

Final

CLINICAL LEGAL EDUCATION AND THE ROLE OF LAW CLINICS
IN SOUTH AFRICA

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A. INTRODUCTION

South Africa has approximately 8000 lawyers¹ serving 35-million people.² While over 80% of South Africa's population is Black, probably more than 90% of the legal profession is White.³ There is an urgent need to redress this imbalance and to make the legal profession more representative of the broader South African community. As a result of South Africa's apartheid policies, the universities were segregated in 1959 and a number of ethnic universities were set up for Africans, "Coloureds" and Indians who were no longer allowed, without a permit, to attend the older established universities which were predominantly White.⁴ In 1983 the Government allowed the older universities to again accept students of colour⁵ and these have increased substantially over the past five years. For instance, in 1989 at the University of Natal, (Durban) Law School more than 52% of the total student body is Black in the broad sense.⁶ Nonetheless, the vast majority of Black law graduates still graduate from the ethnic universities.⁷ Despite the apartheid doctrine of "separate but equal", the ethnic universities have vastly inferior library and teaching facilities when compared with the older established universities.

1 Estimate by Association of Law Societies of Republic of South Africa, 1989.

2 Race Relations Survey 1987/88 11.

3 Estimate by the author based on figures in 1989 Hortors Legal Directory.

4 Extension of University Education Act 45 of 1959.

5 Universities Amendment Act 83 of 1983 which amended s 25 of the University's Act 61 of 1955.

6 Estimate by the Dean of Faculty of Law, University of Natal, Durban, based on the 1989 registration figures.

7 Cf Black Lawyers' Association "Everything you wanted to know about Black Lawyers but didn't want to ask!" (1987) 1 African LR No 1 10, 12-13.

B. LEGAL EDUCATION

The South African legal profession is divided along the same lines as that of the United Kingdom. Law graduates can decide whether they wish to become advocates (barristers) or attorneys (solicitors).⁸ In order to become advocates, law students have to obtain a post-graduate LLB degree which takes 6 years if they have no undergraduate law credits, or 5 years if they have obtained such credits. If they wish to become attorneys, they may take the BProc degree which is a 4 year undergraduate degree. While universities are responsible for academic training, professional training of advocates and attorneys is left to the profession. In order to become advocates, students have to complete 4 month's pupillage under a qualified practitioner. To become attorneys, students with an LLB degree have to serve 2 years of articles, and those with a BProc degree, 3 years with a firm of attorneys.⁹

1. University Training

Generally, university training in South Africa is academic. Some concessions are made to procedural subjects, such as civil procedure, criminal procedure and evidence, but even then an academic approach is adopted in their teaching.¹⁰ Although the universities have a free hand concerning the curriculum of the LLB degree, they have been accused of "dull uniformity" and promoting the "worship of antiquity and rich man's law".¹¹ Likewise law students and principals of articulated clerks have accused the universities of ignoring many courses that are relevant to legal practice and for neglecting

8 See Generally Ellison Kahn "A Review of South African Education" in Faculty of Law, University of Natal, (Durban). Legal Aid in South Africa (1974) 139, 142-145.

9 Kahn op cit 144-5.

10 Cf D J McQuoid-Mason "Methods of Teaching Civil Procedure" (1982) 7 Journal for Juridical Science 160 161.

11 C J R Dugard "A review of South African Legal Education" in Faculty of Law, University of Natal (Durban) Legal Aid in South African op cit 160 161.

practical training.¹² The standard academic response is that their function is to teach students how to think, not to do.¹³ Traditionally therefore, aspiring advocates and attorneys receive their academic training at university, and their practical training with the profession in the form of pupillage or articles of clerkship.

2. Professional Training

The quality of practical training offered by the different branches of the profession has also been criticised. It has been suggested that the period of pupillage should be increased and that the system of articles should be abolished.¹⁴ The success of the latter depends upon the clerk's principal who is often a busy practitioner. As a result there is a danger that some clerks may do nothing more than run errands and collect debts. Articles of clerkship were virtually obsolete in the United States after World War II,¹⁵ and calls for their abolition have been made in England,¹⁶ Canada,¹⁷ Australia¹⁸ and

