

Serving social justice in South Africa through community legal service: A multi-variate analysis of aligning means and ends¹

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Introduction

This paper is about the use of student law clinics to enhance access to justice and social justice more generally in SA. It has modest ambitions. It is neither an attempt to map all current activities being undertaken in SA – this will come later. Even less, does it purport to suggest that SA law clinics somehow need the advice of clinicians outwith SA. While I spent four years as a student in UCT Legal Aid in the eighties and have contacts with a few law clinics there, it would be highly presumptuous of me, as someone living outside SA, to attempt to suggest how clinics may best enhance justice. It should also be borne in mind that law clinics in other jurisdictions have as much to learn from SA as vice versa. Indeed, the clinic model which I have built on establishing clinics at the universities of Bristol and Strathclyde, and which have largely been copied in the six other clinics subsequently established in Scotland, is based on what I learned from my experience at UCT.

instead what I intend to do is to set out various models for delivering access to justice (ATJ) and social justice (SJ) more generally, with some tentative explorations of their various benefits and drawbacks, in the hope that that this might provide some ideas as to how to respond to the perennial problems which Peggy Maisel has highlighted in her excellent analysis of clinical legal education in SA (Maisel 2007; see also De Klerk 2005). These are the precarious nature of funding and the low status and conditions of clinical staff, and are in fact faced in other jurisdictions to a greater or lesser extent.² And even here the discussion will be rather tentative as my experience is limited to only some of these models. Consequently, while I can discuss their merits and drawbacks, I can only speculate as to the merits and drawbacks of others. However, research and contacts with many other clinics in Australia, the US and most importantly SA has shown me that there is an almost infinite way of combining various aspects of clinical activity and that it might be worth attempting to provide an overview of how different dimensions of clinic activity combine so that their implications of a choice about one dimension on another dimension can be better understood at the outset and how each dimension impacts both individually and in combination with others on whatever goal(s) is(are) by being pursued. Hopefully, others both from SA and beyond can help fill in some of the gaps in the analysis so as to work towards some sort of checklist for those setting up, or thinking of altering, a law clinic.

I have valiantly tried to be even-handed in setting out these models and their benefits and drawbacks, but this has proved impossible for a number of reasons. One is that my views are skewed by my own clinical experiences in clinics which are largely student-led and extracurricular, and which prioritise enhancing ATJ and SJ over legal education (what I have called social justice-oriented (SJO: Nicolson 2006)) rather than prioritising student education (what I called education-oriented EO clinics).

¹ Note that this is very rough draft of ideas which still require extensive development in the context of the existing literature, particularly on the clinical environment in SA.

² Eg comparatively resources are far less of a problem in the US, Canada and perhaps Australia than SA and the UK, but in my narrow experience UK clinicians have less problems than in SA and the US in terms of equality of treatment compared to colleagues.

Moreover, largely due to the initiative of the students themselves, the USLC has branched out from merely providing advice and representation, as was my experience at UCT and Bristol, to engaging in public legal education, law reform activities, the investigation of miscarriages of justice, online advice, and more recently assisting survivors of gender violence and running workshops to assist those litigating before housing tribunals.

While I have in recent years gone quite far way to bring educational goals into what was once an entirely extra-curricular clinic, albeit one with a dominant SJ orientation (see Nicolson 2013), USLC remains largely extra-curricular model. This choice was partly dictated by resources but the SJ orientation stemmed from my desire to replicate the spirit of the UCT clinic which was premised on the idea that law students have an obligation to use their privileges to those in society most in need of assistance.³ While I know that many think that student educational needs should take priority over community service and while I have subsequently gone a long way to align as far as possible educational goals with community service (not least because as I hope to show the former supports the latter), I still think promoting SJ should be the overriding goals of clinics and thus set myself the task of working through the various models of clinic organisation and activity in order to see which best suits this goal. No doubt, if one's benchmark for assessing clinical models is not that of their ability to enhance ATJ and SJ but education or some other goal,⁴ the implications of the schema I will outline will look very differently. At the very least, using SJ as a benchmark for this paper seems appropriate given the themes of this conference, especially if one regards justice as extending to enforcing and expanding constitutional rights and making the public aware of these rights.

A Schema for Modelling Clinics

The schema which I will outline involves two broad dimensions each with a number of subsidiary aspects which involves variables. The first dimension relates to the way clinics are organised and the second to the activities it conducts, though there are clear overlaps between these dimensions and their subsidiary aspects.⁵ It will also become clear that while I will discuss each aspect in terms of a choice between a binary opposition, in reality most clinics fall somewhere on a spectrum between the opposing poles, and that at least in relation to clinics which pursue a range of activities (what I will call omnibus clinics) it is possible to have different emphasis on one or side of the binary opposition in different parts of the clinic.⁶

A The Organisational Dimension

³ I have argued elsewhere that law students and law schools have a moral obligation to enhance ATJ and SJ (Nicolson 2013a and 2013b). Put very briefly, legal education is funded by taxpayers and hence should serve the community. Were all law students they educate go on to serve the community then perhaps it would be sufficient to produce well educated students and to engage in legal research. But many, if not the majority, of law students do not go on to serve the community, rather than serve only those who can afford lawyers and in particular those who want to use lawyers to protect their economic and other privileges. To ensure that law schools are not simply a means of enhancing the privileges of lawyer and their wealthy clients, they need therefore to devote some resource to ensure that legal services are extended to those who most of their students overlook when deciding on who to bestow the privileges of a legal education.

