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a perspective from England and Wales



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# Promoting international human rights values through reflective practice in clinical legal education: a perspective from England and Wales

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## Abstract

The global Clinical Legal Education (CLE) movement transcends borders as law teachers worldwide try to inculcate law students, and future legal practitioners with social justice values. One method of achieving this is through developing reflective practitioners. Kolb, finding common ground in the work of Lewin, Dewey and Piaget, formulated the four stages in the experiential development of concrete experience, reflective observation, abstract conceptualisation and active experiment. Although, Kolb's model is used in legal education literature, students may not be provided with the relevant conceptual tool required to engage in reflective practice. This often results in students providing subjective analysis of their work, which fails to fully contribute to their educational experience. One of the reasons for omitting analytical tools is that reflective practice suffers from a lack of conceptual clarity. According to Kinsella, the 'concept remains elusive, is open to multiple interpretations, and is applied in a myriad of ways in educational and practice environments. A further issue hindering reflective practice relates to Donald Schön's critique of the positivist approach adopted by law schools. It is argued that the dominant positivist approach adopted by law schools in England and Wales is fundamental flaw in CLE which not only impacts on students but also vulnerable clients.

This paper will apply a human rights framework to CLE to develop reflective practitioners. The two main reasons for this are: firstly, human rights as formulated by the Universal Declaration on Human Rights are universal, interrelated and indivisible; and secondly, reflection based on these universal human rights values will benefit cross-jurisdictional societies in assisting vulnerable clients affected by emerging implied and direct human rights challenges.

## Introduction

In this paper we argue that legal education, in England and Wales, which is almost exclusively a national undertaking, is ill-equipped to train students to become global practitioners. Apart from the study of International Law and European Law, legal education focuses primarily on its jurisdiction-specific law and legal institutions. Law is predominantly taught in a manner which excludes normative<sup>1</sup> concepts such as duty, justice, and virtue. This is mainly due to the case method,<sup>2</sup> which is the dominant approach used in law schools. Christopher Columbus Langdell is credited with introducing the case method in 1870 (Duxbury, 1991, p. 81; Kimball, 2006, p. 192), which replaced the existing approach for the study of law from a book-and-lecture to a system founded on the study of reported appellate opinions using inductive reasoning. However, he did not discover this method (Hall, 1955, p. 99). Keener wrote that “the teaching of law by the study of cases is but the application to the study of law of a method that has been almost universally accepted in other departments of education” (Keener, 1894, p. 473). Thus, a judge reaching a decision in a case where the law was in dispute is under no requirement, according to the case method, to consider what the effects of a rule were, or whether the rule was moral or not. This form of judicial reasoning is demonstrated by the following quote from Lord Justice Ward in the case of *Re A (Children)* [2000] EWCA Civ 254, ‘This court is a court of law, not of morals, and our task has been to find, and our duty is then to apply the relevant principles of law to the situation before us’. This quote highlights that there is no necessary connection between law and morality.

Similarly, in relation to the application of the case method to legal education, the following Criminal Law problem-based question illustrates the absence of normative values in legal education:

Amanda is late for her Criminal Law lecture. As she is rushing out of her flat, she realises that she cannot find her Criminal Law textbook. She notices that her flat mate’s Criminal Law textbook on the floor and remembers that her flat mate was away visiting their parents. Amanda decides that her flat mate would not mind if Amanda took their textbook. Discuss Amanda’s criminal liability, if any.

This type of scenario is found in substantive law modules such as Contract Law, Tort, and Land Law. The above problem-based question requires the application of case law (previous judicial decisions)

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<sup>1</sup> By ‘normative’ we mean the what the law ought to be as opposed to what law is.

<sup>2</sup> A system of instruction focused upon the analysis of court opinions.

and statute (in this scenario section 1 of the Theft Act 1968). The case method requires students to apply previous judicial decisions and reasoning (*ratio decidendi*) to the problem-based question. This scenario shows that the case method fails to provide students with the opportunity to engage in concepts of justice and morality. This model of teaching law constitutes a ‘corporatised or positivist approach’ (Walsh, 2008, p. 123).

There is a risk that students, whose legal education is based on the case method, will resort to applying this positivist approach when dealing with similar facts as the above scenario. The absence of notions of justice (for example Rawls’ justice as fairness) prevents students and legal practitioners from engaging in values to arrive at substantively just outcomes. The term values is used to refer to principles, ideals, standards, which act as points of reference in decision-making or the evaluation of beliefs or actions and are closely connected to personal identity (Halstead, 1996, p. 5). Empirical data shows that this positivist approach only addresses the needs of all students. Some students enter law school with the desire to effect social change (Schwartz, 1980, p. 437). However, some students might not wish to pursue legal careers. Inculcating such students with notions of social justice can provide them with the necessary intellectual nourishment that they need to find satisfaction in their studies (Thornton, 1991, p. 19).