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- 12 Cf P Ellum Legal Aid Developments in South Africa : July 1973 - June 1975 (1975) 54; Kahn op cit 151; J R L Milton "Legal Education (2)" 1975 De Rebus 266, 269; R E Megarry "Law as Taught and Law as Practiced" (1966) 7 JSPTL 176.
- 13 Cf G S Grossman "Clinical Legal Education : History and Diagnosis" 1974 J Leg Ed 162 190; H W Silverman "The Practitioner as a Law Teacher" 1971 J Leg Ed 424 427; R Stevens "American Legal Education: Reflections in the Light of Ormrod" 1972 Modern LR 242 253.
- 14 Khan op cit 145-46; H Tarlo "Clinical Legal Education" 1976 Aust LJ 139 140.
- 15 W Pincus "Clinical Legal Education in the United States 1968-1975" 1975 Aust LJ 420 423.
- 16 Report of the Committee on Legal Education (Ormrod Report) Cmnd 4595 (March 1971) par 100 which favoured periods of "institutional training and in-training" during the "professional stage". Cf H W Arthers "The Ormrod Report : A Canadian Reaction" 1971 Modern Law Review 642 646.
- 17 McKinnon Committee Report (1972); cf DH Sampson : " Legal Education in Canada (1) 1976 De Rebus 380 386.
- 18 Martin Committee Report (1964) Cf Tarlo op cit 140. See generally D Ross "Legal Skills Courses in Australia - Their Need, Their Value and Their Prospects" 1975 Aust LJ 327.

South Africa.¹⁹

The result is a conflict situation. Universities are reluctant to train lawyers as "mechanics"²⁰ while the legal profession is unable to offer satisfactory training. The obvious solution to this problem lies in clinical legal education.

C. CLINICAL LEGAL EDUCATION

Since the International Legal Aid Conference held at the University of Natal, Durban, in 1973,²¹ almost every university in South Africa has a legal aid clinic.²² The vast majority of universities, however, have not yet integrated their law clinics into the formal teaching programmes of their law schools. The Universities of the Witwatersrand and Natal are probably the only two universities that have properly integrated clinical law programmes.²³ Both universities have a programme that consists of practical training seminars, simulated exercises and work in the law clinics. The role of the law clinics will be dealt with in a separate section.

1. Practical Training Courses

The practical legal studies option at the University of Witwatersrand includes training in interviewing, negotiation, ethics, drafting and trial techniques. Aspects of each topic are dealt with at seminars, and simulated exercises are used to illustrate their practical implementation. Students who

19 Editorials in 1973 De Rebus 4; 1975 De Rebus 457; but cf "Professional News" 1975 De Rebus 345.

20 Cf H Whitmore "Are the Needs of the Community for Legal Services being met by our Universities?" 1975 Aust LJ 315 317.

21 The proceedings of the conference were published in Faculty of Law, University of Natal (Durban) Legal Aid in South Africa (1974).

22 See generally D J McQuoid-Mason An Outline of Legal Aid in South Africa (1982) 139-163.

23 Cf McQuoid-Mason "The Teaching of Civil Procedure" op cit 165-170.

attend the practical legal studies course also service the law clinics.²⁴

The University of Natal, (Durban) offers a professional training course that is compulsory for all final year students. It covers ethics, the advocates' and attorneys' professions, manners of addressing the different courts, dealing with and preparing briefs, interviewing, pleadings, pro do defences, unopposed matrimonial actions, preparing and arguing appeals, opinion work, advice on evidence, cross-examination, and the reading-of balance sheets. In addition all students have to argue a moot court appeal, present a notice of motion, and when necessary, service the legal aid clinic. There is also an optional legal aid credit course for LLB students, that includes simulations and tutorials on practical aspects of problems prevalent in the law clinic. These include divorce, motor vehicle collisions, wrongful dismissals, unemployment insurance, workmans' compensation, credit agreements, debt collection, bail applications, administration of deceased estates, drafting of wills, and the numerous problems that arise from apartheid, such as "group areas" evictions and the forced removals of people.²⁵

2. Simulated Exercises

Both universities use simulated drafting and pleading exercises. The Witwatersrand practical legal studies course teaches students how to draft affidavits, contracts and other documents, and substantive law lectures are supplemented by seminars and simulations on trial techniques. A set of facts is presented to the class and briefs are prepared for each side who are then required to advise on evidence. Thereafter they deal with such matters as the purpose of an opening address, the leading of witnesses, cross-examination, re-examination and the aims of closing arguments. The students play the roles of plaintiffs and defendants and the results of the exercises are discussed.²⁶ A similar method is used at the University of Natal (Durban), where the students are divided into law firms and the firms are required to sue one another and to

24 McQuoid-Mason "The Teaching of Civil Procedure" op cit 165-6.

25 McQuoid-Mason "The Teaching of Civil Procedure" op cit 166.

26 McQuoid-Mason "The Teaching of Civil Procedure" op cit 167.

draft the appropriate documents and pleadings.²⁷ At Natal all final year law students have to participate in moots and motion court proceedings.

