

The Clinical Revolution: How Asylum Law Clinics Can Influence National Policy and Practices in Transitional Democracies

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A. Introduction

Poland, long a refugee-producing country, is like so much of the region fast becoming an important country of refuge: in 1999, 2,955 individuals applied here for status.¹ Like most European countries of refuge in today's political climate, it is not exactly throwing its doors open to this influx. With 2,955 applications in 1999, Poland recognized only 41 refugees. Beneath the system that has been put into place to comply with the 1951 Convention and 1967 Protocol since Poland became a party to both in 1991, there remains a pervasive skepticism and distrust towards asylum seekers and ignorance of or indifference towards Polish and international refugee and human rights law.

Despite these obstacles a small educational organization, the Jagiellonian University Law Clinic (Human Rights Section), is making significant inroads towards improving Poland's refugee protection system. This article will present the Jagiellonian Law Clinic's experience as an example of how clinics can be used to address inadequacies in national procedures for recognizing refugees, including the current lack of available legal aid, as well as to improve the country's overall reception of refugees and other foreigners. Discussions with colleagues throughout the region have revealed that the challenges and the circumstances are similar enough to make such an account useful outside of Poland.

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¹ National statistics are taken from the Ministry of Internal and Administrative Affairs, Department of Border Control, Migration, and Exile (*Departament Ochrony, Granic, Migracji i Uchodźstwa MSWiA Wydział Informatyki i Ewidencji*).

B. Background of the Jagiellonian University Law Clinic

The Jagiellonian University Law Clinic, which has been operating since 1997, is a university programme in which students handle real cases under faculty supervision. The clinic provides its services free of charge and assists only those who cannot afford a professional lawyer. Each of its four sections – civil, criminal, human rights and labour – is supervised jointly by a Jagiellonian faculty member and a practicing lawyer specializing in that field. The clinic was developed by Jagiellonian faculty in partnership with faculty from the Catholic University of America, with technical assistance from a number of organizations, including the American Bar Association's Central and East European Law Initiative, the Organization for Security and Co-operation in Europe (OSCE), Office for Democratic Institutions and Human Rights, the Peace Corps, and the US Consulate in Krakow. Funding came mainly from the Ford Foundation, with additional contributions by the United Nations High Commissioner for Refugees (UNHCR), Jagiellonian University, the US Democracy Commission, and the Krakow regional government.

The initial motivation for the clinic was both educational and social. The idea came from Joanna Wagner of the US Consulate, who was disturbed by the near absence of legal services available to the poor and the prevalent lack of faith in the law as a means of resolving conflicts and asserting individual rights. The Jagiellonian faculty immediately became interested, because the idea of the clinic spoke to their sense that legal education at Jagiellonian, and throughout Poland, was too heavily theoretical and failed to provide students with the opportunity to encounter real-life applications of the law.

It was somewhat of a challenge to gain acceptance for the clinic within the Jagiellonian University, a 600-year old institution wreathed in tradition and conservatism. The clinic was fortunate in that a few eminent faculty members were involved in its development from the beginning. They were able to convince the Jagiellonian Law School faculty council to incorporate it as a unit of the Law School, to provide it with office space, and to award students academic credit for their participation. This together with the fact that Ford agreed to provide the clinic with a generous start-up grant, enabled the clinic to begin on the scale it did: with 1,037 cases in its first three years.

In Poland as in many other countries, clinics face a significant limitation; only professional lawyers are allowed to represent clients in court. At Jagiellonian, this has meant that students focus mainly on counseling clients, preparing motions and appeals, and helping clients apply for court appointed legal counsel. The clinic has continually found ways to expand its sphere of activity; for instance, the Civil Law Section convinced the courts to appoint its students as legal guardians for minors and absent persons, and the clinic successfully applied for status as an association, which can be given power of attorney in alimony and consumer protection cases, with students acting as the actual representatives.

Each section of the Jagiellonian Clinic functions differently, under the conditions

specific to that particular field of law. This article will focus on the Human Rights Section (HRS).

C. Programme Structure²

Students interested in joining the HRS must first take a year long English-language seminar on the European Convention on Human Rights and on refugee law. Towards the end of the year, they begin focusing on specific interpretive issues surrounding the procedure for determining refugee status. At the end of the year, students submit a final paper that helps to decide whom to accept into the clinic. Not only does the pre-seminar requirement ensure that students have an adequate background in the subject and that clinic professors develop a sense of their relative abilities, it also begins building group cohesion.