In relation to the suitability of the jurisdiction-specific case method which is devoid of morality and notions of social justice, it is necessary to provide an overview of the impact of globalisation on the legal profession and communities generally. The United Nations (UN) has, for more than fifteen years now, recognised that “[g]lobalization has increased contacts between people and their values, ideas and ways of life in unprecedented ways” (UNDP, 2004). Globalization is also affecting the practice of the law (Alemanno & Khader, 2018, p. 14). A brief survey of Big Law<sup>3</sup> reveals that corporate law firms such as Baker McKenzie, Clifford Chance, DLA Piper, and Kirkland & Ellis have offices on most continents. Alberto and Khader highlight the international dimension of legal practice:

The transnational judicial dimension of legal practice is today epitomized by the EU, a legal order characterized by a plurality of sources, judicial authorities, and the introduction of new modes of governance that have profoundly shaped the

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<sup>3</sup> An industry term which describes global law firms that employ more than 1,000 lawyers and have offices in different continents.

nature and practice of the law. This constellation is further complexified by the numerous agreements concluded by the EU with third countries as well as international organizations (such as the World Trade Organization [WTO]) that entail the operation of dispute settlement mechanisms, or by the existence of legal sources, also operationalized by dedicated judicial bodies, such as the ECHR (Alemanno & Khader, 2018, p. 16).

Thus, global lawyers are expected to understand the jurisdictional competencies of international courts such as the European Court of Human Rights (ECHR) and the Court of Justice of the EU (CJEU). The implications of globalisation of legal services lead us to conclude that law schools can no longer afford to simply teach the law relevant to their own jurisdiction. Any reform to legal education ought to address the increasing global nature of the profession. As a result of these global changes, law schools should “rethink what type of new knowledge and what type of graduates our future societies need” (Gregersen-Hermans, 2012, p. 24).

In addition to globalisation of the legal profession, recently there has been an emergence of legal issues which transcend national jurisdictions, such as the COVID-19 pandemic outbreak as well as climate change and the recent migrant crisis (Fulconbridge & Muzio, 2009. pp.1335-60). The National Intelligence Council envisages that by 2025:

[N]ation-states will no longer be the only—and often not the most important—actors on the world stage and the “international system” will have morphed to accommodate the new reality. But the transformation will be incomplete and uneven. Although states will not disappear from the international scene, the relative power of various nonstate actors—including businesses, tribes, religious organizations, and even criminal networks—will grow as these groups influence decisions on a widening range of social, economic, and political issues (National Intelligence Council, 2009).

It is, therefore, no longer acceptable to teach law in a manner devoid of the complexities of legal practice. In response to changes in the legal profession and the wider world, this paper will argue that the dominant case method used in law schools, which privileges theory over practice and domestic law over international law, is no longer a viable method for preparing students for a global market. The dominant legal pedagogic method is an inferior mode of academic pursuit (Hutchinson, 1999, p.302).

Teaching students to identify and address emerging global problems is best understood by viewing globalisation to mean world community. In other words, every person and every region are affected

by the same threats, and their responses affect us all (Bloch, 2008, p. 113). We argue for the restructuring of the law school curriculum to train students for roles as “policy makers” in society (Lasswell & McDougal, 1942), by inculcating them with universal values. For the purposes of this paper, the source of these normative values is the Universal Declaration of Human Rights (UDHR).

In addition to exploring the limitations of the case method, this paper discusses the implications of the proposed new qualification route for aspiring solicitors. We identify the universal values as embodied in UDHR as a normative framework for teaching law students to become global policymakers. The final section embeds these values, through reflective practice, within a pedagogical movement which transcends national jurisdictions, namely Clinical Legal Education (CLE).

By applying a normative approach to CLE (Madhloom, 2019), students are provided with the opportunity to confront the complex realities of the “law in action” (Pound, 1910). CLE, similar to substantive modules, cannot expose students to all law. However, CLE may contribute to the denationalisation of the law curriculum by teaching students to reflect on what law ought to be through the lens of universal values.

### Clinical Legal Education in England and Wales

The LawWorks Clinics Network recorded 229 active clinics across England and Wales (Law Works, Lawworks Clinics Network Report: April 2017 - March 2018, 2018).<sup>4</sup> A total of 39,937 clients were given legal advice at a clinic, a 14% increase from the previous year (2016). University law clinics account for 41% of the network and, collectively, they dealt with over 19,000 enquiries. The importance of law school clinics in relation to facilitating access to justice is demonstrated by the fact that they account for 51% of all clients receiving general information, signposting or referral (Law Works, 2018, p. 15). Chart 1 below sets out the breakdown of volunteers that supported clinics between April 2017 and March 2018.

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<sup>4</sup> Law Works is the operating name for the Solicitors Pro Bono Group, a charity working across England and Wales.

