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CLINICAL LEGAL EDUCATION IN UKRAINE AND IN GERMANY A COMPARATIVE ANALYSIS

*"We cannot be human with dignity
if, through ignorance of the state's rules, we face censure and sanction;
if, through inability to use rules, we face loss and damage;
if, through confusion about rules, we lose opportunity."¹*

INTRODUCTION

As the relationships between people become increasingly governed by legal norms we are more than ever reliant on solving the problems arising in our daily life by legal means. This, however, requires a general comprehension of the legal system in our society and usually very detailed knowledge of the relevant legal provisions and judicial decisions applicable in the specific situation. Understandably, this is not possible for everyone, which raises the need for legal assistance. Unfortunately, these kinds of services are usually quite expensive so that many persons from low-income households find themselves without access to this legal assistance, which leaves them at risk of violations of their basic rights and freedoms, both by their fellow citizens and by the state. For these

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¹ Simon Rice, "A Human Right to Legal Aid" Opening Statement at the "Conference on the Protection and Promotion of Human Rights through Provision of Legal Services" in Kiev, Ukraine on 27-30 March 2007, Conference Report available at: <http://www.redress.org/downloads/publications/Kiyv%20Conference.pdf>.

people in particular free legal aid is fundamental for the exercise of their rights and an effective participation and inclusion in society. We could even go as far as to say that the right to legal aid is a question of human dignity.²

Now, if we take a look at the reality of things, we will quickly realize that, although the right to legal aid is guaranteed by the laws or constitutions of many states, they have failed to provide it to a sufficient extent, either for financial or infrastructural reasons. The actual exercise of such rights by individuals is therefore by no means a matter of course. As legal professionals are not likely to want to work for free, one of the common solutions worldwide is the creation of legal centers at universities, where law students provide clients with consultations and other legal services free of charge as well as try to improve the general legal education of the surrounding population. These legal centers are known under a great number of names: law clinic, legal aid clinic, pro bono ... the list goes on and on. The term *pro bono*, which in Latin means as much as "for the sake of good"³, perfectly describes the social objectives of these institutions.

Apart from this charitable trait, the other determining characteristic of the university legal aid clinic is its educational component. The preparation of law students for the professional world is in fact a global challenge.⁴ Given the enormous responsibility shouldered by legal professionals – regardless of their specific occupation – and their constitutional significance in a state under the rule of law, law faculties all over the world face the enormous challenge to provide their students with the skills and qualifications necessary to fulfill that role. These qualifications are not to be equated with legal knowledge but go beyond that. They also include soft skills needed when dealing with clients or

² See, Rice, *supra*, note 1, pp. 7 ff.

³ http://www.oa.edu.ua/en/student/en_studorganizations/probono_en.

⁴ See, Stuckey R., *Preparing Students to Practice Law: A Global Problem in Need of Global Solutions*, 43 South Texas Law Review (2002), pp. 649 ff.

colleagues and more importantly a framework of ethical values and moral standards. These, however, cannot be taught in a classroom. As a result, for the purposes of this article a legal clinic is to be understood as an institution at the university where law students not only provide free legal aid but more importantly do it under the supervision of their teachers and/or legal practitioners ensuring the educational effect on the students' part as well as qualitative legal services for the clients. Nowadays it is also common, but not required, that the activities in the legal clinics are incorporated in the curricula of the students or are otherwise taken into account.

Because the education in legal clinics deviates from the "traditional" form of education that consists of lectures held by a professor in a classroom it is often described as an innovative or new means of education. The idea of experiential education however is not that recent. Already in 1855 D. I. Meyer, a Russian professor at the University of Kazan, published a thesis explaining how he believes that an exclusively theoretical system of knowledge is a dangerous phantasmagoria and how this danger could be met by practical trainings where the transfer of knowledge takes place in real-life situations.⁵ On the other hand, he considered simulated and theatrical forms of education – for example Moot Courts that enjoy popularity nowadays – remote from life and incompatible with the seriousness of the legal profession. Meyer concluded that in order to provide as much practical training as possible the law students should go through a clinical education following the model of medical school. That way they could practice law with real life clients but at the same time mistakes would be less serious and could be corrected more easily. Meyer himself founded a legal clinic that functioned for about 10 years and found supporters like his colleague A. Lublinsky who published an article about his own vision of legal clinics in

⁵See, Мейер Д., *О значении практики в системе современного юридического образования* (1855).

1901.⁶ Parallel to this, the German professor Georg Frommhold brought up the term legal clinic for the first time in an article in a German law journal.⁷ Only then, in the 1920s and 1930s the idea of a legal clinic was taken up by Jerome Frank and then found increasing popularity in the US until finally in the 1970s it spread all over the law faculties in Europe.⁸

Despite their obvious popularity experiential education still remains an exception. For the most part law schools employ passive methods of learning where the students listen to lectures and reproduce what they have learned. They hardly reflect on the subject matter, nor do they learn how to apply their knowledge in a real case. Despite the development of new educational methods such as problem-based learning (PBL) or the existence of moot courts or other practical activities, the direct communication with a client is not sufficiently covered by the curricula. This shortcoming is a never-ending source of complaints from practitioners who wish for more experienced and independent trainees as well as from the students themselves who do not feel prepared for their professional future when they graduate. This phenomenon exists in the USA just as it does in Germany, Ukraine and the rest of the world. The purpose of this article is to examine how this problem is handled by legal clinics in two such different countries as Ukraine and Germany as well as to present their benefits and shortcomings, and the obstacles they face and also to compare the different legal frameworks in the two states.

⁶Люблинский, А.И., *О юридических клиниках*, Журнал Министерства юстиции (1901), pp. 175 ff.

⁷Frommhold, G., *Juristische Kliniken*, Deutsche Juristenzeitung (1900), pp. 448 ff.

⁸See, Філіп'єв, А., *Знайомтесь: юридична клініка* (2005), p. 3.

