

The application of procedural law at Spanish legal clinics

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Abstract

The American clinical education model is not entirely exportable, to the Spanish model of legal education as a consequence of the functional and methodological differences that arises between both legal systems. The conceptualization of the Spanish legal clinic is reasonably tied to its functionality. As a starting point, the configuration of the Spanish clinical legal education is growing exponentially. With a developed social function of legal clinics, the pedagogical function must be accomplished for the perspective of the legal sciences. Although, the interconnection between both functions is not yet strongly established. The clinical treatment of the legal conflict should also be based on the perspective provided by Procedural Law.

Keywords: Legal Clinic, Procedural, Law, Methodology, ADR, Conflicts.

Introduction

The teaching system of North American law schools promote methodological spaces such as Legal Clinics, considering it is based, essentially, on Advocacy and directly related to private legal business.

The traditional conception of the casuistic method of North American law is deeply rooted both in teaching methodologies and in legal practice. This conception is very useful in procedural practice because it considers that law may be created and is always applied before the Courts of Justice.¹

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¹ See Blázquez Martín, Diego, «Apuntes acerca de la educación jurídica clínica», *Universitas. Revista de Filosofía, Derecho y Política*, 2006/2007, num. 3, pp. 48 y 49.

Likewise, a holistic vision of the North American advocacy model conceives the lawyer as a kind of wolf (...) who does not act in defence of his client but moved by economic greed².

That affirmation links the economic expectation of the claim exclusively to the legal profession. However, the parties to a procedure demand a successful procedural strategy regarding their legal claims under the belief that the final judicial decision may satisfy the economic expectation linked to it, generally³.

In addition, the excessive cost that access to justice entails in the North American system should be considered. The financial sustainability of the procedural claim is almost as important as its legal basis. There is a direct relation between economic resources, the continuance of the procedural action and the expectation to judicially succeed.

Thus, the North American clinical legal education model is not exportable to the Spanish legal system, neither in substance nor in form. Among many other reasons, because the Spanish legal educational model is not based just on the practice of the law. The legal professions or persons with legal significance in the Spanish territory are varied. Also, the Spanish legal system, more sensitive to the *lex certa, praevia and scripta*, advises a didactic methodology quite different from the Anglo-Saxon model.

Therefore, a legal clinic model can be configured according to the idiosyncrasy and needs of the Spanish legal system, importing those benefits of the Anglo-Saxon system that are useful to strengthen the clinical results.

However, the widespread claim to link Spanish clinical legal education to the professional advocacy environment, admits the paradox that the clinical tutor may not be a lawyer or has never acted as such. The risk of distorting the learning teaching process exists.

² It is not possible to share this vision that conceives a "soulless" corporate professional, driven solely by the amount of the attorney's cost and expenses.

³ Most of the violations of the American legal system can be mitigated through the monetization of the legal conflict. A quick consideration at the kinds of disputes that are composed in civil proceedings (judicial public records), at the state level, allows to strengthen the previous arguments.

Furthermore, Spanish clinical education is connected to the third sector development as well as the private sector.⁴

Towards the conceptualization of legal clinics in Spain

It is not an easy task to agree on a conceptualization of what should be understood as legal clinics under the Spanish system, although, the concept of legal clinic is generally tied to its own functionality.

As a consequence, and under the influence of didactics as a discipline, there is no unanimity defining the concept of legal clinic in Spain. Several ideas are managed, such as teaching method,⁵ based on service learning;⁶ innovation in competences,⁷ strengthening of competences,⁸ clinical methodology,⁹ learning

⁴ See Blázquez Martín, Diego, Cuenca Gómez, Patricia & Iglesias Garzón, Alberto, *Guía sobre cómo crear, organizar, gestionar y conducir una clínica jurídica en una Facultad de Derecho*, Ilustre Colegio de Abogados de Madrid, 2014, p. 9

⁵ Atienza, Soledad, «Las Clínicas jurídicas como método de formación de abogados. Una visión desde EEUU», *Revista Aranzadi Doctrinal*, 2017, num. 1, pp. 1; Gascón Cuenca, Patricia, «La evolución de la enseñanza jurídica clínica en las universidades españolas: oportunidades y desafíos de la litigación estratégica en las clínicas de derechos humanos», *Revista de Educación y Derecho*, 2016, p. 5 and Blázquez Martín, Diego, Cuenca Gómez, Patricia y Iglesias Garzón, *Guía sobre cómo crear, organizar, gestionar y conducir una clínica jurídica en una Facultad de Derecho*, Ilustre Colegio de Abogados de Madrid, op. cit., p. 9.

