

Elucidation of the Concept of a Law Clinic as a Prerequisite for Developing the Standards for Law Clinics in Europe

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Abstract

Teaching law in Europe and many other parts of the world is primarily and traditionally conducted in an ex-cathedra style of transferring knowledge. The emergence of law clinics and their integration into the law schools and the general curriculum of law students pose the constant question of what specifically defines a law clinic in contrast to other programmes. The authors therefore set out to answer the question of what is essential for a programme to call itself a law clinic as they deem it important for the further development of specific concepts and on a more general note for the general acceptance and movement of law clinics. For this, the article investigates the history of law clinics and the initial motivation of providing social justice as the reason of their formation. With that in mind and their basic understanding of a clinic as an institution that helps clients with specific problems, the authors take the position that a “law clinic” must render legal aid to people in need and therefore work with live-client cases. As the possibility of working on live-client cases with law students is thus defined a prerequisite of operating a law clinic, this must be checked for feasibility. In the following, the article compares different European national legal regimes on rendering legal aid and concludes that the proposed work with live-client cases isn’t only desirable but also viable.

Introduction

It is always good to remind ourselves of the fact that the history of clinical legal education and law clinics has its roots in the USA. As pointed out by Wilson, the early history of clinical legal education in the USA is deeply and inextricably linked to the provision of legal aid for the poor.³ Furthermore, Wilson has written that during the 1920s, student-directed legal aid societies started to emerge at the prominent law schools in the States, with the primary aim of providing legal services to those in need, while during the

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³ Richard J. Wilson, *Legal Aid and Clinical Legal Education in Europe and the USA: Are they Compatible?* In *OUTSOURCING LEGAL AID IN THE NORDIC WELFARE STATES* 267, 263–85 (Olaf Halvorsen Rønning & Ole Hammerslev eds., 2018).

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1960s and later decades, a number of new faculty-based clinics came to life with the task to respond to lawyering skills training demand as well as to promote a just society and fair legal system.⁴ Furthermore, it proved that funding grants and opportunities were of crucial importance for the setting of the clinical scene.⁵ From the perspective of European lawyers who are wholly or partially affiliated with the law school (faculty of law), it is an interesting fact that by the end of the 1980s, 98 per cent of all accredited law schools in the States offered some kind of clinical curriculum.⁶

The truth is that in Europe, ex-cathedra style of teaching still presents a dominant way of knowledge transfer and one might say that Europe is still very far from having different forms of clinical teaching integrated in the regular study programmes. Even so, things are changing quickly. Nowadays there are many legal aid clinics operating across Eastern and Western Europe, which are helping both people in need of legal advice and students to better prepare for legal practice. The fact is also that different forms of innovative legal teaching are gaining more and more ground too.⁷ Many would agree that all that happened so far is a remarkable development, especially if we consider the observation made by Rekosh 20 years ago, when he said that clinical legal education, by the late 1990s, was virtually unknown among Central European law schools, at least in its dominant form of legal aid clinics.⁸

When discussing various problems immanent to provision of legal aid, by students through law clinics, the authors have asked themselves many times whether one law clinic presents a law clinic if it fails to include legal aid and social justice component. This leads us to another interesting question: why is it necessary to distinguish law clinics from other types of ‘clinical legal education’?

It is not a secret that at some law schools in Europe, there are units which do not work with live clients and lack social justice component, but still proudly call themselves ‘a clinic’, thus making harder for the real law clinics to make a breakthrough and secure sustainability within their faculties and universities. If there are too many people proclaiming that they run ‘the clinic’, although the real nature of these programmes significantly departs from what the law clinics are all about, true clinical programmes might have a lot of trouble in reaching the status they deserve and need to make their valuable activities sustainable and to integrate themselves into law schools’ curricula. That is why we hold that it is undesirable to have a situation in which virtually any kind of innovative or not-that-much-innovative educational programme can be tucked into the concept of a law clinic.

Having more and more clinics, at least on paper, calls for a discussion on the standards for law clinics in Europe. There are rumours that discussion on future standards will intensify during 2020 under the auspices of European Network for Clinical Legal Education (ENCLE). Numerous questions can be addressed by the future standards; the organizational and legal forms of law clinics, the issue of

⁴ *Id.* at 269–70. Though one might think that the notion of legal clinic can be tied exclusively to law school legal aid programs, in the US private law offices were also functioning under the ‘Clinic’ name. As could be read, their primary intention was to cut costs by attracting a large clientele, routinize their services and replace lawyers with paraprofessionals who use forms and word-processing equipment. [See R. L. ABEL, *AMERICAN LAWYERS* 138 (Oxford University Press, 1989).]

⁵ Among funding opportunities, it is a well-known fact that the most prominent one was the one coming from Ford Foundations through its Council on Legal Education for Professional Responsibility.

⁶ R. WILSON, *supra* note 1.

⁷ At the Faculty of Law in Bratislava now, there is an institute fully devoted to the development and promotion of clinical legal education (see information at <https://www.flaw.uniba.sk/en/departments/institutes/institute-of-clinical-legal-education/>), and it is also worth noting that the newly established LLM program at the Charles University in Prague now offers specialization in different forms of experimental learning (see <https://www.prf.cuni.cz/en/llm-and-certificate-in-experiential-learning-and-teaching-1404058406.html>). All web links in the references were, last time, checked on 27 March 2020. And in case no information on functionality of the referenced webpages is mentioned, please adhere to this statement.

