Davies, Meghan Gallagher, Nicole C. Israel, and Stephanie K. Mendelsohn, *Creating a Building a Disability Rights Information Center for Asia and the Pacific Clinic: Of Pedagogy and Social Justice*, 17 MARQUETTE BENEFITS & SOCIAL WELFARE LAW REVIEW, 1 (2015).

***Post arrival problems***

The applicant's case is on-going and thus the client and family are not yet reunited. The case is included here because it shows the problems of an on-going application and the anti-therapeutic effects this has for everyone involved. The students have learned a valuable lesson in the continued struggle to satisfy the State's requirements for refugee family reunion. They appreciate the illness facing the sponsor and that if the case is not remedied promptly the sponsor's health may deteriorate to such an extent that reunion will be denied because she will be deemed too ill to care for the children applicants. The students have recognised the need for careful accompanying evidence to be presented to the State in supporting the client's application, the toll this process takes on the wellbeing of the client and family members trapped abroad, and the sense of helplessness when applications are not progressed.

***CASE STUDY TWO***

An Iranian national applied to be reunited with his two children and wife. He had arrived in the UK in 2009 after suffering physical abuse by the military and then persecution by the Iranian government for involvement in political protests. He was physically well (despite experiencing three months' abuse by the Iranian military) when he arrived in the UK but was suffering from the trauma associated with Post-

Traumatic Stress Disorder (PTSD)<sup>30</sup> (although this was undiagnosed at the time). The condition had led to a lack of direct contact with his family for a two-year period. He had experienced significant problems first in his applications for asylum status<sup>31</sup> and then in his applications for family reunion. He had, with the assistance of solicitors in the first instance, made two previous applications for refugee family reunion, however, due to the poor drafting, bundling and interviewing,<sup>32</sup> these were rejected by the Home Office's ECO. Interestingly, following the rejections the client's lawyers failed to provide him with reasons. The client was left with failed applications and the distress of not fully understanding why<sup>33</sup> or what could be done to resolve the matter beyond submitting an appeal. Failed applications such as these are not uncommon due to a range of factors which may include physical and emotional problems<sup>34</sup>

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<sup>30</sup> Which adversely affected his ability to convey his story to the satisfaction of the government (the ECO). For broader discussion of this subject see Stephen Paskey, *Telling Refugee Stories: Trauma, Credibility and the Adversarial Adjudication of Claims for Asylum*, 56 SANTA CLARA LAW REVIEW, 457 (2016).

<sup>31</sup> A not uncommon phenomenon in immigration / asylum claims with refugees. See Kate Aschenbrenner, *Ripples Against the Other Shore: The Impact of Trauma Exposure on the Immigration Process through Adjudicators*, 19 MICHIGAN JOURNAL OF RACE & LAW, 53 (2013) and Linda Piwowarczyk, *Seeking Asylum: A Mental Health Perspective*, 16 GEORGETOWN IMMIGRATION LAW JOURNAL, 155 (2001).

<sup>32</sup> Where, for instance, he was unable to articulate the consequences of the abuse he suffered whilst on military service – see Maggie Schauer, Thomas Elbert and Frank Neuner, *NARRATIVE EXPOSURE THERAPY: A SHORTTERM INTERVENTION FOR TRAUMATIC STRESS DISORDERS AFTER WAR, TERROR OR TORTURE* 2 ed (Hogrefe & Huber 2005).

<sup>33</sup> Michele Cascardi, Alicia Hall and Norman G. Poythress, *Procedural Justice in the Context of Civil Commitment: An Analogue Study*, 18 BEHAVIORAL SCIENCES AND THE LAW, 731 (2000).

<sup>34</sup> Which may include symptoms including hypervigilance, emotional numbing, emotional detachment, nightmares and flashbacks or re-experiencing the trauma. In relation to its effects on adults see Judith L. Herman, *TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE – FROM DOMESTIC ABUSE TO POLITICAL TERROR*, (Basic Books 1992). For research into its effects on adolescents see Sabrina J. Stotz, Thomas Elbert, Veronika Müller, and Maggie Schauer, *The*

affecting the client's ability to articulate the factual elements of their application. Further, the stress the client is experiencing and linguistic difficulties will each influence judgments of the client/applicant's disposition, the consistency and veracity of testimonial evidence, and the details of accounts presented to ECOs and/or the immigration judge.

He came to the HKC Law Clinic following a referral from the British Red Cross and our team devised and rebuilt an application including a bundle of documentary evidence and a clear statement explaining the medical reasons for the lack of contact (which is usually devastating to the success of a claim of family reunion). Supporting statements (which are akin to a covering letter to the application) are not a requirement for applications of refugee family reunion but we insist on our students taking the time to interview the client in sufficient depth to produce a statement which outlines the reasoning and background of the client's circumstances. This is used to clearly articulate the pre-flight family members' relationships, the reason why the client fled the country of origin, the danger facing the existing family and hence their need to join the client in the UK, and, where appropriate, a reference to the ECHR<sup>35</sup> which obliges the UK government to dutifully consider the client's application for family reunion and enables an appeal should it become necessary. This method of interview, implementing "contextual interviewing" ensures the students, by adopting

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*Relationship between Trauma, Shame, and Guilt: Findings from a Community-Based Study of Refugee Minors in Germany*, EUROPEAN JOURNAL OF PSYCHOTRAUMATOL, 6 (2015).

<sup>35</sup> A right to private and family life is provided under Article 8 of the European Convention on Human Rights, 1998.

client-centred representation, do not simply receive advice on their legal position, but involves the students acknowledging the client as a person. It has also been recognized that Narrative Exposure Therapy can be an effective method for treating people with PTSD with its focus on the power of speech in the healing process (and has been used by asylum lawyers, advisors and counsellors with their refugee clients in preparation of their claim and to manage trauma).<sup>36</sup>

The client lodged an application in April 2016 and he was informed in the following July that this was unsuccessful. The client was, naturally, distraught by the news but we had spent time with him, our students employed the skills we developed in them at the training stage. The client displayed obvious signs of emotion and distress. He was anxious, agitated and upset when he came to the Clinic. The student volunteers explained the service we provide, how the process operated and what the likely success and failures were going to be. In so doing they helped to empathise with his situation, explained that the clinic would help him to prepare the best application possible, and that due to expected lack of success of this application to the ECO, that an appeal would be made in the event of his application being rejected. We reiterated that we would help and support him to the exhaustion of any legal redress available. After the negative result in July 2016 we resourced a lawyer who submitted his appeal and who would represent him in the First-tier Tribunal (Immigration and Asylum) Chamber, and provided this service on a pro bono basis. The client's appeal was heard

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<sup>36</sup> Nicolas Gwozdziwycz and Lewis Mehl-Madrona, *Meta-Analysis of the Use of Narrative Exposure Therapy for the Effects of Trauma Among Refugee Populations*, 17(1) PERMANENTE JOURNAL, 70 (2013).

in December 2016 and his claim was successful. The judge remarked favourably on the comprehensive bundle of evidence and its very good organisation. The Home Office subsequently informed the applicants'<sup>37</sup> client that it would not be appealing this decision and therefore the client was to be joined in the New Year with his wife and two sons. This, on face value, appears to be a successful outcome. And it is, yet there are anti-therapeutic elements present. In the preparation of a client for their court hearing they are advised on the questioning likely to come from the Home Office and the judge, on which aspects of their case they should focus, they work with an interpreter to most effectively explain their situation and how to address the issues raised by the ECO in refusing their application for family reunion. This adds to existing distress<sup>38</sup> of a prolonged and uncertain application process, the negative effects attending court can have on clients, and the possibility of another rejection of their application. Having prepared for the case, when the judge makes a decision based on a seemingly (to the client at least) cursory examination of the bundle of evidence, and the representative of the Home Office appears disinterested in contesting the application in court or in appearing at all (and appealing the decision of the court), the client can feel emotionally drained, they can feel cheated, they can

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<sup>37</sup> Significantly they do not inform the refugee (sponsor) about the decision therefore the refugee is unaware if the Home Office will counter appeal or not until either the applicants provide details of such a development or they have counted down the requisite number of days available for the appeal to be lodged.

<sup>38</sup> Although at least through information and awareness of the process the client can feel control over the stressful situation. See Susan T. Fiske and Shelley E. Taylor, *SOCIAL COGNITION* (New York Random House 1984).

feel that having sought an opportunity to explain their circumstances to a person in authority, this has been denied to them and the initial positive reaction to the news of the judgment soon changes to one of negativity. Again, the importance of the legal representative, of the support system offered through advisors in clinics, becomes evident.

