

# Social Justice and Legal Education



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Edited by

Chris Ashford and Paul McKeown

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# CHAPTER ONE

## INTRODUCTION: SOCIAL JUSTICE AND LEGAL EDUCATION

CHRIS ASHFORD AND PAUL MCKEOWN

This edited collection is a study of social justice in a legal education context. Contributors to the collection are drawn from Australia, the Czech Republic, Nigeria, the United States and the United Kingdom, reflecting the significant international interest in the subject matter of the book.

Recent years have seen social justice emerge as a powerful driver for work both in law schools and the legal services sector. However, questions remain about how that term is understood and given meaning within the legal academy and beyond.

This edited collection will explore the meanings that have emerged and might subsequently be developed, together with a practical exploration of projects that have sought to bring the social justice agenda to life in law schools and in communities around the world. Contributors consider the notion of social justice not only citing the literature but drawing upon their own experiences, thus putting the chapters into context.

Clinical legal education has been a key instrument in this agenda, often cited as a valuable method of exposing law students to the issue of social justice and thus instilling such virtues as altruism which they will take into their future careers. The collection explores the notion of social justice within clinical legal education, how it is integrated into the methodology and the impact upon students and the wider community.

However, this collection will also consider how social justice can influence, or be influenced in, traditional teaching. Law schools might also address themes of social justice through broader policy questions in modules such as gender and sexuality, for example, or subjects which

combine theory with social justice, for example feminism, queer theory and critical legal studies.

This edited collection also explores social justice and legal education globally. These chapters will consider how issues of social justice have been addressed in Central and Eastern Europe, as well as in Nigeria.

The collection encompasses empirical work, theory and policy chapters and also case studies. The collection will explore how themes of social justice contribute to the law curriculum (for example through clinical legal education, Street Law, and other values-facing modules), together with an exploration of the broader strategic and policy questions which the social justice agenda raises for law schools and their stakeholders.

Many of the chapters serve as case studies using practical examples of projects or modules and how these have shaped the teaching of social justice at the institution.

This collection begins with a contribution from Jacqueline Kinghan. Kinghan turns to the subject of teaching access to justice through cause lawyering. She describes the work of the UCL Centre for Access to Justice and describes how social justice theory is turned into practice through their clinical legal education offer. Kinghan concludes that “we cannot separate the process of legal education from the cultural and social narratives created by it” and thus rich contextual experiences such as clinical and practical experience of strategic litigation are a key element in the law school experience.

Anna Cody and Frances Gibson continue this debate, moving our focus to the Australian legal education context. They note the varied aims and roles of universities and the complex policy backdrop to developing these missions. They conclude that “universities’ contribution to social justice includes making their knowledge and research accessible to the community” but also emphasize the importance of clinics to delivering practical change and challenging workplace inequalities.

Jeff Giddings continues the theme of clinical legal education but moves to discuss the role of clinical supervision in enabling students to understand the social justice dimensions of legal processes and legal work.

Philip Drake, Natasha Taylor and Stuart Toddington offer another case study, this time the UK law school at Huddersfield University. The authors share their findings from exploring the impact of the legal advice clinic on students' ethical and professional identities and note how their work highlights the ongoing need – identified in the UK's 2013 Legal Education and Training Review – for greater ethical discussion as part of the UK undergraduate law experience.

Paul McKeown's contribution seeks to challenge some of the assumptions that can be made about those ethical discussions and the assumptions about social justice that can be made in a clinical legal education context. McKeown concludes that social justice has a plurality of meaning and that rather than teaching a set of values, law schools can provide the framework in which students can themselves (de)construct values.

Bharat Malkani and Linden Thomas provide another case study, this time the Birmingham Law School Pro Bono Group. The authors explore the motivations and experiences of students providing pro bono legal advice through the group and conclude that there is no single clear motivational driver for the students; rather, a range of factors influences different students in different ways but the students also advocated a greater role for the law school in leading the students to explore themes of social justice.

Lucy Yeatman explores some of the challenges in responding to social justice demands on the law curriculum and notes the importance of clinics in enabling law schools to do this, but also notes that law schools can be more creative and look to a range of experiences that enable clinical legal education to be brought into the heart of a liberal arts degree rather than acting as a binary alternative to such a programme.

Holly Greenwood turns her attention to innocence projects, providing a clear overview of the changes and challenges that have faced innocent projects in recent times. Greenwood notes the recent impact of changes to innocence projects and their apparent decline in response to these changes. Yet Greenwood makes the passionate case for the need for innocence projects to continue within law schools and the enriching value that such programmes can provide.

Elaine Campbell addresses the role of business law clinics in clinical legal education and the perception that such clinics might in some way challenge traditional assumptions about social justice values and the clinic

offer. Campbell describes the business law clinic at Northumbria University and suggests that these types of clinics can reconceptualize the notion of social justice in a clinical legal education context.

Sue Prince links many of the themes already discussed in a chapter that explores the future potential role for alternative business structures in re-shaping legal education. Prince points to examples of pro bono and other clinic programmes but notes the commercial and technological drivers for change.