(a) Moots

Mooting is an obvious example of simulated advocacy training but is voluntary at most South African universities. The University of Natal (Durban) is the only university which makes such moots compulsory.²⁸ Provided the problems are realistic, preparation and argument by the students can closely approximate the role of an advocate appearing before an appeal court. Simulated appeal cases give students an opportunity to obtain practice in oral advocacy and teach them how to communicate with the court and each other. They learn how to prepare an argument, how to set out the law crisply and concisely, how to deal with opposing case authorities, how to handle interjections from the bench, how to reply to opposing arguments, and how to listen to questions carefully. They also discover that they must prepare for every eventuality, but should not over-burden the court with case authorities,²⁹ nor engage in overly complex arguments or read their arguments. A properly argued moot enables students to obtain an all round view of the problem - through the eyes of their clients, opponents and outsiders.³⁰ The absence of training in advocacy at South African universities probably results in court procedures often being accepted without review or criticism.³¹

(b) Motion Courts

At the University of Natal (Durban), every final year law student is obliged to participate in simulated motion court proceedings. Students are required to prepare notices of motion together with the supporting documents.

27 Ibid.

28 McQuoid-Mason "The Teaching of Civil Procedure" op cit 169.

29 Sir Frederick Lawton "Legal Education and the Needs of the Legal Profession" 1980 The Law Teacher 163 166.

30 Cf JT Gaubatz "Moot Court in the Modern Law School" 1981 Leg Ed 87.

31 A similar criticism has been made concerning the lack of training and advocacy in the United Kingdom (Lord Goodman "Educating the Legal Profession" 1977 Current Legal Problems 31 41.

They learn how to draft the necessary affidavits and about the importance of being fully conversant with the legal requirements when making an application on notice of motion. In these exercises the students take turns in playing the roles of advocates and attorneys.³²

4. Trial Advocacy

No South African university offers a trial advocacy course as part of the LLB or BProc programme. At the University of Natal (Durban), mini mock trials are held during criminal procedure and legal aid tutorials.³³

The only fully-fledged trial advocacy course is offered at the University of Natal (Durban). This takes the form of the trial advocacy Master of Laws programme which was introduced in 1989. The course is offered as an LLM course work option, and also forms a component of the full-time LLM in trial advocacy and clinical law.³⁴ The course is mainly aimed at giving students the necessary confidence to prepare for, and participate in, trial court work. The course includes interviewing, case analysis and preparation, direct evidence, cross-examination, exhibits, expert witnesses, closing arguments and objections. The trial advocacy course was offered for the first time during the first semester of 1989 and taught by Professor Neil Franklin of the University of Idaho (Moscow) and myself with assistance from members of faculty and a Supreme Court judge. The course essentially concentrated on criminal trial practice. This is because students in the clinical law programme will be appearing in the criminal magistrates' courts as public defenders during the second semester as part of their law clinic work.

The initial impetus for trial advocacy training in South Africa came from the Black Lawyers' Association (BLA) who, together with the National Institute for Trial Advocacy (NITA) have run annual week-end workshops for practitioners

32 McQuoid-Mason "The Teaching of Civil Procedure" op cit 169.

33 McQuoid-Mason "The Teaching of Civil Procedure" op cit 167.

34 University of Natal Calendar (1989) H32.

during the past 3 years.³⁵

D. LEGAL AID CLINICS

Law clinics in South Africa take three forms: full-time clinics directed by full-time members of law school staff; part-time clinics directed by members of law schools who also have other teaching responsibilities; and, student-run law clinics.³⁶ Most universities are moving towards full-time law clinics as a result of a limited grant from the Attorneys' Fidelity Fund that has enabled law schools to employ full-time directors. The University of Cape Town however, still has an essentially student-run operation while some of the other universities still have part-time legal aid directors.³⁷

In South Africa, with its large politically and socially disadvantaged community, the law clinics are under great pressure to serve the general public. Most clinics are unable to afford the luxury of taking a few selected cases or limiting their activities to public interest law cases, (as is done by the legal resources centres), because of the demands of their local communities. Accordingly, South African law clinics serve three basic functions : a public service to indigent members of the community; a useful teaching instrument for law faculties; and, a potential source of relevant research into poverty law problems.³⁸

Most law clinics tend to be understaffed and pay more attention to their public service duties than to exploiting their value as teaching instruments. In South Africa probably 80% of the Legal Aid Boards' annual budget of R5

35 Kenneth S Broun "Teaching Trial Advocacy to Black Lawyers in South Africa" (1987) 22 International Society of Barristers 331.

