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ISSN 1727-3781



2013 VOLUME 16 No 4

<http://dx.doi.org/10.4314/pelj.v16i4.8>

IMPROVING ACCESS TO JUSTICE THROUGH COMPULSORY STUDENT WORK AT UNIVERSITY LAW CLINICS

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1 The aims of the paper

In this paper an analysis is offered as to compulsory so-called "live client" clinical legal education as part of the LLB. Possible compulsory community service for law graduates as envisaged in the proposed Legal Practice Bill falls beyond the ambit of this paper.¹ These two distinct options could be complementary - for example where post-study community service is provided at a university law clinic through the supervision of student work. However, for the purposes of this paper post-study community service will be excluded. This study will firstly explore the motivating factors which establish the basis for the need to implement a year's compulsory community service during the LLB studies and in the process making clinical legal education compulsory. These include the ways in which law students and graduates may aid in the achievement of access to justice. The research will then focus on what the value of community service is in higher education generally.

In the South African civil justice system many ordinary people cannot afford to use the courts because of the expense involved, or because they are ignorant of their rights.² This is particularly the case in civil as opposed to criminal matters, as legal aid is greatly focused on criminal as opposed to civil matters in this country.³ This paper will consider the role which senior law students may play in rendering *pro bono* work as part of clinical legal education in their LLB studies. In this regard

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¹ These two distinct options have been put forward by other authors. See, for example, Brickhill 2005 *SAJHR* 315.

² McQuoid-Mason 1999 *Windsor YB Access Just* 2.

³ Van As cites various statistics which show that the significant majority of legal aid cases in South Africa are of the criminal variety in Van As 2005 *J Afr L* 54.

particular focus will be directed on the University of KwaZulu-Natal (UKZN), the only university offering law studies in greater Durban.

As to *pro bono* work by students during their LLB, consideration will be given to making clinical legal education a compulsory part of such a student's curriculum.

2 Introductory matters

The South African *Constitution* provides a right of access to courts,⁴ but the value of this right has to be questioned when it comes to the very limited access to free legal services in civil matters for the indigent. McQuoid-Mason pertinently asks "What state and non-governmental mechanisms are available to implement these rights?"⁵ This paper will consider how university law clinics can make *pro bono* legal assistance to its clients by senior students (through clinical legal education) a compulsory component of each LLB student's curriculum and thereby aid improved access to civil justice.⁶ The paper will cite a foreign example (in America) of CLE incorporating community service being used to successfully meet the objective of access to justice.

3 The rationale for the paper's analysis

It has been shown that there is a need for better access to justice⁷ in civil matters as a tool to assist vulnerable residents' access to adequate core socio-economic rights in particular.⁸ It is proposed that a year's community service for law graduates and

⁴ Section 34 of the *Constitution of the Republic of South Africa*, 1996.

⁵ McQuoid-Mason 1999 *Windsor YB Access Just* 4.

⁶ According to the Association of University Legal Aid Institution's 2010 statistics, of 15 responding University law clinics in South Africa, 10 have compulsory clinical legal education and at the remaining five it is elective.

⁷ According to de Klerk: "Social justice has been defined as referring to the fair distribution of health, housing, welfare, education and legal resources in society", quoted in McQuoid-Mason 1999 *Windsor YB Access Just* fn 109.

⁸ Holness 2013 *PER* 154.

increased clinical legal work by law students would play a role in improving access to justice through some form of legal advice and representation.⁹

With regard to clinical legal work, the clinical legal education (CLE) model of the University of KwaZulu-Natal in the eThekweni Metropolitan Area will be considered and comparisons drawn between its clinical legal education model and the institutionalised models of the University of the Free State and to a lesser extent, Rhodes University. When discussing university law clinics this paper's focus is on the legal service provision of university law clinics more than the teaching and learning aspect thereof. However, as has been noted in numerous studies,¹⁰ it is virtually impossible to separate the intrinsically intertwined dual mandates of legal service provision and practical teaching at university law clinics. This study will therefore consider the provision of legal services at university law clinics through the lens, as it were, of CLE. In other words, an intrinsic part of CLE is the provision of legal services to the indigent. Before CLE can be looked at, the author will consider whether or not free civil legal aid should be provided in certain circumstances.

4 Factors to consider as to whether free civil legal aid services should be made available

Section 35 of the *Constitution* provides a more direct right to criminal legal aid in particular circumstances than does section 34's promise of a "fair trial," which applies to civil matters. Nonetheless, our courts' interpretation of factors to consider when granting criminal legal aid can provide useful guidance, it is submitted, as to how section 34 should be interpreted vis-à-vis free legal services in civil matters.

⁹ The latest draft of the Legal Practice Bill (as gazetted on 15 May 2012) makes no mention of compulsory *pro bono* work during the LLB degree (Department of Justice 2012 www.justice.gov.za).

¹⁰ See, for example: Iya 2003 *Third World Legal Studies* 141-160; Bloch and Prasad 2006 *Clin L Rev* 165.