The client's case has taken nearly eight years to be resolved.<sup>39</sup> Having left his young sons to seek asylum in the UK, he is reunited with sons who are now young men. It is likely that the transition for all the family will be difficult, but the students involved in the case have had first-hand experience of how separation of families affects the individuals concerned, the problems involved in the application process for refugee family reunion, the implications of the cuts in legal aid and how this may impact on the role of legal advice for vulnerable individuals, and how they can positively impact on the lives of people in great need. For these students, this is an experience that will live with them for the rest of their lives. It has instilled in them a sense of pride and accomplishment, and a desire to fulfil the ethos of the legal profession's pro bono initiative. It also demonstrates that whilst the client's case may have come to an end, the story of the client's life is simply turning to a new chapter. We are committed to educating our student advisors on the holistic nature of advice and support. This

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<sup>39</sup> This period of isolation from his wife and sons and members of his local community appeared to exacerbate his declining mental health. Similar findings were presented in C. Gorst-Unsworth and E. Goldenberg, *Psychological Sequelae of Torture and Organized Violence Suffered by Refugees from Iraq: Trauma-Related Factors Compared with Social Factors in Exile*, 172 BRITISH JOURNAL OF PSYCHIATRY 90, 90 (1998).



particular client needed assistance with the travel arrangements for his family to leave Iran and reach the UK, and he requires help in obtaining accommodation to reflect his new needs. The children require educational placements and English language support and probably health checks and vaccinations. The family may require some form of counselling in order to bond and work towards a future together. To this end the Clinic staff made several relevant “safe” referrals ensuring they had the mandate to do so from the client. Texts between the client and staff members made him feel we still cared and were interested and would provide on-going specialist support as required.<sup>40</sup> We wanted to ensure that the students did not consider that they had dealt with the client, a successful outcome has been achieved and they should move on to the next person on the Clinic’s waiting list. Their caring, their support, their commitment to helping the client in the next non-legal aspects of his life are important aspects of their development.<sup>41</sup> The students see the impact of their work, but also how the legal system is merely a snapshot of the client’s world. Refugee family reunion, even successful cases, does not necessarily lead to the parties walking happily together into the sunset. Often, a family being reunited is merely where a new set of challenges begin. Maintaining contact and thereby observing a justice system as just that – a system – are important lessons of which our students gain first-hand experience.

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<sup>40</sup> From the housing needs of a single man to a family residence for four individuals.

<sup>41</sup> Beyond the work of the HKC Law Clinic, many of our students have previously volunteered at national and international agencies to assist in the refugee crisis, working in the UK and abroad to aid the plight of individuals suffering in, for example, Syria.

***Post arrival problems***

Being one of our very first cases we were of course delighted with the result though recognised the exceptionally long wait and anticipated that the family would face challenges when reuniting. What we did not expect were housing problems. The Clinic has been unable through capacity to offer formal post arrival support, however one of the clinic leads unexpectedly met the client whilst passing through the City centre and he told her of the problems the family faced immediately upon arrival. He had been told by the local council that he could not apply for larger accommodation until the family arrived in the city and when they did they were told they would have to go onto a waiting list or into homeless accommodation. The client had lived in the same single bed-sit style property for five years and had taken it on as a lease when he had finally been granted status. Terrified of what he had heard about homeless accommodation and how the individual can be moved anywhere, he agreed to be placed on a waiting list. The newly arrived family were crammed into his single room property which had inevitably led to bewilderment, frustration and a high level of stress and tension.

A few weeks later, again crossing town the Clinic lead again saw the client and was struck with his physical appearance. He looked noticeably stressed and anxious, even though he was surrounded by his family. Having rung him a week later whilst at the Clinic he told of how further problems had emerged in accessing education for his adolescent sons, though both had performed well academically in Iran they were told they would only be allowed to undertake English classes for three hours a week for

the first few months and given the housing situation, and the interest in assimilating into their new surroundings, they were very much wanting and needing more. Furthermore, a misunderstanding with his wife's benefit claim, that he believed stemmed from poor interpretation and a member of staff from the Department for Work and Pensions not understanding the immigration status his newly arrived wife and children had, led to the family being taken off the housing waiting list. He was unaware of this though and only found out after several months had elapsed, he had heard nothing and queried what was happening when he paid rent at a local office. The Clinic lead was able only to advise him to attend a drop-in support session but it took several weeks to sort out the family's issues and they faced the risk of having to leave the city where he had social networks and established medical support and assistance. Concerned, the Clinic lead followed up on the client's case and was informed that he was eventually advised to seek a private tenancy, which he did, with some difficulty because of having to find a deposit, references but also much more furniture than he had ever had before.

### ***CASE STUDY THREE***

Mr Adonay, as a sportsman, was quite famous in his own country and lived an opulent lifestyle until he was targeted by the authorities and persecuted because of his religious beliefs. Mr Adonay was almost immediately granted refugee status having claimed asylum upon entering the UK. He has three biological daughters with two women and had assumed care of all three after the relationships broke down.

Fleeing his country of origin he had left the children under the care of his brother. Having gained refugee status he could not find anyone who would conduct the family reunion case for less than a fee of £1,500. Indeed, he actually struggled to find anyone in his home city to represent him through the application process. Having contacted a local British Red Cross representative, he was referred to the HKC Law Clinic despite residing some 40 miles away.

Although living outside the area from where we accept clients, we decided to take the case on given the circumstances. Mr Adonay's first application was refused, and we helped him to appeal the decision and asked for a review. However, given the lack of birth certificates or other accepted proof of fatherhood we decided that the only way to have the case accepted was to order DNA testing. We were interested in pursuing the DNA matter on a policy level and wished to gather evidence around the issue. We successfully negotiated a discount with a major DNA testing provider and all three children were sampled together with their UK based sponsor/father. Having established the biological linkage we decided it would be prudent to submit a fresh application. There were further costs and complications with TB testing and increased fees from when the children were first tested (the first tests should have stood but the Embassy refused to accept them) but eventually the children were accepted. A number of issues were raised in this case which are beyond the scope of this paper to fully explore. However, at its core, the refusal to accept evidence of Mr Adonay being the children's father required him to provide DNA evidence to effectively sponsor the children arriving in the UK. This involved a cost of several hundreds of pounds which

the HKC Law Clinic funded through the generous support of an external funder. Without this money, Mr Adonay would not have been reunited with his children. Further, the costs of accepted DNA evidence are proportionately high and the Clinic staff are in discussions with the Home Office for this restriction on accepted service providers and the associated costs to be reconsidered.

### *Post arrival problems*

Anxious to find work, frustrated by the lack of opportunities in the North and lured by the offer of a job Mr Adonay moved to London. On hearing the children had been granted a visa he tried to source suitable accommodation with the help of the community, but to no avail. The children arrived quickly via the British Red Cross travel assistance and the family were forced to enter the homeless system. Mr Adonay phoned one of the Clinic leads daily at one point and was reduced to tears on the phone stating 'My children are in a terrible place, there are bad people in the hostel we are living in and they do bad things to children.' The three little girls (the eldest being 11, the youngest only seven) were forced out of the hostel during the day as there was no play area and nowhere to cook. The newly reunited family are still sharing just one room and three single beds. Mr Adonay now wishes to return to the North and is having to remotely apply for housing. He does not wish to return to where he originally arrived as he feels there are no job opportunities and little by way of a community, advising he was the only person from his home country he knew of in the area. He wishes to re-locate to another Northern city close by but is inevitably

facing problems because of the 'local connection' test.<sup>42</sup> In the meantime, the children have not been placed in school due to lack of available places and presumably their precarious housing situation. They have also not been able to register at a local GP practice, having instead been forced to go through the homeless medical route. Photos Mr Adonay shared of his family show a family pleased to be together but also display strain on the faces of the young children and their father. There is continued dialogue between clinic staff and Mr Adonay but all we are able to do because of capacity is to refer him to local agencies, some of whom have already turned the family away because of their own limited resources. Mr Adonay has not at any stage complained about his housing situation and facing homelessness, instead he has blamed himself for the reduced circumstances he and the girls are in. He has lost a lot of weight and says he is particularly worried about the oldest daughter who he informs us cries most nights and asks why she is here in the UK.

It is hoped that the family will soon return to the North but are likely to have to enter the same homeless system they did in London. However, they believe they should eventually be able to secure larger and more suitable accommodation and more quickly find schools and health care.

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<sup>42</sup> This test enables a local authority to refer the applicant to another council for help to house them where they do not have a local connection to the area. Local connection includes links based on living and working in the area; close family in the area and other special reasons.

## IMPLICATIONS

There is a significant lack of post-arrival support for refugees having been reunited with their families, and its negative effects, in many regions of the UK. This is often due to a lack of resources and, we consider, a lack of policy and applied academic research to develop mechanisms which can be rolled out more broadly to effectively address the issue.<sup>43</sup> To give just a few examples of the specific experiences of clients to our clinic, it is clear to see the need for post-arrival support to prevent the housing crises, pressure on the family unit and homelessness affecting refugees. Timely information and practical assistance in navigating the welfare benefits system, ensuring the correct housing is sourced, ensuring educational facilities (both academic institutions for children and language classes for all who may have deficiencies in English) are identified and arranged in good time are frequently missing. Medical services for the physical and psychological issues arising from the separation and reunion, and numerous other aspects of legal and non-legal advice and guidance are required. In this last category, for instance, at Sheffield Hallam University a mentoring system operates where refugees to the local area are paired with a mentor who can assist them to integrate into the local community, give advice on how to gain the qualifications/experience/training necessary to continue their previous careers but in

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<sup>43</sup> Policy guidance does exist – for example Local Government Association, *RESETTLING REFUGEES: SUPPORT AFTER THE FIRST YEAR. A GUIDE FOR LOCAL AUTHORITIES* (2017). From an academic perspective, research from Western Australia has been presented. See Val Colic Peisker and Farida Tilbury, “Active” and “passive” resettlement: The influence of support services and refugees’ own resources on resettlement style, 41 *INTERNATIONAL MIGRATION*, 5, 61 (2003)

the UK (or indeed to start a new career) and so on. This is just one way in which non-legal advice and help is so important following the refugee and family's arrival to allow them to focus on their lives and begin, positively, to build a future together.