36 D J McQuoid-Mason "The Organisation, Administration and Funding of Legal Aid Clinics in South Africa" 1986 NULSR 189.

37 McQuoid-Mason "The Organisation, Administration and Funding of Legal Aid Clinics" op cit 189-193.

38 See generally D J McQuoid-Mason (ed) Legal Aid and Law Clinics in South Africa 1985.

million is spent on civil matters, and only 20% on criminal law cases.³⁹ The result is that 100,000 - 150,000 people a year, largely Blacks, go to prison without the benefit of legal representation.⁴⁰

A recent decision in the Natal Provincial Division by Mr Justice Didcott, has raised exciting possibilities for law clinics. In S v Khanyile⁴¹ the court, following a modified form of Betts v Brady,⁴² held that a magistrate should ensure that an unrepresented accused is provided with a legal defence in the following circumstances :

- (a) if the crime is a serious one;
- (b) if the make-up of the accused is such that he or she would be unable to conduct his or her own defence; and
- (c) if the penalty to be attached to a conviction for the crime is likely to be serious (eg imprisonment or loss of a job).⁴³

Although this principle has not yet been confirmed by the appeal court most academics are confident that it will uphold Didcott J's judgement.⁴⁴ In any event, as a result of his judgement, magistrates are now required to implement these guidelines and this provides an exciting challenge for South African law clinics.

1. Student Practice Rules

The attorneys' profession and the universities have already approved the introduction of "student practice rules". These rules were proposed more than

39 1987/88 Legal Aid Board Report.

40 Cf Race Relations Survey 1987/88 549.

41 1988 (3) SA 795 (N).

42 (1941) 316 US 455.

43 At 815.

44 Dirk van Zyl Smit "Indigence and the Right to Counsel" (1988) 4 SAJHR 363 366; D J McQuoid-Mason "The Right to Legal Representation : Implementing Khanyile's case" 1989 2 SACJ 57 60-1.

a decade ago by academics⁴⁵ and are a modification of the American Bar Association's approved set of model student practice rules.⁴⁶ The proposed rules provide that final and intermediate LLB students, or final year undergraduate law students, who have passed courses in criminal law, criminal procedure and evidence, and have undergone a trial advocacy training course, and are attached to a university law clinic, should be given a right of appearance in the criminal magistrates courts.⁴⁷

The implementation of student practice rules will require amendments to the Attorneys' Act⁴⁸ to include "student practitioners" in the definitions and in Chapter IV which deals with qualifications, admissions and removals. Similarly the definitions in the Criminal Procedure Act⁴⁹ will have to be amended as well as those in some of the sections.⁵⁰ It has been pointed out⁵¹ that although some presiding officers may have doubts concerning the suitability of senior law students as "legal representatives" it should be remembered that the United States Federal Supreme Court has recognised the value of student practice rules.⁵²

As has been mentioned, accredited university law clinics can now obtain funding from the Attorneys' Fidelity Fund to employ full-time attorneys as

45 Elim op cit 64; McQuoid-Mason "Clinical Legal Education: Its Future in South Africa" (1977) 40 THRHR 343 349.

46 CLEPR State Rules Permitting the Student Practise of Law, Comparisons and Comments 2 ed (1973).

47 Cf McQuoid-Mason An Outline of Legal Aid op cit 194-7.

48 Act 53 of 1979.

49 Act 51 of 1977.

50 For instance ss 73(1), 197(a) and 201 (cf McQuoid-Mason An Outline of Legal Aid op cit 197-198).

51 McQuoid-Mason "The Right to Legal Representation" op cit 64.

52 "Law students can be looked to to make a significant contribution, qualitatively and quantitatively, to the representation of the poor in many areas" (Argersinger v Hamlyn (1972) SCT 2006 at 2041).