I. Clinical Legal Education in Ukraine

1. Historical background

In the year 1996, which marks the birth of clinical legal education in Ukraine, the first legal clinics were founded in the law faculties of the Universities of Kiev, Lviv and Donetsk.⁹ In the following years this model was established at all leading national universities. In 2002 clinical legal education found support from the Ministry of Education and Science in Ukraine when the deans of the law faculties received a list of recommendations from the Minister concerning the activities of legal clinics based on the results of the Ukrainian Conference on the "*Development of programs that benefit the educational process in law faculties*" that took place in Kiev in march 2002.¹⁰ During the same year a list of recommendations was sent out to all universities by the Methodological Commission in Law Education of Ukraine that stressed the importance of practical training and the possibility of learning to solve problems in realistic situations, possibilities that were not given in the prevailing traditional forms of education.¹¹ It was, however, only in 2006 that the Ministry of Education and Science issued an order – namely the *Наказ № 592 "Про затвердження Типового положення про юридичну клініку вищого навчального закладу України"*¹² – that obliged every higher education facility with a law faculty to establish legal aid clinics. To this day, legal clinics in Ukraine can look back on a history of over 15 successful years during which hundreds of law students have given free legal assistance to a considerable part

⁹Сенчак, І. І., *Проблеми законодавчого визначення статусу юридичних клінік в Україні*, Адвокат №11 (146) 2012, р. 40; Чутчева, О. Г., *Юридическое клиническое образование в условиях присоединения к болонскому образовательному пространству*, Збірник наукових праць Східноукраїнського національного університету імені Володимира Даля (2007), р. 50.

¹⁰«Розвиток програм, що допомагають вдосконалювати навчально-виховний процес на юридичних факультетах»; see, Сенчак, І. І., *supra*, note 9, р. 41.

¹¹See, Сенчак, І. І., *supra*, note 9, pp. 41 f.

¹²*Про затвердження типового положення про юридичну клініку вищого навчального закладу України: Наказ Міністерства освіти і науки України № 592 від 3 серпня 2006 р.*, [online resource] URL: <http://zakon2.rada.gov.ua/laws/show/z0956-06>.

of the population while simultaneously ameliorating the general legal education of thousands of citizens.

2. Structure and work methods of legal clinics in Ukraine and their current legal grounds

a) The implementation of the *Наказ № 592* by the legal clinic "Pro bono" at the National University of Ostroh Academy

With the *Наказ № 592* the Minister of Education and Science not only ordered the presence of a legal aid clinic at every law faculty but also specified its required internal organization and structure. According to Article 2.1. the goals of clinical legal education are to increase the degree of experience and practical knowledge of the students, to teach them in accordance with the principles of the rule of law, justice and human dignity and to be legal professionals as well as to ensure the access to legal assistance of the financially weak and to further the population's legal education. Article 2.2. then states that in order to achieve these goals, students must acquire practical skills by providing the population with free legal consultations and generally by educating citizens about legal matters while at the same time being in contact with practitioners. Clinics have to offer introductory courses destined to familiarize future consultants with their activities as well as organize events and seminars on current legal topics. Chapter 3 provides that all these activities have to be carried out according to the principles of respect of the law, justice, human dignity, the protection of human rights, humanism, legality and the rule of law, objectivity, the *pro bono* character of legal assistance, confidentiality, competence and integrity. In return, the student consultant is obliged to participate in the clinic's activities, to constantly improve his knowledge, to act with respect to ethical norms and confidentiality and to follow the internal rules

of the clinic, especially to be present at his shifts. In accordance with Article 5.3., he must exercise his tasks on time with effort and precision and take care of the client's matters before executive authorities and public institutions. Furthermore the consultant has to keep protocol about his activities.

The Order further contains provisions about means to finance the clinics and altogether regulates their functioning quite strictly. Nevertheless a certain scope for flexibility on how to organize the clinic exists. In the following I would like to present the realization of the *Наказ № 592* by the legal clinic "Pro bono" at the National University of Ostroh Academy where I personally had the opportunity to work for one month.

The legal aid clinic "Pro bono" was founded in the year 2000. The participation in the clinic is designed as an elective course and is offered to 2nd, 3rd and 4th year students of law with a high average mark, morality and exceptional motivation.¹³

While many legal clinics limit their activities to consultations of the clients and others follow a two-stage model where they additionally organize legal educational events for the population, the legal clinic at the National University of Ostroh Academy has chosen a more comprehensive approach. Its work takes place on three levels: the work with the "live" client, the "Street Law" program and the written consultation of prisoners on civil cases by mail. This way a balance has been found that ensures quality legal education and assistance as well as the cooperation and maximum independence of students. During their participation in the program, students pass through all three of these closely coordinated stages.

¹³ For more information about the legal clinic "Pro bono" at the National University of Ostroh Academy see: Фурманчук, О., Самолюк, В., Філіп'єв, А., *Інноваційна модель розвитку клінічної юридичної освіти: на прикладі Національного університету „Острозька академія*, Інформаційний бюлетень (2006).

Students commence their work at the clinic in the second year of their studies. They start by participating in training on interactive methods of teaching that they can later apply in practice while teaching pupils in school about basic legal matters in civil, criminal and constitutional law. This program is known under the name "Street Law". The second year students teach the pupils independently without supervision by the clinic staff. However, they always appear in groups of two: At the beginning, they are placed in groups with students from the third year in order to have someone more experienced to turn to if it is necessary and later, when they have accumulated enough experience, they appear in class with their second year peers. *In order to complete the program, 10 lessons have to be given before the end of the first semester of the second year.* After a couple of months the students participate in trainings on how to provide written consultations, which they are allowed to give by the time they reach the third year under supervision of their peers in the fourth year of their studies. This is also the point where the students stop being just listeners and become consultants. During this period of time they continue to participate in "Street Law" lessons, only at this point they are the older and more experienced members of the group and carry a higher responsibility. By the end of their third year the consultants start to work directly with the clients. They attend shifts and assist their fourth year teammates in oral consultations. This way the third year students are carefully introduced to consulting before they are allowed to take on clients of their own when they reach their fourth year. At this point, the consultants are perfectly prepared to do written and oral consultations. Again, they will find themselves in the role of the older and responsible member of their team as they will now be the ones instructing their younger peers.

