

JC Mubangizi & DJ McQuoid-Mason

The role of university law clinics in public interest litigation, with specific reference to South Africa

Summary

University law clinics in South Africa emerged from the desire of law students and academics to be involved in the struggle for social justice, while simultaneously providing clinical legal education for the students. This article focuses on some of the reported court cases in which university law clinics in South Africa have been involved. It is not concerned with public interest law units at universities that do not involve students in clinical legal education, or the so-called clinics operating in the justice centres of Legal Aid South Africa. Neither does it dwell on the non-litigious activities or the non-reported cases brought by university law clinics. For purposes of comparison, reference is made to the United States context where clinical legal education has been in existence longer than anywhere else. The article also highlights the challenges that law clinics in South Africa face regarding their financial and human resources, the marginalisation of their staff members from mainstream academia, and their heavy caseloads which impact on their educational function. Despite this, national university law clinics have played, and continue to play, an important role in public interest litigation – particularly in the realm of civil litigation which Legal Aid South Africa does not have the resources to address. Through their clinical legal education methodology, South African law clinics have also contributed to the transformation of the South African society, in general, and the legal profession, in particular.

Die rol wat regshulpklinieke by universiteite speel in litigasie in belang van die publiek met spesifieke verwysing na Suid-Afrika

Regshulpklinieke verbonde aan universiteite in Suid-Afrika het hul ontstaan te danke aan die begeerte wat regsstudente en akademiese getoon het om betrokke te wees in die stryd om maatskaplike reg en geregtigheid. Terselfdertyd wou regshulpklinieke praktiese opleiding aan regsstudente verskaf. Die artikel sluit nie 'n bespreking in van die aktiwiteite van eenhede by universiteite of die kantore van Regshulp Suid-Afrika wat geen kliniese regsopleiding aan studente verskaf nie en wat fokus op sake in die openbare belang. Hierdie artikel fokus op die gerapporteerde sake waarin universiteit regshulpklinieke in Suid-Afrika tot dusver betrokke was. Sake waarby regshulpklinieke betrokke was, maar wat nie litigasie ingesluit het nie en ongerapporteerde sake, is uitgesluit van hierdie bespreking. Vir die doel van vergelyking, word daar verwys na die Verenigde State van Amerika en Suid-Afrika,

JC Mubangizi, Deputy Vice Chancellor and Head of the College of Law and Management Studies, University of KwaZulu-Natal.

DJ McQuoid-Mason, Centre for Socio-Legal Studies, University of KwaZulu-Natal.

aangesien kliniese onderrig daar reeds langer toegepas word as in enige ander land ter wêreld. Die artikel beklemtoon ook die aard van die uitdagings met betrekking tot die opvoedkundige funksie van regshulpklinieke. Regshulpklinieke in Suid-Afrika het uitdagings ten opsigte van finansiële druk sowel as die afgesonderheid van die personeel van die hoofstroom akademici. Die groot aantal sake en gevalle wat in regshulpklinieke hanteer word, het ook 'n impak op die personeel ten opsigte van hul rol by die onderrig van regsstudente. Desnieteenstaande die uitdagings, speel universiteitgebaseerde regshulpklinieke 'n belangrike rol en sal steeds in die toekoms die belangrike rol vervul in litigasie in openbare belang. Suid-Afrikaanse regshulpklinieke het, en lewer steeds 'n belangrike bydrae tot die transformasie van die Suid-Afrikaanse gemeenskap oor die algemeen, sowel as die regsprofessie in besonder, as gevolg van die unieke kliniese aanbiedingsmetodes wat gebruik word.

1. Introduction

This article¹ focuses on some of the reported court cases in which university law clinics in South Africa have been involved. It is not concerned with public interest law units at universities that do not involve students in clinical legal education, or the so-called clinics operating in the justice centres of Legal Aid South Africa. Neither does it dwell on the non-litigious activities or the non-reported cases brought by university law clinics.

Historically, university law clinics emerged in South Africa from the desire of law students and academics to be involved in the struggle for social justice, while simultaneously providing clinical legal education for the students.² As such, law clinics were initially founded and managed by students on a voluntary basis. The first South African law clinic was established in 1971 at the University of Cape Town (UCT).³ By July 1973, at the time of the International Legal Aid Conference held in Durban, an “off-campus” law clinic had also been established at the University of the Witwatersrand (Wits). In August 1973, immediately after the Conference, a mobile law clinic was established at the University of KwaZulu-Natal (UKZN), Durban.⁴ The Conference was a watershed in the development of law clinics in South Africa, as it addressed clinical law issues, including the potential role of law clinics in the provision of legal aid services.⁵

The Durban Conference had the impact of providing an immediate impetus for the establishment and development of law clinics. Apart from the UKZN Durban mobile clinic, in the following two years, law clinics were established at the Universities of Port Elizabeth, Western Cape,

1 This is an amended version of the paper presented at the Access to Justice and Clinical Legal Education Conference to Honour the Work of Professor David Jan McQuoid-Mason, University of KwaZulu-Natal, Durban, 10-12 December 2012. Maisel 2006:379.

2 Generally, on the history and development of law clinics in South Africa, see De Klerk 2006:929-950.

3 McQuoid-Mason 1982:139.

4 McQuoid-Mason 1982:153.

5 For the Legal Aid Conference proceedings, see Faculty of Law, University of Natal 1974.

Natal (Pietermaritzburg) and Stellenbosch. Within the next five years, six additional law clinics were opened at other universities.⁶

In 1975, the introduction of Student Practice Rules for South Africa based on the United States experience were suggested for the first time.⁷ They were proposed again in 1982,⁸ and ultimately, in 1985, the Association of Law Societies requested Student Practice Rules to be drafted for South Africa. Regrettably, however, they were never introduced.⁹ The proposed rules are not relevant to public interest litigation, as they dealt with legal representation by law students in the criminal district courts¹⁰ and, unlike those in the Philippines,¹¹ did not provide for representation in the High or Appellate courts.

