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EVOLVING JURISPRUDENCE IN CLINICAL LEGAL EDUCATION – A CONTEMPORARY STUDY IN THEORY AND PRACTICE

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*Tell me, and I will forget. Show me, and I may remember. Involve me,
and I will understand.* – Confucius, circa 450 BC¹

1. INTRODUCTION

In concept and practice, clinical legal education is widely affirmed by its global success.² As R.J. Wilson puts it, clinical legal education is an “...ongoing and growing revolution that is assaulting the deepest traditions of the legal academy.”³ It is also asserted by others that “the trend across the globe has shifted from traditional legal education to justice education which is inspired by justice

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¹ The author cannot be completely sure of the provenance of this famous adage widely attributed to Confucius. However, a slightly different rendition is quoted in *A Student Guide to Clinical Legal Education and Pro Bono*, K. Kerrigan and V. Murray (editors), Palgrave Macmillan (2011) P. 5 – “I hear and I forget. I see and I remember. I do and I understand.”

² See generally F. Bloch, ‘Access to Justice and the Global Clinical Movement’ (2008) *Wash UJL & Policy*. Also,

F. Bloch, (ed.) *The Global Clinical Movement: Educating Lawyers for Social Justice*, OUP (2011) See also, However, it is also the case that this success is not complete, given the tenacity of entrenched nature of traditional law teaching and learning methods in many law schools where the clinical legal practitioner is the exception.

³ R.J. Wilson, *The Global Evolution of Clinical Legal Education: More than Method*, Cambridge Univ. Press (2018) p.1

education campaigns.”⁴ This success is however marked by the absence of a coherent and articulate jurisprudence that unifies the essence of clinical legal education. This may be largely due to the sheer diversity of forms, conceptualisations and justifications of what has become a movement in recent decades. This globalised movement presents as a complexity of diverse thinking and practice.⁵ Nevertheless, upon careful examination, it becomes evident that there are many unifying strands of thinking underpinning clinical legal education that make it possible to theorise clinical legal education whether as pedagogy or legal philosophy. The ambition of this article therefore is to seek to give jurisprudential expression to clinical legal education as an articulate but integral category of legal philosophy. The author will draw on a unique clinical project based in the London Borough of Ealing that has successfully partnered the local law school and the principal human rights and equalities body in the borough to create the Community Advice Programme (CAP) as a substantial expression of the essence of clinical legal education in a modern globalised world. The essay will firstly offer a brief contemporary contextual framework of analysis which reveals a significant level of intersectionality in many parts of the world between clinical legal education and practice and other social, economic, political and cultural

⁴ O.S. Adedokun-Odeyemi, ‘Role of Clinical Legal Education in Social Justice in Nigeria’ in *Asian Journal of Clinical Legal Education* 5 (1) 88-98 (2017) p.88

⁵ For a comprehensive study of diverse global experiences of clinical legal education see R. J. Wilson, *op. cit.* Part II, p. 154

developments that challenge traditional models of clinical legal education.⁶ The article will then examine clinical legal education in theory and practice and conclude with reflections on an evolving clinical jurisprudence. In undertaking this task, it is important to acknowledge at the outset the particularity of clinical experience as conditioned by the realities of its environment and the objective character of the society even within certain shared global realities. Thus, the global reader is encouraged to accommodate diverse experience of clinical practice in the developing world for example, where poverty and conflict are the necessary backdrop for most clinicians and where clinical legal education is unlikely to be about simply improving legal skills training. Thus, an inner city experience in West London, for example, defined as it is by the comingling of migration and refugee issues, poverty and affluence and significant established minority communities, is confronted by issues relating to community cohesion and integration, extremist ideology and violence, hate and honour crimes, etc., that are not present elsewhere.⁷

2. THE CONTEXT

Contemporary global developments have had severe impacts on social cohesion in the modern diverse European state.⁸ Community cohesion and integration have

⁶ See generally, S. Gurpur & R. Rautdesai, *Revisiting Legal Education for Human Development: Best Practices in South Asia*, 157 *Procedia Soc. Behav. Sci.* pp. 254 and 255 (2014).

⁷ See the following sample of London Borough profiles:

⁸ Europe has experienced an unprecedented refugee crisis originating from wars, political repression and poverty mainly in North Africa and the Middle East. This crisis has had a

been strained by extremist violence, ideology and reactions to these.⁹ Profound social, economic and political consequences have convulsed much of Europe in recent times, including the referendum decision on June 23rd 2016 by the United Kingdom to leave the European Union and the terrorist suicide bombing at a pop concert for mainly children and young people that killed 22 people on 22nd May 2017 in Manchester, as well as other equally dastardly acts of extremist violence across Europe.¹⁰ These developments are themselves linked to the broader global turbulence and civil strife in parts of the Middle East, North Africa and Asia¹¹. In turn, there has also been a blowback expressed by the general anti-migration/refugee sentiment across Europe and consequent political shift to the right. Clinical legal practice in many places finds itself, perhaps unexpectedly, at the heart of the legal and social consequences of these developments in many European practices¹² especially in areas such as immigration, its backlash and hate

profound impact on Europe. See a BBC analysis at <http://www.bbc.co.uk/news/world-europe-34131911> See also, a social cohesion impact of the refugee influx to Germany in recent years by USAID titled: 'Refugees – Germany: A Quest for Social Cohesion' , <https://eccnetwork.net/refugees-germany-quest-social-cohesion/>

⁹ See, for example, the European Union Agency for Fundamental Rights (FRA) fact sheet on the rise in hate crime incidents in Europe: <https://fra.europa.eu/sites/default/files/fra-factsheet>

¹⁰ Such as the latest mass attack on London Bridge by a rampaging van and indiscriminate stabbings on 3rd June 2017 in which, at the time of writing, 8 people had been killed.

¹¹ For example, the influx of over 1 million mainly Syrian refugees into Germany between 2015 and 2016 is now acknowledged to be the main reason for the loss of Chancellor Angela Merkel's once dominant political status in the German parliamentary election of 2018. See ABC News at <http://www.abc.net.au/news/2018-03-14/angela-merkel-elected-for-fourth-term-as-german-chancellor/9548896>

¹² Ealing Equality Council, now West London Equality Centre (and partner of CAP) has recently received significant funding from the UK Lottery Fund to undertake hate crime prevention work. The project is recruiting 30 students per year on CAP/EEC placement to participate in the delivery of the project which involves working with and advising victims of hate crime. This is an example of the experience of intersectionality that this particular clinical legal education project is connected to.

crime, in addition to the traditional challenge of identifying unmet legal need and supporting rights and social provision for some of the most vulnerable individuals and marginalised communities through student practice.¹³ In this role, it is contended that the law clinic has become, objectively, politicised and is making a significant but largely unarticulated contribution to the evolving jurisprudence of clinical legal education against the backdrop of the consequential effects on rights and citizenship of the troubles indicated above.¹⁴ This essay seeks to explore the central role that clinical legal education and practice have assumed in some communities in dealing with community legal need in the context of the United Kingdom government's policy of austerity that includes the drastic reduction in resources for the provision of legal services and access to justice¹⁵, in addition to their educational impacts. Clinical legal education as a socio-educational response to extant reality cannot, by definition, be politically neutral as clinical programmes are designed and therefore purposeful beyond skills training. Thus, as Brayne *et al* point out in the American context, "the take-off point for the US clinical movement was the anti-poverty and civil rights campaigns of the early 1960s...(and observe of contemporary times that)...many US clinics have taken up a welfare brief serving the needs of the local minority groups and the indigent

¹³ In the London Borough of Ealing where CAP is based, socio-economic inequality is so stark that the borough has been branded as a 'poverty hotspot' by the UK-based New Policy Institute in a report of a study a few years ago: <https://www.getwestlondon.co.uk/incoming/ealing-one-worst-boroughs-poverty-10524563>

¹⁴ These matters will be illustrated by some examples from the work of CAP later in this article.