⁴ I will not refer to another goal mentioned by Maisel (Maisel 2007), namely as a means to provide opportunities for those from disadvantaged backgrounds to gain articles. I fully support such hiring policies (see McHarg and Nicolson 2006), but think this is a peripheral goal for law clinics; otherwise they would be better just transforming themselves into law centres using article clerks rather than students to provide legal services.

⁵ For a similar discussion of some of the variables under the second dimension, see Bloch and Noone, (2011)

⁶ eg street law might be conducted on an extra-curricular basis but case work attract academic credit.

While this clinical dimension is ostensibly about how clinics are organised and run, much of this will be affected by their goals and hence I will start by exploring those aspects of a clinic's organisation which flows from its choice of goals.

1. Social Justice versus Educational Orientation

Given that I am assessing different clinic models in terms of their ability to enhance justice, the most obvious and possibly the most determinative choice to be made is whether the clinic's primary focus is that of promoting justice and serving the community or on educating students. Of course, this is not an either/or alternative but a question of emphasis. Students serving the community cannot help but learn about law, the way it operates, its justice, ethics and legal practice. Moreover, in order to be able to effectively serve the community, they need to be trained in legal skills and in my view also in legal ethics, neither of which usually form part of the standard curriculum in SA given that universities are not responsible for professional training. Conversely, when students learn about law, justice, legal practice, etc in the context of a law clinic they are very likely to be serving those members of the community most in need, not least because those who can afford legal services or qualify for state legal aid are unlikely to want student rather than professional help. For some this raises the spectre of students practising law on the poor rather than for the poor (Thornton, 2010, p. 83), but rhetoric aside, it seems clear that SJO clinics will by definition tend to do more to enhance justice than EO clinics.

Most obviously this arises because of the greater time involved in using clinical experience and especially the conducting of cases as a form of experiential learning (cf Giddings 2008, pp.17-19). The need for opportunities for regular reflection, the educational benefits of allowing students to make their own mistakes in their own time and the use of supervisor time to bring out the educational lessons of experience as it happens mean that EO clinics have much lower staff-student ratios – for example an average of 1:6 in the US; a suggested 1:12 in the UK (see Nicolson 2006 for references). SJO clinics can have a much higher staff-student ratio (SULC has a ratio currently of around 1.150, Aberdeen Law Clinic even higher) or even, as in the early years at UCT, operate without any paid supervisors but with attorney volunteers checking advice or sometimes even allowing experienced students to give advice unsupervised at least on routine matters. Moreover, where supervision does take place it can be on a “final product” basis in terms of which students exercise considerable autonomy in their research but need to gain approval for letters, pleadings, etc, with experienced students playing an important role in mentoring and monitoring the work of other students. In this way, meagre resources can be made to stretch far and more generous resources stretch further, thus allowing for expanding the provision of community services.

There are obvious downsides to this. From the perspective of enhancing justice, it seems likely that the quality of legal services is bought at the expense of quantity even if extensive training is provided to equip students for their activities. But if this is the case – and here I should note that in over 90% of cases undertaken by the USLC which go beyond advice client goals are at least partially met - the balance between quantity and quality can be adjusted by providing for more hands-on supervision without making the students' educational interests predominant.

Equally obvious, from the perspective of those who see clinics in educational terms, students in SJO clinics will not gain the full benefit of preparation for practice nor will they have a formal opportunity to reflect on, and engage in related reading on how law operates in practice, on problems of ATJ and SJ and lawyer ethics. However, less obviously, the loss of such opportunities may have impact of social justice goals. This is because clinics may serve SJ not just directly through the provision of

legal services to those most in need or otherwise ensuring social justice through education and law reform, but more indirectly and perhaps more importantly or at least plausibly (Wiznrr and Aiken 2004, 1005), through the possible long-term effect in inspiring aspirant lawyers to either devote their careers to similar work or at least give up some of their time to do so on a pro bono basis. In all societies this indirect goal of inspiring or at least sustaining a commitment to justice after law school is at least equally important an goal as the direct one of bringing student services to the community. But this is arguably particularly so in societies like SA where there are huge social inequalities, and where a law career may come to be seen simply as a mean of those from disadvantaged groups to lift themselves and their families out of poverty rather than *also* assisting other members of their community with them. To be absolutely clear, I am not arguing that those from disadvantaged groups have a special moral obligation to their communities (cf Wilkins 1993, 1998) – not least because this ends up quickly as a means for privileged to escape their moral obligations to enhance justice and to redress the links between their privilege and others disadvantages (Nicolson 2005). Instead, I am arguing that all who benefit from the privileges of a legal education paid for directly and indirectly by taxpayers owe an obligation to assist those who cannot afford access to legal service and thus do not benefit from their direct or indirect contribution to the education of lawyers.