In the pre-constitutional case of *S v Khanyile*, Didcott J identified three factors to be considered in deciding if legal representation would need to be provided:¹¹

- (a) the complexity of the case in fact and in law;
- (b) the personal "equipment" of an accused to fend for himself or herself; and
- (c) the gravity of the case, the nature of the offence alleged, and the possible consequences for the accused if convicted.

It is submitted that the three considerations identified by Didcott J can be appropriately adapted to civil cases embraced by the *Constitution* in section 34; albeit that the decision was handed down in the pre-constitutional era. The first factor, being the complexity of the case, applies *mutatis mutandis* to civil matters. For example, an unopposed divorce, where there are no children of the marriage or assets to be divided, could well be handled by the litigants sans legal representation. This could be contrasted with a complex divorce, involving a dispute as to care of children and division of assets, where the complexities are such in fact and law that legal representation would be highly necessary or advisable. As to the second factor, the ability of litigants to represent themselves, (when made applicable to civil matters), in particular the socio-economic position (including the educational background) of some litigants could make them far more capable of adequately representing themselves than others from a more disadvantaged socio-economic position and having only a limited education.

Apropos the gravity of the matter, the issue is not a question of the offence committed but rather the effect of the civil dispute on the litigants. For example, an application for eviction has considerable consequences for the person or persons

¹¹ *S v Khanyile* 1988 3 SA 795 (N) 815. For a discussion thereof see also McQuoid-Mason 1999 *Windsor YB Access Just* 4. Didcott J's judgment was eventually overruled by the Appeal Court in *S v Rudman: S v Mthwana* 1992 1 SA 343 (AD), which held that the courts should not be able to coerce the government into providing civil legal aid because this could not (held the court) be feasibly implemented, given the financial and human resources constraints existing in South Africa. It is submitted that this *ratio decidendi* should no longer be applicable in the light of the purposive interpretation of s 34 of the *Constitution* outlined above. See also McQuoid-Mason 1992 *SAJHR* 96.

evicted. In such an eviction matter, it is submitted that a lack of legal representation could well result in extremely serious results for an evicted litigant.¹²

McQuoid-Mason asks the question of whether a duty is imposed on the state to provide legal aid or assistance to a person in a civil case who cannot afford it. Interestingly he argues that the answer is probably no due to the lack of an explicit Constitutional duty imposed on the state to provide the services of a legal practitioner to litigants in civil cases.¹³

Legal Aid South Africa (LASA) places considerable limitations on the ambit of civil matters it will consider assisting with.¹⁴ In addition to these preclusions of types of civil matters excluded from Legal Aid South Africa's work in their Legal Aid Guide must be considered the very small proportion of Legal Aid South Africa's work which is civil as opposed to criminal. In the latest available annual report of LASA's work for 2011/2012, 382 125 new criminal matters were accepted by the organisation, compared with just 46 528 new civil matters.¹⁵ Furthermore, Legal Aid South Africa has traditionally not had sufficient funds to provide (civil) legal aid to everybody who

¹² As a result, the Socio-Economic Research Institute (SERI), Centre for Applied Legal Studies, and Legal Resources Centre, to name a few, are all non-profit organisations and registered law clinics that have represented indigent individuals and communities in ground-breaking eviction cases. These cases include, for example, *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC); *Joseph v City of Johannesburg* 2012 4 SA 55 (CC); and *Residents of Joe Slovo Community, Western Cape v Thubelisa Homes (Centre on Housing Rights and Evictions as Amici Curiae)* 2011 7 BCLR 723 (CC) respectively.

¹³ McQuoid-Mason 1999 *Windsor YB Access Just* 3 fn 35.

¹⁴ Legal Aid South Africa 2012 www.legalaid.co.za. See the Guide at para 4.9.1, which notes that, in civil matters, legal aid will not be rendered: (i) in debtors' courts proceedings; (ii) for the administration of an estate or the voluntary surrender of any estate; (iii) in actions for damages on the grounds of defamation, breach of promise, infringement of dignity, invasion of privacy, seduction, adultery and inducing someone to desert or stay away from another's spouse; (iv) in a claim for maintenance and which can be determined by a maintenance court without the assistance of a legal practitioner; (v) in undeserving divorce matters; (vi) for any action which may be instituted in the Small Claims Court or where the amount of the claim does not exceed the jurisdiction of the Small Claims Court by more than 25%; (vii) in a civil appeal unless the Director is satisfied that there are reasonable prospects of the appeal succeeding; (viii) in arbitration, conciliation or any other forms of alternate dispute resolution; (ix) in matters where there is not substantial and identifiable benefit to the client; (x) in matters excluded by the Board from time to time; (xi) in matters where enforcement of an order in favour of the applicant will yield little benefit; (xii) in enquiries in the Children's Court without the prior approval of the Director; and (xiii) for an application to obtain an interdict in respect of the prevention of family violence or harassment as a result of domestic or family disputes, since an interdict in these matters can be obtained without the assistance of a legal practitioner.