directors of legal aid.⁵³ This ensures that there is proper supervision in law clinics by suitably qualified persons. Even though the legislation has not yet been amended to allow student practice rules, law clinics should exploit the provision of the Criminal Procedure Act⁵⁴ that provides:

"any accused who in the opinion of the court, requires the assistance of another person at criminal proceedings, may with the permission of the court, be so assisted at such proceedings".⁵⁵

Even though the courts have pointed out that there is a difference between legal representation and assistance,⁵⁶ the provision can still be used creatively. For instance, legal assistance has been interpreted to mean that although the accused is expected to run the trial, the person who is assisting may also cross-examine witnesses, and address the court on the merits and sentencing - even though he or she may not make any decisions concerning the trial.⁵⁷ Until such time as the necessary student practice legislation has been introduced, there is no reason why law clinics should not co-operate with the magistrates' courts in providing assistance for indigent accused in terms of the Criminal Procedure Act.⁵⁸

When student practice rules are introduced, it will be essential that there is close co-operation between the magistrates' courts and the law clinics in order to ensure that neither the accused nor the students are prejudiced by unnecessary delays. The court rolls should be arranged so that staff in the law clinics will know approximately when their cases are likely to be called rather than wasting time in court room corridors. This is essential because during term time, most law students are doing between 6 and 8 law courses and cannot afford to spend wasted hours in court room corridors waiting for their

53 See above 8.

54 Act 51 of 1977.

55 s 73(3).

56 Cf S v Masithela 1986 (3) SA 402 (O).

57 S v Assel 1984 (1) SA 402 (C) 405; S v Masithela supra 404; Cf NC Steytler The Undefended Accused (1988) 71.

58 McQuoid-Mason "The Right to Legal Representation" op cit 62.

cases to be heard.⁵⁹

2. Public Defenders

Another development that could be exploited by the universities would be to attach post-graduate LL.M students to law clinics as public defenders. Students holding the LL.B degree, who have passed university courses in English, Afrikaans and Latin, are automatically entitled to be admitted as advocates⁶⁰ and could be attached to law clinics on the same basis as advocates are attached to the Legal Resources Centres. They would have the right of appearance and would be legally qualified to represent indigent accused.⁶¹

As has been mentioned,⁶² in 1989 the University of Natal, Durban, introduced a trial advocacy and clinical law masters programme to teach prospective practitioners trial advocacy skills. As part of their training, the masters students will be expected to appear in the criminal courts as public defenders.

Another important source of personnel for law clinics would be to employ qualified national servicemen as public defenders as an alternative to national service. This matter has been taken up with the Minister of Defence by the Association of Law Societies. There is no reason in principle why qualified law students should not serve in law clinics as public defenders on the same basis that qualified accountants serve in the Receiver of Revenue's office.⁶³

A major difficulty faced by most busy South African law clinics is that they have insufficient staff and funds.

59 Cf McQuoid-Mason "The Right to Legal Representation" op cit 65.

60 Admission of Advocates Act 74 of 1964 s3.

61 The LL.B degree automatically qualifies a person to be admitted as an Advocate of the Supreme Court but such person may only join one of the local "bars" if he or she has passed the bar examination.

62 See above 7.

63 McQuoid-Mason "The Right to Legal Representation" op cit 63.

E. THE FUTURE OF LAW CLINICS AND CLINICAL LEGAL EDUCATION

The future of law clinics and clinical legal education in South Africa involves a consideration of the following factors : (i) the structure of law clinics; (ii) staffing of law clinics; (iii) the financing of law clinics; (iv) the services provided by law clinics; (v) the use of law clinics for teaching; and (vi) community legal education programmes at law clinics.

1. The Structure of Law Clinics

The present structure of most university law clinics is to have a main clinic on the campus with off-campus branches.⁶⁴ The main clinic has the potential to be used as a teaching hospital⁶⁵ with a number of satellite clinics. In the rural areas it may even be necessary to arrange for mobile clinics to serve rural advice offices. Increasingly public interest law firms, such as the Legal Resources Centres and law clinics, are beginning to network with advice offices and to provide para-legal training for advice office personnel.⁶⁶

A very important future development for law clinics is to provide the criminal courts with public defenders. For a public defenders system to work properly, the magistrates courts will have to work closely with the directors of the clinics, the legal aid board, and the South African police.

