

**Public Interest Law Clinics in Latin America:
A Tool against Legal Formalism
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- I- This presentation will be divided in three parts:
 - a- In the first part, I will present the theoretical and practical framework within which Latin American public interest law clinics are located. In this first part, I will show how this type of clinics is a powerful tool for weakening the type of Legal Formalism dominant in Latin America's legal theory and practice.
 - b- In the second part, I will present the main obstacles that have hindered the creation or consolidation of public interest law clinics in Latin America. These obstacles have also made public interest law clinics a less effective instrument in the legal and political struggle against legal formalism.
 - c- In the third part, I will offer some strategies that can contribute to the creation and consolidation of public interest law clinics in Latin America.

First Part: The theoretical and practical framework in which Latin American public interest law clinics are located

- a- The concept of law, legal education and legal practice are three categories that intertwine both in theory and practice: changes in one imply changes in the other two.
- b- However, the concept of law has analytical and practical priority over the other two categories
 - The different concepts of law indicate us what are law's structural elements, the aims it should attain and/or the roles that the various legal actors (judges, legislators, and practitioners, for example) should play in legal practice.
 - In this way, usually, law schools' curricula and teaching methodologies are constructed around the dominant concept of law in the legal community. The aim of education is, normally, to reproduce in the new generations the concept of law that is considered plausible in a particular community.
 - Equally, legal education determines some of the basic characteristics of legal practice. Young lawyers will be guided in their professional life by the conceptual categories learned and will try to satisfy the normative requirements imposed to the roles that they incarnate in legal practice, e.g., judges, legislators, and practitioners.
- c- In Latin America, since the XIX century and until today, the dominant concept of law has been a very particular interpretation of legal positivism that no positivist will recognize as its own, and that we can call legal formalism.
 - The fundamental characteristics of legal formalism are the following seven:
 1. Law = Statutes

2. The legal order is complete, closed, and coherent
3. There are unique answers to all legal problems
4. The only one that has power to create law is the legislature
5. The ideal judge is a neutral judge
6. The executive power only enforces law
7. Validity = Justice

d- Legal formalism has shaped legal scholarship and education in its own image

- The fundamental task of legal academics is, in the best of cases, the systematization of law, that is, to determine in a precise way the content of legal institutions and determine the relationship that they have among them in a way that the legal system appears as what it is supposed to be: a network of hierarchical and coherent concepts. The fundamental task of legal academics is then to advance a particular form of legal dogmatics. This perspective is no different from legal conceptualism. Therefore, the paradigmatic product of legal academics is the *Tratado*, this is, a commentary on the legislation (particularly on codes) that attempts to determine in a precise way its content and organize its parts, aiming to present the area of law studied as complete, coherent, and closed. In the worst of cases, unhappily the majority, the work of academics committed to legal formalism is the *Glose*. This type of texts repeats in different words what statutes say and offer more or less marginal comments to their content.

1. Characteristics of a formalist legal education:

- 1- Encyclopedic: it divides a curriculum in the classic Civil Law tradition areas of law and includes as many mandatory classes as necessary to oblige students to know all the legislature's creations.
- 2- Memoristic: students should be trained to enunciate readily all legal institutions created by the legislature.
- 3- Uncritical: questions related to the moral or political legitimacy of legal norms are considered irrelevant.
- 4- Decontextualized: radical separation between what is learnt and the reality where it is implemented.
- 5- Practical courses do not exist or are not important: aim of education is not skills' development but the acquisition of information.
- 6- Paradigmatic teaching methodology is the lecture: Professors know the subject and teach it to students, who have very few things to contribute to the educational process. There is a vertical relation between students and professors.

e- The legal practice generated by the formalist concept of law and its reproduction through law schools has various precise characteristics. Here, I will mention only two given the aims of this presentation.

- Lawyers have difficulties to apply what they learned in law school.
- Lawyers do not believe that besides defending the interests of private individuals, they can and should undertake social responsibilities.

- f- Public interest law clinics are one of the fronts where the political battle against legal formalism, and the type of legal education and practice that it has created, has been fought
 - The two main intertwined objectives of public interest law clinics are on the one hand, the transformation of legal education and, on the other, social justice.
 1. Legal education, clinical professors believe, should contribute to the development of skills. It is not argued that information should be put aside, however, it emphasizes in that students should be able to apply information in the social reality where they live, should develop critical skill that allow them to evaluate and question existing legal rules, and should develop skills by acting, that is, by confronting the same type of challenges and doing the same type of work that practitioners do.
 2. Law is conceived as an instrument to achieve social change. Law is a tool for creating a just society. That is why Latin American public interest law clinics have focused, for example, on issues related to the protection of cultural, sexual, racial and other minorities, or to the protection of collective rights such as the right to a clean environment or to public health. The objective is not only to help in the defense of low income sectors of the population but to transform society through high impact litigation and various types of work with legislatures (drafting bills and providing quality information to congress).
 3. Until relatively few years there were no legal clinics in many Latin American countries. The aim of legal education was, as I said before, transmitting information and not trying to achieve social justice or the development of skills. Yet, when legal clinics existed, like in Colombia, they were seen from an assistentialist point of view, as a way of contributing to the defense of the interests and rights of individual members of low income sectors of the population.