¹⁵ Legal Aid South Africa 2012 www.legalaid.co.za 7.

requires it in South Africa.¹⁶ Additional funding would have to be obtained in order to provide legal assistance for human rights and other civil cases, and to establish advice offices for the millions of South Africans who cannot afford the services of a legal practitioner.¹⁷ Van As makes the point that for legal aid to be developed it requires both funding and the political will to implement the developments.¹⁸

In addition to those who qualify for legal aid (be it criminal or civil), there is a broad group - whom Brickhill identifies as the "working poor, lower middle class and parts of the rural population"¹⁹ - who fall through the cracks of the system, as it were. This group of potential civil litigants would not qualify in terms of the means tests of Legal Aid SA or the various law clinics, but would still be unable to afford private legal representation. An expanded service provided by law students at law clinics and/or post-study community service could play a role in meeting this need. The next section deals with how clinical legal education may do this.

5 Clinical legal education at the University of KwaZulu-Natal and elsewhere in South Africa

Maisel notes that:²⁰

Spurred by desires to make the law school experience more educational and relevant for students and to promote equal justice and the rule of law, scholars have devoted considerable attention and resources to creating or expanding clinical legal education.

Yet community service through work at one's university law clinic is not compulsory for many LLB students in South Africa. There is no doubt that as a vocational qualification, an LLB degree should adequately prepare graduates for the world of legal practice. Any failure by the South African LLB curriculum to provide adequate exposure to practical legal skills would be a major shortcoming indeed. This also

¹⁶ McQuoid-Mason 1999 *Windsor YB Access Just* 6.

¹⁷ McQuoid-Mason 1999 *Windsor YB Access Just* 6.

¹⁸ Van As 2005 *Obiter* 188.

¹⁹ Brickhill 2005 *SAJHR* 294.

²⁰ Maisel 2006 *Fordham Int'l LJ* 374.

needs to be seen within the context of universities having an ethical obligation to meaningfully contribute to the social upliftment of the areas in which they exist.²¹

Maisel states that those who support the expansion of clinical legal education in South Africa and elsewhere have sought to achieve up to five different objectives, three related to improving legal education for students and two related to providing assistance to disadvantaged groups.²² These may be summarised as follows:

- i) Legal education is enhanced by having law students experience the socio-economic challenges of the majority of South Africans.²³
- ii) The creation of law clinics and clinical courses inculcates values important to our young constitutional democracy including the need for equal justice for all.²⁴
- iii) CLE involves practical lawyering skills such as case analysis plus confronting students with ethical issues which arise in legal practice.²⁵ De Klerk echoes this and the previous two sentiments by writing that CLE "inculcates in students a spirit of public service and professional responsibility."²⁶ This has the prospect of improving future practitioners' attitude to performing *pro bono* work. McCutcheon submits that whilst most law students will not become public interest lawyers, CLE may still impact upon their "perspectives on their future roles as private legal professionals."²⁷
- iv) Law clinics serve as places for candidate attorneys to perform their mandatory practical training (of one or two years). This opens up entry to the profession to all graduates including those from previously disadvantaged groups.²⁸

²¹ See the University of KwaZulu-Natal Date Unknown www.ukzn.ac.za in this regard.

²² Maisel 2006 *Fordham Int'l LJ* 375.

²³ Maisel 2006 *Fordham Int'l LJ* 375.

²⁴ Maisel 2006 *Fordham Int'l LJ* 375.

²⁵ Maisel 2006 *Fordham Int'l LJ* 375.

²⁶ De Klerk 2005 *SALJ* 937.

²⁷ McCutcheon "University Legal Aid Clinics" 267.

²⁸ Maisel 2006 *Fordham Int'l LJ* 376.

- v) Clinics expand the pool of resources for legal representation accessible to the indigent.²⁹ Legal clinic education programmes thus enable law students to provide legal assistance to persons and groups usually too poor to hire lawyers.³⁰

A good example of a legal system where Maisel's objectives have translated into extensive assistance to the indigent is the United States of America. The American Bar Association ("the ABA") and judges in the United States have long supported clinical legal education because clinical programmes play an important role in ensuring that access to the courts - a precondition for access to justice - will not be limited to only those who can afford to hire lawyers.³¹ Because of the quite extensive functions performed by American students in clinical legal education, it is submitted that reference thereto is also relevant both in so far as South African clinical legal education and post-university community service in South Africa are concerned. The impact of clinical legal education in providing access to justice for those unable to afford lawyers has been significant in the United States. Thousands of law students taking in-house and externship clinical courses each year join the mere 5,000 to 6,000 lawyers working for organisations that represent the 45 million Americans who are so poor that they qualify for civil legal aid.³² In addition to providing access to the courts for clients and learning lawyering skills, law students also learn legal ethics rules and the norms of the legal profession first-hand in their clinical courses.³³

Maisel notes that despite its potential to help meet the above and other vital objectives, the clinical law movement still lacks sufficient support in most countries, including South Africa.³⁴ Among other factors, law school clinics continue to have to battle to obtain financial resources, often from unreliable donor funding, and clinical staff tend not to enjoy the same compensation, status, or job security as their

²⁹ Maisel 2006 *Fordham Int'l LJ* 376.

³⁰ US Department of State 2004 *IIP Electronic Journals* 2.

³¹ US Department of State 2004 *IIP Electronic Journals* 2.