But irrespective of the exact importance of this goal, anecdotal evidence (see references cited in Nicolson, 2008, p.165n.124) and some research (Nicolson 2010; Newman and Nicolson) indicate that clinics may indeed have the desired indirect effect, but this research was undertaken on students in clinics which combined a SJO with classes in which students explore issues of ethics and justice in the context of providing services to the most vulnerable in society,⁷ whereas research undertaken in the US also suggests that clinics will not fulfil the potential of their indirect justice-inculcation role if they are not supported by relevant educational opportunities (Rhode 2004, ch. 7; Granfield, 2007; Schmedemann, 2009; Adcock, 2013).

It is however possible to combine a SJO with educational opportunities in what I have previously called a hybrid clinic (Nicolson 2006) to attempt to gain the best of both worlds.⁸ However, if one's goal is enhancing justice it is important that, not only does the education dimension go beyond an exclusive focus on skills training and substantive law teaching to focus on “educating for justice” through exposure to issues of ATJ, SJ, human rights and democracy as well as the lawyer's responsibility in this regard,⁹ but that the clinic continues to be dominated by a SJ orientation. This will allow more students to be exposed to the potential socialising effect of clinical experience. Moreover it will avoid the risk that by prioritising student education over community service, EO clinics will implicitly convey to students that their interests trump those of clients and the community – a phenomenon observed even with mandatory non-curricular pro bono student legal services in the US (Granfield & Velis, 2009). It is arguably a short step from this to students seeing clients not as people desperate for help but as means to their own ends – now education later commercial. Moreover, choosing cases in terms of their educational value rather than client needs (as some clinics

⁷ By contrast research on EO or at least curricular clinics in Australia (Palermo and Evans 2008) and the US (Sandefur and Selbin (2009) seems to suggest that they only sustain rather than foster a commitment to SJ on graduation.

⁸ USLC students can take an optional ethics and justice class in their final year or the Clinical LLB which integrates reflection on their clinical experience in classes throughout the standard LLB – see Nicolson 2013 for details.

⁹ In fact, if we takes this view of education, there is no tension between community service and educational goals.

apparently do: Nicolson 2006) reduces the chances of learning lessons about the dire state of ATJ and the satisfaction to be gained in helping those affected.

2. Curricular versus extra-curricular activity

In many cases the choice between a SJO or EO clinic largely overlaps with the choice between a clinic involving students undertaking work either for academic credit¹⁰ or on an extra-curricular basis. However, as my own and other clinics show (see Newman and Nicolson 2013) it is possible to provide academic credit for work in a SJO clinic without undermining its overall goals. What is more important than the formal question of whether students obtain credit or not, is whether this credit is performance-based and if so what is being assessed – merely skills, commitment to community service and/or reflection on aspects of justice - given that the award of marks for a particular activity implicitly valorises that activity. Given that the greater the involvement in serving the community the more likely it is to have an inspirational effect, also important is the question of whether the linkage of community service to a class limits the student's clinical involvement to a semester or two rather than allowing the opportunity for the development of a SJ commitment over a much longer period (up to four years in SA and five years in Scotland). Here, however, it is possible to replicate the effect of longevity of experience by replacing it with a highly intensive experience, though I am inclined to think that even if the same level of activity is undertaken by the end of the day, its impact is likely to be more long-lasting if spread of time. Certainly the opportunities for reflection on activity are likely to be greater in curricular clinics and arguably this is where learning best occurs.¹¹ However, all curricular clinics run the risk that students abandon clients once they receive the required credit for their work.

While a curricular SJO clinic is clearly possible, an extra-curricular EO clinic seems far less likely. If one is using clinical experience to teach students, it seems illogical not to give them credit for their learning. But such a clinic is not impossible. Certainly some activities within an EO clinic can be done without credit, such as getting students to act as receptionists before they earn the right to take a clinical class (as at some of the large UK clinics) and certainly many students are happy to take on activities like street law on a voluntary basis because of the perceived benefits in terms of the skills and enhanced employability they gain.

Nevertheless despite these possibilities, it is far more natural fit to have SJO extra-curricular clinics and even more so EO curricular clinics, as long as one keeps in mind that all clinics may be hybrids and fit long a spectrum between the two pairs of polar opposites.

3. Compulsory versus voluntary involvement

On the face of it there is no logical connection between the choice of whether clinic involvement is compulsory or voluntary, on the one hand, and choices concerning other aspects of the organisational dimensions already discussed. Although the idea of compulsory pro bono may strike many as a contradiction in terms (cf Rhode 2004, 203ff), many law schools including some in SA make a certain number of hours of pro bono legal assistance compulsory and/or require students to take a clinical class in their final year. Others make clinical involvement voluntary and such participation may either

¹⁰ and here one can distinguish between just being given credit for performing set tasks and being assessed on performance.