⁸ Edwin 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* 43, 43–50 (Dariusz Lomowski ed., 2005).

performing the lawyering roles by students and the level of supervision of their activities, the forms of legal assistance offered by the clinic and their legality with respect to the national laws, educational role of the clinics, the issue of financing and integration of a law clinic into the law school study programme, etc. We imagine that these standards should determine minimum requirements for law clinics in Europe and address both educational and practical issues surrounding clinical work. Establishing the possibility of earning quality marks or some other kind of accreditation for applying the standards could increase the pressure on law schools to adopt true clinical programmes and integrate them into law school's budgeting. In our opinion, designing the system of standards that would open space for separate labelling of different programmes that are somehow related to clinical legal education, but do not fall within the concept of a law clinic, is also conceivable option that should be given careful consideration.

As it can be easily detectable from available materials on law clinics and clinical legal education, the problem is that there is little unity on what clinical legal education is and whether having a link to genuine legal assistance and legal aid is crucial for maintaining a structure that could rightfully call itself a law clinic. Namely, terms such as 'experimental learning', 'experimental education', 'simulation courses', 'law practicums', 'live client clinic', 'legal aid clinic', 'street law clinic' are commonly used to describe diverse types of learning programmes with or without live clients under the umbrella term.⁹

To set the scene, in the first part of the text, the authors will seek the definition of a law clinic based on their own views and available texts. An insight into available materials, such as those produced by the Association of American Law Schools, American Bar Association and selected papers from practitioner and academics will help us to sort out the place and the role of law clinics.

In the second part of the text, an emphasis on the present situation regarding the legal framework for legal aid in the authors' own countries and some others will be stressed. As we shall see, in both countries, the rules on provision of legal services are now much more liberal than 15 years ago. That has opened opportunities for different organizations and structures willing to collaborate with, or at least to help the state-funded legal aid scheme(s). Both authors firmly believe that every law clinic must serve the purpose of providing some sort legal aid to individual clients and thus also fulfill the original reason of their formation: social justice. Therefore, we shall randomly consider national legal frameworks of European countries just to see whether there are some serious legal constraints preventing clinics and law schools from engaging into provision of legal advice. Bearing in mind the social responsibility aspect of law clinics, we can hardly argue in favour of clinics, which lack legal aid component, especially if the legal system allows them to render legal aid.

As usual, lastly comes the conclusion in which we shall argue that having confusing terms in use with clinical legal education poses a problem if we wish to set the standards for European law clinics anytime soon.

⁹ Obviously, words like 'legal clinic' and 'law clinic' are used as synonyms. As non-native English speakers, the authors are of opinion, after taking an insight into widely used free online WordWeb dictionary (<https://wordweb.info/free/>), that sticking with the term

'law clinic', makes more sense. Namely, the word 'legal' is an adjective, meaning that something is established by or founded upon law or accepted rules, that is, that something has legal efficacy or force. The word 'law' is a noun that primarily stands for the collection of rules imposed by authority or body of rules of conduct inherent in human nature and essential to or binding upon human society. As clinics deal with a law and its application, bearing in mind that work of clinics is not necessarily regulated by the law, we simply find it more proper to use the term 'law clinic' throughout this article, though we are aware that this might not be absolutely correct from the perspective of native English speakers, especially lawyers and academicians.

Indeed, What is a Law Clinic?

The Online Oxford Dictionary explains the word ‘clinic’ as follows: an establishment or hospital department where outpatients are given medical treatment or advice, especially of a specialist nature.¹⁰

Even the simplest analysis of the definition reveals that in a clinic, medical treatment or advice is provided to individuals with suspected medical problems. Law clinics are widely recognized as forms of legal training which actively support legal aid systems, care about provision of legal services to the poor, often without detailed examination of the financial situation of the clients to be helped.¹¹ In the same time, ‘Clinical legal education’ is recognized as a method of teaching law, ethics and professional development, covering diverse types of legal training providing students with many benefits including an opportunity to see how the law operates in practice, exposure to different styles of lawyering and ethical issues (and in many cases opportunities to assist and learn from actual clients).¹²

A good example of misapprehension can be found in (truth to say, with a good reason very inclusive) definition developed by the aforesaid association—European Network for Clinical Legal Education. It reads as follows: ‘Definition of a legal clinic: Clinical legal education is a legal teaching method based on experiential learning, which fosters the growth of knowledge, personal skills and values as well as promoting social justice at the same time. As a broad term, it encompasses varieties of formal, non-formal and informal educational programs and projects, which use practical-oriented, student-centered, problem-based, interactive learning methods, including, but not limited to, the practical work of students on real cases and social issues supervised by academics and professionals. These educational activities aim to develop professional attitudes and foster the growth of the practical skills of students with regard to the modern understanding of the role of the socially oriented professional in promoting the rule of law, providing access to justice and peaceful conflict resolutions, and solving social problems’.¹³

In the definition, clinical legal education is understood as a wide notion, which encompasses various forms of legal training and experiential learning including, but not limited to, learning law by working with real clients and real cases. As it cannot be clearly understood from the definition whether law clinics and clinical legal education are synonyms or distinct but interrelated categories, we ask ourselves again: is it possible to speak about a law clinic if the element of provision of continuous legal assistance is missing?