³² US Department of State 2004 *IIP Electronic Journals* 2.

³³ US Department of State 2004 *IIP Electronic Journals* 2.

³⁴ Maisel 2006 *Fordham Int'l LJ* 377.

"normal" law school or faculty academic colleagues.³⁵ It is argued that the point made by van As (cited earlier in this paper) that legal aid requires funding and political will applies on a more micro-level to the promotion of law clinics within a university.³⁶

Now that the American example has been considered as has the challenges for university law clinics, it becomes appropriate to consider specific examples of CLE in South Africa. The paragraphs below will compare the compulsory clinical legal education at the University of the Free State with the voluntary nature of such training at UKZN. The University of KwaZulu-Natal has a fully functional law clinic staffed by three attorneys, two administrators and between four and six candidate attorneys.³⁷ Final-year LLB students have the opportunity of working at the clinic for a period of one year as part of a public interest elective, "Clinical Law". Students are given the opportunity of choosing whether to register for Clinical Law and hence working at the law clinic or choosing one of two other alternatives; "Teaching Legal Skills" or "Street Law".³⁸ Of the total number of final year registered students for LLB (252), 72 were enrolled for Clinical Law in 2012.³⁹ These students assisted approximately 200 members of the public through an initial consultation with them. It is apparent from these figures that a relatively low percentage of final-year law students choose to work in the Law Clinic. It is submitted that the legal service delivery potential of the UKZN Law Clinic would unquestionably be improved were clinical legal education (through the Clinical Law course) to be compulsory for all final-year law students at the institution. This is one of the answers to the question asked by De Klerk about University law clinics: "to what extent is this resource being exploited to its full capacity?"⁴⁰ However, as highlighted by Brickhill, one cannot

³⁵ Maisel 2006 *Fordham Int'l LJ* 377. See also McDiarmid 1990 *NY L Sch L Rev* 239. See generally Gilbert "Report on the Status of University Law Clinics".

³⁶ Van As 2005 *Obiter* 188.

³⁷ At 30 November 2012.

³⁸ It would be amiss not to note the community outreach work conducted as part of the Street Law course. For example, Street Law provides basic rights awareness training at schools, hospitals and prisons. See Street Law Date Unknown www.streetlaw.org.za. However, this work must be contrasted with what are essentially lawyering skills taught and learnt in Clinical Law.

³⁹ Figures obtained from UKZN Law School Office Manager, Ms R Amod, on 28 November 2012. In 2013 this figure was somewhat higher at 99 students.

⁴⁰ De Klerk 2005 *SALJ* 939.

appropriately make work at a university law clinic a compulsory element of the LLB without ensuring that there is a reasonable supervisor-to-student ratio.⁴¹ Provided sufficient supervision is made available, an increased number of students would improve the capacity of university law clinics to meet their civil legal aid mandate.⁴²

The voluntary nature of clinical legal education at UKZN can be contrasted with the institutionalised community service required of all final year law students at the University of the Free State,⁴³ as part of a course called "Legal Practice 4". A similar model to the University of the Free State exists at Rhodes University where compulsory work at the Law Clinic takes place in the final year of the LLB in a course also called "Legal Practice".⁴⁴ What follows below is a discussion of advantages and disadvantages of making clinical legal education a compulsory part of the LLB degree. Through this discussion the civil legal aid service role of any university law clinic in South Africa will be a recurrent theme.

Swanepoel and Bezuidenhout identify as general challenges facing university law clinics financial sustainability, large student numbers and limited training time in a student's curriculum.⁴⁵ It is appropriate to discuss each of these challenges in turn, specifically in so far as they apply to UKZN. As to financial sustainability, UKZN Law Clinic relies on a grant of R 210,000 from the Attorneys' Fidelity Fund per year. The University's contribution to the Law Clinic's operations is limited to the staffing costs of two attorneys and one administrator plus the premises occupied by the law clinic. An increased number of students working in the law clinic allied with increased legal service provision will unquestionably lead to higher running costs when it comes to regular expenses such as telephone, fax, printing and photocopies and will require more attorneys to be appointed to fulfil the supervisory function. As to large student numbers, the current UKZN Clinical Law module requires quite intensive supervised

⁴¹ Brickhill 2005 *SAJHR* 316.

⁴² Brickhill 2005 *SAJHR* 316.

⁴³ See the Policy Document on the Institutionalisation of Community Service at the University of the Free State at University (Free State Date Unknown ufs.ac.za).

⁴⁴ Rhodes University Date Unknown www.ru.ac.za.

⁴⁵ Swanepoel and Bezuidenhout 2012 *De Jure* 46. This paper does not attempt to analyse community service learning; instead, community service alone is considered.

practical work in the various legal service areas of the Law Clinic.⁴⁶ It is clearly far easier and more manageable to have fewer than 75 students in this process rather than over 250 when there are the same number of supervising attorneys for both these class sizes with the same amount of supervision per student. Finally, the University teaching year is limited to 26 weeks.⁴⁷ This constrains the amount of training and practical legal work that students are able to be exposed to.