## CONCLUSIONS

Legal and non-legal assistance for refugees has been adversely affected by the austerity measures of successive governments since 2008 and by the enactment of LASPO. This has affected not only the provision of legal practitioners working in areas typically used by refugees (including family reunion and nationality applications) but more broadly in the not-for-profit sector generally. Universities have begun to offer dedicated clinical programmes to fill this gap and as a unique learning opportunity for their students, but the overall provision of these services is limited in geographic scope and availability.<sup>44</sup>

Whilst the services offered through these dedicated forms of clinical legal education are of a very high quality (in most cases subject to regulatory body review and audits), they often stop following the specific area of assistance provided. Individual members of such clinics may offer some form of post-arrival support and/or signposting of relevant advisory agencies on a case by case basis. However, a more formal, holistic service which aids the refugee client in their assimilation to the community and transition to their new life with their family is necessary.

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<sup>44</sup> James Marson, Katy Ferris and Clare Tudor, *Family Reunion in a University Law Clinic: A Model for Law Schools* 23 EUROPEAN JOURNAL OF CURRENT LEGAL ISSUES, 2 (2017).



Key areas include clinics offering guidance on British nationality and travel documentation applications, welfare benefits, housing, fuel, employment, education, language development and training and emergency services to avoid homelessness affecting clients. It is perhaps implausible for a single law clinic at a university to offer all of these services in-house. However, if strategic alliances were developed in regions where clients could thereby be referred as a matter of course, resources could be maximised as could the therapeutic and positive effects for the refugee clients.

Innovative practices are being offered across the university sector. Sheffield Hallam University offers a mentoring system for refugees with professionals in the community. This helps to assist and inspire refugees to reassume roles and occupations held in their country of origin. At the University of Plymouth, a law clinic has been established to help refugees to start new businesses and to encourage entrepreneurship and innovation. This is a further aspect of original post-arrival support which is advantageous to all members of the community. Hence, we are very positive about the future of law clinics to continue to support and develop links with community groups. The more who provide these bespoke services, the greater the impact for the refugees, the local and wider communities, and all in the legal sector.

**ACKNOWLEDGING THE RELEVANCE OF EMPATHY IN CLINICAL  
LEGAL EDUCATION. SOME PROPOSALS FROM THE EXPERIENCE  
OF THE UNIVERSITY OF BRESCIA (IT) AND VALENCIA (ESP)**

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Legal Clinical Education is experiencing a great development in the Spanish and the Italian university context. Nevertheless, it comes with new challenges that professors have not faced until now: students working in the field with people in situations of vulnerability or in complex realities. Given that one of the major goals of CLE is the preparation not only of professionals for the practice of law, but also people concerned about social justice and social diversity, this piece of research looks into the significance of working with students about the key role that empathy plays in the development of their relation with the people they assist. Moreover, we will suggest some activities to be introduced in the clinical training plan with this purpose, and lastly, we will construct some final thoughts about this research and the feedback we obtain from our clinical colleagues.

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### **1. Working in the field: Students facing up complex realities.**

Legal Clinics can adopt multiple forms to meet social justice goals, to help individuals and communities with their legal needs, such as Penitentiary Law Clinic, Public Interest Clinic, Live-Client Clinic, and so on. Within the vast reality, the Legal Clinics of the University of Brescia and Valencia mainly work with cases and projects related to public interest<sup>2</sup>. The services offered are directed to people qualified as disadvantaged or at least in a condition of being a *weak party* in their relation with the legal system. More specifically, we focus our resources in working hand in hand with disabled persons, inmates, homeless, single moms, LGTBIQ, asylum seekers, Roma people and many others groups that struggle in their relation with the law for the fulfilment of their rights. Indeed, one of the main goals of our clinics is to encourage students to consider how law impacts the members of the disadvantaged groups.

Nevertheless, this works exposes students to stressful situations where they have to work with people in vulnerable situations and challenging realities (Roma camps, prison, favelas, etc.). Moreover, these particular scenarios may increase biases thoughts or stereotypes the students might have towards the minority groups they are working with, based on cultural differences that may cause misunderstandings and tensions between clients and students, unprepared to manage the emotions coming from that relationship, that might make them feel uncomfortable (embarrassment, bias, fear, anger...).

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<sup>2</sup> Mestre i Mestre, R. M. (ed). *Guía práctica para la enseñanza del derecho a través de las clínicas jurídicas*. (Valencia, Tirant lo Blanch, 2018), 14 ff.

Given that one of the major goals of CLE is the preparation not only of professionals for the practice of law<sup>3</sup>, but also people concerned about social justice and social diversity<sup>4</sup>, we work strongly with our students to teach them why building a collaborative relationship with clients is a landmark objective on performance of their legal work, and how to achieve it. Thus, in the subsequent sections we will research into, firstly, the importance of empathy as one of the central values of clinical legal education, secondly, we will suggest some activities to be introduced in the clinic in order to work with students about empathy, and finally, we will construct some final conclusions about this piece of research and the feedback we obtain from our clinical colleagues.

## **2. Empathy as a core value in legal clinic education: students' reactions to human suffering.**

Despite the changes introduced by the Bologna process in the European higher educational system, both the Italian and the Spanish factual reality shows that law students continue to receive master classes in their formation, at the expenses of a more collaborative group-based one. Even though the curriculum of the courses has

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<sup>3</sup> García Añón, J. «Acceder a la justicia y hacer justicia: la función de las universidades, las clínicas jurídicas y las ONG, y su impacto construyendo los límites del derecho», in García Pascual, C. (ed.), *Acceso a la justicia y garantía de los derechos en tiempos de crisis* (Valencia: Tirant lo Blanch, 2018), 301-328.

<sup>4</sup> Gascón Cuenca, A., «La evolución de la enseñanza jurídica clínica en las universidades españolas: oportunidades y desafíos de la litigación estratégica en las clínicas de derechos humanos», *Revista de educación y derecho. Education and Law Review* 14 (2016): 5-7.

been changed in order to implement the new criteria that came along with it, professors continue to mainly use a theoretical approach to the contents of their lectures, and specially when it comes to law area. Given this situation, law professors are not used to manage challenging pedagogical situations, such as the ones introduced by legal clinics, derived from students working directly with the society in different scenarios. Moreover, legal clinics dealing with social justice problems, work in especially complicated areas such as: ethnicity, gender, poverty, disability, groups that have been historically marginalized, and many others; making a clear stand for justice, equality, respect, inclusion and non-discrimination. Accordingly, this section will introduce the importance of working about empathy within the legal clinics, in order to address some of the challenges that it poses to clinical professors and supervisors.

If we research into other realities where clinical legal education has been longer implemented, we realize that clinical professors have faced highly intricate situations that require from them to work with students in areas that are far away from text books and master classes. Just two examples to illustrate the above affirmation. Professor Stephen Wexler has descried the law school curriculum as a one that teaches students to deal with law and the rich, leaving aside capital questions like how the law came to be like this or why there are certain groups of the society that are always struggling in their relations with the law (like poor people or ex-convicted)<sup>5</sup>. The

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<sup>5</sup> Stephen, W., «Practicing Law for Poor People», *Yale Law Journal* 79 (1970): 1049-1069.

second example is the one published by professor Gavigan, where she describes the reality she encountered when supervising law students at Parkdale Community Legal Services. She depicts the situation as a wartime field hospital, waiting for the worst to happen, remembering that the work they did is like being in the trenches, and the communities they serve, felt constantly under siege<sup>6</sup>. These realities reinforce the ideas of Cambron-McCabe/McCarthy<sup>7</sup> and Marshall<sup>8</sup>. These authors argue that the forefront activity of a social justice legal clinic is working about the topics we mentioned previously, such as race, gender or diversity, instead of technical competences or a pure positivist knowledge of the law.

Furthermore, these two examples serve us to introduce a core concept for the work we do in legal clinics: empathy. Clinical students collaborate in direct contact with communities and persons that have been left aside by the system, like homeless, people being abused, clients that live with HIV, people with functional diversity, with health conditions, and many others. People that had suffer from greatly distressing situations where their rights have been crushed by the most powerful machine we can encounter, the state. Within this relation, the sorrow and the torment suffered by clients is somehow transferred to the students, and case supervisors and clinical

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<sup>6</sup> Gavigan, S. A. M., «Poverty Law and Poor People: e Place of Gender and Class in Clinic Practice», *Journal of Law and Social Policy* 11 (1995): 165-182.<sup>[1]</sup><sub>SEP</sub>

<sup>7</sup> Cambron-McCabe, N., and Martha M. McCarthy. «Educating School Leaders for Social Justice», *Education Policy* 19 (2005): 201-222.

<sup>8</sup> Marshall, C., «Social Justice Challenges to Educational Administration: Introduction to a Special Issue», *Educational Administration Quarterly* 40-1 (2004): 3-13.

directors can realize about this when talking with students, specially in case control rounds, where they debate and discuss with the rest of their peers about the cases or projects they are working with<sup>9</sup>.