A very good starting point for deriving an answer to the question can be found in the text of the American Bar Association Standards and Rules of Procedure for Approval of Law Schools 2019/2020 (hereinafter: ABA Standards).¹⁴ The standard 304 clearly differentiates simulation courses, law clinics and field placements, grouping them all under the concept of experiential courses.

A simulation course is described as a course that provides students with substantial experience not involving an actual client (but the learning experience should be reasonably similar to the experience of a lawyer advising or representing a client), while a law clinic is described as a course providing students with substantial lawyering experience that involves advising or representing one or more actual clients

¹⁰ *Lexico*, <https://www.lexico.com/definition/clinic> (see. supra note 7, last visited on 15 October 2019).

¹¹ R. WILSON, supra note 1.

¹² F. Gibson, *Community Engagement in Action: Creating Successful University Clinical Legal Internship* 1 AFRICAN J CLIN LEGAL EDUC ACCESS JUSTICE 1, 1. Definition of clinical legal education is available at the old ENCLE’s website (<http://encle.org/>, last visited on 15 October 2019, see. supra note 7).

¹³ Definition available at <http://encle.org/about-encle/definition-of-a-legal-clinic> (see. supra note 7, last visited on 15 October 2019).

¹⁴ The document is available online at https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_the_bar/standards/2019-2020/2019-2020-aba-standards-chapter3.pdf (see. supra note 7, last visited on 15 October 2019).

or serving as a third party neutrally.¹⁵ Similar to a law clinic is a field placement. The difference between clinics and field placements is that in the latter, students engage in lawyering tasks outside a clinic under a supervision of a licensed attorney or an individual otherwise qualified to supervise the students' activity.¹⁶

In much more details, different forms of experimental learning are explained in the 'Glossary for Experiential Education' prepared by the Section on Clinical Legal Education of the Association of American Law Schools (hereinafter: the Glossary).¹⁷ Basically, the Glossary is drafted in the form of the commentary of the ABA Standards with the intention to encourage further development of experiential teaching in law schools and to elucidate many different forms of experiential education offered in American law schools. The development of many kinds of experiential courses, some of which are hybrids of various concepts, sometimes similar with law clinics (Law Lab, Law Practicum), has led to a creation of 'a confusing welter of names and labels', which called for a more precise analysis of different terms applicable to clinical legal education.¹⁸

Taking into account different hybrid clinical models and the current state of development of clinical legal education in the USA, the Glossary emphasizes that within the clinic, different courses may be offered for a small group of advanced students (seminars on substantive or procedural areas of law, ethical rules, lawyering skills and theory) as well as other types of teaching that may help students to become better educated for their future profession (simulations, role plays and similar). Obviously, Americans now view clinics primarily as an educational tool, which does not aspire to fill the need for legal assistance. According to Wilson, the alteration from legal aid to educational goals occurred during the second wave of clinical development (1970-1990s) when one mission—the educational one—simply prevailed over the mission of mass delivery of legal aid.¹⁹ Wilson supports his thesis with the data from one 2015 survey, which indicates that clinics now play a minimal role in the delivery of legal aid in the USA; it has been stated that now they serve less than 2 per cent of all clients served.

We think that what happened in the USA is commercialization of legal studies. One hundred per cent shifting from the legal aid movement to fulfilling educational goals makes sense only in countries where people are not short of a national legal aid scheme. It is hard to believe that in the USA, national legal aid scheme successfully covers all bases, considering that there are millions of poor people living across the USA.

Clinics should serve both educational and social justice goal. This does not mean that going for the legal side with the clinics providing actual service is the only job clinics can or should undertake because going with the street law side where you make people aware of their rights also presents the activity, which can be very valuable to community.²⁰

¹⁵ See ABA Standard no. 304.b. and 304.c.

¹⁶ See ABA Standard no. 304.d.

¹⁷ The document is available at <https://www.aals.org/wp-content/uploads/2017/05/AALS-policy-Vocabulary-list-FINAL.pdf> (see *supra* note 7, last visited on 15 October 2019).

¹⁸ As stated on the first page of the document, the intention of the Clinical Section of the Association was to foster clarity with respect to taxonomy of different kinds of experiential courses, to minimize confusion in describing, comparing, and evaluating courses within and among law schools and last but not least to help current and prospective students understand the different kinds of experiential education.

¹⁹ R. WILSON, *supra* note 1.

²⁰ See interview with Professor David J McQuoid-Mason, Professor of Law at the Center for Socio-Studies, University of KwaZulu-Natal, Durban, South Africa and President of the Commonwealth Legal Education Association in "Klinika News" published by the Law Clinic Osijek PRO BONO, 2/2019. p. 2–3. Klinika News is available at: <https://klinika.pravos.unios.hr/wp-content/uploads/2019/12/KlinikaNews.pdf> (last visited at 27 March 2020).

Legal Monopoly as an Obstacle for Law Clinics

As of late, law clinics started to flourish across Europe, even in countries such as Germany, which is, due to its unique system of legal education, observed as a place which resisted the acceptance of clinical legal education for a very long time.²¹ If we limit here our findings only to the countries of origin of the authors of this article, it suffices to say that in Germany, now we have more than 150 clinics²² operating as student-run NGOs or as clinics at law schools, while in Croatia, three law clinics operate under one rather unique legal framework, which will be discussed later in the text.