Notwithstanding the aforementioned challenges of having compulsory clinical legal education at UKZN, there would also be a number of advantages from such an arrangement. As to funding, increased student numbers would add weight to any argument for an increased funding contribution from the University to the Law Clinic's operations. Increased student numbers would have the potential to increase the Law Clinic's legal service delivery output. From the perspective of a holistic legal education it is strongly argued that exposure to real life legal problems has great potential to improve the readiness for legal practice of any graduate from the University.⁴⁸ This point is made on the premise that the "live client" model of teaching in the clinical legal education sphere is adopted. Swanepoel and Bezuidenhout refer to this as "interactive learning."⁴⁹ Such a model can be contrasted with various types of simulation and the like. Furthermore, compulsory community service through work of a law clinic has the added advantage of opening students' eyes to the considerable role which the law may play as a vehicle for improved social change amongst the poorest and most marginalised members of society; in essence fanning the social conscience of the lawyers of the future. It is undoubtedly the case that increased student numbers and the limited duration of the academic year make an intensive hands-on course like Clinical Law challenging to teach. However, there are ways around such challenges. For example, the course

⁴⁶ Detail on the UKZN LLB 4 course, Clinical Law, and the Law School rule book / calendar (University of KwaZulu-Natal 2012 law.ukzn.ac.za).

⁴⁷ University of KwaZulu-Natal 2012 law.ukzn.ac.za.

⁴⁸ For an explanation of different forms of clinical legal education teaching, see Barnhizer 1979 *J Leg Ed* 67.

⁴⁹ Swanepoel and Bezuidenhout 2012 *De Jure* 58.

may be split over two years with some students working in the law clinic in their third year and others in their final year of their LLB.⁵⁰

6 Role of university law clinics in improving access to justice

The UKZN Law Clinic has significant experience as a legal aid service provider for the indigent⁵¹ but is very dependent on donor funding for this work to be continued and expanded. Solutions to the problem of lack of funding are numerous and interrelated. The ideal solution would be for the UKZN Law Clinic's budget to be mainstreamed into the UKZN Law School budget so as to no longer be dependent on donor funding. The alternative is to continue to seek alternative donor funding for particular projects.⁵²

University law clinics - like that of UKZN - can play a pivotal role in acting as a conduit between needy members of society and the private profession providing *pro bono* work to such clients. As De Klerk notes, law clinics are able to screen clients and formulate "*pro bono* briefs" for private lawyers.⁵³ *Pro bono* could become a new focus for many law clinics in relation to access to justice, whilst at the same time facilitating expanded clinical education programs.⁵⁴

In South Africa, where university law clinic students cannot represent clients in the courts, they can nevertheless fulfill crucial legal functions in numerous areas where representation is not required - notably legal research and advice.⁵⁵ Kuppan astutely defines legal aid as more than legal representation to include training and furnishing of legal advice.⁵⁶ University law clinics can play a crucial role in focusing legal

⁵⁰ This is the case at Rhodes University. See Rhodes University Date Unknown www.ru.ac.za.

⁵¹ The UKZN Law Clinic was established in 1973 as one of the first university law clinics in South Africa. Maisel 2006 *Fordham Int'l LJ* 377.

⁵² Examples of the projects that have had external international donors in the last 5 years are the HIV/Aids Project, the Family Law Project and the Social Justice Project (University of KwaZulu-Natal 2012 law.ukzn.ac.za).

⁵³ De Klerk 2005 *SALJ* 945.

⁵⁴ De Klerk 2005 *SALJ* 949.

⁵⁵ Association of University Legal Aid Institutions of South Africa 2003 www.opensocietyfoundations.org.

⁵⁶ Kuppan "Legal Aid" 133.

assistance on the rights of marginalised or vulnerable groups, such as ethnic minorities, refugees, children, prisoners and women. Specialisation allows clinics to tackle systemic deficiencies in the delivery of justice, while at the same time building the expertise of students in a particular area of law.⁵⁷ McQuoid-Mason states that law students can play a valuable role in assisting indigent members of the community in satisfying some of their needs by engaging with the communities in service programs.⁵⁸ In an ideal situation, the combined legal aid efforts should mirror the real needs of its main beneficiaries, the poor and marginalised which, in turn, should be reflective of the demographic distribution of poverty, unemployment and other factors affecting society.⁵⁹

It has been argued that a certain amount of *pro bono* work by law students in South Africa should be a prerequisite for graduation.⁶⁰ It is most obvious for such *pro bono* work to be channelled through CLE. An illustration of this concept is reflected in the graduation requirements of Tulane Law School in the United States of America. In September 1987, Tulane Law School became the first US law school to require its students to perform community service in order to graduate. Each student had to complete a minimum of 30 hours of legal service on behalf of indigent clients in the New Orleans Metropolitan Area or alternatively during their vacation periods at the students' home town or summer community. The required hours are ungraded, but appear on the students' academic transcript as a "*pro bono* credit". Although the implementation of the programme is significantly different from the compulsory community service currently under speculation its resolve to social injustices is on par with current objectives. The decision to begin the *pro bono* program grew out of concern for the unmet legal needs of the poor, as well as concern for the educational enrichment of law students. The essential premise of the programme is the "trickle-up" theory of moral obligation, an ideal way to shape attorneys' attitudes from the ground up. This instills a sense of responsibility within the law students before becoming members of the bar. Drawing upon this, Tulane graduates should

⁵⁷ *Supra* at 4.