In future law clinics in South Africa should operate as full-time law firms with a public interest and public defender bias. They should develop and make use of law clinic manuals and public interest resource materials such as those produced by the Legal Resources Centres, the Centre for Applied Legal Studies (University of the Witwatersrand), the Centre for Socio-Legal Studies

64. See generally McQuoid-Mason An Outline of Legal Aid op cit 139-163.

65. Cf P Pretorius "Legal Aid Clinics as Teaching Instruments" in McQuoid-Mason's (ed) Legal Aid and Law Clinics op cit 85-92.

66. For instance the legal resources centres run advice office para-legal training programmes as does the Centre for Socio-Legal Studies at the University of Natal (Durban).

(University of Natal, Durban), the Labour Law Unit (University of Cape Town) and the Community Law Centre (University of the Western Cape). Law clinics should also be equipped with word processors to speed up the preparation of legal documents and research publications.

2. The Staffing of Law Clinics

Most university law clinics that are members of the Association of University Law Clinics have a director paid for by the Attorneys' Fidelity Fund. Some clinics also have professional assistants, administrative assistants, and legal aid secretaries. Depending upon the clientele of the clinic, interpreters may also be required. For instance at the University of Natal (Durban), over 80% of clients are Zulu speaking.

In future law clinics should be able to employ articled clerks to undertake their full period of articles at the clinic for the purposes of admission. The Transvaal Law Society has agreed in principle to allow six months service in the legal aid clinic to count towards articles. The Natal Law Society has adopted the same approach.⁶⁷ The law clinics can play an important role in providing articles for Black students who often experience great difficulty in obtaining placements in the profession. A period of six months service in a law clinic should equip Black students with the necessary experience to make them more attractive to firms looking for articled clerks.

Articled clerks can act as junior supervisors in the clinics which should be staffed by legal aid students engaged in law studies, who are given credit for their work as part of a legal aid credit course. Some clinics, eg. at the University of Natal (Durban) divide legal aid students into law firms and make each law firm responsible for manning the clinic on a particular day.⁶⁸ During vacation periods it may be necessary for law clinics to employ legal aid

67 The Attorneys' Act of 1979 is flexible enough to enable students who are attached to law clinics to obtain up to six months' credit towards their articles provided they are articled at the time they work in the law clinic and undergo a training programme (s 7(5)).

68 McQuoid-Mason "The Organisation, Administration and Funding of Legal Aid Clinics" op cit 192.

interns but funding will be required because many students from disadvantaged communities need to earn money during their vacations.

Another method of manning law clinics is to introduce trial advocacy masters programmes that are likely to attract students who are qualified to be admitted as advocates. These students can be employed in the clinics as junior supervisors under the general supervision of the director of the clinic.⁶⁹ Graduate assistants who have professional qualifications could also be used, as well as national servicemen and students involved in the Association of Law Societies' annual practical training schools. It is hoped that the latter will be extended to a six month programme, and eventually based at one university in each province and incorporated into that university's law clinic programme.⁷⁰

3. Financing of Law Clinics

Ten years ago the Attorneys' Fidelity Fund was not prepared to make grants to law clinics on the basis that they were not seen as providing legal education. In 1987, however, it was agreed that the Fund would provide the sum of R55 000 for the appointment of a director to any law clinic accredited to the Association of University Law Clinics.⁷¹ The universities in turn would provide the office space, equipment and stationery for the running of the clinics.

Unless the sum granted by the Fidelity Fund is substantially increased, however, law clinics will have to rely on donations by large corporations and human rights organisations. It is essential that law clinics receive proper funding for operating expenses. They also need finance for the employment of articled clerks and for legal aid interns during university vacations. It is

69 This is the model used at the University of Natal (Durban) for the masters programme in trial advocacy and clinical law introduced in 1989. Students in the programme are required to complete courses in trial advocacy, clinical law, and a public interest law course as well as to present a dissertation of 20 000 words (University of Natal Calendar (1989) H32).

70 Cf R de Klerk "An Opportunity Not to be Missed" 1989 De Rebus 331.

71 Cf McQuoid-Mason "The Organisation, Administration and Funding of Legal Aid Clinics" op cit 197.

also necessary to provide funding for the employment of outside counsel when university staff are unable to assist. Law clinics ought to be able to function as fully fledged law firms and allowed to recover costs in the same manner as the legal aid board.⁷² Such costs could be paid into the law clinic's trust fund and not directly to the staff, on the same basis as is done in respect of the legal aid board. Should national servicemen be employed in law clinics as a form of alternative service, their wages would be paid by the Department of Manpower as is done for other alternative service programmes (eg. staffing in rural hospitals).