VOLUNTEER BREAKDOWN

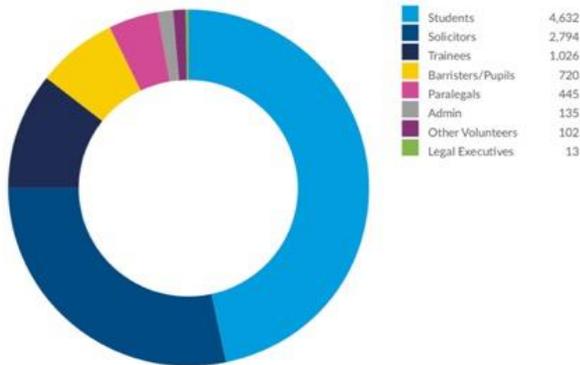


Chart 1 shows that the largest category of volunteers is students, with 4,632<sup>5</sup> participating in clinics (Law Works, 2018). In the UK, over 70% of law schools now provide clinical or pro bono experience to their students. CLE is clearly now mainstream (Duncan, 2016, p. 390). The popularity of university law clinics among student volunteers could be due to the fact that they provide an opportunity to apply theory to practice, and enhance student employability through client interaction, the acquisition of soft skills, and case management (McKeown, 2017). Another significant factor is the general need for *pro bono* legal support, which may have prompted universities to engage in corporate social responsibility through law clinics (Marson, Wilson & Van Hoorebeek, 2005). The Sentencing and Punishment of Offenders Act 2012 (LASPO) introduced funding cuts to legal aid and narrowed the scope and financial eligibility criteria. This resulted in fewer people gaining access to legal advice and representation in areas such as family, employment and welfare benefits law. The number of clients provided with early legal advice, including in social welfare law cases covering areas such as debt, benefits, employment and housing, fell from 573,737 in 2012/13 to 140,091 in 2016/17 (Law Centres Network, 2018, p. 4). The most significant impact of this legislation has been in the area of access to early legal advice, especially in social welfare law, tribunal procedures and family law (Law Works, 2019). Access to justice, according to Law Works, “is eroding” (Ntephe, 2017). The Equalities and Human Rights Commission (EHRC), in their recent work on the impact of legal aid reforms, have referred to the “over-representation of people with certain protected characteristics in areas of law excluded by LASPO” (Equality and Human Rights Commission, 2018). As a result of an increase in the

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<sup>5</sup> Almost 10,000 individuals volunteered across the Law Works Clinics Network, a 33% increase in the number of volunteers reported in previous year (Law Works, 2018).

number of people who are unable to afford professional legal representation, more individuals are relying on pro bono legal assistance. It is, therefore, imperative that clinic students acquire reflective tools to act in the best interest of their clients and to critique the law and political institutions.

CLE is a form of experiential learning. Law schools have long recognised the value of experiential learning techniques such as simulations, moots courts, and mock trials. Experiential learning has been a feature of legal education since medieval times. In England and Wales, formal legal education existed in response to the emergence of the legal profession in the twelfth century. Although the Universities of Cambridge and Oxford offered legal instruction, their curriculum was based on the Roman and canon law and omitted any instruction in common law (Brand, 1992, pp. 143-6). It would appear that this model of education was not utilised to provide the legal education necessary for the emerging profession (Rose, 1998, p. 31). Instead, legal education adopted an experiential approach which involved on-the-job learning and by observing experienced lawyers and judges (Rose, 1998, p. 32). Writing in the fifteenth century, Sir John Fortescue refers to this model of experiential learning as “public stadium”,<sup>6</sup> which he considered to be intellectually and geographically more well-suited to its educational task than the university (Fortescue, 1997, p. 67). This public stadium appears to be an early form of CLE. However, a version of the case method is the dominant form of legal education in the UK, and until recently was CLE rarely featured in law schools. There are two possible reasons for the prominence of the case method. Firstly, judicial decisions/cases are the law, and, therefore, lawyers must be able to extract the law from them (Slawson, 2000, pp. 344-346). While this still holds true in the sense that even statutes require judicial interpretation and, thus, become overlaid with statutes interpreting them, it is inadequate as the only teaching method. It fails to provide students with an insight into the public policies which law seeks to serve. Moreover, the case method does not provide students with the necessary skills to determine which evidence<sup>7</sup> is required to support their client’s case, how to act in their client’s best interests, or how to resolve ethical dilemmas. Secondly, according to Langdell, “law is considered as a science” and all the available materials are contained in books dealing with judicial opinions (Langdell, 1871). This positivist approach privileges source knowledge over practice. Legal positivism is the belief that it is both tenable and valuable to offer a purely conceptual theory of law, whereby the analysis of law is kept strictly separate from its

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<sup>6</sup> Meaning ‘a place of study’.

<sup>7</sup> In England and Wales, Law of Evidence, whether civil or criminal, is not a compulsory module/unit.

evaluation (Bix, 2000, p. 1615). The English jurist John Austin formulated legal positivism in the following manner:

The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it varies from the text, by which we regulate our approbation and disapprobation (Austin, 1995, p. 157).