It is the main characteristic and advantage of this model that older and younger students cooperate with each other which not only promotes their

comradeship but also ensures that a student consultant is never assigned a task that he is unprepared for while at the same time the highest possible degree of independence from their teachers is granted. This effect is reinforced by the obligation of the students to keep protocol about their activities as well as the work of the student administrators who have certain additional tasks and responsibilities vis à vis the other consultants so that when questions arise, students can first seek assistance from their peers before turning to their teachers for help. However, this does not exclude the involvement and continuous support by the teachers, especially the head of the clinic who is always there to discuss the next steps of a case and regularly organizes seminars and trainings as well as presentations from practitioners working in different legal professions and visits of court hearings in civil and criminal law. All this is rounded off by the clinic's own ethical code that ensures the implementation of the principles of the *Наказ № 592*.¹⁴

Having considered all this, it becomes clear that every member of the legal clinic "Pro bono" at the National University of Ostroh Academy – regardless whether he is a consultant, a student administrator, a practitioner or a teacher – is making every effort to guarantee their clients the best possible legal assistance which throughout the years has earned them the trust of the local population. To this day the clinic assists approximately a hundred clients from various age and occupation groups per year all while regularly teaching legal matters to pupils in local schools, where the consultants are always welcome guests.¹⁵

¹⁴ *Етичний кодекс юридичної клініки "Pro bono"* (2006).

¹⁵ Філіп'єв, А., *supra*, note 8, p. 4.

b) Legal grounds and limitations for the provision of free legal aid

The right to free legal assistance is guaranteed by the Ukrainian Constitution¹⁶. Its Article 59 states that this assistance shall be rendered free of charge in cases stipulated by law. Up to the year 2011 however, no specific law concerning this topic existed. Only a few sporadic provisions in the Criminal Procedural Code of Ukraine¹⁷ – more specifically Article 47 – stipulated that a legal defense counsel is to be appointed for an accused with lack of financial resources if the participation of a defender is mandatory in the trial. In June 2011, however, the *Верховна Рада України* – the Ukrainian Parliament – adopted the Law of Ukraine "On free legal aid"¹⁸ which came into force on 9 July, 2011. The law comprehensively regulates the provision of free legal assistance by defining the right to and the content of free legal aid as well as the conditions and procedure for its accordance. At the same time, it constitutes an implementation of the recommendations determined by the Parliamentary Assembly of the Council of Europe set in Paragraph 13.13 of the Resolution 1466 (2005) and Paragraph 7.2.5 of the PACE Resolution 1755 (2010).¹⁹

Article 1 (1) of the Law "On free legal aid" defines free legal aid as legal aid guaranteed by the state and fully or partially provided by the state budget of Ukraine, local budgets and other sources. The legal services envisaged by the law are the provision of legal information, consultations and explanations on legal issues, drafting of requests, claims, procedural and other legal documents,

¹⁶Конституція України / Закон України від 28.06.1996 з. № 254к/96-ВР, [online resource] URL: <http://zakon4.rada.gov.ua/laws/show/254к/96-вр>.

¹⁷Кримінально-процесуальний кодекс України/ Кодекс від 28.12.1960 № 1001-05; [online resource] URL: <http://zakon2.rada.gov.ua/laws/show/1001-05/page>.

¹⁸Про безоплатну правову допомогу / Закон України від 02.06.2011 № 3460-VI; [online resource] URL: <http://zakon4.rada.gov.ua/laws/show/3460-17>.

¹⁹Resolution 1466 (2005), *Honouring of obligations and commitments by Ukraine*, [online resource] URL: <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta05/eres1466.htm>; Resolution 1755 (2010), *The functioning of democratic institutions in Ukraine*, [online resource] URL: <http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta10/ERES1755.htm#1>; for further information see, <http://legalanalytics.com.ua/en/consultacija/20-ogladzakonyprobezoplatnypravovyddopomogy.html>.

legal representation of persons in courts and other state authorities, public authorities, and versus other persons as well as the provision of judicial remedy against charges and the assistance in providing access to secondary legal aid and intermediation. When determining the regime of the provision of free legal assistance – namely the persons and organizations entitled to receive and to provide free legal aid – the law distinguishes between primary and secondary free legal aid which are specified in their own respective chapters – Sections II and III of the law – and follow their own rules. Under Article 7 (1) the aim of primary legal aid consists of informing people about their rights and freedoms, the order of their implementation, rehabilitation in case of their violation and procedure for appealing against decisions, actions or inaction of state authorities, local governmental officials and officers. In accordance with the constitutional guarantee it is granted to every person on the territory of Ukraine.

Secondary legal aid on the other hand is only granted to certain persons that are entitled to this sort of legal service under Article 14 of the law. These are mainly persons involved in criminal cases, persons with low income and those dealing with cases of hardship like orphans and refugees. Article 13 grants these individuals the right to defense against prosecution; the representation of their interests in the courts, other state agencies, self-governing authorities, and versus other persons as well as the drafting of procedural documents.

The most important difference between these two types of legal assistance are the persons or institutions allowed to provide them. While under Article 9 (4) of the law, student consultants are allowed to give primary legal aid as university legal clinics could be considered "specialized institutions", it is highly unclear whether the same goes for secondary legal aid because the provision of such services is reserved to lawyers included in the Registry of Lawyers that provide free secondary legal aid on a temporary or a regular basis and so called

centers for granting secondary free legal aid as stated in Article 15. However, although these centers have been established by the Ministry of Justice of Ukraine as it is required by Article 16, they only work in the field of criminal law at this moment. According to transitional provisions they are not obliged to take on civil and administrative cases until 2014. This creates a legislative gap and the need for secondary free legal aid in these cases is not met. From the text of the law it is therefore impossible to determine the status of the clinic and its consultants when providing these services²⁰, even more so as penalties for unauthorized consultations do not exist.

The situation is similar for the liability in case of incorrect legal advice. In conformity with the current legal position, it is safe to say that a student consultant would not be held liable for faulty legal advice. The responsible institution would much rather be the university that has set in place the legal clinic. This result, however, is questionable as the head of a university usually has no specific knowledge about the clients and the factual and legal details of their cases.

The risk of liability is increased even further as a specialization of law clinics is not mandatory. While some of them – including the legal clinic at the National University of Ostroh Academy – refuse to provide legal aid in criminal and economical law, others operate in all fields. This can be a problem as these cases often are too complicated and vital for the client or involve considerable amounts in dispute. It is highly questionable whether this overwhelming responsibility should be dealt with by students, even more so as the huge variety of cases makes it difficult to ensure the qualification of the supervising staff.