Previous studies have shown that teaching about dignity, equality and discrimination is not an easy task, as it evokes a wide range of powerful feelings and emotions in both students and educators<sup>10</sup>. When we add to this picture the work clinical students do with communities that have suffered from these behaviours, they react to this reality in different ways, from what we are going to identify as the professional approach to the over empathetic one. Thus, we need to provide students with the resources they need in order to manage their empathy towards clients in order to avoid behaviours that can jeopardise or even damage that relationship and the outcome we are expecting out of it.

As said before, when students encounter clients, and the latter share their traumatic stories and the emotions they have felt, like anxiety or agony, this situation has a challenging impact on students, as they have to deal with it in a twofold way, as human beings, and as future lawyers<sup>11</sup>. Consequently, these situations where the rights of certain collectives have been violated, have to be approached from a critical

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<sup>9</sup> Besides our experience in this area, see: Buhler, S., «Painful Injustices: Encountering Social Suffering in Clinical Legal Education», *Clinical Law Review* 19 (2003): 405- 428.

<sup>10</sup> Berlak, A. C., «Confrontation and Pedagogy: Cultural Secrets, Trauma, and Emotion in Antioppressive Pedagogies», *Counterpoints* 240 (2004): 123-144.

<sup>11</sup> Fletcher, L. E., and H. M. Weinstein, «When Students Lose Perspective: Clinical Supervision and the Management of Empathy», *Clinical Law Review* 9 (2002): 147-155.

point of view in order to deconstruct concepts like power, and its relation with discrimination and subjugation. This scenario gives us the occasion of discussing with students concepts like equality, justice, indirect or structural discrimination, all placed at the backbone of social justice. Moreover, these principles are barely known by them, because they have been expelled or reduced to the ranks (all together with courses about human rights), from the law curriculum, in favour of *more practical* knowledge of the regulations of the legal system.

### **2.1. Student reactions to human suffering**

The relation lawyers (and students) adopt when working with clients might be pretty different depending on the case and its features. Previous research has made a clear distinction between the traditional conceptions and the client-centred ones<sup>12</sup>. Derived from these two major conceptions, we consider the following taxonomy: a) the detached professional approach; b) the over-identification approach; and c) the critical emotional praxis. In next paragraphs, we will research into their characteristics in order to make visible the risks they might have for our work and our relation with the people we are working with, and offer arguments for adopting the third model.

- a) The detached “professional approach”.

Under this conception, lawyers view legal problems as something completely

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<sup>12</sup> Binder, A., P. Bergman, and S. Price, «Lawyers as Counsellors: A Client-Centered Approach», *NYL School Rev.* 29 (1990): 29-86.



disconnected from client's emotions and non-legal concerns. In this perspective, lawyers "tend to regard themselves as experts who can and should determine, in a detached and rational manner, and with minimal client input, what solution is best"<sup>13</sup>.

In a reality as the one described above, this approach may reinforce the vulnerability (victimization) of clients, reproducing a model of systemic psychological violence that might be present in the situation. The clients' expertise, thoughts and feelings do not play a role in the decision making of the lawyer, as he or she adopts a position of *life-saver*. This kind of approach is set far away from an idea of clinical legal education as a tool to further social justice values and, among other, social inclusion. On the contrary, we encourage students to estimate clients' perspectives, goals and values to find way of working contribute to their sense of efficacy end empowerment, avoiding hierarchical relationships.

In this regard, if we rather choose to ignore this challenge we can found ourselves and our work, not only reinforcing behaviours that undermine the empowerment of the victims, by reinforcing ideas that represent dominant images of clients as helpless victims or people how have earned their suffering. but also, we will be failing to prepare students to engage with difficult emotional work that requires a shift in values, attitudes and behaviours, limiting their capabilities to address fundamental social justice issues<sup>14</sup>. So that, we have to promote students' aptitudes

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<sup>13</sup> Chen, K., A., and S. Cummings. *Public Interest Lawyering: A Contemporary Perspective* (New York: Wolters Kluwer Law & Business, 2014), 290.

<sup>14</sup> Cambron-McCabe, N., and M. M. McCarthy, «Educating School Leaders for Social Justice». *Education*

and give them the required expertise for them to know, on one hand, how to avoid these pitfalls and, on the other hand, how to work hand in hand with communities to develop their self-empowerment on the given subject. When we allow clients to express themselves, we are in a better position to incorporate the cultural and socio-political vision to the concrete case. This work, not only allows us to both work from the roots to the top of the problem and build up self-empowerment in the community, but also, to overcome the idea of *helpless victims*, by letting them being the leaders of the cause and not mere observers or sources of information. A critical approach to this scenario helps us to dilute biased thoughts about minority groups, all together with the widespread image of lawyers as life-savers for people that cannot *manage their own problems in a right way*.

b) The over identification approach.

Whereas the professional approach builds strong boundaries between lawyers and clients, the over identification approach (or compassionated approach) denies any distance between them. When lawyers and students proceed with a project or a case by this model, they jump into it with both feet trying to fight against the major problems of society like poverty, racial discrimination, structural discrimination, and so on, without controlling the emotions or the reactions these situations produce in them. They are driven by the willing of battle against injustice (which is a positive thing), but losing the perspective of the case as a whole or withdrawing the ability of

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Policy 19 (2005): 214.

making strategic decisions. This situation poses at least two main risks.

On one hand this approach may reproduce a paternalistic model that promotes minorities as *voiceless groups*, that need the majority to guarantee their rights; on the other, becoming too emotionally involved in the clients' legal and non-legal problems may make lawyers lose their necessary objectivity while handling the case. By doing so, lawyer do not practice empathy, but a useless empty empathy<sup>15</sup>, with no concrete benefits for clients.

Moreover, as stated above and generally speaking, the law curriculum does not introduce compulsory subjects where law is studied as a factor for social control. Thus, students may be not aware of these relations of domination, and their work with the community risk to «reproduce dominant notions and understandings of suffering as a private emotional response of clients, located in the “non-legal” sphere, and therefore unrelated to justice and legal practice»<sup>16</sup>. If we lose sight of the social context and the role law plays in it, we might find ourselves enhancing the power relations that had created the discriminatory situations in the first place, by non-bringing them to the surface, making visible and counteracting them side by side with the affected collective. If our students observe client suffering from a pure private empathetically point of view, they will not be addressing the given problems from its roots, but the

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<sup>15</sup> Buhler, S., «Painful Injustice: Encountering Social Suffering in Clinical Legal Education», *Clinical L. Rev.* 19 (2013): 412.

<sup>16</sup> Buhler, S., «Painful Injustice: Encountering Social Suffering in Clinical Legal Education», *Clinical L. Rev.* 19 (2013): 408.

other way around, as they will see it as a problem created by the victims without any other correlations.

c) The critical emotional praxis.

Turning down the previous two models, we consider the critical emotional praxis, *rectius*, empathy, non-only as a value but as a core lawyering skill that we, as clinicians, should promote and enhance in our students.

According to the Oxford Dictionary definition, empathy is *the ability to understand and share the feelings of another*, otherwise than sympathy, which means *feelings of pity and sorrow for someone else's misfortune*.

When assisting people in a vulnerable situation, adopting an empathetic attitude facilitates to build up a relationship based on trust. By deconstructing and working with this definition and its components, we help students to understand why the *detached professional* approach or the *compassioned* one, have negative effects on their work and on the promotion of social justice<sup>17</sup>. Later, as critical witnesses in their encounters with suffering, we teach them how to create a balance between empathetic and critical response, to understand the core of the structures of injustice<sup>18</sup>. We must use the force coming from the empathetic approach to overlap the concrete situation and observe the role that political decisions play in the case we are working with, in

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<sup>17</sup> Sedillo Lopez, A., «Learning through service in a clinical setting: the effect of specialization on social justice and skills training», *Clinical L. Rev.* 7 (2001): 307-326.

<sup>18</sup> Kaplan, E. W., *Trauma, Social Rupture and the Work of Repair*, *Theatre Topics* (2005): 171-183, underlines a basic concept «There is nothing as vital to the understanding and communication of experience as distance».

order to challenge them as the real forces that generate injustice.

In addition, students have to be able to critically identify the position they hold within the systemic forces that play a role in their society, precisely because the interrogation of students' "emotional investments in specific assumptions and ideas is an important component of critical pedagogies"<sup>19</sup>. This is what Zembylas calls *critical emotional reflexivity*<sup>20</sup>, Fletcher and Weinstein identify as *self-awareness*<sup>21</sup>, or Franck identified as *Pedagogy of suffering*<sup>22</sup> and *Pedagogy of Responsibility*<sup>23</sup>. The goal is to teach the students how to examine and manage their emotional responses, to be able to listen to the other people.

In the context of our clinics, where a great number of students belong to the same cultural and ethnic group, we have to invite them to reflect about their assumptions about other members of the society, in order to counteract stereotyped thoughts that put at stake the work we do with members of the society. This activity requires from students to exam their own experiences and assumptions towards social and cultural

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<sup>19</sup> Zembylas, M., «Engaging with Issues of Cultural Diversity and Discrimination Through Critical Emotional Reflexivity in Online Learning», *Adult Education Quarterly* 59-1 (2008): 61.