Legal positivists argue that the validity of the law is derived from its source, not its merit (Gardner, 2001, p. 199). It is not difficult to see how such a doctrine can become the dominant approach in law schools, which are rarely concerned with practice and are removed from the individuals affected by legal/political institutions and the operation of the law (Evans et al., 2017, p. 163).

This legal positivist approach is present in the Solicitors Regulation Authority's (SRA) new route to qualification.<sup>8</sup> In October 2016, the SRA announced a new route for aspiring solicitors: the Solicitors Qualifying Examination (SQE) (SRA, 2016). This overhaul was in response to the Legal Education and Training Review's (LETR) report, which concluded that the current<sup>9</sup> qualification "provides, for the most part, a good standard of education and training" (LETR, 2013, p. ix), but identified a need for clarity in relation to what is expected of a solicitor at the point of admission and an outline of the level ability expected (Legal Education and Training Review, 2013).

The SQE will consist of two stages. Stage 1 (Functioning Legal Knowledge) will be assessed through multiple choice questions. This stage will not require candidates to "call case names or cite statutory authority except where specified," and they "will not be assessed on the development of the law" (SRA, 2017). This seems an unusual decision given that England and Wales operate a common law system which combines not only the passing of legislation but also the creation of precedent through case law. Stage 2 (Practical Legal Skills) will assess skills such as client interviewing and practical legal research (Solicitors Regulation Authority, 2020). All candidates will need to complete at least two-years full-time (or equivalent) qualifying work experience (Solicitors Regulation Authority, 2020). The

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<sup>8</sup> The regulatory body for solicitors in England and Wales

<sup>9</sup> The current position is that the SRA and the BSB jointly set out the requirements for the qualifying law degree, and the SRA approves and monitors LPC-providers.

significance of the SQE is that a law degree and the ‘conversion’ Postgraduate Diploma in Law (GDL) will no longer mandate a pre-requisite to qualifying as a solicitor. Moreover, the requirement to successfully complete the vocational stage (the Legal Practice Course)<sup>10</sup> has been replaced by the SQE.

We identify three pedagogic limitations associated with the SQE. Firstly, the SQE is underpinned by a doctrinal<sup>11</sup> methodology and is focused on the law as ‘is’ rather than what the law ‘ought’ to be (Hume, 1973).<sup>12</sup> This might result in future solicitors lacking analytical and legal reasoning skills leading to a decrease in the value of England and Wales’ legal education/qualification, as far as international employers are concerned (Madhloom, 2019). The SQE does not involve the analysis of judicial decisions, gaining an understanding of the development of law and principles, nor is there a requirement to address fundamental questions such ‘as should one obey unjust or immoral laws?’.

Secondly, future solicitors’ moral and ethical reasoning will be limited to the SRA’s Codes of Conduct. The Codes are client-centric and as such omit analysis of concepts such as lawyer paternalism, client autonomy, judicial activism, and legal issues outside England and Wales. The third reason, which draws on the first two concerns, relates to the fact that the SQE is not designed to develop reflective practitioners. The absence of legal theory, normative values, and case analysis suggests that future solicitors risk confining themselves to simply solving legal issues without analysing the implications of the relevant law and policies.

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<sup>10</sup> The Legal Practice Course is a postgraduate degree and is the final vocational stage for becoming a solicitor in England and Wales.

<sup>11</sup> Doctrinal or “black letter” methodology refers to a way of conducting research which is focused traditional sources of law such as case-law and statutes. It is not concerned with an interdisciplinary approach.

<sup>12</sup> The difference between “is” and “ought” was highlighted by David Hume in his Treatise on Human Nature: “In every system of morality that I have hitherto met with, I have always remarked that the author proceeds for some time in the ordinary way of reasoning, and establishes the being of a God, or makes observations concerning human affairs; when of a sudden I am surprised to find that instead of the usual copulations of propositions, is, and is not, I meet with no proposition that is not connected with an ought, or an ought not. This change is imperceptible; but is, however, of the last consequence...A reason should be given for what seems altogether inconceivable, how this new relation can be a deduction from others, which are entirely different from it”.

## Sourcing universal values

The skills and knowledge to address global problems are dependent on the attitudes and values that underpin a student's future practice. Being a member of a global community of legal practitioners requires a common desire to respond to global issues and concerns. It has been shown that legal education in England and Wales is lacking in a value-based approach due to its positivist approach. This form of legal education ignores the fact that international documents, such as those of the UN and the European Union, which regulate the training and conduct of lawyers, stress the importance of a value-based approach to professional activities (Office of the High Commissioner for Human Rights, 1990, Article 12; Council of Bars and Law Societies of Europe, 2007).