⁶ Álvarez, Alicia, «La educación clínica. Hacia la transformación de la enseñanza del derecho», *Enseñanza clínica del derecho. Una alternativa a los métodos tradicionales de formación de abogados*, (Villarreal y Courtis, eds.), Instituto Tecnológico Autónomo de México D.F., 2007, pp. 225 to 245; FONT I MAS, María & Marín Consarnau, Diana, «Experiencias de aprendizaje – Servicio a través de la metodología de la Clínica jurídica», *Educación y Diversidad*, 2016, Vol. 10, num. 2, pp. 191 to 203, Marqués I Banqué, María, «La dimensión docente de la Responsabilidad Social Universitaria: la institucionalización del aprendizaje servicio en la Universitat Rovira i Virgili», *I Jornadas Internacionales sobre Responsabilidad Social Universitaria*, Cádiz, 2014 and Mugarra Elorriaga, Aitziber & Martínez De Bringas, Asier, «La Clínica Jurídica Loiola: un proyecto de lucha por la justicia social», *Oñati Socio-legal Series*, 2018, Vol. 8, num. 4, p. 491.

⁷ Gascón Cuenca, Patricia, «La evolución de la enseñanza jurídica clínica en las universidades españolas: oportunidades y desafíos de la litigación estratégica en las clínicas de derechos humanos», *Revista de Educación y Derecho*, op. cit., p. 1.

⁸ Pabón Mantilla, Ana Patricia, Aguirre Román, Javier Orlando y Cáceres Rojas, Paul Breinner, «La Clínica jurídica como estrategia para fortalecer las competencias ciudadanas: una apuesta por la convivencia pacífica», *Revista Ratio Juris*, 2016, Vol. 11, num. 23, pp. 27 to 46.

⁹ De Prada Rodríguez, Mercedes, Callejo Carrión, Soraya & López De Osa Escribano, Pilar, «La Clínica jurídica Villanueva: función social y pedagógica del aprendizaje del Derecho», *Reduca*, op. cit., p. 3.

space,¹⁰ professional volunteering,¹¹ research project,¹² all understood from a perspective related to learning and its results. Those concepts are linked to the clinical work developed at the Spanish legal clinics,¹³ and particularly used by them to design the clinical services provided to the Community.

Therefore, even admitting a common functional nexus, the concepts proposed differ substantially.

Despite this, the complex task of conceptualizing a unitary model of legal clinic in the Spanish legal system should be progressively accomplished, considering the close underlying relationship between the concept of legal clinic and the clinical methodology available.¹⁴

However, the initial lack of standards agreed by Spanish legal clinics regarding their configuration¹⁵ provoked this wide conception about what a legal clinic should be, how to approach the clinical method or the resolution of the cases submitted to clinical treatment.

Fortunately, the lack of conceptual uniformity initially considered is being surpassed by the interaction of most of the Spanish legal clinics, that put in common the results of their clinical projects and the creation of the “Red de Clínicas Jurídicas”, where are voluntary represented all Clinics that want to be part of the common project.

¹⁰ Bregaglio Lazarte, Renata, Constantino, Renato & Ocampo, Diego, *Guía para usuarios de la Clínica Jurídica sobre los derechos de las personas con discapacidad*, Open Society, 2013, p. 6.

¹¹ Mugarra Elorriaga, Aitziber & Martínez De Bringas, Asier, «La Clínica Jurídica Loiola: un proyecto de lucha por la justicia social», *Oñati Socio-legal Series*, op. cit., p. 491.

¹² PABÓN MANTILLA, Ana & PINZÓN MEJÍA, Diego, «La experiencia de la Clínica Jurídica de derechos humanos e interés público. El caso de la garantía de los derechos de niños y niñas con discapacidad en el municipio de Bucaramanga», *ADVOCATUS*, 2016, VOL. 14, num. 27, pp. 17 to 34.