¹⁵ See generally, Chapter 15, Quinn and Elliot, *English Legal System*, Pearson (2017) p.306. Also, Access to Justice Act 1993.

population.”¹⁶ Indeed, according to Jon Dubin, clinical legal education promotes the essentials of social justice primarily in three ways: 1. by promoting access to justice for the underprivileged through representing them in various forums; 2. by exposing law students to the responsibility for public service or pro bono work; and 3. by creating an understanding of the relationship between law and social justice among the law students.¹⁷ “All three ways have some effect on the learning of a law student about social justice values because the unique experience that is gained cannot be properly explained by the student’s prior understanding of law and legal procedure.⁴¹ The student is required to properly follow up on a process that can help him to think critically beyond any beliefs, values and norms.”¹⁸

The article exposes the work of a unique collaborative clinical project based at the University of West London and delivered through a community partnership between Ealing Equality Council and the Community Advice Programme in Ealing. The bringing together of equality and human rights, diversity and community cohesion in the practice of the law clinic has energised and challenged clinical legal practice, the clinician, the academic and student alike, as well as local stakeholders in West London such as local authorities, the Quakers and the police. This evolution at the same time, provides the opportunity for, and the basis to, found an underlying clinical jurisprudence upon.

¹⁶ H. Brayne, N. Duncan and R. Grimes, *Clinical Legal Education: Active Learning in your Law School*, Blackstone Press (1998) pp.10-11

¹⁷ See Jon C. Dubin, *Clinical Design for Social Justice Imperatives* 51 S.M.U. L. Rev. 1461, 1476 (1997–98).

¹⁸ Lasky and Sarker, *Asian Journal of Clinical Legal Education* 5(1) 76-87, (2017) p 80

3. CLINICAL LEGAL EDUCATION: PROVENANCE AND PURPOSE

Clinical legal education as an idea, emerged as a pedagogical challenge to the teaching and learning of law in the United States reaching as far back as the 1930s, if not earlier.¹⁹ According to McCrimmon *et al*, “an early iteration of clinical legal education was that conceptualised by the American academic and legal philosopher and jurist, Jerome Frank in the 1930s.”²⁰ As the authors note, although Frank was not the first to agitate for change in the method of teaching law in American law schools and taking inspiration from the clinical method of medical school, he was certainly an early advocate of clinical legal education and perhaps of equal significance, he was also a leading light in the American legal realist philosophical movement.²¹ Implicit in the contribution of Frank therefore lies an unexpressed realist jurisprudence which, it is submitted, contradicts the usual presentation of clinical legal education simply as methodology or legal service provision. The research evidence shows that there was a revolutionary impetus through the 1960s that saw the “establishment of law clinics in a number of law schools.”²² These early clinics “...focused on legal service delivery, usually to disadvantaged members of the community.”²³ It is also suggested that the

¹⁹ For a comprehensive account see R.J. Wilson, *op. cit.* pp. 1-8

²⁰ L. McCrimmon, R. Vickers and K. Parish, ‘Online Clinical Legal Education: Challenging the Traditional Model’ in *International Journal of Clinical Legal Education*, 2016. See also, J. Frank, “Why not a Clinical Law School?” in 81 *The Univ. of Pennsylvania Law Rev.* (1933) On this early history, see also, Martin, Dublin and Joy in *Journal of Legal Education* (1974) vol. 26 p. 162.

²¹ *Ibid.* p.35

²² M.M. Barry, J. Dublin, P. Joy, ‘Clinical Education for this Millennium: The Third Wave’ in *Clinical Law Review* 2001 vol. 7, p. 12

²³ L. McCrimmon *et al*, *op. cit.* p. 36

objective of law clinics at the time was not educational but community service provision (although the *raison d'être* of the American law clinic appears to have altered considerably over time to embrace fundamental issues of social justice such as racial discrimination, poverty and civil rights generally.

As a pedagogical method, “educating students through experiential learning and by using a hands-on approach is nothing new.”²⁴ Indeed, as the same authors acknowledge, “...clinical methods have long been used in the education and training of a range of students from doctors and nurses to engineers, linguists, teachers and computer programmers. At a practical level, who would want to consult a medic who had not yet met a patient or did not have practical experience to complement his or her theoretical knowledge?”²⁵ In short, experiential learning is asserted to be the most effective way to study skills-based disciplines and to demonstrate and apply requisite competencies²⁶. As Wilson describes it, clinical legal education ‘...involves law students learning law by guided practice during law school. Ideally, that setting involves real cases, clients or other project-based work with client communities, usually with the poor or other marginalized populations without access to counsel.’²⁷ However, experiential learning is more

²⁴ H. Brayne, N. Duncan and R. Grimes, *Clinical Legal Education*, Blackstone Press (1998) p.3

²⁵ *Ibid.*

²⁶ In his Keynote Address at the 2017 *International Journal of Clinical Legal Education* Conference (Northumbria Univ. 2-5 July 2017), Professor Kevin Kerrigan related several examples of non-legal clinical education schemes replete at institutions throughout the US and elsewhere, from medical science projects to Business School schemes (including a pet behaviour project!) Also, R.J. Wilson, *op. cit.* p.7 ‘...experience can be the most powerful teacher of all...’

²⁷ *Op. cit.* p.1

than didactic learning or simply a mode of skill acquisition. As analysed by one of the leading exponents,²⁸ experiential learning engages the learner as active subject who *reflects* and has a measure of control over their learning. As Patrick Felicia puts it, it is “...learning through reflection on doing.”²⁹

Reflection is thus postulated as the point of departure for clinical legal education – the point that distinguishes legal skills training of the vocational stage of legal education for entry into the legal professions in the United Kingdom (where law school is an undergraduate endeavour.) Clinical legal education is, as indicated earlier, not simply doing, but “*learning from doing.*”³⁰ Further, it is suggested that even in a milieu of the increasing commodification of higher education where the law school product must justify itself in the modern market place and is therefore expressed in the contemporary jargon of ‘employability skills’, these skills are typically cast in qualitative terms which embrace the idea of the law student as a reflective subject rather than the mere possessor of a set of marketable skills. Thus, even in the following two different definitions of employability skills, one detects an acknowledgment of attributes that relate to the community and the wider world which can only be achieved through reflection:

“A set of attributes, skills and knowledge that all labour market participants should possess to ensure they have the capacity of being effective in the