More than 30 years ago, the role that law clinics can play in Africa was described as follows:

Students represent a cheap source of manpower, which in the presence of proper supervision reaches a standard at least equal to that of a young qualified lawyer ... The well-supervised use of law students will significantly ease the limitations under which most of the legal aid programmes in Africa now have to work; it is only through student programmes that there is any possibility in the near future for legal services becoming widely available to the poor.¹²

There is a wide variety of university law clinics operating in different parts of the world such as general practice clinics, specialist clinics,¹³ public interest law clinics and street law-type clinics.¹⁴ However, this article focuses on public interest court cases in which South African university law clinics have been involved. Insights from United States law clinics are also referred to and it is argued that law clinics can and do play an important role in litigation. It is conceded that the American JD degree is postgraduate, whereas the LLB degree in South Africa, the United Kingdom, Australia and the rest of the Commonwealth tends to be undergraduate. However, it is submitted that valuable lessons can still be learned from the experience of the United States, as it has been the inspiration for the development of law clinics in many countries.¹⁵

6 McQuoid-Mason 1982:139.

7 Ellum 1975:50, 64-65.

8 McQuoid-Mason 1982:194-198.

9 This was apparently due to opposition by the then apartheid era Ministry of Justice. The trend seemed to continue under South Africa's new democratic dispensation - despite a promise to introduce student practice rules by the first post-apartheid Minister of Justice - see McQuoid-Mason 2008:581.

10 McQuoid-Mason 2008:594.

11 McQuoid-Mason 2008:587.

12 Reyntjens 1979:36.

13 See, for instance, De Klerk & Mohamed 2006:306-318; Du Plessis 2006:284-294; Du Plessis 2007:44-63.

14 McQuoid-Mason 2008a:6-8.

15 See, for instance, the work done by the American Bar Association ABA-CEELI (now Rule of Law) Programme in Central and Eastern Europe, Central Asia and

While the main focus of university law clinics is clinical legal education,¹⁶ those that have a service component tend to get involved in different kinds of litigation, including public interest litigation. Their participation in the latter tends to be better suited as *amicus curiae*. Although this article does not necessarily focus on public interest cases alone or *amicus curiae* participation, it is important to briefly examine those two concepts.

2. Public interest litigation

As a concept, public interested litigation has been defined in various ways for various purposes and in various contexts. As a result, it is nearly impossible to find a comprehensive and universal definition of the concept. As with many concepts, attempts at defining public interest litigation vary from the narrow to the broad and from the technical to the general. *Black's Law Dictionary* defines the concept as “a legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or class of the community have a pecuniary interest or some interest by which their legal rights or liabilities are affected.”¹⁷ Clearly, this definition is overly narrow and rather technical, as it tends to focus on the legal rights or liabilities of the public or community and the pursuit of financial interest.

Several other definitions of public interest litigation have been advanced, particularly within the context of social change. From an American perspective, the concept has been defined as “the practice of lawyers ... seeking to precipitate social change through court ordered decisions that reform legal rules, enforce existing laws and articulate public norms.”¹⁸ Adopting a similar approach, Siri Gloppen views public interest litigation as an appropriate strategy to advance the protection of socio-economic rights for marginalised groups, and defines it broadly to refer to legal action aimed at establishing a legal principle or right that is of public importance and aimed at social transformation.¹⁹

Geoff Budlender refers to public interest litigation as “litigation on behalf of interests which are unrepresented or under-represented in the political and legal process”,²⁰ while the South African Law Reform Commission defines a “public interest action” as:

an action instituted by a representative in the interest of the public generally, or in the interest of a section of the public, but not

elsewhere: http://www.americanbar.org/advocacy/rule_of_law/where_we_work/europe_urasia.html (accessed on 24 June 2013). See also footnote 32.

16 Cf. De Klerk 2006:98; Sullivan *et al.* 2007:12; Swanepoel 2008:107; Hall & Kerrigan 2011:26. See, generally, Stuckey *et al.* 2007 and Ortiz 2011, for the important role that clinical legal education can play in legal education.

17 Garner 1999:1229, cited in Jaichand 2004:127.

18 Chayes 1976:1281.

19 Gloppen 2005.

20 Budlender 2009:204.

necessarily in that representative's own interest. Judgement of the court in respect of a public interest action shall not be binding (*res judicata*) on the persons in whose interest the action is brought.²¹

The Constitutional Court indicated the factors that should be taken into account when litigating in the public interest law in *Lawyers for Human Rights v Minister of Home Affairs*.²² The Court stated that the criteria to be met by any person or organisation wishing to act in the public interest should include, but are not limited to:

whether there was another reasonable and effective manner in which the challenge could be brought;

the nature of the relief sought;

the range of persons or groups who may be affected by any order made by the Court;

the degree of vulnerability of the persons affected;

the nature of the right said to be infringed, and

the consequences of the infringement of the right.²³

The first three criteria had already been laid down in *Ferreira v Levin*²⁴ and were merely reaffirmed in the *Lawyers for Human Rights* case. From these criteria, the scope of public interest litigation (and the meaning of the concept) can be much more easily understood. It is important to note that university law clinics, like other organisations that act in the public interest, have engaged and complied with the above criteria whenever litigating in the public interest. A good example is *Campus Law Clinic (University of KwaZulu-Natal Durban) v Standard Bank of South Africa Ltd and Another*,²⁵ in which the Constitutional Court made specific reference to these criteria and concluded that the applicant had standing to bring an application for leave to appeal – although the application for direct access was dismissed on other grounds.