Sue Farran draws upon work undertaken as part of the Justice for the Poor project, a World Bank initiative in respect of the Pacific island country of Vanuatu. Farran describes the project and places it in the context of other international legal education projects that have achieving social justice as a clear aim of their work. She convincingly makes the case that more can and must be done to extend the role of the projects in the developing world as a means of disrupting a system that traditionally places power – and access to justice – merely in the hands of elites.

Maxim Tomoszek moves our focus to post-communist countries and documents the development of legal clinics in Central and Eastern Europe. Tomoszek notes the transformational role that clinic can have and shares a number of experiences of clinical legal education to reflect this.

Our next contributor turns to exploring clinical legal education in a Nigerian context. Olusegun Michael Osinibi, like Tomoszek, notes the transformational nature of clinic but if Tomoszek focused more on social change, Osinibi perhaps notes the socio-economic more. For Osinibi, clinical legal education offers nothing less than the transformation of Nigerian society.

Richard Grimes notes the current trend in legal education towards “hands-on” or experiential learning. Grimes explores the value of clinic in a global context of need and considers a number of case studies drawn from Afghanistan, Georgia, India, Nigeria and Vietnam. Grimes concludes that we need to be aware of the local, regional and national needs and should resist seeking to impose a single model of clinical legal education. Instead, Grimes advocates the importance of dialogue through conduits such as the Global Alliance for Justice Education.

Ruthann Robson turns to the queering of the legal academy. She argues that whilst law school may be more “friendly”, it is less clear that the legal academy has been. In a frank and open contribution, Robson reflects on challenges presented to both LGBTQ faculty and students. She concludes with a question for LGBTQ faculty to ask of itself, but it is arguably a question that all law teachers should ask themselves in seeking the pursuit of social justice aims: “how can we be champions rather than gatekeepers?”

Victoria Murray offers a broader perspective on what she describes as “the social justice mission” for law schools and clinical legal education. She notes the shifting economic and social trends that create new challenges and opportunities for clinical legal education experiences. For Murray, this context is crucial in understanding and realizing the value of clinical legal education, placing social justice at the forefront of legal education.

Finally, Jessica Guth brings our collection to a close with a chapter that critically considers the role of legal education from a liberal perspective, and considers education for sustainable development (ESD) alongside themes of social justice. Guth seeks not merely to examine these concepts on their academic merits, but also to explore the challenges for universities in seeking to implement these agendas. Ultimately, Guth concludes on a theme that runs through many of the contributions of this collection, namely, empowering students.

This perhaps is a key conclusion that we can draw from this collection. Social justice – a concept contested and amorphous in nature – can be given meaning(s) through student empowerment and that empowerment can be achieved in a variety of creative ways through the law curriculum. Social justice is so often about the shifting of power, from those who have it to those who do not. Empowering our own students, giving them the capacity to shape, influence and make change is perhaps the best and only way forward that we can continue to debate and (re)frame social justice and legal education.

## **Acknowledgements**

The editors are extremely grateful to our authors who have worked with us on this important collection. We are grateful for funding support received from the Law School at Northumbria University and particularly to Alexander Maine who provided invaluable research assistance on this

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## CHAPTER TWO

# TEACHING ACCESS TO JUSTICE: CAUSE LAWYERING AND STRATEGIC LITIGATION IN A CLINICAL CONTEXT

JACQUELINE KINGHAN

*Lawyers are not simply carriers of a cause but are at the same time its producers: those who shape it, name it and voice it.*<sup>1</sup>

Changes in legal education tend to mirror changes in society. It is unsurprising then that increased attention has been given to strategic litigation and broader policy impact work in UK law schools of late.<sup>2</sup> Changes to legal aid, welfare benefits, educational provision and judicial review are just some of the many areas in which charities, NGOs and individuals are turning to the courts with increasing fervour to pursue change.<sup>3</sup> For law school clinics designed to maximize their social justice

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<sup>1</sup> Ronen Shamir and Sara Chinsky, “Destruction of Houses and Construction of a Cause: Lawyers and Bedouins in the Israeli Courts.” In *Cause Lawyering: Political Commitments and Professional Responsibilities*, edited by A. Sarat and S. Scheingold. Oxford: Oxford University Press, 1998.

<sup>2</sup> See e.g. Aberdeen Law Project’s recent housing law test case success in *Cross v Aberdeen Property Leasing* 2014 SLT (Sh Ct) 46. See also Kent Law School’s Immigration and Asylum Clinic casework and related report: Richard Warren and Sheona York, “How Children Become Failed Asylum Seekers” (Kent Law School, 2014) [https://www.kent.ac.uk/law/clinic/how\\_children\\_become\\_failed\\_asylum\\_seekers.pdf](https://www.kent.ac.uk/law/clinic/how_children_become_failed_asylum_seekers.pdf) accessed 31 August 2015.

<sup>3</sup> See e.g. the successful challenge to the exceptional funding regime in *IS v Director of Legal Aid Casework & Anor* [2015] EWHC 1965 (Admin) and to the proposed residence test for legal aid *R (Public Law Project) v The Secretary of State for Justice* [2014] EWHC 2365 (Admin). See also the challenge to cuts to legal aid for prisoners *R (Howard League for Penal Reform and Prisoners Advice*

impact, strategic cases and campaigns on specified “causes” hold a wealth of potential for casework in the public interest.

