

Promoting a Public Service Ethic in the Legal Profession in Kenya: The Imperative Role of Clinical Legal Education

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Abstract

The taskforce appointed in 2016 to undertake a review of the legal sector in Kenya highlighted a decline in public service and pro bono work as one of the challenges facing the legal profession in the country. In its report, the taskforce made several proposals to tackle the problem, all directed at qualified lawyers. This article seeks to contribute to the deliberations anticipated from the findings of the taskforce, by suggesting instead that the problem of a declining public service ethic be addressed by targeting law students. Bringing students face to face with real clients and their needs can play an important role in broadening their horizons and shaping their beliefs about, and attitudes towards, the different possible careers they can pursue with their education. The article specifically recommends clinical legal education as a practical and comprehensive means by which students can be encouraged from early on to have an interest in pro bono and public service work.

Keywords

Public service, pro bono, clinical legal education, legal profession, Ojiambo Task Force on Legal Sector Reforms

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INTRODUCTION

In 2016, Kenya's Attorney General appointed a taskforce (the Taskforce) to look into and make proposals for reforms in the legal sector.¹ The Taskforce was directed to make recommendations on, among other issues, the suitability and quality of legal education and professional training in the country. This included legal education and training, both at law faculties where students undertake their undergraduate studies and at the Kenya School of Law (KSL), the post-university professional school that all law graduates must pass through before they qualify for admission to the Bar. In December 2017, the Taskforce released a draft report (the Ojiambo Report), which highlighted a decline in public service and pro bono work as one of the challenges faced by the legal profession in its quest to become a premier profession in Africa and in the global marketplace.²

The Taskforce looked at the issues of access to justice, legal aid, and the link between pro bono work and the practice qualification, under the theme "practice issues".³ To encourage lawyers to undertake pro bono work, the Taskforce recommended that the provision of free legal services should be a basis for practicing advocates to earn continuing professional development points and renew their practising certificates.⁴ The Taskforce also proposed that provision of legal aid service be one of the conditions for the appointment of senior counsel and, further, that tax rebates should be offered as incentives for lawyers who provide legal aid.⁵ It is notable that none of the Taskforce's recommendations refers to the role that legal education providers or legal education can play in addressing the concern of a declining pro bono and public service ethic.

The Taskforce's recommendations will undeniably deal with the current issue, tackling the problem head-on and applying solutions to the concrete situation in which the legal profession currently finds itself. However, the proposals are all aimed at obliging lawyers to provide free legal services, which, while possibly achieving some measure of success in increasing legal aid to the poor, will not be without its disadvantages. As some have surmised, mandatory pro bono work is an oxymoron:⁶ forcing one to give free legal services is

1 Kenya Gazette notice no 8116 (7 October 2016). The appointment took effect on 26 September 2016.

2 "Report of The Taskforce on Legal Sector Reforms" (fifth draft, December 2017), submitted by the chairman of the Taskforce on Legal Sector Reforms, Fred Ojiambo, to the Hon Attorney General of the Republic of Kenya, at 10. As at the date of this article, the final version of the report was still not publicly available.

3 Ojiambo Report at 18–19.

4 Id at 118; see recommendation 28(i).

5 Id at 129. See also id at 118, recommendation 28(ii). While offering tax deductions for pro bono work is possible, in the authors' view, this is insufficient motivation for giving one's services free of charge.

6 J Chaifetz "The value of public service: A model for instilling a pro bono ethic in law school" (July 1993) 45/6 *Stanford Law Review* 1695 at 1710.

a contradiction in terms. The use of sanctions is not the best way to enforce the spirit of generosity that exemplifies public service.

In this article the authors hope to contribute to the anticipated debate following the Taskforce's findings, specifically whether the legal profession has an obligation to produce lawyers who are committed to altruism and who have regard for the public good. While acknowledging the viability of the Taskforce's recommendations, the authors propose that legal education must be re-thought as a more effective, more sustainable and arguably indispensable way of inculcating a pro bono and public service culture in the legal profession.

This article first seeks to determine whether public service has a place in the legal profession. It does this by defining law as a profession, highlighting what the authors consider to be essential characteristics of professions compared to jobs, occupations or careers, including the nature of service, its paramount place in the profession and its orientation towards the public good. The article proceeds to draw the necessary connection between law and public service, and to evaluate what place Kenyan law schools have endeavoured to give to public service in their objectives, missions and activities, and whether or not their efforts have served to promote the professional ideals of law students.

In view of the significance of public service in the legal profession and considering the less than ideal importance that law schools seem to give it, the article then proposes clinical legal education (CLE) as an intentional and sustainable way of inculcating a public service ethic in future legal professionals from an early age. It defines CLE, outlines its benefits and the complementary role it seeks to play in a lawyer's education. The article concludes by offering some suggestions that could be applied in an effort to create an environment within the legal profession in which a pro bono culture can flourish.

THE LEGAL PROFESSION AND PUBLIC SERVICE

Law as a profession

How the law is taught and the expectations placed on lawyers will, to a large extent, turn around the perception of law as a profession. The term "profession" is often used somewhat loosely to refer to almost any career deemed "serious", but this was not the case historically. At the time when universities emerged in the West during medieval times, only divinity, medicine and the law were considered professions.⁷ Reference is made at a later stage to a "classic quintet" of occupations designed to address society's "most fateful tasks", adding the military and academia to the existing trio.⁸ Even these nevertheless

7 See BA Kimball *The 'True Professional Ideal' in America: A History* (1996, Rowman & Littlefield) at 101.

8 JC Hermanowicz and DR Johnson "Professions" in M Sasaki et al (eds) *Concise Encyclopedia of Comparative Sociology* (2014, Koninklijke Brill NV) 209 at 209.

constitute many fewer occupations than those presently considered professions, which include all “white collar” jobs.⁹ This generalization of terminology seems to apply equally in Africa where it is not uncommon to refer to any job or career as a profession.¹⁰

Over the years, attempts have been made to define the term “profession” and, although this exercise has always proven elusive, some common characteristics have emerged, and can be used as a guide, at least at a minimum level, in formulating the criteria to apply in deciding which occupations qualify as professions. Even without a universally accepted definition and with many logical difficulties to be surmounted in the quest to coin one,¹¹ the word has a depth of meaning; it is considered a calling or a vocation, something more than mere employment, an occupation or career. Of the defining features considered by different authors over time, some common ones include: knowledge, expertise, rationality, a higher level of educational base (this could be understood in terms of the qualifications needed to enter a profession) and altruism or a positive contribution to society.¹²

Aptly capturing these characteristics, the following “working” definition of “profession” was proposed for medical educators:

“An occupation whose core element is work based upon the *mastery of a complex body of knowledge and skills*. It is a vocation in which knowledge of some department of science or learning or the practice of an art founded upon it is used *in the service of others*. Its members are governed by codes of ethics and profess a *commitment to competence, integrity and morality, altruism, and the promotion of the public good* within their domain. These commitments form the basis of a social contract between a profession and society, which in return grants the profession a monopoly over the use of its knowledge base, the right

9 The *Cambridge Dictionary* defines “white collar” as “work that needs mental rather than physical effort”, as opposed to “blue collar” jobs, which are manual in nature. See: <<https://dictionary.cambridge.org/dictionary/english/white-collar>> (last accessed 22 January 2020). See also HG Hurd “Who is a professional” (summer 1967) *Journal of Cooperative Extension* 77. An inexhaustive list of occupations considered professions include engineering, accounting, nursing, actuarial science and teaching.

10 See for example “The future of jobs and skills in Africa: Preparing the region for the fourth industrial revolution” (World Economic Forum executive briefing, May 2017) at iii, where (in addition to care, education and health workers) creative industry workers, food technologists, 3D designers and data centre workers are considered among the trending professions on the continent.

11 JE McPeck and JT Sanders “Some reflections on education as a profession” (August 1974) 8/2 *The Journal of Educational Thought* 55 at 58. An example of such a logical problem would be the difficulty in deciding the basic characteristics of a profession: would one create a list of attributes fit for a profession and then decide which occupations qualify, or should one decide on the occupations first and then create a list of common characteristics?