¹¹ 'Learning occurs not in the doing but in the reflection and conceptualisation that takes place during and after the event' (quoted by Brayne, Duncan and Grimes, 1998, 47)

involve extra-curricular or credit-bearing activities, or indeed both. It is even possible for students to require student to either take a clinical class or some extra-curricular work. Thus, leaving aside the distinction between SJO and EO clinics, there are various possibilities

- compulsory extra-curricular clinic service
- compulsory credit bearing clinic service
- compulsory credit bearing and/or extra-curricular clinic service
- voluntary extra-curricular clinic service
- voluntary credit bearing clinic service
- voluntary credit bearing and/or extra-curricular clinic service

Working out the implications for the promotion of SJ is thus complicated especially as the tension between direct and indirect enhancement of justice becomes especially prominent here. Thus on the one hand, forcing all law students to undertake clinic work may increase the numbers directly delivering social justice (though, if this is to be combined with formal experiential learning, also the cost). Prima facie, it will also enhance the indirect role clinics may play as more students will be exposed to the problems of ATJ and SJ and experience a sense of satisfaction at helping other or regret at not being able to do, which, following Aristotle, many philosophers and psychologists see as an important factor in moral development (Nicolson 2008). On the other hand, inculcating in all students a long-standing commitment to continue serving justice is to put it mildly a very tall order. Research across the world suggest that many students enter university without any aim other than an interesting and lucrative career which makes possible the trappings of middle class lifestyle (Gucci, BMWs, skiing holidays) and this is likely to be no different in SA – indeed given the legacy of decades of discrimination may understandably make this particularly relevant. But even with those who enter law school with the desire to do serve others, there are considerable pressures to funnel into commercial and other non-justice oriented jobs: for example, student debts, the dominance of commercial law firm recruiters and the commercial and private law-bias of curricula. With these students, law clinics will do well just to sustain the commitment to social justice. But in addition to these two groups (which one might facetiously call the “Gucci loafers” and “justice warriors”) there are those who attend law school simply because they are not sure what else to do or as, many claim in UK surveys because they think law is interesting(see Nicolson 2013 and other surveys cited). How likely are they to be turned into justice warriors by clinic involvement? Here the answer probably depends on a number of factors, such as:

- whether their underlying personality/character tends toward altruism or egotism;
- what sort of clinic involvement they have – does it expose them directly to problems of those most in need, provide them with opportunities to gain satisfaction at what they achieve or regret at any failures?¹²
- the length and/or intensity of involvement;
- the extent to which any classes accompany clinical experience highlight problems of justice and promote the idea of an ethical obligations on those with law degrees to use their knowledge to help redress problems.

However, even with the best conditions possible, research does not suggest that compulsory pro bono programmes in US have much success in creating a pro bono legacy (Rhode 2005; Granfield 2007) My instinct and experience with voluntary law clinics which retain students for much longer than a year, as well as some of the lessons of moral psychology (Nicolson 2008) suggest that opting to have a lasting impact by giving a smaller group of students an intense experience might - especially if

¹² Here, I would hazard the guess that being actively involving with helping others rather than educating pupils and prisoners for instance might be more likely to inspire an interest in justice.

combined with classes highlighting issues of ethic and justice have a more effective legacy overall than a shorter exposure of all law students. This suggests that voluntary involvement might be preferable in this regard especially if there are generous clinic resources or, if as in SA (like the UK) this is not possible, a cost-effective clinical model which allows a substantial portion of all law school students to have this experience.¹³

If a voluntary clinic is chosen, then another question presents itself – are all volunteers to be admitted to the clinics or is there to be some selection process and if so what criteria are to be applied. This question will certainly arise if demand for participation outstrips the places available. Here the answer would seem to depend on the main goal of the clinic, If it is the promotion of social justice, then the motivation to serve the community, along perhaps with relevant skills and experience seems the most obvious and in advisable criteria. But if the aims are largely educational, then other criteria such as past academic performance could be used.

4. Staff- versus student-managed clinics

In addition to, and related to, the SJO/EO dichotomy is the question of whether the clinic leadership, day to day administration and even student supervision is in the hands of paid staff or students. Like others this distinction can be one of degree in that clinics can vary from totally managed by staff or totally managed by student, with various elements of management involving different mixes of shared responsibility. Thus clinic direction can rest with a committee or management team involving a mix of students and staff , who can have equal or weighted decision-making power. This mix can in turn can vary from one area of responsibility to another (eg staff have sole decision-making power or a veto over hiring and firing, finances, admission to credit-bearing clinic programmes, etc; students have sole or equal decision making power over admission to extra-curricular programmes, and what type of community service to provide, etc). Similarly, day to day running of clinics can be shared between clinical staff (eg educational programmes, finances, etc), paid administrative staff (eg making appointments, allocating cases) and students (eg fundraising, running – but not necessarily – delivering training, IT and communications, etc). It is not even axiomatic in extra-curricular clinics for students to be supervised by paid staff as opposed to volunteer attorneys or even experienced students. Admittedly, most clinics will tend to prefer staff supervision (or at least non-student supervision, for example, by volunteer attorneys, as at UCT in the eighties and has become more feasible given the Cape Law Society's imposition of a pro bono obligation on its attorneys: De Klerk 2005, p.945).It is also much more conceivable that a clinic will involve staff leadership and student administration (for example making client appointments) than student leadership and staff administration (though in its early days UCT was run by students with paid administrative support) .