3. *Amicus curiae*

Much as with the concept of public interest litigation, *amicus curiae* is hard to define. As a result, numerous definitions have been ascribed to the term, leading to confusion and uncertainty as to the true meaning of the term. Part of this uncertainty is the result of the varied and disparate ways in which the concept has been developed and applied in different legal systems and jurisdictions over the years.

21 South African Law Commission 1988:paragraph 3.

22 2004 (4) SA 125 (CC).

23 2004 (4) SA 125 (CC);paragraphs 16-18.

24 1996 (1) SA 984 (CC).

25 2006 (6) SA103 (CC).

In order to understand the meaning of *amicus curiae*, it may be worthwhile to refer to a few legal definitions. *Black's Law Dictionary* defines *amicus curiae* as "a person who is not a party to a lawsuit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter."²⁶ The online *Free Dictionary* defines the *amicus curiae* as "a party that is not involved in a particular litigation but that is allowed by the court to advise it on a matter of law directly affecting the litigation."²⁷ And the *Meriam-Webster Dictionary* defines it as "... a professional person or organization ... that is permitted by the court to advise it in respect to some matter of law that directly affects the case in question."²⁸

The participation of *amicus curiae* in litigation is a well-established practice in South African legal history. Indeed, the South African courts "are increasingly recognizing that certain matters ... must necessarily involve the perspectives and voices of organisations or entities that may not have a direct legal interest in the matter ...".²⁹ In South Africa, the role of *amicus curiae*, particularly in human rights litigation, must be perceived in the general context of public interest litigation which was born out of the apartheid era as part of the political struggle in which human rights activists and civil society organisations sought to fight the apartheid regime through advocacy, mobilisation and litigation. With the advent of democracy, there was "an inevitable shift from challenging an unjust system towards litigating cases that are aimed at enforcing rights enshrined in the Constitution."³⁰ This has been greatly helped by the liberal position adopted by the South African Constitution on *locus standi* for those wishing to enforce the rights in the Bill of Rights of the Constitution by litigating in the public interest. Budlender points out that the "procedural rules of the various courts now make explicit provision for *amicus curiae* intervention".³¹

Amicus curiae intervention by university law clinics provides a valuable educational experience for law students – even though they cannot appear in court. For instance, they are able to conduct the initial interviews with clients and witnesses; research the relevant law involved; write opinions on the chances of success; help draft the court papers, and accompany the supervising attorney and counsel to court. It is for this reason that university law clinics have usually become involved in litigation, either as parties to cases or as *amicus curiae*.

26 Garner 1999:83.

27 *The Free Dictionary* at <http://www.thefreedictionary.com/amicus+curiae> (accessed on 24 June 2013).

28 *Meriam-Webster Dictionary* at <http://www.merriam-webster.com/dictionary/amicus%20curiae> (accessed on 24 June 2013).

29 Brickhill & Du Plessis 2011:152.

30 Badwaza 2005:36.

31 Budlender 2009:197.

4. The United States context

In order to comparatively understand the role of law clinics in litigation in South Africa, it is important to examine the United States context where clinical legal education has been in existence longer than anywhere else³² and has inspired clinical legal education in South Africa³³ – although in the United States clinics operate at the postgraduate level. Indeed, the earliest reference to clinical legal education in the United States can be traced to 1917, and by the 1960s and 1970s, when the clinical legal education movement began spreading across the world, law schools in the US had long taken the lead.³⁴ Despite the fact that reflective practical legal education in a social justice setting was the main focus of clinical practice at law schools in the US,³⁵ the country has had student practice rules for many years, with the result that, as far back as 1979, the United States Supreme Court commented in the landmark right to counsel case, *Argersinger v Hamlyn*³⁶: “Law students can be looked to make a significant contribution, qualitatively and quantitatively, to the representation of the poor in many areas”.

As in South Africa, law clinics in the United States, while focusing on legal education and practical training of law students, were also introduced as a measure to cater for the expanding needs of legal aid for the poor. In the course of time, however, clinical legal education expanded far beyond law school campuses to encompass programmes of empowering the poor by providing legal services and dissemination of legal information.³⁷ Currently, many – if not all – law schools in the United States have law clinics. Georgetown University, for example, has a large, strong and highly regarded in-house clinical programme. According to the School’s website:

Students in the clinics represent a wide range of clients: refugees seeking political asylum; adult and juvenile criminal defendants; victims of domestic violence; housing and community development groups; individuals threatened with eviction; children seeking access to adequate special and regular education; groups or individuals seeking to remedy civil rights violations or protect the environment.³⁸

32 Cf. Schrag & Meltzer: 1998:3; Bloch 2011:4-5.

33 Excellent examples of this are the work done by Professor Clinton Bamberger at the University of the Witwatersrand and Professor Peggy Maisel at the University of KwaZulu-Natal, where they were both involved in introducing innovative methods of clinical legal education based on their United States experiences.

34 Giddings *et al.* 2011:4-5.

35 Bloch 2011:xxiv.

36 S Ct 2006 (1979).

37 Iya 1994:216.

38 Georgetown Law Clinics at <http://www.law.georgetown.edu/academics/academic-programs/clinical-programs/our-clinics/index.cfm> (accessed on 24 June 2013).