<sup>20</sup> Zembylas, M., «Engaging with Issues of Cultural Diversity and Discrimination Through Critical Emotional Reflexivity in Online Learning», *Adult Education Quarterly* 59-1 (2008): 61-82.

<sup>21</sup> FletcherL. E., and H. M. Weinstein, «When Students Lose Perspective: Clinical Supervision and the Management of Empathy», *Clinical Law Review* 9 (2002): 144.

<sup>22</sup> Frank, A.W., *The wounded storyteller: Body, illness and ethics* (Chicago: Chicago University Press, 1995).

<sup>23</sup> Martusewicz, R., and J. Edmundson, «Social Foundations as Pedagogies of Responsibility and Eco-Ethical Commitment», in D. W. Butin (ed.), *Teaching Social Foundations of Education: Contexts, Theories, and Issues* (London: Lea, 2005, 71 ss.)

diversity, by confronting one's own ideas about ethnicity, poverty, people with functional diversity, and so forth. Likewise, it is also helpful to deconstruct concepts that have been used to maintain the *status quo* inside of these systemic relations of power, such as race or the traditional role of women as caregivers.

Apart from cases involving suffering clients, empathy has many rewards for lawyers: they become more “effective” in their job<sup>24</sup>, improving their performances. Generally, as said before, lawyer who can truly view issues as their client do, will develop a stronger relationship with them.

Once a lawyer recognizes that there are emotional components related to their client's legal problem, she can fully understand their needs and provide a better service.

### ***3. Tools experiences of implementing empathy***

Generally speaking, empathy is observed by society as an innate quality, a talent that some people have and others do not. Nevertheless, our approach to empathy is somehow different. We consider that our work as supervisors must include exercises where students need to understand the necessity of having an empathetic approach when working with clients, and specifically, with vulnerable groups. As Westaby and Jones said, working with empathy in the legal profession «can provide both a more

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<sup>24</sup> Zembylas, M., *The Politics of Trauma in Education* (Berlin: Springer, 2008, 35 ss.).

effective form of practice and a deeper appreciation of ethics and values»<sup>25</sup>. Thus, these pedagogical instruments, not only help students to realize the key role that empathy plays in their relations with clients, but also, they are a mean for students to retain this knowledge as a part of their expertise for the future.

As said by many commentators, one cornerstone of the legal clinics is «the coexistence (...) 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»<sup>26</sup>. Working about empathy in the legal clinics helps us to underline the importance of this reality, and as we have said, the legal clinic teaching methodology is one of the best approaches to empathy.

In the following sections, we will suggest some exercises we used in our courses in order to develop these threefold purpose, social justice, educational aims, and student's empathy, in order to train better lawyers.

### ***3.1. The so-called "steaming out exercises".***

As said before, while assisting vulnerable clients students may feel embarrassment, fear, bias: emotions that can make them feel uncomfortable and become an obstacle in

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<sup>25</sup> Westaby, C., and E. Jones, «Empathy: an essential element of legal practice or 'never the twain shall meet'?, Int' J. of the Legal Profession, 25:1 (2018): 107-124.

<sup>26</sup> Barbera, M., and V. Protopapa, «Access to Justice and Legal Clinics: Developing a Reflective Lawyering Space. Some Insights from the Italian Experience», WP CSDLE "Massimo D'Antona".INT, 141 (2017): 22.

handling the casework.

Given this scenario we, as supervisors, should facilitate a process of self-awareness, helping students to 1) identify their feelings and 2) learn how to manage the emotional aspect of their legal work<sup>27</sup>. The idea is to let the steam out before our students blow, to get them rid of frustration and negative feelings.

1) Identify student's conscious or unconscious emotional state it's crucial in order to prevent this thinking from affecting their legal work and their relationship with the client.

To do so, we suggest two activities. Both of them must be conduct in a "safe place": students should feel free to explore their own emotions and share their ideas. For that reason, introducing these exercises too early in the semester can be risky and inhibit further sharing. Moreover, both of them include a debriefing session, to let the students reflects on the activity performed and capitalize the experience of the workshop.

a) Self-awareness exercise: the students stress out the possible bias they may have against certain target groups. Sharing and discussing "common bias" instead of "own bias" help students to be more secure about exploring and identifying them.

Supervisors should engage a discussion about prejudices against inmates (or Muslims, or homeless, depending on the case accepted by the Law Clinic) and ask

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<sup>27</sup> Fletcher L. E., and H. W. Weinstein, «When Students Lose Perspective: Clinical Supervision and the Management of Empathy», *Clinical L. Rev.* 9 (2002): 135-156.



students to share, at the beginning, common opinion about that target group and later, if students agree to, their own beliefs.

At a certain point law teacher start exploring how much participants know about the target group, asking on what their opinion is based on (personal experience; newspapers; others).

Finally, supervisors should report data, statistics, and any reliable documents about the chosen target group (i.e. providing information about inmates' level of education, family and cultural backgrounds, mental disease, poverty); if possible inviting representatives from the advocacy group to give a speech to the class.

b) Role play: "A Step Forward": taking part to this exercise, also called "Privilege Walk Lesson Plan"<sup>28</sup> students experience what is like to be someone else in their society. The purpose of the activity is to learn to recognize how some factors can affect our lives even when we are not aware of.

Before the class, prepare a list of statements related to money, religion, national identity, race, disability (v. g. *"If you're ill or injured, you can afford medical care"*; *"You can practice your religion without any restrictions"*; and role cards (v. g. a 20-years old asylum seeker from Syria"; a famous movie star, a blind student and so on) adapting them to the cases you are going to work on during the semester.

In the class, follow these instructions:

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<sup>28</sup> Privilege Walk Lesson Plan – <https://peacelearner.wordpress.com/2016/03/14/privilege-walk-lesson-plan/>

- 1) Create a safe atmosphere
- 2) Hand out role card at random one to each student and tell him or her to keep it to themselves and to not show it to anyone.
- 3) Ask students to get into the role and to build up a picture of the character. In order to help them, read out some questions (v. g. "What was your childhood like? What sort of house did you live in? What kind of game did you play? How's your everyday life? What sort of lifestyle do you have? What are you afraid of?).
- 4) Ask students to form a straight line across the room (or, if possible, across the University yard), leaving space in front.
- 5) Tell them that you're going to read out a list of statements and to take one step forward if the statement applies to the character, to stand still if don't.
- 6) Read out the statements and take pauses to allow students to move and to look around to check classmate's position.
- 7) At the end, invite students to take note of the final positions.

Invite the students to sit down in circle, and start the debriefing session asking them what do they think about the exercise. In particular, ask them how do they feel about stepping forward or not, why did they decide to stand still and how was to play a role (how much did they know about the character?).

In the final part of the class, introduce a discussion about how the exercise reflect society and how to shorten the distance.

- 2) After these initial steps, supervisor should assist students to manage their feelings,

distinguishing between external triggers and internal over-reactions. In order to maintain a receptive environment, essential in the learning process, teacher may choose if addressing the student in a one to one meeting or, alternatively, in class.

In both cases, should be adopt a problem-centred approach to the matter, locating the issue outside the student's personality<sup>29</sup> and highlighting how it affected the relationship with the client and, consequentially, the casework.

### ***3.2. Collaborative or peer approach***

The usage of a cooperative learning environment in a law clinic is not an easy task to do, at least from the perspective of the Spanish and Italian university. Students are not used to work with their colleagues, as the law curriculum enhances and promotes a purely individualistic model of learning and working in the class, which was not modified by the *Bologna process*. Nevertheless, setting up a law clinic requires from the professors in charge of the supervision a strong effort to overcome this model and advocate for a change on how the students interact with each other in these contexts.

The benefits of the collaborative training have been discussed by many commentators in a wide range of fields, including clinical education<sup>30</sup>, and it is

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<sup>29</sup> Fletcher, L. E., and H. W. Weinstein, «When Students Lose Perspective: Clinical Supervision and the Management of Empathy», *Clinical L. Rev.* 9 (2002): 135-156.

<sup>30</sup> Prince, M., «Does Active Learning Work? A Review of the Research», *J. Engr. Education*, 93-3(2004): 223-231; Gorkhale, A.A., «Collaborative Learning Enhances Critical Thinking», *Journal of Technology Education* 7-1 (1995: 1-4); Burgess, A., K. Black, R. Chapman, T. Clark, C. Roberts, and C. Mellis, «Teaching Skills for Students: our Future Educators», *The Clinical Teacher* 9 (2012): 312-316.

precisely in this context, due to the commitment we have of working with social justice dilemmas, when we have to leave behind the competition model where students struggle among them to *be the best*, towards a model where the group success is a mean to achieve the formational goals. By creating an atmosphere where, senior clinical students share their knowledge, motivations and experiences with the junior ones, we will be upholding a self-directed behaviour where both groups will learn by gaining information from a variety of resources<sup>31</sup>.