12 M Saks “Defining a profession: The role of knowledge and expertise” (2012) 2/1 *Professions and Professionalism* 3.

to considerable autonomy in practice and the privilege of self-regulation. *Professions and their members are accountable to those served and to society.*¹³

A profession could be described as an occupation that involves long and intensive academic preparation and a formal qualification.¹⁴ In addition to university education, professions train their members in professional schools, practical in their orientation and with a decreased emphasis on formal lectures.¹⁵ The training and skills they receive are intended to capacitate them to bring order and some sense of direction and stability in fields such as law that are impacted by a constantly changing society.¹⁶

Training by their profession gives professionals independence from their employers and thus the ability to pursue excellence according to set standards, as opposed to non-professionals who may owe their loyalties to the employer who invests in them (for example in terms of skills training) and therefore has expectations of them.¹⁷ In contrast, a profession creates standards of excellence by which it may be judged and to which its members can refer as a guide for their actions, independently of what their employers may dictate.¹⁸

Professionals are expected to acquire a “spirit of the profession”, which is never only about pursuing one’s given trade for the sake of putting food on the table, merely earning an honest living or being fulfilled in one’s job. While all these ends are equally applicable to professions as to jobs or occupations, a profession is additionally inextricably linked to service to society. It involves dedication not only to one’s personal aspirations, but also to the “constructive use of knowledge for the creation of a better life”.¹⁹ Professions seek to promote the common good:²⁰ the good of all as represented by the social

13 SR Cruess, S Johnston and RL Cruess “‘Profession’: A working definition for medical educators” (February 2004) 16/1 *Teaching and Learning in Medicine* 74 at 75 (emphasis added). The proposed definition builds on the definition given by the *Oxford English Dictionary* (1989, Clarendon Press).

14 Saks “Defining a profession”, above at note 12 at 2. Others however counter the argument that knowledge and expertise alone are central to the definition of a profession, proposing instead that knowledge and expertise cannot be assumed or automatically deduced from years of study and should instead be established through experience and work output.

15 See for example the description of the Advocates’ Training Program offered at the KSL, Kenya’s professional school for lawyers, available at: <<https://www.ksl.ac.ke/advocates-training-program/>> (last accessed 22 January 2020).

16 Hurd “Who is a professional”, above at note 9 at 79.

17 Id at 78.

18 Id at 79.

19 Id at 81.

20 Achievement of the common good will involve the “highest possible attainment of persons to their lives as persons”: J Maritain *The Rights of Man and Natural Law* (1971, Gordian Press) at 9. The common good is the good both of society as a whole, and of the parts that form the whole: the individual human beings who constitute society; it entails the

body of which they form a part.²¹ Whereas all occupations can be said to contain an element of service (all are carried out to meet the needs of society), professions seek, as their *raison d'être*, to be at the service of essential needs in critical fields such as health, justice and education.²²

Law as a profession is therefore, by definition, a public profession for which a public service ethic will have significant importance. In offering “service to others”, professionals arguably should go the extra mile to invest their words with a wide and lasting importance, giving unreciprocated service where members of other trades strive only for excellence.²³ It is only by this extra voluntary effort to go beyond one’s strict obligations that a calling may attain the dignity and distinction of a profession.²⁴ Further, the privilege of professional education confers on professionals the obligation to serve the public.²⁵ Professional education could be seen as privileged due to the rigour imposed in the training, because professions are self-regulated and decide to which standards they shall be held. The professions were designed to go beyond the demands of an ordinary trade by, for example, ensuring that the most vulnerable in society did not lack services for their inability to pay for them.²⁶

Legal professionalism may thus be defined as the pursuit of a learned art in the spirit of public service and this is a primary purpose or hallmark of the profession.²⁷ But what is public service?

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maximization of opportunities for each person to develop him or herself holistically: JM de Torre *Person, Family and State: An Outline of Social Ethics* (1991, SEASFI) at 29.

- 21 Maritain, *id* at 8. As one scholar observed, the professional groups were among the most significant non-governmental institutions that promoted public welfare in Anglo-American history: HF Stone “The public influence of the Bar” (1934) 48/1 *Harvard Law Review* 1 at 4–5.
- 22 These services have been described as those whose nature therefore affects the quality of life. See RB Howsam et al *Educating a Profession*, *American Association of Colleges for Teacher Education* (1976, American Association of Colleges for Teacher Education) at 5–6. See also McPeck and Sanders “Some reflections”, above at note 11 at 60.
- 23 AA Klass ‘What is a profession?’ (1961) 85 *Canadian Medical Association Journal* 698 at 700.
- 24 *Ibid*.
- 25 M Walker “Universities, professional capabilities and contributions to the public good in South Africa” (2012) 42/6 *Compare: A Journal of Comparative and International Education* 819 at 824.
- 26 Professionals will, for example, act to effect social transformation and to reduce injustice. In a project carried out to create a public good professional education index, all the persons involved in the research agreed that public-good professionals will: recognize the full dignity of every human being; act for social transformation and to reduce injustice; make sound, knowledgeable, thoughtful, imaginative professional judgments; and work with others to expand the comprehensive capabilities of people living in poverty. See M McLean and M Walker “The possibilities for university based public-good professional education: A case-study from South Africa based on the ‘capability approach’” (2012) 37/5 *Studies in Higher Education* 585 at 588.
- 27 Chaifetz “The value of public service”, above at note 6 at 1697.

Public service

Kenya's Constitution of 2010 (the Constitution) defines public service as "the collectivity of all individuals, other than State officers, performing a function within a State organ".²⁸ In decrying the decline of public service work, the Taskforce could have meant public service in this sense, referring to the work of lawyers in state organs.

However, in ordinary parlance, "public service" has also been described as work whose objective is the provision of necessary goods or services rather, or more, than the pursuit of profit, whether or not the person performing the service works for a state entity.²⁹ A public service has further been defined simply as a service that serves the public: citizens exercising legitimate claims on state resources to expand their capabilities.³⁰ Such work promotes the public good as distinct from work that is directed to the interests of individual clients.

Public service work by lawyers can take different forms. Work in government agencies, such as the office of the public prosecutor or the different government ministries, is work in the service of the public whom the government exists to serve. It could entail work done by state organs in delivering essential services, like legal aid, to people who cannot afford to pay for them.³¹ It can also take the form of pro bono work in law firms that otherwise deal with private matters. It can be work at non-governmental or international organizations that endeavour to promote the good of society. Unlike private service, which places the interests of the one who pays for the service above all else, public service sets out to attain the greater good of society in the most effective and efficient way possible.

A lawyer, by definition, should be the guardian of a fair and equitable legal system: one whose ultimate purpose is justice, not merely the administration of claims for those who can afford to pay for them.³² As professionals, lawyers ought to have concern and fight for laws and policies that better society, taking on litigation in the public interest where needed. They ought to applaud, criticize, demand or propose ideas that will bring about just solutions to societal problems; they should be ready to do what it takes to deliver legal services and to hold those in public office to account. Such work, done in the public service, effects societal change and will ensure that justice is accessed by all, that no-one is left out for any reason, not least because they cannot pay for the services.

28 The Constitution, art 260.

29 See "Public service", available at: <<https://www.collinsdictionary.com/dictionary/english/public-service>> (last accessed 22 January 2020).

30 Capabilities have been defined as the potential to achieve factors such as the freedoms people have to be and to do what they love doing, including being knowledgeable and using their knowledge in worthwhile ways. See Walker "Universities, professional capabilities", above at note 25 at 822.