²⁸ See generally, D. A. Kolb, *Experiential Learning: Experience as the Source of Learning and Development*, Prentice Hall, (1984) p. 8

²⁹ *Handbook of Research on Improving Learning and Motivation*, IGI Global (2011) p.1003

³⁰ K. Kerrigan and V. Murray (editors), *A Student Guide to Clinical Legal Education and Pro Bono*, Palgrave Macmillan (2011) p. 8. See note 13 above.

workplace to the benefit of themselves, their employer and the wider economy”³¹

and,

“A set of achievements – skills, understanding and personal attributes – that makes graduates more likely to gain employment and be successful in their chosen occupations, which benefits themselves, the workforce, the community and the economy.”³²

It is instructive also that in the particularisation of such employability skills by Finch and Fafinski³³, the elements of active engagement and reflection on the part of the subject are quite implicit:

- self-management
- team working
- problem solving
- application of information technology
- communication
- application of numeracy
- business/commercial and customer awareness

To these we may also add the following:

- sound judgment/decision making

Carefully considered, it would be fair to say that in their nature, most of these skills involve reflective thinking.

³¹ Confederation of British Industry and National Union of Students, ‘Working towards your future; Making the most of your time in Higher Education’ (May 2011)

http://www.nus.org.uk/Global/CBI_NUS_Employability%20report_May%202011.pdf

³² M Yorke, ‘Employability in Higher Education: What it is – what it is not.’ (Learning and Employability Series One, ESECT and HEA, 2006)

³³ E. Finch and S. Fafinski, *Employability Skills for Law Students*, OUP (2014) P. 5

Beyond skills acquisition, larger claims are made for clinical legal education: “It has been argued that clinical learning offers the potential to provide much more than enhanced skills – it enables a richer understanding of legal rules, legal processes, the role of the legal professional and the impact of the legal system on people and organisations.”³⁴ Indeed, so fundamental is the role of reflection in clinical legal education that some authorities have felt it necessary to state that “...to count as clinical legal education, a programme must include reflection. If there is no opportunity or expectation to reflect then an activity is likely to be a valuable pro bono experience but it will not amount to clinic.”³⁵ The educational aspect of clinical legal education which is indicated here is the key to theorising clinical legal education and deserves particular emphasis because the law clinic “is the vehicle through which (the) educational process can be advanced in a way to which students readily relate and by which they are stimulated.”³⁶ The evolving jurisprudence of clinical legal education advanced by this article will be considered in the final section.

It may be useful at this point to outline the many claims that are made as the beneficial outcomes of clinical legal education. These outcomes are also the evidence of the putative global triumph of clinical legal education indicated at the

³⁴ Ibid. p 7

³⁵ Supra, note 14

³⁶ H. Brayne *et al*, op. cit. p.10

beginning of this article. Accordingly, Kerrigan and Murray³⁷ attribute the beneficial outcomes to the following: students

- learn through interacting in-role as a lawyer or other participant in the legal system;
- learn by reflecting on their experience;
- address real or realistic legal issues.

Also, Giddings refers to another pedagogical attribute of clinical legal education as “...a clinical continuum which relates to the degree of control exercised over the teaching setting. The emphasis on critique and reflection is a constant while control over the environment varies.”³⁸

Additionally, the global proliferation of clinical legal education may be presented as a contemporary attribute, not just as a signifier of its success. Thus, it can be asserted that clinical legal education has triumphed on the world stage. This global success is, *inter alia*, evidenced by “the large number of transnational collaborations among clinicians from all over the world; the existence of truly global organisations such as the Global Alliance for Justice Education (GAJE) which at its eighth world conference held in Eskişehir, Turkey in July 2015, attracted 350 delegates (most of whom were clinicians) from all regions of the world; the ever-increasing incorporation of clinical teaching methodology in law school curricula worldwide; and legal publications dedicated to fostering

³⁷ Op. cit. pp. 6-9

³⁸ J. Giddings, ‘A Circle Game: Issues in Australian Legal Education’ (1999) in *10 Legal Education Rev.* p.35

international clinical legal education, perhaps the most prominent being in the *International Journal of Clinical Legal Education* published in the United Kingdom, and the book, *The Global Clinical Movement: Educating Lawyers for Social Justice* edited by Professor Frank Bloch (OUP, 2011).³⁹

Of course, the fact of global success in itself would not be the qualitative measure of usefulness or goodness. The political left, for example, recognise the ubiquity and entrenchment of global capitalism or globalisation but are antithetical to it because they consider the phenomenon to be inimical to global social justice. In the case of clinical legal education however, the benefits of experiential learning and the law clinic are well recognised and documented.⁴⁰ But perhaps the seminal distillation of what succeeds in clinical legal education is captured by the following observation:

“...the study of law is of limited value unless it is directed at understanding the law which is practised, the law which affects the lives of real people. This is the hard evidence from which legal theory can be constructed and hypotheses tested. To study the theory without the evidence in that sense is unscientific. An understanding of law and an ability to apply that understanding requires the study of law in its operational context...this applies equally to those students who wish to practise law *and* to those who do not. Law studied out of the context of practice is an artificial concept. The law clinic is a vehicle through which this educational process can be

³⁹ L. McCrimmon *et al*, *op. cit.* pp. 40-41

⁴⁰ See generally, Brayne *et al*, *op. cit.* and Kerrigan & Murray, *op. cit.* See also, F. Bloc, *op. cit.*

advanced in a way to which students readily relate and by which they are stimulated.”⁴¹

In the final part of this section some consideration must be given to the relationship and relative perspective of the teacher clinician and the student. In this context, it is helpful to recall that one of the attributes of clinical legal education acknowledged in the earlier part of this section is the relative degree of autonomy that a successful clinical experience invests in the student as a reflective learner. Equally, the teacher clinician is liberated by a different relationship engendered by the guided independence of the clinical student. Thus, it is perhaps best to characterise the new model relationship as one in which teaching and learning become a necessary partnership which is most effective if students are guided to own their own learning by motivation based on an understanding of the link between effort and outcomes.

The student is not an intellectual object who receives instruction and knowledge but an active learner who reflects on information and is able to understand and evaluate such information in real or realistic context. The author as teacher-clinician has found over the years that students are best able to become critical and reflective learners if they are enabled to place the subject matter of study into appropriate context (history, economics, politics, purpose, etc.) Learning in context means approaching legal principles and processes by connecting theory and practice. If law is a *social* institution then the student of law must be guided to

⁴¹ Brayne *et al*, *op. cit.* p.10

adopt a critical approach to the study of law and legal processes that gives them an understanding of agency. With this approach, the student will hopefully understand that law is an instrument for the achievement of social goals. As such, the knowledge that the student derives from the experience empowers them as active social functionaries who have the capacity to affect how law works in society. Equally, a teacher-clinician is a product of their own experience of matters requisite such as diversity and inequality and the values of the higher education sector⁴² that they may subscribe to individually or institutionally such as widening participation and equality of opportunity, adopting approaches that best help diverse learning communities to achieve high quality educational outcomes, etc. (progressive modes of assessment for example.)