It becomes obvious that despite the sheer volume of laws and provisions, crucial questions are left undecided. It is advisable for the legislator to take

²⁰Полищук, М.С., К определению правового статуса консультантов юридических клиник (2012), [onlineresource] URL: <http://dspace.uabs.edu.ua/handle/123456789/8481>.

measures to eliminate these uncertainties and facilitate the consultant's legal status as his charitable work is not only valuable for the society, it is also explicitly prescribed by law.

3. Factual challenges and obstacles

Apart from legal uncertainties, clinics also face factual obstacles that are no less difficult to overcome. First and foremost, it is a challenge to get practitioners and university teachers involved in the activities of legal clinics. In Ukraine, as in many other countries, university education is provided through lectures where the professor presents a subject matter while students listen and reproduce what they have learned, in other words: stay passive. Usually university teachers aren't likely to give up this traditional method of teaching for an innovative approach like clinical legal education as it requires considerable additional efforts on their part. Legal practitioners on the other hand are reluctant to support law clinics because they see them as competition and therefore feel threatened that they might "steal" paying clients from them.²¹ Despite the fact that this fear is obviously not justified as the clients of legal clinics usually cannot afford to hire a lawyer and therefore do not constitute prospective clients, it is often hard to convince practitioners to support the clinic's work without remuneration. Their assistance, however, is crucial in order for the students to acquire the best practical experience possible.

Last but not least, the question of how to finance the law clinic is a constant struggle to its founders and organizers. Although the presence of university legal aid clinics is required by the government, these institutions do not receive any direct financing from the state. Instead they are dependent on the universities' support. They, however, often see the financing of the clinics as a "necessary

²¹Фурманчук, О., Самолюк, В., Філіп'єв, А., *supra*, note 13, p. 8.

evil" and therefore aren't particularly generous. Financing from charitable organizations on the other hand is usually granted only when the clinic is already in place even though it needs all the financial means it can get before that, during its formation. It is clear that despite the *Наказ № 592* and the resulting change in legal policies, there has not yet been a comprehensive change of mentality amongst the heads of universities. Here, too, a need for action by the government exists if university legal aid clinics are expected to continue to operate successfully in the future.

II. Clinical legal education in Germany

In Germany the legal status of university law clinics is an entirely different one. On the one hand, a very developed and comprehensive system of state funding for lawyer's and court fees exists for persons with low income. Additionally, it is more and more common for people to conclude legal expenses insurances which not only cover the costs arising in court proceedings but furthermore also the lawyer's fees for legal consultation.²² As a result, the problem the German legislation on legal clinics run by non-professionals such as students concentrates on most, is the protection of the clients against low-quality and inadequate legal services.²³ Correspondingly, the laws on the provision of legal services by non-professionals are significantly stricter when it comes to questions of liability and the formation of such legal centers is by no means encouraged by the legislative or executive powers.

²² Piekenbrock, A. (2011), *Rechtlicher Rahmen für Legal Clinics im RDG*, p. 7.

²³ See, Henssler, M., *Zehn Thesen zum Entwurf eines Rechtsdienstleistungsgesetzes*, *Anwaltsblatt* 2007, pp. 553 ff.

1. Historical background and legal framework

Originally the right to provide legal services was strictly regulated by the *German Legal Advice Act* of 1935²⁴. As Article 1 (1) of this Act stated, only specific professional groups – mostly lawyers – were allowed to manage another person's legal affairs if this management constituted a professional activity.²⁵ In this context, any independent activity that was intended to be repeated in the future was considered such a professional activity even if it was intended to be exercised only occasionally and regardless of whether this service was rendered in return for remuneration or free of charge.²⁶ As a result there was a strict ban on free legal services rendered by non-professionals, including students. However, this prohibition enjoyed less and less acceptance by the public as it led to somewhat odd results. For instance, a son who represented his mother in a rent law matter before a first instance court would be prosecuted for rendering non-permitted legal services.²⁷ The situation was similar for charitable organizations rendering free legal aid.²⁸ Even the *Bundesverfassungsgericht* – the German Federal Constitutional Court – considered this legal policy questionable in light of the constitutional rights and finally decided that it constituted an unacceptable intrusion of the state in private matters that was incompatible with the principles of a free government under the rule of law and the general freedom of action guaranteed by Article 2 (1) of the German Constitution.²⁹

After the *Legal Advice Act* had been declared unconstitutional, a new law had to be elaborated. This law – the *Legal Services Actor Rechtsdienstleistungs-*

²⁴ *Rechtsberatungsgesetz*, 13 December 1935; [online resource] URL: <http://www.gesetzesweb.de/RBerG.html>.

²⁵ Müller, H.-F., *Pro-Bono-Beratung nach dem neuen Rechtsdienstleistungsgesetz*, *Monatsschrift für Deutsches Recht* (2008), p. 357.

²⁶ *Bundesgerichtshof 5 June 1985 – Iva ZR 55/83*, *Neue Juristische Wochenschrift* 1986, pp. 1050 f.; *Bundesgerichtshof 26 July 2001 – III ZR 172/00*, *Neue Juristische Wochenschrift* 2001, p. 3541.

²⁷ *Oberlandesgericht Brandenburg 30 September 1991 – Ss 270/91*, *Neue Juristische Wochenschrift* 1992, p. 2438.

²⁸ Müller, H.-F., *supra*, note 25.

²⁹ Vogler, R., *Legal Clinic, Innovatives Studienmodell oder unerlaubte Rechtsberatung?*, *Zeitschrift für das Juristische Studium* (2013), p. 138.