There are a number of obvious disadvantages to giving students a role in clinic management, most crucially in relation supervision and to clinic leadership and even (but to a lesser extent) day to day running. For example:

- students will usually lack experience and knowledge of the policy and legal justice landscape, and of university procedures and politics;
- students will lack institutional memory of clinic policies and the reasons for them, resulting in unwittingly causing problems with the university, funders and other stakeholders

¹³ Eg at USLC 1/3 of all law students can have anything from 3-5 years clinic involvement, dependent on type of degree they are doing and the majority of these students (230/300) will be exposed to clients and their problems rather than just engaging in street law or online legal enquiries

- it is inefficient to have a regular turn-over of students each of whom will encounter a steep learning curve as regards their new area of responsibility;
- clinic management can suffer because of pressures of academic work, casework and part-time jobs. Yet, because students are volunteers there is a limited extent to which they be disciplined for abnegating responsibility;
- collaborative leadership and management between staff and students can lead to a problematic blurring of the status distinction between academic staff and students especially if clinic staff teach and assess students.
- probably most worryingly for many, students may make decisions with which staff disagree.¹⁴

On the other hand, there are many advantages to sole student-led or mixed management clinic models, such as:

- and most obviously, cost – the money saved by relying on voluntary work can be used to further expand community services and allow for even more students to be exposed to the experiences of serving the community;¹⁵
- students learn valuable skills from the tasks they perform and their management role. This in turn makes them more employable compared to other graduates and more likely that those who develop a desire to continue their justice orientation after graduating will end up with having more chance of gaining a job which is compatible with this desire;
- clinic management is less dependent on one or two key staff members who, if they create problems, are not easily replaced. By comparison the impact of one or even a few students responsible for fewer tasks and for finite periods who are not pulling their weight or alternatively throwing it around, the impact is far less widespread and long-lasting, and can be rectified more easily;
- committee meetings and extended mentoring relationships, which can replace more hands on supervision of EO clinics, arguably provide a more effective process of values socialisation than that provided by a few staff members. While respected staff members may model a commitment to access to justice, the impact might be lessened if they are paid employees and certainly if their focus is on teaching. By contrast, students (and staff members) who give up their free time to run clinics send a very positive message about the value of altruism. Moreover long-standing involvement in a distinct organisation, with perhaps a constitution, elections or an appointment process for committee positions, creates a condition conducive to a strong and cohesive ethos which can be transmitted through an AGM and committee meetings, as well as formal and informal social events, and other forms of informal socialisation which arise when people are involved in working closely with and forming friendships with like-minded colleagues (cf Jackson et al, 1995);
- according to theories of community development, this works best when power is “devolved to the lowest level possible” at least that which is “consistent with effective governance” (Kenny 1999, p.7 cited by Giddings 2008, 6)
- finally, students who help clinics are likely to feel a sense of ‘psychological ownership’ in ‘their clinic’ and its goals which according to empirical research Pierce et al, 2001; O’ Driscoll et al, 2006), tends to lead to them going the extra mile in fulfilling their responsibilities and giving of their free time, but also, as my experience in student-run clinics

¹⁴ As examples in notes 15 and 17 illustrate.

¹⁵ We estimated that by relying on students volunteers to help run the USLC, it saves around £50,000 a year, which more than pays the costs of its only supervisor,

confirms, in using their initiative to further enhance the means and effectiveness of serving the community.

5. “Cluster” versus “omnibus” clinics

The alleged advantages of a cohesive body of students creating an enduring ethos which is passed onto to each new cohort has implications for a final organisational dimension, namely whether it has a single clinic with different activities but all trained together and linked by the same membership rules, working in the same accommodation and liaising with the same staff and committee leadership (omnibus clinic model) or whether clinic activity is broken down into discrete clinics dealing for instance with immigration, domestic violence, family law etc, each with a separate staff and student membership (the latter usually only for a semester or a year (a clinic cluster model). While the former has advantages in terms of its socialisation effect, the latter model is often chosen because of the goal of linking clinical activity to substantive areas of law or legal practice for teaching purposes.

B Clinic Activities

1. Specialist versus generalist clinics

However, the choice of model is also affected by the first dimension relevant to the activity axis of the clinic model schema, namely whether students are generalists in taking on a variety of different areas of practice or specialists in being trained and becoming experienced in only one area, or at least one area at any one time. But whereas a cluster clinic will adopt the latter approach, omnibus clinics can allow students to be generalists but also to specialise within the clinic either for the duration of their involvement or at particular times while they are there (for instance, as they progress, they could move from specialising in more simple to more complex areas of law – from consumer to employment or constitutional) and from more simple to challenging activities (form-filling to investigating miscarriages of justice or preparing constitutional litigation).