Their Appellate Litigation Clinic has had four cases reach the United States Supreme Court with over twenty students working on those cases.³⁹ It is important to note that, in the United States, students are an integral part of the litigation process, and not only their supervising attorneys. Indeed, the above web quote is preceded with a statement that the mission of the Georgetown programme is "... to merge theory and practice so that students master both the practical art of lawyering and its theoretical bases while providing quality legal representation to under-represented individuals and organizations."⁴⁰ This discussion should be viewed in that context.

In many cases, United States law clinics have mainly been involved as *amicus curiae*. In *T.M.H. v D.M.T.*,⁴¹ the issue was whether two women involved in a lesbian (same-sex) relationship for several years could share parental rights and responsibilities to a child born out of that relationship. Florida law school clinics and centres (expert in, and devoted to, representing the legal rights and best interests of children) submitted a brief in support of TMH, based on the rights and interests of the parties' child. It was held that parental rights, which include the love and affection an individual has for his/her child, transcend the relationship between two consenting adults. Their separation does not dissolve the parental rights of either woman to the child, nor does it dissolve the love and affection either has for the child.⁴² It was concluded, therefore, that both the Appellant and the Appellee have parental rights to the child.

In *National Federation of Independent Business v Sebelius*,⁴³ a landmark Supreme Court decision in which the Court upheld Congress' power to enact most provisions of the *Patient Protection and Affordable Care Act (ACA)* and the *Health Care and Education Reconciliation Act (HCERA)*, the "Black Lung Clinic" (the legal clinic) at the Washington and Lee University School of Law in Lexington, Virginia, represented former coal miners and survivors who were pursuing federal black lung benefits. The issues were whether the *Affordable Care Act* must be invalidated in its entirety, because it is non-severable from the individual mandate that exceeds Congress's limited and enumerated powers under the Constitution, and whether, if the Court concludes that the provision of the *Act* requiring virtually all Americans to obtain health insurance or pay a penalty is unconstitutional, the rest of the *Act* can remain in effect or must also be invalidated. It was held that the individual mandate is an essential part of the *ACA*. Moreover, when a court is confronted with an unconstitutional statute, it should endeavour to preserve the constitutional provisions and not to destroy the legislature's objectives. In this instance, that objective was to increase

39 Georgetown Law Clinics at <http://www.law.georgetown.edu/academics/academic-programs/clinical-programs/our-clinics/index.cfm> (accessed on 24 June 2013).

40 See footnote 38.

41 Case No. 5D09-3559.

42 Case No. 5D09-3559 at 26.

43 567 U.S.393 (2012).

access to health care for the poor by increasing the States' access to federal funding.⁴⁴

The Fred T. Korematsu Center for Law and Equality at the Seattle University School of Law joined the Asian Bar Association of Washington, the South Asian Bar Association of Washington and Washington Women Lawyers as *amicus curiae* in *Turner v Stime*.⁴⁵ The issue in the case was whether racially derogatory remarks by jurors about a litigant's attorney constituted jury misconduct justifying a new trial. The court found that there was sufficient evidence to persuade a reasonable person that juror misconduct had been established in the form of racial bias toward the complainant's attorney. Explaining the Korematsu Center's involvement, Center Director Robert Chang stated: "We thought it vital to add our voice in this matter that might have a strong negative impact on minority attorneys and on minority communities. If jurors can express bias with courts impotent to provide a remedy, we would be taking a few steps backward in our quest to achieve racial equality".⁴⁶

Finally, the Georgetown University Appellate Litigation Clinic played an important role in the case of *Cicippio-Puleo v Islamic Republic of Iran*⁴⁷ which involved a lawsuit brought against the Islamic Republic of Iran under the exception (the Flatow Amendment) to the *Foreign Sovereign Immunities Act*. The court held that victims of international terrorism may not sue foreign state-sponsors of terrorism under the Flatow Amendment. In reaching its decision, the court noted that "the advocates from the (Georgetown) Appellate Litigation Program responded admirably on very short notice in assisting the court with an outstanding brief and oral argument".⁴⁸

The foregoing discussion shows that university law clinics in the United States have played, and continue to play an important role in litigation, particularly through participation as *amicus curiae*. Indeed, the examples discussed above are but a few of the numerous cases in which law clinics have been involved. What is particularly interesting is that many United States university law schools have several law clinics each (Harvard, for example), specialising in specific areas of the law. Some of these specialisations lend themselves more easily to public interest litigation. Examples include clinics focusing on environmental issues, human rights violations, and immigration and refugee matters. This is not always the case in South Africa – although there are some exceptions – as the following discussion will show.

44 567 U.S.393 (2012).

45 222 P.3d 1243 (2009).

46 'Korematsu Center files amicus brief in racial bias case' at <http://law.seattleu.edu/x6640.xml> (accessed on 24 June 2013).

47 353 F.3d 1024 (D.C.Cir. 2004).

48 *Cicippio-Puleo v Islamic Republic of Iran* at <http://caselaw.findlaw.com/us-dc-circuit/1061102.html> (accessed on 24 June 2013).

5. The South African context

5.1 Introduction

Primarily, the main *raison d'être* of law clinics is teaching and training law students to become competent lawyers.⁴⁹ Litigation is not a primary function, although the service part of clinical legal education may involve litigation. However, South African law schools, generally, and law clinics, in particular, face a unique challenge “in their desire to support the ongoing effort to bring about social justice and development, considering the deep-seated social inequality, rampant injustice and the political and economic ills to which the majority of the population has been exposed”⁵⁰ – something that is still as relevant today as it was in 1994. However, the interim and final Constitutions introduced justiciable civil and political and socio-economic rights⁵¹ with flexible *locus standi* provisions⁵² which opened the way for universities to shift the emphasis of the service component of their clinical legal education programmes. It is against that backdrop that several law clinics in South African universities have been involved, and have played an important role, in public interest litigation. This section highlights several cases in which some law clinics in South African universities have been involved and the role they have played in such cases.