*gesetz*³⁰ – entered into force in July 2008 and establishes the applicable legal grounds for rendering legal services by professionals as well as non-professionals. It aims to release the charitable legal services from the need to seek permission – at least to a certain degree. The changes have the biggest effect on legal advice between family members and friends but also apply to charitable organizations and volunteers.³¹

2. Conditions for free legal consultations as imposed by § 6 (1) and (2)

RDG

Even under the more liberal *Legal Services Act*, legal consultation as a key area of legal practice has to be explicitly permitted by law as stated by Article 3.³² This permission can be found in the Act itself: according to Article 6 (1) a person can provide legal advice to family members, neighbors or other acquaintances without restrictions. Outside of this personal environment, free legal services can be offered by a legal professional or under supervision of such, as stated in Article 6 (2). In the following I will examine the conditions imposed by these two provisions with special attention to their impact on the work of university legal aid clinics.

a) The service is free of charge

As in Ukraine, the legal service in question must be free of charge. This is the case if it is not – directly or indirectly – connected to a compensation of any kind.³³ The value of this compensation is irrelevant.³⁴ However, presents

³⁰ *Rechtsdienstleistungsgesetz*, 1 July 2008; [online resource] URL: <http://www.gesetze-im-internet.de/rdg/>.

³¹ Müller, H.-F., *supra*, note 25.

³² Vogler, R., *supra*, note 29, p. 137; Piekenbrock, A., *supra*, note 22, p. 3.

³³ Müller, H.-F., *supra*, note 25, p. 358; Vogler, R., *supra*, note 29, p. 137.

³⁴ Müller, H.-F., *supra*, note 25, p. 358.

between friends or relatives that might be considered usual are excluded.³⁵ Also, nothing prevents the consultant from demanding reimbursement for his postal charges, travelling costs and similar expenses as long as the remuneration does not include working hours.³⁶

The *pro bono* work of university legal aid clinics can therefore be considered as free of charge without complications. The fact that students might gain academic achievements, practical experience and legal competences from this work does not constitute compensation in that sense as Article 6 only prohibits pecuniary advantages.³⁷

b) Existence of a close personal connection between consultant and client

Secondly, in order for the student to be allowed to give legal advice without any additional supervision, Articles 6 (1) and (2) require the client to be part of the consultant's personal environment. In this respect, Article 6 (2) includes family members, neighbors or "similar close personal connections". While the first two conditions are clear and unambiguous, the latter has to be examined in detail in the light of the circumstances of every specific case.³⁸ All that can be said with certainty is that the "close personal connection" is not limited to the closest friends but that every form of actual acquaintance suffices.³⁹

It has been established that the consultant's fellow law students are part of his personal environment.⁴⁰ The situation is different when it comes to strangers who seek legal assistance or even students from other faculties. The sole fact

³⁵ Müller, H.-F., *supra*, note 25, p. 358.

³⁶ Weth, S., in Hennsler, M., Prütting, H., *Bundesrechtsanwaltsordnung: BRAO*, § 6 RDG, par. 4 ff.

³⁷ Weth, S., *supra*, note 36, § 6 RDG, par. 4 f.

³⁸ Müller, H.-F., *supra*, note 25, p. 358.

³⁹ Müller, H.-F., *supra*, note 25, p. 358.

⁴⁰ Vogler, R., *supra*, note 29, p. 138.

that two students belong to the same university and the abstract possibility to meet on campus is insufficient to form the required personal connection.⁴¹ At the same time, legal clinics are typically characterized by their open access to all persons seeking legal advice. As the client will usually be unknown to the consultant, he is not allowed to render legal services independently but has to be closely supervised by a legal professional in accordance with Article 6 (2) of the *Legal Services Act*.

c) In case of lack of personal connection: instruction by legal professional

Outside of the personal environment, Article 6 (2) of the *Legal Services Act* allows for mainly two possibilities to provide free legal services: Firstly, free legal aid can be offered by a consultant who is legally allowed to provide legal services against remuneration or, in other words: a legal professional. Secondly, free legal assistance can be rendered by any other person who is supervised by a legal professional.

Given that the aim of legal clinic that is to train the students to think for themselves and work as independently as possible instead of just listening to their teacher present a solution to a case, only the second alternative is an option. The question is therefore which qualifications a person needs to have in order to be considered a legal professional in Germany and which extent of supervision is necessary.

In Germany legal professionals are persons who have graduated law school by passing the two state examinations qualifying them to hold the position of a judge. This is the case for judges, lawyers, prosecutors and other legal practitioners. Under Article 7 (1) of the *German Law on Judges* the required

⁴¹ Vogler, R., *supra*, note 29, p.138.

supervision can also be carried out by every Professor of Law at a German university.

The university in charge of the law clinic has to ensure adequate supervision of the student consultants. Whether this supervision fulfills the premises of Article 6 (2) of the *Legal Services Act* is – again – a question of the individual case. It may require briefing and further training on the topic of a consultation and has to be adapted to the content and scope of the legal service in question.⁴² In some cases the supervisor may be obliged to intervene directly in the consultation.⁴³ All in all, the supervisors must assist and advise the consultants whenever help is needed and cannot restrict themselves to referring the students to the subject matter taught in class while otherwise leaving them unsupervised.⁴⁴ The goal of this rather strict provision is not only to provide quality legal aid to the client and assure the experiential learning experience for the student consultants but also to minimize their risk of liability which will be discussed later in this article.

d) Non-judicial representation and restriction to civil law

At last, it is worth mentioning that students are under no circumstances allowed to represent their clients in court. This means that they are limited to rendering primary free legal aid – even though this terminology is not used in the German law. The right to legal representation in a court of law is regulated in the codes of procedure in question and is reserved exclusively to attorneys.⁴⁵ Where the representation of a lawyer is not mandatory a person can be represented by an adult family member, a legal professional or a joint party.⁴⁶

⁴² Weth, S., *supra*, note 36, § 6 RDG, par. 12 ff; Piekenbrock, A., *supra*, note 22, p. 9.

⁴³ Vogler, R., *supra*, note 29, p.139.

⁴⁴ Vogler, R., *supra*, note 29, p.139.

⁴⁵ Müller, H.-F., *supra*, note 25, p. 359.

⁴⁶ Müller, H.-F., *supra*, note 25, p. 359.