4. Clinical Legal Education

Law clinics are admirably placed to play the role of teaching hospitals and legal laboratories. Their potential in South Africa has not been fully utilised.⁷³ Law clinics bring the law alive by not only showing students the practical workings of the legal system but also by providing valuable material for law teachers who wish to undertake relevant research. Furthermore, law clinics can be used to test the suitability of students as practitioners, reinforce the academic work of law teachers, open up new fields of research for academics, and give academics and students a window into the real world of practice.⁷⁴

As has been mentioned there are very few law schools that incorporate legal aid for credit purposes at South African universities. The legal aid course at the University of Natal (Durban), seeks to improve the clinical skills of students by providing them with seminars on the areas of law experienced in the clinic.⁷⁵

Law clinics can also be used as a nucleus for the establishment of trial

72 See Legal Aid Act 22 of 1969 s 8A(1).

73 Cf Pretorius op cit 85.

74 WM Rees "Clinical Legal Education : An analysis of the University of Kent Model" 1975 The Law Teacher 125 134-5; Grossman op cit 192; McQuoid-Mason "Clinical Legal Education" op cit 359.

75 See above 5.

advocacy masters programmes and the conducting of mock trials. If the proposed student practice rules are introduced,⁷⁶ it will be necessary to provide clinical training for legal aid students, so that they understand how the principles of criminal law, criminal procedure and evidence can be applied in practice.

There is an urgent need for South African law schools to train graduates in trial advocacy skills and to introduce programmes such as that at the University of Natal (Durban), which enables students to qualify in trial advocacy and clinical law. Such programmes could be developed to incorporate the syllabus for the national bar examination, so that pupil advocates who have obtained the masters degree could obtain exemption from it. Such programmes should use members of the bar and bench to assist in the training of students.

5. Types of Services offered by Law Clinics

The perennial question arises whether law clinics should take on all cases that present themselves or merely test cases or public interest law cases that affect a large number of people. The argument against taking on all cases is that eventually clinics will become swamped as happened with the Legal Resources Centre's Hoek Street clinic in Johannesburg which was closed down.⁷⁷ The argument in favour of taking on test cases or public interest law cases is that the clinics can build up their expertise and provide a highly efficient service for their clients. The argument in favour of taking on all cases is that students obtain much wider experience and the clinic serves a wider variety of clients. Likewise the argument against taking on only test cases or public interest law cases is that students become skilled in only a few narrow areas of the law. Another argument in favour of taking on all law cases is that indigent people in South Africa are so poorly served by lawyers that if the law clinics do not take on the cases, nobody else will. This is exacerbated in cases of flagrant human rights abuses although where these effect the public interest they will usually be taken by the Legal Resources

76 See above 9.

77 McQuoid-Mason "The Organisation, Administration and Funding of Legal Aid Clinics" op cit 194.

Centres.⁷⁸

There is general agreement that there is an urgent need for a public defender system in South Africa in order to ensure that the 100,000 - 150,000 unrepresented accused each year receive assistance in the courts.⁷⁹ Law clinics, however, should not operate in a vacuum and should be seen as complimentary to other organisations such as the Legal Resources Centres, the Legal Aid Board, the Black Sash and the numerous advice offices. They should also be seen as filling in the gaps in the Legal Aid Board scheme that prevents certain people from being assisted by the State in legal aid cases.⁸⁰

It is essential that law clinics are properly supervised to ensure that they render an efficient service to their clients. While it has been pointed out that law students are a cheap source of labour for countries in Africa,⁸¹ it is essential that students are properly trained.

University law clinics should also make more effort to reach urban Blacks along the lines of the University of Cape Town's Legal Education Assistance Programme (LEAP). For this to succeed, it is necessary to use a mobile clinic which can visit people in the rural and squatter areas. For instance in the

78 McQuoid-Mason Legal Aid and Law Clinics op cit 82.

79 Cf McQuoid-Mason An Outline of Legal Aid op cit 122.

80 D J McQuoid-Mason "Legal Aid Clinics as a Social Service" in McQuoid-Mason (ed) Legal Aid and Law Clinics op cit 64-69.