From a pedagogical perspective, strategic and impactful clinical work affords students a richly meaningful exposure to the cultural and social context of the practice of law. As Lucie White observes, prior to studying law students are taught by life experience that “the law denotes tangles of cultural meaning, as well as systems of rules”. Yet, when studying law those students “will often repress what they know of law’s complexity”. Students become attracted to a simplification of the rules and a value neutral language that begins to underpin their newly emerging self-identity as legal professionals. Sarat goes so far as to suggest that in this context we have a tendency to teach students to “think like lawyers” as if they have never previously thought for themselves.<sup>4</sup>

This chapter outlines how we might use exposure to, or involvement in, children’s rights strategic casework to increase students’ critical awareness of the role of law and the lawyer in society. It seeks to demonstrate how a brief but intense exposure to strategic litigation can challenge perspectives, allowing students to ask what really is the professional identity of those lawyers in society who pursue social change through the courts. Does such a lawyer exist in the UK? If so, what tensions exist for lawyers and organizations pursuing strategic casework? I suggest that putting students at the heart of strategic litigation offers a rich educational space for critical observation of professional decision making in a unique context and allows students to meaningfully ask what type of lawyer (if any) they want to become.

## **Cause Lawyering: An Introduction**

It has been said that “we live in an age of cause lawyering”: that law schools are quick to “celebrate judicial decisions that resulted from cause lawyering” and academics increasingly contribute to its “sometimes

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*Service) v the Lord Chancellor* [2014] EWHC 709 (Admin), leave to appeal granted in July 2015. In the UKSC see *R (on the application of SG and others (previously JS and others)) v Secretary of State for Work and Pensions* [2015] UKSC 16 concerning the legality of the benefits cap for single mothers.

<sup>4</sup> Stuart Scheingold and Austin Sarat, *Something to Believe In: Politics, Professionalism and Cause Lawyering*. Stanford University Press, 2004.



mythical” culture.<sup>5</sup> Interestingly, these comments were made to a US audience and, until recently, while strategic litigation has been readily pursued in the courts we did not have the same professional or cultural identification with its resonance as in other jurisdictions.<sup>6</sup> While cause lawyering has a “‘place of honour’”<sup>7</sup> in the American legal system, in the UK we are exploring, rather than articulating, a sociological or theoretical space with which to document this important and comparable area of UK legal practice. A consideration of cause lawyering literature is informative, especially against the backdrop of recent and ongoing strategic litigation in response to reforms under the banner of austerity economics.

The span of literature exposes two extreme ends of a spectrum in terms of lawyers’ identification with the causes they serve.<sup>8</sup> At one end are lawyers who deny any moral accountability for their clients’ goals: they are “hired guns” keeping a professional distance from any underlying political motivations in their cases and conforming to a more traditional notion of their role as professionals. This notion is consistent with the “cab rank” rule customarily adhered to by barristers. At the other end are “cause lawyers” with a commitment to the political and moral goals at the heart of their casework. They are qualified practitioners who dedicate their time, whether in private practice or within charities and NGOs, to pursuing political goals through action for clients representing one side of an issue or cause.

Sarat and Scheingold have argued that cause lawyers tend to view their cases as a means of reconnecting law and morality thus “taking sides in a political struggle”.<sup>9</sup> They submit that cause lawyers are drawn to causes as a search for something to believe in, or an outlet for expressing already formed beliefs. For such lawyers the lines between personal politics and

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<sup>5</sup> Lynne Wardle, “The Use and Abuse of Cause Lawyering: The Bad Example of *Roe V Wade*.” *University of La Verne Law Review* 35 (2014): 217.

<sup>6</sup> See Steven Budlender, Gilbert Marcus SC and Nick Ferreira, *Public Interest Litigation and Social Change in South Africa: Strategies, Tactics and Lessons* (The Atlantic Philanthropies, October 2014)  
<http://www.atlanticphilanthropies.org/sites/default/files/uploads/Public-interest-litigation-and-social-change-in-South-Africa.pdf> accessed 31 August 2015.

<sup>7</sup> *Ibid.*: 222.

<sup>8</sup> Ann Southworth, *Lawyers of the Right: Professionalizing the Conservative Coalition*. Chicago: University of Chicago Press, 2008.

<sup>9</sup> Scheingold and Sarat (n4): 5.

professional practice might well be blurred, or be one and the same. In the UK context, Boon identifies that the notion of cause lawyering therefore forces us to ask whether a common conception of justice even exists for lawyers, one that serves as a “touchstone for their distinctive professional values”.<sup>10</sup> If it does exist, it might be said that cause lawyers transgress or move beyond this traditional boundary, and do so in the interests of justice, albeit with an arguably subjective conception of what “justice” is.<sup>11</sup> The main criticism levelled at cause lawyers is of course this very lack of neutrality: a partisanship that subverts the accepted norms of professional ethics. Boon argues however that judgements on this transgression are not consistently applied. He suggests that lawyers in traditional private practice are guilty of the same infraction yet it is more acceptable than apparent breaches made by progressive lawyers on the “fringes” of legal practice.<sup>12</sup> Moreover, recent research conducted on the cab rank rule for barristers perhaps endorses Boon’s conclusion, suggesting that while “as a principle it is to be applauded, as a rule it fails lamentably because there is no apparent application of enforcement procedures”.<sup>13</sup>

The extent to which cause lawyers operate on the fringes of professional practice depends on the type of work they do and the role that activism and campaigning plays in their work.<sup>14</sup> Sarat and Scheingold have identified a spectrum with, at the one end, what might be classed as poverty lawyers working to alleviate unmet legal need. In the middle ground are those lawyers conducting casework in civil liberties and human rights, and at the extreme end are more radical lawyers who pursue social change through litigation, activism and related activities. Even within these sub-groups the term “cause lawyer” is not without its definitional concerns. Boon notes that “treating lobbyists or activists as cause lawyers merely because they

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<sup>10</sup> Andrew Boon, “Cause Lawyering and the Alternate Ethical Paradigm.” *Legal Ethics* 7 (2004): 251.