Once in the clinic, students begin taking cases immediately; the participants also meet weekly to discuss students' cases and to read and analyze case law from other countries. The staff consists of the Section Co-ordinator, Dr Halina Niec, the student assistant, the practicing lawyer, and the native English speaking teaching/research assistant, the author's former position. In terms of the clinic's legal work, the first two positions are the most essential. Dr Niec oversees students' work at every stage, works together with them on revisions, and reviews every document before it is sent out.

The student assistant is chosen from among former students in the clinic. His position is something akin to an associate directorship. Because the clinical faculty do not have time to supervise the technical aspects of students' work – case assignment, making sure students keep appointments and meet deadlines, making sure messages to and from clients are conveyed, co-ordinating with other sections to avoid conflicts of interest – the clinic's student assistant is primarily responsible for these. Because the student assistant is both a peer and a supervisor, he has become an important intermediary between Dr. Niec and the students. He also steps in to assist students or to take over a case if a student is unable to handle it or is away from the clinic for any reason. During the summer, he helps to cover when individual students are away.

A tricky aspect of clinical education is the need to provide professional, responsible assistance with a staff of students who are young and inexperienced, are juggling competing interests and obligations, and are working on a voluntary basis, often supporting themselves with other jobs. In the experience of the professors of

² For readers interested in learning more about the HRS's system of supervision, HRS Co-ordinator Dr Niec has written an article entitled 'Evolutionary Supervision' in (2000) 1(2) *Klinika* (the Jagiellonian University clinical law journal) and also published on the HRS's web site (< www.ujhrc.org >).

the clinic, the combination of a traditional authority figure and a peer-advisor is an ideal way to keep students both engaged and responsible.

The practicing lawyer's role is to advise students on procedural matters, and to take on cases at stages that require a member of the advocates' profession, such as hearings before the High Administrative Court. Whenever possible, the lawyer also accompanies students on their bi-weekly visits to the refugee centre in Lublin. Together with the section co-ordinator, he meets in weekly seminars with students and staff to discuss current student cases.

The teaching/research assistant, a native English speaker, is responsible each week for preparing a case to discuss in seminar, usually taken from a country, such as Canada or Australia, whose case law is influential in the field. The assistant helps students with any language difficulties and leads a discussion about the case in English. This element of the clinical curriculum is important because students often need to communicate with clients in English and so much of the scholarly and legal material on refugee law is written in English. (Because more and more of our clients communicate primarily in Russian, we have begun more actively recruiting students with Russian language skills.)

At the beginning of the year, the author chose cases that she thought raised interesting issues arising from the statutory definition of refugee. As the year progressed, it became clear that students were so involved with their cases, and so preoccupied, that it made more sense to ask them at the end of each session what questions they had arising from their current cases and what issues they needed to learn more about. For instance, after students expressed their concern that some of their clients might have been involved in unethical and perhaps criminal activities in their country of origin, they read *Equizabal v. Minister of Employment and Immigration* (Federal Court of Canada, 1994), which considered the question of when applicants are ineligible for refugee status based on past crimes.

The teaching/research assistant is also involved in HRS fundraising, acts as a liaison with partners, and assists students with English language work such as finding documents or writing claims to the European Court of Human Rights.

D. Educational Purpose

As mentioned above, the clinic appealed to faculty members primarily as an element of educational reform. As such, it has become extremely popular with students. In Poland, as elsewhere, many students choose law simply because it promises some amount of professional security. And many soon find themselves put off by the routine of often-dry lectures and exams that merely test their ability to memorize entire codes. They have little or no idea, from their studies, what it is like to practice law and whether they will enjoy it.

By contrast, the clinic puts them in a position where they have to use their

theoretical knowledge to devise legal solutions to practical problems; it opens up to them the ethical dimension of the law. One student, Patricja Zegarek, wrote about her experience in the clinic:

‘... this year gave me back my conviction that I chose the right course of studies. And it dispelled my doubts that I could build a satisfying life, not only professionally but also personally’.

Work in the clinic also teaches a certain kind of mental flexibility that is essential for the ongoing transformation of Poland’s legal system. In a very basic sense, in countries where the laws are changing rapidly and continuously, it makes especial sense for law students to learn skills as well as laws and to see in action the principles behind these laws. By incorporating clinics into their programme, universities produce graduates with first-hand experience of the everyday legal problems and needs of communities, graduates who may eventually go on to help shape Poland’s developing legal system.

The HRS co-ordinator, Dr Halina Niec, was drawn to the clinic by an additional educational goal: the transformation of student attitudes towards foreigners. As a human rights educator, she was disturbed by the xenophobia, intolerance, and general lack of understanding her students displayed: not surprisingly, given Poland’s post-World War II religious and ethnic homogeneity. (Since these were students who had elected to study human rights, she could only imagine how the general student population thought.) For her, clinical work with asylum applicants was the ideal way to create a new generation of Poles with experience working with people from other cultures, traditions and nationalities, and with the tolerance and sympathy that such experience generally brings.