Two major developments in the early 1990s had an important impact on the ability of law clinics to engage in public interest litigation. In 1993, the *Attorneys Act*⁵³ was amended to allow law graduates seeking admission as attorneys to obtain practical experience – other than in an attorneys’ office under articles of clerkship – by undertaking a period of community service at organisations approved for this purpose by the local law society, such as the state-funded legal aid body, public interest law firms and law clinics.⁵⁴ This meant that law clinics could considerably increase their capacity to engage in litigation by employing law graduates seeking admission to the legal profession as articulated clerks.

The second major development was the introduction by the then Legal Aid Board (now Legal Aid South Africa) of state-funded law clinics in partnership with university law faculties. The Board provided funding for these clinics to employ up to 10 articulated clerks who could act as public defenders in the district courts and assist the clinics with other work. Following a pilot project with five universities, the Board’s clinics ultimately expanded to nearly all law faculties before the clinics were merged with the Board’s new justice centres beginning in early 2000.⁵⁵ The Board’s

49 O’Regan 2002:242-250.

50 Iya 1994:215.

51 See Chapter 2 of the *Constitution of the Republic of South Africa* 1996.

52 Section 38 of the *Constitution of the Republic of South Africa* 1996.

53 *Attorneys Act* 53/1979.

54 Section 2 of the *Attorneys Amendment Act* 115/1993.

55 McQuoid-Mason 2000:S123-S125.

clinics were distinguishable from the university law clinics, because the emphasis was on the delivery of legal aid services by candidate attorneys as public defenders in the district courts – rather than clinical legal education. Legal Aid South Africa now enters into cooperation agreements with university law clinics on a project basis to provide legal services to poor people in civil cases. When entering into cooperation agreements, the universities still pursue their clinical legal education programmes, but the service component may include students doing the preliminary work on the projects funded by Legal Aid South Africa.

The ensuing analysis of the role of law clinics in public interest litigation in South Africa relies on the cases reported in the law reports, and does not take into account the numerous public interest cases that may have been settled out of court which still had a major impact on the lives of people. An example is the Campus Law Clinic of the then University of Natal, Durban (now UKZN) which, in 1999, changed its emphasis from general practice to specialist areas of women and children, administrative justice and land restitution. In respect of the latter, the clinic helped hundreds of families obtain compensation for land confiscated in the Cato Manor area in Durban during apartheid.⁵⁶ Furthermore, as Budlender mentions, “[r]outine case work can be very important in identifying important issues to litigate and finding the right client and in ensuring that favourable court decisions are implemented in practice”.⁵⁷

A number of university law clinics in South Africa have been involved in public interest litigation, but for the purposes of this article the law clinics at the Universities of KwaZulu-Natal, Witwatersrand and North-West will be discussed.

5.2 University of KwaZulu-Natal (UKZN) Law Clinic

In determining the role of law clinics in public interest litigation in South Africa, the starting point is perhaps the Constitutional Court Case of *Campus Law Clinic (University of KwaZulu-Natal Durban) v Standard Bank of South Africa Ltd and Another*.⁵⁸ The case concerned the circumstances in which a court should permit a creditor to sell immovable property in order to recover a mortgage bond. Inevitably, the constitutional right of access to housing was an issue. The main issue, however, was whether the UKZN Campus Law Clinic had the *locus standi* to seek leave to appeal against the judgement of the Supreme Court of Appeal when it had not been party to the earlier proceedings. Although leave to appeal was not granted for other reasons, the Constitutional Court held, *inter alia*, that the fact that the UKZN Campus Law Clinic was not a party to the proceedings

56 Cf. Golub 2000:39.

57 Budlender 2009:203.

58 2006 (6) SA103 (CC).

in the Supreme Court of Appeal, did not constitute an absolute bar to their obtaining leave to appeal to the Constitutional Court.⁵⁹

The significance of this case is that the Constitutional Court recognised the legal status of the Campus Law Clinic as an independent full-fledged legal service provider to the indigent community. Indeed, in its argument, the Law Clinic averred that it provided legal aid to indigent clients regularly and that, accordingly, it had public interest standing in relation to the constitutional issue in the case. By accepting that the Campus Law Clinic had standing to bring the application for leave to appeal, the Constitutional Court was in agreement with the Law Clinic's argument and inadvertently endorsed the role that law clinics can play in public interest litigation.

5.3 University of the Witwatersrand (Wits) Law Clinic

Whereas several law clinics have been involved in litigation in South Africa, it is perhaps the Wits Law Clinic that has played the most prominent role. Indeed, since 1996, there are not less than 30 reported cases in which the Wits Law Clinic has been involved, in many of them as a party. Only a few of those can be highlighted in this instance.

In 1996, the Wits Law Clinic was involved in the landmark Constitutional Certification case: *In re: Certification of the Constitution of the Republic of South Africa*.⁶⁰ The Clinic acted on behalf of the representative body for magistrates in challenging the certification of the new constitution of South Africa, insofar as it did not adequately provide for the separation of powers between the State and the judiciary. In *Mashavha v Couzens & Woods*,⁶¹ Wits Law Clinic represented the applicant whose case was based on an automatically unfair dismissal, as she was of the opinion that she was dismissed as a result of her pregnancy. The respondent opposed the matter and raised a point *in limine* that candidate attorneys did not fall within the ambit of the *Labour Relations Act* and that the Labour Court, therefore, did not have jurisdiction to adjudicate on the matter. The court rejected this argument and found that the applicant was indeed unfairly being discriminated against for reasons of her pregnancy, and that her dismissal was therefore unfair.