31 Ibid.

32 Chaifetz "The value of public service", above at note 6 at 1696.

The place of public service in law schools in Kenya

As all players in the legal sector review the Ojiambo Report and reflect on what they could possibly do about the findings, legal educators should also deliberate on what it is that law schools teach that produces lawyers who are more inclined to private practice than public service.³³ The low regard for pro bono work and public service highlighted by the Taskforce could be a reflection of the lack of prestige with which such work is regarded in law schools.³⁴ Evans observes: “[n]ot many legal education institutions, including law schools and other providers of practical legal training, see themselves as having a responsibility to deliver justice education – that is, education in the social responsibility of the law and the legal profession.”³⁵

A review of institutional mission statements shows that service or public service barely feature in the overall goals of legal education providers in Kenya. When it does, the aspiration to public service is subtle, and does not translate into concrete aspirations or objectives.

Some law faculties do not refer to any kind of service to society in their mission and objectives.³⁶ Instead they focus on academic excellence, offering an “unforgettable learning experience”,³⁷ or carving out a niche as a “good governance academy of Kenya’s legal scholarship”.³⁸ Others, perhaps with the intention of being more service oriented, set out to offer corporate citizenship,³⁹ service to society,⁴⁰ increased sensitivity to community

33 S Wizner “What is a law school?” (Yale Law School Faculty Scholarship Series paper 1853 of 1989) 701 at 704, available at: <http://digitalcommons.law.yale.edu/fss_papers/1853> (last accessed 22 January 2020).

34 Chaifetz “The value of public service”, above at note 6 at 1711.

35 A Evans “Normative attractions to law and their recipe for accountability and self-assessment in justice education” in FS Bloch (ed) *The Global Clinical Movement: Educating Lawyers for Social Justice* (2011, Oxford University Press) 353 at 353.

36 For example the Mount Kenya University, School of Law, Parklands Campus. See “Vision, mission & core values”, available at: <<http://law.mku.ac.ke/index.php/about-us/vision-mission-core-values>> (last accessed 18 February 2020).

37 See “Word from the Dean Law School”, available at: <<http://www.riarauiversity.ac.ke/law/index.php/message-from-dean/>> (last accessed 22 January 2020). Nevertheless, this website does mention achieving the learning experience by using clinical resources.

38 See “Kabarak University Law School: Welcome note”, available at: <<https://kabarak.ac.ke/school-of-law/>> (last accessed 22 January 2020).

39 One of the core values of the University of Nairobi School of Law is to: “Nurture responsible corporate citizenship and strong social responsibility”; see “Our vision”, available at: <<https://law-school.uonbi.ac.ke/basic-page/our-vision>> (last accessed 22 January 2020). The mission statement of the University of Nairobi, School of Law, Mombasa Campus includes no reference to service, although one of the campus’s core values is: “responsible corporate citizenship and strong social responsibility”. See “Vision and mission”, available at: <<https://a-mombasa.uonbi.ac.ke/node/73>> (last accessed 18 February 2020).

40 See Egerton University “Mission of the Faculty of Law”, available at: <<http://www.egerton.ac.ke/index.php/Faculty-of-law/faculty-of-law.html>> (last accessed 22 January 2020). The mission of Egerton University’s Faculty of Law includes offering education that fosters service to society that contributes to national and global development.

needs,⁴¹ community service⁴² or benefit to humanity.⁴³ Some legal education providers have no mission or vision statement but allude to the general sense of service to the community in other aspects of their governance and administration.⁴⁴

The use of the term social responsibility infers giving back to society, which is not synonymous with public service. Public service implies utilizing one's profession for the good of the public, while social responsibility need not have any professional ties, in which case the vision would not necessarily directly shape the professional course of the students' careers. While social responsibility may result in law students reaching out to offer services that can contribute to better public service, there is a chance that this may not be the case, and it could merely refer to or lead to a focus on service of a non-legal nature.

It is important that legal education providers be intentional about offering education in social responsibility that is specific to the law and the legal profession.⁴⁵ In apparent recognition of this need, there are legal education providers that aspire to prepare students for the profession in a context of service that nurtures their professional bias. They aim to create opportunities for students to contribute to society by providing legal aid services to indigent persons,⁴⁶

41 See Kenyatta University School of Law "Mission statement", available at: <<http://www.ku.ac.ke/schools/law/index.php/about-us/fundamental-statements>> (last accessed 22 January 2020); Kenyatta University School of Law aspires to create legal entrepreneurs able to contribute to global competitiveness.

42 See The Catholic University of Eastern Africa "Mission", available at: <<http://www.cuea.edu/index.php/about-us/our-mission>> (last accessed 22 January 2020). There is no statement about the specific mission of the law faculty, but the mission of the university is to promote excellence in research, teaching and community service by preparing morally upright leaders based on the intellectual tradition of the Catholic Church.

43 The University of Nairobi Kisumu Campus has no separate mission statement for its School of Law, but the mission of the campus as a whole is to: "provide quality training, learning, research and consultancy in education, humanities and social sciences by creating, preserving, transmitting and utilizing knowledge for the benefit of humanity." See University of Nairobi Kisumu Campus "Vision and mission", available at: <<https://a-kisumu.uonbi.ac.ke/node/7>> (last accessed 18 February 2020).

44 For example, the African Nazarene University Law School. Its website refers to "offering legal assistance to indigent persons" and the goal of offering "expertise and competence that enables [students] to identify and address needs in their local and regional community". See "Dean's message", available at: <<https://www.anu.ac.ke/school-department/law-school/>> (last accessed 22 January 2020).

45 Evans "Normative attractions to law", above at note 35.

46 The vision of Moi University School of Law is to be a centre of excellence in innovative and experiential legal education. See Moi University School of Law "Vision", available at: <<https://law.mu.ac.ke/index.php/vision-mission-objectives>> (last accessed 22 January 2020). One of its quality objectives is to ensure the provision of legal aid services to at least five indigent persons every month through its legal aid clinics and partnerships. Although the School of Law was started with the goal of applying the legal aid clinic and using clinical methods to teach, nothing is specifically mentioned about

actively pursuing justice,⁴⁷ offering practical learning⁴⁸ and promoting social justice.⁴⁹

To be more clearly public service-oriented, legal education providers could redraft their mission statements and objectives to be more overtly aimed at offering public service. An explicit service-oriented mission could include cultivating in law students a deep commitment to the well-being of others,⁵⁰ expressed in unambiguous terms, with law students as its object,⁵¹ motivating them to pursue justice as ethical professionals and engage in careers that help those in need.⁵² Appreciating the complexity of the legal problems the students will face in their work as lawyers, legal education providers can commit

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the legal aid clinic in the current description of the Bachelor of Laws degree programmes and objectives.

- 47 Strathmore Law School seeks to achieve legal excellence through providing a supportive learning environment that inspires innovative and critical thinking, promoting ground-breaking research, actively pursuing justice and nurturing virtuous leaders. See Strathmore University Law School “Vision mission values”, available at: <<http://www.law.strathmore.edu/about-sls/vision-mission-values>> (last accessed 22 January 2020). All undergraduate students are required to dedicate a minimum of 200 hours in community service through the community-based attachment programme. However, there seems to be no requirement that such community service be directly linked to the students’ field of study. See: Strathmore University “Coat of arms”, available at: <<https://www.strathmore.edu/about-su/mission-vision-coat-of-arms/>> (last accessed 22 January 2020).
- 48 KSL’s mission is to offer quality and practical legal training for professionals and other actors in the legal sector: KSL “Mission”, available at: <<http://www.ksl.ac.ke/mission-vision-and-mandate/>> (last accessed 22 January 2020).
- 49 See School of Law, Jomo Kenyatta University of Agriculture and Technology “Vision and mission”, available at: <<http://www.jkuat.ac.ke/schools/law/vision-and-mission/>> (last accessed 22 January 2020). Nothing in the school’s mission refers to the promotion of service to society, although one of the school’s objectives is to inculcate in students the values of professionalism, social justice and community service.
- 50 The University of San Francisco School of Law seeks to contribute to society theoretically and practically by training professionals who care about the well-being of others and have a deep concern for justice. The school commits itself to creating innovative programmes and training skilled lawyers to serve the local San Francisco community. It also seeks to inspire its graduates to pursue justice and to engage in practice or public service activities that help those in need. See University of San Francisco Law School “Mission and history”, available at: <<https://www.usfca.edu/law/our-school/mission-history>> (last accessed 22 January 2020).
- 51 Service is one of the formation goals at the University of Notre Dame Law School. The school commits itself to preparing its students to serve the community, especially the underprivileged, with dedication to human dignity and the common good. See University of Notre Dame Law School “Educational goals and learning outcomes”, available at: <<https://law.nd.edu/about/educational-goals/>> (last accessed 22 January 2020).
- 52 The University of St Thomas School of Law seeks to promote excellence in enhancing social justice by assisting students in integrating their commitment to serve society into their personal and professional lives. The school further specifically commits itself to promote and participate in service programmes designed to address the needs and improve the conditions of the disadvantaged and underserved. See University of St

to providing opportunities for students to work with clients, thus helping them at a young age to begin the lifelong process of becoming thoughtful, responsible and reflective lawyers.⁵³

The Taskforce noted that one of the reasons for poor quality educational programmes is inadequate strategic planning by legal education providers.⁵⁴ Strategy guides quality and drives outcomes. If public service is an essential component of the legal profession, part of such a strategy should include introducing law students to public service and giving them the opportunity to learn what it takes to be proponents of the public good.