Organizing this setting as a structured activity within the clinic will help to obtain a better outcome in the projects the students are working with<sup>32</sup>. It will add important elements of cogitation and adaptation from the social justice point of view, not only because senior students might have been working in similar cases where they faced similar empirical situations, but also because both groups will be able to debate and discuss about the ethical dilemmas that cases and projects pose, and the stances society has towards the groups with which the clinic works from a critical point of view<sup>33</sup>. This task regularly requires from students to realize and undercover the functioning of social relations of power and subjugation (whether structural or coming from the state), in order to identify patterns of discrimination our clients might

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<sup>31</sup> Quigley F., «Seixing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics», *Clinic L. Rev.* 2-57 (1995): 37-72.

<sup>32</sup> See the activities proposed by Mcquoid Mason, D., R. Palmer (eds), *African Law Clinicians' Manual* (Durban: Masgrave, 2013), 119-124, in particular about teaching ethics and professional responsibility.

<sup>33</sup> Mthethwa-Sommers, S., *Narratives for Social Justice Educators. Standing Firm* (New York: Springer, 2014), 12-15.

be subjected to<sup>34</sup>.

Moreover, this work will help us in two more formative areas: teaching for transfer and working with clients. On one hand, clinic students debating with their senior fellows about the cases they are working with, will add to the picture the necessity of adapting the knowledge they have acquired to similar or new situations. Students-to-student discussions promote this activity as they will need to transform their expertise in order to guide the work of their junior peers, for instance by using brainstorming sessions where they confront what they know and what they need to know to better represent the interests of the project. And, on the other hand, it will help students to deconstruct previous stereotypes they might have towards clients that miss appointments or fail to follow the instructions given by sharing their experiences about this, and realizing that it is not a behaviour linked to a certain type of client<sup>35</sup>.

Summing up, these are the major areas in which the utilization of collaborative learning might help within a legal clinic based on the promotion of the values of social justice.

### ***3.3. The psychological approach.***

We decided to interview a psychologist in order to understand, in a deeper way, the

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<sup>34</sup> Adams, M., *Pedagogical Foundations for Social Justice Education*, 40-42, in M. Adams and, L. A. Bell, *Teaching for Diversity and Social Justice* (New York: Routledge, 2016).

<sup>35</sup> Quigley, F., «Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics», *Clinic L. Rev.* 57 2 (1995): 58.

opportunity given by a correct use of empathy in our clinics. Thus, we chose an expert who has been collaborating with the Penal and Civil Court in Brescia, as she has a great expertise working with inmates, victims of domestic violence, children abused or involved in parents' problematic separations, among other people or groups in a situation of vulnerability.

We decided to take this approach, not only because we are sure that a multidisciplinary perspective is necessary to focus on the different (legal, moral, psychological) implications the legal clinic education has for our students, but also because it is crucial to improve the value of empathy as a skill for better managing legal strategies. In particular, because working in hostile atmosphere, as said before, requires some cautions and we need to prepare ourselves as teacher but also, and above all, our young student to face up these *special* situations.

The implementation of empathy, as core value in legal clinic education is not an immediate goal. On the contrary, it is the result of a long-run process that requires some efforts and investments.

The psychologist suggested us different useful tools and steps to reach our goal, that we can divide in these three macro-steps:

1) The first one is quite elementary: give our students a lot of information. Let them be comfortable – or more comfortable as possible – with the new situation (if for example they have to visit a jail/prison, an asylum seeker camp describes the space; explain the access procedures: “You cannot carry the cell phone in jail”).

The other steps are more elaborate, they demand an iterative or circular process.

2) In the second macro-step we can find some tools as for example *steaming out* (*supra* § 3.1.); *intervision*, which is an auto-training or a peer-training for teachers (the committee of teachers involved in the clinic share and compare experiences, problems, solutions)<sup>36</sup>.

3) The third macro-step provides a more specific professionalism (it is a really deeper step). It consists in implementing some therapies or techniques as for example mindfulness<sup>37</sup>; the tools are the same we often use in our courses - even if without classify them in a specific taxonomy - but the idea is to involve some experts (enforcing the multidisciplinary perspective). We can use these tools to improve a non-judgmentally approach, which may be frequent if our students have some biases or if they believe/promote some stereotypes<sup>38</sup>.

### **3.4. Others' methodologies**

Although the methodologies we just explain have been proved as fruitful for us to work with students about empathy, there is a wide range of other activities that

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<sup>36</sup> Epprecht C., «Intervision: a group-based peer-supervision project by EMCC Switzerland», in Bachkirova, T., P. Jackson, and D. Clutterbuck (eds), *Coaching And Mentoring Supervision: Theory And Practice* (Milton Keynes: Open University Press, 2011, 265-272).

<sup>37</sup> Roeser, R. W., E. Skinner, J. Beers, and P. A. Jennings, «Mindfulness Training and Teachers' Professional Development: An Emerging Area of Research and Practice» *Child Development Perspective*, 6-2 (2012): 167-173.

<sup>38</sup> Fulton, P. R., *Mindfulness as Clinical Training*, in Germer, C. K., R. D. Siegel, and P. R. Fulton (eds.), *Mindfulness and Psychotherapy* (London: Guilford Press, 2016, 59 – 75).

can be used within the legal clinics to do so<sup>39</sup>. The experience of “seeing the world through another’s eyes, hearing as they might hear, and feeling and experiencing their internal world”<sup>40</sup> is an activity that can be performed by using other methodologies that can complement the mains ones introduced in the previous sections. Thus, is not our intention to explain in detail the following exercises, but to point out that working about empathy requires a set of activities that move along with the clinical courses. So that, depending on the stage we are of it, an activity might be more adequate than the others, and professors are the ones in charge to decide which one should be implemented.

Firstly, performing *mock interviews* where some students adopt a role while being interview by their peers is a good dynamic to point out bias behaviours that they might have towards certain members of the society. This training might rise some important red flags, which can be used to develop the rest of the exercises about empathy during the course.

Secondly, it has been proved as an important exercise too, the *use of documentaries* for students to understand the complexities and ambivalences of empathy. When selecting them, we should have in mind that the projections must adopt a critical point of view with the relations of power and subjugation, hierarchy

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<sup>39</sup> For example: Angeles, L. C., and G. Pratt, «Empathy and Entangled Engagements: Critical-Creative Methodologies in Transnational Spaces», *GeoHumanities* 3:2 (2017): 269-278.

<sup>40</sup> Ivery, A. E., M. B. Ivery, and L. Simek-Morgan, *Theories of Counseling and psychotherapy: A Multicultural Perspective*, 7th ed. (Boston: Allyn & Bacon, 1993, 21).



and exclusion, not only within our society, but globally.

Thirdly, the *use of art* in the legal clinics. Art is a powerful instrument that can be used to deconstruct the concepts mentioned above such as power structures and discrimination<sup>41</sup>. Poetry and scenic arts are valuable concepts, useful to make visible acts of intolerance, injustice, sexism, etc., that are present in our daily life but interiorized as *ordinary* patterns of behaviour. Analysing the wording of poems such as *Pretty Normal Day* (written by a mother participating in a project called Sure Start), or the message some paintings give us about the different roles people can adopt in the society, it is an interesting activity for the students to critically realize about how they interact with others.

Fourthly, teach students about the importance of active listening<sup>42</sup> when doing the interviews to clients, as this approach is essential for understanding their problems. Students have to listen not only what the client says, but also to be alert to non-verbal communication as it is essential for better comprehend clients' problems from a holistic point of view.

And last, but no least, *invite representatives and members of groups* that have been historically marginalized in our societies to participate in the training of the clinical students. First-hand testimonies of people that have suffered from biased or bigot

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<sup>41</sup> Foster, V., «The Art of Empathy: Employing the Arts in Social Inquiry with Poor, Working-Class Women» *Social Justice* 34 (2007): 12-27; Foster, V., *Collaborative Art-Based Research for Social Justice* (Oxon: Routledge, 2016).

<sup>42</sup> Active listening, or as Mcquoid Mason says, empathetic listening. See: Mcquoid Mason, D., R. Palmer (eds), *African Law Clinicians' Manual* (Durban: Masgrave, 2013), 164-165.

conducts are a forceful vehicle to evidence the impact that the relations of power have in our societies, and how it affects specifically to certain groups, them members of whom observe their life aspirations reduced to the minimum, or their rights being granted poorly.

These exercises are a brief comment of a vast set of tools that can be used to work about empathy within legal clinics. As said before, the best scenario is to combine some of them depending on the situation we are facing.

#### **4. Conclusions**

Since legal clinics are a program of study aimed at teaching law through direct experience, it has always been clear to us the importance to reflect not only on *what* we teach and *how* we teach, but also to reflect on the resources we can use to enhance students legal and non-legal skills, such as empathy, as it has proved as a backbone concept in our work.

Even if we were not used to manage challenging pedagogical situations such as the ones introduced by legal clinics, we realised quite soon how empathy was relevant to our students, lawyers to-be, to increase their impact and effectiveness in the cases they work with. Particularly, this topic raised our attention after the first visit students from the Legal Clinic of Brescia did to the regional prison facility, and the feedback we got from them when they stated to work with the inmates.

On one hand some students, frightened by the hostile context, were unable to focus on the legal problem and refused the idea of coming back to jail for a second time. Their personal involvement severely affected their ability to manage the case at stake, due to their emotional reaction to the context and their concerns about the “non-friendly” environment they were facing. On the other hand, some other students’ approach to hostile contexts and vulnerable people was to keep the distances with clients in order to avoid any personal involvement. According to these students’ view, a good lawyer is the one who does not leave room for emotional implications but only offers professional legal solutions to his/her clients. Nevertheless, this approach does not take into account of the importance of building a mutual trust relationship with the client. This whole scenario was the main reason for us to start working together about this issue in order to put together synergies and design some activities that empower students to deal with situations.