4. TYPES OF LAW CLINICS AND THEIR EDUCATIONAL VALUE

Clinical legal education is expressed in a diversity of clinical projects and programmes ranging from in-house variants to externships. The most common are:⁴³

1. in-house real-client clinics;
2. externally-located real-client clinics;
3. simulated clinics;
4. externship and placement schemes;
5. street law projects;

⁴² See for example, 'Higher Education 2022 – Priorities for Government' *GuildHE*/30 May 2017

⁴³ See R.J. Wilson, *op. cit.* part II p 149. Also, R. Dunn, 'The Taxonomy of Clinics: The Realities and Risks of All Forms of Clinical Legal Education', *Asian Journal of Clinical Legal Education* 3 (2) 174-187 (2016)

6. specialist clinic projects; and
7. Advice/gateway clinics.

Regardless of the particular nature of each of these various schemes, with the possible exception of street law projects, the purposes of these clinics are relatively similar. These are said to be to expose students to law in a practice setting and to the analysis, management and process of the problems arising.⁴⁴ The in-house clinic involves the replication of a real solicitors practice within the law school. Such clinics typically deliver a full range of legal services to the public under the supervision of a practitioner academic. This type of clinic requires the commitment of substantial resources by the law school or the broader university – premises, salaries, insurance and other running costs. Some consider this type of clinic as ‘the ‘gold standard’⁴⁵ but there are severe limitations on the scope of service delivery because of the cost. For example, the number of clients dealt with per year would tend to be small.⁴⁶ In contrast to the in-house clinic, there are gateway/advice only services which provide initial advice and referral to members of the public, usually over a wide range of areas of law but sometimes limited and specific, with no continuing or retainer relationship between the client and the clinic. This type of clinic has the advantage of being cheaper to run and without most of the professional requirements of the Solicitors’ Regulation Authority (SRA), the professional body in England and Wales responsible for the regulation

⁴⁴ Brayne *et al*, *op. cit.* p. 12

⁴⁵ Kerrigan and Murray, *op. cit.* p. 1

⁴⁶ See, for example, York Law School clinic

of entry into the profession and the profession itself. Simulated clinics use hypothetical cases and students role-play as legal advisers. Simulated legal activity as a type of clinical legal education is dismissed by some as not being proper law clinics but it is clear that they can be a very useful vehicle to deliver clinical education or, at least, many of the benefits of clinical legal education. Externships/placements and street law may not be considered to be clinical legal education activities properly so-called, although there is little doubt in their value as vehicles for experiential or work-based learning. Externships are the structured placement of law students in law firms or advice or other agencies such as local authorities, or community organisations with or without pay. The obvious challenges that may limit the effectiveness of such programmes is the fact that there is no assurance of quality control or indeed anything else because of the variability of placement possibilities. Street law, another American idea, involves projects in which law students are engaged with raising legal literacy and awareness in local communities or with specific interest groups. The general objective is to raise community awareness of rights or seek to bring about policy reform or change.⁴⁷ For example. A project to educate a group or community about their rights against police harassment or unlawful stop-and-search in, say, Brixton in South London with a high population of ethnic minority residents. Such

⁴⁷ See R. Grimes, D. McQuoid-Mason, E. O'Brien and J. Zimmer, 'Street Law and Social Justice Education' in F. Bloc (ed.) *The Global Clinical Movement: Educating Lawyers for Social Justice*, op. cit. Chap. 15

consciousness-raising undoubtedly benefits groups, usually minority or disadvantaged or indigent groups, but has clinical benefits for student and academic participants who in the process of engagement, inevitably deal with real people, the law and the community and live issues. In this regard, particular mention must be made of the way in which the global expansion of clinical legal education, so well chronicled by the significant work of R.J. Wilson referred to repeatedly previously,⁴⁸ has accommodated regional and local nuances to produce models of clinical projects and practice that are redolent of location. The significance of the attributes of location is the subject of an informed article by Lasky and Sarker⁴⁹ on the Asian characteristics of the regional clinical legal education movement which observes as follows:

“An examination of this regional CLE movement would show that it reflects its own Asian characteristics. For example, one contemporary core commonality of most of these Asian university-based CLE programmes can be found in their focused social justice mission of delivering legal assistance and empowerment to the poor and marginalized while simultaneously developing legal knowledge, skills, ethics and pro bono values within the participating university students. A number of CLE programmes, including the Ateneo University Human Rights Center (AHRC) in the Philippines, 47 train students to use a participatory method of representation when working with clients. Rather than utilizing a top-down approach, clients are treated as equals throughout the representation process. In this manner, the lawyer’s role is not restricted to just solving a client’s problem and delivering the answers or solutions through a one-way exchange. Rather, the client is involved as a co-decision-maker. This mode of alternative lawyering enables clients to decide for themselves and find solutions to their own problematic situations based on a better understanding

⁴⁸ *Global Evolution of Clinical Legal Education*, op. cit. notes 3, 4 and 43.

⁴⁹ Op. cit., note 18.

of the issues involved. It is a means of achieving a break in the often cycle of need. Conventionally, clients meet lawyers looking to have their legal problems resolved. In these scenarios, once the immediate need is worked out, it is not unusual for these persons to return to the same environment from which they came. This frequently leads, often only a short time later, to the development of similar or identical problems. It is a type of Band-Aid approach to problem-solving. Traditional lawyering is seen as a mechanism that ‘promotes a client dependency on the lawyer instead of encouraging legal self-reliance on the part of marginalized groups’.⁵⁰

Thus, in seeking to advance the thesis of this article which aims to expose the political and jurisprudential basis of clinical legal education, the different strands of clinical practice discussed above provide the hard evidence that Brayne *et al* suggest are the basis upon which we are able to construct relevant theory. But this is only possible because clinical legal education is premised on the learner as a reflective subject as acknowledged earlier. An appreciation of the fundamental nature of this attribute is essential for an understanding of the analysis that comprises the final sections of this article. It would now be appropriate to consider the case study which is the basis of much of the evidence base for the theoretical arguments of this article advanced in the final section of this article...

⁵⁰ Ibid.

5. CASE STUDY – THE COMMUNITY ADVICE PROGRAMME (CAP – IN PARTNERSHIP WITH THE WEST LONDON EQUALITY CENTRE.)

i. The Project – General

The School of Law and Criminology at the University of West London (UWL) has operated one of the most successful law clinics in the United Kingdom since 1992, serving the community of West London. CAP celebrates its 26th Anniversary this year, 2018. The main project, called Community Advice Programme (CAP), is a legal advice and assistance service which runs in partnership with Ealing Equality Council (EEC⁵¹ (now, West London Equality Centre), the principal equalities and human rights body in the London Borough of Ealing and West London generally). EEC was established in 1963 as the Southall International Friendship Association, then Ealing Community Relations Council, Ealing Racial Equality Council (quasi-statutory affiliate of the Commission for Racial Equality), and finally, Ealing Equality Council in 2011 (and now, West London Equality Centre – WLEC.⁵²) CAP functions as a fortnightly weekend service from *The Street*, at the St Mary's Road Campus of the University of West London, with offices located at Villiers House, Ealing Broadway Station where there are also special student/client engaged daily

⁵¹ Now renamed West London Equality Centre (WLEC).