From this brief analysis, it is apparent that law schools in Kenya do not seem to place sufficient emphasis on the need to communicate to or teach students the value of public service, seen from a professional standpoint. How could this aim be better achieved? This article now attempts to answer this question.

TEACHING A PUBLIC SERVICE ETHIC THROUGH CLINICAL LEGAL EDUCATION

CLE emerged as a response to the weaknesses of the traditional classroom approach of teaching the law and sought to make up for overly theoretical methods that were deemed unsuitable for students preparing for a practical career.⁵⁵ Dissatisfaction with the traditional method of teaching law originated in part from the realization that other professions, such as engineering and medicine, did not rely solely on books to educate their students but exposed them to the practice of the profession in their university years. As students of medicine learnt from doctors and students of engineering from engineers, it was thought that students of law should also learn from trial advocates in a context that depicted the kind of environment in which they would eventually work.⁵⁶

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Thomas Law School “Our vision: Service and community”, available at: <<https://www.stthomas.edu/law/about/>> (last accessed 22 January 2020).

53 The University of the Witwatersrand offers a compulsory practical legal course for all its students in their fourth year of studies. This course gives students the opportunity to “provide professional and quality legal service to the community”. See University of the Witwatersrand Johannesburg “Wits Law Clinic: Mission”, available at: <<http://www.wits.ac.za/lawclinic/>> (last accessed 22 January 2020). The University of Pretoria also recognizes the need to produce graduates who appreciate the importance of community engagement and a concern for fostering the development of local communities. See “Vision, mission and values”, available at: <<https://www.up.ac.za/article/2749453/vision-mission-and-values>> (last accessed 18 February 2020).

54 Ojiambo Report, para 54.

55 See ANA “The problem of practical training for law students in Africa” (1961) 5/3 *Journal of African Law* 123.

56 FJ Macchiarola and J Scanlon “Lawyers in the public service and the role of law schools” (1992) 19 *Fordham Urban Law Journal* 695 at 698. See also J Giddings et al “The first wave of modern clinical legal education (the United States, Britain, Canada and Australia)” in Bloch (ed) *The Global Clinical Movement*, above at note 35, 3 at 5. See also ANA, id at 124.

The movement for CLE began in the USA in the 1960s.⁵⁷ Clinics in Britain started in the 1970s and, although not at the same level as those in the USA, they introduced elements of practical engagement into legal education.⁵⁸ Canada had law clinics from the 1970s, located in both law schools and the community, with funding from government.⁵⁹ In Africa, South Africa has the longest history of university law clinics, also going back to the 1970s. Law clinics were established as a response to the need for the provision of legal aid to the poor in situations of high poverty and a lack of government structures favourable to those without means. From three university clinics in 1973, all law schools in South Africa now have law clinics operating under the umbrella body, the South African University Law Clinics Association.⁶⁰

Nigeria is Africa's CLE rising star.⁶¹ Nigeria's Network of University Legal Aid Institutions (NULAI) was formed in 2003 to promote CLE, legal education reform, legal aid and access to justice in Nigeria.⁶² Through the work of NULAI, Nigeria's clinical law programme was launched in 2004; a clinical legal curriculum for Nigerian universities was approved in 2006 and is currently applied in more than 15 university based law clinics.⁶³ Other countries in Africa are also said to have established legal clinics as far back as the 1970s as a response to the need for practical training for prospective lawyers, which was seen as the best training method for Africa's emerging faculties of law.⁶⁴ Despite that acknowledgement and evidence of attempts at establishing law clinics in other parts of Africa over the years, the information available

57 See "The Center for the Study of Applied Legal Education", available at: <<https://www.csale.org/#aboutus>> last accessed 18 February 2020). The Council on Legal Education for Professional Responsibility gave money to more than 200 law schools to establish law clinics that receive and attend to clients. See also Giddings et al, *ibid*.

58 See also *id* at 6.

59 *Id* at 7–8.

60 Initially known as the Association of University Legal Aid Institutions. See D McQuoid-Mason "Clinical legal education and the role of law clinics in South Africa" at 4 and 20, available at: <<http://clarkcunningham.org/LegalEd/SouthAfricaMason2.pdf>> (last accessed 22 January 2020). See also *Combining Learning and Legal Aid: Clinics in Africa* (report on the First All-Africa colloquium on CLE, 23–28 June 2003) at 3, available at: <https://www.opensocietyfoundations.org/sites/default/files/southafrica_20030628.pdf> (last accessed 22 January 2020).

61 See "African clinics today: Nigeria leads the way" in RJ Wilson *The Global Evolution of Clinical Legal Education: More than a Method* (2018, Cambridge University Press) 215.

62 E Ojukwu, S Erugo and C Adekoya *Clinical Legal Education: Curriculum Lessons and Materials* (2013, NULAI) at 4.

63 *Id* at 4–5.

64 See ANA "The problem of practical training", above at note 55 at 123, where the case is made that practical training must be related to actual cases in the context of a lawyer's office and that, if it is not possible to send students to such offices, such offices must be manufactured in the law school. See also Wilson *The Global Evolution*, above at note 61 at 211.

about them is sketchy at best and not as systematic as it is about South Africa or, in last few years, Nigeria.⁶⁵

CLE may be defined as learning by doing, a “legal teaching method based on experiential learning which fosters the growth of knowledge, personal skills and values while simultaneously promoting social justice”.⁶⁶ In CLE, students actively participate in the learning process, taking the role of lawyers and dealing with cases (real or simulated) under the guidance and supervision of faculty members. The students learn by application, practice and reflection, as opposed to merely reading, listening to or discussing the views of other people.⁶⁷

CLE has also been described as justice education or socially relevant legal education, because its main aim is to prepare future lawyers sufficiently to serve and improve both society and the profession.⁶⁸ Because it changes or restructures institutionalized or traditional legal education, CLE has been described as a philosophy about the role of lawyers in society.⁶⁹ It can be seen as a means of understanding the law and the legal process. CLE challenges or questions the perhaps commonplace understanding that tends to depict the typical lawyer as a professional who makes money solving clients’ problems; it makes room for the future lawyer to see his or her role in enhancing access to justice as he learns what it takes to be a professional.⁷⁰

Although applied in formats that are not exactly the same in different parts of the world, there are key defining features that underlie CLE.⁷¹ One quality is its professional education mission.⁷² Educating lawyers for social justice is a characteristic attribute of CLE.⁷³ More than traditional means of teaching, CLE specifically aims to provide professional skills training and instil public responsibility and social justice as professional values.⁷⁴ Another feature of

65 For a detailed description of the history of CLE in Africa, see “Clinical legal education in Africa” in Wilson, id, 205.

66 See “Definition of a legal clinic” (European Network for Clinical Legal Education), available at: <<http://encle.org/about-encle/definition-of-a-legal-clinic>> (last accessed 22 January 2020).