Recognising these universal values for the global reflective practitioner requires identifying the source of these universal values. In its Preamble, the UDHR states that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world" (UN General Assembly, 1948). This appears to echo the work of Lasswell and McDougal, who in 1943, argued that the fundamental value of democracy is "the realization of human dignity in a commonwealth of mutual deference" (Lasswell & McDougal, 1943, p. 217). In relation to legal education "the proper function" of law schools is to train students for "policy-making" (Lasswell & McDougal, 1942, p. 206). A pedagogic framework focused on training students to become policymakers not only ensures that legal education caters those who do not wish to enter the legal profession but also provides the foundations for inculcating students with normative values. According to Schieler and Ekecrantz:

[N]ormative values are about how things 'ought to be'. What is just and fair? How should students behave? What is good and bad? What is important? Emotions are associated with teaching, such as feelings of joy, frustration, indifference or satisfaction (Schieler & Ekecrantz, 2011, p. 59).

Largely uncontroversial in its provisions, the UDHR creates an accessible introductory framework for students to apply to their studies when reflecting on their own attitudes and practice, thereby introducing normative concepts into the positivist approach associated with the case method. Utilising the UDHR as a guide for good practice and as a tool for instilling human rights within education is to be found in its preamble:

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, ... The General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement of all peoples and all nations, to the end that every individual and every organ of society, keeping this

Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms... (UN General Assembly, 1948, Article 1).

However, the UDHR is not a legally binding document. It omits legalistic language and instead creates a set of moral rights and duties. Despite the lack of legal sanctions for non-compliance with its provisions, the UDHR makes the protection of rights, free from discrimination on any grounds, a priority for all nation-states (Nickel, 1987). The UDHR illustrates that these rights are recognised irrespective of their implementation or non-implementation in national legal systems, but they still remain a normative priority over national laws (Nickel, 1987, p. 3). The UDHR implies that state and non-state actors have duties to protect human rights by establishing “minimal standards of decent social and government practice” (Nickel, 1987, p. 4).

Cho believes that exposing students to the values contained in the UDHR promotes a sense of global citizenship assisting the protection of human rights as they enter their professional lives as practitioners and policy makers (Cho, 2019). The emergence of Human Rights Education (HRE) signalled the focus on the ‘educational strategies’ to achieve human rights protection (Bajaj, 2011, p. 482). The United Nations Declaration on Human Rights Education and Training explains:

Human rights education and training is essential for the promotion of universal respect for and observance of all human rights and fundamental freedoms for all, in accordance with the principles of the universality, indivisibility and interdependence of human rights (UN Human Rights Council, 2011).

Recognising that legal education can rely on one set of values implies an assumption over the universality of its application. Questions over the value of human rights law in a world of inequalities (Moyn, 2018), the effectiveness of human rights treaties (Posner, 2014) , as well as the perceived universality of human rights (Langford, 2018, pp. 72-3), have been some of the concerns raised by human rights critics. For example, Andreopoulos and Claude explain, there is a perceived attempt by HRE to make education ‘value neutral’ (Andreopoulos & Claude, 1997). The underlying principle of HRE, which is that of ensuring a culture of human rights, can be misconstrued as an attempt to align personal values with universal human rights values (Ahmed, 2018). However, Caney explains that universality can be divided in ‘universality of scope’ and ‘universality of justification’. The former relates to the application of one value – in this case rights – to all people. The latter relates to the justification of this value (Caney, 2006).

## Clinical Legal Education

To qualify as solicitors on the SQE route, students will be required to complete at least two years qualifying work experience (Solicitors Regulation Authority, 2020). This period can be spent in one or more of the following:

- on placement during a law degree
- working in a law clinic
- at a voluntary or charitable organisation such as Citizen Advice or a law centre
- working as a paralegal
- on a training contract (Solicitors Regulation Authority, 2020).

For our purposes, we will focus our analysis on university law clinics. These are a form of experiential learning and can take various forms ranging from providing basic assistance and advice to clients to being incorporated entities that carry out similar activities to law firms but on a pro bono basis. Some clinics provide only online support, while others choose to offer face to face support. The student-led client facing model is the common type of university law clinic. Students work on their cases (usually in pairs or small groups) under the supervision of legally qualified academics. In this way, law clinics are similar to university teaching hospitals. Law clinics are a component of CLE. Duncan notes that “[i]n recent decades CLE has moved from a predominantly US phenomenon to one that informs legal education throughout the world” (Duncan, 2016, p. 390). Organisations such as the Global Justice Alliance for Justice Education (GAJE) and the European Network of Clinical Legal Education (ENCLE) have established an international framework devoted to CLE and social justice. In addition to the generic law clinics, the past decade has witnessed the emergence of European Union Law and European Convention of Human Rights specialist clinics. Examples include the University of Bristol’s Human Rights Law Clinic (University of Bristol), Columbia University’s Human Rights Clinic (Columbia Law School), the EU Rights Clinic in Brussels, and the Women’s Law Clinic of the University of Ibadan (Adelakun-Odewale, 2018). Writing in relation to European legal education, Alemanno and Khader state that:

[L]egal teaching – historically formulistic, doctrinal, hierarchical, and passive (lecture- and textbook-based) – is coming under increasing pressure to reimagine itself as pragmatic, policy-aware, and action oriented (Alemanno & Khader, 2018, p. 4).

