

New clinics and new clinicians

Interactions at the university of Valencia

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When we started the Clinic Project at the university of Valencia some 6 years ago, three things were clear: first, it was for us a new methodology for teaching and learning law; second, it could be understood as part of the social function a public university has; and third, we had no idea of how was that going to be done, taught and developed, since most of us had not been practitioners. Our challenges were big, and we still face many. We would like to share some of our ideas and thoughts after this year of experience with real cases and real clients, and the tutors have been a mix of academics and pro-bono lawyers.

We would like to start with the idea of the Clinic being part of what defines a public faculty or school of law and differentiates it from other instances in which one can study law: how do we think of the University as being a public institution with some public functions and responsibilities. We would like then to discuss what type of legal operators should we prepare and to what extent the clinic can help us in that preparation. Our last section will be an attempt to share this year's experience and challenges we've faced, both, from within the clinic or the university and from outside.

The Public University

B. DE SOUSA SANTOS (1998) identified a triple crisis the *University* was facing, linked to a particular crisis of modernity: an hegemonic crisis, a legitimacy crisis and an institutional crisis¹. This analysis refers to public universities in Spain, but we think it can be applicable or of use in other contexts.

¹ B. De Sousa Santos, "De la idea de la Universidad a la Universidad de las ideas" in *De la mano de Alicia: lo social y lo político en la postmodernidad*, Siglo del hombre editores, Uniandes, 1998. See also, B. DE SOUSA SANTOS: *La universidad del Siglo XXI: Para una reforma democrática y emancipadora de la Universidad*, México, UNAM, Centro de Investigaciones Interdisciplinarias en Ciencias y Humanidades, Coordinación de Humanidades, 2005.

The hegemonic crisis and the fact that Universities are no longer the only sites of production of knowledge is the result of a contradiction between what had been considered for centuries the role of universities and the role assigned to it during the XXth century. While universities are still responsible for the production of “high culture, critical thinking and exemplary knowledge, both scientific and humanistic, needed for the education of elites” (traditional role), on the other hand, Universities were asked to produce cultural standards and technical knowledge in order to have qualified workers developing a “healthy capitalist society”. Since both objectives are pretty different and hard to match, states encouraged the creation of other instances of higher education and research, taking away from Universities the hegemonic role of producing *valid* knowledge. This hegemony crisis led to a crisis in legitimacy, since society puts university knowledge on top, but access to university was full of contradictions and discriminated against women and other groups. A democratic revision was needed, but instead of democratisation of access we’ve achieved a massification in the classroom, and education is less elitist, not so much for the number of people that actually have access to it, but for the quality of teaching, and thus, non-democratizing knowledge.

The last crisis, the institutional one, refers to the fact that the autonomy of universities is now subject to the rules of competences, effectiveness and productivity, and criteria like the market or employability. Universities tend thus towards a hard technification in a context in which high education centers do actually produce workers, specialised technicians in human activities. When considering law and law schools, it is true that we need to “produce” good technicians; the decisions they are to take and contribute to make deal with the life and sufferings of people², but an excess of technification should bother us because we know already that “giving legal education a mere technical aspect responds to an authoritative design in which law faculties become professional schools without providing the element of critique to positive law³. But, as Santos

² A.J. ARNAUD: “Los juristas frente a la sociedad (1975-1993)”, *Doxa* 15-16, 1995, pág. 1005.

³ M. BARBERIS: *Filosofia del Diritto*, Bologna, Il Mulino, 2000, pág. 36: “Per sfuggire al rischio che il codice fosse manipolato dai giuristi, infatti, Napoleone provvide a riorganizzare gli studi giuridici, proseguendo anche in questo nella linea adottata dai monarchi assoluti. La riforma napoleonica appare in effetti caratterizzata dal disegno, tipicamente autoritario, di conferire all’istruzione giuridica un carattere meramente tecnico: le facoltà giuridiche

points out, universities diverge from high education centers precisely because they're not professional but critical schools⁴ and as a public institution the University should actively participate in the development of a democracy under the rule of law; actively participate in the fight against exclusion and actively participate in the defence of diversity and pluralism. How can this implication be made?