In a document produced by the ICT Law Incubators Network titled ‘Challenging the Bar: Legal Constraints for Legal Clinics’, it is correctly stated that the interpretation of what constitutes legal advice could prevent the roll out of university-based clinics for two reasons. Firstly, in some instances, legal aid can be only provided by qualified lawyers which means that students and universities may be excluded from certain types of legal counselling, while the second reason relates to the well-known, many times evoked problem of competition between the bar chambers and law clinics. Hence, it is often held that the position of the bar on clinics may not always be welcoming, as bars might show a lot of incentive to monopolize the system of legal aid.²³

Monopolization of the market for legal services by licensed professionals is a well-known issue. For example, in Croatia, right after the Free Legal Aid Act was delivered in 2008, the Bar Association submitted a constitutional complaint, claiming that allowing NGOs and law clinics to participate in the publicly funded legal aid system is contrary to the Constitution’s art. 27, which says that the legal profession, as an autonomous and independent service, shall provide everyone with legal aid in accordance with the law. In other words, the Bar Association’s position was that only lawyers should be allowed to render legal assistance of all kinds, as only lawyers possess a level of expertise needed to deliver quality legal aid. Furthermore, the Bar evoked many times that the duty imposed to licensed lawyers to duly follow strict (and often outdated) ethical rules helps in overcoming the problem of information asymmetry, which is different from the situation with other providers of legal aid, as they are not scrutinized by the ethical rules and codes.

Fortunately, the Croatian Constitutional Court was not tricked into the rationale provided by the Bar. While it has accepted that the constitutional provision in question recognizes the crucial importance of the licensed lawyers in providing legal assistance to citizens and legal entities, the Court has reiterated that it does not give lawyers an absolute monopoly and exclusivity in providing legal assistance. Even before the adoption of the Free Legal Aid Act, Croatian law has enabled others, even persons without any specific legal education, to provide free legal aid in certain circumstances. Consequently, although the system of legal aid which would completely marginalize licensed professionals could be considered as unconstitutional, it cannot be said that allowing NGOs and law clinics to provide legal aid to the poor would be contrary to the rule of law principle.²⁴

²¹ See another paper of R. Wilson, *Western Europe: Last Holdout in the Worldwide Acceptance of Clinical Legal Education*, 10(7) GER. LAW J. 823–46 (2009).

²² Jan-Gero A. Hannemann & Georg Dietlein, *The Development of Refugee Law Clinics in Germany in View of the Refugee Crisis in Europe*, 25(2) IJCLE 163 (2018).

²³ See ICT Law Incubators Network, *Challenging The Bar: Legal Constraints for Legal Clinic*, available at <https://www.ilincnetwork.eu/wp-content/uploads/2015/08/7-PB-Challenging-the-Bar-Legal-Constraints-for-Legal-Clinics.pdf> (see. supra note 7, last visited on 15 October 2019).

²⁴ See para. 17.1. of the Croatian Constitutional Court’s decision of 6 April 2011. (U-I-722/2009).

If we consider current trends of greater liberalization of the legal profession²⁵ and the EU Commission's position on the regulatory restrictions in the profession,²⁶ it becomes obvious that the efforts to maintain a high level of monopoly of lawyers can hardly prevail over the public interest, which calls for securing legal assistance and access to justice to all people, no matter what financial capabilities one individual has when he seeks legal assistance. Unlike in the USA, where court rules empower students to appear in criminal or civil matters before the court of appeals or even supreme courts under the direct supervision of licensed counsels,²⁷ in Europe, representation of parties in court matters is mostly done by the member of the bar. Whatsoever this is currently true, the conclusion reached by the European Commission for Efficiency of Justice (CEPEJ) is that the monopoly of lawyers is not a marked trend, especially not before the courts of first instance.²⁸

Court representation presents only one portion of legal jobs. Timely provision of free legal advice is often vital, as it gives people a guidance on what alternatives, if any, they have in settling their legal problems. To our knowledge, legal aid law clinics in Europe, no matter what their organizational structure is (i.e. Are they operating as the law school units or student-run NGOs?), mainly focus on supplying their clients with free legal advice.²⁹ Naturally, that does not mean that some clinics may not extend their work to court cases or to various kinds of legal policy work. For example, in Italy, where rules on mandatory lawyer representation apply, students assist lawyers in court proceedings, while in Norway, a well-known law clinic 'Iuss Buss' engages into various kinds of projects and policy work, while firmly staying with its primary task—providing legal aid to disadvantaged groups.³⁰

There is no doubt that jurisdictional differences regarding the rules governing provision of legal aid may affect the establishment of law clinics and their operation. However, available resources suggest that in most states, law clinics are under no serious constraint that would disallow them to engage in providing at least legal assistance in the form of legal information or advice.

A Brief Overview of Selected Regimes Regarding Provision of Legal Aid

As it is extremely hard to obtain precise information from all European countries in which law clinics exist, *infra* in the text, we shall point out information we obtained so far from various sources (mostly *via* internet and private contacts). The fact is that this is nothing but a random and ad hoc list of European

²⁵ See, for instance, L. Bugatti, *Toward a New Era for the Legal Profession*, 1 ERPL 83–112 (2019).

²⁶ See COM, *Report on Competition in Professional Services* (2004) 83 final of 9 February 2004.

²⁷ See, for instance, Iowa Court Rules which regulate court practice by law students. The relevant rules are available at http://www.teachinglegalethics.org/sites/default/files/lawyer_regulation/Iowa%20Court%20Rules.pdf (see. *supra* note 7).