<sup>11</sup> Stuart Scheingold and Anne Bloom, “Transgressive Cause Lawyering: Practice Sites and the Politicization of the Professional.” *International Journal of the Legal Profession* 5 (1998): 220.

<sup>12</sup> Boon (n10): 267.

<sup>13</sup> John Flood and Mortin Hviid, *The Cab Rank Rule: Its Meaning and Purpose in the New Legal Services Market* (Legal Services Board, 2013): 22  
[https://research.legalservicesboard.org.uk/wp-content/media/Cab-Rank-Rule\\_final-2013.pdf](https://research.legalservicesboard.org.uk/wp-content/media/Cab-Rank-Rule_final-2013.pdf) accessed 31 August 2015.

<sup>14</sup> Thomas Hilbink, “You Know the Type: Categories of Cause Lawyering.” *Law and Social Inquiry* 29 (2004): 657.

are lawyers undermines the relevance and significance of their activity to legal ethics".<sup>15</sup> While this is true, I suggest that the recent access to justice crisis in the UK may well have facilitated a blurring of separate but related types of cause lawyering activity and exposure to this changing area of legal practice is richly challenging for law students.

## Cause Lawyering in Context

The assertion that lawyers might be held morally accountable for their actions is an intrinsic part of legal professionalism. Deborah Rhode has long held that lawyers have a responsibility to do justice and to facilitate access to justice in society.<sup>16</sup> Arguably, this has recently been given new cultural fervour in light of a political austerity climate where access to civil legal aid has fallen by more than a half, and some areas are almost entirely ineligible for state funding, as a result of reforms brought about by the Legal Aid, Sentencing and Punishments of Offenders Act 2012 (LASPO). These changes have had an adverse impact on the ground<sup>17</sup> and the proposed abolition of the Human Rights Act 1998 has seen lawyers speaking out and campaigning, with the help of social media, in a much broader public space than ever before. One might say that a new cause lawyer has emerged in recent years: a practice at the edges of human rights, although not committed to it exclusively, with a focus on the cause of access to justice for all. Take for example the recent human rights crowdsourcing campaign aimed at telling "ordinary, real stories" about the impact of the Human Rights Act.<sup>18</sup> The steering group for the campaign includes four leading lawyers who assisted in raising over £55,000 from the general public to establish a poster campaign across tube, bus and national rail networks. The objective of the campaign is to raise awareness

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<sup>15</sup> Boon (n10): 252.

<sup>16</sup> Deborah Rhode, *Access to Justice*. Oxford: Oxford University Press, 2004; *The Trouble with Lawyers*. Oxford: Oxford University Press, 2015.

<sup>17</sup> See e.g. Gabrielle Garton Grimwood, *The Rise of Self Represented Litigants in Civil and Family Cases* (House of Commons Library, 2015) <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN07113> accessed 31 August 2015; Natalie Byron, *The State and the Sector: The Impact of Cuts to Civil Legal Aid on Practitioners and Their Clients*. Centre for Human Rights in Practice, University of Warwick, 2013.

<sup>18</sup> See "Act for the Act" crowdsourcing campaign <http://www.crowdfunder.co.uk/actfortheact> accessed 25 August 2015. See also <http://rightsinfo.org> accessed 31 August 2015.

of how important the Human Rights Act is to ordinary people, countering the mainstream notion that the Act only assists, for example, terrorists or illegal immigrants.

The recent flow of litigation<sup>19</sup> and related activism certainly illustrates well the ways in which lawyers might campaign for access to justice around their casework. As legal realists have long held, the context of legal problems, whether due to youth, poverty, exclusion, ill health or unemployment, means that a legal remedy itself is often not enough. The solutions to legal problems may be beyond reach simply by virtue of their social context and the processes of legislative action and administrative decision-making are inevitably interwoven with social, political and economic constraints. Further, the sociologist Kate Nash argues that we are living in a period when definitions of human rights are progressively being expanded. Drawing on questions posed by Nancy Fraser,<sup>20</sup> she asserts that conflicts about justice “always involve first-order questions about the substance of equalities: representation, redistribution or recognition”. A globalized world has changed how we argue about social justice; both the substance and frame of justice are in dispute. Yet, new questions on a global scale also bear national relevance:

1. *What* is at stake in conflicts over justice – distribution of resources, recognition of cultural difference or political representation?
2. *Who* counts as the subject of justice?
3. *How* should conflicts over justice be decided – by what procedures, using which criteria, at what sites and by whom?<sup>21</sup>

These questions must be posed in a variety of institutional settings but “the most vigorous cultural politics of human rights are very often centred around the courts”.<sup>22</sup> In the context of recent strategic casework, the courts continue to apply legal principles and human rights norms in a shifting social context and it is towards this, as educators, we can address the critical engagement of law students. In the next section I will introduce and describe the partnership and teaching framework at UCL Faculty of

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<sup>19</sup> See n3.