The central point is the development of ways in which the University provides services to social groups, organizations, movements, communities, local governments... putting knowledge at society's reach but also, producing it from that very service and needs. For Santos, if this delivering fails, we may have high education but no university⁵: thus, it is this delivering that University can find its legitimacy again and the production of valid knowledge in a particular social context. When it comes to law, it is obvious that legal procedures and processes open specific spaces to visibilize social conflicts, expectations and needs. Clinical legal education is one of the ways in which public law schools can deliver knowledge to society and help produce valid knowledge and strategies for a better protection of the rights and pretensions of citizens.

For us, this constitutes a good framework to start thinking of the kind of education schools of law should provide for future public actors and legal operators.

The ways of the jurist

In a way, many academics are trapped in the old ways of the university and the production of valid knowledge: the law is produced by authorised organs, be it through legislation or adjudication, and there's no other legal reality to check or discuss about; no valid legal knowledge beyond *doctrine*. How on earth can we accept that the legal discourse may be produced by lay people in their interactions? How could we even consider the possibility of ordinary people creating valid legal knowledge? How can they pretend to know what is best for

dovevano trasformare en una sorta di scuole professionali, dalle quali restevano esclusa le materia estranee al diritto positivo...”

⁴ B. DE SOUSA SANTOS: *La universidad del Siglo XXI: Para una reforma democrática y emancipadora de la Universidad*, cit, pág. 62.

⁵ B. DE SOUSA SANTOS: *La universidad del Siglo XXI: Para una reforma democrática y emancipadora de la Universidad*, cit, pág. 62.

them, what legal strategy is correct? Since all these questions are embarrassing for most law professors, we keep on producing *lawyers* instead of jurists but as D. KENNEDY points out, the problem is when we *discipline* in such a way as to “produce” automatons, with new abilities and capacities that ensure their submission to the authority⁶. If we don’t want to create automats, acritically subjected to the authority of the norm, the client or the judge, we have to think of new ways and methodologies to critically teach about law enforcement and protection of rights. If our objective were to create an acritical technician, that knows the norms but ignores *the rest*, most professors could pack up and find a new job. Since that’s not our objective, we better rethink what and how do we teach law and Clinical legal education is one such new methodology that can help us.

Some guiding obvious thoughts:

- We are preparing jurists, legal operators that will in a very short period of time be responsible of *the legal*. We’re not preparing possible jurists for some distant future in some possible world but actual legal operators in a particular legal culture and context⁷. Today that particular legal context is a dynamic, complex legal order, facing challenges and important breaks, with diverse practices and understandings of the law that have different capacity to impose a particular perspective but operating at the core of a political system that receives its legitimacy from its capacity to actually protect the rights of citizens -and others.
- The paradigm of positivism has proven to fail short in present challenges, and it cannot remain the main paradigm in law schools. As L. FERRAJOLI has pointed, the crisis of positivism together with different legal crisis lead to democratic problems of legitimacy the jurist needs to be critic with. Jurist need to be critic with the law because the knowledge of valid law no longer can be separated from the knowledge of law as a fact, both in its production and its enforcement; nor can it be separated from

⁶ D. KENNEDY: *A critique of adjudication (fin de siècle)*, Cambridge, Massachusetts, London, Uk, Harvard University Press, 1997, pág. 365.

⁷ L. GIANFORNAGGIO: *Filosofia e critica del diritto*, Torino, G.Giappichelli editore, 1995.

law as a criterion for legitimacy and deslegitimacy of the law itself⁸. So, the jurists we need are critical jurists and nothing less will do.

- It is no news to say that law is the produce of the activity of legal practitioners and operators, so it is important to determine the learning process of those operators that will be deciding what the law actually is. It is no news either to say that the law is the premise of what legal operators do. A. J. ARNAUD considers that, when educating jurists we should take into account not just the law, in the positivist tradition, but all the legal phenomenon, the skills and ways not just to *break codes* but to manipulate the legal discourse and make sure students understand and are able to connect law and the study of law to the rest of human concerns⁹.
- It is well known that K. LLEWELLYN said that “technique without ideals might be a menace, but ideals without technique are a mess; and to turn ideals into effective vision, in matters of law, calls for passing those ideals through a hard-headed screen of effective legal technique”¹⁰.