In light of these two opposite approaches, but equally inadequate, we realized that we lacked the necessary expertise to address these situations. So that we needed to build specific knowledge and competences in order to provide students with the necessary means to confront hostile atmospheres when dealing with clients, keeping in mind that empathy is essential to build a mutual trustful relationship with clients.

As a result of this work, we decided to present its outcomes in different international meetings for having some feedback from colleagues that have been working already in this field and have confronted the challenges we were facing at

the time. Through these conferences (IJCLE 2016, Toronto; ENCLE 2016, Valencia; ENCLE 2017, Newcastle), and foremost, thanks to their contribution, our work has been growing not only with the intention of offering to students a better approach to the situations described previously, but also to avoid some of the pitfalls pointed out by our peers.

Accordingly, the major drawbacks that were identified by them are: 1. The lack of time for the preparation of the students in such detailed way only regarding empathy; 2. The inadequate preparation of ourselves as supervisors to deal with these situations by our own; and 3. The risk of working in a superficial way in such delicate areas like equality, discrimination, racism, and many others. Once we evaluated them, we enhanced our work to confront these flaws, providing a solution to them. Thus, even though we designed diverse exercises that can be included in the training students received when they first enrol in the clinical course, it is true that working in such complicated subjects requires from legal clinics a comprehensive programme to work about them. The ones that adopt a social justice model mainly work with groups in risk of social exclusion or with communities that have suffered from structural patterns of discrimination. Bringing experts of other areas, like psychologist or sociologists all together with representatives of these communities have demonstrated as a strong resource to deconstruct biased thoughts about other members of the society that can jeopardise the work we do. Nevertheless, it is crux to point out that the

exercises suggested are fruitful to start the work, but as previously said, they need to be complemented by other actions, such as the ones suggested in the section 3.4.

One of our duties as legal clinical professors is to make visible that the process of enacting and applying the law has not a neutral impact on the people. Thus, our students should adopt an empathetic approach to their client's problems with the intention of better understand their needs, enhance their access to justice and create a more inclusive society.

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## **ROUND UP OF THE 2<sup>ND</sup> COMMERCIAL LAW CLINICS ROUND**

### **TABLE – 9<sup>TH</sup> MARCH 2018**

*Victoria Roper, Northumbria University*<sup>1</sup>

Keywords: business law clinic; commercial law clinic; SQE; transactional law clinic

The second annual Commercial Law Clinics Roundtable took place at the University of Sheffield on 9<sup>th</sup> March. The event was well attended by a range of clinicians and clinic students as well as start-up and enterprise advisers. Louise Glover, who organised the event, started the day by welcoming delegates before briefly talking about the successful growth experienced by the University of Sheffield's legal clinic.

### **THE CONTEXT FOR COMMERCIAL CLINICS**

The focus of the first part of the day was the start-up and small business ecosystem. Andrew Bunn, a start-up adviser from Business Sheffield, discussed the common areas where advice start-ups need advice. He summarised these as follows:

- Partnership agreements;
- Lease agreements;
- Employment law
- Intellectual property (IP) including trademarks and copyright;
- Infringement of IP;

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<sup>1</sup> Victoria Roper is a Senior Lecturer and Student Law Office Supervisor at Northumbria University



*From the Field*

- Shareholders' agreements;
- Terms and conditions (especially payment terms);
- Technical provenance;
- Contracts and contract negotiations;
- Non-disclosure agreements (NDAs); and
- General Data Protection Regulation (GDPR).

Darren Chouings, a start-up coach from the University of Sheffield, then went on to discuss his experiences. There was significant overlap between the key areas of business need suggested by Darren, and those covered earlier by Andrew:

- Terms and conditions (payment terms, guarantees, warranties, force majeure etc.);
- Privacy policies and online disclaimers;
- Client contracts (including sub-contracting);
- Copyright and IP;
- Partnership agreements;
- GDPR compliance; and
- Liability and protection.

Key points coming out of the presentations and subsequent question and answer discussions were:

1. That business clients often had multi-faceted and complex legal needs – an entrepreneur or business usually approaches an advisor or clinic with multiple different issues.
2. There was a clear unmet need in terms of legal assistance for start-ups and young businesses, usually they need advice but often cannot afford to pay a solicitor.
3. Often clients would only seek advice after a problem had already arisen.

## **MODELS OF COMMERCIAL LAW CLINIC**

The second part of the day was dedicated to exploration of the different models of commercial clinic and then a question and answer session. It was noted that commercial clinics operate under various models and supervisory structures, and that new clinics might want to 'cherry pick' those aspects from each example which best suited their own needs.

### **1. *CommLaw at the University of Sheffield***

CommLaw is a student-led project which prepares and delivers free commercial legal advice to businesses in Sheffield; particularly small businesses, start-ups and entrepreneurs. This presentation was delivered by students of the clinic and focussed on their personal experiences.

The students discussed being supervised internally, although the clinic website does suggest that there is some use of external supervisors from local law firms.<sup>2</sup> The students did not discuss whether they were assessed. The clinic website states that the student advisers are able to deliver advice on a range of commercial legal issues including:

- Website terms & conditions;
- Business structures;
- Product labelling regulations;
- Disclaimers; and
- Contractual issues.

## **2. *Sheffield Hallam University***

Sheffield Hallam has an existing law clinic which provides a diverse range of advice. Rebecca Draper from the clinic noted that it is expanding into commercial legal advice and is proposing to apply for an Alternative Business Structure (ABS) licence.<sup>3</sup> It was explained the proposed move to ABS status should help the clinic better position itself to respond to the changing qualification landscape for solicitors, allow the clinic to widen the breadth and complexity of work undertaken, and ensure authorisation to

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<sup>2</sup> <https://www.sheffield.ac.uk/law/commlaw> (accessed 15 March 2018).

<sup>3</sup> For a detailed discussion of the issues for clinics involved in becoming an ABS, see Elaine Campbell and Carol Boothby, 'University law clinics as alternative business structures: more questions than answers?' (2016) 50(1) *The Law Teacher*, pp.132-137

undertake reserved legal activities.<sup>4</sup> Whilst the clinic would offer its services free of charge for the first 12 months, careful consideration was being given to the possibility of charging some fees to support the clinic's activities. Whilst the clinic would obtain a separate identity if it were to become an ABS, there would be continued financial and other support from the University. Clinic staff had been hired on non-academic contracts specifically to work in the clinic. Currently clinic students are assessed by way of reflection, although this may change in the future. Students are supervised and will continue to be supervised, internally by qualified solicitors.

### **3. *Leeds Beckett University***

Rebecca Hopkinson, pro bono/law clinic manager, discussed her work to embed clinic into Leeds Beckett's LLB programme. Following a process of validation, the module (which is still partly in the development stage) will operate as a credit bearing elective. The clinic has been fortunate to be given premises in the centre of Leeds by the University and operates on a two week turnaround for provision of advice. Rebecca explained that the need to source clients for the clinic had led her to utilize the University's current business connections, including links to local rugby and cricket organisations. Through such organisations' networks, Rebecca has been able to identify a significant number of grass roots clubs that needed advice on funding and

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<sup>4</sup> For discussion about the regulatory uncertainty surrounding law clinics see Linden Thomas, 'Law clinics in England and Wales: a regulatory black hole' (2017) 51:4 *The Law Teacher*, 469-485.

structure options, including the possibility of becoming charities. The clinic is still evolving but is likely to employ both internal and external supervision.

#### **4. *The Small Business Unit at the University of Strathclyde***

This was another student-led presentation which discussed the Small Business Unit, a pilot stage project, at the University of Strathclyde. The University of Strathclyde already has a well-established clinic offering advice to individuals on personal matters. The Small Business Unit has been set up with the aim of helping small businesses and charities in and around the Glasgow area who could not otherwise afford legal advice.<sup>5</sup> The clinic is not currently assessed and works on an external supervision model with the assistance of commercial law firm DLA Piper. The clinic's website states can assist a small number of clients with the following type of work:

- General commercial legal advice;
- Writing letters;
- Reviewing contracts and commercial leases;
- Assisting with drafting of contracts and agreements;
- Help with establishing a business and choosing a legal structure;
- Help with protecting non-contentious IP;
- Information on legal responsibilities across a range of areas of law; and

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<sup>5</sup> Information taken from the clinic's website - <https://www.lawclinic.org.uk/beyond-casework/projects/sblu> (accessed 20 March 2018). The students did suggest though that in fact the external firm of solicitors requires the clients to all be charities or have charitable aims so this may be a further restriction.

*From the Field*

- Help with completing Companies House forms.<sup>6</sup>

The students discussed the work they had personally carried out which included assisting a charity which required employment law advice.

Key points coming out of the presentations and subsequent question and answer discussions were:

- Despite the unmet need, it was sometimes hard for commercial clinics to obtain enough clients. Helpful advice was for clinicians to explore both internal and external sources of work:
  - External clients – think about links the University has to businesses/organisations in the region;
  - Internal clients – do students in other faculties need business law advice/make links with entrepreneurial programmes.
- Commercial work can be more complex than an initially enquiry might suggest.
- We have to think about how best to deal with any limitations on the work we can do.