²⁸ See CEPEJ STUDIES No. 26, *European judicial systems Efficiency and quality of justice*, 2018 Edition (2016 data), p. 178. The conclusion of CEPEJ certainly calls for a clarification. What one has to say here is that self-representation, representation by the trade union or a family member, may work as an option only for people who possess legal knowledge and ability to represent their interests in court proceedings, have a family member ready to take on the case or for people who are members of the trade union with in house legal office which provides various types of legal aid to the union's members, usually those relating to different issues arising out of labor law.

²⁹ This saying is not easy to elaborate because at the moment, it is not possible to find a list of law clinics operating in Europe with links to their websites (it is expected that the clinical directory will be developed by ENCLE soon). On the other hand, private contacts and the knowledge gathered during clinical conference meetings has led to the conclusion that front line legal assistance, which mostly stands for practical legal information and legal opinions, presents common type of legal aid rendered by the clinics across Europe.

³⁰ See OLESEN HAMMERSLEV & JUSS-BUSS Rønning [Law Bus], *A Student-run Legal Aid Clinic*, in *OUTSOURCING LEGAL AID IN THE NORDIC WELFARE STATES* 147–67, Palgrave Macmillan.

legal regimes that, as we shall see, in most cases, explicitly allow law clinics to handle cases. The purpose of this list is to show that legal frameworks in Europe, although not always encouraging, basically, allow clinics to undertake activities that make the law available to all people. Therefore, our hypothesis is that the provision of free legal advice under the patronage of a law school or law students' NGOs presents a workable option in most of the states across Europe.³¹

In the UK, which has a long history of law clinics and a fundamentally strong legal aid system, the Legal Services Act distinguishes between the reserved and unreserved legal activities.³² While reserved activities are closely related to the public function of a lawyer, unreserved activities constitute the provision of legal advice or assistance in connection with the application of the law or with any form of resolution of legal disputes and the provision of representation in connection with any matter concerning the application of the law or any form of resolution of legal disputes. As unreserved legal activities can be performed by any person, it is clear the Legal Services Act encourages the provision of general legal counselling and consequently the establishment of law clinics.³³

In Belgium, the law allows clinics to render legal aid except legal aid, which is reserved for licensed lawyers (representation in court). It distinguishes between the front-line legal aid (practical legal information, legal information, a first legal opinion or a referral to a specialized authority or organization) and second-line legal aid (detailed legal opinion, legal aid in different proceedings including representation in court).³⁴

The approach of the Belgian legislator has been cherished by the Croatian legislator. Croatian 2013 Free Legal Aid Act classifies legal aid in civil matters into two groups: primary and secondary legal aid. Secondary legal aid includes all kinds of legal aid inherent to representation in judicial proceedings. As expected, court jobs remained reserved for licensed lawyers. On the other hand, the primary legal aid comprises of general legal information, legal advice, legal assistance in preparing documents before bodies vested with public authority, European Court of Human Rights and international organizations and legal aid in conciliation proceedings. NGOs and law clinics can provide primary legal aid if they register with the Ministry of Justice.³⁵

One peculiarity of the Croatian Free Legal Aid Act is that it contains an explicit definition of a law clinic. It reads as follows: a law clinic is organizational unit of an institution of higher education offering university courses in the field of law, which provides primary legal aid in accordance with its memorandum of association.³⁶ At the moment, in Croatia, there are three clinics registered with the Ministry of Justice operating at law schools in Osijek, Split and Zagreb.³⁷ In spite of the fact that, in Croatia, the origins of clinical legal education can be traced to the time before the delivery of the first 2008 Free Legal Aid Act, the real boost to emergence of law clinics came right after the second Free Legal Aid Act of 2013 came

³¹ See ICT Law Incubators Network, *Jurisdictional Differences—Country Report* in CHALLENGING THE BAR: LEGAL CONSTRAINTS FOR LEGAL CLINIC, available at <https://www.ilincnetwork.eu/wp-content/uploads/2015/08/7-PB-Challenging-the-Bar-Legal-Constraints-for-Legal-Clinics.pdf>. Most of the clinical leaders with whom we got in touch while working on this paper informed us that their clinics regularly provide legal assistance in the form of advice.

³² See <https://www.legislation.gov.uk/ukpga/2007/29/part/3/crossheading/reserved-legal-activities> (see. supra note 7, last visited on 15 October 2019).

³³ *Supra* note 23.

³⁴ *Id.*

³⁵ See art. 6-12 of the Free Legal Aid Act (in Croatian: Zakon o besplatnoj pravnoj pomoći, OJ no. 142/2013).

³⁶ See art. 4 para 8 of the Free Legal Aid Act. For more detail about the mention of law clinics in the Croatian Free Legal Aid Act, see Z. Jelinic, *Legal Clinics and Access to Justice in Croatia: Perspectives and Challenges*, 5(1) ASIAN J LEG EDUC 99–108 (2017).