However, despite the emergence of a “global clinic movement” (Bloch, 2010), CLE remains a non-essential component of legal education in England and Wales. This could be due to the fact that CLE ranges from a non-assessed module to a module which is integrated into the curriculum and is

underpinned by legal ethics, moral philosophy, and jurisprudence.<sup>13</sup> Unlike other established modules such as Criminal Law, Contract Law, or Tort, there is no universally accepted definition of CLE. According to Grimes, CLE is:

[A] learning environment where students identify, research and apply knowledge in a setting which replicates, at least in part, the world where it is practiced.... It almost inevitably means that the student takes on some aspect of a case and conducts this as it would ... be conducted in the real world (Grimes, 1996).

Meghdadi and Nasab state that:

Clinical legal education is a course of study combining a classroom experience with representation by students of clients with real cases or projects, under the supervision of a full-time faculty member whose background includes extensive law practice...Clinical legal education implies a method of teaching that, in most instances, has a social justice dimension (Meghdadi & Nasab, 2011, p. 3015).

A more comprehensive definition which outlines the different conceptions CLE can take is provided by ENCLE:

Clinical legal education is a legal teaching method based on experiential learning, which fosters the growth of knowledge, personal skills and values as well as promoting social justice at the same time. As a broad term, it encompasses varieties of formal, non-formal and informal educational programs and projects, which use practical-oriented, student-centered, problem-based, interactive learning methods, including, but not limited to, the practical work of students on real cases and social issues supervised by academics and professionals. These educational activities aim to develop professional attitudes and foster the growth of the practical skills of students with regard to the modern understanding of the role of the socially oriented professional in promoting the rule of law, providing access to justice and peaceful conflict resolutions, and solving social problems (European Network of Clinical Legal Education, 2019).

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<sup>13</sup> At the University of Bristol, the CLE module includes lectures on normative ethics, moral reasoning, and Rawls' theory of justice.

The above definitions not only emphasise the experiential and social justice dimensions of CLE but also draw attention to the fact that CLE can accommodate a variety of teaching methods and forms, to which we will add universal human rights values as presented in the UDHR. The above definitions share a commitment to professional attitudes, access to justice, and resolving social issues. These definitions do not define the key terms which underpin their definitions. For example, ENLCE does not define 'values', 'attitudes', and 'access to justice'. A further limitation of definitions is the absence of reflective practice. The significance of reflection in CLE is that it turns experience into learning (Murray, 2011, p. 227) and promotes continued professional development.

## Reflection

It is now universally acknowledged that reflection is a valuable learning tool for students and practitioners to learn effectively from experience (Boud, Keogh, & Walker, 1985, p. 19). However, law students continue to be trained as domestic lawyers, using a predominantly positivist approach which overemphasises 'technical rationality'. According to Schön:

Technical rationality holds that practitioners are instrumental problem solvers. Who select technical means best suited to particular purposes. Rigorous professional practitioners solve well-formed instrumental problems by applying theory and technique derived from systematic preferably scientific knowledge (Schön, 1987, pp. 3-4).

Because technical rationality is an epistemology of practice rooted in the heritage of positivism, it risks reducing normative questions such as "how ought I act?" to a merely instrumental questions about the means best suited to achieve one's ends (Schön, 1983, p. 33). The gap between legal education and legal realities appears particularly striking in England and Wales, and in Europe generally, where legal scholars and their universities continue with their historical reluctance to engage in self-reflection (Alemanno & Khader, 2018, p. 2). Therefore, there is a dearth of "soul-searching and thinking" beyond legal texts and lectures (Alemanno & Khader, 2018, p. 2).

Similar to CLE, there is not one universally agreed upon definition of reflection. According to Dewey "reflective thinking" involves two sub-processes, "(a) a state of perplexity, hesitation; and (b) an act of search or investigation directed toward bringing to light further facts which serve to corroborate or to nullify the suggested belief" (Dewey, 1910, p. 9). Thus, CLE involves learning from experience. But how does CLE promote learning from experience? One method is through reflection. Without engaging in reflection, CLE risks being downgraded to work experience (Murray, 2011, p. 227).

What does it mean to engage in reflection? In the context of professions, including law, the capacity to engage in reflective practice is a means of enhancing the quality of the work and prompting learning

and development through a continuous reflexive process (McGill & Brockbank, 2004, p. 94). Donald Schön is credited with developing the notion of reflective practice as a means of enhancing a person's critical and reflective abilities (McGill & Brockbank, 2004, p. 94; Kinsella, 2010; Cossentino, 2002; Kibble, 1998; Mickleborough, 2015). Schön was interested in how and when professionals use reflection to build professional knowledge and expertise (Schön, 1983; Schön, 1987). Those who teach disciplines tend to create and promote largely propositional knowledge 'knowing that' and what Ryle has termed 'knowing how' (Ryle, 1949, p. 32). Schön was of the view that such propositional knowledge, on its own, is of limited value for the emerging professional (examples includes lawyers, social workers, nurses, and teachers) (Schön, 1987, p. 22). Limiting student learning to the acquisition of professional knowledge risks limiting their ability to develop into reflective practitioners because propositional knowledge does not take into account the realities and complexities of professional practice (McGill & Brockbank, 2004, p. 94).