As Maisel persuasively argues (Maisel 2007) there are distinct advantages to specialism in terms of the quality of service provided to the community. At the same time, students who specialise in one area might not gain an appreciation of the full range of problems and injustices facing disadvantaged members of the community, and may not find that the particular areas of activity chosen inspires them to a career as a justice warrior. This would suggest that students are encouraged if not required to undertake a variety of specialisms – an option made more possible by lengthy clinic involvement.¹⁶

2. “Professional” versus “amateur” responsibility

A second question involving who does what in clinic relates to the community service activities themselves (cf Giddings 2008, pp.20-21). Is the actual advice and representation, or other clinic work, done by:

- paid staff members, with students learning from observation and engaging in discrete tasks like researching particular legal points or drafting routine letters;
- students acted entirely on their own;

¹⁶ Though one precluded in USLC due to the democratic choice of students on successive committees, who want to gain as much varied experience as possible!

- student acting under supervision of clinic staff, lawyers in placement agencies or even just a lawyer volunteers with the student's level responsibility falling somewhere between outer reaches of sole staff or student resp.

Where particular clinics fit on this spectrum depends in part on resources and procedural rules. Student-run clinics who cannot afford paid staff or cannot attract volunteers do not have much option but do all the work themselves. Conversely, strict protection of lawyers' monopolies in SA mean that any court work must be done by a qualified lawyer. This is one of – if not *the* - major obstacles to law clinics fulfilling their SJ potential in SA, in that it requires either that representation stops short of advocacy thus giving opponents an advantage in negotiation or that clinics who cannot attract pro bono assistance have to expend valuable resources on qualified lawyers who have to take time out from supervision to appear in court. It also means that students lose out on the thrill (and opportunity for gaining advocacy skills) of appearing in court which might add to the hopefully addictive effect of helping those most in need.

To the extent that student representation is possible, the choice as to how much autonomy to give students will depend on:

- Whether one wants students to learn by doing and by making mistakes, or by learning by emulation
- Whether one would prefer to ensure high quality services to a few by allocating most responsibility to experienced professionals or trying to ensure that as many community members are served as possible subject to hands off or not supervision though hopefully subject to min quality standard achieved by training.
- What sort of work is being done: some types can be easily done by students with minimal or no supervision (street law, legal form filling, etc); other types others might be close to impossible without experienced lawyers (eg test cases in the Constitutional or Supreme Court even if students can act as advocates) .

3. In-house versus external placements

The most obvious and common way for law students to serve the community is through law clinic offices operating from campus albeit not necessarily delivering services on campus. However, one way to enable law students to provide community services, at little or no expense and often under professional supervision is to place them with other organisations providing advice and representation, running law campaigns or serving the community in other ways. The downside to these placement or externships is that law schools cannot control the type of experiences students have on placement. But this seems to be more of a problem if you want to provide students with credit for their activities and use the experiences for teaching purposes (cf Lundy in Brayne, Duncan and Grimes 1998). And even then it is far from impossible to establish classes which use their experiences, even in very broad terms, as the basis for reflection on the justice of law and the ethics of legal practice for example. Indeed, according to research in the US cited above, such an approach is preferable if one hopes that involvement in placement or externships may lead to the development of a life-long commitment to enhancing ATJ and SJ. Moreover, if such classes can be linked to placements and externships, they might provide a useful means of directly and (albeit less effective)

means of indirectly enhancing social justice where resources do not allow the inclusion of all applicants to an in-house clinic.¹⁷

4. “Retail” versus “wholesale” legal services

Finally we turn to what clinics are ultimately all about – providing legal assistance to the community (even if only as a means to educating students). Such activities can be categorised in terms of two axes. One involves the scale of the services provided and the other the type of service. As regards the former, there are two different approaches to helping the community. One is to provide legal services to individuals with legal problems or other legal needs. These can be done on a bespoke basis, most obviously by advice and representation, but also by helping clients with more mundane tasks like form-filling, writing letters or even drafting pleadings, or training those who provide legal services to others. Can call these retail services to distinguish them from wholesale services where one seeks to assist whole groups of people using efficiencies of scale. Thus clinics can provide workshops guiding prospective claimants through bringing particular types of claims to court, possibly with a backup of some individualised answers to questions. They can also seek to improve the situation of largely groups by class actions, law reform campaigns and also by educating people so that they don't run into problems in future (eg learn about their constitutional and human rights or what to avoid in rent or employment agreements) or refrain from causing harm to others (through, for example, by being made aware of impact of sexual violence or cyberbullying on its victims).

To me the choice between retail and wholesale service is one of most difficult to be made.¹⁸ As someone who finds himself often deciding clinical issues on utilitarian grounds, I am very attracted to wholesale legal services – the class action or even workshops guiding prospective claimants through bringing particular types of claims to court if necessary. On the other hand, there is something very valuable in clinics showing individuals that they matter as valuable members of the community by taking the time to listen to them, serve their every (ethical) need by doing one's best to help them. The impact on those who have been always been subjected to law and to lawyers rather than cared for by lawyers can be profound and can start a process of healing that is carried through to other aspects of the individual's life. Moreover, it is this that is likely to make a more profound effect in inspiring a desire to help others than the far more long term involvement in a test case where the student might not see the results of their hard work or in public legal education where any impact might not be felt for years and cannot be traced back to any one person.