E. A New Type of Education

One of the most interesting controversies that has arisen in discussions among developing refugee law clinics in the region is the question of how clinical education differs from traditional legal education. That is, to what extent should its practical purpose alter the overall curriculum of a clinical course?

At the May 2000 Refugee and Asylum Law Clinics Working Seminar hosted by the Jagiellonian University and co-organized with the UNHCR and the Constitutional and Legal Policy Institute, Professor Boldizsar Nagy of ELTE challenged participants to develop a core clinical curriculum. Very early on in the discussions, two camps emerged. One, which included most law school faculty members, insisted that students have to be given the historical and theoretical background to understand concepts such as ‘migration’ and ‘asylum’ before studying the Geneva Convention and other human rights instruments. The second, including most of the UNHCR officers present, argued that students are

being trained to become effective advocates, rather than being prepared for academic careers, and that the curriculum should be focused primarily on the training necessary for advocacy.

To the initial surprise of the Jagiellonian University clinic, they found themselves in the practitioners' camp. Their curriculum focuses mainly on analyzing case law, and only briefly treats the history and theory of refugee law.³ The syllabus is organized thematically around specific recurrent problems with interpreting the Geneva Convention and other relevant instruments. In part, the clinic is able to do so because other courses offered at Jagiellonian Law School provide a theoretical introduction to refugee and human rights law. In part, the curriculum reflects Jagiellonian's distinctive educational mission. For Jagiellonian, the clinic is a form of practical education and engages only those theoretical topics that bear directly on students' practice, such as professional responsibility and statutory interpretation.

To a great extent, Jagiellonian's methodology comes from their students; they are attracted to the clinic precisely by the practical character of clinical learning, and express a clear (not to say aggressive) preference for readings that are immediately useful.

F. Training Reformers

Not only do clinical students learn to think critically about particular cases, they also learn to think critically about the system as a whole. No sooner do HRS students learn about interpretive problems such as 'non-state agents' and 'general consequences of civil war' than they grapple with them directly, working in individual cases to convince the Polish authorities to follow more liberal interpretative precedents.

Last school year, for instance, students fought hard with Polish authorities over how to apply the Geneva Convention to Somali refugees. The Ministry of the Interior (MSW) and the Refugee Board (the second instance in Poland's refugee procedure), following the example recently set by a few leading European countries, generally hold that 'persecution' within the meaning of the Geneva Convention must be by state agents. Since Somali refugees fear persecution not by the state (since currently there is none to speak of) but rather by rival clan members, Poland generally has denied their applications.

The clinic started its reform campaign by gathering materials to prove that the

³ Other clinics, such as the ELTE law clinic in Hungary, have successfully struck different balances between education and training. One factor that undoubtedly influences curriculum decisions is the current refugee and refugee law situation in a given country. For example, Estonia, which has few refugee applicants, presents a very different context for its refugee clinics than Poland, where clinics are overwhelmed with cases.

Ministry and Board's restrictive interpretation was anomalous and violated the Geneva Convention and other international laws.

To support its position that Somalia is not safe for repatriation, the clinic asked the Ministry of Foreign Affairs (MSZ) for an opinion on Somalia. The MSZ supplied a very helpful opinion, one which contradicted its earlier opinion, much cited by the MSW, that the situation in Somalia is safe. Since the clinic disseminated this new opinion in November 1999, the MSW and the Refugee Board have more or less held all cases from Somalia (before they were issuing mostly negative decisions). The Board has held some cases for more than two times the usual term, and has requested yet another opinion from the MSZ.

While the HRS welcomed this change, it recognized that the MSW and the Board might also be stalling in the hope that the situation will change in Somalia, a common tactic that violates the spirit of the Geneva Convention as well as the UNHCR's interpretive guidelines. In one case that has been stalled in the Board for over 12 months, students filed a complaint to the High Administrative Court against the Board for failure to act. Students also appealed to the Polish Ombudsman, who submitted a formal request to the Board for further information about the case.