<sup>20</sup> Nancy Fraser, “Reframing Justice in a Globalising World.” *New Left Review* 36 (2005): 1.

<sup>21</sup> Kate Nash, *The Cultural Politics of Human Rights*. Cambridge: Cambridge University Press, 2009.

<sup>22</sup> *Ibid.*: 24.

Laws, and set out by way of a case study a teaching example that aims to facilitate this process. This will provide evidence of case outcomes in child law and access to justice, alongside the practical ways in which students can contribute to those cases.

## **UCL Centre for Access to Justice**

The UCL Centre for Access to Justice was formally launched in March 2012 with the objective of facilitating access to justice in the local community through clinical projects and public legal education initiatives. From the outset clinics have been curricular and attached to an undergraduate course entitled “Access to Justice and Community Engagement” designed to complement casework. During the course students confront a body of research on the difficulties of using legal services, be it due to exclusion from the legal process, lack of funds, lack of awareness of rights or lack of faith in the justice system. They are encouraged to contextualize their critique of legal service provision in the changing landscape of legal aid and access to the courts, while reflecting on relevant aspects of legal professionalism and ethics. Thus, the issues and questions that lie at the heart of traditional versus more progressive types of legal practice are intrinsic to the critical experience of the course.

As with other clinical programmes, the UCL model encourages students to reflect on their own perspectives within a broader political, economic and cultural context.<sup>23</sup> Alongside community impact, one of the pedagogical aims is to develop casework partnerships that facilitate critical engagement and, ideally, expose students to lawyers approaching (and resolving) legal problems in a multi-faceted way. Thus, a partnership with a local London based charity Just for Kids Law (JfK) was established in view of their commitment to legal representation, alongside holistic advice and support to young people. Lawyers and youth advocates staff the charity and advocate on behalf of children in a variety of settings be it in school, at exclusion hearings, at police stations or in the courts. JfK’s approach and organizational structure is innovative given that it has developed out of a legal practice: “The charity’s very existence is an example of adapting an existing service and expertise (legal representation in criminal courts) to a

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<sup>23</sup> See e.g. the University of Essex Prisoners Advice Service Clinic where students confront ethical decision-making underpinning the drafting of legal advice to prisoners.

broader range of needs.” It is also said to be an example of “adapting a reactive service to a more pro-active, preventative one” in that the charity often advocates on behalf of children in non-court settings (e.g. education tribunals, local authority meetings) so that they do not end up in court later on.<sup>24</sup>

JfK’s work is therefore alive to context: legal problems are not addressed in isolation from the complex reality in which those problems arise. For example, the charity might represent a young person with a criminal justice issue and thereafter represent them against a local authority in order to provide a safe home when leaving custody. They might then negotiate with a school to help them get the support they need and other benefits to which they are entitled. Like many charities, JfK has sought to develop its policy work in conjunction with its legal casework. Some early examples of JfK’s work in this field include a case that prompted a change in the law extending provision for young defendants giving evidence via video link proceedings<sup>25</sup> and a case which helped facilitate better domestic protections on fitness to plead.<sup>26</sup> Structurally, the UCL Centre for Access to Justice shares a solicitor with JfK who works part-time as a teaching fellow on Access to Justice within the Faculty, while also being a Senior Solicitor with JfK. Roughly eight students out of a cohort of twenty work in the JfK clinic and, alongside other casework in Education and Community Care, have the opportunity to work on strategic litigation.

## **Public Interest Strategic Litigation: The Case of HC<sup>27</sup>**

### **Background**

Strategic litigation “in the public interest” looks beyond securing a result for an individual client in a case and is aimed at changing wider law, policies or practices. Broadly, it seeks to ensure that individuals have access to the courts and the ability to seek redress for what are perceived

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<sup>24</sup> Matthew van Poortvliet, *Just for Kids Law: Charity Assessment* (New Philanthropy Capital Charity Assessment, February 2011): 5.

<sup>25</sup> *S, R (on the application of) v Waltham Forest Youth Court & Ors* [2004] EWHC 715 (Admin).

<sup>26</sup> *TP, R (on the application of) v West London Youth Court & Ors* [2005] EWHC 2583 (Admin).

<sup>27</sup> *HC (A Child, by his litigation friend CC) v The Secretary of State for the Home Department and Another* [2013] EWHC (Admin).

as, or argued to be, unlawful or unreasonable administrative decision-making. Therefore, the victims or claimants in a strategic case have usually suffered an abuse or infringement that is suffered by many other people. This chapter focuses on children's rights casework and it is noted that children's charities historically took the lead in transplanting the public interest movement in the US to the UK in the 1970s by exploring the possibilities of public interest strategic litigation<sup>28</sup> and as early as the late 1970s the Child Poverty Action Group had already established a test case strategy.<sup>29</sup>

In recent years children's charities and public lawyers have been working together to try to identify key children's rights issues and campaigns, with a focus on facilitating access to justice for young people. One such issue is the discrepancy whereby 17-year-olds are no longer afforded the full protection of their status as children, as required by the UN Convention on the Rights of the Child. Of particular concern has been (i) the lack of an appropriate adult to offer support to 17-year-olds in custody and (ii) the lack of procedural mechanisms whereby 17-year-olds could be transferred to local authority care, rather than remain in a cell overnight.