5. Remedial versus educative legal services.

Finally we can distinguish between remedial and educative legal services, The former can be direct such as advice and assistance to individual or groups, or it can be indirect through helping others to help themselves (again either on a retail or wholesale basis)¹⁹. Moreover, it may be purely retroactive in only helping individuals or groups with existing problems, but may also be prospective in having

¹⁷ Thus at USLC those who do not get into the clinic are offered placement at advice agencies and this is often followed by their admission to the clinic in their second year and the taking of an optional class on legal practice in their third year.

¹⁸ Though again my hands are largely tied by the preference of USLC students for retail services at least as regards remedial rather than educative services.

¹⁹ Or what Maisel, Mahomed and Jain in their paper categorise in terms of access to justice and public interest, respectively.

an impact on all others in the same situation in the future, such as through test cases or law reform cases which change the law.

Educative activities can also either be wholesale – public legal education – or it can be more retail – providing legal training to other agencies or those working in field of ATJ or SJ such as valuable training given by SA law clinics to para-legals working in rural areas. It can also be preventative in help others to avoid problems or encouraging others not to cause problems, or it can be facilitative in helping others to help themselves or those who they themselves seek to help.

Here again, deciding which activity to opt for takes us into the realms of speculation as to potential effect. It is difficult to know how to sensibly weigh up the value to those who have their problems solved against educating people how to avoid problems in the first place, because there is very little had evidence on the effect of public legal education in South Africa. There is evidence to suggest that street law programmes in prison reduce recidivism (see McQuoid-Mason 2008, 33, citing Arbetman et al 1990), but (as far as I can gather) little evidence of its presumably positive effect on helping those exposed to it avoiding legal problems in the future, acting more in accord with others' rights or generally furthering the goal, which is so important in SA of developing a society which values and respects human rights and democracy. Equally, while there are documented benefits to the students in terms of the development of skills and confidence and to the community in terms of learning their legal rights, empowering communities and enhancing a sense of shared community (Pinder, 1998, 225-31; McQuoid-Mason 2008,46; Grimes, McQuoid-Mason, O'Brien and Zimmer 2011; Pandey and Shukkur), and while there is no doubt that those who teach the value of human rights and democracy to others in street law programmes are more likely to themselves develop a commitment to these values, no one has, as far as I can gather, sought to research the extent to which street law programmes develop or at least sustain a commitment to continuing serving the community post-graduation.

Given this lack of certainty as to which is more effective means of enhancing ATJ and SJ, can do little more than hazard some guesses here. And in doing so it might be useful to combine this variable (remedial versus educative) and the former (retail versus wholesale) to gain a more precise idea of various options. But even this does not help a lot because it seems to me that here the direct and indirect means of serving the community might be in tension with them. Thus, on the one hand, wholesale activities will expand the number of people affected albeit one can be much more sure of the effect of, say law reform through case law or legislation, than street law programmes. On the other hand, moral psychology suggests that the impact of experience on attitudes is likely to be greater when students engage with individuals or perhaps also small groups of individuals, can see the extent of their need and subsequently develop empathy and gain a sense of satisfaction at helping or regret at not doing so (Nicolson 2008, 2013). This suggests that retail remedial work might be more effective in this regard.

Conclusion

The above schema outlines ten choices which have implications, albeit to a greater and lesser extent, for the ability of law clinics to deliver social justice in SA (and beyond). Some of these choices and their implications are well known, others perhaps less so. Some choices are self-contained in their impact, but many have implications for other choices in making one or other option impossible, difficult or alternative more likely or inevitable. For instance, opting for a curricular clinic precludes giving students sole or major responsibility for clinic direction and makes an education orientation

likely, whereas requiring all students to undertake clinical work will mean that the opportunity for all to undertake individual remedial activities is only possible with very generous resources or minimal student involvement and/or minimal supervision. Thus a desire to promote justice through serving as many clients as possible will dictate low levels of supervisor involvement and supervision, whereas as desire to educate student or to conduct class actions will dictate high levels of supervision and especially as regards class actions also involvement.

With these considerations in mind, some conclusions can be drawn about how one might maximise the potential to enhance social justice through community service in the light of the challenges facing clinics in SA. What follows is a thought experiment about what I would be inclined to do if I were asked to design a clinic from scratch or redesign an existing clinic, taking into account the main two problems identified by Peggy Maisel as facing SA law clinics, namely that resources are limited and anything beyond a single director funded by the Attorneys' Fidelity Fund is precarious and that law clinicians are not given the same respect and conditions of service as non-clinic academics, leading to a high turnover of clinical staff.

For Maisel, the solution seems to be along the lines of focusing on the educational benefits of law clinics as a means to persuade universities and others to put more resources into clinics and universities to accord clinicians the status and rewards they deserve. While my experience at one university (which is clearly not shared at other more forward-thinking universities which have embraced clinical legal education more warmly) suggests that not all are ready to be persuaded to, as they see it, "dumb down" their high academic standards for a focus on practical skills. However, while not turning my back on the educational argument for raising the status and backing up law clinics, I think a compelling case can also be made based on the universities' obligation to make a contribution to the community of which it forms part, particularly in SA where universities can be argued to have contributed insufficiently in the past.