However in contrast to non-judicial legal aid, for the provision of secondary legal aid neither a close personal relationship between the representative and the represented client nor a mere supervision by a legal professional suffices. It should also be noted that even those law clinics that agree to take on all kinds of matters do not operate in criminal law because in criminal procedure special privileges exist only in favor of the attorney, like for example the right to refuse to testify.⁴⁷

3. Questions of liability

Particular attention should be paid to the liability in case of inaccurate legal advice. Liability is not automatically precluded, neither by the *pro bono* – nature of free legal aid, nor by the fact that the consultant is not yet a legal professional.⁴⁸ For the consulting student this means that he is measured by the standard of due care that can be expected by the target public. To avoid the exposure to the liability of a professional advocate, the student is advised to explicitly point out his lack of qualifications.⁴⁹ For the client it is also important to know that the student consultant – contrary to the attorney – is not obliged to cover his liability risk by legal liability insurance.⁵⁰ Hence, it remains highly doubtful whether a client with entitlement to restitution could even enforce his claim due to the lack of financial resources on the consultant's part.

Concerning the university's liability as an institution, the university itself does not appear during the consultations and can therefore not assume any legal responsibility.⁵¹

⁴⁷Vogler, R., *supra*, note 29, footnote 13; Wreesmann, A.-K., Schmidt-Kessel, M., *Unentgeltliche Rechtsberatung durch Laien nach dem RDG*, Neue Juristische Online-Zeitschrift (2008), p. 4067 f.

⁴⁸Wreesmann, A.-K., Schmidt-Kessel, M., *supra*, note 47, p. 4069.

⁴⁹Wreesmann, A.-K., Schmidt-Kessel, M., *supra*, note 47, pp. 4069 f.

⁵⁰Vogler, R., *supra*, note 29, p. 139.

⁵¹Wreesmann, A.-K., Schmidt-Kessel, M., *supra*, note 47, pp. 4070 f; Vogler, R., *supra*, note 29, p. 139.

The only imaginable situations where liability could be affirmed would be the liability of the supervisor for lacking or inadequate supervision or for faulty legal advice in case he himself intervened in the consultation.⁵² To minimize the risk of liability it is a common practice amongst university legal clinics to exclude the liability for negligence from the beginning on.⁵³

4. The existing legal clinics

As the work of legal clinics was not allowed until the entry of force of the *Legal Services Act* in 2008, such forms of experiential education are still not very common in Germany. However, after the modification of the legal framework university legal clinics have started to appear all over the country. Compared to Ukraine, German legal clinics are still very recent – one could call them "pilot projects" – which is why it remains difficult to evaluate their success at this point. Nevertheless, we can observe a clear tendency towards clinical legal education which has to be a display of the students' acceptance of the idea. As there are no state regulations on the internal organization of legal clinics, they appear in various forms and structures and can take on cases from all kinds of fields of law: while some clinics follow the classical model from the US and operate in all fields of civil law, others are more specialized. Also, not all clinics are run by universities but much rather are the product of student initiatives, where correspondence with clients takes place exclusively via email.⁵⁴ In the following I would like to present two of the more established German university legal clinics: a general and a specialized one.

⁵² Wreesmann, A.-K., Schmidt-Kessel, M., *supra*, note 47, pp. 4070 f; Vogler, R., *supra*, note 29, p. 139.

⁵³ Rüdiger, B., *Neue Wege in der Juristenausbildung: Legal Clinics, Mootcourts und Praktikerseminare, Ein Tagungsbericht zur Praktischen Jurisprudenz*, Zeitschrift für das Juristische Studium (2011), p. 585.

⁵⁴ See, <http://www.student-litigators.de/>; <http://www.lawandlegal.de/de/>.

a) Legal Clinic at the University of Hannover

The Legal Clinic at the University of Hannover⁵⁵ commenced its work in the fall semester of 2010/2011 and is considered one of the first classical legal clinics in the country. It provides free legal aid for all students of the University regardless of their faculty and operates in almost every legal field that is taught in the law studies. The only limits are a maximum value of claims of 750 € as well as the need for the cases to be simple enough to be handled by students. The legal assistance is effectuated in 3 steps: First, there is a preliminary consultation between the consultant and the client where the facts of the case are discussed. Afterwards, the student assesses the legal grounds of the case in collaboration with the supervisors who are practicing lawyers. In a third step, the consultant explains the elaborated legal solution to the client and works with him towards its realization.⁵⁶ The workload for a consultant amounts to 2 hours per week and there is a possibility to obtain credits for the efforts. Similar clinics can be found in Universities in Dusseldorf, Hamburg and Jena.⁵⁷

b) Specialized legal clinics: Refugee Law Clinic of the University of Giessen

The *Refugee Law Clinic* of the University of Giessen was founded in 2007 and aims to provide the students with a practical insight into refugee law and also to support the refugee advice center run by the protestant church in the area.⁵⁸ Since refugee law is not part of the curriculum, students are prepared for the consultations during introductory classes as well as practical exercises and

⁵⁵ See, <http://www.jura.uni-hannover.de/legalclinic.html>.

⁵⁶ Vogler, R., *supra*, note 29, p. 137.

⁵⁷ See, <http://www.jura.hhu.de/en/hilfe.html>; http://www.law-school.de/lawclinic_beratungstaetigkeit.html; <http://www.paralegal.uni-jena.de/index.php/ueber-paralegal>.

⁵⁸ Tiedemann, P., Giesecking, J., *Die Refugee Law Clinic an der Universität Gießen*, *Zeitschrift für Landes- und Kommunalrecht Hessen, Rheinland-Pfalz, Saarland– LKRZ* (2010), pp. 238 f.; see also, <http://www.recht.uni-giessen.de/wps/fb01/home/rlc>.

discussions which serve to train their critical thinking skills. Even though the scope of the consultations is more narrowed down than in general legal aid clinics, the organizational efforts are considerably larger as the students have to be properly introduced to the subject matter and the cooperation with the refugee advice center has to be planned carefully.⁵⁹ In Germany other specialized legal clinics exist on the topics of media law, human rights law or on legal consultations combined with economic advice for startup companies and young entrepreneurs.⁶⁰

5. Critiques of clinical legal education and evaluation

Despite the fact that under the current German legislation university law clinics are legal, numerous concerns and critical arguments are being voiced – mostly by university professors and legal scholars – about the merits of and need for clinical legal education. A lot of this criticism is based on systematic aspects and the history and tradition of higher education not only in Germany but in several European countries which leads some authors to conclude that Western Europe is "the last holdout in the worldwide acceptance of clinical legal education"⁶¹. In the following I would like to present and review the most frequent criticisms.

a) Pre-existing apprenticeships

The most common objection is that German law students have the possibility to accumulate practical legal experience at another point in their law

⁵⁹ Vogler, R., *supra*, note 29, p. 137 Footnote 38.