Emergent professionals, such as solicitors, enter practice and are effective despite not having had formal training on how to reflect. They develop practical experience and professional knowledge, which includes propositional knowledge acquired to enter their chosen profession (McGill & Brockbank, 2004, p. 94). To engage in their practice areas effectively, an additional element is required. Schön observes that, traditionally, professional legal education has been based on a model in which practitioners are instrumental problem solvers, rather than problem setters, who select the technical methods best suited to particular purposes:

In the varied topography of professional practice, there is a high hard ground overlooking a swamp. On the high ground, manageable problems lend themselves to solution through the application of research-based theory and technique. In the swampy lowland, messy, confusing problems defy technical solution (Schön, 1987, p. 3).

Schön distinguishes the high ground from the messy indeterminate swampy lowland of professional legal practice. He posited a new epistemology of practice which allows practitioners to enhance their practice while they are engaging in it:

If the model of Technical Rationality is incomplete, in that it fails to account for practical competence in "divergent" situations, so much the worse for the model. Let us search instead for an epistemology of practice implicit in the artistic, intuitive processes which some practitioners do bring to situations of uncertainty, instability, uniqueness, and value conflict (Schön, 1983, p. 49).

Schön's epistemology of professional practice distinguishes between two types of reflection: reflection-in-action (Schön, 1987, p.29), while the actions are taking place—and reflection-on-action

(Schön, 1987, p.36), reflecting after the event. Retrospective reflection allows practitioners to reflect on *their* reflection-in-action and indirectly shape their future actions (Schön, 1987, p.31). There is a risk that without a framework, students are unable to engage in reflection-in-action due to their limited experience in dealing with clients. Similarly, in relation to reflection-on-action, students might engage in a purely descriptive and/or subjective analysis of their experience.

### Human rights education and reflection in practice

Kreiling contends that “clinical education should reach beyond skills training to provide students with a method from future learning from their experiences” (Kreiling, 1981, p. 284). Without a methodology which can be transferred to the world of professional practice, student experience and law school resources may be squandered by merely providing exposure to an unreflective world of practice (Kreiling, 1981, p. 284). Practitioners who continue to learn through the course of their careers should be more competent lawyers (Kreiling, 1981, p. 286).

Dewey argues that experience “is whatever conditions interact with personal needs, desires, purposes, and capacities to create experience which is had” (Dewey, 1944, p. 44). Therefore, the value of reflection can also extend beyond a student’s own personal development. Teaching through human rights means that diversity, equality and dignity remain at the centre of teaching and learning. This ensures that the student as a future legal professional will live by human rights (Cargas, 2019, p. 297). Reflection allows students to assess the compatibility of their attitudes and behaviour with human rights values. This allows students to then set their own roadmap for their future learning and practice. As Cargas explains, the results of this process are not uniform for all students. This requires a critique of the methods employed and their improvement in order to help students learn to critique their own attitudes and hopefully generate a will to participate in change (Cargas, 2019, p. 297). Aligned with the UN’s recommendation that reflective practice should be combined with experiential learning (UNESCO & UN High Commissioner for Human Rights, 2012), CLE provides the vehicle for reflecting on experience. Johnson and Johnson define experiential learning as:

Generating an action theory from your own experiences and then continually modifying it to improve your effectiveness. The purpose of experiential learning is to affect the learner in three ways: (1) the learner’s cognitive structures are altered, (2) the learner’s attitudes are modified, and (3) the learner’s repertoire of behavioural skills is expanded. These three elements are interconnected and change as a whole, not as separate parts (Johnson & Johnson, 2003, p. 49).

CLE provides a vehicle for reflecting on experiences between the students and their peers, clients, and (global) community. The experiential approach is illustrated by a model of learning known as the learning cycle (Kolb, 1984). Kolb (Kolb, 1984), building on the theories of Dewey, Lewin, and Piaget

(Evans, et al., 2017, p. 159), defines learning as “the process whereby knowledge is created through transformation of experience” (Kolb, 1984, p. 38). The Kolb cycle of learning is commonly used to illustrate the differences between concrete experience (doing), reflective observation (thinking), abstract conceptualisation (extrapolating) and active experimentation (testing). Although the learner can enter the cycle at any point, Kolb appears to link the cycle to concrete experience, and reflection flows from Kolb’s learning model (Evans et al., 2017, p. 159). However, Kolb’s cycle does not provide guidance on how a learner should engage in reflection, nor which values should underpin a learner’s reflective observation.