But whatever the most effective strategy for redressing the problems faced by law clinics it should be clear that I see clinics primarily as a means of directly and indirectly serving the community through enhancing ATJ and SJ more generally, with education as subsidiary goal designed primarily to ensure that they those who go on to contribute to ATJ and SJ do with the best possible skills and experience. For that reason, it should also be clear that I would opt for a SJO over a EO clinic and make any credit bearing activities secondary to and parasitic on the provision of legal services without academic credit. Thus credit bearing education would be confined to courses attached to the training necessary for providing quality services or to exploring the issues of justice ethics, professionalism and legal practice raised by the experience of providing legal services to those most in need or providing necessary education about legal rights and values. I would be disinclined to provide credit or much credit for case performance lest students start to treat quality legal services as a means to an end rather than an end in itself and, as has evidently happened in some UK law clinics, abandon cases once credit and good marks have been obtained. In any event, there are serious problems with assessing performance in cases, as opposed to reflection on it or simulations, flowing inter alia from the inability to control the level of complexity of real-life cases.

As regards the question of compulsory versus voluntary involvement, I would not want to make involvement compulsory but instead, through offering a wide variety of activities, classes and student involvement in clinic management, make it so attractive that students will compete for places and thus allow admission decisions to be made in ways which accords with a SJ ethos. Thus, instead all final year students doing a year of either street law or in-house clinic work I would prefer to opt for a

quarter of all law students having four years of varied clinic experience: both street law and advice and rep work, and as regard the latter both retail and wholesale services. This may in fact mean that around the same amount of student are involved at any one time in a voluntary clinic as in a compulsory final year. In addition, those who do not obtain admission to the clinic can be placed in external agencies and groups, and their experiences supported by subsequent and simultaneous credit-bearing justice and ethics classes.

As regards clinic activities, my preference would be for omnibus clinics involving as many activities as can be supported financially and in terms of ensuring adequate quality control. More particularly, I am attracted by the idea of funnelling students from:

- doing wholesale educational services in the first year (street law) and low-key retail work such as form filling and possible also litigation workshops,
- moving in their second and third years to more intensive client-focussed work and more specialist educational work (eg training of other agencies), and
- finally in their final year to the high profile and high skill work involved in class action, public interest litigation and advising community campaigns .

Indeed, even more specialised services can be provided in specialist units at postgraduate level as is currently planned at UCT, and if suitably supported by training depending on the particular activity involved this might allow for postgraduate students to supervise or at least mentor of undergraduate students.

If resources and curricular space were available I would require all students to take a class or classes allowing them to reflect on issues of justice, ethics, professionalism, legal practice, human rights and the operation of law in the context of their clinical experience whether it is providing legal services or engaging in public legal education. But at the very least there should be the opportunity for all students to take such a class if they desire.²⁰

Nevertheless I think that the key to the success of any clinic in expanding its ability to directly serve the community and to enhance its ability to socialise students into seeing this as a moral obligation rather than a matter of generous charity is having students help to run and set the direction of the clinic. This allows the clinic to continue even when resources require a shrinking of paid staff, but also when times are good to expand from a settled core of activities. Moreover, in my experience student enthusiasm and initiative has often acted as an inspiration to me when worn down the constant battle for resources, and this may also help those faced with problems with status and career rewards.²¹

Arguably, while this suggested model either in its own right or as combined with existing models may have benefits in terms of sustaining or expanding clinic activity in an environment of scarce financial resources, the focus on social justice and community service rather than legal and skills education may have downsides in terms of exacerbating the low status and rewards of clinicians. I cannot honestly say that my model might not make things worse in law schools at least. By contrast, universities management more centrally may well embrace those who help fulfil its purported SJ mission and in any event the fact that skills teachers are not accorded much respect may mean that

²⁰ I might even think of allowing all students to take something like the Clinical LLB even though at USLC I have confined this to 50% of all students on the assumption (which seems to have been misplaced) that the watering down of the voluntary nature of the clinic would undermine its social justice and volunteerist orientation

²¹ Not that this support should replace the case for equal treatment.

those who run SJ may not fare much worse. In fact if volunteer attorneys and advocates can be brought in to do supervision and any required court representation, clinics directors can confine themselves to clinic management, teaching and writing on clinics as and many other clinicians worldwide do.

In essence, what I am suggesting is that while there are many valid choices about the various dimensions of the schema I have outlined, it might be worth looking to what was valuable about clinics at an earlier stage in the SA clinical history.²² Hopefully, this suggestion will not be seen as the desire to impose foreign products (still less one based on the exploitation of indigenous raw materials) on an indigenous clinical environment about which I am sadly and obviously too ignorant (cf Wilson 2011, distinguishing “clinical imperialism” from “cultural blindness”). Instead, I hope that the schema I will outline and my thoughts on clinic models will be seen as tentative gift which can always be politely rejected or like an unwanted Christmas jumper accepted and traded in for something else more suitable.

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²² For a similar call in the US, see Wizner and Aiken, 2004, esp p.1006.

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