67 H Brayne, N Duncan and R Grimes *Clinical Legal Education: Active Learning in Your Law School* (1998, Glasgow) at 1.

68 F Bloch and NR Madhava Menon “The global clinical movement” in Bloch (ed) *The Global Clinical Movement*, above at note 35, 267 at 272.

69 See “What is clinical legal education?” (University of Pretoria), available at: <<https://www.up.ac.za/up-law-clinic-home-page/article/23711/clinical-legal-education>> (last accessed 22 January 2020).

70 Brayne, Duncan and Grimes *Clinical Legal Education*, above at note 67 at 2.

71 In Nigeria, NULAI considers CLE to be an institutional goal for legal education providers. CLE is designed to have a fully fledged curriculum with clear objectives for each module, drafted using an integrative approach that views legal education as both a liberal art and a vocation that seeks to instil knowledge, skills and values. See Ojukwu, Erugo and Adekoya *Clinical Legal Education*, above at note 62 at 7–8.

72 Bloch and Madhava Menon “The global clinical movement”, above at note 68 at 268.

73 Id at 269.

74 Ibid.

CLE is applying experiential learning, or learning by doing, as the main teaching methodology.⁷⁵ Professional skills and values are imparted to students who are already in professional roles as they work with clients in law clinics.⁷⁶ This makes them better able to appreciate what they learn as they grapple with the complexity of the matters with which they have to deal.

CLE may include a classroom instructional component and active participation in law clinics, which become real world settings where students receive and deal with live clients. CLE can also take place without a law clinic, by applying experiential methods that place the students in the role of lawyers in a simulated setting.⁷⁷ Through CLE, the law student is initiated into the public and professional responsibilities of a lawyer, learning in a hands-on manner what lawyers should do and how they should do it.⁷⁸ Clinical education offers the student a practical learning experience, teaching him to question, research, analyse and apply both law and facts to the real life problems presented to him.⁷⁹

A law clinic would typically take the structure of a law firm, within the university campus or outside, run by supervised students. It can be compared to a legal dispensary,⁸⁰ where legal services are provided to those who need but cannot afford to pay for them. In such a setting, with real clients with real problems, students have the chance to apply the knowledge they obtain in class to establish and maintain a relationship with clients and apply skills (interviewing, negotiating, counselling, drafting, research and writing), exercising their personal judgement to examine intricate situations and assist clients to make sense of, and resolve, their conflicts.⁸¹

The next section explores further the gains to be had from applying CLE. It is hoped that the numerous benefits of CLE will justify the investment required to actualize it, both in terms of human and financial resources, but also the effort needed to change the status quo by convincing academics who have been used to the traditional way of teaching to learn and use a different way.

Benefits of clinical legal education

The traditional classroom method of teaching, which is widely used in many law schools in Kenya, equips students with legal expertise; yet the task of producing lawyers able to bring about the administration of justice must go beyond this if it is to enable students to embrace a wider conception of

75 Id at 270.

76 Id at 269.

77 Id at 173–208. See also R Stuckey et al *Best Practices for Legal Education: A Vision and a Roadmap* (2007, Clinical Legal Education Association) at 179–88.

78 FS Bloch “Introduction” in Bloch (ed) *The Global Clinical Movement*, above at note 35, xxi at xxii.

79 Brayne, Duncan and Grimes *Clinical Legal Education*, above at note 67 at 17.

80 Wizner “What is a law school?”, above at note 33 at 713.

81 Ibid.

their profession. The law school clinic provides an opportunity for students to adapt themselves from an early age to the ethos of serving those who cannot afford to pay for legal services, making it more plausible that they will give themselves in the same manner as professionals. If the student is to understand that the purpose of the law is administration of justice as opposed to mere legal expertise, it is not enough for them to think like a lawyer, it is imperative for them to *be* one.⁸²

The setup of a law clinic and the clinical education methods applied in CLE open the students' minds to a worldview of public service and their role in it. If asked, "who is the ideal lawyer?" one may answer: an expert in humanity, because the nature of his work involves dealing with people and trying to solve their problems. Lawyers deal to a large extent with human beings and it is their constant concern to negotiate human relations.⁸³ To train the lawyer for this, CLE seeks to complement doctrinal knowledge of the law by offering a philosophy of the role of the lawyer in society and equipping the law student with the skills they need to play that role effectively.⁸⁴ CLE offers a visible model of imparting to students in a practical way the commitment and responsibility needed to facilitate a just society.⁸⁵

In dealing with the cases of clients who need legal assistance and the challenges they face accessing the courts or the court system, students can learn to appreciate that the main purpose of the court system is to render justice. In the law clinic setting, they will have the opportunity to study the egalitarian values that underlie the justice system.⁸⁶ By offering services even to those who cannot pay, students will learn that lawyers are guardians of a fair and equitable legal system, not professionals available to the highest bidder. They will better appreciate that in law school lawyers learn to administer justice; it is not just another trade school where tradespeople learn their skill.⁸⁷ In dealing with real cases and, in particular, cases of persons who lack the means to pursue justice, students will also learn the limitations of the law and the downside when it fails to protect the rights of the disadvantaged. Such

82 Ibid. For a detailed discussion questioning the assumption that law schools should teach students to think like lawyers, and proposals for a broader aim of teaching other skills needed by lawyers, see: NB Rapoport "Is 'thinking like a lawyer' really what we want to teach?" (2002) 1 *Journal of the Association of Legal Writing Directors* 91; P Toll Hoffinan "Teaching theory versus practice: Are we training lawyers or plumbers?" (2012) *Michigan State Law Review* 625; and NL Schultz "How do lawyers really think?" (March 1992) 42/1 *Journal of Legal Education* 57.

83 EN Griswold "Law schools and human relations" (1955) *Washington University Law Quarterly* 217 at 222.

84 J Pati and M Mohanty "Clinical legal education: A bare necessity in the scientific era" (2016) 3 *Asian Journal of Legal Education* 117 at 118.

85 F Haupt "Some aspects regarding the origin, development and present position of the University of Pretoria Law Clinic" (2006) 39/2 *De Jure* 229.

86 See YK Sabharwal J "My dream of an ideal justice dispensation system", available at: <<http://ijtr.nic.in/articles/art55.pdf>> (last accessed 22 January 2020).

87 Chaifetz "The value of public service", above at note 6 at 1696.

encounters can help them have a critical approach to the law as it is and may stir in them a resolve to create a more just world by working to undo such biases.

Conscious and deliberate reflection or analysis is considered one of the most important elements or outcomes of a good clinical programme and may not be readily available in the classroom setup. CLE can teach students to be reflective, not just to argue both sides of a case, swinging effortlessly from one side to another as if it did not matter, giving the impression that being a lawyer is only about such arguments.⁸⁸ With all their formalism, use of jargon, love for procedural technicalities and inflexible adherence to ancient rules and doctrines,⁸⁹ lawyers ought to be constructive and creative contributors to societal concerns and should therefore be exposed to clients and their problems at the same time as they learn and polish their legalese.⁹⁰

The clinical students could use journals to capture their thoughts and actions and refer to them later for accurate evaluation. A reflection exercise or case “de-brief” will help them consider their actions in the clinic (what they are doing), leading them to reflect on them (to ask “so what?”), having discussions with their colleagues, and with their lecturers or supervisors, then planning the subsequent course of action (considering the question, “now what?”).⁹¹ This exercise can help students to develop professional judgment and prepare them to be reflective practitioners and lifelong learners.⁹²

Those who advocate for CLE advance the view that whatever students learn must be taught and understood within the perspective of contributing to real needs; otherwise, to what avail is it? However, holding a contrary view of what legal education should entail, a seasoned practitioner had this to say about teaching professional legal skills at university: “[t]he function of universities is the induction of the intellectually qualified in the rigors of rational discourse. It is not to remedy the deficiencies of primary and then secondary education. It also is the duty of the organised legal profession,

88 Schwinn recommends incorporating CLE in traditional first year courses, not only applying the methodology in the clinic or in advanced years of study: SD Schwinn “Developmental learning theory and the American Law School curriculum” (2009) 3 *John Marshall (Atlanta) Law Journal* 33 at 44 onwards.