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<sup>6</sup> <https://www.lawclinic.org.uk/beyond-casework/projects/sblu> (accessed 20 March 2018).

## **ASSESSMENT AND PROPOSED SRA REFORMS**

After lunch, the focus moved to assessment and, later, the SRA's proposed reforms in relation to the education and training of solicitors. Gill Hutchins, Director of the Freelaw Clinic at the University of Sheffield, discussed the history of free legal advice at the university with particular emphasis on the Freelaw clinic.<sup>7</sup>

### ***Elaine Campbell of Northumbria University, Newcastle***

Elaine Campbell of Northumbria University discussed their Student Law Office's current and proposed assessment structure.<sup>8</sup> At present, every student undertaking the four-year M Law degree at Northumbria University experiences clinic as a full year, 60 credit module in their fourth and final year. Students are assessed on their practical work (70% of their overall mark) and by way of two reflective essays (30% of their overall mark). A student's final mark for their practical work is not just determined by the physical work they produce and evidence in their portfolio but also by the other skills and attributes they have demonstrated including oral communication, time management and teamwork. In future, under Northumbria's revalidated suite of degree programmes, students will have additional opportunities to work in the clinic. Three-year LLB students will be able to choose to do clinic as

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<sup>7</sup> See discussion of the Freelaw clinic in Vicky Kemp, Tine Munk and Suzanne Gower, *Clinical Legal Education and Experiential Learning: Looking to the Future* (2016). Available at (<http://hummedia.manchester.ac.uk/schools/law/main/news/Clinical-Legal-Education-Final-Report28.09.2016.pdf>) (accessed 28 March 2018).

<sup>8</sup> The Student Law Office is the wider legal clinic within which business and commercial legal advice is provided at Northumbria University.

either a 60 credit assessed yearlong module in the third year, or they can do a smaller, advice only 20 credit module for one semester. M Law students will, in future, undertake their 60 credit yearlong module in third year, and will also have the option to do a clinic based dissertation in their fourth year.

***Maxine Carr, Solicitors Regulation Authority (SRA)***

Following on from the discussion of assessment, Maxine Carr gave an overview of the SRA's proposed changes to the legal education and training of solicitors. The SRA intends to introduce centrally set examinations to be undertaken at various assessment centres in England and Wales. The examinations will consist of:

- SQE1 - Multiple choice test questions (single best answer questions, extended matching questions and MCQs) which will test a candidate's substantive legal knowledge and 1 practical legal research and writing assessment.
- SQE2 – Which will focus on testing 5 practical legal skills - client interviewing, legal research, legal drafting, advocacy/persuasive oral communication, case and matter analysis (2 x 5 practical legal skills assessments).

In future to qualify as a solicitor an individual will need to:

1. pass SQE1 and SQE 2;
2. hold a degree or qualifications or experience which the SRA is satisfied are equivalent to a degree;



3. have completed qualifying work experience (QWE) equivalent to 2 years full time (this can be obtained with up to four separate firms, educational institutions or other organisations including legal clinics); and
4. be of character and suitability to be a solicitor.

Students will no longer be required to have a qualifying law degree (or GLD) or LPC. The way in which students prepare for the SQE exams will not be prescribed. The SRA envisages that SQE1 will be sat before a student starts their QWE. The SRA will recommend that SQE 2 is sat after the candidate has undertaken their QWE (but will not make this mandatory).

*Victoria Roper, Northumbria University, Newcastle*

In response to Maxine's presentation, Victoria Roper gave a reply and then led a question and answer session.

Victoria opined that the SRA's proposed changes offered both opportunities and challenges for legal clinics and law schools. It was noted that, as at the date of the conference, we were still waiting for the Legal Services Board to make a decision on the SRA's proposals (approval has subsequently been given<sup>9</sup>) and that a number of things were still unclear. In particular, the cost of the assessments was not yet known and it was uncertain what impact the proposed changes would have on equality and

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<sup>9</sup> See the decision at <http://hummedia.manchester.ac.uk/schools/law/main/news/Clinical-Legal-Education-Final-Report28.09.2016.pdf> (accessed 28 March 2018).

diversity in the profession. Also, Victoria noted that the proposed implementation date of September 2020 was fast approaching and that universities usually needed at least 18 months to prepare for any major changes to the curriculum.

In terms of opportunities though, Victoria noted that the SRA's proposed changes could be beneficial for clinics and might help to further establish clinical legal education as a mainstream part of legal education. For example, Victoria suggested that law schools are likely to be considering how their clinical programmes might help students to develop the competencies required to pass SQE 2. Legal clinics, focused on the practical application of the law to real life legal problems and skill development, appear to be natural SQE 2 preparation environments (whether formally or informally). Victoria noted that corporate and commercial practice was specifically one of five practice contexts that could be tested in SQE 2.

Additionally there is the possibility of clinics deciding to sign off on QWE. The person signing off the work experience does not need to confirm that the individual has the skills required to practice (this will be tested by SQE), but rather that the student has had the opportunity to develop some or all of the prescribed competences. The people who can sign off QWE are:

- A firm's compliance officer (COLP);
- a solicitor working within the organisation; or

- if neither the above are applicable, a solicitor working outside of the organisation who has direct experience of the student's work and who has undertaken a review of the work/received feedback from persons supervising the work in order to satisfy themselves.

The solicitor who signs off the QWE does not necessarily have to have a practising certificate, it is sufficient that they be on the roll. Victoria suggested that clinics therefore needed to give thought as to whether they wanted to sign off QWE (there will not be under an obligation to do so) and, if so, who in practice would do so.

Given that students do not work full time/set hours in law clinics, Victoria raised asked a question about whether any guidance would be issued by the SRA about how clinics should calculate the length of time of a student's QWE spent in clinic.

Key points coming out of the question and answer discussions were that the SRA:

- Is currently of the view that multiple clinical experiences/placements done within one university could be signed off as one 'placement';
- Has not decided to what extent it will undertake quality assurance of QWE e.g. spot checking or requesting samples of student work;
- Does not have any intention at present to provide any rules/guidance about how clinics should calculate the time a student can be signed off as having done in clinic, but welcomes dialogue on this point. Maxine did indicate that the SRA would likely support an approach of average hours per week x no of

weeks and then using this figure to work out how many weeks/months full time work this equated to. However, the SRA did not intend to stipulate that this was how it must be done.

## **THE STUDENT PERSPECTIVE - WHY DO STUDENTS WANT TO WORK IN A LEGAL CLINIC?**

The next part of the day was led by students from the University of Strathclyde and the University of Sheffield and involved them talking about what drove them to work in legal clinics.

Common themes and drivers were:

- Employability;
- Wanting to check if they liked doing legal work in practice, wanting to get a realistic idea of what a solicitor does;
- The desire to combine voluntary work and practical experience (where the clinic was not credit-bearing/compulsory);
- Skills development as well as learning office skills (file management etc.)
- The chance to take on a project and develop it; and
- Helping clients who might not otherwise be able to obtain legal advice/wanting to engage in pro bono – something that the students noted had come up a lot when they had been looking at university prospectuses.

### *From the Field*

The students had mixed views about whether they preferred assessed or voluntary legal clinic. Some students noted that being curricular and assessed helped to maximize the learning experience and get the best out of a student. A Masters student undertaking clinic as a voluntary extracurricular activity thought there was value in not assessing though as it had allowed her to not worry about assessment and to focus on the experience.

### **TURNING CLINIC EXPERIENCE INTO RESEARCH AND SCHOLARSHIP**

The last session of the day was dedicated to discussion of how we can use our clinical experience as the basis for research and scholarship.

Dr David Hyatt of the University of Sheffield talked about the professional and personal reasons for engaging in scholarship. He discussed an initiative at his university which has utilized scholarship circles/reading groups to stimulate research activity. With the group people had worked in pairs as 'writing buddies', setting themselves the challenge of writing two articles in a year. David suggested that working with someone else makes you accountable and more likely to meet achieve your goals.

Sarah Blandy of the University of Sheffield then went on to talk about clinical legal scholarship lacking evidence. Sarah took us through the life cycle of one of her clinical research projects, prompting us to consider issues such as methodology (qualitative/quantitative/mixed methods), funding, access to participants, and ethics.

Last, but not least, Elaine Campbell of Northumbria University, Newcastle gave some practical advice based on her own research journey. Elaine explained that it took her a while to find her niche, and that her first years as a researcher were characterized by outputs which ranged quite widely in topic. Elaine explained that it is fine to start small, and it is easiest if you begin by writing about something you are really interested in and/or already know about. Elaine's key message was that each researcher must 'find their own voice' and not be afraid to write in a style that feels right to them.

#### **SUMMARY THOUGHTS AND CONCLUSIONS**

Patrick Cahill from Queen Mary University of London concluded the day by noting that there are ongoing challenges in running commercial clinics but this is balanced out by the learning and skill development opportunities they afford students. He also spoke about the importance of legal clinics as vehicles for employability. He entreated us all to publish more, and to have a voice in relation to the SRA's proposed changes to legal education and training. Wise words indeed.