So, the methodology we choose to use has to be able to combine both requirements and I think it has to be clear to all (students and professors) that:

- 1) The method should show positive law in theory and practice.
- 2) The kind of questions and critiques we make to positive law are actual, real questions that arise on a daily basis to legal operators, not weird cases we make up or twisted questions to see if they read the materials

⁸ L. FERRAJOLI: *Derechos y garantías, la ley del más débil*, Madrid, Trotta, 1999.

⁹ F. OST: “Júpiter, Hércules y Hermes: tres modelos de juez”, *Doxa* 14, 1993; J. BALLESTEROS Y J. DE LUCAS: “Por una enseñanza del derecho no reduccionista: vías de superación de la escisión entre teoría y praxis”, *Revista de la Facultad de Derecho de la Universidad Complutense*, n. 5, p. 73-76; ARNAUD, A.J.: *Los juristas frente a la sociedad (1975-1993)*, *art. cit.*

¹⁰ La cita corresponde a un informe que en 1994 elabora Llewellyn para la AALS, publicado en 1945 en Comisión on curriculum, Assn. Am. L. Sch., *The place of Skills in legal education*, 45, *Columbian Law Review* 345, 345. La cita dice: “Technique without ideals might be a menace, but ideals without technique are a mess; and to turn ideals into effective vision, in matters of law, calls for passing those ideals through a hard-headed screen of effective legal technique”. K. Llewellyn citado por B. COOPER: “The integration of Theory, Doctrine, and Practice in legal education”, *Journal of the Association of legal Writing Directors*, 2001, págs. 50-64.

- 3) Law's major virtue nowadays is its imperfection, making impossible absolute legitimacy¹¹, and thus, leaving space to argue and question.
- 4) The method we choose should help both, students and professors, to assume the responsibility of making sense of the law; the responsibility of providing interpretations, and strategies that enlarge the margins of protection of people.
- 5) Assuming that power and that responsibility is important because all legal operators and not only judges participate in the system of guaranty and protection of rights

If methods shape substance¹², then the methodology is a crucial decision when teaching law and clinical legal education has a big chance of becoming an important method... However, we've found many challenges and difficulties in implementing a Clinic program.

New clinics and new clinicians

Being a professor in jurisprudence with virtually no practical experience is hard to coordinate the Human Rights clinic that receives actual clients with real cases. To my credit I have to say that I have always participated and cooperated with NGO's and that my work has always been linked to reality. However, that connection and interest suffice to find problems and NGO's needing the cooperation of the clinic, but was not sufficient by far to even start preparing the solution to a case. So, the most important thing was to find a good team to work with that could be tutors of our students in the different cases. And I did form a great team. I bring here only the experiences of three tutors (out of the many cooperations and help I received) because of their particular position in the clinic, the amount of work they've done and their university status. We're all women under 40 and the only baby in the group was born this past month of May. I think this is interesting, because the profile of our

¹¹ L. FERRAJOLI: *Derechos y garantías, la ley del más débil*, Madrid, Trotta, 1999.

¹² D. L. RHODE: "The politics of paradigms: Gender difference and gender disadvantage", en A. PHILLIPS (ed.): *Feminism and politics, Oxford readings in feminism*, Oxford, New York, Oxford University Press, 1998.

clinicians is pretty much that of women without direct family obligations, giving much of their time to work and pro bono activities linked to their jobs.

C. Azcárraga is associate professor of International private law. For years she has been volunteering at CEAR, an NGO that works with refugees and has been tutoring many cases on migration law. F. Mecó is part-time professor of civil law and part-time lawyer. She has years of experience in court and cases, but also as a professor in the classroom. C. Cabrera is full time lawyer, with no link to the university beyond her participation in the clinical project. As I said, I'm professor of jurisprudence and coordinate the clinic but I have not tutored "direct cases" –only what we call "long term cases".