⁶⁰ See, <http://www.jura.uni-hamburg.de/medialawclinic/>; <http://lawclinic.rewi.hu-berlin.de/>; <http://www.hochschule-heidelberg.de/de/fakultaet-fuer-sozial-und-rechtswissenschaften/law-clinic/>.

⁶¹ See, Wilson, R., *Western Europe: Last Holdout in the Worldwide Acceptance of Clinical Legal Education*, 10 German Law Journal, no. 7 (2009), pp. 823 ff.

studies.⁶² The German legal education consists of a first theoretical period of 4 ½ to 5 years that consists of formal classes followed by the First State Examination and a second practical period of two years that is completed by the Second State Examination called *Referendariat*. Particularly during that second period the student passes through several different apprenticeships and gets to work at law firms, in court and at the prosecutor's office for a state-paid salary. Since the students accumulate sufficient practical experience at that point some critics view clinical legal education as unnecessary. Moreover, only after passing the First State Examination students are believed to have sufficient knowledge to be able to exercise their duties adequately.

However, this practical period only starts at a very late stage in the law studies. The worldwide popularity of legal clinics shows that students welcome the possibility to peek into the reality of the desired profession at an earlier point which allows them to decide if this profession is what they envisioned it to be and whether they want to exercise it in the future. Also, the *Referendariat* is performed with no pedagogical supervision which often leads to exploitation of the students rather than a learning experience.⁶³ It is also notable that the formal classes as well as the apprenticeships are mostly part developed by and orientated to members of the public service such as judges and prosecutors and therefore give only little insight into the key areas of an attorney's activity.⁶⁴ Considering that the vast majority of German law school graduates become advocates, this constitutes a large deficit. It would be welcomed by both, students and future employers, if they graduated law school with more than just a vague idea of what exactly it is a lawyer really does.

⁶² Stephan, T., *Symposium „Clinical Legal Education in den USA“*, *Anwaltsblatt* 1998, p. 92.

⁶³ Wilson, R., *supra*, note 61, pp. 832 f.

⁶⁴ Wilson, R., *supra*, note 61, pp. 832 f.

On a related note, it is also argued that even during the first phase of the study students have to complete mandatory internships in order to be admitted to the First State Examination.⁶⁵ But again there is no supervision by the university. Practitioners are usually not able to seriously occupy their protégées due to their lack of practical experience. Their activities are most often limited to watching and listening and – if ever – minor research tasks that in no way reflect the actual work of these professionals.⁶⁶

With that said it becomes obvious that German law students are in no way prepared for their professional future by the law school or the legal education system and that there is by all means room for innovative education forms. Especially in light of their worldwide success this argument does not appear to be particularly pertinent.

b) Large classes and age of undergraduate law students

Another argument is that clinical legal education, in order to be successful, requires small numbers of students per faculty to ensure adequate supervision and competent representation of clients.⁶⁷ This requirement is not met in German public universities where entering classes are usually very large. Up to 400-500 students usually enroll in fall, with rising tendency. Also, unlike US law schools where legal education takes place on a graduate level German law students are undergraduates and for that reason considered being too young to think for themselves let alone competently represent a real life client.⁶⁸

⁶⁵Piekenbrock, A., *supra*, note 22, p. 13.

⁶⁶ See, Stephan, T., *supra*, note 62, p. 92.

⁶⁷Wilson, R., *supra*, note 61, p. 833.

⁶⁸ Bückner, A., Woodruff, W.A., *The Bologna Process and German Legal Education: Developing Professional Competence Through Clinical Experiences*, 9 German Law Journal (2008) 575, p. 610; Stephan, T., *supra*, note 62, p. 92.

However, students participating in legal aid clinics are usually at an advanced stage of their studies.⁶⁹ One should also take into account that Germans graduate high school at an age of 19 to 20 years – later than in other countries, the US included. That would make 2nd-4th year students about 22-24 years old compared to law students in the US that usually are 23-25 years old when they work at law clinics.⁷⁰ When we look at Ukraine where consultants give quality legal aid at an age of only 18-20 years it becomes obvious that students grow along with their tasks and not the other way around. The fact that students become consultants in later years of their studies also solves the problem of the large law school classes as many drop out throughout the years.⁷¹ Additionally nothing prevents universities to organize legal clinics as elective courses and set into place some sort of selection procedure allowing only the most motivated and responsible students to take part in the program.⁷² So even under the admittedly more difficult conditions of European law schools the problem can be encountered and quality clinical legal education can be ensured.

c) Risk of students taking away paying clients from the professionals

Just like in Ukraine the argument about students posing a threat to legal professionals is raised. However, it can't be stressed enough that students will only represent clients who either can't afford to pay a lawyer or where the value of the claim is so low that it doesn't make sense for them to hire one. When these persons are involved in a dispute the choice they are making is usually not whether to consult a professional lawyer or a student, it is whether to turn to a law clinic for help or to not seek legal assistance at all. Also, as seen above, the student practice rules do not permit widespread representation. Some legal

⁶⁹ Wilson, R., *supra*, note 61, pp. 833 f.

⁷⁰ Wilson, R., *supra*, note 61, pp. 833 f.

⁷¹ Wilson, R., *supra*, note 61, p. 834.

⁷² Wilson, R., *supra*, note 61, p. 834.