81 Reyntjens in F Zeemans Perspectives on Legal Aid (1979) 36 who states : "Students represent a cheap source of manpower, which in the presence of proper supervision reaches a standard at least equal to that of a young qualified lawyer... The well supervised use of law students will significantly ease the limitations under which most of the legal aid programmes in Africa now have to work; it is only through a student programme that there is any possibility in the near future for legal services becoming widely available to the poor". This theme had been emphasized previously by an editorial in the official journal of the Association of Law Societies of South Africa which stated : "Law students constitute a pool of highly educated, unused manpower in our society. This artificial situation can be bridged by properly supervised student practice at legal aid clinics" (editorial 1976 De Rebus 109).

greater Durban area, half the population, (about 1.7 million people), now live in squatter camps.⁸²

The clinic should also work closely with para-legal networks, provide mediation services, and direct people to the small claims courts.⁸³ Conversely the Magistrates' courts must be prepared to work with law clinics when requiring representation for undefended accused.⁸⁴

6. Law Clinics and Community Legal Education Programmes

Law clinics should not merely play a curative role but should also engage in preventive legal education programmes. Law clinics should become involved in para-legal training, particularly in respect of advice office personnel who are likely to service clinics out in the field.⁸⁵

Law clinics should also be closely associated with the Street Law programme which has been sponsored by the Association of Law Societies.⁸⁶ The aims of the programme are: to educate people so that they do not get into trouble; to inform people what to do if they do get into trouble; and to make people think about a future legal system in a post-apartheid South Africa.⁸⁷

A useful by-product of the Street Law programme is that it can act as a

82 Race Relations Survey 1987/88 467.

83 Small claims courts were introduced in 1985 in terms of the Small Claims Courts Act 61 of 1984; cf A J Middleton 'Legal Aid Clinics and the Proposed Small Claims Courts' in McQuoid-Mason (ed) Legal Aid and Law Clinics op cit 73-75.

84 Cf McQuoid-Mason 'The Right to Legal Representation' op cit 65.

85 Law clinics have not become as involved in para legal planning as they should. At the Universities of the Witwatersrand and Natal, (Durban), however, law students have in the past been involved in a Preventive Legal Education (PLEA) Programme (cf I Topping 'The University of Natal Legal Aid Clinic' in McQuoid-Mason (ed) Legal Aid and Law Clinics op cit 62).

86 D J McQuoid-Mason 'Street Law' 1987 De Rebus 395.

87 D J McQuoid-Mason Street Law Book 1 An Introduction to South African Law and the Legal System (1987) 2.

recruiting ground for law students. The programme is run on a non-racial basis and can be used to identify talented potential law students at schools in disadvantaged communities. The teaching techniques used in the Street Law programme involve small group discussions, opinion polls, simulations, role plays and mock trials. Legal aid students can assist with the training of school teachers, in Street Law techniques and participate in the team teaching of school children. The Street Law programme is aimed both at secondary school children and community organisations and enables law students to become involved in a preventive legal education project.⁸⁸

F. CONCLUSION

Law clinics and clinical legal education face a bright future in South Africa, particularly when compared with the dark years of 1973 when there were only three clinics in the country.⁸⁹ The law clinics provide an exciting laboratory for students and law teachers, and give them an opportunity to put something back into society. They bring the universities closer to their communities particularly when they network with para-legal advice offices and community legal education programmes. Law clinics provide a valuable training ground, not only for law students, but also for candidate attorneys and young advocates. The value of this training will increase if more trial advocacy programmes are introduced and student practice rules become a reality.

Law teachers can gain valuable insights into their teaching methods and their relationships with their students if they use the law clinics as the basis of clinical law programmes. Not only will they benefit from having reassessed their teaching methods, but they will also find themselves exposed to new avenues of research. Certainly a properly conceptualised clinical law programme can enhance the academic teaching of what are traditionally regarded as black letter law subjects.

88 McQuoid-Mason 'Street Law' op cit 396; on preventive legal education see generally M K Robertson Preventive Law (1981) unpublished LLM thesis, University of Natal, Durban.

89 McQuoid-Mason 'The Organisation, Administration and Funding of Legal Aid Clinics' op cit 189.

The law clinics however must not become complacent and must continue to improve their standards of supervision and the services they provide to the community. They have the potential to instil a social consciousness in law students that will be taken into their law firms and ultimately into the established legal profession. South Africa with its vast pool of under-represented indigent people and its numerous human rights abuses, offers a wonderful challenge for clinical law teachers and students with a social conscience. Law schools are only just beginning to respond to this challenge.

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14 June 1989