¹³ Authors cited in footnotes 5 to 12 are related or has participated in a specific legal clinic in Spain using one of the concepts described *ut supra* to define the clinical services.

¹⁴ See Blázquez Martín, Diego, «Apuntes acerca de la educación jurídica clínica», *Universitas. Revista de Filosofía, Derecho y Política*, op. cit., pp. 44.

¹⁵ However, this situation also generated a major specialization of several different legal clinics such as the CEDAT de la Universidad Rovira i Virgili de Tarragona, Clínica Jurídica de Dret al Dret de la Universidad Autónoma de Barcelona, *Clínica Jurídica per la Justicia Social* (Facultad de Derecho de la Universidad de Valencia,) Clínica Legal de la Facultad de Derecho de la Universidad de Alcalá or Clínica Jurídica Justicia y Derechos Humanos Professor Juan Antonio Carrillo Salcedo de la Universidad Pablo de Olavide de Sevilla.

As previously said, clinical legal education is commonly understood from the projection of its actions or services. Above all, a practical and real vision of law is provided to the students.

Therefore, it is possible to affirm that clinical legal education becomes especially suitable from the perspective provided by procedural law. Together with forensic practice, legal clinics may achieve other objectives such as social transformation, ethical and professional development of future legal professionals¹⁶ and their awareness towards social justice.¹⁷ In other words, clinical legal education is linked to its rationality and the social commitment of the future jurist doctor.

However, it is possible to sustain a double limitation of the clinical method, both in its pedagogical and social function¹⁸ and define how the clinical pedagogical function will be implemented to achieve the social one.

The standards that inform clinical methodology logically assume the parameters previously designed by other disciplines such as pedagogy or didactics.¹⁹ This leads to search a specific methodology that fitted the legal

¹⁶ About the practice of Law and the acquisition of ethical standards at the University stage see García Añón, José, «La integración de la educación jurídica clínica en el proceso formativo de los juristas, en *REDU: Revista de Docencia Universitaria*, 2014, Vol. 12 (3), p. 158.

¹⁷ Regarding the connection between Social Justice and legal clinical education, see WILSON, Richard, «La educación clínica como un medio para mejorar el acceso a la justicia en países en desarrollo con democracias incipientes», en *Enseñanza clínica del derecho. Una alternativa a los métodos tradicionales de formación de abogados*, (Villarreal y Courtis, eds.), Instituto Tecnológico Autónomo de México D.F., 2007, pp. 225 to 245.

¹⁸ De Prada Rodríguez, Mercedes, Callejo Carrión, Soraya & López De Osa Escribano, Pilar, «La Clínica jurídica Villanueva: función social y pedagógica del aprendizaje del Derecho», en *Reduca*, op. cit., p. 1 to 15.

¹⁹ To this end, Spanish Royal Decree 1393/2007, of October 29, which establishes the organization of official university education, far from providing conceptual clarity, encourages an inappropriate terminological confusion and do not provide legal and conceptual security to the matters it regulates. In this way, the concept of competences has a generously (See Anexo I of the abovementioned normative) legal implementation, constituting the essential legal framework that allows obtaining the bachelor's degree (even when the final configuration of competences transcends the field of knowledge of Procedural Law, it is possible to affirm the Legislator vision, avoiding settling the standards of concepts related to the teaching-learning process). Therefore, the learning results are relegated to their interpretive consideration to obtain, as a mere unit of measurement, the European credits (ECTS) related to each bachelor's degree (Annex 1, section 8.2 of the aforementioned normative). Learning results are assessed according to the acquisition of skills and competences under Spanish Law.

field regarding clinical education because the characteristics that inform the method under study, teaching and learning programs, differ substantially²⁰ when it is considered from the legal perspective.²¹

This leads to consideration of the necessary instruments that will make it possible to approach a methodology adjusted to the idiosyncrasies of the legal field.

The characteristics that inform the method under study, in one and other disciplines, differ substantially. Jurists are used to the firm ground provided by the principle of legal certainty, especially in the determination of the essential legal concepts. When the clinical method in the legal field approaches those disciplines, the conceptualization of the basic elements that inform the method is characterized, precisely, by its great diversity.