When a 17-year-old boy approached JFK after a distressing ordeal in custody both the factual and legal issues in the case were ripe for strategic exploration. The police arrested him in April 2012, four weeks after his 17th birthday, on suspicion of theft of a mobile phone. He was taken to the police station and asked that his mother be informed of his whereabouts but was told this wasn't allowed, and also that he couldn't to speak to her. In fact, both the Police and Criminal Evidence Act 1984 and Code C of the Code of Practice entitled the police to treat him as they would an adult. Having never been in trouble before, he was held in custody for nearly twelve hours and then released without charge.

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<sup>28</sup>The Public Law Project, *Guide to Strategic Litigation*  
<http://www.publiclawproject.org.uk/data/resources/153/Guide-to-Strategic-Litigation.pdf> accessed 31 August 2015.

<sup>29</sup>Roger Smith, *Experience in England and Wales: Test Case Strategies, Public Interest Litigation, The Human Rights Acts and Legal NGOs* (May 2003)  
<http://www.pila.ie/key-issues/experience-in-england-and-wales-test-case-strategies-public-interest-litigation-the-human-rights-act-and-legal-ngos/> accessed 31 August 2015.

## Judgement and Impact

An application was made by way of judicial review to consider whether the Secretary of State's refusal to revise the Code of Practice was lawful. The case was boldly strategic in that it rested on the argument that a revision was needed in order to prevent a similar experience being suffered in future by other 17-year-olds. While JfK represented the claimant, two other children's charities (the Howard League for Penal Reform and the Coram Children's Legal Centre) were given leave to intervene and made submissions in writing. Other families who had gravely suffered were brought to the attention of the court: devastatingly, two 17-year-olds had committed suicide immediately after their time spent in custody without appropriate support. Both had been arrested on minor charges and had been high achievers; their families firmly believed if they had had support in custody they would not have felt so desperate as to take their own lives.<sup>30</sup>

The court in *HC* concluded that the treatment of 17-year-olds as adults when arrested and detained under Code C was inconsistent with the UNCRC and the views of the United Nations Committee of the Rights of the Child.<sup>31</sup> Moses LJ said it was "difficult to imagine a more striking case where the rights of both child and parent under Article 8 are engaged" and that having someone the child trusts offer support goes some way in "redressing the imbalance between child and authority".<sup>32</sup> The court concluded that the Secretary of State had acted incompatibly with Article 8 in failing to revise the Code and that, read together with UNCRC, it required that "a 17-year-old in detention be treated in conformity with the principle that his best interests were a primary consideration".<sup>33</sup>

The Home Office conceded the victory and announced on 21 October 2013 that it would introduce a requirement on police forces in England and Wales to provide 17-year-olds with access to an appropriate adult whilst being held in custody noting that "the welfare and protection of all those held in custody, especially young people, is extremely important".<sup>34</sup> This

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<sup>30</sup> Fiona Bawdon, "Kesia's Law: Anatomy of a Successful Campaign" (29 April 2015) <http://fionabawdon.com> accessed 31 August 2015.

<sup>31</sup> n28: [47].

<sup>32</sup> *Ibid.*: [84].

<sup>33</sup> *Ibid.*: [98].

<sup>34</sup> Home Office, "Changes made to police custody" 23 October 2013



has the practical effect of ensuring that where a child asks to have his parents informed of their arrest and to speak to them, the police have a duty to facilitate it. As a step further, JfK campaigned in support of the Brincat-Baines family who, after the *HC* judgement was handed down but before reforms were put in place, lost their daughter when she was held in a cell overnight and committed suicide upon her release. Lawyers at JfK, and other campaigners, felt that it was clear that a final loophole whereby 17-year-olds remained in cells, rather than being transferred to local authority accommodation, needed to be closed. An extensive media campaign, accompanied by lobbying of peers, aimed to raise both public and political awareness and on 10 November 2014 succeeded in its mission. The government accepted an amendment to the Criminal Justice and Court Bill to give such rights to 17-year-olds at the Bill's third and final reading in the House of Lords, naming it "Kesia's Law".

### **Clinical Components**

The positive changes brought about by *HC* and Kesia's Law impact hugely on the lives of other young people. However, whether a charity is initiating strategic casework or acting by way of intervention, evidence gathering and legal research to achieve these results can be extremely labour intensive. The case study outlined above, and subsequent strategic casework at UCL,<sup>35</sup> suggested that areas where students can provide assistance might be separated into (i) substantive legal matters; (ii) administrative support; (iii) evidence gathering; and (iv) campaigning.

#### ***(i) Substantive Legal Matters***

Students are well placed to conduct legal research for supervising practitioners. Of particular importance in strategic casework is comparative research across jurisdictions. Students can assist, for example, by researching international practices and relevant legislation, summarising case law, researching law reform proposals and locating relevant reports made by national governments, NGOs or INGOs. As in the case of *HC*, the reports relied upon by various charitable bodies, and

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<https://www.gov.uk/government/news/changes-made-to-police-custody-rules>  
accessed 31 August 2015.