The Wits Law Clinic was also involved in *Jeebhai v Minister of Home Affairs and Another*⁶² which revolved around the arrest, detention and deportation of a Pakistan national. The Supreme Court of Appeal held that the detention and deportation were unlawful. The Law Clinic was an applicant in a related matter in which the Constitutional Court rejected an

59 2006 (6) SA103 (CC):paragraph 20.

60 1996 (4) SA (CC).

61 (1998) 19 ILJ 1486 (LC).

62 2007 (4) SA 294 (T) SCA.

application for leave to appeal while a similar application was pending in the High Court.⁶³

Of particular significance was the role of the Wits Law Clinic in the famous *Minister of Health and Others v Treatment Action Campaign (TAC) and Others (2) (TAC case)*.⁶⁴ The Clinic was also an *amicus curiae* in *In Re: Certain Amicus Curiae Applications; Minister of Health and Others v Treatment Action Campaign and Others*⁶⁵ which dealt with various applications for admission as *amicus curiae* to adduce further evidence in the appeal by the government against orders made against it by the High Court in the aforementioned case. Although the application was refused, the Court made important remarks regarding the role of *amicus curiae*:

The role of an *amicus* is to draw the attention of the court to relevant matters of law and fact to which attention would not otherwise be drawn. In return for the privilege of participating in the proceedings without having to qualify as a party, an *amicus* has a special duty to the court. That duty is to provide cogent and helpful submissions that assist the court.⁶⁶

In *S v Mumba*,⁶⁷ the Clinic acted for an accused person in successfully challenging the constitutionality of an ordinance providing for a reverse onus on the accused. The implication of the reverse onus was that, if the accused person is found in possession of certain animal products of protected species such as elephant ivory, then s/he is presumed to have imported such products into the country, unless s/he can prove that s/he did not.

One of the most recent cases in which the Wits Law Clinic was involved is *Minister of Home Affairs and Others v Tsebe and Others, Minister of Justice and Constitutional Development and Another v Tsebe and Others*⁶⁸ which dealt with extradition or deportation of the applicants to Botswana in the absence of a written assurance from Botswana that, if convicted of murder, the death penalty would not be imposed or, if imposed, it would not be executed. The Court dismissed the appeals and held that, by adopting the Constitution, South Africa had affirmed its commitment to upholding the human rights of every person in everything that it did, and could not deport or extradite any person, where doing so would expose him/her to the real risk of the imposition and execution of the death penalty.

The cases discussed above are some of the cases in which the Wits Law Clinic has been involved either as *amicus curiae* or as instructing attorneys. A number of other cases have been litigated through the Centre for Applied Legal Studies (CALs) under the auspices of the Law Clinic,

63 *University of The Witwatersrand Law Clinic v Minister of Home Affairs & Others* 2008 (1) SA 447 (CC).

64 2002 (5) SA 721 (CC).

65 2002 (5) SA 713 (CC).

66 2002 (5) SA 713 (CC); paragraph 5.

67 1997 (1) SA 854 (W).

68 2012 (5) SA 467 (CC).

but since CALS is not a law clinic, those cases do not form part of this discussion.

5.4 North-West University Law Clinic

The North-West University Law Clinic has also been involved in litigation. Its involvement has been mainly in labour disputes due to the predominance of the mining industry in the area. For example, in 2011, the Law Clinic represented 39 miners from Stilfontein Mining Company, who for 5 years had struggled to receive money due to them after the liquidation of the mine in 2006. The Law Clinic instituted a claim on behalf of the miners to the liquidators. The sale of the mining company's assets ultimately took place and the final Liquidation and Distribution Account was approved in November 2011. The total amount claimed on behalf of the miners was R1.9 million. Only R980.000.00 was paid out due to the restrictions in the *Insolvency Act* for certain amounts; for example, amounts due as a result of leave pay. All payments were effected on 15 December 2011. The amounts paid out averaged between R8.000 and R28.000 for each miner.

In *Van den Heever & Six Others v Eclipse Networks (PTY) Ltd*,⁶⁹ the entire staff of the Potchefstroom branch of the company was notified to attend a meeting on 30 November 2007. At this meeting, they were informed that the Potchefstroom branch was closing and that all (except one woman) were to resume their work the next day in Mafikeng, 300km away from their homes. One woman was immediately retrenched. The staff informed management that they could not relocate within such a short time, which led to their dismissal. The Potchefstroom branch, however, continued operating with new employees. The matter was taken to the Labour Court, but prior to trial, it was settled in favour of the complainants.

It is not possible to discuss or even mention all the South African university-based law clinics and the cases in which they have been involved. Suffice it to say that, for various reasons, some law clinics have not been able to play an important role in this regard. This is due, in part, to the various challenges and limitations that law clinics face, an aspect to which we now turn our attention.

6. Limitations and challenges

University law clinics face many challenges, not only in South Africa, but also the world over, particularly in developing countries. Foremost among these is the lack of sufficient stable funding for law clinics not mainstreamed into law faculty budgets and reliant on outside funding.⁷⁰ Many clinics receive limited financial support from their universities and tend to rely on external funding, particularly in the form of grants and

69 Labour Court JS 215/2008.

70 Cf. De Klerk 2007:99.

donations.⁷¹ In South Africa, some of these grants come from the Attorney's Fidelity Fund, which imposes certain conditions regarding the educational component and operation of the clinics, and the Association of University Legal Aid Institutions (AULAI) Trust, which provides logistical support for AULAI meetings, the running of workshops and the development of clinical materials.⁷² International funders have included, *inter alia*, the Ford Foundation, Atlantic Philanthropies and the International Commission of Jurists (Swedish Section). These will, of course, vary from university to university. Funding based on grants and donations is not sustainable. For this reason, it is important for law clinics to be recognised by law faculties as providing a valuable learning experience for law students. At the same time, where the service component of clinical work involves services to indigent people, the funding of projects linked to them should be mainstreamed into the national legal aid scheme by Legal Aid South Africa entering into cooperation agreements with the universities concerned.⁷³ However, the clinical legal education component of the students' work should be maintained. As mentioned earlier, clinical law students can experience valuable practical legal education by being involved in the pre-trial work concerning such projects.