As soon as the elementary concepts of competence, learning objects and learning outcomes or methodology are confronted from the legal perspective, the diversity, rich in nuances, of the conceptualization provided by those disciplines may clash head-on with the necessary primary concreteness that should inform the study of legal sciences.²²

By way of conclusion, it is necessary to develop and agree a common concept of clinical legal education, and its standards, defining the different applicable methodologies together with the objectives and results that are intended to be achieved.

If the clinical legal education model is linked to the teaching and learning methodology, the didactic objectives and its results should be tied to it, reserving the development of the meta didactic objectives or purposes, to a

²⁰ Adam, Stephen, «Using Learning Outcomes», *Report for the Bologna conference on learning outcomes*, Edinburgh, 2004, p. 6.

²¹ As an example, see the conceptualization of competences and learning basis according to the Spanish legal system as developed by DEL REAL ALCALÁ, J. Alberto, «Sobre las competencias y resultados de aprendizaje en Derecho», *Nuevas formulaciones de los contenidos docentes* (Fombona Cadavieco, Javier y Caldevilla Domínguez, David, Coords.), Mc Graw Hill Education, España, 2014, pp. 215 to 220; Jérez Yañez, Oscar, *Los resultados de aprendizaje en la educación superior por competencias*, Universidad de Granada, 2011, p. 55; Juandó Bosch, Josep & Pérez Cabaní, María Luisa, «La evaluación de los resultados de aprendizaje», *Evaluación y calidad en la universidad. Simposio internacional: 27 y 28 de septiembre de 2010*, Huelva, 2010, pp. 265 to 270.

²² An example of this is the implicit difficulty in conceptually distinguishing between competencies and learning outcomes in accordance with the Spanish legal system.

certain conception of law²³ and the firm commitment of juris doctor to their social responsibility.

In this regard it may be necessary to assume the configuration of didactics and legal methodologies and differentiate them from their correlatives in educational sciences using those educational parameters that may be applicable, in all or in part, to the legal sciences.²⁴

Conflicts and clinical treatment

As it was previously stated, the categorization of the conflicts that legal clinic may deal with depend on its degree of functionality, being always preferable a reasonable specialization and coordination between the different existing legal clinics.

To this extent, Spanish legal clinics are generally designed to promote human rights,²⁵ especially regarding social conflicts, marginalization of people or groups of people, from the higher consideration of the right to access to justice.²⁶

Conflicts that may receive clinical legal treatment are particularly complex, as they are not generally configured in a linear manner: composition is not generated by the mere application of previously defined jurisprudential standards.

²³ Blázquez Martín, Diego, «Apuntes acerca de la educación jurídica clínica», *Universitas. Revista de Filosofía, Derecho y Política*, op. cit., p. 50.

²⁴ As an example, the necessary differentiation between the concepts of legal clinic and service learning can be assessed, from the perspective of the existing tangential lines between both concepts. To this regard, see Gascón Cuenca, Andrés, «La evolución de la enseñanza jurídica clínica en las universidades españolas: oportunidades y desafíos de la litigación estratégica en las clínicas de derechos humanos», *Revista de Educación y Derecho*, op. cit., p. 4.

²⁵ Regarding the implementation of Legal Clinics in Spain, GARCÍA AÑÓN, José, «La evolución de la Educación Jurídica Clínica en España», *Revista de Educación y Derecho*, 2014 - 2015, num. 11 pp. 1.

²⁶ Blázquez Martín, Diego, Cuenca Gómez, Patricia y Iglesias Garzón, Alberto, *Guía sobre cómo crear, organizar, gestionar y conducir una clínica jurídica en una Facultad de Derecho*, Ilustre Colegio de Abogados de Madrid, op. cit., p. 10.

Indeed, the controversies submitted to clinical knowledge tend to transcend the mere underlying legal conflict in a subjective or plurisubjective legal relationship.

Both the conflict, as well as its eventual judicial resolution present numerous edges that encourage the intervention of other professions or different disciplines²⁷ may contribute to a comprehensive treatment of the proposed clinical composition.

Likewise, a specific vision of procedural law has been provided, strategic litigation, perhaps adjusted to the reality of the typology of conflicts discussed. Certainly, as Blázquez Martín, Cuenca Gómez, and Iglesias Garzón,²⁸ point out “in other legal systems, activities of public interest are usually reduced to the procedural sphere in those cases in which we find possibilities of legitimation or participation open to more or less numerous groups”.