89 These are some of the traditions in which the legal profession takes greater pride than any other professional class. See Stone “The public influence”, above at note 21 at 8.

90 Wizner “What is a law school?”, above at note 33 at 703.

91 N Blenkinsop (Classic, Saskatoon) “Reflective / self-reflective practice at the clinical level” (paper presented to the panel on Fostering Professionalism and Reflective Practice in Clinics at the fourth annual Association of Canadian Clinical Legal Education conference, Dalhousie University, Halifax, 16–19 October 2013).

92 A Evans et al *Australian Clinical Legal Education: Designing and Operating a Best Practice Clinical Program in an Australian Law School* (2016, Australian National University) at 153. See also Stuckey et al *Best Practices*, above at note 77. See also T Casey “Reflective practice in legal education: The stages of reflection” (2014) 20 *Clinical Law Review* 317.

not universities, to teach professional skills and the adjectival law relevant to these.”⁹³

But we could also ask: why should the teaching of professional legal skills be left for the vocational stage of the lawyers’ training? Depending on the profession to impart these practical skills assumes that pupil masters have the time and skill to form the pupils; this is not always the case, especially in Kenya where, as the Taskforce observed, legal sector practice is beguiled by numerous challenges.⁹⁴ So the skills needed in practice should, as far as possible, be imparted to law students in the course of their undergraduate studies. Even if CLE is applied in the one year post-graduate training period at KSL, a failure to give students the chance to put the theory they learn into practice during the four years of undergraduate studies would be a wasted opportunity.

Yet clinical education is not only about preparing students for practice or, as some argue, it is not about merely teaching certain necessary skills; it gives the student a particular learning experience.⁹⁵ Clinical programmes offer an educational experience that differs from and cannot simply be provided for in the traditional law classroom.⁹⁶ Operating law clinics and using clinical methods of teaching improve the quality of legal education by engaging the students, giving them the opportunity to be active rather than passive learners. CLE can be used to shift the focus of learning from the classroom where it mostly takes place, to the real world.⁹⁷

Having students take an active part in the learning process and exposing them to clients will help them appreciate better the underlying factors that affect the outcome of cases, but that cannot be captured or expressed in textbooks or reported cases. It is not possible to discern human concerns that can affect decisions about cases in all their complexity in books or reported cases. While one may read and analyse the judge’s opinion in a case, it may not be possible to acknowledge all the factors that influenced the decision as he or she heard the matter. Underscoring this point, the Council on Legal Education for Professional Responsibility in the USA, established in 1969 to promote applied legal education, cited the benefits of CLE as follows:

93 J Gauntlett “Speech to law teachers” (speech to the conference of the Society of Law Teachers, Stellenbosch, 17 January 2011), available at: <<https://constitutionallyspeaking.co.za/jeremy-gasuntlett-speech-to-law-teachers/>> (last accessed 22 January 2020).

94 See Ojiambo Report at 10 on the “Challenges of the legal profession”. The Taskforce noted the deteriorating quality of training and apprenticeship as a result of the lack of a system or structure for continuous mentorship, and the deterioration in the quality, professional capacity and competence of legal practitioners, among other deficiencies, all which can be attributable to deficiencies in a lawyer’s training.

95 Brayne, Duncan and Grimes *Clinical Legal Education*, above at note 67 at 17.

96 Wizner “What is a law school?”, above at note 33 at 712.

97 Bloch and Madhava Menon “The global clinical movement”, above at note 68 at 271.

"[It] effectively places the practitioners-to-be in the chaos of real life; sharpens their skills in this context; teaches them to triumph over emotional stress and tensions as professionals; heightens their appreciation of quality standards of practice; shows them what it is to be people-oriented; enables them to help the machinery of justice function better by their presence as lawyers in training; and, above all, exposes them to the complexities and demands of justice on the level at which it operates."⁹⁸

In the law clinic, students encounter a substantive lawyering experience that involves advising or representing actual clients, having to work through the human factors, such as emotions, that inevitably present themselves in each case, while receiving guidance and direct supervision of their performance by a faculty member and opportunities for performance feedback and self-evaluation.⁹⁹

Clinical education enhances the intellectual development of the students and helps them to understand concepts, techniques and ethics in a practical way.¹⁰⁰ Being experiential and client-focused, clinical programmes can be tools for teaching professional responsibility in innovative ways, with better chances of communicating ethical ideals to students. CLE offers a professional experience that enables students to take what they learn beyond the classroom and the library and into the settings where actual practice takes place.¹⁰¹

In apparent recognition of the value of CLE and clinical methods of teaching, CLE finds a place in the legal education system in Kenya. The next section briefly explores how it features in the professional preparation of lawyers and question whether the existing setup suffices to channel the benefits highlighted above.

Clinical legal education in the legal education curriculum in Kenya

CLE in the LLB undergraduate course

Although the number of law graduates emerging from law schools in many African countries like Kenya in the last decade has generally been on the increase, access to justice is still a highly complex and expensive affair for many Kenyans. A probable reason for this is that the majority of lawyers serve a particular class of clients (those who can afford to pay legal fees) so that those who cannot afford to pay make up the category of the "underserved".

98 The Council on Legal Education for Professional Responsibility *Biennial Report* for the period ended 31 December 1970 at 1, cited in PCA Snyman "A proposal for a national link-up of the new legal services corporation law offices and law school clinical training programs" (1979) 30 1/2 *Journal of Legal Education* 43 at 43.

99 For example, in the USA; see American Bar Association "Standards and rules of procedure for approval of law schools (2017–18)", standard 304 on "Simulation courses, law clinics, and field placements".

100 Brayne, Duncan and Grimes *Clinical Legal Education*, above at note 67 at 17.

101 Wizner "What is a law school?", above at note 33 at 712.

Hand in hand with the reality of an unequal society with many structural inequalities is the fact that Kenya has a constitution that enshrines socio-economic rights. On promulgating its progressive constitution, Kenya joined other countries (most of them emerging democracies) that have taken the need to promote and respect socio-economic rights to a higher level, declaring their commitment to realize these rights in a most solemn manner.

The Legal Aid Act, 2016 further advocates the use of CLE as a vehicle to provide legal assistance to indigenous and disadvantaged people, making the need for law clinics and clinical education more direct.¹⁰² The act aims to facilitate access to justice through: the provision of affordable, accessible, sustainable, credible and accountable legal aid services to indigent persons; the establishment of a legal aid scheme to assist indigent persons to access legal aid; promotion of legal awareness; supporting community legal services by funding justice advisory centres, education and research; and promoting alternative dispute resolution methods that enhance access to justice.¹⁰³

Because they are designated as legal aid providers under the Legal Aid Act, universities can contribute to bridging the access to justice gap. However, there has not yet been a concerted effort in the country to link students to the communities or persons in need through well thought out, calculated and impactful means. Taking advantage of the spirit of the Constitution and the objective of the act, institutionalizing CLE and law clinics in law schools can provide an avenue for students to help create legal awareness and offer legal aid to the indigent as part of their learning, enabling them to exercise a public service spirit while at the same time contributing to narrowing the access to justice gap. Legal education can be better designed to encourage and prepare students to serve the public good.

The introduction or re-introduction of university-based law clinics in Africa is traced back to the All-African Colloquium on Clinical Legal Education, held in Durban, South Africa in June 2003, where Kenya was represented among the participants.¹⁰⁴ CLE is applied in some Kenyan universities to varying extents, but not in a systematic or sustainable manner as happens in many other universities in other countries around the world. Although efforts have been made over the years to establish law clinics in a number of law faculties, most remain at levels that do not meet the characteristic features of CLE.¹⁰⁵

102 The Legal Aid Act (No 6 of 2016), sec 2 defines a legal aid provider to include a university or other institution operating legal aid clinics.

103 *Id.*, sec 3.

104 O Bamgbose "Access to justice through clinical legal education: A way forward for good governance and development" (2015) 15 *African Human Rights Law Journal* 378 at 387.