⁵² The following extract from the 2017 Annual Report presented at its AGM on 8th November 2017, is indicative of the nature of the functioning of CAP's partner organisation: "...our work targets the poor and disadvantaged and the newly-arrived. Ealing ranks as the third most ethnically diverse local authority (in the UK) – migrants of more than 102 nationalities have arrived in the borough due to the refugee crisis and the Referendum. We have seen many EU immigrants, newly-arrived refugees and undocumented migrants accessing the service for immigration and nationality advice." For a profile of the London Borough of Ealing, see: https://www.ealing.gov.uk/info/201048/ealing_facts_and_figures

advice sessions. CAP is serviced by volunteer legal practitioners, including solicitors, barristers, judges, trainees, law teachers, students and other legal professionals.

CAP assists members of the local community in West London with legal advice and other help such as drafting documents, making representations on behalf of clients to a variety of agencies or filling in forms covering areas such as employment, housing, family, discrimination, human rights, consumer, welfare, debt, crime, police and immigration law. CAP also offers placement and training opportunities to law and criminology students, as well as local secondary school students and therefore makes an important contribution to student employability, career development and community engagement through clinical practice. CAP does not engage in direct litigation or court proceedings although it typically advises and prepares documents for clients where referrals to solicitors or barristers are inappropriate or not possible.

The close partnership with the Equality Centre has enabled students to gain access to placements and practical experience on a myriad of projects and activities in West London such as hate crime, homelessness, refugee projects, debt and poverty reduction. The services and projects include the following:⁵³

⁵³ For a comprehensive account, see Director's Report and Report of Projects and Operations officer in 2016/2017 Annual Report: <http://ealingequalitycouncil.org.uk/wp-content/uploads/2018/01/Annual-Report-2016-2017-Final-09.11.2017.pdf>

- The MILAR Project, an ERASMUS+ refugee integration project funded by the European Commission (with partner universities in Italy, Sweden and Germany);
- Help Through Crisis - A Foodbank project funded by the Big Lottery Fund with operational sites at Northolt, Brentford, Greenford, Acton, Southall and Hanwell (all in West London);
- Positive Link – a UK Home Office Strengthening Communities project; and
- Hate Crime Project – a National Lottery substantial project which has enabled 90 placement places to be made available to University of West London Students over a period of 3 years which has only recently commenced.

The range of placement activities that CAP students are able to engage as indicated above perhaps has no equal in the UK in its particularity. However, this may be offered as evidence of the inter-connection between local communities and pro bono legal service provision typical of community-based law clinics.

A further illustration of CAP's community intersectionality is provided by a project that was instituted in 2016. CAP at UWL was a pioneering partner along with LSE, UCL, Queen Mary, University of London (and now College of Law) with the City of London Criminal Appeals Clinic where students engaged miscarriage of justice cases to research and prepare worthy cases for submission to the Criminal Cases Review Commission⁵⁴, the body in the UK that reviews and presents cases of alleged miscarriage of justice in criminal matters to the Court of

⁵⁴ <http://ccrc.gov.uk/about-us/>

Appeal for determination. In the first season of the project, CAP UWL was awarded the prize for the Best Performing institution in 2016.

ii The Academic Module – Community Legal Advice

One of CAP's most important functions is that it supports the University of West London law students with guaranteed placements for the LL.B clinical module, Community Legal Advice (CLA) which currently has a cohort of 42 students. This helps to overcome the significant problem clinical students experience in securing externship placements with live clients. The module is a 20-credit final year elective and its methodology is described as follows in the Module Study Guide:

“As a Clinical Legal Education module, the teaching and learning method places you at the centre of the delivery of the outcomes of the module. You have ownership of your learning because you largely control your placement and its activities or at least exercise a large measure of autonomy. Learning in the classroom is therefore a partnership which requires you to be an active learner who owns your learning. With this methodology, you can map with confidence, a clear path between effort and success.”⁵⁵

The module requires students to be in placement with law firms, community advice organisations, etc., for at least the duration of the module. Students participate in scheduled classroom activities including discussion of clinical legal education and experiential learning, skills training in research methodology and

⁵⁵ Community Legal Advice, UWL Module Study Guide 2017/18 p.28

electronic databases, employability, drafting, negotiation and conciliation, written and oral communication, policy issues such as legal services and access to justice, social justice ethics and law, etc. The module is assessed by the submission of a compulsory Reflective Journal, recording their placement activities and their reflection on these. This journal is submitted along with the student's placement report at the end of the module. The report is a critical account of, and reflection upon, their placement activities and their personal journey of development as a student clinician in the community. Student reflections often chronicle transformation and epiphany. The following excerpts from two student reports in 2018 are illustrative:

“By studying CLA I became acutely aware of the importance of access to justice. The public rely on services such as CRB and CAP to give free advice to the public who do not have the funds to hire a solicitor to take on their cases. The cut backs that are made in legal aid have forced individuals to self-help or rely on agencies to give them advice is so large. This is morally and ethically wrong as this effects the great number of the public who have no funds available for a solicitor or to pay court fees. Every individual should be entitled to a fair justice system not just the high paid citizens, the justice system has failed to help the lower class citizens who suffer the most, I have seen this first hand by interviewing clients at CAP many of the problems are caused my debt and arrears, these clients would never be able to afford a solicitor and pay the high fees. Relying on services like CAP benefits the community a great deal on providing advice and writing letters on behalf of the clients.

The government are aware that these agencies are run by volunteers who offer their time and advice to help people but do not fund these agencies, considering we play an active role in helping the public.

I did not know the extent of access to justice and how important it is until studying this module, I have developed a good understanding of this area and continue to do so in my legal profession.”

“During my reflective learning journey, I expressed large amounts of empathy and compassion and felt responsibility and purpose in a different form. I had challenged my own opinions on humanity and coming to find myself more intrigued and supportive of a communist regime in western society or perhaps globally.”

Thus, it may be concluded that the student clinicians have the opportunity to become socially conscious practitioners whose experience of the practical legal world intersects the lives of the communities that they serve.

In addition, one of the most significant developments at CAP over the past two years, has been the successful submission by four trainee solicitors on the work-based “equivalent means” route⁵⁶ through their work at CAP. Upon completion of the law degree and the required vocational course, the Legal Practice Course, a prospective solicitor in England and Wales must obtain a training contract with a law firm and serve their solicitor’s apprenticeship for two years before formal admission to the role of registered solicitors. Training contracts are notoriously limited in number, especially after the financial crash of 2008 and subsequent

⁵⁶ <https://www.sra.org.uk/SearchResult.aspx?q=alternative+to+training+contract>

regulatory changes by the Solicitors Regulation Authority (SRA) that led to many medium and small size high street practices folding. The recognition by the SRA of the appropriateness of CAP work and supervision is an important step in overcoming the age-old barrier students from diverse backgrounds and newer universities have when they try to enter the legal profession upon completion of the academic and vocational stages of their legal education.