The traditional scheme of judicial resolution of disputes allows us to affirm how the legal system pre-establishes the solution designed by the legislator in the event of a controversy with legal significance. Therefore, it is possible that said situation be evaluated according to legal criteria due to the effects that emanated from it.²⁹

In effect, the defence of people's rights, generally, must be enforced through a court action³⁰ under the public authority of the judiciary, impartial and independent, following due process of law, considered as the procedural

²⁷ Also see Mugarra Elorriaga, Aitziber y Martínez De Bringas, Asier, «La Clínica Jurídica Loiola: un proyecto de lucha por la justicia social», *Oñati Socio-legal Series*, op. cit., p. 496.

²⁸ Blázquez Martín, Diego, Cuenca Gómez, Patricia y Iglesias Garzón, Alberto, *Guía sobre cómo crear, organizar, gestionar y conducir una clínica jurídica en una Facultad de Derecho*, Ilustre Colegio de Abogados de Madrid, op. cit., p. 46. A good example may be article 125 of the Spanish Constitution, arts. 6 to 11 Spanish Civil Procedure Rules, articles 19.1 and 20.3 of the Spanish Organic Law of the Judiciary Power, in concurrence with arts. 101, 102, 110, 270 and 281, 782.1 of the Spanish Criminal Procedure Rules. However, a broad conception of the defence of the public interest does not have to be limited to these procedural aspects.

²⁹ Almagro Nosete, José, *Consideraciones de Derecho procesal*, Bosch, D.L., Barcelona, 1987, p. 121.

³⁰ Moreno Catena, Víctor, *Sobre el contenido del derecho fundamental a la tutela efectiva*, Poder judicial, 1984, num. 10, pp. 41 to 46.

mechanism that brings Justice to the citizenship. The application of law also means the preservation of the legal system³¹.

Consider some examples about how legal clinics may contribute to this extent.

Article 125 of the Spanish Constitution constitutionalizes the engagement of citizens in popular action and the participation in the administration of justice through the institution of the jury. The popular action is a nineteenth century legal mechanism that allows any Spanish citizen to bring a case to courts as long as the case is in the larger public interest. Under the Spanish Code of Criminal Procedure, the exercise of criminal action, commonly understood as the right to accuse a person alleged to have committed an offence punishable by law, corresponds either to the ones directly offended or harmed by the crime, or to any citizen through the exercise of popular action, as provide by article 270 LEcrim. Thus, the popular action (*quivis ex populo*) is connected to the prosecution of crimes that present a wider social impact.³²

Also, similar institutions exist in fields outside the criminal proceedings, for example, issues related to Urban Planning Law (arts. 4 and 48 of Legislative Royal Decree 2/2008 of 20 June, by which is approved the Consolidated Text of the Land Act) in connection to environmental law.

The connection of popular action in both criminal and environmental law with the right to access to justice confirms the suitability of the clinical treatment of conflicts to anticipate potential legal action where clinicians may participate in the design of the procedural strategy prior to take court action.

A similar approach may be considered regarding other legal fields such as consumer law, health law, or the expanded legal legitimacy established for associations specialized on equality rights (articles 11 and 12 of Spanish Code of Civil Procedure).³³ In other words, the clinical treatment of those conflicts

³¹ Cortés Domínguez, Valentín, «El proceso», en *Introducción al Derecho Procesal* (con Moreno Catena), Tirant lo Blanch, 2014, p. 224.

³² Moreno Catena, Victor, «La acción popular» en *El Proceso Penal*, Tirant Online, Valencia, 2000.

³³ These premises are presented considering the scope of some legal clinics, such as Clínica Jurídica Justicia y Derechos Humanos Professor Juan Antonio Carrillo Salcedo de la Universidad Pablo de Olavide de Sevilla but probably is not extensible to all legal projects developed.

may be developed from the perspective of the three essential concepts that inform procedural law: jurisdiction, legal remedies, and procedure.