³⁷ In Croatia, there are (only) four law schools at the Universities of Osijek, Rijeka, Zagreb and Split providing graduate scientific fully-fledged law study programs and more than a dozen of shortened law study programs at other institutions of higher education, both public and private (polytechnics and colleges). Law students other than those graduating from the law schools cannot apply for bar exam, which is administered by the Ministry of Justice.

to force. It should not be neglected that the Free Legal Aid Act laid down rules according to which registered clinics and NGOs may apply to the Ministry of Justice with project applications and thus receive money for their operations from the state budget. Although the system of financing envisaged by the Act is not without constraints as it is not possible to apply for durable funding, it must be said that, so far, it serves the purpose of aiding the sustainability of law clinics.³⁸

To sum up, in Croatia, apart from its significant role in legal education, the existence of legal clinics is also very important in terms of enhancing the legal aid system by broadening the cycle of legal aid providers to which underprivileged citizens can turn when they are in need of legal aid.³⁹ The establishment of the legal framework was important because it has opened the space and cleared legal obstacles for law clinics to participate state-funded legal aid system in civil matters.

Although Germany now has a thriving movement of over 150 law clinics,⁴⁰ this is a comparatively recent trend. As mentioned before, just 10 years ago when Richard J. Wilson wrote an article titled ‘Western Europe: Last Holdout in the Worldwide Acceptance of Clinical Legal Education’,⁴¹ he used Germany as an example for basically non-existing culture of clinical legal education. One of the most undeniable milestones in recent German legal history can be found in German Legal Services Act (hereafter: RDG; German: Rechtsdienstleistungsgesetz) that entered into force in July 2008 and legalized legal advice provided by students.⁴² Beforehand live client law clinics would not be legal, as the previous regulations⁴³ heavily monopolised the right to provide legal advice allowing only members of the bar to serve as legal counsels. There were no exceptions to this restriction, even if the legal advice or service of any kind would be given free of charge⁴⁴ or to a family member. This was rooted in the anti-Semitic objective of the former law of 1935 to hinder Jewish lawyers from practising and offering legal advice after they got excluded from the bar in 1933,⁴⁵ but it did not get changed much after the World War II, as it protected the economic interest of lawyers and consumers from unqualified advice⁴⁶. Only when the Federal Constitutional Court has declared that legal advice for family members and close friends cannot be prohibited outright⁴⁷ and under growing pressure to liberalize regulations comparable to other European countries the new RDG partially brought down these restrictions.

Now § 6 RDG states that free legal services are permitted (para 1), but that

[...]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

³⁸ The author has many times stressed that the clinic he leads—Law Clinic OSIJEK PRO BONO—would hardly hold up without a help from the State budget. Namely, the integration of the clinic into the study program of the Osijek Law School turned up to be one very daunting task as there are still so much misunderstanding among the faculty about the true benefits of having a clinic within the law school.

³⁹ B. Preloznjak, *Clinical Legal Education in Croatia—From Providing Legal Assistance to the Poor to Practical Education of Students*, 19 INT J CLIN LEG EDUC 380 (2013).

⁴⁰ Jan-Gero Alexander Hannemann & Georg Dietlein, *supra* note 22.

⁴¹ *Supra* note 21.

⁴² Jan-Gero Alexander Hannemann & Georg Dietlein, *Studentische Rechtsberatung Und Clinical Legal Education In Deutschland* 16 (Springer Verlag 2016).

⁴³ Rechtsberatungsgesetz (Act on Legal Services), until 1964 known as Gesetz zur Verhütung von Mißbräuchen auf dem Gebiet der Rechtsberatung (Law on the Prevention of Abuses in the Field of Legal Advice).

⁴⁴ Art. 1 § 1 Act on Legal Services.

⁴⁵ KLEINE-COSACK, KOMMENTAR ZUM RECHTSBERATUNGSGESETZ 38 (Heidelberg 2004).

⁴⁶ Federal Bar Association Statement (BRAK) Statement Nr. 19/2007.

⁴⁷ Federal Constitutional Court of Germany (BVerfG), Decision of 29 July 2004, also found in *Neue Juristische Wochenschrift* (NJW) 2004, 2662 ff.

a qualification of a judge or under the guidance of such 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 (para 2).⁴⁸

Thus, this reform has allowed law students working in live client law clinics to render free legal advice under the guidance of properly qualified staff. Thereby the goal of enabling new ways of providing non-profit legal advice was finally achieved.⁴⁹

After RDG has allowed students and law clinics to provide legal aid, Germany started to experience its first wave of new projects in 2010⁵⁰ and since then a growing number of projects started establishing themselves in the German legal advice market, in the same time penetrating to legal education and universities. Thus, Germany is prime example of a country having a slow start in the commencement of law clinics, which afterwards started to grow up quickly, only after regulatory boundaries surrounding live client law clinics dropped out, as concepts without live clients would have been possible far before.

Switzerland has currently nine programmes that define themselves as law clinics, plus there are two additional student services that offer legal advice by students for students but do not call themselves 'law clinics'.⁵¹ Half of the 10 Swiss law schools are hosts to one or more law clinics or clinical projects run by students and it is important to mention that all Swiss clinical projects are part of the university structures or the institutionalized student bodies. Five out of 11 projects offer legal advice for live clients while four law clinics at the Graduate Institute Geneva work together with NGOs and other organizations on a more institutional level⁵². Most of the projects are offering pro bono advice for students or members of their respective faculties but some projects are also dealing with human or migrants' rights.

Swiss Law has no specific set of rules for law clinics or regulations regarding offering legal advice or services. Therefore, the rules that govern provision of legal aid are primarily rules of contract law regulated in the Part five of Swiss Civil Code, as, for example, the duty of professional secrecy.⁵³ Within these parameters, law clinics have the freedom to offer any kind of out of court legal advice like any other institution. The defence of a criminal case is reserved only for lawyers⁵⁴ while the representation of parties before civil courts is separately regulated and mostly restricted by cantonal regulations.