⁵⁸ McQuoid-Mason "Teaching Social Justice" 5.

⁵⁹ Bodenstein "Role of University-Based Law Clinics".

⁶⁰ Brickhill 2005 *SAJHR* 315.

be more willing to seek *pro bono* opportunities in their law practices and make them more confident in their ability to provide assistance to those who desperately need it.⁶¹

The concept of *pro bono* work during the LLB forming a requirement for registration as a legal practitioner was reflected in section 13 of a previous draft of the Legal Practice Bill. It is a notable omission from the latest draft of the Legal Practice Bill, where there is no mention of unremunerated practical legal training. Section 13 stipulated one of the requirements being that a person eligible for registration should have completed, during the course of study for the degree, a period of 200 hours of unremunerated practical legal training. This involves the delivery of, or assistance with the delivery of at least 100 hours of legal services which would be in the nature of community service. A likely positive spin-off of the completion of such community service would be an increased awareness in students of the need to assist the community, allied with improved awareness in the community of their legal rights.⁶² This may in turn lead to a sense of duty within students who have been exposed to the needs within the community and feel compelled to do something about it especially if it is necessary for their qualification. Already a nationwide society promoting *pro bono* work by law students, *Students for Law and Social Justice*, exists. Their aim is "to transform legal education and access to justice" and (of relevance to this research) to "provide opportunities for legal graduates to engage in public interest legal work before and after graduation".⁶³ It would therefore be very possible to tap into this resource in order to provide *pro bono* opportunities for law students.

McQuoid-Mason summarises the advantages of community service by law students and graduates as follows: he says there are two important advantages. Firstly, there is the opportunity to help the disadvantaged and indigent members of the community obtain what is due to them. Secondly, students receive theoretical and practical exposure to the social justice issues of the day - something which is vitally

⁶¹ Tulane University Date Unknown www.law.tulane.edu.

⁶² Perold and Omar *Community Service* 1.

⁶³ Students for Law and Social Justice Date Unknown www.slsj.org.

important and which is not possible to obtain in a regular black-letter law course, which the majority of the courses at university are.⁶⁴ Other possible advantages are that by taking part in the programme the graduated student will develop the skills necessary to be an efficient practitioner and in this way supplement the shortcomings of the LLB degree, which according to many law firms are obvious.⁶⁵ Another advantage is that the community service programme, if applied prior to the graduate entering the job market, would extend length of time in which the student could search for articles of clerkship. A further possible advantage is that the graduate will be working in a predominantly social justice context and in that way build a library of contacts who operate within the social justice context, effectively broadening the social justice network and awareness.

7 Further recommendations and conclusions

Various recommendations have already been made in the course of this paper. Some of the further recommendations and conclusions which follow relate to how a compulsory clinical programme should be introduced whilst others are alternatives or variations on such a development.

Firstly, many university law faculties have legal aid clinics or street law programmes, but students are not always awarded academic recognition for such programmes. Such academic credit is called for.⁶⁶

Secondly, lessons may be learnt from the externship and internship possibilities in the USA for law students.⁶⁷ In externship programmes, which form a part of their

⁶⁴ McQuoid-Mason 1999 *Windsor YB Access Just* 4.

⁶⁵ This has been substantiated by UKZN implementing the requirement (through a supplementary course) that all students have a certain level of mathematical skill. The implementation of this skills training is based on an inadequacy complained of by firms of attorneys accepting candidate attorneys (University of KwaZulu-Natal 2012 law.ukzn.ac.za).

⁶⁶ This type of recognition is recommended by McQuoid-Mason. McQuoid-Mason states that at present only a few of the 17 law schools involved in the Street Law programme give academic credit for Street Law work, and suggests that students deserve to be rewarded academically for their efforts in respect of these programmes. McQuoid-Mason 1999 *Windsor YB Access Just* 6.

⁶⁷ An externship offers experiential learning opportunities where a placement in a legal NGO or the like forms part of a credit towards a degree. An internship is not part of a particular academic

law degree requirements, students provide free legal services either to a law clinic or legal NGO or to the Department of Justice by providing research assistance to a judge or magistrate. This plays a big role in conscientising the students to social justice. Such opportunities could be offered within our own justice and NGO system. The externship option is also recommended as a cost-effective alternative to an in-house clinical course.

Finally, a further recommendation would be for the duration of post-LLB community service to be reduced according to the number of hours' community service already achieved during the LLB degree. This recommendation is made on the assumption that the Legal Practice Bill's community service provisions is passed into law.⁶⁸

In conclusion, this paper has shown that university law clinics have a positive role to play in promoting improved access to justice for all. However, to fully harness the legal service provision potential of these clinics, it is submitted that CLE - through work at university law clinics - should be a compulsory, credit-earning course for graduation with the LLB degree. However, university law clinics require adequate resourcing, in terms of financial and other logistical backing from their universities and adequate supervisory capacity for compulsory CLE to work properly.

course. Internships can be said to be unpaid work through which students gain experience in a given field. A student in an externship receives academic credit for his/her unpaid legal work and therefore must meet a series of requirements set by a law school and the legal profession. American University Washington School of Law Date Unknown www.wcl.american.edu.