105 See, for example, this observation in P Maisel "Expanding and sustaining clinical legal education in developing countries: What we can learn from South Africa" (2006) 30/2 *Fordham International Law Journal* at 378, note 19: "In developing countries, what is called clinical education sometimes only consists of theoretical or simulation courses taught in the classroom. This is true, for example, in Kenya where the University of Nairobi clinical

Even where law clinics have been attempted, only in the minority of cases do legal education providers have a curriculum that credits CLE. Moi University School of Law offers a clinical seminar, clinical externship and clinical substantive law seminar as compulsory courses in the third and fourth year of studies.¹⁰⁶ CLE is highlighted as one of the means of content delivery for the LLB course at Kenyatta University School of Law; the school offers a public interest clinic course as an elective in the fourth year of studies and, in the third year, a clinical seminar is offered both in the first and second semesters.¹⁰⁷ The School of Law, University of Nairobi offers a public interest clinic course in the fourth year of studies.¹⁰⁸ Mount Kenya University School of Law offers a course on practical legal clinics to fourth year students and aims through its LLB course “to program clinical seminars as an opportunity for conducting practical research and sharing findings”.¹⁰⁹

Other clinics are run by students as co-curricular activities, aimed more at offering legal services to the underserved instead of imparting practical legal skills. The Faculty of Law, Catholic University of East Africa has no law clinic as such, but law students are involved in an institutionalized mentorship programme, under which they visit communities to offer legal information sessions and partner with other organizations to promote access to justice.¹¹⁰ The University of Nairobi Parklands Campus has the Students Association for Legal Aid and Research (SALAR), a student run non-profit organization that is not directly linked with the clinical course offered at the school.¹¹¹

Strathmore University Law School runs the Strathmore Law Clinic, which mainly focuses on advocacy, outreach and stakeholder engagement to offer legal aid to those in need. The clinic has made efforts to promote legal

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legal education program was in the form of theoretical courses before 2001.” See also D McQuoid Mason et al “Clinical legal education in Africa: Legal education and community service” in Bloch (ed) *The Global Clinical Movement*, above at note 35, 23.

- 106 See Moi University School of Law “Bachelor of Laws (LLB)”, available at: <<https://law.mu.ac.ke/index.php/academics#first-semester-4>> (last accessed 22 January 2020).
- 107 See Kenyatta University School of Law “Bachelor of Laws LLB”, available at: <<http://law.ku.ac.ke/index.php/departments/private-law>> (last accessed 22 January 2020).
- 108 See School of Law University of Nairobi “Bachelor of law (LLB)”, available at: <https://a-law-school.uonbi.ac.ke/degree_courses/1482> (last accessed 18 February 2020). Assessment for the clinic course is based on coursework and the course has no final written examination: <<https://a-law-school.uonbi.ac.ke/node/1846>> (last accessed 18 February 2020).
- 109 See Mt Kenya University Bachelor of Laws (LLB) program objectives, available at: <<https://www.mku.ac.ke/index.php/academic-programmes/118-programmes/502-bachelor-of-laws>> (last accessed 18 February 2020).
- 110 See: *Exploring Opportunities for University Law Clinics in Kenya* (report of roundtable discussion, held at Strathmore University, 26 April 2019) at 8.
- 111 SALAR was established in 1999 and its main objective is to provide legal awareness, research and advisory services. See University of Nairobi Parklands Campus “SALAR”, available at: <<https://www.uonsalar.org/index.html>> (last accessed 22 January 2020).

awareness through its blog and has led a successful “grassroots law” project that trains youth leaders from one of the city slums on human rights and business law.¹¹² The University of Nairobi Mombasa Campus adopts an approach of providing legal aid by raising awareness through various social media platforms, linking clients to institutions that deal with particular themes, and by carrying out fieldwork on selected topics such as environmental concerns, corruption and human rights.¹¹³ Despite all these efforts made by students in running what are akin to law clinics, no credit is given for their work and all they do is regarded as an extra-curricular activity.

No information is available about law clinics at any of the other law faculties and schools in the country.¹¹⁴

Clinical legal education at the Kenya School of Law

Advanced preparation for a profession is usually given in a professional school where a protracted programme is offered to induct graduates into the profession. There is an expectation that the additional training will impart skills to supplement the doctrinal knowledge obtained at university.¹¹⁵ The assumption made is that, in the professional school, the professional is trained to bring a vast amount of usable knowledge into everyday use.¹¹⁶ One of the objects of the professional (usually postgraduate) programme is to develop an understanding of people (whom professionals seek to serve), their motivations, needs and desires:¹¹⁷ ideals that would not necessarily be targeted in undergraduate training.

Well suited to this understanding of the professional school, KSL, Kenya’s only Bar school, is designed to offer CLE. A comprehensive re-evaluation of legal education and training in Kenya recommended that the vocational aspect of legal training be reserved for KSL, where the curriculum was intended to supplement the theoretical training received in the undergraduate LLB course.¹¹⁸ It is currently compulsory for all graduates of law, both local

112 The Sheria Mashinani project targets residents of Kibera (a slum in Nairobi) and is conducted in partnership with the institutions Shining Hope for Communities and Crime Si Poa. See *Exploring Opportunities*, above at note 110 at 8.

113 *Ibid.*

114 The Faculty of Law, Kisii University College was started with the specific goal of promoting social justice. It aimed to revamp the legal aid clinic as a teaching medium. However, the LLB curriculum contains no clinical courses and no information is available on the university website about a law clinic; see: <<http://kisiuniversity.ac.ke/law/>> (last accessed 22 January 2020). The Kabarak University School of Law website mentions students’ work in law clinics under teaching materials and methodology. However, there is no indication of any clinical course, or whether the school runs a law clinic. See “Kabarak University: Welcome note”, available at: <<https://kabarak.ac.ke/school-of-law/>> (last accessed 18 February 2020).

115 Hurd “Who is a professional”, above at note 9 at 79.

116 *Ibid.*

117 *Ibid.*

118 See *Report of the Ministerial Task Force on the Development of a Policy and Legal Framework for Legal Education in Kenya* (August 2005), preface.

and foreign, to undergo pre-Bar admission training at KSL. KSL is practical in its orientation and has a decreased emphasis on formal lectures.¹¹⁹ Instruction takes the clinical approach (in theory at least, as expressed in KSL's constitutive statute and other documents) and problem questions are discussed through simulations, role plays, interactive seminars and moot courts.¹²⁰

Due to practical challenges, the clinical approach intended to be applied at the school is far from ideal. Although the programme offered has in recent years been revamped and a new curriculum offered, KSL is grappling with challenges, not least that of student numbers, estimated at about 3,000 in 2017 (including those waiting to resit examinations from previous years).¹²¹ If only because of these numbers and the resulting high student to lecturer ratio, it is impossible to offer the expected vocational training to impart practical skills through clinical teaching, or have any meaningful assessment of students in the way that clinical education demands.¹²² KSL continues to face seemingly insurmountable challenges, including the mass failure of students,¹²³ with calls for urgent action to be taken to remedy the situation.¹²⁴

As the legal education providers sit to ponder the Taskforce's findings and the implications of the recommendations made, they must deliberate about the place of public service, not only in the legal profession but also in the law school. Considering the foregoing, this article now offers some suggestions in a bid to contribute to such a discussion.

PROMOTING A PUBLIC SERVICE ETHIC: SOME PROPOSALS

In view of the numerous benefits of CLE and the concrete role it can play in promoting a public service ethic, this article concludes with four proposals.

First, CLE and law clinics should be introduced at undergraduate LLB level. This would provide more effective help in reducing the gap in skills and

119 See the description of the Advocates' Training Program, available at: <<https://www.ksl.ac.ke/advocates-training-program/>> (last accessed 17 February 2020).

120 See *ibid.* The Kenya School of Law Act, sec 19, also lists moot courts, clinics and other practical outputs as course requirements for all students.

121 See Ojiambo Report, para 93. In 2019, the number of students was estimated at 1,700; see "Kenya School of Law at a glance", available at: <<https://www.ksl.ac.ke/>> (last accessed 17 February 2020).