<sup>35</sup> *R (on the application of Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57.

recommendations previously made to Parliament, may require summary and analysis and law students are well able to complete such tasks under supervision.

### ***(ii) Administrative Support***

While (for obvious reasons) it does not always immediately appeal to students, the educational remit of administrative support during litigation should not be underestimated. Administrative tasks around the court hearing itself prepare students especially well for life as a trainee solicitor or pupil barrister. These might include copying documents, finding appropriate case reports and preparing bundles for court. Thereafter students can attend the hearing and play an important role taking a noting brief for counsel in the case, or otherwise assisting during the court hearing when further documents or information might be required. Supervisors should of course aim to ensure that students do not get caught up in administrative tasks to the detriment of other areas of activity and a balance of tasks is achieved.

### ***(iii) Evidence Gathering***

This is especially important where a charity is acting by way of intervention in a case. The role of the intervener is to essentially assist the court with the broader context of the case and is “a method by which a person or organisation not otherwise involved in the litigation may submit specialist information or expertise”.<sup>36</sup> Gathering “specialist information” or otherwise articulating “specialist expertise” requires a great deal of time and effort, especially for small charities with constrained resources. The Supreme Court case of *Tigere*<sup>37</sup> concerned the denial of a student loan to a young student who had discretionary leave to remain in the UK but was not yet a settled resident and JfK acted as intervener. UCL students assisted with evidence gathering as part of their clinical studies: it was estimated that the blanket policy to deny loans to such students had already affected 600–1000 students since it was introduced in 2012, and was due to adversely impact many more. First, students designed a

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<sup>36</sup> The Public Law Project, *Third Party Interventions: A Practical Guide* (PLP 2008) 3  
[http://www.publiclawproject.org.uk/data/resources/120/PLP\\_2008\\_Guide\\_3rd\\_Party\\_Interventions.pdf](http://www.publiclawproject.org.uk/data/resources/120/PLP_2008_Guide_3rd_Party_Interventions.pdf) accessed 31 August 2015.

<sup>37</sup> n36.

template to determine the types of evidence needed and a work plan for their investigations. Their evidence gathering involved important skills including interviewing young people, drafting and submitting FOI requests to the Home Office and local authorities and researching and summarising relevant policy research to inform the intervener's submissions to the UKSC. The case successfully overturned the blanket ban on student loans and will benefit many other students who have been living in the UK from a young age but are awaiting a decision as to settlement status.

#### ***(iv) Campaigning***

The children's rights barrister Steve Broach publicly congratulated the lawyers on the decision in *HC* describing it as a "textbook example" of how to conduct strategic litigation. It is important to note that the court case itself was accompanied by an exhaustive campaign in both local and national press and across various forms of social media. Likewise, the case of *Tigere* was part of the "Let us Learn" campaign and relied heavily on social media to gain support. Clinical students are often excellent motivators of their peers and can harness the power of fellow students in raising public awareness. By way of example, the highlights of the campaign in *HC* were:

- (i) social media outreach through various channels aimed at encouraging petition signatures;
- (ii) media campaign (online, print and TV) including stories from other families impacted by the policy (Channel 4 News, BBC);
- (iii) peaceful activism outside court including placards and information sharing aimed at public and local/national press presence;
- (iv) lobbying of MPs and peers to draw attention to the ongoing case.

While active participation in campaigns is left as a matter of extra-curricular choice to students, rather than being part of substantive clinical activity, students might become involved in some or all of these activities or otherwise be exposed to broader campaigning at some level throughout the life of a strategic case. In the *Tigere* case, for example, students were paired with a young person from the "Let us Learn" campaign and assisted with activities such as writing to their MPs and navigating higher

education procedures.<sup>38</sup>

## **Social Justice Education: In Theory and Practice**

An interest in the practical should not preclude, on the contrary it should invite, a lively interest in theory. For practices unavoidably blossom into theories, and most theories induce practices, good or bad. (Jerome Frank)<sup>39</sup>

The clinical components above serve as a basis for critical engagement with the role of law in society. Most students, prior to studying the UCL Access to Justice course, have no previous knowledge or awareness of strategic litigation or progressive legal practice. The casework can serve as a complement to other undergraduate courses such as human rights, public law and child law. Against this backdrop, it is important that both the triumphs and pitfalls of strategic practice are explored, as well as the professional and ethical tensions of cause lawyering. A reflective approach aims to present students with the opportunity to address and question the strategic choices that lawyers make.

With this in mind students may wish to consider the ways in which clients might become disempowered, or lost, amidst strategic decision-making. How does this rest alongside one's professional duty to act in the best interests of the client? Where are the dividing lines between losses and gains in strategic choices? Should courts even consider such policy driven issues? What is the role of the lawyer-activist and what tensions does it raise? Indeed, it is these final questions that are illuminating for students and at the crux of their own perceptions of the role of law in society and judicial decision-making. It is especially challenging in the current access to justice climate and, in this regard, strategic cases that have been given short shrift by the courts are equally of interest. For example, Mr Justice Cranston noted in a recent case concerning prison reform regulations limiting legal aid that, while he understood the concern that the changes could have a serious adverse effects for prisoners, "for the time being, the forum for advancing these concerns remains the political".<sup>40</sup> His findings echo the general declaration made by Lord Sumption that courts are "not

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<sup>38</sup> See "Let us Learn" campaign [www.justforkidslaw.org/our-goals/let-us-learn](http://www.justforkidslaw.org/our-goals/let-us-learn) accessed 31 August 2015.