Their experiences diverge, but they all agree in a couple of things:

1) They all agree that the project itself seemed of interest and that the experience has been very satisfactory:

- "When I first knew about the establishment of a Legal Clinic in our Faculty, I believed that it was a highly-interesting project. ...My overall impression is thus highly positive and I deeply thank the coordinators for this opportunity". C. Azcárraga
- "I engaged with the Clinic because I thought: 'I wish I would have had that opportunity as a law student!'... It has been a lot of work, but very stimulating and I want to continue cooperating in years to come". C. Cabrera.

2) One of the reasons why they think clinical legal education is a good experience is because it helps bridging the gap between theory and practice; between the law we teach in the classroom and the law in action legal operators find once they leave university:

- "I have always considered that the relationship between the University and the social reality, i.e. between theory and practice, is of a crucial importance. There is still at Universities a worrying lack of contact with real problems. It is important for students to learn not only Law and its interpretation, but also its application in practice. This aspect becomes of an outstanding importance to learn how difficult is to adapt what they learned to real problems. It is a

challenge for them –and for us- for two main reasons: firstly, because the legal system does not always resolve every problem, so that they are forced to go beyond the Law to find answers; secondly, because feelings and ethical problems also arise when dealing with cases where students meet personally the clients involved”. C. Azcárraga.

- “... the Clinic added a new factor: the student’s responsibility before a real professional assignment. This change of scenery makes the student’s profile to grow out of its traditional proportion and appear with a more protagonist attitude and the wish to be up to the challenge and solve the case they’re assigned, the will to do a well done job”. F. Meco

This made me think that we share the idea that the education we received, even if it was of quality, was not the kind of education we had in mind or thought that it was what students now needed. We have identified the problem of not having models and feeling insecure about what methods we should use and what did that actually imply. We all thought Clinical legal education could offer us a framework to work in a different way:

- The experiences I’ve had with the students in each case preparation have been diverse. The most positive element might have been the students’ behaviour, as they’ve been more alert, decisive and concerned about a more accurate and reliable presentation of their case in order to solve it. F. Meco
- I believe that the introduction of different ways of teaching within the University is always interesting. New times in Education need new tools to lecture. Secondly, because the Legal Clinic overcomes the concerns related with the lack of contact with social reality which have been highlighted above. The degree of commitment when resolving a case is certainly not the same when the jurist meets the person who is asking for legal assistance. C. Azcárraga

3) A second reason for believing clinics was a good method is the type of relationship students and supervisors develop. As we’ve organised this year’s sessions, students were assigned a case and a tutor and had to meet with their supervisor to organize the research and work. They looked for solutions and came back to a common session for discussion. They take as many time as they need to solve the actual problem (which may be a

problem for the good functioning of the clinic). But this creates a total different relation between students and supervisors as they cooperate in the solution of the case.

- It's been a very enriching experience, as the bond between student and teacher grows stronger: we work together in the solution of a real problem; not something "I" invented and know the right answer... F. Meco
- "The good thing was seeing their development. At first they felt insecure and uneasy but little by little they grew more self-confident, and could ask questions or propose a solution without fearing a bad mark: we were in the same boat". C. Cabrera

As for the problems and challenges, we've found many:

- "Timing and actual functioning was not clear for all. Some students would email you with the solution of a case you had not look upon yet, instead of waiting for the first meeting. I think we need to clarify and simplify the ways and structure for solving each case" C. Cabrera.
- Clients didn't seem to understand that we were not an actual team of lawyers and sometimes pushed us in giving a faster solution. I think that is because students in a way produced that kind of expectation and the need to explain carefully what do we do and how do we deliver results". F. Meco
- I just would like to finish these words with a brief commentary that might help to improve the implementation of the Legal Clinic. I would suggest enhancing the promotion of the project. It is important to reach both lecturers and students to attract people who might be interested in being involved in the experience but do not still know its existence. C. Azcárraga

As a conclusion, we all think it has been a good experience that requires hard work but is worthed. However, we've faced problems and difficulties that we need to address. At our presentation, we would also like to share the opinions of students (still being processed) and conclude with the things we plan to do next year for improving our clinic.