Second Part: Obstacles and Challenges to Public Interest Law Clinical Education

- a- The efforts to create or consolidate public interest law clinics have as a common axis the questioning of legal formalism and the idea that these projects offer an alternative view to the dominant way of understanding law in the region. Yet, legal clinics have confronted serious obstacles that have impeded their materialization or development. These obstacles have been confronted by persons like Juan Carlos Marín and Gabriela Rodríguez at ITAM in México, Christian Courtis at ITAM and Universidad de Palermo in Argentina, Martín Bohmer at Universidad de Palermo, Gorki Gonzales at Universidad Católica del Perú, Felipe González at Universidad Diego Portales de Chile, Beatriz Londoño at Universidad del Rosario in Colombia and all persons that have worked with the public interest law clinic of Universidad de los Andes in Colombia. Of course, these persons have not confronted all the problems that I will mention in the following minutes or have dealt with the same problem during the same period of time. Equally, the intensity of the challenges confronted, have certainly varied among countries and universities.
 - i. The first important obstacle has been the political opposition of universities' administrators, deans, and groups of professors. Two reasons explain this opposition: first, public interest law clinics have been seen with suspicion by conservative administrators and professors, since clinics have been associated

with leftist political perspectives and individuals; second formalist scholars see clinics as a menace to the legal formalism's dominance within law schools.

- ii. In Latin America, the number of full time law professors is low, the existing full time professors have a high work load, and there is no political will to hire clinical professors or to redistribute the work load to allow full time professors to work in public interest law clinics.
 - 1. There are no economic resources available to fund clinics. There is no money to hire professors, administrative personnel, external legal advisors, technical experts or to pay for the infrastructure needed to allow clinics to work adequately.
 - 2. The excessive rigidity of curricula and universities' structure and decision making procedures that do not allow the creation of clinics or that make the procedure extremely slow.
 - 3. Students are not interested in participating in clinics since they tend to undervalue clinical work. Formalist legal education has taught them that this type of work is not important for their education and for being good lawyers.
 - 4. In universities where clinics are optional, students are not interested in participating inasmuch as their fundamental aim is to attain professional success. In Latin America this is usually understood as having economic success. Therefore, students generally prefer to use their time and energy in other type of projects that can help them to attain this aim, e.g., to work part time in law firms.
 - 5. Lack of clarity among clinical professor with regard to the objectives pursued by public interest law clinics and/or internal disputes about what these aims should be. Three points are particularly problematic. First, although the theoretical adversary is clear, legal formalism, the political and legal alternative is not clearly articulated or is not even articulated. There is no clear sense of what is the alternative concept of law that clinics want to defend. Second, there is no precise definition or agreement about the meaning of public interest law. Third, there is no clear definition of the concept of justice that wants to be defended through the various public interest law clinics.
 - 6. Lack or low quality of the scholarly production available. We have very few high quality publications where the aims, concrete outcomes of Latin American public interest law clinics and the best ways to achieve them are described, analyzed or criticized.
 - 7. Isolation or sporadic contact among Latin American clinical professors. This situation does not allow clinical professors to work together and learn from the experiences that others have had in the creation and consolidation of clinics and clinical projects.

Third part: Some strategies that can contribute to the creation and consolidation of public interest law clinics in Latin America.

- a- It is necessary to create publications and organize on a regular basis academic events (seminars, conferences, debates, etc.) where the weaknesses of legal formalism can be discussed and where the pedagogic benefits of public interest law clinics can be made

explicit. This type of activities can contribute to create a critical mass constituted by professors and students that can press for the creation or consolidation of public interest law clinics in the region. These activities can also reduce the spaces occupied by formalist education and practice.

- b- It is necessary to articulate political strategies and implement political activities that can contribute to overcome the obstacles that in universities and law schools impede the creation or consolidation of public interest law clinics. For example, emphasize the importance of public interest law clinics in faculty meetings, question publicly the decisions made by administrators that undermine clinics or obstacle its creation, generate alliances with colleagues of other disciplines that might be interested in this type of work (psychology and social work, for example) that can contribute to create a critical mass in favor o clinical education within universities
- c- It is fundamental to generate fund raising activities that can find economic resources to establish or consolidate clinics. International organizations and governments are particularly important targets. The economic autonomy of clinics would guarantee the independence of clinics as well as their continuity.
- d- Promote among students the importance of clinical education. This aim can be achieved if alternative views to legal formalism are promoted among students, particularly if professors made explicit to students the different roles that lawyers can play in Latin American societies and evince the positive consequences that clinical education has for developing skills that are fundamental for being good lawyers.
- e- Create or strengthen the formal and informal links among those that work in a local and international level with public interest law clinics. The Latin American Network of Public Interest Law Clinics, for example, was a privileged example for achieving this aim (until the Ford foundation cut the funds to organize it).
- f- Promote among clinical professors the importance of writing and publishing as a means to deepen the understanding of what we do and to criticize what we have done, and to articulate new paths to follow.