<sup>39</sup> Jerome Frank, "A Plea for Lawyer Schools." *Yale Law Journal* 56 (1947): 1321.

<sup>40</sup> *R (Howard League for Penal Reform and Prisoners Advice Service) v the Lord Chancellor* [2014] EWHC 709 (Admin), leave to appeal granted in July 2015.

[here] concerned with social or economic issues or other issues of macro-policy which are classically the domain of Parliament”.<sup>41</sup> Students might therefore juxtapose this strict approach with broader contextual questions, such as the redistribution and recognition of social justice outlined above.<sup>42</sup>

This pedagogical approach raises broader questions about the content and form of legal education. Educators have recently explored in great detail, amongst other things, the core subjects of the qualifying law degree, the inclusion of legal ethics and the definition of Day One outcomes in the professional stage. In a working paper submitted to the LETR Research Consortium in 2012, Richard Susskind suggested that the key question for the review was “what are we training young lawyers to become?”<sup>43</sup> He made a “plea for theory” and pointed to the many branches of philosophical jurisprudence that bear directly on legal practice including “work on statutory interpretation, judicial precedent, legal reasoning and legal problem solving”.<sup>44</sup> Susskind asserted that aspiring lawyers should be “engaged by the theoretical underpinnings of the law, by its history and origins, its structure and nature, and its impact on society more generally”. Similarly, Guth and Ashford recently noted that the role of a liberal law degree is not to produce “trained fools” but students who “are compelled to engage with theoretical questions, forced to think about, discuss, write about and explore a variety of legal issues”. They argue that all subjects can and should be taught from a socio-legal perspective “because they provide students with a much broader and often nuanced understanding of what the law is, how it works and what impacts it may have”.<sup>45</sup>

In sum, practical experience of strategic litigation provides a highly contextual platform upon which to reflect on cause lawyering theory and current public interest legal practice. Indeed, this intricate relationship between theory and practice was an intrinsic part of the educational model

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<sup>41</sup> *R (on the application of Prudential PLC) v Special Commissioner of Income Tax* [2013] UKSC 1 [131].

<sup>42</sup> Nash (n21).

<sup>43</sup> Richard Susskind, *Provocations and Perspectives: A Working Paper Submitted to the UK CLE Research Consortium* (October 2012): 10.

<sup>44</sup> *Ibid.*: 29.

<sup>45</sup> Jessica Guth and Chris Ashford, “The Legal Education and Training Review: Regulating Socio-Legal and Liberal Legal Education.” *The Law Teacher* 48 (2014): 13.

proposed by the realists, often said to be the historical roots of clinical legal education. It has been observed that “the arguments Jerome Frank mounted in support of clinical lawyer-schools grew directly from his emphasis on the central role of fact-finding and the idiosyncrasy of judging in his legal realist writing”.<sup>46</sup> This relationship was considered valuable in allowing practical experience to enhance the theoretical understanding of law. Grossman summarizes that to men like Jerome Frank, clinical law training was not justified solely on the basis that “it would enable new lawyers to face more rapidly the practical problems of practice”. Rather, “for the greats of realism, practical training was primarily for the purpose of deepening theoretical understanding”.<sup>47</sup> For the realists, “students needed to be exposed to the ‘law in action’ in order to become sensitive to the impact of the law on the world and the impact of the world on the law”.<sup>48</sup> This exposure should allow students to see firsthand the reality of the extent to which the law can be used to address client needs, as well as thinking critically about their own role in that process.

It is unclear how the roots of realism are articulated in today’s mainstream clinical model. More than three decades ago Grossman identified uncertainties and tensions that have not yet been resolved. In his view law schools remain somewhat torn and “efforts to combine the study of law and the study of society continue; so do uncertainties about how and why this should be done”.<sup>49</sup> I submit that the practical and theoretical exposure to public interest legal practice goes some way in bridging the liberal and professional divide. Indeed, the theoretical and critical basis I have articulated is alive to social context, yet rooted in skills enhancement. It facilitates a circular educational model that can assist in meeting social justice needs whilst placing students at the centre of the law and policy choices that may have, in part, necessitated those needs. Medical practitioners with a cause are driven forwards by breakthroughs that provide a rich theoretical realm directly linked to practice. It is this practice-led theory that facilitates ease of movement between the lecture

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<sup>46</sup> Katherine Kruse, “Getting Real About Realism, New Legal Realism and Clinical Legal Education.” *New York Law Review* 56 (2011): 303. See further Jerome Frank, *Law and The Modern Mind* (Transaction Publishers, 1930).

<sup>47</sup> George Grossman, “Clinical Legal Education, History and Diagnosis.” *Journal of Legal Education* 26 (1973): 171.

<sup>48</sup> *Ibid.*

<sup>49</sup> Grossman (n47): 168.