Undoubtedly, there are other dispute composition mechanisms – alternative dispute resolution methods (ADR) – that may inform the legal clinical services in Spain. This proposal brings some positive aspects. The promotion of ADR should be promote at the base of the legal educational system,³⁴ abandoning a strictly adversarial point of view at the conflict's resolution. Agreements between parties at the legal clinical stage optimize clinical resources and increase or may increase a prompt satisfaction of claims.³⁵

However, the legal requirements to act as a mediator at the Spanish systems requires that a fully authorized professional participates during the mediation sessions at the clinical stage. Recently adopted by some public institutions, mediation in public services may help with this task by subscribing agreements with the legal clinics interested on the promotion of ADR as a suitable mechanism to resolve controversies.

Therefore, the clinical treatment of a legal conflict will favour the promotion of the public interest, but it should not be conceived as a service that only reaches the doors of the courts of justice. Alliances with the so-called clearing houses³⁶ and other entities become crucial to grant effectiveness to the comprehensive legal treatment of the conflict.

On the other hand, the planning of clinical work linked to the issuance of reports and legal opinions has an immediate reflection on the training of students, bringing its conclusions available to the Society. Furthermore,

³⁴ However, the impulse pretended by different legal bodies regarding the promotion of ADR in the Spanish legal system, it is still residual in the practice of Law.

³⁵ The introduction of ADR methods through the intervention of a public mediation service, such as the one developed by Diputación de Sevilla, would be an interesting instrument in providing greater efficiency in the composition of conflicts, especially those who present a community and convivial perspective.

³⁶ *For a more extended point of view about Clearing Houses in Spain, see Sánchez Gómez, Raúl, «La implementación del pro-bono en la cultura jurídica española como sistema de acceso a la justicia», en Práctica de tribunales: Revista de derecho procesal civil y mercantil, 2019, num. 136, pp. 8.*

guidelines designed for a specific type or legal action strengthens its administrative and judicial composition.³⁷

Likewise, the consideration of clinical work is especially useful to promote social transformation through the more effective protection of fundamental rights and guarantees. There is no better approach in the design of a procedural strategy than the concatenation of similar cases resolved judicially in a certain direction.

However, the scope of litigation at Spanish legal clinics has been considered, general and exclusively, from a strategic point of view. This conception of clinical work can lead to a deviation in the clinical methodology used, assuming that the ordinary and usual cases resolved by the courts follow the procedural standards that inform the more complex strategic cases.

The contribution of legal clinics to future professionals on values related to public services and ethical standards cannot be separated from a wider conception of procedural law. It is not recommended to train future legal practitioners outside of the discipline. The procedural strategy must be at the clinical worktable, as long as the resolution conflicts and enforcement still have a jurisdictional nature. Disregarding these arguments may produce serious dysfunctions if, finally, the conflict turns into a legal action at the jurisdictional stage.

Conclusion

Clinical legal education must not be exclusively linked to professional advocacy, considering the wide range of legal professions available in the Spanish legal market.

The conceptualization of Spanish legal clinics is reasonably linked to their functionality, although there is still a long way to go in defining its pedagogical functions as clinical education model based on its own legal system. A specific methodology that informs the clinical method should be developed, assuming

³⁷ As an example, see Sánchez Gómez, Raúl, «La reclamación por asistencia sanitaria pública en casos de enfermedades infecto-contagiosas. Estrategia procesal y sistema de recursos», en *Revista Aranzadi Doctrinal*, 2015, num. 10, pp. 153 to 190.

the premises disposed by other disciplines such as didactics or pedagogy, but considering the concrete circumstances of the legal field.

As previously stated, the procedural strategy must be at the clinical worktable, as long as conflict resolution and enforcement still have a jurisdictional nature. Disregarding these arguments may produce serious dysfunctions if, finally, the conflict turns into a legal action at the jurisdictional stage. To this end, the clinical treatment of the legal conflict must also use the perspective provided by procedural law, especially in terms of the effective and efficient resolution of conflicts.

There are great spaces in Spanish law where legal clinics may collaborate in order to perform a procedural treatment of the conflict submitted to clinical knowledge.

To this extent, clinical experts and students may consider the three basic concepts that inform procedural law: jurisdiction, legal remedies, and procedure, preparing the case before going to trial. A good preparation of cases with a common nexus may avoid action before the court, promoting access to justice by implementing either procedural strategies or ADR. However, considering how ADR is regulated in the Spanish system, the intervention of ADR accredited professionals is required.