122 The ratio recommended by the Commission for University Education for humanities courses is 1:18; see Commission for University Education "University standards and guidelines" (2014) at 63. See also P Bowry "Admission systems unfair to law students" (1 February 2012) *Standard* (Nairobi), available at: <<https://www.standardmedia.co.ke/article/2000051204/admission-systems-unfair-to-law-students>> (last accessed 22 January 2020).

123 See Ojiambo Report generally for findings on the state of KSL.

124 The Taskforce proposed that satellite training centres be opened in the country and that other legal education providers be licensed to offer training alternatives and relieve the strain on KSL. See *id.* at 63–64, recommendation 11.

experience the lawyers would otherwise have by the end of their training. Whereas the contribution of KSL to the formation of lawyers is appreciated and note is taken of the role it seeks to fulfil by offering a practical approach to learning, it is not necessary to wait until lawyers reach an advanced stage of their careers to inculcate or promote a commitment to public service. Additionally, the challenges faced at KSL make the envisioned clinical teaching less effective than intended.¹²⁵ Public service and concern for the marginalized are part of the very core of what the legal profession stands for: lawyers strive to “make law more readily available as an instrument of justice to the common man”.¹²⁶ The undergraduate stage of studies therefore presents the most opportune time to teach this to the aspiring professionals, taking advantage of their formative years.

The concept of law clinics and practical learning will not be easy to implement, especially due to the resource constraints that such a programme entails. However, if lawyers hope to rank among the best, to be a premier profession in Africa and in the global marketplace,¹²⁷ they cannot be left behind.¹²⁸ Joining the bandwagon so many years after the pioneers, Kenya stands to gain from the advantages of investing in a tried and tested methodology of teaching, notwithstanding the huge effort and resources it will require.

The second proposal is for formal deliberation among legal academics, practitioners and other legal professionals, as this will help create a consensus in the legal profession about the value of pro bono work and public service. The question of what role public service has in a lawyer’s professional life must be discussed. If public service is important to the profession, students must be prepared for it in the course of their studies. The formation of lawyers takes place in large part at the university and the legal education they receive there ought therefore to prepare them adequately to fit in the profession. Further, under the Constitution, public officers (including lawyers) are bound by the national values and principles of governance,¹²⁹ which include human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized.¹³⁰ If these are important qualities for lawyers, legal education must be designed to equip law students to attain them.

Thirdly, each legal education provider should be intentional in prescribing the kind of graduates it aspires to produce: lawyers who are committed to public service. Legal education providers should use the opportunity proposed to

125 See text to footnotes 121–24 above.

126 Stone “The public influence”, above at note 21 at 8.

127 The Ojiambo Report highlights this as an aspiration of the Kenyan legal profession. See at 10, para 3.

128 As Frank Bloch observes, no law school can afford to ignore global perspectives in its curriculum. See Bloch “Introduction”, above at note 78 at xxii.

129 The Constitution, art 10(1).

130 *Id.*, art 10(2)(b).

them by the Taskforce findings to align their strategies and intentionally design activities that will lead to greater public service outcomes. One of the ways of structuring the university system to lead to such outcomes is ensuring that service to society is included in a law school's mission statement. Public service and the public good are fundamental to the meaning of the legal profession and a commitment to these will involve giving pride of place to the aspiration to improve access to justice by including them in the mission, goals and objectives of legal education providers. Clarity expressed in the vision and mission statements of legal education providers can help to direct their strategies and actions, making them more clearly oriented towards public service.

Intentionality can also be shown by including public service in the LLB curriculum policies of legal education providers. Kenya's Legal Education Act makes provision for the legal education provider to determine its own curriculum policy, which is required to set out modes of delivery for each course along with the purpose of the course, its content, outcomes and instructional material, among other requirements.¹³¹ The authors propose that guidance be given to legal education providers about what the curriculum should contain in order to be aligned to public service.

An example may be taken from South Africa where the South African Council for Higher Education developed a national standard for the LLB degree in 2015–16. Under this national standard, legal education “must produce skilled graduates who are critical thinkers and enlightened citizens with a profound understanding of the impact of the Constitution on the development of the law and in *advancing the course of social justice in South Africa*”.¹³² The South African legal graduate is expected to recognize the role that the legal practitioner can play in shaping and transforming the legal system, while applying social justice imperatives in service to the community.¹³³ In the South African system, CLE provides a means for law students to learn the necessary skills and to understand the professional responsibilities of the legal practitioner.¹³⁴ Recognizing this, the South African national standard for the LLB degree prescribes areas of the law or specializations where the student is expected to have advanced knowledge, and includes CLE as one of them.¹³⁵

If similar standards were developed in Kenya to guide the development of the curriculum and curriculum policies, directly prescribing CLE as a means to promote critical thinking and a commitment to social justice, legal

131 See Legal Education Act (No 27 of 2012), third sched, sec 13.

132 Council on Higher Education “Higher education qualifications sub-framework qualification standard for Bachelor of Laws (LLB)” (May 2015) at 7 (emphasis added).

133 *Id* at 11.

134 *Ibid*.

135 *Id* at 9.

education providers could be adequately guided to launch CLE programmes in their undergraduate courses.

Lastly, ensuring that university law clinics are accredited as legal aid providers under the National Legal Aid Service would increase the probability of the growth of law clinics. The definition of legal aid provider in the Legal Aid Act includes universities or other institutions operating legal aid clinics.¹³⁶ However, the Taskforce recommended that only legal aid providers with a wide reach be accredited to provide legal aid under the National Legal Aid Service.¹³⁷ If accepted, this recommendation would limit the potential of those who can provide a legal aid service that is meaningful albeit on a small scale, as it would presumably have the effect of locking out small legal aid providers from benefiting from the Legal Aid Fund created under the Legal Aid Act.¹³⁸

In the face of these two conflicting possibilities (of accrediting all university law clinics, or accrediting only those with a wide reach), it may be helpful to look at the legal aid operations in other jurisdictions where universities play an important role in bridging the access to justice gap by providing legal aid services, utilizing the services of the students who take part in the clinics. It could then be considered if and how universities in Kenya can be supported by the Legal Aid Fund to do the same in the most optimal way.

CONCLUSION

Does the public interest or pro bono lawyer who pursues justice beyond the ability of a client to pay have a place in the legal profession? This article answers this question in the affirmative. The values of the legal profession help to identify the lawyer. In educating the lawyer, the law school should help to shape this identity. Embracing the definition of law as a profession, legal education providers should direct their energies at ensuring the education they offer empowers their students to meet the criteria identified as defining a profession: a commitment to competence, integrity and morality; altruism; and the promotion of the public good. In such a context, students of law would know what to aim for during the course of their training and this conscious effort will probably lead to greater conscientiousness and a professional attitude in young lawyers. If more students understood that “no tradition of our profession is more cherished by lawyers than that of leadership in public affairs”,¹³⁹ they would hopefully develop greater altruistic aspirations than they currently seem to have.

136 Legal Aid Act, sec 2.

137 Ojiambo Report at 118.

138 Legal Aid Act, secs 29 and 30.

139 Stone “The public influence”, above at note 21 at 2.

Taking all the Taskforce's observations into account, the authors recommend the application of CLE as a concrete way of improving the quality of legal education. Introducing CLE at undergraduate level will help align legal education in Kenya with international best practice,¹⁴⁰ and make it possible to inculcate a spirit of commitment to public service and the public good at an early stage in the formation of lawyers, giving them a better chance of appreciating and thus being able to live up to it.

Through CLE, legal education providers will be equipped to engage students, to make them think in a more practical way about how they perceive the law, how society perceives it, how the law should be and what role they can play in aligning these perspectives, thus ensuring that a tangible commitment to public service and social justice define the legal profession in the country.

CONFLICTS OF INTEREST

None

140 In the chapter on legal training and legal education providers, the Ojiambo Report notes (at para 61) the need for investment in learning resources and partnerships with institutions and organizations at the international level for international benchmarking.