Another important challenge is the lack of adequate integration of law clinics within the main fabric of the law schools and faculties at the universities to which they belong.⁷⁴ Most law clinics are seen to operate as independent non-governmental organisations whose main use to the University is to provide a mechanism for community engagement. Law faculties tend to overlook the valuable learning experience obtained by clinical law students, and law clinic staff members usually occupy contract positions, do not receive benefits such as promotion, sabbatical leave, and so on, and are often not regarded as tenured members of the law school.⁷⁵ Law clinics need to emphasise the clinical legal education nature of their work and the fact that the service component is tailored to the learning experience of the students. Emphasis on the academic component of clinical legal education will make it easier to convince law faculties that clinicians should be tenured members of the academic staff. Law clinics should be regarded as the law school's laboratory – in the same way that science students gain practical experience in science laboratories – where law students learn practical skills in a social justice setting. To this end, the staffing and operating costs of the clinics should be covered by the law school, and individual litigation cases treated as projects to be funded by the national legal aid scheme or interested funders.

71 Cf. Mahomed 2008:60-61.

72 McQuoid-Mason 2000:S129.

73 McQuoid-Mason 2000:S132. Cooperation agreement partners accounted for less than 1% of all new matters handled by Legal Aid South Africa during 2009-2010 (3.463 out of 416.147 new matters) - Legal Aid South Africa 2010:26.

74 Cf. Swanepoel 2008:100.

75 De Klerk 2007:99-101.

As a result of the above two challenges, law clinics face a serious capacity problem. The lack of funding and uncertain security of tenure leads to high rate of staff turnover and a lack of stability. This is compounded by the fact that many clinics employ candidate attorneys as part of the clinical staff where they may act as junior supervisors of law students who give preliminary advice or assistance, or as part of a litigation project funded from outside. In both instances, the candidate attorneys move on once their period of articles of one or two years is complete,⁷⁶ because there are no positions for them at the clinics. In the law clinic service context of litigation, this is problematic as it leads to matters being handled by different people at various stages.

A third important challenge, particularly in South Africa, relates to the need for law clinics to manage the delicate balance between their various functions.⁷⁷ In broad terms, this balance is mainly between the function of teaching and training law students and that of providing free legal services to indigent people in neighbouring communities. As a result of historical and socio-economic factors, it appears that the latter function sometimes takes precedence in South African law clinics, leading to heavy caseloads and work pressure.⁷⁸ It is in that context that the role played by law clinics in litigation has become affected. However, as mentioned earlier, it is essential that university law clinics emphasise the teaching and learning aspects of their work, if the structural problems concerning operating costs and academic conditions of service are to be mainstreamed into law school budgets.

During 2009-2010, more than 93% of Legal Aid South Africa's annual budget was spent on criminal legal aid,⁷⁹ and even the mandatory introduction of *pro bono* work by attorneys and advocates in some provinces is unlikely to meet the pressing need for legal aid in civil cases. As a result, Legal Aid South Africa is committed to increasing the number of its cooperation agreements.⁸⁰ The challenge for the universities is to ensure that the educational objectives of their clinical law programmes are properly met and not undermined by excessive caseloads imposed by such agreements.

7. Conclusion

Despite several challenges and their primary function of providing reflective practical legal training in a social justice environment,⁸¹ in the service components of their clinical legal education programmes, university law clinics have played, and continue to play an important role in litigation. In the South African context, this role must be viewed against the background

76 Section 2 of the *Attorneys Amendment Act 115/1993*.

77 Du Plessis 2008:2.

78 Mahomed 2008:63.

79 Legal Aid South Africa 2010:11 and 26.

80 Legal Aid South Africa 2010:11.

81 Cf. Bloch 2011:xxiv-xxv.

of the country's peculiar historical and socio-economic dynamics. Even though the national legal aid scheme is very extensive in criminal matters and lawyers' organisations are expanding *pro bono* services, the fact is that there is still a large unmet need for legal aid in civil cases which university law clinics are being increasingly asked to meet. The clinics have also been requested to assist with the transformation of the South African legal profession.⁸² In both instances, the primary educational goal of university law clinics must remain – they should be training good future lawyers who can fulfil the promises of our progressive Constitution.⁸³

82 For example, apart from their important role in the training of law students and public interest litigation, law clinics provide access to the legal profession by aspirant candidate attorneys from disadvantaged backgrounds. During 2009-2011, the Ministry of Justice funded a project whereby unemployed law graduates could serve their articles at university law clinics. The Ministry paid the salaries of both the articulated clerks and their supervising attorneys.