Currently, there are four clinical projects in Austria that label themselves as 'law clinics'.⁵⁵ Out of these four clinics, all, but one state online, are working with live clients and tackling real cases.⁵⁶

⁴⁸ As translated by Jan-Gero Alexander Hannemann & Georg Dietlein in *supra* note 1, at 162.

⁴⁹ German Parliament (BT) Printing Matter (Drucksache) 16/3655, p. 39.

⁵⁰ Cf. Jan-Gero Alexander Hannemann, *Übersicht bestehender Legal Clinics in Deutschland* [Survey on the Existing Legal Clinics in Germany], 3 GJLE 200 (2016).

⁵¹ All information concerning law clinics in Switzerland and Austria that is not properly referenced, is information sourced by the authors from the websites and information materials provided by the law clinics. Thanks goes out to the Legal Advice Service of the Student Body of the University of Basel (SKUBA-Clinic) and the Law-Clinic SML at the Zürcher Hochschule für Angewandte Wissenschaften as well as the RLC Graz for providing information about their work and practice. The Swiss Programmes are: Human Rights Law Clinic Bern; Law Clinics at The Graduate Institute Geneva; Law Clinic—Anwaltliche Praxis Universität Zürich; Law-Clinic SML; Law Clinic sur les droits des personnes vulnérables [Law Clinic on the Rights of Vulnerable People]; SKUBA-Clinic and the Rechtsberatungsdienst der SUB [Legal Advice Service by the Student Body Bern], Legal Advice Service by the Student Body of the University St. Gallen.

⁵² J. PAUWELYN & M. S. ORREGO, *The International Law Clinic at the Graduate Institute in Geneva in Reinventing Legal Education* (A. Alemanno & L. Khadar eds. Cambridge University Press, 2018).

⁵³ Art. 321 Swiss Criminal Code (StGB).

⁵⁴ Art. 127 Swiss Criminal Procedure Code (StPO).

⁵⁵ These are: Vienna Law Clinics (with three sub divisions for: Asylum, Start-Up and Consumer matters) at the University of Vienna; Refugee Law Clinic Graz; Legal Clinic for Public Law and Environmental Law at the University of Graz and the 'Rechtsambulanz im Strafrecht' [Law Clinic on Criminal Law] at Johannes Kepler Universität Linz.

⁵⁶ At the Vienna Law Clinics the Subdivision of Asylum Law.

Although there is little legal literature on Austrian laws and regulation concerning legal advice and services, free legal advice by people outside the bar association is apparently legal within the general regulations on services provided free of charge. Whatsoever, there seems to be no experience of offering legal advice through the clinics, as all services are delivered in cooperation with other organizations or licensed lawyers to secure that the law clinics do not get involved in the actual provision of legal service on a formal level.

In Hungary, the reform of the laws regulating access to legal services has opened space for different pro bono projects and activities. As explained by Toth, the Hungarian Bar Association holds a monopoly on legal counselling in relation to judicial proceedings, while clinics, NGOs and trade unions may provide supplemental free legal aid (mainly in the form of legal advice and eventually representation *pro bono publico*) only to segregated, poor and vulnerable persons in need of legal assistance, but only out of the legal frames which are under the monopoly of licensed professionals.⁵⁷

It could be read that, in Spain, there is little literature available about the exclusive nature of legal advice, and therefore, it is difficult to assess the legality of the provision of legal services by law students.⁵⁸ However, the mere fact that Spain now has several law clinics in operation suggests that the provision of free legal advice by the clinics is workable in Spanish legal system.⁵⁹

Regarding the Polish situation, there is no need to present detailed information. Poland has been on the forefront of the development of the law clinic movement in the Central and Eastern Europe for years and hopefully it will remain so.⁶⁰

In Nordic states, legal aid systems are very well developed. Moreover, the monopolization of legal aid by lawyers has never been a feature of their legal systems. For example, in CEPEJ Report, it is stated as a curiosity that the Swedish legal profession is having an open and free legal market and no monopoly for lawyers; everyone can act as legal counsel and represent clients in a court.⁶¹ Finland is somewhat interesting. There are no law clinics or paralegals that aid people with legal problems, although the Finnish Bar Association (FBA) does not have a monopoly on providing legal services.⁶²

As we could see, even if they exist, the restrictions in providing legal services by clinics are becoming more and more liberal. Where legal environment is inconclusive, the interpretation of the notion of legal services may play a crucial role. Even if some serious restrictions exist (Portugal is regarded as a country with conservative approach to the interpretation of what constitutes legal advice), it is reasonable to expect that they are never strictly controlled, especially if the legal assistance is provided in the very basic form of legal information, opinion or advice by students who are properly supervised and instructed.

Another point that needs to be raised is that no matter if we are talking about systems that disallow teaching law and working in practice simultaneously or the systems in which teaching and practicing law nicely play along, the fact is that law schools and bar associations have always been collaborating, if not on the basis of various agreements and projects, then tacitly. The reality is also that clinics can hardly fill

⁵⁷ See J. Toth, *Legal Clinic as a Promising Alternative Instrument in Hungary*, available at <http://www.juris.u-szeged.hu/download.php?docID=68487> (see. supra note 7, last visited on 15 October 2019).

⁵⁸ *Supra* note 23.