⁶⁸ For the latest draft of the Legal Practice Bill see Department of Justice 2012 www.justice.gov.za.

Bibliography

Barnhizer 1979 *J Leg Ed*

Barnhizer DR "The clinical method of instruction: its theory and implementation" 1979 *J Leg Ed* 67-148

Bloch and Prasad 2006 *Clin L Rev*

Bloch FS and Prasad MRK "Institutionalizing a social justice mission for clinical legal education: cross-national currents from India and the United States" 2006 *Clin L Rev* 165-212

Bodenstein "Role of University-Based Law Clinics"

Bodenstein J "The Role of University-Based Law Clinics in the Provision of Legal Aid in South Africa" (Unpublished paper delivered at the ILAG Conference Antwerp 8 June 2007)

Brickhill 2005 *SAJHR*

Brickhill J "The right to a fair civil trial: the duties of lawyers and law students to act *pro bono*" 2005 *SAJHR* 293-322

De Klerk 2005 *SALJ*

De Klerk W "University Law Clinics in South Africa" 2005 *SALJ* 929-950

Gilbert "Report on the Status of University Law Clinics"

Gilbert MS "Report on the Status of University Law Clinics in South Africa" (Unpublished report, on file with The Ford Foundation, South Africa, Namibia Office 2003)

Greenbaum 2012 *De Jure*

Greenbaum L "Experiencing the South African undergraduate law curriculum" 2012 *De Jure* 104-124

Holness 2013 *PER*

Holness D "Recent Developments in the Provision of Pro Bono Legal Services by Attorneys in South Africa" 2013 16(1) *PER* 129-164

Iya 2003 *Third World Legal Studies*

Iya PF "From Lecture Room to Practice: Addressing the Challenges of Reconstructing and Regulating Legal Education and Legal Practice in the New South Africa" 2003 *Third World Legal Studies* 141-160

Kuppan "Legal Aid"

Kuppan G "Legal Aid" in Olivier MP *et al* (eds) *The Extension of Social Security Protection in South Africa: A Legal Query* (Siber Ink Cape Town 2001) 1 - 30

Maisel 2006 *Fordham Int'l LJ*

Maisel P "Expanding and Sustaining Clinical Legal Education in Developing Countries: What We Can Learn From South Africa" 2006 *Fordham Int'l LJ* 374-420

McCutcheon "University Legal Aid Clinics"

McCutcheon A "University Legal Aid Clinics: A Growing International Presence with Manifold Benefits" in McClymont S and Golub M (eds) *Many Roads to Justice: The Law-related Work of the Foundation Grantees Around the World* (Ford Foundation New York 2000) 267-282

McDiarmid 1990 *NY L Sch L Rev*

McDiarmid MA "What's Going on Down There in the Basement: In-House Clinics Expand Their Beachhead" 1990 *NY L Sch L Rev* 239-291

McQuoid-Mason 1992 *SAJHR*

McQuoid-Mason D "*Rudman* and the Right to Counsel: Is it Feasible to Implement *Khanyile*?" 1992 *SAJHR* 96-113

McQuoid-Mason 1999 *Windsor YB Access Just*

McQuoid-Mason D "Access to Justice in South Africa" 1999 *Windsor YB Access Just* 1-16

McQuoid-Mason "Teaching Social Justice"

McQuoid-Mason D "Teaching Social Justice to Law Students through Community Service- The South African Experience" in Iya P, Rembe NS and Baloro J (eds) *Transforming South African Universities: Capacity Building for Historically Black Universities: Challenges and Strategies for the Next Millennium* (Africa Institute of South Africa Pretoria 2000) 1-10

Perold and Omar *Community Service*

Perold H and Omar R *Community Service in Higher Education: A Concept Paper* (Joint Education Trust Johannesburg 1997)

Swanepoel and Bezuidenhout 2012 *De Jure*

Swanepoel I and Bezuidenhout N "The institutionalisation of community service and community service learning at South African tertiary institutions: specific reference to the role of the University law clinics" 2012 *De Jure* 46-60

US Department of State 2004 *IIP Electronic Journals*

US Department of State "Issues of Democracy. Access to the courts, Equal Justice for All" 2004 9(2) *IIP Electronic Journals* 2-35

Van As 2005 *Obiter*

Van As H "Taking legal aid to the people: unleashing local potential in South Africa" 2005 *Obiter* 187-206

Van As 2005 *J Afr L*

Van As H "Legal Aid in South Africa: making justice reality" 2005 *J Afr L* 54-72

Register of legislation

Constitution of the Republic of South Africa, 1996

Register of government publications

Canadian National Council of Welfare Report on Legal Aid (1995)

Register of cases

City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd 2012 2 SA 104 (CC)

Joseph v City of Johannesburg 2012 4 SA 55 (CC)