83 O'Regan 2002:242-245.

Bibliography

- American Bar Association (CEELI) *Rule of Law Programme* 'Where we work' http://www.americanbar.org/advocacy/rule_of_law/where_we_work/europe_eurasia.html (accessed on 24 June 2013).
- BADWAZA YM**
2005. Public interest litigation as practised by South African NGOs: Any lessons for Ethiopia? Unpublished LLM submitted to the University of the Western Cape:36.
- BLOCH FS (ED)**
2011. *The global clinical movement: Educating lawyers for social justice*. New York: Oxford University Press.
- BRICKHILL J AND DU PLESSIS M**
2011. Two's company. Three's a crowd in investor-state arbitration (*Piero v South Africa*). *South African Journal on Human Rights* 27:152-166.
- BUDLENDER G**
2009. The public interest movement in South Africa: Law as a means of promoting social justice. In Dias AK and Welch GH (eds) 2009:185-206.
- CHAYES A**
1976. The role of the judge in public law litigation. *Harvard Law Review* 89(7):1281-1316.
- DE KLERK W**
2006. University law clinics in South Africa. *South African Law Journal* 122(4):929-950.
- DE KLERK W AND MOHAMED S**
2006. Specialisation at a university law clinic: The Wits experience. *De Jure* 39(2):306-318.
- DIAS AK AND WELCH GH (EDS)**
2009. *Justice for the Poor: Perspectives on Accelerating Access*. New Delhi. Oxford University Press.
- DU PLESSIS R**
2006. A consumer clinic as a specialised unit. *De Jure* 39(2):284-294.
- ELIUM P**
1975. *Legal Aid Developments in South Africa: July 1973-June*. Durban: Faculty of Law, University of Natal, Durban.
- FACULTY OF LAW, UNIVERSITY OF NATAL, DURBAN**
1974. *Legal Aid in South Africa: Conference Proceedings*. Durban: Faculty of Law, University of Natal, Durban.
- GARNER BA**
1999. *Black's Law Dictionary*. 7th ed. Minneapolis/Saint Paul: West Publishing.
- Georgetown Law Clinics at <http://www.law.georgetown.edu/academics/academic-programs/clinical-programs/our-clinics/index.cfm>.
- GIDDINGS J, BURRIDGE R, GAVIGAN S AND KLEIN C**
2011. The first wave of modern clinical legal education. Bloch (ed) 2011:3-22.
- GLOPPEN S**
2005. Public interest litigation social rights and social policy. Paper presented at the Arusha Conference, New Frontiers of Social Policy, 12-15 December 2005.
- GOLUB S**
2000. Battling apartheid: Building a new South Africa. In M McClymont and S Golub (eds) 2000:19-54.
- HALL J AND KERRIGAN K**
2011. Clinic and the wider law curriculum. *International Journal of Clinical Legal Education* 15-16:25-37. Also available at <http://www.ukcle.ac.uk/resources/teaching-and-learning-practices/clinical-legal-education/>.

IYA P

1994. Legal education for democracy and human rights in the new South Africa with lessons from the American Legal Aid Movement. *Journal of Professional Legal Education* 12:216.

JAICHAND V

2004. Public interest litigation strategies for advancing human rights in domestic systems of law. *SUR International Journal on Human Rights* 1:127.

Korematsu Center files amicus brief in racial bias case' at <http://law.seattleu.edu/x6640.xml>.

LEGAL AID SOUTH AFRICA

2010. 2009/2010 *Annual Report*. Johannesburg: Legal Aid South Africa.

MAHOMED SH

2008. United in our challenges – Should the model used in clinical legal education be reviewed? *Journal for Juridical Science Special Issue*: 53.

MAISEL P

2006. Expanding and sustaining clinical legal education in developing countries: What we can learn from South Africa. *Fordham International Law Journal* 30:379.

McCLYMONT M AND GOLUB S (EDS)

2000. *Many roads to justice: The law-related work of Ford Foundation Grantees around the world*. New York: The Ford Foundation.

McQUOID-MASON D

2008. Whatever happened to the proposed student practice rules? *De Jure* 41:580.

2008a. Law clinics at African universities: An overview of the service delivery component with passing references to experiences in South and South-East Asia. *Journal for Juridical Science Special Issue*: 1.

McQUOID-MASON DJ

1982. *An outline of legal aid in South Africa*. Durban: Butterworths.

2000. The delivery of civil legal aid services in South Africa. *Fordham International Law Journal Symposium* 24:S111.

Meriam-Webster Dictionary at <http://www.merriam-webster.com/dictionary/amicus%20curiae>.

O'REGAN K

2002. Producing competent graduates: The primary social responsibility of law schools. *South African Law Journal*: 242-250.

ORTIZ JD

2011. Going back to basics: Changing the law school curriculum by implementing experiential methods in teaching students the practice of law. http://works.bepress.com/damian_ortiz/1 (accessed on 21 June 2013).

REYNTJENS F

1979. *Africa – South of the Sahara*. Zemans (ed) 1979:12.

SCHRAG PG AND MELTZNER M

1998. *Reflections on clinical legal education*. Boston: Northeastern University Press.

SOUTH AFRICAN LAW COMMISSION

1988. *Report on the Recognition of Class Actions and Public Interest Actions in South Africa: Project 88*. Pretoria: South African Law Commission.

STUCKEY R & OTHERS

2007. *Best practices for legal education*. 1st ed. University of South Carolina Publications Columbia. (The publication is available online.)

SULLIVAN WM, COLBY A AND

WEGNER JW

2007. *Educating lawyers – Preparation for the profession of law*. The Carnegie Foundation for the Advancement of Teaching. New York. Jossey-Bass.

SWANEPOEL CF

2008. Integrating theory and practice in the LLB curriculum: Some reflections. *Journal for Juridical Science Special Issue*: 99-111.

The Free Dictionary at <http://www.thefreedictionary.com/amicus+curiae>.

ZEMANS FA (ED)

1979. *Perspectives on legal aid*. London: Francis Pinter (Publishers) Ltd.