⁵⁹ See C. Bartoli, *Legal Clinics in Europe: For a Commitment of Higher Education in Social Justice*, *Diritto & Questioni Pubbliche*, Special Issue of May 2016, 46 available at http://www.dirittoquestionipubbliche.org/page/2016_nSE_Legal-clinics-in-Europe/DQ_2016_Legal-Clinics-in-Europe_specialissue.pdf (see. supra note 7, last visited on 15 October 2019).

⁶⁰ See information available at the webpage of Polish Legal Clinics Foundation, <http://www.fupp.org.pl/> (see. supra note 7, last visited on 15 October 2019).

⁶¹ *Supra* note 28, at 174.

⁶² See A. RISSANEN, *Legal Aid in Finland* in *OUTSOURCING LEGAL AID IN THE NORDIC WELFARE STATES* 86, 90 (Hammerslev et al. eds. 2018).

in the gaps of the public legal aid schemes without having a strong network and immense support from various sides, including bar associations. If monetary interests are low or inexistent, it is very unreasonable to expect that someone could start perceiving law clinics as units having the capacity to entice cases away from those who make their living by working in market for legal services.

Ironically, although this is hard to prove, we deem that it is possible that law clinics and clinical initiatives have much more problems with their law schools while seeking support and sustainability than with the Bar Associations, Law Societies, or some other professional organizations. For example, our experience from Croatia and Germany is that licensed lawyers—those who have been participating in the work of a clinic during their studies, almost as a rule—stay with the clinic after they become admitted to the Bar, thus helping students and supervising their work. In addition, our clinical friends from all over Europe have never told us that a bar member was ever penalized for working closely with students in the clinics because such practice would be interpreted as contrary to the ethical rules.

Instead of Conclusion: What Are Law Clinics After All?

Law clinics are the dominant form of clinical legal education, in which students give legal assistance to actual clients.⁶³ Although this definition per se does not exclude other types of pro bono work which can be performed by law clinics such as making people aware of their rights through different street law programmes, both authors think that law clinics should not be confused with other types of practice-related instructional programmes that use the ‘clinical’ prefix, but never engage in provision of actual service to actual people (different in-class simulations, practice-skill exercises, court visitations, different types of innovative classroom instructions, training and similar concepts underlying the teaching of professional skills).⁶⁴ Social justice can be hardly promoted without resorting to community and helping actual people with legal problems.

We ask ourselves, does it make any sense to use the term ‘live-client clinic’ as the core clinical activity presupposes students making contacts with real clients? Of course, law clinics can and should endorse various kinds of experiential courses and activities such as the seminars addressing ethical rules in provision of legal aid, role plays, case rounds, research, learning some issues relating to some specific areas of law, doing legal writing exercises and similar. Many times, having these kinds of activities within the clinic shall be necessary to adequately prepare students for assuming the role of a lawyer as well as for assuring that clients are provided with quality legal aid.

The mere fact that, in the USA, every law school that wishes to improve its image has a clinic whose financing is with the hands of the school only shows how things can positively develop over time if some standards are adopted and closely monitored. Although it seems to us that in the USA things went wrong direction in terms of commercialization of legal education which have resulted with many hybrid programmes that call themselves clinics but not always have social justice component, standards are crucial for earning stronger support for the real (‘live-client’) clinics from the universities and faculties of law. Still, before taking any further actions in drafting the standards, we believe that differentiating law clinics from other types of experiential learning (which may fall within the concept of clinical legal

⁶³ *Supra* note 11, at 43.

⁶⁴ See R. CONDLIN, *The Moral Failure of Clinical Legal Education*, in *THE GOOD LAWYER: LAWYER’S ROLES AND LAWYER’S ETHICS* 318 (D. Luban eds. 1983), available online at https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1295&context=fac_pubs (see *supra* note 7, visited 30 March 2019).

education, especially if they promote teaching of practical legal skills) is the prerequisite for any further discussion on future standards.

In support of the thesis that the clinics should always engage in working with actual clients, it is very important to emphasize that while doing, truth to say, somewhat limited fact finding, we could not establish the existence of explicit proscriptions preventing law clinics from providing actual clients with at least some form of legal aid. Therefore, it is perfectly legitimate for clinics to engage into charitable legal services, as we could neither find nor hear about some insuperable constraints that would totally impede European clinics to provide certain kinds of legal assistance.

However, as we cannot ignore that clinical activities can vary greatly due to some structural factors as well as economic, political and legal environment in different regions and countries, the future standards should be tailored in a way that will be inclusive, but not overly inclusive, as we find that dropping out or minimalizing the importance the legal aid and social justice component would undermine the social responsibility aspect of the clinics, which has served as the foundational element and driving force for many clinical initiatives, no matter whether they originated as student groups or law school organizational units.⁶⁵ Therefore, Winkler's definition which says that a law clinic is a combination of practical legal education and legal aid probably reflects the concept of law clinics in the simplest and the most precise way, and it can serve as a good starting point for future discussions.⁶⁶

Lastly, it seems to us that drafting the standards is important because the future development of law clinics needs a kind of supportive axis, which will make European law clinics easily recognizable by everyone having interest to foster changes in legal education and legal aid delivery, thus helping in promotion of the social justice and initiatives acting in the public interests.

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⁶⁵ Emil Winkler, *A Report on the Concept of Law Clinics*, Clin Leg Educ, available online at [link] (visited 27 March 2020).

⁶⁶ *Id.*