Residents of Joe Slovo Community, Western Cape v Thubelisa Homes (Centre on Housing Rights and Evictions as Amici Curiae) 2011 7 BCLR 723 (CC)

S v Khanyile 1988 3 SA 795 (N)

S v Rudman: S v Mthwana 1992 1 SA 343 (AD)

Register of internet sources

American University Washington School of Law Date Unknown
www.wcl.american.edu American University Washington School of Law Date
 Unknown *Frequently Asked Question* www.wcl.american.edu/externship/faq.cfm#1 [date of use 11 Feb 2013]

Association of University Legal Aid Institutions of South Africa 2003
www.opensocietyfoundations.org Association of University Legal Aid
 Institutions of South Africa 2003 *Combining Learning and Legal Aid : Clinics in
 Africa - Report on the First All-Africa, Colloquium on Clinical Legal Education,
 23-28 June 2003* www.opensocietyfoundations.org/sites/default/files/southafrica_20030628.pdf [date of use 2 Dec 2012]

Department of Justice 2012 www.justice.gov.za

Department of Justice 2012 *Draft South African Legal Practice Bill*
www.justice.gov.za/legislation/bills/2012_legal-practice-bill.pdf [date of use
24 Jul 2013]

Legal Aid South Africa 2012 www.legalaid.co.za

Legal Aid South Africa 2012 *Legal Aid Guide* www.legalaid.co.za [date of use
20 Mar 2013]

Rhodes University Date Unknown www.ru.ac.za

Rhodes University Date Unknown *Law Degree Structure* [www.ru.ac.za/
orientationgateway/departmentsandfaculties/courseandcurriculum/law/](http://www.ru.ac.za/orientationgateway/departmentsandfaculties/courseandcurriculum/law/) [date
of use 31 Dec 2012]

Street Law Date Unknown www.streetlaw.org.za

Street Law Date Unknown *About Us* [www.streetlaw.org.za/index.php/about-
us/about-us](http://www.streetlaw.org.za/index.php/about-us/about-us) [date of use 3 Jan 2013]

Students for Law and Social Justice Date Unknown www.slsj.org

Students for Law and Social Justice Date Unknown *About Page*
www.slsj.org/about/ [date of use 10 Feb 2013]

Tulane University Date Unknown www.law.tulane.edu

Tulane University Date Unknown *Home Page* www.law.tulane.edu [date of
use 9 Feb 2013]

University of KwaZulu-Natal Date Unknown www.ukzn.ac.za

University of KwaZulu-Natal Date Unknown *Transformation Charter*
www.ukzn.ac.za [date of use 30 Nov 2012]

University of KwaZulu-Natal 2012 law.ukzn.ac.za

University of KwaZulu-Natal Date Unknown *Bachelor of Laws*
 law.ukzn.ac.za/UndergraduateStudies/BachelorOfLaws.aspx [date of use 31
 Dec 2012]

University of the Free State Date Unknown ufs.ac.za

University of the Free State Date Unknown *Policy Document on the*
Institutionalisation of Community Service www.ufs.ac.za/content.aspx?id=57
 [date of use 2 Dec 2012]

List of abbreviations

ABA	American Bar Association
CLE	Clinical legal education
Clin L Rev	Clinical Law Review
Fordham LJ	Fordham International Law Journal
J Afr L	Journal of African Law
J Leg Ed	Journal of Legal Education
LASA	Legal Aid South Africa
NY L Sch L Rev	New York Law School Law Review
PER	Potchefstroom Electronic Law Journal
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
UKZN	University of KwaZulu-Natal
Windsor YB Access Just	Windsor Yearbook of Access to Justice

IMPROVING ACCESS TO JUSTICE THROUGH COMPULSORY STUDENT WORK AT UNIVERSITY LAW CLINICS

D Holness*

SUMMARY

In this paper an analysis is offered of compulsory so-called "live client" clinical legal education as part of the LLB as a means of improving access to justice for the indigent. This study first explores the factors which motivate which the establishment of a year's compulsory community service during the LLB studies, and making clinical legal education compulsory. The motivation includes inducing law students and graduates to aid in the achievement of access to justice. The research then focuses on what the value of community service is in higher education generally.

In the South African civil justice system many ordinary people cannot afford to use the courts because of the expense involved, or because they are ignorant of their rights. This is particularly the case in civil as opposed to criminal matters, as legal aid is more frequently focused on criminal than on civil matters in this country. This paper will consider the role which senior law students may play in rendering *pro bono* work as part of clinical legal education in their LLB studies. In this regard particular focus will be made on the University of KwaZulu-Natal (UKZN), the only university offering law studies in greater Durban.

As for *pro bono* work by students during their LLB, consideration could be given to making clinical legal education a compulsory part of such students' curricula. Possible compulsory community service for law graduates (ie post-LLB) as envisaged in the proposed Legal Practice Bill falls beyond the ambit of this paper.

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KEYWORDS: Legal service delivery; indigent; attorneys; pro bono; civil matters; constitutional; South Africa; University of KwaZulu-Natal; LLB; socio-economic; access to justice; foreign jurisdictions; voluntary; mandatory; legal aid; free legal services.