Clinics explicitly mention that they only provide a first consultation and will redirect the client to a professional lawyer if necessary.⁷³ Legal professionals are therefore in no way endangered by the charitable work of legal aid clinics.

d) Little need for clinics as a way of compensating for the shortcomings of government-funded legal protection

Legal aid clinics will usually be most welcome where there is a need for free legal protection that the state fails to satisfy. In Germany, however, a functioning legal aid system exists, at least for the foreseeable future. Because of this, some object that university law clinics aren't really needed in our society since there weren't shortcomings in the German government-funded legal protection to compensate for.⁷⁴

This argument however is not persuasive. Legal aid clinics should be primarily pedagogically driven, not service driven, meaning that their main goal should be to provide a learning experience and training for the students as well as teach them moral and ethical values.⁷⁵ As seen above, this need still exists in the German legal education system regardless of the state of our legal and social security mechanisms in place. Even in an environment where the need for free legal advice is not as urgent legal clinics can thrive. They do not do themselves any favors by taking on too many clients and neglecting the pedagogical supervision of the students because of an overly extensive workload. So, one might as well consider the reduced need of the population for free legal assistance to be an advantage. Also, the application for legal aid implies a considerable amount of paper work not easily understood by regular people that often need to consult a lawyer just to help them fill out the necessary forms at

⁷³ See for example, <http://www.paralegal.uni-jena.de/index.php/beratung>.

⁷⁴ Piekenbrock, A., *supra*, note 22, p. 7.

⁷⁵ Wilson, R., *supra*, note 61, p. 835.

the risk that legal protection is not granted due to a lack of chances of success, the possible consequence being that they might have to shoulder those costs by themselves. This could constitute a niche for university legal aid: to clarify the client's situation and roughly assess the chances of his request in order to prevent him from taking unnecessary financial risks.

e) Traditional educational ideals and highly structured curricula leaving little room for practical elective courses

Finally Germany's civil law tradition and Humboldt's educational ideal that still prevails in law schools are seen as a major obstacle to clinical legal education.

Friedrich Wilhelm Christian Karl Ferdinand von Humboldt was the founder of the University of Berlin in the 19th century. His ideal dictates that the university is a place of unity of research and teaching. This has two major consequences: first, research and teaching have to be effectuated by the same people, meaning that university professors are not practitioners but rather scholars that teach students about their research or about how to do research. As a result, students are educated in a general sense rather than trained for a specific occupation. Secondly, the university as envisioned by Humboldt means freedom: freedom of the professor to choose the topic of his research and of his lessons and freedom of the students to decide on their own program of study and work on his own pace.⁷⁶

Unlike in the USA, where teachers keep practicing law alongside their jobs at the university, German law schools – to this day – are characterized by the fact that professors are usually legal researchers. This may also explain why law students spend a relatively long period of time solving mostly theoretical cases

⁷⁶ <http://www.runder-tisch-usa.de/chicago/site/statements/matthiasdoepke.html>.

before being released into the professional world. It is obvious that in a university following the Humboldt ideal practical considerations like the preparation of students for their future careers – one of the core advantages of clinical legal education – have no place. Although throughout the years modern education has ventured far away from this idea, for example by employing more legal practitioners, including mandatory internships in their curricula or – as we can see – considering innovative forms of education destined to train soft skills needed in the professional world, proponents of the traditional model fear that by introducing new forms of education the "scientific" value of legal education will be diminished and along with it its overall quality.⁷⁷ In fact, the classical law school curriculum does not include the participation in a legal clinic and it only credits this performance very little with no regard to the voluntary considerable additional efforts made by the students and the staff.

In this context it should be said that the reality of the legal profession has changed considerably in the last 200 years. Universities that adapt to the new environment and its requirements not only improve the quality of their education but more importantly fulfill their responsibility to their students and the society. It might even be time for a new reform of law school education as it has happened in most other courses of study during the Bologna Process. In any case, a slight change like the introduction of legal clinics to law school curricula will in no way diminish the quality of their education but, on the contrary, enhance it and ensure that law students can keep up with their international competition.

⁷⁷ Rüdiger, B., *supra*, note 53, p. 583.

CONCLUSION

To conclude what has been said, even though throughout the years clinical legal education has been able to address social and educational problems and shortcomings successfully, the legal grounds for the provision of free legal aid by students are not yet satisfactorily elaborated neither in Germany, nor in Ukraine. Apart from the legal obstacles and uncertainties that exist in both countries and expose the student consultants as well as the staff of university legal aid clinics to an unnecessary legal risk, much work remains to be done on the attitudes towards clinical legal education, particularly on the mentalities of teaching personnel, legal practitioners and members of universities' administrations as their support is crucial to the success and the achievements of law clinics. The latter in particular need to understand that only by introducing innovative forms of education they can fulfill their responsibility, which is to prepare their students for the professional world and additionally increase the institution's popularity and good reputation.

Despite all the challenges, however, the existing university legal aid clinics demonstrate impressively that those who are determined to fight for a good cause will always find opportunities to do so and achieve a change for the better. We can only hope that the trend, we have observed in the last decades, continues and paves the way for social justice and responsible legal professionals worthy of a state under the rule of law.

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Геллер Белла

Клінічна юридична освіта в Україні та Німеччині. Порівняльний аналіз

У дослідженні порівнюється законодавство, теорія та практика у сфері діяльності юридичних клінік в університетах України та Німеччини. Робиться висновок про необхідність усвідомлення, що тільки за рахунок впровадження інноваційних форм освіти, можна досягти мети юридичних університетів, яка полягає у підготовці своїх студентів до професійного світу, і додатково збільшити популярність та хорошу репутацію вищого навчального закладу

Ключові слова: юридична освіта, юридична клініка, Україна, Німеччина

Геллер Белла

Клиническое юридическое образование в Украине и Германии. Сравнительный анализ

В исследовании сравнивается законодательство, теория и практика в сфере деятельности юридических клиник в университетах Украины и Германии. Делается вывод о необходимости осознания, что только за счет внедрения инновационных форм образования, можно достичь цели юридических университетов, которая заключается в подготовке своих

студентов к профессиональной деятельности и дополнительно увеличить популярность и хорошую репутацию высшего учебного заведения

Ключевые слова: юридическое образование, юридическая клиника, Украина, Германия

Geller Bella

Clinical Legal Education in Ukraine and in Germany. A Comparative Analysis

The legislation, theory and practice in the field of legal clinics at universities in Ukraine and Germany are compared in the study. It is in particular need to be understood by teaching personnel, legal practitioners and members of universities' administrations that only by introducing innovative forms of education they can fulfill their responsibility, which is to prepare their students for the professional world and additionally increase the institution's popularity and good reputation

Key words: legal education, legal clinic, Ukraine, Germany