Arguably, the most significant aspect of the CAP/WLEC project is the community and institutional networking that is made possible as well as the incidence of real community engagement across different issues and at different levels by clinicians. It is the usual practice for CAP sessions on Saturdays to end in seminars and lectures given by experts on key socio-legal issues such as immigration, hate crime, islamophobia, terrorism, refugees, food banks and poverty alleviation, debt prevention, social security, family, human rights and Brexit. All these matters have been covered over the past two years by CAP/EEC. Thus, there is a deeply enriching experience of intersectionality and community engagement within which the teacher and student-clinician interpret the law and enables the theorising of clinical legal education.

6. CONSTRUCTING AN UNDERLYING JURISPRUDENCE

What emerges from the CAP/WLEC project is the practical evidence of a particular model of clinical legal education acknowledged for its success in legal service

provision for the local community and clinical development of student participants for over 25 years. It may also be useful to observe the striking commonality of the CAP experience of interconnection with the issues of poverty and social disadvantage with experience elsewhere⁵⁷ consistent with the earliest social justice mission at the root of the vision of the realist founders of the idea of clinical legal education. On this basis, it is appropriate now to attempt to identify a unifying philosophical basis for clinical legal education in contemporary times.

i. Philosophical context

“A spider conducts operations resembling those of a weaver, and a bee puts to shame many an architect in the construction of her cells. But what distinguishes the worst architect from the best bees is this, that the architect raises the structure in imagination before he creates it in reality.”⁵⁸

The centrality of reflection in clinical legal education emphasised throughout this article means that any theory of clinical legal education must recognise the conscious choices that clinical programmes are based upon even if their philosophical underpinnings are not given specific expression. Thus, as human architects (human agency in other words) we first raise structures in imagination. Philosophy enables us to do this in a conscious way and therefore we are able to

⁵⁷ See for example, Tatyana Khudoykina and Vlalena Lysenko, ‘Development of Clinical Legal Studies as an Essential Component in the Modernization of Legal Education’ in [Integraciã](#) [Obrazovaniã](#) (Mordovia State University) 2017;21(1):124-137. Also Hannemann and Lampe, ‘Clinical Legal Education – Observing, Comparing and Analyzing the Differences in Germany and China for each other’s Respective Advantages’, *Asian Journal of Legal Education* Vol. 2, Issue 2 (2015) p 157-169. See also more generally R.J. Wilson, op. cit. note 5.

⁵⁸ K. Marx, *Capital Vol. 1*, Progress Pub. P. 174

assert that clinical legal education, by definition, has a philosophical basis and that this requires expression. What follows is therefore an attempt to explore an appropriate theory of clinical legal education.

Philosophy as an epistemological category, represents the capacity of human beings to conceptualise and reflect their world. Philosophy therefore represents the sum total of our world view and enables us to develop an integrated idea or conception of the phenomena of our world and thereby helping us to order our everyday activities and behaviour. But more than constructing our world outlook, philosophy provides us with a method of cognition. In this sense, philosophy is pervasive and integral to intellectual activity. Thus, as recognised earlier in this article, out of clinical practice emerges the “hard evidence” that enables us to build a theory of clinical legal education.⁵⁹

It was suggested at the beginning⁶⁰ of this article that, to a large extent, clinical legal education lacks an articulate and coherent jurisprudence. However, this state of affairs even in contemporary times is somewhat at odds with the early promise offered by the critics of the standard teaching model of American law schools and some of the originators of the idea of clinical legal education such as Frank⁶¹ and Llewelyn⁶² in the 1930s who were firmly rooted in legal realism. Also, as Brayne *et al* point out, well after the entrenchment of clinical legal education, “...the

⁵⁹ See preceding Case Study above (section 5)

⁶⁰ See ‘Introduction’ *supra* p.

⁶¹ J. Frank, *supra* note 20

⁶² K. Llewelyn, ‘Some Realism about Realism (1931) *Harv L Rev* 1222

critical legal studies advocate, the feminist jurist and those supporting a law in context approach have all found the narrow doctrinal system (of law teaching) wanting...(because) it does not take into account the realities of law in practice, the economic and political context in which law is made and operates.”⁶³ These antagonists are also united by the fact of their assumed different legal philosophical positions. The point here is this: there is a clear connection between clinical legal education and jurisprudence – those who depart from the standard operating model of teaching and learning law are marked by an ideological, political or philosophical departure from the standard position. For this reason, clinical legal education is neither politically or jurisprudentially neutral. This is a matter which is illuminated by the globalisation of clinical legal education and the enhanced contemporary focus (in tandem with legal skills training and experiential learning) on a social justice objective advanced as a contribution to enabling disadvantaged group’s access to justice. Of course, any deep analysis of the global problem of access to justice for the poor and the disadvantaged immediately confronts the more fundamental problem of all societies – social and economic inequality.

⁶³ *Op. cit.* p. 5. The authors support their observation with the following references:
G. Peller, ‘The metaphysics of American Law’ (1985) *Calif. Law Rev* 1151; and A. Seales, ‘The Emergence of a Feminist Jurisprudence: An Essay’ (198) 95 *Yale L Rev* 1373

ii. Clinical Legal Education and Social Inequality

We saw in Section 5 above that the existence of law clinics such as the Community Advice Programme (CAP), is justified not only by their legal skills and experiential learning aspects but also as service provision for unmet public need.

Unmet legal service need is a huge global problem as acute in most advanced economies as it is in developing societies,⁶⁴ with equally devastating consequences for hundreds of millions of people who are unable to vindicate their rights. In turn, unmet legal need is a reflection and consequence of socio-economic status and inequality. Thus, in a real sense, contemporary clinical legal education is inextricably connected to socio-economic inequality and the battle cry of “access to justice” is not simply intended to indicate the closing of the gap in communities between those who have access to the law, but also signifies a more profound social justice mission. The problem though is that most of the analyses of clinical legal education traditionally fail to cast law clinics in such terms – terms that are much more readily understood as a political or philosophical positioning. This failure creates the danger of neutering or masking the power of dynamic activism that is an integral part of the reflective process of clinical legal education. An illustration is provided by the following description of the law clinic by Evans: a clinic involves “...supervised experiential encounters between clients and their

⁶⁴ See for example, Y. Ouma and E. Chege, “Law Clinics and Access to Justice in Kenya: Bridging the Legal Divide”, *IJCLE* Vol. 23, No. 5 (2016) p.107

legal advisors, in the interest of just case outcomes, the processes of law reform and political renewal.”⁶⁵ This otherwise embrative and progressive description would have been better encapsulated by an explicit declaration of a social justice objective – for such is the clear underlying purpose expressed by Evans.