To address the larger issues underpinning the controversy concerning Somali applicants, the HRS filed an extensive 'exceptional appeal' (*rewizja nadzwyczajna*) against a decision by the High Administrative Court in one of the clinic's cases, focusing mainly on the question of whether the Court's interpretation of 'agents of persecution' violated international and Polish constitutional law. (The exceptional appeal is a rarely used mechanism for applying to various high officials who are authorized to bring the case before the Supreme Court.) The appeal also questions the High Court's characterization of the applicant's plight as part of the 'general consequences of civil war' (a term often invoked to exclude an applicant from the Geneva Convention's definition). The President of the High Administrative Court has agreed to bring the case before the Supreme Court, recognizing that it raises important legal issues that must be resolved.

The initiative for this campaign came entirely from students who studied the problem of 'non-state agents' and saw it emerging in decisions made by Polish authorities. And students' activism is not just an exercise. In June 2000, perhaps partly as a result of this pressure, the Board invited two HRS clients for second interviews, a decision that to the clinic's knowledge is unprecedented. Since students began applying pressure, the authorities have virtually stopped issuing denials to Somali applicants, and have even in a few instances granted them status.

G. The Law Clinic as an Effective Non-Governmental Organization?

Some sceptics may wonder whether students really can be taken seriously by refugee status decision-makers. One reason students in Poland were taken seriously from the very beginning is that they help mitigate, albeit on a small scale, the serious lack of legal assistance available to refugee status seekers. The government itself does not provide any legal services for refugee applicants. Given the complexity of refugee law, and the added language and cultural difficulties refugees have, even officials recognize that many refugee applicants require such services.

Out of the 2,955 new applicants in 1999 in Poland, clinics assisted roughly 185,⁴ or 6.3 per cent. Apart from the main source of cost free legal assistance in Poland, the Polish Helsinki Foundation which assisted 770 clients in 1999, 25 per cent, there is no one else involved. While the Helsinki foundation mainly assists applicants with appeals, Jagiellonian students often become involved at an earlier stage, assisting clients with their initial application and status interview. It is not only that there is not enough cost free assistance for refugee status applicants; there is, not surprisingly, an overall lack of lawyers, public or private, with experience in the field.

As mentioned above, there are certain limitations on what students can do, although there are not so many limitations in the refugee procedure as in other areas of law. Even so, with a proxy from their client, students can draft the application, actively participate in the client's status interview, and draft the appeal to the Refugee Board. Students also draft appeals from the second instance to the High Administrative Court, but these must be signed either by the client or by the clinic's practicing lawyer. When the High Administrative Court agrees to hear a case, either the practicing lawyer will represent the client or the client will represent himself/herself. Students may attend the trial as spectators.

Part of the initial challenge of setting up the clinic was convincing the Ministry and the Refugee Board that the clinic was a legitimate organization and that they should co-operate with it. Ministry interviewers who are not even used to conducting an interview in the presence of a lawyer were understandably reluctant even to allow students at interviews, let alone as active participants. Gradually, through meetings, client interviews, and phone conversations, the Ministry has come to know the clinic and individual students, to the point where students can telephone the Ministry to discuss their clients' cases and inquire into their status. Students have also built up

⁴ From these 185, the Jagiellonian clinic assisted 145. Although they could not give the present author an exact figure, the Warsaw University clinic, the only other functioning refugee law clinic in Poland, estimated they had assisted approximately 40 individuals. All percentages given here are estimates, as organizations may accept a case in one year that actually began the previous year or earlier.

contacts within the Foreign Ministry – partly through internships there – to the extent that they can even contact them when they need a country opinion.

Perhaps the very nature of the clinic – as a legal aid organization staffed by student-lawyers – that made these contacts difficult in the beginning has, in the long run, made them easier. After all, students may go on to work in one of the Ministries or in the Refugee Board. Indeed, in the long-term, both sides stand to benefit from such a development; the authorities gain a larger pool of knowledgeable, experienced potential employees, and the clinic is able to sensitize future decision-makers to the predicament of refugees.

H. Conclusion

Law clinics have the potential to dramatically effect evolving legal systems in transitional democracies; by improving general access to justice; by directly exposing law students (future decision-makers) to the legal needs and problems of the poor; and by calling attention to shortcomings in these legal systems. However alongside this great potential it is evident that there are serious obstacles which must be overcome. These obstacles are: scarcity of time and material resources; resistance amongst conservative faculties; resistance amongst the professional bar, which has an interest in keeping the legal profession exclusive; and instability and uncertainty within the legal system itself. Throughout the region, clinics and their sponsors and promoters have realized the need for a continual dialogue concerning how to overcome these obstacles. Thanks to the UNHCR, COLPI and Columbia University's Public Interest Law Initiative, there have been a number of conferences and colloquia, both regional and sub-regional, as well as numerous exchanges and study visits between clinics. In presenting Jagiellonian's experience, this present author hopes to further open up this dialogue.