Commentators have highlighted the benefit of teaching theory in an integrated manner by arguing that a theoretical underpinning allows students to better understand reflection (Wrenn & Wrenn, 2009). Fook writes:

In order to understand the idea of critical reflection and the processes involved, it is helpful to explore the main traditions of thinking from which it arises. I have identified four main ones that are involved: reflective practice, reflexivity, postmodernism/deconstruction and critical social theory. These traditions are not mutually exclusive and, of course, share many commonalities. It is helpful to understand some of the basic tenets of each of these traditions in order to build up a more complex understanding of the theoretical underpinnings of critical reflection (Fook, 1991, p. 442).

Having discussed the global reach of CLE and the importance of developing practitioners who are able to apply normative values such as those espoused by the UDHR, we will now address how the CLE can incorporate Human Rights Education (HRE). An understanding of the HRE is particularly important and is defined as

a movement to promote awareness about the rights accorded by the Universal Declaration of Human Rights and related human rights conventions... intended to be one that skills, knowledge, and motivation to individuals to transform their own lives and realities so that they are more consistent with human rights norms and values (Tibbits & Fernekes, 2010, pp. 87, 93).

However, Human Rights is offered as an optional module. Whilst other compulsory modules offer an introduction to human rights, such as Land Law, there is little exposure to the normative aspect of human rights unless the student selects a specialised human rights module. This paper suggests that the CLE curriculum should include an introduction to the UDHR. This introduction will cover the background of the UDHR, its provisions, and its significance to democracy and Human Rights Law, considering the elements of dignity, equality and social justice. The introduction should inspire law

students in identifying the values on which they can rely when reflecting on their interactions with clients.

Embedding human rights within education has been supported by the UN, which suggested the adopting a human-rights-consistent teaching style in order for students to ‘learn tolerance and respect for the dignity of others and the means and methods of ensuring that respect in all societies’ (UN General Assembly, 2005). In addition, the Universal Declaration on Human Rights Education and Training pointed to the UDHR as the source of these human rights values. The UN General Assembly clarified that the aim of HRE is ensuring the respect of dignity in all societies (UN General Assembly, 2005), bringing at the centre of HRE, dignity.<sup>14</sup> The Guidelines for National Plans of Action for Human Rights Education, suggested that “human rights are promoted through three dimensions of education campaigns:

(a) knowledge: provision of information about human rights and mechanisms for their protection;

(b) values, beliefs and attitudes: promotion of a human rights culture through the development of values, beliefs and attitudes which uphold human rights;

(c) Action: encouragement to take action to defend human rights to prevent human rights abuses (UN General Assembly, 1997, 13(c))”.

The importance of (a) and (b), notwithstanding, CLE can act as a vehicle for influencing future policy-makers’ “values, beliefs and attitudes” through a combination of experiential learning and reflection (UN Human Rights Council, 2010, 27(b)(iii)), “promoting the development of the individual—in this case, the future policy-maker—as a responsible member of a free, peaceful, pluralist and inclusive society” (UN Human Rights Council, 2011, Article 4).

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<sup>14</sup> Protecting human rights as a means to protecting dignity, entails moral considerations (Lukow, 2018). Associating human dignity to the action of ensuring human rights protection, entails a question of universality of justification (Caney, 2006). The attempt to define human dignity could potentially find obstacles within the cultural interpretations of dignity, and such an exercise should remain independent from the overall adoption of the principles of the UDHR (Lukow, 2018).

## Conclusion

This paper argued that CLE should be the vehicle for embedding normative values into legal education through reflective practice. These normative values should derive from a universally recognised moral guide, such as the UDHR, which transcends geographical and cultural boundaries. Knowledge of human rights leads to knowledge for human rights: supporting the development of the students' attitudes and values aims at responding to global problems as global policymakers in government, law firms, NGOs, or international organisations. However, it is not suggested that this normative approach becomes the sole method for developing global policymakers; rather, these universal values are used as a point of reference for addressing jurisdiction-specific and global issues.

In relation to implementing our proposed normative framework for reflective practice, students advising law clinic clients would not only address the individual client's legal needs using domestic law, but also would reflect on their interaction with the client and the role of the State in terms of limiting or removing the right to a public-funded lawyer. Students should treat the client with respect and do so in an unbiased manner, which should be influenced by the principles found in Articles 1 and 2 (dignity and equality, respectively). This provides a framework for students to address any biases they might have towards their clients. Students might conclude that LASPO is contrary to Article 7 (equal protection of the law), Article 8 (a right to a fair remedy), and Article 10 (right to a fair hearing) of the UDHR.

In real-world practice, problems do not simply present themselves to policymakers. Instead, they must be constructed from the materials of problematic situations which are puzzling, troubling, and uncertain (Schön, 1983, pp. 39-40). By applying our proposed framework of embedding UDHR into CLE, future practitioners are trained to become policymakers by not only solving legal problems based on domestic law, but also identifying global threats to human rights.

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