One may then ask why it matters that clinical legal education is given jurisprudential expression? The answer relates to the matter of social consciousness, or even a narrower legal consciousness that is essential for an active reflective role for the student and clinician alike, such consciousness being prerequisite for desirable social change. A conscious student or clinician is an agent for social change. Social change is necessary to redress the problem of social inequality which is deeply embedded in international society; not only within the familiar North- South divide, but marked inequalities within both the North and the South, and also as between genders, ethnicity, religion, etc. If we accept the globalised reach of clinical legal education carries with it a concomitant social justice mission, then a proper understanding of the philosophical underpinning of the movement is best achieved by also understanding the globalised nature of poverty and social inequality. On this basis, it is submitted that a unified theory of clinical legal education must encompass global socio-economic realities as indicated below; the student clinician and teacher practitioner operate within the

⁶⁵ A. Evans, “Global Agendas, Cultural Capital, and Self-assessment of Clinical Legal Education programs” (2012) 38 *Monash U L Rev* 55 at 59. See also R Wilson, “Training for Justice: the Global Reach of Clinical Legal Education” (2004) 22 *Penn St Int. L Rev* 421 at 422-423.

much broader spectrum of income and wealth inequalities as indicated by the following vignettes:

“More than 1 billion people in the world live on less than \$1 a day;”⁶⁶

“pre-Davos report shows how 1% now own more than the rest of us combined. Runaway inequality has created a world where 62 people own as much as the poorest half of the world's population, according to an Oxfam Report published today ahead of the annual gathering of the world's financial and political elites in Davos. This number has fallen dramatically from 388 as recently as 2010 and 80 last year. An Economy for the 1%, shows that the wealth of the poorest half of the world's population - that's 3.6 billion people - has fallen by a trillion dollars since 2010. This 38 per cent drop has occurred despite the global population increasing by around 400 million people during that period. Meanwhile the wealth of the richest 62 has increased by more than half a trillion dollars to \$1.76tr. Just nine of the '62' are women.”⁶⁷

Africa, for example, is a continent hardly contradicted by mass social and economic progress. Riven with mass poverty, hunger, disease, corruption, political instability and internecine warfare in many parts, the continent has been ravaged by over two centuries of structural underdevelopment, the evidence of poverty and deprivation is as clear as it is grim: The UN Food and Agriculture Organisation estimates that 239 million people in sub-Saharan Africa were

⁶⁶ ‘Introduction to PovcalNet’, <http://iresearch.worldbank.org/PovcalNet/introduction.aspx> ; see statistical data breakdown by region and country at <http://iresearch.worldbank.org/PovcalNet/data.aspx>

⁶⁷ *Oxfam* Press Release, 18th Jan. 2016 - <http://www.oxfam.org.uk/media-centre/press-releases/2016/01/62-people-own-same-as-half-world-says-oxfam-inequality-report-davos-world-economic-forum>

hungry/undernourished in 2010 (its most recent estimate) and 925 million people were hungry worldwide. Africa was the continent with the second largest number of hungry people, as Asia and the Pacific had 578 million, principally due to the much larger population of Asia when compared to sub-Saharan Africa. Sub-Saharan Africa actually had the largest proportion of its population undernourished, an estimated 30 per cent in 2010, compared to 16 per cent in Asia and the Pacific (FAO 2010). Thus almost one in three people who live in sub-Saharan Africa were hungry, far higher than any other region of the world, with the exception of South Asia. In 2008, 47 per cent of the population of sub-Saharan Africa lived on \$1.25 a day or less. (United Nations 2012)

In the meantime, the world's most expensive car has a price tag of \$4.8 million⁶⁸; the most expensive painting sold at auction, Leonardo Da Vinci's *Salvatore Mundi*, at a price of \$400 million⁶⁹ and in the United Kingdom, according to *The Guardian*, within the first three days of January 2018, the top business executives in the UK had earned the equivalent annual salary of the average worker.⁷⁰ To top it all in the absurdity of inequality, the BBC reported on 5th January 2018, the theft from a bar in Denmark of the most expensive bottle of vodka in the world claimed to be valued at \$1.3 million.⁷¹

⁶⁸ See <https://www.digitaltrends.com/cars/most-expensive-cars-in-the-world/>

⁶⁹ See <https://www.theguardian.com/artanddesign/2017/nov/16/salvator-mundi-leonardo-da-vinci-most-expensive-painting-ever-sold-auction>

⁷⁰ <https://www.theguardian.com/business/2018/jan/04/fat-cat-thursday-top-bosses-earn-workers-annual-salary-by-lunchtime>

⁷¹ <http://www.bbc.co.uk/news/world-europe-42558331>

Poverty and social inequality divide classes and communities in the United Kingdom. In the biggest ever review into race inequality in Great Britain, the Equality and Human Rights Commission in its 2016 race equality report⁷² reveals “...an alarming picture of the challenges to equality of opportunity that still remain in modern 21st century Britain...It is indefensible that...Black workers with degrees earn over 23 per cent less on average than White workers with degrees and that if you are Black in England you are more than three times likely to be a victim of murder and four times more likely to be stopped by the police. ”⁷³ Equally grimly, the report found that “If you are young and from an ethnic minority, your life chances have got much worse over the past five years and are at the most challenging for generations. Since 2010, there has been a 49% increase in the number of 16 to 24 year olds across the UK from ethnic minority communities who are long-term unemployed, compared with a fall of 2% if you are White. Black workers are also more than twice as likely to be in insecure forms of employment such as temporary contracts or working for an agency – which increased by nearly 40% for Black and Asian workers, compared with a 16% rise for White workers.⁷⁴ Also, ethnic minority people are more likely to live in poverty than the white population.⁷⁵ The same report details adverse statistics for Gypsy

⁷² “Healing a Divided Britain: the need for a comprehensive race equality strategy”, EHRC Report August 2016: <https://www.equalityhumanrights.com/en/race-report-healing-divided-britain>

⁷³ ‘Forward’ by David Isaac CBE, Chair, EHRC, *ibid* p.5

⁷⁴ *Ibid*.

⁷⁵ *Ibid*. p.31

and Traveller communities and regional inequalities between different parts of the United Kingdom.

In the field of health and wellbeing, there are again striking inequalities for different classes worldwide and in the UK. According to United Nations research statistics, average life expectancy in the highest developed economies is 80 years and 59 years in the lowest developed.⁷⁶ Thus, the global clinic is inextricably linked to global inequality. It is therefore necessary to examine the issues of access to justice and social justice more broadly.

7. CLINICAL LEGAL EDUCATION AS AN EXPRESSION OF SOCIAL JUSTICE

i. Access to Justice

“The concept of access to justice has various connotations. In common parlance, it simply refers to the accessibility or otherwise of adjudicatory forums where individuals can have disputes between them resolved. At a more technical level, access to justice has many conceptions. It may refer to the ease with which participants in the various adjudication forums are able to understand both the substantive and procedural aspects of the law applied in resolving their disputes. Access to justice may also refer to the extent to which disputants can afford the costs involved in having their disputes resolved at various adjudication forums.”⁷⁷

⁷⁶ http://www.un.org/en/development/desa/policy/cdp/cdp_statements/cdp_plen09_gph.pdf

⁷⁷ Y. Ouma and E. Chege, ‘Law Clinics and Access to Justice – Bridging the Legal Divide’, *IJCLE* vol. 25 No. 5 (2016) pp.107-108

Although the statement above conceptualises access to justice as a response to unmet legal need in various forms and thus extends beyond law clinics,⁷⁸ the authors also acknowledge “...law clinics in various countries in the world have continued to engage in activities aimed at the realization of the ideal of access to justice in its various conceptions.”⁷⁹ Access to justice as an issue is therefore very well understood in the popular literature as a referent for unmet legal need⁸⁰ and socio-economic inequality as discussed above. In this context, it would seem quite clear that the traditional approaches to access to justice as a variety of juridical responses to unmet legal need is reflective of much of clinical practice in the wider sense but narrower and limited in philosophical or jurisprudential sense as it misses the political economy context of law and of legal process. Ellie Palmer captures this critical point in the opening of her excellent book, *Judicial Review, Socio-Economic Rights and the Human Rights Act*: “During the past three decades individuals and groups have increasingly tested the extent to which governments and public authorities can be held to account through the judicial system for delay or failure to provide access to welfare services such as health treatment, education and housing. However, in the absence maladministration or flagrant breaches of public law duties, there is deep-rooted scepticism about the potential for courts to make effective and constitutionally appropriate contributions to the resolution of

⁷⁸ For an excellent study of the subject, see generally, Palmer, Cornford *et al* (eds.), *Access to Justice: Beyond the Policies and Politics of Austerity*, Hart Publishing (2016)

⁷⁹ *ibid.*

⁸⁰ See Elliot and Quinn, *supra*, chap. 15

such disputes. These doubts are not only based on widespread perceptions that courts are constitutionally and institutionally ill-suited to adjudicating in politically sensitive disputes involving issues of resource allocation, but also closely related to a prevailing understanding in Western style democracies that, by contrast with civil and political rights, socio-economic rights - whether enshrined international, regional or domestic instruments - are ideological aspirations or programmatic goals, dependent on resources for the satisfaction, and therefore inherently unsuited to the mechanisms and techniques developed by courts for the protection of fundamental human rights.”⁸¹ Given this contextual reality (rather redolent of the Legal Realism of the clinical legal education founders of the 1930s), clinical legal education, in addition to its educational role, is thus assigned a social justice function as an underlying attribute. It is therefore submitted that the jurisprudence of clinical legal education must be founded upon social justice theory.

ii. *The jurisprudence of Clinical Legal Education*

The attribution of a social justice function to clinical legal education requires an examination of social justice or justice theory. The intuitive meaning of social justice is often expressed in simple terms as what is fair and just in the individual’s relationship to society in terms of social goods and resources and access to

⁸¹ Hart Publishing (2009), ‘Introduction’ p.1

opportunity and personal functioning. In social theory however, the term is acknowledged to be far more complex beyond the scope of this current essay as it encompasses issues such as, taxation, social insurance, regulation of markets and the fair distribution of wealth.⁸² The issue of social justice has, however, found jurisprudential expression in justice theory, the philosophical antipode to the entrenched Western policy of utilitarianism.

iii. Clinical Legal Education and the Just Society

According to Ross, an appreciation of what is unfair develops early in the human being.⁸³ Indeed for Riddall, a child of five or a little older knows the meaning of unfairness or, at least, can give practical examples – “The position is similar to justice, a concept that has affinities to fairness. The absence of justice, injustice, proclaims itself.”⁸⁴ But what is justice?, he enquires. What is this quality, the absence of which produces such outcry?⁸⁵ The author offers the following comment in response to this question: “Justice is a quality considered to be desirable. Everyone claims to want justice, and people know what they want. The result is that in seeking to define justice, people attach the label, justice, to the ends

⁸² See, for example, the following: Muschert, Klocke *et al*, *Agenda for Social Justice: Solutions for 2016*, Policy Press (2016); M.J. Thompson, ‘The Limits of Liberalism: A Republican Theory of Social Justice’ *International Journal of Ethics*, vol. 7, No.3; P. Corning, *The Fair Society: The Science of Human Nature and the Pursuit of Social Justice*, Chicago Univ. Press (2011); and J.S. Mill, *Utilitarianism*, Prometheus Books (1987)

⁸³ A. Ross, *On Law and Justice*, Univ. of California Press (1959) p.269

⁸⁴ J.G. Riddall, *Jurisprudence*, Butterworths (1991) p.130

⁸⁵ *Ibid*.

that they desire.”⁸⁶ Even so, there is little doubt that the quality of fairness and justice is essentially an intuitive value, measurable against the standard of treatment by the state and society. As Rawls reminds us in his seminal work, *A Theory of Justice*, “Justice is the first virtue of social institutions, as truth is of systems of thought. A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust. Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override.”⁸⁷ Although Rawls’ treatise is complex, as are all other theories that have sought to analyse the matter of fairness and justice in society in modern times such as Perelman, Nozick, Dworkin, etc., the notion of just treatment is premised on principles that recognise the equal worth and dignity of each individual, a key attribute of which has been characterised by Rawls as the first fundamental principle of a just society, namely that, “Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.”⁸⁸ As Rawls’ analysis shows, there is therefore an enhanced duty placed on the state to protect the vulnerable in society, if such people are to realise their entitlement to equality in society. The principle of equality is itself theoretical difficult, but in the context of the gross inequalities

⁸⁶ Ibid. p.131

⁸⁷ Oxford (1973) p.3

⁸⁸ Ibid. pp.302, 303

in resource allocation we saw in Section 6 (ii) above, the millions of people across the globe who are the beneficiaries of clinical legal education clinics and projects are not confused about their status as unequal citizens who are immiserated by poverty, discrimination and social disadvantage. Poverty is tangible and measurable, even if economists legitimately distinguish between relative and absolute poverty. Thus, the ideology of utilitarianism which Jeremy Bentham articulated so superficially attractively, and which is the basis of modern Western democratic institutions, contests the mission of clinical legal education which aims to promote the interest of the underprivileged to be enabled to vindicate their rights and to promote their equal participation in society. This is because, in essence, “Utilitarianism is a goal-based theory which evaluates actions in terms of their propensity to maximise goodness, however this is defined”⁸⁹ in the name of the greatest good for the greatest number, even at the expense of the minority. This is not the mission of clinical legal education and a theory based on justice would readily justify the functioning of the law clinic in its myriad forms.

⁸⁹ Davies & Holdcroft, *Jurisprudence*, Butterworths, (1996) p. 205. For an analysis of how rights and utility may be mediated, see N.E. Simmonds, *Central Issues in Jurisprudence*, Sweet & Maxwell, (1986) p.143 *et seq.*

CONCLUSION

In pressing the importance of clinical legal education theory in this article, the primary motivation has been to encourage the reconnection of the clinician, practice and theory as an inextricable, mutually-reinforcing process that enhances learning and directly impacts legal consciousness. The increasing commodification of education generally in the United Kingdom, accelerated by the recent institution of student self-funding in England and Wales, seems to have led to the preference of more apparently 'marketable' subjects to the detriment of theoretical ones or the theoretical components of subjects. For example, Legal Theory or Jurisprudence is much diminished in the life of the law student of the modern university in England.⁹⁰ Legal categories, like all philosophical categories, define specific world views and as such, guide human action. A conscious clinician is motivated and justified by an awareness of his or her actions or inaction and their place in the broader society as a stakeholder in society's general wellbeing. In short, they become a socially conscious being possessing agency.

⁹⁰ As an illustration, Jurisprudence as a subject was a core module for law students at the author's institution until the 1990s. Today, neither Legal Theory nor Jurisprudence is on offer on the law curriculum either at undergraduate or postgraduate levels.